
Privatization of Accident Compensation: Policy and Politics in New Zealand

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Introduction	405
I. The Woodhouse Report	406
II. The Accident Compensation Act 1972	410
III. The Accident Compensation Act 1982	411
IV. The Law Commission Report of 1988	412
V. The Accident Rehabilitation and Compensation Insurance Act 1992	414
A. Coverage	415
B. Benefits	416
C. Funding	417
D. Appraisal	418
VI. The Accident Insurance Act 1998	419
A. Coverage	420
i. Relationship between the 1998 Act and the common law	423
ii. Personal injury	427
iii. Personal injury by an accident	428
Mental injury	430
Non-accidental injury	431
Disease	432
Heart attacks and strokes	432
Pregnancy and unwanted births	433
Torts actionable per se	434
iv. Medical misadventure and treatment for personal injury	434
Medical misadventure	435
Treatment for personal injury.....	437
Actions for damages.....	438
v. Work-related disease, heart attacks, and strokes	441
Work-related disease	441
Work-related heart attacks and strokes	443
Actions for damages	443
vi. Miscellaneous categories	444
Visitors to New Zealand	444
Injury suffered while abroad	444
Carriage by air	445
Breach of the New Zealand Bill of Rights	446
vii. Exemplary damages	447
Donselaar v. Donselaar	447
Daniels v. Thompson	448
Section 396	452
B. Benefits	456
i. Treatment	456
ii. Weekly compensation	456
iii. Rehabilitation	458
iv. Independence allowance	459
v. Death benefits	459
vi. Disentitling factors	460
C. Competitive Accident Insurance	463

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i.	The accident insurance contract	463
	Terms of the contract	464
	Self-employed persons and private domestic workers	465
	Risk sharing	465
	Captive insurers	465
	Duration of the contract	466
	Misrepresentation and non-disclosure	466
ii.	Regulatory regime	467
	Compliance mechanisms	467
	Registration of insurers	468
	Prudential supervisors.....	468
	Insolvent insurers' fund and non-compliers' fund	469
iii.	The Accident Compensation Corporation	470
iv.	Claims process	470
v.	Reviews and appeals	472
vi.	Funding	473
D.	Appraisal	474
	i. Philosophy	474
	ii. Full funding	476
	iii. Deterrence and safety	478
	iv. Efficiency	482
	v. Choice	486
VII.	Future Directions	487
	A. Abolishing the Scheme	487
	B. Reviving the Right to Sue	489
	C. Delivering Benefits	491
	D. Improving Benefits	492
	E. Expanding the Boundaries	493
Conclusion	495

INTRODUCTION

On April 1, 1974, the New Zealand Parliament replaced the common law action for damages for personal injury with an accident compensation scheme. A system of awarding damages based upon proof of another person's responsibility for causing injury was seen as incapable of dealing with the serious social problem of accident victims needing a secure source of financial support after having been deprived, permanently or temporarily, of their capacity to work. From the outset, the right to recover compensation under the new scheme was based not on any question of *liability* but simply on the claimant coming within one of the statutory conditions for cover, in which case he or she could make a claim to the public body administering the scheme. This right also was the claimant's only option. Where coverage¹ existed, the right to sue for damages was barred.

The founders of the scheme had high hopes that it would provide fair compensation quickly and efficiently to deserving victims. It was introduced to general approbation and initially, indeed, it worked well enough. Unsurprisingly, however, the scheme has become increasingly controversial as problems concerning the level of coverage, incentives to rehabilitation, methods of funding, and, most critically, overall

1. The term "cover" and "coverage" will be used interchangeably in this article.

expense have come to the fore. The scheme originally had broad all-party support. Nowadays it has become far more of a political football. Recent developments have dramatically widened the area of disagreement. A major change in the nature of the scheme occurred on July 1, 1999, when the part dealing with personal injuries suffered at work was hived off from public administration and control and opened up to private enterprise insurers. Then, at the end of 1999, after a general election, political opponents of this change came to power, and shortly afterwards they introduced a Bill aimed at restoring the public monopoly.

The purpose of this article is to report on these various developments. The first part considers the background to the scheme and surveys the somewhat checkered path leading up to the Accident Insurance Act 1998² ("1998 Act") and the introduction of competitive provision of compensation. Next, the inquiry will turn to the coverage of the scheme under the 1998 Act, the benefits it provides, and how these benefits are delivered. This leads on to the core area of investigation, *viz* the impact of privatization, the portents for its success or failure, and whether its early abandonment can be seen to be justified. The final section attempts to make an overall assessment of the working of the scheme. Accident compensation has operated in New Zealand for twenty-five years, but it remains unique. Many countries have considered it, but nowhere else has anything quite like it actually been adopted. We will consider what lessons can be learned from New Zealand's quarter of a century of accumulated experience. Does the scheme represent a net gain to human welfare? Or is the lack of faith or of political will by onlookers shown to be well justified?

I. THE WOODHOUSE REPORT

The reasons for the introduction of the accident compensation scheme, and its fundamental design, are found in the Report of the Royal Commission inquiring into personal injury law in New Zealand (usually known as the Woodhouse Report after the name of its Chairman, the Hon. Justice Woodhouse).³ The Royal Commission was charged with investigating and reporting upon the law relating to compensation and claims for damages for incapacity or death arising out of accidents (including diseases) suffered by employees.

The Woodhouse Commission thought that a system of compensation for injured persons should be guided by the following five principles:

2. Accident Insurance Act 1998 (N.Z.).

3. See REPORT OF THE ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1967) [hereinafter Woodhouse Report].

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

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

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

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

Fifth, the achievement of the system will be eroded to the extent that its benefits are delayed, or are inconsistently assessed, or the system itself is administered by methods that are economically wasteful.⁴

Against the background of these principles, the Commission examined the existing remedies for injured persons at common law and under the workers' compensation legislation. It was satisfied that these remedies were unjust and perpetuated anomalies and that the time had clearly arrived for their replacement. However, the Commission stopped short of recommending full scale integration into the social security system.

Looking first at the disadvantages of the common law process, the Commission found many justifications for abandoning the common law. Its short-comings can be summarized as follows:⁵

(1) Liability at common law depended on proving that the defendant was at fault. Yet negligence could not be equated with moral blameworthiness. A finding of liability did not necessarily suggest any moral failing on the part of the defendant, for the expected standard of care was determined objectively, irrespective of the defendant's actual capacity to guard against the risk. Further, there was no principle of proportionality to link the extent of a defendant's liability and the degree of his or her culpability.

(2) The economic consequences of negligent conduct were spread via insurance over the whole community. In a modern world of many accidents and community-wide insurance to cover them, the fault theory had developed into a legal fiction.

(3) Compulsory insurance also undermined the claim that the

4. *Id.*, ¶ 55.

5. *See id.*, ¶¶ 78-127 (discussing the common law in a chapter entitled *Disadvantages of the Common Law Process*).

threat of damages provided a financial incentive to be careful. The Committee found no evidence, in New Zealand or elsewhere, providing any affirmative support for the deterrent effect of tort law. Other factors, like conscience, safety education, enforcement by inspection and self-interest were clearly more important, and if these failed the sanctions of the criminal law remained.

(4) The risks of litigation—the difficulties of proof, the ability of advocates, the reactions of juries, and mere chance itself—turned the system into a lottery. The hazards were such that only a small percentage of claims were litigated and brought to finality. The remedy produced a complete indemnity for a relatively tiny group of injured persons, something less for a small group of injured persons, and nothing for the rest.

(5) The delay involved in the process of investigating an accident and bringing it to trial caused the injured litigant to suffer distress and anxiety while carrying the whole burden of the loss.

(6) The operation of the tort system was cumbersome, inefficient, and extravagant. The cost of administration absorbed more than forty percent of the total amount of money flowing into the system.

(7) The award of damages in a lump sum representing all future loss was an entirely conjectural exercise where precision was impossible. Such damages carried the temptation to mortgage the future. They might be suitable for minor injuries, but those whose problems turned out to have been badly underestimated were left with no further remedy.

(8) The uncertainty, delay, and expense associated with litigation caused unnecessary anxiety and impeded rehabilitation. A remedy was needed which would enable payments to commence at an early date and would permit subsequent reviews in favor of the injured person.

Having examined the inadequacies of the action for damages, the Commission turned to consider the extent to which they were alleviated by the statutory system of compensation for industrial injury under the Workers' Compensation Act 1956.⁶ This legislation, first introduced in 1900, was generally regarded as the earliest example of statutory social insurance. It provided for payment of compensation to all workers employed under a contract of service who suffered personal injury by accident or occupational disease arising out of and in the course of employment. Responsibility for payment of compensation lay on the employer, who was obliged to insure against this liability. The system did not deprive the worker of any right to claim damages but merely

6. *See id.*, ¶¶ 176-240.

prevented double payment. A worker who failed in a damages action could still seek compensation, but if he or she succeeded, then a claim for compensation was barred.

The workers' compensation system provided a more consistent remedy than the common law, yet it also carried a number of serious disadvantages. In particular, it raised demarcation problems in determining whether an injury arose out of and in the course of employment, the available benefits were set at a relatively low level, and payments could be made only for a maximum six year period, after which they ceased. The Commission noted that the Act had been subject to criticism and was marked by unfortunate compromises.⁷ It worked upon a limited principle, was formal in procedure, was meager in its awards, and was ineffective in the field of prevention of accidents, or the physical or vocational restoration of the injured.⁸ These last two areas, it was said, should be at the forefront of any general scheme of compensation.⁹

The Commission concluded that both the action for damages and workers' compensation fell clearly short of satisfying its five fundamental requirements for the operation of a satisfactory system of compensation. It recognized that an overall solution might be the integration of a comprehensive scheme of accident compensation into the social security framework.¹⁰ There would be great advantage in doing this, for it would give an organic structure and unity to the whole process.¹¹ However, integration was not feasible if compensation would then have to take the form of the same flat rate payments for all, which would be unacceptable and unjust. The only way a comprehensive system could operate equitably was by linking benefits to earning capacity and by taking into account permanent physical disability. The Commission thought that the next move might be in this direction, but did not itself pursue the matter. It was seen as unwise to attempt one massive leap when two considered steps might be taken, but the experience gained by taking the first step would assist in moving towards a comprehensive plan.

The Commission proposed that there should be a comprehensive system of accident prevention, rehabilitation and compensation which would avoid the disadvantages of the existing processes. The system should meet the requirements of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, administrative efficiency and financial affordability. The objective

7. *See generally id.*

8. *See id.*, ¶ 240.

9. *See id.*

10. *See id.*, ¶¶ 278-81.

11. *See id.*, ¶¶ 241-74.

should be compensation for all injuries, irrespective of fault and regardless of cause. Out of the Commission's recommendations in this respect emerged the Accident Compensation Act 1972,¹² which gave a new statutory remedy to the victims of accidents but not generally to those suffering from illness or disease unless it was related to employment. As we shall see, problems arising out of the creation of this distinction between accident and illness have dogged the scheme since its very inception.

II. THE ACCIDENT COMPENSATION ACT 1972

Following the Woodhouse Commission's Report, a White Paper,¹³ and a Select Committee Report,¹⁴ the Accident Compensation Act 1972 ("1972 Act") was enacted. In its original form, this was a scaled down version of the Woodhouse Commission's recommendations. Its coverage was limited to employees injured at work and victims of motor vehicle accidents. Tort remedies remained for victims suffering accidents in other contexts. Before the scheme came into force, however, there was a change of government, and the new administration made extensive changes to the legislation to provide comprehensive coverage for all accident victims. At the same time, the scheme barred the right to sue or to claim workers' compensation for those covered by it, following Woodhouse's view that these remedies became irrelevant. This bar has remained in place ever since.¹⁵ The legislation denied access to the courts in return for the perceived advantages of the statutory scheme. The exchange has frequently been spoken of as a social contract or social compact.¹⁶

The purposes of the 1972 Act were to promote safety, to promote the rehabilitation of persons who suffered personal injury by accident, and to make provision for the compensation of those persons or their dependents. "Personal injury by accident" was not fully defined. The Act merely stated that it included the physical and mental consequences of the injury or accident, medical misadventure, incapacity resulting from occupational disease, and bodily harm caused by the commission of certain criminal offenses.¹⁷ The precise ambit of the concept was left to be determined by the decision-making process and the system for reviews and appeals established by the Act. In this way the system was

12. Accident Compensation Act 1972 (N.Z.).

13. NEW ZEALAND DEP'T OF LABOUR, PERSONAL INJURY: A COMMENTARY ON THE REPORT OF THE ROYAL COMMISSION OF INQUIRY INTO COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1969).

14. SELECT COMMITTEE ON COMPENSATION FOR PERSONAL INJURY, REPORT OF SELECT COMMITTEE ON COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1970).

15. For discussion of the bar see *infra* Part VI.A.i.

16. See *Queenstown Lakes Dist. Council v. Palmer*, [1999] 1 N.Z.L.R. 549, 555 (C.A.).

17. See *generally* Accident Compensation Act 1972.

deliberately given a degree of flexibility. Where coverage existed it was compulsory. Individuals could not opt out of the scheme and seek damages instead.

The scheme was administered by a new statutory body, the Accident Compensation Commission. Its functions included the taking of various steps to promote safety and rehabilitation and making payments to those entitled to the new benefits. Weekly compensation was payable for loss of earnings at the rate of eighty percent of the claimant's earnings prior to the accident. Lump sums were payable for loss of bodily function to a maximum of NZ\$7,000 and for pain and suffering and loss of amenity up to a maximum of NZ\$10,000. Medical expenses and other incidental costs, like transport to hospital and replacement of damaged clothing, were also covered. In the case of death, the dependents could seek compensation related to the victim's pre-accident earnings plus certain lump sums.

Funding came from three sources. First, there was an "earner's scheme" under which employers and the self-employed were required to pay levies to cover the cost of all accidents to earners, whether or not they occurred at the workplace. The levies were risk rated, so higher rates were paid by employers in dangerous industries as compared to those in safer ones. Second, there was the "motor vehicle accident scheme." This imposed levies on the owners of motor vehicles, payable at the time of registration, with the amount depending on the nature of the vehicle. Third, the "supplementary scheme" covered the victims of accidents occurring other than at work or on the road and was funded out of general taxation. The 1972 Act allowed the Commission to make recommendations for variable levies in accordance with an employer's claims record or the incidence of motor vehicle accidents in relation to age groups and classes of drivers, but this was not done. So economic deterrence was eschewed and there were no financial incentives to achieve a good claims record or financial penalties for a bad record.

III. THE ACCIDENT COMPENSATION ACT 1982

The first major review of the accident compensation scheme was in a report of a Cabinet/Caucus Committee in 1980.¹⁸ The review recommended that the three person Accident Compensation Commission be turned into the Accident Compensation Corporation ("ACC") with a board of directors. This transition was duly achieved without controversy. Certain proposals to cut benefits were referred to a Select Committee, where they were substantially watered down. A further recommendation was that the scheme henceforth be funded on

18. This is commonly known as the Quigley Report, after the name of the chairman, Mr. Derek Quigley.

a pay-as-you-go basis. The Accident Compensation Act 1982¹⁹ ("1982 Act"), which emerged from the review, left coverage untouched and made relatively minor changes to entitlements, some to the benefit of claimants.²⁰ However, implementation of the new method of funding has had long-term economic and political consequences.

Pay-as-you-go funding means that premiums or levies for the year pay all of that year's costs, including both new and old claims. They do not cover the continuing costs of claims extending into future years. In comparison, under full funding, premiums must meet all the costs of claims made during the year. They do not include past claims, but do include the continuing cost of claims for the full duration of an injury. Of course, in the case of young persons who are permanently incapacitated, that may extend for many years.

At its inception the scheme was not fully funded in an actuarial sense, but because there were no old claims, receipts were substantially greater than disbursements. This partial funding in the early years meant that substantial reserves were accumulated. The change to pay-as-you-go, while not itself imprudent, led to political pressure from employers to reduce the cost of accident compensation and to a subsequent decision to make substantial cuts in the levies. Seemingly these reductions went too far. The reserves were depleted very rapidly, which contributed to the financial problems that emerged shortly afterwards.²¹

IV. THE LAW COMMISSION REPORT OF 1988

Political support for accident compensation initially was both broad and firm. During the 1980s it began to fragment as the scheme came under pressure from different directions. One reason was dissatisfaction with the ambit of the scheme and, in particular, with the injury/illness distinction. Why, it was asked, should victims of illness be treated less favorably than victims of accidents? Others pointed to the burgeoning expense. The drain on the reserves, high inflation and cost increases all took their toll, causing the new Labour Government to respond by tripling the levies.

Following a growing volume of complaints, the government asked the Law Commission to review the scheme's operation and to make recommendations accordingly. The Law Commission's report²² strongly

19. Accident Compensation Act 1982 (N.Z.).

20. For example, the maximum lump sum payment for loss of bodily function was increased to NZ\$17,000. *See id.*

21. *See* Geoffrey Palmer, *New Zealand's Accident Compensation Scheme: Twenty Years On*, 44 U. TORONTO L.J. 223, 231 (1994) (commenting that while pay-as-you-go did not call for the sort of reserves necessary in a fully funded scheme, it was quite unsound to run them down altogether).

22. LAW COMMISSION, PERSONAL INJURY: PREVENTION AND RECOVERY—REPORT ON THE ACCIDENT COMPENSATION SCHEME (1988) [hereinafter LAW COMMISSION 1988 REPORT].

supported expanding the scheme so as to bring sickness and non-accidental incapacity under its umbrella. The Commission noted that for pragmatic and historical reasons, sickness incapacities had not been included. The Woodhouse Report recognized that funds which were already supporting the workers' compensation and compulsory motor insurance systems could be applied to the wider injury scheme, but there were questions about the cost of extending coverage any further. However, the Commission considered the demarcation anomalous and thought it ought to disappear—sooner rather than later. It believed that this could be done in stages, by first accepting congenital incapacities already supported by the social welfare system, then later taking in higher level disabilities, and finally including less serious disabilities. On the other hand, lump sum payments were seen as illogical in relation to the income maintenance purposes of the injury scheme, and for sickness they would become incongruous. Serious physical incapacity and economic loss were better compensated by periodic payments. Lump sums should, therefore, be abolished.

The Commission was satisfied that its scheme would not lead to an explosion in costs and could be funded by levies (proposing a single rate for employers and the self-employed close to the average rate for 1987/88), investment income, and taxation. It was confident, moreover, that the existing scheme was not facing a financial crisis.²³ By far the largest area of cost increase was in the amounts payable to those who claimed in earlier years who were still in receipt of payments. The cost of claims in the first year had increased only by small amounts. In 1987, the whole of the real increase in spending covered costs incurred during the earlier years. The scheme was doing what it was intended to do—compensating the seriously incapacitated without a limit of time. However, a second question was whether people were receiving payments over a longer period than previously. Some figures suggested that this might be happening, but the Commission did not know why. Possible reasons, apart from a build-up of long-term entitlements, were the removal of certain deductions from earnings related compensation, higher and more lump sums being awarded, a catch up in a backlog of claims, and changes in medical payments. It was thought that limiting professional fees, abolishing lump sums and investigating possible fraud and abuse could lead to substantial savings.

A contemporaneous report of the Royal Commission on Social Policy²⁴ also proposed removing the sickness exclusion, but at the same time cutting back substantially on accident benefits. The Commission

23. *See id.*, ¶¶ 83-102.

24. ROYAL COMMISSION ON SOCIAL POLICY, 2 REPORT OF THE ROYAL COMMISSION ON SOCIAL POLICY—FUTURE DIRECTIONS 757 (1988).

considered this latter proposal to be unnecessary and socially undesirable.

Expansion of the accident scheme to an incapacity scheme was taken up by the Labour Government, and in 1990 it tabled a Rehabilitation and Incapacity Bill founded on the Law Commission's report. The purpose of the Bill was to introduce a comprehensive income maintenance and rehabilitation scheme available to all persons who suffered incapacity, regardless of cause. Nothing came of this Bill, for Labour shortly afterwards was voted out of office. Before the election, the National Party had also indicated that it favored extension of this nature and had promised a White Paper on the subject. However, the new National Government then came to the conclusion that the existing scheme was too expensive and abruptly changed direction.

V. THE ACCIDENT REHABILITATION AND COMPENSATION INSURANCE ACT 1992

Following the election, a ministerial Working Party was appointed by the government to review the working of the accident compensation scheme and to develop proposals to ensure, *inter alia*, that in the event of incapacity, everyone had access to an acceptable level of income support and to health care services. Due to a tight time frame, however, the Working Party limited its analysis to injury and did not consider illness. Its report proposed an insurance based and compulsory injury compensation scheme, with private insurers competing with the ACC to provide cover.²⁵ The government did not accept the recommendations, but asked the Working Party to consider further how to contain and spread the costs of the existing scheme on the basis that the ACC continued to administer it. A supplementary report formed the basis for the Minister of Labour's policy statement on the future of accident compensation,²⁶ from which emerged the Accident Rehabilitation and Compensation Insurance Act 1992²⁷ ("1992 Act").

The policy statement maintained that the government recognized the value of a comprehensive no-fault accident scheme and would retain it. Yet it noted that there had been some criticism, particularly in respect of the fairness and the affordability of the scheme. Regarding fairness, employers were funding nearly seventy percent of the total scheme, while work accidents accounted for only about forty percent of

25. See MINISTERIAL WORKING PARTY ON THE ACC AND INCAPACITY, REPORT OF THE MINISTERIAL WORKING PARTY ON THE ACC AND INCAPACITY (1991) [hereinafter MINISTERIAL WORKING PARTY REPORT].

26. See NEW ZEALAND DEP'T OF LABOUR, ACCIDENT COMPENSATION—A FAIRER SCHEME (1991) [hereinafter ACCIDENT COMPENSATION—A FAIRER SCHEME].

27. Accident Rehabilitation and Compensation Insurance Act 1992 (N.Z.).

total costs. Earners, by contrast, did not contribute towards the cost of non-work injuries. Regarding affordability, the cost of accident compensation had risen at an average rate of twenty-five percent per annum between 1985 and 1990 and continued to rise. In effect, there had been a doubling of costs every four years. Cost escalation had occurred particularly in the areas of earnings related compensation, lump sum payments and health care, while at the same time judicial interpretation of "personal injury by accident" had considerably expanded the coverage provided by the scheme. This meant that absent structural reform or a substantial increase in premium rates, there would soon be insufficient funds to meet new claims. The necessary levy increases were unacceptable, and what was proposed instead was a reform of the scheme aimed at widening and reallocating its funding base, reducing its costs and restricting its coverage.

Whether the government's financial analysis was unduly alarmist might be debated in light of considerations of the kind found in the Law Commission's report. Arguably the scheme had reached maturity, with a rough balance between new claims and expiring liabilities. And clearly, substantial savings could be made without disturbing coverage. The scheme still was very cheap. The annual cost before the 1992 changes was about NZ\$1 billion, or a dollar a day for every person in New Zealand.²⁸ Yet considerations such as these were not allowed to stand in the way of the proposed changes, which were enacted as the 1992 Act.

A. Coverage

A primary objective of the new Act was to eliminate uncertainty about the boundaries of the scheme and to rein in the ability of the judges to give an expansive interpretation to the provisions governing its ambit. The bases for cover were similar to those laid down in the earlier Acts, but their scope was precisely, and in some respects far more restrictively, defined. So there was cover for personal injury caused by an accident, by employment-related disease or infection, by medical misadventure and by treatment for personal injury, and also for mental or nervous shock suffered by the victims of certain specified sexual offenses. However, whereas formerly these categories all fell within the broad concept of "personal injury by accident" (which had only a non-inclusive definition), they were now treated as separate categories and made subject to a series of detailed definitions. Judicial discretion in determining their limits was entirely removed. This arrangement has been carried over into the Accident Insurance Act

28. Palmer, *supra* note 21, at 227.

1998, and we will look more closely at the details of the coverage now provided by the scheme when examining the 1998 Act.

B. Benefits

The 1992 Act sought to contain costs by cutting back on some of the benefits payable under the scheme. Earnings related compensation starting one week after the injury and based on eighty percent of total earnings up to a prescribed maximum was continued. In the case of low earners, there was provision for a minimum level of benefit, to prevent compensation falling below the equivalent social security benefit. In addition, new time limits on the payment of benefits were introduced. Formerly, compensation continued for able-bodied workers who could not find employment, but now benefits ended after twelve months where a claimant was assessed to have a capacity to work greater than eighty-five percent of full working capacity. Unemployment benefits were thought to be the appropriate form of income support for those unable to find work. However, the eighty-five percent test proved to be unworkable in the light of the varied objectives of the legislation, and because it called for an unobtainable degree of scientific precision. In 1996 it was replaced by a new assessment procedure aimed at determining whether a person had a "capacity to work," meaning work for which the person was suited by reason of experience, education or training. A further time limit was related to the claimant's age. The Act provided that entitlement to compensation ended at the age at which a person became entitled to New Zealand superannuation. In limited circumstances, he or she could elect to continue to receive compensation for up to a year after that age.

Social rehabilitation, covering compensation for such expenses as home alterations, motor vehicle adaptation, wheelchairs, and home help, was to be paid according to regulations, which were drafted in a very restrictive fashion.²⁹ Vocational rehabilitation, directed at assisting persons to maintain or obtain employment, was available only to persons who had been earners immediately before the accident in question. Thus non-earners could get no employment-oriented assistance.

Lump sum payments for loss of faculty and for pain, suffering and loss of enjoyment of life were abolished. They were replaced by a new disability allowance of up to NZ\$40 per week, which was available to those with a degree of disability of ten percent or more. This quickly was found to be quite inadequate for its intended purpose of meeting

29. The regulations governing the provision of social rehabilitation were found to be so inflexible that by an amendment to the Act in 1996 the ACC was given a discretion not to apply them.

the day to day costs of loss of faculty. Furthermore, in its first year of operation over half the claimants either failed to qualify or obtained only the minimum payment of NZ\$4 per week.³⁰ In 1997, following widespread criticism, a slightly more generous scheme was introduced. This focused more on the impairment suffered by the individual than the costs of living with incapacity, increased the maximum amount of the allowance to NZ\$60 per week, and made provision for subsequent rises in the costs of living.

The 1992 Act also provided for various payments in the event of the death of a person covered by the scheme. These included funeral expenses, grants for a surviving spouse and for the children and other dependents of the deceased, and weekly compensation for these persons. The scheme of benefits and entitlements continued or introduced by the 1992 Act have all been carried over into the 1998 Act. We shall look at their present scope later on.³¹

C. Funding

Pay-as-you-go was retained, but substantial changes were made to existing sources of funding and new sources were introduced. Employers now met only the cost of providing coverage for injury sustained in the course of employment, except where a motor vehicle was involved. Henceforth, all earners paid a premium to meet the cost of coverage for accidental injury. This was deducted by employers from wages and salaries and paid to the ACC through the Inland Revenue Department. The self-employed premium continued to have components to meet the costs of work and non-work injury. The motor vehicle owners' premium (covering also public health care costs) was supplemented by a new premium on petrol. This sought to ensure that non-owning drivers also contributed to the costs of injuries involving motor vehicles. The government continued to meet the costs of compensation for accidental injury to non-earners.

The Act sought to meet the criticism that the existing scheme lacked financial incentives to encourage safety and good work practices by introducing experience rating of employers,³² in order to ensure that premiums reflected actual claims history. The policy statement preceding the Act had said that the government would investigate the feasibility of extending experience rating to earners and motor vehicle owners, but in fact this was not done.

30. ACCIDENT COMPENSATION CORP., REPORT OF THE ACC REGULATIONS REVIEW PANEL (Aug. 24, 1994).

31. See *infra* Part VI.B.

32. See Accident Rehabilitation and Compensation Insurance Act 1992, § 104.

D. Appraisal

Aspects of the 1992 Act were purportedly insurance-based, as indicated, for example, in the new provisions for "premiums"³³ and risk rating, but, arguably, the changes in this respect were more cosmetic than real. The continuing similarities with social welfare provision were far more significant. The scheme was managed by a government owned corporation, there was a monopoly in the delivery of services, and levies, cover and entitlements were prescribed in legislation and regulations. What is quite clear, however, is that after 1992 coverage was more limited and some of the available benefits markedly less generous. For example, the abolition of lump sum awards, justified on the ground that they provided a disincentive to rehabilitation, was severely criticized as constituting a breach of the social contract upon which the scheme was founded. Certainly they had often provided the only source of substantial compensation to non-earners, who would now recover little or nothing. The independence allowance was far from an adequate replacement, even taking into account some amelioration of its worst features. Again, the provisions for obtaining vocational rehabilitation were rigid, with an arbitrary distinction from social rehabilitation. This restriction also had a disproportionate affect on women.³⁴ Finally, the introduction of an age limit was inconsistent with the insurance philosophy of the 1992 Act. Older persons were charged the same premiums, but had very limited rights to compensation.

Commentators heaped a good deal of opprobrium on the 1992 Act, both for its lack of any coherent policy and for its markedly reduced benefits. Palmer noted that the National Government's decision appeared to have been motivated by a desire to cut as much from the scheme as the traffic would bear, without regard to any principle other than making it cheaper.³⁵ He saw the scheme as being more in the nature of a mean workers' compensation scheme which covered injuries for twenty-four hours a day.³⁶ Harrison thought that the result of the 1992 restructuring rendered the scheme scarcely recognizable as an accident compensation system.³⁷ Entitlement had ceased to be comprehensive and compensation had ceased to be real.³⁸ Ison was critical both of the changes and of the process by which they were

33. See Accident Rehabilitation and Compensation Insurance Act 1992, § 101.

34. See generally Margaret A. McGregor Vennell, *Issues for Women in Claims for Medical Misadventure*, 23 VICT. U. WELLINGTON L. REV. 13 (1993); Louise Delaney, *Accident Rehabilitation and Compensation Bill: A Feminist Assessment*, 22 VICT. U. WELLINGTON L. REV. 79 (1992).

35. See Palmer, *supra* note 21, at 233, 237.

36. See *id.*

37. See RODNEY HARRISON, *MATTERS OF LIFE AND DEATH: THE ACCIDENT REHABILITATION AND COMPENSATION INSURANCE ACT 1992 AND COMMON LAW CLAIMS FOR PERSONAL INJURY* 50 (1993).

38. See *id.*

determined, and noted the disincentives to rehabilitation, the major drawbacks in experience rating, and the revival of adversarial processes.³⁹ Miller was less critical, remarking that the lack of any clear philosophy was not nearly as important as the extent to which the scheme served important values.⁴⁰ He concluded that as regard compensation, earners were treated adequately but non-earners and victims of medical misadventure were worse off,⁴¹ and as regards deterrence, desirable incentives to safety and accident prevention had been introduced.⁴²

Some of the criticisms of the 1992 Act arguably were overstated. Coverage was reduced but only at the margins. The core areas of coverage—physical injury by accident, medical misadventure and occupational disease—continued much as before. These categories also were similar in conception, albeit defined with much greater precision. However, the reductions in certain benefits were real enough and, as we shall see, their effect on non-earners has been a continuing source of controversy.

VI. THE ACCIDENT INSURANCE ACT 1998

During the last years of the 1990s, the National Government, increasingly antipathetic to state administration and control, turned towards changing the accident compensation scheme into a system of universal compulsory insurance. As we have already seen, some proposals to this effect were made by a ministerial Working Party in 1991 but were put to one side.⁴³ In 1998 the idea was revived and, with the passing of the Accident Insurance Act,⁴⁴ the first step was taken along this path.

The 1998 Act (with its mercifully briefer title) repeals the Accident Rehabilitation and Compensation Insurance Act 1992 and sets out the whole scheme afresh. Much has been rearranged and there are many changes of detail, but in important respects the substance has not been altered. In particular, it remains compulsory, the coverage of the scheme continues to be based primarily on accidents, medical misadventure and occupational disease, and benefits also are broadly

39. See Terence G. Ison, *Changes to the Accident Compensation System: An International Perspective*, 23 VICT. U. WELLINGTON L. REV. 25 (1993).

40. See Richard S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme*, 52 MD. L. REV. 1070 (1993).

41. See *id.*

42. See *id.*

43. See MINISTERIAL WORKING PARTY REPORT, *supra* note 25.

44. Accident Insurance Act 1998. At the date of writing this article—March 2000—the 1998 Act was in force, and references hereafter to its provisions are in the present tense. The new Labour Government, however, is in the process of making changes, most immediately by removing the element of competition and, at a later stage, by altering and raising benefits and expanding coverage. For a discussion of these developments see *infra* Part VII.

the same. Indeed, the Act itself confirms that it “continues a ‘no-fault’ accident compensation scheme to provide statutory entitlements for all persons--(a) who suffer personal injury for which they have cover, or (b) who are the spouses, children, or other dependents of persons [who have cover].”⁴⁵

The major change is in the method of delivery of the statutory benefits for work-related injury, amounting to a partial privatization of the scheme. In the field of work injuries, the monopoly formerly held by the ACC in providing cover under the scheme has been removed. Employers must insure with a private insurance company or a new state-owned enterprise (called “@Work”) set up to compete with the private companies.⁴⁶ Self-employed persons and private domestic workers may choose to insure in this way or to remain with the ACC.⁴⁷ A regulatory regime aims to ensure that persons with cover receive their entitlements. The ACC continues to administer the other, unprivatized, parts of the scheme. The method of funding also has changed. Formerly, all payments were funded on a pay-as-you-go basis, but, consistently with the introduction of private insurers, all ACC accounts except the non-earners’ account become fully funded.⁴⁸

The statutory scheme is detailed and complex. We will consider its main features, looking first at coverage, second at entitlements, and third at the provisions governing competitive accident insurance, paying particular attention to the accident insurance contract.

A. Coverage

The 1998 Act provides coverage for personal injury which is broadly similar to that provided under the 1992 Act. The arrangement of the 1998 Act and the wording of the provisions setting out the various categories where cover is provided have, however, been changed in some ways. Possibly this may have some effect on the substance of the provisions.

The accident compensation scheme applies to persons who are “insured” under the 1998 Act. There is a list of categories of insured persons, which in their totality cover all persons within New Zealand.⁴⁹

45. Accident Insurance Act 1998, § 7(1).

46. See Accident Insurance Act 1998, § 169.

47. See Accident Insurance Act 1998, §§ 176-79.

48. See Accident Insurance Act 1998, § 290.

49. See Accident Insurance Act 1998, § 22(1). “‘Insured’ means (a) An employee of an employer: (b) A person who is a self-employed person: (c) A person who is a private domestic worker: (d) A person to whom section 279 applies: (e) A person to whom entitlements must be provided under [the former Acts].” *Id.*

In the case of a person who has died, section 22(2) and (3) provide that “insured” means the person who has died for the purpose of provisions concerning cover, and means his or her personal representative or spouse, child or other dependent for the purpose of provisions concerning entitlements or review or appeal. See Accident Insurance Act 1998, § 22(2), (3).

The purpose of this seemingly prolix arrangement is to provide the bases for differentiating between the source of the funds for meeting claims by insured persons and for drawing distinctions as to entitlements under the Act.

Section 39(1) provides that an insured has cover for a personal injury if (1) he or she suffers the personal injury in New Zealand on or after July 1, 1999; and (2) the personal injury is any of the kinds of injuries described in section 29(1)(a), (b) or (c);⁵⁰ and (3) the personal injury is described in any of the paragraphs in section 39(2).⁵¹ They are:

- (a) Personal injury which is caused by an accident to the insured; or
- (b) Personal injury caused by medical misadventure suffered by the insured; or
- (c) Personal injury caused by treatment given to the insured for personal injury for which the insured has cover; or
- (d) Personal injury caused by a work-related gradual process, disease or infection suffered by the insured; or
- (e) Personal injury caused by a gradual process, disease or infection that is personal injury caused by medical misadventure suffered by the insured; or
- (f) Personal injury caused by a gradual process, disease or infection consequential on personal injury suffered by the insured for which the insured has cover; or
- (g) Personal injury caused by a gradual process, disease or infection consequential on treatment given to the insured for personal injury for which the insured has cover; or
- (h) Personal injury that is a cardio-vascular or cerebro-vascular episode that is personal injury caused by medical misadventure suffered by the insured; or
- (i) Personal injury that is a cardio-vascular or cerebro-vascular episode that is a personal injury suffered by the insured to which section 32(2) applies.

Section 279(1), incorporated in the above definition, applies to the provision of cover for, and the delivery of entitlements to:

- (a) Non-earners, employees, and private domestic workers, in respect of non-work injuries; and
- (b) Self-employed persons who do not have an accident insurance contract, in respect of work-related personal injury (other than as an employee) and non-work injury; and
- (c) Private domestic workers who do not have an accident insurance contract, in respect of work-related personal injury in that private domestic work; and
- (d) All persons, in respect of motor vehicle injury; and
- (e) Persons who have cover or an entitlement in accordance with Part 13, in respect of personal injury suffered while any former Act was in force.

Accident Insurance Act 1998, 279(1). By section 279(2), persons not ordinarily resident in New Zealand are included. See Accident Insurance Act 1998, § 279(2).

50. See *infra* Part VI.A.ii.

51. See Accident Insurance Act 1998, § 39(1).

52. Accident Insurance Act 1998, § 39(2). Section 32(2) provides for cover where the personal injury is work-related: see *infra* Part VI.A.v.

Section 40 further provides for cover for mental injury caused by an act performed on, with, or in relation to the insured, which constitutes one of the criminal offenses listed in Schedule Three to the Act.⁵³ These are primarily sexual offenses and include sexual violation, incest, sexual intercourse with an underage girl, and certain offenses of indecency. Included also are infecting with disease, assault on a child or by a male on a female, and certain offenses relating to female genital mutilation.⁵⁴

The coverage provided by the scheme is subject to certain geographical limits. Broadly, it applies to personal injury that is suffered in New Zealand in respect to which there is cover under the 1998 Act.⁵⁵ Thus the scheme is not confined in its application to New Zealand residents but includes visitors to New Zealand.⁵⁶ The scheme also has an extra-territorial application in the case of persons ordinarily resident in New Zealand⁵⁷ who suffer death, physical injuries, or mental injuries consequential on physical injuries, and the injury is one for which there would be cover if the personal injury had occurred within New Zealand.⁵⁸ Personal injury resulting from medical treatment received while outside New Zealand is covered on a similar basis.⁵⁹ Special provision is made for injury by work-related disease where this is suffered outside New Zealand.⁶⁰

53. See Accident Insurance Act 1998, § 40.

54. See Accident Insurance Act 1998, sched. 3.

55. See Accident Insurance Act 1998, § 39(1). "New Zealand" is defined to include all the land and islands between the 162nd degree of east longitude and the 173rd degree of west longitude and between the 33rd and 53rd parallels of south latitude, the Kermadec Group, the internal waters and territorial sea of the foregoing, and any appurtenant installations or drilling rigs. See Accident Insurance Act 1998, § 23(1). A person who embarks by ship or aircraft to travel from one place in New Zealand to another or to return without stopping to the place of embarkation, and in either case does not go beyond 300 nautical miles from New Zealand, is deemed to have remained within New Zealand. See Accident Insurance Act 1998, § 23(3).

56. However, overseas visitors are entitled only to limited benefits: see *infra* Part VI.A.vi.

57. See Accident Insurance Act 1998, § 24. A person is "ordinarily resident in New Zealand" if he or she--

- (a) Has New Zealand as his or her permanent place of residence, whether or not he or she also has a place of residence outside New Zealand; and
- (b) Is in 1 of the following categories:
 - (i) A New Zealand citizen;
 - (ii) A holder of a residence permit granted under the Immigration Act 1987;
 - (iii) A holder of a returning resident's visa or residence visa issued under the Immigration Act 1987 allowing the person to lawfully return to New Zealand or come to New Zealand for the purpose of residence;
 - (iv) A person who is exempt from any requirement to hold a permit under the Immigration Act 1987;
 - (v) A person who is a spouse, child, or other dependent of any person referred to in any of subparagraphs (i) to (iv), and who generally accompanies the person referred to in the subparagraph.

Id.

58. See Accident Insurance Act 1998, § 41(1).

59. See Accident Insurance Act 1998, § 41(2). For further discussion of coverage for medical misadventure see *infra* Part VI.A.iv. Mental injury caused by criminal acts that is suffered by a resident when outside New Zealand is covered separately. See Accident Insurance Act 1998, § 40.

60. See Accident Insurance Act 1998, § 43.

i. Relationship between the 1998 Act and the common law

The quid pro quo of the right to statutory compensation was the barring of any right to sue for damages that might otherwise have been available. From the inception of the accident compensation scheme in 1974, it has not generally been possible to sue in New Zealand for compensation for personal injuries or death suffered after that date. The bar on actions for damages for personal injury is presently found in section 394(1) of the 1998 Act. It has been simplified a little, and provides:

No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of

- (a) Personal injury covered by this Act; or
- (b) Personal injury covered by the former Acts.⁶¹

There are anti-avoidance provisions in section 394(6).⁶² These make it clear that the bar cannot be avoided by failure to make a claim or a purported denial or surrender of rights under any of the Acts or a lack of entitlement to any particular benefit.⁶³ A similar bar applies in the case of personal injury caused by a work-related gradual process, disease, or infection.⁶⁴

On the face of it, the relationship between the 1998 Act and the common law is straightforward. To the extent that there is coverage provided by the accident compensation scheme, an action for damages in tort (or contract, equity, or under statute) is barred. To the extent that there is no such coverage, any action for damages can proceed.⁶⁵ So, making an obvious point, if a claim does not involve personal injury in any form, the 1998 Act has no application. Indeed, the Act itself provides that that the bar on proceedings for personal injury

does not prevent any person from bringing proceedings related to, or arising from--

- (a) Any damage to property; or
- (b) Any express term of any contract or agreement (other than an accident insurance contract); or
- (c) The unjustifiable dismissal of any person or any other personal grievance arising out of a contract of employment. However, no court . . . may award compensation in any such proceedings for

61. Accident Insurance Act 1998, § 394(1).

62. See Accident Insurance Act 1998, § 394(6).

63. In *Childs v. Hillock*, [1994] 2 N.Z.L.R. 65 (C.A.), the Court of Appeal confirmed that the bar applies if at the time the plaintiff suffered a personal injury compensation could have been obtained, even though it can now no longer be attained.

64. See Accident Insurance Act 1998, § 395(1), (2).

65. See *generally* van Soest v. Residual Health Management Unit, [2000] 1 N.Z.L.R. 179 (C.A.).

personal injury⁶⁶

Nor does the bar prevent proceedings under the Health and Disability Commissioner Act 1994 or the Human Rights Act 1993.⁶⁷

Arguably these provisions are hardly necessary. We can point to many other examples of claims which are not affected by the scheme at all. An action for negligence is barred if it is for personal injury but not if it is for property damage or financial loss. A claim for malicious prosecution is not affected by the Act, for the plaintiff sues in respect of damage to reputation, loss of liberty, and financial loss. Nor is a claim for false imprisonment affected, for the plaintiff seeks damages, *inter alia*, for being imprisoned. Upset and distress caused by a breach of contract may be the subject of a civil action, for such does not constitute personal injury. Various other kinds of claims, involving, for example, trespass to or loss of enjoyment of property, interference with title to goods, intentional infliction of financial loss, abuse of public power, injury to reputation, invasions of privacy, can be maintained in just the same way. The law of torts is alive and well in all these fields.

So far the position is straightforward. But a complication on the question of the relationship of the Act and the common law was thought to arise in a number of cases where a claimant suffered mental injury as a result of seeing the death or injury of another person. Even though the mental injury itself was not covered, the claim nonetheless was seen as being for damages arising indirectly out of personal injury covered by the Act (i.e., the death or injury of the other person), to which the statutory bar still applied.⁶⁸ However, the Court of Appeal in *Queenstown Lakes District Council v. Palmer*⁶⁹ rejected this interpretation of the bar.⁷⁰

Mr. Palmer's wife was drowned allegedly as a result of negligence by the defendants in operating a rafting trip. Mr. Palmer was also on the raft and claimed damages for psychiatric injury suffered as a consequence of seeing the accident.⁷¹ The Court of Appeal held that the action was not barred. Justice Thomas, writing for the court, was satisfied that the scope of the 1992 Act was coterminous with cover provided under the Act. The proceedings did not arise directly or indirectly out of Mrs. Palmer's death, so as to bring section 14(1) of the

66. Accident Insurance Act 1998, § 394(2).

67. See Accident Insurance Act 1998, § 394(3).

68. See, e.g., *McMeekin v. Boyce*, CP 5/97 (H.C. Palmerston North, Dec. 11, 1997) (Thomson, Mast.); *Kingi v. Partridge* High Court, CP 16/93 (H.C. Rotorua, Aug. 2, 1993) (Thorp, J.); *McDonnell v. Wellington Area Health Bd.*, CP 250/9316 (H.C. Wellington, Dec. 5, 1993) (Thomson, Mast.). But cf. *McDonnell v. Wellington Area Health Bd.*, CP 250/93 (H.C. Wellington, Dec. 16, 1994) (Gallen, J.).

69. [1999] 1 N.Z.L.R. 549 (C.A.).

70. For further discussion see Stephen Todd, *Mental Injury and Actions for Damages*, 1999 N.Z. L.J. 216. See also 1999 N.Z. L.J. 298 (correcting a printing error in the original article).

71. *Queenstown Lakes Dist. Council v. Palmer*, [1999] 1 N.Z.L.R. 549 (C.A.).

1992 Act (the predecessor to section 394(1) of the 1998 Act) into operation, because Mr. Palmer was not seeking damages for his wife's death.⁷² The relevant injuries for which he was seeking damages were the mental injuries which he himself suffered as a result of the alleged breach of a duty of care owed to him by the defendants. Mrs. Palmer's death was simply part of the sequence of events which provided the factual basis for his claim. In the court's view, therefore, the relevant personal injury for the purposes of section 14(1) must be the personal injury for which damages are sought.⁷³

Turning to the policy of the 1992 Act, Justice Thomas noted that persons covered under the 1992 Act were denied access to the courts at common law in return for the perceived advantages of the statutory scheme. The exchange was frequently spoken of as a social contract or social compact. The purpose of the provision barring common law claims was to prevent persons who suffered personal injury from being compensated twice, not to prevent them from recovering any compensation at all. He continued:

It follows from what has been said that the application of the Act and the corresponding scope for common law proceedings automatically adjust as and when the scope of the cover provided by the Act is extended or contracted. To the extent that the statutory cover is extended, the right to sue at common law is removed; to the extent that the cover is withdrawn or contracted, the right to sue at common law is revived.⁷⁴

Any other view would lead to fundamental injustice, whereby a person was deprived both of compensation and of damages. It would also lead to the anomaly that the availability of a claim for damages would depend on whether the claimant suffered trauma from his or her own peril or from peril to another person and, if the latter, whether that person was actually injured or merely endangered. Mr. Palmer's claim for damages thus could proceed.

One result of the *Queenstown Lakes* case may be that a secondary victim not covered by the accident compensation scheme might recover substantially more by way of common law damages than the primary victim could obtain by way of compensation under the Act. This might be perceived to be an injustice or anomaly, but Justice Thomas remarked that damages and compensation were never intended to correspond.⁷⁵ Uncertainty of recovery at common law was exchanged for a no-fault scheme which included provision for rehabilitation as well as ongoing earnings-related compensation. Disparity between the two would always exist. So too would difficulties necessarily arise out of the

72. *See id.*

73. *See id.*

74. *Id.* at 556.

75. *See id.*

line between injuries arising from accidents and other injuries and conditions which were not attributable to accidents.

The clarity of the holding in *Queenstown Lakes*, that a common law remedy starts where the statute ends, was blurred shortly afterwards by a further decision of the Court of Appeal. In *Brownlie v. Good Health Wanganui, Ltd.*,⁷⁶ the plaintiffs sought damages from the defendant hospital for mental injury which they suffered as a result of being diagnosed as free from cancer and then discovering that they did in fact have the disease. Justice Henry, delivering the judgment of the court, held first that the plaintiffs had suffered personal injury which was covered by the 1992 Act. The personal injury was the untreated cancer, and this was suffered as a result of a negligent medical error amounting to medical misadventure.⁷⁷ There was, therefore, cover for this injury. As for the mental injury, this was covered under the 1992 Act if it was an outcome of the physical injury, but the plaintiffs' counsel presented the case on the basis that it was not an outcome. This assumption is not easy to accept, for the injury seemingly was caused by (or was an outcome of) the misdiagnosis *and* the plaintiffs' knowledge that they had cancer which had not been treated. Proceeding, however, on the basis of the case as presented, the further question was whether the claims for mental injury nonetheless were claims for damages arising directly or indirectly out of the physical injury so as to be caught by the statutory bar. Justice Henry maintained that once an initial period of uncertainty was over, it seemed unarguable that the mental consequences which flowed thereafter arose at least indirectly from the physical injury, even if it could be said that they were not the outcome of physical injury. The damages claimed therefore arose from medical misadventure which was covered under the 1992 Act, and the section 14 bar⁷⁸ applied. There was, however, a relatively short period when the plaintiffs were in a state of uncertainty as to whether or not, contrary to the earlier advice, they were in fact suffering from cancer. During this period, their mental stress could not be said to have arisen from any physical injury—the same kind of mental injury would be suffered whether or not there had in fact been physical injury—and this gave a “window” for a very limited claim for damages.

Brownlie accepts that there may be cover under the statute, so an action for damages is barred, but no relief under the statute. In such a case the victim fails under both heads. This result seems undesirable in principle and inconsistent with *Queenstown Lakes*. As we have seen, the Court of Appeal held in that case that the personal injury for the

76. CA 64/97 (C.A. Wellington, Dec. 10, 1998).

77. See *Brownlie v. Good Health Wanganui, Ltd.*, CA 64/97 (C.A. Wellington, Dec. 10, 1998). For further discussion on medical misadventure see *infra* Part VI.A.iv.

78. See Accident Rehabilitation and Compensation Insurance Act 1992, § 14.

purposes of the section 14 bar must be the personal injury for which damages are sought. So the question in *Brownlie* should have been whether the plaintiffs' claims were proceedings for damages arising directly or indirectly out of personal injury for which the plaintiffs were seeking damages and which were covered by the 1992 Act. Seemingly they were not. On the contrary, still on the assumption that they were not an outcome of the physical injury, the personal injuries for which the plaintiffs were seeking damages were mental injuries which were *not* covered by the Act. Indeed, it is hard to see any relevant distinction between the two cases. In one the physical injury was suffered by a third person and in the other it was suffered by the plaintiffs, yet in neither case did the damages for the mental injuries arise out of personal injury covered by the Act.

Very arguably, then, the reasoning in *Brownlie* ought to be reconsidered. As it stands, however, the general rule is that the accident compensation scheme and actions for damages at common law do not overlap, but there is an exception where the claimant has suffered physical injury which is covered by the scheme and mental injury which is not. In this situation, neither claim can be maintained.

ii. Personal injury

We need now to look more closely at the particular categories where the 1998 Act provides cover. These all depend on the claimant having suffered "personal injury." By section 29(1) this means:

- (a) The death of an insured; or
- (b) Physical injuries suffered by an insured, including, for example, a strain or sprain; or
- (c) Mental injury suffered by an insured because of physical injuries suffered by the insured; or
- (d) Mental injury suffered by an insured in the circumstances described in section 40.

(2) "Personal injury" does not include personal injury caused wholly or substantially by gradual process, disease, or infection unless it is personal injury of a kind described in section 39(2)(d), (e), (f), or (g).

(3) "Personal injury" does not include a cardio-vascular or cerebro-vascular episode unless it is personal injury of a kind described in section 39(2)(h) or (i).

(4) "Personal injury" does not include--

(a) Personal injury caused wholly or substantially by the ageing process; or

(b) Personal injury to teeth caused by the natural use of those teeth.⁷⁹

By section 30, "'mental injury' means a clinically significant

79. Accident Insurance Act 1998, § 29.

behavioral, cognitive, or psychological dysfunction.”⁸⁰ This definition is based upon that given in the Manual of the American Psychiatric Association.⁸¹

We have seen that cover for personal injury depends on the insured having suffered personal injury within the meaning of section 29(1)(a), (b) or (c) of the 1998 Act,⁸² viz death, physical injuries, or mental injuries suffered because of his or her physical injuries, and the personal injury falls within any of the paragraphs listed in section 39(2).⁸³ “Physical injuries” are not further defined, but seemingly they should be understood as meaning any condition involving harm to the human body, including harm by sickness or disease, that is more than merely trifling or fleeting. Certainly it was implicit in the 1992 Act, and the courts accepted, that the concept of “physical injury” included disease,⁸⁴ and the position must be the same under the new Act. If the instances of personal injury by gradual process, disease or infection and personal injury by heart attacks or strokes which are covered in section 39(2)(d)-(i) are not physical injuries, they are never covered for compensation.

So personal injury has this very broad meaning. But even where some form of personal injury has been suffered, it may fall outside the particular categories that are covered for compensation and still be potentially actionable. We need to consider these categories and see how far they extend. We need also to identify any other kinds of cases where a common law action may still lie.

iii. Personal injury by an accident

The first category in which personal injury is covered for compensation is where the injury is caused by an accident.⁸⁵ In the legislation as originally enacted the concept of “accident” was undefined and left to be determined by the courts. The Court of Appeal, drawing upon overseas authority, took a broad view, holding that “accident” meant an unlooked for mishap or untoward event which was not expected or designed.⁸⁶ In the 1992 Act, however, it was said to mean any of various particular kinds of occurrences, and these are reproduced (with some minor changes) in section 28(2) of the 1998

80. Accident Insurance Act 1998, § 30.

81. See AMERICAN PSYCHIATRIC ASSOC'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

82. See Accident Insurance Act 1998, § 29(1).

83. See Accident Insurance Act 1998, § 39(2).

84. See, e.g., *Brownlie v. Good Health Wanganui, Ltd.*, CA 64/97 (C.A. Wellington, Dec. 10, 1998); *Childs v. Hillock*, [1993] N.Z.A.R. 249.

85. See Accident Insurance Act 1998, § 39(2)(a).

86. See *Green v. Matheson*, [1989] 3 N.Z.L.R. 564 (C.A.); *Willis v. Attorney-General*, [1989] 3 N.Z.L.R. 574 (C.A.) (applying *Fenton v. Thorley & Co.*, [1903] App. Cas. 403, 408 (Eng.)).

Act.⁸⁷ This states:

“Accident” means any of the following kinds of occurrences:

- (a) A specific event, or a series of events, that--
 - (i) Involves the application of a force or resistance external to the human body; and
 - (ii) Is not a gradual process:
- (b) The inhalation or oral ingestion of any solid, liquid, gas, or foreign object on a specific occasion. This kind of occurrence does not include the inhalation or ingestion of a virus, bacterium, protozoa, or fungi, unless that inhalation or ingestion is the result of the criminal act of a person other than the insured:
- (c) A burn, or exposure to radiation or rays of any kind, on a specific occasion. This kind of occurrence does not include a burn or exposure caused by exposure to the elements:
- (d) The absorption of any chemical through the skin within a defined period of time not exceeding 1 month:
- (e) Any exposure to the elements, or to extremes of temperature or environment, within a defined period of time not exceeding 1 month, that causes--
 - (i) Disability lasting for a continuous period exceeding 1 month; or
 - (ii) Death.

....

The fact that an insured has suffered a personal injury is not of itself to be construed⁸⁸ as an indication or presumption that it was caused by an accident.

It is also provided in section 28(4) that the fact that an insured has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident

The most commonly invoked form of “accident” is that falling within paragraph (a), involving the application of force upon the body. This obviously covers the ordinary type of accident, such as falling over, and is apt to include intentional conduct, as where one person is struck by another. It also encompasses a series of events constituting an accident, although this has to be distinguished from a “gradual process.”⁸⁹ Strains or sprains are included as personal injury,⁹⁰ and seemingly they occur by accident on the basis that gravity constitutes

87. See Accident Insurance Act 1998, § 28(2).

88. Accident Insurance Act 1998, § 28(2), (4).

89. See, e.g., *Accident Rehabilitation and Compensation Insurance Corp. v. McHardy*, [1996] N.Z.A.R. 289 (finding that a depressive illness was caused by a gradual process); *Owen v. Accident Compensation Corp.*, [1991] N.Z.A.R. 122 (holding that injury to shoulder during fitness program not caused by accident); *Re Rivers*, (1982) 3 N.Z.A.R. 204 (holding that injury to feet from long distance running was caused by a gradual process). *But cf. Re Lucas*, [1983] N.Z.A.C.R. 689 (holding back injury suffered during running was a personal injury by accident).

90. See Accident Insurance Act 1998, § 29(1)(b).

the requisite external force or resistance.⁹¹ However, the requirement that the event involve the application of an external force or resistance, and the denial of any presumption to be drawn from the mere occurrence of injury, reverse the effect of earlier cases holding that an accident could lie simply in the suffering of an injury with no identifiable cause or discernible external action.⁹² Paragraph (b) effectively excludes disease caused by infection unless the infection is caused by criminal conduct.⁹³ Paragraph (c) makes it clear that skin cancer caused by long term exposure to the sun is not covered.⁹⁴ This may be contrasted with paragraph (e), which covers, for example, pneumonia caused by exposure to cold and fevers or diseases attributable to extremes of heat or humidity.⁹⁵ Burns might fall under paragraph (a) but in any event are covered under paragraph (c).⁹⁶

In cases where personal injury is caused by a tort but there is no "personal injury" or no "accident" as defined in the statute (and there is no coverage under one of the other heads), then an action for damages may lie. There are a number of possibilities which need to be considered.

Mental injury

Claims for mental injury originally were included within the ambit of the accident compensation scheme. The Acts of 1972 and 1982 provided for cover where a person suffered personal injury by accident, which was defined to include the physical or mental consequences of the injury or the accident. In *Accident Compensation Corp. v. E*,⁹⁷ the Court of Appeal held that these words covered a person who suffered a mental breakdown as a result of being sent by her employer to attend a highly stressful management course. The consequence of this interpretation was that the bar on bringing actions for damages for personal injury extended to include claims for mental injury standing alone. The scope of the coverage for mental injury was such that there was no room for any claims for compensatory damages falling outside the legislation where the common law might give a remedy.

*Accident Compensation Corp. v. E*⁹⁸ was one of the decisions of the

91. For coverage of this type of case under the earlier legislation see *Wallbuton v. Accident Compensation Corp.*, [1983] N.Z.A.C.R. 629.

92. See *Accident Compensation Corp. v. E*, [1992] 2 N.Z.L.R. 426 (C.A.) (mental breakdown); *Accident Compensation Corp. v. Mitchell*, [1992] 2 N.Z.L.R. 436 (C.A.) (apnoeic attack).

93. See *Accident Insurance Act 1998*, § 28(2)(b).

94. See *Accident Insurance Act 1998*, § 28(2)(c).

95. See *Accident Insurance Act 1998*, § 28(2)(e).

96. See *Accident Insurance Act 1998*, § 28(2)(c). In *Hill v. Accident Rehabilitation and Compensation Insurance Corp.*, [1994] N.Z.A.R. 357, the court took the view that burns from clothing catching alight constituted an accident under paragraph (a).

97. [1992] 2 N.Z.L.R. 426 (C.A.).

98. *Id.*

courts which the government of the day regarded as having taken too wide an interpretation of the 1982 Act and as having contributed to the escalating costs of the scheme. Accordingly, claims for compensation for mental injury were targeted when the coverage of the scheme was cut back in 1992, and the limited coverage continues under section 29(1)(c) and (d) of the 1998 Act. Mental injury is covered only where it amounts to "personal injury" under the 1998 Act,⁹⁹ viz where it constitutes physical injuries suffered by the insured or where it is caused by one of the specified criminal offenses.

We have seen that "physical injuries" includes any kind of bodily harm, so mental injury is covered where it is suffered because of personal injury which is covered by any of the categories in section 39(2).¹⁰⁰ In other cases, only the common law can give a remedy. Examples of possible claims are where a secondary victim sees death or injury being suffered by another, as in *Queenstown Lakes*, and where the victim fears for his or her own safety but is not in fact injured. *Brownlie*, however, says that the victim cannot claim where he or she suffers physical injury as well as mental injury, even though the mental injury is not the outcome of the physical injury or is not suffered because of the physical injury. For the reasons already given this is not easy to accept.

There is coverage under the 1998 Act for the victims of the specified criminal—mostly sexual—offenses.¹⁰¹ Mental injury caused by any other crime, like attempted murder or arson, thus may be actionable in damages. Furthermore, any mental injury suffered by persons other than the victims of the specified crimes is not covered either. This would include, say, a parent or husband witnessing the sexual violation of a child or wife and suing for damages.

Non-accidental injury

A qualifying accident must be an event or series of events which involves the application of an external force or resistance or must fall within one of the other specified instances. Merely seeing or hearing about an event is not an accident in the requisite sense, so this is another reason why a secondary victim suffering mental harm cannot claim compensation and can seek damages. The same applies where a person suffers shock through fear or stress, without any physical impact or event. Other cases where an action for damages could lie include poisoning consequent upon the inhalation or ingestion of a bacterium

99. See Accident Insurance Act 1998, § 29(1)(c), (d).

100. See Accident Insurance Act 1998, § 39(2).

101. See Accident Insurance Act 1998, § 40.

caused by another's negligent (as opposed to criminal) conduct,¹⁰² and negligently causing a person to be exposed to the elements or to absorb a chemical through the skin for a period exceeding one month.¹⁰³

Disease

Although "personal injury" includes disease, section 29(2)¹⁰⁴ states that this is only where the disease is covered in section 39(2)(d)-(g) as being work-related, or caused by medical misadventure, or is consequential upon personal injury or treatment for personal injury for which the insured has cover.¹⁰⁵ So a tort action can be brought in cases where a person negligently infects another with a disease in circumstances falling outside these cases. Examples include: a sexual partner infecting the plaintiff with a venereal disease or with the HIV virus; a parent allowing a child with an infectious disease to infect a playmate; and a restaurant negligently preparing food causing a customer to contract food poisoning. It appears that disease caused by criminal conduct is not covered either, even though "accident" includes the inhalation or ingestion of a virus, bacterium, protozoa, or fungi where this is the result of the criminal act of another person. This is because the disease is still not "personal injury" falling within the categories specified in section 29(2).¹⁰⁶ In particular, it is not "disease . . . consequential on personal injury suffered by the insured for which the insured has cover"¹⁰⁷ because the disease *is* the personal injury rather than a consequence of other personal injury covered by the Act. So, for example, a rape victim who contracts a disease or becomes pregnant cannot recover compensation but can sue the rapist for damages. By contrast, as we have seen, a rape victim is covered for compensation for mental injury and cannot sue for that injury. The different treatment is not easy to understand.

Heart attacks and strokes

"Personal injury" does not include heart attacks or strokes unless they are caused by medical misadventure or are work-related.¹⁰⁸ If they do not fall within one of these two categories they are not covered, irrespective of whether they are caused by an accident or come about

102. Damages still will not lie if this is personal injury caused by medical misadventure or employment-related disease, as to which see *infra* Part VI.A.iv and v.

103. The latter case might be covered as being an employment-related gradual process: see *infra* Part VI.A.v.

104. See Accident Insurance Act 1998, § 29(2).

105. See Accident Insurance Act 1998, § 39(2)(d)-(g).

106. See Accident Insurance Act 1998, § 29(2).

107. Accident Insurance Act 1998, § 39(2)(f).

108. See Accident Insurance Act 1998, § 29(3). For medical misadventure see *infra* Part VI.A.iv. For the meaning of work-related personal injury see *infra* Part VI.A.v.

without any initial injury or accident. Clearly, there is scope here for various kinds of actions for damages. These include, for example, a heart attack or stroke suffered by the victim of a car accident, or of a practical joke, or of a threat of harm.¹⁰⁹

Pregnancy and unwanted births

In a number of early cases it was held that unwanted pregnancy was not, by itself, a personal injury by accident,¹¹⁰ and it is also clear that pregnancy or the birth of a child or an abortion does not amount to personal injury as defined in the 1992 or 1998 Acts. In such cases there is, therefore, no personal injury by an accident, nor is there personal injury for the purpose of establishing that medical misadventure has occurred.¹¹¹ Further, actual injury associated with the birth would seem not to be covered either, as not having been caused by an "accident," for the birth of a child is not an event involving the application of an external force or resistance. If, however, the injury comes about through medical negligence it will then constitute medical misadventure.¹¹² Otherwise, claims for injury or loss caused by the birth and upbringing are not barred. So if the conception, or the continued ability to conceive, or the continuation of the pregnancy, can be attributed to negligence by a doctor or surgeon in performing a sterilization operation or abortion, making a diagnosis or giving advice, or by a chemist who issues the wrong pills, or even by the manufacturer of a contraceptive, the question arises whether the parent can recover damages for this "loss" at common law.¹¹³ This kind of action, of course, involves weighing fundamental issues of policy, as well as difficult problems of proof of negligence and causation. Some courts have given full damages and some have denied them altogether, although a common solution, recently endorsed by the House of Lords, is to allow limited damages covering the cost of pregnancy but not the costs of bringing up the child.¹¹⁴

109. See *Innes v. Wong*, [1996] 3 N.Z.L.R. 238.

110. See *Accident Compensation Corp. v. Auckland Hosp. Bd.*, [1980] 2 N.Z.L.R. 748; *L v. M.* [1979] 2 N.Z.L.R. 519; *Re Mrs. McR.*, (1978) 1 N.Z.A.R. 567.

111. See *DK v. Accident Rehabilitation and Compensation Insurance Corp.*, [1995] N.Z.A.R. 529.

112. See *infra* Part VI.A.iv.

113. See D. Weybury & C. Witting, *Wrongful Conception Actions in Australia*, 3 TORT L. REV. 53 (1995); Philip G. Peters, Jr., *Rethinking Wrongful Life: Bridging the Boundary Between Tort and Family Law*, 67 TUL. L. REV. 397 (1992); C. R. Symmons, *Policy Factors in Actions for Wrongful Birth*, 50 MOD. L. REV. 269 (1987); Anne C. Reichman, *Damages in Tort for Wrongful Conception—Who Bears the Cost of Raising the Child?*, 10 SYDNEY L. REV. 568 (1985); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983); Homer H. Clark, *Wrongful Conception: A New Kind of Medical Malpractice?*, 12 FAM. L.Q. 259 (1979).

114. See *McFarlane v. Tayside Health Bd.*, [1999] 3 W.L.R. 1301 (H.L. 1999) (Eng.). For a review of U.S. decisions see *Johnson v. University Hosp. of Cleveland*, 540 N.E.2d 1370 (Ohio 1989). For a review of Canadian law see *Kealey v. Berezowski*, [1996] 136 D.L.R. 4th 708, 723-41

Torts actionable per se

If a claim does not seek compensation for a loss but, instead, seeks to establish that a legally protected right has been infringed, a common law action can proceed. Where a tort is actionable per se, the victim may seek damages to vindicate his or her right to inviolability of the person and to mark the wrong that has been done. Such damages do not arise directly or indirectly out of personal injury covered by the 1998 Act, as required for the statutory bar to apply.¹¹⁵ For example, actions for damages for assault and battery not involving personal injury may proceed without regard for the Act. Indeed, assault is an act that causes the plaintiff merely to apprehend the imminent infliction of a battery. The damage about which the plaintiff complains can only be in the form of mental suffering, or simply mental awareness, and this certainly does not constitute personal injury, as defined. Again, non-permitted bodily contact alone, such as spitting on another, or taking of fingerprints, or searching another, is actionable as a battery and actions for damages on this basis can be brought in the normal way. Furthermore, an action for nominal damages for battery may also be possible even where personal injury has been suffered, because the plaintiff does not seek compensation for that injury. Exemplary damages also remain available¹¹⁶ and are of particular significance in the context of deliberate invasions of another's bodily integrity.

iv. Medical misadventure and treatment for personal injury

There is coverage under the 1998 Act for personal injury caused by medical treatment under five overlapping heads: (1) personal injury caused by medical misadventure;¹¹⁷ (2) personal injury caused by treatment for personal injury for which the insured has cover;¹¹⁸ (3) personal injury caused by gradual process, disease, or infection that is personal injury caused by medical misadventure;¹¹⁹ (4) personal injury caused by a gradual process, disease or infection consequential on treatment given to the insured for personal injury for which the insured has cover;¹²⁰ and (5) personal injury that is a cardio-vascular or cerebro-vascular episode that is personal injury caused by medical misadventure suffered by the insured.¹²¹ These sections are the exclusive

(Ont. Gen. Div.). For a review of Australian law see *CES v. Superclinics (Australia) Party, Ltd.*, [1995] 38 N.S.W.L.R. 47 (C.A. 1995) (Austl.).

115. See Accident Insurance Act 1998, § 394.

116. For a discussion of exemplary damages see *infra* Part VI.A.vii.

117. See Accident Insurance Act 1998, § 39(2)(b).

118. See Accident Insurance Act 1998, § 39(2)(c).

119. See Accident Insurance Act 1998, § 39(2)(e).

120. See Accident Insurance Act 1998, § 39(2)(g).

121. See Accident Insurance Act 1998, § 39(2)(h).

determinants of cover insofar as “registered health professionals” are concerned.¹²² Formerly it was possible to mount alternative arguments, that what had occurred either was medical misadventure or was personal injury by accident in the ordinary sense. However, section 28(3) now provides that there is no “accident” where any of the specified occurrences involve treatment by a registered health professional or by a person outside New Zealand with equivalent qualifications.¹²³ It follows that medical misadventure cannot also be considered a general “personal injury” caused by an accident.¹²⁴ Coverage in such cases is determined according to whether there is medical misadventure or treatment for personal injury. Why the occurrence of a personal injury by an accident in a medical context should not be covered in the same way as in other contexts is not clear.

Medical misadventure

Personal injury caused by medical misadventure means personal injury caused by medical error or medical mishap. As we have seen, “personal injury” in this context includes injury by disease or infection, or by a heart attack or stroke, which are then specifically covered for compensation in section 39(2)(e) and (h).¹²⁵ It also includes an infection suffered by the spouse, child, or other dependent of an insured where the insured suffered the infection by medical misadventure and passed it on to the spouse or dependents.¹²⁶ This provision reverses the position under the 1992 Act, where secondary victims of this kind probably were not covered.¹²⁷ “Personal injury” must also cover an existing condition that does not get better or worsens, as where a patient is not properly diagnosed or treated.

“Medical error” means “the failure of a registered health professional to observe a standard of care and skill reasonably to be

122. The Accident Insurance Act 1998 states that:

“registered health professional” means—

- (a) A registered medical practitioner [meaning a person who is entitled to practice medicine under the title of medical practitioner under the Medical Practitioners Act 1995]; or
- (b) A person who holds a current annual practising certificate issued by the Chiropractic Board, the Dental Council of New Zealand, the Dental Technicians Board, the Nursing Council of New Zealand, the Occupational Therapy Board, the Pharmaceutical Society of New Zealand, or the Physiotherapy Board; or
- (c) A person registered with the Medical Laboratory Technologists Board, the Medical Radiation Technologists Board, or the Podiatrists Board; or
- (d) An optometrist registered with the Opticians Board.

Accident Insurance Act 1998, § 13(1).

123. See Accident Insurance Act 1998, § 28(3).

124. See Accident Insurance Act 1998, § 39(2)(a).

125. See Accident Insurance Act 1998, § 39(2)(e), (h).

126. See Accident Insurance Act 1998, § 357.

127. For further discussion of secondary victims see *infra* note 144 and accompanying text.

expected in the circumstances.”¹²⁸ So this test is founded not on the existence of a certain type of injury, which requirement underlies the rest of the 1998 Act, but on the question of the registered health professional’s negligence or culpability. A negligent failure to take care can include a failure to obtain informed consent to treatment, to diagnose correctly, or to treat.¹²⁹ The Act goes on to provide that medical error does not exist “solely because desired results are not achieved or because subsequent events show that different decisions might have produced better results.”¹³⁰ This reflects the familiar point that doctors (and other professionals) are not to be regarded as negligent merely because the course they took turned out to be mistaken. Doctors can be expected to take care and to act in accordance with proper professional standards, but opinions can differ and they are not expected always to be right or to guarantee the success of their treatment.¹³¹

“Medical mishap” is defined as

an adverse consequence of treatment, when--

- (a) The treatment is given to an insured, is given properly, and is given by or at the direction of a registered health professional; and
- (b) The adverse consequence is suffered by the insured; and
- (c) The adverse consequence is severe . . . ; and
- (d) The likelihood that treatment of the kind that was given would have the adverse consequence is rare¹³²

The first of these requirements, that the treatment be “properly given,” distinguishes medical mishap from medical error. Clearly, these concepts do not overlap. The elements of severity and rarity of outcome in paragraphs (c) and (d) originally were developed by the courts in determining the meaning of “mishap,”¹³³ but now these concepts are defined in close detail. An adverse consequence is “severe” only if it results in the insured dying, being hospitalized as an inpatient for more than fourteen days, or suffering significant disability lasting more than twenty-eight days in total.¹³⁴ Such a consequence is

128. Accident Insurance Act 1998, § 36(1).

129. See Accident Insurance Act 1998, § 36(2).

130. Accident Insurance Act 1998, § 36(3).

131. See *Bolitho v. City and Hackney Health Auth.*, [1998] App. Cas. 232 (1998) (Eng.); *Sidaway v. Governors of the Bethlem Royal Hosp.*, [1985] App. Cas. 871 (1985) (Eng.); *Maynard v. West Midlands Reg'l Health Auth.*, [1984] 1 W.L.R. 634 (H.L. 1983) (Eng.); *Whitehouse v. Jordan*, [1981] 1 W.L.R. 246 (H.L. 1980) (Eng.).

132. Accident Insurance Act 1998, § 37(1).

133. See *Accident Compensation Corp. v. Auckland Hosp. Bd.*, [1980] 2 N.Z.L.R. 748; *Childs v. Hillock*, [1994] N.Z.L.R. 65 (C.A.); *Bridgeman v. Accident Compensation Corp.*, [1993] N.Z.A.R. 199; *Villari v. Accident Compensation Corp.*, [1992] N.Z.A.R. 81; *Child v. Accident Compensation Corp.*, [1991] N.Z.A.R. 397; *Polansky v. Accident Compensation Corp.*, [1990] N.Z.A.R. 481; *Viggars v. Accident Compensation Corp.*, (1986) 6 N.Z.A.R. 235; *MacDonald v. Accident Compensation Corp.*, (1985) 5 N.Z.A.R. 276.

134. See Accident Insurance Act 1998, § 37(2).

“rare” only if the probability is that it would not occur in more than one percent of cases where that treatment is given.¹³⁵ This is qualified by a further provision which states that there is no medical mishap when an adverse consequence is rare in the ordinary course but is not rare having regard to the particular circumstances of the insured (i.e., it was not rare for that particular person), and the greater risk was known to the insured or his or her parent or guardian prior to the treatment.¹³⁶

The accident compensation scheme is not intended to underwrite the success of medical treatment, as the medical mishap provisions make apparent.¹³⁷ They contemplate an “accident-like” consequence occurring, rather than failed or ineffective treatment of a kind which can ordinarily be expected or foreseen. The conditions for cover are very specific, putting a heavy onus on the claimant seeking to satisfy them. The one percent threshold in particular may tend to operate arbitrarily. Patients who are especially prone to injury are also treated strictly. On the other hand, a specially susceptible person who suffers extra harm due to negligence is covered as being a victim of medical error. The injury must simply be caused by the error, and there is no principle of remoteness restricting coverage under the Act. In this respect, the Act gives effect to the “thin skull” rule of the common law.

The ambit of medical misadventure is restricted in two further ways. First, while it can include personal injury arising from abnormal reaction to treatment or later complication because of the treatment, this is only if medical error or medical mishap occurs at the time of the treatment.¹³⁸ It may not be easy to draw the contemplated distinction, for the problem may have arisen at the time of treatment but not manifested itself until later. Second, there is also special provision for certain clinical trials. Personal injury resulting from medical error or medical mishap in anything done or omitted as part of such a trial is medical misadventure only if the insured did not agree in writing to participate in the trial, or an ethics committee approved by the Health Research Council or Director-General of Health certified that it was satisfied that the trial was not to be conducted principally for the benefit of the manufacturer or distributor of the medicine or item being trialled.¹³⁹

Treatment for personal injury

The 1998 Act provides separate coverage under section 39(2)(c) for personal injury caused by treatment for personal injury for which

135. See Accident Insurance Act 1998, § 37(3).

136. See Accident Insurance Act 1998, § 37(4).

137. See generally Accident Insurance Act 1998, § 37.

138. See Accident Insurance Act 1998, § 35(2).

139. See Accident Insurance Act 1998, § 35(3)-(5).

the insured has cover,¹⁴⁰ and under section 39(2)(g) for personal injury caused by a gradual process, disease, or infection consequential on treatment given to the insured for personal injury for which the insured has cover.¹⁴¹ It is not clear why these provisions have been included, for in each case there must be an initial personal injury for which the insured has cover. Therefore, before the provisions can apply, there must first of all be cover for personal injury by an accident, occupational disease, or medical misadventure. Presumably, they are intended to remove any doubt about coverage for some later injury caused by later treatment.

As a general rule, when treatment is given by a registered health professional the provisions for medical misadventure and for the consequences of treatment will cover the same ground.¹⁴² The injury being treated must be covered as being caused by medical misadventure, but then the treatment itself is likely to be medical misadventure as well. Perhaps section 39(2)(c) covers the unlikely case of subsequent treatment of an injury caused by medical error or mishap where the treatment causes further personal injury but without medical error or mishap. If a person who is not a registered health professional gives treatment to the victim of a personal injury by an accident which is covered under section 39(2)(a), that treatment may itself cause the victim to suffer a personal injury by an accident. An example could be an injury caused by a paramedic's attempted resuscitation of a road accident victim. Suppose now such treatment causes further injury by way of an infection. Arguably, this would still be covered as being partly "caused by" the initial accident. Section 39(2)(g) removes any uncertainty about this and says that the injury is independently covered.¹⁴³

Actions for damages

There is not very much scope for bringing actions for damages in a medical context. Negligence by a registered health professional gives rise to coverage under the statutory scheme for medical error, and this includes negligence in relation to treatment, diagnosis, the giving of advice, and obtaining consent to treatment. If there is no negligence

140. See Accident Insurance Act 1998, § 39(2)(c).

141. See Accident Insurance Act 1998, § 39(2)(g).

142. In *Childs v. Hillock*, [1993] N.Z.A.R. 249, negligence claims against a doctor and the Department of Health with respect to a pelvic inflammatory disease caused by an intra-uterine contraceptive device were denied. This was medical misadventure under the 1982 Act, and under the 1992 Act the claims were barred as being both medical misadventure and the consequence of treatment for personal injury. See *id.* The issue was not discussed on appeal. See *Childs v. Hillock*, [1994] 2 N.Z.L.R. 65 (C.A.).

143. See Accident Insurance Act 1998, § 39(2)(g) ("personal injury caused by a gradual process, disease, or infection consequential on treatment given to the insured for personal injury for which the insured has cover").

and no cover, normally there is no scope for a common law action either.

Several possible exceptions exist to this general rule. First, there may be an exception in the case of certain secondary victims of negligent medical treatment. Persons who come into contact with a patient may suffer physical or mental injury where medical negligence has caused personal injury to the patient. As regards physical injury, we have seen that there is cover where an infection is passed on to a spouse, child or other dependent by a patient who was infected as a result of medical misadventure. In all other cases, it seems that there is cover for medical misadventure only for the person undergoing the treatment.¹⁴⁴ For example, if a patient is infected by HIV as a result of a negligent blood transfusion and passes it on to a sexual partner who is not the patient's spouse, an action for damages will then lie. Similarly, a claim for damages for mental injury suffered by a secondary victim is also a possibility. An example which arose under the 1982 Act is where a husband suffered "reactive depression" as a result of being unable to continue sexual relations with his wife after she was injured due to medical misadventure.¹⁴⁵

The second exception arises out of the special rules applying to clinical trials. If a trial is duly approved and certified, then injury caused by medical error or mishap is covered. If a trial is not certified pursuant to the 1998 Act, injury suffered by a participant can be the subject of an action for negligence. So also, if a person taking part in a trial has agreed in writing to participate there is no coverage even in the case of a certified trial, and once again damages for negligence can be sought. Seemingly, the first restriction is aimed at people who take part in private trials, usually for payment, by pharmaceutical manufacturers, cosmetics companies or research institutions. The reason for singling out and denying coverage to those who have signed an agreement to participate is obscure. In either case, it is difficult to see why negligent trials are left to the common law in this way. Probably, the underlying reason is the notion that willing participants in trials have consented to the risks. Yet consent does not exclude a claimant from coverage in other contexts, such as where he or she participates in a dangerous

144. In *Estate of N v. Accident Rehab. and Compensation Ins. Corp.*, AP 127/94 (H.C. Wellington, Feb. 5, 1996) (Heron & Doogue, JJ.), a secondary AIDS victim was held to be covered under the 1982 Act. The court did not have to decide the issue in relation to the 1992 Act, but it pointed out that new definitions applied and that several provisions appeared directly to relate medical misadventure to doctor/patient or hospital/patient relationships. *See id.*

145. *See Accident Compensation Corp. v. F.*, [1991] 1 N.Z.L.R. 234. Coverage was wrongly denied under the 1982 Act, on the basis that the Act did not extend to mental suffering that was not the consequence of an accident causing physical injury to the claimant. *See id.* To the extent the case decided that mental injury alone was not compensable, it was overruled by *Accident Compensation Corp. v. E.*, [1992] 2 N.Z.L.R. 426. Since 1992, of course, it is clear that there is no cover in this sort of case.

sport, and in the present context any consent would not in any event seem to extend to negligence. Certainly, it is not clear that mere written agreement to take part would allow the defendant in a common law action to establish consent, for the defense requires proof both that the plaintiff knew the full extent of the risk, including the risk of negligence, and made a free and unfettered decision to incur that risk.

Third, the general limits on coverage—where there is no personal injury—can apply in a medical context. For example, a doctor can be liable in battery for inappropriate touching or for negligence in sterilizing a patient leading to the birth of an unwanted child.

Finally, there is coverage for medical misadventure only in the case of registered health professionals. So the negligent provision of medical services by other persons is not medical misadventure, and if there is no coverage under some other head it can give rise to an action for damages. Possible examples are where there is negligence by non-medical staff in managing a hospital or in allocating resources resulting in personal injury to a patient. Suppose a member of the administrative staff of a hospital negligently fills out a patient's record card and a doctor, relying on the card, discharges the patient, whose condition later worsens. If the doctor is not negligent there is no medical misadventure, the continuation of an illness is not personal injury by an accident, this is not treatment for personal injury for which the insured already had cover, and the provisions governing work-related disease are not relevant. Accordingly, damages become an option.¹⁴⁶

In certain circumstances, medical products which are defective or ineffective, or which pose a risk of injury without having actually caused it, can give rise to liability on the part of the manufacturer. Suppliers of medical products are not "registered health professionals", so the medical misadventure regime does not apply to them, but personal harm caused by their products is still included as a medical mishap if it constitutes an adverse consequence of treatment by a registered health professional and the consequence is "rare" and "severe."¹⁴⁷ Probably this covers the manufacturer of a contraceptive pill that fails to give adequate warning of the risks involved in taking the pill and a user suffers a stroke after having had it prescribed for her by her doctor.¹⁴⁸ Even so, there may be room for argument as to what constitutes a consequence of treatment. Suppose a heart valve or pacemaker fails as

146. The argument depends on there being no negligence by a registered health professional. In *van Soest v. Residual Health Management Unit*, [2000] 1 N.Z.L.R. 179, the court held that if there was negligence by a registered health professional causing personal injury, then it was beside the point that the defendant being sued was only vicariously liable and was not itself a registered health professional.

147. See Accident Insurance Act 1998, § 37(1).

148. For liability at common law see *Buchan v. Ortho Pharm. (Canada), Ltd.*, [1986] 25 D.L.R. 4th 658 (Ont. Sup. Ct.).

a result of a manufacturing defect. This could be regarded as a *novus actus interveniens* and the harm treated as having been caused solely by the manufacturer. There would be no "accident" in this case and so a claim for damages would be possible.¹⁴⁹ Perhaps the better view, giving wider scope to the Act, is that the injury is a consequence both of the defect and also of the treatment when the valve was inserted. The same might be said of other internal injuries caused by manufactured products, such as a leaking breast implant.¹⁵⁰ Yet, in any of these cases, if the injury is not sufficiently "rare" and "severe" there is no coverage and an action at common law remains a possibility. Again, where a drug is ineffective, so the patient's condition simply fails to improve or continues to deteriorate, arguably there is no "adverse consequence" in the relevant sense and an action for misrepresentation or misleading conduct could conceivably lie. Harm not involving medical treatment at all and where there is no personal injury by an "accident" clearly is not covered. An action might lie for misleading labeling on pharmaceutical products, which fail to warn of dangers to consumers to whom the products pose a special risk. Toxic shock syndrome caused by a tampon could be an example.¹⁵¹

v. Work-related disease, heart attacks, and strokes

We have seen that the accident compensation scheme does not generally cover sickness and disease. However, there is an exception in the case of occupational diseases. This category of coverage has been included in the scheme since its inception, and is a carry-over from the workers' compensation scheme that provided for compensation for such diseases prior to the days of accident compensation. As presently provided, there is cover for personal injury caused by a work-related gradual process, disease, or infection¹⁵² and for a work-related heart attack or stroke.¹⁵³

Work-related disease

An insured suffers personal injury caused by a work-related gradual process, disease, or infection in circumstances where

- (a) The insured--
 - (i) Performs an employment task that has a particular property or

149. For discussion of some of the issues involved in such an action see Harold Luntz, *Heart Valves, Class Actions and Remedies: Lessons for Australia*, in *TORTS IN THE NINETIES* (Nicholas J. Mullany ed., 1997).

150. For liability at common law see *Dow Corning Corp. v. Hollis*, [1996] 129 D.L.R. 4th 609 (Can.).

151. However, in *Thompson v. Johnson & Johnson Party, Ltd.*, [1991] 2 V.R. 449 (Vict. Sup. Ct.), the court held that there had been no breach of duty by the manufacturer.

152. See Accident Insurance Act 1998, § 39(2)(d).

153. See Accident Insurance Act 1998, § 39(2)(i).

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- characteristic; or
- (ii) Works in an environment that has a particular property or characteristic; and
- (b) The particular property or characteristic--
- (i) Causes or contributes to the personal injury; and
 - (ii) Is not found to any material extent in the non-employment activities or environment of the insured; and
 - (iii) May or may not be present throughout the whole of the insured's employment; and
- (c) The risk of suffering the personal injury--
- (i) Is significantly greater for persons who perform the employment task than for persons who do not perform it; or
 - (ii) Is significantly greater for persons who work in that environment than for persons who do not work in it.¹⁵⁴

However, there is no cover where the personal injury is attributable to air-conditioning systems or passive smoking, or is related to non-physical stress, or is any degree of deafness for which workers' compensation has been paid.¹⁵⁵

Diseases may be latent for long periods, creating coverage problems where the cause of the disease pre-dates the coming into force of the scheme. In this case, the 1998 Act extends its reach to include an insured who contracted a disease from performing an employment task or working in an environment that had the requisite particular property or characteristic prior to April 1, 1974.¹⁵⁶ However, there is no cover in such a case if the insured performed the task or worked in the environment outside New Zealand and, at that time, was not ordinarily resident in New Zealand,¹⁵⁷ or, if within New Zealand, the insured died on a date before July 1, 1992.¹⁵⁸ The effect of these provisions is that all work-related diseases are covered whenever occurring, subject only to those two specific qualifications.¹⁵⁹ All proceedings for damages arising directly or indirectly out of personal injury caused by a work-related gradual process, disease, or infection covered by the 1998 or former Acts are barred,¹⁶⁰ subject only to persons completing proceedings initiated before April 1, 1993.¹⁶¹

154. Accident Insurance Act 1998, § 33(2).

155. See Accident Insurance Act 1998, § 33(3).

156. See Accident Insurance Act 1998, § 33(4).

157. See Accident Insurance Act 1998, § 43.

158. See Accident Insurance Act 1998, § 424.

159. However, in order to be able to recover compensation, the time limits for making a claim must be satisfied. See *infra* Part VI.C.iv.

160. See Accident Insurance Act 1998, § 395(1), (2).

161. See Accident Insurance Act 1998, § 395(3).

Work-related heart attacks and strokes

A cardio-vascular or cerebro-vascular episode suffered by an insured is covered for compensation if the episode is caused by physical effort or physical strain that is work-related and is abnormal in application or excessive in intensity.¹⁶² "Work-related personal injury", broadly, is personal injury suffered by an insured while at his or her place of work, or while traveling to or from work in transport provided by the employer, or while traveling between the place of work and another place for the purpose of getting treatment for a work-related personal injury.¹⁶³ Under the earlier Acts the abnormal or excessive strain had to arise out of and in the course of the employment, requiring a frequently difficult determination as to whether a heart attack or stroke was caused by the work or simply by a pre-existing condition.¹⁶⁴ It is now sufficient that the episode happened at work and that the activity involved was abnormal or excessive for the particular claimant as compared with the effort to which the claimant was accustomed. Normal exertion leading to a heart attack or stroke, even during employment, does not qualify.¹⁶⁵

Actions for damages

There is little scope for actions for damages by primary victims of an occupational disease. Indeed, negligence by an employer in this context normally would be a failure to take reasonable steps to prevent the employment task or the work environment from causing the harm, and any property or characteristic of the task or environment causing the harm is what triggers cover under the 1998 Act. An argument that performance of an unusual task or performance of a normal task in an unusual environment might not be covered seems to be precluded by the provision that the property or characteristic may or may not be present throughout the whole of the employment. However, the specific exclusions from cover are significant. Provided negligence could be established, an employer could be liable for the onset of Legionnaires' disease (which can be spread via air-conditioning systems), lung or heart disease due to passive smoking in the workplace (although there would be major hurdles to be overcome in bringing a successful action), and conditions related to "non-physical stress."¹⁶⁶

162. See Accident Insurance Act 1998, § 32(2).

163. See Accident Insurance Act 1998, § 32(1).

164. See generally *Re Archer*, (1979) 2 N.Z.A.R. 25.

165. See *Re Saunders*, [1983] N.Z.A.C.R. 662 (heart attack by security guard after taking short walk not covered); *Re Archer*, (1979) 2 N.Z.A.R. 25 (heart attack when crawling under truck not covered). *But cf. Re Stirling*, [1983] N.Z.A.C.R. 600 (heart attack by English teacher during game of basketball covered); *Groves v. Accident Compensation Corp.*, (1978) 2 N.Z.A.R. 15 (awkward task requiring unusual effort by manual laborer covered).

166. See *Leitch v. Accident Compensation Corp.*, [1990] N.Z.A.R. 26 (reviewing the cases on

Secondary victims are in a different position. There is cover only for personal injury caused by a work-related gradual process, disease, or infection which is suffered by the insured, and, unlike the coverage for medical misadventure, there is no extension to include spouses or dependents. So a family member or other person who contracts a disease or infection from the immediate victim of an employment related disease is not covered for compensation. Hence, a common law action against the employer might be possible.

Lastly, cover exists for a work-related cardio-vascular or cerebro-vascular episode only where the episode is caused by physical effort or strain. Thus employment related mental stress or strain causing a heart attack or stroke is not included¹⁶⁷ and similarly could be actionable in damages.

vi. Miscellaneous categories

Visitors to New Zealand

The accident compensation scheme applies generally to all persons within New Zealand. Visitors, like everyone else, can make a claim. However, entitlements are limited, for the visitor will not have an accident insurance contract and will not be an employee as defined in the 1998 Act,¹⁶⁸ and so the visitor will be unable to recover weekly earnings-related compensation or vocational rehabilitation. Benefits are likely to be confined to treatment, social rehabilitation and death payments.

There is an exception to coverage in the case of injury suffered by a non-resident while on board, or while embarking on or disembarking from, the ship, aircraft or other means of conveyance used in coming to, traveling around or leaving New Zealand.¹⁶⁹ In these circumstances a common law action may lie.

Injury suffered while abroad

The 1998 Act provides cover for New Zealand residents who are outside New Zealand and who suffer personal injury of a kind for which there would be cover if he or she had suffered it in New Zealand.¹⁷⁰ Suppose, however, a resident seeks to bring an action for damages

stress claims under the 1982 Act). *See also* Accident Compensation Corp. v. E, [1992] 2 N.Z.L.R. 426.

167. *See* O'Flaherty v. Accident Rehab. and Compensation Ins. Corp., [1994] N.Z.A.R. 499.

168. *See* Accident Insurance Act 1998, § 13 (defining "employee" in relation to persons receiving income as defined in the Income Tax Act 1994).

169. *See* Accident Insurance Act 1998, § 42.

170. *See* Accident Insurance Act 1998, § 41.

before a New Zealand court. The general rule relevant to overseas torts is that an action can be maintained provided that the act complained of would have been actionable if committed in New Zealand and that the act is not justifiable by the law of the place where it was done.¹⁷¹ Assuming the conduct can be shown to be tortious in the overseas jurisdiction, the question is whether the first limb of the test can be satisfied. The 1998 Act and its predecessors do not abolish any causes of action, and arguably tortious conduct causing personal injury is still “actionable” in New Zealand even though the remedy of damages for personal injury covered by the Act is not available. Indeed, exemplary damages could not be recovered if there were no extant cause of action. A New Zealand court thus has jurisdiction to hear a claim, and would have to decide which system of law ought to be applied to the issue of substantive liability. The court must determine the “proper law of the tort,”¹⁷² an inquiry which, broadly, seeks to determine which system is most closely associated with the commission of that tort. In most cases, this is likely to be the law of the place where the damage happened. For example, a person injured in New South Wales in a road accident caused by a New Zealand resident on holiday in New South Wales would have to satisfy the requirements of New South Wales law as to the defendant’s liability. In this case, then, an action could lie. Sometimes, however, New Zealand law might be appropriate. A court might so decide, for example, in the case of an action against the New Zealand manufacturer of a product which was purchased in New Zealand and which injures the plaintiff while on holiday in New South Wales. The place where the damage happened could be regarded as a purely incidental feature of the plaintiff’s cause of action. In these circumstances there is accident compensation cover available provided the plaintiff is a New Zealand resident, and so applying New Zealand law the action for damages is barred.

Carriage by air

The 1998 Act does not prevent the bringing of proceedings for damages, in New Zealand or elsewhere, if the cause of action is any liability for damages under the law of New Zealand pursuant to any international convention relating to the carriage of passengers.¹⁷³ New Zealand is a party to the Warsaw Convention as supplemented by The Hague Protocol and Guadalajara Convention, which has been implemented in New Zealand by the Carriage by Air Act 1967.¹⁷⁴

171. See *Phillips v. Eyre*, 6 L.R.-Q.B. 1 (1870) (Eng.); *Chaplin v. Boys*, [1971] App. Cas. 356 (1969) (Eng.); *Richards v. McLean*, [1973] 1 N.Z.L.R. 521.

172. See generally *Chaplin v. Boys*, [1971] App. Cas. 356 (1969) (Eng.).

173. See *Accident Insurance Act 1998*, § 394(4).

174. *Carriage by Air Act 1967*, § 7(1), sched. 1 (N.Z.).

Accordingly, death or injury suffered by a person within New Zealand in the circumstances covered by the Warsaw Convention may be the subject of an action under the Convention, irrespective of whether the person is a New Zealand resident or a visitor.¹⁷⁵

Breach of the New Zealand Bill of Rights

The human rights and fundamental freedoms of persons in New Zealand are affirmed, protected and promoted by the New Zealand Bill of Rights Act 1990. Part II of the Act sets out these rights and freedoms under four heads: life and the security of the person; democratic and civil rights; non-discrimination and minority rights; and search, arrest, and detention. The Bill of Rights applies to acts done (a) by the legislative, executive or judicial branches of the government of New Zealand, or (b) by any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law.¹⁷⁶ It does not apply to acts of private persons unless they are performing a public function, power, or duty of this kind.¹⁷⁷

There are no express provisions in the 1990 Act concerning remedies for its breach. However, two major forms of redress have been developed by way of judicial decision. First, information obtained in breach of the Bill of Rights is presumptively inadmissible in evidence, although it may be admitted in the discretion of the court. We are not concerned with this question. Secondly, in *Simpson v. Attorney-General (Baigent's case)*¹⁷⁸ a majority of the Court of Appeal held that breach of the Bill of Rights can give rise to a remedy by way of monetary compensation distinct from an action for damages in tort. This is a direct liability of the State in public law as guarantor of the rights and freedoms contained in the Bill. It is not a vicarious liability for the acts of individuals. It accordingly exists independently of, and is unaffected by, specific statutory immunities or restrictions upon the liability of the Crown or of individual Crown servants. It also is not a liability to pay damages, and so the bar on bringing proceedings *for damages* arising directly or indirectly out of personal injury covered by the accident compensation scheme seemingly does not apply. In principle, the remedy may therefore be available even in respect of breaches causing

175. For coverage under the Convention see Margaret A. McGregor Vennell, *Order or Chaos: Air Carriers' Liability in the South Pacific—An Overview of International and Regional Developments*, [1998] 2 N.Z. L. Rev. 345 (1998).

176. See New Zealand Bill of Rights Act 1990, § 3.

177. In *R v. N.*, [1999] 1 N.Z.L.R. 713 (C.A.), the Court of Appeal decided that a provision in the Crimes Act 1961 giving an *immunity* to a private person from liability for arresting another did not confer a *power* of arrest, and accordingly the requirements of the Bill of Rights Act did not apply to the arrest.

178. [1994] 3 N.Z.L.R. 667 (C.A.).

personal injury.¹⁷⁹ In deciding in its discretion whether to grant a public law remedy, the court should take into account the availability of other causes of action or remedies, including, presumably, accident compensation benefits. However, there is scope for the court to award public law compensation in an appropriate case. In assessing the level of compensation, the court may make provision for intangible harm such as distress and injured feelings, and may take into account the gravity of the breach and the need to emphasize the importance of the affirmed rights and to deter future breaches. Extravagant awards are to be avoided, and the emphasis must be on the compensatory and not the punitive element.¹⁸⁰

vii. Exemplary damages

Donselaar v. Donselaar

Quite early on after the accident compensation scheme was introduced, the question arose whether a person who had suffered personal injury covered by the scheme could still claim exemplary, as opposed to compensatory, damages. In *Donselaar v. Donselaar*¹⁸¹ the Court of Appeal held that actions claiming damages of this kind were not barred. Allowing them would not undermine the policy of the legislation, for the statutory bar was aimed at actions for compensation, not actions seeking to punish and deter. Justice Richardson explained that proceedings for exemplary damages were not “proceedings for damages arising directly or indirectly out of” a person’s injury or death, because exemplary damages did not arise out of the plaintiff’s injury and were not directed to the plaintiff’s loss.¹⁸² They were awarded against the defendant because of the outrageous manner in which he had conducted himself in the course of committing the tort. In a strict sense such damages did not “arise” at all, and in a looser sense they could be said to arise out of the acts of the defendant. On this interpretation, however, the court still had to resolve the problem posed by the overlapping of compensatory with exemplary damages. The leading cases prior to *Donselaar* on the recovery of exemplary damages all emphasized that an exemplary element could be included in the damages only if the sum contemplated for compensatory damages was itself inadequate as a punishment for the defendant.¹⁸³ So the barring of

179. In *Innes v. Wong*, [1996] 3 N.Z.L.R. 238, 251. Justice Cartwright thought that it was at least arguable that public law compensation would not arise directly or indirectly out of personal injury covered by the compensation scheme.

180. See *Simpson v. Attorney-General (Baigent's case)*, [1994] 3 N.Z.L.R. 667, 678, 703 (C.A.).

181. [1982] 1 N.Z.L.R. 97 (C.A.).

182. *Donselaar v. Donselaar*, [1982] 1 N.Z.L.R. 97 (C.A.).

183. See, e.g., *Cassell & Co. v. Broome*, [1972] App. Cas. 1027, 1062, 1089, 1096, 1104, 1118,

compensatory damages arguably could prevent recovery of exemplary damages, on the basis that the normal starting point for their assessment was absent. Justice Cooke recognized that an award of exemplary damages alone unaccompanied by even nominal damages might look something of an oddity,¹⁸⁴ yet the need was clear and a useful weapon in the legal armory should not be sacrificed without compelling reason.¹⁸⁵ The solution was to allow actions for damages for purely punitive purposes and to accept that these would have to take over part of the role formerly performed by compensatory damages. Justice Somers likewise identified the need for a new approach. That which was appropriate might prove to be whether the circumstances as a whole merited punishment and, if so, what sum should be awarded to achieve that end.¹⁸⁶

Daniels v. Thompson

Donselaar thus affirmed that in principle a person who suffers personal injury caused by the tortious conduct of another can still pursue an action for exemplary damages. However, a recent decision of the Court of Appeal, which was not concerned with this question, put a significant limit on the circumstances in which they might be awarded. In the consolidated appeals in *Daniels v. Thompson*,¹⁸⁷ *J v. Bell*,¹⁸⁸ *W v. W*,¹⁸⁹ and *H v. P*¹⁹⁰ a majority of the court decided that either conviction or acquittal in a prior criminal proceeding prevents any subsequent recovery of exemplary damages, and that where a prosecution is likely any civil action should be stayed until the prosecution either is concluded or it becomes clear that it will not be brought. *W v. W* and *J v. Bell* were taken on further appeal to the Privy Council, which dismissed the appeals without reaching a concluded view of the substantive issue.¹⁹¹ Their Lordships considered that any determination of the effect of criminal proceedings on a later civil action depends upon a perception of the balance of public advantage and disadvantage, with no principles mandating an answer one way or the other. The question

1121, 1134 (1972) (Eng.); *Rookes v. Barnard*, [1964] App. Cas. 1129, 1228 (1964) (Eng.); *Taylor v. Beere*, [1982] 1 N.Z.L.R. 81, 87, 90, 95 (C.A.).

184. See *Donselaar v. Donselaar*, [1982] 1 N.Z.L.R. 97 (C.A.).

185. See *id.*

186. See *id.*

187. [1998] 3 N.Z.L.R. 22 (C.A.).

188. *Id.*

189. *Id.*

190. *Id.* For further discussion see A. Beck, *Exemplary Damages in New Zealand: Sunset and Evening Star*, 6 TORT L. REV. 194 (1998); J. Manning, *Daniels v. Thompson: Double Punishment or Double Trouble?*, [1998] 2 N.Z. L. REV. 721 (1998); J. Smillie, *Exemplary Damages and the Criminal Law*, 6 TORT L. REV. 113 (1998); Stephen Todd, *Exemplary Damages*, 18 N.Z. U. L. REV. 145, 169-79 (1998).

191. See *W v. W*, [1999] 2 N.Z.L.R. 1 (P.C. 1999) (Eng.) (appeal taken from N.Z.).

being one of public policy, they declined to substitute their own views (if different) for those of the national court.¹⁹² So the decision of the Court of Appeal stood. Its import for any action taking advantage of the *Donselaar* principle is clear. In cases where the personal injury is caused by criminal conduct, a civil action against the offender is likely to be barred, not by the statute, but by the application of common law principle.

The decision of the Privy Council,¹⁹³ while not coming down on one side or the other, gives a useful summary of the various policy issues which are canvassed at greater length in the majority judgment of Justice Henry and in Justice Thomas' dissent in the Court of Appeal.¹⁹⁴ Lord Hoffmann, giving the judgment of the Board, looked first at the arguments against imposing a bar.¹⁹⁵ They focused on the important differences between a criminal prosecution and an action for exemplary damages. The procedure is radically different and so is the standard of proof. A prosecution is, generally speaking, initiated and controlled by the State. A civil action is initiated and controlled by the victim. Thus the prosecution of an action for exemplary damages enables the victim publicly to vindicate his or her version of events and inflict punishment in ways that a criminal prosecution may not satisfy.¹⁹⁶ Punishment takes the form of damages which go to the victim rather than imprisonment or a fine that can afford her only indirect satisfaction. Allowing the victim to pursue such a claim may also have a therapeutic value which mitigates the effect of the sentence.

Lord Hoffmann then turned to the arguments pointing the opposite way. Allowing an action for exemplary damages to follow or precede a criminal punishment carries the risk that a person may be punished twice for the same offense.¹⁹⁷ Taking the punishment into account by way of reduction in the damages carries its own difficulties, because *prima facie* it must be assumed that the criminal punishment was assumed by the court to be appropriate to the offense and the offender. To award exemplary damages at all would imply that the civil court thought that the criminal punishment had been inadequate. A further problem arises when a criminal prosecution follows a civil action. Logically, the punishment should take into account the exemplary damages, but, arguably, criminal proceedings in the name of the State should have primacy over a private action. In addition,

192. *See id.* (applying *Australian Consolidated Press, Ltd. v. Uren*, [1969] 1 App. Cas. 590 (P.C. 1967) (Eng.) (appeal taken from Austl.); *Invercargill City Council v. Hamlin*, [1996] App. Cas. 624 (P.C. 1996) (Eng.) (appeal taken from N.Z.)).

193. *See W v. W*, [1999] 2 N.Z.L.R. 1 (P.C. 1999) (Eng.) (appeal taken from N.Z.).

194. *See Daniels v. Thompson*, [1998] 3 N.Z.L.R. 22 (C.A.).

195. *See W v. W*, [1999] 2 N.Z.L.R. 1 (P.C. 1999) (Eng.) (appeal taken from N.Z.).

196. *See id.*

197. *See id.*

arguments about whether claims for exemplary damages should be awarded at all, such as the absence of the ordinary safeguards afforded to an accused person in criminal proceedings, remain to be taken into account in deciding the narrower, double jeopardy, issue.

There were also aspects to the argument peculiar to New Zealand. Lord Hoffmann recognized that victims of personal injury may try to obtain additional compensation by way of exemplary damages because they consider the statutory compensation to be inadequate.¹⁹⁸ The courts had cautioned against confusing questions of compensation and punishment, but the pressure was there and tort liability has a tendency to expand. On the other hand, the absence of a tort remedy for compensatory damages meant that if exemplary damages are barred, the action is struck altogether. The defendant does not have to undergo another public investigation of the same incident in a civil court, but the victim in cases where a prosecution has failed has no private remedy by which she can prove that her allegations were true.¹⁹⁹

The arguments favoring a bar having prevailed in the Court of Appeal and the Privy Council having declined to interfere, we need to ask whether they carry the greater weight. If we take first the case where the defendant has been convicted, then very arguably they do. Punishing a person twice for the same conduct is not normally countenanced, and indeed Justice Thomas in his dissent, recognizing this, thought that the criminal punishment must be taken into account in deciding whether to make an award and in setting its amount.²⁰⁰ But on what principles should the judge's discretion in this respect be exercised? Any criminal sentence seeks to achieve punishment and deterrence, and includes consideration of the impact of the crime on the victim.²⁰¹ So the aims of exemplary damages are taken into account by the criminal sentence. If the civil court adds a further financial penalty, seemingly this must be on the basis that the first sentence was inadequate. It is not at all desirable that a civil court should second guess a criminal court in this way. On the other hand, if the civil court decides against doing this (and Justice Thomas thought that an award of exemplary damages would be exceptional), then the action will fail. We may question whether encouraging a victim of an offense to bring an unsuccessful civil action will have substantial therapeutic value.

Justice Thomas also criticized the majority view in *Daniels* as being unfair and discriminatory, on the grounds that it denied victims, mainly women, the ability to choose to sue and to pursue a claim for exemplary

198. *See id.*

199. *See id.*

200. *See Daniels v. Thompson*, [1998] 3 N.Z.L.R. 22 (C.A.) (Thomas, J., dissenting).

201. *See Victims of Offences Act 1987*, § 8(1) (N.Z.).

damages.²⁰² “Victims of crime are effectively disenfranchised if they are required to resort to public enforcement to punish the perpetrator and vindicate their complaint.”²⁰³ Yet *Daniels* does not force a victim of criminal behavior to cooperate with a prosecution and sometimes, perhaps frequently, non-cooperation will mean that a prosecution is not brought. In *G v. G*²⁰⁴ Justice Cartwright held that the plaintiff was free to control the course of any proceedings brought against the defendant.²⁰⁵ The outcome of her action for exemplary damages should not be affected by her prior decision not to make a criminal complaint against the defendant. *Daniels* does not change this position. Even so, the majority decision does provide a disincentive to assist in criminal prosecutions, but Justice Thomas’ view does this as well. If indeed an award of exemplary damages over and above a criminal penalty is to be made only in exceptional circumstances, the victim has almost as strong a reason not to make a criminal complaint and to seek exemplary damages alone.

A further consideration, not discussed in the judgments in *Daniels*, is the power of a criminal court to award reparation for emotional harm suffered by a victim of criminal offending,²⁰⁶ and to direct that the whole or part of a fine be paid to the victim.²⁰⁷ These powers, of course, exist to allow the court to compensate the victim at the same time as it determines punishment. Exemplary damages, by contrast, are not intended to compensate, which the Court of Appeal in both *Donselaar* and *Daniels* was at pains to emphasize. To the extent that they are in fact awarded for the purpose of compensation (which some proponents appear to favor), they are being used in an illegitimate way and to achieve an end which was in any event open to the criminal court. To the extent that they are used for their legitimate purpose of punishment, they are punishing the convicted defendant for a second time.

The approach taken if no prosecution is brought also deserves to be supported, on the simple ground that criminal proceedings ought to have primacy over civil proceedings. A rapist should be prosecuted before facing any civil action. Recognizing this, the Court of Appeal held that civil proceedings should be stayed if it appeared that a criminal prosecution was likely, in order, once again, to prevent double punishment or an abuse of process.²⁰⁸ Otherwise, however, civil proceedings could still be pursued.²⁰⁹

202. See *Daniels v. Thompson*, [1998] 3 N.Z.L.R. 22 (C.A.) (Thomas, J., dissenting).

203. *Id.* at 75.

204. [1997] N.Z.F.L.R. 49.

205. See *G v. G*, [1997] N.Z.F.L.R. 49.

206. See Criminal Justice Act 1985, § 22(1) (N.Z.).

207. See Criminal Justice Act 1985, § 28(1).

208. See *Daniels v. Thompson*, [1998] 3 N.Z.L.R. 22 (C.A.).

209. See *id.*

Possibly, an *acquittal* in the criminal proceedings should be treated differently. Here there is no question of double punishment. Rather, the concern is double jeopardy—that to relitigate the same issues in the civil action is an abuse of process. But in cases where an action for *compensatory* damages lies, the issues between the parties can be investigated again, notwithstanding that the defendant has been acquitted in criminal proceedings. So the objection is more about relitigating the issue of punishment than relitigation per se. And if there has been no punishment then the objection tends to disappear. Again, in civil proceedings there are different rules of evidence and a different standard of proof.²¹⁰ Weighing up these considerations, it is not clear that a prior criminal acquittal should necessarily amount to a bar on civil action.

Section 396

Perhaps, then, this particular aspect of *Daniels* justifies further consideration. However, some commentators condemned the whole decision and called for a change in the law. These calls obtained political support in a New Zealand Parliament elected for the first time by a system of proportional representation, enabling a new provision in the 1998 Act to be forced upon a reluctant minority government. Section 396 provides:

- (1) Nothing in this Act, and no rule of law, prevents any person from bringing proceedings in any court in New Zealand for exemplary damages for conduct by the defendant that has resulted in--
 - (a) Personal injury covered by this Act; or
 - (b) Personal injury covered by the former Acts.
- (2) The court may make an award of exemplary damages for conduct of the kind described in subsection (1) even though--
 - (a) The defendant has been charged with, and acquitted or convicted of, an offence involving the conduct concerned in the claim for exemplary damages; or
 - (b) The defendant has been charged with such an offence, and has been discharged without conviction under section 19 of the Criminal Justice Act 1985 or convicted and discharged under section 20 of that Act; or
 - (c) The defendant has been charged with such an offence and, at the time at which the court is making its decision on the claim for exemplary damages, the charge has not been dealt with; or
 - (d) The defendant has not, at the time at which the court is making its decision on the claim for exemplary damages, been charged with such an offence; or

210. However, *Gregoriadis v. Commissioner of Inland Revenue*, [1986] 1 N.Z.L.R. 110 (C.A.) suggests that this latter difference may not be significant.

(e) The limitation period for bringing a charge for such an offence has expired.

(3) In determining whether to award exemplary damages and, if they are to be awarded, the amount of them, the court may have regard to--

(a) Whether a penalty has been imposed on the defendant for an offence involving the conduct concerned in the claim for exemplary damages; and

(b) If so, the nature of the penalty.²¹¹

We need to comment on this provision, in relation both to its general policy and to its application in personal injuries cases. As we shall see, it reintroduces various anomalies and uncertainties associated with personal injury litigation and adds some more of its own.

First, for the reasons already given, the policy of *Daniels* can be seen as broadly satisfactory. The decision has indeed been approved by a majority of the High Court of Australia in *Gray v. Motor Accident Commission*.²¹² Reversing it is likely to have undesirable consequences. In particular, providing that the existence and nature of any criminal penalty may be taken into account in deciding whether to award exemplary damages and, if so, their amount,²¹³ creates exactly those difficulties to which reference has already been made. No guidance is given as to how the courts should go about making a determination on this issue. Probably, they will be reluctant to "top up" any criminal penalty, leaving the unfortunate plaintiff out of pocket or causing his or her legal aid to have been wasted on speculative and fruitless litigation. Certainly, the plaintiff is likely to nurse a grievance about the pitfalls of bringing legal proceedings much greater than if the action had simply been barred in the first place. Perhaps the policy of section 396 is to allow the civil action in any case of sufficiently outrageous conduct. If so, the criminal penalty should be disregarded. Of course, the element of double punishment involved in adding to the criminal sentence would then be considerably magnified.

Secondly, we should ask what a provision of this nature is doing in legislation concerning an accident compensation scheme. Certainly, a likely effect of the *Daniels* decision is to bar exemplary damages in claims which are covered under the scheme. Exemplary damages may be awarded where the defendant is guilty of "outrageous" or "heinous" conduct which shows a contumelious disregard for the plaintiff's rights.²¹⁴ If conduct of this nature causes personal injuries, very probably the conduct will also be criminal and the offender will be

211. Accident Insurance Act 1998, § 396.

212. (1998) 158 A.L.R. 485 (Austl.). See also J. Edelman, *Exemplary Damages Revisited*, 7 TORT L. REV. 87 (1999).

213. See Accident Insurance Act 1998, § 396(3).

214. See *Taylor v. Beere*, [1982] 1 N.Z.L.R. 81, 90-91 (C.A.).

liable to prosecution. *Daniels* (and the other individual cases joined with *Daniels*) all involved allegations of rape or other forms of sexual abuse which were covered under the accident compensation scheme.²¹⁵ In three of the cases the defendants had been convicted and sentenced in a criminal court and in one (*W v. W*) the defendant had been acquitted. In each case the civil action was held to be barred. Conduct causing personal injury, which is tortious but not criminal, where *Daniels* would not apply, is unlikely to attract exemplary damages at all. So negligence causing personal injuries may not amount to a criminal offense, but in *Ellison v. L*²¹⁶ the Court of Appeal emphasized that mere negligence does not justify giving exemplary damages.²¹⁷

It is apparent that the double jeopardy issue will often arise in personal injury claims which are covered for accident compensation, but clearly there is no necessary connection. An action for exemplary damages in a case involving personal injury can still lie, even under *Daniels*, where the defendant's conduct is criminal but criminal proceedings are not in fact instituted. One reason might be because the defendant has died. Here a claim for exemplary damages will survive against the estate of the deceased person.²¹⁸ But arguably, exemplary damages should not be awarded in this case, because achieving retribution and deterrence is no longer possible. Making an award simply visits the sins of a deceased wrongdoer on innocent dependents.²¹⁹ Other possible reasons, where success perhaps is more likely, are where the evidence is not thought sufficient to justify a criminal prosecution or, as we have seen, the victim does not want to press charges against the offender. In the latter case, section 396(2)(d)²²⁰ allows an award, although under *Daniels* if criminal proceedings are unlikely there is no bar in any event.

More significantly for present purposes, the principle of *Daniels* does not only apply to personal injury claims. The bar may operate in cases involving property damage, or wrongful contacts which do not cause personal injury, like spitting, putting on handcuffs, taking fingerprints, indecent touching. Or there may be tortious conduct causing personal injuries which are not covered by the 1998 Act, such as infecting another with disease or threatening another or frightening a person so as to cause mental injury. Here the plaintiff may recover compensatory damages, but exemplary damages are barred if the perpetrator is prosecuted or might be prosecuted. Again, tortious

215. See *Daniels v. Thompson*, [1998] 3 N.Z.L.R. 22 (C.A.).

216. [1998] 1 N.Z.L.R. 416 (C.A.).

217. See *Ellison v. L*, [1998] 1 N.Z.L.R. 416 (C.A.).

218. See Law Reform Act 1936, § 3(1) (N.Z.).

219. However, see *B v. R*, (1996) 10 P.R.N.Z. 73, where an award against an estate was in fact made. See also *R v. R*, [1998] 1 N.Z.F.L.R. 611.

220. See Accident Insurance Act 1998, § 396(2)(d).

conduct may not be criminal at all, and, if so, both forms of damages are available. Defamation and malicious prosecution are examples. These cases are not touched by section 396. So the unhappy position is that section 396 applies in the case of personal injury covered by the 1998 Act but *Daniels* seemingly still applies in other cases. An offender who is convicted for breaking into a house and assaulting and injuring the occupier can still be sued for exemplary damages, whereas an offender who is convicted for breaking into a house, threatening the offender with a gun and burning down the house cannot. Perhaps the Court of Appeal might reconsider its decision in the light of the contrary view endorsed by Parliament in section 396, but it is by no means clear that this section, in contrast to *Daniels*, represents a considered and well thought out conclusion of policy. If Parliament decided, after a serious analysis of the issues, that the view taken in *Daniels* ought to be rejected, one might have expected that it would have been rejected across the board.

Finally, it appears that much of the criticism of the *Daniels* case in reality was about the bar on actions for *compensatory* damages and the low level of benefits obtainable under the 1998 Act, not about issues of double jeopardy. In responding to this, section 396 does precisely what the courts have said should not be done. It encourages personal injury victims to bring actions for compensation in the guise of actions for exemplary damages.

The prospects for success in personal injury litigation, both in establishing liability and in satisfying the test for the award of exemplary damages, are necessarily uncertain. Plaintiffs will be embarking upon just the kind of stressful and unsatisfactory exercise that the accident compensation scheme was designed to abolish. And clearly they will do this in pursuit of compensation for the harm done to them. This reality is vividly demonstrated by a paper prepared by the Public Issues Committee of the Auckland District Law Society which followed the *Daniels* decision and which appears to have been influential in leading to the enactment of section 396. The paper's title is "Compensation for Rape and Other Assaults," not, it should be noted "Punishment" for these offenses. It gives the background to the claim by one of the victims in the *Daniels* litigation, and points out that lump sum payments under the accident compensation scheme could no longer be awarded after the changes to the scheme in 1992. Accordingly, victims of rape and other assaults were likely to recover only medical expenses and minimal periodic payments. The solution offered was to allow the recovery of exemplary damages. The argument seems quite misconceived. It may be that sex abuse victims are treated badly by the statutory scheme, but this has nothing to do with the award

of exemplary damages. Unless there is to be a return to personal injury litigation for compensatory damages, the solution surely is to amend the statutory scheme in some appropriate way. Consideration of whether or how this ought to be done would at least be directed at the right issue.

B. Benefits

An insured person may make a claim for cover and for the statutory entitlements arising out of his or her personal injury.²²¹ The entitlements are set out in Schedule One, under five headings: treatment, weekly compensation, rehabilitation, independence allowances, and entitlements arising from fatal injuries.²²² However, a person who qualifies for one or more of these benefits may nonetheless be disentitled to relief for various, essentially policy-based, reasons.

i. Treatment

Free treatment for injury or illness is provided by New Zealand's public health system. However, it does not subsidize the accident compensation system. An insurer is liable to pay the prescribed, or if not prescribed the actual, cost of an insured's treatment for personal injury for which he or she has cover.²²³ The treatment must be for the purpose of enabling the insured to lead as normal a life as possible and must be necessary and appropriate for that purpose. The insurer must not impose a condition that directly or indirectly requires that the insured should pay any part of the treatment provider's fee, or that the insured get the treatment from a particular treatment provider, unless the treatment is an assessment required by the 1998 Act or is a second opinion. Public health costs are thus recoverable from the insurer.

ii. Weekly compensation

The main features to the existing system whereby a victim of personal injury could recover earnings-related compensation are also carried over to the 1998 Act.²²⁴ As before, employers are liable to pay eighty percent of the lost earnings during the first week in which an insured who suffers work-related personal injury is unable to work.²²⁵ Earners who suffer injury in some other way have to bear the loss during the first week themselves. Thereafter, an insurer is liable to pay

221. See Accident Insurance Act 1998, §§ 54, 79.

222. See Accident Insurance Act 1998, sched. 1.

223. See Accident Insurance Act 1998, sched. 1, pt. 1. A treatment provider may lodge a claim on behalf of an insured. See Accident Insurance Act 1998, § 57.

224. See Accident Insurance Act 1998, pt. 5. See also Accident Insurance Act 1998, sched. 1, pt. 2.

225. See Accident Insurance Act 1998, §§ 76, 77.

weekly compensation at the same rate of eighty percent if the insurer determines that the insured is incapacitated for employment and does not have a capacity for work.²²⁶

The test for the incapacity of an insured who was an earner immediately before the incapacity commenced is whether the insured is unable, because of the personal injury, to engage in every part of every employment in which he or she was employed at the time of the injury. Compensation is not payable in relation to any employment for which the insured is not incapacitated. Again, an insurer must determine the incapacity of an insured who, at the time of the incapacity, has ceased to be an employee but who is deemed to continue to be an employee (by reason, broadly, of recent employment), or is a potential earner (meaning, broadly, persons under eighteen, full-time students, or persons over eighteen with low earnings), or is or has been an earner and has elected to purchase from the ACC the right to receive weekly compensation.²²⁷ The question is whether the insured is unable because of the injury to engage in work for which he or she is suited by reason of experience, education or training, or any combination of these factors.

An insured's capacity for work is similarly tested on the basis of the insured's capacity to engage in employment for which he or she is suited, for thirty hours or more a week. Any conditions unrelated to the personal injury and whether there are employment opportunities are not required to be taken into account. The question is determined in accordance with a process laid down in the Act. The process involves both an occupational assessment and a medical assessment, which may be repeated at reasonable intervals and must be repeated if the insurer believes or should reasonably believe that the insured's condition may have deteriorated. An insured who is reassessed as having a capacity for work loses his or her entitlement to compensation three months after being notified of the determination.

There is detailed provision for calculating the weekly earnings, depending upon whether or not the employee was in permanent employment on a full-time or part-time basis, or was self-employed with an insurance contract or insured with the ACC, or was a shareholder-employee. In the case of multiple employment the calculations are aggregated. The statutory minimum earnings for earners in full time employment is NZ\$216.47 per week for persons under twenty and NZ\$280 per week for persons aged twenty or over.²²⁸ Upward adjustment to the minimum can be made in the case of low earners.

226. See Accident Insurance Act 1998, §§ 82-88.

227. For deemed employees see Accident Insurance Act 1998, sched. 1, cl. 19. For potential earners see Accident Insurance Act 1998, § 13. For non-earners who elect to be earners see Accident Insurance Act 1998, § 286.

228. See Accident Insurance Act 1998, sched. 1, pt.1.

This seeks to prevent the amount of compensation from falling below the level of the equivalent social security benefit. An insured is deemed to be an employee even in the case of certain temporary interruptions in employment.

Earnings can be estimated if an insurer cannot readily ascertain an insured's actual earnings, and there are deemed weekly earnings in the case of potential earners. All calculations are subject to a maximum weekly payment of NZ\$1277.18, which is adjustable in relation to movements in average weekly earnings. Early return to part-time work is encouraged by a regime whereby the statutory payments abate in stages according to the amount of the earnings.

As before, the general rule is that an insured loses his or her entitlement to compensation on reaching superannuation age. However, in certain circumstances an insured who becomes entitled to compensation within two years of that age can elect to receive compensation instead of superannuation for up to a year after attaining that age.

iii. Rehabilitation

An insured is entitled to be provided with sufficient rehabilitation so that he or she can lead as normal a life as possible.²²⁹ An insurer must decide whether the insured needs rehabilitation and, if so, must prepare an individual rehabilitation plan. The insured and his or her representative, any health professional providing treatment to the insured and any employer of the insured must be given an opportunity to participate in the preparation and costing of the plan. If the insured is not happy with the plan, then he or she has the normal rights of review and appeal.²³⁰

Rehabilitation may be social or vocational, with entitlement to the latter being more restricted. Social rehabilitation is available to all persons covered by the 1998 Act who are assessed as being in need of it as a direct result of their personal injury. Its purpose is to assist the insured to undertake the activities of daily living to the greatest extent possible, having regard to the consequences of his or her injury. An insurer thus may be liable to provide such benefits as aids and appliances, home help, child care, modifications to the home, assistance with transport, and training for independent living. The need for social rehabilitation may be reassessed from time to time.²³¹ Vocational rehabilitation can be sought by persons covered by the Act who are entitled to weekly compensation, or are likely to be so entitled unless

229. See generally Accident Insurance Act 1998, sched. 1, pt. 3.

230. See *infra* Part VI.C.v.

231. For details see Accident Insurance Act 1998, sched. 1, cls. 36-52.

such rehabilitation is provided, or who are on parental leave. The purpose is to help an insured maintain or obtain employment or regain or acquire a capacity for work. In deciding whether to provide vocational rehabilitation, the insurer must consider its likely success, its likely cost effectiveness having regard to the likelihood that the costs of other entitlements will be reduced, and its general appropriateness. The rehabilitation may start or resume as circumstances change.²³² As under the 1992 Act, it is apparent from these requirements that people who were not earners before the accident do not qualify.

iv. Independence allowance

The independence allowance, introduced amidst controversy in 1992 and amended in 1996 in the light of criticism both as to its amount and its workability, continues in its amended form.²³³ The allowance is payable after an assessor appointed by the insurer has assessed the insured for "whole-person" impairment,²³⁴ excluding any impairment that does not result from the personal injury for which the insured lodged the claim. The assessment must establish a degree of impairment of ten percent or more. There can be a reassessment in certain circumstances. The rates of payment are specified and range from NZ\$10.28 per week for ten percent impairment to NZ\$61.68 per week for impairment of eighty percent and over.²³⁵ These amounts are adjusted in relation to movements in the Consumer Price Index. The insurer is required to pay the quarterly allowance in advance.

v. Death benefits

The 1998 Act provides for various payments in the event of the death of a person covered by the scheme.²³⁶ A funeral grant is payable to the personal representatives and survivors' grants to spouses,²³⁷ children under eighteen, and any other dependents.²³⁸ There can also be compensation for the cost of child care until the earlier of five years

232. For details see Accident Insurance Act 1998, sched. 1, cls. 53-57.

233. See Accident Insurance Act 1998, sched. 1, pt. 4.

234. The assessor will use the American Medical Association's guidelines. See AMERICAN MEDICAL ASSOC'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed. 1995).

235. See Accident Insurance Act 1998, sched. 1, pt. 4.

236. See Accident Insurance Act 1998, sched. 1, pt. 5.

237. "Spouse," in relation to a deceased insured, means a person to whom the deceased was married, or a person with whom the deceased was in a relationship in the nature of marriage (whether the person was of the opposite or the same gender), immediately before his or her death. See Accident Insurance Act 1998, § 25(1). The person is not a spouse if, at the time of the death, he or she and the deceased were living apart and the deceased was not contributing financially to that person's welfare, except where this is principally because of health, imprisonment, or employment obligations. See Accident Insurance Act 1998, § 25(2), (3).

238. The funeral grant is the lesser of the actual costs of the funeral or NZ\$3145.63. The surviving spouse's grant is NZ\$4504.60 and the child's or dependent's is NZ\$2252.30. Both are indexed in relation to movements in the Consumer Price Index. See Accident Insurance Act 1998, sched. 1, pt. 5.

after the death or the child reaches fourteen (or twenty-one if the child needs care because of his or her physical or mental condition).²³⁹ There is nothing for counseling or similar services.

Weekly compensation representing loss of dependency is payable to a surviving spouse at the rate of sixty percent of the actual weekly compensation for loss of earnings to which the deceased would have been entitled at the end of five weeks of incapacity, or sixty percent of the weekly compensation for loss of potential earning capacity to which the deceased would have been entitled at the end of six months of incapacity. This lasts for the latest of five years, the surviving spouse ceasing to have the care of all the children or other dependents of the deceased, or the youngest child turning eighteen. The compensation is not affected by the spouse remarrying or entering into another relationship or by the age of the deceased. Provision is made for a surviving spouse who also qualifies for superannuation to elect which payment he or she wishes to receive. A child of the deceased can also recover weekly compensation, at the rate of twenty percent of the compensation for lost earnings or lost earning capacity, until the end of the year in which he or she reaches eighteen or, if engaged in full time education, he or she ceases to be so engaged or reaches twenty-one. The compensation is doubled if both parents have died, even though the death of the other parent is unrelated to the child's claim. Analogous provision is made for other dependents. The sum of these various weekly payments cannot exceed the compensation to which the deceased would have been entitled had he or she lived. If necessary there will be pro rata reductions in respect of each claimant.

vi. Disentitling factors

An insurer can suspend or decline any statutory entitlements for so long as an insured unreasonably refuses or unreasonably fails to comply with any requirement of the 1998 Act, to undergo treatment provided by the insurer, or to agree to or comply with a rehabilitation plan.²⁴⁰ In addition, an insured is disentitled to relief on a number of grounds which have been carried over from previous Acts. These include: an insured knowingly misrepresenting at the start of employment that he or she was not suffering, and had not suffered, from a specified work-related injury caused by gradual process, disease, or infection;²⁴¹ an insured suffering a work-related disease before April 1, 1974 and, broadly, subsequently bringing proceedings or recovering damages

239. The amount is NZ\$100 per week for one child, NZ\$120 per week for two children, and NZ\$140 per week for three or more children. *See id.*

240. *See* Accident Insurance Act 1998, § 116(3).

241. *See* Accident Insurance Act 1998, § 118.

other than under the Act;²⁴² an insured willfully inflicting injury on himself or herself or committing suicide;²⁴³ an insured claiming compensation as a spouse or dependent in circumstances where he or she has been convicted of the murder of the deceased person;²⁴⁴ the insured being sent to prison;²⁴⁵ and the insured being injured in the course of committing a criminal offense.²⁴⁶

The focus here will be on the bars relating to an insured's criminality, for they raise controversial issues of public policy. The bar on a claim by a person who has murdered his or her spouse (or a person on whom he or she was dependent) reflects a similar rule of exclusion which is well known in insurance law. The disentitlement of prison inmates arises out of the fact of imprisonment rather than the quality of the prisoner's conduct. The bar applies to persons who are injured and later imprisoned and to persons who are injured while they are imprisoned. It reflects the fact that during the imprisonment no earnings have been lost on account of the injury. However, the right to compensation is not permanently denied, but is merely suspended during the imprisonment. The disentitlement for criminality per se is more problematic. It seeks to balance the desirability of adhering to a no fault ethic with the need not in any way to reward serious criminal wrongdoing. Section 123 seeks to achieve this balance by providing that where a person suffers personal injury in the course of committing a criminal offense for which that person is subsequently sentenced to imprisonment, an insurer may apply to the District Court for a determination whether the insurer ought not to provide any specified statutory entitlements because it would be repugnant to justice for the insured to receive them.²⁴⁷ The section goes on to provide that in determining the question the court should consider:

- (a) The harm caused by the insured's offence; and
- (b) The gravity of the offence; and
- (c) The insured's personal culpability for the offence; and
- (d) The extent of other penalties the insured has already suffered because of the offence; and
- (e) The insured's personal circumstances; and
- (f) The nature of the statutory entitlement; and
- (g) The strength of the insured's need for the statutory entitlement; and
- (h) The resources the insured has to meet that need.²⁴⁸

242. See Accident Insurance Act 1998, § 119.

243. See Accident Insurance Act 1998, § 120.

244. See Accident Insurance Act 1998, § 121.

245. See Accident Insurance Act 1998, § 122.

246. See Accident Insurance Act 1998, § 123.

247. See *id.*

248. *Id.*

The section provides also that if the insured is no longer imprisoned, the insurer must pay the entitlements until the court makes a determination to the contrary.

This, then, is a penal provision preventing payment of what would otherwise be a perfectly valid claim for reasons of public policy. A provision of this kind had been included in the earlier legislation, although the present wording is more extensive. The key element—that payment would be “repugnant to justice”—remains unchanged. The nature of the inquiry that needs to be undertaken was considered by the Court of Appeal in *Accident Compensation Corp. v. Curtis*²⁴⁹ in relation to the 1982 Act. The claimant had been convicted of dangerous driving when intoxicated causing the death of three persons, and sentenced to one year’s imprisonment. She herself was seriously injured and sought to recover rehabilitation and lump sum compensation. Justice Fisher, delivering the judgment of the court, said that “justice” should be construed objectively in the light of the purpose and scope of the 1982 Act. The dominant purpose was to provide comprehensive no-fault cover to all, including those who had behaved badly to the extent of incurring the penalty of imprisonment.²⁵⁰ Such cover could only be denied where the demands of justice, such as retribution, denunciation, deterrence and reparation, outweighed that purpose. Considerations to be taken into account included the gravity of the offense, the nature of the proposed assistance, and the claimant’s needs and resources. The threshold for applying the statutory bar, that assistance be “repugnant to justice,” was clearly a high one. It was an unusually emphatic expression involving injustice so plain and serious that it ought not to be tolerated. Furthermore, in determining the question a principle of proportionality could be applied, so different heads of compensation could be allowed in whole or in part or refused altogether. Applying these principles, the decision of the Accident Compensation Appeal Authority allowing the claim was upheld.²⁵¹ This was a first offense, the claimant was separated from her husband and was unable to care for her children, she was making progress in freeing herself from alcohol addiction, she had suffered severe injury in an earlier accident, the other victims were guilty of complicity in the intoxicated driving, and she had no earnings related compensation to fall back on. In all the circumstances the court could see no ground for interfering in the Authority’s decision.

Section 123 clearly constitutes a statutory endorsement of the approach taken by the Court of Appeal in *Curtis*. In the end, as the

249. [1994] 2 N.Z.L.R. 519 (C.A.). *Accident Compensation Corp. v. McKee*, a second and similar case, was decided at the same time in a consolidated opinion.

250. See *Accident Compensation Corp. v. Curtis*, [1994] 2 N.Z.L.R. 519 (C.A.).

251. See *id.*

court observed, one must stand back from the details and exercise a robust judgment viewing the case as a whole.²⁵² A similar kind of inquiry is undertaken when a court decides whether a claim for damages ought to be barred on the application of the maxim *ex turpi causa non oritur actio*. Decisions concerning this question could provide helpful analogies.²⁵³

C. Competitive Accident Insurance²⁵⁴

The Labour Government elected at the end of 1999 quickly announced its intention to bar private insurers from providing accident compensation and to return the scheme to public administration. Since then, by the Accident Insurance (Transitional Provisions) Act 2000, the provisions in the 1998 Act governing competitive accident insurance have been repealed. The 2000 Act is not yet fully in force and, putting it aside for the moment, the following account gives a brief overview of the structure and workings of the 1998 scheme.

i. The accident insurance contract

As of July 1, 1999, all employers must have an accident insurance contract with a commercial insurer.²⁵⁵ This contract has a number of special features that distinguish it from an ordinary insurance contract.

252. *See id.*

253. Exactly how *ex turpi causa* fits into the law of torts is unclear. In Australia, the courts have generally regarded the plaintiff's illegality as relevant to whether the defendant was under any legal duty owed to the plaintiff. *See* *Gala v. Preston*, (1991) 100 A.L.R. 29 (Austl.); *Smith v. Jenkins*, (1970) 119 C.L.R. 397 (Austl.). A similar view has been taken in England. *See* *Pitts v. Hunt*, [1991] 1 Q.B. 24 (1990) (Eng. C.A.). Seemingly, however, the concern is not so much with the conduct of the defendant or his or her relationship with the plaintiff, but with whether the conduct of the plaintiff is such as to raise a bar against his or her recovering damages. The better view is to treat the plaintiff's illegal behavior as a defense to liability. So understood, the Supreme Court of Canada, in *Hall v. Hebert*, [1993] 101 D.L.R. 4th 109 (Can.) (McLachlin, J.), gave it a very narrow scope. Justice McLachlin said that the plea would bar recovery only where to allow it would undermine the integrity of the legal system by introducing inconsistency into the law's fabric. *See id.* Thus a plaintiff would not be permitted to profit from his or her illegal conduct, as where a plaintiff claims for financial loss arising from a joint illegal venture or for exemplary damages, nor to evade a penalty prescribed by the criminal law, as where a burglar is caught due to his partner's negligence and required to pay a fine. However, a wrongdoer could still recover damages insofar as this was not compensation for an illegal act but was compensation for the loss caused by the negligence of another. *Reville v. Newbery*, [1996] 2 W.L.R. 239 (C.A. 1995) (Eng.) is a similar case. On this approach the statutory bar would be of little real effect. Other formulations simply ask whether the plaintiff's illegal conduct is of such moral turpitude as to require recovery to be denied on the grounds of public policy. Suggested tests include whether recovery would be an "affront to the public conscience," or "an affront to the administration of justice," or would "shock the ordinary citizen." *See, e.g.,* *Reeves v. Commissioner of Police of the Metropolis*, [1998] 2 W.L.R. 401 (C.A. 1997) (Eng.); *Brown v. Dunsmuir*, [1994] 3 N.Z.L.R. 485; *but compare* *Clunis v. Camden and Islington Health Auth.*, [1998] 2 W.L.R. 902 (C.A. 1998) (Eng.); *Tinsley v. Milligan*, [1994] 1 App. Cas. 340 (1993) (Eng.). These authorities seek to make the same kind of inquiry as is required under the statute.

254. *See generally* D. Ireland & J. Stevenson, *Competitive Delivery of Accident Compensation*, in *NEW ZEALAND L. SOC'Y SEMINAR PAPER* (Feb. 1999).

255. *See* Accident Insurance Act 1998, § 169. There is an exception in the case of employers of private domestic workers. *See* Accident Insurance Act 1998, § 169(3).

These relate to the statutory implication of certain terms into the contract, the question of third party enforcement, and the effect of misrepresentation and non-disclosure of information sought by the insurer.

Terms of the contract

A number of terms, which cannot be excluded, are implied into every accident insurance contract.²⁵⁶ These implied terms are:

- (a) The contract applies to every employee of the insured employer; and
- (b) The contract applies to every work-related personal injury suffered by the employer's employee in that employment . . . ; and
- (c) The contract provides for the receipt and determination of claims in accordance with . . . [the Act]; and
- (d) The contract provides no less than the statutory entitlements; and
- (e) All employees . . . and all other persons who have a statutory entitlement under the contract, may enforce the contract as if a party to the contract; and
- (f) Every dispute about cover and statutory entitlements under the contract is determinable in accordance with . . . [the statutory disputes resolution procedures]; and
- (g) The Regulator or prudential supervisor may transfer . . . the insurer's rights and obligations under the contract to another insurer . . . ; and
- (h) The contract continues in force until it is terminated in accordance with . . . [the Act]; and
- (i) The obligations of the insurer under the contract in respect of personal injury suffered while the contract was in force continue after termination [of the contract]²⁵⁷

The contract thus applies to all employees of an insured employer, irrespective of any changes after the contract is made in their number or composition or in the type of work they perform. All work-related injury must be covered under the one agreement. Crucially, the contract must provide injured employees with the minimum entitlements provided by the 1998 Act, and may provide greater cover according to whether it is suitable for the particular business activity. Any such additional coverage is, naturally, a matter for private negotiation.

A particular feature to this statutory insurance contract is that it is made between the employer and the insurer for the benefit of a third person, the employee. On ordinary principle the insured party, i.e., the employee, must have an insurable interest in the subject matter of the insurance. That interest is the health of the employee. He or she has

256. See Accident Insurance Act 1998, § 170.

257. *Id.*

the legally enforceable right to seek payment when an insured event happens.²⁵⁸ Indeed, claims must be made by insured persons, not employers.

Employers must disclose the terms of the contracts to their employees in accordance with certain prescribed requirements.²⁵⁹ They must not require employees to contribute towards the cost of the premiums.²⁶⁰ Insurers may insure their own employees if they meet the prudential requirements for insurers set out in the legislation.²⁶¹

Self-employed persons and private domestic workers

Self-employed persons and private domestic workers must also insure, but may choose between purchasing cover from a commercial insurer (including the new state-owned enterprise insurer) for both work and non-work-related personal injury or remaining insured with the ACC.²⁶² Self-employed persons who opt for the former must purchase a minimum level of income replacement (eighty percent of N.Z.\$14,560). In each case, similar implied terms apply.²⁶³ Self-employed persons and private domestic workers who do not purchase commercial insurance are covered in default by, and must pay premiums to, the ACC.²⁶⁴

Risk sharing

An employer (or self-employed person or private domestic worker) may enter a risk sharing agreement with an insurer, under which they agree to cover part of the costs associated with an injury in exchange for a reduced premium.²⁶⁵ This might cover, for example, specified payments for early treatment or initial weekly compensation. However, the insurer remains liable to provide cover and statutory entitlements if the obligations specified in the risk sharing agreement are not carried out.²⁶⁶

Captive insurers

An insurer that is established to provide accident insurance solely to its employees (which may include employees of a related company of

258. Seemingly, section 4 of the Contracts (Privity) Act 1982, requiring third party beneficiaries to be designated by name, description, or reference to a class, and to be intended to have an action, would also be satisfied. See Contracts (Privity) Act 1982, § 4 (N.Z.).

259. See Accident Insurance Act 1998, § 171.

260. See Accident Insurance Act 1998, § 172.

261. See Accident Insurance Act 1998, § 173.

262. See Accident Insurance Act 1998, §§ 176, 180.

263. See Accident Insurance Act 1998, §§ 178, 181.

264. See Accident Insurance Act 1998, § 300.

265. See Accident Insurance Act 1998, § 185(1).

266. See Accident Insurance Act 1998, § 185(3).

the insurer) is excused from the obligation to provide accident insurance to any employer or other person seeking insurance under the 1998 Act.²⁶⁷ The effect of this is to allow employers to establish their own captive insurance arrangements for employees of a particular corporate group. Of course, the insurer must still meet the prudential requirements for insurers set out in the legislation.

Duration of the contract

The 1998 Act sets out the procedures to be followed in making and canceling insurance contracts. An insurer must offer to contract with employers, the self employed and private domestic workers who are prepared to accept their terms, within ten working days of their request.²⁶⁸ Neither party can terminate the contract without following the requirements of the Act. Employers cannot terminate unless they have entered into a new contract or have ceased to be an employer. The contract continues until the necessary evidence is provided to the insurer.²⁶⁹ Self-employed persons and private domestic workers similarly must continue their insurance until they enter into a new contract or cease to be self-employed or employed in domestic work.²⁷⁰ Insurers can terminate an insurance contract but must give between twenty and forty days notice, allowing the other party time to find new insurance.²⁷¹

Misrepresentation and non-disclosure

Misrepresentation and non-disclosure do not carry the normal consequences in the case of an accident insurance contract. At common law an insurer can avoid an insurance contract where information supplied by the policy owner forming the basis for the contract is false or the owner otherwise is guilty of misrepresentation, although by statute the contract cannot be avoided unless the misstatement was substantially incorrect and was material.²⁷² However, an insurer cannot avoid an accident insurance contract because of a misrepresentation or failure to disclose by any person.²⁷³ An insurer's only remedy is a right to seek damages from an employer, self-employed person or domestic worker in respect of a "material non-disclosure."²⁷⁴ This occurs where a

267. See Accident Insurance Act 1998, § 186(4).

268. See Accident Insurance Act 1998, § 186(1), (2).

269. See Accident Insurance Act 1998, § 174.

270. See Accident Insurance Act 1998, §§ 179, 183.

271. See Accident Insurance Act 1998, § 189.

272. See Insurance Law Reform Act 1977, § 5(1) (N.Z.). To avoid a contract of life insurance, the misstatement must also have been made fraudulently or within certain time limits. See Insurance Law Reform Act 1977, § 4(1).

273. See Accident Insurance Act 1998, § 190(1).

274. See Accident Insurance Act 1998, § 191(1).

person knew a fact, failed to disclose it to the insurer, and knew or should have known that disclosure would have influenced the judgment of a prudent insurer in setting the terms of the contract.²⁷⁵ The damages may be an amount not exceeding three times the amount of any loss or damage suffered by the insurer as a result of the non-disclosure.²⁷⁶ As the insurer would have been obliged in any event to enter the contract, its loss appears to be the difference between the premium charged and the premium as it would have been with full information. Clearly, then, this is not going to be a very significant remedy.

Any other right to damages is unaffected.²⁷⁷ Seemingly, this could cover an insurer who provides in the contract that the employer should indemnify it against the consequences of non-disclosure by an employee. Employers cannot impose a similar obligation on employees in the employment contracts, which must provide for the full statutory entitlements. Any provision to the contrary is ineffective.²⁷⁸ Perhaps, however, an employer could make misrepresentation or the withholding of information grounds for the dismissal of the employee.²⁷⁹

ii. Regulatory regime

The competitive delivery of parts of the accident compensation scheme is subject to a regime regulating the insurers participating in the scheme. This seeks to ensure that statutory entitlements are provided without any interruption and to manage the financial risks involved. Significant features of the regulatory regime include: mechanisms promoting compliance with the requirements of the Act; provision for penalties in the event of failure to meet those requirements; registration of insurers; prudential supervision of insurers; and guaranteed payments in the event of an insurer becoming insolvent or an employer failing to insure.

Compliance mechanisms

The 1998 Act creates the position of Regulator within the Department of Labour. The Regulator's functions, broadly, are to enforce the obligations under the Act of employers, the self-employed, private domestic workers and insurers, and to ensure that statutory entitlements are met where the insurer has insufficient assets or an employer has failed to enter or maintain an insurance contract.²⁸⁰ The Regulator oversees the various obligations on insurers relating to the

275. See Accident Insurance Act 1998, § 191(2).

276. See Accident Insurance Act 1998, § 191(3).

277. See Accident Insurance Act 1998, § 191(4).

278. See Accident Insurance Act 1998, § 358.

279. See Ireland & Stevenson, *supra* note 254, at 36.

280. See Accident Insurance Act 1998, § 198.

claims process and the resolution of disputes, and on employers, the self-employed, private domestic workers and insurers relating to the accident insurance contract. The Regulator also has a number of specific duties and powers, including a duty to provide every employer with an insurance number, a power to verify that an employer, self-employed person, or private domestic worker is a party to an accident insurance contract, and various powers relating to the inspection of documents and premises.²⁸¹

Registration of insurers

A person offering accident insurance is required to be registered under the 1998 Act.²⁸² The person must be a company incorporated under the Companies Act 1993 and listed on the New Zealand register.²⁸³ This requirement was justified by the Select Committee considering submissions on the Act on the grounds that New Zealand law should always apply, particularly in relation to directors' duties and liabilities, insolvency and taxation. The company also must have a current rating in accordance with the Insurance Companies (Ratings and Inspections) Act 1994, or its prudential supervisor must have certified that the person is a captive insurer.²⁸⁴ The purpose of rating an insurer is to provide standard information to consumers, and captive insurers are excepted because the risk is assessed internally within a corporate group structure. The other requirements are that the company has appointed a prudential supervisor, which has certified that the trust deed for the insurer complies with the Act, a copy of the trust deed has been received for registration, and the prudential supervisor has certified that the insurer has a designated reviewer.²⁸⁵ These requirements are continuing conditions of registration.²⁸⁶

The Registrar of Companies keeps and maintains a register of insurers, registers insurers, cancels their registration if there is a failure to comply with the conditions for registration, and, on application, removes their name from the register.²⁸⁷ Initially, five private companies and one state-owned enterprise registered to provide insurance cover under the 1998 Act.

Prudential supervisors

An insurer is subject to monitoring by a prudential supervisor.

281. See Accident Insurance Act 1998, §§ 220-34.

282. See Accident Insurance Act 1998, § 199.

283. See Accident Insurance Act 1998, § 201(1)(a).

284. See Accident Insurance Act 1998, § 201(1)(b).

285. See Accident Insurance Act 1998, § 201(1)(c)-(e).

286. See Accident Insurance Act 1998, § 204.

287. See Accident Insurance Act 1998, §§ 197, 201-207.

Only a trustee company, the Public Trust, or a person authorized by an Order in Council can act as a prudential supervisor.²⁸⁸ There must be no relationship between the insurer and the supervisor that is likely to materially conflict with the exercise of the duties of the supervisor.²⁸⁹ The duties of prudential supervisors are to exercise reasonable diligence and care, broadly, to guarantee the insurer's continuing solvency. The supervisor must, *inter alia*, take enforcement action under the trust deed, monitor compliance with the conditions of registration, inform the regulator if the insurer's assets are or are likely to be insufficient to meet the insurer's obligations, and, if the insurer is declared to be insolvent, ensure that the responsibilities are met.²⁹⁰ The supervisor can be civilly liable for failing to perform its duties with care, and any provision in a deed or contract seeking to avoid that liability is void.²⁹¹

A trust deed required under the 1998 Act must create a first charge over the assets of the insurer in favor of the prudential supervisor. This mandatory charge must secure, in order of priority, the costs of the enforcement of the charge, the costs of ensuring that the obligations of the insurer under accident insurance contracts are met, and the costs of reimbursing payments from the Insolvent Insurers Fund. The mandatory charge ranks ahead of all mortgages, charges, encumbrances and any other claims.²⁹² The trust deed must also contain provisions which are necessary for the effective enforcement of the charge and which allow the supervisor to perform its duties under the Act.²⁹³

Insolvent insurers' fund and non-compliers' fund

The 1998 Act establishes an insolvent insurers fund to ensure that the obligations under accident insurance contracts for which an insolvent insurer is liable are satisfied without interruption. The fund is activated when the regulator declares that an insurer is an insolvent insurer after a receiver, statutory manager or liquidator has been appointed or the insurer has been removed from the register, and the regulator has been informed by the prudential supervisor that the assets of the insurer are insufficient to meet its obligations. The fund is made up by Crown advances, one-off payments of a year's premium by persons insured with the insurer, and annual insurers' contributions.²⁹⁴

The 1998 Act also establishes a non-compliers fund. Its purpose is to guarantee the provision of statutory entitlements to employees whose

288. See Accident Insurance Act 1998, § 208.

289. See Accident Insurance Act 1998, § 209.

290. See Accident Insurance Act 1998, § 210.

291. See Accident Insurance Act 1998, § 211.

292. See Accident Insurance Act 1998, § 215.

293. See Accident Insurance Act 1998, § 214.

294. See Accident Insurance Act 1998, §§ 237-61.

employer fails to insure. It is funded, *inter alia*, by Crown advances, penalties imposed on defaulting employers, and annual levies on insurers.²⁹⁵

iii. The Accident Compensation Corporation

The ACC continues in existence.²⁹⁶ Its primary functions are to manage claims by persons who are not otherwise insured with a private insurer, to promote safety measures, to reduce the incidence and severity of personal injury, and to manage the non-competitive accounts.²⁹⁷ The ACC is obliged to form and register a subsidiary company under the Companies Act 1993 to receive and determine claims,²⁹⁸ and also has power to perform any of its functions or duties through subsidiary companies.²⁹⁹ Three subsidiaries have been formed: Catalyst (for claims management services), Prism (for injury prevention and risk management services) and Healthwise (for health contracting services). These services can be contracted out on a commercial basis to insurers, employers and others. The ACC itself is the underwriting insurer and provides only limited services (like certain property management and computing services).

iv. Claims process

Opening the accident scheme to multiple insurers creates a need for mechanisms to allocate between the insurers, the responsibility for claims and the costs of meeting those claims. The 1998 Act does this in ways which do not affect insured persons. The insurer to which an insured makes a claim must decide whether there is cover and, if so, must start to provide the statutory entitlements.³⁰⁰ However, responsibility for managing a claim lies with an insured's "managing insurer."³⁰¹ If a claim has been lodged with the wrong insurer, then that insurer can transfer the claim to the managing insurer,³⁰² which must provide the entitlements.³⁰³ In this case the managing insurer must reimburse the receiving insurer.³⁰⁴

An insured claiming cover and a specified entitlement under the Act should lodge the claim with the insurer that the insured believes is

295. See Accident Insurance Act 1998, §§ 262-73.

296. See Accident Insurance Act 1998, § 328.

297. See Accident Insurance Act 1998, § 331.

298. See Accident Insurance Act 1998, § 335(1).

299. See Accident Insurance Act 1998, § 329(3).

300. See Accident Insurance Act 1998, § 51.

301. The Act gives a series of definitions of "managing insurer" depending on the circumstances of the claim in question. See Accident Insurance Act 1998, §§ 48, 105, 107, 109, 112, sched. 4.

302. See Accident Insurance Act 1998, § 52.

303. See Accident Insurance Act 1998, § 53.

304. See Accident Insurance Act 1998, § 104.

his or her managing insurer,³⁰⁵ which in this context means, broadly, the current insurer, if there is an accident insurance contract, or the ACC.³⁰⁶ The claim should be made in such reasonable manner as the insurer specifies, which may include, for example, a requirement that it be in writing.³⁰⁷ Any claim for cover must be lodged within twelve months after the date on which the claimant suffers the personal injury,³⁰⁸ and a claim for an entitlement after cover has been accepted must be within the time limit specified by the insurer, but which cannot be less than twelve months after the date on which the insured becomes aware, or could reasonably be expected to have become aware, that he or she needs the entitlement.³⁰⁹ Late claims cannot be declined unless their lateness prejudices the insurer in its ability to make decisions.³¹⁰

Sometimes an insured seeking cover might not have known when the injury first occurred, but special definitions governing the date on which injury is suffered tend to resolve any potential problems. Thus the date on which an insured suffers mental injury caused by criminal conduct³¹¹ or personal injury by medical misadventure is the date on which the insured first receives treatment for that injury.³¹² The date on which an insured suffers personal injury caused by a work-related gradual process, disease, or infection is the earlier of the date on which the insured first receives medical treatment for the injury or the date on which the injury first results in the insured's incapacity.³¹³ Pre-1974 injuries are deemed to be suffered on July 1, 1992 unless the injury is actually suffered on some later date.³¹⁴ Even where, taking into account these provisions, a claim is out of time, the question whether there is prejudice to the insurer still remains. However, it is still important for claimants not to exceed the twelve month limit, for if prejudice is shown and the claim is barred any possible right to damages will not revive. There is still cover under the qualifying provisions, but no longer any entitlement to payment.

Insurers are obliged to make reasonable decisions.³¹⁵ Claimants must supply medical and other pertinent information to the insurer, authorize the insurer to obtain relevant medical or other records and

305. See Accident Insurance Act 1998, § 55(1)(2). A claim for an entitlement once an insurer has accepted cover is to the insurer that received the previous claim or to which it has been transferred. See Accident Insurance Act 1998, § 56.

306. See Accident Insurance Act 1998, sched. 4.

307. See Accident Insurance Act 1998, § 60.

308. See Accident Insurance Act 1998, § 61(3).

309. See Accident Insurance Act 1998, § 61(4), (5).

310. See Accident Insurance Act 1998, § 61(2).

311. For a list of the offenses which are covered see Accident Insurance Act 1998, sched. 3.

312. See Accident Insurance Act 1998, §§ 44, 46.

313. See Accident Insurance Act 1998, § 45(1).

314. See Accident Insurance Act 1998, § 45(2), (3).

315. See Accident Insurance Act 1998, § 62.

undergo examination or assessment.³¹⁶ After investigating the claim the insurer must determine it, generally within twenty-one days from when the claim is lodged.³¹⁷ The insurer must also give written notice with reasons for its decision to the insured and, where appropriate, to the insured's employer or to any registered health professional concerned.³¹⁸ In addition, the insurer must tell the insured about his or her review and appeal rights.³¹⁹

In certain circumstances a managing insurer may wish to recover a contribution from other insurers towards meeting the costs of a claim. The Act makes detailed provision for determining responsibilities between insurers where an insured suffers a work-related personal injury and has earnings from more than one source, where an insured suffers a non-work injury and has earnings both as an employee and a self-employed person, where the injury is caused by a gradual process, disease, or infection, and where the insured is injured and later suffers a second, subsequent, injury.³²⁰

v. Reviews and appeals

The insured can apply to the insurer for a review of any of its decisions regarding a claim.³²¹ The application must be in writing and be made within three months of the decision in question.³²² The insurer is obliged to engage people to carry out reviews, but a reviewer's duty is to act independently.³²³ However, the insurer's responsibility for paying the reviewer and for meeting the costs of the review does not mean that the reviewer is not independent of the insurer.³²⁴ The 1998 Act lays down various requirements for the conduct of the review, persons entitled to be present, and formalities in relation to the reviewer's decision.³²⁵ In particular, the reviewer may admit any relevant evidence whether or not it would be admissible in court.³²⁶ As regards substance,

316. See Accident Insurance Act 1998, § 63.

317. See Accident Insurance Act 1998, § 64. Certain complicated claims must be decided within two months after the claim is lodged. See Accident Insurance Act 1998, § 65. Failure to meet the time limits, or to decide, is a decision to accept the claim. See Accident Insurance Act 1998, § 66.

318. See Accident Insurance Act 1998, § 136.

319. See Accident Insurance Act 1998, §§ 71, 72(4)(c).

320. See Accident Insurance Act 1998, §§ 105-14.

321. See Accident Insurance Act 1998, § 135(1). In addition, employers can apply to the insurer for a review of its decision that an injury is work-related or is attributable to the employer, and a registered health professional can apply regarding a decision that his or her conduct contributed to personal injury caused by medical error. See Accident Insurance Act 1998, § 135(2), (4). An insurer can also apply for review of another insurer's decision on matters concerning their respective responsibilities. See Accident Insurance Act 1998, § 135(6).

322. See Accident Insurance Act 1998, § 136.

323. See Accident Insurance Act 1998, § 140(1). The reviewer must not be involved in a claim in any capacity other than as a reviewer. See Accident Insurance Act 1998, § 142.

324. See Accident Insurance Act 1998, §§ 139, 140(2).

325. See Accident Insurance Act 1998, §§ 143-47.

326. See Accident Insurance Act 1998, § 144(4).

the reviewer must put aside the insurer's decision and look at the matter afresh on the basis of information provided at the review, and put aside the policy and procedure followed by the insurer and decide the matter on the basis of its substantive merits.³²⁷ The reviewer must award the applicant costs and expenses if the decision is fully or partly in the applicant's favor, and may do so, even if the decision is unfavorable, if the applicant acted reasonably in applying for the review.³²⁸

A reviewer's decision may be appealed to the District Court.³²⁹ As with a review, the court can hear any evidence that it thinks fit, whether or not it would be otherwise admissible.³³⁰ There is a procedure for the appointment of assessors with expertise in professional, technical or specialist areas, although the judge alone determines the appeal.³³¹ An appeal lies to the High Court on a question of law, with the leave of the District Court or by a special grant of leave from the High Court.³³² Similarly, a further appeal lies to the Court of Appeal on a question of law, with the leave of the High Court or by a special grant of leave from the Court of Appeal. There is no further appeal to the Privy Council.³³³

vi. Funding

Work-related claims formerly were funded from the Employers' Account, which was administered by the ACC and to which all employers were obliged to contribute. Naturally, this does not exist in the 1998 Act. The ACC continues to manage the accounts which fund the parts of the scheme which are not open to competition. These are: the Earners' Account (for earners' non-work injuries); the Non-Earners' Account (for injuries to non-earners other than motor vehicles injuries or medical misadventure injuries); the Motor Vehicle Account (for motor vehicle injuries); the Medical Misadventure Account (for injuries caused by medical misadventure); the Self-Employed Work Account (for work injuries of self-employed persons or private domestic workers who do not have an accident insurance contract); and the Residual Claims Account (for continuing injuries which were formerly funded from the Employers' Account).

We have seen that for most of the accident compensation scheme's existence, and explicitly since 1982, premiums or levies have been set on a pay-as-you-go basis. As will be explained below, private insurers must

327. See Accident Insurance Act 1998, § 148(1).

328. See Accident Insurance Act 1998, § 151(2)(a), (b). Other persons may also be awarded costs. See Accident Insurance Act 1998, § 151(2)(c).

329. See Accident Insurance Act 1998, § 152. The 1998 Act also specifies who may bring an appeal. See *id.*

330. See Accident Insurance Act 1998, § 159(1).

331. See Accident Insurance Act 1998, §§ 160, 161.

332. See Accident Insurance Act 1998, § 165.

333. See Accident Insurance Act 1998, § 166.

necessarily operate on a fully funded basis, and, consistently with this, all the non-competitive accounts save for the Non-Earners' Account are required to be fully funded. The premiums for each account must cover all the costs of claims made in any particular year, including all future costs. There remains a large unfunded liability, or "tail" of past claims, estimated at NZ\$8.2 billion,³³⁴ the costs of which continue into future years. This is funded by two additional levies. All employers, self-employed people with liable earnings and private domestic workers pay a residual claims levy, funding the ongoing costs of work injury claims made before July 1, 1999 and non-work claims before July 1, 1992 (when the 1992 Act came into force).³³⁵ The levy is imposed for a maximum of fifteen years.³³⁶ Employees and the self employed pay an earners' account levy to fund the continuing costs of non-work accidents that occurred between July 1, 1992 and July 1, 1999.³³⁷

D. Appraisal

i. Philosophy

The policy behind the 1998 changes, broadly, was to replace state control by private enterprise, and thereby to facilitate freedom of choice, promote a greater emphasis on safety and encourage rehabilitation and the efficient management of claims.³³⁸ Incentives to safety and efficiency under the former scheme were seen as relatively weak. The monopoly status of the ACC provided few means for the government to assess the relative merits of the ACC's initiatives, gave little ability to determine value for money for claimants and employers, and limited any notion of partnership between employers and the ACC in achieving injured workers' rehabilitation. Pay-as-you-go funding also restricted the ability of the ACC to reward innovation in injury prevention, as employers paid premiums that related largely to injuries that had already occurred. The 1998 Act aims to redress these perceived deficiencies, by introducing three key features.

First, as we have already noted, most of the scheme is fully funded. This is required for competitive underwriting of accident insurance in the field of work injuries and has also been adopted for the non-competitive accounts. The Act introduces risk rating and seeks to ensure that the full costs of injuries are reflected in premiums paid.

334. See ACCIDENT COMPENSATION CORP., ANNUAL REPORT 1997 at 83 (1997).

335. See Accident Insurance Act 1998, §§ 303, 304.

336. See Accident Insurance Act 1998, § 304.

337. See Accident Insurance Act 1998, § 283(2).

338. A summary of the National Government policy is contained in *Initial Briefing: Accident Insurance Bill*, a briefing to government members on October 13, 1998, and released under the Official Information Act 1982 (N.Z.) [hereinafter *Initial Briefing*].

Second, competing insurers underwrite the full funded costs of work injuries. This is intended to create incentives for insurers to involve employers in rehabilitation and injury prevention and to ensure that premiums accurately reflect the full costs of injuries. Insurers will be rewarded by greater profits and market share if they are successful in managing down the costs of injury, and employers will benefit from lower premiums. Claimants must receive their statutory entitlements, so insurer strategies will be focused on managing claims efficiently.

Third, flexibility in making arrangements for insurance allows insurers to share the costs of injuries with employers. This also creates incentives for employer involvement aimed at preventing harm.

The framers of the 1998 Act recognized that there could be no unfettered competition, with the risk of market failure, in the context of a no-fault, compulsory and comprehensive scheme. A regulatory environment was required, aimed at encouraging active competition, ensuring delivery of statutory entitlements, and minimizing fiscal and regulatory costs to government and industry. The insolvent insurers' fund would achieve the objective of guaranteed payments, yet it would also weaken incentives on employers to purchase from a prudent insurer and create a risk of insolvency. Accordingly, the regulatory regime was designed to encourage market participants to manage the risks of insolvency and to reduce the costs of failure. Similarly, the non-compliers' fund gives a remedy of last resort for employees whose employer has failed to enter into an accident insurance contract. The Act seeks to minimize the risk, by providing for penalties for breach of the obligation to ensure and for monitoring of employers to catch non-compliers. By these means undue distortion of the competitive market would, it was hoped, be avoided.

In summary, the government thought that the new regime would generate ongoing efficiencies, as constant pressure was applied to fine tune premiums and risk sharing arrangements, and would help develop more effective prevention of injury and better treatment and rehabilitation thereafter. A bureaucratically controlled monopoly was seen as unlikely to face this level of pressure on an ongoing basis. On balance, the reduction in injury costs from improved incentives were considered to outweigh the costs of increased resources devoted to prevention, claims management, premium setting and regulating the competitive environment. So the 1998 Act would provide an overall reduction in the costs of injury to society.

We need now to evaluate these policies and the claims made for them. It is obviously desirable to prevent death or injury from occurring, yet there are limits as to how far it is practically possible to achieve this objective and disagreements as to how to balance

considerations of safety with considerations of cost and efficiency.³³⁹ Injury prevention, as well as injury compensation, has costs. So the objective should be at least to minimize the sum of these two costs. The question is whether the 1998 Act has achieved the correct balance. We can attempt to decide this by looking separately at questions of funding, safety, efficiency and freedom of choice, although they overlap to some considerable extent.

ii. Full funding

The move from pay-as-you-go to full funding does not represent simply a change in the method of accounting. Rather, it reflects important considerations of policy and recognizes that privatization must be accompanied by full funding. Under pay-as-you-go, as we have seen, premiums for the current year pay all of that year's costs, including both new and old claims. Proponents of the 1998 reform see this as having undesirable consequences. Mills³⁴⁰ identifies three implications. First, it results in inter-generational cost transfers, with future payers subsidizing past payers. Second, historical costs minimize the impact that experience rating has on encouraging safety measures. About eighty percent of the average employer premium goes towards meeting the cost of past claims, so improved safety does not lead to a corresponding premium reduction. Under-investment in health and safety is a likely consequence. Third, the real cost of claims is obscured, tending to weak disciplines in managing claims efficiently. Because of the limited exposure to the full-funded costs, gains from assisting with rehabilitation are reduced below their true economic value. Again, exposure of insurers to the full funded liability creates superior incentives for their involvement in case management and rehabilitation.

The funding issue thus overlaps with questions of safety and efficiency, and we will deal with these separately. First, we should consider the question of comparative costs. Mills contends that at maturity, in theory, full funded costs are lower than pay-as-you-go costs (and consequently so are premiums),³⁴¹ although he does not explain why this should be so. Stritch,³⁴² by contrast, argues that full funding is more costly. He notes that private insurance companies must operate on a fully funded basis, because they take on liabilities that need to be met from present resources. If an insurance company goes bankrupt,

339. See *Daborn v. Bath Tramways Motor Co.*, [1946] 2 All E.R. 333, 336 (C.A. 1946) (Eng.) ("If all trains were restricted to a speed of 5 miles per hour, there would be fewer accidents but national life would be intolerably slowed down.")

340. See M. Mills, *The Case for ACC Reform*, 11 SOCIAL POL'Y J. OF NEW ZEALAND 83, 88-89 (1998).

341. See *id.* at 84.

342. See A. Stritch, *Competition and Compensation: The Privatisation of ACC*, 11 SOCIAL POL'Y J. OF NEW ZEALAND 67 (1998).

future benefits still have to be paid. So there needs to be a fund to meet the full cost of existing obligations. However, Stritch argues that the ACC can operate on a pay-as-you-go basis because it is a governmental body, funded by compulsory levies, which cannot go bankrupt.³⁴³ The levies for the year can always be set at an appropriate level to cover the expenses and any reserves thought necessary. In this respect there is no difference in principle between setting levies and setting tax rates sufficient to meet outgoings for the year. Stritch states that this gives the ACC substantial cost savings over private firms and allows it to charge lower premiums.³⁴⁴

Stritch's argument is too simple. Putting aside for the moment any possible financial benefits from the introduction of competition, it may be, as he says, that a consequence of privatization will be a rise in the cost of premiums as compared to the levies imposed by the ACC. However, this will happen only during the transition from a pay-as-you-go system to full funding, in order to meet the unfunded tail of past claims. Premium payers must pay these claims as well as the full cost of new claims. But once the unfunded claims have been satisfied, fully funded premiums will be lower than pay-as-you-go premiums.

Let us analyze the position as from when an accident compensation system is introduced, assuming the number of claims each year remains constant and comparing pay-as-you-go to full funding. In year one, pay-as-you-go premiums will be lower than fully funded premiums because the cost of injuries extending into year two does not have to be included. Fully funded premiums must pay this cost. Pay-as-you-go premium payers get a windfall, as part of the cost of year one injuries are left to be paid in the future. In year two, pay-as-you-go premiums will rise, as the cost of long-term injuries from year one must also be included. Fully funded premiums will fall, because part of the cost of payments out can be met from interest on the reserves which are being built up to meet these long-term claims. In year three the same process occurs, with more long-term injuries being added to the pay-as-you-go bill while greater reserves accumulate in the full funding account. Eventually the scheme reaches maturity, when new liabilities match expiring liabilities. Persons suffering longer term injuries eventually become rehabilitated, or move onto superannuation, or die. Some kind of equilibrium between those coming into the scheme and those going out is achieved. Pay-as-you go continues to pay for past costs but not for those in the future. Full funding continues to pay for future costs but not for those in the past. At this stage full funding premiums are lower, and will remain permanently lower, because of the interest on

343. *See id.*

344. *See id.* at 70.

the reserve fund covering future costs.

No doubt there is a financial cost involved in full funding by paying now what will only be disbursed in the future. However, the payments must be met at some stage, and pay-as-you-go simply postpones collecting the necessary funds. This leads to arguments about the "fairness" of inter-generational subsidies, but they do not seem to take us very far.³⁴⁵ Pay-as-you-go has been criticized on the ground that past employer behavior is subsidized by present and future employers.³⁴⁶ This may be true in the early years, the continuing costs of the accidents of the first generation being paid for by later generations. However, at maturity, present premium payers are subsidizing past payers but are also being subsidized by future payers. Any unfairness has already been suffered by others. Problems arise only in transition periods, when there can be substantial gains or losses. Accident compensation having started with pay-as-you-go, perhaps full funding is now unfair because payers today must pay for the existing unfunded liability. Yet this does not seem to be a sufficient reason for retaining pay-as-you-go forever, particularly as the payments have been spread over fifteen years and premiums under full funding in the end are lower.

Ultimately, the financial implications of pay-as-you-go as compared to full funding do not help very much in determining whether the 1998 changes deserve to be supported. Seemingly, if the method of funding does not affect performance, then from the outset current outlays should be the same whichever is chosen. If full funding leads to fewer accidents or better administration then outlays will be less. We will turn our attention to these matters.

iii. Deterrence and safety

Underpinning the new scheme is the theory of market deterrence. This requires that the costs of accidents be internalized to deter injury-producing activities. The theory states that if the cost of the harm caused by an activity is required by law to be paid by those who engage in that activity, then they will take precautions to prevent inflicting harm, provided the cost of precautions is less than the cost of the harm (i.e., any payments they have to make). In this way the optimum or

345. A separate issue is whether changing demographics—declining birth rates—might put pay-as-you-go under pressure. Stritch notes that when persons on long term weekly compensation reach retirement age, their ACC benefits are terminated and they receive superannuation instead. *See id.* at 70-71. Again, the increase in long term claims had halted, and projections for the next twenty years showed no major demographic changes were likely in regard to the workforce age population. Other factors, like female employment, rates of unemployment and immigration were also relevant. Stritch concludes that it is not clear whether any changes would have adverse consequences for accident compensation under pay-as-you-go. *See id.*

346. *See* NEW ZEALAND EMPLOYERS' FEDERATION, A NEW PRESCRIPTION FOR ACCIDENT COMPENSATION 56 (1995).

efficient level of precautions (and, conversely, of harm) will be reached.³⁴⁷ The question now is whether the theory matches the reality.

An anticipated benefit from the introduction of a competitive regime was a safer work environment and fewer injuries. The Select Committee on the Accident Insurance Bill had sought information from the Department of Labour on New Zealand's comparative performance as regards injuries at work and on the impact of financial incentives in achieving workplace safety. Regarding the first request, the advice it received was that consistent data for making international comparisons was difficult to obtain, but that which was available tended to indicate that New Zealand's fatality rates were above average.³⁴⁸ Regarding the second request, the weight of evidence was seen as tending to favor financial incentives having an overall positive impact on reducing the costs of injury.³⁴⁹ Certainly the 1998 Act assumes this connection. The government view was that poor incentives in the former scheme, and the response of employers to increased incentives (for example, the Accredited Employer Programme), indicated that the overall costs of injury would be reduced by an increased focus on prevention and rehabilitation.³⁵⁰ It was expected that the monitoring of workplace safety performance would increase under private insurer provision. This was because insurers would be under constant pressure from competition and from the requirement to maintain solvency to ensure that employers' work risks were adequately reflected in premiums. This might involve health and safety audits, or premium reductions for employers who undertook injury prevention programs. The change to full funding, with premiums reflecting present risk, would be another incentive to safety.

How significant are financial incentives on workplace safety? This is a controversial area, with available research and studies being susceptible to differing interpretation. The Department of Labour's

347. See generally RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (4th ed. 1992); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

348. See NEW ZEALAND DEP'T OF LABOUR, *COMPARATIVE DATA ON WORKPLACE SAFETY* (Nov. 4, 1998) (memorandum to the Chair of the Select Committee). New Zealand has a fatality rate of 5.1 fatalities per 100,000 employees per annum, not including road based work injuries. The Occupational Safety and Health Service of the Department of Labour estimated 10.21 deaths per 100,000 workers including transport accidents. U.S. data indicated 4.8/3.7 fatalities per 100,000 workers with/without transport fatalities. The European fatality rate was 6.1 deaths per 100,000 employees (road injuries not included). Fatalities per 100,000 workers in the building construction industry indicated high N.Z. rates: N.Z. 18.8; U.S. 16.0; Australia 13.0; Germany 11.5; Sweden 10.0; England 7.5; Ontario 5.3. Comparison of injury rates was difficult because of different data definitions between countries. An average New Zealand rate of 24.8 injuries exceeding five days lost time per 1000 workers compared to a rate of 21.8 for Australia. The Australian data included transport injuries that were excluded from the N.Z. figures. See *id.* For a discussion of priorities in health showing New Zealand's relatively poor performance, see John Wren, *A Matter of Priority*, SAFEGUARD, Mar.-Apr. 1998, at 34.

349. See NEW ZEALAND DEP'T OF LABOUR, *THE IMPACT OF FINANCIAL INCENTIVES ON WORKPLACE SAFETY* (Oct. 29, 1998) (memorandum to the Chair of the Select Committee).

350. See *Initial Briefing*, *supra* note 338, at 3-4.

advice was supported by empirical studies by Kotz and Schafer,³⁵¹ Bruce and Atkins,³⁵² Hager,³⁵³ and the evidence provided by the Accredited Employer Programme in New Zealand. A study by Lanoie,³⁵⁴ however, was noted as showing no significant link. Survey articles on experience rating showed mixed results. Vaillancourt³⁵⁵ found positive improvements in safety, but the Workers' Compensation Board of British Columbia noted that others had reached the opposite conclusion on the basis of the same evidence.³⁵⁶ The Australian Industry Commission ("AIC") recommended the use of experience rating, bonuses and penalties in their report on Australian Workers' Compensation Schemes.³⁵⁷ Claims suppression by some employers was a concern, but was thought to be outweighed by overall incentives for prevention. The AIC's later report³⁵⁸ referred to studies showing a positive link between financial incentives and lower work fatality rates. The AIC noted that the use of fatalities in these studies meant that they were not likely to be affected by claims suppression. Dewees, Duff, and Trebilcock³⁵⁹ in a wide review of accident law concluded that the operation of the workers' compensation system reduced worker injury rates, and that for the high risk industries and risk rated firms the reduction was substantial, although the absolute magnitude of the effect was subject to enormous uncertainty.

Other studies on experience rating not cited to the Select Committee showed inconclusive results.³⁶⁰ The Law Commission, in its 1988 Report,³⁶¹ drew attention to the uncertainties and also to possible inequities resulting from experience rating. Thus small firms might be subject to statistically random fluctuations in accident rates, which might occur despite taking all proper precautions. Further, there might

351. See Hein Kotz & Hans-Bernd Schafer, *Economic Incentives to Accident Prevention: An Empirical Study of the German Sugar Industry*, 13 INT'L REV. L. & ECON. 19, 19-33 (1993).

352. See Christopher J. Bruce & Frank J. Atkins, *Efficiency Effects of Premium-Setting Regimes under Workers' Compensation: Canada and the United States*, 11 J. LAB. ECON. S38 (1993).

353. See Hager, *Experience Rating Puts Maximum Pressure on Unsafe Businesses*, 5 J. WORKERS' COMPENSATION 1 (1996).

354. See Paul Lanoie, *The Impact of Occupational Safety and Health Regulation on the Incidence of Workplace Accidents: Quebec 1983-1987*, 27 J. HUM. RESOURCES 643 (1992).

355. See FRANÇOIS VAILLANCOURT, *THE FINANCING OF WORKERS' COMPENSATION BOARDS IN CANADA 1960-1990* (1994) (Canadian Tax Paper, No. 98).

356. See WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA, *CLASSIFICATION AND EXPERIENCE RATING: A BRIEFING PAPER* 21 (May 1997).

357. See AUSTRALIAN INDUSTRY COMMISSION, *WORKERS' COMPENSATION IN AUSTRALIA* 70 (1994) (Report No. 36).

358. See AUSTRALIAN INDUSTRY COMMISSION, *WORK, HEALTH AND SAFETY: AN INQUIRY INTO OCCUPATIONAL HEALTH AND SAFETY* ch. 10 (1995) (Report No. 47).

359. See DONALD N. DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* (1996).

360. See Ronald G. Ehrenberg, *Workers' Compensation, Wages and the Risk of Injury*, in *NEW PERSPECTIVES IN WORKERS' COMPENSATION* 91 (John F. Burton Jr. ed., 1988); James R. Chelius & Robert S. Smith, *Experience Rating and Injury Prevention*, in *SAFETY AND THE WORK FORCE: INCENTIVES AND DISINCENTIVES IN WORKERS' COMPENSATION* 128 (John D. Worrall ed., 1983).

361. See LAW COMMISSION 1988 REPORT, *supra* note 22, ¶¶ 140-49.

be a time lag problem so, for example, a penalty might be imposed long after poor safety practices had been abandoned. Indeed, in the Policy Statement on the future of accident compensation which preceded the 1992 Act, it was recognized that evidence justifying experience rating on the grounds that it sent the right "signals" to employers and thereby led to safer employment practices was at best equivocal.³⁶²

The debate is a reminder of one of the fundamental issues underlying the introduction of accident compensation in the first place, *viz* whether replacing tort liability by a no-fault scheme would remove a deterrent on accident-producing activities. The Law Commission also considered this question and concluded that the alleged deterrent role of tort was not significant.³⁶³ The Commission cited a study of traffic accidents in New Zealand showing that the removal of tort liability for personal injury had no adverse effect on driving habits. In fact, statistics showed a decline in accident and fatality rates.³⁶⁴ Again, the authors of a major North American study of personal injury cases reached a relatively bleak judgment about the properties of the tort system as a deterrent mechanism (and an even bleaker evaluation of the tort system as a compensatory mechanism).³⁶⁵

Palmer,³⁶⁶ writing in 1994, doubted whether deterrence goals could be achieved at a practical level in designing a compensation system. There was no evidence that the absence of market driven safety incentives had caused anything to happen to the incidence of accidents. Nor did the existence of the accident scheme appear to have caused significant problems of moral hazard.³⁶⁷ Palmer suggested that divorcing the issues of paying victims and reducing accidents might be the superior policy, however much that was resisted by economists and the law and economics analysts.³⁶⁸ There was no logical or necessary connection, and both policies could be pursued independently.

Of course, all kinds of accident-reducing factors can operate independently of any compensation system. These include safety legislation imposing standards and rules in particular environments,³⁶⁹ criminal prosecutions, inquiries of various kinds into health and safety issues, licensing of particular activities, professional and occupational disciplinary processes, education and training, and systems of peer review. A penetrating Canadian study concluded that little could be

362. See ACCIDENT COMPENSATION—A FAIRER SCHEME, *supra* note 26, at 23.

363. See LAW COMMISSION 1988 REPORT, *supra* note 22, ¶ 81.

364. See Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CAL. L. REV. 976 (1985).

365. See Donald Dewees & Michael Trebilcock, *The Efficacy of the Tort System and Its Alternatives: A Review of the Empirical Evidence*, 30 OSGOODE HALL L.J. 57 (1992).

366. See Palmer, *supra* note 21, at 252-58.

367. For further discussion see *infra* Part VI.D.iv.

368. See Palmer, *supra* note 21, at 252-58.

369. See, e.g., Health and Safety in Employment Act 1992 (N.Z.).

said with confidence about the effectiveness of measures seeking to promote safe behavior, because of “the inherently multi-causal nature of accidents. Accidents are products of myriad necessary and often interactive conditions.”³⁷⁰

The preceding account merely touches on a huge subject. However, it may suffice to show that what, if any, role compensation rules can play in deterring accidents by creating market-driven incentives to safety is highly uncertain. In Palmer’s view, all the efforts of the law and economics school have remained at the level of theory, and the analytical insights have failed to produce a workable model that could be implemented that did achieve deterrence goals.³⁷¹ Even so, the attempt to construct such a model in the 1998 Act should not be rejected simply because some analyses of financial deterrence are susceptible of different interpretation and not all point in the same direction. Existing studies do give a degree of support. Furthermore, the safety issue is also bound up with considerations of efficiency, and here the evidence points rather more in favor of the private model.

iv. Efficiency

A major claim for the new scheme is that private enterprise will provide better claims management than a state corporation. The ACC was thought to have inadequate incentives for efficiency, and certainly its monopoly status made assessment difficult. The National Government saw incentives for greater employer and insurer involvement as critical in minimizing the incidence and costs of injuries, promoting rehabilitation and encouraging early return to work.³⁷² For example, the risk sharing arrangements with insurers encouraged employers to participate in rehabilitation. The Accredited Employer Programme, under which employers paid for the first year’s costs of claims, provided evidence for their likely efficacy. The 1996 evaluation indicated that the number of claims fell by 15.5 percent, and the duration of compensation also fell, with 7.4 percent of claims continuing past twelve months compared to 12.7 percent for the scheme generally. Insurers equally had financial incentives to manage the cost of injuries. They could work with employers to manage down claims incidence and improve rehabilitation outcomes, with the reward being greater market share and profits.

Mills recognizes several new and increased costs that the introduction of competition generates.³⁷³ These were increased

370. Martin L. Friedland et al., *Regulating Traffic Safety*, in *SECURING COMPLIANCE* 267 (Martin L. Friedland ed., 1990).

371. See Palmer, *supra* note 21, at 254, 256.

372. See *Initial Briefing*, *supra* note 338, at 3-4.

373. See Mills, *supra* note 340, at 91-93.

resources devoted to claims management (estimated at seven percent of premiums), costs of preventing harm, costs of rivalry like marketing and distribution (estimated at eight percent of premiums), the costs of the regulatory environment, and the loss of any economies of scale.³⁷⁴ The benefits, broadly, were improved setting of premiums and risk sharing for employers, and improved incentives on insurers to manage claims.³⁷⁵ Competition would test employers' and insurers' choices regarding their use of resources to prevent injury and rehabilitate victims. Compared to a monopoly provider environment where these choices were decreed, there should be a reduction in the total costs of injury to society.

Mills also emphasizes the need for care in determining whether welfare schemes are administratively efficient.³⁷⁶ They may have low operating costs, but this can be symptomatic of poor claims management. Mills notes that pay-as-you-go funding means that the costs of poor performance are not transparent. Instead, they are simply passed on to future years.³⁷⁷ An emphasis on administration costs as an indicator of management performance is a symptom of focusing on pay-as-you-go costs. Full funding and competitive provision focuses management on the full cost of injury, the pricing of cover, and the management of financial assets.³⁷⁸

Stritch, by contrast, argues that the case for private provision has not been established.³⁷⁹ He notes that the ACC's administrative costs were generally acknowledged to be low by insurance industry standards.³⁸⁰ The claim that private companies would devote greater resources to claims management than the ACC was hard to verify in the absence of comparative cost data.³⁸¹ The ACC's operating costs would be expected to be lower, because it did not have to advertise or promote its services and could avoid other sorts of outlays that private companies had to accommodate, such as making profits, paying dividends, paying taxes, or spending money to attract investors. Monopoly provision avoided any duplication of the administrative set-up needed to deliver

374. *See id.*

375. *See id.*

376. *See id.* at 88-90.

377. *See id.*

378. *See id.* Mills also compares the cost of the former ACC Employers' Account with Australian workers' compensation schemes. He concludes that on an actuarially assessed full funded basis and taking into account differences in scheme design, the New Zealand scheme appeared to be neither particularly cheap nor overly expensive. *See id.* (citing COOPERS & LYBRAND, L.L.P., INTRODUCTION OF COMPETITION TO THE PROVISION OF ACC SERVICES: ACC BENCHMARKING (May 1998) (Austl.)).

379. *See Stritch, supra* note 342, at 68-69.

380. *See id.* *See also* Roger Kerr, *New Zealand's Accident Compensation Scheme: Time for a Decent Burial*, NEW ZEALAND BUS. ROUNDTABLE (1996); NEW ZEALAND EMPLOYERS' FEDERATION, A NEW PRESCRIPTION FOR ACCIDENT COMPENSATION (1995); MINISTERIAL WORKING PARTY REPORT, *supra* note 25.

381. *See Stritch, supra* note 342. *See also* NEW ZEALAND EMPLOYERS' FEDERATION, ACC: PROBLEMS AND SOLUTIONS (1997); Kerr, *supra* note 380.

the services. The ACC collected premiums and levies through the Inland Revenue system and New Zealand Post, which was surely more efficient than having each company run its own separate system.

This use of the ACC's low administration costs as evidence of efficiency is open to Mills' criticism that this is not a reliable or appropriate test.³⁸² The question is whether any additional costs are balanced or outweighed by other savings. While the percentage of premium income required for administration under a multi-insurer environment seemingly will be higher than under the ACC monopoly, superior claims management by private insurers may achieve greater efficiency overall. There is at least some evidence in support from the Accredited Employer Programme. Some of Stritch's other cost savings hardly convince. If the Inland Revenue and New Zealand Post can provide a cheap service in collecting premiums or debts, then it should be possible for private insurers similarly to buy their services. The supposed advantage that the ACC does not have to make profits or pay dividends and taxes overlooks the cost to taxpayers, who pay for its assets and receive no return.

Some further light may be thrown on the debate by looking further afield, at studies of the effects of market discipline and whether it is likely to force private companies to achieve greater efficiency than the public sector. Evidence from overseas suggests that it does. Boardman and Vining conclude, after controlling for a wide variety of factors, that large industrial mixed enterprises and state-owned enterprises performed substantially worse than similar private corporations.³⁸³ The same authors maintain that a non-trivial, although not an obvious, conclusion from a later study was that where competition was normatively appropriate, private ownership was preferable from an efficiency perspective.³⁸⁴ Megginson, Nash and van Randenborgh compare the pre and post-privatization financial and operating performance of sixty-one companies from eighteen countries and thirty-two industries that experienced full or partial privatization through public share offerings during the period of 1961 to 1990.³⁸⁵ Their results document strong performance improvements, which were achieved without sacrificing employment security.³⁸⁶ Yarrow surveys various empirical studies of the efficiency of privatized industries, with results

382. See Mills, *supra* note 340.

383. See Anthony Boardman & Aidan R. Vining, *Ownership and Performance in Competitive Environments: A Comparison of the Performance of Private, Mixed and State-Owned Enterprises*, 32 J.L. & ECON. 1 (1989).

384. See Aidan R. Vining & Anthony Boardman, *Ownership Versus Competition: Efficiency in Public Enterprise*, 73 PUB. CHOICE 205 (1992).

385. See William L. Megginson, Robert C. Nash & Matthias van Randenborgh, *The Financial and Operating Performance of Newly Privatized Firms: An International Empirical Analysis*, 49 J. FIN. 403 (1994).

386. See *id.*

generally favoring the private model.³⁸⁷ Wolf makes a similar survey of comparisons between public as compared to private service delivery, indicating that the costs of the public services are generally higher.³⁸⁸

In a broad overview, Vickers and Yarrow state that the evidence suggests that private ownership has efficiency advantages in competitive conditions, but does not show either public or private ownership to be generally superior when market power is present.³⁸⁹ They also say that the effects of privatization in any particular context will be highly dependent upon the wider market, regulatory and institutional environments in which it is implemented.³⁹⁰

The impact of privatization has been extensively analyzed in New Zealand since the economic reforms commencing in the mid-1980s. Taking, for example, the telecommunications industry, Boles de Boer and Evans conclude that changes in the telecommunications network market in the six years after privatization led to marked improvements in the quality of outputs and a profitable investment for shareholders.³⁹¹ Duncan and Bollard examine the commercialization of state trading departments under the State-Owned Enterprises Act 1986, but state that it was too early to be sure of the aggregate effects of ongoing operational improvements.³⁹² Spicer, Emanuel and Powell, in a study of five New Zealand corporatizations, conclude that the experiment was extremely successful in turning what were bureaucratic and often inefficient and wasteful organizations with mixed and confusing objectives into well-focused, commercially oriented and profitable companies.³⁹³

Of course, the ACC can, and has, taken various steps to prevent abuse and encourage rehabilitation. For example, in 1997 it introduced a work capacity assessment procedure aimed at overcoming the problem of "passive dependence" on accident compensation.³⁹⁴ The

387. See George Yarrow, *Privatization in Theory and Practice*, 2 *ECON. POL'Y* 324 (1986) (listing twenty-eight studies of which six are pro-public ownership, one is pro or neutral public ownership, four are neutral, and seventeen favor private ownership).

388. See CHARLES WOLF, *MARKETS OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES* 201-11 (2d ed. 1993). In particular, Wolf discusses two empirical studies. The first, a German study concerning life firms, which showed the same rate of return and no obvious cost differences between organizational forms. The second, a Canadian study concerning car insurance, indicated that the quality and services of private insurers were higher than their public counterparts. See *id.*

389. See John Vickers & George Yarrow, *Economic Perspectives on Privatization*, 5 *J. ECON. PERSP.* 111 (1991).

390. See *id.*

391. See David Boles de Boer & Lewis Evans, *The Economic Efficiency of Telecommunications in a Deregulated Market: The Case of New Zealand*, 72 *ECON. REC.* 24 (1996).

392. See IAN DUNCAN & ALAN BOLLARD, *CORPORATIZATION AND PRIVATIZATION: LESSONS FROM NEW ZEALAND* (1992).

393. See BARRY SPICER ET AL., *TRANSFORMING GOVERNMENT ENTERPRISES: MANAGING RADICAL ORGANIZATIONAL CHANGE IN DEREGULATED ENVIRONMENTS* (1996) (indicating that further gains from privatization may be significant).

394. Some evidence of the extent of the problem is provided by R. Sellars, *Assessing Pain and*

problem as seen by the ACC's critics is the difficulty in determining whether or how far such measures have been successful and the need for constant pressure and monitoring. They consider that the only long term solution lies in the discipline of competition. The evidence shows that there is some merit in this view, but determining at this stage whether there is likely to be any overall benefit is fraught with difficulty.

No doubt there is scope for argument on how much light the analyses of privatizations in other industries can throw on the likelihood of success of the unique accident compensation provisions. Yet any system for compensating accident victims needs to operate efficiently. The evidence tends to show that the financial benefits achieved by the introduction of a competitive market are real, although weighing and quantifying them in the present context, certainly at an early stage, is not easy.

v. Choice

An overall policy justification for the new regime is the introduction of the element of choice. The ACC is no longer the only show in town. Employers can choose their insurer for a minimum level of benefits at the agreed price. Mills notes that while minimum entitlements are fixed for ACC insurance, there is still significant scope for product differentiation in, for example, the degree of insurance and risk sharing and other service features like premium payments by installments.³⁹⁵

Stritch deprecates this feature, observing that the choice of an insurer is made by the employer who must insure, not the employee who gets the benefit, and that employers and employees have different interests.³⁹⁶ Employees' interests are in obtaining the maximum possible level of protection. Employers' interests are in maintaining the bar on actions for damages while paying low insurance premiums, which means that they are likely to choose an insurer offering a minimum level of benefits. Stritch suggests that there is no particular advantage in having a number of insurers all competing to offer the same, statutorily guaranteed, level of benefits at much the same price. And while employers can offer its workforce superior protection, they can do that under an ACC regime in any event.³⁹⁷

It is true that the employer chooses the insurer and the terms of the

Disability Exaggeration with the Functional Capacity Evaluation Process, presented at MOVING IN ON OCCUPATIONAL INJURY CONFERENCE (Cairns, Australia, June 3, 1999) (concluding that most New Zealanders who had been off work for lengthy periods because of occupational injuries exaggerated their condition).

395. See Mills, *supra* note 340, at 93.

396. See Stritch, *supra* note 342, at 72.

397. See *id.*

agreement, not the employee, but as entitlements are guaranteed this does not disadvantage the employee. Private enterprise at least facilitates product differentiation, which can also be efficiency enhancing. Furthermore, there was early evidence of considerable variation in premiums under the private enterprise regime, with most showing savings which, in some cases, were substantial.³⁹⁸ Of course, making choice available is a value in its own right, quite apart from lower premiums, although opinions will differ as to how much weight it ought to carry. The various insurance companies also have different market strategies, with some developing specialized products focusing on particular industry categories.

VII. FUTURE DIRECTIONS

Developments in the 1990s suggest that the future of New Zealand's accident compensation system is likely to continue to be controversial. The leading political parties have very different ideas, as do business and trade union organizations. Political change at the end of 1999 has brought about an abrupt reversal of policy, in favor of an expansion of the scheme under public administration. The National Government which introduced the private enterprise experiment was voted out of office, and the Labour Party, which had signaled unremitting opposition, came to power. In light of this polarization of opinion, and after twenty-five years of experience, it is time to take stock. Has accident compensation been a success? And, if it has, what direction should it be taking now?

There are a number of options, some of which overlap. These include: abolishing the scheme in its entirety; retaining it in some form and reintroducing a right to sue; privatizing more of, or the whole, scheme; returning to public administration; improving the statutory benefits; and expanding the boundaries of the scheme. We will consider all of these options, placing them where appropriate in the context of recent political developments and proposals for change.

A. Abolishing the Scheme

A pure theory of market deterrence is promoted by the New Zealand Business Roundtable, which regards the accident compensation scheme as an unjustifiable intrusion by the state upon individual freedom and decision making and would like to see it disappear altogether. In a report prepared prior to the 1998 changes, the Business Roundtable recommended ending the ACC's statutory

³⁹⁸. See M. Clark-Reynolds, *Don't Fiddle with ACC Reforms*, CHRISTCHURCH PRESS, Dec. 4, 1999.

monopoly (subsequently, of course, partially achieved), privatization of the ACC and its liabilities, and an end to most mandatory insurance coverage.³⁹⁹ This would, it was thought, promote optimally efficient insurance arrangements. The report made a number of associated proposals, including minimal regulation of insurers, who should be subject only to normal prudential requirements, provision for a safety net for hardship cases, whether due to accident or sickness, and provision for targeted assistance to low income earners to pay insurance premiums.⁴⁰⁰ It also advocated that there should be no unqualified return of the right to sue.⁴⁰¹ The concern was with the high cost of vexatious litigation, the arbitrary and extensive tort awards that are made in other countries, judicial activism, and the intrusion of the state and of remote third parties into contractual arrangements. So there should be investigation of measures to extend consensual contracting to optimize assignment of risk, to affirm the sanctity of contract, and to prevent capricious and unpredictable tort actions.⁴⁰²

This last proposal rejects the notion of a social contract and a trade-off between the loss of common law rights and the gaining of accident compensation benefits. Calabresi and Melamed, in a famous article, point out that there is no inalienable right to sue independent of rules determined by the State.⁴⁰³ The incidence of the costs of an accident and the liability for those costs depends on whether the State leaves them to lie where they fall or whether they are shifted to another. So, in the present context, the fact that a fault system with a right to sue existed prior to the introduction of accident compensation does not mean that the State must reintroduce that system if accident compensation is abandoned. Rather, it is free to choose such criteria, and the weight to be attached to the criteria, as are thought to be appropriate. The Business Roundtable thinks that economic efficiency should be the dominant objective.

In my view, outright abolition of the scheme should not be an option. The Woodhouse ideals of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency still maintain their resonance, certainly within New Zealand. After twenty-five years during which the scheme has undergone almost perpetual analysis and review and has been

399. See CREDIT SUISSE FIRST BOSTON, ACCIDENT COMPENSATION: OPTIONS FOR REFORM (Nov. 1998) (prepared for the New Zealand Business Roundtable). For comment see B. Maughan, *Whither ACC?*, 1999 N.Z. L.J. 221.

400. See CREDIT SUISSE FIRST BOSTON, ACCIDENT COMPENSATION: OPTIONS FOR REFORM (Nov. 1998) (prepared for the New Zealand Business Roundtable).

401. See *id.*

402. See *id.*

403. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

reconstructed three times, it emerges a substantial success. The coverage is still comprehensive, the cost is relatively low and the lessening of human suffering clear.⁴⁰⁴ Turning to and trusting in an economic model of resource allocation ignores the social dimension when dealing with the victims of incapacity. The reality is that people do not act as rational economic agents. Gaskins notes that in today's public welfare philosophies the commitment to distributive justice is largely missing; it finds no place within the scope of efficiency-driven economics.⁴⁰⁵ For many, the cost of the ACC is simply a net burden to the public purse and funding it is like any other budget decision. According to the Woodhouse model, however, the costs of injury belong in some different calculation. The costs have already been paid by some members of society, and the question is whether to leave them randomly assigned, or to distribute them according to a principle of equity.

B. Reviving the Right to Sue

The opposite solution to that proposed by the Business Roundtable is to retain the scheme and to fill any gaps by reintroducing the right to sue.⁴⁰⁶ A major source of criticism has been the disjunction in certain types of cases between coverage and benefits. *Queenstown Lakes*⁴⁰⁷ resolved the question of the relationship between claims under the 1992 Act and claims under the common law—victims can assert either and (subject to the special situation in *Brownlie*⁴⁰⁸) cannot fail to qualify under the Acts and be barred from suing. Yet there is a problem where cover exists but no or miserly benefits are payable. Ever since lump sums were abolished, claimants who are not employed or whose injury does not prevent them from working have been badly treated. Examples are claims for sexual abuse or for wrong medical diagnoses resulting in unnecessary treatment to healthy patients.⁴⁰⁹ The

404. See Palmer, *supra* note 21, at 228.

405. See Richard Gaskins, *The Woodhouse Report Reconsidered*, presented at COLLOQUIUM ON ACCIDENT COMPENSATION (Victoria University of Wellington, July 7, 1999).

406. A number of commentators have suggested reintroducing the right to sue. See, e.g., Richard Mahoney, *New Zealand's Accident Compensation Scheme: A Reassessment*, 60 AM. J. COMP. L. 159 (1992); Richard Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 1 (1989); Ailsa Duffy, *The Common Law Response to the Accident Compensation Scheme*, presented at COLLOQUIUM ON ACCIDENT COMPENSATION, (Victoria University of Wellington, July 7, 1999). See also Jeffrey O'Connell, Craig Brown & Margaret Vennell, *Reforming New Zealand's Reform: Accident Compensation Revisited*, 1988 N.Z. L.J. 399 (suggesting that the ACC should have the right to sue in certain circumstances under the doctrine of subrogation).

407. See *Queenstown Lakes Dist. Council v. Palmer*, [1999] 1 N.Z.L.R. 549 (C.A.). See also *supra* note 69 and accompanying text.

408. See *Brownlie v. Good Health Wanganui, Ltd.*, CA 64/97 (C.A. Wellington, Dec. 10, 1998). See also *supra* note 76 and accompanying text.

409. See Duffy, *supra* note 406 (citing *Bell v. Good Health Wanganui, Ltd.*, (1997) 1 B.A.C.R. 344 (plaintiffs suffered medical misadventure on being wrongly diagnosed as having cancer. They

victims argue that the 1998 Act does not apply, in order to try to get damages instead. So efforts are now made to get out of, rather than into, the scheme. Another consequence, as we have seen, are attempts to recover compensation in the guise of exemplary damages. The remedy thus is misused, the likelihood of success is uncertain (and in any event low), and any damages actually recovered are not based upon the plaintiff's loss.

Dissatisfaction with accident compensation can also be seen in high profile accident cases involving public or other prominent defendants, who make *ex gratia* payments in order to avoid political embarrassment or accusations of tight-fistedness. The Cave Creek disaster provides a clear example. Fourteen young people died and others were injured when a viewing platform over a scenic gorge collapsed. The platform had been negligently constructed by employees of the Department of Conservation, and the New Zealand government later paid substantial compensation to the surviving victims and to the families of those who died. Everyday accident victims or their families are not so favored.

These various developments show how the accident compensation scheme can come under pressure if the social contract upon which it was founded is not taken seriously. Removing common law rights and then emasculating accident compensation entitlements is bound to lead to tension and distortion. Yet reintroducing the right to sue would be too cumbersome and too expensive.⁴¹⁰ The possibility of dual claims would be likely to undermine the existing scheme. If both systems existed side by side the efficiency of the no-fault principle would be compromised, defendants would have to insure as well as pay premiums or levies, there would be pressure to cut premiums and benefits, and the common law lottery, as before, would throw up a few winners and many losers. Very arguably this solution would be neither just nor efficient.

Calls for a return to actions for damages stem partly from the natural human desire by some accident victims to hold the perpetrator responsible for his or her misconduct. Yet tort actions are primarily concerned with compensation, not accountability. A criminal prosecution often will be the solution, with an action for exemplary damages being another possibility in cases where punishment is appropriate. Allowing both is undesirable, for reasons already given.⁴¹¹ Disciplinary sanctions by trade or professional bodies, peer review, inquiries of various kinds and statutory regulation all may have parts to play. It also needs emphasizing that the accountability issue is likely to

suffered the loss of a breast or unnecessary uterine surgery when there was nothing wrong with them, but they did not qualify for any benefits).

410. See Palmer, *supra* note 21, at 252.

411. See *supra* Part VI.A.vii.

assume importance only in a small minority of accident cases. In most, the focus is on compensation, not blame.

C. Delivering Benefits

How best to deliver the statutory entitlements has polarized political opinion. The National Government, after initially pledging in the Coalition Agreement of 1996 to retain the ACC's public monopoly, changed its mind and introduced the partially privatized system in the 1998 Act. Privatizing the other accounts was also under consideration, with the motor vehicle account probably first in line.

By contrast, the Labour opposition said in its Policy Statement in mid-1999 that it intended to undo the changes and, indeed, to move further in the direction contemplated at the outset by the Woodhouse Report.⁴¹² Its revamped scheme would be delivered through a single public fund model. Existing insurers would have the option of applying for a buy-out of their liabilities. The separate accounts would be retained, with the funding for each based on partial rather than full funding and a specified reserve requirement. Contributions would be based on independently audited cost projections over a five year period. Employer levies would be based on industry rates. The primary responsibility for the ACC would be the development and promotion of injury prevention and health protection strategies. In particular, it would have the power to reduce levies to reflect improved practices and a reduced level of workplace risk. Experience rating was thought to be ineffective, unfair and often counter-productive and would be abolished. It penalized with no evidence of fault, gave an incentive to under-report workplace accidents, and was contrary to the interests of rehabilitation.⁴¹³

At the end of 1999 the new Labour Government introduced a Bill aimed at undoing the former government's privatization scheme.⁴¹⁴ This has been enacted as the Accident Insurance (Transitional Provisions) Act 2000 ("2000 Act"), which states that its key objectives are to remove competition from workplace insurance, return responsibility to the ACC for the provision of all such insurance, and re-establish the Accredited Employers' Programme.⁴¹⁵ More specifically, the 2000 Act makes provision for transferring accident insurance contracts from private insurers to the ACC (with appropriate financial adjustments) and for establishing a new Employers' Account. It is intended to be fully in force on July 1, 2000.

412. See LABOUR PARTY, POLICY STATEMENT: LABOUR ON ACC (July 1999) [hereinafter LABOUR PARTY POLICY STATEMENT].

413. See *id.*

414. See Accident Insurance (Transitional Provisions) Bill 1999 (N.Z.).

415. See Accident Insurance (Transitional Provisions) Act 2000, § 3 (N.Z.).

The 2000 Act seems to be based more on ideology than on a weighing of comparative costs and benefits. Privatization of state enterprises often has led to improvements in the quality and efficiency of the services that are offered, and accident compensation is not inherently immune from such beneficial consequences. Nor is the 1998 set-up incompatible with extending coverage or improving benefits. And, arguably, charging premiums makes the cost a good deal more transparent than allocating funds from general government revenue. If we accept that the scheme should retain its comprehensive, compulsory and no-fault character, there is a clear public interest in its efficient administration. In my view, it would be sensible to persevere with the private model.

D. Improving Benefits

Criticism that the accident compensation scheme works unfairly in relation to some claimants would also be lessened if benefits were to be improved in certain respects. Perhaps the guiding principle should be to ensure that where cover exists, real compensation is available. Provision for weekly compensation at eighty percent of pre-accident earnings is widely regarded as satisfactory, and neither of the major political parties intends to change this. However, Labour Party policy⁴¹⁶ is to give greater support during and after rehabilitation, by introducing certain measures giving job security for injured workers, and by making provision after rehabilitation has been completed for persons with a permanent incapacity to receive a fixed rate weekly payment reflecting their loss of earning capacity and linked to the average wage. New formulae would be developed to relate compensation for permanently incapacitated children and students with no work record to average earnings, rather than, as at present, to the minimum wage.

The independence allowance remains problematic. There needs to be a threshold which does not exclude large numbers of permanently disabled persons and which provides for more realistic levels of payment. Labour policy is to reintroduce compensation for loss of faculty by lump sum payments. There would be a ten percent threshold with the maximum payment initially being set at NZ\$100,000 and being adjustable annually to maintain real value. Lump sums for pain and suffering would also be reintroduced for those not suffering loss of faculty, up to a maximum of NZ\$15,000.⁴¹⁷

Perhaps there should be room for modest lump sums representing pain, suffering and emotional distress which would provide a solatium for the victim. Yet caution is needed here. It is difficult to see that

416. See LABOUR PARTY POLICY STATEMENT, *supra* note 412.

417. See *id.*

lump sums can have more than a minor role to play if indeed, as Labour proposes, the compensation scheme is to move towards including illness.⁴¹⁸ And another problem, as we have seen, is that rehabilitation may be hindered by a hope of future reward. So reintroducing substantial lump sum payments looks like a retrograde step. However, it seems likely to happen, as the Labour Government has stated its intention to introduce a Bill giving effect to its pre-election proposals.

E. Expanding the Boundaries

We saw early on that the accident compensation scheme was originally conceived in the Woodhouse Report⁴¹⁹ and later by the Law Commission⁴²⁰ as going part of the way towards a scheme covering all forms of disability. Denying cover for incapacity caused by illness was seen as anomalous and unfair, which could be justified only on a temporary basis by considerations of expediency. Clearly cost was a major issue, but the Law Commission concluded that integrating sickness into the scheme could be affordable. The Labour Government of the time, acting on this recommendation, introduced its Rehabilitation and Incapacity Bill, which turned out to be short-lived. Labour Party policy now is to revisit this question. Its 1999 Policy Statement proposed that the anomaly whereby cover for impairment depends on its cause should be gradually addressed, by rebuilding the scheme and bringing into line the entitlements of those injured by accident and those incapacitated by illness.⁴²¹ Cover for stress following a traumatic event or with a significant work component would also be reinstated. Whether the anticipated Bill will address these questions remains to be seen.

Ultimately, any compensation scheme has to set boundaries. All of us may be disadvantaged in some respects and to a greater or lesser extent in relation to our fellow human beings. This is life, and we have to make the best of our lot. Usually our failings and limitations cannot be seen as raising questions of compensation. For example, A may be less intelligent and may earn less than B, but no one would contemplate A making a claim from a fund of some kind to compensate for his lack of ability. So we need to decide what kind of disadvantages ought to be recognized as triggering a right to compensation.

The existing boundaries to the accident compensation scheme are founded very broadly on a distinction between human and natural causes. This might be justified on the basis that society is, in a sense,

418. See *infra* Part VII.E.

419. See Woodhouse Report, *supra* note 3, ¶ 17.

420. See LAW COMMISSION 1988 REPORT, *supra* note 22, ¶¶ 7-10.

421. See LABOUR PARTY POLICY STATEMENT, *supra* note 412.

“responsible” for injuries or disease caused by humans. But on analysis this rationale tends to break down.⁴²² If we ask what “responsible” means here, it may contemplate that society in some general sense is at “fault” in promoting or tolerating risk-producing activities. Yet what is the basis for making judgments of this kind? If we take driving as an example, an individually negligent party may be seen as personally at fault, but how do we identify criteria for assigning blame to society as a whole simply because many members of society perform the lawful activity of driving? It apparently requires society somehow to pass judgment on itself.

Another possible meaning is that society “causes” harm of human origin but not of natural origin. Yet this suggests only that the harm is caused by people. It provides a ground for differentiating between harm caused by individual conduct and other cases, but it does not help in finding criteria for determining when harm can be said to have been caused by people. Perhaps occupational diseases, actionable at common law and covered by the accident compensation scheme, can be seen to qualify. But, if we take some other examples, diseases may be “caused” by people coming into contact with one another, or in some general sense by the organization of society, or they may be of unknown origin. In each case, how do we answer the question? And even supposing that criteria can be found, a causal analysis does not explain why persons disabled by human action are somehow more deserving than those disabled in other ways.

An alternative ground for compensating people might be to protect their reasonable expectations. Long-term disability, whether through accident or illness, is relatively rare, and people generally plan their lives and enter commitments on the basis that they will not suffer such misfortune. Perhaps, then, any justification for compensation should focus on the relative frequency of the disability and the extent to which people ought reasonably to guard against the risk of disability by personal insurance.⁴²³

Victims of misfortune of common occurrence can bear their lot more easily because they share it with many others. But if misfortune is abnormal or infrequent, victims may feel that they are laboring under the additional burden of unfairness. So they ask that the loss be shared around rather than left to lie where it falls. Distributing losses in this way serves to promote ideas of social equality.⁴²⁴ Yet people are not equal in health, strength, looks, personality and intelligence. How far can the process be taken? Of course, wealth can be redistributed in

422. See PETER CANE, *ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW* 333-34 (5th ed. 1993), where the arguments are developed in greater detail.

423. See *id.* at 335.

424. See *id.*

various ways, especially by taxation and the social security system. What role should be played by a compensation system? Certainly, by including compensation for disabilities from natural causes the problem becomes harder to resolve.

Compensating for income loss from sickness arguably can be justified in a similar way to compensating for income loss due to an accident. They both can involve the unexpected onset of an incapacitating condition. But compensating for, say, congenital disability, or premature aging, might be thought to raise a different order of difficulty. Again, the idea of compensating for disability as such or for pain and suffering needs to be re-evaluated in relation to any proposal that covers natural conditions. For example, should we contemplate lump sum compensation for a painful illness?

The boundaries to the accident compensation scheme as they presently exist may be hard to defend, but there is no natural limit upon which all can agree. A line has to be drawn somewhere, and wherever it is it will create difficulties and anomalies in relation to cases that are excluded. The point at which an egalitarian ideal should give way to human individuality involves both a judgment about values and, perhaps, a large measure of common sense.

CONCLUSION

In 1974 the accident compensation scheme in New Zealand represented a great experiment. Now, after twenty-five years of experience, a return to tort seems unthinkable. The manifest weaknesses of the tort system have not disappeared, and any corrective role, which might be regarded as its main asset, tends to disappear when put in the context of widespread liability insurance. Certainly, accident compensation has had its own problems, but by comparison with the tort system it has to be judged a clear success. It now faces two key challenges. First, there is the choice between public and private administration. This is susceptible of determination on the basis of evidence relating to such issues as safety, efficiency and funding. Mere ideology should have no part to play. The second challenge, posing a deeper conceptual problem, is how best to go about rationalizing the boundaries to the scheme.