

## ***Boundary Disputes in the ACC Scheme and the No-Fault Principle***

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*The Woodhouse Report is most widely remembered for its recommendation to remove claims for compensation for personal injury from the New Zealand courts, and instead to refer all personal injury cases to a social insurance provider for assessment of cover on a no-fault basis. But the Woodhouse Commission had a wider concern to reduce or prevent all forms of adversarial litigation, not just negligence actions. Hence, the Woodhouse Commission's vision for a state monopoly that comprehensively covers work-related and off-the-job injuries, as well as non-earners, on a universal basis has the advantage of avoiding much litigation about cover and about the distribution of liabilities. The Woodhouse Commission even recognized that the distinction between accident and illness, as causes of disability that attract different entitlements, would eventually need to be overcome by a full extension of its principles. Unfortunately, in spite of cross-party support for the Woodhouse principles, successive governments have tinkered with the ACC scheme in ways that reintroduce such disputes and litigation, and there is a limited appreciation of the scope of the Woodhouse Commission's desire to prevent litigation. This article looks at two recent cases that highlight the problems that remain within the ACC scheme, and suggests that the Woodhouse principles have yet to be fully and consistently adopted by Parliament.*

### **Introduction**

One of the crucial lessons of the Woodhouse Report concerns the prevention of litigation. The Woodhouse Commission rightly perceived that, if

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rehabilitation is to be the overriding aim of the compensation authority, then delay caused by legal and administrative processes of review and appeal only serve to frustrate a person's return to "normal" life. If the burden of proving personal injury rests on the claimant's shoulders, and if proof requires lengthy legal processes, then the system may create an incentive for a person to prolong the disability, or at least the appearance of disability, for the purposes of gaining compensation. The most prominent example of this is the common law negligence claim, and the Woodhouse Report is most widely remembered now for its proposal to prohibit the hearing of claims for compensatory damages for personal injury in New Zealand's courts. Extending the idea of no-fault compensation to a complete ban on the right to sue and eliminating costly adversarial processes are at the heart of what the Woodhouse Report meant by "administrative efficiency". Claims could be processed swiftly, and rehabilitation could commence without the need for adversarial hearings of any kind. Naturally, the Woodhouse Report did envisage a system of review and appeal in cases of dispute over cover and entitlement, but its recommendations were for an internal administrative process, with a final appeal to the then Supreme Court on a point of law. In general, the Woodhouse Commission concluded that "there could be no point in retaining *any form* of adversary system in regard to the assessment of compensation".<sup>1</sup>

Hence, the Woodhouse Commission was attempting to eliminate the need for adversarial, fault-based proceedings at all levels. This would include, therefore, not only the common law action, but also adversarial actions over the compensation authority's interpretations of statute. One of the features of the traditional workers' compensation institutions is the risk of litigation over whether an injury is "work-related". This may come about because the employer wishes to dispute the acceptance of a claim that falls near the boundary of work-relatedness (and may consequently lead to a rise in the insurance premium), and because, for the claimant, to be denied insurance-based workers' compensation means being thrown back onto relying on less generous public assistance or social security. Such a system creates incentives for adversarial hearings, if the law permits them, and the Woodhouse Commission wanted to reduce litigation, especially if adversarial, to a minimum.

Now, if we accept the Woodhouse Commission's view, based on its desire for speedy rehabilitation, then we need to think about what kind of compensation system would maximize that advantage. It is easy enough to see that universal, no-fault, 24-hour cover will automatically remove the need for various forms of litigation — but there remains a danger that ill-advised

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1 Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (13 December 1967) ("the Woodhouse Report"), para 306 (emphasis added).

tinkering with the ACC scheme may open up new forms of adversarial process.

### **The AFFCO Case**

A recent case serves to illustrate the way in which any departure from the vision in the Woodhouse Report can lead to fault-based disputes about cover and compensation entitlement. The facts of this case have been made public because they were the cause of a series of questions in the House of Representatives.<sup>2</sup> A man was injured and paralysed in 2003 due to a gunshot wound received while on a work break in his employer's carpark (although there appears to be some doubt raised in the House of Representatives about whether the exact location of the event was under the employer's control). The employer, AFFCO, was an accredited employer, meaning that the employer managed its own work-related injuries in compliance with the Injury Prevention, Rehabilitation, and Compensation Act 2001 ("the 2001 Act"). The case manager employed by the third party administrator that was contracted to AFFCO wrote to the injured person to advise him that his claim for cover was accepted under s 20 of the 2001 Act, and that his employer acknowledged the injury as work-related. Section 28 of the 2001 Act, which defines "work-related personal injury", clearly includes the circumstance where an employee "is having a break from work for a meal or rest or refreshment at his or her place of employment". This particular provision has been in force since the Accident Rehabilitation and Compensation Insurance Act 1992 ("the 1992 Act"), and hence one would presume it had support from both sides of the House of Representatives.

As it was a complex case, AFFCO handed it over to the Accident Compensation Commission (now Corporation) ("the ACC") for long-term management, but, under the terms of the accreditation agreement, AFFCO remained liable for one million dollars of the ongoing costs. AFFCO later sought a review of its liability by the ACC, but this was not possible under the terms of the 2001 Act and the accreditation agreement. Presumably, AFFCO then raised the matter with a local Member of Parliament who then questioned the Minister for ACC in the House of Representatives. It appears that members of the opposition parties were concerned that the employer had been landed with a large bill for what they said was a gang-related shooting. Such politically motivated incomprehension was then mirrored in the media, with Bill Ralston, for example, citing the case as a form of "nuttiness".<sup>3</sup> Not

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2 Questions for Oral Answer, 642 NZPD 11915–11917 (18 September 2007), 12000–12002 (19 September 2007), 12078–12080 (20 September) & 12128 (9 October 2007).

3 Ralston, "Height of Barking Madness", *New Zealand Herald*, 23 September 2007 (<http://>

only was the claimant named in the House of Representatives, but his name and photograph were subsequently published in the media. At the time of writing, mediation between the ACC and AFFCO about the payment of the ongoing costs had failed.

The key point here is that the employer, and even several Members of Parliament, were of the opinion that the determination of liability for an injury in the workplace should be influenced by questions of fault — in this case, the “fault” residing in the criminal act of wounding with a firearm, of which the injured person was apparently the victim and not the perpetrator. And clearly the accredited employers’ scheme under the 2001 Act creates a situation where the employer has a financial motive to dispute cover as a work-related injury if the circumstances are marginal and the costs high. It should be noted though that the Minister for ACC stated repeatedly in the House of Representatives that the employer in this case had not used the appropriate legislative powers to repeal its own decision on the claim for cover, and that its own spokesperson had publicly admitted that the injury was work-related.

## **Boundary Disputes**

This kind of dispute over whether an injury is work-related or non-work-related is not, however, a new problem. The 1992 Act used “experience rating” to adjust employers’ premiums according to the cost of claims arising on their account. Employers, once notified by the ACC of a work-related personal injury claim, had the opportunity to dispute its work-related status. Frequently, employers would use accusations of employee fault to deny liability; for example, saying that the employee had failed to report the injury to the employer contrary to workplace rules. They were apparently unaware that the accident compensation legislation has never included the failure to report an injury to the employer as a circumstance relevant to denying work-related status to that injury. But, due to the potential for a penalty on their ACC levy, they were motivated to use fault as a reason to limit their liability.

Now, this is all clearly a departure from the Woodhouse Commission’s vision, which had sought to avoid any need for delay caused by holding up a claim assessment while boundary disputes were being settled. As soon as Parliament imposes levies in a system that varies them according to employer risk, then the question of fault will automatically become relevant to the employer and disputes will soon follow. Indeed, it appears that questions may

even have been asked in the House of Representatives about an individual's claim, using parliamentary privilege to breach his right to privacy.

As well as being relevant to the Woodhouse Commission's insistence on the avoidance of adversarial processes, these matters also raise the question of monopoly state provision. If Parliament permits self-insurance (as it does with the employer accreditation system under the 2001 Act) or the competitive provision of cover by the private sector (as under the Accident Insurance Act 1998), the no-fault principle is undermined as provision must then be made for those paying a premium (who will be more directly liable for the costs of claims) to review and appeal their liabilities. Appeals will eventually be brought before the courts about cover, and evidence about who did what (and when) will need to be heard.

The insurance industry generally supports its claims about the benefits of "experience rating" and the competitive provision of cover on the theoretical assumption that these will create incentives for improved health and safety management and more prompt rehabilitation. This may to some extent be true, but surveys (based on comparisons of different jurisdictions with different institutional arrangements) suggest that competition may *not* result in lower costs.<sup>4</sup> The only way to reduce the cost of such systems is probably to reduce benefits, regardless of the institutional mode of provision, but lowering benefits is simply a means of shifting costs away from employers and onto employees and their families.<sup>5</sup> "Experience rating", moreover, creates incentives for "proxy" activities that lead to the *appearance* of improved injury prevention and rehabilitation. The closer that employers' premiums are linked to the injury costs of each individual employer, the greater the incentive for employers also to "manage" claims by preventing them from being lodged or accepted in the first place, by disputing medical advice about costly treatments or rehabilitation programmes, and by seeking to hasten an employee's return to work.<sup>6</sup> So, the danger may be that ill-considered "reforms" designed to improve "efficiency" may not achieve their goals, but may instead result in the introduction of various new reasons for *inefficient*, *inequitable*, and *wasteful* adversarial processes.

Now, the matters considered so far mostly concern the boundary between work and non-work-related circumstances. In a comprehensive scheme such as in New Zealand, if a personal injury caused by accident is found *not* to be

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4 See Coopers & Lybrand (Australia), "Introduction of Competition to the Provision of ACC Services: ACC Benchmarking", A Report to the Department of Labour (May 1998); Munich Re Group, "Workers' Compensation: Analysis of Private and Public Systems" (2000) (<http://www.munichre.com>) (last accessed 30 March 2008).

5 McCluskey, "The Illusion of Efficiency in Workers' Compensation 'Reform'" (1998) 50 Rutgers L Rev 657.

6 Thomason & Pozzebon, "Determinants of Firm Workplace Health and Safety and Claims Management Practices" (2001–2002) 55 Indus & Lab Rel Rev 286.

work-related, then the injured person is still covered, with equal entitlements, under the 2001 Act. The same cannot be said, however, of personal injury that is caused by a gradual process, disease, or infection. Such cases have cover under the 2001 Act *only if* they are work-related. A respiratory disease, hearing loss, or a gradual process musculoskeletal disorder may be subject to quite onerous legal tests if a claim for cover is lodged with the ACC. The possibility that an employment may have a particular characteristic “not found to any material extent in the non-employment activities or environment” of the employee and that the risk of personal injury for persons in that employment may be “significantly greater”<sup>7</sup> can easily deny the claim cover (although the occupational diseases listed in schedule 2 of the 2001 Act are excluded from these tests).

The consequences for the claimant of failing to pass this test can be quite significant, as he or she would then be reliant upon public healthcare and means-tested sickness or invalid’s benefits. These social assistance entitlements are needs-based and less generous than the social insurance benefits of the ACC scheme. A claimant whose personal injury falls along this particular boundary may sometimes have a financial incentive of sufficient magnitude to pursue an appeal to the court, if cover under the ACC scheme is challenged. This also raises a wider general concern about the discrepancy between the ACC scheme and the public health and disability services. If we think about the Woodhouse principles as a charter for a social insurance system that seeks to compensate for economic and non-economic losses arising from disability, and that treats rehabilitation as its primary goal (if prevention fails), then it is natural to ask if it is desirable and feasible to extend its scope to include all forms of disability, regardless of the cause.

## Covering Sickness

The Woodhouse Report is remarkable for seeking to include work and non-work-related accidents, on the grounds that they both result in similar social and economic losses, and for including earners and non-earners, on the grounds that the latter contribute through unpaid work to social and economic wellbeing. Indeed, the Woodhouse Report is probably the world’s first policy document to recognize the economic value of unpaid work. It is then only a short conceptual step to ask why disability due to causes other than personal injury caused by accidents and occupational diseases should be excluded. The losses to society and to the individual caused by diseases are equally severe and statistically are equally predictable. Indeed, the Woodhouse Commission does consider this issue, with the brevity and

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7 Injury Prevention, Rehabilitation, and Compensation Act 2001, s 30(2).

clarity that typifies the whole of its report: it points out that there is no logical reason why someone incapacitated by disease should be entitled to less than someone injured in a car accident. The personal suffering and the loss of productivity may be very similar. But the Woodhouse Report does not go so far as to recommend such an extension of cover for the following reasons:<sup>8</sup>

First, it might be thought unwise to attempt one massive leap when two considered steps can be taken. Second, the urgent need is to co-ordinate the unrelated systems at present working in the injury field. Third, there is a virtual absence of the statistical signposting which alone can demonstrate the feasibility of the further move. And finally, the proposals now put forward for injury leave the way entirely open for sickness to follow whenever the relevant decision is taken.

Surely, the first and second reservations expressed above no longer apply — provided Parliament does not try again to destroy the coordination of the system by introducing the competitive provision of cover. And policymakers should by now have sufficient information to assess the feasibility of such a proposal. So the Woodhouse Commission clearly wished to signal the way forward for a future extension of its universal, no-fault social insurance concept to sickness as well as injury, and we are now in a position to debate that second “considered step”, if there is the will to do it. The notion has been aired from time to time since the inception of the ACC scheme.

The 1988 Royal Commission on Social Policy looked carefully at the policy anomaly between disability caused by personal injury under the ACC scheme and other forms of disability. It concluded that those in the former category were “far better provided for” in terms of levels of compensation and access to medical treatment, and it found this situation to be “inequitable”. The Royal Commission did not recommend the abolition of the ACC scheme, and indeed it supported the Woodhouse principles. While the Royal Commission was conscious of the costs, it did recommend a progressive extension of support to non-ACC disability, with the intention of eventually making the two systems identical. This could have included reducing entitlements for those with less severe injuries in order to offset the extra costs.<sup>9</sup>

The fourth Labour Government did take the Royal Commission’s concerns seriously. The Rehabilitation and Incapacity Bill was introduced into the House of Representatives by the Hon Dr Michael Cullen in 1990 and was to take effect from 1 April 1992. It applied to incapacity for employment

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<sup>8</sup> See the Woodhouse Report, para 17.

<sup>9</sup> See Report of the Royal Commission on Social Policy (1988), vol III, part II, 608–609.

“irrespective of where the incapacity arose”.<sup>10</sup> The ACC would have been reconstituted as the Rehabilitation and Incapacity Corporation and would have provided rehabilitation and income benefits to persons incapacitated from working due to any “physical or mental incapacity”. This Rehabilitation and Incapacity Bill did not survive the change of government in 1990, but it does at least give a precedent for legislative reform to rectify the anomaly between accident compensation and public health and welfare systems by covering all forms of incapacity within one social insurance institution.

For people in the disability sector, the anomaly between the ACC and health schemes has been an ongoing source of dissatisfaction and grievance. The ACC scheme is based on the social insurance principle of compensation for losses incurred, and, due to the prohibition on the right to sue, it must make up for the loss of that right. Persons with disability covered by the ACC scheme are thus entitled to more generous income support that is not means-tested, and to more generous treatment subsidies and rehabilitation entitlements compared to those who are disabled due to non-work-related diseases. From the point of view of an individual who lives with a disability caused by a congenital or a chronic degenerative condition, the discrepancy in the levels of support for different disability groups, based purely on cause and not on actual needs or losses, seems unjust. A case brought before the Human Rights Review Tribunal has claimed that the different entitlements provided by the ACC scheme and the New Zealand Ministry of Health, being based purely on different causes of disability, are a form of discrimination that contravenes the Human Rights Act 1993. A woman suffering from severe multiple sclerosis and who is wheelchair-bound has taken this case. Despite severe impairment and disability, she receives significantly less support than a claimant under the ACC scheme with similar needs resulting from physical impairments.<sup>11</sup> At the time of writing, Crown Law had successfully challenged the Tribunal’s right to hear the case, arguing that the prohibited ground of discrimination in s 21(1)(h) of the Human Rights Act 1993 did not encompass the *cause* of the disability.<sup>12</sup> The plaintiff, however, was preparing to appeal this decision to the High Court.<sup>13</sup>

Whether or not that appeal is ultimately successful, it does indicate the ongoing grievance in the disability sector about a discrepancy in entitlements based purely on the cause of disability, to the neglect of actual life consequences. Furthermore, the financial disadvantages for many persons

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10 See *Rehabilitation and Incapacity Bill 1990*, cl 2(2) & 6.

11 *Trevethick v Ministry of Health* (Human Rights Review Tribunal, Decision No 7-2007, HRRT 13-06, 4 April 2007, RDC Hindle (Chair)).

12 *Trevethick v Ministry of Health (No 2)* (Human Rights Review Tribunal, Decision No 21-07, HRRT 13-06, 24 October 2007, RDC Hindle (Chair)).

13 My thanks to John Miller for drawing this to my attention.

with disability who may not be granted cover under the ACC scheme raises the stakes for those on the margins of that scheme to litigate over the question of cover.

## **Conclusion**

The Woodhouse Report is a visionary social and legal document. Its basic principles have been accepted now for 40 years, indicating the robustness of thought behind them. The Woodhouse principles have been applied in the law since 1972, but, it must be said, with varying levels of understanding and commitment from lawmakers. When the Woodhouse Report talks about preventing litigation, it refers of course to the common law action for compensatory damages, which has been banned since the Accident Compensation Act 1972 took effect in 1974, but the Woodhouse Report also clearly intended that the ACC scheme be designed in such a way that *all forms of adversarial process* should be kept to a minimum. A scheme that is inclusive, rather than divisive, and that avoids creating financial advantages or disadvantages based on (often quite random) matters of aetiology or actuarial risk will be able to avoid delays and uncertainties created by legal disputes. It will thus be able to deal more expeditiously and effectively with the real-life social and economic consequences of disability and incapacity to work. An efficient service that addresses the actual social outcomes was always more important to the Woodhouse Commission than the short-term problems of determining fault or causation and allocating liabilities according to risk profiles. Superficially, it may appear to be the case that self-insurance, the competitive provision of cover, or “experience rating” have some advantages in terms of efficiency or equity, but these ideas have to be evaluated in terms of the administrative and legal inefficiencies and the inequitable treatment of persons that they can produce. We also have to be wary of the ways in which such systems can undermine the no-fault basis of the ACC scheme. If we are serious about the prevention of litigation, about the universal, no-fault principle, and about preserving the ban on the right to sue, it is imperative that the public and their representatives in Parliament be aware that an inclusive definition of cover under a state monopoly provider is the best way to go forward. We should seek a structure that does not create a sense of fault through attempts to have fine-grained systems that allocate liabilities and entitlements on the basis of risk and causation.