

ACCOUNTING FOR ACCIDENTS: SOCIAL COSTS OF PERSONAL INJURIES

*Richard Gaskins**

This short article places the current controversy over the funding of the Accident Compensation regime within the wider context of the original Woodhouse vision of a system that directly deals with, and consequentially alleviates, the wider Social costs of accidents and their impact on individuals. Gaskins argues that an over focus on the "Programme costs" of administering the current scheme risks ignoring the real originality of that vision by focusing simply on the cost of providing benefits rather than on reducing the costs that accidents to society and the individuals that suffer accidents.

I THE SOCIAL COST FRAMEWORK: TWO LEVELS OF ACCOUNTS

How should New Zealand fund its unique national policy on accident compensation? This question has played a decisive role in the evolution of Accident Compensation Corporation (ACC) legislation since its inception in 1974, having provoked intense debate during the lengthy drafting process.¹ In addition to political considerations, the funding component must reflect the complex time horizons surrounding policy objectives of injury prevention, rehabilitation, and compensation. Looming behind this process is the danger that the distinctive no-fault conception will be weakened if fault-like criteria control the design of funding mechanisms. Over time, public conceptions of the ACC scheme have been shaped by resistance to the apportionment of levies, raising the broader question of whether ACC should be seen as "insurance" or "welfare", and what it means to call it "social insurance".

* Brandeis University (Massachusetts, United States of America). The author wishes to thank Alan Clayton, Grant Duncan, Brian Easton, Don Gilling, Geoff McLay, and Susan St John for comments on earlier drafts. Remaining errors are the sole responsibility of the author.

1 Current legislation is the Accident Compensation Act 2001 and later amendments. Texts of major statutory versions are archived at Accident Compensation Corporation website <www.acc.co.nz>. A useful legislative history from 1974 through the 1992 Act can be found in Ian B Campbell *Accident Compensation: Its Rise and Fall* (Auckland University Press, Auckland, 1996). For a review of legislative debates surrounding funding, see Susan St John "The Rationale for Pre-Funding ACC" (2009) ACC Future Coalition <www.accfutures.org.nz>.

Accounting issues tend to mask larger concerns about the complex risks associated with personal injury, especially whether and how such risks can be reduced to purely financial terms.² For such broader concerns we must revisit the original vision for the scheme, going back to the 1967 *Report of the Royal Commission (Woodhouse Report)*.³ This Commission, chaired by Sir Owen Woodhouse, was deeply concerned with accounting concepts and funding estimates. Its creative vision for personal injury was framed in accounting terms, defining a distinctive social dimension of costs, as announced in the opening sentences of the *Woodhouse Report*:⁴

The Problem – One hundred thousand workers are injured in industrial accidents every year. By good fortune most escape with minor incapacities, but many are left with grievous personal problems. *Directly or indirectly the cost to the nation for work injuries alone now approaches \$50 million annually.*

A *Social Costs*

According to these opening paragraphs, personal injuries place a heavy toll on New Zealand society, as they do in other countries with similar levels of economic development. These aggregated private and public costs, along with society's failure to offset them, provide the fundamental reference point for all that follows in this influential report. The "toll of personal injury"⁵ includes a diverse mix of "direct" and "indirect" costs, both difficult to reduce to a single monetary figure – although Woodhouse cites estimates for the extended costs of workplace accidents. These costs fall initially on what the *Woodhouse Report* describes as random but "statistically inevitable"⁶ victims, with a series of effects that may include immediate pain, lost earnings, loss of future function and reduced long-term economic prospects. The *Woodhouse Report* extends this social accounting model to include the impact of serious injuries on victims' families, on their workplaces, and onwards through the social and economic networks in which individuals are embedded. Acknowledging the larger network effects of personal injury, with their diffuse Social costs⁷ was one of many prescient insights found in the *Woodhouse Report*, which takes a

2 For a public policy perspective on accounting, see Anthony G Hopwood and Peter Miller (eds) *Accounting as Social and Institutional Practice* (Cambridge University Press, Cambridge, 1994).

3 New Zealand Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (Government Printer, Wellington, 1967) [*Woodhouse Report*]. Full text available at Auckland University Library website <www.library.auckland.ac.nz>.

4 *Woodhouse Report*, above n 3, at [1] (emphasis added).

5 *Ibid.*

6 *Ibid.*

7 *Ibid.*, at [34]. By "Social costs" I mean a diverse range of costs incurred outside the parameters of market exchange. This usage includes what some economists call "external costs" or "spillovers" but goes beyond the notion of costs modelled as potential market transactions. This broader usage is commonly found in German and American Institutional economists, perhaps most notably in K William Kapp *The Social Costs*

whole-of-society perspective that has since found strong support in public health studies of injury and disease.⁸

By 2003 injury researchers in New Zealand managed to assign a dollar figure to this complex toll for all personal injuries – somewhere around NZ\$6-7 billion per year (in current dollars).⁹ The toll of personal injury is the sum of Social costs that have already been paid, not a mere spending target dreamt up by utopian social planners. It signifies real losses accruing annually, extending from concrete victims to their families, to their associates and to the community as a whole, in a cycle destined to continue if nothing is done to prevent future injuries of the same type. These losses afflict individuals but are spread through social channels of interdependence, as the consequences of more serious injuries accrue over time, encompassing past and future victims. These losses have already occurred and will continue to occur. By invoking this grim toll, the *Woodhouse Report* established a social accounting framework for assessing the community's combined efforts to remediate the damage. It was a heavy deficit that demanded immediate attention.

Responsibility for addressing these costs, according to the *Woodhouse Report*, belongs to the community that participates in the same risk-bearing activities that, taken altogether, generate losses.¹⁰ Remediating these Social costs requires multiple strategies. It means taking steps to reduce the likelihood of similar injuries in the future; it means reducing the contagion of loss through social and economic networks; and it means countering the impact on individual victims. Woodhouse identifies these three strategies as prevention, rehabilitation and compensation, stressing that order of priority.¹¹ From an accounting perspective, these coordinated responses from the whole community reduce the social deficit raised by the toll of personal injury. Defining injuries as a time series of Social costs puts the mitigation emphasis on prevention and rehabilitation, anticipating models developed by public health research in later decades. The *Woodhouse Report* famously concluded that removing the compensation process from common law courts and Social Security would allow society to address these losses more efficiently. A comprehensive plan for compensation and rehabilitation reduces follow-on losses, and it builds an essential database for injury prevention. The *Woodhouse Report*, with its trademark clarity, balances all these remedial

of Private Enterprise (Schocken Books, New York, 1971). In this article I adopt the convention of capitalizing initial letters in my contrasting terms "Social costs" and "Programme costs," as a continuing reference to these two distinct accounting levels.

8 See, among many sources, Robert Beaglehole and Ruth Bonita *Public Health at the Crossroads* (2nd ed, Cambridge University Press, Cambridge, 2004).

9 For this figure and other assessments of the toll of personal injury, see the New Zealand Injury Prevention Strategy website <www.nzips.govt.nz>.

10 This is the Woodhouse principle of community responsibility. See *Woodhouse Report*, above n 3, at [5] and [42].

11 *Ibid*, at [2].

strategies against the scope of the underlying social problem: in this way the community mobilizes resources to meet the toll of personal injury. New Zealand society will never close the gap entirely but it can move farther and faster in that direction. The overall vision of the *Woodhouse Report* is built on this accounting model, laying out a policy agenda for remediating the toll of Social costs.

B Programme Costs

Today, the accounting issues surrounding ACC are confined to a different level from the one just described, played out on the programmatic level of costs and revenues passing through the ACC Corporation, which is charged with implementing the mission inherited from the *Woodhouse Report*.¹² On this more immediate level of accounting, the notion of injury loss is pegged to shifting statutory definitions of entitlements. These costs are more narrowly defined as Programme costs: the sum of claims properly filed under the ACC statute and regulations. Statutory entitlements for compensation and rehabilitation administered by the Corporation must be funded by revenues flowing into Corporation accounts. The balance of claims and revenues must be consistent with generally accepted accounting practice used in the New Zealand public sector, which has shifted over the lifetime of the injury scheme.¹³ Going back to the first ACC statute of 1972, entitlements under the compensation scheme have always been carefully circumscribed by conditions of political possibility. They have excluded a vast portion of the burdens contained in Woodhouse's "toll of personal injuries", certainly falling short of the annual figure of NZ\$6-7 billion (using dollar values from 2003). Some of these burdens are ignored entirely; others are shifted to other programmes (health and welfare payments; employers' sickness benefits) and in some rare instances back to the tort system. By default, the balance of Woodhouse's "toll" of Social costs remains where it falls – on the victims and extended members of the community. Along with these sunk costs, prevention policies for future injuries have been slow to develop. The National Injury Prevention Strategy of 2003 was a welcome step.¹⁴ Even then, the announced priorities are narrowly targeted to reducing Programme costs, thereby easing pressure on the Corporation's revenues. Only a small subset of prevention strategies may be self-funded in this manner. Public prevention policy has yet to address the general principle of who should pay the up-front costs of injury prevention. How should any proposed Programme costs of prevention be allocated, where the goal is to reduce future Social costs of personal injuries?

12 It is important to distinguish ACC legislation from administrative actions taken by the Accident Compensation Corporation. Both the statutory framework and the implementing Corporation are commonly referred to as "ACC", but this article tries to maintain a clear distinction.

13 Donald M Gilling "The New Zealand Public Sector Accounting Revolution" in Ernst Buschor and Kuno Schedler (eds) *Perspectives on Performance Measurement in Public Sector Accounting* (Paul Haupt, Berne, 1994) 197 at 217.

14 NZIPS website, above n 9.

The problem of costs must be analysed on two separate but related levels. Social costs (Level 1) are widely distributed real costs referred to by Woodhouse as "the toll of personal injury" in New Zealand. Later researchers have assigned a recurring annual figure of NZ\$6-7 billion to this level. On this broad level, a diverse sum of costs must be balanced against the combined remedial efforts, both public and private, devoted to injury prevention, rehabilitation and compensation. Even though we cannot begin to attach a dollar figure to this mitigation effort, it remains well below the overall injury toll. The *Woodhouse Report* articulated this vital social level of accounting more simply and elegantly than any other document of its kind. While the concepts advanced by Woodhouse in 1967 may have seemed elusive, they connect with an entire tradition of institutional economics that flourished earlier in the twentieth century. They may also be seen, in retrospect, as anticipating concepts that would emerge within the environmental movement, which has developed its own literature about environmental costs, sustainability, and "green accounting".¹⁵

After setting its discussion within the framework of Social cost accounting (the "toll of personal injury"), the *Woodhouse Report* turned its full attention to remedies. Addressing the other side of the balance sheet for Social costs required an inventory of existing remedial programmes, comparing those programmes against the accounting target of Social costs and proposing more efficient ways to bring these two sums into closer balance. Radical as the Woodhouse proposals seemed, they were conservative from a fiscal perspective – striving to remain within the limits of existing remedial expenditures, and proposing ways to offset a higher proportion of Social costs through administrative efficiency. Maintaining the fiscal status quo was politically important, so that Programme revenues for compensation and rehabilitation might continue to flow from existing funding streams. Legislative drafters accentuated this conservative approach by importing allocation formulas from existing workers' compensation insurance.¹⁶ The balance that was finally struck between Social costs and remedies moved substantially closer to equality but still remained far short. Nonetheless, the direction of change was clearly mapped out, and the appropriate target for remedial efforts was brought into sharp relief

By contrast, the perspective of Programme costs (Level 2) remains within a more circumscribed set of accounts, limited on the cost side to only those individual claims allowed by statute. Policy debates that focus on this narrower accounting level tend to ignore the reference point of Social costs, integral to the Woodhouse analysis of interconnected social patterns. Conventional audits of Programme costs and revenues simply compare the costs of claims incurred by the Corporation against the levies and taxes collected by the Corporation under its revenue structure.

15 The Institutionalists were a diverse group working predominantly in Germany and in the United States in the first half of the twentieth century. See, for example, John Maurice Clark *A Preface to Social Economics* (Farrar & Reinhart, New York, 1936). A bridge between this group and the later environmental accounting movement is Kapp, above n 7.

16 See Campbell, above n 1.

Without the framework principles of Social costs, any gap between these Programme costs and revenues brings tactical instability to the ACC scheme, as interest groups vie over lowering benefits or raising revenues. Such debates often obscure the larger principles of policy design, which focus on broader strategic questions about how to relate statutory entitlements to the higher-level definition of Social costs. The tension between these two accounting levels was present at the scheme's inception and remains central to the policy debate, if often suppressed behind more tactical concerns. Among the suppressed assumptions are the comparative performance of public programmes and private markets, as public policy has generally been wracked by the "states versus markets" dichotomy. The intensity of this institutional debate may drive both sides to focus more heavily on means rather than ends – on the mechanisms for funding the Corporations' existing programmes rather than on the Woodhouse goal of remediating Social costs.

The *Woodhouse Report* made a serious effort to reconcile accounts at the immediate level of Programme costs. It offered practical reasons for building its compensation proposals on existing funding streams associated with workers' compensation and motor vehicle insurance, seeking to leverage these sources to provide the bulk of needed revenues. It ultimately concluded that a small additional sum would be needed from general taxation to raise programme revenues to cover proposed statutory benefits. During the years leading up to the 1972 statute, legislators trimmed back on the scope of benefits, even to the point of excluding housewives and other "non-earners" from the initial statute supported by the National government. These political battles have been thoroughly chronicled by key participants.¹⁷ The practical need to balance Programme costs and revenues, fully accepted by Woodhouse, has tended to overwhelm the more significant accounting framework of Social costs.

Among the recurring ACC funding issues, conducted entirely on the level of Programme costs, is the debate between the present funding of future programme costs (usually called "full-funding" or "pre-funding") in contrast to annual funding for only those benefits paid out in the same year (usually called "pay-as-you-go"). (There are, to be sure, many possibilities between these two extremes.)¹⁸ As our later discussion will show, the main arguments for pre-funding at the level of Programme costs seem to abandon the larger framework of Social costs. The Programme costs that are said to be pre-funded are future costs of existing Programme entitlements only. As a revenue target, these particular costs inevitably fall short of meeting those Social costs, both present and future, that fall outside the statutory boundaries of the scheme. Even "fully-funded" revenue regimes will never achieve balance with future Social costs. Later generations are inevitably left to determine how many Social costs to build into the evolving entitlement programmes administered

17 The leading insider history is Geoffrey Palmer *Compensation for Incapacity* (Oxford University Press, Wellington, 1979).

18 Susan St John, above n 1.

by the Corporation. At any given time, a pre-funded Programme budget for the Corporation would still leave a vast portion of Social costs uncovered, both in the present and in the future.

II SOME FUNDING PRINCIPLES AND THEIR ASSUMPTIONS

According to the *Woodhouse Report*, funding a compensation scheme is one way to remedy the accounting imbalance at the higher level of Social costs. As the *Woodhouse Report* emphasises, the toll of personal injury in New Zealand is already being paid – directly, by the injury victims, and also indirectly, by those who connect with them through families, workplaces and communities.¹⁹ The policy question is how to shift some of these costs through taxation or levies to support a compensation scheme. A similar point arises with rehabilitation services. Less obvious from the *Woodhouse Report* is how the costs of preventing future accidents should be funded, given the inevitability that real injuries will continue to accrue throughout social networks.

With its primary focus on the remedial strategy of compensation, the *Woodhouse Report* saw the problem of funding as a matter of alleviating the Social costs falling on random but "statistically inevitable" victims by shifting them to a broad cross section of the community, whose activities support the injury-generating practices of a complex industrial society. Over time, however, as the accounting focus narrowed to the level of matching Programme costs and Programme revenues, the level of discourse has often reverted to the pre-Woodhouse language of common law and workers' compensation.

Both fields embodied distinctive assumptions about when to shift injury burdens from victims onto others, each one posing a different root question. In the common law tradition, cost-shifting turned on answers to the question "who caused the injury?" In the case of workers' compensation, the relevant question was "who was in a position to prevent (or mitigate) it?" The first question, which evolved early-on into the notorious "fault" principle, belongs conceptually to the nineteenth century; the second belongs to the first half of the twentieth. A third question emerged out of both traditions at about the same time as the publication of the *Woodhouse Report*: "who is in a position to prevent it most efficiently?" All three questions figure heavily in current ACC funding debates. The third one, in alliance with free-market advocates, opens the door to private insurance concepts, and has posed the strongest challenge to the Woodhouse framework.

A Who Caused It? (Whose Fault Was It?)

These questions mark the long development of tort law from the early years of the 19th century.²⁰ They reflect a moral asymmetry embedded in common law: that injury losses stay with the victim, unless the injury was caused by a financially viable defendant. Even this condition was tightened up further to require that the defendant was "at fault", that he or she had done something

¹⁹ *Woodhouse Report*, above n 3, [59] and [61].

²⁰ *Ibid*, [63] and [68].

wrong in causing the injury. Questions about causation and fault are raised by defendants seeking to avoid shouldering the plaintiff's loss: "it wasn't my fault – I didn't cause it – don't hold me responsible". Of course, the victims may also be blameless; but under this regime the loss remains with them, unless someone else can be found who passes the fault test.

The *Woodhouse Report* repudiates this moral framework, which had been riddled with exceptions and anomalies during the first two-thirds of the 20th century.²¹ By the late 1960s many commentators across the common-law realm had lost confidence in the fault principle.²² It failed to capture the complex causality of motor vehicle injuries, let alone diseases linked to environmental sources. It was ruinously costly to administer, mired in fictions and abstractions and subject to inconsistent results across similar cases. Woodhouse made at least two significant contributions to this growing critique. First, he assessed the performance of common law from the accounting level of Social costs. As tools for mitigating the toll of personal injury, common law methods come up scandalously short, leaving a large deficit of Social costs.²³ Second, based on his analysis that "all industrial activity is interdependent", Woodhouse emphasized that personal injuries stem from multiple causes, too complex to disentangle and too expensive even if we could.²⁴ This view of causation had radical implications for funding the new compensation scheme. Injury victims would be entitled to compensation regardless of the cause of injury; and by the same token, those funding the scheme could not avoid responsibility by saying: I didn't cause it – it wasn't my fault.

Over time, paradoxically, the pioneering "no-fault" New Zealand scheme has evolved to the point where all the vagaries of the fault system reappear in debates about funding and levies. A scheme that was inspired by clear-headed accounting at the level of Social costs has acquiesced in the old common-law ethic, which would relieve the levy payer because he or she did not cause the injury – or was not "at fault". The intuitions that haunt this discussion are ancient, of course and can be excused as part of human nature. But the dominance of early ACC administration by lawyers may have helped perpetuate this style of contesting levies. In recent months, as funding issues have moved further to the centre of public attention, New Zealand motor-bikers have protested threatened levy increases by declaring that they do not actually cause the serious injuries that many of them succumb to. Their message echoes the arguments raised by many other interest groups seeking to reduce their levy assessments.

21 Ibid, [82] and [84].

22 See Terence C Ison *The Forensic Lottery* (Staples Press, London, 1967); Guido Calabresi *The Costs of Accidents* (Yale University Press, New Haven, 1970).

23 *Woodhouse Report*, above n 3, at [83].

24 Ibid, at [467].

B Who is in a Position to Prevent (Mitigate) it?

In historical terms, a very different kind of question emerged to address the Social costs of personal injury in industrial workplaces. Shifting these burdens onto industry came early to New Zealand and spread throughout the industrial world in the early 20th century.²⁵ Historians disagree on the motivations behind this movement, but it signalled a growing awareness that the incidence of personal injury is governed by collective factors – by organizations, technologies and environments. The *Woodhouse Report* expressed a forward-looking version of this perspective:²⁶

People have begun to recognize that the accidents regularly befalling large numbers of their fellow citizens are due not so much to human error as to the complicated and uneasy environment which everybody tolerates for its apparent advantages. The risks are the risks of social progress, and if there are instinctive feelings at work today in this general area they are not concerned with the greater or lesser faults of individuals, but with the wider responsibility of the whole community.

Further evidence for this growing feeling, according to Woodhouse, was the widespread acceptance of private insurance, with its capacity to spread losses across vast segments of the population. In the early 20th century, businesses had been asked to underwrite comprehensive insurance, not because they were the "cause" of workplace injury, but because they were in the best position to mitigate it through insurance, and to pass costs on to consumers. But compensation was only one part of the larger movement for progressive reform. Industrial safety specialists believed, perhaps naively, that individual companies could and would engineer their way to reducing future injuries. The basic intuition seems correct that injury prevention requires an organizational focus. But the competitive pressures of industrial capitalism made it difficult for any single enterprise to invest in safer work conditions, or indeed in safer technologies.

Shifting the toll of personal injury to those who could prevent or mitigate loss was a promising idea at first, but it lost focus as the 20th century progressed. In the case of motor vehicle injuries, which posed a crisis at mid-century, the larger safety issues fell to the state, and the trend to "no-fault" insurance reflected the high cost of trying to allocate burdens according to causation or blame. As Woodhouse emphasized, limited no-fault regimes backed by compulsory insurance could mitigate only one segment of the larger toll of personal injuries. Many people suffered injuries outside of work and off the highways.²⁷ And more strenuous mitigation was needed beyond pooling the costs of compensation, requiring also some state-directed efforts at injury prevention. At the time of the *Woodhouse Report* American law was beginning to confront the surge of "products liability" claims and some American commentators were looking to collectivize both compensation

25 For a classic history see Ian B Campbell and DDP Neazor *Worker's Compensation Law in New Zealand* (Butterworth, Wellington, 1964).

26 *Woodhouse Report*, above n 3, at [89].

27 *Ibid.*, [42], [47], and [146].

and prevention by promoting the judicial doctrine of "enterprise liability" – having decided that companies were in the best position to prevent (and mitigate) injuries from manufactured products.²⁸ But even this way of shifting injury losses relies too much on the older concept of causation. Given the "interdependence" of all industrial activity, the *Woodhouse Report* argues that the problem of injury prevention cannot be apportioned fully to separate industries, let alone to individual companies.²⁹ Much can be done to promote safety at the company level, but the oversight comes rather from health and safety regulations, not the tort system.

C Who is in the Position to Prevent it most Efficiently?

At nearly the same moment that the *Woodhouse Report* appeared, a new theory was floated among scholars of law and economics, initially following the progressive cost-shifting strategies of the workers' compensation movement. Prevention, not cause, was the main focus, but exactly how much prevention is warranted, and how can injury prevention be efficiently organized? Among the pioneers of this movement were scholars with liberal leanings, including Professor (now Judge) Guido Calabresi.³⁰ But the rhetoric of "efficiency" was soon captured by the market-friendly political movements of the 1980s, expressed nowhere more purely than in writings by the New Zealand Business Roundtable.³¹ The key point was that injury burdens should be balanced through the framework of market exchange. The alleged Social costs of injury should be addressed by creating private markets for insurance and risk management. Any government mandates that could not pass the ultimate test of market efficiency came under strong suspicion. In practical terms, such suspicions tend to strengthen the market status quo. From this perspective it is less important to compensate past injuries than to treat past events as financial signals to risk managers, who can then decide how much to invest in future prevention. A public compensation scheme becomes an anomaly, since injured people should already have purchased first-party insurance. Going forward, society should strive to achieve only that level of prevention it is willing to pay for, taking into account the scope of future claims, defined by consumer choices in private insurance markets. It follows from these premises that risk reduction is an investment decision best left to individual companies and persons.

28 For an overview see Don Dewees and others *Exploring the Domain of Accident Law* (Oxford University Press, New York, 1996) at ch 4.

29 *Woodhouse Report*, above n 3, at [467].

30 *Costs of Accidents*, above n 22. This work was preceded by several influential essays published by Calabresi in the 1960s.

31 New Zealand Business Roundtable proposals on ACC go back to the July 1987 Submission to the New Zealand Law Commission *Review of Accident Compensation* (New Zealand Business Roundtable, Wellington, 1987). The same basic analysis continues in a steady stream of reports and submissions.

This analytical approach to allocating injury burdens first entered into the ACC debate in the 1969 *White Paper*, which provided the conceptual bridge between the Royal Commission and the 1972 legislation.³² The *White Paper* explains the logic of market allocation as follows:³³

Some say it is best to make the enterprise producing the accident liable for the risks. The losses should be spread among those whose activities create the risk of accidents. It has been argued that such a system would be more efficient in deterring accidents than if the costs of accidents are spread throughout the community. The idea is that, to the extent that the claims met by the fund result from injuries that can be attributed to identifiable activities, the claims should be a charge on those activities.

The *Woodhouse Report* had expressed little patience for this approach, for all its novelty and sophistication. The *White Paper* logic assigns injuries to specific risk-creating "activities" and the individual enterprises that "produce" them. It was a step backwards to causal notions reminiscent of common law, combined with the workers' compensation belief that separate industries and discrete enterprises could fine-tune their risk-bearing behaviour. By contrast, the *Woodhouse Report* maintained that all risk-bearing activities were interdependent, and that microeconomic calculation cannot sort them out. When bikers are seriously injured, should we assign their risk to bike-riding alone, or does it not also belong to motor vehicle drivers, to law enforcement officials, and to roading engineers? Should we expect all these groups to bargain among themselves over risk-reduction, and can we trust the market to produce the right answer?

Woodhouse concluded that payments for compensation and prevention should ideally be funded from general taxation, with no further allocational criteria.³⁴ As a practical matter, however, the *Report* found most of the needed resources in two existing insurance streams identified with workplace accidents and motor vehicle accidents. The *Report* was prepared to abandon the elaborate classification scheme setting differential workers' compensation payments by industry. A contrasting view was expressed at the same time by Professor Terence Ison, whose work is often compared to the *Woodhouse Report*. Ison had absorbed the market-allocation model and feared that uniform levies across industries would require the low-risk industries to "subsidise" the high-risk ones.³⁵ Ison's view was shared at the time by the influential Ontario Workman's Compensation Board.

The market allocation model differs profoundly from the Woodhouse framework. It shifts the focus away from social losses, which have already been incurred, and toward risk-management

32 *Personal Injury: A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (Government Printer, Wellington, 1969) (referred to here by its familiar reference, *White Paper*).

33 *Ibid.*, at [205].

34 *Woodhouse Report*, above n 3, [461] and [462].

35 Ison, above n 22, at 58.

investments that will turn a future profit. Using levies as a tool for managing personal injury rates and severity imagines a world in which the risks of modern living have been fully reduced to financial terms. New Zealand proponents of this approach appear to accept the ability of private insurance markets to perform these reductions. But recent evidence may indicate that insurance markets in today's global economy depend on more esoteric financial instruments for managing large-scale risks. The recent meltdown of global financial markets suggests how such instruments can be overused.³⁶

In retrospect, the late 1960s can be seen as a turning point for personal injury policies. One could choose either the political remediation of Social costs, as in the *Woodhouse Report*, or the market management of future risk – which took root within the ACC levy system. The risk-allocation philosophy introduced in the *White Paper*, endorsed by the Gair Committee,³⁷ and built into the early statutes was destined to emerge in periodic disputes about levies, currently distributed across six separate levy accounts. This feature of the scheme has fuelled four decades of debate about cross-subsidization and distorted economic incentives. The logic of fully financialised risk collides with the basic principles of the Woodhouse vision, and it remains the leading source of political conflict within the ACC scheme.

III CONCLUSION: FRAMING THE FUNDING DEBATE

Two competing frameworks stand behind current ACC funding debates, struggling for some middle ground in a statutory scheme that has drifted rather far from its original vision. The two levels of accounts – Social costs and Programme costs – define the central focus for each alternative, each one exerting a distinctive force field within the overall scheme.

The framework of Social costs pulls the discussion of ACC levies toward the vision identified with the *Woodhouse Report*. Within this framework, the scope of Social costs always exceeds the narrower subset of Programme costs. It follows that potential remedies for Social costs would reach far beyond the more limited strategies and resources enacted in current ACC legislation. The very notion of "social" insurance requires this broader level of accounting. When the ACC statute is guided by Social cost accounting, it serves the social insurance principle. Many New Zealanders acknowledge this larger mission as the "social contract" background of ACC. In practical terms it generally means that ACC entitlements are elevated to a preferred position above those of standard "welfare" goals. Seen as social insurance, ACC programmes seek to remediate the "toll of personal injury", which presses ever-forward, regardless of limitations on ACC levies and entitlements.

³⁶ See Robert Skildesky *Keynes: The Return of the Master* (Public Affairs, New York, 2009) at ch 1.

³⁷ Following the *White Paper*, the *Woodhouse Report* was considered by a select committee chaired by Hon GF Gair MP (the Gair Committee); *Report of the Select Committee on Compensation for Personal Injury in New Zealand* (New Zealand Government Printer, 1970).

The market-based challenge to social insurance principles has had spectacular success throughout the world in recent decades. This market alternative considers Programme costs as the only calculable reference point for public policy; injury prevention and compensation are thus constrained by the overriding imperative that all revenues contributing to Programme costs shall promote efficient risk management. Safety thus becomes a commodity competing on the basis of price with other commodities, regulated ultimately by sovereign consumers.³⁸ Having abolished common law actions for personal injury, New Zealand would be in a unique position to implement this market philosophy in its purest form, relying entirely on private first-party insurance and the free purchase of financial risk instruments. This utopian goal is essentially what the New Zealand Business Roundtable has been advocating for more than two decades. To them, any concern with Social costs would be mere advocacy for social welfare.

This clash of visions summarizes much of what has happened elsewhere in public life over the past half-century. From an international policy perspective, New Zealand is important because of the *Woodhouse Report* and its unique eloquence in making the case for Social cost accounting. New Zealand is also important because this vision was powerful enough to support large institutional changes, including the abolition of most personal injury lawsuits. On a practical level, however, these two accounting frameworks now seem caught in a political stalemate, where neither side can gain much ground. After nearly four decades, the New Zealand public generally accept ACC as a noble experiment; but interest groups still resist their portion of the levies. Whenever governments change, these two views seem fated to collide. It is then that political debate resonates with the familiar contest of labels: "insurance" versus "welfare," and "social insurance" versus "privatisation".

ACC debates in New Zealand are increasingly dominated by reference to competing accounting terms: "full-funding" versus "pay-as-you-go". From the standpoint of Social costs, even the present full-funding (or "pre-funding") of future Programme costs still leaves a major portion of Social costs uncovered. On this view, pre-funding is an illusion maintained by restricting one's accounting framework to the level of Programme costs. As a policy matter, the zeal for pre-funding these Programme-limited costs may take priority over the still unfunded Social costs we call the "toll of personal injury". When it comes to injury prevention, pre-funding long-term Programme costs would encroach even further on the unmet needs of a comprehensive prevention strategy. Rigid pre-funding imperatives either shift uncovered Social costs to other public programmes, or leave them with injury victims, only to leach out further through the extensive networks outlined by Woodhouse. To be sure, there have been moments when New Zealand expanded its coverage of

38 The broader theory is presented in Robert Shiller *The New Financial Order: Risk in the 21st Century* (Princeton University Press, Princeton, 2005).

Social costs, as in the 2005 Amendment adding treatment injuries to the ACC scheme.³⁹ To the extent one is concerned with fairness to future generations, it may be more important to expand the scope of Social costs addressed by ACC – including more injury prevention – than to insist on pre-funding the limited Programme costs of the status quo.

Treating the pre-funding of Programme costs as the supreme goal follows directly from the imperative of financialising risk. What matters most, from this perspective, is the mathematical relationship between Programme revenues and fully-specified future Programme costs. To reach a balance, one can just as well reduce benefits (especially those with uncertain future costs) as raise revenues; the ultimate concern is simply to bring all elements of the scheme within the scope of present financial calculation. Before markets can price risks properly there must be a full assessment of future liabilities, notwithstanding that future prices are then discounted to present value, and reconstructed in accordance with actuarial assumptions. This preoccupation ignores the "social contract" aspects of the scheme – or pretty much everything that happens on the level of Social costs, including the original vision on which the entire no-fault scheme was based. If the ultimate goal is to integrate injury costs into the market calculus of risk management, getting the prices right for Programme costs becomes an end in itself. The most ardent full-funders make frequent reference to the practices of private insurance, which remains their conceptual standard, as well as the most likely policy goal they hope to achieve.

Here too the probable outcome is a pragmatic middle ground. Paraphrasing St Augustine, it is possible to ask for pre-funding, but not just yet. The difference between 2014 and 2019⁴⁰ is something leading adversaries have chosen to finesse. Pay-as-you-go proponents are willing to accept a range of modifications for purposes of smoothing, reserving, and buying peace with political opponents waiting to pounce on the next accounting blip on the level of Programme costs. Despite the ongoing political stalemate, the significance of current funding debates should be understood in terms of the larger clash of principles discussed throughout this paper. ACC has muddled through nearly four decades, but the future of the scheme is certainly not guaranteed. The world is watching carefully how New Zealanders mobilize their arguments, and how this unique system will survive the policy battles yet to come.

39 Accident Compensation Act 2001, text available New Zealand Legislation Website <www.legislation.govt.nz>. For discussion of the treatment injury initiative, see Marie Bismark and Ron Paterson "No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety" (2006) 25 Health Affairs 278 at 283.

40 Accident Compensation Amendment Act 2010, ss 17, 25 and 31.