

# ACC and the Woodhouse Principles: Real Compensation

## 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 fourth 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 real compensation.

THE FOURTH PRINCIPLE IN THE WOODHOUSE REPORT relates to real compensation.

It states at Clause 59: "Clearly if compensation is to meet real losses it must provide adequate recompense, unrestricted by earlier philosophies which put forward tests related merely to need." It also observes that "... average modern households, geared to the regular injection of incomes ... have corresponding commitments which do not disappear conveniently if one of the hazards of modern life suddenly produced physical misfortune."

Those observations apply today just as much as they did in 1967.

## First Accident Compensation Act

It is important to remember that the original Accident Compensation Act 1972 was drafted to implement a scheme that covered only earners and the victims of motor vehicle accidents. The format and principles used to draft the Act followed the form of the previous workers' compensation legislation and, while limited to only covering employees and the self-employed as well as the victims of motor vehicle accidents, left the rest of the community with the common law right to sue.

The 1972 Act as originally drafted, was amended in

1973. It extended cover to include every accident victim whose injury occurred in New Zealand and abolished the common law right to sue to recover damages for personal injury. It came into operation on 1 April 1974. However, the 1973 amendment was not drafted in a way that clearly adopted the five basic Woodhouse principles. Subsequent amendments have

merely changed preceding legislation without any attempt to completely re-write the Act. There now only remains in rare cases the common law right to sue for exemplary or punitive damages arising out of personal injury in New Zealand.

## The common law approach to compensation for personal injury

As observed by Woodhouse at para 74 of the report, damages are an indemnity designed to put the injured person in the same relative position as that person was in when the injury occurred. At common law an

attempt was made to quantify in money terms, the harm caused to the injured person. The recognised heads of damage included actual economic loss including future loss by reason of diminished earning capacity, pain and suffering (including mental suffering) and loss of capacity to enjoy life.

Claims at common law required proof of special damages, that is, proof of the actual losses sustained in terms of loss of income, capital or property. The claim also included an assessment of possible future losses which was a purely conjectural exercise where proof was impossible. There was a saying amongst

The common law action for damages was rightly referred to as the "forensic lottery". It produced unpredictable results relating to both liability and quantum of damages, often relying on matters which were not capable of proof





plaintiff lawyers that "Every soldier carries a Field Marshal's Baton in his knapsack" meaning that even the lowest ranking members of society had the potential to improve themselves to the highest level and that was a lost opportunity for which the plaintiff should be compensated. In the case of future pain and loss of capacity to enjoy life, the difficulty was greatly increased by the need to put money values on physical disabilities. Of course any award of damages was subject to adjustment if the claimant was found to have been negligent and that negligence contributed to the loss sustained.

The common law action for damages was rightly referred to as the "forensic lottery". It produced unpredictable results relating to both liability and quantum of damages, often relying on matters which were not capable of proof or based on other factors which swayed the judge or jury's thinking.

Part 3 of the Woodhouse Report discusses the issues involved in the common law action including, the history of negligence, the standard of care, the duty of employers, contributory negligence, breach of industrial statutes, the nature of damages and the disadvantages of the common law system.

## Compensation for permanent impairment

Permanent physical disability can have damaging effects on the ordinary activities of both young and old, regardless of their influence on a capacity to work. Woodhouse wrote at para 61: "there must therefore be a realistic assessment of actual loss, both physical and economic, followed by shifting that loss on a suitably generous basis".

The report went on to say "If there might seem to be an issue as to whether compensation ... should be restricted to meet their current needs or be assessed on a uniform flat rate basis, then these are propositions which we reject as entirely unacceptable."

## Current legislation

Section 69(1)(d) of the 2001 Act states that lump sum compensation for permanent impairment is an entitlement under s 6. The amount of the lump sum payable was originally set by clause 56 of Schedule 1 of the Act which fixed the minimum at \$2,500 and the maximum at \$100,000. The Injury Prevention, Rehabilitation and Compensation (Lump Sum and Independence Allowance) Regulations 2002 provided in the schedule to reg 4, a scale of lump sum compensation for whole person impairment, ranging from the lowest recognised impairment of 10% that attracted \$2,500, increasing by 1% increments up to 80% and over, that attracted the maximum of \$100,000. The scale of payments has since been inflation adjusted under s 116 of the Act so the adjusted maximum is currently \$133,000.

# The meaning of impairment

Under s 6, impairment means "a loss, loss of use, or derangement of any body part, organ or system, or organ function". The definition is taken from the American Medical Association Guides to the Evaluation of Permanent Impairment which are said to clarify the differences between the often-confusing terms disability, handicap, functional limitations and impairment. Whether or not they do clarify the differences is questionable. "Handicap" is a term historically used to describe disability.

# Assessing compensation payable

The amount of the lump sum payable for permanent impairment under reg 4 of the Injury Prevention, Rehabilitation and Compensation (Lump Sum and Independence Allowance) Regulations 2002, can only be paid after an assessment is carried out by an assessor appointed by the ACC under clause 58 of Schedule 1 of the Act. Clause 58(2)

requires that in appointing an assessor, the ACC must have regard to the skills, qualifications and training it considers are necessary. To do the assessment the assessor must use the assessment tool provided in regulation 4(2).

#### The assessment tool

The assessment tool provided in regulation 4(2) comprises (a) The AMA Guides to the Evaluation of Permanent Impairment (Fourth Edition) and (b) the ACC User Handbook to AMA 4. Regulation 4(3) states that the ACC User Handbook prevails if there is a conflict between it and the AMA Guides (Fourth Edition). There are now a Fifth and Sixth Editions of the AMA Guides available but they cannot be used because they do not comply with the regulation.

## Impairment under AMA Guides Fourth Edition

As noted above the AMA Guides are said to clarify the differences between the terms disability, handicap, functional limitations and impairment but it is questionable whether they in fact do so.

Assume, for example, a person in good health suffers a back injury from lifting something heavy and suffers a disc herniation causing a decreased range of movement which is defined as an impairment under the Act. That impairment may result in functional limitation and the person may not be able to perform all the activities of daily living or lift heavy weights. According to the AMA Guides that may not necessarily lead to a disability. It depends on the demands of the job and what the injured person was required to perform. For example, if he works as a truck driver and is required to load goods on the tray of the truck by hand and unaided which he cannot manage, then there is a disability. However, if he drives a truck designed to carry pre-packed



containers which are lifted onto the truck by crane then, according to the AMA Guides, he can still drive the truck and he is not involved in heavy lifting, therefore there is no disability because he can still perform his role as a driver.

Disability is defined in the AMA Guides as "an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of impairment". The Guides note that "handicap" is a term historically used to describe disability.

The ACC User Handbook to AMA 4 clarifies the difference between, disability, work capacity and impairment by comparing the amputation of a little finger on a concert pianist and a gardener. According to the scale both suffered an impairment of

5% but, in relation to work capacity, the effect on the pianist was major and on the gardener none. In relation to disability the effect on the concert pianist was very significant but to the gardener minor. How then is the scale applied in these two cases where the percentage impairment is the same according to the scale but the consequences are widely different?

## Restriction on ACC making an assessment

Clause 57 of Schedule 1 of the Act provides that the ACC must not make a lump sum assessment until it receives a medical certificate as to the stability of the claimant's condition. The certificate must indicate that the condition arises from personal injury and that



there is permanent impairment. An assessment can be made if two years have passed since the injury and the medical certificate states that the condition has not stabilised but there is likely to be permanent impairment.

Applying these provisions to the two cases mentioned above, the medical certificates will be the same. Neither claimant is going to grow a new little finger so the condition is permanent and the "impairment" is the same according to the schedule. It would obviously be unjust to determine that both were only entitled to \$2,500 when the losses were so vastly different.

## The Woodhouse Principles

In relation to some aspects of the

Disability is defined in the AMA Guides as "an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of impairment".

common law damages action, the ACC scheme cannot provide compensation for all the real consequences of accidental injury. Whereas the common law allowed in-depth investigation of all the consequences of an accident suffered by an individual claimant, the ACC scheme deals with many, but not all, of the issues which would have made up a common law claim.

The ACC scheme covers not only loss of earnings, hospital, medical and rehabilitation costs, but it does not recognise compensation for pain and suffering, loss of enjoyment of life, loss or disruption of present, future or potential opportunities and many other issues which would have been part of a common law claim. This particularly applies to self-employed earners who often purchase private insurance to cover losses not recognised by ACC.

While an individual rehabilitation programme is prescribed in the Act, under ACC legislation, accident victims have been provided with a scheme of treatment, compensation and rehabilitation on a "one size fits all" basis. Lump sum payments must be made under the fixed requirements of the Act and according to the schedule in the regulations.

This seems to be contrary to what Woodhouse said at para 61 of the report, on compensation for actual loss "If there might seem to be an issue as to whether compensation ... should be restricted to meet their current needs or be assessed on a uniform flat rate basis, then these are propositions which we reject as entirely unacceptable." The prescribed scale fixes the percentage of impairment and the amount of compensation payable which appears to be a system incompatible with the Woodhouse principle of real compensation.

## Real compensation

Accident victims have been deprived of the ability to seek damages not only for actual provable losses not covered by the scheme, but also for pain and suffering both present and future and loss or interruption of business opportunities. While the scheme provides cover for a large number of the consequences of personal injury, some important issues which used to be part of a common law claim, are no longer recognised by the law. The current provisions are particularly hard on self-employed tradesmen and small business people who may not be able to carry on their trade or business because of impairment. The lump sums payable are far short of what is necessary to put them in the position they would have been in if the injury had not occurred.

<u>Don Rennie</u> <u>■ rendon@actrix.co.nz</u> is convenor of the New Zealand Law Society's ACC Committee. This article contains his personal views.