

I. Accident Compensation in New Zealand

*Ken Oliphant**

A. INTRODUCTION¹

- 1 New Zealand has frequently been described as a “social laboratory” on account of its long-established reputation for progressive social policy. In 1893, when it extended voting rights to women, it was the first country to introduce universal suffrage. In 1898, it introduced old-age pensions, in 1900 workers’ compensation, and in 1938 its national health service. Its Criminal Injuries Compensation Scheme (1964) was the first in the common law world. Broadly contemporaneously, a Committee on Absolute Liability gave serious consideration to reform of the basis of compensation in road accident cases.² The Committee, whilst recognising the death and injury toll on the roads as an alarming problem, recommended (by majority) that reform be delayed pending a review of the whole basis of the existing system of accident compensation, and in particular the system of compensating for industrial accidents. In 1966, the Government appointed Sir Owen Woodhouse, a judge of the New Zealand High Court, to chair a Royal Commission on the law relating to compensation for incapacity suffered by persons in employment. Woodhouse construed the Commission’s terms of reference widely, and its

* University of Bristol. This summary draws upon a paper, “Landmarks of No-Fault in the Common Law”, to be published in 2007 by Springer Verlag in a collection entitled *Shifts in Compensation*.

¹ For general overviews, see G. Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (1979), T.G. Ison, *Accident Compensation: A Commentary on the New Zealand Scheme* (1980), G. Palmer, ‘New Zealand’s Accident Compensation Scheme: 20 Years on’ (1994) 44 U. Toronto L.J. 223, I. Campbell, *Compensation for Personal Injury in New Zealand: Its Rise and Fall* (1995), and S. Todd, ‘Privatization of Accident Compensation: Policy and Politics in New Zealand’ (2000) 39 Washburn L.J. 404. Additional information is available from the Accident Compensation Corporation (ACC) website: www.acc.co.nz.

² Committee on Absolute Liability, *Report of Committee on Absolute Liability* (1963).

subsequent report³ recommended a new compensation scheme covering all accidental injury, not just that suffered by persons in employment. The antecedents of the new scheme can be seen in the previous regime of workers' compensation, and its philosophy was in tune with the broadly concurrent introduction of "auto no-fault" in several North American jurisdictions.⁴ But its ambition exceeded that of all these other initiatives.

- 2 On 1 April 1974, New Zealand introduced its unique accident compensation scheme, offering 24-hour protection against accidental personal injury. The scheme is administered by the Accident Compensation Corporation, known for short as "ACC" and it is by that acronym that New Zealanders most commonly refer to the scheme as a whole. Its fundamental underpinnings are the twin principles of community responsibility and comprehensive entitlement. The scheme operates on a no-fault basis, meaning that fault is (mostly) immaterial. In contrast with the pre-existing tort system, there is no need to find a guilty defendant. The scheme awards compensation even in cases of pure accident, and even for accidents that were the claimant's own fault, for his fault too is generally disregarded. There is, for example, no provision for the reduction of compensation for contributory negligence. However, there is no entitlement in respect of self-inflicted injuries or suicides (unless resulting from mental injury), or the murder of a person upon whom the claimant was financially dependent. In addition, ACC has no liability for economic losses suffered while a claimant is in gaol, though it has a discretion to compensate for non-economic losses.
- 3 The scheme's introduction formed part of a "social contract"⁵ in which the price paid was the abolition of compensation through the law of tort (and other mechanisms like worker's compensation). Tort compensation remains available for injuries that are not covered by the scheme (e.g. certain mental

³ Royal Commission of Inquiry into Compensation for Personal Injury (Chairman: Mr Justice Woodhouse), *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (1967) [hereafter, "Woodhouse Report"],

⁴ The first North American jurisdiction to introduce auto no-fault was Saskatchewan in 1946: see J. Green, *Automobile Accident Insurance Legislation in the Province of Saskatchewan*, (1949) 31 *J. Comp. Legis. & Int'l L.* 3d ser. 39, and W.P. Rokes, *The Saskatchewan Plan*, (1962) 29 *Journal of Insurance* 373. But it was not until the 1970s – largely inspired by a famous book by Robert E. Keeton and Jeffrey O'Connell (*Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* (1965)) – that the example was followed. Massachusetts was the first US state to act (1971). At its height, auto no-fault was to be found in 16 US states (not including states introducing so-called "add-on" plans which gave benefits additional to, not instead of, previous rights to damages. For general surveys, see C.R. Cole et al., *A Review of the Current and Historical No-Fault Environment*, (2004) 23 *J. Insurance Reg.* 3, D.S. Greer, *No-Fault Compensation for Personal Injuries Arising From Road Accidents: Developments in the United States* (1992) 21 *Anglo-Am. L. Rev.* 221, and E. Nordman, *The History of No-Fault Auto Insurance*, (1998) 16 *J. Insurance Regulation* 457.

⁵ See now Injury Prevention, Rehabilitation, and Compensation Act 2001, sec. 3.

injuries). Tort liability for exemplary or punitive damages also remains but is limited to cases of outrageous conduct.

- 4 Although often spoken-of as “comprehensive” or “universal”, the scheme is in fact limited in the main to accidental injuries. Illness and disease are largely excluded. The “logic” of extending the scheme to incapacity of all sorts is widely acknowledged;⁶ what is lacking is the political will to embark on a reform whose ultimate costs are uncertain. Though “completion” remains on the agenda in some quarters,⁷ it may be doubted whether this remains a realistic goal, at least in the short- and medium-term.
- 5 In the 1980s, the scheme experienced serious financial problems, which lead some international observers to conclude that its days were numbered, and that the New Zealand no-fault experiment had failed.⁸ But the scheme overcame its economic difficulties, and has now survived for more than 30 years, retaining the support of the main political parties and the principal employer and employee-representative organisations, as well as other interested groups.
- 6 This paper will consider the history of ACC in New Zealand, tracing its origins in the Report of the Woodhouse Royal Commission in 1967, and giving an overview of the scheme as introduced in 1974. It then considers the subsequent history of the scheme, with analyses of the “cost crisis” of the 1980s and the legislative response to it, the brief flirtation with privatization in 1999-2000, and reform of the scheme’s medical injury provisions in 2005. The next section looks at attempts to export the ACC model to other countries. The paper concludes with a brief examination of the successes of the ACC scheme, and the most fundamental criticisms that have been made of it.

2. The Woodhouse Report⁹

- 7 The Woodhouse Report affirmed in 1967 that “it was impossible to resolve the problem of industrial injuries in isolation.” Instead, it sought “a co-ordinated and sensible answer to a series of interrelated and complex problems”¹⁰ concerning the claims of all groups in society to compensation and the various mechanisms - tort, workers’ compensation, social security,

⁶ See especially *Woodhouse Report* (supra fn. 3), § 290.

⁷ See, e.g., R. Dyson, *The Future of Accident Compensation: New Directions and Visions*, (2004) 35 *Victoria University of Wellington Law Review* [V.U.W.L.R.] 775. Dyson is the current Minister for ACC.

⁸ See, e.g., B. Markesinis and S. Deakin, *Tort Law* (3rd edn. 1994), 5 (“dismantled”).

⁹ Supra fn. 3.

¹⁰ *Woodhouse Report* (supra fn. 3), § 34.

etc. - that might provide it. In its judgement, the law's existing responses were "fragmented and capricious".¹¹ Each of the three main remedies for personal injury was unsatisfactory. To the Commission, "[t]he negligence action is a form of lottery",¹² while workers' compensation, unduly limited to accidents befalling workers in the course of employment, provided only "meagre compensation", emphasised short-term and minor problems at the expense of serious injury, and entrusted private enterprise with the task of fulfilling a social responsibility.¹³ Furthermore, social security provided only the minimum level of assistance necessary to satisfy basic need and made no attempt to match lost income or to make provision for lost or damaged limbs. Its means testing of benefits was inimical to the idea of compensation for loss, favoured the debt-ridden over the provident, and would act as a disincentive to rehabilitation and a return to work.¹⁴ Together, the three existing remedies provided fragmentary coverage for personal injury, created the risk of double compensation, and failed to exhibit any coherent rationale of response. In the Commission's view, the social problem of accidental injury "cries out for co-ordinated and comprehensive treatment."¹⁵

- 8 The Commission identified five guiding principles for the rational provision of compensation to injured persons:¹⁶

First, in the national interest, and as a matter of national obligation, the community must protect all citizens (including the self employed) and the housewives who sustain them from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity;

Second, all injured persons should receive compensation from any community financial scheme on the same uniform method of assessment, regardless of the causes that gave rise to their injuries;

Third, the scheme must be deliberately organised to urge forward the physical and vocational recovery of these citizens while at the same time providing a real measure of money compensation for their losses;

Fourth, real compensation demands for the whole period of incapacity the provision of income-related benefits for lost income and recognition of the plain fact that any permanent bodily impairment is a loss in itself regardless of its effect on earning capacity;

¹¹ Ibid., § 1; see further § 4&f.

¹² Echoing T.G. Ison, *The Forensic Lottery* (1967), which Woodhouse had seen in draft prior to the publication of his Report, but after he had substantially determined its form.

¹³ *Woodhouse Report* (supra fn. 3), §§ 1, 239-40.

¹⁴ Ibid., Part 5

¹⁵ Ibid., § 1.

¹⁶ Ibid., § 55.

Fifth, the achievement of the system will be eroded to the extent that its benefits are delayed, or are inconsistently assessed, or the system itself is administered by methods that are economically wasteful.

The Commission summarised these principles as: *Community responsibility; Comprehensive entitlement; Complete rehabilitation; Real compensation; and Administrative efficiency.*

- 9 In the Commission's view, the first two principles were fundamental. It affirmed that no satisfactory system of injury insurance could be organised except on a basis of community responsibility":¹⁷

Just as a modern society benefits from the productive work of its citizens, so should society accept responsibility for those willing to work but prevented from doing so by physical incapacity. And, since we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically inevitable victims.

The principle of comprehensive entitlement followed automatically: "wisdom, logic, and justice all require that every citizen who is injured must be included, and equal losses must be given equal treatment."¹⁸ The needs of the injured, and the country's needs of them, were the same whatever the cause of their injury: "Injury, not cause, is the issue."¹⁹ It was therefore the Commission's "central recommendation" that there should be "an integrated solution with comprehensive entitlement for every man and woman, and coverage in respect of every type of accident."²⁰

- 10 The Commission's proposal was carefully costed on the basis that existing expenditure on compulsory insurance for employers and motor vehicle owners should be diverted to the new scheme, as also should the indirect savings made by those who had previously acted as self-insurers (e.g. the Government) and also by the social security and healthcare budgets. Together, these sums would produce an income falling not far short of the total estimated expenditure of the new scheme. The difference could be made up (with a generous safety margin) by additional contributions from two groups who would be protected by compulsory schemes for the first time, namely, the self-employed and vehicle licence-holders.²¹ Only by diverting all the sums which supported - directly or indirectly - the previous compensation mechanisms could the Commission hope to finance its proposal. Only by

¹⁷ Ibid., § 56.

¹⁸ Ibid., § 4.

¹⁹ Ibid., § 6.

²⁰ Ibid., § 7.

²¹ Ibid., ch. 26. Drivers might therefore be expected to contribute twice: both as owners of motor vehicles and as licence-holders.

means of the administrative savings achieved by moving to a unified and streamlined system of compensation could the Commission achieve its goal of comprehensive entitlement to real compensation.

- 11 In a sense, ACC was “the compensation scheme no one asked for.”²² Few submissions to the Woodhouse Commission had argued for a comprehensive scheme. The strongest support had come from the Social Security Department. The Victoria University of Wellington Law Faculty was the only non-governmental body to argue for the reform. As we have seen, the Committee on Absolute Liability had previously recognised “a case for an accident insurance scheme that would cover all persons who are injured in any way without negligence on their part, provided the community can afford to bear the cost on an equitable basis.”²³ But there was no pressure group in society actively pushing for such a reform.²⁴
- 12 The Report’s eventual publication met with a mixed reaction. The unions were attracted by the proposed no-fault scheme but initially favoured the retention of tort actions for damages. They were finally brought round to the reform by the promise to maintain lump sum compensation for non-economic losses, against Woodhouse’s own recommendation. In the legal profession, some favoured the Woodhouse proposal, and others opposed it, the then President of the New Zealand Court of Appeal describing the Report’s suggestion that the tort action was a lottery as “a gross exaggeration.”²⁵ There was also entirely predictable opposition from the insurance industry, particularly at its proposed exclusion from compensation for personal injury. (It has proved difficult to track down information about the initial reaction of employers and employers’ groups to the proposals.)
- 13 The National government, which had commissioned the report, engaged in a good deal of political manoeuvring consequent upon its appearance, with further consideration of its proposals in a White Paper and two select committee reports. At the general election of 1969, Labour promised to implement the majority of the Woodhouse proposals, while National wished to wait for the outcome of public consultation, but no-fault was not a major election issue. National was re-elected. In 1972, another Royal Commission, this time on social security, published its report, but with little cross-reference to the much more radical Woodhouse proposals or the forthcoming accident compensation legislation. From this time on, accident compensation was

²² P. McKenzie, *The Compensation Scheme No One Asked For: The Origins of ACC in New Zealand*, (2003) 34 V.U.W.L.R. 193.

²³ Committee on Absolute Liability (supra fn. 2), § 40.

²⁴ P. McKenzie (supra fn. 17), 206.

²⁵ Sir Alfred North in “The Woodhouse Report, a Panel Discussion” [1969] NZLJ 297.

mostly considered to be quite separate from social security and the two systems pursued independent lines of development.²⁶

- 14 The Accident Compensation Act 1972 provided for a scheme limited to accidents at work and on the roads. The then National Government had been concerned at the uncertain financial consequences of a more comprehensive reform. But in a general election in November of the same year, Labour was returned to power and it subsequently introduced amending legislation in order to implement the comprehensive scheme envisaged by the Woodhouse Commission.²⁷ Compensation in cases falling outside the two funds that were originally-envisaged – the Earners’ Fund and Motor Vehicle Accident Fund – was to be provided out of a new Supplementary Fund. This reform made it possible to abolish all common law actions for compensation in cases of personal injury by accident.²⁸

3. Overview of the Scheme

- 15 The scope of the scheme was originally defined by the central concept of “personal injury by accident”, itself borrowed from the earlier workers’ compensation legislation. Following reforms in 1992, the categories of “covered” personal injury were broken up and specified independently. The legislation now lists 11 categories of covered personal injury, of which the following are the most important: personal injury caused by “an accident”; work-related diseases, infections and processes; and treatment injuries (previously known as “medical misadventure”).²⁹ There are specific exclusions from the scheme in respect of illnesses and infections – except if work-related, or the result of treatment injury – and the consequences of ageing.
- 16 As already noted, the goal of the scheme is “real”, rather “full”, compensation, covering both economic and non-economic losses. It includes, where appropriate:
 - *Weekly compensation*, paid at 80 percent of pre-accident earnings, up to a fixed maximum of approximately 2.5 times average weekly income for those in paid employment. ACC is only responsible for weekly

²⁶ M. McClure, A Decade of Confusion: The Differing Directions of Social Security and Accident Compensation 1969-1979, (2003) 34 V.U.W.L.R. 269.

²⁷ Accident Compensation Amendment Act (No. 2) 1973. As G. Palmer, *Compensation for Incapacity* (supra fn. 1), appendix 1 clearly demonstrates, the scheme introduced in fact differed from the Woodhouse model in numerous specifics.

²⁸ See generally A.A.P. Willy, The Accident Compensation Act and Recovery for Losses Arising from Personal Injury and Death by Accident, (1975) 6 N.Z.U.L.R. 250.

²⁹ Injury Prevention, Rehabilitation, and Compensation Act 2001, secs. 20-21.

compensation from the second week of absence from work. If the injury is work-related, the employer pays for the first week; otherwise, the loss is left with the injured person. Weekly compensation is also paid to those who have lost financial support as a result of a fatal accident.

- *Lump sum compensation for non-economic loss*, paid in respect of permanent impairment assessed at 10% or greater. These awards range from \$2500 to \$100,000 depending on the severity of the impairment.
- *Medical and rehabilitation expenses*, including public healthcare fees (so there is no hidden subsidy of ACC out of the healthcare budget), and expenses such as the cost of home or vehicle adjustments, care assistance in the home, and the provision of a wheelchair.

- 17 The scheme is funded by levies on employers, the self-employed, motor vehicle licence-holders, and, since 1992, by employees (“earners”) too. A proportion of excise on petrol also goes to ACC. The scheme is run as a number of separate accounts, with (for example) the Employers’ Account paying for work-related injuries, the Motor Vehicle Account bearing the cost of motor accidents on public roads, and the Earners’ Account paying for other non-work injuries suffered by people in paid employment.

4. The “Cost Crisis” of 1986 and Subsequent Reforms

- 18 In 1986, concern about escalating costs and dwindling reserves led the Labour Government of David Lange to order an investigation into ACC administration. This diagnosed a “massive cost blow-out” with compensation expenditures rising more rapidly than levy incomes.³⁰ To cope with the shortfall, ACC had drawn heavily upon its accumulated reserves, which at the end of the year had become so depleted that reserves meant to be sufficient for 4 or 5 years of compensation payments were likely to be exhausted within a matter of months, making ACC effectively insolvent. The Government was forced into immediate action and, in December 1986, vastly increased the levies for the following year. The average levy rate increase for employers was 192 per cent, while that for the self-employed was 265 per cent; in some cases the levy increases exceeded 500 per cent. This dramatic response produced an immediate outcry and much adverse criticism of the scheme.

³⁰ Officials Committee, *Review by Officials Committee of the Accident Compensation Scheme* (1986), iii.

- 19 In hindsight, it appears that the main problem was a failure to make adequate provision for the scheme's progress towards maturity.³¹ Liabilities for new claims were added to on-going liabilities from previous years, causing an entirely predictable build-up of costs – which would continue until the yearly number of new claims accepted was matched by the number of on-going claims extinguished. At the same time as the scheme's ongoing liabilities rose, however, ACC had recklessly reduced levies to unviable levels, partly in response to political pressure.
- 20 However, other sources of “cost creep” were also implicated, including the expansive and expanding definition given by the courts and tribunals to the key concept of “personal injury by accident”, which was then the sole qualifying criterion for cover under the scheme.³² Other factors were the growing tail of claimants remaining on ACC for the long-term for reasons other than incapacity for work (e.g. because there was no work for them to go to: the problem of hidden unemployment), and the increasing cost of medical treatments plus the growing number of treatments provided. The National Party, then in opposition, made it one of their election promises to address these issues and alleviate what they considered the “unfairness” that employers were experiencing as a consequence.
- 21 In 1991, the newly-elected National Government set out its programme for ACC reform whilst emphasising its continuing commitment to the scheme.³³ The aim of the reforms was to reverse “cost creep” and to distribute the costs of the scheme more equitably. The Government expressed its particular concern at the “unfairness” of the levy burden on employers, who it claimed contributed 70% of overall ACC income, even though work accidents only accounted for 40% of total ACC costs. By an Act of 1992, the following changes were effected.³⁴ First, the single, umbrella category of “personal injury by accident” was abolished and the separate categories of covered personal injury were specified independently with greater precision. Secondly, compensation and rehabilitation entitlements were curtailed. Most controversially, the 1992 Act abolished the lump sum compensation for non-economic loss, replacing it with a periodic independence allowance paid in a more restrictive set of circumstances (for residual disability only, not mere pain, suffering or loss of amenity). After Labour returned to power in 2000, the lump sums were reintroduced, but in a limited form, dealing only with permanent impairments of 10% or more, and not with mere pain and suffering or loss of amenity.³⁵ Thirdly, to reduce the cost burden on employers, the Act introduced a new Earners' premium to cover the costs of employees' non-

³¹ See, e.g., Law Commission (New Zealand), *Personal Injury: Prevention and Recovery*, Report No. 4 (1988), § 16.

³² Accident Compensation Corporation, *Sources of Cost Creep* (1987).

³³ W.F. Birch, *Accident Compensation: A Fairer Scheme* (1991).

³⁴ Accident Rehabilitation and Compensation Insurance Act 1992.

³⁵ See now Injury Prevention, Rehabilitation, and Compensation Act 2001, sec. 69.

work accidents. Originally a cent in the dollar on income tax (up to a prescribed maximum), it currently amounts to 1.2 cents in the dollar.

5. Privatization (1999-2000)³⁶

- 22 In its second term of government, National set about the partial privatisation of ACC by involving private insurers in place of the state-owned ACC in respect of work-related accidents. It believed that the creation of a competitive market would decrease costs and increase efficiency, enhance consumer choice, and promote workplace safety. The reform was implemented by the Accident Insurance Act 1998, and took effect in July 1999. Although it was initially envisaged that ACC would be allowed to compete with the private insurers, the legislation prohibited it from contracting with employers (but not the self-employed).
- 23 Labour immediately announced that, if re-elected, it would reverse the privatisation experiment and restore ACC's position as the exclusive provider of insurance under the scheme. This came to pass in 2000 and a very short amending Act of the same year stopped private insurers from undertaking new accident insurance business.³⁷ The amending legislation provided that the Crown would pay no compensation for any resulting losses.³⁸ The return to the *status quo ante* was cemented by consolidating legislation the following year (the Injury Prevention Rehabilitation and Compensation Act 2001, which remains in force today). A measure of private risk-management remains in the scheme, however, because the legislation re-introduced the accredited employer scheme which effectively allows employers to opt out of ACC and undertake compensation payments themselves for their employees' work-related injuries – for a pre-determined period (of up to 4 years from the end of the cover period). The benefit for the employer is significantly reduced ACC premiums.

6. Reform of Compensation for Medical Injuries (2005)

- 24 Of what is likely to be more lasting significance is the reform in 2005 of the compensation provisions applicable to medical injuries. ACC has always covered what, until 2005, was termed "medical misadventure".³⁹ In the

³⁶ See generally S. Todd (supra fn. 1), and D. Caygill, 1990s: Decade of Change, (2003) 34 V.U.W.L.R. 395.

³⁷ Accident Insurance (Transitional Provisions) Act 2000.

³⁸ Sec. 10.

³⁹ See generally K. Oliphant, Defining "Medical Misadventure": Lessons from New Zealand, (1996) 4 *Medical Law Review* 1.

legislation of 1974, the phrase denoted an illustrative category of “personal injury by accident”, but in 1992 it became a distinct category of covered personal injury in itself, and a separate claims-management unit was established. The new statutory definition specified that medical misadventure covered two distinct types of case: “medical error” and “medical mishap”. The former was defined in terms of common law negligence, and meant “the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances.”⁴⁰ It covered negligent failure to diagnose and treat as well as negligent treatment itself. The other branch of medical misadventure, medical mishap, was given an elaborate definition in terms of the rarity and severity of an adverse outcome resulting from treatment. A one-percent rarity threshold was applied: “the probability [must be] that the adverse consequence would not occur in more than 1 percent of cases where that treatment is given.”⁴¹ The intention was to define strictly the degree of rarity required, for it was felt that the test of misadventure had gradually been watered down by tribunal and court decisions. In addition, a new severity test was introduced so as to eliminate claims arising from less serious injuries. This required that the result of the treatment should be death, extended hospitalisation, or lasting and significant disability.

- 25 A review of the ACC medical misadventure proposals was announced in 2003 and a consultation paper published.⁴² The exercise was primarily motivated by health professionals’ concern that fault, through the concept of medical error, continued to play a role in determining cover for medical misadventure. By focusing on the actions of individual healthcare professionals, the concept of error was thought to promote an adversarial encounter, delay decisions whether to pay out on claims or not, and inhibit the development of a learning culture. The review also considered that the rarity and severity tests of medical mishap were arbitrary and unfair to claimants. By an Act of 2005, the concept of medical misadventure was abolished, and replaced with what is now to be called “treatment injury”. This covers all personal injury arising from medical treatment that is neither substantially attributable to the patient’s underlying condition nor an ordinary consequence of treatment. Fault no longer plays a role in determining the patient’s right to compensation. Cover decisions are quicker – in the first year of the reform, the average time between claim and cover decision came down from five months to 36 days, in spite of a steadily increasing number of claims⁴³ – and the outcome is believed to be fairer to claimants. The New Zealand Treasury estimated that the reform will add about 17% to the annual fully funded costs of medical

⁴⁰ Accident Rehabilitation and Compensation Insurance Act 1992, sec. 5(1).

⁴¹ Accident Rehabilitation and Compensation Insurance Act 1992, sec. 5(2).

⁴² ACC and Department of Labour, *Review of ACC Medical Misadventure: Consultation Document* (2003).

⁴³ ACC, *ACC News: A Newsletter for Health Care Professionals*, issue 93 (August 2006), p. 1.

misadventure compensation, or about a third of one percent of total ACC income.⁴⁴

7. Consideration of No-Fault Elsewhere

- 26 Following his hugely influential report on accident compensation in New Zealand, Mr Justice Woodhouse was asked by the Australian government to report on the implementation of a national no-fault scheme in Australia, the decision having already been reached that this was desirable. The then Labour Prime Minister, Gough Whitlam, had been a longstanding proponent of no-fault compensation for road accidents.⁴⁵ A national compensation scheme was part of his election platform in 1972. Almost a year after the second Woodhouse Commission's appointment, its terms of reference were extended to cover the question of incapacity caused by sickness and congenital defect. The Commission was asked to advise whether no-fault benefits should be available, and, if so, how. The second Woodhouse Report⁴⁶ did indeed recommend the extension of no-fault to all cases of incapacity, including incapacity from sickness and congenital defect, but with a three week "waiting period" in such cases rather than the one week period applying to accidents. Otherwise, the proposals were broadly comparable to Woodhouse's previous proposals for New Zealand.⁴⁷
- 27 The Report attracted little media interest. Lacking support from "natural allies" like the unions and the welfare lobby, the proposals were strongly opposed by the legal and medical professions and the insurance industry.⁴⁸ In Parliament, the Bill to enact the scheme was passed by the House of Representatives but stalled before the Senate, the upper house, where the government lacked a majority. A Senate committee feared that the costs of the reform would be too high to be financed by insurance premiums and that the state would be called upon to give supplementary financial assistance. The Bill was consequently redrafted, and limited to accidental injury. But there was a change of government before it could be reintroduced to Parliament. Whitlam himself tried to revive it as a private member's Bill, but without success, and no similar proposal was ever again formally advanced, despite comprehensive no-fault accident compensation remaining Labour Party policy

⁴⁴ See R. Dyson, 'Medical Misadventure Review – Conclusions and Recommendations', Cabinet Social Development Committee (2004), §§ 14 and 66-71.

⁴⁵ H. Luntz, *Looking Back at Accident Compensation: An Australian Perspective*, (2003) 34 V.U.W.L.R. 279, 281.

⁴⁶ Australian National Rehabilitation and Compensation Committee of Inquiry, *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry* (1974).

⁴⁷ For consideration of particular differences, see H. Luntz (*supra* fn. 000), 284-5.

⁴⁸ *Ibid.*, 285-288.

at the time of its re-election in 1983. What moves there have been towards no-fault have been in the area of traffic accidents – in the Northern Territory (1979) and Victoria (1987). In New South Wales, however, a law commission recommendation for auto no-fault⁴⁹ was never enacted, and a more limited experiment with a fault-based administrative scheme was short-lived (1987-88).⁵⁰

- 28 Outside New Zealand and Australia, the idea of comprehensive no-fault compensation has received support from a number of writers,⁵¹ but nowhere else has it been adopted by government. Britain's Pearson Commission,⁵² reporting in 1978, was confidently expected by some to be ready to follow the New Zealand example, but it narrowly construed its terms of reference to preclude consideration of a comprehensive accident scheme, and its proposals for no-fault in particular areas (e.g. road accidents) have so far been ignored.

8. Conclusion

- 29 New Zealand's ACC is the most extensive no-fault compensation scheme to have been implemented in the common law world, and the most radical departure from private law. Today ACC accepts over 1.5m claims each year,⁵³ which might be thought a rather large number in a country whose population is just over 4m, but over 85% of accepted claims are for treatment only, without any payment of compensation or rehabilitation assistance. In fact, only about 150,000 claims each year are classified as entitlement claims – that is, as giving rise to a compensation or rehabilitation entitlement – which is about 1 in a thousand of all accepted claims. Of these, somewhat more than two-thirds are new claims, and somewhat less than one-third are ongoing claims carried forward from previous years. ACC costs account for approximately 5% of total government expenditure.

⁴⁹ New South Wales Law Reform Commission, *Accident Compensation: A Transport Accidents Scheme for New South Wales* (1984).

⁵⁰ See further H. Luntz (*supra* fn. 000), 190-191.

⁵¹ See, e.g., D. Harris *et al.*, *Compensation and Support for Illness and Injury* (1984), S.D. Sugarman, "Doing Away with Tort Law", 73 Cal. L. Rev. 555 (1985), and his subsequent book, *Doing Away with Personal Injury Law* (1989), and T. Ison, *Compensation Systems for Injury and Disease: The Policy Options* (1994). Elective no-fault for all accidents has been recommended by J. O'Connell, No-Fault Insurance for All Accidents, (1975) 13 Osgoode Hall L. J. 461, criticised by R.A. Posner, A Comment on No-Fault Insurance for All Accidents, (1975) 13 Osgoode Hall L. J. 471.

⁵² Royal Commission on Civil Liability and Compensation for Personal Injury (Chairman: Lord Pearson), *Report*, Cmnd 7054 (1978) [hereafter, *Pearson Report*]. For critical analysis, see A.L. Ogus/P. Corfield/D.R. Harris, Pearson: Principled Reform or Political Compromise?, (1978) 7 I.L.J. 143, and D.K. Allen/C.J. Bourn/J. Holyoak, *Accident Compensation After Pearson* (1979).

⁵³ Up-to-date statistics can be found on the ACC website: www.acc.co.nz.

30 A brochure published in 2004 to mark 30 years of ACC described it as “[t]he most rational and the most humane compensation law in the world.”⁵⁴ The scheme is frequently said to have the support of New Zealanders in general,⁵⁵ and ACC certainly takes considerable efforts to monitor satisfaction rates of claimants and other stakeholders. The most recently recorded claimant satisfaction rate was 80%.⁵⁶ There are, admittedly, frequent ripples of discontent about the scheme in the news media, but most are directed at the operation of the scheme in particular cases, and not at the no-fault ideal underpinning it. Of the more fundamental criticisms that have been made against the basic Woodhouse proposal, perhaps the three most significant have been the following.

a) Criticisms⁵⁷

31 First, it is argued by some that it is unfair to limit the compensation paid to those injured by fault below the levels that would be awarded in a successful civil action for compensatory damages.⁵⁸ Corrective justice, it is said, requires full compensation for losses attributable to the wrong.⁵⁹ The principle undoubtedly has intuitive appeal, but does the tort system really achieve corrective justice in the imagined sense? To Woodhouse, it did not. Legal fault (the failure to attain the standard of the reasonable person) was “a legal fiction”, and certainly did not connote moral culpability.⁶⁰ It was, in addition, an insubstantial basis for distinguishing between injury attracting full compensation and injury which left the victim to look for collateral sources of support. The negligence action was, in effect, “a form of lottery.”⁶¹ In any case, the tortfeasor was almost always insulated from the direct cost of liability by insurance. Would it, then, be possible to maintain (or restore) previously existing rights of action for victims of fault alongside the no-fault compensation entitlements extended to all suffering accidental personal injury? This has been suggested from time to time by commentators,⁶² but the

⁵⁴ ACC, *Thirty Years of Kiwis Helping Kiwis, 1974-2004*, (2004), 3.

⁵⁵ See, e.g., G. Wilson, *ACC and Community Responsibility*, (2004) 35 V.U.W.L.R. 969, 970

⁵⁶ ACC, *Annual Report 2005* (2005), 44.

⁵⁷ For an overview of criticisms, see J. Henderson, *The New Zealand Accident Compensation Reform*, (1981) 48 U. Chi. L. Rev. 781.

⁵⁸ See, e.g., R. Mahoney, *New Zealand’s Accident Compensation Scheme: A Reassessment*, (1992) Am. J. Comp. L. 159.

⁵⁹ Key works include: G. Fletcher, *Fairness and Utility in Tort Theory*, (1972) 65 Harv. L. Rev. 537; J. Coleman, *Risks and Wrongs* (1992); and E. Weinrib, *The Idea of Private Law* (1995).

⁶⁰ *Woodhouse Report* (supra fn. 3), § 88.

⁶¹ *Woodhouse Report* (supra fn. 3), § 1.

⁶² See, e.g., L. Klar, *New Zealand’s Accident Compensation Scheme: A Tort Lawyer’s Perspective*, [1983] U. Toronto L.J. 33, R. Miller, *The Future of New Zealand’s Accident Compensation Scheme*, (1989) 11 U. Hawaii.L. Rev.1, and R. Mahoney (supra fn. 58).

New Zealand Law Commission has expressed its scepticism: “[a] supplementary tort liability scheme could duplicate the costs of compensating injury.”⁶³ In fact, the Woodhouse vision was explicitly premised on a costs calculation that the finances devoted to existing compensation systems (tort, workers’ compensation and criminal injuries compensation) would be redeployed to the new no-fault scheme.⁶⁴

- 32 A second criticism is that a no-fault compensation scheme cannot deter careless conduct, and, if its introduction is accompanied by the abolition of the deterrent of an action for damages in tort, must inevitably promote an increase in accident rates.⁶⁵ The evidence, it has to be said, is inconclusive. That cited in support of the criticism has relied excessively upon anecdote and personal observation. Thus Miller’s conclusion that “disgracefully hazardous conditions had become endemic” as a consequence of the ACC reform is backed up by observations he made while visiting New Zealand as an overseas scholar, for example, that rugby players do not wear the helmets or padding used in American football.⁶⁶ On the other side of the argument, it has been shown that the available statistical evidence gives no reason to believe that the ACC reform has increased accident rates.⁶⁷ Brown, for example, has demonstrated that the predominantly downward trend in road accident casualties that started prior to 1974 continued and even accelerated after that date.⁶⁸ It must also be remembered that ACC has had available to it a number of tools that it can employ to duplicate – at least to some extent – such incentive effect as tort possesses, for example, the experience-rating of levies and the variation of levies following audit of safety management practices.⁶⁹ Nevertheless, the statistical record is insufficiently comprehensive to allow firm conclusions to be drawn on the effects of the ACC reform on accident prevention.

⁶³ New Zealand Law Commission, Comment on “The Future of New Zealand’s Accident Compensation Scheme” by Richard S. Miller, (1990) 12 U. Hawaii L. Rev. 339, 342.

⁶⁴ See no. 10, above.

⁶⁵ See, e.g., R. Mahoney (supra fn. 58), R. Miller (supra fn. 62), and B. Howell, ‘Medical Misadventure and Accident Compensation in New Zealand: An Incentives-Based Analysis’ (2004) 35 V.U.W.L.R. 857.

⁶⁶ R. Miller (supra fn. 62), 37-8.

⁶⁷ See, e.g., New Zealand Law Commission (supra fn. 63).

⁶⁸ C. Brown, Deterrence in Tort and No-Fault: the New Zealand Experience, (1985) 73 Cal. L. Rev. 976.

⁶⁹ For the latter, see Injury Prevention, Rehabilitation, and Compensation Act 2001, s. 175 and Injury Prevention, Rehabilitation, and Compensation (Employer Levy) Regulations 2004 (SR 2004/23). Experience rating of employers was introduced in 1992 but not restored after the short privatization episode in 1999-2000. An earlier system of safety incentive bonuses was abandoned in the 1980s because it could not be shown that it contributed to improved accident prevention.

- 33 Finally, ACC has been criticised as an undue burden on state expenditure and the public at large,⁷⁰ a claim lent some substance by the financial difficulties experienced by ACC in the 1980s. As has already been indicated, however, the so-called costs crisis was attributable not to any fundamental lack of viability in the no-fault project, but rather to specific failures in the implementation of that project, for example, the failure to make advance provision for increased liabilities as the scheme matured. ACC is now well over those difficulties and in apparently good financial health, though it would be naïve to think that the justifiability of the burden on both the state purse and individual levy-payers will never again be the subject of dispute.

b) Countervailing benefits

- 34 Against these criticisms – even if one accepts that they have some validity – must be weighed what I consider to be ACC’s three principal achievements. First, it extends compensation entitlements beyond the class of those injured by another person’s fault, and so makes the receipt of compensation following an accident less of a lottery than it inevitably is under tort. Tort compensates only a very small minority of accident victims, maybe as few as the 6.5% estimated by a Royal Commission in the United Kingdom.⁷¹ ACC covers *all* accidents, and the claims figures quoted above illustrate very clearly the number of successful applications that are made to the scheme every year. What ACC does not cover is illness or congenital disability, and there have been persistent calls to widen the scope of the scheme still further.⁷²
- 35 Secondly, the resources necessary to achieve this more complete coverage are much more efficiently deployed than they would be in the tort litigation system. While the operating costs of the tort system (in the UK) have been calculated at 85% of the value of total damages awards,⁷³ the comparable figure under ACC is only 12% (i.e. for every New Zealand dollar paid on compensation or rehabilitation, only 12 cents is paid on overheads).⁷⁴ Of course, what would now be the tort costs of New Zealand if the ACC reform had not been implemented cannot be known, but it is certainly plausible to suggest that – far from increasing overall expenditure on accident compensation – ACC has in fact protected the New Zealand economy from

⁷⁰ See, e.g., P.S. Atiyah, *The Damages Lottery* (1997), 183-4 (adding that such state schemes also promote an undesirable “blame culture”). In this book, Atiyah, previously a proponent of no-fault (see especially his book *Accidents, Compensation and the Law*, first published in 1969 but now edited by P. Cane (7th edn. 2006)), declared his preference for first-party insurance as the solution to the social problem of accidental injury.

⁷¹ *Pearson Commission* (supra fn. 52), vol. 1, § 78.

⁷² See, e.g., New Zealand Law Commission *Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme)*, NZLC R4 (1988).

⁷³ *Pearson Commission* (supra fn. 52), vol. 1, § 83.

⁷⁴ ACC (supra fn. 56), 74.

the excesses of the tort system that are alleged to have materialised elsewhere in the common law world.⁷⁵

- 36 Finally, ACC explicitly acknowledges community responsibility for both the production of accidental injury and its redress. Accidents are the inevitable by-product of activities which the community encourages, and from which the community as a whole benefits, and so the community bears causal responsibility for their occurrence.⁷⁶ But the community's obligation to compensate for accidental injuries has a broader foundation too – in the notion of social solidarity that also underpins other institutions of the welfare state in New Zealand.⁷⁷ Of course, the dictates of community responsibility must be balanced with those of individual responsibility,⁷⁸ but surely no successful accident prevention strategy can succeed that does not explore the wider social causes of accident, nor any accident compensation strategy that relies exclusively on individual initiative.

c) Envoi

- 37 40 years after Sir Owen Woodhouse's seminal report, his vision of a no-fault compensation scheme reflecting principles of community responsibility and comprehensive entitlement still finds full expression in New Zealand. The history of ACC has not been without its difficulties, but the present day finds it in apparently rude health. Nevertheless, the failure – in all those 40 years – to transplant the prototype to other legal cultures suggests that (sadly) the New Zealand "experiment" may remain unique, the product of a particular time and a particular place. The introduction of no-fault compensation for specific injuries, however, as opposed to accidental injury as a whole, is an entirely different matter, and currently or recently the subject of reforms or law reform proposals in more than one jurisdiction.

⁷⁵ On the alleged excesses of tort elsewhere, see, e.g., P. Huber, *Liability: The Legal Revolution and Its Consequences* (1988), and W. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991).

⁷⁶ See further R. Gaskins, *Environmental Accidents* (1990).

⁷⁷ *Woodhouse Report* (supra fn. 3), § 5.

⁷⁸ See generally K. Oliphant, *Beyond Woodhouse: Devising New Principles for Determining ACC Boundary Issues*, (2004) 35 V.U.W.L.R. 915.