AN ANALYSIS AND CRITIQUE OF THE 1992 CHANGES TO NEW ZEALAND'S ACCIDENT COMPENSATION SCHEME

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Because of alleged deficiencies of the tort system as a means of dealing with personal injury accidents,[1] there continues to be great interest in New Zealand's no-fault accident compensation scheme as a possible alternative to civil actions under the tort system.[2]

The New Zealand scheme, first adopted in 1972, provided benefits, *without requiring any proof of fault*, to persons suffering "injury by accident".[3] These benefits included medical and rehabilitative expenses, compensation for 80 per cent of lost earnings as long as disability continued, and lump sum payments of up to $27,000 for non-economic losses, as well as other necessary expenses.[4] The most significant feature of the scheme, however, provided that where the scheme provided "cover" where a person suffered "injury by accident" *the right to bring a civil action in tort for damages was abolished.*[5]

The New Zealand scheme has been regarded, as W F Birch, New Zealand's Minister of Labour, has pointed out, as "one of the world's most advanced schemes for compensating the victims of accidents ...".[6] But the current New Zealand Government, a National rather than a Labour Government, since taking power has also imposed what Minister Birch has characterized as "the most radical reforms to the accident compensation scheme since it first provided cover in 1974".[7] Most of these reforms took effect on 1 July 1992.

It is the purpose of this paper to describe the more significant changes to the scheme made by the National Government and to analyse the likely effects of these changes.[8]

First, however, it is important to note that there has been a clearly identifiable change in the underlying philosophy of accident compensation.

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1 See Stephen D Sugarman, *Doing Away With Personal Injury Law: New Compensation Mechanism for Victims, Consumers, and Business* (1989), 1-72.

2 See, for example, Masanobu Kato, *Liability Damages to Social Insurance – Compensating Personal Injury Victims* (1989). Law students in the United States are routinely exposed to alternatives to tort law, including the New Zealand accident compensation scheme. See, eg Marc A Franklin & Robert L Rabin, *Tort Law and Alternatives – Cases and Materials* (4th Ed. 1987) 749-54; James A Henderson Jr, & Richard N Pearson, *The Torts Process* (3rd ed. 1988), 899-910; Jerry J Phillips et al, *Tort Law – Cases, Materials, Problems* (1991), 1284-86.

3 *Accident Compensation Act* 1982, [hereinafter *ACA* 1982] consolidating and amending the *Accident Compensation Act* 1972 and its amendments.

4 *ACA* 1982. All dollar amounts are in New Zealand dollars.

5 Ibid, s 27(1).

6 Honourable Bill Birch, *Accident Compensation – A Fairer Scheme* (hereinafter *A Fairer Scheme*), in Preface, Letter from Hon W F Birch (1991).

7 Ibid at 66.

8 For my description and view of the New Zealand's scheme prior to the current amendments, see Richard S Miller, "The Future of New Zealand's Accident Compensation Scheme" (1989) 11 U Haw L Rev 1 (hereinafter "The Future").

The first principle underlying the original scheme had been identified by Mr Justice Woodhouse, who may rightly be called the Father of the New Zealand accident compensation scheme, as community or collective responsibility (as opposed to individual responsibility.)[9] In his view, the scheme was a program of social insurance; it was not a private insurance scheme.[10]

By contrast, the new Act is not considered by the Government to be a social welfare or social insurance scheme in concept. Instead, it is intended to become more like a scheme of *accident insurance*,[11] including premiums to be paid by individuals who will benefit from the scheme. This important change is reflected in the title of the new Act, the *Accident Rehabilitation and Compensation Insurance Act* 1992 (*ARCIA*), and in the new name of the Accident Compensation Corporation, the governmental body that operates the scheme, the Accident Rehabilitation and Compensation *Insurance* Corporation (ARCIC). It is also reflected in another change of language: charges against those who must pay for the scheme are no longer called "levies". They are now explicitly called "premiums".[12]

I. The Right to Bring a Common Law Action

As in the prior law, the most important feature of the new Act is that civil tort actions for compensatory damages for personal injuries may not be brought with regard to covered injuries.[13] It is important to keep in mind, however, that where coverage of an injury is excluded, the victim is *not* precluded from seeking to bring a civil tort action for damages in the court system;[14] a rule or a court decision of no coverage, therefore, opens the door to a possible claim for damages under the common law of torts.

II. Coverage

The prior Act covered "personal injury by accident".[15] Personal injury by accident, in turn, was defined to include "the physical and mental consequences of any such injury or of the accident";[16] "medical, surgical, dental, or first aid misadventure", otherwise undefined;[17] "incapacity resulting from an occupational disease or industrial deafness",[18] as more specifically defined;[19] and "actual bodily harm (including pregnancy and mental or nervous shock)" arising from acts or omissions which fit the description of certain sexual crimes.[20]

An important difference is that the new Act explicitly seems to exclude cover for mental distress not associated with physical injury to the person

9 Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (1967), 40 (hereinafter The Woodhouse Report).
10 Law Commission Report No. 4, *Personal Injury: Prevention and Recovery – Report on the Accident Compensation Scheme* (1988), 4-5 (hereinafter Report No. 4).
11 *A Fairer Scheme*, above, n 6, at 15.
12 See *ARCIA*, s 134: "Levies paid or payable under the *Accident Compensation Act* 1982 shall be deemed to be premiums paid or payable for the purposes of this Act".
13 *ARCIA*, s 14. Civil actions at law to recover punitive or exemplary damages for outrageous conduct are still permitted. See *Auckland City Council v Blundell* [1986] 1 NZLR 732; *Donselaar v Donselaar* [1982] 1 NZLR 97.
14 See ibid.
15 *ACA* 1982, s 26.
16 Ibid, s 2(a)(i).
17 Ibid at (ii).
18 Ibid at (iii).
19 Ibid at ss 28 and 29.
20 Ibid at s 2(1).

seeking cover.[21] That exclusion may result in a denial of cover in cases where tort actions to recover for intentional or negligent infliction of emotional distress may be allowed.

Perhaps the most radical change to coverage is the extent to which the Act now seeks to spell out coverage for harms caused by something health care professionals did or failed to do. While the former Act merely stated that personal injury by accident included "medical, surgical, dental, or first aid misadventure" without further definition,[22] the new Act includes a definition of medical misadventure that covers almost two pages.[23] The result of all this, as I will explain,[24] is that in cases in which claimants seek compensation for "medical misadventure", the proceedings are likely in most cases to turn into actions to prove medical negligence or malpractice.

21 *ARCIA*, s 4:
(1) For the purposes of this Act, "personal injury" means the death of, or physical injuries to, a person, and any mental injury suffered by that person *which is an outcome of those physical injuries to that person* ... (Emphasis added.). And see also s 8(3).

22 See *ACA* 1982, s 2(1).

23 *ARCIA*, s 5:
(1) For the purposes of the Act, -
"Medical error" means the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances. It is not medical error solely because desired results are not achieved or because subsequent events show that different decisions might have produced better results;
"Medical misadventure" means personal injury resulting from medical error or medical mishap;
"Medical mishap" means an adverse consequence of treatment by a registered health professional, properly given, if -
(a) the likelihood of the adverse consequence of the treatment occurring is rare; and
(b) the adverse consequence of the treatment is severe.
(2) For the purposes of the definition of the term "medical mishap", the likelihood that treatment of the kind that occurred would have the adverse consequence shall be rare only if the probability is that the adverse consequence would not occur in more than 1 percent of cases where that treatment is given.
(3) Where the likelihood that an injury would occur is in the ordinary course rare, but is not rare having regard to the circumstances of the particular person, it shall not be medical mishap if the greater risk to the particular person injured -
(a) was known to that person; or
(b) in the case of a person who does not have legal capacity, was known to that person's parent, legal guardian, or welfare guardian, as the case may be, -
prior to the treatment.
(4) For the purposes of the definition of the term "medical mishap", the adverse consequences of treatment are severe only if they result in death or
(a) hospitalisation as an inpatient for more than 14 days; or
(b) significant disability lasting for more than 28 days total; or
(c) the person qualifying for an independence allowance under section 54 of this Act.
(5) Medical misadventure does not include personal injury arising from abnormal reaction of a patient or later complication arising from treatment procedures unless medical misadventure occurred at the time of the procedure.
(6) A failure to obtain informed consent to treatment from the person on whom the treatment is performed or that person's parent, legal guardian, or welfare guardian, as the case may be, is medical misadventure only if the registered health professional acted negligently in failing to obtain informed consent.
(7) Medical misadventure does not include a failure to diagnose correctly the medical condition of any person or a failure to provide treatment unless that failure is negligent.
(8) Medical misadventure does not include any personal injury resulting from the carrying out of any drug trial or clinical trial where the injured person has agreed in writing to participate in the trial.
(9) In making any decision under this section the Corporation shall obtain and have regard to independent advice in accordance with procedures prescribed by regulations under this Act.
(10) Where the Corporation considers that medical misadventure may be attributable to negligence or an inappropriate action on the part of a registered health professional it shall -
(a) give the registered health professional a reasonable opportunity to comment on the matter; and
(b) if satisfied that there may have been negligence or inappropriate action
report the circumstances to the appropriate body with a view to the institution of disciplinary proceedings, and to any other body that may be appropriate.

24 See text at nn 91-103, below.

III. Benefits

There have been significant changes in the benefits.

1. Earnings-related compensation.

It should be noted first, however, that earnings-related compensation, measured as 80 per cent of lost earnings, remain in place.[25] Further, as in the former Act,[26] the employer pays for the first week if the injury is a work injury,[27] and ARCIC pays for all earners' injuries, on or off the job, after the first week.[28] The maximum amount payable as compensation for loss of earnings is $1,179 per week.[29]

2. Lump sums for loss or impairment of bodily function and for non-economic losses eliminated.

Perhaps the most important and controversial change, one that was supported by the Labour Government and by the Law Commission,[30] is the elimination of both lump-sum payments for permanent loss or impairment of bodily function, which in the 1982 Act could reach $17,000,[31] and lump-sum payments for loss "of amenities or capacity for enjoying life, including loss from disfigurement; and ... [p]ain and suffering, including nervous shock and neurosis", of up to $10,000.[32] Together, these items had constituted a significant part of the cost of the accident compensation scheme.[33] The elimination of these non-economic losses moves the scheme away from its historical roots as a substitute for the civil tort action.

3. Independence allowance created.

In place of the these payments, the new Act provides for an "independence allowance" based upon the degree of the claimant's disability and commencing not earlier than thirteen weeks after the injury for which it is paid.[34] The allowance is $40 per week, paid quarterly, for a person with 100 percent disability, to be scaled downward in accordance with regulations to be promulgated for those with lesser disability.[35] The allowance is not paid to those with less than 10 percent disability.[36] Finally, under this provision the degree of a person's disability must be reassessed at intervals of not more than five years.[37]

The purpose of the independence allowance, in the language of Mr Birch, Minister of Labour, is "to enable those injured to meet the additional costs arising from a ... disability during the remainder of their life".[38] The relatively small amount provided is designed "to cover miscellaneous expenses associated with disability".[39] It is to be adjusted annually to

25 *ARCIA*, s 39.
26 *ACA* 1982, ss 57, 59.
27 *ARCIA*, s 38.
28 Ibid, s 39.
29 Subject to annual adjustments to reflect "movements in average weekly earnings": ARCIA, ss 48 and 70.
30 Report No. 4, above, n 10, at 21.
31 *ACA* 1982, s 78.
32 Ibid, s 79.
33 See Law Commission Report No. 4, above, n 10, at xiv.
34 *ARCIA*, s 54(1) and (2).
35 Ibid, (3) and (4).
36 Ibid, (1).
37 Ibid, (11).
38 *A Fairer Scheme*, above, n 6, at 47.
39 Ibid at 49.

reflect changes in the Consumer Price Index.[40] This payment cannot be converted to a lump sum.[41]

In addition to the independence allowance, additional expenses and costs for care, for purchase or modification of motor vehicles, for modifying a residence, for household help, for child care, and for wheelchairs and other necessary equipment or appliances will be covered, as in the prior Act,[42] as part of the rehabilitation of the accident victim.[43]

4. Permanency of incapacity may be re-evaluated.

An important change, at least from the perspectives of both moral hazard and rehabilitation, is the elimination of the provision in the former Act that prohibited the earnings-related compensation of a person determined to be permanently incapacitated from ever being reduced.[44] This provision was designed to encourage permanently disabled workers to seek rehabilitation, though it may have led some workers to feign permanent incapacity. Section 61 of the new Act requires periodic reassessments at intervals of not less than six months unless ARCIC "is satisfied that no purpose would be served by a further assessment".[45]

5. Earnings related compensation may not be used as a substitute for unemployment compensation.

Even more significant is a provision in the new law which prevents the accident compensation scheme from being used, at least after the first twelve months following the incapacity, as unemployment compensation. By virtue of section 59(2)[46] of the former Act, claimants who were able to return to work, though not necessarily in their previous occupations, would continue to receive earnings-related compensation if there was no "appropriate" work available. In view of the serious recession in New Zealand, this provision evidently became very expensive: Mr Birch estimated that it was costing $40 million per year in recent years.[47] Under the new Act, there is a grace period of twelve months after the incapacity started, but if at that time the worker is determined to have a capacity for work of 85 percent or more, eligibility for earnings-related compensation ceases irrespective of whether suitable employment opportunities are available.[48]

6. Loss of earning capacity of non-earners.

A feature of the prior Acts that had been criticized was the treatment of non-earners who became accident victims.[49] Children under 16 or in school or apprenticeship programs who were injured were allowed minimal earnings-related compensation based to some extent on lost earning capacity.[50] But housewives who had taken time out of their profession or outside occupation in order to raise a family and other non-earners were not entitled to earnings-related compensation based on their lost earning capacity. The new Act purports to deal with that problem by allowing

40 *ARCIA*, s 71.
41 Ibid at s 74(1).
42 *ACA* 1982, s 37.
43 *ARCIA*, s 26, under the title "Social Rehabilitation".
44 *ACA* 1982, s 60(5).
45 *ARCIA*, s 61(4).
46 Added in 1985.
47 *A Fairer Scheme*, above, n 6, at 43.
48 *ARCIA*, s 49.
49 See "The Future", above, n 8, at 8.
50 cf *ACA* 1982, ss 62 and 63.

certain persons to pay premiums to purchase the right to receive compensation for lost earning capacity in the event of an accident.[51]

7. Medical and health benefits.

One of the problems complained of under the prior Act was that accident victims had access to expensive and often preferred private hospitals and other private medical and surgical services not available to victims of illness under the public health system.[52] This created an incentive for doctors and patients to classify illnesses as accidents.[53] Another problem was that patients who were charged little or nothing for their health care had little motivation or incentive to keep costs low.[54]

Recognizing these problems,[55] the Government has evidently inaugurated "user part charges" for publicly funded health care and required, or intends to promulgate regulations to require, accident victims to "pay user charges for pharmaceuticals, laboratory diagnostic tests and some public hospital services on the same basis as the sick", and also to require them to "pay the same targeted user charges for general practitioner visits as the sick".[56] With regard to private hospitals and other health care provisions the Government will increase beneficiaries' charges by reducing the maximum that ARCIC can pay.[57]

IV. Funding and Deterrence

Apart from the change of label for philosophical purposes from "levies" to "premiums", already mentioned, there are some significant changes wrought by the new Act both in the way that the scheme will be funded and in the way that premiums will be allocated and adjusted to internalize costs to accident causers.

1. The former Act.

Under the former Act, levies on employers covered both work and non-work related accidents of earners, levies on motor vehicles covered motor vehicle accidents, and general taxes covered accidents to non-earners.[58] Levies on employers varied according to the past accident cost experience of the industrial group into which each employer fell; levies on motor vehicles

51 *ARCIA*, s 45. The new provision, however, seems inadequate to the task. First, it only applies to those who have been earners, who have had 12 months continuous employment, and who make the election while still employed or within a month after ceasing to be employed. Second, the amount to be treated as earnings must be specified, and that amount may be either "the weekly earnings of the person calculated under this Act as if the incapacity of the person commenced more than 5 weeks before the date of the election" or a lesser amount. Third, compensation under this provision shall be for a maximum of five years from the date of the incapacity irrespective of how long the incapacity actually continues. And fourth, the amount of the premiums charged will be determined "with the objective of there being sufficient in any year to meet the full costs of the compensation payable under this section in that year and future years for any claims made under this section in respect of personal injury suffered in that year and the costs of administration of this section in that year". A less generous provision can hardly be imagined. Certainly this provision offers little to compensate an injured housewife who earned professional competence by virtue of her education but who was either working at an entry level position when she elected to purchase the protection or could not under the highly restrictive requirements of this section purchase the election at all.

52 Cf *A Fairer Scheme*, above, n 6, at 55-56.

53 Ibid, at 55.

54 Ibid.

55 Ibid.

56 Ibid, at 56.

57 Ibid.

58 See *Accident Compensation Corporation, ACC Levies Due For Payment By 31 May 1989 – Employers, 7 February 1990 – Self-employed* (1989) (Mach ACC 3704 0189), 5-6.

varied according to the class of vehicle.[59] While there was authority under the former Act to engage in experience rating by awarding bonuses and assessing penalties to individual employers,[60] this authority was not being exercised. Statutory authority to impose levies on motor vehicle drivers and to impose penalties for poor driving records[61] was never exercised.[62]

2. The new Act — work injuries

Under the new Act, employers pay premiums, again adjusted by industry class,[63] into an employer account which covers only work injuries and industrial diseases, not including work-related motor vehicle injuries, of employees.[64]

3. The new Act — earners' non-work injuries.

One of the most controversial features of *ARCIA* is the removal from employers of the obligation to fund employees' non-work injuries, and the imposition of the obligation to self-insure for such injuries on the employees themselves.[65]

The initial premium for non-earners is 70 cents per $100 of earnings.[66] Employers under *ARCIA* are obligated to withhold premiums from employees' wages and pay them into the Earners' Account.[67]

4. The new Act — motor vehicle accident injuries.

The costs of motor vehicle accidents will continue to be borne, at least in part, by motor vehicle owners through premiums to be paid in conjunction with the annual registration and licensing of vehicles.[68] There is an interesting innovation, however – in order "to assist with public health costs of injuries arising from motor vehicle accidents",[69] the Government increased the price of "motor spirit"[70] by 2 cents per litre and is obligated to pay this amount to ARCIC annually for the benefit of the Motor Vehicle Account. The avowed purpose of this charge is to "alert individual drivers to the real costs of accidents, especially public health costs".[71]

5. The new Act — non-earners' injuries.

Apart from a new section that permits some non-earners to pay premiums for protection against loss of earning capacity,[72] benefits for non-earners

59 Ibid.
60 *ACA* 1982, s 40.
61 Ibid, at s 49(d).
62 Although recognising the possible advantages by way of deterrence to experience rating, the Law Commission ultimately arrived at the conclusion that experience rating and penalties and bonuses could not fairly or effectively be imposed. See Law Commission Report No. 4, above, n 10, at 36-40.
63 *ARCIA*, s 103.
64 Ibid, ss 100, 101. Covered industrial diseases are also included. A unique feature of the new Act with regard to employees' work injuries is that an employer may apply for the status of "exempt employer": ibid, ss 105-107. If the status is granted by ARCIC the exempt employer becomes, in effect, a self insurer with regard to its employee's work injuries for a twelve month period following each such injury: ibid, s 106(2). One year following the injury ARCIC assumes the obligation with respect to that employee: ibid. The reward to an employer for becoming an exempt employer is to have its premium reduced to reflect the cost saving to ARCIC: ibid, s 106(3). The status of exempt employer may only be granted for one year at a time: ibid, s 105(1) and (2).
65 Ibid, ss 113-116.
66 The Government's initial plan was to set a premium of between $0.50 and $0.70 per $100 of earnings, before GST: *A Fairer Scheme*, above, n 6, at 25.
67 *ARCIA*, s 115.
68 Ibid, s 110.
69 *A Fairer Scheme*, above, n 6, at 27.
70 Presumably this includes petrol and other motor vehicle fuels, such as gas.
71 *A Fairer Scheme*, above, n 6, at 27.
72 *ARCIA*, s 45, discussed above, in n 51.

who are injured other than in motor vehicle accidents will continue to be funded by general tax revenues.[73]

6. The new Act — medical misadventure injuries.

In the former Act health professionals were treated no differently from other self-employed persons, occupations, or businesses: their levies were based upon their industry class which, in turn, was charged in accordance with the injury experience *of persons working in that industry*. In short, premiums were not based on the accidental harm the professional caused to patients, but on the injury experience of the professional and the professional's employees with regard to their own accidental injuries. In consequence, levies to health professionals – who are in a relatively non-dangerous profession – tended to be relatively low.[74]

The new Act, however, creates a new account known as the Medical Misadventure Account.[75] Its purpose is to finance benefits required to be paid under *ARCIA* to victims of medical misadventure.[76] Premiums are to be set by classes of certified health professional as established by regulations.[77] Classes may includes different fields of specialisation as well as different categories of health professionals.[78] Funds to pay benefits to victims of medical misadventure are to be derived from "[a]ny premiums that may be payable by registered health professionals of the same class as the registered health professional responsible for the medical misadventure".[79]

The upshot is that, for the first time since the advent of New Zealand's accident compensation scheme, a system of economic accountability to third persons – where one class of injury causers will be charged for the costs of injuries to persons, other than their own employees, whom they have injured – has been inaugurated.[80]

7. The new Act — experience rating and internalizing costs.

The new Act provides for experience rating which may result in "no-claims bonuses, increased premiums, or claim thresholds".[81] These are applicable to all cases in which premiums are to be collected – employers (including self-employeds), motor vehicle owners, earners, and persons liable to pay medical misadventure premiums.[82] While the language pro-

73 Ibid, s 120.

74 Thus, for example, the levy for those in the practice of medicine that was due on February 7, 1990, was $1.35 per $100 of payroll. By way of comparison, the levy for someone in the milk distribution business was $2.75, in the millinery retailing business $1.65, and in the scrap metal business $11.00. *Accident Compensation Corporation, ACC Levies Due For Payment By 31 May 1989 – Employers, 7 February 1990 – Self-employed* (1989) (Mach ACC 3704 0189), 37.

75 *ARCIA*, ss 122-24.

76 Ibid, s 122(1).

77 Ibid, s 123(5).

78 Ibid.

79 Ibid, s 122(1)(a). Sub (b) provides: "Where there is no such premium, from the Earners' Account (in the case of an earner) or the Non-Earners' Account (in the case of a non-earner)". Presumably this subsection will apply when there is no class specified for a particular certified health professional and therefore no special premiums collected from members of that class.

80 It is interesting to note that the concept of a special medical misadventure fund was not specifically mentioned by Mr Birch, the Minister of Labour responsible for the accident compensation scheme, as late as 30 July 1991 when he promulgated his report on the future of the scheme. See *A Fairer Scheme*, above, n 6. He did note, however: "There has been criticism of the scheme arising from the inadequacy of alternative means of calling medical practitioners to account for alleged negligence. There will be no return to the right to sue; instead, the Government will introduce legislation to effect changes in disciplinary procedures for the medical profession". Ibid, at 31.

81 *ARCIA*, ss 104, 111, 116 and 124.

82 Ibid.

viding for experience rating for earners, self-employeds, motor vehicle owners, and health professionals appears to be discretionary, using the word "may", the section dealing with experience rating of individual employers "on the basis of the actual costs of work injuries that occur in the employment of that employer" seems to be mandatory, using the word "shall".[83]

With regard to premiums on employers the Government felt that experience rating would overcome the "problem of broad industry classifications" and regarded "[t]he introduction of experience rating [to be] an essential part of the change in emphasis towards an insurance scheme funded by premiums".[84]

Apart from the fairness that might be associated with experience rating, there is some indication that the Government was concerned also with deterrence of accidents. Thus, for example, with regard to the assessment of a motor vehicle fuel tax, Mr Birch stated:

> While impacting on all road users, this premium is expected to have a particular impact on young drivers, especially 16 to 24 year old males. This group has a particularly high accident rate and therefore has a disproportionate effect on public health costs. They often drive vehicles owned by others, such as their parents, and this additional premium will impact on them directly when they purchase petrol.[85]

V. CRITIQUE

At an international workshop entitled "Beyond Compensation: Dealing With Accidents in the 21st Century",[86] Geoffrey Palmer, who was heavily involved with Woodhouse J in the development of the original New Zealand scheme,[87] suggested that the new Act "hasn't got any coherent thinking in it at all. It is really unprincipled mishmash ...".[88] Is that a fair reading of the new Act?

First, it should be understood that the former Act was seen by its framers as just a way-station on the road to a perfect collective or welfare approach to disability.[89] That the scheme did not purport to cover incapacity by reason of illness was in their view only a temporary problem based on expediency, to be righted as soon as practicable. The recent election of the National Party, however, prevented the ultimate step, or at least a step toward a more comprehensive plan, as exemplified by the Labour Government's Rehabilitation and Incapacity Bill, from being taken.

Quite clearly the new Act is not viewed by its sponsors as a social insurance scheme, but as a scheme providing comprehensive accident insurance. From this perspective, therefore, the retention of tax-funded benefits for non-earners is clearly anomalous, since those benefits are only consistent with a welfare scheme. But this is not too drastic a deviation from the new philosophy because the benefits paid to non-earners, even including the new $40 per week independence allowance, do not include much if anything by way of disability income and undoubtedly only constitute, as they always have, a relatively small part of the scheme.

83 *ARCIA*, s 104(1).
84 *A Fairer Scheme*, above, n 6, at 24.
85 Ibid, at 27.
86 March 22-24, 1992, East-West Centre, Honolulu, Hawaii. The proceedings have been accepted for publication in the University of Hawaii Law Review.
87 See Geoffrey Palmer, *Accident Compensation: A Study of Law and Social Change in New Zealand and Australia*, passim (1979).
88 Volume 2, Proceedings of March 23, 1992, at 26, unpublished.
89 See The Woodhouse Report, above, n 9, at 26; Report No. 4, above, n 10, at 7-10.

Indeed, the poor treatment of non-earners, especially after depriving them of their civil actions for personal injuries, seems to constitute a serious area of injustice in the New Zealand scheme. Unfortunately, that has not changed very much under the new Act.

It does appear that the scheme, although provided in a single statute, embodies five distinctive compensation schemes:

First, as just described, a modest welfare scheme for injured non-earners.

Second, a fairly classical workers' compensation scheme covering accident and industrial disease arising out of and in the course of employment and funded almost entirely by employers. While the scheme is rather generous in terms of earnings-related compensation, however, it will henceforth require injured employees to pay user-costs in order to get some of their health benefits. This is less generous than most workers' compensation schemes in the United States, which usually cover all medical and rehabilitative expenses.

The new "exempt employer" provision seems similar, but not as far-reaching, as permission under most workers' compensation acts for qualified employers to self-insure or, at least, for employers to purchase insurance from private insurers.

Viewed, in isolation as a separate system, therefore, there is nothing very exceptional about the provisions for compensation to earners for work injuries.

Third, the provisions dealing with compensation and premiums for earners' non-work injuries constitute a first-party accident insurance scheme. The differences from other private schemes are that this scheme is mandated by the Government; that the coverage is relatively comprehensive, including disability income, health and other benefits rather than just lump sums or just disability income; and that a Government corporation, ARCIC, stands in for the private insurers who might otherwise offer such insurance.[90]

Fourth, the scheme with regard to motor vehicle accidents constitutes a total no-fault motor vehicle accident scheme. Presumably, it too will be fully funded by user charges, including the premiums to be paid by owners and the fuel tax to be paid by drivers and owners who purchase the fuel. The amounts collected from these sources will be used fully to pay for the scheme, including the public health costs.

Fifth, the new provisions dealing with medical misadventure seem to establish a quasi-medical malpractice action. Under the former Act it was necessary for the claimant to establish "medical, surgical, dental, or first aid misadventure",[91] which was not otherwise defined in the Act. As Margaret Vennell has well described, there has been considerable difficulty in determining what kind of acts, omissions, or other medically-related misfortunes constitute medical misadventure.[92] While proof of medical error amounting to a breach of the appropriate standard of care has increasingly been deemed relevant by judges to the question of medical

90 There is evidently an intention on the part of the Government, however, to give further consideration to a greater role for private insurers. See *A Fairer Scheme*, above, n 6, at 61. Further, it might be possible, although the issue has evidently not been addressed, to permit an employer to become exempt and self-insure under ss 105 and 106 of *ARCIA* by purchasing insurance from a private carrier.

91 *ACA* 1982, s 2(1).

92 Margaret A M Vennell, *Medical Injury Compensation Under the New Zealand Accident Compensation Scheme and Medical Responsibility*, (1992) (monograph) (hereinafter *Medical Injury Compensation*).

misadventure in both omission-to-act[93] and in other cases,[94] such proof was not relevant in every case.[95] It also remained at least theoretically possible to define medical misadventure in all cases in a way that focussed on the accidental nature of the injury to the victim rather than on the fault of the medical professional. Under the new Act, however, a fault requirement has expressly been inserted into the framework of the accident compensation system. With the exception of those who claim "medical mishap", which as restrictively defined in the Act is likely to constitute a small minority of claims,[96] all other medical misadventure claimants, to prevail, must evidently establish "medical error",[97] which in turn requires proof of negligence – malpractice.[98]

These provisions requiring proof of medical negligence when considered in connection with other new provisions that give the medical professional an opportunity to be heard,[99] that require that the decision-making body have expert advice,[100] that require findings of medical negligence or other inappropriate action to be reported to a disciplinary or other body,[101] that call for experience rating of premiums paid by health professionals,[102] and that permit claimants and health professionals dissatisfied with a decision of ARCIC to request a review of the decision and to appeal the decision of the reviewer through the courts,[103] appear to create what is

93 Ibid, at 13-16.

94 Ibid, at 20-21, discussing, inter alia, *Buckley v Accident Compensation Corporation*, 24 November 1988, ACAA, 275/88, Middleton DCJ (failure to treat with appropriate antibiotics); *Vernon v Accident Compensation Corporation*, 13 January 1989, ACAA, 1/89, Blackwood BH (continued prescription of a dangerous drug to an alcoholic); *Hata v Accident Compensation Corporation*, 30 April 1990, ACAA, 100/90, Cartwright PJ (failure to warn of the risk of a sterilisation operation); and *Tiddy v Accident Compensation Corporation*, 15 May 1990, ACAA, 11/90, Middleton AW (failure of a vasectomy operation and failure to warn of dangers of unprotected intercourse).

95 See eg ibid, at 19, describing *Polansky v Accident Compensation Corporation* (1986) 5 NZAR 276 ("a misdiagnosis of an 'extensive carcinoma' followed by the unnecessary removal of the entire stomach, distal oesophagus (sic), spleen and distal half of the pancreas", although not negligent, constituted medical misadventure).

96 *ARCIA*, s 5(1)-(4): see above, n 23.

97 Ibid, s 5(1). Since personal injury caused by an accident is a separate ground for cover, a patient who suffers injury during treatment may not have to establish medical misadventure if she can show that she suffered injury caused by an accident, (s 8(2)(a)), or personal injury which was a consequence of treatment for personal injury, (s 8(2)(d)). Presumably, injury by accident can be established without proof of medical misadventure, for example, by proving that the patient suffered injury when a surgical instrument broke while within her body cavity. See, for example, the facts of Anderson v Somberg (1975) 67 NJ 191, 338 A 2d 1, cert. denied, 423 US 929 (the tip of an angulated pituitary rongeur broke off while the tool was being manipulated in plaintiff's spinal canal).

98 "Medical error" is defined as "the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances": *ARCIA*, s 5(1). Section 5(6) of *ARCIA* disallows claims for failure to obtain informed consent unless "the registered health professional acted negligently in failing to obtain informed consent". Section 5(7) disallows claims for injury based on failure to diagnose the medical condition correctly or failure to provide treatment "unless the failure is negligent".

99 *ARCIA*, s 5(10)(a).

100 Ibid, s 5(9).

101 Ibid, s 5(10)(b).

102 Ibid, s 124.

103 Section 5(10)(a) of *ARCIA* provides that a health professional has a right to "comment" to ARCIC where medical misadventure may be attributable to negligence or other inappropriate action. Section 89(3) provides that a registered health professional dissatisfied with a decision involving negligent failure to diagnose an illness or provide treatment (s 5(7)), or negligent failure to obtain informed consent (s 5(6)), may apply to ARCIC for a review of the decision. And s 90(4)(c) allows the professional in such cases "to be present and be heard either personally or by a representative". However, the situations referred to in s 89(3) seem to exclude many, indeed probably most, other possible cases of medical error where negligence in treatment occurs within s 5(1). Section 91 allows any person permitted to apply for review under s 89(3) to appeal to a District Court. Section 97 permits an appeal of that decision to the High Court. Questions of law may then be appealed to the Court of Appeal on leave of the High Court

likely to become a highly adversarial proceeding or series of proceedings in which the issue is whether the tort of medical negligence has been committed!

This development, in turn, raises serious questions about the difficulties, costs, and delays a claimant will be likely to experience in seeking compensation for medical error. First, as Vennell has noted, "There is a possible danger that if the Accident Compensation Corporation becomes involved in the complaint procedure that injured patients will be disadvantaged".[104] In a medical community as small as New Zealand's, it may be difficult to find expert witnesses to testify on a claimant's behalf. Second, there is a problem of affordability of legal costs. Although wrongful conduct or omissions on the part of the health professional will have to be established as in a civil medical malpractice action, the awards are not likely to come close to matching the large damages available in a conventional tort action for malpractice. Claimants ineligible for legal aid may find legal representation excessively expensive, and may in any event not find the benefits worth the anguish of pressing the claim. Finally, there is the problem of delays. Those claiming medical error who might receive significant benefits if their claim is approved may have to wait for extended periods while their claims wend their way through the courts. From the point of view of compensation to accident victims, therefore, the medical misadventure provisions leave much to be desired. One is tempted to characterize the new medical misadventure scheme as a miscegenetic union of fault and no fault, grossly unfair to many victims of medical error.

There is, however, a potentially positive aspect to the new Act: the attempt to reassert accountability through experience rating. It has been my view that the former Act significantly undermined deterrence of accidents by externalizing accident costs and by eliminating the concept of negligence or fault with regard to personal injuries from the public consciousness.[105] Under the new Act, experience rating is mandatory for work injuries and may be inaugurated for all other categories where premiums are required. This reflects an intention to internalize the costs of accidents, and that intention is praiseworthy. Unfortunately, there may be insurmountable difficulties in attempting fairly to experience rate individual New Zealand employers,[106] and even greater problems may arise with regard to experience rating of individual earners. On the other hand, as is the case with motorists in the United States, rates might profitably be increased for those motor vehicle owners whose vehicles have been involved in the violation of traffic laws.

With regard to medical misadventure, to the extent that findings of negligence are now required for recovery in cases of medical misadventure, experience rating of health professionals may fairly be imposed.[107]

or the Court of Appeal: s 98.

104 *Medical Injury Compensation*, above, n 92, at 24. See also Gellhorn, "Medical Malpractice Litigation (US) – Medical Mishap Compensation (NZ)", (1988) 73 Cornell L Rev 170, 197-202.

105 See "The Future", above, n 8, at 78-80.

106 See New Zealand Law Commission, Comment on "The Future of New Zealand's Accident Compensation Scheme" by Richard S Miller, (1990) 12 U Haw L Rev 339, 341; Report No. 4, above, n 10, at 36-40.

107 That is, if the medical professional whose premium is increased because of negligence is actually given a reasonable opportunity to be heard. That would include the right to be represented by counsel, to testify, to present witnesses, and to participate fully through counsel on appeals. That is probably the case under the new Act: s 90(4)(a) allows any person dissatisfied with a premium assessment, who seeks review as permitted in s 89(4), to be present and to be heard personally or by a representative. Section 91 allows any person permitted to apply for review

Such increased premiums could serve to deter health provider negligence. It is unfortunate, however, that it is the nature of the new system, as described above, to discourage the bringing of even justified medical misadventure claims. Increases in premiums, therefore, are not likely to come close to matching the actual costs of medical error.

It has been my view, set forth in my 1989 article,[108] that the best way to reintroduce deterrence into the New Zealand system would be to allow the corporation which administers the system and the claimant to bring tort actions against persons who caused the injuries for which compensation is granted. If my approach were adopted, the corporation, ARCIC, would through subrogation seek to recover the value of benefits paid and to be paid under *ARCIA* from tortfeasors; the individual could seek to recover tort damages not compensated by ARCIC. In the event of settlement, ARCIC's claims would be primary.[109] Even though the new Act has reintroduced tort-like considerations in the area of medical injuries, and even though some provisions of the Act denying cover may reopen the door to full-scale tort actions that courts will allow,[110] the Government clings to the view that it is not reintroducing the tort system.[111]

VI. Conclusions

1. Fairness

The scheme continues to exhibit serious unfairness to non-earners. Neither the new independence allowance or the election to purchase benefits for loss of earning capacity seem adequately to compensate non-earners who lose significant future earning capacity by reason of accident. This unfairness, as is often the case, is most likely to have its adverse effect on women who are raising children or working at low-paying jobs, or both, at the time they suffer their accidental harm. There is also serious unfairness, as pointed out above, to claimants seeking compensation for medical error, by virtue of the hurdles they must jump and the costs they may have to incur before their entitlement to compensation is established.

There is other evidence of unfairness: before the original scheme was adopted employers were liable for workers' compensation and also subject to tort actions by their employees and, most importantly, to tort actions, such as product liability actions, brought by persons, *other than employees*, injured by employers. A significant trade-off produced by the adoption of that scheme was that in exchange for immunity from tort actions brought by workers *and by others*, employers would cover their workers for non-work-related as well as work-related accidents. Further, the availabil-

under s 89(4) to appeal to a District Court. Section 97 permits an appeal of that decision to the High Court. Questions of law may then be appealed to the Court of Appeal on leave of the High Court or the Court of Appeal: s 98.

108 "The Future", above, n 8, at 63-73.

109 For greater detail see ibid.

110 Recall that tort actions are only disallowed in situations where *ARCIA* provides cover. There are situations, such as where cover for mental distress unaccompanied by physical injury is not provided (see ss 4(1) and 8(3)), or where negligence or intentional wrongs involved in drug trials or clinical trials are excluded in cases where claimant agreed in writing to participate in the trials (s 5(8)), where the courts may well allow a tort recovery.

111 *A Fairer Scheme*, above, n 6, at 1. It is interesting to note that the Act expressly provides for rights of subrogation for ARCIC in those few cases where the accident victim retains a right of action at law: *ARCIA*, s 15. It would be relatively easy to require general subrogation simply by expanding this section of the Act and amending s 14, which bars tort actions for damages with respect to personal injury for which the Act provides cover.

ity of lump-sum payments for non-economic loss, although limited in amount, constituted another element of the trade-off, since accident victims were giving up their right at common law to recover for pain and suffering. In the new scheme the employee has been deprived of both the lump sum payment and the employer's payment to cover non-work accidents, and these fairly significant benefits have been replaced only by an insignificant independence allowance of up to $40 per week. On the other hand, employers remain exempt from both worker law suits and from personal injury actions brought by others. To put it more starkly, while the benefits paid for by employers have been significantly reduced, they remain immune from product liability actions and from other tort actions arising out of personal injuries to third persons. In effect, therefore, employers, who undoubtedly include manufacturing companies, agricultural producers, service companies, landlords, and all non-health professionals, are having the costs of accidents negligently caused by them subsidized both by accident victims and by workers who now pay individual premiums. From a global perspective, this will increase the subsidy produced by immunity to personal injury tort liability already given to New Zealand producers of products and services sold in international markets and further increase their competitive advantage against firms from nations which allow liability claims by injured persons.

2. Philosophy

It is true that no clear philosophy supports the five compensation systems encompassed by the new Act. Using five "models for the management of risk and its consequences" suggested by Stephen Sugarman,[112] the non-earner provisions are still based on collective welfare notions, but the rejection of equal coverage for illness-caused disability is anti-collectivist and illiberal. The workers' compensation feature, financed by employers, fits the liberal model. The compulsory non-work injury accident insurance scheme for workers is a curious hybrid: authoritarian in its mandatory feature and collectivist in its administration by a state-run corporation, but conservative if not libertarian in having workers cover the costs through premiums. The semi-fault-based medical misadventure scheme begins to move in a conservative direction by requiring proof of fault in most cases and possibly by imposing the costs of medical error on health care providers through experience rating, but it is liberal to the extent that claims are initially handled administratively, that medical mishap is not based on fault, and that compensation is limited. Similarly, the intention to experience-rate the premiums for the entire system and to require payment of user charges for medical and hospital benefits constitute a further distancing from a collectivist welfare scheme. From this perspective, therefore, the new Act does, indeed, seem to constitute an unprincipled mishmash.

There is, however, evidence of an overarching anti-collectivist theme, one that seems to be based principally on a conservative view of the needs of New Zealand's economic situation: with the glaring exception of non-earner accidents, the accident compensation system and the public health system upon which it draws to serve accident victims is increasingly to be financed by premiums, user charges, and motor fuel taxes paid by

112 The models are libertarian, conservative, liberal, collective, and socialist. See "Proceedings of International Workshop: Beyond Compensation – Dealing with Accidents in the Twenty-First Century", accepted for publication in the University of Hawaii Law Review.

individuals and firms and not by general taxation. In other words, with the sole exception of compensation for non-earners, the National Government is in the process of removing the costs of the accident compensation scheme from the general tax rolls where the Law Commission and the Labour Government would have preferred to have them put. This clearly reflects an exodus from the principle of community or collective responsibility which guided the former scheme.

3. Accident policy

From a policy perspective, however, applying political labels is not nearly as significant as the extent to which the new scheme serves or disserves important values. In the case of an accident compensation scheme, well-being is clearly the primary value. Well-being may be served in two ways: (1) by compensating accident victims, and (2) by preventing and deterring accidents.[113]

a. Compensation

With regard to earnings-related compensation, i.e. income replacement for earners, the new Act seems to provide compensation about as adequate and as timely as that provided in the prior Act. For most earners that compensation should continue to prove very adequate to replace lost earnings, even without lump sum payments for noneconomic loss. The plight of injured non-earners, because they have lost the right to receive lump-sums for non-economic loss, seems on the whole worse than under the prior Act notwithstanding the availability of a meagre independence allowance and limited optional insurance. The well-being of most victims of medical misadventure is likely to diminish significantly compared with their situation under the prior Act: Those claiming medical error may find themselves embroiled in a contentious, if not adversarial, process subject to several appeals which may either delay their recovery or result in a denial of compensation altogether if fault is not proven. Few will qualify to recover under the highly restricted claim of medical mishap. Finally, with regard to hospital, medical, and surgical expenses, accident victims will henceforth face "user part charges" and maximum limits on payments by ARCIC for private hospitalisation which could have the effect of reducing victims' access to necessary health care.

b. Deterrence

The intention to internalize accident costs is commendable. Notwithstanding doubts about the effectiveness of experience rating as a deterrent and its fairness to small firms and individuals, the possibility that a poor accident record can lead to higher premiums could reintroduce a greater consciousness of the need for safety and accident prevention into the national psyche – a consciousness that in my opinion has diminished since the advent of the accident compensation scheme. Because of those doubts, however, it remains to be seen whether and to what extent experience rating will actually be carried out.

Although the changes to medical misadventure are likely to undermine the comprehensiveness of the accident compensation scheme, they are, ironically, likely to strengthen considerably deterrence and injury prevention in the case of health professionals, at least for the near term. Once it

113 Calabresi would refer to these as reducing secondary and primary accident costs respectively. Guido Calabresi, *The Costs of Accidents* (1970), 26-28.

is learned that findings of medical error are to be reported to professional disciplinary bodies and that determinations of medical error can result in payment of higher premiums, health professionals can be expected to react by undertaking greater care in the provision of health services. Indeed, it would not be a surprise to hear complaints that physicians are beginning to practice "defensive medicine" in order to avoid claims of medical error. On the other hand, once the weaknesses and ineffectiveness of the scheme, from the point of view of a claimant alleging medical misadventure, become understood, the deterrent effect is likely to decline.

Notwithstanding the confusion of principles and the weakness of deterrence, it is likely that the New Zealand scheme, as it has been amended by *ARCIA*, will become as to most of its features even more attractive as a substitute for the tort system than the former Act. First, the workers' compensation scheme is already in place in developed nations. Second, the worker-financed non-work-accident insurance scheme with employer withholding of premiums seems a relatively painless way to finance compensation for such injuries. Third, the total no-fault motor vehicle injury scheme financed by owner premiums and in part by taxes on motor fuel may not appear too radical a departure in jurisdictions that are familiar with partial motor vehicle no-fault schemes.[114] When to this mix is added the perceived, if illusory, savings achieved by eliminating all personal liability and liability insurance for personal injury, the adoption of such a scheme, including even the limited but "free" benefits for non-earners, may appear very attractive to all but personal injury lawyers and those, like this commentator, who are concerned about deterrence of accidents and efficiency. Adoption of such a system to replace an ongoing tort system without provision for a tort liability *back-up* would in my opinion be most unfortunate.[115]

As to medical misadventure, the fact that New Zealand, the leading proponent of no-fault accident compensation among the developed nations, has rejected its own no-fault approach for dealing with medical error and reintroduced fault – medical negligence – as a basis for compensation, could have a dampening effect on efforts, such as those in the United States,[116] to replace medical malpractice with a no-fault system.

114 Quebec has already adopted a total automobile no-fault scheme. See O'Connor & Tenser, "North America's Most Ambitious No-Fault Law: Quebec's Auto Insurance Act", (1987) 24 San Diego L Rev 917. The study which led to Hawaii's adoption of a partial no-fault plan for automobile accidents had recommended a "pure" no-fault scheme. See Haldi Associates, Inc., *A Study of Hawaii's Motor Vehicle Insurance Program* (1972) 119, 127.

115 See "The Future", above, n 8, at 63-80.

116 *The American Law Institute, Reporter's Study, Enterprise Responsibility for Personal Injury*, Vol II, 487-516 (1991). In Hawaii a Governor's Blue Ribbon Committee "has made a no-fault malpractice system for Hawaii one of its top priorities for reining in health care costs". Kevin Dayton, "Doubts on no-fault in medicine; Hawaii doctors, nurses skeptical about changing system", Aug. 28, 1992, Honolulu Advertiser, at A2.