LEGISLATIVE APPROACHES

THE WOODHOUSE REPORT

Original Report

1967 Royal Inquiry Report lead by Sir Owen Woodhouse reviewing workers compensation. Opens with arguments about how accidents can befall everyone, and so there should be a scheme for universal compensation access to avoid the 'lottery' common law claims in negligence.

Issues with tort law:

- Expense: very expensive legal process which bars many people from being able to access solutions
- Inefficiency: most of the money going into the process goes to lawyers and legal officials which prevents victims from keeping that money for themselves
- Inconsistency: very few people end up actually winning cases or accessing compensation because the negligence requirements include proving fault, and the burden of proof and required precedents are very complicated and difficult to meet
- Unpredictability: court cases and jury trials are not done deals
- Accidents: system provides no solutions for accident victims, as the adversarial style requires fault

Principles of the scheme:

- Community responsibility: everyone contributes to a scheme because society benefits as a whole from a productive labour force. Everyone has equal opportunity to be accident victims, so should all contribute.
- Comprehensive entitlement: no fault scheme: all injured people should receive compensation regardless of the causes that give rise to their injuries
- Complete rehabilitation: real measure of money compensation for loses, measures go towards physical and vocational recovery. Gets people back to work sooner
- Real compensation: compensation should rest upon a realistic assessment of actual loss, followed by a shifting of that loss on a suitably generous basis (80% of income)
- Administrative efficiency: system should be quick, consistent and economic.

Advantages of a no-fault scheme:

- Utility: healed people are more useful to society, so the most effective and comprehensive system is the best
- Engagement: deterrence from risky activities means these activities don't make money and people are worse off from not doing them at all
- Community responsibility: everyone participates and carries equal risk, so everyone should contribute and benefit
- Employment: opens the scheme up to people who aren't workers or suffer injury through work (lots of women in 1967)

Criticisms of a no-fault scheme:

- Henderson: no deterrence from partaking in risky/dangerous behaviour because there's no risk of liability
    - Linden: insurance protects people from this. So why not just insure? May raise premiums, not everyone is insured, excess is expensive, and insurance is discriminatory

- Woodhouse: deterrence can come from the compensation scheme funding prevention campaigns, education, awareness, etc (reality is very little of ACC money is spent on deterrence (55m out of 4-5b)
- Gaskin: deterrence is not just economic: people can be deterred from risky activities because they don't want to be injured or die

- Palmer: great but should cover illness
  - PRO-COVER for illness: replaces lottery of tort with illness/accident lottery. Illness cover is more consistent with comprehensive coverage argument. Better coverage than sick and disability benefit. People giving up their common law rights, so should get something really fundamentally great in return.
  - NO-COVER for illness: much more expensive, scheme sold on premise of cheaper alternative to tort law. Better than nothing at all. System replaces tort law, which never covered illness in the first place. Having a half-ass accident compensation scheme and sickness scheme would piss off unions and violate international labour conventions.

GENEROUS UNNIGGARDLY INTERPRETATION

Harrild v Director of Proceedings: a "generous, unniggardly interpretation" of what can be considered personal injury is seen by the Court as in keeping with legislative policy

J v Accident Compensation Corporation: "If the Act is unavoidably niggardly or ungenerous, that is that. But if a reasonable choice presents itself, the more generous path should be taken." (Kos P – dissent from majority on the case but consistent with majority on interpretative approach)

W v Accident Compensation Corporation: "[claimants should] not be denied cover unless the language of the statute is clear and unambiguous"

G v Auckland Hospital Board: purpose of accident in the scheme is to be inclusive of as many people as possible, even if this is undesirable for the current plaintiff because they wish to pursue claims at common law. Not every plaintiff will be in this position, so it is more desirable to have guaranteed access to cover and be barred.

McGougan v DePuy International Ltd: social contract and no-fault principles exist between the individual and the state, not the contributors and the state. ACC is not an insurance scheme for contributors to protect them from liability, but a scheme which provide the most comprehensive cover for individuals in exchange for the barring of their access to the courts and common law rights.

Estate of Priddle v Accident Compensation Corporation: use of a generous interpretation when it came to the distribution of lump-sum payments – the scenario (compensating a family for the death of their relative) was exactly what compensation legislation exists for, so a generous approach should be taken if possible to make it happen.

1992 AMENDMENT

Legislative Context

Up until the passage of the Accident Rehabilitation and Compensation Insurance Act 1992, claims for pure nervous shock or psychiatric injury were covered under compensation legislation and barred from common law claims because of a wider definition of 'personal injury'. Since 1992, these claims have been excluded from cover unless consequential on a physical injury, work-related or gained through criminal acts.

This was because NZ was going through a financial crisis at the time and limiting potential claims was a way to save money. This was becoming increasingly expensive as judges began to expand the categories of harm to include more victims of mental injury. The judicial response to this was to take a fairly generous response to common law cases for psychiatric injury and to ACC claims that involved mental injury under the limited circumstances allowed by the Act.

Queenstown Lakes District Council v Palmer: secondary victims of accidents may claim in negligence for pure psychiatric injury damages. Consistent with the principle that individuals are not to be denied access to the courts, except in rare circumstances and only when pursuant to explicit statutory language.
W v Accident Compensation Corporation: where there is a temporal gap between physical and mental injuries, cover should still be available. In complex cases, as long as mental injuries satisfy a but-for causation test, physical injuries need only be a contributing cause to mental injuries for there to be cover.
Allenby v H: pregnancy following rape or failed sterilisation is a physical injury, so any consequent mental injuries are covered by ACC.

2005 AMENDMENT

Legislative Context:
In 2005, an amendment to the Accident Compensation Act changed the provisions for medical misadventure and medical error to the broader term "treatment injury". The prior provisions were at odds with the general no-fault approach of the scheme, as to obtain cover under them, one had to prove fault on the part of the registered health professional, which was incredibly difficult and expensive. Also damaged the relationship between ACC and medical profession, as doctors at fault would have to undergo review and could lose their jobs. To establish medical mishap, a condition must be less than 1% rarity, which was super difficult to fit into and the hard-edged statistical probability also did not fit into the context of the scheme.
Adlam v Accident Compensation Corporation: established that a treatment injury required a departure from standard, which is effectively the same as proving fault on the part of the health professional. Reduced the amendment to abolishment in name only.
Accident Compensation Corporation v Ng: criticised the approach taken in *Adlam*, and held that an ordinary consequence must be more likely to occur than not on the balance of probabilities. Much more generous approach to interpretation. Distinguished from *Adlam* on the base that the *Adlam* fact scenario was out of scope, while in cases where there is ambiguity, unniggardly choices should be made.