

BLOOD ON THE COAL

*The origins and future of New Zealand's
Accident Compensation scheme*

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Hazel Armstrong

2008

*Oh, it's easy money stacking
carcasses in the half-dark.*

*It's easy money dodging timber
that would burst you like a tick.*

*yes, easy as pie
as a piece of cake
as falling off a log.
Or being felled by one.*

extract from
The Ballad of Fifty-One
by Bill Sewell

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INTRODUCTION

When introduced in 1974, New Zealand's state-run ACC scheme was the world's first fully comprehensive, no-fault system for personal injury compensation. The scheme remains internationally unique today. No other country has found a more successful population-wide approach to addressing the multiple problems resulting from personal injury.

As this booklet explains, three major events in our history shaped our current ACC scheme. The first occurred in 1896 on the West Coast when an explosion in the Brunner coal mine killed 65 miners and left widows, children and elderly family members without adequate financial support. The second key event followed World War One, when injured soldiers returned to this country to find themselves unemployed, on meagre pensions and without adequate rehabilitation. Efforts to avoid repeating this social betrayal after World War Two were further developed by the chief architect of New Zealand's accident compensation scheme, Sir Owen Woodhouse, whose 1972 report ushered in the era of a comprehensive, 24-hour, no-fault accident compensation scheme, administered by ACC.¹ The guiding principles of the Woodhouse report still form the bedrock of the current accident compensation scheme.

However, these principles have been compromised by the ascendancy of neo-liberal ideology and its influence on social policy in the late 1980s and 1990s. The Accident Rehabilitation and Insurance Act 1992, which came into force in the midst of the Bolger-led National government's cutbacks to social welfare spending, exemplifies the shift

1 ACC, as an organisation, first came into being in 1974 with the passage into law of the Accident Compensation Act 1972.

towards neo-liberalism. While most of the 1992 Act has since been repealed, the vestiges of several key provisions remain, notably work capacity testing that enables the insurer, ACC, to restrict its own liability but often results in adverse outcomes for claimants. Neo-liberal deregulation further impacted on ACC when, for a brief period from July 1999 to June 2000, New Zealanders were given a glimpse of a privatised accident compensation scheme for work injuries.

The opposition National Party has signaled that if it becomes the government after the 2008 election, it intends to re-privatise the ACC scheme, thereby re-introducing private insurance companies into the accident insurance marketplace.² This booklet argues for the retention of ACC as a state-monopoly accident insurance provider.

In March 2008 the ACC scheme was independently reviewed by PricewaterhouseCoopers. The review described our ACC scheme as ‘the only system in the world that provides universal, 24-hour coverage for all accidental physical injuries. ACC was a groundbreaking world leader at its inception and remains today highly regarded by many experts in the field of accident compensation.’³ The review concluded that “the current ACC scheme is consistent with the Woodhouse principles, adds considerable value to New Zealand society and economy, and performs very well in comparison to alternative schemes in operation internationally.”⁴

The author of this booklet is a lawyer specialising in employment, accident compensation, and health and safety law. My professional experience has convinced me that a privatised accident compensation system, as proposed by National, would retard claimants’ rehabilitation and weaken injury prevention programmes.

2 “National’s policy is to re-establish a competitive market to provide accident insurance.” (National Party Leader John Key, Address to NZ Large Herds Association Conference, 21 March 2007

3 PricewaterhouseCoopers, Executive summary, Accident Compensation Corporation in New Zealand, scheme review, March 2008, p. i].

4 Ibid, p. xviii

I do not, however, claim that the current ACC scheme is ideal, since not all of Sir Owen Woodhouse's original recommendations were fully and properly implemented. In particular, I argue that changes to the scheme are needed to deliver effective and meaningful rehabilitation to victims of accidents.

Thirty-three years after New Zealanders gave up the right to sue employers for accident compensation in favour of a fairer, more effective and universal system by which the whole community takes responsibility for accident victims, our ACC scheme, still the envy of the world, is at an historic crossroads. The 2008 general election offers an opportunity to retain the valuable features of this groundbreaking and socially equitable scheme, and to further improve it along the lines intended by its original architect.

This booklet is intended to help you, the voter, consider the issues affecting our ACC scheme at the next election. It traces the origins of the scheme from the grossly inequitable and cumbersome system which preceded it, when workers were obliged to sue their employers for compensation for workplace injuries, into a system based on principles of fairness for all and shared community responsibility. It outlines how, in my view as a compensation law practitioner, the proposed privatisation of personal injury insurance would be detrimental to claimants and to society in general. I argue that certain aspects of the current scheme, dealing with the full rehabilitation of accident victims, are not working as effectively and fairly as they should. Finally, I provide a list of questions to ask of your election candidates, to help make ACC an election issue and to guide you in voting for its future.

Hazel Armstrong

April 2008

WORKING IN THE SLOUGH OF DESPOND: 1870s – 1900

For over 100 years New Zealand workers have received statutory protection in the form of a workers' compensation scheme, although for most of that time the amount of compensation was often inadequate, and the process for claiming and receiving it was arduous and uncertain.

IN the nineteenth century, British immigrants brought to New Zealand their understanding of workers' rights and labour laws from an Old World entering an industrial age. In Britain, the increasing use of steam power, negligible safety standards and abject working conditions in factories and fields had created extremely hazardous working environments, and there was growing recognition that some form of legal protection should be afforded to workers. Workplace deaths and injuries resulting from poor working conditions led to workers claiming compensation from their employers. As the pressure on negligent employers grew, judicial minds were exercised and the judiciary developed common law defences that made it increasingly difficult for injured workers to succeed in their claims.⁵ The British courts tested liability against the fault principle – fault had to be attributed to a party for a claim for damages to succeed. This principle was used to reduce the economic demands on industry as well as on the cost of production.

An “unholy trinity” of employer defences dominated the landscape of nineteenth-century British industrial law, comprising the doctrine of common employment⁶,

5 'Common law' refers to the body of law established through court action, rather than by Parliament.

6 Alan Clayton. “Some reflections on the Woodhouse and ACC legacy” (2003) 34 VUWLR p449-450

- 7 The case of *Priestley v Fowler* (1837) 3 M&W1 established the principle of 'common employment' which stated that an employee was deemed to have accepted the risk of injury as a result of any fellow employee's action. The doctrine of voluntary assumption of risk (or *volenti non fit injuria*) prescribed that on taking employment a worker voluntarily accepted the hazards of the job. The third employer defence, contributory negligence, was repealed by the Contributory Negligence Act 1947. Prior to this, employees could be found guilty of contributory negligence if their lack of care contributed to their own injury and this was a complete bar to a successful claim. Ian Campbell. *Compensation for Personal Injury in New Zealand*. pp6-8.
- 8 Margaret Tennant. *Paupers & Providers – Charitable Aid in New Zealand*. (1989) Wellington: Allen & Unwin NZ Ltd and Historical Branch of Internal Affairs, Port Nicholson Press, p164
- 9 Steven Eldred-Grigg. *New Zealand Working People 1890 to 1990*. (1990) Palmerston North: Dunmore Press, p66

voluntary assumption of risk and contributory negligence.⁷ Each of these employer defences eroded workers' rights by diluting employer responsibility in the event of workplace injury or death. In addition to these common law defences, the English Parliament introduced the statutory roadblock of limitation periods, which prevented legal actions being brought after a specified time period. This system was transferred largely unchanged to the booming, free-for-all colony of New Zealand. Any worker injured at their workplace was not entitled to compensation as of right, but might be required to sue their employer, at their own expense and in the face of the same employer defences as in Britain.

By 1891, death rates from workplace accidents and violence in New Zealand were higher than in the 'old country' and, at 95.7 per 100,000 population, higher than in some Australian states.⁸ One historian describes the parlous state of affairs for New Zealand workers:

*Work caused spectacular accidents and diseases... Timber felling, which crushed dozens of men every year in the late nineteenth century, was probably the most dangerous job. Deaths from other forms of crushing in mines and quarries, or on road and railway works, were almost as common.*⁹

Rudolph (left) and Jack collecting donations for their father Louis Lousich. Louis came to New Zealand from Yugoslavia ca 1875 and married Sarah Chisnall, in Greymouth, in 1883. The accident described on the sign occurred in May 1884.



DESERVING CASE.

Be so kind as to patronise the
blind man's Widow with five children
who lost his sight & right arm by an
explosion of Dynamite at Kumara -
Smallest Donation Twenty-five Pence

10 Len Richardson. *Coal, Class and Community – the United Mine Workers of New Zealand 1880 to 1960*. (1995) Auckland: Auckland University Press, p65

11 Eldred-Grigg. (1990) as above

The 1890s' West Coast coalfields have been evocatively described as a 'slough of despond'.¹⁰ They were notoriously hazardous working environments: "There's always blood on the coal", miners said.¹¹ In 1891, Richard Seddon, then the MP for Hokitika and Minister of Mines, oversaw the Coal Mines Act of 1891 which imposed a levy on all coal production. Seddon hoped that this would provide a 'sort of State insurance' and that it would prevent injured miners seeking compensation from their employers.

However the utter inadequacy of the employer levy to provide for workers injured in mining accidents was demonstrated a few years later in the horrific form of the Brunner mine disaster of 1896, when an underground explosion killed all 65 miners. The aftershocks of this tragedy reverberated throughout the community: 39 widows and 192 children, as well as elderly dependents, were affected by the disaster.

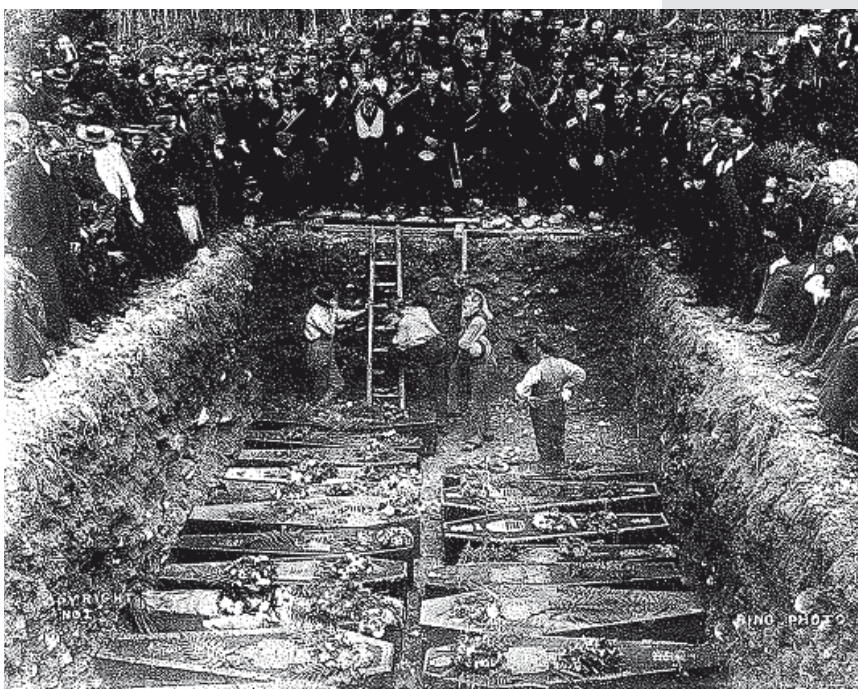
Workers in the mining industry had already taken the initiative, through their union, of providing their own insurance by forming 'friendly societies'. These offered a measure of financial assistance to members and their dependents in the event of injury or illness. The magnitude of the Brunner mine disaster, however, was such that these friendly society funds, along with the compensation available from the state-administered accident fund, were still insufficient to support the widows and families. Special charitable relief funds were established to help the families, and the Brunner Mine Accident Relief Fund attracted donations from throughout New Zealand.

Mass grave. Fifty-three of the victims of the Brunner mine explosion were buried in the Stillwater cemetery, 33 of them in this single grave. The funeral procession stretched 800 metres.

(Te Ara - the Encyclopedia of New Zealand)



1896. Brunner Mine, Canterbury Museum



Ref: PhotoCD 2, IMG0073. Christchurch City Libraries

12 These actions were filed under the Coal Mines Act 1891.

Civil legal action against the coal company was a course of action open to the dependents of the Brunner Mine disaster. In 1898, 23 separate actions were brought (the claimants paying their own legal costs), alleging negligence against the mine owners. The families were initially successful, but the English owners managed to overturn the decision at appeal. The Brunner mine was closed, the remaining miners were dismissed and an agreement was reached whereby claimants received a small lump sum of £75 each.¹²

The lawsuits brought in the aftermath of the disaster illustrate the polarising nature of common law actions in a small, highly connected society. Some members of the community were angry that the financial demands of the claimants (as distinct from the disaster itself) had brought the mining company to its knees and resulted in the mine's closure. The legal wrangling led to bitterness among all parties – the claimants because of the legal costs and the pitiful payout, and the community because of the mine closure.

This event sowed the seeds for a plan in which New Zealanders gave up their right to sue in return for a more generous state scheme that compensated every New Zealander who suffers injury, whether at work, at home or on the road. Had the legal outcome for the Brunner mine disaster survivors resulted in handsome payouts and the mine remained open, then the debate about trading off the right to sue for a no-fault scheme might have taken a different route. In fact, New Zealanders gained an insight that litigation was a flawed process which could not necessarily deliver a favourable outcome for the injured party.

A statue commemorating the miners at Brunner.

Hazel Armstrong



In Memory Of All
DEDICATED BY WEST COAST M.P.
DAMIEN O'CONNOR
ON THE CENTENARY OF THE
BRUNNER MINE DISASTER

*There's a land that is fairer than day,
and by faith we can see it afar.*

A PENSION FOR THE INDUSTRIAL SOLDIER: 1900 – 1966

The Brunner Mine disaster had a galvanising effect on the debate about workers' compensation. In the Legislative Council debate on the Workers Compensation for Accidents Act 1900, Hon John MacGregor raised the concept of the worker as an 'industrial soldier':

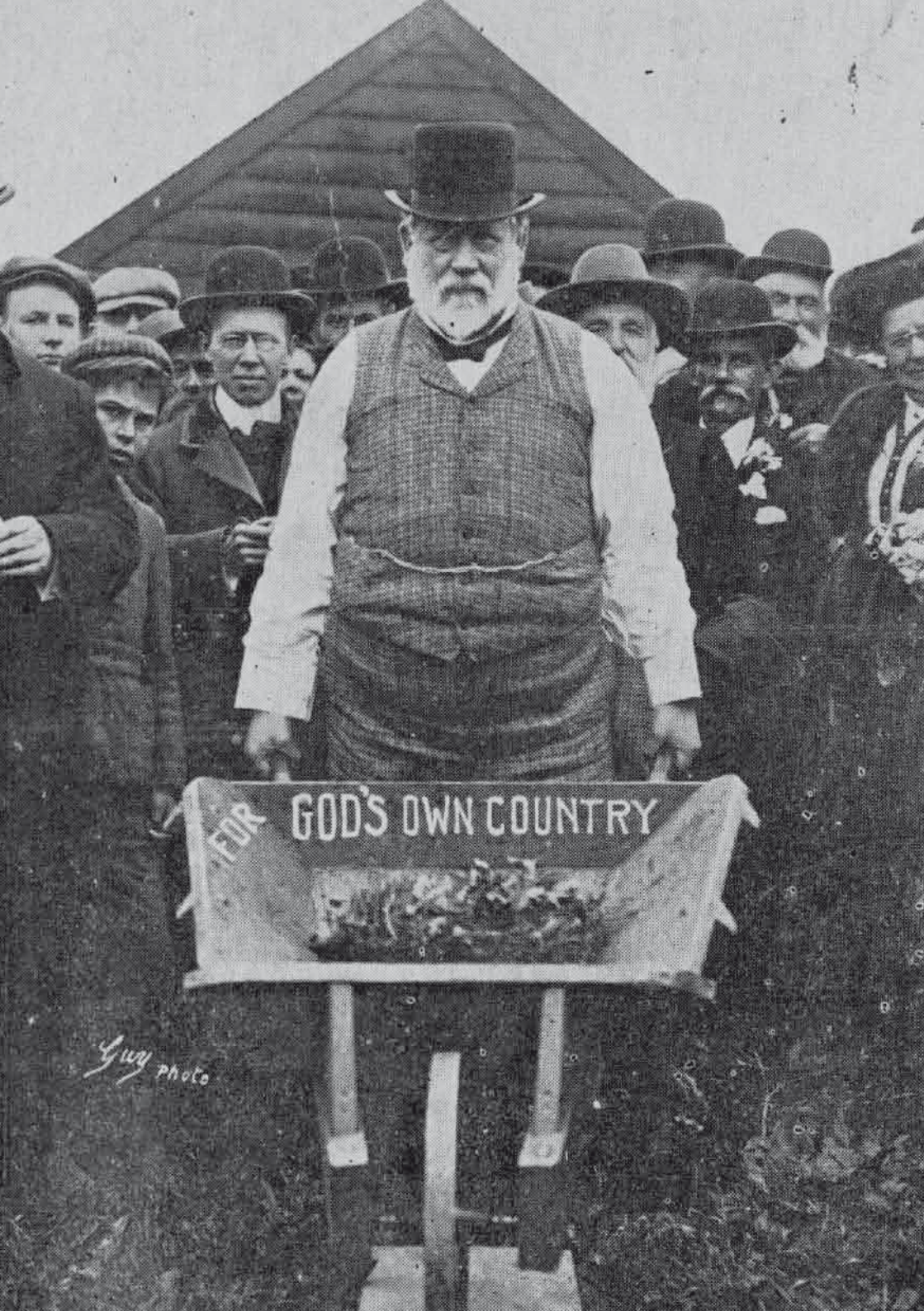
The artisan and the mechanic is like the soldier, in that both run a risk of death or horrid maiming, and that in the interests of others – of the community at large. The soldier has his pension, the industrial soldier should have his. The employer can insure his building against destruction by fire, his machinery against depreciation, and insurance forms a charge on the industry, one of the costs of production. Why should not the workman insure the only instrument of production he possesses – namely his life and limbs – against destruction by exploding firedamp, or unfenced machinery, from depreciation by lead poisoning or phossy jaw?¹³ And why should not such insurance constitute an incidental charge on the industries, payable eventually, like the cost of fire insurance, by the consumers?¹⁴

13 'Phossy jaw' is a deadly occupational hazard for those who work with white phosphorus without safeguards. Chronic exposure to white phosphorus vapour caused the jawbone to rot away and ultimately could lead to organ failure and death.

14 Hon John MacGregor took his quote from *The Economic Journal*. This was cited in Hansard (1899) NZPD 108, 528.

Richard Seddon

Alexander Turnbull Library Ref: F-58363-1/2.



FOR GOD'S OWN COUNTRY

Gunn Photo

IN the same period, other countries were outstripping New Zealand in passing legislation to provide statutory worker's compensation. As early as 1884, German Chancellor Otto von Bismarck passed the Accident Insurance Act which laid the ground for a scheme of workers compensation funded by employers. It provided for medical treatment and a pension equivalent to two-thirds of a worker's wages if they suffered from permanent disability. By 1897, 40 other countries also had some form of statutory protection for workers.¹⁵

New Zealand's own Workers' Compensation Act 1900 therefore passed into law against the backdrop of a catastrophic high-profile disaster at home and the consolidation of accident insurance law abroad. Initially this Act offered no more than rudimentary coverage and was restricted to dangerous trades. As with Seddon's 1891 Coal Mines Act, employers in industries such as mining and manufacturing were required to pay a levy intended to cover the cost of work injuries suffered by their employees. In later years the legislation was amended more than 40 times until protection had been extended to most workers in employment, entitlements had improved and some occupational diseases were covered.

This workers' compensation legislation ran in parallel with the common law which allowed workers to sue their employer for negligent actions that caused injury or death. However, employers were never required to pay both damages and compensation. If the worker failed in a damages action, they could apply to the courts to assess compensation but were barred from claiming compensation under the Act. The exercise of these common law rights proved costly and time-consuming and outcomes tended to be arbitrary.



Group of returned servicemen during rehabilitation after World War One.

[ca 1919] Ref: F- 944-1/4 -MNZ. Alexander Turnbull Library, Wellington, N.Z.

The second event which forged New Zealand's present workers' compensation system was the experience of soldiers returning from World War One. During that war 45% of New Zealand men of military age served in the armed forces and nearly 17,000 were killed. The survivors returned to find little preparation for their rehabilitation. Housing and satisfactory employment were difficult to obtain, and war pensions for disabled veterans, widows and orphans were well below the basic wage.¹⁶

The need to re-integrate injured ex-servicemen into the workforce sparked the introduction of vocational rehabilitation and retraining. In 1931 the Disabled



Wounded soldiers being evacuated from Gallipoli

AWM A1798

16 Gustafson. (1980) p101

17 Te Ara: 'Returned Services Association', from an *Encyclopaedia of New Zealand*, edited by A.H. McLintock, originally published in 1966. *Te Ara – The Encyclopaedia of New Zealand*, updated 26-Sep-2006, URL: <http://www.TeAra.govt.nz/1966/R/ReturnedServicesAssociation/en>

18 Te Ara: 'War-rehabilitation', *ibid*, URL: <http://www.TeAra.govt.nz/1966/W/WarRehabilitation/en>

19 Campbell. *Compensation for Personal Injury in New Zealand* (1996) p35

Servicemen's Re-establishment League was formed, funded initially by armed services' charities and later by the RSA and the government. The League encouraged employers to take on disabled servicemen, to carry out vocational training and, if required, to top up their earnings.¹⁷ After WW2, it also provided sheltered employment and training to injured veterans with a level of disability 40% or higher.¹⁸

By the 1960s, many of New Zealand's leaders - politicians, academics, lawyers and judges – were men who had served in WW2. These returned servicemen were infused with a strong sense of social responsibility. They recognised the widespread discontent with New Zealand's workers' compensation scheme which restricted earnings-related compensation to six years, even if the injured person remained incapacitated beyond this period. The combination of public-spirited decision-makers and dissatisfaction with the existing systems engendered a climate favourable to new ideas on workers' compensation.

In 1959 Ian Campbell, Secretary of the Workers Compensation Board, undertook a study tour on behalf of the Board, assessing actions for personal injury claims in Great Britain, Europe and North America. He reported:

*The fact that a worker may have a remedy at common law also complicates the situation here in New Zealand. The line of demarcation between a successful claim and an unsuccessful one is extremely tenuous and not infrequently due to the plaintiff's luck with witnesses, even to the extent of their veracity. If such a right were replaced by a pension on a sound and worthwhile basis, I consider workers generally would be better off. It should not place any more cost on industry for the cost of common law claims here is already becoming increasingly high.*¹⁹

The momentum for an overhaul of the status quo gathered pace.

‘MORE GENEROUS, FULL AND FITTING’ COMPENSATION: 1966 – 1974

In 1966 a Royal Commission on Compensation for Personal Injury in New Zealand was established to report “upon the law relating to compensation and claims for damages for incapacity or death arising out of accidents (including disease) suffered by persons during their employment and the medical care, retraining and rehabilitation of injured persons”, and to recommend changes.

OWEN Woodhouse, a Judge of the Supreme Court and a decorated veteran of WW2, chaired the Commission together with retired Secretary of Labour and Chairman of the Workers Compensation Board Herbert Bockett, and Geoff Parsons, an accountant. In their report of December 1967 the Commissioners rejected the model of the original Workers’ Compensation Act as fundamentally misconceived, since it was managed by private enterprise when its function affected a social responsibility.²⁰ They cited the cost of the system and its inability to improve accident prevention and effectively rehabilitate the injured: “... the Act works upon a limited principle, it is formal in procedure, it is meagre in its awards, and it is ineffective in two important areas which should be at the forefront of any general scheme of compensation.”²¹

They were acutely aware of the pitfalls of entrusting this social responsibility to insurance companies: “...the insurance system itself can offer no central impetus in the important areas of accident prevention and rehabilitation.”

20 *Personal Injury – a commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand.* (1969) Wellington: Government Printer. p18

21 Ibid



Members of the Royal Commission. L-R: Mr Herbert Leslie Bockett, Mr Justice Arthur Owen Woodhouse (later Sir), and Mr Geoffrey Arnold Parsons.

[ca 29 September 1966] Ref: EP/1966/4146. Dominion Post Collection. Alexander Turnbull Library, Wellington, N.Z

To rectify this, the Commissioners thought that a scheme reliant on the acceptance of community-wide responsibility in respect of every injured citizen must be handled as a social service by a Government agency.²²

The Royal Commission's novel blueprint proposed that a state mechanism, the Accident Compensation Commission as it was then, be established. The Commission was to provide comprehensive 'no-fault' coverage to victims of personal injury by accident.²³ The trade-off for this 24-hour, seven-days-a-week insurance cover was that the right to sue for damages at common law was relinquished. Workers who incurred an income loss as a result of their personal injury would receive compensation related to their earnings, and earners would be eligible for lump sum payments.²⁴

The triple goals of the radical proposed scheme were (in order of importance) the prevention of accidents; rehabilitation of the victims; and compensation for injury. In order to implement these goals, the Royal Commission recommended a complete departure from the adversarial system which required proof of fault as a basis for compensation. The Commissioners regarded legal action over negligence as a form of lottery and felt that this lack of certainty demanded urgent legislative reform.²⁵

It is important to appreciate the rationale behind the creation of a new independent authority with an exclusive mandate to administer social insurance driven by a principled approach.²⁶

The Commissioners thought it was inappropriate for a comprehensive and compulsory scheme of social insurance to be administered by private insurers, with their dual motivations of minimising liability and maximising profit. The alternative model proposed by the Commissioners

22 Ibid, p19

23 A 'no-fault' insurance system is one where neither party is required to establish who was at fault for causing the accident or injury

24 The Royal Commission proposed that non-earners should be covered. When initially introduced, the scheme covered everyone injured in a road accident, whether employed or not, and every person who was an earner. The scheme has been extended since 1972 to include non-earners, the victims of treatment injuries, and victims of criminal offences.

25 Royal Commission of Inquiry. *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry*. (1967) Wellington: Government Printer, p19

26 *Personal Injury – a commentary...* (1969), p6. In 1967, when the Commission reported, there were 61 private insurers or mutuals, the state continued to provide insurance, and there were 48 self-insurers.

represented a move towards collectivising the responsibility for personal injury by spreading the costs throughout the community.

Owen Woodhouse was mindful that private insurance was an expensive way to manage injury claims because of the heavy administrative costs. In a 1974 report, representatives of the Australian private insurance sector estimated that the private insurers' overall ratio of administrative expenses to their total funds was 18%. One of that report's authors thought that if the State took over administering worker's compensation, private insurers would stand to lose 25% of their income.²⁷

The 2008 independent review of the ACC scheme confirmed the low administrative costs of a state-run scheme:

*New Zealand has lower claims management expenses (8% of total expenditure), than all Australian schemes (9-32%) and lower total administration expenses (24% of total expenditure) than the schemes providing comparable benefits... It is clear that ACC is paying a relatively high portion of total premiums directly to claimant benefits.*²⁸

As current President of the Law Commission and former Prime Minister Sir Geoffrey Palmer pointed out recently:

*The ultimate issues in the New Zealand accident compensation reforms were not about the law. They were about values. They concerned social priorities. The choices were political. The debate was about which matters should be handled as a matter of collective community decision and which matters are best left to the market to be dealt with on a commercial basis.*²⁹

27 *Compensation and Rehabilitation in Australia*, Report of the National Committee of Inquiry July 1974. Appendix 7.

28 Pricewaterhouse-Coopers, Executive summary, Accident Compensation Corporation in New Zealand, scheme review, March 2008, p. xiii

29 Palmer, 2004, p906



Tom Shand

MP, Minister of Labour, Minister in Charge of Rehabilitation

Tom Shand was aged 43 when, in 1954, Prime Minister Holland appointed him Minister of Labour and Minister in Charge of Rehabilitation. He had entered Parliament eight years earlier as a National MP representing provincial Marlborough. His war service in the Pacific had given him a keen interest in supporting efforts to provide land for returned servicemen.

Shand had a farming background but had encountered unionists when he worked in the flax and freezing industries. As Minister of Labour, he worked closely with the Federation of Labour, even if it meant challenging Prime Minister Holyoake and colleagues around the Cabinet table.

He was ably supported by his Secretaries of Labour, one of whom was Herbert Bockett. Bockett was appointed to chair the Workers Compensation Board. In 1965 the Department of Labour suggested to Shand that a Royal Commission should be established to inquire into workers' compensation, which at that time provided only limited benefits to injured workers. Shand agreed and on 14 September 1966, Owen Woodhouse DSC, a judge of the Supreme Court, Bert Bockett CMG, by then retired as Secretary of Labour, and Geoffrey Parsons, an accountant, were appointed to make up the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand.

The origins of the present ACC scheme therefore arose on Shand's watch. He was a Minister who encouraged a positive role for government in business and in workforce development. He was not afraid to lead a major reorganisation of the delivery of compensation to injured workers, which would exclude private insurers and eliminate the need for litigation if that would result in an effective working democracy.

Shand tabled the White Paper on Personal Injury in Parliament in October 1969, and referred the matter to a select committee for "intensive study", and he affirmed his belief that "the proposals [in the Paper] would not be shelved". However, he died of lung cancer just two months later, before the committee had begun its hearings.

Sources:

- Tom Shand*, by Hugh Templeton www.dbnz.govt.nz
Obituary Marlborough Express 11 Dec 1969:6
- B Gustafson, *The first 50 years of the National Party*
Reed Methuen 1986 p 85
- Ian Campbell, *Compensation for Personal Injury in New Zealand* AUP 1996
- Rt Hon Ted Thomas, ACC symposium University of Auckland 13 Dec 2007.
- Peter McKenzie, *The Origins of ACC in New Zealand* (2003) 34 VUWLR 194

‘COMPREHENSIVE COVERAGE, UNIVERSAL ENTITLEMENT’: PRINCIPLES OF THE ACC SCHEME

It is useful to now look more closely at some of the most important principles underlying the Woodhouse Report, how these were later enshrined in legislation, and the extent to which they were implemented in practice.

FOR New Zealanders born after 1974, ACC has been a fixture of our public life, woven into the social fabric. Several generations have been spared the divisiveness of litigation, perhaps best epitomised by the legal minefield of multi-million dollar lawsuits in the US. New Zealanders are entitled to make a claim for cover if they have suffered an accident or an occupational disease within New Zealand. If their claim is accepted, the injured person is entitled to receive compensation, treatment and rehabilitation. The claimant does not have to prove fault. So long as they can demonstrate that the accident or occupational disease has caused injury, then they will be covered. In return, New Zealanders relinquished their right to sue for compensation for injury sustained from the negligent acts of others. The scheme is comprehensive in that it covers all New Zealanders whether at work, on the road or at home, on the sports field or for injuries suffered in the course of treatment. Entitlements are provided to earners and non-earners alike. The scheme was designed to promote injury prevention and provide claimants with complete rehabilitation. All of these services would be provided through a state agency – the ACC.

The Woodhouse scheme built upon the existing workers’ compensation scheme, which also ensured that injured



Sir Owen Woodhouse

Lawyer, Supreme Court Judge, Chair of Royal Commission on Personal Injury, Privy Councillor.

It was Owen Woodhouse's legal experience at the bar in Hawkes Bay that convinced him of the need to abandon the right to sue for personal injury compensation.

His wartime experiences had also given him first-hand experience of incapacity from injury. He served with the Royal Navy, where he rose to command a torpedo boat in the Adriatic. He was awarded a D.S.C. In 1943 he worked on shore as a liaison officer with the Yugoslav forces- the partisans- under Tito and later went as assistant to the Naval Attache in the British Embassy at Belgrade.

When the war was over he returned to NZ and practised law. He did a lot of motor vehicle cases, representing both sides in the argument for damages. He found it incredible that so much effort was put in to deciding who was to blame. In the 1950s he became interested in no fault insurance, and supported Solicitor-General Richard Wild's efforts to recommend no fault cover for motor vehicle accidents, where the injured victim would not need to prove fault to obtain cover and entitlement.

In the 1950s Owen Woodhouse was counsel assisting a committee considering the introduction of fluoridation in water to protect the dental health of young children. The report was accepted both in NZ and worldwide. This

brought him national attention and he was appointed a Judge of the Supreme Court of New Zealand in 1961.

In late 1966, Owen Woodhouse was asked to chair a Royal Commission on personal injury in NZ. He read the terms of reference as allowing the Commission to make recommendations concerning personal injury suffered by persons whilst working. He did not confine his report to considering work injury only, and recommended a universal accident compensation insurance scheme, abolishing the right to sue at common law. His approach to the terms of reference caused controversy, but Minister of Labour Hon Tom Shand accepted the report in its entirety.

Owen Woodhouse wrote the Royal Commission report himself, wording it simply and elegantly for impact. The recommendations were a team effort between Woodhouse, Bockett and Parsons (an accountant and third member of the Commission). The report was made public on 13 December 1967. Hon Tom Shand described it as a "bold and imaginative document". It became known as the Woodhouse Report. The findings were based on five guiding principles: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.

The reception to the report was varied: the Law Society was split; the media and the trade union movement cautiously welcomed it; key Government officials, Labour Party Ministers and legal academics supported it wholeheartedly as its adoption would once more put NZ into prominence as a leader in social legislation.

Owen Woodhouse was knighted, became Privy Councillor and has been awarded the Order of New Zealand.

Sources:

"Compensation for Incapacity", Geoffrey Palmer. Oxford University Press

"Compensation for personal injury", Ian Campbell, Auckland University Press, 1996.

Interview with Sir Owen Woodhouse, 18 May 2007

"Special Honours: Sir Owen Woodhouse", NZ Herald 6 February 2007

30 Injured New Zealanders receive 80% of their pre-injury earnings as compensation for their loss. 80% represents the proportion of the individual's loss that ACC (and by extension, the State and the community) will cover as part of the social contract and the protection afforded by community responsibility. 80% also allows for a proportion of the loss to be left with the injured person; the remaining 20% reflects the contribution made by the injured person.

workers received compensation set at 80% of their pre-injury earnings. But unlike that scheme, the new accident compensation scheme allowed compensation to continue so long as the claimant remained incapacitated. The six-year cut-off date contained in the old scheme was abandoned.³⁰

The scheme as conceived by Owen Woodhouse and his fellow Commissioners was intrinsically value-laden. These values, of comprehensive coverage and universal entitlement, had been informed by the experiences of British immigrants as well as the crucible of events such as the Brunner Mine disaster and both World Wars.

As social historian Tony Simpson asserted:

The political culture which grew out of the nineteenth-century experience of emigration to New Zealand has continued to lie at the root of most of the social attitudes of New Zealanders and the political actions which have flowed from them. The experience of the depression of the 1930s reaffirmed these attitudes, and numerous subsequent studies have shown that they continue to underpin the most cherished beliefs of most of those who live here. These beliefs in the importance of accessibility to education for all; the availability of community-funded assistance during periods of unlooked-for or unavoidable adversity such as sickness, accident or unemployment; affordable and decent housing; and support in old age do not differ in any material way from the programmes espoused by the Chartists, trade unionists and others in nineteenth-century Britain who endeavoured to recover the moral economy they believed had been denied them by the changes through which they had passed. The political culture which grew out of the nineteenth-century experience of New Zealand's British immigrants is appropriately perceived as one of the richest and most prolific flowerings of that economy and its culture.³¹

31 Simpson, 1997, pp. 216-7



Herbett Bockett

Secretary of Labour, Chairman of Workers Compensation Board and member of the Royal Commission for Personal Injury in NZ

Following WW2, Herbert Bockett planned for New Zealand's reconstruction as the Director of the National Employment Service, and in 1947 he became Secretary of Labour. Bockett was part of a group of visionary public servants who were appointed while Labour was in power, yet who served for many years under a National Government.

After the war, thousands of young men flooded back to New Zealand with high hopes for a better country to live in. They needed employment training and placements and expected improved conditions in the workplace. Bert Bockett expanded the Department of Labour's functions and promoted policies of full employment, industrial health and safety, vocational training and Maori employment. He also developed rehabilitation services for those incapacitated during the war.

In 1951 Bockett implemented Government policy against the locked-out watersiders. In 1960 he and Minister of Labour Tom Shand strove successfully to retain a form of compulsory unionism and the arbitration

system, which allowed for centralised control of the industrial landscape. In 1960 Bockett was appointed Chair of the Workers Compensation Board and worked in this capacity until the Board was disbanded in 1976.

During the early 1960s Bockett and Shand, along with Minister of Justice and Attorney General Ralph Hanan, Head of Justice Dr Robson, and Solicitor General Richard Wild, pressed for reform of the workers compensation scheme. They perceived that its entitlements were inadequate and that New Zealand was falling behind other countries. In fact, New Zealand was unable to ratify ILO Convention 121 concerning benefits for injury while in employment, because the standards in this country fell short of the Convention's minimum requirements.

All the key people were in agreement: the heads of the two main government agencies and their Ministers. National's 1963 election policy was to steadily and systematically improve workers compensation.

In 1965 the Department of Labour suggested to Shand that a Royal Commission on personal injury be established. Bockett had retired as Secretary of Labour in 1964, so Shand was able to appoint him one of the three commissioners, with Justice Woodhouse as Chair.

Herbett Bockett died in 1980, having played a key role in the origins of New Zealand's unique ACC scheme.

Sources:

Holding the balance, a history of New Zealand's Department of labour. John Martin, Canterbury University Press 1966

Compensation for Incapacity. Geoffrey Palmer, Oxford University Press

"Bockett, Herbert Leslie". Dictionary of New Zealand Biography, John E Martin.

The five guiding principles proposed by Woodhouse and his fellow Commissioners encapsulated the above concerns and represented a socialised response to accident and injury. Those principles are:

- community responsibility
- comprehensive entitlement
- complete rehabilitation
- real compensation; and
- administrative efficiency.

The principles of community responsibility and complete rehabilitation are examined below.

Community Responsibility

“Everyone was to be looked after – it was the community’s responsibility to do it. Beneath the idea lurked a definitely collectivist set of values”.³²

32 Sir Geoffrey Palmer “The Future of Community Responsibility” (2004) 35 VUWLR 905, 909

The notion of community responsibility underpins the ACC scheme and is elegantly articulated in the Woodhouse Report:

The first principle is fundamental. It rests on a double argument. Just as a modern society benefits from the productive work of its citizens, so should society accept responsibility for those willing to work but prevented from doing so by physical incapacity. And, since we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically necessary victims. The inherent cost of these community purposes should be borne on a basis of equity by the community.

Community responsibility was to be realised in practice through the complementary function of the second principle – comprehensive entitlement. The costs of personal injury could be minimised if loss was spread through the community, that is, if the injured person's burden was socialised. The Commissioners were explicit in their view that it was incumbent upon the State to embody this concept:

First, in the national interest, and as a matter of national obligation, the community must protect all citizens (including the self-employed) and the housewives who sustain them 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.

Complete Rehabilitation

The Royal Commission considered that the nation had a clear duty and a vested interest to promote and foster “the physical and economic rehabilitation of every adult citizen whose activities bear upon the general welfare”. The Commission packaged this notion as an economic imperative: “If the wellbeing of the workforce is neglected, the economy must suffer injury.” The Commission saw all New Zealanders contributing to a national effort so that “the process of rehabilitation should be developed and encouraged by every means possible as it has much to offer New Zealand both in human and economic terms.”³³

*The consideration of overriding importance must be to encourage every injured worker to recover the maximum degree of bodily health and vocational utility in a minimum of time. Any impediment to this should be regarded as a serious failure to safeguard the real interests of the man himself and the interest to which the community has in his restored productive capacity.*³⁴

33 Royal Commission of Inquiry. (1967) p20

34 Ibid, p40

The Commissioners analysed rehabilitation and its benefits at some length:

The rehabilitation process clearly is able to provide great benefits. Independence and self-respect, an alleviation of the strain of incapacity, and some mitigation of money losses are offered to the man himself. And apart from humanitarian considerations there is for the community the advantage of increased production and the avoidance of some of the economic costs of incapacity. It is a process which should be supported widely and made available to all who might be assisted by it: and the test for assistance should never demand that the advantage to the patient must always balance the cost to the nation.

The Commissioners recommended that a special rehabilitation benefit could be provided to act as an incentive for vocational rehabilitation, and described the elements of vocational rehabilitation: “It covers everything from the evaluation of aptitudes, skills and experience of the client to his training or retraining for a new occupation”. The Commissioners envisaged assessment facilities and facilities for training, and that the Government would provide grants and subsidies to encourage training of the disabled for employment.

*The assessment is not merely of the patient’s physical condition and the likely state he will reach after appropriate medical treatment: it must extend to an appreciation of his intelligence, educational standards, mental and emotional state, general aptitudes and adaptability, motivation, resilience and social and economic background.*³⁵

The Commissioners recommended that a permanent periodic payment would be made (after assessment) for those suffering permanent partial incapacity. The purpose of this permanent pension, which could never be reduced, was to act as an incentive on those who were being rehabilitated.

35 Ibid, p109

Even after they returned to work, and weekly compensation ceased, the permanent pension would be retained.

Many politicians on both sides of Parliament had experience of WW2 and were aware of the difficulties faced by returned soldiers, including their rehabilitation needs.

Mr Young, National MP for Miramar, said during the second reading of the Bill:

*We remember the part [rehabilitation] played during WWII in re-establishing people as useful members of society. It is equally important that a person injured, whether in industry or as a result of a road accident, should be rehabilitated so that he can continue to play a proper part in the community...our purpose is to promote rehabilitation so as to seek to restore all such earners and persons to the fullest physical, mental, social, vocational and economic usefulness of which they are capable.... The Bill does take care of rehabilitation. It lays the groundwork for consideration of people and their rehabilitation to a greater extent than ever before in the history of our country.*³⁶

The select committee considering the original Accident Compensation Bill reiterated Owen Woodhouse's words:

*The objective in all cases must be, as quickly as possible, to get injured persons back onto productive employment and to enable them to become useful members of the community once more...It is essential that those who are seriously injured should not be regarded as outcasts or as social misfits. This has often been the case in the past. Even today the extent to which the body and spirit of man is endowed with reserve powers and functions is not fully recognised. Much can be done even for the person who has serious permanent injuries. It is now known that a man can take his place in the community not only without a limb, but even without other organs which were once considered vital to the human being.*³⁷

36 Hon Mr Young speech to House *Hansard* 3 October 1972, p.2996

37 Gair Select Committee Report para 257

The 1972 Act provided for retention in pre-injury employment where possible and training/retraining for those injured workers who could not be reinstated into their pre-injury employment. Injured workers could make arrangements with ACC concerning examinations, completion of apprenticeships, obtaining employment experience, paying for costs of training, funding for travel and accommodation assistance if training was required away from home.

Unfortunately, however, the principles expressed in the 1972 legislation in regard to rehabilitation have not been fully and systematically enacted. In 1988 the Law Commission noted that although the legislation recognised the critical importance of rehabilitation, ACC had a lack of national policies and programmes, and employers lacked incentives to provide retraining.³⁸ As a result, injured people have often remained on weekly compensation for years on end, even though they may have been keen to return to work.

38 The Law Commission.
(1988) *Personal
Injury: Prevention and
Recovery*. Wellington:
NZLC R4, p42, para 157

‘LEGISLATION WHICH LEADS THE WORLD’ – PASSING THE ACC BILL

FOLLOWING delivery of the Woodhouse Report, Hon. Tom Shand, Minister of Labour in the Holyoake-led National government, told Parliament in 1969 that: *the Commissioners have proposed a bold blueprint of total reform in the realm of compensation for personal injury; a unified and comprehensive system to replace a variety of disconnected remedies which they described as a ‘fragmented and capricious response to a social problem.’*

The Commissioners, said Shand, believed that “in the national interest and as a matter of national obligation the community must protect all its citizens”. The Minister was unequivocal on the benefits that should be delivered: “...the alternative compensation provided in workers’ compensation legislation must be more generous, full, and fitting than it is today.”³⁹

The Bill received its final reading in Parliament in December 1971. The Labour opposition supported the Woodhouse principles but did not believe the Bill went far enough to implement them. Hon. Mr Faulkner, Labour MP for Roskill, told the House:

*I hope we can amend it and introduce not only the letter of the Woodhouse report, but also the spirit of the concept behind that report. This Parliament will then be able to say that once again it is a leader in social responsibility.*⁴⁰

The government, however, was justifiably proud of this world-leading initiative and Prime Minister Hon. Jack Marshall introduced the Bill’s third reading with the words: *This is a very advanced piece of legislation which I believe we will look back on as a landmark in our social welfare*

39 Campbell. (1996) p42

40 Hansard 3 October 1972 3024 Second Reading of Accident Compensation Bill

41 Rt Hon J Marshall
Hansard 18 October
1971 p.3445, 3rd
Reading of the Accident
Compensation Bill

*development. I think it is the most important piece of legislation since the introduction of social security, and I believe that will be the verdict of history. I am proud to have been associated with it and proud that the National Government has taken the lead in introducing legislation which leads the world in this field.*⁴¹

The impact of neo-liberalism in the 1980s and 1990s

In 1972 the Accident Compensation Act was passed and its provisions became effective from 1974. The introduction of the ACC scheme marked a sudden and dramatic improvement for people affected by any form of injury or accident. They could now receive weekly compensation and treatment as of right, quickly and easily, without recourse to expensive litigation. However 15 years later, well before the scheme had a chance to mature, it became a target for politically driven reforms.

42 Neo-liberalism can be broadly defined as a political and economic ideology that advocates the reduction of government intervention in the economy in favour of corporate control of the market.

In the 1980s and 90s neo-liberal politics, with its emphasis on free market economics, reinforced the interests of private insurers.⁴² Neo-liberal values influenced the 1992 amendment to the Accident Compensation legislation which adjusted individual employer levies on the basis of claims costs, prescribed entitlements for claimants, privatised the employers' account and introduced the work capacity test.

Neo-liberalism achieved prominence in New Zealand political discourse through the radical restructuring of the economy that occurred during the late 1980s and early 1990s. After the fourth Labour government took office in 1984, Finance Minister Roger Douglas, in response to the economic downturn following the Muldoon administration, initiated a series of economic reforms



*Ruth Richardson, Jim Bolger, Bill Birch and Simon Upton.
National Members of Parliament elected in 1990.*

including the deregulation of the financial market, the creation of profit-driven state-owned enterprises and the privatisation of national assets. In 1990 National returned to power under Jim Bolger and continued the programme of economic restructuring started by Douglas. Welfare services and industrial relations bore the brunt of the reform packages, which included widespread cutbacks to benefits and allowances and the introduction of the Employment Contracts Act 1991. However, workers' entitlements under ACC in relation to rehabilitation were also under attack.

The Bolger Government took the view that the cost of the [existing] scheme was unsustainable. (As noted earlier, the number of claimants receiving weekly compensation payments was steadily growing, but this was a consequence of a failure to fully rehabilitate those claimants, and was not a structural flaw in the scheme.) A working party

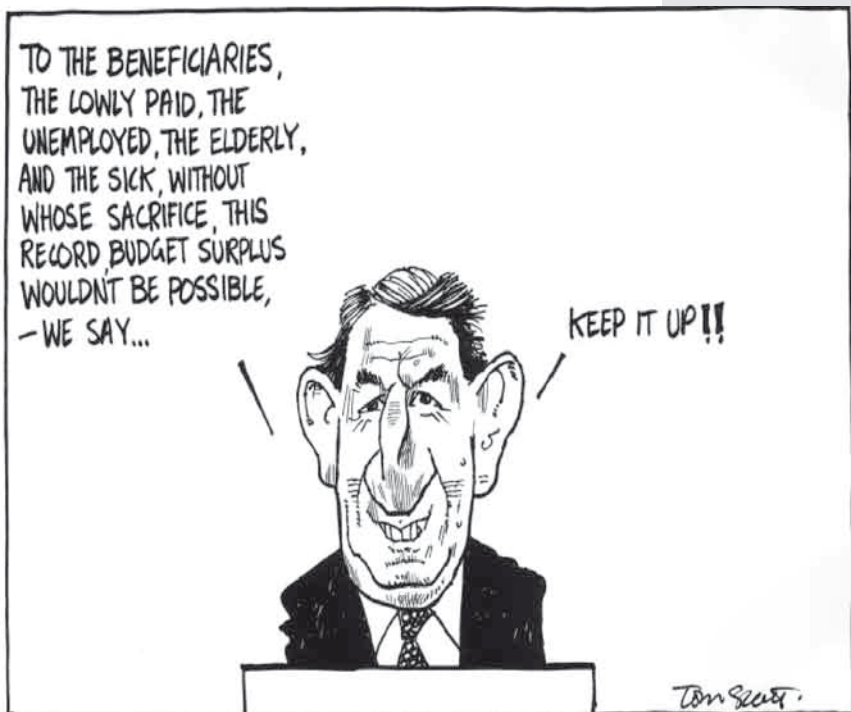
43 New Zealand Ministerial Working Party on the Accident Compensation Corporation and Incapacity: Report to the Ministers of Labour and Health, 1991, Wellington, New Zealand.

known as the Galvin Committee, after its Chair, was tasked with minimising “the cost to society of the system of compensation for incapacity”.⁴³

The terms of reference given to the Galvin Committee specified that any workers’ compensation scheme had to provide greater freedom of choice among alternate insurers, competition between public and private sector insurers, and minimal barriers to competition among insurers. The Galvin Committee recommended a staged process towards the eventual privatisation of the ACC system. Stage One prescribed the reduction of benefits, required the scheme to pay for public health services used, introduced experience rating whereby employers paid a levy linked to the cost of their claims, and the funding of the Scheme on a pay-as-you-go basis. Stage One was executed by the enactment of the Accident, Rehabilitation and Compensation Insurance Act (ARCI) 1992 Act.

This Act also resulted in a significant change in direction for rehabilitation, one that amounted to a deviation from the Woodhouse benchmark, by limiting the amount and extent of rehabilitation assistance that could be given to an injured person. These regulations replaced the flexible, although underused, provisions in the existing ACC legislation. The 1992 Act introduced work capacity testing to assess a claimant’s ability to return to work, with weekly compensation ceasing if the person was deemed fit for work, whether or not they had a job. The Act also removed access to lump sum compensation for pain and suffering and loss of enjoyment of life, replacing it with a small independence allowance which recognised impairment only.

The work capacity test evolved from the National Government’s concern at the rising costs of ACC, and their aim of limiting liability for the insurer. The work capacity test (and in its current guise, the vocational independence



Bill Birch Cartoon by Tom Scott

process) gave ACC certainty by fixing an endpoint to its liability – weekly compensation ended three months after a claimant was deemed to be fit to work.⁴⁴ On top of this, the Minister for ACC, Bill Birch, speculated that the new system would expose “hidden unemployment” or malingerers who were unfairly taking advantage of the benefits of weekly compensation.

The work capacity test allowed ACC to cease paying weekly compensation to injured workers if an occupational and medical assessor deemed them capable of working 30 hours or more a week in a job. The test was riddled with difficulties for the claimant, since no actual job needed to be available for a claimant to be assessed as having a

44 ACC’s liability had previously ended once the person was actually fit for work, as opposed to being deemed fit for work by ACC. Occupational and medical assessors interview and examine the claimant, and provide a report to ACC on their assessment of whether the claimant can work 35 hours or more a week in a nominated job. It is an irrelevant consideration whether or not the person is in work.

capacity to work, and the job could be at a much lower income and skill level than the pre-injury employment. Moreover, the priority for rehabilitation shifted to removing long-term claimants from the scheme. This arbitrary mechanism did, however, achieve results of a sort. As Grant Duncan notes: 'In a stroke, [Birch] redefined the status of many claimants from "injured person" to "unemployed person."⁴⁵

45 Grant Duncan. "Moral Hazard and Medical Assessment" (2003) VUWLR 34 433, 435

The vocational rehabilitation outlook was bleak. Not only did 'the insurance-based principles of the Accident Rehabilitation and Compensation Insurance Act 1992 br[ing] in the concepts of individual (as opposed to community) responsibility and of work-capacity assessment' but scant attention was actually being paid to rehabilitation.⁴⁶

46 Ibid, 441

The politically charged nature of the ACC debate was further illustrated when the National Government, supported by the employer and private insurance lobbies, opened the employers' account up to competition. The employers' account was privatised through the Accident Insurance Act 1998, 'the AI Act' which aimed to introduce competition to aspects of ACC's business and introduce insurance concepts and principles to the administration of the scheme.

The AI Act 1998 required all employers to purchase accident insurance for work-related personal injuries suffered by their employees and enabled self-employed persons to purchase accident insurance from insurers other than ACC for both work-related personal injuries and non-work injuries (other than motor vehicle injuries).

The work capacity provisions of the ARCI Act 1992 were carried over into the AI Act 1998. Their essential objective was for the claimant to attain a capacity for work in any occupation for which they were suited by reason of

education, training and/or experience, irrespective of how low-skilled or poorly-paid the occupation or whether it was available in the labour market.

The incoming Labour Government of 1999 took urgent steps to repeal the AI Act 1998 and restored the state-run scheme, but did not fully restore its original provisions. The new government did not, for example, repeal the work capacity provisions but simply renamed the assessment procedure the 'vocational independence' process. The work capacity test had operated principally as a device to remove long-term claimants from funding, so there was little incentive for ACC to invest in rehabilitation, let alone retraining, for those claimants. This function has largely been replicated by the vocational independence process. As Duncan comments:

*...the determination of vocational independence creates the possibility that those with permanent partial disability who cannot return to their previous occupation may be exited from the scheme, on the basis of a capacity to be employed in an occupation of a lower status and lower income than that enjoyed previously – regardless of the availability of any actual job in that new occupation. There is no compensation for long-term loss of earnings, no statutory requirement to retrain the claimant in an occupation of a similar social and economic status, and no follow-up to evaluate the claimant's subsequent employment or income.*⁴⁷

Ross Wilson, President of the New Zealand Council of Trade Unions, describes the difficulties associated with the successful implementation of rehabilitation strategies:

*... we have a legislative shambles created by the ill-informed legislators and advisors of the 1990s, funding difficulties created by the unwise political concessions to the employer lobby, and an administration struggling to survive let alone achieve successful return to work and rehabilitation programmes.*⁴⁸

47 Grant Duncan.
"Advancing in
Employment: the way
forward for vocational
rehabilitation" (2004) 35
VUWLR 801, 803

48 Ross Wilson.
"Rehabilitation and
Return to Work" 2003

The Notion of Fairness

Fairness is a quintessentially New Zealand value – everyone should get a fair go and if possible equal treatment. From the 1930s to the mid-1980s, New Zealand social policy was able to provide a broad range of basic health, welfare and educational services on a fair and approximately equal basis to most New Zealanders.⁴⁹ A commitment to fairness on the part of socially minded legislators was ingrained in social policy.

The Woodhouse Report invokes fairness:

*The compensation purpose of the scheme is not to provide merely for need but to shift a fair share of the burden suddenly falling upon individuals as a result of personal injury... Since the object is compensation for all injuries, irrespective of fault and regardless of cause, the level of compensation must be entirely adequate and it must be assessed fairly as between groups and as between individuals within those groups...*⁵⁰

In 1995, Sir Owen Woodhouse commented:

*Our social responsibilities are not to be tested by clever equations or the latest economic dogma. They depend upon decent fellow feeling and the ideas and ideals which support it. That I am sure is the continuing attitude of New Zealanders. It is something which ought to be applied to the future of the accident compensation scheme.*⁵¹

If ACC were required to rehabilitate and retrain a victim of personal injury into a job, equivalent in economic and social status, to their pre-injury situation, that, in the author's view, would provide a fair return on the social contract. Woodhouse contended that vocational rehabilitation was beneficial to society as it facilitated a worker's return to productive employment. To achieve this end, he and his fellow Commissioners promoted a

49 Wilson, Marie.G and Allison Enright. New Zealand's Workforce Policy in Sharp, Andrew (ed). (1994) *Leap Into the Dark*. Auckland: Auckland University Press, p126

50 The Royal Commission of Inquiry. (1967). p108

51 Personal correspondence June 2007

scheme that encouraged every injured worker to attain the maximum degree of vocational utility. Woodhouse resisted the notion that the test for determining rehabilitation entitlement should balance the cost to the nation with the advantage being provided to the injured person.

Woodhouse's rationale for complete rehabilitation has been imported into the IPRC Act 2001 which states that a claimant is entitled to be provided with rehabilitation by ACC to assist in restoring their health, independence and participation *to the maximum extent practicable* (emphasis added). In reality, however, the claimant is often rehabilitated to a level below the maximum. This is because the legislation gives clear direction to ACC that any rehabilitation provided must be cost effective.⁵² This test elevates short-term, individual cost effectiveness over long-term claimant and societal benefits.

Although the 2001 Act promotes rehabilitation as a principal objective, the combined effect of the cost-effectiveness test and the vocational independence⁵³ provisions is that these (predominantly) 'long-term' claimants are removed from the scheme before they are ready.⁵⁴ This relieves ACC of any responsibility to retrain injured workers or ensure that they are retained in sustainable employment.

It is also important to note that there is no requirement that a claimant is made vocationally independent in an occupation of equivalent social and economic status to their pre-injury employment. In other words, the pre-injury occupation establishes a ceiling that determines the vocational options available to the claimant at the outset of the vocational rehabilitation process. This is a far cry from the aspirational nature of complete rehabilitation as advanced by Woodhouse.

52 section 87(1)(b) IPRC Act 2001

53 A claimant is made vocationally independent of the scheme if they are deemed to be able to engage in employment, for which they are suited in terms of their education, experience and/or training, for more than 35 hours per week. If the worker is deemed vocationally independent, weekly compensation will cease within three months.

54 The size of the 'longterm' claimant population should be emphasised. ACC's data on rehabilitation rates indicate that 60-70% of claimants have returned to work or independence after three months, and about 90% after 12 months (ACC, 2005). This means that one in ten claimants can be regarded as longterm, or in receipt of weekly compensation for longer than three months. This accords with the definition of longterm applied in Crichton et al - *Returning to Work from Injury: Longitudinal Evidence on Employment and Earnings* (August 2005).

Grant Duncan identifies ACC's distrust of claimants' motives as an issue:

The problem with this assumption of distrust, which is now built in to law, is that it does not recognise that there may also be strong willingness to return to work, to retrain for work if need be, but on one's own terms, rather than under the direction of administrators. And hence there is a source of frequent conflict.⁵⁵

55 Grant Duncan. "Moral hazard" (2003) 34 VUWLR 433, 434

There are conflicting values within the accident compensation legislation: the notion of fairness that Woodhouse envisaged is contained in the expectation that the injured person would be rehabilitated to their maximum vocational utility; however, this notion is undermined when ACC applies the test to satisfy itself that any such rehabilitation provided should directly result in a reduction in entitlements. Once ACC determines that the injured person is deemed fit for work of any kind, it can cease paying weekly compensation. Assessing a person as fit for work irrespective of labour market realities falls well short of assessing maximum vocational utility and fails the test of fairness.

In addition, effective injury management by ACC makes good economic sense to the country. The Pricewaterhouse-Coopers 2008 review estimated that the benefits of effective injury management are already worth \$315 million per annum, and this figure could be further enhanced by improving the ability of injured persons to work.⁵⁶

56 Pricewaterhouse-Coopers, Executive summary, Accident Compensation Corporation in New Zealand, scheme review, March 2008, p. ix

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ASBESTOS: THE WONDER PRODUCT

A versatile but highly dangerous building and insulation material, asbestos was widely used in New Zealand until the mid 1980s, when its harmful effects finally became well understood. People exposed to asbestos do not usually suffer its ill effects, which include potentially fatal diseases such as mesothelioma, until 20 to 40 years later. This time lag helped the manufacturers and sellers of asbestos to deny responsibility for its deadly effects, and has both tested and affirmed the fundamental principles of New Zealand's workers' compensation legislation.

Asbestos is strong, flexible and impervious to electricity and fire. With the advent of steam-driven power, heat-resistant substances were at a premium and asbestos seemed the perfect solution for lagging boilers and steam pipes. In 1885 the American Henry Ward Johns took out patents to manufacture roofing materials from asbestos, then diversified into asbestos paints.

Asbestos was soon associated with safety and industrial progress. It was cheap and adaptable, a useful replacement for wood and brick. James Hardie, a Scot who had migrated to Melbourne in 1851, started using asbestos fibre cement in 1888 as a substitute for slate to roof railways workers' huts. By 1917 his product, now named fibrolite, began rolling off James Hardie production lines in Australia and by 1938 Hardie had opened a factory in Penrose, Auckland. Soon fibrolite housing sprawled over the New Zealand hills. "The material can be cut, scored and sawed with the normal tools of trade. It is non-irritating to the skin and non-toxic" advertised James Hardie in 1955.⁵⁷

⁵⁷ *Asbestos House, the secret history of James Hardie Industries*, Gideon Haigh. Scribe Publications PTY Ltd, 2006

Firemen Clothed in Asbestos.

The London firemen are about to be uniformed for duty in asbestos cloth, a material which has already been adopted by the Paris fire brigade with satisfactory results. Equipped in this incombustible apparel, the fireman is practically master of the flames.

The health hazards of asbestos were already known by 1930, and by 1933 eleven cases had been brought against Johns, the original patent holder, by sufferers of the lung disease asbestosis. These cases were quietly settled for \$35,000 each.⁵⁸ As early as 1939, health department officials in Victoria, Australia recommended informing workers of the hazards of asbestos. In 1953 the *British Journal of Industrial Medicine* suggested that asbestos workers faced a risk of lung cancer 11 times that of the general population. James Hardie tried unsuccessfully to suppress publication of this article.⁵⁹

However medical academics and public health officials showed only passing concern for the mounting evidence of the health effects of asbestos, and in the first half of the 20th century Hardies was under no pressure to change its production of asbestos materials. In 1964 the tide started to turn following a study of over a thousand asbestos-insulation workers. British television ran an expose of passengers exposed to asbestos in British Rail passenger coaches, and workers in dockyards. Union activity mounted to protect workers from asbestos and to compensate victims of asbestos-related diseases. Even so, the annual importation of asbestos into New Zealand continued to rise, peaking in 1974.

58 *Asbestos House* ibid
page 30

59 *Asbestos House* ibid
page 48

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By the 1960s Hardies in Australia was settling claims for asbestos illnesses and calculating its future liabilities, expected to peak between the years 2000 and 2010. If such claims were also made in New Zealand at that time, they have not been publicised because it would have been in Hardies' and Fletchers' interests to settle those claims confidentially, to avoid further litigation.

After 1974, our no-fault accident and occupational disease scheme removed the right to sue for all injuries sustained, and for those diseases where exposure to asbestos occurred after 1974. When New Zealand workers began to bring forward their own cases of asbestos-related disease, the newly-established scheme was severely tested by the need to adequately compensate for these often devastating diseases. The legislation was amended several times, and is currently facing further amendment.

Our ACC scheme originally excluded from cover those exposed to asbestos prior to the scheme's commencement,



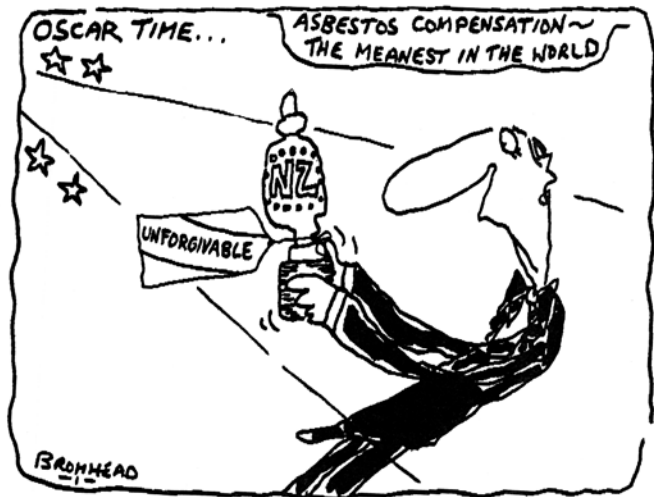
Robin McKenzie at Wellington Hospital with his wife Shirley.

yet there was huge exposure to asbestos products in New Zealand during the building boom of the 1960s and early 1970s. Thousands of tons of asbestos had been used in insulation, applied to boilers and pipes, and sprayed as a fire retardant in homes, commercial buildings, power stations, railway workshops, hospitals and schools.

Robin McKenzie worked in New Plymouth during the 1960s and 1970s for the state-owned Electricity

Corporation of NZ (ECNZ). After 1974 he was diagnosed with mesothelioma and, since his exposure to asbestos had occurred prior to that date, he began the long, slow process of suing ECNZ. He reached an out-of-court settlement in 1993, said to be for \$2 million. The National government's response was immediate. ACC Minister Bill Birch prevented further litigation in similar cases, and cancelled entitlement to lump sum compensation. Instead, those suffering from an asbestos-related disease were only entitled to a weekly payment of \$67 for the remainder of their life, surely one of the meanest compensation systems for asbestos victims in the world. This amendment to the original ACC legislation constituted a breach of the social contract by which New Zealanders traded off their right to sue in return for fair and adequate compensation.

Birch's amendment was strongly opposed by the labour movement and the Parliamentary opposition. The incoming Labour government therefore again amended the ACC legislation in 2001 by reintroducing lump sum compensation. The first recipient of the new compensation



The Dominion, 1 April 1993



Juanita Angell and her late husband Vic. Married for 48 years, he was diagnosed with terminal cancer caused by exposure to asbestos. ACC offered him \$67 a week, but they decided to fight for lump sum payment. She took his case to the Court of Appeal to obtain lump sum compensation and won, while he was still alive.

was Lower Hutt signalman Jim Lind. However, he was successful only because he was still exposed to asbestos after the 2001 amendment came into effect. His signal box in the Hutt suburb of Taita was roofed with asbestos which had begun to deteriorate, with dust settling in his office.

Jim Lind's case was followed by others whose exposure to asbestos had occurred prior to 2001.⁶⁰ ACC declined these claims and litigation commenced. In 2006 the Court of Appeal determined that those cases should also receive lump sum compensation for their invariably fatal asbestos related diseases. This decision resulted in a proposal to extend lump sum entitlement to all workers suffering occupational disease, regardless of when they were exposed.^{61,62} The Labour administration proposed a Bill, currently before the Select Committee, entitling all

60 Lind 22/5/03 ACC Review Number 20190 DRSL 4110

61 The IPRC Bill (No 2)2007

62 AVV v The Estate of Lehmann 11/8/04, Judge Ongley, DC Wellington 225/04 and The Estate of Priddle and Others v ACC CA 223/05 19 October 2006.

workers suffering occupational disease after the Bill comes into force to receive up to \$113,363, depending on their level of impairment at the time of assessment.

Asbestos use remains a problem in New Zealand. Although it has not been sold here since the ban on imported raw asbestos in 1991, thousands of tons are still in this country's buildings and dumps. Most houses built before 1975 would have asbestos products somewhere. These products have a lifetime of 25 to 50 years, and when repairs, refurbishment or demolition takes place the asbestos is exposed beneath cladding, ceiling tiles or flooring. The workers engaged in this work are frequently not aware of the hazards of asbestos. Particular risks are posed by water blasting of asbestos cement roofs, floor sanding to remove backing from vinyl floors, disturbance of asbestos cladding, removal of textured ceilings, building rubble, fires in older buildings shedding asbestos, and stripping old boilers for copper.⁶³

63 "The management of asbestos in NZ workplaces", a report commissioned by DOL in 2007.

Compensation under the ACC legislation, including the proposed amendment, is available only to workers exposed to asbestos at work. Members of the community and families who suffer asbestos-related disease not related to their work will not be compensated under the Act. Their only recourse is through civil action: finding someone to sue who has negligently exposed them to asbestos. While the likelihood of exposure to asbestos fibres is increasing as the aging housing stock needs repair or demolition, the chances of finding someone to sue is diminishing. Those non-work-related victims of asbestos poisoning may therefore be denied compensation, and will pose a growing problem for our society.

The contrast between their situation and that of workers exposed to asbestos underlines the virtues of our ACC scheme, which delivers smaller amounts of compensation



Suruj Singh, 75 with her great grand-children Jessica 3, and Vanessa 17 months and her daughter Reena Woodford. They fear for their health as asbestos is being removed next door to their house in Miramar, Wellington. The old Masonic Hall was being demolished and asbestos was found in the rubble.

than if victims successfully sued, but delivers those sums much more quickly, cheaply and easily and thus benefits both the claimants and the wider society.

The example of asbestos shows how fundamentally sound in practice, and how flexible the state-run accident compensation scheme is. Over its 24 years of existence it has been adapted – sometimes adversely affecting claimants to such an extent that the changes have breached the social contract upon which it is based – but it has also shown that it can be restored, extended and improved in the light of our evolving understanding of health and safety.

CONCLUSION

IN the tradition of New Zealand's world-leading social policy innovations of the 1890s and 1930s, ACC represented a radical and unique system for handling the consequences of personal injury by accident.

ACC's creation is indebted to three key events: the aftermath of the Brunner Mine Disaster in 1896, the return of injured servicemen from both World Wars and the perspicacity of the Woodhouse Report. The first two events highlighted the need for the community to rally in support of the injured and dependents of victims of trauma, whilst the Woodhouse Report articulated the blueprint for giving effect to this community support.

This Report laid the foundation for a comprehensive no-fault scheme of accident insurance which is available to all New Zealanders. The ACC scheme cut a swathe through the morass of existing remedies, and required New Zealanders to trade off their right to sue in exchange for 24-hour coverage. Sir Jack Marshall, a former National Party Prime Minister, said when he introduced the scheme into Parliament that the ACC scheme was a "landmark in our social welfare development and world-leading social legislation."⁶⁴

The vision of the Royal Commission was to be realised through the implementation of five guiding principles. This paper has focused, in particular, on two of those principles - community responsibility and complete rehabilitation. The cost-benefit attitude adopted by ACC has compromised the application of these principles. Individuals are often forced to bear the losses caused by their injury while the rehabilitation available to claimants in these cases may be inadequate and fall below the standard contemplated by the Woodhouse Report.

⁶⁴ Rt Hon. J Marshall
Hansard 18 October
1971 p.3445, 3rd
reading of the Accident
Compensation Bill

ACC was grounded in a principled approach and has always been intimately and inextricably linked to values. These values have been subjected to change as political ideology, notably neo-liberalism, has waded into the arena of workers' compensation. There are conflicting values that have yet to be resolved between those expounded by Woodhouse and those espoused by the neo-liberals. The legislation has bold purpose statements which are nevertheless undermined by the practical application of the tools contained in the legislation that allow ACC to suspend entitlement of weekly compensation before the injured person's maximum vocational utility has been achieved.

Thirty-three years after it was introduced, the ACC scheme is at a crossroads. The National opposition has publicised its intention to privatise the Accident Compensation scheme, should it succeed at the 2008 general election. As with their 2005 election policy on ACC, the National Party have told employers and other potential political allies that they will allow private insurers to compete with ACC should they secure the Treasury benches in 2008. Although these statements have been couched in euphemistic terms: "this is not privatising ACC – merely giving employers a choice", they clearly disclose National's intention to privatise ACC.⁶⁵ Their intention is to change ACC legislation early in the first term in government. Private insurers are in business to make money for themselves. Privatisation would undermine the founding principles of the scheme and National's own legacy.

Even if the government does not change after the 2008 election, ACC remains an important issue for the incoming government. Whilst the current Labour-led government is inclined to take a whole-of-government approach to ensure

65 Wilkinson, Kate, National Party Spokeswoman for Labour and Industrial Relations, in a speech to Lexis Nexis 2nd Annual Employment Law and Human Resources Conference, 10 May 2007.

that government services are integrated, it also needs to include injured workers in this vision. If claimants are not completely rehabilitated then productivity suffers, with claimants often forced to shift from ACC onto welfare benefits. If rehabilitation policy and practices were designed to ensure claimants received sufficient rehabilitation to ensure a return to their maximum vocational utility, this would be another avenue open to the government to enhance productivity and skill levels, and address skill shortages.

Due to the inevitability of physical deterioration, the possibility of injury or occupational disease, and a nationwide skills shortage, the author believes that New Zealanders now need to enhance the social value of our accident compensation scheme. There is a need to refocus government policy on the work ability of aging workers. Alternative approaches to rehabilitation are crucial in order to sustain working lives, while skills must be diversified to enhance employability and mitigate financial losses for those who are injured, and for their families and the community as a whole.

WHERE TO FROM HERE? – QUESTIONS FOR POLITICIANS

The following questions, based on the information in this booklet, are provided for you to ask of your local candidates in the 2008 election.

- What is your party's policy on the future of the current ACC scheme, which ensures that the state is the only insurer for personal injury?
- Do you think it's appropriate for private insurers to replace ACC in providing compensation and rehabilitation for people who have suffered personal injury?
- Do you think ACC should, wherever possible, provide injured people with retraining and upskilling to enable them to return to work at the same or a better income level?
- Do you think it's appropriate for ACC or private insurers to regard injured workers as fit for work whether or not a job is available for them?



Free at last: Rescuers pull Ricky Heihei to the surface after he was caught underground in a Newtown, Wellington drain for seven hours, in 1997. Suction from packed mud had trapped his foot, stranding him down a five metre deep hole.

After this accident he went back to work but then suffered a back injury which stopped him doing such physically demanding work. He went onto ACC, and trained to be a teacher over the next four years. He says "ACC have been very helpful".



Photos: Craig Simcox Dominion Post.

TIMELINE

- 1891 Coal Mines Act – levy imposed on coal production to provide limited assistance to injured miners
- 1896 Brunner Mine Disaster – killing 65 miners
- 1898 Brunner Mine closes – remaining workers dismissed – widows sue employer – receive small lump sums.
- 1900 Workers Compensation scheme established (employers in dangerous trades required to insure their employees against injury or death – private insurers administer the claims)
- 1901 Accident branch of the State Insurance Office is established.
- 1914-1918 WWI injured soldiers return to high unemployment and pensions less than the basic wage
- 1931 The Disabled Servicemen's Re-establishment League is set up to assist injured soldiers obtain sheltered employment and retraining.
- 1939-1945 WWII injured soldiers are provided vocational rehabilitation through the Re-establishment League.
- 1947 Employers are required to insure with the State Insurance Office.
- 1947 Mr Herbert Bockett appointed Secretary of Labour and commences reform of the Department of Labour. Rehabilitation of incapacitated soldiers given a high priority.
- 1951 National reprivatises the scheme. A Workers Compensation Board established, to moderate profits made by private insurers through statutory oversight, also required to consider injury prevention and rehabilitation. Employers can now insure with private insurance companies.
- 1953 National Safety Association established – training in occupational health and safety offered.
- 1956 Weekly compensation increased to 80% of pre injury earnings, payable for up to 6 years.

- 1960 Hon Tom Shand appointed Minister of Labour by Mr Keith Holyoake. Mr Bockett appointed Chair of the Workers Compensation Board.
- 1962 Government Committee on absolute liability for motor vehicle accidents established and reports back. Richard Wild Solicitor General and member of Committee writes dissenting report calling for no fault motor vehicle accident insurance.
- 1963 General Election, National returned to office promising to steadily and systematically improve workers compensation.
- 1964 NZ unable to ratify ILO Convention 121 as NZ's workers compensation provisions fail to meet the minimum standard.
- 1966 Royal Commission established to investigate Personal Injury in NZ. Owen Woodhouse is Chair, Herbert Bockett and Geoff Parsons appointed as members.
- 1967 The Royal Commission's recommendations are released in the Woodhouse Report.
- 1969 White Paper presented to the House, authored by Geoffrey Palmer.
- 1969 General Election. National is returned to office. Hon Tom Shand dies 11 December. Jack Marshall assumes role as Minister of Labour.
- 1970 Gair Select Committee established – which produced a unanimous report to the House of Parliament.
- 1971 Accident Compensation Bill enters the House
- 1972 Accident Compensation Act 1972 is passed National for – 35 votes, Labour opposed – 34 votes.
- 1972 General Election National is defeated and Labour becomes Government, led by Norman Kirk.
- 1973 Accident Compensation Amendment Act passed, Labour extends the scheme to non earners.
- 1974 The Accident Compensation Act enacted. New Zealanders lose the right to sue for personal injury and death caused by the negligent actions of others. In return a state agency, ACC established to administer a 24 hour, comprehensive scheme covering

all injuries. Initially the State Insurance Office manages claims.

- 1975 Committee established to consider extending the Accident Compensation scheme to sickness.
- 1975 General Election. Labour defeated, National becomes Government.
- 1977 ACC set up first branch office in Dunedin.
- 1977 Committee to investigate extending Accident Compensation to sickness disbanded.
- 1992 Accident Rehabilitation and Compensation Insurance Act 1992 regulates the amount of rehabilitation that can be provided

Introduces the work capacity test that allows ACC to cease paying weekly compensation to those it deems can work 30 hours of more a week. Removes lump sum compensation, repeals permanent pensions.
- 1996 Amendment to ARCI Act provides for more flexibility to allow ACC to provide more effective rehabilitation.
- 1998 The National Government privatises insurance for workplace injuries. All other claims continue to be administered by ACC. Most small employers remain with the ACC established insurer At Work Insurance.
- 2000 The Labour-led Government restores ACC as the administrator for all claims, although it allows accredited employers to manage their own claims under **contract to ACC**.
- 2001 The Injury Prevention Rehabilitation and Compensation Act 2001 passed with the objective of restoring the vision expounded by Woodhouse.
- 2005 Injury Prevention, Rehabilitation and Compensation Amendment Act and Injury Prevention, Rehabilitation and Compensation Amendment Act (No. 2) passed
- 2007 Injury Prevention, Rehabilitation and Compensation Amendment Bill (No. 2) introduced to House
- 2008 PriceWaterhouseCoopers ACC Scheme review

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