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BACKGROUND TO ACC

Since 1 April 1974 there must be few people in New Zealand who haven't heard of ACC. Many will have lodged a claim either because of receiving hospital treatment, through treatment by their doctor or when applying for some form of entitlement. Until they have had an accidental injury, most people know nothing about ACC and how it works or what entitlements it provides. Depending on how they are treated, the public's view of ACC varies between marvellous, helpful and professional; to appalling, obstructive confrontational, unhelpful and contrary to the victim's physical, emotional, economic and social rehabilitation and wellbeing.

Employers, the self-employed, earners and motor vehicle owners know about ACC because they pay levies to fund the scheme. Those levies are at variable rates depending on the industry in which they operate or the type of vehicle they own, and the degree of exposure to the risk of injury thereby causing a cost to the scheme.

Doctors are, of course, vital to the success of the scheme because they are the gatekeepers. They provide medical evidence of accidental injury in terms of the legislation which is a necessary requirement for an accident victim to gain access to cover and entitlements under the scheme.

ACC is NOT Insurance

There is a widespread misunderstanding of what ACC is about. It is **not** an **insurance** scheme. It is a unique **statutory legal system** which **replaces** the common law **right of accident victims to sue** to recover damages for their injuries. It also replaces the Workers Compensation legislation and any other legislation which compensated accident victims. Apart from workers compensation legislation, ACC is the only statutory system in a common law jurisdiction that is designed to provide treatment, rehabilitation and compensation for **all** accident victims

regardless of the cause of their injuries or who, if anyone, was at fault. It might be called a “social insurance” scheme but it is not commercial insurance.

New Zealand’s Legal system and Common law principles

The early settlers of New Zealand brought with them the common laws of England which became the basis of our early legal systems. In relation to personal injury the common law action based on negligence applied.

Negligence is a judge-made remedy which has a history as an independent civil wrong going back over the last couple of centuries, based on the simple concept of fault. Even if inadvertent fault could be proved, the innocent victim could shift his losses by receiving indemnity in the form of damages. With the introduction of industrial statutes, damages could also be made available to workers who could show that there had been a breach of a section of one of the industrial statutes, whether or not negligence could be proved.

New Zealand was an early leader with the introduction in 1900 of the Workers’ Compensation Act which operated on the principle that, regardless of fault, employers must share some of the losses of employees who suffered from accident arising out of and in the course of their employment. The remedy provided a limited form of compensation which is regarded generally as the oldest form of social insurance in modern societies.

There were criticisms of the both the common law and compensation systems because of the limitations under which each system had to operate. Because the damages system equated responsibility with fault, the damages were reduced for contributory negligence and what is more important, large numbers of people lacked the ability to prove fault or were the victims of what lawyers called “an act of God”. On the other hand, while the compensation under the Workers Compensation legislation filled the gap by assisting a whole general class, its benefits averaged out at levels considered inadequate as a true recompense for what was lost.

By choosing to pursue the common law action for damages the injured person exposed him/herself to a system which was, because of its unpredictable outcome, rightly called the “forensic lottery”. The award of damages was not guaranteed and any award was subject to being downgraded by contributory negligence by the claimant. To succeed in an action for damages, the claimant had to prove that the offender has been guilty of negligence.

The concept of negligence depends on an objective standard of reasonableness and compares the conduct of the claimant with the conduct of a reasonable man of ordinary prudence in the same circumstances. A reasonably foreseeable risk of harm to others must therefore be subject to precautions reasonably adequate to the risk and to the circumstances generally. It is not a standard of perfection and is often difficult to prove. Launching an action to recover damages for personal injury based on proof of negligence was a risky business and confirmed the expression “forensic lottery”.

Before 1 April 1974, persons who suffered personal injury in New Zealand and who wanted to recover damages because of their injury, had to prove that the injury had been caused by the negligence of another person or organisation or that there had been a breach of a statutory duty imposed on whoever caused the injury. Proof of the cause and nature of the injury was essential and many senior doctors and specialists will recall the common law days when their expertise was called upon to prove the case for either the accident victim, or the insurance company, and the ensuing courtroom battles involved in upholding or challenging their opinions.

Proving negligence was a forensic lottery

Negligence is a breach of a legal duty owed by the perpetrator to the person injured. Proving negligence was not easy. The outcome of an action based on negligence was never guaranteed and was subject to many factors and limitations. A finding of contributory negligence by the plaintiff could significantly reduce any damages awarded. In industrial cases, the negligence action provided inconsistent solutions for less than 1% of victims. Undertaking a damages action was sometimes regarded as entering a form of “forensic lottery”.

Practical examples of the forensic lottery:

- bridge over the Wanganui River – negligence under the principle res ipsur loquitor (the thing speaks for itself) - obvious negligence
- aircraft propeller – breach of statutory duty to guard
- motor- cycle pillion passenger - knee joint injury long-term consequences possible osteoarthritis – proof – disabled Judge

The Workers Compensation Act

New Zealand was an early leader in the field of compensation for work injuries. Only 12 years after Bismarck established the first “no fault” workers compensation system in Germany, New Zealand passed the Workers’ Compensation Act 1900. The Act required all employers to be insured against their liability to pay the cost of treatment, compensation and rehabilitation for workers who suffered injuries arising out of and in the course of their employment. Liability was established on proof of the employment and the circumstances of the injury, but without proof of fault or negligence. Cover depended on proof, on the balance of probabilities, that the injury arose out of and in the course of the employment. Entitlements to compensation which, in fatal cases, also applied to certain dependents, were limited and were restricted to payment for only six years. However, if the worker could prove that the injury had been caused by negligence, notwithstanding having cover under the Workers’ Compensation Act, he/she could elect to sue the employer, or the tortfeasor, for damages.

Compulsory insurance for personal injury caused by motor vehicles

In 1928 with the rapid increase of the number of vehicles on New Zealand roads and the increasing road-accident injury toll, compulsory insurance was introduced. The Motor-vehicles Insurance (Third-party Risks) Act 1928 provided that when motor-vehicle owners registered their vehicles, they were required to pay a levy that automatically insured them against liability for personal injury caused to a third party, by the use of the vehicle. This compulsory insurance scheme provided a pool of money ensuring that victims of motor-vehicle accidents who had a successful claim, could be paid.

There were other statutes (since repealed), such as the Criminal Injuries Compensation Act and the Deaths by Accident Compensation Act, that gave cover for injuries suffered in particular circumstances.

The Woodhouse Report

Over the years, the Workers Compensation Act became more expensive but less and less effective. Minimal benefits were available to injured workers for only a limited period. Compulsory insurance schemes meant that the person or organisation causing the injury was indemnified against liability for their actions so there was little reason to improve dangerous, injury causing, behaviour. Common law actions for damages produced such unpredictable results that pursuing a claim was often regarded as entering a "forensic lottery". Between the various remedies available under the law for work accidents, motor-vehicle accidents, statutory breaches and the common law right to sue, together with the social welfare system for accident victims who were not otherwise covered, the fragmented and capricious approach to dealing with personal injury by accident in the community, created problems that cried out for a co-ordinated and comprehensive solution.

To address the problem, in 1966 the National government established a Royal Commission of Inquiry chaired by Sir Owen Woodhouse to:

> "*Inquire into, investigate and report on, the law relating to compensation and claims for damages for incapacity or death arising out of accidents (including diseases) suffered by persons in employment*…"

In carrying out the inquiry, the Royal Commission quickly came to the view that the solution to problems in the system, could not be limited to injuries suffered by accidents only in employment. The Commission observed that a worker injured in a non-work environment and incapacitated from working, was just as much in need of assistance as a worker injured at work. This required a more comprehensive view of the law relating to incapacity from whatever cause, regardless of fault, and arising from every community activity where incapacity occurred.

The five Woodhouse Principles

On 13th December 1967 the Royal Commission delivered a report entitled "*Compensation for Personal Injury in New Zealand*"[1] in which a new comprehensive "no fault" legal system was proposed for all

[1] Report of The Royal Commission of Inquiry December 1967,A.R.Shearer Government Printer December 1967

personal injury occurring in New Zealand. The scheme applied universally to an earner, non-earner, child, retiree or visitor to New Zealand and whether the injury occurred at home, on the road, at work, sport or recreation or in any other environment. It was proposed that, on the adoption of such a scheme, the common law right to sue for damages for personal injury suffered in New Zealand should be abolished.

The proposed scheme was based on five fundamental principles that can be summarised as:

Community responsibility

Comprehensive entitlement

Complete rehabilitation

Real compensation

Administrative efficiency

Accident Compensation Legislation

In 1972 the National Government drafted a Bill which provided no-fault cover but only for earners and the victims of motor-vehicle accidents. It left the rest of the community to pursue common law remedies. It purported to be based on the Woodhouse Royal Commission recommendations but clearly failed in every respect. Although this draft Bill caused much discussion and controversy it was enacted in 1972 as the first Accident Compensation Act. However, before the Act came into operation the government changed.

The 1973 Accident Compensation Amendment Act

When the Labour government came to power late in 1972, the Act was amended in several respects. The 1973 Accident Compensation Amendment Act, provided universal cover not only to earners and the victims of motor vehicle accidents, but also to non-earners and visitors to the country in fact to everybody who suffered personal injury in New Zealand. The Act created three schemes: the **earners scheme** covering “earners”, whether employees or self-employed persons, who were not injured by the use of a motor-vehicle. This scheme was funded from levies payable by employers on earnings paid to employees and from the self-employed by a levy on tax-assessable income: the **motor**

vehicle accidents scheme covering victims of motor vehicle accidents This scheme was funded from levies payable by motor-vehicle owners: and the **supplementary scheme** which applied to non-earners who were not covered by the other two schemes. This scheme was funded by government from consolidated revenues.

ACC Commencement date 1 April 1974

On 1 April 1974 the 1972 Accident Compensation Act, as amended in 1973, came into operation. The Act abolished the right to sue for damages for personal injury and replaced it with a statutory legal system covering everyone who suffers personal injury in New Zealand. To be covered all that was necessary was to show that accidental personal injury was suffered in New Zealand.

The amended title to the 1973 Act clearly indicated that the new Act was intended to implement the recommendations of the 1967 Woodhouse report by:

- providing a comprehensive “no fault” scheme covering all personal injury occurring in New Zealand regardless of the cause or circumstances of the injury;
- making provision for safety and the prevention of accidents;
- providing for the rehabilitation of accident victims;
- providing compensation for loss of earnings suffered by employees and the self-employed;
- providing for compensation of certain dependants of those persons where death arises from the injury; and
- abolishing the right to bring an action for damages arising directly or indirectly from personal injury.

However, the legislation was not re-drafted in a way which would achieve these principles. 1972 Act, as amended in 1973, had been drafted following basically the insurance principles and format of the previous Workers Compensation Acts.

For example, in the past, premiums paid by employers in respect of earnings paid to their employees, had been classified in terms of the degree of the risk supposed to have been inherent in the industry concerned. It was a system that failed to recognise, as pointed out by

Woodhouse, that all industrial activity is interdependent and there should be a community pooling of risks. It also failed to ignore individual liability in favour of community responsibility, the first and basic Woodhouse principle.

The Woodhouse Report recommended that the method of industry classification should be abandoned in favour of a uniform levy based on salaries and wages paid. The Report recommended at para 314(c), that an amount equal to 1% of wages paid to employees and 1% of tax assessable income of the self-employed, with a statutory earnings maximum in both cases, should be sufficient to fund the scheme. It also suggested that, in order to simplify administration, the levies should be paid to Inland Revenue Department along with normal tax payments.

Instead of adopting the Woodhouse recommendations, the 1972 Act, following the pattern of drafting used in the previous Workers Compensation Act, provided that levies, at prescribed rates, were payable under Orders in Council prescribing the classifications of earners, industries and occupations. These provisions were repeated in the 1973 Amendment Act and have remained in the legislation till the present time. This levy classification system has remained, notwithstanding that in the Report, Woodhouse noted that the system of classification of Industries for levy purposes had been discontinued in England in the 1940s. The levy classification, monitoring and collection system adopted by the ACC together with the investment of surplus levies collected for investment, is, and always has been, responsible for a large part of the cost of administering the scheme.

Administration of the Scheme

The original 1972 Act established the administration of the ACC scheme by a Commission of three Commissioners. There was a requirement that the Chairperson, or another Commissioner, must be a barrister or solicitor of the Supreme (now High) Court of not less than 7 years practice (i.e. similar to a District Court or High Court judge). This recognised the importance of the abolition of the legal right of accident victims to sue, and its replacement with a statutory scheme. Interpretation of the statute and its application to individual circumstances is clearly a legal issue which explains why either the

Chairperson or another Commissioner was required to be legally qualified to judicial level. Two of the first three Commissioners appointed were legally qualified and, because of the way the levy system was to operate, the third Commissioner had both accounting and tax background and experience.

All decisions relating to entitlement and to the quantum of benefits, were made by the Commission. Any person dissatisfied with a decision could apply for a review of that decision to a Hearing Officer who, although an officer of the Commission, had the powers of a Commission of Inquiry under the Commissions of Inquiry Act 1908. In determining an appeal, the Hearing Officer could over-rule the decision and substitute another decision that was binding on the Commission. Anyone dissatisfied with a decision of a Hearing Officer, could appeal to the Accident Compensation Appeal Authority from which there was a further right of appeal to the High Court on a question of law, then to the Court of Appeal and from there to the Privy Council.

The Quigley Cabinet Caucus Committee

By 1979, criticism was mounting about the way the scheme was operating. Employers complained about paying for the cost of non-work claims, about increasing expenditure for medical treatment and about lump sums for pain and suffering. To address these issues, the government established a Cabinet-Caucus Committee chaired by the Hon. Derek Quigley to review the accident compensation scheme. That committee made a number of recommendations affecting both entitlement and benefits as well as the levy system and collection methods. Many of the recommendations were unpopular and, as a reaction to the Quigley Committee proposals and after much discussion and consideration, the Accident Compensation Act 1982 was passed.

The 1982 Act and Politicisation of ACC

In 1982 the then National Government amended the Act by abolishing the Commission and creating the Accident Compensation Corporation with a Board of Directors responsible for policy, appointed by the Minister. None of the directors were required to be legally qualified and the Board membership often changed when the government changed. The politicisation of ACC by this amendment, changed the character of

the original scheme from a statutory legal system replacing common law rights, to what became fundamentally an insurance scheme subject to the direction or influence of the governing political party of the day.

The changes in1982 Act were directed at improving the administration of the scheme. Over 60 sections of the 1972 Act were deleted, provision was made to change the funding from “fully funded” to a “pay-as-you-go” funding system and the three schemes were amalgamated back into a single scheme which continued to be funded from the three levy sources.

The original 1972 Act has been amended or replaced many times, and has gone through a number of phases reflecting the policies of successive governments and their understanding of the scheme and the part it plays in society and in the economy. To date, no government has taken the opportunity to re-write the legislation to clearly implement the five Woodhouse principles. Instead, over many years since 1982, when the Commission was abolished and the ACC became a Corporation with a Board of Directors responsible for policy, the ACC has been subject to Ministerial direction or influence, and it is administered as if it was a large insurance operation.

The Officials Committee Report

In 1986 the Labour Government undertook another review of the accident compensation scheme through an Officials Committee made up of officials from ACC, the Department of Social Welfare, the Department of Labour, the Department of Health and the Treasury. The Committee was asked:

> “*to review the substance of the scheme to ensure the foundation principles are put into practice in a manner appropriate to the environment of today and the future*”.

The two-volume report followed a comprehensive review of the operation of the scheme and placed particular emphasis on the question of equity, especially the disparity between the treatment of accident victims and the illness-disabled.

The Law Commission Report

Following the publication of the Officials Committee Report, in 1987 the government asked the Law Commission (then chaired by Sir Owen Woodhouse) to review the accident compensation scheme. The terms of reference were:

> "*to examine and review that part of the Accident Compensation Act 1982 which recognises, and is intended to promote, the general principles of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and, in particular, administrative efficiency, as propounded in the 1967 Royal Commission Report on Personal Injury in New Zealand. It may be accepted that these principles are broadly acceptable and deserve to be supported*."

The Law Commission Report was published in May 1988. It proposed changes to the scheme designed to remove some of the perceived anomalies between the earnings-related compensation available to accident victims, and the means-tested welfare benefits payable to those who were incapacitated by sickness or disease. It was aimed at simplifying the administration of the scheme and removing some of the inconsistencies, which had been met in applying the concept of "*personal injury by accident*". It proposed the abolition of lump sums for permanent loss or impairment of bodily function and for pain and mental suffering and loss of enjoyment of life, and advocated that they be replaced with periodic payments. In relation to motor-vehicle levies, it was recommended that levies be geared to changes in the consumer price index.

The Law Commission recommendations were given careful consideration by a Cabinet Committee comprising the then Deputy Prime Minister Geoffrey Palmer MP, the Minister of Social Welfare and the Minister of Health. Further work was done by officials and in the 1989 budget major changes were proposed. The scheme was to be extended to cover incapacity from sickness and disease and was clearly directed towards compensating the more seriously disabled. The reforms proposed in the 1989 Budget did not proceed. The National Government, which came to power in October 1990, established yet another Committee to look into the accident compensation scheme.

The Accident Rehabilitation and Compensation Insurance Act 1992

The basic goal of the government was to ensure that, in the event of incapacity, everyone was eligible for an acceptable level of income support and had access to health care services on fair terms. The terms of reference for the reforms include a provision that stated it was:

> "*to minimise the cost to society of the system of compensation for incapacity that may require: (i) a greater freedom of choice between insurers; (ii) competition between public and private sector insurers; (iii) minimising barriers to competition among insurers and ensuring that they compete on a neutral basis".*

The Accident Rehabilitation and Compensation Insurance Bill was introduced in November 1991 and referred to the Labour Select Committee for consideration. After receiving a significant number of petitions and submissions, the Bill was reported back to the House on 19th March 1992 and passed into law on 1 April 1992.

The 1992 Act stated its purpose was to "*establish an insurance-based scheme to rehabilitate and compensate in an equitable and affordable manner those persons who suffer personal injury*". The Act was very prescriptive and introduced the independence allowance. It placed the primary responsibility for rehabilitation on the accident victim. It was concerned with cost minimisation, the ACC monopoly, and the inability for employers to have greater choice between insurers. It abolished lump sum compensation, introduced the independence allowance and provisions regarding "work capacity assessment". The Corporation was re-named the Accident Rehabilitation and Compensation Insurance Corporation.

The Accident Insurance Act 1998

Following the 1996 election, the National/New Zealand-First Coalition government developed extensive policy proposals for the introduction of a degree of competition into the provision of accident compensation. The Accident Insurance Bill inherited the "no fault" philosophy of previous legislation, but reflected the influence of market-oriented economic policies of successive governments from the mid 1980s and their encroachment on social and health policies. The driving factors behind

the Bill were a concern to minimise the economic cost of accidents and whether monopoly ACC delivery offered the right incentives. Competitive insurance contracting and flexible risk sharing options were thought to provide greater incentives. There was also dissatisfaction amongst levy payers about the way premiums were set by the ACC and the way entitlements were being delivered. There was continuing uncertainty about the potential scope and cost of types of cover and certain entitlements, and the ability of government to anticipate and constrain these costs. The outstanding claims liability was also a worry to some, as was the move away from 1982 pay-as-you-go levy system rather than a fully funded system which is necessary in any insurance scheme.

These issues gave rise to the 1998 Accident Insurance Act which repealed the 1992 Act but retained the 24 hour no-fault compulsory comprehensive protection for accident victims. Importantly the Act provided for the delivery of competitive accident insurance services by registered insurers in respect of employers who were required to have accident insurance contracts for their employees' work-related personal injuries. It also covered private domestic workers and self-employed persons who could choose to have cover for accident insurance for any personal injury except motor-vehicle injury, provided either by the ACC or a private insurer. The legislation allowed insurers to "cherry pick" who they would cover and the ACC remained the "insurer" for employers and the self-employed who did not have contracts. The ACC continued to provide cover for injury to non-earners, non-work injuries to employees and private domestic workers, all motor vehicle injuries, and for personal injury suffered before 1 July 1999 for persons who were covered by previous ACC legislation.

A number of complex provisions were introduced relating to both cover and entitlements and issues relating to compliance, registration, prudential supervision and other matters required of registered insurers. The consequences of the changes made by the Act created a competitive market for accident insurance contracts and associated regulatory features.

The Accident Rehabilitation and Compensation Act 2001

Following a change of government in 1999, the Labour-led Coalition Government repealed the 1998 Act. The Injury Prevention, Rehabilitation and Compensation Act 2001 provided that no new insurance contracts for work-related personal injury could be written, and existing contracts were cancelled. The ACC would provide cover for all personal injury including work-related injury. This Act made a number of important changes including changes surrounding cover, weekly compensation entitlement, and processes around vocational independence and occupational assessments related to rehabilitation. It also provided for a Code of ACC Claimants' Rights.

The 2001 Act has subsequently been subject to a number of amendments of a technical nature and the name has been changed back to the Accident Compensation Act. Apart from a significant amendment in 2010, the majority of the Act has not been changed since 2001 and, together with the various Regulations and the case law which has developed over the years, now provides the law applying to all personal injury which has occurred in New Zealand since 1 April 1974. However, some of the provisions of previous repealed Acts may still continue to apply to persons who had cover under those Acts.

The present situation

Following the 1998 Accident Insurance Act, the Hon Nick Smith encouraged his government colleagues and the public that the ACC has run out of money and was "broke" and that, following prudent insurance principles, it was necessary to build up reserves to pay for the ongoing future cost of injury claims incurred in each year. Full funding of all the accounts was introduced and since then, the ACC has grown its reserves to over $40 billion. It has become a bureaucratic monster and the second largest investor in the NZ Stock Exchange behind the National Superannuation fund. Because it is a monopoly, and derives its income from compulsory levies together with returns from its reserves, it has been able to regularly exceed the bench mark for investors on the open market. Each year the ACC considers and makes recommendation to government concerning levy rates. Its recommendations are based on the advice of actuaries who estimate not only the requirements for the annual cost of paying current claims, but also the ongoing future cost of those claims. It is difficult for the layman to understand how actuaries

when making their assessments, can take into account possible future changes in medical treatment and knowledge, improvements in the rehabilitation of accident victims, changes in the national and world economies and all the other variables which will occur involving serious injury claims which may be in the system over the next 40 or 50 years. The ACC recommendations to government are not always accepted and we have seen in the past, that ACC's request for increases in levy rates have not been approved.

Access to Justice for Claimants

There has been considerable dissatisfaction with the way the ACC has managed the review and appeal system as it applies to both unrepresented claimants and those who have sought legal assistance. Two major pieces of research have recently been undertaken. The first by Acclaim Otago (Inc.) in July 2015 entitled "**UNDERSTANDING THE PROBLEM an analysis of ACC appeals processes to identify barriers to access to justice for injured New Zealanders**" and the second "**A review of the Acclaim Otago Report**" by Miriam Dean QC dated May 2016 in which a comprehensive analysis disclosed many shortcomings in the ACC's administration of the process. Both of these reports have identified serious shortcomings in the way the ACC has been operating. The ACC advises that work to improve its management of this area is ongoing. Few lawyers practice predominantly in the area of ACC law because of the complexity of the legislation, the paltry level of fees they can charge and the difficulty of obtaining a grant of legal aid for their clients.

Principles under which ACC is operating

It is interesting to note that the purpose of the 2001 Accident Compensation Act is spelled out in section 3 which states:

> "*The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs*)".

The social contract referred to clearly means acknowledging that New Zealand citizens have given up their right to sue to recover damages for personal injury in exchange for the accident compensation scheme proposed by the Woodhouse Report.

This social contract was obviously not understood by either the government of the day or the drafters of the original 1972 legislation who produced a hybrid scheme covering only some members of the community leaving the rest with the right to pursue common law remedies. There is little evidence that the Woodhouse proposals have been understood by successive governments because the five Woodhouse principles are still not embedded in the legislation. It is difficult to find evidence that the ACC Board's management of the scheme "*enhances the public good*" when they are influenced by the policies and directions of the government of the day and governed by the legislation. The situation is made worse because the Corporation is a Crown Enterprise and its $40 billion reserve fund of compulsory levies paid by all levy payers, is managed by the ACC but counted as "government money" and forms part of the government's financial accounts.

The way the ACC has been structured and the way it operates as an insurer in building a massive reserve fund, and the ability of successive governments to control the selection of Board members to influence policy making in the administration of the scheme, make it difficult to identify clear policy goals which the ACC Board should, or could, adopt. Over the years the direction has swung from the 1972 hybrid scheme offering limited cover but retaining the right to sue; the 1973 Amendment Act providing comprehensive cover with ACC monopoly administration and the abolition of the right to sue; the 1982 Act abolishing the Commission and creating a Corporation with Board of Directors appointed by the Minister and responsible for policy; the 1992 Accident Insurance Act introducing prescription and regulation of entitlements; the 1998 Accident Insurance Act introducing partial privatisation by allowing private insurers to offer cover for work related injuries; the 2001 Act's attempt to indicate policy by referring to the social contract incorporating the Woodhouse proposals when the Act does not achieve this purpose; makes clear policy direction incredibly obscure. Nothing has changed.

The current government has indicated that, once again, it proposes to review the accident compensation scheme, possibly next year. We can only wait and see what happens but the following question must be answered:

Are the five Woodhouse Principles still relevant today?

Community responsibility

The Woodhouse Report regarded this principle as fundamental. It rested on two arguments. First, because modern society benefits from the productive work of its citizens, society should accept responsibility for those workers who are prevented from working by physical incapacity, and secondly, because we are all involved in community activities which every year exact a predictable and inevitable price in bodily injury, society should share in sustaining those who become the random but statistically necessary victims. The inherent cost of these community purposes should be borne on the basis of equity, by the community.

The scheme shifted the common law principle of entitlement based on proof of negligence, or a breach of a statutory duty, to the needs of the injured person consequent upon personal injury, regardless of the cause of the injury. While the Report limited its recommendations to incapacity arising from personal injury by accident, it said that the scheme should be extended to include incapacity from sickness, disease and other causes. Because the recommendations were so far-reaching, it said that more statistical information was needed before firm decisions on extending the scheme could be made.

In any real sense the proposed scheme was not an insurance scheme. It was a compulsory and universal method of sharing the cost of social activity. The Report said the scheme should follow the five fundamental principles and meet the requirement of cost.

The principle of community responsibility is as relevant today as it was when propounded in the Woodhouse Royal Commission Report.

Comprehensive Entitlement

The second principle that the Woodhouse Report recommended should be the basis of any statutory system designed to replace common law

rights, is the need for comprehensive entitlement for all persons covered by the scheme. There could not be unequal community treatment of identical losses merely because one person was injured at work while another was injured on the road. The report said that the chance victim of an acceptable social activity should be provided for, including their dependant spouse and family. The Report envisaged that to receive an entitlement which would otherwise have been available at common law, it was only necessary to show that personal injury had been suffered in New Zealand. However, the legislation imposes some restrictions on the principle of comprehensive entitlement.

The original 1972 Act showed a complete misunderstanding of the basis of the Report's recommendations for a comprehensive scheme. Adoption of the hybrid scheme in the Act which only applied to earners and the victims of motor-vehicle accidents leaving the rest of the community with common law rights, would have been disastrous. It would have meant that everyone who was not covered, would have to be privately insured against the possibility of themselves suffering personal injury by accident as well as their liability for causing injury to another person. It is clear that the scheme as proposed in the Report, had to provide comprehensive entitlement to all injured persons.

The current legislation does not meet the principle of comprehensive entitlement in the following respects:

Age limits

The Report examined whether compensation should be restricted to those within defined age limits. There was no issue about entitlement to treatment and rehabilitation but there was an issue as to whether the elderly and the young should be compensated on a basis which recognised their past or potential contribution to the productive efforts of the nation. It observed that an upper age limit would disregard the element of lost physical capacity in the case of periodical compensation payments; it would be difficult to provide for those injured outside the age limit; and it would cost relatively little to go beyond the normal span of working life in favour of lifetime payment. Accordingly, no upper age limit was recommended. There was provision for younger claimants who may be entitled to compensation for loss of potential earning capacity.

Compensation and National Superannuation

When the NZ Superannuation Qualification Age (NZSQA) was 60 years, the original 1972 AC Act provided variable upper age limits up to which earnings-related compensation was payable. Entitlement depended on the date the accident happened. If the accident happened when the person was below the age of 60, weekly compensation was payable to age 65; if, at the accident date, the person was between the age of 60 and 65 compensation was payable for 5 years; if the accident date occurred between the ages of 65 and 69 compensation was payable to age 70; if the accident date occurred on or after age 69 compensation was payable for 1 year. There was a proviso that if the claimant was in employment in which a statutory retirement age in excess of 65 was fixed, those provisions applied to the statutory date if that was later than the date fixed in the ACC legislation. Other provisions applied to the widow or widower and dependent children in fatal cases.

The entitlements in the 1972 Act were repeated in the 1982 Act but, by limiting entitlements based on age, breached the principle of comprehensive entitlement.

Election between compensation and superannuation

A dramatic change to entitlement to compensation occurred with the passing of the 1992 AC Act which provided that no compensation would be payable to any person who had attained NZSQA unless that person made an **irrevocable election not** to receive national superannuation for any period for which he/she was entitled to weekly compensation. In other words, although a working superannuitant could receive both earnings from employment and superannuation, which was not means tested, if they were incapacitated from working by accidental injury, they could only receive either weekly compensation or national superannuation but they could not have both. This ignored the principle of comprehensive entitlement and treated superannuitants differently from all other earners. These provisions have been repeated in all subsequent amendments to the AC legislation and appear in Schedule 1 of the current 2001 Act.

The Government has announced it will repeal the requirement for an election to be made. However, that will solve only one problem. The

legislation will still provide that entitlement to weekly compensation for an injured superannuitant can only be paid for a maximum of 24 months. This will not only repeat the problem of entitlement not being comprehensive but is also inconsistent with the right to freedom from discrimination on the basis of age and is almost certainly a breach of both the Human Rights Act and the NZ Bill of Rights Act as declared by the Human Rights Review Tribunal in *Heads v Attorney-General [2015] NZHRRT 12.*

Even following removal of the requirement of an election between weekly compensation or superannuation the limitation on paying compensation to an injured superannuitant beyond 24 months cannot be justified.

It ignores the principle of comprehensive entitlement which is an important element in the scheme.

Complete Rehabilitation

The third principle the Woodhouse Report recommended should be the basis of any statutory system, is the need for complete rehabilitation for all persons covered by the scheme.

In discussing the objective of rehabilitation, the Report referred to the widely used definition of rehabilitation in the United States namely; "*the restoration of the handicapped to the fullest physical, mental, social, vocational and economic usefulness of which they are capable*". It said that rehabilitation is a total process which begins with the earliest treatment of the injury and does not end until everything has been done to achieve maximum social and economic independence. The aim is that this should be achieved in a minimum of time.

The Report emphasised the need for early referral, comprehensive assessment and appropriate medical treatment. The assessment should include an appreciation of the victim's intelligence, educational standard, mental and emotional state, general aptitudes and adaptability, motivation, resilience and social and economic background.

Assessment

The Report observed that although the assessment is largely medical in nature, it is most usefully provided by the coordinated teamwork of a group of experts in various fields. The assessment team should include, surgeon, physician, psychologist, psychiatrist, social worker, placement officer, physiotherapist, and occupational therapist.

Paragraph 428 of the Report said:

> "*The compensation process should always be secondary to the goal of rehabilitation but it is not enough to pay lip service to the principle. There must be imagination, drive, and leadership which will ensure that the best use is made of facilities; the best sort of co-operation is maintained with the medical profession; and efficient medical administration is achieved in the wide area of the authority itself*." The Report went on to say "*All this will not be easy and it is a task which must be organised from the beginning. Accordingly, it would be a mistake to underestimate its importance or undervalue the importance of the medical director in terms of remuneration*".

Rehabilitation

Rehabilitation is defined in s.6 of the 2001 AC Act and means:

> "*a process of active change and support with the goal of restoring, to the extent provided under s.70, a claimant's health, independence and participation and comprises treatment, social rehabilitation and vocational rehabilitation*.

Section 70 says that anyone who has suffered personal injury covered by the Act, is entitled to be provided with rehabilitation. There is no age limit on entitlement to rehabilitation. However, the ACC's responsibility is limited to the extent provided by the Act which says that the person is responsible for his or her own rehabilitation to the extent practicable having regard to the consequences of the injury. It is important to note that the ACC's responsibility only extends to the consequences of the injury and not to other causes.

To repeat the reference above to para 428:

"*The compensation process should always be secondary to the goal of rehabilitation but it is not enough to pay lip service to this principle*."

Social rehabilitation

Section 79 of the Act says that the purpose of social rehabilitation is to assist in restoring a claimant's independence to the maximum extent practicable. Section 81(1) lists the key aspects of social rehabilitation for which the ACC is responsible and sub section (4) lists the conditions which apply to its delivery. Section 82 gives the ACC a discretion to provide social rehabilitation if it is a direct consequence of personal injury covered by the Act and; the claimant has been assessed or re-assessed as needing it and; the ACC considers that it is for the purposes set out in s.79; it is necessary and appropriate and of quality and; it is part of an agreed rehabilitation plan. All of this is subject to regulations made under ss. 324 and 325.

The ACC is given the power to limit the application of the principle of complete rehabilitation recommended by Woodhouse in a way that it is not provided according to actual need but is limited by statute.

Vocational rehabilitation

Vocational rehabilitation is a statutory right under s. 69 (1)(a) of the Act. The ACC's liability to provide it is contained in s.85 and matters to be taken into consideration when deciding whether to provide it are contained in s 86 and further matters in s. 87. Section 88 provides that vocational rehabilitation may start or resume if circumstances change. Section 89 specifies what must be taken into account in the assessment of the claimant's vocational rehabilitation needs.

Section 90 specifies that the assessment must be carried out by a person who the ACC thinks has the appropriate qualifications but there is no independent criteria and the ACC can appoint anyone. Section 91 sets out the rules to be followed in the conduct of the initial occupational assessment. The ACC takes the view that once a claimant has returned to work, rehabilitation has been achieved ad it has no further responsibility.

These are further indications where claimants have lost a common law right which is not reflected in the ACC legislation because of the discretions and limitations provided both in the legislation and the regulations. Clearly, the Woodhouse Report principle of complete rehabilitation is not reflected in the statute.

Statistics

The ACC has a unique record of every person who has lodged a claim for accidental personal injury in New Zealand in the last 45 years. However, it has not produced comprehensive statistics showing the success rate (or otherwise) of rehabilitation programmes undertaken. There is very little data and no statistics available to the public which shows how the ACC goes about providing social rehabilitation to different people in various circumstances. Occasionally individual cases get media attention but no information is available to claimants showing what they can expect from the ACC by way of vocational or social rehabilitation for their particular case.

Conclusion

There should by now, be statistics available with an analysis of the different forms of both social and vocational rehabilitation for various types of injury to different people by age group in different industries and occupations and the consequences which have resulted from the rehabilitation programmes undertaken.

It is clear that the ACC has never fully adopted the principle of complete rehabilitation outlined in the Report. The Corporation has never reflected in its policies, structure or operations, the statement in the Report that "*The compensation process should always be secondary to the goal of rehabilitation".* The main objective has been cost minimisation which has been achieved by following a policy of concentrating on getting people "back to work and off the system" without regard for, or the monitoring of, the long-term consequences of the injury. It has never employed a medical director with specialist expertise in rehabilitation. In fact, the ACC has recently undergone a major re-structuring and according to the website, no longer employs medical staff responsible for implementing rehabilitation policy. There is no longer on the ACC Board, a Director with medical expertise in rehabilitation.

The Woodhouse principle of Complete Rehabilitation continues to be an important goal which should be in any ACC scheme.

Real Compensation

Accident victims have been deprived of the ability to seek damages not only for actual provable losses not covered by the scheme, but also for pain and suffering both present and future and loss or interruption of business opportunities. While the scheme provides cover for a large number of the consequences of personal injury, some important issues which used to be part of a common law claim, are no longer recognised by the law. The current provisions are particularly hard on self-employed professionals and tradesmen and small business people who may not be able to carry on their profession, trade or business because of impairment. The lump sums payable fall far short of what is necessary to put them in the position they would have been in if the injury had not occurred.

The Report states at Clause 59:

> "*Clearly if compensation is to meet real losses it must provide adequate recompense, unrestricted by earlier philosophies which put forward tests related merely to need*." It also observed that *"… average modern households, geared to the regular injection of incomes… have corresponding commitments which do not disappear conveniently if one of the hazards of modern life suddenly produced physical misfortune*."

Those observations apply today just as much as they did in 1967.

Compensation for Permanent impairment

Permanent physical disability can have damaging effects on the ordinary activities of both young and old, regardless of their influence on a capacity to work. Woodhouse wrote at para. 61 of the Report

> "*there must therefore be a realistic assessment of actual loss, both physical and economic, followed by shifting that loss on a suitably generous basis"*.

The Report went on to say:

"*If there might seem to be an issue as to whether compensation… should be restricted to meet their current needs or be assessed on a uniform flat rate basis, then these are propositions which we reject as entirely unacceptable*."

Current legislation - Scheduled payments

Section 69(1)(d) of the 2001 Act states that lump sum compensation for permanent impairment is an entitlement under s.6. The amount of the lump sum payable was originally set by Clause 56 of Schedule 1 of the Act which fixed the minimum at $2,500 and the maximum at $100,000. The Injury Prevention, Rehabilitation and Compensation (Lump Sum and Independence Allowance) Regulations 2002 provided in the schedule to reg. 4, a scale of lump sum compensation for whole person impairment, ranging from the lowest recognised impairment of 10% that attracted $2,500, increasing by 1% increments up to 80% and over, that attracted the maximum of $100,000. The scale of payments has since been inflation adjusted under s.116 of the Act so the adjusted maximum is currently $133,000.

The meaning of impairment

Under s.6 impairment, means:

" a loss, loss of use, or derangement of any body part, organ or system, or organ function".

The definition is taken from the *American Medical Association Guides to the Evaluation of Permanent Impairment* which are said to clarify the differences between the often-confusing terms disability, handicap, functional limitations and impairment. Whether or not they do clarify the differences is questionable.

Assessing Compensation Payable

The amount of the lump sum payable for permanent impairment under reg. 4 of the Injury Prevention, Rehabilitation and Compensation (Lump Sum and Independence Allowance) Regulations 2002, can only be paid after an assessment is carried out by an assessor appointed by the ACC under clause 58 of Schedule 1 of the Act. Clause 58(2) requires that in appointing an assessor, the ACC must have regard to the skills,

qualifications and training it considers are necessary. To do the assessment the assessor must use the assessment tool provided in regulation 4(2).

The assessment tool

The assessment tool comprises (a) The AMA *Guides to the Evaluation of Permanent Impairment (Fourth Edition)* and (b) the *ACC User Handbook to AMA 4*. Regulation 4(3) states *The ACC User Handbook prevails if there is a conflict between it and the AMA Guides (Fourth Edition)*. There is now a Sixth Edition of the AMA Guides available but it cannot be used because it does not comply with the regulation.

While the ACC cannot provide full compensation for the all consequences of personal injury in every case, it should be in a position to recognise and compensate, persons who have suffered the most severe injuries.

The Woodhouse principle of real compensation is still relevant but cannot be achieved under the restrictions and requirements of the current Act.

Administrative efficiency

The fifth Woodhouse principle is administrative efficiency.

It is difficult to determine whether the ACC is efficient in administering the scheme when the legislation does not embed the five Woodhouse principles and there is no clear alternative legislated policy direction against which the Corporation's success (or otherwise) can be measured.

The Minister for ACC delivers to the Corporation an annual "letter of expectations" and in the latest such letter, outlines the Government's key priorities the first of which is:

" – **ensure that ACC functions as a publicly administered and delivered social insurance scheme distinct in character from a private insurance company**".

There is little evidence that the ACC meets this Ministerial requirement. In fact, the ACC is structured and operates as though it is a large public

insurance company with a monopoly on insuring against some of the consequences of personal injury suffered in New Zealand. The selection of members to serve on the Board seems to favour persons with qualifications in financial management and the investment of funds. From recent annual reports it is clear there is an emphasis on cost containment and improving returns on the investment of surplus levies. As noted above, reserves are required by private insurance companies because they sometime go out of business leaving the reserves to meet payment of the ongoing cost of claims. That is clearly part of the essential character of private insurance companies but is not the function of the ACC, a public Corporation and Crown Entity.

It is interesting to note that the government has also said it requires:

> " ***high levels of transparency in the Integrated Change Investment Portfolio and ensuring that the Board does not commit to any significant investments prior to Cabinet discussions on progress to date and planned investment for coming years*****".**

This may indicate that the present government may be contemplating major changes to the ACC and the way it operates.

The recent report of the Government's Education and Workforce Committee in its **2017/18 Annual review of ACC,** shows that there was a substantial increase in expenditure of **$2.102 billion** which the ACC said was due to an increase in its outstanding claims liability (OCL) bringing the total OCL to $40.6 billion. The ACC congratulates itself on noting that it has exceed its investment growth benchmarks for the last 23 years in a row. Hardly surprising since it does not have to pay a dividend and has a guaranteed compulsory levy income as well as income from past investments. It has in the past recommended increases in levy rates to fund the estimated OCL, but the current government has not approved levy increases sought by ACC.

Administrative efficiency is a commendable goal for an organisation like ACC but efficiency can only be measured against clear policy objectives which are missing from the current legislation. The report from the Education and Workforce Select Committee which included reference of a report from the Auditor-General, indicate that there is strong emphasis

on financial issues including controls on cost, levy and investment income and the build up of reserves. There is no mention of the success (or otherwise) of any activity which can be related to any of the five Woodhouse principles or to the lack of meaningful statistics relevant to any such activities.

Conclusion

The unique ACC legal system is an important part of New Zealand Society on which the public has come to rely in times of adversity. Its success (or otherwise) has been determined by the different Government policies of political parties in power from time to time. While it has become a political football, it has been welcomed as changing the capricious common law right to sue for damages for personal injury and outdated statutory rights of workers covered by Workers Compensation and other former statutes. However, it will continue to be subject to criticism, unless and until, there has been locked into the legislation, a firm basis of principled policy on which it is to operate. The five principles enunciated in the 1967 Woodhouse Royal Commission Report provides that principled basis.

The Report said at Clause 290:

> "*It is possible to argue that if incapacity arising from accidental injury is to be subject to comprehensive community insurance, then interruption of work for reasons of sickness or unemployment, or other causes which cannot be guarded against, should be equally included*."

It said that before firm decisions can be taken as to the cost of extending the scheme, more statistical information was needed. Surely, after 45 years of collecting data on every accidental personal injury which has resulted in a claim, the ACC and other Government Departments should be able to provide the statistics necessary to support an extension of the scheme to cover incapacity from whatever causes.

Since the ACC is based on statute law, and to end the constant changes to the law depending on the political party in power at the time, there is an argument for changing the organisation of the ACC from a

Corporation back to a Commission with the Commissioner(s) being answerable to Parliament and not to the current political party in power.

This paper represents my own views and opinions and doesn't represent the views of the ACC Committee of the New Zealand Law Society.

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