

NEGLIGENCE LIABILITY FOR PERSONAL INJURY: A PERSPECTIVE FROM NEW ZEALAND

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I INTRODUCTION

We are told in New Zealand that Australia is in the midst of a liability crisis. Reports from over the Tasman say that claims for damages for personal injury have spiralled, insurance companies have collapsed, many risks have become insurable only at prohibitive cost or not at all, and businesses and community organisations have closed down. Such developments have led to the setting up by the Commonwealth, State and Territory governments of a Panel of Eminent Persons to review the operation of the law of negligence. Its terms of reference request the Panel to develop and evaluate principled options for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.¹

Clearly the Panel has been charged with resolving a problem of major proportions. Yet it appears that its task is essentially negative. Death or injury occurring in circumstances where liability is excluded following any reform of the common law will remain uncompensated. We can reasonably ask whether this is the only or an appropriate way to deal with the problem. The experience of New Zealand suggests that consideration should be given to a more positive and more radical alternative. This is to introduce an accident compensation scheme.

Back in 1967 the Report of the Royal Commission charged with inquiring into personal injury law in New Zealand² saw the shortcomings of the action for damages as deep-rooted and pervasive. In particular, insurance considerations had caused the fault theory to develop into a legal fiction and undermined the claim that the threat of damages provided a financial incentive to be careful; the risks of litigation — the difficulties of proof, the ability of advocates, the reactions of juries and mere chance itself — turned the system into a lottery; and tort was cumbersome, inefficient and extravagant in operation to the point that

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1 Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002) ix–xii.

2 Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (1967) ('Woodhouse Report').

the cost of administration absorbed more than 40 per cent of the total amount of money flowing into the system. The Commission was satisfied that the concern should be with the needs of accident victims rather than the responsibility of alleged wrongdoers. Accordingly it recommended that the common law should be replaced by a statutory scheme for compensating victims of personal injury by accident. After widespread debate Parliament acted on the recommendation, by passing the *Accident Compensation Act 1972* (NZ). From the date when this legislation came into force, on 1 April 1974, most actions for damages for personal injury occurring in New Zealand were barred, and at the same time the statutory scheme came into operation. This new right to compensation was based not on any question of *liability* but simply on the claimant coming within the statutory conditions for cover. In this case he or she could make a claim for compensation pursuant to a simple administrative process.

Since 1974 the scheme has been re-examined, analysed and reviewed on any number of occasions. It was introduced to general approbation but soon became controversial, as problems emerged concerning the level of coverage, incentives to rehabilitation, methods of funding and, most critically, overall expense. There have now been four re-enactments, in 1982,³ 1992,⁴ 1998⁵ and 2001.⁶ These made various changes, some of them quite major, affecting the coverage of the scheme, the benefits it provides, the method of delivery of those benefits and the funding of those benefits. Yet in its fundamentals the scheme still operates in 2002 on much the same basis as it did when it was introduced nearly 30 years ago. And, broadly, it continues to operate successfully and to command widespread popular support.

The current legislation is the *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) ('IPRCA'). Let us consider its key features, where appropriate with a brief explanation of the political or economic background. We will then be in a position to evaluate the scheme as a whole and to assess its likely directions for the future.

II COVERAGE

As originally enacted the scheme provided compensation for victims of 'personal injury by accident'. The concept was not fully defined, the courts being left to flesh out the boundaries. But Parliament intervened in 1992, following some expansive decisions,⁷ and reined in the judicial discretion. There was cover, as before, for personal injury caused by an accident, by employment-related disease or infection, by medical misadventure and by treatment for personal injury, and also for mental or nervous shock suffered by the victims of

3 *Accident Compensation Act 1982* (NZ).

4 *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ).

5 *Accident Insurance Act 1998* (NZ).

6 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ).

7 See especially *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (Court of Appeal); *Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436 (Court of Appeal).

certain specified sexual offences. However, whereas formerly these categories all fell within the broad concept of personal injury by accident, they were now treated as separate categories and made subject to a series of detailed definitions. Judicial discretion in determining their limits was entirely removed. This arrangement has been carried over into the *IPRCA*. So coverage is more limited than in the early years. But the core categories remain. These also are largely unchanged in conception, although they are defined with much greater precision.

The main forms of personal harm which are not covered are mental injury which is not consequential on physical injury or on the commission of a sexual offence, and non-employment-related disease. Prior to the 1999 election the Labour Party's policy on accident compensation was to reinstate coverage for mental injury following a traumatic event or with a significant work component and gradually to bring into line the entitlements of those injured by accident and those incapacitated by illness.⁸ This has not happened. The Labour Government later decided that compensation for mental injury would be open-ended and potentially very expensive, and no initiatives have been taken as regards compensation for disease.

III ACTIONS FOR DAMAGES

The relationship between the *IPRCA* and the common law is straightforward. Where cover exists, actions for damages are barred.⁹ Where there is no cover, the right to sue remains. In *Queenstown Lakes District Council v Palmer*,¹⁰ Thomas J noted that persons covered under the legislation were denied access to the courts at common law in return for the perceived advantages of the statutory scheme. The exchange was frequently spoken of as a social contract or social compact.

Accordingly, if a claim does not involve personal injury in any form, or if it involves personal injury but falls outside the particular categories covered for compensation, an action for damages can proceed in the ordinary way. For example, claims for mental injury suffered by a secondary victim of an accident, or for negligent poisoning, or for infection by a sexual disease, or for cancer caused by smoking, are not barred. None of these constitutes a 'personal injury by an accident' as this concept is defined in the *IPRCA*. Again, the medical misadventure regime does not extend to certain participants in clinical trials, nor is there cover for work-related mental stress causing a heart attack or stroke. So, inevitably, there are various circumstances at the margins to the scheme where a tort action might lie.

A further possible basis for an action is where the plaintiff seeks to recover exemplary, rather than compensatory, damages. Quite early on, in *Donselaar v*

⁸ Labour Party, *Policy Statement: Labour on ACC* (July 1999).

⁹ *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 317.

¹⁰ [1999] 1 NZLR 549 (Court of Appeal).

Donselaar,¹¹ the Court of Appeal decided that actions for exemplary damages can still be maintained. Richardson J explained that proceedings for exemplary damages were not 'proceedings for damages arising directly or indirectly out of' a person's injury or death, where the statutory bar applied, because exemplary damages did not arise out of the plaintiff's injury and were not directed to the plaintiff's loss. In its contemporaneous decision in *Taylor v Beere*¹² the Court of Appeal confirmed that exemplary or punitive damages are intended to punish and deter a defendant guilty of outrageous or contumelious conduct. Compensatory damages may themselves have a punitive effect, but a court may make an award beyond what is properly allowed for by way of compensation in order to register its condemnation of the defendant's 'outrageous' conduct and to mark 'the contumelious disregard by the defendant of the plaintiff's rights'.¹³

Recently, in *Bottrill v A*,¹⁴ the Court of Appeal limited the remedy by holding that it should be available only in cases of advertent or reckless wrongdoing, but the decision was reversed in the Privy Council.¹⁵ Lord Nicholls thought that the criterion should be outrageousness and that any departure from this principle needed to be justified. In the nature of things cases satisfying the test would usually involve intentional wrongdoing with, additionally, an element of flagrancy or cynicism or oppression or the like. But, exceptionally, negligence might qualify. So there might be rare cases where the defendant departed so far and so flagrantly from ordinary or professional precepts of prudence or standards of care that the conduct satisfied this test even though the defendant was not consciously reckless.

IV STATUTORY BENEFITS

Where there is cover there is a right to compensation. The statutory entitlements available to a victim of personal injury are treatment and rehabilitation, earnings-related compensation, lump sum compensation for permanent impairment, and death benefits. Each of these needs brief explanation.

The Accident Compensation Corporation ('ACC') is liable to pay the cost of necessary and appropriate medical treatment and of social or vocational rehabilitation.¹⁶ The purpose of social rehabilitation is to assist in restoring a claimant's independence to the maximum extent possible, and can cover such benefits as aids and appliances, home help, child care, modifications to the home, assistance with transport and training for independent living. Vocational rehabilitation is available to persons covered by the *IPRCA* who are entitled to

11 [1982] 1 NZLR 97 (Court of Appeal).

12 [1982] 1 NZLR 81 (Court of Appeal).

13 Ibid 90.

14 [2001] 3 NZLR 622 (Court of Appeal).

15 *A v Bottrill* (Unreported, Privy Council, Lord Nicholls, Lord Hope, Lord Hutton, Lord Millet and Lord Rodger, 6 September 2002).

16 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) ss 69(1)(a), 75–96, sch 1, pt 1.

weekly compensation. It seeks to help a claimant maintain or obtain employment or regain or acquire vocational independence.

Earnings-related compensation has always been, and remains, a key benefit.¹⁷ It is payable to claimants who were earners at the time of the personal injury and who are unable, because of their injury, to engage in their employment. There are special provisions dealing with, *inter alios*, earners not in permanent employment, the self-employed, low earners and potential earners. The amount payable is 80 per cent of the claimant's weekly earnings, as calculated in accordance with detailed statutory formulae. All calculations are subject to a maximum weekly payment of NZ\$1341.31, which is adjustable in relation to movements in average weekly earnings.

Lump sums for pain and suffering and loss of amenity originally were payable, but they were thought to diminish the incentive to return to work and in 1992 they were abolished and replaced by an 'independence allowance'. This was a weekly sum, adjusted in relation to movements in the Consumer Price Index ('CPI'), which sought to compensate for expenses incurred because of impaired amenity. The allowance was set at low levels and was widely perceived to be unsatisfactory, so in 2001 it was in turn abolished and lump sums were restored.¹⁸ These compensate for permanent impairment, including both physical impairment and mental injury caused by a physical injury or sexual abuse, but not for pain and suffering. There is a minimum impairment threshold of 10 per cent and the minimum payment is NZ\$2500. The maximum sum, which is payable for impairment of 80 per cent or more, is set at NZ\$100 000. These figures are adjusted annually in line with the CPI. The amount payable in any particular case is calibrated so that more seriously injured claimants receive proportionately more than less seriously injured claimants.

Lastly, the *IPRCA* provides for various payments in the event of the death of a person covered by the scheme.¹⁹ A funeral grant is payable to the personal representatives and survivors' grants to a spouse, child under 18 and any other dependant. There can also be compensation for the cost of child care in certain circumstances. Weekly compensation representing loss of dependency is payable to a surviving spouse and dependant children.

A claimant who qualifies for compensation may be disentitled to relief on a number of grounds which have been carried over from previous legislation.²⁰ They include: the claimant wilfully inflicting injury on himself or herself or committing suicide; the claimant seeking compensation as a spouse or dependant in circumstances where he or she has been convicted of the murder of the deceased person; the claimant being in prison; and the claimant being injured in the course of committing a criminal offence where it would be 'repugnant to justice' for him or her to receive the statutory benefits. These ultimately are penal provisions, preventing payment of what would otherwise be perfectly valid claims, for reasons of public policy.

17 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) ss 69(1)(b), (c), 100–6, sch 1, pt 2.

18 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 69(1)(d), sch 1, pt 3.

19 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 69(1)(e), sch 1, pt 4.

20 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) ss 118–22.

V FUNDING

Since its inception accident compensation has been funded by levies on activities where accidents tend to occur and out of general taxation. Initially there were levies on employers and the self-employed and on motor vehicle owners, and since then their reach has been widened. Today the levies fund six accounts: the Employers' Account (for work-related injuries); the Self-Employed Work Account (for work injuries of self-employed persons); the Earners' Account (for injury to earners other than work injuries, motor vehicle injuries or medical misadventure injuries); the Motor Vehicle Account (for motor vehicle injuries); the Medical Misadventure Account (for injuries caused by medical misadventure); and the Residual Claims Account (for the continuing cost of certain older work injuries and non-work injuries to earners). These accounts finance most of the costs of the scheme. There is also the Non-Earners' Account (for injuries to non-earners other than motor vehicle injuries or medical misadventure injuries), which is financed by appropriations from Parliament.

During the 1980s and 1990s the levies for the year were set on a pay-as-you-go basis. This means that they were calculated to pay only that year's costs, including both old and new claims. But, broadly, since the *Accident Insurance Act 1998* (NZ) all of the accounts save for the Residual Claims Account and the Non-Earners' Account have been required to be fully funded. The levies must cover all the costs of new claims made in any particular year, including costs for the full duration of the injury. There remains a large unfunded liability from past claims,²¹ the costs of which continue into future years. These outstanding liabilities are to be fully funded by way of residual claims levies by the year 2014.²²

VI DELIVERY

As originally conceived, the accident compensation scheme operated as an arm of the state. It was administered by the ACC, which later was converted to a statutory corporation. But in the *Accident Insurance Act 1998* (NZ) the National Government of the time, hostile to this monopoly control, introduced a substantial element of private provision into the delivery of the statutory benefits. In the case of work injuries the ACC could no longer provide cover. Employers were obliged to insure with a private insurance company or a new state-owned enterprise set up to compete with the private companies. A regulatory regime aimed to make sure that persons with cover received their entitlements. The ACC continued to administer the unprivatised parts of the scheme.

21 The unfunded liability has been estimated at NZ\$8.2 billion: see Accident Compensation Corporation *Annual Report 1997* (1997) 83.

22 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 193.

The purpose behind the reform, broadly, was to facilitate freedom of choice, promote a greater emphasis on safety and rehabilitation, and encourage the efficient management of claims. The government view was that a publicly administered scheme lacked sufficient incentives to safety and efficiency. The introduction of private enterprise would reduce the overall costs of injury, by an increased focus on prevention and rehabilitation and on the monitoring of workplace safety performance. Further, pay-as-you-go funding restricted the ability of the ACC to reward innovation in injury prevention, as employers paid premiums that related largely to injuries that had already occurred. Full funding could resolve this problem.

It appears that the privatisation of the employers' account was a first step towards changing the accident compensation scheme into a system of universal compulsory insurance. But, as it turned out, the new regime was in force for just one year. One of the first acts of the Labour Government elected at the end of 1999 was to reverse its predecessor's reforms and restore the public monopoly.²³ It saw no necessary or sufficient connection between the issues of paying victims and reducing accidents. It also rejected the view that the ACC operated inefficiently. On the contrary, there was no duplication in the provision of services and administrative costs were very low. However, full funding was thought to be desirable and this has been retained.

VII EVALUATION

Evaluations of the success or failure of the accident compensation scheme are likely to be coloured at least to some extent by political persuasion. Some would abolish it altogether, on the grounds that it is administered by an unaccountable state bureaucracy, that it condones inefficiency and anti-competitive behaviour and that it removes a necessary deterrent to tortious misconduct. The New Zealand Business Roundtable has recommended ending the ACC's statutory monopoly, privatisation of the ACC and its liabilities and an end to most mandatory insurance coverage.²⁴ Others, including me, view the scheme as a substantial success.²⁵ The cost compares very well with any system where liability needs to be proved, the coverage is far greater and the benefits are affordable. And public administration is not necessarily inefficient. Certainly, whether the financial incentives involved in private provision can have an overall positive impact on reducing the costs of injury is controversial, with available research and studies being susceptible of differing interpretation.²⁶ An

23 *Accident Insurance (Transitional Provisions) Act 2000 (NZ)*.

24 Credit Suisse First Boston, *Accident Compensation: Options for Reform* (1998). This report was prepared for the New Zealand Business Roundtable, November 1998.

25 An overview is given by a series of papers delivered at a conference on 2–3 August 2002 at the Faculty of Law, Victoria University of Wellington, the theme of which was 'Looking Back at Accident Compensation: Finding Lessons for the Future'.

26 There is a survey of the evidence in Stephen Todd, 'Privatization of Accident Compensation: Policy and Politics in New Zealand' (2000) 39 *Washburn Law Journal* 404, 474–87.

argument can still be made that the 1998 experiment deserved a proper trial. But there will need to be a major change in political direction before this might happen.

For the time being the scheme is likely to stay in its present form, although there will be continuing debate about coverage and benefits. As regards the former, some rationalisation of the elements for establishing medical misadventure is already under consideration.²⁷ The existing need in many cases to show medical negligence arguably is difficult to reconcile with the no-fault basis to the scheme. Again, cover for mental injury may come to be revisited, as may the provisions concerning accident and disease. But, probably, radical change is a long way off.

This brings us to a frequently voiced criticism of the scheme, that it imposes arbitrary limits on coverage. Why, it is asked, should the victims of accidents be treated so much better than the victims of illness? Both may be equally incapacitated, but the latter have to fall back on the social welfare system. No doubt there is validity in such criticism, yet any compensation scheme has to set boundaries. Those that have been chosen are founded very broadly on a distinction between human and natural causes. They may be hard to defend as a matter of logic, but there is no natural limit upon which all can agree. A line has to be drawn somewhere, and wherever it is it will create difficulties and anomalies in relation to cases which are excluded. And there is practical value to the present boundaries. The great bulk of cases where the question whether injury was suffered in circumstances which can give rise to questions of legal liability are covered, as coming within a much broader conception of compensable loss than is found in the common law. The difficulties that are presently arising in Australia are avoided, while victims by and large receive sufficient compensation.

Of course, some might take issue at least with the second of these assertions. But it can certainly be defended. The scheme works well for earners. Index-linked weekly compensation is a very valuable benefit. Treatment and rehabilitation are both adequately covered. The problems that have tended to arise are in a minority of cases where the victim is not an earner, or the injury has not affected his or her earning capacity. To take a well known example, women participating in a cervical screening programme whose cancerous smears were negligently misreported, who later suffered more invasive medical treatment or learned that their condition was terminal because of the delay in diagnosis, were covered for accident compensation; but they were able to recover only minimal financial benefits under the scheme.²⁸ Shortcomings such as these may have been resolved at least to some extent by the reintroduction of lump sums in the *IPRCA*. Even so, the problem is likely to require further attention.

27 See Ruth Dyson, Minister for ACC, Letter to the Editor, *Sunday Star-Times* (Auckland), 8 September 2002, A10.

28 The facts of *A v Bottrill* (Unreported, Privy Council, Lord Nicholls, Lord Hope, Lord Hutton, Lord Millet and Lord Rodger, 6 September 2002) were of this kind.

Finally, as we have seen, the common law continues to provide one particular avenue for redress by way of an action for exemplary damages. Frequently the desire of those with cover but limited benefits is to call the wrongdoer to account. The statutory bar on actions for damages seeking compensation for personal injury tends to frustrate this desire, and an action claiming exemplary damages perhaps can help fill the gap. But whether such damages ought to be awarded at all raises fundamental issues of policy about which views may legitimately differ. A strong argument can be made that the accident compensation system exists to provide compensation, while in appropriate cases the criminal law and professional disciplinary proceedings can punish and deter the offender and protect the public at large. However, if we assume that exemplary damages have a role to play, we need to focus on their award in the context of a fully functioning accident compensation scheme. As to this, the courts have warned against any tendency to use them to make up for any deficiencies in the level of benefits obtainable under that scheme.²⁹ Indeed, they have stressed that the jurisdiction to make awards should be exercised with restraint and that their quantum should be moderate.³⁰ *A v Bottrill*³¹ has in fact widened the circumstances in which they may be available, but the limitation on damages suggests that any fear of ‘opening the floodgates’ can be discounted.

29 *Donselaar v Donselaar* [1982] 1 NZLR 97, 107 (Court of Appeal); *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424, 433; *Bottrill v A* [2001] 3 NZLR 622, 637 (Court of Appeal).

30 *Ellison v L* [1998] 1 NZLR 416, 419 (Court of Appeal).

31 (Unreported, Privy Council, Lord Nicholls, Lord Hope, Lord Hutton, Lord Millet and Lord Rodger, 6 September 2002).