REPORT TO THE
ROYAL COMMISSION ON WORKERS COMPENSATION
IN BRITISH COLUMBIA

Philosophical Underpinnings of the
Workers’ Compensation System

- 

Compensation Based on Loss vs.
Compensation Based on Need

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October 20, 1998
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INTRODUCTION AND PRELIMINARY COMMENTS

I have been asked to undertake a general analysis of the fundamental aims of the workers’ compensation system, in terms of whether the system is primarily aimed at compensating workers and their dependants on the basis of loss or on the basis of need. In particular, I have been asked to identify which provisions of the Workers’ Compensation Act are clearly needs-based, which are clearly loss-based and, if the system includes elements of both and loss, to consider the rationales for the inclusion of each. I have also been asked in conjunction with this topic to consider how, if at all, the system interacts with other systems which might also provide benefits to workers and their dependents.

References below to provisions of the “Act” are taken from the Workers’ Compensation Act, R.S.B.C. 1996 c. 492, and references to excerpts from the “Manual” are taken from the Rehabilitation and Claims Services Manual. I have not appended materials referred to below which are already available in the Royal Commission’s library. Except as noted, copies of legal authorities are attached to the original of this report.

SUMMARY

As between loss and need, considerations of loss appear to predominate in the workers’ compensation system. While the system does not seek to measure the precise extent of actual loss in any individual case, the starting point for calculation of most wage loss and survivor benefits refers to the worker’s actual earnings, which correlates with actual loss. In that regard, as a general rule workers who began with higher pre-disability incomes have lost more and receive correspondingly higher benefits.

There are a number of exceptions where benefits do not appear to be related to loss. However in many of these instances, it is not clear that need is a consideration either. Two exceptions which appear to be clearly based on considerations of need arise in connection with statutory minimum benefit levels and varying pensions for surviving spouses according to the latter’s age.

Statutory minimums appear to be based on a deliberate decision to provide a minimum level of benefits, irrespective of actual loss, sufficient to meet basic needs and provide a reasonable subsistence allowance. This has been acknowledged by prior Royal Commission as based solely upon considerations of need and as providing a form of social welfare funded by employers. It is questionable whether that is appropriate in light of the workers’ compensation system’s general focus on providing compensation for loss and in light of other resources now available to assist workers and dependents whose benefits do not provide adequate subsistence levels of support. However, it may be justified as an aspect of the trade-offs made in the context of the historic compromise. In that regard, I note that employers may be called upon to fund certain benefits exceeding actual loss in the case of statutory minimums but they are also only required to fund other benefits at a level falling short of actual loss by virtue of statutory maximums. Thus while the system may not be perfectly consistent in this needs-based departure from loss considerations, it may nonetheless accomplish rough justice consistent with the historic compromise.

The treatment of benefits for surviving spouses is problematic with respect to the effects of both age and remarriage. The variation in benefits depending upon age appears to be based on the assumption that younger spouses are more likely to be able to become fully self-supporting than older spouses. This may be a valid assumption, but it is questionable whether it has a proper place in the fatality benefit scheme. The emphasis on the spouse’s ability to get by without the lost support of the deceased worker puts the emphasis squarely upon need...
rather than loss. It also seems to impose something in the nature of a duty on surviving spouses to mitigate or offset the loss of support by earning more within their own presumed capabilities. However, maximization of earnings by the surviving spouse does not serve to reduce the lost support. The spouse could have maximized earnings irrespective of whether the support was still available or not and the two sources of income are entirely separate.

Another problem with the scheme based on age is that it employs two different conceptual underpinnings for the measurement of benefits. In the case of non-invalid surviving spouses under the age of 40, benefits are based on what appears to be an arbitrary lump sum which is the same in every case and thus bears no relationship to actual loss. In the case of all other surviving spouses, pension benefits are provided and the calculation of these is tied to the worker’s actual earnings. Thus, such benefits take account of loss in the same way that wage loss benefits do. Even assuming that it is appropriate to provide lower benefits to younger spouses, I could find no justification for employing different principles in assessing them. A more consistent approach might be to provide a sliding scale of benefits decreasing incrementally in relation to age, as is currently done with surviving spouses in the 40-49 age group.

With respect to the current practice of continuing full payment of fatality pensions upon the remarriage of a surviving spouse, this approach seems to ignore the effect of remarriage on the loss for which the fatality benefits are intended to compensate. (It does not appear to be based on issues of need either. I have not been able to determine what the rationale for it is.) Unlike income earned by a surviving spouse through other employment, support received from a new spouse does serve to reduce the lost support for which the survivor benefits provide compensation. It would be more consistent with the overall scheme of the act if some adjustment to benefits were made to take account of this.

Another problematic area arises with s.98(3) which allows the board to cancel or suspend benefits upon a worker’s incarceration. The Appeal Division has suggested that this is based at least in part on considerations of need, in that the worker’s basic needs are being met by the institution during the term of incarceration. This is inconsistent with the system’s response to other situations where workers’ needs are taken care of by other means and they are not actually relying on wage loss benefits. The provision might be justified on novus actus interveniens principles, on the theory that the worker is unable to earn income by reason of the incarceration rather than the work-related injury, and the unlawful conduct which landed the worker in jail constitutes an intervening cause breaking the chain of causation between the compensable event and the loss suffered. The history of s.98(3) and the fact that incarceration is singled out from analogous situations may suggest that this provision hearkens back to the moral overtones of the sections’s predecessor (which allowed variation of benefits of those deemed guilty of “immoral or improper” conduct). The novus actus considerations could still be served if this section were repealed and it were simply affirmed that the board may cancel or suspend benefits where an intervening wrongful act by a worker has broken the chain of causation.

Issues of stacking versus integration of benefits appears to be an area of considerable conceptual confusion in both the workers’ compensation and tort systems. Tort law principles should be regarded with caution, since they appear to place considerable emphasis on not benefiting a wrongdoer, and there is no wrongdoer in the workers’ compensation scheme where fault is irrelevant.

The system currently takes different approaches to wage loss benefits and survivor benefits in terms of stacking and integration, and I was unable to determine any principled basis for that.

Overall, greater integration of benefits than currently occurs would in many cases result in a more accurate assessment of actual loss and the elimination of double recovery. However, given that many of the current benefits have some reference to actual loss but do not attempt to measure it with precision, it is questionable whether integration is warranted in such cases. Perhaps more importantly, greater integration of benefits is likely to result in significant cost and consumption of administrative resources, as it will require complex inquiries in a great many cases regarding the extent to which the benefits have actually offset the losses addressed by the workers’ compensation benefits. For example, the benefits may actually be unrelated to the work-related injury or integration may have already occurred by deduction of workers’ compensation benefits prior to the provision of
such benefits. Inquiries into these issues would have to occur in each case before it could be determined whether integration was appropriate.

DISCUSSION

It has long been acknowledged that the workers’ compensation scheme is not limited to providing benefits solely upon the basis of loss or solely upon the basis of need. For example, in the 1966 Report of the Commission of Inquiry Workmen’s Compensations Act report (the “Tysoe Report”), Mr. Justice Tysoe began by noting that benefits are a matter of entitlement and not social welfare. He then went on to cite several examples of benefits based upon actual or presumed economic loss (such as disability pensions and widow’s pensions), and those based on presumed need (such as flat rate allowances payable for each child of deceased workers), concluding that elements of both loss and need arise, alternatively and in combination:

I think I may properly say that compensation benefits are truly a mixed bag. Some are based on presumed economic loss, some on presumed economic need, and some on a combination of both. (Page 23)

Having made these points, Mr. Justice Tysoe does not go on to discuss why it might be appropriate to consider questions of need when one is dealing with benefits which are provided as a matter of right. What is also missing from the Tysoe Report, and what has generally not been a subject of comment is an overall analysis of whether considerations of loss or of need predominate in the system and, if one predominates, why the other might be included in exceptional circumstances.

In the tort system, need is totally irrelevant. There, the focus is squarely upon actual losses caused by the wrongdoer. If a plaintiff can prove that he or she suffered a particular loss as a result of a legal wrong by the defendant, the tort system compensates the plaintiff to the full extent of that loss, irrespective of whether the plaintiff has any actual need of such compensation. If the defendant cannot prove his or her losses or cannot prove that the losses were caused by the wrongdoer, the plaintiff receives no compensation no matter how desperate his or her need might be. This is not to suggest that principles applied in the tort system should be imported wholesale into the workers’ compensation system, as the latter was designed in large part with different purposes in mind and quite frequently departs from tort principles. It is simply to note that in the system which the workers’ compensation was designed to replace, need has no relevance.

I will begin with an examination of which provisions in the Act appear to relate compensation to loss and which appear to consider elements of need. I have identified several areas which involve complex and often overlapping considerations of need and loss, and these are dealt with later under separate headings.

1. Loss-Based Provisions in the Act

There are many provisions in the Act which relate the benefits to the actual loss sustained by the recipient as a result of a worker’s injury or death. Most of the relevant provisions relate to wage loss and fatality benefits, as discussed in detail below. I note that other types of benefits such as physical and vocational rehabilitation benefits and services have nothing to do with a workers’ losses (except in the indirect sense that they are provided in order to promote recovery and maximize re-employment prospects, thus minimizing future loss), so the provisions dealing with such benefits have no application to the need vs. loss inquiry.

Apart from wage loss and survivor benefits, health care benefits also appear to be based to some extent upon losses caused by a worker’s disability. Section 21 of the Act allows for a variety of benefits including treatment, transportation, medicines, crutches and other apparatus, allowances to cover expenses while obtaining treatment out of town, etc. In the tort system, expenses of this nature are generally recoverable by plaintiffs as “special damages.” Where a plaintiff is out of pocket for such expenses as a result of injury caused by a wrongdoer, this constitutes a compensable loss. While there may be somewhat closer scrutiny in the workers’ compensation system as to whether such expenses are reasonable and necessary, the same general principle of compensation for such losses appears to be the same.
Almost all of the provisions in the Act relating to calculation of wage loss benefits take as their starting point the disabled worker’s actual pre-disability earnings. This is true of the calculation of periodic payments for permanent total disability (s.22(1)), permanent partial disability (s.23(1) and (3)), temporary total disability (s.29(1)), and temporary partial disability (s.30(1)).

In my view, this approach is clearly loss-based. This is not to say that the system seeks to undertake a detailed individual calculation of precise losses and compensate the worker dollar-for-dollar as the tort system would. However, compensation is related to loss in that benefits vary in proportion to actual earnings. Those workers who began with higher pre-disability earning levels have sustained a greater loss by virtue of their disability and receive correspondingly higher levels of benefits.

This general approach to calculation of wage loss benefits has applied since the Act’s inception. For example, s.17 of the 1916 Act (Workmen’s Compensation Act, S.B.C. 1916, c. 77) provided that upon permanent total disability, workers were entitled to benefits equal to 55% of average earnings, and ss. 18 and 22 provided a system much like the present one for calculating permanent partial disability benefits on the difference between past and prospective average earnings.

Similarly, the starting point for calculation of benefits payable to a worker’s surviving dependants under s.17(3) is the amount which would have been payable to the worker had he or she sustained a permanent total disability, which is in turn tied to the worker’s average earnings. Again, the more a worker had been earning, the greater the presumed loss to that worker’s dependants and the higher the benefits payable to them. (This is subject to certain exceptions regarding a particular class of surviving spouses, which I will discuss under a separate heading below.)

Interestingly, s. 15(20(d) of the 1916 Act provided that where a deceased worker leaves other dependents but no spouse or dependent children, the other dependents are to receive “a sum reasonable and proportionate to the pecuniary loss to such dependents occasioned by the death,” up to a statutory maximum.

Since providing compensation for workers and their dependents is one of the key functions of the workers’ compensation system, it is noteworthy that most of the basic provisions relating to calculation of such benefits take account of loss and not of need. There are many other provisions in the Act which also correlate benefits and loss.

Sections 32(1) and 33(1) deal with calculation of benefits upon certain recurrences of disability and the calculation of average earnings, respectively. Each section offers alternative means of calculation and allows adjudicators to employ the alternative which will best represent actual earning loss.

**Recurrence of disability**

32. (1) For the purpose of determining the amount of compensation payable where there is a recurrence of temporary total disability or temporary partial disability after a lapse of 3 years following the occurrence of the injury, the board may calculate the compensation as if the recurrence were the happening of the injury if it considers that by doing so the compensation payable would more nearly represent the percentage of actual loss of earnings suffered by the worker by reason of the recurrence of the injury. (Emphasis added.)
Average earnings

33. (1) The average earnings and earning capacity of a worker must be determined with reference to the average earnings and earning capacity at the time of injury, and may be calculated on the daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earning capacity of the worker at the time of the injury, as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury. . .

(Emphasis added)

Similarly, s.33(3) allows the board to take account of probable future increases in future earnings in circumstances where a worker’s past earnings “do not truly represent the worker’s average yearly earnings or earning capacity.” Again, while the aim is not perfect compensation for every dollar lost, these provisions all appear to be aimed at promoting a more accurate assessment of actual loss as the starting point for determination of wage loss benefits.

Section 17(9) deals with benefits payable to a surviving spouse and children when the worker and spouse had separated prior to the worker’s death. The section provides that if the worker was paying support under a court order or separation agreement to a separated spouse for the spouse and/or children residing with the spouse, compensation must be paid in amount equal to those support payments (s.17(9)(a)(I)). Where these is no court order or separation agreement providing for support, or where the worker had not been paying support in compliance with same, compensation is instead to be based upon “the level of support that the board believes the spouse and those children would have been likely to receive from the worker if the death had not occurred.” (See ss.17(9)(a)(ii) and 17(9)(b)(ii). Emphasis added.) Again, the focus in determining compensation levels is very much upon the amount of income which the survivors actually lost as a result of the worker’s death.

(As a side issue, I note in connection with the above provision that the Commission’s October 31, 1997 report on fatality benefits recommends that benefits be paid under s.17(9) at a level consistent with support payments ordered by a court or agreed to in a separation agreement, irrespective of a worker’s history of non-compliance with such a payment schedule (at pp. 161-2). In some respects, this may be seen as a departure from the loss-based thrust of the provision in that some surviving families could be compensated for income which they would never have successfully recovered from the worker and thus have arguably not lost. However in my opinion, the better view is that this recommendation does not change the underpinnings of s.17(9), but simply shifts from a presumption that the worker’s non-compliance would have continued to a presumption that the survivors would ultimately have succeeded in enforcing the worker’s support obligations. On that basis, compensation is still based on an assessment of the survivors’ actual loss. The effect is somewhat similar to that created by s.17(9)(b)(I), which essentially creates a presumption that a separation of less than 3 months prior to a worker’s death would not have been permanent and therefore affects neither actual loss nor levels of survivor benefits.)

Section 17(10) provides that compensation payable in the event of a separation must never exceed amounts which would have been payable had a separation not occurred. The intention behind this provision is not entirely clear. Arguably, it recognizes the unlikelihood that surviving family members would suffer a greater loss of support when living separately from the worker than when still living in a common household at the time of the worker’s death. In that case, the focus is again on actual loss.

There are some provisions which deal with adjustment of benefits to take account of benefits received from other sources. Section 17(3)(a) and (b) includes Canada Pension Plan benefits in the calculation of certain survivor benefits. In effect, the result of this is a deduction of CPP from benefits payable by the WCB. Section 34 provides for the deduction of a limited class of benefits provided by a worker’s employer in the calculation of various types of benefits. I will discuss the general issue of benefits received from other sources in detail under a separate heading below. For now, I simply note that these provisions appear to be loss-based, to the extent that they acknowledge that a worker or dependent’s actual losses may be reduced by benefits received from other sources.
Section 31(1) provides that a worker receiving compensation in respect of more than one disability cannot receive an aggregate amount exceeding the amount payable for total disability. This appears to be designed to preclude recovery exceeding actual loss, assuming that total disability represents the maximum loss which one can suffer.

In addition to the issue of integration of benefits, there are several areas (relating to the effect upon benefit entitlements of a surviving spouse’s age or subsequent remarriage, and of a worker’s incarceration) which appear to involve overlapping considerations related to both loss and need. Due to this overlap and the complexity of the issues which they raise, I will deal with each issue under separate headings below.

2. Need-Based Provisions in the Act

There are a number of provisions in the Act which do not appear to base benefits upon actual or presumed loss. In many cases though, it is difficult to determine whether the absence of loss-based considerations means that such provisions are necessarily designed instead to address issues of need.

For example, I have noted that a worker’s actual pre-disability earnings generally provide the starting point for the calculation of wage loss benefits and survivor benefits. However, such benefits provide for an amount equal to 75% of lost earnings. Survivor pension benefits vary depending on a number of circumstances, but are generally calculated as various smaller percentages of the 75% used to calculate permanent total disability benefits.

It has been suggested that the intention behind the 75% compensation rate is to provide a level of compensation sufficient to meet a worker’s basic needs. For example, in considering what was then a 66 2/3% compensation rate in the 1952 Report of the Commissioner relating to the Workmen’s Compensation Act and Board (the “1952 Sloan Report), Chief Justice Sloan suggested that this rate had been set in order to meet some “subsistence” standard:

I assume - and the assumption is purely speculative - that percentages lower than 66 2/3% did not provide a reasonable subsistence allowance... (Pp. 162 and 164)

The Tysoe Report expressed complete agreement with Chief Justice Sloan on this issue (page 25). These comments suggest that need is a component of the compensation rate, in that it is being set with subsistence requirements in mind, rather than the worker’s actual loss.

Whatever the original intention may have been behind the compensation rate (which, as noted, was as low as 55% in the original 1916 Act), some consideration should be given to whether current compensation levels, while not providing 100% compensation for the income loss calculated, are nonetheless comparable to amounts which injured parties would have recovered in the tort system had the historic compromise not resulted in the current workers’ compensation scheme. In that sense, the workers and their dependents are being compensated not for the specific loss of earnings or support, but for the what they have lost by virtue of the historic compromise. Arguably the measure of the latter “loss” is the amount which would have been recovered by pursuing a remedy through the courts. There is considerable evidence suggesting that recovery is equal or even higher in the workers’ compensation system than the tort system.

Some interesting examples of awards under the two systems are canvassed in David Law’s August, 1998 report to the Commission, Comparative Awards in Tort and Workers’ Compensation, suggesting that at least in many instances, awards for comparable injuries are more generous under the workers’ compensation system than under the tort system, even though the former pays 75% of gross earnings and does not provide the additional compensation for pain and suffering included in tort awards. (See, in particular, Mr. Law’s discussion of back injury cases at pp. 12-15.)
As Mr. Law also notes, a great many cases in the tort system are settled prior to trial, generally for lesser amounts than claimed. Figures on settlements are not available but it seems fair to assume that if benefits under the workers’ compensation system often exceed awards granted by courts for comparable injuries, they are even more apt to exceed the settlements which so many plaintiffs in the tort system agree to accept in exchange for foregoing the expense, effort and uncertainties of trial.

I also note that the costs of pursuing remedies in the tort system are typically quite high and the amount awarded by a court is likely to be substantially reduced by unrecoverable disbursements and legal fees. (As to the latter, I note that the maximum remuneration for lawyer’s contingency fee arrangements in personal injury or wrongful death matters is set at 33 1/3 % of the amount recovered in motor vehicle cases and 40% of the amount recovered in other types of cases. (Law Society Rules, Part 12, s.1055.) )

As a result of all of this, a conclusion that the 75% compensation rate reflects a lower degree of recovery than that which would be obtained in the tort system is questionable. Even leaving aside the intriguing but probably unanswerable question of whether awards are usually more generous to begin with in the workers’ compensation system, there is a strong argument that actual recovery is higher under that system because injured workers are freed from the enormous costs generally associated with obtaining recovery under the tort system.

Evidence as to whether the 75% wage rate is tied to need is inconclusive. However, it may be at least as plausible to suggest that wage rates bring benefits more closely in line with amounts lost by virtue of the loss of the right to pursue court actions as it is to suggest that they are designed to meet some need-based subsistence levels as suggested by earlier Royal Commissions dealing with lower wage rates.

Another area in which compensation departs from considerations of loss, and appears to be more clearly based on need, arises where benefits are paid on the basis of flat rates, minimums and, to a certain extent, maximums.

The Act contains a number of provisions setting minimum and maximum benefit levels. (Mechanisms are generally in place for periodic adjustment of the figures specified.) With respect to wage loss benefits in the case of permanent total disability, permanent partial disability, temporary total disability, and temporary partial disability, ss. 22(2), 23(4), 29(2) and 30(2) provide for minimum compensation levels in each case, irrespective of the worker’s actual average earnings. Section 33(5) makes further provision for minimum compensation for permanent total disability in particular circumstances, and ss.33(6)-(10) provides for maximum wage rates which apply in the calculation of average earnings, irrespective of whether a worker’s actual earnings are higher.

With respect to survivor benefits, ss.17(3)(c) and (g) set minimum levels for benefits in certain circumstances, and ss.17(3)(h) and (I) set maximum benefit levels in others. Sections 17(3)(a)(ii) and 17(3)(f)(iii)(B) provide for payment of a specific sum per child in certain circumstances where there are more than two or three surviving dependent children. The effect of all of these provisions is to fix amounts payable according to statutory minimums, maximums and flat rates, and without reference to the actual earnings of the deceased worker if those earnings would result in benefits above or below the statutory maximum or minimum.

It seems clear that statutory minimums ignore actual loss, and are instead based on considerations of need. The flat rate allowances may take account of both factors, depending upon the circumstances. These issues were addressed in some detail in the Tysoe Report:

Need or presumed need plays a part in the setting of maximum and minimum average earnings to which the basic rate of 75 per cent of average earnings applies. So it does - at least to some extent - in the allowances for children of deceased workmen for they are payable for each and every dependent child. Thus the aggregate payments are greater or less according to the number of children. In these cases there may be a mixture of compensation for loss and provision for basic needs.

Moreover, as will be seen hereafter, the concept of need has played its part in other ways. From time to time the Legislature has raised compensation levels and has made the increases applicable to existing as well as to future pensions. To take just one example: Widows of workmen who died prior to April 1,
1952, became entitled to pensions of $50 per month and widows of workmen who died in the period April 1, 1952 to March 19, 1959 to pensions of $75 per month. The increase to $90 on March 20, 1959 was made applicable to the pensions of all widows. I can only presume that the increases were motivated solely by a belief that the pensioners’ economic needs called for additional moneys being available to them, for there would be no other justification. Industry has had to bear the cost of these increases in existing pensions and so has been called upon to provide what is, in my view, in essence a species of social welfare. (Page 23)

These comments echo those of Chief Justice Sloan cited above regarding the underlying aim of providing at minimum a “reasonable subsistence allowance.” They are also consistent with the discussion in the 1916 Report of the Committee of Investigation on Worker’s Compensation Laws (the “Pineo Report”) regarding minimum levels of compensation for low-waged workers and their dependents, where the emphasis was very clearly upon need:

There are one or two minor points however, that we would like to see amended slightly in favour of the lower-waged workmen and their dependents. From the evidence before us it would appear impossible for widows or invalid widowers to live in this Province on less than $20 per month without becoming objects of charity... For similar reasons we recommend that under sections 37 and 39 of the Bill a minimum be fixed of at least $5 per week to workmen who are totally disabled. Under the scale of wages ordinarily prevailing in this Province such a minimum would very rarely be invoked but we feel that it should be provided to meet the needs in the few instances, mostly among apprentices and women workers, when it would be of advantage...

The increase in the rate of assessment necessary for the carrying-out of these suggestions would be trifling, but we feel that the addition would meet some cases which might otherwise result in very great hardship... (p.13)

While the foregoing authors have recognized that minimum benefit levels address concerns about need, there was virtually no discussion about the rationale for employer funding of this type of benefit. I will discuss that issue further in the final section of this report.

I find it less clear that statutory maximums are based on considerations of need. Presumably the rationale would be that such ceilings upon benefits were imposed because nobody “needs” more than the maximum compensation provided by the Act, because higher income earners can afford to carry additional insurance and do not need to depend solely upon the workers’ compensation system for income replacement benefits. (As to the latter point, see, for example, the 1942 Sloan Report at p. 27 and the Tysoe Report at p. 34)

It seems clear enough that putting a ceiling on compensation irrespective of whether actual loss exceeds that ceiling is a departure from compensation on the basis of loss. However, the relationship of maximum compensation levels to need appears to have been the subject of very little consideration or comment. When the question of maximum compensation levels first arose in the 1916 Final Report on Laws Relating to the Liability of Employers to Make Compensation to their Employees for Injuries (the “Meredith Report”), the rationale appears to have related to the overall cost to employers of funding the system. Having noted early in the report that small employers should not be “ruined” by having to pay compensation for death or disability caused no fault of his own, Chief Justice Meredith went on to recommend a statutory maximum:

I have, however, upon further consideration come to the conclusion that as the purpose of the proposed law is to protect the wage earner there is no reason why highly paid managers and superintendents of establishments, to which Part 1 is applicable, should be entitled to compensation out of the accident fund to an amount greater than the highest paid wage earner would be entitled to receive and I therefore recommend that the draft bill be amended by adding the following subsection 1 of section 39:

“But not so as to exceed in any case the rate of $2,000 per annum”
If no such limit is prescribed the result would be that the small employer, in the case of an accident happening in another establishment to a highly paid official would be unduly burdened. I propose $2,000 as the limit because that sum is probably the maximum amount earned in a year by the highest paid wage earner.

While distinctions between managers and “wage earners” have fallen by the wayside, the above passage suggests that the statutory maximum had its roots in concerns about reducing the cost of the system to employers rather than an assessment of the needs of those receiving benefits. This would be consistent with the employers’ side of the historic compromise, in that the ceiling on benefits can be seen as one of the advantages employers received in exchange for giving up their freedom from liability under the tort system to the many workers injured without fault on the employers’ part.

On balance, while it seems that statutory maximums constitute a departure from loss-based considerations, it is difficult to say whether they are based on need.

I note that there are also several provisions in the Act which provide for benefits in certain circumstances even though there has been no actual loss. For example, s.3(5) allows the board to deem persons who are carrying on undertakings considered to be in the public interest to be workers, and to fix their average earnings somewhere between the allowable statutory minimum and maximum figures even if those persons had been receiving no payment for their services. Section 33(2) allows the board to base the average earnings of unpaid ambulance drivers and fire brigade members on their average earnings in their regular employment. I note these provisions because they clearly do not base compensation on actual loss. Where such parties were not being paid, there has been no loss of income. However, it is again difficult to say whether these provision are based on need either. They may simply be based on the policy aim of encouraging or rewarding desirable unpaid activities which benefit society as a whole.

Section 98(3) allows for cancellation, suspension, etc. of compensation where a worker is incarcerated. I will discuss the possible rationales for this provision in detail under a separate heading below, but simply note here that the Appeal Division has related this provision to need, suggesting that the fact that a worker’s basic needs are taken care of by the institution during incarceration can warrant variation of benefit payments under s.98(3).

3. Particular Issues

A. Effect of Surviving Spouse’s Age on Entitlement to Benefits

Considerations of both loss and need appear to arise in connection with the variation in levels of fatality benefits depending upon the age of a deceased worker’s surviving spouse. (This issue is discussed in detail at pp.5-6 and 34-40 of my August 27, 1997 report to the Commission on Charter issues pertaining to fatality benefits. In the present report, I will focus not on whether these provisions might infringe the Charter but on the extent to which they are based on loss-based or needs-based rationales.)

Section 17(3)(c)-(e) ties compensation for non-invalid surviving spouses without dependent children directly to the survivor’s age. Those aged 50 or older receive a pension equal to 60% of what the worker would have received upon total disability. (I note that a surviving spouse of any age also receives this amount if he or she is an “invalid,” defined as incapable of earning. Different calculations apply to surviving spouses with dependent children. Provisions are in place for variation of benefits when children’s dependency or the spouse’s invalid status cease.)

Surviving spouses between 40 and 49 receive pensions based on a rather complex formula which results in slightly higher compensation with each increasing year of age. This pension is still tied to the amount the worker would have received for total disability, although less closely than in the case of pensions for surviving spouses who are 50 or older. It is based on the difference between a prescribed flat rate and 60% of what the worker would have received upon total disability. That difference is then adjusted by 1/11 for each year of age between 40 and 49. (See s.17(3)(d) and Schedule C.)
In contrast, surviving spouses under the age of 40 receive a specific lump sum rather than a pension. The same sum is paid to every surviving spouse in this category regardless of how much younger than 40 the spouse may be, and regardless of the average earnings of the deceased worker.

Pensions for those in the 40-49 and the 50 and over categories take some account of actual loss in that each pension is tied to the actual earnings of the deceased worker. For example, a 45 year old spouse of a deceased worker who earned $50,000 will generally have sustained a greater loss than a 45 year old spouse of a deceased worker who earned $20,000, and would receive higher compensation pursuant to s.17(3)(d). On the other hand, a 44 year old spouse of a deceased worker who earned $50,000 will receive less than a 45 year old spouse of a worker with that same income. The latter difference clearly has nothing to do with relative degrees of loss sustained by each survivor.

Section 17(3)(e) goes even further in that it takes no account whatsoever of the deceased worker’s earning level and simply provides for flat rate compensation for all surviving spouses within the defined class. This is despite the fact that degrees of loss would no doubt vary considerably for different members of the class. Degrees of need would no doubt vary as well.

While it is clear that loss is not the governing factor in the scheme created by s.17(3)(c)-(e), it is also not entirely clear whether need is the primary rationale. At the time I wrote my August 27, 1997 report on Charter issues, the Review Board and Appeal Division had reached opposite conclusions about whether these age distinctions constitute discrimination contrary to the equality provisions in s.15 of the Charter, with the Review Board finding no Charter violation and the Appeal Division disagreeing and allowing all appeals on the issue. In April 1998, a panel of the Appeal Division reconsidered the Charter issue in connection with a group of 17 appeals by surviving spouses under age 50 seeking over-50 benefit levels. In this decision, the panel reached an opposite conclusion to those of earlier panels and upheld the age distinctions. (Appeal Division Decision No. 98-0527, 14 W.C.R. 113)

The Appeal Division reviewed the history of s.17 and in particular amendments to the Act in 1974 which introduced pensions rather than lump sums for most surviving spouses and created the same general scheme which currently exists (pp. 142-150). The Appeal Division described the purpose behind the 1974 amendments as follows:

In 1974, the purpose of the amendments to Section 17 was to improve compensation for widows who suffered a loss of income because of the death of their spouses by taking into account the size of that loss and also by ensuring minimum levels of compensation. The widows’ actual and potential access to various sources of income was taken into account so as not to overcompensate them. Thus, the purpose of the 1974 amendments was to replace income, in light of projected needs, so as to avoid overcompensation and undercompensation. Compensation was integrated with federal benefits. To avoid undue intrusion in the widows’ lives, the legislature used a presumptive approach based on age, health and the presence of children to predict the opportunity for income from other sources, particularly employment, over the long term, rather than subjecting the widows to ongoing scrutiny and reporting requirements concerning their actual income. (Page 175)

The panel concluded that the broad purpose of s.17(3)(c)-(e) is:

. . . to provide dependent spouses with benefits that will compensate them for the loss in income due to the work related death of their spouses while taking into account their other (actual and potential) sources of income. . . (Page 180)

The Appeal Division also noted that the workers’ compensation scheme does not aim solely to provide financial benefits, but also to provide rehabilitation and promote income replacement. Considerable emphasis was placed on the fact that s.16 the Act allows for provision of vocational rehabilitation to surviving spouses. (I note that this is currently a matter of discretion and that the Commission recommended mandatory provision of such services upon request in its October 31, 1997 report.)
Thus a key factor in the distinction between spouses of different ages is that younger spouses typically have better prospects for finding work or improving their earnings, and are more likely to be able to achieve financial independence than older spouses.

This raises a number of issues. I note that emphasis is placed upon the surviving spouse’s ability to become financially independent. This seems to presume that financial independence should have an impact upon entitlement to benefits. However, actual dependence is not a prerequisite to receipt of fatality benefits, since cohabiting spouses each contributing to the support of a common household are deemed to be mutually dependent pursuant to s.17(7).

I also note that the emphasis on ability to replace the support provided by a deceased spouse with one’s own enhanced earnings seems to impose something in the nature of a duty to mitigate on the part of the surviving spouse. That obligation is consistent with the general requirement in the family law context that a spouse should make reasonable efforts to become financially independent upon marital breakup. However, it is not consistent with the approach to Family Compensation Act claims in tort law. In the latter context, the focus is on whether the surviving spouse has suffered a loss of support as a result of the wrongful death and it is irrelevant whether the spouse needs such compensation or can make up for the loss by earning more himself or herself.

I note that there is an obligation on the part of an injured worker to mitigate losses which also applies in the tort context. However, I do not think that a surviving spouse is in an analogous position. A party who has been injured has some obligation to take reasonable steps to minimize losses resulting from the injury. Where a worker pursues alternative means of earning income, the result is a direct reduction in the worker’s actual income loss. A surviving spouse is in a different position. He or she has lost the support of the deceased spouse. Extra income which a spouse might earn does not reduce the fact or the extent of that loss. The surviving spouse could have pursued enhanced earnings while his or her spouse was still alive, and doing so would have had no effect on the spousal support.

Again, this is not to say that the workers’ compensation scheme should follow the tort model or apply the same principles. However, if surviving spouses’ benefit entitlements are to be tied to their ability to replace support from the deceased worker with income which they earn themselves, care should be taken to ensure that this is based on principles consistent with the workers’ compensation system, and not confusion as to the applicable legal principles.

In my view, tying benefits to a surviving spouse’s ability to earn income can only be justified on a needs-based rationale. The Commission may wish to consider whether there is sufficient reason to depart from the loss-based model which generally predominates in the areas of wage loss and fatality benefits. The 1974 amendments appear to have been designed in large measure to shift the focus of spousal pension benefits away from needs-based lump sum payments to loss-based pensions tied to actual earnings of deceased workers. The retention of lump sum payments for younger spouses may simply be an unconsidered vestige of the earlier scheme. On the other hand, it may be the result of a conscious choice regarding the allocation of resources. In that regard, I note the Appeal Division in Decision No. 98-0527 viewed the fatality benefit scheme as attempting to balance competing rights and the “distribution of scarce resources” (p. 211). However, I have not found any evidence as to specific weighing of costs or choices between competing demands on this point.

A further issue arises in connection with the conceptual differences between the manner in which benefits are measured for spouses in different age groups. The focus of most inquiry concerning the age distinctions tends to be on whether it is appropriate to make distinctions at all on the basis of age. There tends to be no discussion as to why deceased workers’ actual earnings are considered in the calculation of benefits for all non-invalid surviving spouses without dependent children except those under the age of 40. The effect of this that actual loss plays some role in the assessment of benefits for all but the latter group.

While there has been extensive discussion about why it might make sense to provide lower benefits to younger surviving spouses, I have found no rationale for approaching compensation for this group on an entirely different conceptual basis. This seems to be a vestige of the former system where all surviving spouses received a lump sum. If it is accepted that it is appropriate to vary benefits according to age, it would be more consistent with the
overall scheme to provide benefits to spouses under 40 on a sliding scale which increases in small increments with each year of age, as is already done in the case of surviving spouses aged 40-49.

B. Effect of Surviving Spouse’s Remarriage on Entitlement to Benefits

The treatment of remarriage was also addressed in detail in my August 27, 1997 report to the Commission on Charter issues and fatality benefits (at pp.4-5 and 20-27). For present purposes, my focus is on how past and current treatment of remarriage relates to issues of loss and need. (I am using the terms such as “marriage” “remarriage” and “spouse” to refer to situations involving both formal marriages and common law relationships. Both have been treated similarly in the fatality benefits provisions of the Act for some time.)

The history of the applicable provision (which is now s.19 of the Act) is set out in more detail in the above report. In short, for many years, the remarriage of a surviving spouse resulted in termination of benefits. At present, remarriage has no such effect and all surviving spouses continue to receive full benefits whether they remarry or not.

As discussed above, the current fatality benefits scheme incorporates considerations of both loss and need. It is questionable whether the current approach to remarriage takes account of either. The Appeal Division stated the issues aptly in Decision No. 98-0527:

The 1993/94 amendments to Section 19 which provided for the continuation of pensions benefits after remarriage (or involvement in a common law relationship), may be reconciled with the original purpose of Section 17(3)(c) to (e) (income replacement in light of need), only if one assumes that remarriage (or involvement in a common law relationship) will bring no financial benefits to the surviving spouse.

To recapitulate, the termination of pension benefits upon the spouse’s remarriage (or involvement in a common law relationship) was consistent with the notion that the benefits were intended to compensate for loss of income relative to needs, if one assumed that the new relationship would be as beneficial financially as the first relationship. The continuation of pension benefits after remarriage (or involvement in a common law relationship) is consistent with that notion, if one assumes that the new relationship will not be beneficial at all. Both assumptions are problematic in their own way. Both assumptions are inconsistent with how the courts deal with remarriage or involvement in a common law relationship when they assess damages for wrongful death. While the two assumptions are logically symmetrical, the assumption that the new relationship will not be beneficial at all is intuitively less plausible than the assumption that the new relationship would be as beneficial financially as the first relationship. (Page 176)

The Appeal Division’s comments recognize support provided by a new spouse upon remarriage as a form of income replacement. The panel distinguished between this form of income replacement and other types of income which might arise irrespective of the worker’s death and are thus unrelated to the surviving spouse’s loss:

The question may be raised as to why the [previous] Act included provisions terminating pensions if the surviving spouse formed a new relationship, but not if she found remunerative work or was promoted. The continuation of pension benefits where the surviving spouse finds a job or is promoted is consistent with the notion that the payment of benefits is intended to compensate the surviving spouse for the loss of partner’s income. The surviving spouse may have started working or may have been promoted, even if her partner had not died. Her additional income would not have cut her off from her partner’s income. However, the continuation of pension benefits where the surviving spouse finds a job or is promoted is less consistent with the notion that the payment of benefits ought to depend to some extent on the recipient’s needs. . . (Page 175)

To take the clearest sort of example, where a surviving spouse subsequently remarries and the new spouse has the same income and the same legal support obligations and actually makes the same contribution toward support of the surviving spouse as the deceased worker, the surviving spouse’s loss of spousal support has been fully
Financial need arising from the loss of support from the deceased worker would similarly be eliminated.

Thus to the extent that financial support provided by a new spouse replaces support previously provided by the deceased worker, this both mitigates or offsets the surviving spouse’s loss and decreases his or her need. Where benefits continue in full following remarriage, this effectively ignores the remarriage’s impact on both loss and need.

Whether one assumes that the rationale for the pension benefits is to address either loss or need or both, the current approach would only be appropriate in cases where remarriage has in fact had no effect on loss or need. As the Appeal Division noted, this will occur where the new relationship brings no financial benefits whatsoever, and such instances seem likely to occur far less frequently than instances where the new relationship brings at least some financial benefit, if not full replacement of the support which has been lost.

There are three possible approaches which could be taken to remarriage. First, benefits can be terminated altogether upon remarriage. This takes account of the fact that financial support from the new spouse offsets both the loss and need of the surviving spouse. The principal concern would be that it results in undercompensation where the new spouse provides no financial support or support at a substantially lower level than that provided by the deceased worker.

Second, benefits can be continued irrespective of remarriage, as is the present practice. This recognizes that in some cases remarriage has no effect on the loss or needs of the surviving spouse. However, the approach takes no account of the many instances where that is not the case. If a surviving spouse is receiving both support from the new spouse and benefits designed to replace support from the deceased worker, the result would appear to be at least some degree of double compensation.

Third, a more “middle ground” approach could be taken where remarriage results in neither automatic termination of all benefits nor continued payment of benefits in full. Such an approach would take account of the fact that remarriage often has an impact upon both loss and need, but that this is not invariably true.

The “middle” approach could take various forms. For example, there could be an inquiry upon remarriage into the income level of the new spouse, a determination on that basis of the degree (if at all) to which financial support from the new spouse has offset loss and/or lessened need, and a variation of benefits accordingly. Such an approach would be the most closely tailored to the individual circumstances of the surviving spouse. However it is likely to raise some concerns about administrative expedience and may be perceived as unduly intrusive and insensitive to surviving spouses.

I note that the legislation previously provided for a lump sum payment equivalent to two years of pension benefit payments when pensions were terminated upon remarriage. This additional lump sum payment could be taken as recognition that remarriage will have some impact on loss and/or need but will not necessarily offset them in full. (That is, the pension is discontinued on the basis that remarriage may have offset the loss or need in full, but the lump sum payment is added on the basis that it may not have.) An alternative means of accomplishing a similar end might be to provide for an automatic reduction of pension benefits by a set percentage upon remarriage. This would also recognize that remarriage is likely but not certain to have some impact upon loss and need.

The latter two alternatives would be less tailored to individual circumstances, but may well serve the collective justice principles which generally underlie the whole workers’ compensation scheme. They are also less intrusive and less administratively problematic. I note however that if a lump sum payment or percentage reduction in pension payments are intended to take account of income replacement by support from the new spouse, they should bear some relationship to the actual likelihood of such income replacement. The Commission may wish to consider recommending that if such an approach is taken, an effort be made to obtain statistical information concerning the impact of remarriage on actual loss. (I have not undertaken research into whether such information may already be available or whether some independent study would be required.)
I note that the rationale for the current approach has not been clearly articulated. It is possible that a deliberate policy choice has been made by the legislature which has nothing to do with considerations of either loss or need. For example, the legislature may have elected to treat all remarried surviving spouses as receiving no financial benefit from remarriage because such situations can occasionally occur, and the legislature wishes to ensure proper compensation in such cases while at the same time sparing all surviving spouses what is likely to be perceived as a very painful inquiry into the extent to which each has “benefited” from remarriage after losing their spouse. (I note that while the “income replacement” view of remarriage is conceptually sound, the emotional circumstances surrounding the loss of a spouse may often make this approach seem inappropriate and even cruel. Loss of financial support awards and corresponding benefits in both tort law and the workers’ compensation setting often raise painful issues for surviving family members, since they measure only specific financial values associated with the loss of a loved one and do not attempt to address the full scope of the loss.)

Short of any possible policy considerations such as the one I have suggested (and I have seen no evidence that the legislature had any such concerns in mind), the current approach to remarriage may simply be based upon a misperception of the underlying purpose of survivors’ pension benefits. (I note, for example, that certain statements made in the course of legislative debate preceding the 1993/94 amendments to s.19 suggest that a misperception about the effects of remarriage on the assessment of damages in tort law may have played a part in the decision to continue full benefits upon remarriage. See, for example, excerpts from the debate at pp.177-179 of Appeal Division Decision No. 98-0527.)

In this situation, it does not seem necessary for the Commission to choose between need and loss as the rationale for survivor benefits, since remarriage would generally have the same effect on both. However as noted in earlier discussion of fatality benefits, there appear to be more factors suggesting that these benefits are based on considerations of loss rather than need.

C. Effect of Worker’s Incarceration on Entitlements to Benefits

Section 98(3) provides for variation of benefits when a worker is imprisoned:

98. (3) Where it is found that a worker is confined to jail or prison, the board may cancel, withhold or suspend the payment of compensation for the period it considers advisable. Where compensation is withheld or suspended, the board may pay the compensation or any portion of it to the worker’s wife, husband or children, or to a trustee appointed by the board, who must expend it for the benefit of the worker, the worker’s wife, husband or children.

The Manual addresses some aspects of the discretionary powers created by s.98(3) at #49.20, noting that the section is intended to apply where a worker who is receiving benefits is subsequently incarcerated, and not to a situation where a worker is injured while incarcerated. The Manual says that in practice, the board “cancels” an imprisoned worker’s compensation, and that cancellation means that the compensation which would have been payable during the term of incarceration is permanently lost to the worker. The Manual further provides that payments will resume when a worker is released on full parole or becomes eligible for a work release program but cannot participate as a result of work-related disability.

As for the discretion to pay all or a portion of benefits to the worker’s spouse and children, the Manual states that this power is exercised if the worker was supporting the spouse or children prior to imprisonment, or there was a court order requiring the worker to do so. (I note that this suggests that the provision of benefits to the worker’s dependents is based on the latter’s actual loss. I also note that payment based on the existence of a court order, and not the worker’s history of compliance, with the order is more consistent with the Commission’s recommendations regarding amendment of s.17(9), discussed above.)

Neither s.98(3) of the Act nor #49.20 of the Manual explain the rationale for stopping or decreasing benefits upon a worker’s incarceration and there appears to be very little in the way of a historical record regarding this provision. The Review Board and Appeal Division have had some occasion to consider the matter in the course of challenges to s.98(3). At this point, the Review Board has found that s.98(3) does not violate equality rights.

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guaranteed by s.15 of the Charter. (Essentially the Review Board decided that incarcerated persons are not among the groups protected by s.15.) The Appeal Division has not found it necessary to determine the Charter issue. The Appeal Division has considered the basis for s.98(3) in some detail and has found that the section does not permit cancellation of all types of benefits. In Appeal Division Decisions No. 93-1059/93-1060, 10 W.C.R. 7 and No. 94-0324, 10 W.C.R. 621, the panels held that cancellation of permanent partial disability benefits paid pursuant to s.23(1) (a.k.a. functional disability awards) would be contrary to the terms of s.23(1). This finding was based on the fact that the latter provision bases compensation on the nature and degree of injury, and does not take account of the availability of suitable employment. The Appeal Division contrasted this with the example of s.30(1), which bases temporary partial disability benefits on the difference between the worker’s pre-injury average earnings and the amount the worker is earning or is able to earn in suitable employment following the injury.

The Appeal Division began its analysis in Decision No. 93-1059/1060 by noting that the overarching objective of the Act is not to furnish financial benefits, but to promote rehabilitation and re-employment.

Where there is disablement from work, the purpose of the Act is to restore the injured worker to productive employment where possible without delay. Entitlement to compensation payments is based on disablement from employment (“. . . from earning full wages at the work at which he was employed. . .”). The availability of suitable re-employment, then, is central in determining the duration of compensation payments.

When viewing the application and interpretation of Section 98(3) within the context of the purpose of the Act, we must ask: Are there circumstances consistent with the terms of the Act that warrant cancellation of compensation payments because a worker is prevented from re-employment by confinement to jail or prison?

Our conclusion that the authority to cancel compensation payments in some circumstances is consistent with the provisions for entitlement rests on the fact that confinement to jail or prison prevents re-employment and is an economic factor that may be relevant when determining entitlement. The fact that the authority to cancel compensation was introduced in 1943 at the same time that the confinement provision was added to the legislation establishes a link between this authority and confinement. In our view, this link is primarily economic in nature and relates to the limitations on re-employment imposed by confinement. (Pp. 16-17. Emphasis in original.)

The above reasoning was subsequently affirmed by the Appeal Division No. 94-0324. In that case, a worker had been receiving a functional disability pension pursuant to s.23(1). She was subsequently confined to a psychiatric institution for evaluation while awaiting trial on criminal charges and again while awaiting an appeal from her conviction. The board suspended her benefits for the entire period of her confinement and the Review Board denied the worker’s appeal. On further appeal, the Appeal Division found that s.98(3) still applies where a worker has been incarcerated without yet having been convicted of anything. The panel agreed that “cancellation” (i.e. permanent loss) of functional disability pension benefits is contrary to s.23(1), but held that such benefits can still be suspended or withheld.

The panel has considered the circumstances of the worker’s case. We have considered that she has been sentenced to 25 years imprisonment, that her basic needs are and will be met by the institution in which she is incarcerated, and that when she is released, it will likely be difficult for her to obtain employment.

In light of these circumstances, the Appeal Division directed that 50% of the worker’s benefits would be paid to a trustee to be expended on the worker’s behalf during her imprisonment and that the remaining 50% would be suspended until the worker’s release. At that point, her accumulated payments would be paid to her with interest. This decision places clear emphasis upon the worker’s needs. The s.98(3) discretion was exercised on the basis that the worker’s “basic needs” would be taken care of by the institution and she would therefore need less income during her incarceration. The panel also concluded that she would have greater need for financial benefits upon her release, when her employment prospects would be bleak.
Except in limited circumstances described above, such as those involving statutory minimum benefit levels, wage loss benefits appear to be based on considerations of loss and not need. On that basis, it seems inconsistent and unwarranted to focus on need in connection with s.98(3). There are many circumstances where a worker’s needs might be reduced following assessment of wage loss benefits. A worker might win the lottery, receive an inheritance, or move in with a family member who bears the costs of the worker’s “basic needs.” These are not considered grounds for reducing benefits.

In addition, the Appeal Division did not consider the fact that #49.20 directs that benefits will not be affected where, for example, a worker is eligible for a work release program, but cannot participate due to the work-related disability. Presumably the institution is still taking care of the needs of a worker in such circumstances. The difference would appear to be that the only thing now preventing the worker’s employment is the disability, rather than the incarceration.

As the panel noted in Decision No. 93-1059/1060, the historical record regarding s.98(3) is very limited. A comparable section was first enacted in 1924 and gave the board similar discretion regarding payment of benefits where it considered that any person entitled to compensation was leading “an immoral and improper life.” An amendment was made in 1943 extending this power to situations where persons entitled to benefits were confined to jail or prison. A further amendment was made in 1968 deleting the grounds of immorality and impropriety and leaving the section in its present form.

The current approach under s.98(3) and the provision itself may simply constitute a throwback to the moral and paternalistic overtones of s.98(3)’s predecessor. If so, the Commission may wish to consider recommending that this provision be repealed as it would not appear to be in keeping with the remainder of the modern version of the Act. However, the situation is not necessarily that simple.

Irrespective of the Appeal Division’s references to need, s.98(3) might actually be designed to take account of the impact of a worker’s incarceration on the worker’s loss as measured by the scheme of the Act. That measurement of loss, whether it arises in the context of functional disability or loss of earnings pensions, is based on the recognition that a worker’s earning ability has been impaired by the work-related injury. In either case, the assumption is that the worker would have been earning more but for the injury and should therefore be compensated. If it turns out that in fact the worker would not have been earning more but for the injury because he or she would have been incarcerated, this is arguably an issue relating to loss.

One problem with this interpretation is that the system does not respond in the same way in other circumstances where a worker is unemployed for reasons unrelated to the work-related disability. See, for example, #39.00 of the Manual:

Where a claim is reopened more than three years after the injury and a worker has a compensable permanent disability or an increased permanent disability, but is unemployed at the time of the reopening otherwise than through the effects of the injury and it is determined that the worker has no potential loss of earnings, a pension will be assessed on a physical impairment basis under s.23(1) of the Workers Compensation Act. It will be calculated on the basis of the wage rate originally set on the claim subject to any appropriate wage rate review being carried out or Consumer Price Index adjustments.

The Appeal Division has found that s.23(1) benefits cannot be cancelled pursuant to s.98(3). Considering that such benefits are payable even though a worker is unemployed for unrelated reasons and has “no potential loss of earnings,” I have been unable to ascertain any reason why the board should still be able to withhold, suspend or redirect payment of such benefits.

This leaves the issue of whether different considerations should apply to loss of earning pensions, as has been suggested by the Appeal Division. The Appeal Division felt that the key distinction is that the latter benefits are based on the difference between the worker’s pre-disability earnings and what the disabled worker actually is or could be earning. While it is not spelled out in such terms, the Appeal Division’s reasoning seems to be based on the fact that the worker is prevented by incarceration from pursuing alternative employment.
It is difficult to say whether this consideration raises issues relating to mitigation or causation (both of which are concepts related to compensation for loss). The Appeal Division emphasized the system’s goals of rehabilitation and re-employment, noted that incarceration prevents re-employment, and suggested that this is may be an “economic factor” relevant to entitlement. This suggests that the focus may have been on the worker’s duty to mitigate losses by making reasonable efforts to seek re-employment, and the fact that the worker’s own conduct has made re-employment impossible, at least for the duration of incarceration. The situation is somewhat similar to s.57(2) which empowers the board to reduce or suspend compensation if a worker persists in practices which imperil recovery or refuses to submit to medical treatment.

However, I note that non-incarcerated workers may deliberately choose not to pursue re-employment. The result in such cases is not cancellation of their benefits until they fulfill their mitigation obligations, but a benefit calculation based on deemed employment opportunities, as discussed in my July 7, 1998 report to the Commission at pp.7-8 and 49-54. That suggests that the failure to mitigate should have an impact not on entitlement to benefits, but only on how they are calculated.

With respect to causation, one might say that the worker’s earning loss in such circumstances is caused by the incarceration and not by the work-related injury. As a general rule, benefits are not varied where an unrelated event subsequent to the injury affects a worker’s ability to earn income. As far as I am aware, for example, if it comes to the board’s attention that a worker receiving wage loss benefits has been stricken by an unrelated debilitating disease, the worker is not subsequently deprived of benefits on the basis that he or she would have ultimately become ill and unable to work irrespective of the work-related injury. Yet this situation is in many ways analogous to that of the incarcerated worker.

A relevant difference may lie in the fact that unlike the worker in the above example, the incarcerated worker made deliberate choices which led to the inability to work. This is not necessarily an echo of the moral overtones of s.98(3)’s predecessor. In my July 7, 1998 report to the Commission on causation issues, I discussed in the detail the principle of novus actus interveniens (pp. 4 and 12-18) On that principle, compensation may be denied where the chain of causation between the compensable event and the subsequent harm has been broken by the intervening wrongful act of the injured party. In my view, although it was probably not the original intention behind s.98(3), it may be possible to justify this provision on novus actus principles. I have not come across any examples in tort law where a plaintiff’s future wage loss damages were reduced as a result of the plaintiff’s incarceration, but such a result would be conceptually consistent with tort principles (as long as the incarceration was not part of a chain of causation traceable back to the original injury).

I note though that even if one assumes on novus actus principles that the chain of causation has been broken by the worker’s criminal act leading to incarceration, certain aspects of s.98(3) remain problematic. This rationale would support cancellation of benefits for the duration of incarceration, but not suspension, withholding or redirecting of the benefits. Also, I note that in Appeal Division Decision No.94-0324, the discretion under s.98(3) was applied in part during a period when the worker was incarcerated pending trial. In addition, the incarceration in issue was in a psychiatric facility where the worker was being held for evaluation. There is not very much detail about the circumstances in the Appeal Division’s reasons and they did not consider novus actus issues. However, I not that only wrongful conduct can constitute a novus actus. The principles should therefore not apply where a worker is incarcerated pending charges which are ultimately unproven. It is also questionable whether s.98(3) should apply at all where a worker is not mentally responsible for criminal conduct.

Another problem is that s.98(3) may treat incarceration inconsistently with analogous situations. The worker who is incarcerated for criminal activity might suffer an injury in the course of that criminal activity which affects long-term earning prospects. Or, the worker might become virtually unemployable as a result of his or her criminal record. These are consequences of the same criminal act which led to the incarceration and they would both affect loss beyond the period of incarceration, but s.98(3) ignores them.

Section 98(3) raises a host of issues, none of which can be addressed in an entirely satisfactory way. Since the provision presumably applies to relatively few situations, the Commission may wish to consider whether an alternative would be to recommend repeal of this provision, while at the same time making it clear that the board has the discretion to cancel benefits wherever it considers that unlawful conduct on the part of the worker has broken the chain of causation between the work-related injury and the worker’s loss of income.
D Effect of Compensation from Other Sources on Entitlements to Benefits

The issue of the extent to which workers’ compensation benefits should be adjusted to take account of benefits received from other sources is being considered by the Commission in various other contexts, and I do not propose to deal with the matter exhaustively here. Most aspects of the debate have been given thorough coverage in the WCB Policy and Regulation Development Bureau’s May 21, 1997 briefing paper entitled “Benefit Stacking and Integration” (the “Briefing Paper”).

I am adopting the terms “stacking” and “integration” as they are used in the Briefing Paper:

When a worker or survivor receives benefits from two or more sources without any adjustment to reflect the existence of other benefits, there is said to be “stacking” of the benefits. When one benefit is reduced to take into account the receipt of a benefit from another source, there is said to be “integration” between the two types of benefits.

For the purposes of this report, issues surrounding the availability of benefits from other sources and stacking versus integration are relevant in two general respects. First, the question of whether the workers’ compensation system should provide compensation on the basis of need arises when one considers that there may be other sources of benefits designed to address issues of need. Second, the question of what, if anything, should be “integrated,” or deducted from workers’ compensation benefits is relevant to how the system measures loss and addresses questions of double recovery.

With respect to the first issue, I note that the goal of providing a sufficient level of benefits to provide for the basic needs of workers and dependents figured prominently in the early stages of development of the workers’ compensation system in B.C. and elsewhere. See, for example, the comments cited earlier in this report by Chief Justice Sloan regarding the goal of providing at minimum a “reasonable subsistence allowance” and the reference in the Pineo Report to providing enough for recipients of benefits to avoid “becoming objects of charity.” The social safety net has evolved considerably since the inception of the workers’ compensation system. It is no longer likely to be the case, as it was in 1916 and 1942 when these comments were made, that workers and dependents rely upon benefits provided by the system to keep them from starvation or charity.

What also appears to have evolved over the years is an increasing emphasis upon actual loss as the basis for measurement of benefits. While many benefits (most notably the functional impairment wage loss pension) are still based on a presumed loss which may bear only a slight connection to a worker’s actual loss, the system has moved toward using a growing number of approaches to calculating benefits which are more closely tied to actual loss. For example, in 1974 the fatality benefits provisions were amended to provide for a pension related to the deceased worker’s earnings in the case of all surviving spouses except non-invalids under 40 with no dependent children. Similarly, the loss of earnings approach began to be used in order to calculate pensions in the case of certain types of injuries and has been expanded so that it is now considered in every case and provides the basis for benefits anytime it results in higher compensation.

As discussed earlier, the main areas in which needs-based considerations predominate are in regard to statutory minimum (and perhaps maximum) levels of compensation and variation of fatality benefits depending upon the ages of surviving spouses. “Need” arises in a different sense in each case. The statutory minimums are paid irrespective of whether the actual loss in question may be lower and the aim is to provide a minimum level of compensation. The various spousal benefits do not appear to be aimed at ensuring that minimum basic needs are met, but instead are designed take account of the fact that there will be varying degrees of need for benefits (as opposed to potential for self-sufficiency) among surviving spouses in different age groups.

The result in the case of minimum wage levels is that the system (and hence the employers who fund it) are paying for needs which exceed losses. While this may occasionally be an incidental result in the case of fatality benefits, the difference with minimum compensation levels is that it is the result and indeed the goal of the legislation providing for “floors” on compensation.
The Commission may wish to consider the extent to which different aspects of compensation should be funded by different sources.

The Appeal Division has suggested that the workers’ compensation system should be the first source of benefits:

It is generally accepted that where a worker has entitlement to workers’ compensation benefits the Board is in the position of first payer. Other organizations and agencies which provide disability payments for the same disability may adjust their benefits to take into consideration W.C.B. entitlements or make arrangements through the worker for reimbursement of double payments. (Appeal Division Decision No.95-0165, 11 W.C.R. 13, at p.21)

Similar sentiments have been expressed by others. For example, it has been noted in connection with the proposal that CPP benefits be reduced through integration with workers’ compensation benefits that this would “remain consistent with Workers’ Compensation principles that the employer - not the CPP - should bear the cost of a work injury.” (“An Information Paper for Consultations on the Canada Pension Plan” February, 1996, page 38)

Putting the board in the position of first payer suggests that the board will typically be the party covering the recipient’s minimum requirements. However, it may be argued that employers should bear the cost only to the extent of losses caused by the work-related injury, that this is the purpose of the workers’ compensation system, and that it is the function of other agencies to provide for minimum basic needs where the loss-based benefits provided by the workers’ compensation fall short of this.

Certain comments in the Tysoe Report seem to support this position:

In my Introduction, when speaking of the benefits that accrue to workmen under the Act, I said: “These benefits are not granted as a matter of grace, but of right. There is no measure of charity about them.” I added that workmen’s compensation should not be converted into social welfare, and that it is proper to distinguish between what should be borne by industry alone and what should be borne by society as a whole. (Page 22)

Subsequently, in speaking about increases in widows’ pension levels designed to address the pensioner’s needs, Mr. Justice Tysoe acknowledged the social welfare aspect of this:

Industry has had to bear the cost of these increases in existing pensions and so has been called upon to provide what is, in my view, in essence a species of social welfare. (Page 23)

The justification for industry funding a form of social welfare is not clear. As noted earlier, the Pineo Report in referring to the desirability of minimum compensation levels irrespective of loss suggested that the minimum levels might have a significant impact for some recipients of benefits and the cost to employers of funding the minimum would be “trifling.” Whether the impact upon recipients is as pronounced today in light of the availability of benefits from other sources to meet minimum needs is not clear. Whether the present day costs to employers of funding minimum levels can still be characterized as trifling is also unclear.

While I have not found direct evidence on the point, it seems plausible to suppose that the concept of minimum benefit levels is an aspect of the historic compromise. The idea may have been that workers were prepared to give up the right to sue in tort in exchange for somewhat reduced recovery, but only within limits which would provide them at minimum with, as Chief Justice Sloan described it, a “reasonable subsistence allowance.” The present availability of benefits from other sources may make this feature of less importance to modern workers, but that is not necessarily reason to vary the terms of the compromise. The employers may have received other advantages in exchange for this. Most notably, benefits are subject not only to “floors” but also to “ceilings.” While employers may in some cases have to fund benefits in excess of loss in the case of statutory minimums, they will also in many cases only have to fund benefits which fall short of loss in the case of statutory maximums. Thus the system may be providing for a fair trade-off.
Since the historic compromise is more a theoretical construct than a real event, one would not expect to find a “checklist” of trade-offs providing concrete support for this suggestion. Reasons exist both for and against the funding of need-based benefits by employers. If the current system is not ideal, the existence of the minimum/maximum trade-off may support the view that rough justice is being served and it is not unduly burdensome to require some funding of social welfare by employers.

As noted, the second issue involves how the system measures loss in relation to its treatment of stacking and integration. The treatment of benefits received from other sources is relevant to the issue of loss if those other benefits have offset the loss for which the benefits are intended to provide compensation. This might best be illustrated by an example. Suppose a worker who previously earned $40,000 per year can now only earn $20,000 per year as the result of a work-related injury. The loss resulting from the injury is $20,000 per year. If, as a result of the injury, the worker receives benefits from another source of $10,000 per year, it is arguable that the worker’s loss has been reduced. If the worker is earning $20,000, the workers’ compensation system provides benefits equivalent to $15,000 per year (75% of $20,000), and the other source provides $10,000 per year, the worker is now receiving a total of $45,000 per year. This exceeds pre-injury earnings.

One way of characterizing this is to say that the worker has suffered a loss of only $10,000 per year because the remaining part of the loss has been offset by the benefits received from the other source. Another way of looking at it is to say that the failure to integrate the workers’ compensation and other benefits results in the worker receiving double recovery for a portion of the loss.

The workers’ compensation system does make provision for integration of some benefits, as I will discuss below. There are a wide variety of benefits which injured workers or the survivors of deceased workers may receive from other sources. These include Canada Pension Plan benefits, other forms of social assistance, insurance proceeds, employment-related benefits, and gifts or ex gratia payments from various sources. As noted in the Briefing Paper and Appeal Division Decision No.95-0165, provision may be made for integration by the source of the other benefits. (For example, workers’ compensation benefits are deducted from employment insurance benefits, presumably to avoid double recovery and to make employers the primary source of funding of benefits.) The Act and Manual only specifically address a limited range of benefits from other sources.

Section 34 provides for the deduction of a limited range of other benefits from compensation paid to workers:

34. In fixing the amount of a periodic payment of compensation, consideration must be had to payments, allowances or benefits which the worker may receive from the worker’s employer during the period of the disability, including a pension, gratuity or other allowance provided wholly at the expense of the employer, and a sum deducted under this section from the compensation otherwise payable may be paid to the employer out of the accident fund.

As is noted in the above Briefing Paper, there are a number of unresolved issues about how to interpret and implement this section (pp.11-12). The Manual interprets the provision as discretionary, and gives only limited guidance as to when deductions should be made.

A key feature of s.34 is that it deals only with benefits received from and wholly at the expense of the employer and provides for reimbursement of the employer out of the accident fund as well as a deduction from the worker’s benefits. This suggests that the provision was designed as much to prevent double contribution by an employer as double recovery by a worker. By virtue of the deduction, the worker does not receive both of two separate contributions from the same employer (i.e. the extra benefits provided directly and the workers’ compensation benefits provided indirectly by the employer’s contribution to the accident fund). The reimbursement of the employer out of the accident fund effectively cancels out the employer’s payment of the extra benefits is and the employer’s contribution is restored to the original assessment levied by the system.

Apart from the employer-funded benefits dealt with in s.34, the Act does not provide for integration of any other benefits received by workers.
Benefits paid to the surviving dependants of deceased workers are treated somewhat differently. Sections 17(3)(a)-(c) integrate federal benefits (defined as specific CPP benefits) when calculating the benefits discussed above. Thus, for example, a 50 year old childless non-invalid spouse is entitled to an amount equal to 60% of what the deceased worker would have received upon total disability. However, the compensation payable under the Act is not that 60%, but a sum which will add up to that 60% “when combined with federal benefits.”

Apart from these provisions dealing with CPP benefits, the Act does not provide for integration of any other benefits received by dependents of deceased workers.

Similar issues to those of stacking versus integration arise in tort law in the context of whether benefits received by a plaintiff from other sources should reduce the damages which a defendant is required to pay. The fundamental compensation principle applied in tort law requires that an injured party be compensated as fully as possible for all losses caused by a defendant’s wrongful act. It is just as much as part of the compensation principle that a plaintiff should not receive compensation exceeding actual loss. A key concern in tort law is thus whether a plaintiff who receives benefits from two different sources in respect of the same loss is being overcompensated.

Notwithstanding the compensation principle, exceptions have developed where courts decline to deduct other benefits from tort awards even though the net result may be compensation in excess of a plaintiff’s actual loss. Court have grappled with the rationale for doing this, and as noted in the Briefing Paper, the Supreme Court of Canada has been divided on the issue (page 18 and Appendix “B”) The law in this area is widely regarded as being in an unsatisfactory state at present and was recently described by the B.C. Court of Appeal as having become a “conceptual quagmire.” (Kask v. Tam (1996) 21 B.C.L.R. (3d) 11 (C.A.) at page 16)

As is noted in Kask v. Tam at p.19 and in Ratych v. Bloomer (1990) 69 D.L.R. (4th) 25 (S.C.C.) at p.45 and 47, ex gratia payments are not deductible from tort benefits. This applies whether such payments are in the form of welfare benefits or gratuitous payments from an employer or some other source . The reasoning usually stated is that “the defendants cannot have the benefit of the [payer’s] generosity.” (Kask v. Tam, at p. 19)

At present, courts do not deduct collateral benefits for which the plaintiff has paid something, either directly (as in the case of insurance premiums) or indirectly (as in the case of trade-offs in the course of collective bargaining or as part of an employment contract). The result of this is that the majority of collateral benefits are not currently deducted. There is considerable controversy over the rationale for this.

The rationale often stated places the focus not on double compensation of the plaintiff but on whether the defendant should “benefit” (in the sense of paying lower damages) for the forethought of the plaintiff in making provision for other benefits. It is also recognized that there is some cost to a plaintiff in making such provision, and a deduction is apt to ignore that cost. (See, for example, the majority opinion in Cunningham v. Wheeler [1994] 4 W.W.R. 153 (S.C.C.) at p. 162.)

The contrary view, which argues in favour of deduction of many collateral benefits focuses on the measurement of the plaintiff’s actual loss. This view is set out by McLachlin J., writing for a 5:4 majority in Ratych v. Bloomer and a 3:4 dissent in Cunningham v. Wheeler.

It is argued that as between the prudent employee and the negligent tortfeasor, the tortfeasor should bear the loss. Or, in the words of Cory J., “it makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.”

This argument rests on the assumption that there has been a loss which someone must pay. A plaintiff who has been compensated for lost earnings by an employment benefits plan has suffered no loss to the extent of those benefits. It is not a question of who will bear the loss, but rather of whether there is any loss to be borne.

Nor is this a case of the tortfeasor unjustly benefiting at the plaintiff’s expense. The plaintiff contributes regardless of whether the accident occurs or not. And the tortfeasor does not benefit in any usual sense of the word; he or she pays the actual measure of the plaintiff’s loss. If the fact that a plaintiff was wearing a
seatbelt lessens the injury which might have otherwise occurred from a defendant’s negligence, we do not say that the defendant has benefited from the prudence of the plaintiff, nor do we suggest there is any unfairness in this. The measure of tort damages is what the plaintiff has lost, not what the defendant should be compelled to pay as the price of his negligence.

The fallacy behind the argument that the tortfeasor should bear the loss is the notion that the tortfeasor should be punished. That is an approach which our law has eschewed except for those special situations in which punitive damages may be awarded. (Cunningham v. Wheeler, at p.187)

As this passage suggest, many critics of the approach currently prevailing in tort law argue that it places inappropriate focus on punishment of the wrongdoer and fails to base compensation upon actual loss. Such a criticism might be even more apt if the tort approach were adopted in the workers’ compensation system where fault is irrelevant and there quite frequently is no “wrongdoer” against whose interests those of the injured party are to be weighed. Caution should therefore be employed in adopting current tort principles in the workers’ compensation context.

It may be that different approaches are warranted depending upon the type of workers’ compensation benefits in issue. For example where there has been little or no attempt to measure the benefits by reference to actual loss (for example in the case of functional disability pensions or fatality benefits for spouses under 40) it may make less sense to deduct other benefits in order to achieve some closer approximation of loss. However, in other instances, most notably s.23(3) loss of earnings pensions which are much more closely based upon actual loss, such adjustments would make more sense and ensure a closer approximation of actual loss than is currently being achieved.

A problem with making deductions where loss is offset by other benefits is that it is apt to warrant a separate inquiry in each case as to whether the benefits in question are actually in respect of the same loss, whether the benefits have offset the worker’s losses (i.e. they may have already been subject to integration by the provider of the other benefits), and whether an adjustment should be made to compensate the worker for costs incurred in obtaining these other benefits. Such inquiries are apt to be complex and difficult in many instances and would tax the system not only by mandating an additional area for investigation at the initial adjudication stage, but by no doubt giving rise to numerous appeals and requests for reviews of such decisions.

There does not appear to be a right or wrong way to approach this issue and the Commission may simply want to consider whether the present approach strikes an appropriate balance in light of administrative feasibility considerations and the fact that the current scheme focuses on loss, rather than need, as the basic principle giving rise to entitlement, but does not attempt to measure with precision the precise scope of the loss sustained by each worker and dependent. I do note though that whatever approach is adopted, it should be internally consistent. I have not been able to ascertain the justification for treating workers and dependents differently with regard to stacking versus integration.