Legal Studies (2019), **39**, 499–516
doi:10.1017/lst.2018.50

S·L·S
The Society of Legal Scholars

RESEARCH ARTICLE

Community insurance versus compulsory insurance: competing paradigms of no-fault accident compensation in New Zealand

Simon Connell*†

Faculty of Law, University of Otago, Otago, New Zealand
*Author email: simon.connell@otago.ac.nz

(Accepted 9 October 2018)

Abstract
This paper presents a history of New Zealand's accident compensation scheme as a struggle between two competing normative paradigms that justify the core reform of the replacement of civil actions for victims of personal injury with a comprehensive no-fault scheme. Under 'community insurance', the scheme represents the community taking moral and practical responsibility for members who are injured in accidents, while for 'compulsory insurance' the scheme is a specific form of compulsory accident insurance. Understanding the history of the scheme in this way helps explain both the persistence of the scheme and important changes made to it by different governments.

Keywords: torts; accident compensation; New Zealand; no-fault

Introduction

New Zealand's comprehensive no-fault accident compensation scheme commenced on 1 April 1974.[1] The scheme is comprehensive in the sense that it provides cover for anyone suffering personal injury by accident regardless of the cause, in contrast with, for example, a workers' or motor vehicle injury compensation scheme. The scheme is no-fault in the sense that the injured person seeking compensation does not need to establish that their injury was the result of a departure from some required standard[2] and fault on the part of the accident victim is irrelevant.[3]

Now, over four decades later, the core reform of the scheme remains in place: victims of personal injury by accident receive 'entitlements' under the scheme and cannot recover compensation from

†I wish to thank the anonymous reviewers for their helpful comments, Mike King for comments on a draft version of the paper and Andrew Geddis for suggesting some useful literature.

[1]Accident Compensation Act 1972 (the 1972 Act) and its successors: the Accident Compensation Act 1982, Accident Rehabilitation Compensation and Insurance Act 1992, Accident Insurance Act 1998 and Injury Prevention, Compensation and Rehabilitation Act 2001 (later renamed the Accident Compensation Act 2001). For the sake of variety, the scheme implemented by these statutes is referred to herein as 'ACC', 'the ACC scheme' and 'the scheme'.

[2]The system is not dispute free, see Acclaim Otago *Understanding the Problem: An Analysis of ACC Appeals Processes to Identify Barriers to Justice for Injured New Zealanders* (Report supported by the New Zealand Law Foundation and University of Otago Legal Issues Centre, 2015) [207] and, by the same authors, see also 'The idea of access to justice: reflections on New Zealand's accident compensation (or personal injury) system' (2016) 33 Windsor YB Access Just 197 at 202.

[3]With limited exceptions such as for injuries suffered during the commission of a serious criminal offence (s 122).

wrongdoers through the civil law.[4] New Zealand still has a law of torts, but tort cases are rarely concerned with personal injuries.[5]

Since the introduction of the scheme, New Zealand has seen eight different governments, which have implemented fundamental reforms of the basic features of the economy and the social welfare system. Although there have been changes to the details in the administration and funding of the scheme, and the scope for cover and the requirements for compensation, the core reform of the ACC scheme has endured: victims of personal injury by accident still receive compensation under the scheme and still cannot sue.

A common explanation for the presence of comprehensive no-fault accident compensation in New Zealand, which Jesse Wall described as the 'abandonment view', goes something like this: the people of New Zealand abandoned the tort system in favour of ACC because they preferred a system that provides compensation to all victims of injury over a system that makes wrongdoers who cause injury make up for the harm that they inflict.[6] Sir Geoffrey Palmer, a prominent proponent of this view, has put it in strong terms: the people of New Zealand place no value on making wrongdoers pay and instead care about the welfare of others.[7]

New Zealand *still* has a comprehensive no-fault scheme, a supporter of the abandonment view might suggest, because that is still the case. There is certainly some truth to the abandonment view. There is no popular support for the resurrection of negligence actions for personal injury.[8] New Zealanders abroad tend to be as puzzled at seeing advertisements for personal injury lawyers, just as visitors to New Zealand are puzzled by their absence.[9] The abandonment view also has the appeal of being a sufficient explanation for the ongoing presence of ACC. It could also perhaps explain the absence of comprehensive no-fault schemes in similar jurisdictions such as the USA or the UK: those societies must not have embraced comprehensive no-fault because New Zealand was (and still is) a highly community-minded socialist society. However, the level of collectivism in New Zealand society has waxed and waned over time. Palmer reflected in 1996 that:[10]

> [T]he political culture of New Zealand may be changing, in the past we have accepted a high level of collectivist solutions to the misfortunes of individuals, and have regarded them as a state responsibility…

[4]A person with an injury covered under the statute receives 'entitlements' as long as they meet the statutory criteria. Entitlements include compensation for lost earnings, lump sum compensation for permanent impairment, treatment, and social and vocational rehabilitation. The bar on proceedings is found in s 317 of the 2001 Act.

[5]Exceptions include proceedings for exemplary damages (see *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149) and cases of psychiatric illness that do not receive cover under the scheme (see *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA) and *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA)).

[6]J Wall 'No-fault compensation and unlocking tort law's "reciprocal normative embrace"' (2016) 27 NZULR 125 at 126.

[7]For the first proposition see G Palmer 'New Zealand's accident compensation scheme: twenty years on' (1994) 44 UTLJ 223 at 247–253. For the latter see G Palmer *Compensation for Incapacity* (Oxford University Press, 1979) p 64. See 'The idea of access to justice', above n 2, at 201.

[8]A return to the right to sue was raised in a report commissioned by the New Zealand Business Roundtable, see C Thomson et al *Accident Compensation: Options for Reform* (New Zealand Business Roundtable, 1998) pp 85–156 and has been suggested by some academics, see R Mahoney 'New Zealand's accident compensation scheme: a reassessment' (1992) 40 American Journal of Comparative Law 159 and R Miller 'The future of New Zealand's accident compensation scheme' (1989) 11 U Hawaii LR 1. Compare P Cane and P Atiyah *Atiyah's Accidents, Compensation and the Law* (Cambridge: Cambridge University Press, 7th edn, 2006) pp 471–472 and the New Zealand Law Commission's response to Miller in (1990) 12 U Hawaii LR 339 at 342.

[9]See DH Fischer *Fairness and Freedom: A History of Two Open Societies New Zealand and the United States* (New York: Oxford University Press, 2012) p 472 and WB Wendel 'Political culture and the rule of law: comparing the United States and New Zealand' (2012) Otago LR 663 at 691–692.

[10]G Palmer 'Commentary' in R Epstein (ed) *Accident Compensation: The Faulty Basis of No-fault and State Provision* (New Zealand Business Roundtable, 1996) p 22, and 'The future of community responsibility' (2004) 35(4) VURLW 905 at 912, and A Clayton 'Some reflections on the Woodhouse and ACC legacy' (2003) 34 VUWLR 449 at 457.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

Thus, we have reason to doubt that the abandonment view can explain why the ACC scheme is still here, even if it could explain the genesis of the scheme. It is worth noting that the abandonment view is not universally accepted as a valid explanation for the introduction of ACC. Wall rejected it because the abandonment view, as it is usually articulated, entails the position that the fault principle underlying tort law is philosophically unsound. This puts him at odds with those such as Palmer, who saw no merit at all in a corrective justice justification for tort actions, making the shift to a no-fault scheme an obvious improvement. Wall's view is that the implementation of ACC, seen as a philosophical shift to viewing personal injuries as 'wrongful' in the sense that the *community* is obliged to provide a remedy, prevents the crystallisation of a corrective-justice based obligation that any individual provide a remedy for the injury in question.[11] Thus, corrective justice is not so much abandoned in favour of something better but never comes into play in the first place given the ACC scheme. Wall argues that something of value is lost (and cannot be regained) in the transition to ACC: the application of the fault principle as a coherent whole and thus the 'normative connection between actions and outcomes'.[12] While Wall was concerned with providing an explanation for the introduction of ACC that does not involve dismissing the value of making citizens responsible for harm-causing departures from an objective standard of behaviour, I am concerned with finding an explanation for why the ACC scheme is still here that fits with New Zealand's political history.

The main argument put forward in this paper is that the core reform of ACC (ie the removal of civil actions for victims of injury and the introduction of a comprehensive no-fault scheme) has persisted because it is compatible with the political philosophies of the left and right wings of politics in New Zealand. This explains why the core reform remains intact despite successive left- and right-wing governments in New Zealand that have implemented other significant policy changes. The scheme has survived not because there is a political consensus about the philosophy of the scheme, but because the core reform is compatible with different political philosophies. Supporting the core reform does not necessarily entail a general preference for collectivist solutions, or a particular degree of concern for the welfare of others. Appreciating that New Zealand still has ACC in spite of a lack of general political consensus about collectivism, not because of it, helps understand the ongoing presence of the scheme and also some of the changes made to the detail of the scheme by different governments.

I develop this argument by articulating two competing normative paradigms of comprehensive no-fault accident compensation: 'community insurance' and 'compulsory insurance'. By itself, the idea that the scheme has persisted because it appeals to different political perspectives may seem trite.[13] Articulating these two competing paradigms in detail advances things further and performs two useful functions. First, it gives a developed account of how the core reform, typically associated with collectivism, is also compatible with a competitive/individualist worldview. Secondly, it explains specific changes in the history of the scheme.

The next part of this introductory section considers the origin of ACC. Then, I provide more detail on the political 'left' and 'right' in New Zealand. Part 2 of the paper sets out 'community insurance' and 'compulsory insurance' in the abstract. Part 3 then demonstrates how the conflict between community insurance and compulsory insurance is evident in several political and legislative developments. Finally, I offer some comments for other jurisdictions considering the introduction of a similar scheme.

(a) A Royal Commission for the problem of injury

ACC was introduced following the recommendations of a Royal Commission of Inquiry established to consider the law relating to compensation for injured workers. The resulting Report,[14] generally

[11]Wall, above n 6, at 125–126.

[12]Ibid, at 142–144.

[13]See, for example, F Lamm et al 'The rhetoric versus the reality: New Zealand's experience rating' (2012) 38(2) New Zealand Journal of Employment Relations 21 at 22–23.

[14]Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand Compensation for personal injury in New Zealand; Report of the Royal Commission of Inquiry (Wellington: 1967), hereafter 'Woodhouse Report'.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

referred to as the 'Woodhouse Report' after its chairman Sir Owen Woodhouse, went further and proposed a revolutionary reform providing no-fault compensation for all victims of injury.[15] We can turn to the text of the Woodhouse Report to provide both a helpful summary, and critique, of the availability of compensation for injured persons in New Zealand in the late 1960s:[16]

> The toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole. They receive this only from the health service. For financial relief they must turn to three entirely different remedies, and frequently they are aided by none.
>
> The negligence action is a form of lottery. In the case of industrial accidents it provides inconsistent solutions for less than one victim in every hundred. The Workers' Compensation Act provides meagre compensation for workers, but only if their injury occurred at their work. The Social Security Act will assist with the pressing needs of those who remain, provided they can meet the means test. All others are left to fend for themselves.

As well as criticising the overall distribution of the burden of accidents, the Woodhouse Report argued that the fault principle at the heart of the negligence action was itself philosophically faulty. This philosophical criticism included that the idea of making transgressors of an objective standard of behaviour make reparation to people injured by that wrongful act was illogical because: (i) failure to meet an objective standard cannot be equated with moral blameworthiness; and (ii) the fault principle can result in the defendant having to pay damages which are disproportionate to the wrongfulness of the conduct which is said to justify them.[17]

The Report proposed both a set of principles to guide, and a detailed proposal for, an alternative scheme. The Woodhouse Report put forward five principles to underpin the new proposed scheme. These principles contain normative statements about how society ought to behave, as well as providing a kind of blueprint for the shape of the scheme.

(i) Community responsibility

The whole community should take responsibility for the burden of accidents. This is the moral imperative underpinning the Royal Commission's proposed scheme. The Woodhouse Report puts forward two arguments for *why* the community, as a whole, should take responsibility of all the injuries suffered through myriad causes. The arguments are at the same time an appeal to self-interest and a statement of moral responsibility.[18] The first is that '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'.[19] The second is that the phenomenon of personal injury by accident can be understood as the statistically inevitable result of activities that the community collectively takes part in and benefits from. Accordingly, the community should take responsibility for the 'random but statistically necessary victims'.[20] As to how the community should fund the cost of sustaining victims of injury, the Report's articulation of the community responsibility principle simply states that

[15]See P McKenzie 'The compensation scheme no one asked for: the origins of ACC in New Zealand' (2003) 34 VUWLR 193.

[16]Woodhouse Report, above n 14, p 1. The Report omitted the Criminal Injuries Compensation Scheme, which provided compensation to injured victims of crime in some circumstances, see McKenzie, above n 15, at 195 and S Connell 'Justice for victims of injury: the influence of New Zealand's accident compensation scheme on the civil and criminal law' (2012) 25 NZULR 181 at 186.

[17]Woodhouse Report, above n 14, pp 49 and 50. See Wall, above n 6, at 130–133 for a sound critique of these arguments.

[18]This is made clear in the summary of the principle of community responsibility in the summary chapter of the report: 'the nation has *not merely a clear duty* but *also a vested interest* in urging forward the physical and economic rehabilitation of every adult citizen whose activities bear upon the general welfare'. Woodhouse Report, above n 14, p 20.

[19]Ibid, p 40.

[20]Ibid, p 40.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

the 'inherent cost of these community purposes should be borne on a basis of equity by the community'.[21]

(ii) Comprehensive entitlement

Victims of injury ought to be treated equally regardless of the cause of injury:[22]

> there can be no justification for providing from community funds for the same class of worker entirely inconsistent awards for precisely similar incapacities merely because fortuitously the causes which gave rise to them have at different stages of our social development been the subject of conflicting responses.

(iii) Complete rehabilitation

Although injury losses must be quantified in money terms, the primary focus of the scheme should be rehabilitation.[23] This principle distinguishes the proposed scheme from a system focused on compensation.

(iv) Real compensation

Compensation ought to be generous and based on real losses, in contrast with the means-tested benefits based on meeting basic needs provided by the social welfare system. This principle distinguishes the proposed social insurance scheme from social welfare. The Report argues that the latter system made sense as a response by a financially-stretched society to the poverty caused by the Great Depression of the 1930s, but that a different approach could and ought to be taken to injury by the more affluent society that New Zealand had grown into by the 1960s.

(v) Administrative efficiency

Although the Woodhouse Report states that the wording of this principle 'speaks of itself in terms which are clear enough',[24] I cannot agree. It is self-evident that any provider of insurance or social welfare, whether public or private sector, should strive to be administratively efficient and avoid wasteful spending.[25] But, there is more to the Woodhouse principle of administrative efficiency than that. If the principle of community responsibility can be seen as a statement of profound *moral* insight, the principle of administrative efficiency is a statement of profound *practical* insight: a no-fault scheme is a *more efficient allocation of resources*.[26] The Royal Commission's investigation into the negligence action found that around 40% of the money in the negligence system comprised administrative and legal charges, even though there was no indication of overcharging.[27] Simply put, the money in the negligence system could be put to better use by implementing a scheme where 'the collection of

[21]Ibid, p 40.

[22]Ibid, p 40. The Report makes the exception that 'the elderly and the young … cannot reasonably expect to be provided with a form of social insurance on the same level'. This means, for example, that non-earners cannot necessarily expect to receive compensation for lost earnings in the same way that earners would.

[23]Ibid, p 40. There is room to argue over whether the primary focus on rehabilitation actually carried through to the Report's specific recommendations.

[24]Ibid, p 41.

[25]For an example of how focusing on the words 'administrative efficiency' without appreciating the context can lead to a misunderstanding of the principle, see R Kerr 'ACC monopoly: an idea whose time has passed' *The Dominion Post* (New Zealand, 2 November 2009), available at the New Zealand Initiative research archive at https://nzinitiative.org.nz/insights/opinion/acc-monopoly-an-idea-whose-time-has-passed/: 'Administrative efficiency? Any insurer can hold down administrative costs if they don't properly investigate and monitor claims'.

[26]See B Easton 'The historical context of the Woodhouse Commission' (2003) 34 VUWLR 207 at 211 and 'The idea of access to justice', above n 2, at 226.

[27]Woodhouse Report, above n 14, p 59.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

funds and their distribution as benefits should be handled speedily, consistently, economically and *without contention*'.[28]

(b) The political 'left' and 'right' in New Zealand

The purpose of this introductory section is to provide the reader with the political context that is the backdrop to the history of the ACC scheme in New Zealand. First, I clarify my usage of 'left-wing' and 'right-wing'. Secondly, I provide a brief political history of New Zealand for the purposes of the present discussion.

(i) 'Left-wing' and 'right-wing' in New Zealand

In this paper, 'left-wing' and 'right-wing' are used in accordance with their present-day colloquial New Zealand meanings.[29] Broadly speaking:

- the left is typically associated with protecting the interests of workers and the less well-off, while the right is typically associated with promoting the interests of businesses and employers;
- the left is associated with collectivist and government solutions to problems, while the right tends to support market-driven and privately-provided solutions;
- the left tends to support progressive taxation and redistributive government spending, while the right does the opposite;
- the left tends to emphasise the community's responsibility to its members, while the right tends to emphasise the responsibility of individuals to look out for themselves. On the right, along with that responsibility to look after oneself economically goes a stronger conception of individual freedom from the government interfering in one's economic affairs.

This broad division arises in different countries,[30] but what might be considered the 'centre' between left and right varies. In New Zealand, the Labour Party is generally considered the main left-wing political party, and the National Party the main right-wing party.

(ii) A brief political history of New Zealand

Until the mid-1980s, New Zealand had a long period of broad political consensus over social and economic policy. New Zealand's first Labour government (1935–1949) established a welfare state and took a Keynesian approach to economics, with the state playing a highly active role in the economy. A stable two-party system emerged, with Labour on the left and National on the right.[31]

The consensus on economic policy came to an end following the election of the fourth Labour government in 1984. The global recession in the mid-1970s, leading to high unemployment and inflation alongside low growth, had put pressure on the government coffers.[32] The fourth Labour government's response to this position was to abandon Keynesian economics in favour of a series of neoliberal economic reforms to transform New Zealand into a free-market economy.

The fourth National government (1990–1999) continued to implement neoliberal economic policies.[33] It also departed from the prior consensus on the welfare state, implementing dramatic reforms to the social welfare system, including reducing benefits and requiring beneficiaries to seek work.[34]

[28]Ibid, p 41. Emphasis added.

[29]See M Littlewood 'The history of death duties and gift duty in New Zealand' [2012] NZJTLP 66 at 67 for a similar approach to defining left and right in New Zealand in a different context.

[30]See JC Reitz 'Political economy as a major architectural principle of public law' (2001) 75 Tul L Rev 1121 at 1123–1124.

[31]N Atkinson 'New Zealand politics 1935 to 1984' in J Hayward (ed) *New Zealand Government and Politics* (Melbourne: Oxford University Press, 6th edn, 2015) pp 15–24.

[32]B Roper 'New Zealand politics post-1984' in Hayward, above n 31, p 28.

[33]JH Nagel 'Social choice in a pluralitarian democracy: the politics of market liberalization in New Zealand' (1998) 28 British Journal of Political Science 223.

[34]See M Baker 'Family welfare – family policy, 1980–1999' (Te Ara – the Encyclopedia of New Zealand), available at https://www.TeAra.govt.nz/en/family-welfare/page-6 accessed 24 April 2019.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

Although the pace of neoliberal reform slowed from 1993, the fifth Labour government (1998–2008) 'softened but further entrenched' the neoliberal policies of the fourth Labour and fourth National governments.[35] The fifth Labour government's approach was characterised as a 'third way' approach, blending market solutions with a concern for social equality,[36] and marked a retreat from the radical free-market approach of the fourth Labour government.

The fifth Labour government's policies included the Working for Families programme, which significantly increased the level of social welfare assistance for low-income working families.[37] The fifth Labour government was followed by the fifth National government (2008–2017), which responded to the global financial crisis by continuing the neoliberal programme, although Working for Families was retained.[38]

New Zealand's present government is the sixth Labour government, elected in November 2017. One of the new government's first moves was to expand the Working for Families programme.[39] We are yet to see whether the sixth Labour government will be one that, on the whole, softens but maintains neoliberal policies, or marks a more dramatic departure from previous administrations.

1. Community insurance and compulsory insurance in the abstract

Despite these significant changes to social and economic policy, the core reform of the ACC scheme – dealing with accidents through a government-run scheme rather than civil proceedings – has endured. The scheme has been maintained by both Labour and National governments.[40] However, the left and right support the same core reform for different reasons, in alignment with their different political philosophies. Understanding this helps us explain why successive governments have made quite significant changes to the detail of the scheme while leaving the core reform intact.

Broadly speaking, the core reform appeals to the left because the moral imperative of community responsibility is consistent with left-wing thinking, while the core reform can be justified to right-wing thinkers in terms of self-interest and economic efficiency. This can be understood in terms of two competing conceptions of the scheme, which I will call 'community insurance' and 'compulsory insurance'. Each offers a rationale for why the core reform is desirable. These two conceptions sit at opposite ends of a spectrum – we can think of the history of legislative changes in terms of a kind of tug-of-war where successive governments move the detail of the scheme up and down that spectrum. Neither pure community insurance nor pure compulsory insurance have been realised; the various statutory implementations of the scheme sit somewhere between the two.

Of course, the actual state of New Zealand politics is more complex than a homogenous group of 'left' politicians and an equally uniform group of 'right' politicians that have consistently adhered to one conception of the scheme or the other. And, there is more to the various changes to the detail of the scheme than a movement on a simple spectrum. However, the point here is to do better than the idea that ACC was introduced as a result of, and persists because of, an ongoing bi-partisan embrace of community responsibility.

This section will elaborate on the 'community insurance' and 'compulsory insurance' conceptions of ACC, explain how they align with left- and right-wing thinking, and how they might be

[35]Roper, above n 32, pp 25 and 32–33.

[36]See G Piercy et al 'Investigating commentary on the fifth labour-led government's third way approach' (2017) 32(1) NZ Sociology 51.

[37]See M Baker and R Du Plessis 'Family welfare – family welfare in the 21st century' (Te Ara – the Encyclopedia of New Zealand), available at https://www.TeAra.govt.nz/en/family-welfare/page-7, accessed 24 April 2019.

[38]Roper, above n 32, p 25.

[39]See Baker and Du Plessis, above n 37.

[40]It is not the case where one party started supporting the scheme with the other opposing it, and at some point they switched sides – compare to the situation with tort in the USA described in SD Sugarman 'Ideological flip-flop: American liberals are now the primary supporters of tort law' in *Essays on Tort, Insurance, Law and Society in Honour of Bill W Dufwa* (Vol 2, Jure Förl, 2006) p 1105.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

implemented in terms of the scope and funding of a scheme. When I discuss the efficiency of the scheme in this section, and in the following section where I set out the two conceptions as manifested in the legislative history of the scheme, I do so for the purposes of exposition of the two competing paradigms. That is, I am not myself making claims about the efficiency of the scheme as part of my argument about the two competing paradigms, but rather I am claiming that the 'community insurance' and 'compulsory insurance' mindsets involve empirical positions about the efficiency of the scheme. One can similarly observe that a particular political position entails views about the efficiency of free markets, for example, without necessarily adopting those views.

(a) Community insurance

The community insurance conception of ACC stems from a wholehearted acceptance of the principle of community responsibility: what ACC is about is that the community has recognised that we ought to care for those members of our community who are injured. The 'community' part of the label speaks for itself. The 'insurance' part of the label captures the idea that ACC is a social *insurance* scheme, aimed at providing real compensation that reflects actual losses, as opposed to a social *assistance* scheme like the social welfare system.[41] This community insurance conception of ACC is consistent with the tendency of the left to focus on protecting those in society who are worse off, and to do so through collectivist government solutions.

A community insurance approach would suggest an inclusive approach towards cover. As the Royal Commission looked beyond its original brief of 'injuries to earners' to *all* injuries, fully embracing community responsibility would arguably mean providing cover looking beyond injury to illness. As the Woodhouse Report put it:[42]

> It may be asked how incapacity arising from sickness and disease can be left aside. In logic there is no answer. A man overcome by ill health is no more able to work and no less afflicted than his neighbour hit by a car.

That is an appeal to the first prong of the argument for community responsibility (as a result of benefiting from those who do work, the community should take responsibility for those who cannot). The second prong (that the community should take responsibility for injuries suffered during collective activities) could certainly be extended to illnesses that are contracted as a result of human contact.[43] It could even be extended to genetically inherited conditions, especially if the ongoing propagation of the human species is itself considered a sort of collective activity.[44] The degree to which one is persuaded by these arguments will depend on one's tendency to take a collectivist as opposed to an individualist approach to things.

With respect to funding, the Woodhouse Report's statement of the principle of community responsibility simply states that the costs of the scheme should be borne on a basis of equity by the community. This requires an account of how to equitably distribute the cost of the scheme across the community. The community insurance conception of ACC fills that void by considering the capacity of different parts of society to contribute to the finances of the scheme, as well as the extent to which

[41]Woodhouse Report, above n 14, p 107.

[42]Woodhouse Report, above n 14, p 17. The justification for excluding illness was pragmatic: the issue of injury was seen as a more urgent need. The Report suggested that 'the proposals now put forward for injury leave the way entirely open for sickness to follow whenever the relevant decision is taken'. For further discussion see JT Chapman *Review by Officials Committee of the Accident Compensation Scheme* (Wellington: 1986) and New Zealand Law Commission *Report on the Accident Compensation Scheme, Personal Injury: Prevention and Recovery* (Wellington: NZLC R4, 1988).

[43]The case is perhaps even stronger for illness *caused* by human activities: see M Hook 'New Zealand's accident compensation scheme and man-made disease' (2008) 39(2) VUWLR 289 at 293–294 and 299–301.

[44]See K Oliphant 'Beyond Woodhouse: devising new principles for determining ACC boundary issues' (2004) 35 VUWLR 915 at 926–935 for a discussion of ways of extending the scope of ACC without fully embracing community responsibility.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

different parts of society contribute to the risks of injury,[45] in light of the overall picture of injuries arising out of the complex mix of collective activities performed by an industrialised modern society. The Woodhouse Report's plan for funding the scheme reflected this approach in recommending a flat 1% levy on all wages and salaries, to be paid by employers and the self-employed rather than different levy rates for different industries or individual employers. To do so, the Report suggested, would be artificial and fail to recognise that: '[j]ust as the steam power station relies upon the work of the coal miner so do all industries depend directly upon one another'.[46]

(b) Compulsory insurance

The compulsory insurance conception of ACC stems from rejecting the Woodhouse Report's moral exhortations about community duty while accepting the finding that a no-fault system is a better use of economic resources: the ACC scheme is best understood as a kind of compulsory insurance scheme. It is compulsory for individuals, who are insured against the risk of suffering injury, and for employers, who are insured against the risk of causing injury. Viewing ACC as a kind of compulsory insurance scheme is consistent with right-wing political thinking, which tends to focus on economic efficiency, and individual responsibility rather than community responsibility. The 'compulsory' part of the label reflects the fact that the scheme is not optional. The idea of the scheme as 'insurance' is much more closely aligned with private insurance arrangements than the community responsibility idea of social insurance.

The core reform can be justified on economic grounds as a more economically efficient allocation of resources across society and also as economically preferable for individuals and employers. This is important for explaining the core reform's appeal to the right, because of its traditional emphasis on individualism and towards employer- and business-friendly policies. While the argument for community insurance can be seen as primarily an argument about moral duty, the argument for compulsory insurance is primarily an appeal to self-interest. With respect to the individual, the main argument is that one is better off having no-fault insurance for injury rather than leaving things up to the lottery of a fault-based system. In addition, one avoids the rare but potentially expensive possibility of liability for causing injury to someone else, and benefits from living in a society which, as a whole, functions more smoothly through the implementation of a no-fault scheme. In addition, because the scheme is focused on rehabilitation and provides real compensation, workers return to work more quickly, and a system of paying levies is more predictable than the lottery of a fault-based system.[47] The overall economic benefits to the nation can be said to outweigh the individual loss of autonomy that results from imposing a compulsory insurance that individual people or employers might not actually choose for themselves. The underlying principle basis for compulsory insurance can be put thus: the ACC scheme is good for the economy, and what is good for the economy is good for the community, so compulsion is justified.

The compulsory insurance conception of ACC is not simply that everyone should get accident insurance.[48] Rather, it is that everyone should get the specific form of accident insurance found in the ACC scheme which includes, to some extent, the implementation of the principles of real compensation and complete rehabilitation. Implementing those principles is necessary for the economic benefits of the scheme to actually accrue. For an individual, they are part of the package that makes giving

[45]For example, the Woodhouse Report states that drivers of motor vehicles should provide some additional contribution to the funding of the scheme: Woodhouse Report, above n 14, p 174.

[46]Ibid, p 135.

[47]The latter benefit can also be achieved to some extent by allowing employers to insurance against liability in a fault-based system.

[48]This distinguishes the 'compulsory insurance' conception of ACC from systems that require, or strongly encourage, insurance with less generous benefits, for example the scheme implemented by The Patient Protection and Affordable Care Act (USA). See B Obama 'United States health care reform/progress to date and next steps' (2 August 2016) 316(5) JAMA 525 for a discussion of that scheme.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

up the negligence action acceptable. For an employer, a system without those features will not have the appeal of the ACC scheme – workers will not return to work as quickly, and real compensation is required for workers to be prepared to give up the right to sue.

Although the compulsory insurance conception of ACC is closer to thinking of ACC as like a private insurance scheme than the community insurance conception, it is important to note that it does not entail a position on whether the scheme should be administered by private insurers, by a government entity, or by private insurers in competition with a government entity. How the scheme is administered should turn on what is more economically efficient, and different views exist on that question.

Because it does not accept community responsibility, the compulsory insurance conception of ACC can explain why the ACC scheme does not extend to illness: it does not necessarily follow from the fact that it is more economically efficient for everyone to have ACC *accident* insurance that it is more economically efficient for everyone to have *illness* cover providing the same entitlements as the ACC scheme. As the authors of *Accidents, Compensation and the Law* observe, illness is a more common source of physical incapacity compared to accident,[49] and a scheme that treated illness as ACC does injury would be vastly more expensive. Whether or not that expense can be justified by appealing to economics and self-interest is unclear. Furthermore, the idea of an accident is generally something that happens part way through one's life, resulting in disability where there was none before.[50] This is a good fit for thinking about the scheme as insurance: one pays for insurance before the risk materialises. The same general statement cannot be said about illness conditions, which can be present, and manifest as disability, from (and indeed before) birth.[51] That said, it is possible that extending the ACC scheme to include illness would be economically efficient. From a compulsory insurance mindset, however, the numbers would have to be crunched to justify that conclusion. Instead, it may be that compulsory illness insurance would be more economically efficient than the status quo, but only if compensation is paid at a level lower than that available under the ACC scheme. That would suggest a different compulsory insurance scheme for illness, rather than bringing it into the ACC scheme.

The compulsory insurance conception of ACC leads to a quite different model of funding compared to community insurance. Insurance involves the transfer of risk from one party to another.[52] The cost of insurance typically reflects two aspects of risk: the chance of the risk occurring, and the value of an insured-against event occurring (ie the cost to the insurer of a claim). If ACC is a system of compulsory insurance, then the funding of the scheme should reflect that. The levies that individuals pay should reflect their risk of injury, and the entitlements that would be received if injury occurs. The levies that employers pay should reflect the risk that the particular employer has of causing injury.

One objection to the preceding claim that 'compulsory insurance' paradigm of no-fault accident compensation can be associated with right-wing thinking is this: that ACC is compulsory makes it a poor fit with right-wing thinking, at least in terms of how right-wing thinking is normally understood in other jurisdictions. I have three responses to that objection. The first is to accept that the right, in New Zealand as elsewhere, does tend to favour individual choice and oppose compulsion. However, the right also tends to favour measures that benefit the economy and protect employers. The ACC scheme can be seen as benefiting the economy and protecting employers, which arguably makes it worthwhile overall, despite interfering with individual freedom.

The second response is that I also accept that a compulsory insurance scheme might be a difficult sell to the right elsewhere, but doing so does not undermine the central thesis of this paper that the notions of 'community insurance' and 'compulsory insurance' help explain the persistence and history of changes to the ACC scheme in New Zealand.

[49]Cane and Atiyah, above n 8, p 473.

[50]Although there are some cases where a person can have ACC cover from birth due to an injury to the mother, see *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA).

[51]See Oliphant, above n 44, at 935.

[52]Risk is a different concept from fault. See Wall, above n 6, at 142–143.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

The third response to the concern that the compulsory nature of ACC is a poor match for right-wing thinking is that path-dependency may have a role in the New Zealand right's ongoing acceptance of ACC despite the scheme being compulsory. Originating from economics and the social sciences, path-dependency is the idea that 'once a path is chosen, this choice itself affects possible future action to the point of locking in earlier paths even when this becomes comparatively inefficient'.[53] In the ACC context, arguably the sheer enormity of the task of removing ACC and re-introducing an alternative, perhaps involving compensation based on fault, locks the right out of doing so, even though the scheme is an infringement on individual liberty. With the option of removing ACC off the table, the right has instead effectively sought to implement a right-wing version of ACC by changing the operation and funding of the scheme, as we will see in the following section.

2. Community insurance and compulsory insurance manifested

(a) Conflict over comprehensiveness in the early days of the scheme

The first accident compensation statute, the Accident Compensation Act 1972, was passed unanimously. However, a closer look at the events surrounding the introduction of the scheme shows that a difference of view over why a no-fault scheme is desirable is evident from an early stage.

The Woodhouse Report was published when the National party was in power. The government's response to the Report has a number of features which are consistent with the compulsory insurance conception of ACC. The government took a cautious approach to the Royal Commission's recommendations, including commissioning officials to prepare a commentary on the Report. The officials' commentary on the principle of community responsibility stated that the moral force of that principle depended on one's political philosophy but that a scheme like the one recommended in the Woodhouse Report could be introduced on economic grounds.[54] The scheme enacted in the original Accident Compensation Act 1972 was not the kind of comprehensive scheme that follows from taking community responsibility as a premise.[55] Instead, the Act provided for two schemes, which replaced existing measures for certain types of injury:

- an earners' scheme for injuries to earners suffered in and outside of work, funded by risk-based levies on employers;[56] and
- a road accident scheme for motor vehicle injuries, funded by levies on motor vehicle owners.

The risk-based employer levy is more consistent with a compulsory insurance approach, compared to the Woodhouse Report's recommendation of a flat levy.

The original 1972 Act was passed unanimously. The then Labour opposition's support of the Act should be understood as being because they considered the Act an improvement on the status quo. The Labour party had been much more supportive of the Woodhouse Report than National,[57] so it should not have been particularly surprising when, after winning power in 1972, the third Labour government amended the 1972 Act to make the scheme comprehensive. This was achieved by adding a 'supplementary' scheme to cover all injuries not addressed by the other two schemes, funded by general taxation. Two aspects of the supplementary scheme reflect a community insurance approach. First, the extension of the scheme to non-earners, despite the cost, can be understood in terms of accepting the moral imperative of community responsibility. Secondly, funding the supplementary

[53]FG Sourgens 'The virtue of path dependence in the law' (2016) Santa Clara Law Review 306. See further O Hathaway 'Path dependence in the law: the course and pattern of legal change in a common law system' (2001) 86 Iowa LR 601.

[54]Department of Labour *A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (Wellington, 1969) p 45.

[55]One major concern was cost, see GF Gair 'Report of select committee on compensation for personal injury in New Zealand' I AJHR [1970] I15 at 21–22. See Cane and Atiyah, above n 8, p 446.

[56]Including the self-employed.

[57]See Palmer (1979), above n 7, p 21.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

scheme through general taxation spreads the cost of accidents to non-earners widely across the community.

The scheme almost took a turn even further towards comprehensiveness in the early 1990s. A series of reports produced in the late 1980s highlighted the issue of the exclusion of illness: a review of the scheme by officials from various government departments,[58] the Royal Commission on Social Policy,[59] and a Law Commission Report on the scheme.[60] The government of the day, the fourth Labour government, looked into extending the ACC scheme to illness while reducing its cost by lowering the compensation available.

Two of the objections that arose to that extension are noteworthy for present purposes. The Social Welfare department and its Minister noted that extending ACC to illness would create a disparity between people incapacitated through illness and injury (who received more) and beneficiaries not working for other reasons (such as unemployment, age, or parenting responsibilities).[61] If the distinction between illness and injury is unjustified, why maintain an equally unjustifiable two classes of beneficiary?

A different view on extending the scheme to illness was put forward by trade unions, which objected to the reduction of entitlements considered necessary for the extension of the scheme. Palmer explains this as the trade unions being 'determined to protect their members' interests, and the unions do not include non-earners'.[62] We could also see it in terms of trying to hold the state to the ACC social contract: having given up the right to sue, workers deserve a system that provides compensation close to that available under tort – reducing entitlements under ACC to include illness while continuing to bar the right to sue is a breach of the social contract because it takes away without giving back. Despite these objections, the Labour government introduced a Bill to implement the proposed extension of ACC.[63] However, the National party won power before the Bill was passed and did not take it further.

(b) Conflict over funding: fully-funded versus pay-as-you-go

One of the ongoing debates about the scheme, which links to the community insurance/compulsory insurance debate, is whether the funding model should be pay-as-you-go or fully-funded.

Pay-as-you-go funding is relatively straightforward: each year, the scheme collects enough money to pay for the scheme's expected outgoings that year. Collecting a modest reserve is not incompatible with pay-as-you-go funding, but is not a necessary part of it. Pay-as-you-go is generally the funding model used for social welfare or health systems.

Under the fully-funded model, each year, the scheme must collect enough money to pay for the lifetime cost of injuries suffered in that year. That is, all the money that is expected to ever be spent on injuries suffered in that year, estimated using actuarial calculations, is collected and set aside. The full-funding model is closer to that of private insurance schemes.[64]

Each funding model spreads the cost of accidents across different groups of levy payers. To illustrate this, suppose Jane breaks her shoulder at work, which needs treatment. Five years later, she needs surgery. She has cover for her fracture and is entitled to have the contemporaneous treatment and the

[58]Chapman, above n 42.

[59]Royal Commission on Social Policy *Report of the Royal Commission on Social Policy* (Wellington: 1988).

[60]New Zealand Law Commission, above n 42. The government essentially invited the recommendation of the extension of the scheme to illness by asking the Law Commission (then chaired by Sir Owen Woodhouse) to comment on whether the current scheme was operating in accordance with the principles laid down in the Woodhouse Report, see terms of reference at viii.

[61]See Palmer (1994), above n 7, at 235.

[62]Ibid, at 235.

[63]Rehabilitation and Incapacity Bill 1990.

[64]M Littlewood 'Why does the accident compensation corporation have a fund?' in *Pension Commentary* (University of Auckland Business School 2009) p 3.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

later surgery provided as entitlements under the ACC scheme. Under fully-funded, the funding for both the immediate treatment and the subsequent surgery will be paid for with money collected in the year she was injured, from employers paying levies in that year, which includes Jane's employer. Under pay-as-you-go, the funding for her immediate treatment also comes from the money collected that year, which comes from employers paying levies in that year. However, the later surgery is funded by employers who happened to be paying levies five years later, which (for argument's sake) does not include Jane's employer, which has since gone out of business.

That outcome is objectionable from a compulsory insurance point of view: it is unfair that the employers who happen to be operating five years after Jane's injury must bear the cost of her surgery. They did not contribute to the risk of Jane's injury and did not directly benefit from her historical employment. Pay-as-you-go could also be said to be unfair from an intergenerational equity point of view, on the basis that it is unfair to leave ongoing or subsequent injury costs to later levy-payers.[65] Pay-as-you-go could also be seen to be imprudent in light of an ageing population, where the proportion of earners in the population, who are funding the scheme, will be lower while at the same time ongoing entitlement costs are rising because people are living longer.

If we instead take a community insurance point of view, the objections to the fairness of pay-as-you-go melt away: it *is* fair for the community to absorb the costs of people who were injured in the past, because that is precisely what the community ought to be doing.[66] Furthermore, it can be argued that there is no need for a government-run scheme to set aside a substantial reserve for future expenditure because governments 'can always fund their social commitments from higher levies or taxes'.[67] It is also arguable that full-funding is not only not necessary but not possible 'given the very long-term and unpredictable nature of some of the compensation and other benefits involved'.[68]

The ACC scheme started out fully-funded, but was shifted to pay-as-you-go by the third National government in the 1982 Act. The reason for this shift was for an immediate political payoff: it decreased levies (although that effect was short-lived).[69] The fourth National government initially rejected a return to fully-funding because it would be prohibitively expensive,[70] but later brought it back in the late 1990s, as a necessary step for privatising the scheme.

The scheme has remained full-funded ever since. The fifth Labour government, in power for nine years, did not return the scheme to pay-as-you-go, despite making other changes to the scheme including reversing privatisation. As Susan St John has remarked,[71] this is somewhat surprising, given Labour's general community insurance approach. St John offers several possible explanations, including a desire to prevent a repeat of the 1980s experience of pay-as-you-go and that the 'fiscal conservatism' of that Labour government led them to consider that full-funding could be justified on its own merits rather than as a means to the end of privatisation.[72]

[65]See Accident Compensation Corporation *Statement of Intent 2015–2019* (Accident Compensation Corporation, 2015) p 19.

[66]See Clayton, above n 10, at 461: 'Pure pay-as-you go funding is philosophically more appropriate for a comprehensive, state fund scheme as the ACC'.

[67]S St John 'ACC the lessons from history' (2010) 6(1) Policy Quarterly 23 at 24; see further Littlewood, above n 64, p 18.

[68]S St John 'Accident compensation in New Zealand: a fairer scheme?' in J Boston et al *Redesigning the Welfare State in New Zealand: Problems, Policies and Prospects* (Oxford University Press, 1999) p 158. See also Clayton, above n 10, at 460 for the argument that actuarial calculation is 'eductively alluring in theory, it is largely chimerical in practice … almost as pointless as the debate in mediaeval scholasticism as to the number of angels that can dance on the head of a pin'.

[69]See D Rennie 'Administering accident compensation in the 1980s' (2003) 19 VUWLR 329 at 348.

[70]Hon WF Birch *Accident Compensation: A Fairer Scheme* (Wellington, 1991) p 28. Shifting from pay-as-you-go to fully-funded means that, as well as collecting levies for the future cost of accidents suffered in a particular year, the scheme would also need to build up a fund for the future cost of injuries suffered during the pay-as-you go period. This was done when full-funding was brought back in in 1998, and it took until 2015 to build up the funds for the future costs of the pay-as-you-go period. See N Kaye 'ACC reaches milestone as residual levies removed' (Press Release, New Zealand Government, 22 September 2015).

[71]St John, above n 67, at 27.

[72]St John, above n 67, at 28.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

In 2012, it seemed that the previous bi-partisan consensus about full-funding could be coming to an end. Andrew Little, then Labour ACC spokesman, stated in a speech that the argument for full-funding:[73]

> [S]ays that tomorrow's community is somehow disconnected from, or unrelated to, the community today [and is] totally contradictory to the notion of community responsibility articulated in the original Woodhouse Report.

Little stated that the Labour government should review the funding of the scheme, as well as the exclusion of illness – moves which would be consistent with a shift to community insurance. In a radio interview in 2015, Little, who at the time was Labour party leader, again indicated that Labour would investigate returning to pay-as-you-go funding.[74]

In 2014, Labour placed all its policies under review. In 2017, when the Labour Party's Manifesto was released in the lead up to the election, the ACC Policy mentioned improving the levy system, including removing the risk rating model for vehicles. However, no mention was made of a return to pay-as-you-go or an expansion of cover to include illness.[75] The policy of the New Zealand Green Party, which is supporting the current Labour-led government, is to return ACC to pay-as-you-go funding.[76]

(c) The insurance era of ACC

Following their election in 1990, the National government shelved the various reports recommending extending the scheme to illness. A new series of reports was prepared, which advocated for a move towards a compulsory insurance version of ACC.[77] These reports supported the core reform on the basis that no-fault was a more economically efficient form of compensation than tort,[78] but raised concerns about the present state of the scheme. It was suggested that scheme had eroded personal responsibility,[79] was inequitably funded,[80] and that judicial decisions had expanded the scope of the scheme beyond what Parliament originally intended, leading to cost increases.[81] This led to the Accident Rehabilitation, Compensation and Insurance Act 1992. As a number of commentators have observed, the 1992 Act brought the scheme much closer to a private insurance scheme.[82] The 1992 Act introduced a whole series of changes to the scheme that are consistent with a shift towards a compulsory insurance version of ACC, starting with the presence of the word 'insurance' in the statute itself.

[73]V Small 'Little: change ACC illness "injustice"' *Stuff* (New Zealand, 5 November 2012), available at www.stuff.co.nz/national/politics/7907461/Little-Change-ACC-illness-injustice, accessed 24 April 2019.

[74]See Morning Report 'Labour leader says fully funded ACC is not needed' (*Radio New Zealand*, 12 May 2015), available at https://www.radionz.co.nz/national/programmes/morningreport/audio/201753959/labour-leader-says-fully-funded-acc-is-not-needed, accessed 24 April 2019.

[75]New Zealand Labour Party *Manifesto 2017: Accident Compensation* (New Zealand Labour Party, 2017).

[76]New Zealand Green Party *Accident Compensation Policy*, available at https://www.greens.org.nz/page/accident-compensation-policy, accessed 24 April 2019.

[77]Ministerial Working Party on the Accident Compensation Corporation and Incapacity *Report* (1991) 51 and *First Supplementary Report* (1991), Birch, above n 70.

[78]See *Report*, ibid, at [14] and Birch, above n 70, p 16.

[79]See *Report*, above n 77, at [16].

[80]Birch, above n 70, pp 10–15.

[81]Birch, above n 70, p 8.

[82]See, for example, St John, above n 68, pp 162–163, Mahoney, above n 8, at 210 and R Miller 'An analysis and critique of the 1992 changes to New Zealand's accident compensation scheme' (1992) 5(1) Canterbury Law Rev 1 at 1–2.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

The scheme was separated into different 'accounts', each of which had a different revenue stream:

Account	Funds entitlements for	Funded by
Work Account	Work accidents	Levies on employers
Motor Vehicle Injury	Motor vehicle accidents	Vehicle registrations and petrol levies
Earners' Account	Earners who are injured in other accidents (ie non-work non-motor vehicle accidents)	A levy on earnings
Non-Earners' Account	Non-earners who are injured in non-motor vehicle accidents	General taxation

Prior to the 1992 Act, levies on employers funded both work and non-work accidents for employers. After the 1992 Act, employers were only required to fund the work account, so employees essentially had to take on the responsibility for insuring themselves for accidents outside work. This was achieved by placing a levy on earnings, which was collected by the Inland Revenue Department. For the funding of the Work Account, the 1992 Act retained levies for employers based on risk at industry level, and re-introduced 'experience rating' adjustments for the accident record of individual employers.[83] This is all consistent with a compulsory insurance vision for ACC: employers pay levies based on their contribution to risk, and higher earners pay more into the Earners' Account because they stand to receive greater weekly compensation if injured. The funding of the Motor Vehicle Account also reflects risk, since the petrol levy component means people who drive more frequently contribute more. The Non-Earners' Account is the least like compulsory insurance, since it is funded through general taxation. The overall picture of the 1992 Act has been described as 'an overarching anti-collectivist theme … an exodus from the principle of community or collective responsibility'.[84]

The 1992 Act also marked a shift in legislative drafting philosophy.[85] In contrast to the 1972 Act, the 1992 Act took a prescriptive approach to cover and entitlements. For example, while the 1972 Act provided cover for 'personal injury by accident' but gave no exhaustive definition, the 1992 Act provided cover for 'personal injury caused by an accident' and gave exhaustive definitions for both 'personal injury' and 'accident'.[86] The definition of 'accident' is broken down into a series of different types of accident, for example 'The inhalation or oral ingestion of any solid, liquid, gas, or foreign object where the inhalation or ingestion occurs on a specific occasion'.[87] Where the 1972 Act took a relatively discretionary approach to the determination of entitlements, for example weekly compensation, the 1992 Act took a prescriptive approach, setting out formulae for calculation. Thus, the 1992 Act resembles an insurance policy far more than its predecessors.

The apex of the insurance era of ACC was the Accident Insurance Act 1998, passed by the then National government. The 1998 Act introduced competitive provision of the Work Account. That is, private insurers were able to collect levies and provide entitlements. The theory was that private insurers would be able to operate more efficiently than a government provider, even though they were still

[83]Section 73 of the original 1972 Act provided a form of experience rating in that levies could be increased by up to 100% or decreased by up to 50% for employers whose accident record was 'significantly' worse or better the norm for their class. The strict 'significantly' requirement proved unworkable and s 73 was later amended to give ACC a broad discretion to adjust levies based on employers' 'accident experience': see S St John 'Safety incentives in the New Zealand accident compensation scheme' (1981) 15(1) New Zealand Economic Papers 111 at 115. St John's paper also provides a critique, at 123–125, of this use of employer accident records. ACC did make some cautious and exploratory use of the revised power in the early 1980s, but the practice was abandoned a few years later with no reason given, see Lamm et al, above n 13, at 28 and I Campbell *Compensation for Personal Injury in New Zealand: Its Rise and Fall* (Auckland University Press, 1996) pp 205–208.

[84]See Miller, above n 82, at 14–15.

[85]'The idea of access to justice', above n 2, at 202.

[86]1992 Act, ss 8, 3 and 4 (2001 Act, ss 20, 25 and 26).

[87]1992 Act, s 3, definition of accident (b).

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

required to provide the same package of statutory entitlements. To facilitate private provision of ACC, the scheme was returned to full-funding. The language of the statute took things even further down the insurance path. As well as stripping any mention of rehabilitation or compensation from the name of the statute, references to 'persons' or 'claimants' in the 1992 Act were changed to 'insureds' in the 1998 Act.

(d) The end of the insurance era and beyond

Competitive provision of ACC did not last long. It commenced in July 1999, but Labour returned to power in 1999 and quickly moved to re-nationalise accident compensation.[88] After removing competitive provision, Labour made further changes to the scheme by passing the Injury Prevention, Rehabilitation and Compensation Act 2001. The 2001 Act ditched the 'insurance' language of the insurance era statutes. It did, however, retain a number of features of the insurance era version of the ACC scheme. The 2001 Act retained the prescriptive style of drafting, and did not return the comprehensiveness of the scheme to its pre-1992 Act state (although some incremental expansions of cover have later been made).[89] Furthermore, the 2001 Act retained full-funding, although experience rating for individual employers was removed as part of the Work Account funding model.

The fifth National government came into power in 2008, and made no seismic changes to the ACC scheme. That said, several minor changes have been made to the funding side of the scheme which are consistent with a compulsory insurance conception of the scheme. National reintroduced experience rating for individual employers, which seems to have been something of a political game of ping-pong: experience rating was not part of the funding of the original scheme, was introduced by National in 1992, removed by Labour in 2001 and re-introduced by National in 2011. In 2015, National introduced changes to vehicle registrations so that owners of safer vehicles[90] do not have to contribute as much to the Motor Vehicle Account. This makes sense from a compulsory insurance viewpoint: people with safer vehicles are at less risk of serious injury, and should not have to pay as much. However, the change does not make sense from a community insurance viewpoint. Indeed, people who own safer vehicles tend to be better off than those with older and less safe ones, and perhaps should be shouldering more of the burden of the cost of the scheme, rather than less.

One final issue that has arisen in the post-insurance era of ACC which helpfully draws out the community insurance/compulsory insurance distinction is that of weekly compensation for potential earners. Consider the following scenario: Joe is in his final year at University. He has not worked in his time as a student. Joe breaks his shoulder in an accident playing casual cricket. After graduating, Joe lands a high-paying job. Two years into his new job, he experiences further problems with his shoulder. This requires time off work, then surgery, then more time off work recovering.

Can Joe receive compensation because he has missed work? The answer is yes. Can Joe receive weekly compensation based on his actual lost earnings from his well-paid position? The answer is, perhaps unintuitively, no. Rather, Joe receives weekly compensation at the minimal 'potential earner' rate because, at the time of the injury, he was a potential earner and not an earner.[91] On this point, the statute is crystal clear, perhaps ruthlessly so.[92] Joe might be worse off if, rather than studying, he had been injured while taking a non-working year off travelling. If he was classified as a non-earner at date of injury, then he would not be eligible for lost earnings compensation at all.

That outcome might seem unfair,[93] particularly from a community insurance point of view. However, it is explicable by understanding the scheme as a fully-funded compulsory insurance scheme. At the time

[88]Accident Insurance Amendment Act 2000 and Accident Insurance (Transitional Provisions) Act 2000.

[89]'Treatment Injury' cover (Injury Prevention, Rehabilitation and Compensation Amendment Act 2005), 'work-related mental injury' (Injury, Prevention, Rehabilitation and Compensation Amendment Act 2008).

[90]At least, vehicles that are deemed to be safer based on make and model.

[91]80% of the higher of: the minimum wage or 125% of the invalid's benefit, see 2001 Act, Schedule 1, cl 42(3) and 47(4).

[92]*Murray & Others v ACC* [2013] NZHC 2967 at [65] and [69]. See also *ACC v Vandy* [2011] 2 NZLR 131 (HC) and *Giltrap v ACC* DC Wellington 141/206, 9 June 2006.

[93]See *Giltrap* at [22] and *Murray* at [69].

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

Joe was injured, he was not an earner and was not contributing to the Earners' Account. Therefore, he is not eligible to later receive earnings-based entitlements funded through the Earners' Account. He would have been contributing to the Non-Earners' Account, which is funded through general taxation (which includes tax collected through Goods and Services Tax), but not to the extent that he could be said to have purchased insurance for his future earnings. His injury can be seen as a kind of pre-existing condition, so when he gets his job and starts paying earner levies into the Earners' Account, he is only purchasing insurance for any injuries that he suffers after that date.

After this potential earner issue was decided by the courts, it received some political attention. Iain Lees-Galloway, then Labour spokesperson for ACC, issued a press release stating that Labour would do away with this 'unfair anomaly'.[94] Then National Party ACC spokesperson, Judith Collins, responded that Labour treated employers as a 'bottomless money box'.[95]

Conclusion

I have argued that the persistence of New Zealand's accident compensation scheme cannot simply be attributed to the idea that New Zealand is, and always has been, an egalitarian paradise where the community looks after everyone. That the accident compensation scheme is still here, despite significant neo-liberal reforms to other areas of the law, requires an understanding of why the scheme appeals to the political right as well as the left. I have attempted to put forward such an explanation in this paper: while the left embraces the Woodhouse principle of community responsibility and thinks of the ACC scheme as 'community insurance', the right is more interested in the economic efficiency arguments of the Woodhouse Report and thinks of the scheme as 'compulsory insurance'.

I have shown that the community insurance/compulsory insurance conflict can be seen to underlie a number of features of the statutory history of the scheme, with successive governments generally moving the details of the scheme backwards and forwards between the two. The existence of these two competing paradigms also explains why the scheme has not inevitably grown to encompass illness. The usual argument for including illness takes the principle of community responsibility as a premise, and that premise has not been accepted by the political right in New Zealand. To conclude, I will offer a few comments for comparable jurisdictions who are considering something like ACC.

(a) Comments for other jurisdictions considering no-fault schemes

The main piece of advice I have for other jurisdictions considering no-fault schemes is that, if they are like New Zealand and subject to a political cycle where governments tend to alternate between left- and right-wing, the longevity of a no-fault scheme will probably depend on the extent to which it is palatable to both wings of politics. This does not mean that the success of a no-fault scheme is dependent on unanimous passing of the first statutory version of the scheme. Rather, the aim is that, when power passes, the new government tinkers with the detail of the scheme rather than repeals it entirely.

It must also be said that the introduction of the ACC scheme has had its downsides. I agree with Wall that the loss of the tort system as a means of holding individuals to account for loss-causing departures from objective standards of behaviour is a meaningful one. Before ACC, tort law played a role in regulating workplace health and safety standards via the torts of negligence and breach of statutory duty. That function was lost through the introduction of the ACC scheme. Although the Woodhouse Report was sceptical about the deterrent effect of the tort system, one might well reasonably wonder whether the loss of proceedings for compensatory damages has had a role in New Zealand's poor workplace health and safety record.[96] That said, that does not necessarily mean that concerns about

[94]I Lees-Galloway 'Labour promises a fairer ACC for all Kiwis' (Press Release, New Zealand Labour Party, 8 August 2014).

[95]J Collins 'Labour's ACC policy treats employers as bottomless money box' (Press Release, New Zealand Government, 8 August 2014).

[96]See WorkSafe New Zealand *Towards 2020 Progress Towards the 2020 Work-Related Injury Reduction* (Wellington: November 2017) p 4.

https://doi.org/10.1017/lst.2018.50 Published online by Cambridge University Press

deterrence are a sufficient reason to reject a no-fault scheme. Rather, other mechanisms must be established to deter unsafe workplaces or products, and should be done concurrently with the introduction of a no-fault scheme and the removal of fault-based proceedings. In 2015, New Zealand implemented stricter workplace health and safety laws,[97] and there are signs of improvement in fatal and serious work-related injuries.[98] In addition, O'Sullivan and Tokeley have recently raised valid questions as to whether the ACC scheme has left a gap in New Zealand's legal system with respect to the responsibility of manufacturers towards consumers with respect to injuries caused by product failures.[99]

A further thought is that, although ACC is, broadly speaking, compatible with right- and left-wing thinking, there might be *other* societal differences between New Zealand and elsewhere that might prove substantial obstacles the introduction of a no-fault scheme. Gaskins and Oliphant have argued that social and political factors blocked the emergence of no-fault schemes elsewhere in the 1960s.[100]

In terms of comparing New Zealand with the USA, Fischer argues that no-fault is a better fit with the former's concern for fairness compared to the latter's regard for individual freedom.[101] Robert A Kagan helpfully distinguishes 'adversarial legalism', a claimant-driven system of adjudication where the introduction of evidence and the invocation of legal rules is led by the parties' lawyers rather than judges, which he argues is the dominant approach in the USA, with other forms of legalism such as 'bureaucratic legalism', characterised by centrally-devised rules and a significant role for officials, including responsibility for fact-finding.[102] The ACC scheme is arguably an example of the latter and, moreover, New Zealand society in general does not exhibit a particular fondness for adversarial legalism. Indeed, even among pre-ACC legal practitioners there was no clear support for the negligence action – the New Zealand Law Society's submission to the Royal Commission noted a range of views and stated that the Society was unable to express a view representative of the profession as a whole.[103] For a society that embraces adversarial legalism, however, the introduction of a no-fault scheme may see more opposition.

The final comment I have for other jurisdictions is that implementation of a no-fault scheme does not necessarily whet public appetite for fault-based compensation in some circumstances. In New Zealand, persons convicted of criminal offences can be ordered as part of the sentencing process to pay compensatory awards of 'reparation' to victims and their families injured by the offending.[104] A majority of the Supreme Court considered that the sentencing statute did not allow for reparation awards to 'top-up' payments made under the ACC scheme, for example an offender paying the 20% of lost earnings not paid by the scheme, with Tipping J stating that such a practice would 'go against the whole philosophy and purpose of the accident compensation scheme'.[105] However, Parliament had the last word, passing legislation to overturn the Supreme Court and reinstate the practice of 'topping-up' of ACC payments by reparation.[106]

[97]Health and Safety at Work Act 2015; see Royal Commission on the Pike River Coal Mine Tragedy *Royal Commission Report* (Wellington: October 2012).

[98]*Towards 2020*, above n 106, at 6–7.

[99]T O'Sullivan and K Tokeley 'Consumer product failure causing personal injury under the no-fault accident compensation scheme in New Zealand – a let-off for manufacturers?' (2018) Journal of Consumer Policy, published online 10 August 2018.

[100]R Gaskins 'The fate of "no-fault" in America' (2003) 34 VUWLR 213 at 214 and K Oliphant 'Accident compensation in New Zealand', available at https://www.courdecassation.fr/IMG/File/pdf_2006/05-12-2006_assurance/05-12-06_ken_oliphant-en.pdf, accessed 23 April 2019, at 17 and 'Landmarks of no-fault in the common law' in WH van Boom and M Faure (eds) *Shifts in Compensation (vol III): Between Private and Public Systems* (Springer, 2007) p 79. Compare N Freeman Engstrom 'An alternative explanation for no-fault's "demise"' (2012) 61 DePaul LR 303.

[101]Fischer, above n 9; compare Wendel, above n 9.

[102]RA Kagan *Adversarial Legalism* (Cambridge, Mass: Harvard University Press, 2001) pp 10–11.

[103]Palmer (1979), above n 7, p 89.

[104]Sentencing Act 2002 (NZ), s 12.

[105]*Davies v Police* [2009] NZSC 47, [2009] 3 NZLR 189.

[106]Sentencing Amendment Act 2014. See S Connell 'Overturning the social contract?' [2014] NZLJ 314.

Cite this article: Connell Simon, (2019). Community insurance versus compulsory insurance: competing paradigms of no-fault accident compensation in New Zealand. *Legal Studies* **39**, 499–516. https://doi.org/10.1017/lst.2018.50