Law Commission proposals for accident compensation : What place for personal remedies?

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New Zealand's radical accident compensation scheme has been in operation for well over a decade. While it has become an accepted part of the country's social policy, the precise form and operation of the scheme have been criticised. Major proposals, including a new draft Bill, were drawn up by the Law Commission in 1988. One important issue not discussed by the Law Commission but significantly affected by the terms of the Bill, is the ability to sue at common law. Catherine Yates analyses the key provisions, reveals numerous uncertainties of interpretation, and suggests that the likely result is a widening of the scope for bringing a common law action for personal injury. She argues however that the new basis for actionability is misconceived.

I. INTRODUCTION

From May 1987 to May 1988, the New Zealand Law Commission conducted a review of the Accident Compensation Scheme (ACS). In that time it produced two reports,[1] calling for submissions and comments on its ideas. The second report contained a proposed Bill to replace the current Accident Compensation Act 1982 (ACA). In addition to this intensive scrutiny by the Law Commission, the Royal Commission on Social Policy included a discussion of the ACS in its wide ranging report on social conditions in contemporary New Zealand[2].

This article discusses some of the changes to the ASC which the Law Commission's Bill would effect if implemented. It focuses particularly on the impact which modifications to the scheme will have on the present bar on bringing proceedings for damages in cases of personal injury by accident.

The changes proposed in the Bill will enlarge the range of physical and mental conditions for which ACS compensation is payable; limit the scope of the Accident

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1 *Law Commission: The Accident Compensation Scheme - Interim Report on Aspects of Funding* (Wellington 1987) (NZLC R3) and *Personal Injury: Prevention and Recovery* (Wellington, 1988) (NZLC R4).

2 *Royal Commission on Social Policy, The April Report* (5 Volumes, Wellington, 1988) (Referred to hereafter as RCSPR). Note that the interim Working Papers on Income Maintenance and Taxation which contained its discussion at the ACS was published before the Law Commission's final report.

Compensation Corporation's (ACC's) responsibility for paying compensation; and limit the types of compensation payable. It is my submission that the result will be an increased opportunity by some to take a common law action in respect of personal injuries. While this article argues that an expanded role for common law actions may be no bad thing, it questions whether the opportunity to bring proceedings proposed by the Law Commission is appropriate. The significance of the greater opportunity to sue is heightened by the proposed abolition of the lump sum payments presently awarded by the ACC for pain and suffering, loss of amenities and capacity to enjoy life.

The article is divided into five main sections.

1. A very brief background to the ACS, and the reasons for the latest review of its operation.

2. Discussion of the present form of the bar to suing, as enacted by section 27 of the ACA, and with reference to the definition of personal injury by accident (piba) contained in the Act.

3. Discussion of the effect of the bar: whereas the second section looked at precise wording, this section deals with what could be termed policy considerations.

4. A detailed look at the wording of the proposed bar contained in clauses 81 and 82, and a prediction of how the bar would operate in the context of the Bill as a whole.

5. A brief discussion of the effect of the proposed abandonment of payments for paid and suffering, loss of amenities and capacity to enjoy life. The payments can generally be termed as being for non-economic, non-physical loss; the acronym "nenpl" will be adopted when referring to them.

In the conclusion it is suggested that the bar to suing should not be re-enacted without an assessment of its appropriateness to present social conditions. These conditions are not the same as existed when the ACA was first introduced. New Zealand should hesitate before accepting a continued bar to bringing actions for damages for personal injury. Such a bar is a major restriction on people's right to pursue claims against those who harm them, and that restriction should not be accepted without clear and valid reasons.

II. BACKGROUND TO THE CURRENT ACCIDENT COMPENSATION SCHEME

Prior to the introduction of the Accident Compensation Act 1972, compensation was available to injured persons from a range of sources. Earners could receive compensation under the Workers Compensation Act 1956; those injured as a result of tortuous acts could claim damages at common law; persons injured in motor vehicle accidents would be compensated through the compulsory insurance scheme; the social security system provided a range of safety-net benefits as well as free public hospital treatment to all;

individuals could take out personal insurance against injury or death by accident; and victims of some crimes could receive compensation through the Criminal Injuries Compensation Act 1963.

The various sources provided compensation under various heads, and entitlement to each was based on different criteria. In some cases, the criteria were pre-accident circumstances; in others, the extent of the injury. The richest source of compensation for an individual was a successful tort action taken against a wealthy defendant. A common law claim for damages was for such compensation as would restore the victim, as far as money could, to the pre-accident condition. Damages were payable in respect of lost income, both past and future; out-of-pocket medical and related expenses; pain and suffering; loss of amenities of life; disfigurement; loss of bodily integrity; and, sometimes, for inconvenience. Though the rewards in bringing a successful common law action were great, the risk of failure was high. Payment received through tort actions formed about one quarter of the total amount paid out in any one year as accident compensation[3].

In 1966 the Hon. Owen Woodhouse (as he then was) was asked to chair a Royal Commission to look into the "law relating to compensation and claims for damages for incapacity or death arising out of accidents (including diseases) suffered by persons in employment". The report of that Commission[4] (referred to hereafter as the "Woodhouse Report") proposed a radical new scheme to provide comprehensive accident compensation for all victims of accidents, not just workers. The report identified five principles which it used as a foundation for the proposal. They were: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency. Crudely put, the scheme promised that compensation would be available giving as much, to more, at no increased cost. It would achieve this by channeling the funds presently paid by employers and motor vehicle owners on insurance into a single central fund. The administrative savings made in applying those funds on a no-fault basis to all accident victims would involve no extra cost to employers, motor vehicle owners or taxpayers in general, yet would achieve comprehensive and coherent cover for all New Zealanders. The losses which would be compensatable were economic losses arising from physical injury - loss of earnings (on a continuous basis through periodic payments) as well as all medical and other expenses relating to treatment and rehabilitation. Some payment for loss of a part of the body was also envisaged.

The scheme would do away with the Workers Compensation Act, the Criminal Injuries Compensation Act, compulsory third party motor vehicle insurance and to some extent the need for personal insurance. The other thing to go was the right to sue. There would be no point in having that right since the ACC would pay compensation to victims. More importantly though, there could be no benefit to employers and motor vehicle owners in paying for a comprehensive scheme if they still had to insure against the risk of an action being taken against them. The denial of this right to sue would

3 Palmer *Compensation for Incapacity* (OUP, Wellington 1979) 34.

4 Report of the Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (Government Printer, Wellington, 1967) (Referred to hereafter as the "Woodhouse Report").

affect comparatively few, and besides, as a tool for obtaining compensation, the common law actions had been much criticised as being inefficient[5], uncertain and arbitrary.

The Woodhouse Report was delivered in 1967, but the first Accident Compensation Act did not appear till 1972. In its gestation the proposal had undergone many changes. One was that a lump sum payment for non-economic non-physical loss (nenpl) was made available to victims of accidents, up to the maximum available previously under this head in the now defunct Workers Compensation Act. The Law Society and unions had argued strongly for its inclusion, seeing the promise of "real compensation" as incomplete without it.

Since then the Scheme has undergone a series of changes, most of which have returned it increasingly to its original Woodhouse form. The latest in this series of changes is that proposed by the Law Commission. The Commission, as it happens, is headed by Sir Owen Woodhouse. Not surprisingly, the new proposal suggests changes which draw heavily on the original Woodhouse proposal[6]. But twenty years have passed since the Woodhouse Report, and the new scheme reflects the changing times by grafting on a sixth principle to the five already mentioned - that of individual responsibility[7].

The Law Commission's review of the ACS arose out of a perceived funding crisis. The proposal to abolish nenpl payments is largely in response to that, combined, one suspects, with a wish to return to the conceptual purity of the original scheme. Submissions from the public uncovered various other dissatisfactions with the Scheme, in particular the fact that it resulted in wide disparity between the treatment given to the sick as compared to that given to the injured. It was also found that the scheme was unnecessarily generous to victims of minor accidents, while being over-restrictive in its grants to those with severe injuries. It is unclear what precisely has prompted the alteration in the enactment of the bar to sue, but as we shall see, it possibly arises from a fear that the limits on the scope of that bar are no longer clearly definable.

5 It was estimated that around 40% of the total money paid out in compensation was used up in expenses involved in bringing about the action.

6 Another major source is the second report on this subject which Woodhouse chaired : the Report of the National Committee of Inquiry *Compensation and Rehabilitation in Australia*, (3 Volumes, Canberra, 1974) (Referred to hereafter as the Australian Report).

7 It is interesting to note that the Royal Commission also recognised the increased importance now attached to individual responsibility; it also however added a seventh principle which the Law Committee refrains from mentioning - fiscal reponsibility (Vol III, Part II , 583).

III. THE CURRENT POSITION - SECTION 27 (1)

At present the bar to bringing proceedings for damages in cases of personal injury by accident (piba) is contained in section 27(1) of the ACA. The following discussion shows how this section has worked, and the way in which its scope has been extended and become uncertain over the years.

The present section 27(1) is as follows:

> Subject to this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

Broadly speaking, this section means that, once piba is found, no person may sue for damages. By using the phrase "proceedings for damages", the bar theoretically extends to cover not just negligence - the primary target of the bar - but any other form of action as well. This would include the intentional torts, defamation, breach of contract, breach of statutory duty or an action based on administrative action or inaction[8]. In practice the courts have limited the range of actions which are barred. Assault and battery are treated as definitely falling within the bar, while defamation and breach of contract are outside its scope[9]. The position regarding other actions is unclear. A claim for damages arising out of false imprisonment was referred, a year ago, by Tipping J[10] to the ACC for a determination as to whether the injuries sustained amounted to piba; the outcome is still not known. Where in *Blundell's*[11] case Cooke P. confirmed that the tort of conspiracy is unaffected by the ACA, the learned judge in *Dandoroft v. Rogozinoff*[12] was of the view that this did not lay down a general rule, and in the case before him the claim for damages for conspiracy was caught by the section 27 bar, along with the other torts pleaded, those of intimidation and coercion. It appears then that

8 MA Vennell "Informed Consent or Reasonable Discolosure of Risks" [1987] Recent Law 160.

9 The most recent case to discuss this issue is *Dandoroff* v *Rogozinoff* (Auckland High Court, 8 July 1988, A1033/84). On p 20, Henry J indicates that he assumes that assault and battery were not pleaded in the case because of section 27, implying that there is no longer any question but that claims for damages arising from those torts are barred. On p 25, the judge asserts that the obvious intention of the legislature was not to bar defamation and breach of contract.

10 *Sinclair* v *Invercargill City Council* CP 21/86 and *Haberfield* v *Attorney-General* CP 43/86, heard together. *Sinclair* v *Invercargill City Council* and *Haberfield* v *Attorney-General* (Invercargill High Court, CP 21/86 and CP 43/86, 27 March 1987).

11 *Auckland City Council* v *Blundell* [1986] 1 NZLR 732.

12 Above n9.

while causes of action may exist for some purposes - such as founding an injunction[13] - which ones survive the section 27 bar for the purpose of claiming damages is unclear and unpredictable - 14 years after the Act was introduced.

The definition of piba in section 2 is clearly all important:

"Personal injury by accident" -

(a) Includes -
  (i) The physical and mental consequences of any such injury or of the accident:
  (ii) Medical, surgical, dental or first aid misadventure:
  (iii) Incapacity resulting from an occupational disease or industrial deafness to the extent that cover extends in respect of the disease or industrial deafness under sections 28 and 29 of this Act:
  (iv) Actual bodily harm (including pregnancy and mental or nervous shock) arising by any act or omission of any other person which is within the description of any of the offences specified in sections 128, 132, and 201 of the Crimes Act 1961, irrespective of whether or not any person is charged with the offence and notwithstanding that the offender was legally incapable of forming a criminal intent:

(b) Except as provided in the last preceding paragraph, does not include -
  (i) Damage to the body or mind caused by a cardio-vascular or cerebro-vascular episode unless the episode is the result of effort, strain, or stress that is abnormal, excessive, or unusual for the person suffering it, and the effort, strain or stress arises out of and in the course of the employment of that person:
  (ii) Damage to the body or mind caused exclusively by disease, infection, or the ageing process:

This definition has received much judicial explanation and cannot be taken at face value. It should be noted that it is an inclusive, not an exclusive, definition. What follows is a brief summary, for the purpose of comparison with the proposed Bill's provisions.

The first clause of the definition requires that two elements be shown:

a) physical or mental consequences
b) an accident

plus the nexus between the two.

The idea of physical consequences is fairly straightforward; they are consequences which manifest in the body of the injured person, and include pregnancy.

13 *Tucker* v *News Media Ownership* (Wellington High Court, 22 October 1986, CP 477/86).

Mental consequences are more problematic. Blair[14] treats these words in a relatively narrow sense and in discussing this topic constantly uses expressions such as "mental illness", "mental damage", "mental disease". He points out that the Act has included the notion of compensating mental consequences because both at common law and under the Workers Compensation Act this was considered a loss worthy of compensation. While mental consequences can range from mild embarrassment to psychiatric illness to total extinguishment of mental powers, at common law only certain of these were compensatable. The former judge records that in making decisions he has adopted the statement made by Griffiths LJ in *McLoughlin v O'Brian*[15] that there must be a "recognisable illness as opposed to grief or emotional upset". Earlier in his book, Blair had warned against applying common law definitions to the new Act[16]; in the light of later Court of Appeal interpretations of mental consequences, it is respectfully suggested that Blair may have fallen into that very trap.

While the High Court and the Corporation have for the most part treated mental consequences as meaning some identifiable mental illness, the Court of Appeal has taken the words more literally. The widest meaning ascribed so far has come from Cooke P. in *Blundell's* case[17]. There the President suggested that the phrase "physical and mental consequences" may have been intended to cover all the consequences to the victim's person, including such effects as wounded feelings, worry and distress and the like[18]. It was this broad definition which led the learned judge in *Dandoroff's*[19] case to treat the claim for intimidation and coercion as barred. The quantum of damage arising from such torts will rarely be sufficient to warrant ACC financial compensation, so effectively there is now no remedy, outside the criminal law or a claim for exemplary damages, for the victim of such disgraceful behaviour.

The second aspect of piba is the need to identify an accident. This too is given a broad definition. In the first place, the word is given its ordinary meaning, the classic description being the one identified by Lord Macnaghten in *Fenton v Thorley*[20] as denoting "an unlooked-for mishap or an untoward event which is not expected or designed". The various extensions and applications of this can be traced through common law cases[21] and further limits have been put around it in the context of the ACA. A most important extension to the everyday meaning of the word came in *G v. Auckland Hospital Board* [22] where Henry J asserted that the "legislation must be construed from the point of view of the person who suffers the injury"[23]. The effect of this is to render most intentional torts "accidents" for the purpose of the Act, as they are

14 AP Blair *Accident Compensation in New Zealand* (2 ed, Butterworths, Wellington, 1983).
15 *McLoughlin* v *O'Brian* [1981] QB 599, 617.
16 Blair, above n14, 5-6 and 32.
17 Above n11.
18 Ibid 739.
19 Above n9.
20 *Fenton* v *Thorley & Co. Ltd* [1903] AC 443.
21 Blair, above n14, Chapter 4.
22 *G* v *Auckland Hospital Board* [1976] 1 NZLR 638.
23 Ibid 641.

unexpected from the victim's point of view. It is an interpretation which is in line with at least the latter part of the indication given in the Woodhouse Report that "the general basis for protection should be bodily injury by accident which is undesigned and unexpected so far as the person injured is concerned."[24]

The link between the accident and the physical or mental consequences also needs to be established. While this is generally straight forward, there can be problems distinguishing between a condition which has deteriorated and manifests on one particular occasion, and the situation where an actual "accident" produces a significant worsening of a latent weakness. In the case of pregnancy, which is classified as an accident if it is the result of medical misadventure or rape, compensation is paid for the various consequences of the pregnancy and birth, but not of the subsequent rearing of the child.[25]

The second definition of piba is medical, surgical, dental or first aid misadventure. The idea of what constitutes medical and other misadventure has varied over the years, and the field is full of uncertainty still. Medical negligence will almost always fall under this heading. From *ACC v Auckland Hospital Board*[26] it appears that medical misadventure includes the consequences of a mischance, a reaction which falls outside the normal anticipated failure rate for that treatment. More recently, Bisson J. in *MacDonald's* case[27] varied this test by giving more consideration to the actual effect of the accident on the victim. Rather than whether the reaction was within the range of known risks, the important factors were the likelihood of that occurrence, the gravity of its consequences, and the reason for those consequences. These two tests can produce quite different results.

The third piba definition involves deeming diseases suffered by earners which arise "due to the nature of any employment" to be personal injuries by accident (section 28). This has been taken to mean that the nature of the employment conditions themselves must have created the tendency for the disease to occur.[28] A link must be established between the employment conditions and the occurrence of the disease. The scientific research and data to establish such a link in many cases is simply not available. The range of diseases caught under this definition is consequently fairly limited.

A fourth definition of piba extends it to cover the results of certain specified crimes, namely rape, sexual intercourse with a girl under 12, and wilfully infecting another with a disease. An applicant need only show that the harm sustained resulted from an act within the description of the crimes specified, and having shown this to the reasonable satisfaction of the Corporation, it is irrelevant whether or not a successful prosecution is or could be taken against the wrongdoer.[29] The increased awareness of child abuse is

24 Woodhouse Report above n4, para 289.
25 *XY* v *ACC* (1984) 4 NZAR 7.
26 *ACC* v *Auckland Hospital Board and M* [1980] 2 NZLR 748
27 *Macdonald* v *ACC* [1985] NZACR 276.
28 Blair, above n14, 90
29 *Hyland* (Unreported, 1980 Appeal Authority Dec No. 359).

currently producing claims for piba under this definition, for abuse which women allegedly suffered as children.

Part (b)(i) permits heart attacks and strokes to be counted as piba in certain situations additional to those covered by part (a). The everyday meaning of "accident" is thus once again extended. In classifying the episode as producing piba, the critical factor is the cause, which requires a careful comparison of the stress and strain usual for an employee in that employment with that which produced the stroke or heart attack.[30]

The scope of the definition of piba determines the range of people barred from suing. For those who wish to sue, the more widely piba is defined, the bleaker the prospects. There is constant pressure to extend the range of piba because injured people have to show piba before they become entitled to ACC benefits. But the wider the definition of piba, the narrower the scope for bringing a common law action. The courts and the Corporation have used a variety of methods at different times to avoid barring an action for damages under section 27 simply because piba could be identified in the victim.[31] The most widely accepted method, established in the well-known case of *Donselaar*[32] and confirmed in *Blundell*,[33] is where the claim is brought for exemplary damages. In that situation, proceedings will not be barred as the action is said to arise not "directly or indirectly out of the injury or death", but out of the defendant's behaviour. However, this is seen as a "serious and exceptional remedy"[34] and must be carefully pleaded so as to avoid any suggestion that compensation for injured feelings or similar is being sought.

Section 27 has effected a substantial reduction in the range of actions which a private citizen can bring against a tortfeasor. As a negligence claim requires that "damage" be shown, the process of showing personal injury invariably brings down the bar to proceedings for damages. Similarly, in a claim for damages arising from an intentional tort - which is actionable per se, without proof of damage - if there is even a hint of actual personal injury, the incident is an accident from the victim's point of view, and a defendant may delay proceedings by a referral to the Corporation for a determination whether or not there has been piba; if there has, the plaintiff will be barred from suing.

The most significant feature of this definition is that common law actions are forbidden not on the basis that the ACC will pay compensation, but simply on proof of piba. Where the "injury" is caused by an intentional tort, the actual physical or mental consequences may be too slight to warrant any compensation, yet the bar will still operate. Unless exemplary damages are available, plaintiffs will be barred from suing if they have suffered physically or mentally; and if they have not so suffered, they will

30 Accident Compensation Claims Manual, Volume I, Part 3, para 4.5.

31 See J Miller "The Accident Compensation Act and Damages Claims" Parts I and II [1987] NZLJ 159 and 234. This article outlines seven district methods by which the courts and the ACC have attempted to limit the scope of section 27.

32 *Donselaar* v *Donselaar* [1982] 1 NZLR 97.

33 Above n11.

34 *Donselaar* v *Donselaar* above n32, 107.

gain only nominal damages if they do proceed - which would make it hardly worth the trouble. It is a case of "heads I win, tails you lose".

IV. TORTS AND INDIVIDUAL RESPONSIBILITY

It is clear from the preceding discussion that a great many potential tort actions do not come before the courts. Of course there is no way of knowing how many. What are we missing out on by not having these kinds of disputes fought out in the public arena of the courts?

The function of tort actions is not limited to providing compensation. When the ACA was introduced, the inability of tort to provide predictable, adequate and comprehensive compensation was used as the primary justification for doing away with it. The philosophic difficulties with the fault principle and the general unsatisfactoriness of tort actions were discussed at length, while their possible values were ignored. Such an approach may have been necessary at that time to get the scheme accepted. But fourteen years on, the ACS is well established, while the social scene has changed dramatically. Individual responsibility is the catch-cry. It is the time to re-evaluate some of the possible benefits that were lost when New Zealanders lost the right to sue for damages following personal injury.

The opportunity to bring a tort action gives the individual the power to bring a wrongdoer to account. That power may be uncertain, weak and costly to wield, but it is a vehicle for dealing with one's own life. A trial, even an unsuccessful one, gives a victim a "day in court" and the chance to have a say. It provides a public vindication of the right of individuals to expect and receive a certain standard of treatment from fellow citizens. In a democratic country, the determination to assert and stand by one's rights, the willingness to take control, to demand accountability, and to pursue matters that affect one personally are characteristics which need to be fostered, not frustrated. Under the ACS, a person who is injured becomes a client of the state. The person may be cushioned by the scheme, but is also muffled by it. There is no opportunity to bring attention to a state of affairs which is seen as unsatisfactory. A justifiable sense of personal grievance is left no outlet except that of raging at the impersonal institution handing out compensation according to its own rules. The event which gave rise to a personal crisis either becomes public property, through a police prosecution, or sinks into oblivion. As victims are channelled into dealing with the bureaucracy they are rendered impotent, are disempowered. The state may or may not choose to bring criminal proceedings against the wrongdoer, and either way what the victim feels is of little importance.

The above criticisms have been levelled of course at the criminal justice system itself; once a matter comes under that system, the victim is reduced to the role of a bystander. For the past ten years, this has been recognised as a defect of the system.[35]

35 Nils Christie "Conflicts as Property" [1977] British Journal of Criminology 1.

Attempts are now being made to recognise[36] and re-empower victims. Reparation for economic loss has been available for some time, but since August 1987, victims have been able to receive reparation from offenders for emotional harm[37] and to receive part or all of the fine where the victim has suffered physical or mental harm.[38] More significant still may be the provisions for enabling meetings to take place between offenders and victims. In this, New Zealand is following an overseas trend, but is also possibly developing a theme arising independently out of Maori concepts concerning the need to restore mana by personal contact.[39] All this points to a trend towards reinstating conflict as a source of growth and development, and away from a denial of its value.

The traditional European forum for conflict between individuals is through a civil action. The process may have become over-dominated by legal professionals, but to deny the right to bring a civil action altogether may be to throw the baby out with the bath water. Unless the provision of compensation to accident victims is to be entirely objectively assessed, there will always be a subjective element in any compensation package. Would it not be preferable to permit that contention to be fought out between the parties whose conflict it is, rather than directing the victim to do battle with a government organisation? Where a criminal action is brought there is now at least provision (if not yet the practice) whereby a victim and a wrongdoer may come together, and personal reparation may be made. Thought should be given to the possibilities of permitting and facilitating personal contact between victims of accidents and those perceived as being the cause of the accident or injury. If reinstatement of a limited right to bring civil actions is the first step to some ultimately less adversarial method of dealing with the conflict, then let us take that step.[40]

Besides the value of a tort action for individuals, such proceedings have a value for society as a whole. A procession of personal injury claims through the courts measures the changes in society's attitudes to the relationships between people. It establishes the changing boundaries between acceptable and unacceptable behaviour. This is not simply educative; it is in itself developmental. The bar on proceedings enacted by the ACA

36 Victims of Offences Act 1987. This is an Act "to make better provision for the treatment of victims of criminal offences", and sets up a Task Force to facilitate and promote such "better treatment".

37 Criminal Justice Amendment Act (No. 3) 1987, section 4, which replaces section 22 Criminal Justice Act 1985.

38 Criminal Justice Amendment Act (No. 3) 1987, section 6 amends section 28 Criminal Justice Act 1985.

39 This statement is made most tentatively. It is made on the basis of conversations with various individuals, and gains some support from comments quoted in *Te Whainga i Te Tika - In Search of Justice* (Wellington, 1986), especially at pages 45 and 49.

40 The possibility of introducing the right to sue for non-economic loss has been mooted by others. In *Review of the Accident Compensation Scheme : Submissions to the Law Commission on Behalf of the Board and Senior Management of the ACC* (Wellington, 1987), the suggestion was rejected (para 4.8) largely on the grounds of the cost of administration and likely objection by employers. A purely economic approach was also taken in the discussion of individual responsibility (para 5.2), indicating perhaps a narrowness of vision.

stunts the development of society's approach to personal injury. Klar[41] points out that since the ACA halted this development in New Zealand, the law in Canada has moved on as a result of decisions in personal injury cases, giving legal recognition to the right of privacy, establishing standards of sportsfield behaviour and so on. A particular example is the contrast between New Zealand and Canada in the progress towards ensuring that patients give informed consent to medical treatment.[42] Shifts in emphasis concerning what is and what should be compensated cannot easily occur in New Zealand. The proposal to remove lump sum payments for nenpl is a prime example. In a country where common law claims can be brought, the attitude of society towards these payments would be reflected by how much and for what they were awarded by the courts. It is conceivable that shifts in societal attitudes might produce a scheme of compensation which awarded heavily for pain and suffering, but minimally for loss of bodily function; and a generation later, the reverse might be the case. In New Zealand, any variation in the type of compensation awarded has to be done through political channels, a slow and relatively inflexible process.

The question of the deterrent effect of the threat of tort actions is most vexed and still the subject of considerable controversy.[43] One of the difficulties in the debate is to find adequate empirical evidence to support arguments one way or the other. The Law Commission cites studies which indicate that losing the right to sue had no impact on the driving habits of New Zealanders.[44] Evidence of employer reactions was based on OECD figures relating to days off work for ill-health[45] which obviously does not get us very far. However, it is interesting to compare statistics given in the Woodhouse Report with figures currently available for prosecutions brought by the various statutory bodies involved in maintaining safety standards. The Woodhouse Report cited[46], in tones of disgust, that in 1964 only 67 criminal prosecutions were brought against employers. The implication was that with the removal of private tort actions, this figure would increase, as it was appropriate that breaches of safety standards should be met with criminal sanctions. The expected increase has not occurred. Enquiries (see Appendix) show that in 1987 the number of criminal prosecutions brought against employers for breaches of safety regulations was in the region of 100.

Before 1974, employers risked being taken to court firstly by statutory bodies on criminal charges and secondly by individuals, often through their insurance companies or unions, in a common law action. The number of such civil actions brought in 1964 was 608[47], of which 143 were not proceeded with. That left 455 cases where people

41 Lewis Klar "New Zealand's Accident Compensation Scheme - a Tort Lawyer's Perspective" (1983) 33 University of Toronto LJ 80.
42 M.A. Vennell "The Effect of the Accident Compensation Scheme on Claims for Damages Against Doctors and Nurses" (1983) 11 NZ Nursing Forum 4.
43 See David Owen "Deterrence and Desert in Tort : A Comment" and S.D. Sugarman "Doing Away with Tort Law", both in (1985) 73 Calif LR 665 and 558.
44 Craig Brown "Deterrence in Tort and No-Fault : the New Zealand Experience" (1985) 73 Calif LR 976.
45 NZLC R4 above n1 para 80.
46 Above n5 para 327.
47 Woodhouse Report, above n5, para 101.

believed that they could recover from an employer in (most likely) negligence. Employers were thus nearly seven times more likely to face a common law claim than to face criminal proceedings. The possible size of a successful claim, unlike a fine from a criminal conviction, could not be guessed at. The essence of a common law claim was its fearful unpredictability. An employer who could probably get away for years without acting on local inspectors' warnings could never know when a particular inadequate safety procedure might result in an accident to an employee who would not meekly accept Workers Compensation or a modest out-of-court settlement. If that employee took the employer to court, the ignored warnings could prove extremely expensive to the employer. Employers of bush workers, for instance, might think again before embarking on particularly difficult felling operations if they knew that, when their supervisors were not adequately trained and an accident occurred, they risked facing an unimaginably high suit for damages rather than merely a fine of $500 - the maximum fine made against an employer in 1987 for a conviction under the Bush Workers Act 1945 - which arose from a fatal accident. Not only are criminal prosecutions rare, the fines are insultingly small. The Labour Department officials with whom the author spoke stated that their concern was prevention, and that they preferred not to initiate prosecutions, because they were difficult, expensive and time consuming to bring. The officials asserted that their basic practices have not changed following the introduction of the ACS. The fact is that, whether the deterrent effect of tort actions was minimal or substantial, it has not been replaced. The same applies to whatever educative function court actions served - that function is not being fulfilled by criminal sanctions, and so has either been lost, or is being fulfilled by some other agency, whose costs are not considered when assessing the financial impact of the ACS.

There is no denying that tort actions did not provide a secure method of compensating accident victims. The ACC fulfils that role now. The question which should be asked is, what institution has taken or can take over some of the other functions of torts - of providing scope for individual responsibility, of satisfying a still widespread desire for retribution against wrongdoers, of allowing social development in this area, of providing an added deterrent to unsafe practices? The possibility of actions for exemplary damages begins to fill that gap, and this opening does not appear to have undermined the viability of the ACS. The occasion of a major rethink of the scheme is perhaps the moment to extend the inspiration of the original proposal by finding a mechanism appropriate in the late 1980s for dealing with the individual's response to personal injury by accident.

V. THE PROPOSAL - CLAUSES 81 AND 82

A. Introduction

Beyond asserting that there is an almost universal desire not to reintroduce elements of the old tort law, the Law Commission is silent on the issue of what could or should be done about the bar to proceedings created by section 27 of the present Act. All that is

said, in the explanatory note to the Bill[48], is that clause 82 "repeats the existing rule that benefits under the scheme are in substitution for any claims that might have been made under the common law"[49]. There is no indication in the report that consideration was given to any more radical development of this aspect of the scheme. In fact, however, the new clause differs from the current bar to sue in an important respect. The new clause bars from suing only those who receive a benefit under the Act, rather than those who simply suffer piba. This change represents a significant shift of emphasis, as well as altering the scope of the statutory bar on proceedings for damages.

The following is a detailed critique of the re-enactment of the bar. The purpose of the critique is to show how the proposed bar in its present form is imprecise, illogical and probably unworkable. As such it is essential that it be amended. As a rewording of the provision will be necessary, it is hoped that before doing so, careful consideration will be given to the underlying purpose of the bar and its precise function within the overall social policy of the country.

B. Clause 81

In clause 81, "damages" is defined as including compensation, by whatever name called, but excluding exemplary damages. This in effect is a codification of the result in *Donselaar*.[50]

C. Clause 82

Clause 82 is as follows:

(1) Where a benefit is payable under this Act in respect of the incapacity or death of any person as the result of personal injury, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

(2) Nothing in this section shall apply to any proceedings relating to or arising from -

(a) any injury to property; or
(b) any contract of insurance; or
(c) any payment in respect of which contributions have been made; or
(d) salary or wages in respect of a period of leave or absence.

(3) Nothing in this section shall prevent the bringing of any proceedings for damages in any Court in New Zealand in respect of the death or injury of any

48 NZLC R4 above n1 Appendix B, para 48.
49 The new clause 82 in fact draws much more upon the Australian Report (above n6), which explicitly states that the proposed benefits are "in substitution for any damages recoverable" (cl 91(1)).
50 Above n32.

person, in New Zealand or elsewhere, if the cause of action is any liability for damages -

(a) under the law of New Zealand, pursuant to any treaty obligation of the Government of New Zealand; or
(b) under the law of any other country.

(4) The reference in subsection (1) to the case where a benefit is payable in respect of the incapacity or death of any person includes a reference to the case where a benefit is not being paid by reason only that a claim for it has not been lodged.

From this clause it is clear that people are excluded from suing if it is shown that they:

(a) have suffered an incapacity or death, AND
(b) have so suffered as a result of personal injury, AND
(c) that a benefit is (or would be if applied for) payable in respect of such incapacity or death.

The Bill contains definitions of "incapacity" and of "personal injury", but not of "benefit payable under this Act".

D. "Benefit Payable Under this Act"

Under the Bill the new ACC is set up to pay a range of benefits. The most important are earnings related compensation (ERC), and an incapacity allowance. In addition the scheme provides that dental expenses arising out of personal injury shall be paid (clause 55), as shall funeral expenses (clause 69) and allowances for surviving spouse, children and dependants. All these are presumably "benefits payable under this Act".

At present, the other major benefits paid for by the ACC are medical expenses (except public hospital treatment which is paid for by the Health Department), along with a host of miscellaneous forms of compensation, such as for transport to treatment, the cost of artificial limbs and aids, economic losses not directly arising from loss of earnings, and so on. (There is also the lump sum payment for nenpl which, as already mentioned, would disappear under the new scheme.)

Medical expenses and related miscellaneous services are defined in clause 53 as "personal attention". Whether payments for these services are "benefits" is unclear - intentionally so apparently. As their payment has implications beyond the ACS and into the area of health administration as a whole, the Law Commission did not feel able to make definite recommendations .

However, from a careful reading of the report containing the Bill[51], it appears that the Commission favours a system in which items of "personal attention" are paid for in part by the patient, and in part by the Health Department, through extending the provisions of the Social Security Act 1964. If this idea, or a version of it, is implemented, then presumably those payments would not be "benefits payable under this Act", as they would be payable by the patient and/or the Health Department. They would be more like a subsidised "user-pays", and the receipt of the subsidy (or theoretical entitlement to it under clause 82 (4)) would not serve to bar the recipient from suing.

If this is the case, there are complications. The report acknowledges that any scheme which throws more expense onto the victim must incorporate a safety net for those unable to pay.[52] If that safety net is provided by the ACC under the Act, the ACC will thereby have provided a benefit payable under the Act, and the victim will be barred from suing. Those who have been able to pay their own portion of personal expenses - presumably the better off - will not be barred. In other words, the rich may have opportunities to sue which are denied the poor.

A similar situation arises through a number of provisions in the Bill. By clause 56(2), employers have to pay the employee's share of personal attention costs if the injury arose out of and in the course of that person's employment and if the person "had been in the employment of that employer during the 7 days before the day on which the incapacity commenced and the employment was not due to terminate on that day or within six days thereafter." However, if the person had not been so employed, or if the employer fails to pay, the ACC will pay the victim's share of the costs. So if the employer does pay, no benefit will have been paid and an action for damages may still be possible; whereas if the employer does not pay, the person will be barred from suing because the ACC will have paid. Any employers fearing a negligence action would be well advised to absolutely refuse to pay any personal attention costs to their employees.

Again, non-residents who may not be eligible to receive the cost of personal attention normally payable by the Health Department have that part paid by the ACC - thus incurring the bar to proceedings. The people who may do best out of the ACC are those in the group (much extended by clause 9) of New Zealanders who are covered by the scheme when they suffer an accident overseas. They may receive immediate benefits from the ACC, yet still sue under the laws of the country in which the accident occurred (clause 82(3)), though the claw-back provisions of clause 83 will apply. This raises conflict of laws issues, but it could well be that New Zealanders abroad find themselves with more rights and opportunities to sue than their stay-at-home compatriots, thereby gaining the best of both worlds - the safety net of the ACC plus the option to sue.

Clause 82(4) plugs an obvious gap where a person could avoid receiving a benefit under the Act simply by not applying for it. One ploy for a defendant facing a tort action will be to suggest that the plaintiff in the action is in fact eligible for some

51 NZLC R4 above n1 para 18 and 174-179.
52 Ibid para 178.

payment for which no application has been made. This will delay proceedings, increase the cost, and might uncover an obscure entitlement, such as for minor dental treatment, which would bar the plaintiff from proceeding.

By clause 59, the ACC will pay reasonable costs for such things as artificial limbs, aids, clothing, spectacles, and also the expense incurred in making and pursuing a claim. So if a person suffers burns (for example, through an employer's negligence at work) the victim would apply to the ACC for compensation. Eventually, perhaps after an appeal, the application is refused as the injuries were not sufficiently extensive to warrant an incapacity payment, and no ERC was required. One might think that, having received no benefits from the ACC, the way would be open to sue. But by this stage the victim would be barred from suing, having incurred an entitlement to the "benefit" of expenses involved in pursuing the unsuccessful claim!

Two changes to the scheme which have not been mentioned so far make it highly significant whether or not medical and other personal attention is treated as a "benefit payable under this Act". First, the scheme proposes that employers shall pay all ERC for the first two weeks following an accident, instead of one week as at present. As the Law Commission estimates that one quarter of all ERC claims are for just one week[53], this extended waiting period will result in many more accident victims being ineligible for the ERC benefit. Secondly, it is proposed that impairment ratings should now be made using the American Medical Association Guides.[54] These are a standardized system for assessing the effect of a particular impairment in terms of "the general experience of mankind".[55] However, the Guides tend to produce overall a lower assessment than the present system, so that although the same threshold of 5% will be kept as at present (under section 78(6)), far more people will fall below that threshold. A sample of 168 people was taken to compare rating levels under the present system with what would be obtained using the AMA Guides.[56] Under the present system, only 3 had an impairment rating of less than 5%. Using the AMA Guides, the number was 56 - a third of the total sample. Those of that third who did not receive ERC (because they were not in employment or were away from work less than 2 weeks) will then receive nothing from the ACC. There is therefore a large group of probably minor injuries for which the ACC will never be called upon to pay the major benefits. If it does not pay for the relatively small medical and related expenses involved in such injuries either, then those lesser injuries will not be ones for which any benefit is payable under the Act. The section 82 bar will not apply. Victims of minor injuries will therefore be entitled to sue, while those with major injuries will have only the ACC to fall back on.

The problems associated with determining what qualifies as a "benefit payable under this Act" could be overcome by providing a careful definition, such as one which deems all benefits paid by the Health Department for personal attention to be ACA benefits.

53 Ibid para 184.

54 American Medical Association "Guides to the Evaluation of Permanent Impairment" (2cd245, 1984) See NZLC R4 para 195.

55 NZLC R4 above n1 para 203.

56 Report (unpublished) prepared by JR Cumpston and RC Madden for the Law Commission. Referred to in NZLC R4 at para 195 et seq.

However, even where definitions are given in the Bill, as for "incapacity" and "personal injury", the distinction between who can and who cannot sue is still unclear.

E . "Incapacity"

This is defined in clause 17 which reads:

> (1) For the purposes of this Act, a person is "incapacitated" by personal injury if as the result of personal injury that person's ability to lead a normal life (including the ability to engage in useful or gainful work) is, for the time being, lessened; and "incapacity" has a corresponding meaning.
>
> (2) For the purposes of this Act
>
> (a) "total incapacity" is incapacity that the Corporation has determined to be total incapacity or incapacity that is to be taken to be total incapacity by reason of the operation of a provision of this Act;
>
> (b) "permanent total incapacity" is total incapacity that the Corporation has determined to be permanent or incapacity that is to be taken to be permanent total incapacity by reason of the operation of a provision of this Act;
>
> (c) "partial incapacity" is incapacity other than total incapacity;

This definition gives scope for wide discretion. The first and most glaring problem is, what is a "normal life"? The earlier use of the phrase "that person's ability" suggests the test is subjective, in other words, the normal life is that of the victim. So where a school-teacher, parent, judge, road-sweeper, bank clerk or dairy farmer may not have the capacity to live their normal lives in the least impaired by the loss of part of their little finger (once the wound has healed), the mechanic, piano teacher, secretary and sportsperson might have their normal lives shattered by such an injury, and for a period extending far beyond the time when the wound has healed. The parenthetical addition of "including the ability to engage in useful or gainful work" does not help one way or the other. Does it, or does it not, mean that the impact on employment possibilities is significant? The mechanic's ability to engage in the gainful work of being a bank clerk is not lessened by the loss of part of a little finger - but so what? That fact does not make it any easier to determine whether that person is incapacitated under this definition.

If a more objective approach is taken to what constitutes a "normal life", there are still difficulties. Is a twenty-eight year old, unmarried career-woman "incapacitated" by being sterilised through, perhaps, a faulty IUD? Does the person who through some accident loses the sensation down part of one leg have the ability to live a normal life lessened? Is the normal life of a person who develops a phobia about jumping from a height after a first parachute jump "incapacitated"? Or the person who is told not to play vigorous sport on a now weakened ankle when that person has never played more than tiddleywinks and had no intention of engaging in more hearty activities - is that person

incapacitated? It comes down to an assessment of the range of activities which constitute a "normal life". Whether a subjective or an objective approach is taken, the definition is bound to cause uncertainty and produce results which in individual cases appear unfair or absurd.

A further problem arises with the phrase "for the time being". If people can show that they are incapacitated only as long as they are unable to live a normal life, there will be a huge temptation to continue to evince an inability to live "normally" after an accident. An accident victim would be wise to prove persistent inability to cope with a lost finger - perhaps develop a complex of some kind over it as a way of ensuring a continued classification as "incapacitated". If limping is a sign of a continued lessened ability to lead a normal life, all those with leg injuries should work to develop an habitual limp. The obvious disincentives to rehabilitation involved in this definition hardly need more illustration.

People wanting to sue who are eligible for some benefit such as dental repairs may avoid the bar by showing that they are not incapacitated. The problem will be to show that the ability to live a normal life was not lessened "for the time being". How long is that? If a person took one day off work recovering from a blow, is that enough to qualify for having been incapacitated, and thereby being barred from suing?

The final difficulty with the definition is the phrase already mentioned of "that person's ability". Whichever way "normal life" is defined, as assessor must determine on a purely subjective basis whether that particular victim has had the ability to lead a normal life lessened. Once again, this will penalise those who make determined efforts to lead normal lives despite some incapacity, while pandering to those who present an inability to cope.

Overall, this definition creates more uncertainties than it resolves. There are ways to wriggle out of it if trying to sue, and ways to worm into it if trying to gain benefits through the ACC. It is more likely to produce disagreement than the present definition of piba.

F. "Personal Injury"

Five clauses - 12, 13, 14, 15 and 16 - along with clause 17 defining incapacity - replace the old definition of piba in section 2 of the current ACA.

12 Meaning of personal injury

(1) For the purposes of this Act, "personal injury" is a physical or mental injury or other physical or mental damage or adverse effect that -

(a) is specified in the First Schedule; or

(b) is caused by an occurrence specified in the First Schedule; or

(c) is caused in circumstances specified in the First Schedule.

(2) Subsection (1) shall be taken into account in applying sections 13, 14, 15 and 16; and nothing in those sections shall have effect so as to exclude any injury, damage or effect from the operation of subsection (1).

(3) Subsection (1) has effect subject to section 16.

(4) A late effect of anything that is personal injury by reason of the operation of this section or of sections 13, 14, 15 or 16 is also personal injury.

13 Nervous shock, psychiatric illness, occupational disease etc

For the purposes of this Act, the following are also personal injury:-

(a) nervous shock or lasting emotional harm caused by an occurrence specified in, or caused in circumstances specified in the First Schedule;

(b) a psychiatric illness or condition caused by an occurrence specified in, or caused in circumstances specified in the First Schedule;

(c) a disease that is contracted by a person in the course of his or her employment, whether at or away from the place of employment, being a disease to which the employment contributed;

(d) deafness resulting from noise.

14 Misadventures

For the purposes of this Act, a misadventure in connection with medical, paramedical, surgical, dental or first-aid treatment, care or attention of a person is also personal injury.

15 Contracting, etc. of diseases

For the purposes of this Act, the contracting, acceleration, aggravation or exacerbation of a disease or illness or the deterioration of a condition as the result of personal injury is also personal injury.

16 Work-related malignant neoplasms and heart diseases

(1) For the purposes of this Act, a malignant neoplasm or a heart disease is also personal injury if it was sustained or contracted by the person concerned in the course of his or her employment,whether at or away from his or her place of employment, and the employment contributed to it, but otherwise is not personal injury.

(2) For the purposes of this Act, the acceleration, aggravation, exacerbation or deterioration of a malignant neoplasm or of a heart disease, being such an acceleration, aggravation, exacerbation or deterioration -

(a) that was due to or arose in the course of employment of the person concerned, whether at or away from his or her place of employment; and

(b) to which his or her employment contributed, is also personal injury, but otherwise is not personal injury.

These definitions are taken, with some modification, from the 1974 Report of the National Committee of Inquiry, Compensation and Rehabilitation in Australia. [57] They will be discussed here under the headings: general description; misadventure; illness and disease; work related illness; and deafness.

1. General Description

This is contained is clauses 12, 13(a) and 13(b). It covers, broadly, physical and mental damage or adverse effect caused by any occurrence specified in the First Schedule.

The contents of the First Schedule are clearly of central importance. The Schedule is a list taken from the classification of external causes of injury, used by the World Health Organisation for statistical purposes. It needs amending to suit New Zealand's circumstances. For instance, its description of criminally inflicted injuries comes under the heading "Homicide and Injury Purposely Inflicted by Other Person", which obviously does not tie in with our criminal law. Even a fairly cursory look through the Schedule reveals anomalies. The provision for accidents resulting from remaining in a weightless environment is unlikely to have much application in New Zealand. The classification E903 is "an accident resulting from Travel and Motion". This appears to raise the possibility that compensation could be payable in respect of car sickness - being an adverse effect resulting from a First Schedule cause, producing incapacity. On the other hand, some things that are currently provided for would miss out, such an injury sustained when a back "goes out" following some perfectly normal but distinct activity. There is also a whole section entitled "Legal Intervention" which would provide compensation to the armed criminal injured in the course of lawful arrest.

57 Above n6, cls 8-12. Note that cls 13 and 14 which exclude injuries committed in the course of various criminal activities, and judicial execution, are left out of the New Zealand Bill.

While this might be perfectly philosophically justifiable, the public may feel disinclined to provide such a person with ACC payment for life.

One of the biggest changes that will be brought about by the use of the Schedule relates to the description of "Abnormal Effects" produced by various drugs, treatments or therapies. This appears to open the door far more widely than at present to claims for compensation when medical treatment does not take its normal course. If the present test is "a reaction which falls outside the known range of responses",[58] the First Schedule cover of merely abnormal reactions is a huge extension.

The "physical injury or damage" aspect of the definition is fairly straightforward, and the reference to mental injury or mental damage is less problematic than the present "mental consequences" used in the definition of piba. The expressions "injury" and "damage" connote a more definitely physically-based mental state, in other words, one related to the condition of the brain. This view also makes sense of the separate description in clause 13 of "nervous shock or lasting emotional harm" and "psychiatric illness or condition", which may incorporate more non-physically-based mental states. This more limited scope of the mental effects of accidents would certainly avoid the problems of whether compensation is payable for worry and distress and other transient emotional effects. It may even close out too much, by leaving uncompensatable the development of highly disruptive phobias in otherwise perfectly mentally-normal people.

However, the limitations put on the scope of mental and physical consequences are rendered meaningless by the final phrase "or adverse effect". That phrase lets in all that might otherwise have been excluded, such as emotional upset. Any adverse effect - broken sleep, extreme irritability or despondency - which causes an incapacity (such as losing the motivation to go to work for some time), will be compensatable if caused by a First Schedule occurrence.

2. Misadventures

Besides those medical-related "accidents" described in the First Schedule, the separate provision in clause 14 widens the scope for this type of claim still further. It is no longer "medical (etc) misadventure" which is included as personal injury, but "misadventures *in connection with*" a range of treatments, care and attention. That range now includes paramedical treatment, a term left undefined. It would cover treatment by physiotherapists, ostoepaths and chiropractors. Whether the term would also embrace less orthodox practices such as acupuncture, herbalism and amateur massage is unclear. The use of the words "treatment, care and attention" certainly appears to extend the definition to cover acts or omissions by non-professionals. One wonders in fact why such acceptable yet potentially dangerous physical treatments such as those given by beauticians, hairdressers and tattooists are not covered. Certainly the very wide cover given to medical-related accidents and errors will serve to protect doctors

58 *ACC* v *Auckland Hospital Board and M* above n26.

and others even more thoroughly than at present from any risk of court actions being taken against them, so long as a benefit is payable.

The most striking defect in this definition however is that it gives no guidance on what exactly should count as a misadventure. It may be confusing even to use the term "misadventure" if what is meant is no longer "medical misadventure", but rather merely some bad fortune, some mischance which happens to arise in the course of giving medical or other care.

3. Illness and Disease

This is covered in clause 15. There are two ways of reading this clause, and either appears to open wide the door to the coverage of sickness. The narrow reading of the section is:

- the contracting, acceleration, aggravation or exacerbation of a disease or illness resulting from personal injury, OR

- the deterioration of a condition, as a result of personal injury.

The second way of reading the section is more literal, and produces a much wider definition. Personal injury is:

- the contracting, acceleration, aggravation or exacerbation of a disease or illness, OR

- the deterioration of a condition as the result of personal injury.

Even if the first interpretation is identified as the correct one, the result is that a sick person will be tempted to assert a link between the sickness and one of the causes listed in the First Schedule. So, for instance, a person who has 'flu could say that, although originally it was only a cold, the condition was exacerbated by E901.0 - an accident resulting from excessive cold due to weather conditions - the accident being the electric heater blowing its fuse one particularly cold night. Consequently such a person has suffered "personal injury" causing incapacity and could be eligible for compensation.

4. Work Related Illness

This is covered by clauses 13(c) and 16. Clause 16 serves to include heart disease and cancer in that range of illnesses covered by clause 13(c). Here the definition of illnesses covered is much broader than at present. Instead of having to show the illness is "due to the nature of the employment", a worker need only show:

(a) that the illness was contracted in the course of that employment, AND

(b) that the employment contributed to the disease.

No mention is made of how strong or weak that contribution need be.

5. *Deafness*

Of all the disabilities that afflict people, deafness caused by noise is identified as worthy of specifically being deemed to be personal injury. Presumably this means that those who have impaired their hearing by excessive listening to disco music at high volume, or by refusing to wear the ear-muffs provided by an employer, will be compensated. Those deaf from birth or through disease during life will get nothing. It is curious that those disabled in a totally innocent way, or by congenital defect are not also "deemed" to have suffered personal injury, and so are left uncompensated.

G. Summary

The definitions of incapacity and personal injury extend the potential scope for ACC cover well beyond that presently given on proof of piba. In particular, sickness and adverse results arising from medical and other care will give rise to more claims. Whether, and what, benefits will be payable to this large catch of accident victims is uncertain.

The question of whether benefits are payable will determine who cannot sue. This is in striking contrast to the present provision which determines who can or cannot sue on the basis of piba, rather than entitlement to benefits. The shift proposed by the new scheme will avoid the "heads I win, tails you lose" situation described earlier, where on proof of piba people may find themselves neither able to sue nor in fact eligible for any compensation from the ACC.

However, the results of the benefits-based bar to suing will give rise to absurd results. Individuals whose injuries do not entitle them to ACC benefits may sue for the full range of common law damages, including nenpl, whereas the more severely injured - or those unlucky enough to be eligible for even a tiny amount from the ACC - will be barred from taking such an action. It is the non-availability of nenpl compensation which will particularly highlight the disadvantages of not being permitted to sue.

VI. THE ABOLITION OF NON-ECONOMIC, NON-PHYSICAL LOSS PAYMENTS

The original Woodhouse proposal did not include any provision for nenpl. It was introduced by the Gair Committee[59] as a result of political pressure. It now offers (under section 79) a maximum benefit of $10,000, payable as a lump sum, on a non-schedule basis. There is a marked trend for maximum awards to be paid, as even injuries which

59 *Report of the Select Committee on Compensation for Personal Injury in New Zealand* New Zealand. Parliament, House of Representatives. Appendix to the journals, vol. 4, I 15).

leave a victim far from totally incapacitated may be seen as warranting $10,000 in compensation for lost enjoyment of life and so on. The result is that section 79 payments now account for some 16% of the total ACC budget.

As these nenpl payments must be assessed individually, they give rise to problems of inconsistency with accusations of unfairness and inevitable bad-feeling among both accident victims and the staff of the ACC. One tenth of all section 79 awards are appealed, and this is said to have a serious effect on people's incentive to rehabilitate quickly.

Two further problems with the nenpl payments are that they are seen as not fitting comfortably[60] with the rest of the philosophy behind the scheme, and that they stand in the way of extending the scheme to cover the sick.[61] These points can be answered briefly. Firstly, there is no one overall philosophy with which nenpl payments or any other feature of the scheme has necessarily to conform. Secondly, having had such payments available for the injured for the past 14 years, the sick may well not feel that such compensation is "outlandish".[62] Besides, compared to the real problems of extending the scheme to cover the sick in a coherent fashion, nenpl payments are a relatively simple matter - either a provision for the payment of nenpl will be made, or it will not. To trumpet the dropping of nenpl payments as a necessary first step towards a wholesale coverage of the sick by the ACC is to ignore the much more important obstacles which need to be cleared away first.

However much the ACC may balk at the continued payment of what it sees as a mere solatium to accident victims, the fact is that nenpl payments were, and still are, part of the "real compensation" which was promised by the scheme, and for which people gave up their rights to sue.[63] It is hardly fair to remove that aspect of the compensation package, and give nothing in return.[64] Payments for nenpl form the major part of compensation for many people on no or low incomes. As described earlier, with the ACC opting to stay out of the picture for the first two weeks after an accident, and keeping a 5% threshold for impairment but using the AMA Guides, the number for whom nenpl payments would be their sole cash entitlement would increase markedly. Now, if even nenpl payments are denied by the ACC, people will seek compensation from some other source - and the obvious one will be the wrongdoer, if there is a readily identifiable one. The holes identified in clause 82 will quickly be exploited.

60 RCSPR above n2, 579. NZLC R4 at para 59 describes the payment as "quite anomalous" in a social welfare scheme. Some would say the payment of earnings related compensation is similarly anomalous.

61 NZLC R4 above n1 paras 11, 59 and 193.

62 Ibid para 59.

63 R Gaskins "Tort Reform in the Welfare State : The New Zealand Accident Compensation Act" (1980) 81 Osgoode Hall LJ 239.

64 Provision for nenpl payments is however made for victims of certain crimes and those who suffer severe disfigurement by, in effect, supplementing the AMA Guide rating. See NZLC R4 para 206 et seq.

At present the ACC keeps an artificial lid on the sums awarded for pain and suffering, but despite this injuries such as a damaged knee resulting in some persistent pain and an inability to play sports can result in an award of $10,000 as in *Re Appleby*.[65] Under the new scheme, that award would not have been made. The impairment rating was 10%, but using the AMA guides it could well have been below the magical 5%.[66] If the accident victim in that case had been unemployed but was able to show the injury arose, say, out of the negligence of the local council in not keeping the pavements to the standard expected of the reasonable council, the victim could perhaps receive considerably more than $10,000 in compensation. The experience overseas suggests that awards for nenpl keep on rising, and in a few years who can guess what level of awards might be paid. In the meantime, the employed victim of the very same accident, having received ERC from the ACC while earning capacity was affected, will have received nothing more. Without the ACC to keep a ceiling on nenpl payments, the option of suing could quickly become vastly more attractive than accepting the long-term but relatively insignificant amounts available under the ACC for less serious injuries.

VII. CONCLUSION

The introduction of the ACS was an experiment involving bold measures. The removal of the right to sue was a necessary step at that time. The success of the experiment depended to a large extent on the actual words used in the legislation, and on the whole they have served well. There are indications however that the definition of piba, on which the bar to the right to sue is based, is being strained, and its outer limits being taken beyond the bounds of good sense.

It is only to be expected then that a review of the legislation should attempt to deal with some of the problems now becoming apparent. The pity is that the Law Commission chose only to patch-up the flaws in the present section 27, rather than look at the wider picture to see if the policy behind such a provision is still sound. The original bar to suing was essential for the introduction of a scheme for compensating accident victims, for only then could funds formerly used in guarding against common law actions be diverted to the comprehensive programme. But times have changed. The proposed ACS is moving away from its original conception and becoming assimilated into the general social welfare system by providing increasingly for the sick as well as the injured. If the policy is changing in that respect, it is not unreasonable to expect that consideration should also be given to whether the rationale for denying the right to sue still exists.

In the course of this article, it has been suggested that perhaps there is some middle way between a return to the old method, and a continued complete abandonment of it. This could perhaps take the form of some limited right to sue being made available -

65 (1985) 5 NZAR 99.
66 As with Sample No 50 in the Cumpston and Madden report (above n53).

say, for the right to sue for those damages no longer available under the ACC, such as for non-economic, non physical loss. Or perhaps mechanisms could be developed so that victims of accidents, and those who are responsible for the accident can be brought together, to negotiate a settlement or even simply to demand and receive an apology or explanation. The possibility of permitting the Corporation to take actions on behalf of victims might promote the tort functions of deterrence and retribution, but would do nothing to re-empower people. Those whose job it is to develop the ASC should adopt a creative approach to the problems, one more attuned to the promotion of individual responsibility than merely tinkering with existing measures.

In the meantime, clause 82 is in need of drastic modification. It is this writer's hope that while re-thinking that clause, attention will be given to the larger issue of whether New Zealanders should still be denied the right to sue in cases of personal injury.

APPENDIX-PROSECUTIONS BROUGHT AGAINST EMPLOYERS 1986/87

Sources: Annual Reports to Parliament for the year March 1986 - March 1987 of the Department of Labour and the Department of Transport, and discussions with Department officers. Information regarding other departments came from discussions with officers concerned with the safety and/or legal aspects of the Departments.

Notes:
(a) Prosecutions are in general only brought after there has been a serious accident.
(b) Statistics are not compiled or presented in a uniform manner either between Departments or between sections dealing with different Acts in the same Department.
(c) The Ministry of Energy may bring prosecutions, but their policy is such that they are very rare, tending only to be used as "show trials".
(d) Information on breaches of regulations and prosecutions taken by the Coal Mines Inspectorate of the Ministry of Energy were not available.
(e) The Health Department very rarely brings prosecutions (the recollection of one officer was that there had been 3 in the past 8 years brought against employers).
(f) The Police occasionally prosecute employers under the Crimes Act for dangerous practices.

	Breaches of Regulations Relating to Safety, Health and Welfare	Accidents (fatalities in brackets)	Total Proceed-ings against Employers	Convictions	Dismissed or Discharged Without Conviction	Case Not Currently Complete	Withdrawn by Department	Highest Fine	Lowest Fine	Total Amount	Average Fine
Factories & Commercial Premises Act 1981 (Factory Inspectorate of Department of Labour)	23,583 rectified	unknown (7)	14	10	1	2	1	$5,000	$40	$11,365	$668.52
Machinery Act 1950 (Factory Inspectorate of Department of Labour)	18,648 rectified	unknown (15)	53	42	2	8	1	$3,000	0	$20,495	$365.98
Bush Workers Act 1945 (Factory Inspectorate of Department of Labour)	753	1170 (11)	6	4	1	1	0	$500	$100	$1,150	$287.50
Construction Act 1959 (Construction Safety Inspectorate of Department of Labour)	17, 128 (including non-safety related breaches)	1161 (14)	22	12	1	9	0				
Shipping & Seamen Act 1952 (Marine Division of Ministry of Transport)	-	-	3	2	0	1	0				
Boilers, Lifts & Cranes Act 1950	- -	36 (2)	2	1	0	1	0				
TOTALS			100	71	5	22	2				