

WOODHOUSE HERESIES

*Richard Gaskins**

The radical principles behind the 1967 Woodhouse Report were eclipsed by shifting political styles—and gradually abandoned as heretical. We can now turn to Sir Owen's own notion, that "the apparent heresies of one generation become the orthodoxies of the next", to explore how core Woodhouse heresies might themselves perform this transition: providing fresh support for a generation grappling with headline challenges of climate change and pandemic control.

I A RADICAL REPORT

[I]t is worth remembering that the apparent heresies of one generation become the orthodoxies of the next.¹

More than a half-century after publication of the *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (Woodhouse Report)*, it is worth remembering just how truly radical it was back then—and *is* still now. Behind a façade of sober prose, the report reveals wider ambitions beyond the celebrated reform of 1960s tort law. Outflanking its formal "terms of reference", the report takes direct aim at some fundamental social problems. Personal injury compensation was but one example.

My task here is to identify these fundamental themes—so richly imagined in the report, but now lost in the fog of history. To be sure, these themes may have been camouflaged by the report's calm, common-sense tone. But once we find these heretical principles, we can measure their radicalism in comparison to other big ideas circulating at the same time.

* Richard Gaskins is Professor Emeritus at Brandeis University, where he directed the Program in Legal Studies. A frequent visitor at Victoria University of Wellington—Te Herenga Waka (on some 10 occasions from 1991, and with support from United States and New Zealand Fulbright Commissions), he began comparative work on the ACC scheme in 1975 with a group of United States and New Zealand researchers. That group met with Sir Owen Woodhouse in Philadelphia in 1979. This article is an edited version of the Sir Owen Woodhouse Memorial Lecture 2023, delivered by Professor Gaskins in Wellington on 18 October 2023 and in Auckland on 25 October 2023. Professor Gaskins' broader research fields include comparative law, legal argumentation and international criminal law. He holds postgraduate degrees in law and philosophy from Yale University.

1 *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (December 1967) [*Woodhouse Report*] at [33].

My comments here are directed to the future rather than just the past. As Woodhouse goes on to say, the "ultimate validity of any social measure will depend not upon its antecedents but upon its current and future utility".² The question now is whether these old Woodhouse heresies can inspire new orthodoxies for the next generation. Given the rapid pace of change in our everyday lives, Woodhouse says what counts most is not tradition, but the future usefulness of new ideas. This was the test Woodhouse set for himself in dealing with the concrete problem of personal injuries, as the first step in a new direction for public policy.

The Woodhouse heresies lurking in the 1967 report have been further obscured by a half-century of shape-shifting ACC legislation and implementation. Along the way, some alternative orthodoxies took hold as the Woodhouse formula got diluted by political compromise—and as later ideological debates twisted and oversimplified that original formula. Elsewhere I have argued that the radical concept of "community responsibility", famously laid out in the report, has been adopted by multiple political factions, to the point where its original sharp meaning has been irretrievably dulled.³

So let us first acknowledge some false orthodoxies, retrospectively assigned to the *Woodhouse Report*, and sustained in many forms for more than five decades. Despite the drumbeat of repetition, these are so many "myths" that distort the original report and persist largely by custom. Here are some examples.⁴

First, legal crisis. This is the myth that the *Woodhouse Report* was responding to an acute breakdown in the common law system—the domain where a respected judge might be understood to operate. In fact, the report is quite emphatic that the problems at hand go well beyond the scope of what traditional tort law might accomplish, even operating at its ideal best. Rather, the underlying issues are *social* in nature, demanding a broader response using different tools.⁵ The anomaly today is that ACC has been studied most assiduously in law schools, rather than in departments of sociology or public policy, or even economics. Some of this has to do with Woodhouse's astute legal colleagues, who shared his vision of law serving social functions, and who looked with scepticism on traditional legal doctrines that fail to meet human needs.

Secondly, compensation. This is the myth that takes the *Woodhouse Report* at face value as a commentary on compensating injury victims. To be sure, compensation became the direct focus for

2 At [33].

3 Richard Gaskins "The Enigma of Community Responsibility: Ethical Reflections on Accident Compensation" (2015) 46 VUWLR 789.

4 This discussion is revised from an earlier version in Richard Gaskins "Reading Woodhouse for the Twenty-First Century" [2008] NZ L Rev 11 at 13–14.

5 *Woodhouse Report*, above n 1, at [98], [34], [83] and [157]. Woodhouse cites other authorities for this position, including the 1963 New Zealand "Committee on Absolute Liability", chaired by Sir Richard Wild: at [140].

the statutory scheme that followed. And certainly, the original terms of reference for the Royal Commission centred on victim compensation. But Woodhouse reveals his own discovery, on the first page of his report, that injury *prevention* is the greater task for community response, leaving compensation and rehabilitation as corollary concerns.⁶ His broader framework relegates compensation to third place in this triad of policy objectives. The legislative history of ACC has largely ignored this radical shift in emphasis, with only sporadic efforts to imagine parallel policy streams for rehabilitation and prevention.

Thirdly, social welfare. This is the myth that the *Woodhouse Report* measured common law outcomes by public welfare standards—thereby shifting injury compensation into the realm of social welfare entitlements. While some commentators outside New Zealand had taken this welfarist approach to tort reform,⁷ the *Woodhouse Report* turns this whole relationship around. Instead, Woodhouse applies the standards of common law damages to show the inadequate support levels within the prevailing welfare system.⁸ By contrast, benefit levels under a compensation scheme are understood as replacing real losses, rather than expressing sentiments of charity or compassion, as some kind of public largesse. The Woodhouse emphasis on the unpaid toll of massive social losses, announced in the report's opening paragraph, raises questions about the whole structure of public welfare benefits—questions sidestepped in the following decades by two later New Zealand Royal Commissions.

Fourthly, social contract. This is the myth that Woodhouse's statutory replacement for tort law was a metaphorical contract, promising financial security in exchange for the loss of common law rights.⁹ The image of a binding contract or bargain does enter into early legislative debates about the ACC scheme; but it was not part of the original Woodhouse vision. Over the years this image of the social contract has been used defensively, as a backstop against erosion of ACC benefits under threat by welfare cost-cutters. As useful as this may be, it was not part of the Woodhouse legacy.

Fifthly, litigation. This is the myth that fearless litigators will rescue the ACC scheme from heartless bureaucrats and cost-cutting legislators. Numerous battles have been won along these lines, pushing back against harsh ACC administrative policies. But whatever fleeting truth might attach to

6 At [2].

7 For example, Woodhouse cites torts expert John G Fleming: at [67].

8 This is the import of Woodhouse's principle of "real compensation": at [59] and [279]. Woodhouse considers wider implications for the prevailing social security system: at [274].

9 In Woodhouse's view, tort mechanisms had become dysfunctional in present society, given the radical uncertainty surrounding the diffuse causes of modern injuries. The new compensation mechanism was to work along entirely separate principles: at [82]–[83].

this idea in recent practice, it requires us to ignore the main thrust of the *Woodhouse Report*, and to risk substituting the disease for the cure.¹⁰

Sixthly, market efficiency. This is the myth that Woodhouse's emphasis on "administrative efficiency"¹¹ accepts the emerging neoliberal mantra of efficiency in state services, opening up the "more market" approach. Over the years this myth succeeded in briefly transforming the ACC statute into a shell for private insurance markets, while drawing safety regulation and injury prevention into the orbit of market demand. Today the *Woodhouse Report* remains one of the strongest counterarguments to this dead-end philosophy.

II BEYOND ACCIDENT COMPENSATION

For the past 50 years, the *Woodhouse Report* has been used selectively for strategic purposes in public debates. Although the report never lost its legendary status, it was unrecognisable in its profound neglect. Indeed, it was increasingly difficult even to get one's hands on a physical copy of the report—until Susan St John and her Auckland colleagues made it available electronically in 2007.¹²

Taking the *Woodhouse Report* in hand, there is more here than a critique of the 1960s personal injury tort system. The most obvious clue is Woodhouse's insistence that he is dealing with not just a legal problem, but a broader *social* problem.¹³ This key insight seemed to rise organically within the logic of the report, based simply on practical reflection on the problems of his day—as Woodhouse himself was fond of saying. But these wider *social* concerns for Woodhouse match up closely with two emerging trends from the 1960s: a reborn environmental movement and key advances in public health. Today we look to these two fields—environmental policy and public health—for answers to the central challenges of our own decade: controlling climate change and managing mass pandemics. The *Woodhouse Report* connects to these existential debates, if we dig deep enough into the underlying principles.

Before these 1960s heresies can be rehabilitated, they must free themselves from 50 years of neoliberal counterpoint. Yet another reason for studying the 1967 Woodhouse document is its clear rejection of economic and political arguments that were sweeping into fashion at exactly the same moment in time, with the rise of neoliberalism.¹⁴ In historical terms, Woodhouse stands on the other

10 At [94].

11 At [62].

12 The report is available online in PDF format at: University of Auckland "Libraries and Learning Services" <<https://digitool.auckland.ac.nz>>.

13 *Woodhouse Report*, above n 1, at [98].

14 At [15].

side of that long half-century, when neoliberal concepts have occupied the commanding heights of public affairs—even if today those trends appear to be on the wane.

Internationally, in the narrow field of accident compensation, the Woodhouse scheme was eclipsed almost immediately by entirely different conceptual models from the law-and-economics movement—which was just then taking flight. Some of these faddish economic notions crept into the New Zealand debate as early as the 1969 White Paper, and they can also be found in the parallel Ontario discussion led by Professor Terence Ison.¹⁵ In New Zealand, the legislative jousting over ACC ignored the deeper roots of the Woodhouse philosophy, embarking instead on a fruitless journey through the rise and fall of neoliberal orthodoxies.

It may be controversial for me to declare that our world is finally coming out the other end now, after 50 years of neoliberal political and economic dominance. But if I am correct, then we may hope to find new resonance in the older Woodhouse framework—precisely because of its vintage. Later on I will say more about this rise and fall of neoliberalism. I see it as more than just a right-wing movement, but as also including a broad spectrum of centre-left thinking, with its enthusiasm for globalising, technology-focused policies. Neoliberalism was much more than a set of abstract ideas hatched by old Austrian émigrés. Recent histories show its spread across public policy circles through an embrace of applied economics, constituting a contagious style of reasoning that transformed political and popular movements.¹⁶

III TWO WOODHOUSE HERESIES

Let us start with general paraphrases distilled from the 1967 report.¹⁷

The toll of personal injury is a concrete sum, randomly imposed on social actors, and embedded in modern networks of industrial organisation. These "social costs" fall outside the mechanisms of market exchange.

Here is the core statement of what I call the "social cost heresy", which is the basis today for the boldest environmental strategies to combat climate change. Woodhouse was not alone in the 1960s in articulating this view, prior to countervailing waves of neoliberalism.

15 *Personal Injury: A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (Department of Labour, 1969) at [205], which cites Calabresi and notes Professor Ison's endorsement of "experience rating" as a means of efficient resource allocation.

16 For the argument that neoliberalism spread more through practical applications than high theory, and did so across a broad political spectrum, see Elizabeth Popp Berman *Thinking Like an Economist: How Efficiency Replaced Equality in US Public Policy* (Princeton University Press, Princeton, 2022).

17 See generally *Woodhouse Report*, above n 1.

Here is the second paraphrase:¹⁸

Our dense networks of social relations place responsibility for mitigating harmful outcomes onto the community as a whole, requiring a fully responsive political process.

This is the core statement of what I call the "public health heresy", which is the basis today for collective action to control global pandemics—among other common threats to human well-being. Here too, in the 1960s Woodhouse had good company, at a time when it was still possible to speak about a "common good" and about the responsibility of communities.¹⁹ But here too, the coming wave of neoliberalism would shift this positive principle into the realm of heresies.²⁰

Common to both these heresies is a commitment to ecological complexity, social interdependence and compensatory justice, leading to a social agenda centred on environmental protection and the collective concern for individual well-being.²¹ Over time, in the face of neoliberal opposition, these broad commitments encountered strong resistance, and were watered down through translation into market-based terms. By restating these earlier principles as "heresies", I emphasise their radical implications, prior to their eclipse by the "economic style" that hardened into neoliberalism.

18 See generally *Woodhouse Report*, above n 1.

19 A classic source is John Dewey *Individualism Old and New* (1930), in John Dewey *The Later Works* (Jo Ann Boydston (ed), Southern Illinois University Press, Carbondale, 2008) vol 5. For a modern restatement, see Michael J Sandel *Democracy's Discontent: A New Edition for our Perilous Times* (Belknap Press, Cambridge (Mass), 2022); and Michael J Sandel *The Tyranny of Merit* (Farrar Strauss, New York, 2020). Borrowing from the common law ethic of compensatory justice, Woodhouse shifted the responsibility for action to "the community as a whole". Such ideas were recently tested by the COVID-19 pandemic, with renewed attention to public health promotion of the common good, and the importance of wide public trust: see for example Mariana Mazzucato and Rainer Kattel "COVID-19 and public-sector capacity" (2020) 36 *Oxford Review of Economic Policy* S256.

20 Pushing back against that neoliberal ethic is the emphasis on "human capabilities" associated with Amartya Sen and Martha Nussbaum. Among numerous references, see Amartya Sen "Well-Being, Agency and Freedom: The Dewey Lectures 1984" (1985) 82 *Journal of Philosophy* 169; and Martha Nussbaum *Creating Capabilities: The Human Development Approach* (Belknap Press, Cambridge (Mass), 2011). For the reception of these ideas into New Zealand, see Paul Dalziel and Caroline Saunders *Wellbeing Economics: Future Directions for New Zealand* (Bridget Williams Books, Wellington, 2014). Implications for New Zealand welfare policy are discussed by Jonathan Boston *Transforming the Welfare State: Towards a New Social Contract* (Bridget Williams Books, Wellington, 2019).

21 Historians have found a direct link between early 20th-century "industrial hygiene" programmes in industry and the 1960s discovery of environmental hazards: see Christopher C Sellers *Hazards of the Job: From Industrial Disease to Environmental Health Science* (University of North Carolina Press, Chapel Hill, 1997).

A *The Social Cost Heresy*

The notion that "the world is filled with unpaid [social] costs" was developed during the 1930s in works of the leading American Institutional economist, John Maurice Clark.²² An important application of this thesis came from the German-American Institutional figure, K William Kapp, who is now recognised as one of the first economists to specialise in environmental issues. His main research was carried out in South Asia during the 1950s and published during the 1960s.²³ Kapp applied the term "social costs" to collective harms of post-war industrial society, even in then-emerging economies. These harms included air and resource pollution, personal injury, changing disease patterns, and other unintended consequences—all of which occurred outside the scope of market transactions. Kapp described:²⁴

... an economy of unpaid costs, "unpaid" in so far as a substantial proportion of the actual costs of production remain unaccounted for in entrepreneurial outlays; instead they are shifted to, and ultimately borne by, third persons or by the community as a whole.

Kapp brought ecological concepts to his economic studies, noting the complex causal interrelations of the natural and biological environment. And he insisted on placing human society at the centre of that complexity:²⁵

The increasing use of the terms "environment" and "ecology" in recent discussions of social costs is to be welcomed, provided these terms are interpreted in a sense sufficiently broad to include not only the impairment of the physical environment but the impairment ... of all external conditions and influences affecting the life and development of human beings, human behavior, and hence society.

This wider sense of ecological complexity finds its way into the *Woodhouse Report*, in passages asserting the collective nature of risk, the random incidence of personal injuries and the collective

22 John Maurice Clark *A Preface to Social Economics: Essays on Economic Theory and Social Problems* (Farrar & Rinehart, New York, 1936) at 45. See also John Maurice Clark *Social Control of Business* (2nd ed, McGraw-Hill, New York, 1939) at 202 and 220–221. On American Institutionalism as a movement, see Malcolm Rutherford "Institutionalism and the Social Control of Business" (2015) 47 (supplement 1) *History of Political Economy* 77.

23 K William Kapp *The Social Costs of Private Enterprise* (revised ed, Schocken Books, New York, 1971). For a contemporary (heterodox) analysis of Kapp's theory of social costs, see Pietro Frigato and Francisco J Santos-Arteaga *The Dark Places of Business Enterprise: Reinstating Social Costs in Institutional Economics* (Routledge, Abingdon, 2019).

24 Kapp, above n 23, at 231.

25 At ix–x. Kapp's "social costs" correspond closely to recent sociological attention to "social harms", defined (as with Kapp) as personal and biophysical effects, collectively caused, and not reducible to economic models of subjective welfare preferences: see Simon Pemberton *Harmful Societies: Understanding Social Harm* (Policy Press, Bristol, 2015).

harms that fall outside the scope of market transactions. This inescapable complexity makes untenable the reigning doctrine of "fault" in private law. Instead:²⁶

People have begun to recognise 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.

Woodhouse's use of the word "responsibility" here is pivotal. It comes from a notion of causal responsibility, and it carries the additional meaning of moral responsibility—rooted in social complexity. Woodhouse previewed this critical connection in the opening section of the report, making the link between an environment of unpaid costs and the ethical response later defined as "community responsibility":²⁷

The toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole.

The argument that personal injury costs are unpaid social costs was central to the 1967 report, but largely abandoned in both the initial legislation and the full sequence of ACC amendments up to our own day. In particular, Woodhouse cited the diffuse nature of social risk to reject the fashionable idea of "experience rating", where organisations and professions would be levied (or taxed) according to their distinct contributions to the injury problem.²⁸ The Woodhouse heresy would deny this market-inspired solution to funding, based on his ecological premise that personal injury costs are *social* costs, and that all production is deeply interrelated.

The report sees personal injuries as woven into the larger fabric of social production, to be understood as by-products in the web of modern industrial relations.²⁹ By treating both cause and effect as collective in nature, Woodhouse expands the debate over injury compensation to include injury prevention and rehabilitation. Over time, the collective mitigation of such problems shifts the primary emphasis to *prevention*—as Woodhouse announces in Part 2 of the report.

To be sure, the original terms of reference for the Royal Commission spoke only of "compensation". And accordingly, the immediate remedy proposed by the report was to replace the private law system of compensation, while shifting the ethic of compensatory justice onto the social level, and then expanding the justice timeframe to future prevention. Left unsaid in the report were

²⁶ *Woodhouse Report*, above n 1, at [89] (footnotes omitted).

²⁷ At [1].

²⁸ At [331]–[336] (acknowledging recent arguments to the contrary). Woodhouse bases his approach on the principle that "all industrial activity is interdependent": at [314].

²⁹ Woodhouse refers to "a series of interrelated and complex problems": at [34].

the logical implications of this expanded notion of compensatory justice for likewise preventing damage to the biosphere. It was in the early 1960s that Rachel Carson's *Silent Spring* inspired a "second wave" environmental movement, refreshing older ecological concepts.³⁰ Today, if we think about controlling climate change, the priority of prevention is entirely self-evident, although rehabilitation and compensation (applied both to people and to the natural environment) remain within the scope of remedial justice. In the context of the 2020s, this Woodhouse heresy would push to reverse the catastrophic forces of climate change, while mitigating social costs at their most fundamental level.

B The Public Health Heresy

It may seem odd to characterise public health as a kind of heresy. Prior to the 1967 *Woodhouse Report*, of course, there was an established discipline of public health, represented in state ministries, at times mobilised in the face of mass epidemics. But in the decades after World War II, new advances in epidemiology put greater emphasis on social and environmental factors in the distribution of disease and trauma.³¹ More specifically, by the 1960s some American and British public health experts began modelling personal injury causation, shifting attention from legal compensation to collective methods for preventing future injuries. One such expert was William Haddon, Jr, writing at the same time as Woodhouse:³²

Approaches to the phenomena of trauma ... are rapidly becoming more rational and scientific. ... The traditional wisdom perpetuates terms and concepts formerly applied to much of human experience. "Luck," "chance," "accident," and other extrarational notions still survive ... What then, is the essence of this transition? Very broadly and importantly, it is part of the increasing awareness of the relationships between man and his environment, of human ecology ... It is the shift from descriptive thinking ... to categorizations in etiologic terms. ... [T]he old, descriptive, concept of an accident is largely giving way ... to an etiologic concept ... Hence it opens the door to the possibility of manipulation and control.

30 For background, see Philip Shabecoff *A Fierce Green Fire* (revised ed, Island Press, Washington, 2003). For arguments that Carson's environmentalism was an outgrowth of prior industrial health research programmes, see (in addition to Sellers, above n 21) Chad Montrie *The Myth of Silent Spring: Rethinking the Origins of American Environmentalism* (University of California Press, Berkeley, 2018).

31 According to Robert Beaglehole and Ruth Bonita, the "second epidemiological revolution" took place during the period 1946 to the mid-1960s: Robert Beaglehole and Ruth Bonita *Public Health at the Crossroads: Achievements and Prospects* (2nd ed, Cambridge University Press, Cambridge, 2004) at 119.

32 William Haddon, Jr "The Changing Approach to the Epidemiology, Prevention, and Amelioration of Trauma: The Transition to Approaches Etiologically Rather than Descriptively Based" (1968) 58 *American Journal of Public Health* 1431 at 1431–1433 (based on a paper delivered some six weeks before the *Woodhouse Report* was published).

Contemporary with the *Woodhouse Report*, this passage expresses the public health corollary to the key Woodhouse passage cited above:³³

People have begun to recognise 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.

In the new public health analysis of the 1960s, researchers contemplated a wide set of causal vectors, all of them potentially relevant to mitigating the toll of personal injuries, reaching well beyond the old legal folklore of fault. Modern prevention would need to choose from this wider range of behavioural and structural factors.³⁴ In other words:³⁵

The process of causal inference runs the danger of adopting a narrow individualistic focus, and ignoring the social, economic and political contributions ... the so-called upstream determinants which are outside the control of individuals.

33 *Woodhouse Report*, above n 1, at [89].

34 In the public health vocabulary, compensation was treated as "tertiary prevention", much the same way as Woodhouse describes it.

35 Beaglehole and Bonita, above n 31, at 152–153 (footnotes omitted).

Public health hopes to find specific remedies for complex causation, on the presumption that disease and disorder demand collective intervention, wisely scripted. The variables at hand derive from the web-like structure of environmental events. The clearest description of this mitigation toolbox is a 1968 diagram from Haddon, separating out the actors, vectors and time dimensions that could all be relevant to a prevention strategy:³⁶

COMPONENT \ PHASE	DRIVER	PASSENGERS	PEDESTRIANS	BICYCLISTS	MOTOR-CYCLISTS	VEHICLES	HIGHWAYS	POLICE
PRECRASH								
CRASH								
POSTCRASH								

RESULTS → DRIVER INJURY & DEATH PASSENGER INJURY & DEATH --- --- --- PROPERTY DAMAGE --- ---

Figure 3—A matrix for identifying major areas within the highway portion of the over-all chemical and physical injury problem

The Haddon matrix analyses accidents using classic public health categories of host, agent and environment, familiar in the mitigation of infectious diseases. These analytical distinctions were implicit in Woodhouse's references to the causal matrix of modern accidents. For the emerging environmental movement, this new research offered multiple strategies for preventive regulation:³⁷

Approaching injury as a disease ... relies on an etiologic framework which attributes the physical manifestations of injury to the interaction among host, agent and environment, a method proven successful in the prevention of infectious and communicable disease and widely used to appraise risks to health. There are several assumptions at work here. First, injury is not a random event but is invariably attributable to the complex interaction of ... host, agent and environment. Second, no one of these factors alone can

36 Haddon, above n 32, at 1436.

37 Stephen H Linder "Injury as Metaphor: Towards an Integration of Perspectives" (1987) 19 Accident Analysis and Prevention 3 at 4 (citations omitted).

be considered a sufficient cause. And third, primary prevention can only be effective when implemented at the community level.

Applying public health on a global level, there was the question of completely new hazards cropping up in developing countries, echoing the social cost studies of the economist Kapp. By the 1960s, public health had documented the notorious "health transition", within newly industrialising societies, as increasing prosperity and life expectancy opened the door to the same chronic diseases and incapacities experienced by industrialised countries, including an increase in personal injuries.³⁸

There is a further humanistic corollary to this shift coming from social welfare theory, in the expansion of welfare goals to promote strengthening human "capabilities", both individual and social capacities, in contrast to the economic emphasis on maximising individual wealth and income.³⁹ This transition was likewise implicit in the Woodhouse framework, with its declaration that community responsibility be directed to prevention and rehabilitation, and not just monetary compensation.

Given these parallel developments in social cost economics and public health, contemporary with the *Woodhouse Report*, the two Woodhouse heresies can be seen to converge. Both heresies invoke the ecological complexity of society and environment. For social costs, both the causes and the remedies support a collective notion of agency and response, starting with a rejection of older common law concepts. Both heresies look beyond the closed world of market exchanges, and both imply broadly representative political participation in fashioning remedies. The public health language treats prevention as the primary remedy, naming rehabilitation as "secondary prevention" and compensation as "tertiary prevention".

IV THE FATE OF WOODHOUSE HERESIES

Building on these ideas, Woodhouse found key principles to support his new compensation scheme. But he kept this larger framework in the background, putting the main focus on his legislative programme. Had the later implementation of ACC paid closer attention to the underlying premises, New Zealand might have considered tackling related problems of uncompensated social and environmental costs. There was certainly more to be done to advance public health, environmental protection and human capabilities. Woodhouse invited New Zealand to take an initial step in this direction: abolishing the private law approach to personal injury, while leaving an open path to still bolder applications of environmental and public health principles.

But this is not what happened in the 1970s. For all its depth of vision, the Woodhouse formula was hobbled from the very start by the rise of a powerful neoliberal alternative. We can speculate about how that change happened, and why it happened. From a vantage point 50 years later, it is

³⁸ Beaglehole and Bonita, above n 31, at 6–10.

³⁹ See Sen, above n 20; and Nussbaum, above n 20.

important not to underestimate the strength and breadth of neoliberalism, nor to dismiss it as just some far-right ideological fashion. By the mid-1960s, the ground was already shifting towards such ways of thinking, reaching across the entire political spectrum. This new set of economic and political concepts firmly rejected those principles embraced by Woodhouse. Even many supporters of ACC lost sight of the report's increasingly "heretical" views, settling rather into a defensive crouch to preserve the public nature of the compensation system.

But 50 years of neglect is long enough. Today, faced with existential challenges on the scale of global climate change and mass pandemics, we need to find new paths and new orthodoxies. If the Woodhouse heresies can point us in new directions, much depends on whether our public culture will finally escape the stranglehold of the neoliberal order. A recent history maintains that this movement has mostly run its course, rising and falling during the period of 1970–2020. Symptoms of decline were the 2008 global financial crisis and the political turns marked by Brexit in the United Kingdom and Trumpism in the United States. We might now add to this list the public health challenges left behind from the COVID-19 pandemic.⁴⁰

Of course, no one knows what comes next; and it is a serious mistake to assume that public policy would now return to where it left off with heretics like Woodhouse, Kapp and Haddon. Assuming that neoliberalism is finally moving offstage, it vacates a political space that has yet to be defined. Its departure opens the way for a plague of social pathologies—populist anger, anxiety about immigration and racial difference, authoritarian and nationalistic political slogans, along with scepticism about the very notion of a "common good". The struggle within this political space will determine which of today's views will become the next orthodoxies.

Whether it is premature to mark the end of neoliberalism, its arrival coincided almost precisely with the publication of the *Woodhouse Report*. It was a shift in styles of thinking that cut across the political spectrum from right to left. The unmistakable signs of this change appeared in the late 1960s, with the embrace of cost-benefit analysis as the touchstone of public policy. Such developments in practical thinking counted far more than the intellectual subtleties of Austrian economics, or the extreme doctrines of Chicago economics. The popularity of these academic ideas was more an effect rather than the cause of the neoliberal turn in the United States and elsewhere. On the heels of right-wing figures like Margaret Thatcher and Ronald Reagan, there came such left-centre figures as Tony Blair and Bill Clinton, building a united front behind trade globalisation.⁴¹ In New Zealand, famously, it was the Fourth Labour Government that promoted these changes.

40 Gary Gerstle *The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era* (Oxford University Press, Oxford, 2022). Other sources consider the COVID-19 pandemic as the final step: see Adam Tooze *Shutdown: How Covid Shook the World's Economy* (Viking, New York, 2021).

41 For Western Europe, see Stephanie L. Mudge *Leftism Reinvented: Western Parties from Socialism to Neoliberalism* (Harvard University Press, Cambridge (Mass), 2018).

From the centre-left there came a persistent scepticism about political power, supported by a growing presumption against state regulations. Cost-benefit analysis was accepted as a universal check on governmental overreach. This relentless disenchantment of politics awakened a whole array of market remedies as preferred social tools. Unpaid social costs, like those invoked by Woodhouse, were either ignored or reduced to market impediments, for which the proper remedy was greater market freedoms.

In some circles, including the legal academy, the same scepticism awakened a new faith in judicial authority, which favoured class-action lawsuits, and managerial judicial oversight of state agencies. Governmental failures were said to be as ubiquitous as market failures—and indeed inevitable failures, if one accepts that all human nature is incurably self-interested.⁴² For a large group on the political left, the exception was judicial authority, which alone was able to escape this web of self-dealing.⁴³

In the United States, this embrace of judicial authority was derived in part from prior court decisions protecting the political rights of racial and ethnic minorities, generally challenging state and local restrictions on racial minorities. In the 1960s those expansive court rulings had been long overdue. But they also raised presumptions against other actions taken by the state. The new civil rights were invariably framed by the judges as "negative" rights limiting state action, and thus became

42 For an extended historical treatment of this shift, see Nancy MacLean *Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America* (Viking, New York, 2017). MacLean's book emphasises the "public choice economics" of James M Buchanan (a Chicago school ally, leader of the "Virginia school" and the recipient of massive funding from entrepreneurs on the right). But much of this philosophy can also be associated with the "public interest law" movement, initiated by Ralph Nader and funded by left-leaning philanthropies, as described by Paul Sabin *Public Citizens: The Attack on Big Government and the Remaking of American Liberalism* (Norton, New York, 2021).

43 As Sabin, above n 42, indicates, this movement began with a sense of "ideological righteousness", and was initially successful in enlisting courts to intervene in both corporate and state regulatory behaviour. But their litigation strategies "proved to be overly dependent on sympathetic judges appointed by liberal politicians" and were "easily adopted by conservative antagonists backed by corporate donors and private philanthropists". The left was powerless to overcome this shift, having "neglected to build support for government in a way that could facilitate policy-making": at 193. For a socio-legal study of public policy pursued through litigation, see Jeb E Barnes and Thomas F Burke *How Policy Shapes Politics: Rights, Courts, Litigation, and the Struggle Over Injury Compensation* (Oxford University Press, Oxford, 2015).

part of the rising anti-regulatory spirit.⁴⁴ Eventually, new judicial appointments would weave neoliberal tenets into their jurisprudence.⁴⁵

V SOME NEOLIBERAL ORTHODOXIES

Let us not suppose that neoliberalism arrived by chance as some kind of ideological fashion. It is worth remembering the highly unsettled state of economy and politics in the late 1960s, just as Woodhouse was framing his heretical principles. In the developed countries in Europe, the United States and also in Australia and New Zealand, major structural changes were taking place during this short pivot to the 1970s. In retrospect, the two post-war decades (1945–1965) can be seen as the golden period, with a steady rise in general prosperity, living standards, full employment, economic growth and income equality.⁴⁶

By contrast, the 1970s and beyond brought us energy crises and stagflation, beginning a long-term decline in the rate of GDP growth, a steady rise in income inequality and increasing periods of unemployment. For the New Zealand experience, I rely on Brian Easton's analysis. Precisely one year before the *Woodhouse Report* was released, the price of wool collapsed in world markets. It was the beginning of a long-term shift in the terms of international trade. As Brian says, December 1966 can be seen as the end of New Zealand's post-war boom, as the economy "entered another long period of relative stagnation".⁴⁷ As Brian likes to say, it marked "the end of the golden wether".⁴⁸

These structural shifts in the economy increased the sum of social costs. But it also put unprecedented strains on the political system, which was insufficiently inclusive and utterly unprepared to justify new and urgent distributive choices.⁴⁹ In both Europe and the United States,

44 See Max Rashbrooke *Government for the Public Good: The Surprising Science of Large-Scale Collective Action* (Bridget Williams Books, Wellington, 2018). The post-war shift in liberalism away from Dewey's "social action" to Isaiah Berlin's "negative rights" has been described by Samuel Moyn as a manifestation of "cold-war liberalism", easing the eventual path towards neoliberalism: see Samuel Moyn *Liberalism Against Itself: Cold War Intellectuals and the Making of Our Times* (Yale University Press, New Haven, 2023) at ch 2.

45 On the post-1980s policy scepticism as the legacy of this judge-led civil rights movement, see Gary Gerstle *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* (Princeton University Press, Princeton, 2015) at ch 10. For a rare dissenting voice from the left regarding judge-led social change, see Gerald N Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (3rd ed, University of Chicago Press, Chicago, 2023).

46 See Marc Levinson *An Extraordinary Time: The End of the Postwar Boom and the Return of the Ordinary Economy* (Basic Books, New York, 2016).

47 Brian Easton *Not in Narrow Seas: The Economic History of Aotearoa New Zealand* (Victoria University Press, Wellington, 2020) at 362.

48 At 362–364.

49 As Levinson, above n 46, concludes, the 1970 changes marked "a shift away from collective responsibility for social well-being; as state institutions were allowed to wither, individuals were asked to assume more of

political conflict reached a notable peak in the late 1960s. Fallout from the Vietnam War ignited more intensive protests, alongside a deeper reckoning in the United States and elsewhere over race relations. The old political consensus from the post-war years was faltering, in the face of shifting economic realities, marking the transition to a more complex public arena.⁵⁰ State finances came under sustained pressure. The established order was soon picked apart by challengers with selective notions of who belonged to the "community", let alone the kinds of responsibilities assigned to "the community as a whole". Some core Woodhouse concepts were losing whatever resonance they might previously have enjoyed. As political institutions failed to adapt, social factions splintered into interest groups, weakening the notion of a "common good" as a unifying moral standard.⁵¹

As one economic sociologist put it, newly affluent societies were suddenly unable "to face the political challenges imposed by the end of affluence".⁵² Social responsibilities that seemed entirely obvious to Woodhouse slipped into the netherworld of heresies. Social cost economics, environmental protection and public health were fully prepared to assess these new challenges. But doing something about any of these problems required political capacities that were quickly dropping away.

Take public health measures, like those confidently graphed by William Haddon, with the potential to promote public safety by choosing among a dozen points of regulatory leverage, applied across social actors, physical objects and temporal dimensions. Just as all these regulatory possibilities became ripe for analysis, they ran afoul of new anti-regulatory doctrines.⁵³ Cost-benefit analysis placed suspicion on new regulatory policies, unless they could show how they would pay their own way. In its basic rhetorical stance, cost-benefit economics sanctified the economic status quo, concentrating on discrete adjustments at the margins. This approach had no place for the critiques from social cost economics, developed by the Institutionalists and accepted by Woodhouse. It is not

the costs and risks of their health care, their education, and their old age. It is fair to say that the economic changes of the 1970s turned the world to the right": at 10.

50 See Greta R Krippner *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (Harvard University Press, Cambridge (Mass), 2011). With reference to Daniel Bell's work on "cultural contradictions" of capitalism, Krippner notes that "the depoliticization of the economy ... has atrophied the collective capacities" that Bell emphasised as essential support for economic life: at 140.

51 For an analysis of this 1960s process of political fragmentation, see generally Ira Katznelson "Was the Great Society a Lost Opportunity?" in Steve Fraser and Gary Gerstle (eds) *The Rise and Fall of the New Deal Order, 1930–1980* (Princeton University Press, Princeton, 1989) 185, but especially at 191–192. A more general historical treatment is Daniel T Rodgers *The Age of Fracture* (Harvard University Press, Cambridge (Mass), 2011).

52 Krippner, above n 50, at 149.

53 Sabin, above n 42, recounts this turn in discussing Haddon's experience after President Johnson appointed him to head the National Traffic Safety Bureau in 1966: at 31–32 and 139.

surprising, therefore, that the New Zealand ACC was dismissed from abroad, derided as a "wrong turn" and heading up a "blind alley".⁵⁴

Much of the New Zealand debate, going back to the Accident Compensation Act 1972 and persisting throughout the coming decades, centred on the topic of cost. Could New Zealand afford to implement the Woodhouse proposal? Woodhouse himself anticipated this resistance and offered practical measures for launching his new scheme.⁵⁵

But his deeper answer to the cost question was more radical, indeed "heretical". According to the first paragraph of the report, the toll of personal injury in New Zealand was a massive sum of social costs, *which had already been incurred* by the victims, their families and their communities. For Woodhouse, his strongest arguments were based on economic costs, taken as a social reality. These very real costs appeared nowhere on the books of the state or private enterprise and were as yet uncompensated by the network of "responsible" social forces. That responsibility was both causal and remedial: the society that benefits from modern industrial prosperity must take action to prevent, rehabilitate and compensate.

Following the *Woodhouse Report*, a group of public health researchers in Otago undertook to measure what Woodhouse called "the toll of personal injury", or the unpaid costs already imposed on the "random and necessary" victims. Their estimates for 2005 were \$6–7 billion in annual costs.⁵⁶ But Woodhouse knew this kind of information would not be sufficient to galvanise a more radical community response—at least, not in the late 1960s. Rather, his approach was incremental, taking advantage of existing financial streams, giving the community time to accept more robust ways of fulfilling the demands of community responsibility. To the extent he expected "logic" to drive this evolution, it was the radical logic tied to his heretical principles, so clearly stated in the report.⁵⁷

54 James A Henderson, Jr "The New Zealand Accident Compensation Reform" (1981) 48 U Chi L Rev 781; and Jeffrey O'Connell *Ending Insult to Injury: No-Fault Insurance for Products and Services* (University of Illinois Press, Urbana, 1975) at 73–76.

55 This is why Woodhouse insisted on having an accountant as one of his fellow commissioners: Owen Woodhouse "Closing Remarks" (address to the Accident Compensation Symposium: Accident Compensation 40 Years On, University of Auckland, Auckland, 13 December 2007) (oral remarks, not incorporated in the written version).

56 Over the years, relevant studies have been conducted by the Injury Prevention Research Unit at Otago University: see for example SCR Stephenson, John D Langley and MJ Trotter *Impact of Injury in New Zealand* (2nd ed, University of Otago, Dunedin, 2005). A 2012 study gave the annual cost figure as \$10.5 billion. See also New Zealand Injury Prevention Strategy *The New Zealand Injury Prevention Outcomes Report – June 2012* (Accident Compensation Corporation, 2012) at 7. The New Zealand Injury Prevention Strategy was short-lived, having been disestablished in 2013.

57 *Woodhouse Report*, above n 1, at [17], which acknowledges that strict logic must give way to political realities.

Outside New Zealand, the complex social dynamics cited by Woodhouse would play no part in the next big theories of tort reform.⁵⁸ For one of those pioneers of neoliberal tort analysis, Professor Guido Calabresi, the overriding cost imperative was to limit the resources society spends on accident prevention. In 1970 Calabresi released a book called *The Costs of Accidents*,⁵⁹ but nowhere in that book does he consider the toll of unpaid social costs falling on accident victims, as declared by Woodhouse in his opening paragraph. For Calabresi, the cost problem was far more subtle, defined now as the danger of economic over-investment in accident prevention. The neoliberal solution was to cap the costs of prevention to match whatever aggregate sum individual consumers might be willing to pay to insure their own personal safety. The prevention part of this equation called for tweaking tort liability rules. But the central imperative was to convert safety into a commodity, allowing individual consumers to pay for safety premiums, or at least private insurance, and thereby set the limit on prevention costs. It seems heartless to delegate safety thus to individual purchasers. But Calabresi's only concession was to restructure markets, so that the commodity of safety could be delivered in the most cost-efficient way. The moral obligation to victims was irrelevant—or at best a charitable afterthought.

In the powerful law-and-economics movement, this austere philosophy became the new orthodoxy, strengthened by further refinements from the Chicago school that privileged current markets as producing the right amount of public safety. The status quo was efficient enough, or at least it would be moving towards efficiency if left alone by public authorities.⁶⁰ To the extent there was any social crisis about personal injury or environmental damage, it was caused by artificial constraints on markets. This was the message drawn from a classic 1960 essay by British economist Ronald Coase, which translated the old social cost notion into neoliberal terms. Using Coase's theory, unpaid social costs were to be cured not by regulation or state action, but by expanding bargaining opportunities between potential perpetrators and victims.⁶¹ The problem was not the ultimate injury or damage, but the fact that bargains over safety between the affected parties were still too

58 For an extended analysis of this neoliberal turn in theory and policy, see Richard Gaskins "The Fate of 'No-Fault' in America" (2003) 34 VUWLR 213.

59 Guido Calabresi *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, New Haven, 1970).

60 This shift was consolidated by Richard A Posner *Economic Analysis of Law* (Little Brown, Boston, 1973), now in its ninth edition (2014).

61 RH Coase "The Problem of Social Cost" (1960) 3 *Journal of Law & Economics* 1. This influential line of thought replaces the more realistic Institutionalist concept of "social costs" with the economic formalism of "externalities", conceived as potential transactions on the route to equilibrium. The harm of such "externalities" consists of unrealised subjective welfare maximisation, rather than concrete injuries to individuals or to the biosphere. For Kapp's rejection of "externalities" as the essence of social costs, see Frigato and Santos-Arteaga, above n 23, at 140–144. It comes as no surprise that Coase never mentions Kapp, nor engages with his contemporary writings on social costs; for Coase, "costs" are unrealised extensions of economic transactions (transactions that may be too "costly" to complete).

cumbersome. The solution was more markets, freer transactions and a social equilibrium of risk reached by individual economic actors. While Coase himself was not convinced that such total market bliss was attainable, his Chicago-based disciples would carry his theories to their extreme.

The concept of risk was thus transformed into an amalgam of strictly individual economic calculations, replacing the social responsibility formula advanced by Woodhouse. It was now up to single economic actors with their subjective choices to decide how much risk they preferred to absorb with cost premiums or insurance, and how much risk they chose to live with.⁶² Of course, knowing about future risk requires a lot of information; but that too is a commodity that would be bargained for in unfettered markets. This was not to deny that nature itself is rife with chance events, at least within the scope of human knowledge. But strictly personal management of risk defines the innate welfare-maximising essence of human nature.⁶³ This new orthodoxy would override the old Institutionalist concept of social cost, ignoring objective, collective sums by reducing safety to subjective, individual choice. What Kapp and Woodhouse were talking about came to be abandoned as heresies.

VI *REBUILDING THE COMMUNITY*

To sum up, over the past 50 years the thinner norms of market transactions replaced the thicker norms of social cohesion and collective responsibility. Neoliberal views on risk and social costs were able to suppress the ecological, community-centred principles circulating during the Woodhouse era. In some ways, Woodhouse in 1967 was the last gasp of an older tradition, ready to be eclipsed by a surge of new market-centred thinking—including in the field of tort law.

But from our current vantage point, we can also see Woodhouse as a pioneer of the next wave—a wave yet to come. Woodhouse captured the spirit of social realism beyond the market, highlighting the essential human relationships that remain invisible in market accounts. The Woodhouse heresies are in fact perennial ideas that once shaped a new wave of environmental awareness, along with advances in public health.

The politics of our current moment are clearly unsettled. If we continue to give markets the last word, our political voices will be overpowered by the consumer culture. And we will miss other

62 This line of thought translates loss or harm into movements up and down subjective preference scales, as postulated by neoliberal economics, missing entirely the existential reality of physical pain, mental distress and biosphere degradation. For a sustained critique of such "moral geometry", see George F DeMartino *The Tragic Science: How Economists Cause Harm (Even as They Aspire to Do Good)* (University of Chicago Press, Chicago, 2022) at pt III.

63 Yascha Mounk has argued that the 1970s marked a conceptual transformation in the understanding of "responsibility" in both political thought and public policy, in both the United States and Europe. While the prior meaning generally focused on the moral duty to help and support others, changes in the 1970s reduced "responsibility" to personal self-sufficiency, or strictly "personal responsibility": Yascha Mounk *The Age of Responsibility: Luck, Choice, and the Welfare State* (Harvard University Press, Cambridge (Mass), 2017).

community voices—voices stilled by income inequality, among other random incapacities. Such wider deliberations are sorely missing from today's political systems, as they fail to address collective harms, preparing a darker future for our planet and for all of us trying to live on it. We seem to be caught in tunnel-vision, in a transitional moment when real but unrecognised social costs set up alternating cycles of political retribution.

Let us return to Woodhouse's notion of "community responsibility", which stands at the crossroads of his heretical principles. The moral substance of this phrase flowed from the new ecological spirit shared by Woodhouse, where the complexities of environmental causation combined with public health prevention. Woodhouse drew a moral link between this social nexus of production and the collective duty to prevent harm. Even so, for Woodhouse these sweeping terms remained as background principles. The social costs of modern living were real enough, but the full spectrum of harm remained beyond the political capacities of his day. And today, long after Woodhouse wrote, this imagined "responsible community" has become even more elusive, undermined by a half-century of neoliberal diversion and avoidance.⁶⁴

If the Woodhouse principles have any prospect of becoming orthodoxies, the next generation must find practical ways to implement this stronger concept of the common good.⁶⁵ It is an enormous challenge that will not be met easily, and probably not quickly enough. Current political systems are still riven by suspicion and backlash, while still lacking in full participation and active deliberation.⁶⁶ Our fractured political life may well block wise stewardship over our imperilled environment, also curtailing public health measures when the next pandemics strike. Yet these inherently collective problems cannot be solved in a political vacuum, despite advances in technology and elite expertise. We will continue to search for that broader sense of "community" emphasised by Woodhouse.

It is an old political problem, one that will continue to hold us back until the old Woodhouse heresies can be transformed into new orthodoxies. Today, moreover, the responsible community must become truly global, as the problems of climate change and pandemic control reach across the planet.⁶⁷ The public community of the future will have to stretch beyond national governance if it is to meet its full responsibilities. To be successful, that future community will need to draw on new and stronger visions.

64 The classic source for defining a larger public community, including all those affected by social costs, is John Dewey *The Public and Its Problems* (1927), in John Dewey *The Later Works* (Jo Ann Boydston (ed), Southern Illinois University Press, Carbondale, 1988) vol 2.

65 For a recent restatement of Deweyan ideas, see Rashbrooke, above n 44, at 21–22.

66 On the civic elements of Sen's and Nussbaum's "capabilities", see the discussion in Dalziel and Saunders, above n 20, at 20–21.

67 See John Narayan *John Dewey: The Global Public and Its Problems* (Manchester University Press, Manchester, 2016).

VII THE WOODHOUSE VISION

It is time to set aside this history and look to the future. Having studied these old "Woodhouse heresies", we can now regard them as future visions—indeed quite bold visions, ready to meet the policy challenges of our present time. Recall that my remarks here are an *inaugural* lecture, offered with the hope that future presenters might find ways to apply this strong Woodhouse vision—the legacy of Sir Owen's profound public service. There will be new case studies, new proposals, new schemes and new ways to capture the spirit of community responsibility.

The core Woodhouse vision is more salient today than at any time since the 1967 report. In the whole climate change debate, the stark realities of unpaid social costs are plain for all to see. It has taken decades of careful scientific work, plus steady refinement of ecological terms—all now pointing to the present danger of massive costs, shifted to third parties and to society as a whole, and lying outside the reach of market transactions.⁶⁸ These web-like connections of environment and society call for complex analysis and collective responses—the same point Woodhouse was making in his case study of personal injury compensation.⁶⁹ Remedies cannot be limited by what we think we might afford right now, or by what we are individually willing to pay out through taxes on carbon and methane.⁷⁰ Massive social costs are already being incurred, spreading randomly but inevitably across a wide swath of humanity and the biosphere. Adequate remedies must soon be organised as compensation, rehabilitation and prevention.⁷¹ With prevention as the central pillar, we must confront a range of national and international initiatives, including strategic investments by states in alternative energy sources, while mitigating the long-tail effects of fossil fuels.

68 Spencer R Weart *The Discovery of Global Warming* (revised and expanded ed, Harvard University Press, Cambridge (Mass), 2008). See Intergovernmental Panel on Climate Change *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (March 2023), with the latest timetables and predictions, and with urgent action scenarios.

69 In contemporary literature, a clear expression of this community-wide response to problems of sustainability and climate change can be found in works by Mariana Mazzucato: see Mariana Mazzucato *The Entrepreneurial State: Debunking Public vs Private Sector Myths* (2nd revised ed, Public Affairs, New York, 2015); and Mariana Mazzucato *Mission Economy: A Moonshot Guide to Changing Capitalism* (Penguin, London, 2021), which proposes a range of specific state-led initiatives on sustainability, climate action and public health at ch 5.

70 Compare Mazzucato *Mission Economy*, above n 69, at 142–143.

71 See the agenda proposed by Dimitri Zenghelis "Decarbonisation: Innovation and the Economics of Climate Change" in Michael Jacobs and Mariana Mazzucato (eds) *Rethinking Capitalism: Economics and Policy for Sustainable and Inclusive Growth* (Wiley-Blackwell, Chichester, 2016) 185. See also Bronwyn Hayward *Sea Change: Climate Politics and New Zealand* (Bridget Williams Books, Wellington, 2017), which recognises that concrete policies will depend on first "reclaiming our capacity as *political* actors": at 72 (emphasis in original).

This triad of remedies leads naturally to the parallel vision for public health. During the recent global pandemic, it became woefully clear that most nations had not prepared adequately for that magnitude of threat. Future preparation will require more breakthroughs in vaccine technology, in addition to public investment to upgrade building codes, and to ensure better safety in the workplace and public schools. Alongside future prevention, a responsible public must be better prepared to control disease outbreaks and ensure equitable treatment to victims, their families and communities.⁷² As a public health footnote, it is worth recalling Woodhouse's personal leadership on the topic of water fluoridation, which he championed some 10 years before the accident compensation report.⁷³ The literature of public health, certainly in New Zealand, offers an impressive range of proposals for future planning, covering the same ecological matrix as environmental policy. One highly detailed agenda was assembled back in 1994, through work by the short-lived Public Health Commission.⁷⁴ It could be a fine starting point for new remedies.

If Sir Owen now serves as our guide, we cannot sit back and wait for big principles to mature into orthodoxies. From Woodhouse we can learn something more strategic: a turn to practical problem-solving, moving incrementally into the future. Before those new orthodoxies can be embraced, they may be foreshadowed in particular ways.

Notice that Woodhouse was not demanding comprehensive social change in his famous report, despite the big heretical principles. His contribution was to create a practical solution to the particular social problem of uncompensated personal injuries. His creative solution to a well-defined problem occupied the foreground—and in fact this is how the *Woodhouse Report* was widely received, both then and now. Yes, there were larger principles involved—those Woodhouse heresies, powerfully articulated throughout the report. But the practical proposal was meant to stand on its own: a compelling alternative to well-documented failures of the prevailing tort system. Against a backdrop of radical principles, Sir Owen offered a large dose of common sense, memorably expressed in accessible prose.

What about costs? How do future Woodhouse-like policies tread on such sensitive ground? For a widespread problem of previously sunk social costs, truly practical solutions will need to challenge

72 For a summary of pandemic policy essentials, see Naomi Oreskes and Erik M Conway *The Big Myth: How American Business Taught Us to Loathe Government and Love the Free Market* (Bloomsbury, New York, 2023) at 539–543. In the United States, a balanced critique of recent pandemic policy was published by The Covid Crisis Group *Lessons from the Covid War: An Investigative Report* (Public Affairs, New York, 2023).

73 Woodhouse played an active role as counsel for the Commission of Inquiry on the Fluoridation of Public Water Supplies: see *Report of the Commission of Inquiry on the Fluoridation of Public Water Supplies* (1957). A more recent initiative, with less success, was Sir Geoffrey Palmer's 2010 report for the New Zealand Law Commission *Alcohol in Our Lives: Curbing the Harm* (NZLC R114, 2010).

74 The story of missed opportunities and future challenges is laid out by David Skegg *The Health of the People* (Bridget Williams Books, Wellington, 2019), in particular at 62. A Royal Commission has been appointed to review the COVID-19 pandemic response, with a report expected sometime in 2024.

the current orthodoxies of public finance. As Woodhouse pointed out, most of us—perhaps all of us—are already incurring these social costs, inevitably if randomly. Like his resonant toll of personal injury, our communities today are already incurring large environmental costs, day in and day out. They are built into our status quo future, although they show up nowhere in balance sheets of private enterprise or state budgets. Acknowledging and mitigating such unpaid social costs, clearly identified as such, will be a defining quality of future policies cast in the Woodhouse mould.

The Woodhouse model for future public policy includes the critical element of *compensatory justice*: the very essence of "community responsibility". Woodhouse was borrowing creatively from the common law tradition of tortious liability, while shifting that principle out of the interpersonal framework of private law. In the *Woodhouse Report*, the compensatory principle was transplanted into a modern industrial context, characterised by ecological forces of causation, non-market shifting of social costs and the public-health focus on *prevention* as the appropriate strategy for setting things right.

The Woodhouses of the future will want to plan carefully for new public initiatives, just as carefully as Woodhouse planned his famous report. In addition to finding practical solutions to public problems, that plan must articulate aspirational goals for strengthening community responsibility.⁷⁵ There are no magic formulas in the old *Woodhouse Report*, no automatic templates that can guarantee future progress in the face of today's overwhelming global problems. What endures from that 1967 report is a calm and reasonable voice, prepared to let creative planning override the defects of past practice. Woodhouse surely knew that he faced formidable odds with his new compensation programme, as he boldly challenged the orthodoxies of his time. He became aware, as time went by, that other common law systems chose not to follow his path, and that compromises in the working New Zealand scheme would lead to new anomalies. His confidence in the scheme was based firmly on the strength of his underlying principles. His hope for the future was expressed with typical modesty:⁷⁶

[I]t is worth remembering that the apparent heresies of one generation become the orthodoxies of the next.

And so, for us, it is worth remembering how much Sir Owen Woodhouse accomplished, and to summon our own creativity and common sense to continue down this well-blazed path.

75 Among other documents, the 1986 Ottawa Charter for Health Promotion contains a statement regarding the importance of wide civic participation in the solution of global public health problems: see World Health Organization "Health Promotion: The 1st International Conference on Health Promotion, Ottawa, 1986" <www.who.int>.

76 *Woodhouse Report*, above n 1, at [33].

