



ACC and the Woodhouse Principles: community responsibility

BY **DON RENNIE**

THE FOUNDATION FOR THE CURRENT ACC LEGISLATION is found in the recommendations of the 1967 Woodhouse Royal Commission Report "Compensation for Personal Injury in New Zealand" which proposed the abolition of the common law right to sue for damages for personal injury caused by negligence or a breach of statutory duty, and its replacement with a statutory system based on five fundamental principles: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency.

This is the first of a series of articles by Don Rennie that will discuss each of these principles and the extent to which they are embodied in legislation and in its administration by the ACC. While Mr Rennie is convenor of the Law Society's Accident Compensation Committee, the views expressed in this article are his, and not necessarily those of the Law Society.

Community responsibility

The Woodhouse Report regarded this principle as fundamental. It rested on two arguments: first, because modern society benefits from the productive work of its citizens, society should accept responsibility for those workers who are prevented from working by physical incapacity; and secondly, because we are all involved in community activities which each year exact a predictable and inevitable price in bodily injury, society should 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.

The scheme shifted the common law principle of entitlement based on proof of negligence, or a breach of a statutory duty, to the needs of the injured person consequent upon personal injury, regardless of the cause of the injury. While the report limited its recommendations to incapacity arising from personal injury by accident, it said that the scheme should be extended to include incapacity from sickness and other causes. Because the recommendations were far-reaching, it said that more statistical information was needed before

firm decisions on extending the scheme could be made.

In any real sense the proposed scheme was not an insurance scheme. It was a compulsory and universal method of sharing the cost of social activity. The report said the scheme should follow the five fundamental principles and meet the requirement of cost.

In 1972 the then National government introduced legislation which created a hybrid scheme that covered only accident victims who were earners or the victims of motor vehicle accidents, leaving the rest of the community to pursue common law remedies. The 1972 Act was drafted on lines similar to the previous Workers Compensation Act and other legislation involving insurance principles based on fault and liability. The legislation clearly did not meet the first and fundamental Woodhouse principle of community responsibility, neither did it meet the principle of comprehensive cover and entitlement.

Scheme extended

The 1972 Act was amended in 1973 by the new Labour government. The amendment came into operation on 1 April 1974 and extended the scheme to cover everyone

who suffered personal injury by accident in New Zealand including non-earners such as children, the unemployed, the aged and visitors to the country. The Act removed the right of any person who had cover to sue in a New Zealand court to recover damages for personal injury suffered in New Zealand.

In amending the 1972 Act, and in subsequent amendments, no opportunity has been taken to redraft the legislation to clearly incorporate the unique five principles. Instead, the legislation has carried over the old risk-based user pays principles and drafting methods which do not suit the fundamental community responsibility principle in a new

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legal system.

For example, the provisions for funding the scheme in the 1972 Act merely imported the previous levy system that applied under the Workers Compensation Act. Levies were based on the user pays principle: the higher the risk (and therefore cost to the scheme) the higher the premium. Levies were fixed by Order in Council based on prescribed classifications of earners, industries and occupations at prescribed differential rates. The levies were set on a risk-related basis and adjustments could be made within classes according to safety records.

This variable risk-based levy system ignores the fact that all industries and occupations are interdependent. It therefore ignores the fundamental principle of community responsibility. The Woodhouse Report criticised the classification of risks as a basis for levy setting and recommended a uniform levy based on earnings, which was calculated to be at a rate slightly more than 1% of wages paid by employers to employees and 1% of net earned income by the self-employed who would be entitled to a tax deduction for the levy paid. The report pointed out that in 1947, classification of industries as a basis for levy setting had been discarded in the United Kingdom.

In 1988 the Law Commission Report on the Accident Compensation Scheme recommended that for reasons of equity, and as a matter of principle, as well as practicality, a single rate levy for employers and the self-employed be introduced. The rate would be fixed by Parliament and would apply evenly to the payroll of employees (in the case of employers) and to the tax assessable income of the self-employed.

Recommendations never incorporated

These recommendations have never been incorporated into the scheme or the legislation. Instead variable

risk-based levy rates have continued to be applied and the concept of "fully funding" each of the levy rated accounts has been adopted. The issue of pay-as-you-go funding, as against full funding of the various accounts, has been the subject of political discussion over the years. The present full funding has applied since the then Minister for ACC Nick Smith in 2008 persuaded his colleagues, and the public, that the ACC was running out of money and there was a need to have reserves to fund the ongoing cost of current claims. That is an insurance principle made necessary because sometimes insurance companies go out of business leaving the ongoing cost of current claims to be paid from reserves.

The ACC scheme is a unique legal system administered by the government as part of the general legal fabric and governments don't "go out of business". ACC levies are a form of compulsory tax. As the result of the full funding policy, the ACC has accumulated reserves in excess of \$36 billion which has made the Corporation one of the largest investors in the New Zealand Stock Exchange next to the National Superannuation Fund. It also means that, over the last 20 years, \$36 billion has been taken out of the productive economy for investment by the ACC investment committee.

Since the ACC is a state enterprise its funds are counted as "government money" and appear in the statement of government accounts.

The government is currently considering significant changes occurring in the way employment works in a modern economy because of the impact of technology such as automation, robots and artificial intelligence. People are re-training and moving between employment types and many have more than one job and not necessarily full-time or in the same risk environment. In the near future, the "gig economy" will have a massive impact on ACC funding and it is likely that the variable levy rate system will not survive. A universal levy, based on the national payroll regardless of industrial risk activity, will likely be the only answer.

The Woodhouse Report carefully considered the options for funding the scheme and ruled out variable levy rates in favour of a single uniform levy. That view was supported by the Law Commission's 1988 report. A levy based on a percentage of the national payroll sufficient to meet the annual cost of claims (with a small reserve to meet the cost of a national disaster) would recognise the principle of community responsibility. Successful management of the cost of claims would depend on the success of the safety, accident prevention and rehabilitation programmes implemented by the ACC as required by statute.

Community responsibility remains the fundamental principle behind the ACC scheme and should form the basis of legislation and policy administered by the ACC.

The current levy system and its administration by ACC is a significant element in the administrative cost of the scheme. This topic will be addressed in a later article. ■

Don Rennie is convenor of the Law Society's ACC Committee. The opinions in this article are those of the author in his private capacity.

