Boundary Disputes in ACC and the No-Fault Principle

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Abstract

The Woodhouse Report is most widely remembered for its recommendation to ban claims for compensation for personal injury from New Zealand’s Courts, and instead to refer all personal injury cases to a social-insurance provider for assessment for cover on a no-fault basis. But Woodhouse had a wider concern to reduce or prevent all forms of adversarial litigation – not only the negligence action. Hence, his vision for a State monopoly that comprehensively covers work-related and off-the-job injuries, as well as non-earners, on a universal basis, has the advantage of avoiding much litigation about cover and about the distribution of liabilities. He even recognized that the distinction between accident and illness, as causes of disability that attract different entitlements, would eventually need to be overcome by a full extension of his principles. Unfortunately, in spite of cross-party support for the Woodhouse principles, governments have tinkered with the ACC scheme in ways that reintroduce such disputes and litigation, and there is a limited appreciation of the scope of Woodhouse’s desire to prevent litigation. The present paper looks at two recent cases that highlight the problems that remain within the ACC scheme, and suggests that the Woodhouse principles have yet to be fully and consistently adopted by Parliament.

Introduction

One of the crucial lessons of the Woodhouse Report concerns the prevention of litigation. The Commission rightly perceived that, if rehabilitation is to be the over-riding aim of the compensation authority, then delay caused by legal and administrative processes of review and appeal only serve to frustrate the return to ‘normal’ life. If the burden of proof of personal injury rests on the claimant’s shoulders, and if proof requires lengthy legal processes, then the system may create an incentive to sustain the disability, or at least the appearance of disability, for the purposes of gaining compensation. The most prominent example of this is the common-law negligence claim; and Woodhouse is most widely remembered now for his proposal to ban the hearing of claims for compensatory damages for personal injury in New Zealand’s courts. To extend the idea of ‘no fault’ to a complete ban on the right to sue, and to eliminate costly adversarial processes, are at the heart of what Woodhouse meant by ‘administrative efficiency’. Claims could be processed swiftly and rehabilitation could commence without the need for adversarial hearings of any kind. Naturally, Woodhouse did envisage a system of review and appeal, in cases of disputes over cover and entitlements; but his recommendations were for an internal administrative process, with a final appeal to the then Supreme Court on a point
of law. In general, the Commission concludes, ‘there could be no point in retaining any form of adversary system in regard to the assessment of compensation.’

Hence, Woodhouse was attempting to eliminate the need for adversarial, fault-based proceedings at all levels. This would include, therefore, not only the common-law action, but also adversarial actions over the authority’s interpretations of statute. One of the features of the traditional workers’ compensation institutions is the risk of litigation over whether an injury is ‘work-related’. This comes about because the employer may wish to dispute the acceptance of a claim that falls on the boundary of work-relatedness and that may lead to a rise in the insurance premium; and because, for the claimant, to be denied insurance-based workers’ compensation means being thrown onto a reliance on less generous public assistance or social security. Such a system creates incentives for adversarial hearings, if the law permits them, and Woodhouse wanted to reduce litigation, especially if adversarial, to a minimum.

Now, if we accept Woodhouse’s view, based on its desire for speedy rehabilitation, then we need to think about what kind of compensation system would maximize that advantage. It is easy enough to see that universal no-fault twenty-four-hour cover will automatically remove the need for various forms of litigation – but there remains a danger that ill-advised tinkering with the compensation scheme may open up new forms of adversarial processes.

The AFFCO Case

A recent case serves to illustrate the way in which any departure from Woodhouse’s vision can lead to fault-based disputes about cover and compensation entitlement. The facts of this case have been made public because they were the cause of a series of questions in the House. A man was injured and paralysed in 2003 due to a gunshot wound received while on a work break in his employer’s carpark (although there appears to be some doubt raised in the House about whether the exact location of the event was under the employer’s control). The employer (AFFCO) was an accredited employer, meaning that the employer manages its own work-related injuries, in compliance with the Injury Prevention Rehabilitation and Compensation Act 2001. A third-party provider contracted to the employer wrote to the injured person to advise him that his claim for cover was accepted under section 20 and that his employer acknowledged the injury as work-related. Section 28, which defines ‘work-related personal injury,’ clearly includes the circumstance where an employee ‘is having a break from work for a meal or rest or refreshment at his or her place of employment.’ This particular provision has been in force since the Accident Rehabilitation and Compensation Insurance Act 1992, and hence one would presume it has support from both sides of the House.

2 Hansard, Questions for Oral Answer, 18 September, 19 September, 20 September, 9 October, 2007.
As it was a complex case, AFFCO handed it over to ACC for long-term management, but, under the terms of the accreditation agreement, AFFCO remained liable for $1 million of the ongoing costs. AFFCO later sought to review this liability with ACC, but this was not possible under the terms of the Act and the accreditation agreement. Presumably, AFFCO then raised the matter with a local MP who then questioned the Minister in the House. It appears that members of the Opposition were concerned that the employer was landed with a large bill for what they said was a gang-related shooting. Such politically motivated incomprehension was then mirrored in the media, with Bill Ralston, for example, citing the case as a form of ‘nuttiness’.

Not only was the claimant named in the House, but his name and photograph were subsequently published in the media. At the time of writing, mediation between ACC and AFFCO about the payment of the ongoing costs had failed.

The key point here is that the employer, and even several Members of Parliament, were of the opinion that the determination of liability for an injury in the workplace should be influenced by a question of fault – in this case, the ‘fault’ lying with the criminal act of wounding with a firearm, of which the injured person was apparently the victim and not the perpetrator. And clearly the accredited employers’ scheme, under the IPRC Act 2001, creates a situation where the employer has a financial motive to dispute cover as a work-related injury if the circumstances are marginal and the costs high. It should be noted, though, that the Minister for ACC stated repeatedly in the House that the employer, in this case, had not used the appropriate legislative powers to repeal its own decision on the claim for cover, and that its own spokesperson had publicly admitted that the injury was work-related.

**Boundary Disputes**

This kind of work/non-work dispute is not a new problem, however. The ARCI Act 1992 used experience-rating to adjust employers’ premiums according to the costs of claims arising on their account. Employers, once notified by ACC of a work-related personal injury claim, had the opportunity to dispute its work-related status. Frequently, employers would use accusations of employee fault to deny liability, for example saying that the employee had failed to report the injury to the employer, contrary to workplace rules. They were apparently unaware that the legislation has never included ‘failure to report an injury to the employer’ as a circumstance relevant to denying work-relatedness. But, due to the potential for a penalty on their ACC levy, they were motivated to use fault as a reason to limit liabilities.

Now, this is all clearly a departure from Woodhouse’s vision, as he had sought to avoid any need for delay caused by holding claims assessment in doubt while boundary disputes could be settled. As soon as Parliament puts levies under a system that varies

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them according to employers’ risks, then the question of fault will automatically become relevant to the employer and disputes will soon follow. Indeed, it appears that questions may even be asked in the House about an individual’s claim, using parliamentary privilege to breach his privacy.

As well as being relevant to Woodhouse’s insistence on the avoidance of adversarial processes, these matters also raise the question of monopoly State provision. If Parliament permits self-insurance (as it did with the employer accreditation system under the present Act) or competitive private-sector provision (as under the Accident Insurance Act 1998), the no-fault principle is undermined, as provisions must be made for premium-payers, who will be more directly liable for claims costs, to review and appeal their liabilities. Appeals will eventually be brought before the Courts about cover, and evidence about ‘who did what and when?’ will need to be heard.

The insurance industry generally bases its claims for the benefits of experience-rating and competitive provision on the theoretical assumption that they will create incentives for improved health and safety management and prompt rehabilitation. This may to some extent be true, but surveys (based on comparisons of different jurisdictions with different institutional arrangements) suggest that competition may not result in lower costs. The only way to reduce the costs of such systems is probably to reduce benefits, regardless of the institutional mode of provision; but lowering benefits is simply a means of shifting costs away from employers and onto employees and their families. Experience-rating, moreover, creates incentives for ‘proxy’ activities that lead to the appearance of improved injury prevention and rehabilitation. The closer that employers’ premiums are linked to injury costs of each individual employer, the greater the incentive for employers also to ‘manage’ claims by preventing them from being lodged or accepted in the first place, by disputing medical advice about costly treatments or rehabilitation programmes, and by seeking to hasten return-to-work. So, the danger may be that ill-considered ‘reforms’ designed to improve ‘efficiency’ may not achieve their goals, but may instead result in the introduction of various new reasons for inefficient, inequitable and wasteful adversarial processes.

Now, the matters considered so far mostly concern the boundary between work and non-work circumstances. In a comprehensive scheme such as New Zealand’s, if a personal injury caused by accident is found not to be work-related, then the injured person is still covered, with equal entitlements, under the same Act. The same cannot be said, though,

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of personal injury that is caused by gradual process, disease or infection. Such cases have cover under the Act only if they are work-related. A respiratory disease, or hearing loss, or gradual-process musculo-skeletal disorder may be subject to quite onerous legal tests if a claim for cover is lodged with ACC. The tests of ‘not found to any material extent in the non-employment activities or environment’ and ‘significantly greater risk’ for persons in that employment\(^7\) can easily deny the claim cover (although the occupational diseases listed in Schedule 2 of the Act are excluded from these tests).

The consequences for the claimant of failing to pass this test can be quite significant, as he or she would then be reliant upon public health-care and means-tested sickness or invalids’ benefits. These social-assistance entitlements are needs-based and less generous than the social-insurance benefits of ACC. A claimant whose personal injury falls on this particular boundary may sometimes have a financial incentive of sufficient dimensions to pursue an appeal to the Court, if ACC cover is challenged.

This raises a wider general concern about the discrepancy between ACC and the public health and disability services. If we think about the Woodhouse principles as a charter for a social-insurance system that seeks to compensate for economic and non-economic losses arising from disability, and that treats rehabilitation as its primary goal (if prevention fails), then there arises a question about the scope of causes and consequences involved. Woodhouse is remarkable for seeking to include work and non-work accidents, on the grounds that they both result in similar social and economic losses, and for including earners and non-earners, on the grounds that the latter contribute through unpaid work to social and economic well-being. Indeed, the Commission’s report is probably the world’s first policy document to recognize the economic value of unpaid work.

**Covering Sickness**

It is only a short conceptual step then to ask why disability due to causes other than personal injury caused by accidents and occupational diseases should be excluded. The losses to society and to the individual caused by diseases are equally severe, and equally predictable statistically. And indeed Woodhouse does consider this issue, with the brevity and clarity that typifies the whole of his report. He points out that there is no logical reason why someone incapacitated by disease should be entitled to less than someone injured in a car accident. The personal suffering and the loss of productivity may be very similar. But his report does not go so far as to recommend such an extension of cover for the following reasons:

First, it might be thought unwise to attempt one massive leap when two considered steps can be taken. Second, the urgent need is to co-ordinate the unrelated systems at present working in the injury field. Third, there is a virtual absence of the statistical signposting which alone can demonstrate the feasibility

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\(^7\) Injury Prevention Rehabilitation and Compensation Act 2001, s 30.
of the further move. And finally, the proposals now put forward for injury leave the way entirely open for sickness to follow whenever the relevant decision is taken.8

Surely, the first and second reservations expressed above no longer apply – provided Parliament does not try again to destroy the co-ordination of the system by introducing competitive provision. And policy-makers should by now have sufficient information to assess the feasibility of such a proposal. So Woodhouse clearly wished to signal the way forward for a future extension of his universal no-fault social insurance concept to sickness as well as injury, and we are now in a position to debate that second ‘considered step’, if the will is there to do it. The concept has been aired from time to time since the inception of ACC.

The 1988 Royal Commission on Social Policy looked carefully at the policy anomaly between disability caused by personal injury under ACC and other forms of disability. It concluded that those in the former category were ‘far better provided for’ in terms of levels of compensation and access to medical treatment, and it found this situation to be ‘inequitable’. The Commission did not recommend the abolition of ACC, and indeed it supported the Woodhouse principles. While the Commission was conscious of the costs, it did recommend a progressive extension of support to non-ACC disability, with the intention of eventually making the two systems identical. This could have included reducing entitlements for those with less severe injuries in order to offset the costs.9

The fourth Labour Government did take the Commission’s concerns seriously. The Rehabilitation and Incapacity Bill was introduced by the Hon. Dr Michael Cullen in 1990 and was to take effect from 1 April 1992. It applied to incapacity for employment, ‘irrespective of where the incapacity arose’.10 The ACC would have been reconstituted as the Rehabilitation and Incapacity Corporation and would have provided rehabilitation and income benefits to persons incapacitated for employment due to any ‘physical or mental incapacity.’ This Bill did not survive the change of government in 1990, but it does at least give a precedent for legislative reform to rectify the anomaly between accident compensation and public health and welfare systems by covering all forms of incapacity in one social insurance institution.

For people in the disability sector, the ACC–health anomaly has been an ongoing source of dissatisfaction and grievance. ACC is based on the social-insurance principle of compensation for losses incurred, and, due to the ban on the right to sue, it must make up for the loss of that right. Persons with disability covered by ACC are thus entitled to more generous income support that is not means-tested, and to more generous treatment subsidies and rehabilitation entitlements compared with those disabled due to non-work-related diseases. From the point of view of an individual who lives with a disability caused by a congenital or a chronic degenerative condition, the discrepancy in the levels

8 See footnote 1, p 26.
10 See clauses 2(2) and 6.
of support for different disability groups, based purely on cause and not on actual needs or losses, seems unjust. A case brought before the Human Rights Review Tribunal claims that the different entitlements provided by ACC and the Ministry of Health, being based purely on different causes of disability, are a form of discrimination that contravenes the Human Rights Act 1994. A woman who suffers from severe multiple sclerosis and who is wheelchair-bound has taken this case. Despite severe impairment and disability, she receives significantly less support than an ACC claimant with similar needs resulting from physical impairments.\footnote{Trevethick v Ministry of Health [2007] NZHRRT 7 (4 April 2007).} At the time of writing, Crown Law had successfully challenged the Tribunal’s right to hear the case, arguing that cause of disability is not one of the prohibited grounds. The plaintiff, however, was preparing to appeal this decision to the High Court.\footnote{John Miller, personal communication.}

Whether or not that appeal is ultimately successful, it does indicate the ongoing grievance in the disability sector about a discrepancy in entitlements based purely on the cause of disability, to the neglect of actual life-consequences. Furthermore, the financial disadvantage to many persons with disability who may not be granted ACC cover raises the stakes for those on the margins of the scheme to litigate over the question of cover.

**Conclusion**

The Woodhouse Report is a visionary social and legal document. Its basic principles have been accepted now for forty years, indicating the robustness of thought behind them. These principles have been applied in the law since 1972, but, it must be said, with varying levels of understanding and commitment from law-makers. When Woodhouse talks about preventing litigation, he refers of course to the common-law action for compensatory damages, which has been banned since the 1972 Act took effect in 1974; but he also clearly intended that the scheme be designed in such a way that all forms of adversarial processes should be kept to a minimum. A scheme that is inclusive, rather than divisive, and that avoids creating financial advantages or disadvantages based on (often quite random) matters of aetiology or actuarial risk will be able to avoid delays and uncertainties created by legal disputes. It will thus be able to deal more expeditiously and effectively with the real-life social and economic consequences of disability and incapacity for employment. An efficient service that addresses the actual social outcomes was always more important to Woodhouse than the short-term problems of determining fault or causation and allocating liabilities according to risk profiles. It may appear superficially to be the case that self-insurance, or competitive provision, or experience-rating has some kind of advantage in terms of efficiency or equity; but these ideas have to be evaluated in terms of the administrative and legal inefficiencies, and the inequitable treatment of persons, that they can produce. We also have to be wary of the ways in which such systems can undermine the no-fault basis of the scheme. If we are serious about the prevention of litigation, about the universal no-fault principle, and about preserving the ban on the right to sue, it is imperative that the public and their
representatives in Parliament are aware that an inclusive definition of cover under a state monopoly provider is the best way to go forward. We should seek a structure that does not create a sense of fault through attempts to have fine-grained systems that allocate liabilities and entitlements on the basis of distinctions of risk and causation.