

Accident Compensation - 1995 and Still Languishing

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Introduction

With the publication of the latest policy review of ACC, *Accident Compensation 1995*, the question of deregulating injury insurance in New Zealand has once again come to the fore. Action on ACC legislation, although openly acknowledged by all commentators as a necessity, has been slow in coming due to disagreement about the basic premises of rights, entitlements and institutional arrangements and an uncertain balance of power in Parliament. The present article examines the debates around deregulation and efficiency, the principles of "no fault" and "no right to sue", and the failure of the current regulatory régime.

The institutional context

Arguments for deregulation of ACC may be traced back to the report of the Ministerial Working Party on the Accident Compensation Corporation and Incapacity (1991) headed by Bernard Galvin. This report informed the supplementary paper to the 1991 Budget entitled *Accident compensation - a fairer scheme* (Birch, 1991). The Ministerial Working Party was clearly in favour of an institutional environment which would allow multiple, competing insurers to operate in a new injury compensation scheme along with the ACC. Consequently, ACC would become a state-owned enterprise. The 1992 Act did not implement this recommendation, preserving instead ACC's position as a compulsory monopoly provider.

In an earlier article (Duncan, 1993) I highlighted those aspects of the Accident Rehabilitation and Compensation Insurance (ARCI) Act 1992 which clearly indicate that the long-term policy goal was nonetheless eventual deregulation of the injury insurance market.¹ Events since then, especially the National government's minority position in Parliament, have placed any attempt at further fundamental reforms in a political impasse. Proposals for deregulation of ACC, such as that from the Insurance Council, have tended to be rejected by Cabinet (*New Zealand Herald*, 1995). This seems out of keeping with a general policy trend in favour of privatisation and deregulation which, even though the pace has slowed considerably, is still discernible.

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¹ For a fuller history of ACC and the 1992 reforms see Duncan and Nimmo (1993) or Rennie (1995).

The most commonly promoted alternative to the current sole-insurer system seems to be akin to that which existed prior to ACC (e.g., Insurance Council of New Zealand, 1995): a statutory, compulsory system of cover underwritten and administered by private companies. Legislation would set minimum benefits and premiums and the parameters of cover for personal injury; and the State's institutional role would reduce to a policy advice and monitoring body. Insurers would operate on a commercial, competitive basis, bearing the risks under the scheme. Pool insurance cover for non-earners and as an insurer of last resort could be funded by levies and administered by a private company under contract to Government. This would cater for Government's commitment to universal coverage. While minimum cover would be mandatory, customers could choose their provider and also purchase higher levels of benefits as required. Cover would continue to be "no fault", meaning that factors such as contributory negligence or prior knowledge of risks would not affect acceptance of claims (with the probable exception of wilfully self-inflicted injury.)

The latest review of ACC by the Minister's panel of "eminent persons" (Cliffe et al., 1995) does not recommend any such change, however. The report is based around the five original principles espoused by Woodhouse when the current scheme was first conceived, and the following possibilities are indicated:

- Making ACC a Department of State.
- Maintaining the present Board structure with improved accountability.
- Imposing on ACC some of the disciplines of a state-owned enterprise.
- Making delivery contestable with private sector involvement.

Private sector involvement is considered "difficult to implement" due to unspecified "practical issues" (Cliffe et al. 1995: 30-31). Amending legislation introduced at the time of writing seems to be in line with the second option above: the policy advice function has been shifted to the Labour Department, and the role of the ACC Board of Directors will be principally "to ensure the efficient and effective administration of the Corporation".

Efficiency advantages

The Ministerial Working Party of 1991 was unable to produce any unequivocal empirical evidence that a competitive multi-insurer environment would lead to greater efficiency from the perspective of premium-payers. More recently, however, the Insurance Council of New Zealand (1995) and the New Zealand Employers' Federation (1995) have both expressed strong support for private sector involvement in service delivery. Both have put forward further arguments for the improved efficiency supposedly to be gained by deregulation, and these arguments must be examined.

What, then, are the relative advantages and disadvantages to the premium-paying customer of a multi-insurer versus the current sole-insurer systems? The following points attempt to compare the two impartially in terms of economic efficiency and service effectiveness. First, in favour of a multi-insurer environment:

- Passing on costs of inefficiencies to the customer will result in customers finding an alternative provider, hence ensuring lower premiums across the whole market.
- Greater choice for customers in terms of preferred policies, benefits and delivery systems.
- Wider use of experience rating will mean that costs will more accurately reflect actual risks. Hence businesses and individuals are exposed to the true costs of their activities.
- Greater incentive on insurers to monitor claims and control costs.
- Less political interference.
- Greater incentive to retain customers through responsive and satisfactory service delivery.

Contrary to the prevalent distrust of state-owned monopoly providers, however, there are certain efficiency advantages in the existing ACC institution:

- Fewer costs associated with marketing and selling, litigation and returns to shareholders.
- Pooling of risk across the whole population can more easily absorb costs of high-risk endeavours and large disasters.
- Little risk of costly negligence actions.
- No risk of insurer insolvency.
- Automatic coverage and consistent entitlements.
- Individuals and firms who would otherwise be declined insurance (other than by a state-funded insurer of last resort) can automatically be covered.
- Private insurers may be reluctant to accept the long-term risks of income maintenance for permanently incapacitated earners.
- Where experience rating does not operate, there is no need to dispute causality or fault in order to establish cover.
- The pay-as-you-go financial policy keeps premiums lower in the short-term. (This point will require some further analysis, however. See below.)

Against the concept of a non-competitive state-welfare compensation system like ACC, on the other hand, it is often argued that the greater cross-subsidisation between firms (or non-internalisation of costs) does not adequately discourage investment in unsafe activities, nor does it provide an incentive to control the costs of claims. This may sound logical, but the evidence for it is far from unequivocal. Risa (1995) provides an analysis which, contrary to popular wisdom, suggests that "welfare state insurance may *reduce* accident probabilities in equilibrium as compared to a system with perfect safety incentives" (p.132). Similarly, Campbell (1989) claims that there is no adequate evidence to support the conclusion that experience rating reduces accidents. Hyatt and Kralj's (1995) survey of the research also reveals a lack of support for any positive relationship between experience rating and accident frequency. Hyatt and Kralj's study suggests that experience rating creates incentives for displacing the efforts of firms into appealing decisions on claims rather than preventing injuries. It may also be that most firms do not appreciate the true extent of their exposure through accidents. Many costs (e.g. property damage, loss of production) are "indirect" and not transparently accounted for as costs of accidents. Experience rating compensation claims alone - accounting for probably only about one fifth of a firm's full cost of accidents (Brody, Létourneau and Poirier as cited in Hyatt and Kralj, 1995) - would provide preventative incentives only to those firms on the margins.

While business lobby groups in New Zealand seem largely to favour deregulation as a "solution" to ACC's rising premiums and perceived inefficiency, their counterparts in the USA, where multi-insurer competition is the rule, routinely deplore the impacts of dramatic cost increases there (Davis, 1992; Juliff and Polakoff, 1994; Kay, Murphy and Harris, 1994). Juliff and Polakoff claim that these rising costs in California have "literally driven many enterprises either out of business or out of the state" (1994: 91). On the other hand, ACC reforms appear to be keeping overall costs relatively stable, according to forecasts provided by Cliffe et al. (1995), and employers should be well satisfied with that.

The argument for a competitive, multi-insurer system claims that premiums will more closely reflect the actual injury risks and that this is "the key means of improving efficiency" (Insurance Council of New Zealand, 1995: 2). There is, however, no evidence that greater efficiency will thus be obtained either in terms of reduced injury rates or lower premiums. Although private insurers may be willing to underwrite injuries, it is doubtful (given their need to fully-fund and to make profits) that they could offer premiums lower than ACC's. Moreover, despite the advent of the insurance-based concept of experience rating under the ARCI Act 1992, employers' premiums have continued to rise and will need to rise even further. The only fully justified argument in favour of experience rating is that of equity: i.e., cross-subsidisation between customers is reduced.

The Insurance Council of New Zealand (1995) in its proposal for a deregulated, multi-insurer system presents a range of figures which compare ACC performance with that of the general insurance industry. These figures are supposed to demonstrate that ACC is a less efficient provider of insurance than the private sector. In comparing ACC with those who handle claims for dented panels, stolen VCRs and occasional visits to the doctor, there is a complete neglect of the fact that ACC is a very complex medico-legal, rehabilitative business dealing with highly sensitive, long-term cases. There are certainly large numbers of straightforward payments for health-care treatment and income support, but a great deal of time and energy goes into complex, individualised rehabilitation negotiation and planning - that is, case management. Simplistic benchmarking with property, life and health insurance does not create a convincing case either for or against the private insurance industry's comparative efficiency in the injury insurance and rehabilitation market.

The arguments about the relative "efficiencies" of state monopoly versus deregulated systems have tended to work at cross-purposes. Woodhouse and subsequent advocates of the current ACC institution have seen its efficiency in terms of the low level of ACC's administrative costs as a proportion of the overall costs of the scheme. In other words, the present scheme is more efficient in delivering funds into the hands of injured persons rather than lawyers or shareholders. Those sceptical about the state monopoly provider will tend, on the other hand, to look at its overall cost to the economy, especially as a cost of labour. One thing we can be certain about, though, is that the 1992 Act appears to have provided a framework for reducing the rate of growth in ACC expenditure - although expected reductions in the employers' premiums have yet to be realised.

This stemming of a rising financial tide would no doubt be partly due to the effect of experience rating in providing an incentive on employers to rehabilitate workers on weekly compensation. Another reason, though, would be the removal of lump sums - not just because of their cash value, but also due to their effect as a strong incentive to claim.

Analyses from US researchers clearly suggest that compensation benefit levels are positively correlated with the frequency and severity of claims:

The principal findings of these studies is that the duration of disability varies directly with workers' compensation benefits and indirectly with the wage. The benefit elasticity in these studies is about 0.2 to 0.5, implying that a 10 percent increase in benefits yields about a two to five percent increase in the average cost per claim (Butler, 1994: 385).

This kind of effect appears to be a function of the *reporting* of injuries, and does not necessarily reflect a change in the risky behaviour of workers or firms. Butler's survey points to a "moral hazard" effect in workers' compensation systems, although other factors (such as the level of risky employment and the demographics of the workforce) will also have some effect on costs. The removal of lump sums in particular in New Zealand's case would probably alone have reduced the motivation to claim, and numbers of new claims have tended to decline. Given, though, that we do not know the full and true costs to society of injuries, it may be spurious to argue that this cost control means greater "efficiency". Costs may only have been transferred onto others and any withdrawal of co-ordinated institutional support may well result in long-term losses to the productivity and independence of those who have suffered personal injury.

Service effectiveness

Perhaps the most widely perceived disadvantage of a state monopoly provider, however, is in poor service quality. This could be counteracted by adequate entitlement regulations, setting clear objectives and standards for managers and staff and through effective evaluation systems, but at present ACC's service performance record is a poor one. In its own 1994 Annual Report (Accident Rehabilitation and Compensation Insurance Corporation, 1994), a summary of customer satisfaction surveys shows that injured persons, employers and health care professionals rated ACC consistently lower on average than other medical and general insurers. A problem with drawing the obvious conclusions from this kind of benchmarking is similar to that raised above in respect of the attempt to compare efficiency between ACC and private sector insurers: ACC's complex medico-legal business, its long-term relationships with injured persons, and its position as a State institution all make such simplistic comparisons highly problematic. Looking, however, in more detail at the survey of injured persons (CM Research, 1994), there was an overall average rating of "moderate satisfaction". On all service performance factors, however, one half to three quarters of respondents reported that they received a less satisfactory service than they would have expected. Items of particular influence in these ratings were professional and empathic communication, ease of use of forms and rehabilitation quality. The low perception of rehabilitation quality is of particular concern, as rehabilitation is vital for the return of claimants to work and social independence and for controlling the costs of the scheme.

A recent report on past procedures in ACC resulting from the Gluckman inquiry (Trapski, 1994) found that ACC's handling of sensitive claims was below the standard expected by private sector insurers. The events concerned took place in the 1980s, and a number of administrative steps have since been taken to prevent the further misuse of ACC's powers,

but the report does highlight a potential deficiency of systems where consumers have no opportunity to exit.

An imprudent financial policy

As mentioned above, one of the apparent efficiency advantages of the present ACC scheme is its ability to operate on a pay-as-you-go basis: that is, the scheme collects premiums in any one year sufficient to carry the costs of that year's expenditure and maintain a modest level of reserves. (ACC aims to have reserves equivalent to six months' expenditure). A fully-funded scheme, on the other hand, would require the collection and management of a fund large enough to pay off all projected future liabilities arising from current open claims.

While under the 1972 Accident Compensation Act levies collected in any year were expected to cover both current and future liabilities, the 1982 Act amended that to allow the Corporation to recommend levies which would cover costs over any period it chose (Rennie, 1995). The subsequent pay-as-you-go policy was arguably used as a means to keep employers' levies capped for the short term. The political reluctance to levy employers for the true costs of their ACC accident experience has led to two financial disasters in recent history: once in the mid-1980s, and again recently when the employers' account fell into the red and money had to be borrowed to meet ongoing commitments. To make matters even less transparent, ACC has traditionally accounted for its claims liabilities on an annual cash basis and has not revealed its level of unfunded contingent liability. Outstanding liabilities have been estimated, however, to total approximately \$5.5 billion (as of 31 March 1994 at existing dollar values) and only nine percent of this was funded from account balances (Trowbridge Consulting, 1994).

Although of short-term political expediency, the pay-as-you-go policy has resulted in a position which will satisfy neither those who wish to retain ACC and the Woodhouse principles nor those who wish to deregulate. The pay-as-you-go policy means that earners and employers who pay premiums today are funding the costs of victims of yesterday's accidents. Today's beneficiary cannot rest assured that he or she is being supported by benefits funded in advance, while those paying premiums today cannot be assured that their needs will be met in the same way in future. The beneficiary may be accused of living on "someone else's money", while those paying resent supporting unproductive members of society. Only in a fully-funded scheme can premium payers know that their premiums go towards their own injury risks. We can observe here a political problem which has also affected other welfare systems, especially superannuation. The vacillation between fully-funded and pay-as-you-go schemes seems to reveal National governments as particularly reluctant to collect funds in public hands large enough to guarantee future needs. Not only does a fully-funded State scheme require levying more from voters in the short term and sustaining this pace for the long term, but it also places the State in control of large amounts of investment finance which would otherwise be held by the private sector.

The level of ACC's unfunded liability which has accumulated as a result of the pay-as-you-go policy also creates a practical problem for the advocates of deregulation (Ministerial

Working Party, 1991; Insurance Council of New Zealand, 1995; New Zealand Employers' Federation, 1995). Employers in particular could not opt out of ACC cover for another insurer without first dealing with their remaining debts. Furthermore, companies which become insolvent may leave behind long-term claims on the scheme which then have to be paid for by surviving companies. To deregulate, then, Government must either increase premiums until the scheme is fully funded, or find some alternative means of managing remaining liabilities. For instance, old claims could continue to be funded on a pay-as-you-go basis from a surcharged levy while new claims are separately and fully funded. The costs of old claims could either be "bled out" or discharged when reserves were sufficient to cover future liabilities for the remaining "tail".

In any case, the problem is of such a magnitude that it cannot be solved in the short term. Until it is solved, the existence of unfunded liabilities creates distortions for both employers and injured persons: the system works more like welfare than insurance; premium levels are less predictable; and there is less latitude for tying premium rates to actual risk.

As mentioned above, the ability of ACC to operate without full funding gives it a competitive edge over proposed deregulated systems. The Employers' Federation are cited as admitting that "if ACC did not fully fund, it could set premiums way below private sector competitors" (Ward, 1995: 2). In conclusion, it appears that ACC is the most efficient option from the premium-payer's viewpoint, as well as succeeding in delivering a larger slice of the pie to injured persons. The business sector's demand for competition is apparently based on the premise that, in order to have "a fair and level playing-field", we all have to pay higher premiums which will fully-fund profit-making insurers.

The failure of entitlement by measuring-tape

One of the main deficiencies in the new ACC scheme which appears to be acknowledged now by all concerned is the inadequacy of the rehabilitation regulations (e.g., for attendant care, home help, home modifications). The regulations apply an inflexible system of assessment tools and formulae for calculating entitlements. The idea fits in with the long-term goal of deregulation, however: a central state agency determines systems for setting benefits and measuring entitlements, and these are underwritten and delivered by a range of accredited insurers. Although inflexible, such benefits would at least be relatively consistent across providers.

The rehabilitation regulations, then, appear to have been created in anticipation of deregulation. This can be confirmed by reading the report of the Ministerial Working Party. This committee recommended a weekly allowance of up to \$40 for permanent disability which was eventually implemented as the Independence Allowance. It was observed that:

For deciding degree of impairment a more objective scale for use by insurers is needed than the present table of maims We see no difficulty in developing an objective scale of measurement of impairment for use by insurers. *In a multi-insurer environment* it may be necessary to have one agency administering the guides as takes place in California (Ministerial Working Party on the Accident Compensation Corporation and Incapacity, 1991: 86, emphasis added).

Such an "objective scale" is precisely what the Independence Allowance (and other rehabilitation) regulations have attempted to put in place. In the greater scheme of things, these "objective" measurements would be coupled with the more precise gate-keeping definitions of cover for personal injury. This would result in a deregulated system by which all insurers would assess and remunerate individual cases in a consistent and well-defined manner. Unfortunately, the Ministerial Working Party failed to foresee the difficulties inherent in developing and implementing these measurements. Furthermore, the need to govern centrally multiple insurers in a deregulated market may not eventuate - at least for the time being.

From the claimants' perspective, the main criticism of this regulatory approach has been that it is inflexible and insensitive to the needs of the individual injured person. The regulations deliberately remove discretion from ACC offices so that requests based on special needs have tended to be denied. The measurement systems are mainly based on functional impairment, in social as well as physical terms, and compensate the claimant based on a relatively arbitrary, though more or less consistent, measurement scheme. It will not necessarily take into account the fact that the same degree of disability in two different persons may result in quite different, though nonetheless legitimate, needs.

The independence allowance assessment, for example, requires that the claimant respond to 136 statements about functional limitations caused by the injury. This is carried out by trained assessors, and may have to be repeated every so often for long-term cases. Some of these queries are quite intrusive, and, for many claimants, totally inappropriate: for example, items 48 ("I do less of the household chores than I used to do") and 72 ("My sexual activity is decreased") are hardly applicable to a young child. The final score which determines the allowance level is dependent on answers to all 136 items, however, thus disadvantaging the child claimant. Item 87 ("I have attempted suicide") may be relevant in terms of the emotional impact of an injury, but a claimant to whom this applies could be forgiven for not wishing to confirm this to a complete stranger.

This only hints at a few of the objections raised against the independence allowance assessment, not to mention the host of other rehabilitation regulations. The full litany of complaints has been well rehearsed by the review committee chaired by Bill Wilson (see Cliffe et al., 1995). In terms of case management, the outcome is quite contrary to what would be desired of a high-quality human service. The ACC case manager's task becomes restricted by a bureaucratic system which leaves little discretion, cannot always respond to actual and reasonable needs, and which does not necessarily compensate the victim at a level required for successful rehabilitation.

In the author's opinion, a preferable alternative approach would see the claimant's needs as the starting-point rather than use a relatively arbitrary measurement of disability. Case management would come into action in response to these identified needs. The gate-keeping and needs assessment functions would be crucial points for service effectiveness and fairness. Rather than attempt rigidly to regulate entitlements, services could be based on verifiable standards of quality care, promotion of independence, confidentiality, etc. Claimants who see that the Corporation's approach is based on a partnership in identifying individual needs will be less likely to perceive the organisation as working to prevent their full care and recovery. Improved internal management systems for service quality may be

capable of preventing many reviews and appeals, provided there is the regulatory ability to respond to the individual claimant with greater flexibility.

The present regulatory system has attempted to address the potential for inconsistency of decision-making and cost escalation. The results, in many cases, are acknowledged to have been ineffective service delivery, unnecessary hardships to claimants and wastage of ACC funds (Cliffe et al, 1995).

Given an alternative system of reasonable quality standards, on the other hand, the potential is there for the ACC to achieve a service which overcomes these dilemmas. Flexibility and discretion in decision-making will more likely be perceived as unfair and inconsistent if based on non-transparent criteria. Claimants' demands will only result in cost escalations if genuine needs are not clearly defined in the context of improving independence and productivity.

In the meantime, regulations to deal with potentially high-profile "complex" cases were put in place to allow the Corporation more discretion. At the time of writing, amending legislation before Parliament seeks to give ACC wider flexibility by allowing social rehabilitation payments over and above that provided for by regulations, although the unwieldy regulations themselves remain in force for run-of-the-mill cases. The proposed discretion would be subject to Ministerial policy directions, thus widening the risks of political interference. It is, moreover, proposed to change the means of assessing the Independence Allowance from the present system to the American Medical Association Guides to the Evaluation of Permanent Impairment.

The principal lesson to be learned is that, while the regulations were designed to govern multiple insurers, the expected gains from the proposed competitive environment in terms of improved service quality would have been seriously compromised due to the unresponsiveness and inflexibility of the regulations. As with the experience of Crown Health Enterprises, no amount of private-sector management expertise can improve public-sector service delivery if resources are inadequate. Effective rehabilitation service will never eventuate if the rules are heedless of the needs of the individual.

To sue or not to sue?

The intention here is, once again, to look at both sides of a highly contentious debate: in this case, whether to allow injured persons to sue for compensation where they are the victims of the negligence of others.

The 1992 reform of ACC legislation has, in the light of perceived inadequacies in the levels of compensation, led to calls for a return of the right to sue for personal injury-related damages in New Zealand Courts. These claims are often justified in reference to a "social contract" by which New Zealand citizens accepted the suppression of a legal right in exchange for an ACC system which provided certainty and adequacy of entitlement regardless of cause (Vennell, 1994; Wilson, 1994).

Accident Compensation 1995 (Cliffe et al., 1995) does acknowledge and reaffirm this "social contract", preferring the term "compact" which I take to be synonymous:

... the accident compensation scheme is a compact under which the common law right to sue for damages was withdrawn in return for the comprehensive availability and cover of the scheme (p.9).

With this principle reaffirmed, it would be beyond the bounds of legitimacy for the State to withdraw its direct guarantee of universal cover and comprehensive entitlement without returning the right to sue.

The loss of lump sums (particularly those for pain and suffering and loss of enjoyment of life) has created a loss of confidence in the legitimacy of this "trade-off", however. A number of high-profile cases has emerged where the victims of someone else's apparent negligence may be left with no right to sue under ACC law, but also with virtually no compensation of any significance. For instance, some medical misadventure cases (such as an unnecessary mastectomy performed as a result of misdiagnosis) often have devastating consequences for the victim while not greatly affecting capacity for work and social life. A significant loss to a person, although caused possibly by negligence, can go both unpunished and virtually uncompensated. Such cases highlight the perversity of a law which extends insurance cover whether the individual wanted it or not, and then offers, in certain cases, no compensation, but still refuses the right to seek redress through the Courts.

The Courts have nonetheless moved to reinstate limited forms of compensation for victims. Fines under the Health and Safety in Employment Act 1992 are now routinely used to award sizeable sums to victims of workplace accidents where the employer has been found in breach of the Act. In one such judgement, Judge Moore, in awarding \$5,000 to the victim, commented that ACC payments "have now ceased or become reduced - in many cases - to a level which many sections of the community regard as almost contemptuous . . ." (*Department of Labour v Alexandra Holdings Ltd.*, 1993). Of more serious consequences, however, was the decision by Master J C A Thomson in the Wellington High Court not to strike out a claim for exemplary damages by an injured employee (*Akavi v Taylor Preston Ltd*, 1994). The judge comments that, "Reduced availability and quantum of accident compensation may parallel the situation which occurred early this century when Courts began to extend the concept of negligence to permit common law damages to be awarded because it became notorious that the statutory compensation available under the Workers' Compensation Act was clearly inadequate" (p.14). More recently, a victim of sexual abuse, who already had ACC cover, succeeded in a civil claim for exemplary damages against the perpetrator (*Sunday Star Times*, 1995).

Some commentators have seen this judge-made law as undermining the intentions of Parliament (Knowles, 1995). But it could equally be said that judges are simply applying principles which restore certain legal rights which Parliament has failed to protect. As Vennell points out:

... there is an argument that it is unconstitutional to take away any right of a citizen unless it is replaced by an equivalent right. If this is so the rights of the citizen are entitled to the protection of the courts and the legal system (1994: 7).

Accident Compensation 1995 does little to address this basic issue of an imbalance of rights. The main concern appears to be to defend the integrity of the ACC scheme by dealing with the boundaries where torts may still apply.

Two main anomalies appear to have arisen with the current law. The first involves injured persons who are covered by ACC and yet receive no significant compensation, even though a negligence action may otherwise have been possible. Examples are: the misdiagnoses at Good Health Wanganui which led, among other things, to unnecessary mastectomies being performed; and the Cave Creek disaster where a number of students died. In both cases, ACC does not compensate in any significant way for the non-economic losses to the injured persons or the bereaved, and yet the possibilities for negligence actions seem obvious. When weighed up against recent large awards in defamation cases, the benefits currently available to those grievously injured or bereaved due to someone else's negligence seem insultingly negligible.

A hypothetical example of the second kind of anomaly would be an armed bank robbery where one teller is threatened with a loaded shotgun, and another teller nearby is actually shot and wounded. The latter's injuries would be covered by ACC, while the former would not since her "injury" would consist of mental stress alone. The teller who was *not* shot would, in theory, be able to sue for compensation in a New Zealand Court while the one who was shot and wounded is definitely barred from such proceedings.

Situations may thus arise wherein it may appear to be inequitable to be covered by ACC, and hence the famous "compact" with the people of New Zealand is seen to be increasingly anomalous.

Deregulation and the right to sue

One of the basic conceptual muddles which has arisen around this is the failure to see the distinction between the principle of "no fault" and that of "no right to sue". The two are closely inter-related, but not quite the same: "no fault" implies that eligibility for statutory compensation does not require proof of negligence, nor can it be disallowed due to contributory negligence; "no right to sue" means that there is a statutory procedural bar against any actions in a New Zealand Court for compensation for personal injury suffered in New Zealand (Rennie, 1995). Perhaps our history of a generation under ACC has led us into blurring these two concepts. Prior to ACC we had a "no fault" workers' compensation system (in that, to gain cover, proof of the employer's negligence was not a precondition, and contributory negligence was not considered). Common law actions, however, were also permitted, though contributory negligence could then be taken into account.

The Employers' Federation may thus be advocating an unworkable compromise: a return to the pre-ACC system, and yet no return of the right to sue - with the apparent assumption that "no fault" automatically means "no right to sue" (Knowles, 1995). If injury compensation becomes a matter of contract for which an individual or firm must be responsible, any further restrictions on their civil freedoms would seem quite inconsistent.

Readmitting the right to sue, however, does not necessarily deny injured persons the right to a no-fault compensation system. It is conceivable even that, in negotiating individual employment contracts, employees may contract out of their right to sue the employer (in return, of course, for provision of adequate no-fault insurance and management of hazards), but it would seem wrong for the State to impose that restriction across a deregulated market. If the source of injury insurance is to become a matter of individual choice, then so should the decision to appeal to the Courts in cases of negligence.

To the contrary, it may be argued that, provided there is a compulsory, statutory "umbrella" guaranteeing universal, no-fault cover, then the right to sue can still be suppressed (Knowles, 1995). A system with private insurer participation may bring us closer into line with other jurisdictions, but then other jurisdictions do not maintain a blanket ban on negligence actions. The only interests which would sustain this combination of deregulation and abolition of the right to sue would be those of employers, doctors and the wealthy - who would no doubt prefer not to be sued for their occasional negligence.

The only legitimate way to continue suppressing the right to sue would be to maintain a state monopoly provider, as Woodhouse originally and correctly saw. But ACC as a sole insurer stands in quite an anomalous position, ideologically speaking, in relation to the principles of the Employment Contracts Act. The latter's basic concepts of freedom of association and negotiation of specific conditions of employment are at odds with compulsory, statutory systems such as ACC.² In a truly liberalised economy, ACC as we know it would not exist and the individual would be free not only to choose an injury insurance policy, but also to seek remedies from the Courts in cases of injury caused by negligence. Access to the Courts for common law remedies in disputes over employment contracts, for example, has already been established by precedent in the Court of Appeal (*Turner v Ogilvy Mather* cited by Latimer and Quigg (1995)). This case proceeded outside of comprehensive statutory personal grievance procedures under the Employment Contracts Act because it may have been lodged after the Act's 90-day time limit - but it was made possible, of course, by the absence of any explicit limitation on torts. Any move toward a multi-insurer, contractual system for covering injury costs, on the other hand, could *in theory* continue with the suppression of the right to sue - provided Parliament was willing to pass such a law. But in practice it would undoubtedly lead at least to greater legal and political pressures for common law remedies and it would be quite inconsistent with the liberal contractualism of the Employment Contracts Act.

A recent survey of public perceptions of ACC found that a majority of New Zealanders (56 percent of those surveyed) agree with the principle of "no fault" injury insurance under ACC: meaning that "you are covered by ACC even if the injury is your fault." On the other hand, only 43 percent agreed with the principle of "no right to sue", while 49 percent disagreed with it (MRL Research Group, 1995). People are clearly able to distinguish between the two principles, and the survey would suggest some electoral support for a policy of continuing with "no fault" injury insurance, and yet allowing for the possibility of common law actions.

² For a fuller discussion of the anomalous position of ACC in relation to National's labour market reforms, see Duncan (1995)

The negligence action, however, was accurately portrayed by Woodhouse as a capricious and wasteful means for gaining compensation (Royal Commission of Inquiry, 1967). Palmer (1995), in discussing the American tort system, describes it as "a discreditable social institution propped up by forces of privilege whose motives cannot survive scrutiny" (p.1169) and advocates its abolition. Woodhouse, moreover, rightly saw that it only became possible to abolish torts if the State, on behalf of the whole community, were to be the guarantor of adequate universal, no-fault compensation. Supporters of deregulation may have a strong argument in their favour, but they cannot legitimately cling to the "no right to sue" policy at the same time. If the individual is to be compelled to provide for his or her own personal insurance, then it should be possible for that individual, when circumstances allow, to accept the risks and benefits associated with tortious remedies. But, if deregulation were to bring in its wake the inevitable rise of torts litigation, then we would be reminded of what an economically and socially inefficient means of providing compensation torts can be. Studies of the transaction costs of the American tort system show that victims receive less than half of the money spent (Palmer, 1995), whereas in New Zealand only about eight percent goes on administration, and the rest directly to injured persons and their treatment providers.

What is "real" compensation?

Many critics of the current scheme, such as the New Zealand Council of Trade Unions and the Alliance Party, share a central concern about the current imbalance between the ARCI Act's suppression of rights and a lack of "real compensation" especially in respect of non-economic losses - an important balance established by Woodhouse. Part of the problem perhaps resides in the term "real". In many cases, no amount of financial support can compensate for the "real" losses sustained by an injured person or a bereft family. It appears, moreover, that compensation insurance systems do not even account for the full *economic* costs of injuries to the community, according to available data from the USA and Australia (Alliance Parliamentary Office, 1995).

It is no doubt appropriate that certain costs should be the responsibility of the individual, or there would be almost unlimited demand on the scheme. A ceiling must be set, and the debate on ACC is largely about what is a "realistic" ceiling and about who is responsible for funding it.

The two main sides of the debate are perhaps best represented by the Alliance Party (Alliance Parliamentary Office, 1995) and the Insurance Council of New Zealand (1995). The former would view ACC as a right of workers and citizens which should adequately serve the needs of the injured person. The insurance and business lobbies would view ACC as a potential future market for expansion and as a cost of labour which must be minimised. Given the scheme's present financial position, though, it seems impossible for either policy option to deliver lower premiums in the medium term: More generous benefits will require higher premiums and will increase the "claims reporting moral hazard" (Butler, 1994). But deregulation will also bring its costs as insurers will need to be fully funded, produce profits and cover the costs of the "tail" of old claims.

A way forward

Current legislation was based on the claim that ACC was becoming "unaffordable" - but without any research into the true costs to the community of injury nor any widespread consultation about what the community believes it can afford. Moreover, it was taken for granted that the community still wishes to maintain the Woodhouse "compact" wherein ACC benefits are given by right in exchange for relinquishing the right to sue. From the author's experience, it would appear that most parties to the debate do not wish to see a return of the torts system, and so this may be taken as an axiom for further research and debate. Without then presupposing what are the most desirable levels of compensation or the best means for delivering it, the following, by way of conclusion, is a proposed process (more or less in temporal order) by which government could consult with the community about accident compensation policy:

- A reaffirmation of Parliament's intention not to return the right to sue for compensation for personal injury in New Zealand Courts; and hence a commitment to guaranteeing a replacement scheme which balances social and economic interests and takes into account the civil rights foregone.
- Research into the full and "true" costs, both economic and non-economic, of personal injury to the individual and the whole community.
- Inform the public about the risks to the individual of personal injury, and the likely consequences, costs and needs arising therefrom.
- Discussion of the limits to what risks should be collectively and compulsorily insured and what other risks should be accepted by the individual.
- Full information about the premiums required to fully-fund each different level of cover and benefits proposed.
- A decision as to what levels of compensation are generally accepted by the community as adequate and necessary and yet affordable.
- Debate about the most appropriate institutional arrangements to deliver such insurance, on the basis that structural considerations should be subordinate to strategic policy decisions.

Judgments about affordability can never be properly made in the absence of good information about the risks and benefits involved. We may, for example, decide that we are currently underinsured and thus wish to pay higher premiums. Furthermore, if New Zealanders would mostly prefer not to have the right to sue, then certain conclusions must be drawn about the rights they would need to be guaranteed in return. There may, however, come a point at which the electorate would support a limited right to sue - distasteful as it may seem to many - on the basis that the plaintiff shoulder the burden of risk involved in making a claim, and the defendant be publicly held to account and disciplined for negligence. Such views will be encouraged by any combination of inadequate ACC benefits and user-pays policies.

Government's latest contribution to the debate (Cliffe et al., 1995) has been an informative document, but, in clear and bold recommendations it is notably lacking. By the time this article comes to print, Parliament will have debated the amendments before it. These

amendments do propose some important changes. What is absent at the time of writing is any substantial movement on the fundamental, unresolved political and economic questions around the delicate balance of individual rights and responsibilities and State versus private-sector ownership. Like many other outstanding policy issues, ACC seems to be languishing in a Parliament paralysed by an uncertain environment of political allegiances and by the sheer complexity of the issues.

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