

1990S – DECADE OF CHANGE

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This paper provides a trade union perspective on the changes to New Zealand accident compensation laws during the 1990s, in the context of the political, social and economic environment of the time, and measures those changes, including the changing structure of the statutory scheme and its delivery, against the original Woodhouse Commission principles of Community Responsibility, Comprehensive Entitlement, Real Compensation, Complete Rehabilitation, and Administrative Efficiency.

I A DEFENCELESS ACC

On any objective criteria, New Zealand had, until 1 July 1992, an accident compensation scheme which was fundamentally sound and cost-effective, and which was, quite justifiably, held up as a model for reform in other countries.

It is reasonable to ask why, if it was generally supported by the New Zealand population, the Government was able to, by passing the Accident Rehabilitation and Compensation Insurance Act 1992, reduce the accident compensation scheme to the rather mean shadow of its former self.

The following were at least contributory reasons:

- Much was made politically of ACC expenditure increases during the 1980s. In promoting his legislation in 1991 the then Minister, W F Birch, frequently referred to "expenditure increases of 25 per cent in each of the years between 1985 and 1990". Apart from the point that in inflation adjusted terms the increases were 16 per cent, the rate of increase dropped to 12.5 per cent in 1991 and to below 10 per cent in 1992. The increasing costs were predicted and the Law Commission Report confirmed that almost all of the increases in earnings-related compensation related to previous years' claims; in other words were attributable to scheme maturation.¹ It is also relevant to note that expenditure in New Zealand in a comparable area — fire and accident (property loss) insurance — increased

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¹ New Zealand Law Commission *Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme)* (NZLC R4, Wellington, 1988).

78.5 per cent over a similar four year period. There was no employer lobby outcry about this. The reality is that the ACC Scheme (the Scheme) was very cheap by international standards.

- The credibility of the Scheme had suffered (unfairly, I think) by adverse publicity over many years. As a consequence a public impression had been created that the Scheme was expensive and had been the subject of abuse. For this reason the Government presented its reform proposals as "The Fairer Scheme".
- The political allies of the Scheme had lost interest. In particular the Law Society, which so ardently defends the common-law system in other countries, had no great financial interest in the Scheme. The only active lobby for the Scheme had been the trade union movement, and the Government's "Fairer Scheme" restructuring coincided with the implementation of the Employment Contracts Act 1991 and the most concerted Government and employer attack on trade unions for a hundred years.
- The Scheme had come to be identified in the public mind with the social welfare system. The common-law origins and the social contract trade-offs had been lost sight of.
- Legislative change was comparatively easy in New Zealand. Elected on a landslide under a first-past-the-post electoral system to a unicameral Parliament dominated by Cabinet, the National Party was able to quickly and easily push the Bill through the legislative processes.

For Woodhouse supporters it was a bitter and sobering political experience. The union movement had been sceptical about the abolition of the common law because it was felt that a statutory scheme would be politically vulnerable. At least a powerful interest group (lawyers) had a vested interest in the tort system.

In 1993 it seemed that their scepticism may have been justified.

II THE GALVIN COMMITTEE

Following the change of Government in 1990 the new Minister in Charge of the Accident Compensation Scheme, Bill Birch, moved quickly to establish a "political" committee to review the Scheme. The Committee was chaired by a former Treasury Secretary (Bernie Galvin), and included a former National Party Leader (Jim McLay), and a senior manager from Shell Oil, none of whom had had any significant involvement with the subject of their review.

The Galvin Committee recommended a four stage programme to ultimate deregulation of injury compensation insurance:²

Stage One

Reduce benefits.
 Require the Scheme to pay for public health services used.
 Introduce experience-rating.
 Fund the Scheme on pay-as-you-go.

Stage Two

Reconstitute the Accident Compensation Corporation as a State Owned Enterprise (the state corporate model used in transition to privatisation).

Stage Three

Take responsibility for non-work accidents out of the Work Scheme thereby reducing the levies to be paid by employers.

Require all persons to take insurance cover (initially with ACC) for the proposed general scheme (all non-work other than Motor Vehicle).

Establish targeting mechanisms to ensure cover for low income earnings and beneficiaries.

Stage Four

Allow competitive private insurers to provide injury compensation insurance cover.

The 1992 Act implemented Stage One of the Galvin Committee prescription, as well as transferring the cost of workers' non-work, non-motor-vehicle accidents from the employers' levy to a new levy imposed on workers, also by way of a payroll tax.

III TRANSFERRING THE COST OF INJURY

The only real issue in the accident compensation debate is what proportion of the inevitable costs which result from accidental injury will be indemnified by the tortfeasor, or insurer, or ACC, and what proportion of those costs will be borne by the injured person and his or her family.

It is clear that the original intent of the scheme developed from the *Woodhouse Report*³ on a bi-partisan basis by the Gair Select Committee⁴ in the early 1970s was that ACC should carry forward

2 Ministerial Working Party on the Accident Compensation Corporation and Incapacity *Report of the Ministerial Working Party on Accident Compensation Corporation and Incapacity* (Government Printer, Wellington, 1991).

the common law indemnity principle and (with the exception of the requirement for injured workers to absorb 20 per cent of their earnings loss) reimburse injured people in full for their other losses and costs, both economic and non-economic.

This principle was a very important aspect of the social contract basis of the Scheme.

It is not surprising, therefore, that a major issue for the Council of Trade Unions during the 1990s was the extent to which the entitlements were eroded and an increasing proportion of the cost of accidents transferred to the injured person.

I do not think it can be disputed by anybody that the Accident Rehabilitation and Compensation Insurance Act 1992 did transfer a significant proportion of costs from the Scheme onto the injured person, and that this was continued under the Accident Insurance Act 1998.

IV THE CASE STUDIES

Rather than analyse the legal changes in entitlement in detail I have chosen to look, on a comparative basis, at the cases of two railway workers; one under the 1972 Act and the other under the 1992 Act. I shall use fictitious names but they are very real people I am talking about.

Jack was a railway shunter who in 1974 suffered a double leg amputation in a shunting accident. There was clear negligence on the part of his employer and he had an equally clear entitlement to a very large common-law damages award. This would have included full indemnification for medical treatment costs, rehabilitation, loss of earnings, and a significant award for his pain and suffering and loss of enjoyment of life.

However, the accident occurred in October 1974 and the Accident Compensation Act 1972 had come into effect six months before. His common-law claim was barred by that Act and his entitlements were limited to the entitlements provided for in the Act.

Jack was, and is still, a very positive and strong person. The assessment reports spoke of his stoic character and intelligence, and in accordance with the ACC policies of the day, he was offered the opportunity to pursue university studies to help him realise his potential and maximise his employment opportunities. For personal reasons he chose not to do that but he did return to a clerical position with Railways.

3 New Zealand Royal Commission of Inquiry into Compensation for Personal Injury *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967) [*Woodhouse Report*].

4 Select Committee on Compensation for Personal Injury in New Zealand "Report of Select Committee on Compensation for Personal Injury in New Zealand" [1972] AJHR I 15 (commonly referred to as the "Gair Committee" after its Chairman George F Gair MP).

In terms of entitlements he, of course, received 80 per cent of his pre-accident earnings while he was off work, and his treatment costs were paid in full. He was also reimbursed for travelling and incidental expenses incurred, such as travelling for treatment.

On completion of his rehabilitation and following his return to work, he had a permanent pension assessed which reflected his loss of earning capacity. Although it was considerably less than 80 per cent of his pre-accident earnings it provided him with a base income which he still receives (although his union had to make very strong submissions to the Select Committees considering the 1992 and the 1998 legislation to roll back a proposed retrospective power which would have enabled his permanent pension to be terminated).

He was awarded the maximum lump sum then payable for pain and suffering, which was \$10,000. He used that to buy a car to travel to and from work. He had not previously owned a car because he was able to use Railway bus and rail services. ACC recognised the cost of private transport as a cost of the accident by reimbursing him a mileage rate for the use of his car to and from work.

Tino had his accident more than 20 years later, under the 1992 Act. He was also an experienced railway shunter who had a serious accident in which his leg was amputated. In fact he very nearly died. Like Jack he would have had very strong common-law claim against his employer for damages. Unlike Jack however his entitlements were severely limited by the 1992 Act.

In accordance with the common practice in our hospitals these days Tino was discharged before his wounds had healed and he had to travel to and from hospital for medical treatment. He could not use a bus (there are very few through his area anyway), he could not drive his car, and his wife did not drive at all. However the Government regulations made under the 1992 Act prevented ACC from paying for a taxi to take him to and from the hospital (although the employer agreed to pay the shortfall). If he attended his general practitioner, the Regulations limited the amount he could claim for reimbursement so he was personally liable for about \$10 per visit. This is in spite of the commitment by our governments since 1938, under International Labour Convention 17, to provide all necessary treatment for work injuries at no cost to the injured worker.

Tino did, of course, receive 80 per cent of his pre-accident earnings, but that will not be payable indefinitely. Under the 1992 Act his rights to rehabilitation, particularly vocational rehabilitation, were more limited. If he is assessed, at some stage, as being fit for some job (for which he is judged to be suited by his skills, knowledge and experience) in which he can work for 30 hours or more a week, his earnings compensation entitlement will be terminated. He may qualify for a small "independence allowance" (about \$30-40 per week) to recognise his functional loss but he will receive no recognition whatsoever, whether by lump sum compensation or periodic payment, of the incredible pain he has endured and the loss of enjoyment of life.

V THE FIGHT BACK: COAC

Although the union movement had campaigned against the 1992 Act, and had formed a campaign coalition (HONTRACT – Honour the Social Contract), the severe negative impact of the Act, particularly on severely injured people, galvanised a number of groups into action a few months prior to the 1993 General Election.

An organisation called COAC (the Coalition on Accident Compensation) was formed, which included the Council of Trade Unions, the Assembly of Disabled Persons (DPA), the Women's Division of Federated Farmers, Grey Power, and other disability and community organizations.

COAC mounted an active media campaign around a number of cases where the injured person had been disadvantaged by the severity and inflexibility of the prescriptive regulatory approach which replaced the previous discretionary approach to ACC decision-making.

One such case highlighted the absurdity of the Regulations. The new Regulations prevented a tetraplegic 13 year old boy being moved home from hospital because they denied ACC any discretionary power to contribute to the costs of the necessary home care.

The COAC campaign had a significant impact during the 1993 General Election campaign and was acknowledged, by the then Prime Minister Jim Bolger, and commentators, as a factor in the very close electoral result in that election.

COAC continued to have an influence throughout the 1990s and, through the Council of Trade Unions, worked closely with the Labour Party, and other opposition parties, on their ACC policies.

VI THE ACCIDENT INSURANCE ACT 1998

National made specific commitments at both the 1993 and 1996 General Elections that ACC would not be privatised. With the replacement of Jim Bolger as National Leader and Prime Minister by Jenny Shipley, that commitment was ignored and the Accident Insurance Bill was introduced into Parliament on 17 September 1998.

The 1998 legislation was the product of a major lobbying effort by the Business Roundtable, the New Zealand Employers Federation, and the New Zealand Insurance Council. Lobbyists from Australian insurance companies, such as HIH Insurance and FAI Insurance, worked almost full-time in Wellington during this period.

For many New Zealanders, disillusioned by the 1992 Act, fraud trials involving two ACC Chief Executives, and harsh ACC claims administration, it seemed that "privatisation could not be worse".

From the Council of Trade Union's perspective the Accident Insurance Act 1998, like the 1992 Act, was primarily an ideological measure; essentially a charter for private insurance profits at the expense of injured workers.

The Act created a "work accident injury insurance market" and ensured:

- compulsory private insurance;
- statutory suspension of the common-law right to sue; and
- statutory limits on injured workers' entitlements.

The Government promoted the measure as providing "choice". In reality the only choice was for employers — to choose between insurers competing for business, who would inevitably do so by constraining the cost of compensation and rehabilitation assistance to injured workers.

There was no choice for injured workers. Their legal right to sue remained suspended by law and they were dependent upon an insurance contract between their employer and an insurer to which they were not even a legal party.

The evidence to support the ideological "belief" that private insurance delivery would be more cost effective was not apparent. On the contrary:

- The only available research study (Terry Thomasin and John F Burton) over 20 years in North America concluded that Government-operated schemes had been more cost efficient administratively than private insurance. This was confirmed in a report to the British Columbia Government Royal Commission of Inquiry in 1997.
- A 1998 report to the New Zealand Government by Coopers and Lybrand cautioned against moving to the private insurance model.
- Administration costs of private insurers were 30-40 per cent compared with 8-10 per cent for ACC.
- The average ACC employers' premium had been deliberately "inflated" to \$2.35 per \$100 of payroll in preparation for the 'full funded' private insurance model. Had ACC been retained as a pay-as-you-go scheme the average premium would have been \$1.67 in 1998, probably reducing to \$1.30 the following year.

In any event the privatisation experiment was short lived. Given the subsequent demise of one of the strongest lobbyists for the 1998 Act, HIH Insurance, in the biggest corporate failure in Australian history, and the current instability of private insurance markets, we should all be celebrating our lucky escape. The Australian Minister of Small Business, Joe Hockley, apparently envies our position and has called for Australia to again consider the New Zealand ACC model.

VII RESTORING ACC

The Injury Prevention, Rehabilitation, and Compensation Act 2001 goes some way to restoring fairness to ACC entitlements. The Act establishes a new rehabilitation principle of restoring an injured person's health, independence, and participation to the maximum extent practicable, reinstates lump sum compensation for permanent impairment up to a maximum payment of \$100,000 (although with a tough American Medical Association-based assessment schedule),

ensures a more flexible approach to assessment of weekly earnings related compensation, introduces a new Code of ACC Claimants' Rights, and makes other improvements to entitlements.

But the Act still does not guarantee that injured workers will get treatment at no cost to them as the International Labour Organisation convention requires. Similarly, the regulated approach to meeting costs, such as travel costs to get treatment, remains.

It remains to be seen whether the new Code of Claimants' Rights will contain any service and fairness standards which can be enforced, and whether there will be any effective sanction on ACC by way of penalty. At the consultation stage the draft Code looks rather weak.

However, the Act does put quite strong obligations on ACC, the injured worker's pre-accident employer, and the injured worker, to ensure that rehabilitation is maximised, although I still have a lingering concern that the retention of a form of work capacity assessment process continues to provide an incentive to terminate compensation on the basis of a notionally available job rather than focus on innovative rehabilitation. I hope I will be proved wrong in practice.

But at least the turning of the new century saw the re-establishment of a national public fund scheme and the return of a political commitment to it.

With the passing of the Injury Prevention, Rehabilitation, and Compensation Act 2001, the primary challenge is to restore the legal concept of fairness to ACC administration and adjudication.

The criteria for success should not be bottom-line profitability (although efficient financial management is crucial), but the much less easily achievable objectives of injury and disease prevention and the effective rehabilitation of injured people.

Part of the social contract deal was that the courts' role in adjudicating compensation entitlements would be replaced in the accident scheme by a quasi-judicial Accident Compensation Commission. That was seen as a necessary safeguard to ensure that injured people received a fair deal. The Commission role has, since 1982, been discharged by the Accident Compensation Corporation which has, at times since then, lost sight of its quasi-judicial role to ensure fairness.

Unless ACC restores public confidence in its integrity and fairness, ACC will continue to be vulnerable to the ideologically driven reform agendas we saw in the 1990s.