

---

# **BACK TO THE FUTURE: COMPENSATING INJURED WORKERS FOR LOST INCOME**

---

**WARREN FORSTER**

A dissertation submitted in partial fulfilment of the degree of  
Bachelor of Laws (with Honours) at the University of Otago.

October 2011

## **ACKNOWLEDGEMENTS**

Thank you to the staff and students at the Faculty of Law at the University of Otago who have made the journey so interesting and have engaged with me throughout my time here. I am grateful to my two supervisors: Judith Fergusson for the time she has spent and the encouragement she has given in shaping the ideas and to Professor John Smillie for robust testing of these ideas. Professors Kim Economides and Peter Skegg deserve special thanks for giving me the confidence to explore new ground.

I would like to thank my parents for sparking my interest in this area, which has changed the direction in my life. You have given me the most valuable gifts one could want.

I would not be here in Dunedin writing on this topic without the hundreds of people who have opened up their lives to me. You all know who you are. It has been a privilege to be involved.

Most importantly, I would like to thank Jane without whose support, the last two years would not have been possible, and Jenny and James for the very important role they play in our lives.

# TABLE OF CONTENTS

<b>I</b>	<b>Introduction</b>	<b>1</b>
<b>II</b>	<b>Legal Mechanisms for Constraining Compensation for Income</b>	<b>4</b>
<b>A</b>	<b>Background</b>	<b>4</b>
1	Problems at Common Law in Assessing Future Loss at Date of Judgment	4
2	Initial Determination of Level of Compensation	5
3	Current Exit Mechanisms	6
<b>B</b>	<b>Incapacity Exit</b>	<b>7</b>
1	Overview	7
2	Medical Certificate	8
3	Determining what the Pre-injury Occupation Required	9
4	What Can be Taken into Account	10
5	Conflict Between Assessments of Treating and Non-Treating Assessors	11
6	Situations When a Person Returns to Work but is Then Incapacitated	13
<b>C</b>	<b>Vocational Independence Exit</b>	<b>14</b>
1	Overview	14
2	Vocational Independence Process	17
3	Assessors	17
4	The Ramsay Principle and the Martin Decision	18
5	Accuracy of Assessments	20
<b>D</b>	<b>Causation Exit</b>	<b>21</b>
1	Is the Onus on the Injured Person or ACC ?	21
2	The Statutory Tests	22
3	Causation and Gene-X-Environment Interactions	24
4	The Future of Causation in the ACC Scheme	26
<b>E</b>	<b>Fraud Exit</b>	<b>27</b>
1	Introduction	27

2	ACC Fraud Process .....	28
3	Issues with the Fraud Process .....	30
4	Ultimate Deterrent.....	32
5	A Fairer Process for Determining Entitlement to Compensation in Criminal Cases 32	
<b>III The Effects of Exit Strategies .....</b>		<b>34</b>
<b>A What Happens to People Exited from ACC? .....</b>		<b>34</b>
1	Return to Work.....	35
2	Transfer from ACC to Social Security.....	36
3	Exited From ACC and not Working or Receiving Social Security.....	39
<b>B Available Datasets.....</b>		<b>39</b>
1	Data Matching between ACC and Social Security .....	40
2	The Longitudinal Effects of Injury on Earnings Study.....	41
3	Potential Outcomes of Injury Study.....	42
<b>C Future Empirical Research .....</b>		<b>43</b>
1	A Prospective Longitudinal Study .....	43
2	A Retrospective Data-Matching Study.....	44
<b>IV Options for Legislative Change.....</b>		<b>45</b>
<b>A What has Remained Consistent since 1972 .....</b>		<b>45</b>
1	Earnings Related Principle .....	45
2	80% Principle and the Neo-Liberal Critique .....	46
3	Duty to Mitigate Loss .....	47
4	Seriously Injured Require Most Support.....	50
<b>B Framework for Discussion of Legislative Change.....</b>		<b>50</b>
1	Change the Entry Criteria for the Scheme by Changing what is Covered; .....	50
2	Limiting Compensation through Arbitrary or Assessment-Based Mechanisms.....	51
<b>C Arbitrary Changes.....</b>		<b>51</b>
1	Flat-Rate Model .....	51
2	Lower the Percentage of Earnings that are Compensated .....	53

3	Limit by Time .....	54
4	Overview of the Limited Total Amount Model .....	56
5	Parachute Model .....	56
6	Restrict Weekly Compensation to Those who are Incapacitated for More Than 12 weeks .....	58
<b>D</b>	<b>Assessment Changes.....</b>	<b>59</b>
1	Refining the Current Assessment Based Process .....	60
2	Changing the Variable That is Assessed .....	63
<b>V</b>	<b>Conclusion .....</b>	<b>66</b>
<b>VI</b>	<b>Bibliography.....</b>	<b>67</b>
<b>A</b>	<b>Cases: .....</b>	<b>67</b>
<b>B</b>	<b>Legislation:.....</b>	<b>70</b>
<b>C</b>	<b>Books: .....</b>	<b>71</b>
<b>D</b>	<b>Reports: .....</b>	<b>72</b>
<b>E</b>	<b>Journal Articles:.....</b>	<b>74</b>
<b>F</b>	<b>Other: .....</b>	<b>76</b>
<b>G</b>	<b>ACC Review Decisions .....</b>	<b>77</b>

## *I Introduction*

This paper explores the legal system of compensating people for lost earnings following injury in New Zealand. It examines the existing system then considers how the legal mechanisms impact on injured people and their long-term outcomes following injury. Alternatives are then developed that could be tested against the outcomes of the existing legal mechanisms in future studies to achieve the goal of continuing to reduce the cost of personal injury to society.

New Zealand's unique statutory personal injury scheme has been providing 24-hour, no-fault personal injury coverage since 1 April 1974.<sup>1</sup> When personal injury<sup>2</sup> by accident<sup>3</sup> prevents someone from returning to work, they are "incapacitated"<sup>4</sup> and entitled to "weekly compensation"<sup>5</sup> at 80 per cent of their income.<sup>6</sup>

The Accident Compensation Scheme (the "ACC<sup>7</sup> Scheme") was enacted<sup>8</sup> following the Royal Commission of Inquiry into Workers Compensation (the Royal Commission).<sup>9</sup> Like all personal injury systems, the ACC scheme requires clear boundaries, both in terms of coverage and compensation.<sup>10</sup> The "most complicated and difficult issue in personal injury law"<sup>11</sup> is compensating lost earnings for those people who can do some

---

<sup>1</sup> Accident Compensation Act 1972, s 1(2) and Accident Compensation Order 1973 (SR 1973/290), cl 2.

<sup>2</sup> Accident Compensation Act 2001, s 26.

<sup>3</sup> Accident Compensation Act 2001, s 25.

<sup>4</sup> Accident Compensation Act 2001, s 6 (definition of incapacity) and s103(2).

<sup>5</sup> Accident Compensation Act 2001, s 69(1)(c).

<sup>6</sup> Accident Compensation Act 2001, sch 1, cl 32(3).

<sup>7</sup> The Accident Compensation Corporation known as ACC was established by the Accident Compensation Act 1972, s 6 and is now a Crown Entity (Accident Compensation Act 2001, s259; Crown Entities Act 2004, sch 1).

<sup>8</sup> The scheme created by the Accident Compensation Act 1972 has been continued by: Accident Compensation Act 1982, Accident Compensation Rehabilitation and Insurance Act 1992, Accident Insurance Act 1998, and Accident Compensation Act 2001.

<sup>9</sup> A Owen Woodhouse, H L Bockett and G A Parsons *Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (Government Printer, Wellington, 1967).

<sup>10</sup> *Ibid* at p 108, [81]; Geoffrey Palmer *Compensation for Incapacity* (Oxford University Press, Wellington, 1979) at p 244.

<sup>11</sup> Geoffrey Palmer *Compensation for Incapacity* (Oxford University Press, Wellington, 1979) at p 215.

work, but cannot go back to doing exactly what they were doing when they were injured.<sup>12</sup>

This problem of compensating “partial incapacity”<sup>13</sup> is very similar to the problem that exists at common law of calculating damages for “future pecuniary loss.”<sup>14</sup> Both begin with the acknowledgment that an injured person cannot return to the work they were doing before they were incapacitated and should be compensated for their loss. But in both cases, rehabilitation is expected to result in the person regaining some ability undertake alternative work. How the law intervenes in this relationship between compensation and rehabilitation to reduce the cost of injury to society is controversial and it has changed significantly over time.

The ACC scheme is a code created by two privative provisions. The first prohibits proceedings for personal injury being brought in New Zealand if the personal injury comes within the scope of cover under the scheme.<sup>15</sup> The second prohibits any court, tribunal or other authority from considering or granting remedies in relation to any matter covered by the scheme.<sup>16</sup>

The Royal Commission envisaged a principle-based scheme that would operate without the adversarial methods. Its basic principles, known as the “Woodhouse Principles” are:<sup>17</sup>

- Community Responsibility
- Comprehensive Entitlement
- Complete Rehabilitation
- Real Compensation
- Administrative Efficiency

---

<sup>12</sup> Ibid; Lord Pearson *Royal Commission on Civil Liability and Compensation for Personal Injury* (United Kingdom, 1978) at 176-178 [814].

<sup>13</sup> Palmer, above n 11 at p 215, 217-219; Terrance G Ison *Accident Compensation* (Croom Helm, London, 1980) at p 56 [6].

<sup>14</sup> Salmond & Heuston *Law of Torts* (21st Ed, Sweet and Maxwell 1996) at 530-531; Andrew Tettenborn (ed) *The Law of Damages* (2nd Ed, LexisNexis London 2010) at 794-795 [33.19].

<sup>15</sup> Accident Compensation Act 2001, s 317.

<sup>16</sup> Accident Compensation Act 2001, s 133(5).

<sup>17</sup> Royal Commission, above n 9 at p 39.

The Royal Commission recommended that adversarial methods of determining compensation for lost earnings be replaced with non-contentious processes of assessment and review<sup>18</sup> and originally this vision was achieved. But as the New Zealand labour market changed and the ACC scheme matured, the cost of providing compensation for lost income was considered to be more than society could afford so Parliament developed legal mechanisms to constrain weekly compensation to claimants.<sup>19</sup> These mechanisms are (1) assessment of incapacity;<sup>20</sup> (2) assessment of vocational independence;<sup>21</sup> (3) assessment of causation;<sup>22</sup> and, (4) fraud investigations.<sup>23</sup> Disputes about these assessment processes and ACC's "decisions"<sup>24</sup> have led to a "drift back towards an adversary situation"<sup>25</sup> and have contributed to the increasing number of disputes arising from the scheme.<sup>26</sup>

Research shows that the effects of the current models of compensating for lost income do not fulfil the purpose of reducing the cost of injury to society as well as they might. Potential solutions that address the problem of compensating partial incapacity in ways that utilise the advantages of the ACC scheme will be explored.

---

<sup>18</sup> Royal Commission, above n 9, at p108 [280(f)].

<sup>19</sup> Bill Birch *Accident Compensation A Fairer Scheme* (Government Printer Wellington, 1991) at 37.

<sup>20</sup> Accident Compensation Act 2001, ss103 and 105.

<sup>21</sup> Accident Compensation Act 2001, ss 107 and 108.

<sup>22</sup> Accident Compensation Act 2001, ss 26(2) and (4), and 117(1).

<sup>23</sup> These are undertaken by the ACC Investigations Unit in reliance on the criminal law.

<sup>24</sup> Accident Compensation Act 2001, s 6, definition of "decision" and s 134(1)(a) allows a decision of ACC to be reviewed in accordance with the statutory process in Part 5.

<sup>25</sup> Palmer above n 11, at 230.

<sup>26</sup> Around ten thousand disputes are now brought annually under the ACC scheme, (Dispute Resolution Services Limited *Annual Report* (2010), p 17). This is nearly twice the combined total annual number of workers' compensation claims and personal injury cases before the implementation of the no-fault scheme that had been developed to end litigation. (Royal Commission, above n 9, at Appendix 5, p 219-223). This number is rapidly growing with a 64 per cent increase in two years (DRSL Annual Report 2010, p 17).

## *II Legal Mechanisms for Constraining Compensation for Income*

This chapter explains the operation of the legislative mechanisms that have been developed to cease the weekly compensation for lost income that is paid to injured people under the ACC scheme. Importantly, when a person has cover under the ACC scheme, they might be entitled to compensation in different forms for different things, for example compensation for impairment, or a contribution towards vehicle or housing modifications.<sup>27</sup> However, the focus of this paper is on compensating for lost income and other forms of compensation will not be addressed.

When it comes to calculating loss of income, the procedure is initially quite straightforward and it includes lost earnings whilst a person is in hospital undergoing treatment or whilst they are undergoing physiotherapy to improve their function. Most people are then able to return to the job they were doing before they were injured and they do not suffer any long-term effects of their injury on the earnings, but a small number cannot return to their jobs and for these people who are off work for more than three months, their injury has a long-term effect on their income.

### ***A Background***

#### *1 Problems at Common Law in Assessing Future Loss at Date of Judgment*

The common law assesses damages at date of judgment. The future loss of earnings caused by the breach of the duty has to be determined with finality at the time of the decision of the court.<sup>28</sup> In personal injury cases, this involves much guesswork in calculation of the loss, particularly in relation to what the remaining post-injury earning capacity might be.<sup>29</sup> Variables taken into account also include rates of

---

<sup>27</sup> Accident Compensation Act 2001, s 67(1).

<sup>28</sup> Royal Commission, above n 9, at p 45, [75]; Stephen Todd (ed) *The Law of Torts in New Zealand* (5<sup>th</sup> ed, Brookers, Wellington, 2009) at [25.2.02].

<sup>29</sup> Royal Commission, above n 9, at p 45; Lord Pearson *Royal Commission on Civil Liability and Compensation for Personal Injury* (United Kingdom, 1978) at 137; Harold Luntz *Compensation and*

inflation, discounts for investment, time the person would have spent off work, and future promotions that a person may have received. As a result, there are wide variations on awards of damages and courts have generally undercompensated partially incapacitated injured people and consistently underestimated the adverse effects of disability on post-accident earnings, when compared to the real labour market information.<sup>30</sup>

## 2 *Initial Determination of Level of Compensation*

The Royal Commission recommended calculating and paying periodic payments to overcome some of the problems of determining damages in a lump sum.<sup>31</sup> Exactly how these payments should be calculated has been the subject of repeated policy decisions by successive Parliaments across the decades.<sup>32</sup> The common thread is that there would be an initial determination of the amount of compensation a person is entitled to receive. From that starting point there have been two broad legislative approaches.

The earlier legislation<sup>33</sup> followed the Royal Commission's recommendation that the level of compensation should not be decreased by further assessment of an injured person's ability to work.<sup>34</sup> The Royal Commission was concerned that an injured person might become "concerned, anxious and uncertain lest the amount be reduced"<sup>35</sup> and noted that such an approach creates a disincentive to injured people increasing

---

*Rehabilitation* (Butterworths Melbourne, 1975) p37 at 2.215; Salmond & Heuston *Law of Torts* (21st Ed, Sweet and Maxwell 1996) at 530-531; Peter Cane *Atiyah's Accidents, Compensation and the Law* (7th Ed, Cambridge University Press, 2008) at p146.

<sup>30</sup> Richard Lewis, Robert McNabb, Helen Robinson and Victoria Wass "Court Awards of Damages for Loss of Future Earnings: An Empirical Study and an Alternative Method of Calculation" (2002) 29 *Law and Society* 406, at 408.

<sup>31</sup> Royal Commission, above n 9, at p 116 [293].

<sup>32</sup> Accident Compensation Act 1972 (repealed), ss 113 and 114; Accident Compensation Act 1982, ss 52-56 and ss 59-69; Accident Rehabilitation, Compensation and Insurance Act 1992, Part 4, ss 37-51; Accident Insurance Act 1998, ss 83-100 and Schedule 1, part 2; Accident Compensation Act 2001, ss 100-112 and sch 1, part 2.

<sup>33</sup> Accident Compensation Act 1972 and Accident Compensation Act 1982.

<sup>34</sup> Royal Commission, above n 9, at p 62 at [127], p 124 at [305(d)], p117 [293(e)] and p153 at [404].

<sup>35</sup> Royal Commission, above n 9, at p 62 at [126].

their income.<sup>36</sup> The subsequent legislative approach still in practice today is one of continual reassessment. Claimants are required to undergo repeated assessments if they receive compensation.<sup>37</sup>

### 3 *Current Exit Mechanisms*

Today, someone suffering personal injury by accident is entitled to be compensated at 80 per cent<sup>38</sup> of their pre-accident weekly earnings<sup>39</sup> until one of four things occurs: (1) they are assessed as able to return to the job they were doing when injured;<sup>40</sup> (2) they are assessed as being able to work 30 hours per week in any new job;<sup>41</sup> (3) they are assessed and it is decided that their inability to work is wholly or substantially caused by non-covered conditions;<sup>42</sup> or, (4) they are criminally prosecuted and the criminal court determines that they are not entitled to weekly compensation.

These are known as “exit streams.” The focus of each is an assessment and then a decision and the result of the decision is that the person is “exited” from the scheme. Importantly, the personal injury remains covered; there is simply no entitlement to compensation.<sup>43</sup> The court has recognised that such policies have resulted in claimants who are unable to obtain work being moved from compensation to invalid benefits, but

---

<sup>36</sup> Royal Commission, above n 9, at p 124 [305(d)].

<sup>37</sup> Accident Compensation Act 2001, s 72(1)(d) and s 117(3)(a). See also s 102(1) Incapacity can be determined “from time to time” and s 109(1) vocational independence can be assessed “at such reasonable intervals as ACC considers appropriate”.

<sup>38</sup> Accident Compensation Act 2001, sch 1, cl 32(3).

<sup>39</sup> There are numerous provisions for determining exactly how the weekly earnings are calculated depending upon how the person earns their income. Accident Compensation Act 2001, sch 1, part 2 sets these out and the details will not be discussed.

<sup>40</sup> Accident Compensation Act 2001, ss103 -105 and s 100(3).

<sup>41</sup> Accident Compensation Act 2001, s107 and s 100(3).

<sup>42</sup> Combined effects of Accident Compensation Act 2001, ss 26(2) and 117(1).

<sup>43</sup> Unless cover is revoked (Accident Compensation Act 2001, s 65), it continues when compensation for lost earnings ceases in accordance with the legislative policy (Accident Compensation Act 2001, s 67). For example when a person turns 65 years old, they are no longer entitled to weekly compensation (Accident Compensation Act 2001, sch 1, cl 52(2)), but they still have cover and could receive rehabilitation, or other entitlements.

nonetheless sees its role as being to implement Parliament's policy, which cannot be interpreted in order to achieve broadly desirable social consequences.<sup>44</sup>

## ***B Incapacity Exit***

### *1 Overview*

When a person cannot do their pre-injury job, they are “incapacitated”<sup>45</sup> and therefore entitled to compensation for their lost income.<sup>46</sup> Since the first legislation was enacted, the primary focus has been to return injured people to the job they were undertaking immediately prior to their accident, as soon as possible. This remains the primary goal of vocational rehabilitation under the current legislation.<sup>47</sup> Entitlement to compensation continues until the injured person is capable of returning to their pre-injury job, at which point they are “no longer incapacitated” – in common law terms they no longer suffer pecuniary loss.

It is fundamental to the ACC scheme that when a person *can* actually return to their pre-injury job, they no longer suffer pecuniary loss so they are not entitled to be compensated. Nonetheless, issues remain with determining when a person is capable of returning to their pre-injury job. The incapacity procedures<sup>48</sup> now require ACC to determine from time to time,<sup>49</sup> whether a person can return to their pre-injury job. This is very narrowly defined; being the job they were doing at the time of injury, not another job with the same employer.<sup>50</sup> In *McCartney v ACC*, Beattie DCJ said:<sup>51</sup>

---

<sup>44</sup> *Raitt v ACC* [2007] NZACC 136 at [2]-[5].

<sup>45</sup> Accident Compensation Act 2001, s 6(1) “incapacity” is defined by reference to a determination in accordance with s103 and 105.

<sup>46</sup> An injured person is only compensated at 80 per cent of their loss, creating an incentive to get back to work to obtain the 20 per cent of “lost earnings” (Royal Commission, above n 9, at p 181 [492]). Prior to *Davies v Police* [2009] NZSC 47, the 20 per cent lost earnings could be recovered as reparation in criminal proceedings. The Law Commission has recently reported options for compensating victims of crime (Law Commission *Compensating Crime Victims* (NZLC R121 2010)). Some employers still pay this 20 per cent as part of their collective employment agreement.

<sup>47</sup> Accident Compensation Act 2001, s 86(2)(a).

<sup>48</sup> Accident Compensation Act 2001, ss 102-106.

<sup>49</sup> Accident Compensation Act 2001, s 102(1).

<sup>50</sup> Accident Compensation Act 2001, ss 86(2)(b)(i) is distinct from 86(2)(a).

[24] Capacity or incapacity is directly linked to the pre-injury employment and to no other employment; thus a freezing worker who suffers a back injury would be regarded as being incapacitated and unable to continue in that employment and would continue to retain the status of being incapacitated even though he were to obtain employment as a sales assistant where a back injury was not a factor. That status of incapacity would continue for so long as the person remained unable to resume the employment of a freezing worker and abated weekly compensation would continue to be paid for so long as the income from the position of sales assistant was less than the weekly compensation assessed as being the entitlement. ...

[26] If it is the case that the person cannot resume their pre-injury employment but can take up another position with the same employer then that person is in exactly the same position as the freezing worker/sales assistant example I have stated above.

This raises the problem of determining exactly what the old job was, and what that job required. Almost all jobs change over time, both as requirements of the job change and the skills and experience of the employee change. Accurate records are not available, especially when the dispute about what the job requires only comes to light years or decades later. This creates obvious problems for courts, for example in *Thomas v ACC*<sup>52</sup> the court heard weeks of evidence in 2008 and 2009 to determine what the claimant's pre-injury job was twenty years earlier. In the end, the court decided that on the balance of probabilities, in 1997, the applicant was capable of doing what he was doing in 1989.

## 2 *Medical Certificate*

In practice, incapacity for work is determined by medical certificate. The legislation requires an assessment by a medical professional and the early forms simply required a doctor to fill in and stamp the form.<sup>53</sup> The medical certificate was limited to the injured person being classified as fit or unfit for regular work, which was understood to refer

---

<sup>51</sup> *McCartney v ACC* [2005] NZACC 180 at [24] and [26].

<sup>52</sup> *Thomas v ACC* [2010] NZACC 61 at [474].

<sup>53</sup> See for example early ACC forms C3, C14 and C15.

to their old job. There was also another small section that allowed for comment on alternative work but this was not very well utilised.<sup>54</sup>

Allegations of abuse by medical professionals with “phantom” claims (whereby a claim for payment would be lodged with ACC and no patient seen), resulted in a new requirement that the claimant sign the forms as well as the doctor.<sup>55</sup> This signature, along with the claimant’s declaration, will be discussed in detail below in the context of the “fraud exit”.

The medical certificate remains limited to whether a person can do their old job and is not relevant to assessment of vocational independence. A person’s medical certificate certifying that the person is fully unfit, does not limit ACC’s requirement that the claimant undergoes vocational rehabilitation.<sup>56</sup>

### 3 *Determining what the Pre-injury Occupation Required*

There is sometimes dispute between the injured person and ACC regarding what the person’s pre-injury job actually was. Whilst it may seem obvious at first glance, it is often not very clear exactly what functional tasks are required to do a job. Almost a third of New Zealand employees work for small businesses<sup>57</sup> and these generally lack formal documentation.<sup>58</sup> Those who are employed for many years by the same employer often find their job tasks have changed significantly over the years.

But each party has an interest in explaining the pre-injury job in certain way. An injured person might want their job to seem more physically demanding, but ACC would prefer to focus on light tasks that the injured person is more likely to be able to

---

<sup>54</sup> Ison, above n 13, at 58.

<sup>55</sup> Law Commission *Personal Injury Prevention and Recovery* (NZLC R4, 1988) p xvii at [17].

<sup>56</sup> ACC Response dated 29 May 2008 to an Official Information Act Request dated 18 May 2008 to disclose all policies surrounding the medical certification (Obtained under the Official Information Act 1982 Request to the Accident Compensation Corporation).

<sup>57</sup> National Health and Safety Advisory Committee *Occupational Health and Safety in Small Businesses* (NOHSAC Technical Report 12, Wellington, 2009) at 8.

<sup>58</sup> *Ibid*, at 9.

do after their accident. What is required is a proper assessment that takes into account what the person was actually doing before their accident.

*Tuitaatlili v ACC* is a case that involved ACC deciding that a claimant was no longer incapacitated as a result of a fraud investigation and prosecution of an injured fisherman. Before Mr Tuitaatlili's injury, he worked on a fishing boat, and his jobs included filleting fish, moving fish bins around and stacking them above head height. After about a year, ACC undertook a fraud investigation and in November 2005, ACC told Mr Tuitaatlili's general practitioner, Dr McCabe that he had been seen carrying heavy fish and working in a fish and chip shop, filleting fish, moving a fish bin around, painting and decorating, selling fish from back of shop, and that the work was heavy at times. Dr McCabe then said he would have issued a certificate stating that Mr Tuitaatlili was fully fit for full time work had he known. ACC then decided that the client was no longer incapacitated but no assessment was undertaken that considered the client's pre-injury job tasks. Just because he was filleting fish in both setting does not mean the job was the same. In allowing the appeal in 2009, Ongley DCJ said:<sup>59</sup>

... it is too easy to obscure the real question by applying occupational labels without fairly defining the occupational group and considering the essential work requirements. The occupation of a commercial fisherman would seem to involve much heavier physical work than the physical tasks of working in a fish shop and delivering small punnets of prepared fish. The heavy work in the shop was put at its highest as "lifting heavy fish", which does not compare with lifting bins of fish above head height when working on a fishing vessel.

#### 4 *What Can be Taken into Account.*

In addition to mandating assessment by medical or nurse practitioner,<sup>60</sup> the legislation allows ACC to take into account "professional, technical, specialised, or other advice from any person it considers appropriate."<sup>61</sup> There is a question as to whether this

---

<sup>59</sup> *Tuitaatlili v ACC* [2009] NZACC 68 at [35].

<sup>60</sup> Accident Compensation Act 2001, s 102(2)(a) was amended by the Injury Prevention, Rehabilitation, and Compensation Amendment Act 2008 so as to allow nurses to sign medical certificates.

<sup>61</sup> Accident Compensation Act 2001, s 102(2)(b).

allows ACC to take into account private investigators' or former spouses' statements when determining whether people are incapacitated and this raises issues of natural justice.<sup>62</sup> Further, "other advice from any person it considers appropriate" is limited by the *eiusdem generis* principle to people with some sort of expertise rather than the opinion of a layperson.<sup>63</sup> This has been used to exclude ACC from taking into account the opinion of an injured person, but it could equally apply to the opinion of a former spouse.

While it could be argued that the legislation limits what ACC can take into account, ACC is entitled to take into account an assessment by a medical practitioner and the legislation does not limit what this or any other assessor can take into account. So, in theory, ACC can simply provide the disputed information to the assessor. Further, there is no accountability mechanism that is enforceable by claimants against an assessor.<sup>64</sup> Even judicial review is barred by the second privative provision,<sup>65</sup> which limits disputes about matters covered by the legislation to the statutory processes.<sup>66</sup> This can be compared to the situation in the United Kingdom where in *Jones v Kaney*,<sup>67</sup> the Supreme Court held that there is no bar to suing expert witnesses regarding their evidence.

## 5 *Conflict Between Assessments of Treating and Non-Treating Assessors*

The legislation does not specify the requirements for assessment<sup>68</sup> and there is no definition of "assessment" in the legislation,<sup>69</sup> although we do know that "treatment"

---

<sup>62</sup> *Tuitaatalili v ACC* [2009] NZACC at [31].

<sup>63</sup> Reviews 153669 and 153670, p 9.

<sup>64</sup> Warren Forster "Accountability of Non-treating Health Practitioners" (LLB Research Essay, Law and Medicine, University of Otago, 2010).

<sup>65</sup> Accident Compensation Act 2001, s133(5).

<sup>66</sup> *Ramsay v Wellington District Court* [2006] NZAR 136 (CA) at [31].

<sup>67</sup> *Jones v Kaney* [2011] UKSC 13.

<sup>68</sup> Accident Compensation Act 2001, s 102(2)(a).

<sup>69</sup> Accident Compensation Act 2001, s 6(1), does not define assessment.

includes assessment of whether a person can return to work.<sup>70</sup> This suggests that such an assessment is undertaken by a person's general practitioner in the course of a treatment relationship.

Notwithstanding this, the legislation requires claimants to undergo assessment by a medical professional specified by the Corporation<sup>71</sup> and assessments by non-treating doctors are commonplace. The significance is that these non-treating assessors are, at least in theory, subject to the Medical Council guidelines for non-treating doctors performing medical assessments of patients for third parties.<sup>72</sup> ACC terms this assessment a "medical case review". Policy documents presented in court attest to ACC's expectations that second opinions on incapacity by "appropriate providers" would reduce the number of claimants receiving weekly compensation. In one case, his Honour, Judge Middleton observed the issue as:<sup>73</sup>

2. What is meant by the statement "*The Referred Providers programme involves the obtaining of second opinions from appropriate providers where medical certificates are being unreasonable (sic) extended?*" Does that mean that a direction to a "tame" provider will produce the required report to enable an "exit" to be made? It certainly has that appearance and it would follow that the "*appropriate provider*" would be suitably recompensed.

Non-treating assessors' opinions are often different to that of the treating doctor or treating specialist,<sup>74</sup> and it is not clear how these assessments are to be weighed although it would appear that the opinion of the doctor who has actually seen the patient is to be preferred by the courts.<sup>75</sup> However, when the claimant's General Practitioner and a non-treating specialist have both personally examined the client, the

---

<sup>70</sup> Accident Compensation Act 2001, s 6(1), definition of "treatment".

<sup>71</sup> Accident Compensation Act, ss 55(1)(d) and 72(1)(d).

<sup>72</sup> Medical Council of New Zealand *Non-treating doctors performing medical assessments of patients for third parties* (Medical Council of New Zealand, December 2010). However, for discussion of practical enforcement of this see Forster, above n 64 at 8 and 9.

<sup>73</sup> *Albert v ACC* [2000] NZACC 238, at page 10.

<sup>74</sup> Medical Council, above n 72 at [21].

<sup>75</sup> *Dobbs v ACC* [2005] NZACC 46 at [26] and [63]; *Biggart v ACC* [2010] NZACC 56 at [16]-[23].

specialist assessment is to be preferred<sup>76</sup> as the legislation specifically allows for specialist opinion.<sup>77</sup>

This overriding of the function of the claimant's General Practitioner<sup>78</sup> and the return to an adversarial approach<sup>79</sup> is exactly the problem envisaged by the Royal Commission. The problems came to a head after the introduction of the Accident Rehabilitation, Compensation and Insurance Act, 1992. ACC was sending a number of clients to a particular specialist who was overriding other doctors' opinions and ACC was exiting the claimants as a result. The retired Chief District Court Judge, Peter Trapski conducted an inquiry into the matter. He criticised the arrangements and said ACC's preference of the opinions of their contracted occupational assessors over claimants' general practitioners fuels perceptions of bias and increases disputes about injury and causation.<sup>80</sup>

#### *6 Situations When a Person Returns to Work but is Then Incapacitated*

One of the key advantages of the scheme is that it provides encouragement to individuals to go back to work as soon as possible after they suffer personal injury. Not only are the outcomes better for society, but also for individuals.<sup>81</sup> Unfortunately, some individuals, who will return to work early despite their injury and pain, will find their condition deteriorates and they are unable to sustain their work. In some cases it is because the physical injury deteriorates, but in other cases, the mental consequences of the injury come to the fore.

---

<sup>76</sup> *McIntosh v ACC* [2009] NZACC 180 at [13].

<sup>77</sup> Accident Compensation Act 2001, s 102(2)(b).

<sup>78</sup> Royal Commission, above n 9, p 146 and 147 at [378].

<sup>79</sup> Royal Commission, above n 9, p 153 at [400]-[402].

<sup>80</sup> Peter J Trapski *Report of the Inquiry into the procedures of the Accident Compensation Corporation* (1994) at 52-55.

<sup>81</sup> Sarah Crichton, Steven Stillman and Dean Hyslop. "Returning to Work from Injury: Longitudinal Evidence on Employment and Earnings" (2011) 65 *Industrial and Labor Relations Review* 765.

Nonetheless, once a person is able to return to work, they are no longer entitled to receive weekly compensation.<sup>82</sup> This has been strictly interpreted by the court and applied as a form of statutory estoppel. If some time later, they are unable to sustain their job, there is no remedy available.<sup>83</sup>

This policy is inconsistently applied and has been criticised on the basis that ACC has an obligation to consider whether the condition that causes the person to stop work is itself covered by ACC.<sup>84</sup> If so, a fresh incapacity arises and processes of determining incapacity start again. Unlike the vocational independence provisions discussed below, which allow deterioration in the condition to trigger a reassessment of vocational independence,<sup>85</sup> no such provisions apply for incapacity. This provides a clear disincentive for claimants to return to work if there is any doubt of their ability to sustain this work.

### ***C Vocational Independence Exit***

#### *1 Overview*

As a matter of public policy, if a person cannot return to the job they were doing when injured, both the individual and society will be better off if they are able to work in some other job. The issue here is – what is meant by work? Further, how does one determine what work a person can do? These are questions of policy and Parliament has answered them.

Unfortunately, Parliament’s test, now known as a ‘vocational independence assessment’ is problematic. If a person cannot return to the job they were doing when they were injured, they are required to undertake a series of assessments that purport to assess a person’s vocational independence – are they able to return to another

---

<sup>82</sup> Accident Compensation Act 2001, ss 100(3), 104 and 106.

<sup>83</sup> *Heaney v ACC* [2001] NZACC 5 at 22; *O’Connor v ACC* [2000] NZACC 224; *James v ACC* [2005] NZACC 86; *Brotherton v ACC* [2005] NZACC 172.

<sup>84</sup> *Mathieson v ACC* [2002] NZACC 45 at [5]; *Auld v ACC* [2009] NZACC 90 at [31].

<sup>85</sup> Accident Compensation Act 2001, s 113.

occupation that they are “suited to” for 30 hours per week?<sup>86</sup> If so, then a legal fiction deems them to be able to return to their old job<sup>87</sup> and they no longer have entitlement to weekly compensation.

The importance of returning to work is still acknowledged today, both within the ACC scheme<sup>88</sup> and the parallel social security scheme. The problem is that the measure is not actual work, but an assessment that a person can work. Assessors have acknowledged that in many cases these assessments are completely unreliable and it is not possible to assess pain, which is a major cause of incapacity.<sup>89</sup> They have also been criticised in the literature.<sup>90</sup> In the United Kingdom, it took less than two years for this model to be criticised by the legislature as an unworkable method of assessing beneficiaries’ ability to work after 400,000 appeals were lodged against its decisions and 39 per cent of appeals were successful.<sup>91</sup> Yet in New Zealand it was implemented in 1996<sup>92</sup> and has remained almost unchanged since then. Whilst actual work will undoubtedly improve mental health and long-term outcomes in most cases, a system of assessments and a belief by claimants that they are being exited, will not.

Under the present ACC legislation, a claimant who receives rehabilitation is subjected to a process where compensation is likely to be ceased, without inquiry into the prospect of income to replace the compensation. The threat of losing compensation

---

<sup>86</sup> Defined by Accident Compensation Act 2001, s 6 (1). From 1999 to 2001 it was 30 hours/week (Accident Insurance Act 1998, s 15(1)(b)), from 2001 to 2009 it was 35 hours per week (Injury Prevention, Rehabilitation and Compensation Act 2001 s 6 (1) definition of “vocational independence”).

<sup>87</sup> Accident Compensation Act 2001, s 111.

<sup>88</sup> Accident Compensation Act s102-106.

<sup>89</sup> John Alchin “Can Work Capacity in Chronic Non-Specific Pain be Validly Assessed?” Ngau Mamae Feb 2010 at p 36.

<sup>90</sup> Grant Duncan “The Assessment of Residual Capacity for Work: Easier Said than Done” 1999 12 Social Policy Journal of New Zealand 35; Grant Duncan “Moral Hazard and Medical Assessment” (2003) 34 VUWLR 433 at 440; E MacEachen and others “The ‘Ability’ paradigm in Vocational Rehabilitation: Challenges in an Ontario Injured Worker Retraining Program” (2011) J Occup Rehabil (published online 6 Sep 2011); E MacEachen and others “The ‘Toxic Dose’ of System Problems: Why Some Injured Workers don’t Return to Work as Expected” (2010) 20 J Occup Rehabil 349.

<sup>91</sup> United Kingdom Parliamentary Reports, House of Commons Work and Pensions Committee - Sixth Report, The role of incapacity benefit reassessment in helping claimants into employment 13 July 2011.

<sup>92</sup> Accident Rehabilitation, Compensation and Insurance Amendment Act (No 2) 1996.

without having a replacement creates disincentives for claimants to engage in rehabilitation. This undermines the entire ACC scheme, so that it cannot achieve its purpose of reducing the cost of personal injury through rehabilitation.

This process is the antithesis of that proposed by the Royal Commission<sup>93</sup> as it creates disincentives for injured people to participate in rehabilitation. Anything they do to improve their situation will result in another assessment<sup>94</sup> of their ability to do a new job for 30 hours per week. This exposes them to the risk of losing all compensation through a legal fiction that deems them to be able to return to their old job.<sup>95</sup> This occurs even though the injured person will probably not be able to work in the new job. Even if they do, they are likely to earn significantly less than they received before their accident and when they were entitled to compensation.<sup>96</sup> It has been established through the longitudinal research, the cause of this is the injury and not the labour market.<sup>97</sup>

This approach leads to a focus on what the person cannot do, and widespread resistance by claimants to assessment. The legislative response is to refuse weekly compensation for those who will not attend the assessment.<sup>98</sup> The result is exactly what the Royal Commission envisaged would occur if assessments reduced compensation and injured people were coerced into rehabilitation.<sup>99</sup> In addition, claimants are now developing mental injuries from the manner in which ACC is managing their claims.<sup>100</sup>

---

<sup>93</sup> Royal Commission, above n 9, p 153 [403-404].

<sup>94</sup> Accident Compensation Act 2001, s 88(1).

<sup>95</sup> Accident Compensation Act 2001, s 100(3), s 107 and s 111.

<sup>96</sup> Hazel Armstrong and Rob Laurs *Vocational Independence: outcomes for ACC Claimants* (prepared for the Department of Labour, 2007) at 60 and 62. This involved a study of 160 claimants who were determined to be vocational independent.

<sup>97</sup> Crichton, above n 81.

<sup>98</sup> *Print v ACC* [2004] NZACC 394; *Henderson v ACC* [2004] NZACC 396; and *Milian* [2004] NZACC 397; *Gibb v ACC* [2005] 122; *Gibb v ACC* [2006] 243; *Gibb v ACC* [2006] NZACC 308; *Gibb v ACC* [2007] NZACC 137; and, *Raitt v ACC* [2007] NZACC 136.

<sup>99</sup> Royal Commission, above, n 9, p 62, [126] and p152-153 [398] and [404].

<sup>100</sup> Review 195273; and, Review 202052.

## 2 Vocational Independence Process

The vocational independence process, as its name suggests, has been designed as a procedurally-focused rehabilitation process requiring a series of assessments, rather than an outcome-based process. At the end of the process, there is no inquiry as to whether a person's rehabilitation is successful in terms of their actually getting a job;<sup>101</sup> the question is simply whether the assessments have been completed properly.<sup>102</sup>

Two "initial assessments"<sup>103</sup> are designed to identify jobs that a person is suited to and any rehabilitation "interventions" in order to get the person into those jobs. These interventions are then developed into an "Individual Rehabilitation Plan."<sup>104</sup> Some time is then set aside for rehabilitation, and thereafter, a further series of assessments, known as vocational independence assessments,<sup>105</sup> is carried out. If these show that an individual has vocational independence<sup>106</sup> then the person is deemed not to be incapacitated,<sup>107</sup> and is given three months' notice that their weekly compensation will cease.<sup>108</sup>

## 3 Assessors

As with the assessments to determine incapacity, there are also issues with the assessors selected for determining vocational independence. The assessor need not be qualified in, nor demonstrate an understanding of, the injured person's condition.<sup>109</sup> All that is required by the legislation is that the person is a GP, or is training to be a GP, or has expertise in occupational medicine, or in disability management.<sup>110</sup> If the assessors

---

<sup>101</sup> ACC Response dated 15 November 2010 to an Official Information Act Request dated 15 October 2010 requesting disclose of outcomes for long-term clients who were assessed as vocationally independent (Obtained under the Official Information Act 1982 Request to the Accident Compensation Corporation).

<sup>102</sup> *Martin v ACC* [2009] 3 NZLR 701 at [36](a).

<sup>103</sup> Accident Compensation Act 2001, ss 90-96.

<sup>104</sup> Accident Compensation Act 2001, sch 1, cls 7-10.

<sup>105</sup> Accident Compensation Act 2001, ss 107-108 and sch 1, cls 24-29.

<sup>106</sup> They are assessed as able to perform suitable work for 30 hours per week. Accident Compensation Act 2001, s 6(1) definition and s107 assessment.

<sup>107</sup> Accident Compensation Act 2001, s 111.

<sup>108</sup> Accident Compensation Act 2001, s 112.

<sup>109</sup> Review 194849.

<sup>110</sup> Accident Compensation Act 2001, sch 1, cl 27.

meet these requirements then their opinions are accepted. The courts were initially reluctant to enforce these assessments, especially after considering ACC's policies. In *Albert v ACC*, Middleton DCJ considered ACC's exit strategies contained in their operation policy and said<sup>111</sup>

I hope that the proposals outlined in the document of 6 October 1999 are not being implemented in the manner in which I have interpreted them but because of the number of times this issue has been raised before me I have my doubts. These doubts have not been assisted by a recent public statement from the respondent claiming "*success*" in the reduction of the number of longstanding claimants.

As I have already said, the Court must accept the assessments made by the duly qualified assessors but I have to do so with reluctance.

Injured people regularly allege that assessors are biased in favour of ACC.<sup>112</sup> The assessors are contracted to ACC, ACC decides which assessor the claimant is sent to, and ACC pays the assessor.<sup>113</sup> Further, there is a belief amongst clinicians that a contract with ACC is a "pot of gold" for the duration of the agreement.<sup>114</sup> Unfortunately, there are not effective accountability mechanisms for non-treating health practitioners and these problems continue unchecked.<sup>115</sup>

#### 4 *The Ramsay Principle and the Martin Decision*

It had long been the case that on review<sup>116</sup> and appeal<sup>117</sup> of ACC's decision that an injured person was vocationally independent,<sup>118</sup> the reviewer and the court would not

---

<sup>111</sup> *Albert v ACC*, above n 73, at p 10.

<sup>112</sup> *Davies v ACC* [2005] NZACC 74; *Van Ryhn v ACC* [2006] NZACC 1; *Gronn v ACC* [2008] NZACC 101; *U of Gisbourne v ACC* [2006] NZACC 266; *Oliver v ACC* [2008] NZACC 34; *Ilich v ACC* HC AK CIV-2006-485-001074 (25 Oct 2006).

<sup>113</sup> Assessors can be paid millions of dollars over several years by ACC (Forster, above n 54 at 5).

<sup>114</sup> Commerce Commission Decision No. 546, 17 February 2004, at 25 and 26.

<sup>115</sup> Forster, above n 64.

<sup>116</sup> Claimants have the right to "Review" ACC's decision that they are vocationally independent in accordance with the statutory process (Accident Compensation Act 2001, s134-148).

<sup>117</sup> Claimants and ACC have the right to Appeal the decision of the Reviewer to the District Court (Accident Compensation Act 2001, ss 149-161).

<sup>118</sup> Accident Compensation Act, part 5.

disturb a procedurally correct assessment. In 2003, this position was confirmed by the High Court in *Ramsay v ACC*,<sup>119</sup> which was an application to the High Court for special leave to appeal.<sup>120</sup> In declining leave, the court commented that once an assessment had been carried out in accordance with proper process, the court could not hear or rely upon any evidence that was contrary to this statutory assessment. For many years, the “mantra of Ramsay”<sup>121</sup> made ACC’s assessors sacrosanct, and without any way to challenge them in court or constrain their behaviour,<sup>122</sup> many claimants were exited from the scheme.

In 2009, the High Court in *Martin*<sup>123</sup> finally heard the substantive issue that was declined leave to appeal in *Ramsay* five years earlier, and set out the approach as: (1) ACC are themselves bound to follow a procedurally correct assessment when they first make their decision; and (2) if the claimant disputes this decision, at review<sup>124</sup> and appeal<sup>125</sup> the parties and the fact finder are not bound by the assessment ACC relied upon and the matter is to be reconsidered afresh by reference to all available evidence.<sup>126</sup> So it has finally become possible for a claimant to challenge the assessment and produce evidence at a hearing to support their entitlement to compensation.

While this goes some way towards restoring balance, there remains a significant obstacle in the ability of injured people to obtain independent medical assessments. Even if successful upon review, costs cannot be awarded by reviewers to cover the full expense incurred in procuring these assessments.<sup>127</sup> Further, it is difficult to obtain

---

<sup>119</sup> *Ramsay v ACC* [2004] NZAR 1.

<sup>120</sup> Accident Compensation Act, 2001, s 162(4).

<sup>121</sup> *Jones v ACC* [2008] NZACC 195 at [65].

<sup>122</sup> Forster, above n 64, at 3-5.

<sup>123</sup> *Martin v ACC* above n 102.

<sup>124</sup> Claimants have the right to “Review” ACC’s decision that they are vocationally independent in accordance with the statutory process (Accident Compensation Act 2001, s134-148).

<sup>125</sup> Claimants and ACC have the right to Appeal the decision of the Reviewer to the District Court (Accident Compensation Act 2001, s149-161).

<sup>126</sup> *Martin v ACC* above n 102, at [32] and [36].

<sup>127</sup> Injury Prevention, Rehabilitation and Compensation (Review Costs and Appeal) Regulations 2002, sch 1. These assessments cost between \$3,000 and \$5,000. The regulations limit the award to \$915.

independent opinions from experts because of ACC's effect on the market.<sup>128</sup> In the decade between *Albert v ACC*<sup>129</sup> in 2000 where the court found itself bound to follow ACC's assessment without considering any other evidence and *Martin v ACC*<sup>130</sup> in 2009 when the court said that claimants could produce further medical evidence to support their case, ACC was almost the exclusive purchaser of expert occupational assessments in New Zealand. This effect on the market of expert medical assessors and the inability of most injured people to fund an independent assessment<sup>131</sup> means it remains difficult for claimants and lawyers to obtain independent expert evidence. ACC is publicly funded and spends money to obtain medical evidence in a market that they dominate. This problem has been the subject of repeated submissions to Parliament, including by independent bodies such as the New Zealand Law Society.<sup>132</sup>

### 5 Accuracy of Assessments

Whilst no system-wide data have been collected,<sup>133</sup> the available information suggests that vocational rehabilitation and assessments are neither accurate, nor indicative of complete rehabilitation. One study of several hundred claimants who had undertaken a rehabilitation programme found that the rehabilitation goals of the legislation were only being met in 30 per cent of cases.<sup>134</sup> Another found that few people assessed as vocationally independent were in fact able to work full-time in the occupations they were assessed as suitable for.<sup>135</sup> Further, previous trials have acknowledged that it is

---

<sup>128</sup> The only system-wide review of ACC's effect on the market was been carried out by David Goddard, QC (David Goddard "The way in which Physiotherapy Services are funded and accredited by ACC" (Report to the Minister of ACC, Department of Labour, Wellington, 2007)). It clearly shows the effect on the market of one dominant funder (ie, ACC).

<sup>129</sup> *Albert v ACC* above n 73.

<sup>130</sup> *Martin v ACC* above n 102.

<sup>131</sup> By the time claimants seek an independent assessment, they have usually been on reduced earnings for some time, they savings have been eroded and their weekly compensation ceased.

<sup>132</sup> New Zealand Law Society ACC Committee "Submissions to the Regulations Review Committee's review of the Injury Prevention, Rehabilitation and Compensation (Review Costs and Appeals Regulations)" 2008.

<sup>133</sup> ACC's Official Information Act Response 15 November 2010, above n 101.

<sup>134</sup> Kathryn McPherson *Evaluation of Vocational Rehabilitation under the IPRC Act 2001* (prepared for ACC by Auckland University of Technology, 2007) at p 76.

<sup>135</sup> Armstrong and Laurs, above n 96, at p 60.

not possible to accurately predict how much work someone can do in an assessment that lasts for less than an hour.<sup>136</sup> Assessors have also accepted that it is not possible to determine how many hours a person can work when they suffer from chronic pain.<sup>137</sup> The outcomes of vocational independence will be discussed in the next chapter, which discusses the effect of the exit strategies.

## ***D Causation Exit***

### *1 Is the Onus on the Injured Person or ACC ?*

There are two approaches to causation that are relevant to compensation under the Accident Compensation Act 2001: (1) determination of incapacity and (2) suspension of entitlements. The first approach is that ACC has to determine that the person is unable, “because of his or her personal injury” to return to their pre-injury occupation.<sup>138</sup> This implies that if ACC determines that a person is unable to return to their pre-injury occupation because of something *other* than their personal injury, then they are not incapacitated and therefore lose their entitlement immediately.<sup>139</sup> This was considered by the High Court in *Fowlie* and the law placed a continuing onus *on the claimant* to show that the cause of their incapacity (and therefore their entitlement to compensation) is the personal injury for which they have been given cover.<sup>140</sup> This *Fowlie* approach was followed until 2007.

The current approach by ACC is to suspend entitlements under s117. This was considered by the High Court decision in *Ellwood*, which distinguished *Fowlie*<sup>141</sup> and held that when suspending entitlements ACC must be able to show that at the time of suspension, they had a sufficient basis on which entitlements should be suspended (in effect, terminated).<sup>142</sup> *Ellwood* in effect transferred the evidential onus to ACC.

---

<sup>136</sup> Grant Duncan “Moral Hazard and Medical Assessment” (2003) 34 VUWLR 433 at 440.

<sup>137</sup> Alchin, above n 89.

<sup>138</sup> Accident Compensation Act 2001, s 103(2).

<sup>139</sup> Accident Compensation Act 2001, s 104(a)(i).

<sup>140</sup> *Fowlie v Accident Rehabilitation and Compensation Insurance Corporation* (AP 50/00, decision of Hansen J, 4 October 2000) p 8. *Finnemore v ARCIC* [1998] NZACC 262 at p 9.

<sup>141</sup> *Ellwood v ACC* [2006] NZHC 1607 considered and distinguished *Fowlie* at [57].

<sup>142</sup> *Ellwood v ACC* [2006] NZHC 1607 at [64].

Although *Fowlie* was distinguished rather than overruled by *Ellwood*, *Fowlie* is no longer relied upon by ACC. Once weekly compensation entitlement is provided to a claimant,<sup>143</sup> ACC suspends compensation on the grounds of causation by following the *Ellwood* process. This involves suspending a claimant’s weekly compensation on the grounds that ACC is “not satisfied, on the basis of the information in its possession, that the claimant is entitled to continue to receive the entitlement.”<sup>144</sup>

## 2 *The Statutory Tests*

Whilst ACC has to show that they have information in their possession that the person is no longer entitled to receive the compensation,<sup>145</sup> the particular information ACC needs to be able to meet the *Ellwood* test depends upon *when* the person was granted cover.<sup>146</sup>

### (a) Covered between 1974 – 1992

If a person is covered under the 1972 or 1982 legislation, then the question is whether their accident and the physical and mental consequences thereof are a partial causal factor of their inability to work.<sup>147</sup>

---

<sup>143</sup> Claimants still have to prove entitlement when they are first injured, see incapacity discussion above.

<sup>144</sup> Accident Compensation Act 2001, s117(1)(a).

<sup>145</sup> *Ellwood v ACC*, above n 142, at [64].

<sup>146</sup> Accident Rehabilitation, Insurance and Compensation Act 1992, s10; c.f. Accident Compensation Act 1982, s 2 where cover was not provided for injuries caused exclusively by non-injury factors.

<sup>147</sup> *Cochrane v ACC* [2005] NZAR 193 at [24]; *Wall v ACC* [2001] NZACC 322 at [27]-[28]; *Gale v ACC* [2008] NZACC 156, and *Gale v ACC* [2008] NZACC 242 at [86], [99]-[100]. The dichotomy between cover under the 1982 and 1992 Acts is not very well understood in New Zealand. In writing about causation under the ACC scheme, one commentator has concluded the *Cochrane* test under the 1982 Act is in effect the same as the *McDonald* test under the 1992 Act, despite noting the different ambit of cover. See Doug Tennent “Degenerative Conditions: One of the Dilemmas of Accident Compensation Cover. Is there a way of clarifying the confusion in order to achieve fairness” (2009) 23 NZULR 315 at 318 (difference in cover under the 1982 Act), and 324 (*Cochrane* test is “in effect the same”).

(b) Covered after 1992

If a person was granted cover after 1992<sup>148</sup> then the question is whether non-covered factors are wholly, or substantially the cause of their inability to work. Judicial interpretation has applied the *noscitur a sociis* maxim of interpretation and read “substantially” as being coloured by “wholly”. In *Booker v ACC*<sup>149</sup> the Court considered that the degree of causation represented by the test of “wholly or substantially” in what is now s 26(2) of the Accident Compensation Act 2001, represents more than 70 per cent. This was followed in *Hamilton v ACC*.<sup>150</sup>

(c) A Multiple Cause Example

Someone who suffered personal injury by accident in July 1993, who continued to suffer the effects of the injury, and certainly could not work, would still be able to gain cover for that personal injury. But if the reason they could not work were substantially caused by a non-covered condition for example diabetes,<sup>151</sup> they would no longer be eligible to receive entitlements. In these situations, ACC suspends the person’s entitlements.<sup>152</sup>

Another example is that of a delivery driver who suffered a disc prolapse in a car accident and continued to suffer the effects of this back injury, but then went on to develop blindness due to diabetes and degeneration in her spine. Applying the post 1992 test, while she still had the disc prolapse which caused her to stop work in the first place and it still causes symptoms, her inability to work would be substantially caused by the non-covered conditions (diabetes and degeneration) and therefore she would not be entitled to weekly compensation, notwithstanding the fact that she could not return to work. This occurs even though the disc prolapse alone would be sufficient to stop her working as a delivery driver.

---

<sup>148</sup> The Accident Rehabilitation, Compensation and Insurance Act 1992, the Accident Insurance Act 1998, and the Accident Compensation Act 2001 all have similar tests for cover.

<sup>149</sup> *Booker v ACC* [2000] NZACC 205,

<sup>150</sup> *Hamilton v ACC* [2006] NZACC 318 at [27].

<sup>151</sup> *Auld v ACC* [2009] NZACC 90.

<sup>152</sup> Accident Compensation Act 2001, s117(1)(a).

If that same delivery driver were given cover for the same injury but three years earlier in 1990, then she would remain entitled to weekly compensation, as her injury is partially causative of her incapacity.

(d) Degeneration

Issues of causation are particularly problematic in cases involving degeneration.<sup>153</sup> Once the assessment identifies degeneration, weekly compensation is ceased on the basis that the person can no longer show their covered injury is wholly or substantially the cause of their incapacity. This is done notwithstanding the fact that degeneration subsequent to a covered injury is, in and of itself, covered by the scheme.<sup>154</sup> There remains a duty on ACC to be satisfied that a person is not entitled before suspending entitlements.<sup>155</sup> This requires ACC to turn its mind to the question of whether the degeneration is subsequent to their covered injury or not, prior to suspending entitlements.<sup>156</sup>

### 3 *Causation and Gene-X-Environment Interactions*

ACC has to have information in its possession that the cause is substantially something other than the injury. Taking this reframed causation issue to its natural conclusion requires consideration of it in the context of its application in the developing area of genetics. An accepted body of scientific literature is developing around the gene-environment interactions (known as g-X-e) including out of the Dunedin Multidisciplinary Health and Development Research Unit.<sup>157</sup> A g-X-e is an explanation

---

<sup>153</sup> Doug Tennent “Degenerative Conditions: One of the Dilemmas of Accident Compensation Cover. Is there a way of clarifying the confusion in order to achieve fairness” (2009) 23 NZULR 315 at 317.

<sup>154</sup> Accident Compensation Act 2001, s 20(2)(g).

<sup>155</sup> *Ellwood v ACC* [2006] NZHC 1607

<sup>156</sup> *Accident Compensation Corporation v Ambros* [2007] NZCA 304 at [64]-[65]; Accident Compensation Act 2001, s 54. *Mathieson v ACC* [2002] NZACC 45 at [15]; *Auld v ACC* [2009], NZACC 90 at [31].

<sup>157</sup> For example see, R Poulton, G Andrews and J Millichamp “Gene-environment interaction and the anxiety disorders” (2008) 258 *European Archives of Psychiatry and Clinical Neuroscience* 65; SP

of health outcomes, which require both a genetic pre-disposition and an environmental condition to have an effect. Some genomes have been identified including those for Chronic Fatigue Syndrome<sup>158</sup> and Chronic Pain Syndrome<sup>159</sup> and widespread studies of others are underway. In this context, the environmental factors would include the accident,<sup>160</sup> which caused the personal injury<sup>161</sup> and its consequences.<sup>162</sup>

How genes and environmental factors interact, particularly with regard to chronic conditions, has a significant impact on the outcomes following accidents and indeed on future loss of income. When a person suffers an injury, for which they are granted cover, and this injury and its consequences (eg, pain) interact with the person's genes and they develop a Chronic Fatigue Syndrome or a Chronic Pain Syndrome and this means that they cannot work, are they entitled to compensation?

ACC has already been suspending compensation for individuals suffering congenital defects, or Chronic Fatigue Syndrome, on the basis that the need for entitlements is caused by congenital defects and genetics and not accident.<sup>163</sup> This has potential for significant impacts on the Accident Compensation Scheme. Legislation will need to

---

Robertson and R Poulton "Longitudinal studies to detect gene x environment interactions in common disease - Bang for your buck?" (2008) 67 *Social Science and Medicine* 666-672; A Caspi and others "Moderation of the effect of adolescent-onset cannabis use on adult psychosis by a functional polymorphism in the COMT gene: Longitudinal evidence of a gene x environment interaction" (2005) 57 *Biological Psychiatry* 1117.

<sup>158</sup> *Carter v Accident Compensation Corporation* [2007] NZACC 248; *Forbes v Accident Compensation Corporation* [2011] NZACC 76.

<sup>159</sup> Whilst it has long been accepted in the literature that the development of chronic pain is a gene-X-environment interaction, it has only recently been discovered exactly how this occurs. Edward Emery and others "HCN2 Ion Channels Play a Central Role in Inflammatory and Neuropathic Pain" (2011) 333 *Science* 1462 (9 September 2011).

<sup>160</sup> Accident Compensation Act 2001, s 25.

<sup>161</sup> Accident Compensation Act 2001, s 26.

<sup>162</sup> Accident Compensation Act 2001, s 20(2)(e)-(h).

<sup>163</sup> P Robertson, R Nicholson "ACC and back injuries: The relevance of pre-existing asymptomatic conditions" (2000) 113 *NZMJ* 16; Richard Wigley, Christopher Walls, David Brougham, Peter Dixon "What does degeneration mean? The use and abuse of an ambiguous word" (2011) 124 *NZMJ* 73.

address the issue of causation and gene-x-environment interactions, however first a wider debate is required within society.<sup>164</sup>

#### *4 The Future of Causation in the ACC Scheme*

This is currently viewed as essentially a medical question and will turn on the medical evidence.<sup>165</sup> But the next question that the court or Parliament will need to consider is whether compensation for loss of income will be provided when an injury is caused by the specific environmental factor necessary to trigger the genetic risk factor into action. In such a case, the effects of the gene-X-environment interaction cause the inability to work and the need for compensation.

If the causation exit continues to develop, and as scientific and medical understanding of the factors that lead to inability to work increases, it will undoubtedly add more litigation to the scheme. There will be more invasions of claimants' privacy, as genetic tests are demanded, in the same way that other personal information is demanded today.<sup>166</sup> This has potential to significantly affect the ACC scheme, and another approach on causation is required.<sup>167</sup> Given the potential implications, these issues deserve wide societal debate.<sup>168</sup>

---

<sup>164</sup> Joanna Goven *Implications of Genetic Testing for the Workplace and ACC: Findings from interviews by the Complementary Expertise Sub-team* (Constructive Conversations Research Report 8) June 2005 at 18.

<sup>165</sup> *Stewart v ACC* [2003] NZACC 109.

<sup>166</sup> Diagnostic tests such as X-Rays and MRI scans are demanded and attendance at assessments is required by statute s 72 (1).

<sup>167</sup> Tennent, above n 153, at 338.

<sup>168</sup> Goven, above n 164, at 34 and 35.

## ***E Fraud Exit***

### *1 Introduction*

A person's entitlement continues until (1) they are assessed as able to return to their pre-injury job; (2) they are assessed as able to return to their new job for 30 hours per week; or, (3) the injury is no longer the cause of their incapacity. These are all matters to be assessed and decided through the processes set out in the statute.<sup>169</sup>

If there is a dispute about whether a claimant is entitled to compensation, the claimant has the right to review that decision.<sup>170</sup> The second privative provision prevents disputes about compensation from being determined in any other way except in accordance with the review and appeal process.<sup>171</sup> Despite this, ACC uses the criminal law as a mechanism to determine that injured people are not entitled to compensation and to recover overpayment.

ACC believes that approximately 10 per cent of claims involve fraud.<sup>172</sup> There are about 13,000 long-term claimants receiving weekly compensation and each year ACC's Investigation Unit investigates approximately 1,500 claimants.<sup>173</sup> The criminal law has been utilised by ACC to stop abuse of the scheme. Whilst there is a small proportion of people who may defraud the scheme by 'faking injuries,' the vast majority who have been subject to a fraud investigation were people who were genuinely injured and prima facie entitled to receive weekly compensation.<sup>174</sup> These

---

<sup>169</sup> Accident Compensation Act 2001, ss 101 and 117.

<sup>170</sup> Accident Compensation Act 2001, s6(1) definition of "decision" and s134(1)(a) right to review decision.

<sup>171</sup> Accident Compensation Act 2001, s 133(5).

<sup>172</sup> Transport and Industrial Relations Select Committee 2005/06 Estimates Vote ACC *Report of the Transport and Industrial Relations Committee* Appendix 4, corrected transcript of evidence given on 16 June 2005 at p 28 and 29.

<sup>173</sup> Written Parliamentary Question 4876 (2011).

<sup>174</sup> Approximately 1 per cent of people investigated are prosecuted (1,500 are investigated and about 15 are prosecuted).

people could not do the job they were doing when they were injured, yet, arguably, at the same time they might have been capable of doing a new job at least part-time. This group had no obligation to do anything as they continued to receive weekly compensation until they could return to a new job full-time.

The fraud investigation was the tool developed to force this group of people off the scheme. It is the only mechanism that allows retrospective determination of entitlement, and is the only way that proper assessment procedures can be ignored. ACC has successfully criminally prosecuted people (alleging that fraud has occurred) and afterwards it was determined that the person was injured and entitled to receive the compensation that they were convicted of obtaining by deceit. ACC ultimately had to acknowledge that a criminal prosecution does not mean the person was not entitled to weekly compensation.<sup>175</sup>

## 2 ACC Fraud Process

### (a) Investigation

The purpose of the investigation is clearly identified in ACC's former contract with private investigators. This contract included a key performance indicator that 80 per cent of investigations result in: "Prosecution, cessation, suspension of entitlements, civil action, positive change in claimant capacity status... or some other form of positive action has occurred."<sup>176</sup> Whilst publicity around this release resulted in a review of the ACC Fraud Unit<sup>177</sup> and rewriting of the contracts, it suggests that the purpose of the investigations was to cease entitlement. Further evidence of this is the

---

<sup>175</sup> *Burnett v ACC* [2007] NZACC 210; *ACC v Burnett* [2008] NZACC 74; *Tuitautili v ACC* [2009] NZACC 68; *Cruickshank v ACC* [2011] NZACC 130; *Hayes v ACC* [2010] NZACC 238; Review 42058; Review 146254; and Review 146255.

<sup>176</sup> ACC Response dated 20 April 2007 to an Official Information Act Request dated 3 January 2007 to disclose the contract between ACC and Private Investigators (Obtained under the Official Information Act 1982 Request to the Accident Compensation Corporation).

<sup>177</sup> Doug Martin, Chloe Anderson and Barry Jordan *Review of the Accident Compensation Corporation Fraud Unit* (Report to the Accident Compensation Corporation, Wellington, 2007).

fact that success of the Fraud Unit was measured by comparing expenditure on investigations with the amount of compensation that was saved.<sup>178</sup>

(b) Prosecution

When ACC prosecutes an injured person, that person is charged with “dishonesty using a document”<sup>179</sup> or “obtaining by deceit.”<sup>180</sup> The key documents for both charges are the medical certificates. The allegation is generally that the medical certificates record that the person is “fully unfit” whereas the evidence obtained by the investigation is that the person is capable of working (to some extent) and therefore they lied to their doctor because the medical certificate says they are fully unfit.<sup>181</sup>

(c) Reparation

Reparation is sought through the criminal court for the weekly compensation that was paid to the claimant over the life of the claim. The sentence of reparation is based on the unfairness and cost for ACC of having to prove wrongdoing by the offender and establishing the quantum of loss in separate civil proceedings when this can be achieved in the course of the criminal proceeding.<sup>182</sup> The Sentencing Act 2002 introduced a presumption in favour of reparation.<sup>183</sup> However issues arise in the criminal court determining entitlement to ACC compensation, particularly given the procedural complexity of assessing entitlement and the specific statutory provisions for resolving disputes about compensation.

---

<sup>178</sup> Transport and Industrial Relations Select Committee, above n 172.

<sup>179</sup> Crimes Act 1963, s 228.

<sup>180</sup> Crimes Act 1963, s 240.

<sup>181</sup> Independent Police Conduct Authority *Report into Complaint by Bruce Van Essen* (Wellington, 2008) at p 26, [91].

<sup>182</sup> Law Commission *Compensating Crime Victims* (NZLC R121, 2010) p 10 at [2.10].

<sup>183</sup> Sentencing Act 2002, s 12 (1).

### 3 *Issues with the Fraud Process*

The fraud process above raises three issues: (1) what does the “fully unfit” certification on the medical certificate actually mean; (2) does ACC have to prove that the person is not entitled; and, (3) has ACC made a decision that they are not entitled to weekly compensation when they prosecute an injured person seeking reparation of the compensation they have paid? Each of these will be briefly discussed.

#### (a) Fully Unfit Certification on Medical Certificates

The only statutory process for medical certificates relates to a determination of incapacity – whether the injured person can return to their pre-accident job. There is a separate process for determining vocational independence,<sup>184</sup> which is completely unrelated to determination of incapacity.<sup>185</sup> ACC has confirmed this in response to an Official Information Act question.<sup>186</sup>

#### (b) Does ACC Have to Prove that the person is not entitled?

The Supreme Court decided that lack of entitlement did not need to be proven in order for a prosecution to be successful. Someone could intend to obtain weekly compensation using fraudulent means, even though they were entitled to it. Therefore the prosecution need not prove lack of entitlement. However, the court noted that entitlement to compensation was relevant to mens rea and also to sentence.<sup>187</sup>

The problems with the current approach to entitlement in criminal proceedings are highlighted by the *Stewart* cases. Mr Stewart was convicted of defrauding ACC in 2007 and sentenced to three years imprisonment on the basis that he received compensation he was not entitled to for more than a decade. Importantly, after the first

---

<sup>184</sup> Accident Compensation Act 2001, s 108.

<sup>185</sup> Accident Compensation Act 2001, s 102.

<sup>186</sup> ACC’s Official Information Act Response above n 56.

<sup>187</sup> *Hayes v R* [2008] NZSC 3; [2008] 2 NZLR 321; (2008) 23 CRNZ 720, at [6], [16], [25]-[26].

appeal where the Court of Appeal upheld his convictions in September 2008, ACC finally allowed his entitlement under the ACC scheme to be reviewed and it was decided he was entitled.<sup>188</sup> In the second appeal to the Court of Appeal, Mr Stewart's sentence was quashed on the basis that he was entitled to receive his compensation.<sup>189</sup> The Supreme Court later quashed his convictions on the grounds of prosecutorial misconduct, but one of the reasons they did not apply the proviso and uphold the convictions was that the review decision determined that Mr Stewart was entitled to compensation.<sup>190</sup> Still, ACC have refused to pay his compensation for the 10 months he was imprisoned<sup>191</sup> on the grounds that the legislation prevents payments to an imprisoned person<sup>192</sup> and have refused to apologise.

The issue of relevance of entitlement in criminal cases is still unresolved. In the recent case of *R v Sinclair O'Driscoll* DCJ noted the uncertain state of the law and recommended the question be resolved by the Court of Appeal before trial.<sup>193</sup> The case did not proceed to trial and the issue remains unresolved.

(c) Has ACC made a Decision on Entitlement to Weekly Compensation?

It has been argued, unsuccessfully, that when ACC decides to prosecute an injured person and seeks reparation of the compensation that has been paid to them, ACC has decided that the person is not entitled to weekly compensation.<sup>194</sup> In these cases, ACC refuses to give review rights. This means that the injured person cannot challenge ACC's position that they are not entitled to their compensation in accordance with the ACC review and appeal process.<sup>195</sup> It follows that there is no way for claimants to have their entitlement to compensation determined in accordance with the ACC

---

<sup>188</sup> Review 42058.

<sup>189</sup> *R v Stewart* [2009] NZCA 89 (CA 802/2008, 25 March 2009).

<sup>190</sup> *R v Stewart* [2009] NZSC 53.

<sup>191</sup> Review 163132.

<sup>192</sup> Accident Compensation Act 2001, s 121(1).

<sup>193</sup> *R v Sinclair* DC Dunedin CRI-2008-12-2846; CRI-2008-12-6377 (6 April 2009) at [6], [7], and [12].

<sup>194</sup> *Cruickshank v Accident Compensation Corporation* [2008] NZACC 271; Review 146254; and, Review 146255.

<sup>195</sup> Review 146254; and Review 146255. The appeal of decision 146255 was heard in Dunedin in July 2011.

legislation when ACC is seeking to have the criminal court decide that a person is fraudulent, and that on this basis, they are not entitled to compensation and order reparation.

#### *4 Ultimate Deterrent*

People who are genuinely injured, unable to return to work in their previous careers, yet possibly able to do some work in a different job, are being prosecuted through the criminal courts based on evidence of their voluntary activities in the community or home maintenance tasks. These prosecutions raise the question of the person's injury and entitlement to compensation, despite the second privative provision<sup>196</sup> that prevents any court determining these matters except in accordance with the statutory process (because such matters are exclusively the domains of the scheme).

This process has devastating consequences on the individual subject to the prosecution. However, the prosecution and publicity surrounding it, is deemed desirable by some involved in ACC both in terms of deterring abuse of the scheme and in recovering weekly compensation paid to injured persons. The question is whether we have the ultimate deterrent which is maximally effective in preventing fraudulent behaviour or whether we have a system that is inherently unfair and denies people their rights to procedural fairness.

#### *5 A Fairer Process for Determining Entitlement to Compensation in Criminal Cases*

If the current approach to fraud prosecutions were changed so that ACC was required to issue a decision that a person was not entitled, before they launched a prosecution seeking reparation of compensation paid, then proper investigation and due process would be followed. ACC would be required to undertake proper assessments and address the proper questions. If ACC decided that a person was not entitled to compensation and the person disputed this decision, then that person would have the right to review that decision.

---

<sup>196</sup> Accident Compensation Act 2001, s 133(5).

If the statutory process for determining entitlement were followed, the findings of the tribunal about entitlement to compensation would be admissible in criminal proceedings pursuant to the Evidence Act, because review decisions meet the definition of “documents” and “public documents” and the section 50 bar does not apply as they are not decisions of a “court” in “proceedings”.<sup>197</sup> It follows that admissibility is then not in question. They are relevant to any criminal proceedings around the boundaries of the scheme and have a probative effect as they would prove or disprove entitlement.

Taking this approach, the evidence of entitlement could be provided to the criminal court in proceedings and it would also significantly reduce the time and cost of the criminal proceedings and would shed some light on the grey area of entitlement at the criminal trial.

---

<sup>197</sup> Evidence Act, s 4 definitions of “court” and “proceedings”; s 50 bars decisions of a court in civil proceedings being admitted as evidence in criminal proceedings.

### *III The Effects of Exit Strategies*

The earlier chapters have explained the operations of the legal mechanisms that are used to cease compensation. Before turning to examine options for legislative change the outcomes for injured people exited from the scheme will be considered. The author proposes that research be undertaken (either prospectively or retrospectively) to build a model that measures the outcomes of people exited from the scheme through the various exit mechanisms. It would then be possible to test the options for legislative change against this model.

#### *A What Happens to People Exited from ACC?*

The current strategies to exit long-term injured people who are partially incapacitated from ACC weekly compensation are: (1) their assessed ability to return to work in their old job; (2) their assessed ability to work full-time for 30 hours per week in a new job; (3) their incapacity is assessed to be wholly or substantially caused by a non-covered gradual process, disease or infection, or by the ageing process; or, (4) they are exited through the fraud process. But very little is known about how many people are exited from the scheme through each exit strategy and what happens to them.

The operation of the ACC scheme has been repeatedly criticised for over a quarter of a century for failing to collect data on outcomes for injured people and assuming that completed rehabilitation is the same as returning to work.<sup>198</sup> Even today, no scheme-wide data exists regarding what outcomes are achieved by injured people whose weekly compensation is ceased.<sup>199</sup> Although it is clear that injured people are less

---

<sup>198</sup> Terrance Ison “Accident Compensation in New Zealand: Future Options” (Wellington 28 Nov 1985) at 20; Grant Duncan. “Advancing in Employment: the way forward for vocational rehabilitation” (2004) 35 VUWLR 801, 803; Pamela Lee *Strategies to Return Injured Workers to Sustainable Earnings, An International Literature Review, July 2003* (Report to the Department of Labour) at 47; PricewaterhouseCoopers *Accident Compensation Corporation Scheme Review* (Report to ACC, March 2008) at xiv.

<sup>199</sup> ACC’s Official Information Act Response 15 November 2010, above n 101.

likely to return to work<sup>200</sup> and have poorer earning outcomes than the rest of the population<sup>201</sup> the information available does not show what happens to people who are exited from ACC, and does not separate outcomes against how they were exited. It is important that this data is collected in order to: (1) properly critique the current mechanisms; (2) to act as a benchmark for scheme analysis; and, (3) to inform legislative amendment. The range of outcomes and the data that is available will be summarised below, then options for future empirical research will be discussed. This research is required in order to allow effective analysis of the existing legal mechanisms.

### *1 Return to Work*

Ideologically, return to work is the best outcome and one that has universal agreement. The main return-to-work outcomes are: (a) return to pre-injury job; (b) return to a new job without losing income; and, (c) return to a new job with reduced income. These will be discussed briefly below.

#### (a) Return to Pre-Injury Job

The vast majority of those who receive weekly compensation return to the job they were doing when they were injured within a few months and these can be referred to as temporarily disabled. Most injured people achieve this outcome and those who return to work within three months do not suffer long-term loss of income.<sup>202</sup> As there is no long-term loss of income, it can be argued that these cases do not require weekly compensation by the scheme. Amendment will be proposed below regarding this.

---

<sup>200</sup> Office of Disability Issues Work in Progress 2008: Annual Report from the Minister for Disability Issues to the House of Representatives on implementing the New Zealand Disability Strategy (Ministry of Social Development, 2008) p 46.

<sup>201</sup> Crichton, above n 81.

<sup>202</sup> Ibid.

(b) Return to New Job Without Losing Income

There is a group of people who received long-term weekly compensation and upon exiting the scheme are able to return to a new job. Both ideologically, and in reality, this is a good outcome and they are truly vocationally independent. They are able to earn a similar income to what they did pre-injury. One small study of 94 claimants who were working after being determined vocationally independent found that around 2 per cent of people who obtained a new job received a higher income. Approximately one third of people received a similar income to their weekly compensation after being assessed as vocationally independent.<sup>203</sup> These are the success stories of vocational independence and this group needs to be studied in order to understand what made their rehabilitation successful.

(c) Return to New Job with Reduced Income

Most people who are assessed as vocationally independent and who are able to find income suffer a significant drop in income.<sup>204</sup> This includes those who can only work part-time. It could be that their injury continues to prevent them from working full time, or it could be that the jobs they are able to do are significantly lower paid than their pre-injury jobs. Either way, the loss caused by the injury continues and this is a poor outcome for an injured person if they do not receive any ongoing compensation for their loss.

*2 Transfer from ACC to Social Security*

Thousands of injured people transfer to Social Security when they exit ACC.<sup>205</sup> These people can be divided into distinct groups based on what benefit they receive and how they were exited from ACC: (a) reaching retirement age and receive superannuation; (b) assessed as able to work, but receiving sickness or invalids benefits; (c) assessed as

---

<sup>203</sup> Armstrong and Laurs, above n 96, at 62.

<sup>204</sup> Ibid.

<sup>205</sup> (27 July 2004) 618 NZPD 14296.

able to work, but receiving non-health related benefits (unemployment or domestic purposes); and, (d) assessed as unable to work because of non-covered health-related factors and receiving sickness or invalids benefits.

(a) Superannuation

There are injured people who reach the retirement age of 65 and transfer to superannuation. These are largely ideologically neutral. Further, weekly compensation is limited by time to 12 months for those over 65 years of age who suffer personal injury.<sup>206</sup> This applies regardless of whether the injured person is entitled to superannuation. There have been several complaints made to the Human Rights Commission by people who are over 65 years old and have had their weekly compensation ceased.<sup>207</sup> One involves an individual who was working full-time and suffered a work injury. He initially received weekly compensation but this was then ceased in accordance with the superannuation provisions, even though he had not been in New Zealand for the requisite period of ten years<sup>208</sup> so he was not entitled to superannuation.<sup>209</sup> The author is not aware of any cases that have actually been heard by the Human Rights Review Tribunal regarding cessation of compensation although there has been one case where ACC was held to have discriminated against a person over the age of 65 years old by denying them rehabilitation.<sup>210</sup>

(b) Assessed as Vocationally Independent or No Longer Incapacitated but receiving Sickness or Invalids Benefits

Perhaps the most controversial outcome for ACC claimants is when they are assessed as vocationally independent through the ACC process and are then transferred onto the

---

<sup>206</sup> Accident Compensation Act 2001, Schedule 1, clause 52(7).

<sup>207</sup> Letter from Human Rights Commission to Department of Labour regarding complaints of age discrimination against the Accident Compensation Commission in complaints 61527, 61806, 62489, 63862, 63871 (10 Oct 2008).

<sup>208</sup> New Zealand Superannuation and Retirement Income Act 2001, s 8(b).

<sup>209</sup> Human Rights Commission, complaint 63871.

<sup>210</sup> *Howard v Attorney-General* [2008] NZHRRT 10 at [92]. The subsequent legislative amendment was enacted through Injury Prevention, Rehabilitation and Compensation Amendment Act (No.2) 2007.

sickness or invalids benefit. The issue is that either they should not be receiving sickness or invalids benefits and should instead be receiving the unemployment benefit, or the vocational independence process is wrong and they are not in fact employable for 30 hours per week.

The only data available from a small study suggests most people who are assessed as able to work but cannot work and then receive social security benefits fall into this category and receive sickness or invalids benefits.<sup>211</sup> Ideologically, this is of concern as the social security system recognises inability to work and compensates for loss of earnings at a flat-rate, when it is in fact the role of the ACC scheme to compensate them for their injuries. There is clear evidence of cost-shifting from the ACC scheme to the social security scheme, but the scale of this will only be apparent through further scheme-wide research.

(c) Assessed as Vocationally Independent or No Longer Incapacitated and receiving non-health related benefits

It would be expected that if the vocational independence process is working properly, injured people who are able to return to work for 30 hours per week, but who cannot find work will be in receipt of unemployment benefits. However, available information suggests that very few vocationally independent people are in receipt of unemployment benefits.<sup>212</sup> Even this raises ideological issues as the current labour market is very different to that which was in place when the scheme was designed. This makes the vocational independence process even more problematic. It can be argued that it is not the fault of ACC that the labour market prevents people from obtaining employment, but some responsibility does rest with ACC in relation to the type of job a person is rehabilitated for. An example of this is that in Dunedin there are only two places that have a position for car park attendants. However there might be a dozen Dunedinites that have been deemed vocationally independent to become car park attendants. The opportunity for rehabilitation into actual jobs, or jobs where employment is at least possible, is not required. The vocational independence exit applies irrespective of how

---

<sup>211</sup> Armstrong and Laurs, above n 96, at 64.

<sup>212</sup> Ibid.

low-skilled or poorly-paid the occupation is, or whether it is available in the current labour market.<sup>213</sup>

(d) Assessed That Their Incapacity is Caused by Non-Covered Health Factors

The evidence upon which ACC bases their causation exit is that the reason a person cannot work is a non-injury-related health condition. Whether they are unable to work is irrelevant to the legal test. It would be expected therefore that everyone who is exited by causation, would be in receipt of either sickness or invalids benefits unless their income, or that of their spouse or partner, is above the income-tested threshold (meaning they have no entitlement to a social security benefit).

*3 Exited From ACC and not Working or Receiving Social Security*

Some people who are assessed as vocationally independent and yet cannot work, do not return to work and do not receive social security benefits. There is little known about this group. Some reasons why people in this group might not receive benefits are that they are not entitled to benefits due to the income of a spouse or partner, they do not meet other criteria, they have left New Zealand, or they do not wish to claim social security.

***B Available Datasets***

Several potential sources of data exist in New Zealand, which have been the subject of research to date. These will be outlined below with a view towards their usefulness in assessing outcomes of injured people.

---

<sup>213</sup> Hazel Armstrong and Rob Laurs *When the Going Gets Tough: What happens to injured workers? An overview of the development and implementation of New Zealand's Accident Compensation Scheme in Relation to Vocational Rehabilitation for Injured Workers* (Wellington 2007) at 28.

The available data do not provide a breakdown of different exit mechanisms. The main sources of available data are: (1) data-matching between ACC and Social Security to show the progression of people from ACC onto Social Security; (2) longitudinal effects of injury on earnings research that is taken from actual income data and matched against control groups; (3) potential outcomes of injury study that includes all injured people, regardless of whether they receive weekly compensation for lost earnings.

### *1 Data Matching between ACC and Social Security*

In the five years to 2004, approximately 17,000 people were moved from ACC to sickness and invalids benefits.<sup>214</sup> Importantly, these people do not include those who transferred to non-health-related benefits such as the unemployment benefit and domestic purposes benefit. Data obtained in 2004 by data matching between ACC and WINZ<sup>215</sup> shows that 12 per cent of those people exited from ACC then received sickness and invalids benefits and a further 10 per cent received unemployment benefits.<sup>216</sup> More recent data show that in the year to August 2010, an average of 160 people per month were transferred from ACC to social security benefits for people of working age, however this includes both health-related (sickness and invalids) and non-health related (unemployment and domestic purposes) benefits.<sup>217</sup> Importantly, these datasets only matched ACC and WINZ data. This means that the unknown proportion of people who were ineligible for WINZ payments because they have spouses who work, or income from other sources, simply go unnoticed.

---

<sup>214</sup> (27 July 2004) 618 NZPD 14296.

<sup>215</sup> Work and Income New Zealand is the Department that administers the Social Security Act 1964.

<sup>216</sup> Grant Duncan. "Advancing in Employment: the way forward for vocational rehabilitation" (2004) 35 VUWLR 801, 805.

<sup>217</sup> (24 Sep 2010) Parliamentary Questions for Written Answers PQ 31963 (2010).

## 2 *The Longitudinal Effects of Injury on Earnings Study*

The Linked Employer Employee Dataset held by Statistics New Zealand is another potential source of data. This database links what a person earns to their employer so it allows comparisons to be made between longitudinal outcomes for injured workers and non-injured workers. The workers can be matched by characteristics, such as age, sex and also against workers in a similar position at the same employer. Matching injured workers with both control groups means that more confidence can be placed in the outcomes.

One study using this data analysed over 100,000 people who were off work by injury for more than one month from 1999 until 2004.<sup>218</sup> Employees from the agricultural, manufacturing, construction and transport sectors, are over-represented in this category given that they comprise 30 per cent of employees, yet 50 per cent of accident victims. The study showed that injured people have poorer long-term outcomes than non-injured people, particularly if the injured person is off work for more than three months following their accident.<sup>219</sup> It could be that people who are off work for more than three months also lose their job. Further, “longer-duration injuries are estimated to increase the likelihood of receiving benefits and reduce average total income, with little systematic decline in effects over time.”<sup>220</sup>

The real loss of earnings by accident is a significant issue with estimates suggesting that after social security benefits are taken into account, people who remain off work for four to six months continue to receive \$160-220 less per month. Those off work for 7 to 24 months receive \$320-370 less per month.<sup>221</sup> Some people go on to receive benefits, yet others do not suffer a significant drop in income; the reasons for these differences are not understood. This study concludes that “injuries have long-term

---

<sup>218</sup> Crichton, above n 81.

<sup>219</sup> Ibid at 774-775 and 777.

<sup>220</sup> Ibid, at 777.

<sup>221</sup> Ibid, at 780.

effects on individual labour market outcomes and that the institutional arrangements in place in New Zealand fail to compensate for this.”<sup>222</sup>

Further research is needed to understand why some people suffer long-term loss of income following injury. It is clear that the institutional arrangements in New Zealand fail to compensate for post-injury loss of earnings. The other finding to be considered in the context of legislative amendment is that long-term incapacitated people have the poorest outcomes.

### *3 Potential Outcomes of Injury Study*

In recent years, the University of Otago has undertaken a study of the long-term outcomes of injury. Following a pilot study to confirm that it would be feasible to ensure the participation of injured people,<sup>223</sup> this study finally involved over 2850 injured people, and the results are now being published internationally.<sup>224</sup> The main limitation of this study in terms of its usefulness for analysis of weekly compensation payments and exits is that it included all injured people, rather than just those in receipt of weekly compensation, and the number of people in receipt of weekly compensation long-term was low.

This significance of this study is not that it can show outcomes of long-term injured people whose compensation is ceased, but that it has developed a methodology that could be adopted for future research into long-term recipients of weekly compensation to properly measure outcomes.

---

<sup>222</sup> Ibid, at 784.

<sup>223</sup> Sarah Derrett, Gabrielle Davie, Shanthi Ameratunga, John Langley “Capturing outcomes following injury: a New Zealand pilot study” 2010 123 NZMJ 66.

<sup>224</sup> S Derrett, J Langley, B Hokowhitu, S Ameratunga, P Hansen, G Davie, E Wyeth, R Lilley “Disability outcomes following injury: results from phase one of the prospective outcomes of injury study (POIS)” (2010) *Inj Prev* 16; John Langley, Sarah Derrett, Gabrielle Davie, Shanthi Ameratunga and Emma Wyet “A cohort study of short-term functional outcomes following injury: the role of pre-injury socio-demographic and health characteristics, injury and injury-related healthcare” (2011) 9 *Health and Quality of Life Outcomes* 68.

The purpose of the current ACC legislation includes “minimizing the ... impact of injury on the community (including economic, social and personal costs).”<sup>225</sup> Unlike the studies discussed above at (1) and (2), a potential outcomes-of-injury study of people who suffer long-term loss of income could capture the effects of long-term compensation on factors other than earnings. This methodology could be used to measure the effect of the exit strategies on outcomes for people with long-term loss of earnings, and to build a model against which the outcomes of legislative amendment could be tested. It is important that future studies collect data to allow consideration of the wider costs of personal injury to society.

### ***C Future Empirical Research***

Research into long-term outcomes is required for effective analysis of potential legal reform of compensation for partial incapacity. The target populations for further research are those who receive compensation from the scheme for more than three months. The available evidence shows that this group suffers long-term loss of income following their injury and therefore it is this group to whom the problem of partial incapacity is most important. The two ways to obtain this information are: (1) a prospective longitudinal study, or (2) a retrospective data-matching study.

#### ***1 A Prospective Longitudinal Study***

It would be possible to follow a sample of claimants longitudinally (for example those who received weekly compensation for more than three months) and investigate their outcomes. The advantage of this is that it would be possible to gather more contemporaneous data including coexisting factors such as mental health issues, social support, and other relevant data such as number of jobs that people applied for and the impact of their injury on their ability to find work.

---

<sup>225</sup> Accident Compensation Act 2001, s3.

## 2 *A Retrospective Data-Matching Study*

Retrospective research could be done to identify from ACC records why a person was exited from the scheme. This could then be data-matched with Social Security Records to identify which benefits a person went on to receive and for how long. This data could be matched to the Linked Employer Employee Dataset and this could provide details of information pre-injury and post-injury, which could lead to a better understanding of salient risk factors for long-term incapacity. Such a study would provide a benchmark for any further legislative change. Further, the suggested models for systemic change set out below could be tested against this database.

The long-term effects of injury on income are greater for some people than others.<sup>226</sup> Interviewing injured people and gathering more information may provide an understanding of why some injured people have better rehabilitation outcomes than others. One hypothesis is that level of educational attainment affects post-incapacity earnings. International data suggests that those with higher educational attainment are likely to more quickly and successfully return to the workforce following injury than people with lower educational attainment.<sup>227</sup> The longitudinal effects-of-injury study suggests that persons injured with lower earnings suffer poorer outcomes than those with higher earnings.<sup>228</sup> If earnings are a marker of educational levels, then the New Zealand data is likely to be similar to the English data and it is people with low earnings and low levels of education attainment that have the poorest outcomes post-accident. Education and skill level are likely to be factors in long-term outcomes and may require incorporation into legislative change.

---

<sup>226</sup> Crichton, above n 81; Armstrong and Laurs, above n 96, at 62.

<sup>227</sup> Andrew Tettenborn (ed) *The Law of Damages* (2nd Ed, LexisNexis London 2010) at 795.

<sup>228</sup> Crichton, above n 81.

## *IV Options for Legislative Change*

The options for legislative amendment will be outlined and discussed in this chapter. The starting point for discussion are the core aspects of the current system of compensating lost income that have remained in place, in one form or another, during the four decades since the first legislation was introduced. A framework will then be discussed that broadly outlines the approaches to change provision of compensation for lost earnings, namely: (a) to change the entry criteria for the scheme by changing what is covered; (b) to change the exit from the scheme to a more arbitrary approach which does not look to individual circumstances; and, (c) to change the assessment process. These later two approaches will (arbitrary models and assessment models) will then be expanded and discussed.

### *A What has Remained Consistent since 1972*

The Royal Commission expressed a principle of “real compensation”<sup>229</sup> with regard to compensation for lost income. In delivering on this principle, the following points can be identified as remaining consistent through the various legislative regimes: (1) compensation is earnings-related; (2) compensation is based on 80 per cent of the earnings; (3) claimants are required to minimise their lost earnings; and, (4) the needs of seriously injured people must be recognised over those suffering minor injuries. Each of these will be discussed briefly below.

#### *1 Earnings Related Principle*

Tort systems, workers’ compensation systems and accident compensation systems all compensate for loss of income following an accident based upon what a person earned prior to their accident. This is sometimes referred to as the earnings related principle.<sup>230</sup> This can be contrasted with other situations where a person suffers loss of earnings for

---

<sup>229</sup> Royal Commission, above n 9 at p 40 [59]-[61].

<sup>230</sup> Peter Cane *Atiyah’s Accidents, Compensation and the Law* (7th Ed, Cambridge University Press, 2008) at 153.

other reasons, for example they retire, or they cannot work due to sickness or disease. In non-injury situations, compensation for lost earning is at a flat rate set by policy makers following a decision about how much society can afford to pay, rather than individually based on earnings.

The Royal Commission adopted the workers compensation model and envisaged that even in no-fault circumstances, weekly compensation should be paid based on earnings.<sup>231</sup>

## *2 80% Principle and the Neo-Liberal Critique*

As discussed earlier, since its inception, the ACC scheme maintained an earnings-based model with the rate of compensation always being set at 80 per cent of people's pre-injury earnings. The Royal Commission<sup>232</sup> and the Law Commission<sup>233</sup> believed that the 20 per cent loss of earnings would motivate injured workers to get back to work.

The neoliberal critique of this 80 per cent rate of compensation assumes that claimants will conduct their lives in order to maximise their income. When it is difficult to find work, 80 per cent of a full-time wage is an attractive option and injured people receiving compensation are therefore inclined to malingering. If claimants say they cannot return to work, do not believe them and send them off for an assessment with an "objective" assessor. This assumption, which was built into law with the rise of neoliberal government in New Zealand, ignores the fact that there can be strong willingness to return to work, retrain for work and become free of ACC, but on one's own terms.<sup>234</sup> Even ACC accepts that injured people want to get off ACC, recently stating, "Most people want to get off ACC. We don't have to push them."<sup>235</sup>

---

<sup>231</sup> Royal Commission, above n 9, at p 40.

<sup>232</sup> Royal Commission, above n 9 at p 115 [292(a)].

<sup>233</sup> Law Commission, above n 55, at xiii [9].

<sup>234</sup> Duncan, Moral Hazard, above n 136, at 434 and 436.

<sup>235</sup> Letter to the Editor, Otago Daily Times from Mike Tully, Acting General Manager, Claims Management (Otago Daily Times, 24 September 2010).

The evidence currently available is clear that the link between claim durations and the percentage of earnings that are compensated is probably quite modest.<sup>236</sup> Whilst there are undoubtedly some cases where the 80 per cent of pre-injury earnings acts as a disincentive to regaining independence, care must be taken in developing models constraining weekly compensation to address a perception that people are malingering, without any evidence to show that this is a real and significant problem.

### 3 *Duty to Mitigate Loss*

The duty to mitigate loss has its history in the common law. A plaintiff had a duty to take reasonable steps to reduce the loss caused by the defendant and if they did not take those steps, then they could not claim the loss caused by the neglect to do so.<sup>237</sup> It was not a particularly onerous duty<sup>238</sup> of reasonableness and a person could not be punished for failing to do something they could not have done.<sup>239</sup> The duty has been expressly incorporated into New Zealand statutes<sup>240</sup> and also read into statutes by the Courts.<sup>241</sup>

The duty to mitigate loss has also been read into the Employment Relations Act 2000. This legislation provides a system for resolving disputes about employment relationships and it allows compensation for lost income arising from an employment dispute. While it does not expressly include a duty to mitigate loss, the Courts have

---

<sup>236</sup> Kevin Purse, Frances Meredith and Robert Guthrie “Neo-liberalism, Workers’ Compensation and the Productivity Commission” (2004) 54 JAPE 45 at 51.

<sup>237</sup> *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689 (HL) as cited in *White and White v Rodney District Council and Another* HC AK CIV 2009-404-001880 [2009] NZHC 2135 (19 November 2009).

<sup>238</sup> Stephen Todd (ed) *The Law of Torts in New Zealand* (5<sup>th</sup> ed, Brookers, Wellington 2009) at 25.2.03.

<sup>239</sup> *White v Rodney District Council*, above n 237, at [27].

<sup>240</sup> Biosecurity Act 1993, compensation claims under s 162A. See also Prisoners' and Victims' Claims Act 2005, s 14(2)(a).

<sup>241</sup> Weathertight Homes Resolution Services Act 2006 does not expressly require the duty to mitigate loss to be taken into account, but the High Court has approved decisions of the Tribunal which have espoused this common law duty into the award of damages; *White v Rodney District Council*, above n 237; *Coughlan v Abernethy* HC Auckland CIV 2009-004-2374 [2010] NZHC 2180 (20 October 2010) at [109] – [113].

said that if an employee is unjustifiably dismissed and brings a personal grievance, they must seek alternative work, otherwise the damages they are awarded for lost income can be reduced, in accordance with the principles governing compensation for financial loss.<sup>242</sup>

The duty to mitigate loss applies to the ACC scheme in two ways: (1) claimants have a duty to undergo medical treatment to improve their condition so they can return to work (which has been in place since the first legislation);<sup>243</sup> and, (2) claimants have a duty to reduce their dependence on ACC's provision of compensation for lost income. This second aspect of the duty has been subject to different legislative approaches, which will be explained below. While the Royal Commission did not speak of the duty to mitigate loss, they emphasised a need for "realistic assessment of actual loss"<sup>244</sup> which implies that only actual loss rather than total earnings, be compensated. The first legislation reflected such an approach.

(a) The 1972 Act

The Accident Compensation Act 1972 specifically allowed ACC to reduce the compensation for lost earnings that it paid to injured workers.<sup>245</sup>

...if [ACC] considers... that the person is... not endeavouring to work in paid employment to the extent of his capacity ... [ACC] may fix the amount to be deducted... at such figure as, having regard to that evidence, it considers appropriate.

This provision gave significant discretion to ACC to determine what steps an injured person should take to mitigate their loss.

---

<sup>242</sup> *Telecom New Zealand Ltd v Nutter* (2004) 7 NZELC 97,563; [2004] 1 ERNZ 315; (2004) 2 NZLR 83, at [70]-[83].

<sup>243</sup> Accident Compensation Act 2001, s 117(3)(b); Accident Insurance Act 1998, s 116 (3)(b); Accident, Rehabilitation, Compensation and Insurance Act 1992, s73(2)(b); Accident Compensation Act 1982, s 87(3); Accident Compensation Act 1972, s 132(6).

<sup>244</sup> Royal Commission, above n 9, at [61].

<sup>245</sup> Accident Compensation Act 1972, s 113(2).

(b) The 1982 Act

The Accident Compensation Act 1982 brought a new approach to compensating partial incapacity. It involved an assessment of disability and a permanent pension based on that percentage of disability. This did not take into account future earnings. This was perceived to result in abuse, as injured people assessed to have permanent partial disability and in receipt of permanent pensions returned to full-time work without any ongoing loss of earnings from their injuries.

(c) The 1992 Act

The Accident Rehabilitation, Compensation and Insurance Act 1992 abandoned the permanent partial incapacity model and the District Court then read into the legislation a duty on claimants to mitigate their loss by undergoing work that they were capable of.<sup>246</sup> In *McDonald v ARCIC* Ongley DCJ held that claimants are required to reduce their independence upon ACC and said:

It is plain, without needing to be expressly stated, that the insured person should seek whatever level of employment is consistent with his or her capacity and that the Corporation should take active steps to ascertain, in appropriate cases, that an effort is being made. That conforms also with general concepts of insurance cover.

(d) The Work Capacity and Vocational Independence Tests 1996 – Present

Following the introduction of the work capacity assessment procedures,<sup>247</sup> the courts have held that the procedures of assessment must be followed. Today, if the proper process is not followed, the person remains entitled to receive compensation.<sup>248</sup> The duty to mitigate loss has become a duty to participate in rehabilitation and undergo

---

<sup>246</sup> *McDonald v ARCIC* [1994] NZACC 15 at p 5; [1994] NZAR 364. This was approved and followed in *Porter v ARCIC* (1994) 1 BACR 22; [1994] NZAR 503.

<sup>247</sup> Accident Rehabilitation, Compensation and Insurance Act 1992, s37 was amended by Accident Rehabilitation, Compensation and Insurance Amendment Act (No 2) 1996, s 7, from 2 September 1996. These amendments introduced the formal “Work Capacity” procedure.

<sup>248</sup> *Burnett v ACC* [2007] NZACC 210 at [4], [10] and [11]; *ACC v Burnett* [2008] NZACC 74 at [14]-[16]; *Tuitaatili v ACC* [2009] NZACC 68 at [37].

assessment. Once the person is assessed to be able to work 30 hours per week, they are deemed to be able to return to their pre-injury employment and to no longer suffer loss of income. Therefore they are no longer entitled to weekly compensation. What was once a duty to mitigate loss has become a duty to be assessed.

#### *4 Seriously Injured Require Most Support*

The Royal Commission was clear that the focus of the scheme was on those who suffered long-term effects of injury saying.<sup>249</sup>

It is wrong that the short-term or minor incapacities should be preferred to protracted or serious ones. It is indefensible to provide a man with 97 percent of his wages during a fortnight's absence from work while leaving the long-term victim of a crippling accident without assistance after six years... Instead there should be a system of wage-related payments kept to a fair but sensible level for the minor cases and greatly increased for all others.

From the time of the Royal Commission's report to today, there has never been a legislative attempt to cease of limit weekly compensation of the most seriously injured. It is only those who ACC decides are able to do some work who get repeatedly put through the exit mechanisms.

### ***B Framework for Discussion of Legislative Change***

#### *1 Change the Entry Criteria for the Scheme by Changing what is Covered;*

Provision of compensation can be limited by controlling entry into the scheme and by limiting the compensation that is then paid to the injured person.<sup>250</sup> For example entry can be limited by changing the definition of cover.<sup>251</sup> Cover approaches are beyond the

---

<sup>249</sup> Royal Commission, above n 9 at 94.

<sup>250</sup> Judith Fergusson "The line between sickness and accidental injury in New Zealand's Accident Compensation Scheme" (2004) 12 TLJ 61.

<sup>251</sup> Accident Rehabilitation, Compensation and Insurance Act 1992, s 10.

scope of this dissertation, but it is important to note that significant amendment to cover may lead to litigation as the first privative provision only bars actions for damages when the injury is covered by the scheme.<sup>252</sup>

## *2 Limiting Compensation through Arbitrary or Assessment-Based Mechanisms*

The remainder of this chapter discusses options for changing the way that compensation is calculated and paid. Constraints on entitlements can largely be broken into the categories of arbitrary based and assessment based. Arbitrary models are based on factors that do not consider (or take into account) a person's individual circumstances, for example everyone is compensated at 50% of their pre-injury earnings, or at a flat-rate of \$400 per week. This can be contrasted with assessment based models which take into account people's personal circumstances, for example how many hours a person can work, or how disabled they are, or how much they can earn after their accident. A number of arbitrary and assessment based approaches will now be discussed.

### *C Arbitrary Changes*

The main approaches are (1) limit the rate of weekly compensation to a flat-rate; (2) compensate at a lower rate than 80 per cent of earnings, for example 50 per cent of earnings; (3) limit compensation by time, for example, 100 weeks; (4) limit compensation payable to a maximum amount, for example, \$300,000 total compensation; (5) progressively reduce the rate of compensation from 80 per cent to 70 per cent and so on over time; and (6) restrict weekly compensation to those who are off work for 12 weeks or more.

#### *1 Flat-Rate Model*

The flat-rate model would limit compensation that is paid each week to an arbitrary flat-rate (akin to social welfare). The Royal Commission rejected a flat-rate approach because it failed in the context of workers' compensation<sup>253</sup> and few would accept such

---

<sup>252</sup> Accident Compensation Act 2001, s317.

<sup>253</sup> Royal Commission, above n 9, at p 93 [227]-[229]; p115 [291(a)].

a scheme and it would not be just or equitable.<sup>254</sup> They recommended that restriction of compensation to a flat rate or based on need would be “entirely unacceptable”.<sup>255</sup> Whether this should remain the case was considered in detail by the ministerial working party in early 1991 who rejected the idea that a flat-rate be implemented because of its long standing history in workers’ compensation and because the underlying principle of accident compensation is to restore an injured person to their pre-injury position in terms of income.<sup>256</sup>

The state provides a “safety net” for people without any other income, regardless of why they have no income. Some argue that provided this safety net is in place, there is no principled reason that the state should compensate a person for lost earnings at a higher rate when that person no longer adds the extra value to society that justifies the higher rate of payment.<sup>257</sup> If the cause of the inability to work results in access to higher rates of post-incapacity income, then disputes about causation of incapacity will be further encouraged. Additional support is found in the notion that the needs of those unable to work do not vary according to the cause of being unable to work.<sup>258</sup> These arguments inevitably result in a conclusion that there should be one rate of compensation for lost earnings, regardless of cause.<sup>259</sup> To achieve this, one of the following three things must occur:<sup>260</sup> (1) compensation for personal injury is lowered to flat-rate social security levels,<sup>261</sup> (2) social security levels be increased to ACC weekly compensation levels, or (3) both are adjusted to meet in the middle.<sup>262</sup>

---

<sup>254</sup> Ibid at p 100, [250].

<sup>255</sup> Ibid at p 41, [61].

<sup>256</sup> Ministerial Working Party on The Accident Compensation Corporation and Incapacity *Report* (Government Printer, Wellington 1991) at p 35, [100] – [102].

<sup>257</sup> Cane, above n 230, at p143 [6.3.1].

<sup>258</sup> Royal Commission above, n 9, at p 26 [17]; Ison, above n 13, at 21 [b]; Law Commission, above n 55, p xi at [6].

<sup>259</sup> Royal Commission, above, n 9, at p 26 [17], p 36 [48] (quoting Lord Beveridge), p 114 [290]; Law Commission, above n 55, at p 7-10 [56]-[66]; Ison, above n 13, at 21-22.

<sup>260</sup> For detailed discussion, see Chapter XIX *From Injury to Sickness and Beyond* in Geoffrey Palmer *Compensation for Incapacity* (Oxford University Press, Wellington, 1979) at p 316-337.

<sup>261</sup> This approach was rejected by both the Royal Commission (above n 9 at [291(a)]) and the Law Commission (above n 55, at p 10 [64]-[65]).

<sup>262</sup> Law Commission, above n 55, p 10 at [66].

Setting a flat rate would be problematic. Some people would be better off on the scheme than returning to work while most would suffer a significant sudden drop in income. Those whose income drops significantly would struggle and complain of unfairness. However it could be argued that they could have purchased private income replacement insurance.<sup>263</sup> Finally, without parity with the social security system, boundary disputes regarding causation will be accentuated.<sup>264</sup>

## *2 Lower the Percentage of Earnings that are Compensated*

A simple method of reducing compensation paid is to reduce the rate from 80 per cent to 70 per cent or 50 per cent. The lower the percentage compensation, the less weekly compensation would be paid. This would also provide an immediate incentive to many claimants to exit the scheme, as they would be better off working part-time or on social security benefits. However, as discussed above, the rate of 80 per cent was recommended by the Royal Commission,<sup>265</sup> and implemented with the first legislation.<sup>266</sup> It has remained the same ever since.<sup>267</sup>

The Royal Commission proposed a core principle of “real compensation.”<sup>268</sup> It recommended a realistic assessment of actual loss and the shifting on this on a generous basis.<sup>269</sup> It can be argued that “100 percent principle”<sup>270</sup> requires accident victims to receive compensation close to 100 per cent of their loss, based on what is potentially recoverable in tort. However this idea is flawed in several ways. Firstly, only a tiny percentage of people succeed in tort, if the same limited pool of money is going to be used to make many more accident victims better off, this requires a

---

<sup>263</sup> The option of private first-party insurance still exists. This is mainly purchased by individuals with high earnings. If the maximum rate were to drop, it is likely that more high earners would seek top up insurance.

<sup>264</sup> Ison, above n 13, at 22-23.

<sup>265</sup> Royal Commission, above n 9, at p 115 [292]; p 120 [300(e)].

<sup>266</sup> Accident Compensation Act 1972, s 113.

<sup>267</sup> Accident Compensation Act 1982, s 59(1) and 60(1)(e); Accident Rehabilitation, Compensation and Insurance Act 1992, s 39(1); Accident Insurance Act 1998, sch 1, cl 7(3); Accident Compensation Act 2001, sch 1 cl 32(3).

<sup>268</sup> Royal Commission, above n 9, p 40 [59]-[61].

<sup>269</sup> Ibid at [61].

<sup>270</sup> Cane, above n 230, at 156, [6.3.2].

reduction in the rate. Secondly, if a periodic payment were to be made at 100%, there would be reduced incentive to return to work.<sup>271</sup> Thirdly, even those few who succeed in torts do not get 100%. The “rhetoric of the [tort] system is not matched by its reality” as tort systems do not provide full compensation for loss of earnings.<sup>272</sup> There is no substance to the argument that the level of compensation should be set at 80 per cent because 100 per cent is recoverable in tort.

The Law Commission recommended reducing it to 75 per cent to adjust for compensating lost earnings caused by sickness.<sup>273</sup> This was introduced into Parliament as part of the Rehabilitation and Incapacity Bill, which provided compensation for incapacity for employment, irrespective of how the incapacity arose.<sup>274</sup> However, the new government shelved the bill<sup>275</sup> and decided to restrict cover to ACC rather than extend cover to sickness.<sup>276</sup>

### 3 *Limit by Time*

Another way of limiting compensation is to limit it by time, for example, five years. The Royal Commission considered and rejected the model of limiting compensation by time as an outdated relic from the workers compensation scheme.<sup>277</sup> In 1988, the Law Commission considered it again after the recommendation of the Royal Commission on Social Policy that weekly compensation be limited to two years.<sup>278</sup> This was rejected because it would only affect those most severely injured and “may” be in breach of New Zealand’s International Labour Organisation obligations.<sup>279</sup> In 1991,

---

<sup>271</sup> Ibid.

<sup>272</sup> Lewis, above n 30, at 407.

<sup>273</sup> Law Commission, above n 55, at p 10, [66].

<sup>274</sup> Rehabilitation and Incapacity Bill 1990, cls 2(2) and 6.

<sup>275</sup> Grant Duncan “Boundary Disputes in the ACC Scheme and the No-Fault Principle” (2008) NZ L Rev 27 at 34.

<sup>276</sup> Accident, Rehabilitation, Compensation and Insurance Act 1992, s 10.

<sup>277</sup> Royal Commission, above n 9, at p 94 [230].

<sup>278</sup> Law Commission, above n 55, p 55 at [186].

<sup>279</sup> Law Commission, above n 55, p 56 at 187. It is interesting to note that whilst New Zealand did have an obligation to pay compensation to injured workers pursuant to ILO 17, it not have any obligations to provide compensation to injured workers at a particular rate, although the Labour Government appeared

government policy was developed around limiting compensation to 12 months for those who were determined to have 85 per cent or more capacity to work. The recommendation was.<sup>280</sup>

Claimants with a capacity for work of greater than 85 percent (and assumed therefore, to be fit for work) will not be eligible for earnings-related compensation beyond 12 months.

This was enacted in the 1992 legislation<sup>281</sup> but was substituted by a work capacity assessment procedure in 1996.<sup>282</sup> This procedure is the basis for the current vocational independence assessment procedure discussed above.<sup>283</sup>

Time limits on compensation already apply within the scheme. For example, a surviving spouse of a deceased claimant without dependants is only entitled to weekly compensation for five years.<sup>284</sup> Similarly, a person who stops work but purchases weekly compensation cover from ACC<sup>285</sup> and is then injured whilst off work, is entitled to weekly compensation for five years.<sup>286</sup> The policy reason here appears to be to allow someone to retrain with five years being considered an appropriate time to allow someone to adjust to the new circumstances. Given that time limits are already embedded in the scheme, a wider use of time limits might be considered further if the objection relating to serious injury can be overcome. This will be discussed below.

---

to be interested in ratifying ILO121 (Law Commission, above n 55, at xiii) which would have imposed such obligations upon New Zealand.

<sup>280</sup> Birch, above n 19, at p 43-44.

<sup>281</sup> Accident Rehabilitation and Compensation Insurance Act 1992, s49 (1)

<sup>282</sup> Accident Rehabilitation and Compensation Insurance Amendment Act (No 2) 1996 s 12 replaced ss 49-51.

<sup>283</sup> Accident Insurance Act 1998, s 89-92 “Capacity for Work,” and Accident Compensation Act 2001, ss 107-113 “Vocational Independence”.

<sup>284</sup> Accident Compensation Act 2001, sch 1, cl 66(5)(a).

<sup>285</sup> Accident Compensation Act 2001, s 223.

<sup>286</sup> Accident Compensation Act 2001, s 224 (2).

#### 4 *Overview of the Limited Total Amount Model*

The author proposes a new model of limiting compensation to a total amount. This would retain the 80 per cent rate, but limit weekly compensation for lost income<sup>287</sup> to an overall total amount, for example \$300,000.<sup>288</sup> If a person is a higher earner, then they will reach this amount more quickly, but if they are a low earner it may take 10 years for compensation to reach this maximum amount. This model is based on an assumption that higher earners have a higher level of education and skills,<sup>289</sup> and therefore are more likely to be rehabilitated faster and receive higher post injury earnings than those with lower earnings who are more likely to be involved in manual work.<sup>290</sup> If it were to be seriously considered, research would need to be conducted in New Zealand to test the validity of these assumptions.<sup>291</sup>

The total compensation model would be simple to implement and administer. It has the advantage of providing some certainty for both ACC and claimants, with the amount of time available for rehabilitation ranging from three years for those on the highest level of compensation to ten years for those on a low level. Further, a mechanism could be incorporated whereby earners might elect to receive weekly compensation at a lower rate than 80 per cent to allow them to undertake rehabilitation for longer period of time.

#### 5 *Parachute Model*

The parachuting model of compensation proposed by this author aims for controlled and expected compensation drops at a manageable rate allowing adjustment in people's lives. It involves a significant change to the 80 per cent of pre-injury earnings level that

---

<sup>287</sup> This would not apply to other entitlements ie, attendant care, home-help, housing modification, transport for independence, it would simply apply to weekly compensation. In common law terms, it would apply simply to damages for pecuniary loss.

<sup>288</sup> This figure is currently just over 3 years on the maximum rate of weekly compensation (which after the 1 July adjustment is \$91,014 per annum).

<sup>289</sup> This approach would not be able to be followed in cases of brain injury.

<sup>290</sup> Research in the United Kingdom shows pre-accident earnings, disability status and level of education attainment to be the best predictors of future earnings: Tettenborn, above n 227, at 795.

<sup>291</sup> Data could potentially be extracted from the Linked Employer-Employee Data set (*LEED*), see Crichton, above n 81.

has remained unchanged since the inception of the scheme.<sup>292</sup> It combines the time-limited and flat-rate models above. With this approach, compensation for lost earnings would gradually decrease until it reached a flat-rate which was indexed to social security payments or the average wage.

(a) Previous Suggestion of a Step Down Approach

The idea of a step down approach was briefly mentioned by the ministerial working party in 1991 when it considered reducing the rate of compensation from 80 per cent to 60 per cent after 12 months for some claimants.<sup>293</sup> The ministerial working party also considered whether there should be a shifting rate of compensation, as short-term incapacity became long-term incapacity to allow seriously injured persons to adjust their lifestyle to accommodate the lower rate.<sup>294</sup> They recommended that the extra cost for long-term disability could be recognised by way of compensation for loss of function, rather than loss of earnings. However, none of these ideas were ever developed further or implemented into legislation.

(b) Examples of a Parachute Model

To illustrate this approach, compensation would be paid at 80 per cent of earnings for the first year and then the compensation payable per year would reduce until it reached a minimum flat rate. For example after 80 per cent for the first year of incapacity, compensation for lost income then reduce by 10 per cent per year until the minimum was reached. Compensation would be 70 per cent of pre-incapacity earnings in the second year, 60 per cent in the third, 50 per cent in the fourth, and 40 per cent in the fifth and so on.

---

<sup>292</sup> Royal Commission, above, n 9, at p 115 [292]; Accident Compensation Act 1972, s 113; Accident Compensation Act 1982, s 59(1) and 60(1)(e); Accident Rehabilitation, Compensation and Insurance Act 1992, s 39(1); Accident Insurance Act 1998, sch 1, cl 7(3); Accident Compensation Act 2001, sch 1 cl 32(3).

<sup>293</sup> Ministerial Working Party on The Accident Compensation Corporation and Incapacity *Report* (Government Printer, Wellington 1991) at p 39 [121], this idea was rejected and replaced with a 12-month time limit, see discussion above.

<sup>294</sup> *Ibid* at p 38 [117].

A parachuting model would provide increasing incentives to return to work and to increase earnings, as well as a set timeframe for doing so. Those with higher earnings would receive entitlements longer than those with low earnings, but the real dollar value of compensation for those with higher earnings would drop faster.

Three specific examples show how a person's compensation could parachute down to a minimum rate of \$20,000 per year based on starting incomes of (1) \$100,000; (2) 50,000; and, (3) \$30,000. The first person on \$100,000 would parachute down losing \$10,000 each year until in their seventh year; they reached the \$20,000 minimum level.<sup>295</sup> The person earning \$50,000 would start their compensation on \$40,000 in their first year and this would drop by \$5,000 per year until their fifth year when they received the minimum. The third person that was earning \$30,000 per year would receive \$24,000 in their first year and drop by \$3,000 per year and reach the minimum rate after three years.

This would have the advantage of providing certainty for individuals and the scheme placing the responsibility on the injured person to engage with rehabilitation and increase their earnings. People's actual earnings should interface with the parachute model through a process of abatement.<sup>296</sup> If their earnings were to increase faster than the parachuting entitlement to compensation, they should receive a reward for their effort, but their compensation should also be reduced.

#### *6 Restrict Weekly Compensation to Those who are Incapacitated for More Than 12 weeks*

In much the same way as arbitrary models can be used to limit weekly compensation by ceasing payments, they can be used to limit access to compensation in the first place. This would have the effect of removing the minor injuries, which were very rarely the subject of common law action. Consistent with this, research has indicated

---

<sup>295</sup> First year they would receive \$80,000, and then their compensation would drop by \$10,000 per year until in the seventh year they received \$20,000.

<sup>296</sup> Accident Compensation Act 2001, sch 1, cls 49-51.

that only injuries resulting in incapacity of three months or more have long-term effects on employment outcomes. Therefore, cover could be granted and treatment and rehabilitation provided, but weekly compensation withheld for those who only suffer short-term incapacity. This is similar to the suggestion by Ison to blend early periods of incapacity into employment relationships, which he suggested would free up ACC to focus on long term incapacity.<sup>297</sup> The Law Commission also recommended increasing the waiting period for weekly compensation saying it would add an element of individual responsibility.<sup>298</sup>

The legislative framework currently provides for employers to pay the first week of compensation for work related injuries.<sup>299</sup> For non-work injuries, an injured person can either take sick leave, or other leave and then they are paid weekly compensation after the first week of incapacity.<sup>300</sup> These provisions could be extended, whereby employers pay compensation for a longer period for work accidents, or alternatively the legislation providing for sick leave<sup>301</sup> could be amended so that employees are deemed to have sick leave for a longer period if they are injured at work.

#### ***D Assessment Changes***

The final options for systemic change to the way in which injured people are compensated for lost income involve assessment-based procedures where some individual variable is assessed. It is central to the models set out below that return to pre-injury employment (no longer incapacitated) remains the dominant exit mechanism whereby most injured people recover and return to their pre-injury employment without any long-term loss of earnings. These proposals are in response to the problem of partial incapacity – people who have long-term loss of earnings and who can do some work but not as much as they were doing when they were injured. These proposals do not aim to alter the way in which a person’s actual earnings affect their

---

<sup>297</sup> Terrance Ison “Accident Compensation in New Zealand: Future Options” (Wellington, 28 Nov 1985) at p 5.

<sup>298</sup> Law Commission, above n 55, pp 54-55.

<sup>299</sup> Accident Compensation Act 2001, s97.

<sup>300</sup> Accident Compensation Act 2001, sch 1, cl 32(2).

<sup>301</sup> Holidays Act 2003, s 65.

weekly compensation. A claimant can of course earn income whilst they are in receipt of weekly compensation. The process ACC then uses to reduce people's compensation is called the abatement process and it is set out in the statute,<sup>302</sup> although it is subject to regular legislative change.

The proposals outlined below for changing how entitlement to compensation for partial incapacity is assessed can be broken into two broad categories (1) developing the current assessment process further; and (2) radically changing the assessment process by changing the variable that is subject to assessment – for example, rather than assessing whether someone can work 30 hours, assess their percentage of disability and compensate them accordingly, or assess what they actually earn and compensate them for their lost earnings.

### *1 Refining the Current Assessment Based Process*

The first group of proposals involve refining the existing system of vocational independence assessments to exit long-term claimants. These involve maintaining an assessment process which seeks to determine how many hours a person can do in a new job but: (a) changing the outcome of vocational independence so that an injured person is deemed to be able to reduce their loss by earning the assessed amount; (b) deeming the assessment most favourable to the claimant to be given the most weight; (c) building accountability mechanisms around assessments; (d) placing limits on the assessors, for example limiting the number or time or value of assessments a particular assessor can carry out; and (e) assessing ability to work by mandatory work trials rather than in a consultation room. Each of these potential amendments will be briefly discussed.

#### (a) Changing the Effect of a Vocational Independence Assessment

The proposal here is to change the effect of a vocational independence assessment that a person can work 30 hours per week. Rather than this assessment resulting in an injured person being subject to a legal fiction that they can return to their pre-injury

---

<sup>302</sup> Accident Compensation Act 2001, sch 1, cls 49-51.

work,<sup>303</sup> it could result in a legal fiction that the person is actually working 30 hours per week in an actual assessed job and their weekly compensation is reduced accordingly.

For example, an injured pilot earning \$100,000 per year receives \$1,540 per week as compensation for lost income. Today, if that pilot were assessed to be vocationally independent as a computer technician (earning \$15 per hour for 30 hours/week), they would lose all entitlement to compensation. Their income would drop from \$1,540 to \$0, unless they were able to find a job paying \$450 per week as a computer programmer or they received social security benefits. If the legislation was amended and the effect of the vocational independence provision was to deem them to be able to earn \$450 per week, they would continue to receive weekly compensation at a reduced rate that was calculated in accordance with the abatement provisions, as if they actually did earn \$450.<sup>304</sup>

This model has the advantage of instilling the duty to mitigate loss on claimants and providing an incentive for ACC to rehabilitate injured people into jobs that pay higher than the minimum wage. This maximises effort towards proper rehabilitation to reduce loss of earnings caused by accident. It would reduce the adversarial culture that has developed in relation to rehabilitation and vocational independence assessments and could potentially reduce the long-term effects of loss of income caused by injury.

(b) Assessment most favourable to the claimant to be given the most weight

The purpose of this amendment would be to limit disputes about medical evidence. Implementing a provision where the assessment that was most in favour of the claimant would be given the most weight would remove incentives upon ACC to repeatedly assess claimants. The only possible outcome of another assessment would be that it results in something more favourable to the claimant. This would reverse the current trend of repeated assessments and balance the playing field at review and

---

<sup>303</sup> Accident Compensation Act 2001, s 111.

<sup>304</sup> This scenario is based on the case of *Hohepa v ACC* [2006] NZACC 22 where an Airline Pilot was “rehabilitated” to be a computer operator, which have been adapted with the proposed changes.

appeal. A claimant could get one proper independent report and not be concerned about ACC obtaining five reports to outweigh it.

(c) Accountability Mechanisms around Assessments

The current legal framework does not allow injured people to hold assessors to account.<sup>305</sup> This situation could be resolved by allowing claimants to bring action against assessors directly, or through statutory bodies such as the Health and Disability Commissioner. Another approach would be to allow claimants to bring action against ACC when problems occur with the assessment process, for example where ACC fails to provide information to assessors or prejudices the assessment by ringing the assessor and speaking to them “off the record.” One way to do this would be to create an actionable statutory duty. Bad faith by ACC, for example, where they refuse to assess or make a decision on a claimant’s cover for mental injury<sup>306</sup> or ignore the assessor’s request to urgently arrange treatment for a suicidal claimant<sup>307</sup> could then be actioned.

(d) Placing Limits on Assessors

It is proposed here to remove the incentives upon assessors to build businesses around ACC assessments. This purpose could be achieved in a number of ways: limiting the number of assessments an assessor can carry out each year to 20 assessments (some assessors currently perform 1000-2000 assessments yearly); (2) limiting the time during which an assessor can provide assessment reports to ACC to three years over a career (some have been primarily engaged in ACC assessments for 15 years); or, (3) limiting the maximum that ACC can pay any assessor each year to \$50,000 (some assessors have received between \$1 million - \$2 million over several years).<sup>308</sup>

These limits would force an increase in the pool of assessors and stop the nepotism that has built up around provision of assessment in the scheme. For example ACC has

---

<sup>305</sup> Forster, above n 64, at 1.

<sup>306</sup> *Sinclair v ACC* [2009] NZACC 175. Leave to appeal to the high court has recently been granted, *Sinclair v ACC* [2011] NZACC 213.

<sup>307</sup> Review 181545, 14 July 2011.

<sup>308</sup> Forster, above n 64, at 3-5.

developed strategies to send claimants with chronic pain from all over New Zealand to an assessor in Christchurch who has been repeatedly criticised by the court for espousing a view that chronic pain is of no known aetiology.<sup>309</sup> Data released under the Official Information Act shows that this assessor received between \$2.3 million and \$2.4 million from ACC across this period.<sup>310</sup> It would also remove the allegations of bias that arise in proceedings where the court often sees the same reports by the same assessors.<sup>311</sup>

(e) Assess Ability to Work with Work Trials rather than in Doctors Rooms

Research conducted in New Zealand during the early 1990s identified that field trials of ability to work are more accurate than assessments carried out in consultation rooms. The technical validity of the current vocational assessment process is very limited.<sup>312</sup> If data regarding outcomes of ACC exits were to be collected and managed (and it is thought important to improve these outcomes), then more robust and technically valid assessment procedures must be adopted.

## 2 *Changing the Variable That is Assessed*

The other group of proposals for legislative amendment involve significant change from the current system. They require a changing of the variable that is subject to assessment. The assessment of whether someone can work 30 hours per week could be substituted with: (a) an assessment of a person's percentage of disability; or (b) an assessment of how much a person is earning. These approaches will be briefly discussed.

---

<sup>309</sup> *Thirring v ACC* [2008] NZACC 135 per Judge Beattie at para 31 et seq; *Otto v ACC* [2008] NZACC 253 per Judge Beattie at paras 30 et seq; *Brennan v ACC* [2009] NZACC 101 per Judge Ongley.

<sup>310</sup> Forster, above n 54 at 5.

<sup>311</sup> *Davies v ACC* and other cases, above n 112.

<sup>312</sup> Duncan, Moral Hazard, above n 136, 436.

(a) Assess The Person's percentage of Disability

The idea here is to compensate for lost income based on the extent of injury, rather than on the pre-injury earning. Since its inception, the ACC scheme has paid weekly compensation based on 80 per cent of pre-injury earnings, regardless of the extent of injury. The result is that under the current model, different people are compensated at different amounts because their pre-injury earnings were different. A person who was a helicopter pilot who lost their finger and thumb so cannot fly anymore who earned \$2000 per week before their accident, is compensated for lost income at a much higher rate than an injured scaffolder who fell off scaffolding and broke their neck, lost an arm and is unable to walk again (but was only earning \$400 per week before their accident).

The proposed process of assessing disability and compensating on the basis of disability would switch this around and provide compensation for lost income at different rates depending upon the level of disability. For example, a person with a 15 per cent disability would receive 15 per cent of the compensation that a person with 100 per cent disability receives. This model could also be combined with the arbitrary models, such as the parachute model so that a person's compensation dropped over time.

(b) Assess People's Actual Earnings

This proposal would assess what a person actually earns, rather than an assessment of their ability to earn. If this change were implemented, the outcome measure of all rehabilitation would become actual earnings and the compensation could then be reduced in accordance with the abatement provisions.<sup>313</sup> This would place incentives upon ACC to fulfil its statutory purpose and rehabilitate people to the maximum practicable extent.<sup>314</sup> This approach can be criticised based on the theory that injured people would prefer to sit at home doing nothing and collect their compensation rather than work, however there is little evidence that this is, in fact, the way in which most

---

<sup>313</sup> Accident Compensation Act 2001, sch 1, cl 49-51.

<sup>314</sup> Accident Compensation Act 2001, s3.

claimants behave. Nonetheless, it must be acknowledged that most of those who are currently assessed as vocationally independent, do go on to undertake some work.<sup>315</sup> Whilst the long-term outcomes of this are not known, the challenge for legislative change is to maximise income from the work that is undertaken by injured people after their accident.

---

<sup>315</sup> Armstrong and Laurs, above n 96.

## *V Conclusion*

The current legal mechanisms for constraining weekly compensation do not fulfil their statutory function of reducing the cost of injury to society. A number of serious flaws in the current ACC system of compensating for lost income have been identified, including cost-shifting (where the cost of injury has been moved from the ACC scheme to the social welfare scheme, and to injured people and their families); a return to an adversarial system; and, failure to measure outcomes in relation to injured people and the scheme as a whole.

Empirical study into the outcomes of the ACC scheme for injured workers who are off work for more than three months must be undertaken. There is an opportunity to build a model that can then be used to test mechanisms for legislative reform.

If the vocational assessment process is to be maintained, measures must be developed to improve its outcomes. Chapter four discusses several ways that this would be achieved and these should be investigated further and trialled.

The fraud exit must either be removed, or fixed so that entitlement is determined in accordance with the statutory process. It is not appropriate to avoid the statutory process and seek repayment of compensation through reparation if the decision of ACC cannot withstand the most basic level of scrutiny that is provided by the review process.

The arbitrary mechanisms (including restriction before weekly compensation starts, the time limited, and parachute models) should be developed and tested. It is possible that a combination of these mechanisms (once tested empirically) will achieve a better result than the current legal mechanisms.

The key to the future of the ACC scheme is to measure and improve the actual outcomes for injured people. This will be the challenge of the next generation of researchers and lawmakers.

## VI Bibliography

### A Cases:

*ACC v Ambros* [2007] NZCA 304.

*ACC v Burnett* [2008] NZACC 74

*Albert v ACC* [2000] NZACC 238.

*Auld v ACC* [2009] NZACC 90.

*Biggart v ACC* [2010] NZACC 56.

*Booker v ACC* [2000] NZACC 205.

*Brennan v ACC* [2009] NZACC 101.

*British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL).

*Brotherton v ACC* [2005] NZACC 172.

*Burnett v ACC* [2007] NZACC 210.

*Carter v Accident Compensation Corporation* [2007] NZACC 248.

*Cochrane v ACC* [2005] NZAR 193.

*Coughlan v Abernethy* HC Auckland CIV 2009-004-2374 [2010] NZHC 2180 (20 October 2010).

*Davies v ACC* [2005] NZACC 74

*Davies v Police* [2009] NZSC 47.

*Dobbs v ACC* [2005] NZACC 46.

*Ellwood v ACC* [2006] NZHC 1607.

*Finnemore v ARCIC* [1998] NZACC 262.

*Forbes v Accident Compensation Corporation* [2011] NZACC 76.

*Fowlie v Accident Rehabilitation and Compensation Insurance Corporation* (AP 50/00, decision of Hansen J, 4 October 2000).

*Gale v ACC* [2008] NZACC 156.  
*Gale v ACC* [2008] NZACC 242.  
*Gibb v ACC* [2005] 122.  
*Gibb v ACC* [2006] 243.  
*Gibb v ACC* [2006] NZACC 308.  
*Gibb v ACC* [2007] NZACC 137.  
*Gronn v ACC* [2008] NZACC 101.  
*Hamilton v ACC* [2006] NZACC 318.  
*Hayes v R* [2008] NZSC 3  
*Heaney v ACC* [2001] NZACC 5.  
*Henderson v ACC* [2004] NZACC 396.  
*Hohepa v ACC* [2006] NZACC 22.  
*Howard v Attorney-General* [2008] NZHRRT 10.  
*Ilich v ACC* HC AK CIV-2006-485-001074 (25 Oct 2006).  
*James v ACC* [2005] NZACC 86.  
*Jones v ACC* [2008] NZACC 195.  
*Jones v Kaney* [2011] UKSC 13.  
*Martin v ACC* [2009] 3 NZLR 701.  
*Mathieson v ACC* [2002] NZACC 45.  
*McCartney v ACC* [2005] NZACC 180.  
*McDonald v ARCIC* [1994] NZACC 15.  
*McIntosh v ACC* [2009] NZACC 180.  
*Milian* [2004] NZACC 397.  
*O'Connor v ACC* [2000] NZACC 224.  
*Oliver v ACC* [2008] NZACC 34.  
*Otto v ACC* [2008] NZACC 253.

*Porter v ARCIC* (1994) 1 BACR 22; [1994] NZAR 503.

*Print v ACC* [2004] NZACC 394.

*R v Stewart* [2009] NZCA 89 (CA 802/2008, 25 March 2009).

*R v Stewart* [2009] NZSC 53.

*Raitt v ACC* [2007] NZACC 136.

*Ramsay v ACC* [2004] NZAR 1.

*Ramsay v Wellington District Court* [2006] NZAR 136 (CA).

*Stewart v ACC* [2003] NZACC 109.

*Telecom New Zealand Ltd v Nutter* (2004) 7 NZELC 97,563; [2004] 1 ERNZ 315; (2004) 2 NZELR 83.

*Thomas v ACC* [2010] NZACC 61.

*Thirring v ACC* [2008] NZACC 135.

*Tuitaatili v ACC* [2009] NZACC 68.

*U of Gisbourne v ACC* [2006] NZACC 266.

*Van Ryhn v ACC* [2006] NZACC 1.

*Wall v ACC* [2001] NZACC 322.

*White and White v Rodney District Council and Another* HC AK CIV 2009-404-001880 [2009] NZHC 2135 (19 November 2009).

***B Legislation:***

Accident Compensation Act 1972.

Accident Compensation Order 1973 (SR 1973/290).

Accident Compensation Act 1982.

Accident Compensation Act 2001.

Accident Compensation Rehabilitation and Insurance Act 1992.

Accident Insurance Act 1998.

Accident Rehabilitation, Compensation and Insurance Amendment Act (No 2) 1996.

Biosecurity Act 1993.

Crimes Act 1963.

Crown Entities Act 2004.

Employment Relations Act 2000.

Evidence Act 2006.

Holidays Act 2003.

Injury Prevention, Rehabilitation and Compensation Amendment Act (No.2) 2007.

Injury Prevention, Rehabilitation, and Compensation Amendment Act 2008.

Injury Prevention, Rehabilitation and Compensation (Review Costs and Appeal) Regulations 2002.

New Zealand Superannuation and Retirement Income Act 2001.

Official Information Act 1982.

Prisoners' and Victims' Claims Act 2005.

Rehabilitation and Incapacity Bill 1990.

Sentencing Act 2002.

Social Security Act 1964.

Weathertight Homes Resolution Services Act 2006.

**C Books:**

Cane, Peter *Atiyah's Accidents, Compensation and the Law* (7th Ed, Cambridge University Press, 2008)

Harder, Sirko *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart Publishing, Oxford 2010)

Ison, Terrance G *Accident Compensation* (Croom Helm, London, 1980)

Luntz, Harold *Compensation and Rehabilitation* (Butterworths Melbourne, 1975).

Palmer, Geoffrey *Compensation for Incapacity* (Oxford University Press, Wellington, 1979).

Posner, Richard; and, Parisi, Francesco (eds) *Economic Foundations of Private Law* (Edward Edgar Cheltenham, UK, 2002).

Rubin, Paul (ed) *The evolution of Efficient Common Law* (Edward Edgar Cheltenham, UK, 2002).

Salmond & Heuston *Law of Torts* (21st Ed, Sweet and Maxwell 1996).

Tettenborn, Andrew (ed) *The Law of Damages* (2nd Ed, LexisNexis London 2010).

Todd, Stephen (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009).

***D Reports:***

A Owen Woodhouse, H L Bockett and G A Parsons *Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (Government Printer, Wellington, 1967).

Bill Birch *Accident Compensation A Fairer Scheme* (Government Printer Wellington, 1991).

David Goddard “*The way in which Physiotherapy Services are funded and accredited by ACC*” (Report to the Minister of ACC, Department of Labour, Wellington, 2007).

Doug Martin, Chloe Anderson and Barry Jordan *Review of the Accident Compensation Corporation Fraud Unit* (Report to the Accident Compensation Corporation, Wellington, 2007).

Dispute Resolution Services Limited *Annual Report* (2010).

Hazel Armstrong and Rob Laurs *Vocational Independence: outcomes for ACC Claimants* (prepared for the Department of Labour, 2007).

Hazel Armstrong and Rob Laurs *When the Going Gets Tough: What happens to injured workers? An overview of the development and implementation of New Zealand’s Accident Compensation Scheme in Relation to Vocational Rehabilitation for Injured Workers* (Wellington 2007).

Independent Police Conduct Authority *Report into Complaint by Bruce Van Essen* (Wellington, 2008).

Joanna Goven *Implications of Genetic Testing for the Workplace and ACC: Findings from interviews by the Complementary Expertise Sub-team* (Constructive Conversations Research Report 8, June 2005).

Kathryn McPherson *Evaluation of Vocational Rehabilitation under the IPRC Act 2001* (prepared for ACC by Auckland University of Technology, 2007).

Law Commission *Personal Injury Prevention and Recovery* (NZLC R4, 1988).

Law Commission *Compensating Crime Victims* (NZLC R121, 2010).

Lord Pearson *Royal Commission on Civil Liability and Compensation for Personal Injury* (United Kingdom, 1978).

Ministerial Working Party on The Accident Compensation Corporation and Incapacity *Report* (Government Printer, Wellington 1991).

National Health and Safety Advisory Committee *Occupational Health and Safety in Small Businesses* (NOHSAC Technical Report 12, Wellington, 2009).

Pamela Lee *Strategies to Return Injured Workers to Sustainable Earnings, An International Literature Review* (Report to the Department of Labour, July 2003).

Peter J Trapski *Report of the Inquiry into the procedures of the Accident Compensation Corporation* (1994).

PricewaterhouseCoopers *Accident Compensation Corporation Scheme Review* (Report to ACC, March 2008).

Office of Disability Issues *Work in Progress 2008: Annual Report from the Minister for Disability Issues to the House of Representatives on implementing the New Zealand Disability Strategy* (Ministry of Social Development, 2008).

***E Journal Articles:***

Caspi A and others “Moderation of the effect of adolescent-onset cannabis use on adult psychosis by a functional polymorphism in the COMT gene: Longitudinal evidence of a gene x environment interaction” (2005) 57 *Biological Psychiatry* 1117.

Crichton, Sarah; Stillman, Steven; and, Hyslop, Dean "Returning to Work from Injury: Longitudinal Evidence on Employment and Earnings," (2011) 65 *Industrial and Labor Relations Review* 765.

Derrett, Sarah and others “Capturing outcomes following injury: a New Zealand pilot study” 2010 123 *NZMJ* 66.

Derrett, S and others “Disability outcomes following injury: results from phase one of the prospective outcomes of injury study (POIS)” (2010) *Inj Prev* 16.

Duncan, Grant “Advancing in Employment: the way forward for vocational rehabilitation” (2004) 35 *VUWLR* 801.

Duncan, Grant “Boundary Disputes in the ACC Scheme and the No-Fault Principle” (2008) *NZ L Rev* 27.

Duncan, Grant “Moral Hazard and Medical Assessment” (2003) 34 *VUWLR* 433

Duncan, Grant “The Assessment of Residual Capacity for Work: Easier Said than Done” 1999 12 *Social Policy Journal of New Zealand* 35.

Emery, Edward and others “HCN2 Ion Channels Play a Central Role in Inflammatory and Neuropathic Pain” (2011) 333 *Science* 1462.

Fergusson, Judith “The line between sickness and accidental injury in New Zealand’s Accident Compensation Scheme” (2004) 12 *TLJ* 61.

Langley, John and others “A cohort study of short-term functional outcomes following injury: the role of pre-injury socio-demographic and health characteristics, injury and injury-related healthcare” (2011) 9 Health and Quality of Life Outcomes 68.

Lewis, Richard; McNabb, Robert; Robinson, Helen; and, Wass, Victoria “Court Awards of Damages for Loss of Future Earnings: An Empirical Study and an Alternative Method of Calculation” (2002) 29 Law and Society 406.

MacEachen, E and others “The ‘Toxic Dose’ of System Problems: Why Some Injured Workers don’t Return to Work as Expected” (2010) 20 J Occup Rehabil 349.

MacEachen, E and others “The ‘Ability’ paradigm in Vocational Rehabilitation: Challenges in an Ontario Injured Worker Retraining Program” (2011) J Occup Rehabil (published online 6 Sep 2011).

Poulton, R, Andrews, G, and Millichamp, J “Gene-environment interaction and the anxiety disorders” (2008) 258 European Archives of Psychiatry and Clinical Neuroscience 65.

Purse, Kevin; Meredith, Frances; and, Guthrie, Robert “Neo-liberalism, Workers’ Compensation and the Productivity Commission” (2004) 54 JAPE 45.

Robertson, SP; and, Poulton, R “Longitudinal studies to detect gene x environment interactions in common disease - Bang for your buck?” (2008) 67 *Social Science and Medicine* 666-672.

Tennent, Doug “Degenerative Conditions: One of the Dilemmas of Accident Compensation Cover. Is there a way of clarifying the confusion in order to achieve fairness” (2009) 23 NZULR 315.

Wigley, Richard; Walls, Christopher; Brougham, David; and, Dixon Peter “What does degeneration mean? The use and abuse of an ambiguous word” (2011) 124 NZMJ 73.

***F Other:***

Alchin, John “Can Work Capacity in Chronic Non-Specific Pain be Validly Assessed?” Ngau Mamae Feb 2010 36.

Commerce Commission Decision No. 546, 17 February 2004.

Forster, Warren “Accountability of Non-treating Health Practitioners” (LLB Research Essay, Law and Medicine, University of Otago, 2010).

Ison, Terrance “Accident Compensation in New Zealand: Future Options” (Wellington 28 Nov 1985).

Letter from Human Rights Commission to Department of Labour regarding complaints of age discrimination against the Accident Compensation Commission in complaints 61527, 61806, 62489, 63862, 63871 (10 Oct 2008).

Letter to the Editor, Otago Daily Times from Mike Tully, Acting General Manager, Claims Management (Otago Daily Times, 24 September 2010).

Medical Council of New Zealand *Non-treating doctors performing medical assessments of patients for third parties* (Medical Council of New Zealand, December 2010).

New Zealand Law Society ACC Committee “Submissions to the Regulations Review Committee’s review of the Injury Prevention, Rehabilitation and Compensation (Review Costs and Appeals Regulations)” 2008.

Transport and Industrial Relations Select Committee 2005/06 Estimates Vote ACC *Report of the Transport and Industrial Relations Committee* Appendix 4, corrected transcript of evidence given on 16 June 2005 at p 28 and 29.

United Kingdom Parliamentary Reports, House of Commons Work and Pensions Committee - Sixth Report, The role of incapacity benefit reassessment in helping claimants into employment 13 July 2011.

***G ACC Review Decisions***

ACC Review Decision 42058.

ACC Review Decisions 153669 and 153670.

ACC Review Decision 163132.

ACC Review Decision 181545.

ACC Review Decision 195273.

ACC Review Decision 194849.

ACC Review Decision 202052.