



# ACC and the Woodhouse Principles: Comprehensive entitlement

BY **DON  
RENNIE**

*The foundation for our current ACC legislation is found in the recommendations of the 1967 Woodhouse Royal Commission Report Compensation for Personal Injury in New Zealand. This proposed the abolition of the common law right to sue for damages for personal injury caused by negligence or 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.*

*In the second in a series of articles looking at each of the principles and the extent to which they are embodied in legislation and its administration by the ACC, Don Rennie considers the need for comprehensive entitlement for all persons covered by the scheme. While he is convenor of the Law Society's Accident Compensation Committee, the views expressed in this article and the series are those of Mr Rennie, and not necessarily those of the Law Society.*

THE SECOND PRINCIPLE THE WOODHOUSE REPORT recommended should be the basis of any statutory system designed to replace common law rights, is the need for comprehensive entitlement for all persons covered by the scheme. There could not be unequal community treatment of identical losses merely because one person was injured at work while another was injured on the road [para 282(b)]. The report said that the chance victim of an acceptable social activity should be provided for, including their dependant spouse and family. The report envisaged that to receive an entitlement which would otherwise have been available at common law, it was only necessary to show that personal injury had been suffered in New Zealand.

## Cover, entitlements and the burden of proof

Neither the legislation nor its administration by the ACC follows this fundamental Woodhouse principle of comprehensive entitlement. Section 48 of the 2010 amendment to the ACC Act requires injured persons

to apply for both cover for their injury and also for entitlements. This implies that the ACC can grant cover and entitlements and contradicts not only the Woodhouse principle but also the provisions of s 20(1) which clearly states that a person has cover if the personal injury is suffered in New Zealand and the personal injury is described or occurs in circumstances referred to in sub-section (2) of that section. Entitlements automatically follow cover unless it can be shown that

they are non-compliant with the legislation. On injury occurring, the statutory rights to cover and entitlements are determinant, not the decisions of the ACC.

The way the present claims system operates under the current legislation makes the ACC appear to be an insurance company. It places the burden on the injured person to prove to the satisfaction of the ACC that the injury is within the statutory definition of personal injury, that it occurred in circumstances recognised in the statute as giving cover, and that the claimant had an entitlement. That is contrary to the second Woodhouse principle that cover and entitlements are comprehensive upon personal injury occurring.

There is an argument for suggesting that rather than requiring a formal claim, all that is required to be lodged with the ACC is a Notice of Accidental Injury Suffered in New Zealand recording the necessary details including supporting medical evidence. The burden of proof would then move to the ACC to show that a particular injury, or the circumstances in which it occurred, did not come within the specific statutory provisions giving cover and/or entitlements.

The vast majority of what are currently "claims" are automatically administered without further question and entitlements are paid automatically, but the ACC, in giving its decisions, seldom refers to the statutory provision, regulation or case law on which it relies to



prove why the particular injury does not have cover and/or entitlement. Instead the injured person is required to prove the case which contradicts the Woodhouse principle and the statutory provision in s 20.

### Age limits

The report examined whether compensation should be restricted to those within defined age limits [para 283(a)]. There was no issue about entitlement to treatment and rehabilitation but there was an issue as to whether the elderly and the young should be compensated on a basis which recognised their past or potential contribution to the productive effort of the nation [paras 282 (b) and (c)]. It observed that an upper age limit would disregard the element of lost physical capacity in the case of periodical compensation payments; it would be difficult to provide for those injured outside the age limit; and it would cost relatively little to go beyond the normal span of working life in favour of lifetime payment. Accordingly, no upper age limit was recommended.

### Compensation and National Superannuation

When the NZ Superannuation Qualification Age (NZSQA) was 60 years, the original 1972 ACC Act provided variable upper age limits at which earnings-related compensation was payable. Entitlement depended on the date the

accident happened. If the accident happened when the person was below the age of 60, weekly compensation was payable to age 65; if, at the accident date, the person was between the age of 60 and 65 compensation was payable for five years; if the accident date occurred between the ages of 65 and 69 compensation was payable to age 70; if the accident date occurred on or after age 69 compensation was payable for one year (1972 Act s 128).

There was a proviso that if the claimant was in employment in which a statutory retirement age in excess of 65 was fixed, those provisions applied to the statutory date if that was later than the date fixed in the ACC legislation. Other provisions applied to the widow or widower and dependent children in fatal cases. The entitlements in the 1972 Act were repeated in the 1982 Act and, by limiting entitlements based on age, breached the principle of comprehensive entitlement.

**There is a misunderstanding about entitlement to weekly compensation under the current legislation. Previous ministers have been advised that without an upper age limit, an injured superannuitant could become entitled to weekly compensation indefinitely**



## Election between compensation and superannuation

A dramatic change to entitlement to compensation occurred with the passing of the 1992 ACC Act which provided that no compensation would be payable to any person who had attained NZSQA unless that person made an irrevocable election not to receive national superannuation for any period for which he/she was entitled to receive compensation. In other words, although a working superannuitant could receive both earnings from employment and superannuation (which was not means tested), if they were incapacitated from working by accidental injury, they could only receive either weekly compensation or national superannuation but they could not have both. This ignored the principle of comprehensive entitlement and treated superannuitants differently from all other earners. These provisions have been repeated in all subsequent amendments to the AC legislation and appear in Schedule 1 of the current 2001 Act.

## Limit on compensation for superannuitants

There is presently a bill before Parliament designed to repeal the requirement for an election to be made. However, that will solve only one problem. The legislation will still provide that entitlement to weekly compensation for an injured superannuitant can only be paid for a maximum of 24 months (ACC Act 2001 Schedule 1 Cl. 52). This will not only repeat the problem of entitlement not being comprehensive but is also inconsistent with the right to freedom from discrimination on the basis of age and is almost certainly a breach of both the Human Rights Act and the NZ Bill of Rights Act as declared by the Human Rights Review Tribunal in *Heads v Attorney-General* [2015] NZHRRT 12.

## Weekly compensation and period of incapacity

There is a misunderstanding about entitlement to weekly compensation under the current legislation. Previous ministers have been advised that without an upper age limit, an injured superannuitant could become entitled to weekly compensation indefinitely. That is wrong. Weekly compensation is payable to an "earner" (as defined) only for so long as the incapacity for work is due to the injury for

which the person has cover under the Act. If the ongoing physical condition is due to some other cause, for example an age-related condition, entitlement to weekly compensation stops. The incapacity for work is a mixed legal and medical question and entitlement should not be limited by a statutory provision based on age (ie, NZSQA).

No emphasis is placed on these provisions in any of the literature provided by the ACC, Ministry of Social Development, the Retirement Commissioner or any other authority, to superannuitants who are encouraged to continue working after reaching NZSQA. The effect of these provisions can be devastating for a superannuitant who has committed him/herself financially by setting up a business or undertaking or taking out loans designed to enable or continue income during their "retirement" years in the belief that if they had an injury (whether simple or serious) they would like any other earner, be entitled to ACC weekly compensation, until they were able to go back to work.

## Superannuitants in employment

Previous ministers have regarded the current retirement age of 65 as an appropriate age for the cessation of entitlement to weekly compensation on the basis that people usually stop working at that age. That ignores the reality that many people on reaching NZSQA, from necessity or from choice, continue in their current employment full or part time or set up in business to supplement their superannuation income.

The 2013 Census showed that there were at that time at least 130,000 persons over NZSQA in full or part-time employment. Following the latest census, that figure is now estimated at 287,500 and will increase rapidly with our ageing population. To meet the Woodhouse principle of comprehensive entitlement, the entitlement of these people must be on an equal footing with all other earners. ■

**Don Rennie** ✉ [rendon@actrix.co.nz](mailto:rendon@actrix.co.nz) is convenor of the New Zealand Law Society's ACC Committee. He has worked for the ACC and in private practice and is widely published in the areas of accident compensation and personal injury. The opinions in this article are of the author in his private capacity.

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