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INSURANCE LAW PRINCIPLES, SOCIAL INSURANCE AND THE ACCIDENT REHABILITATION AND COMPENSATION INSURANCE ACT: HOW DO THEY INTERELATE?

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ABSTRACT

This paper explores the interrelationship between the New Zealand Accident Compensation Legislation (primarily the 1992 Act), Social Insurance and insurance law principles.

Essentially the papers aim is to attempt to establish what the 1992 act is? An insurance scheme? Social insurance? Or some sort of hybrid?

The paper will detail the history of the accident compensation legislation leading up to the 1992 act focusing on how the word "insurance" managed to appear in the title. It will then briefly consider the concept of "social insurance", and whether there are any defining characteristics in this to identify the accident compensation legislation. The last part of the paper will consider the general insurance law concepts, describing them briefly and comparing them with provisions in the 1992 act.

The text of this paper (excluding the contents, footnotes and annexures) comprises approximately 11,000 words.

I INTRODUCTION

In 1881 Oliver Wendell Holmes, in a lecture on "Trespass and Negligence - Principle and Policy" stated:[1]

> "The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members.
>
> ...State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise.
>
> ...Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbour against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning."

Almost one hundred years on New Zealand has embraced the concept of a universal accident compensation scheme, which has been part of New Zealander's lives for over a generation. In that last twenty years or so from the passing of the first act in 1972, significant changes have taken place to which we now have the Accident Rehabilitation and Compensation Insurance Act 1992. This took effect from 1 July 1992. It was passed amidst rising costs and a general dissatisfaction, especially from employers, on the way the Accident Compensation Corporation (ACC)[2] ran the scheme.

And after that one hundred years, the New Zealand Accident Compensation Scheme still has the same sort of criticism levelled at it as highlighted by Oliver Wendell Holmes. First, that state involvement is evil; secondly, private insurance can do it cheaper and more efficiently and thirdly, why should a person indemnify his or her neighbour where no fault lies?

The new act was, perhaps not surprisingly, met with suspicion largely due to the inclusion of the word "insurance" in its title. This had raised the spectre of "privatisation" which as we will see later may have been just what the Galvin Committee report in 1991 had intended.

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1 Holmes OW "The Common Law" (Little , Brown & Co) 96

2 ACC and the Corporation will be used interchangeably.

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Essentially the purpose of this paper is to establish what exactly is the 1992 Act by examining the interrelationship between the generally accepted concept of social insurance and general insurance law principles. Is the scheme an insurance scheme per se? Social insurance? A welfare measure? Or some sort of hybrid which contains a little of everything? To do this, this paper will examine what led up to the inclusion of the word "insurance" and why it was so important to be included. It is also curious as to what it means. To ascertain what indeed it did mean, this paper will explore the development and history of the accident compensation legislation in an attempt to gain some insight. The paper will discuss the concept of social insurance both in the wider context and in respect of the New Zealand legislation. It will also consider whether the present scheme has any identifying characteristics that it may have with conventional insurance law principles. Clearly this will lead on to the conclusion of just what sort of "accident insurance" scheme New Zealand has.

II THE NEW ZEALAND ACCIDENT COMPENSATION SCHEME

(i) General

Every ten years, for the last 30 years or so New Zealand legislators have passed a major piece of legislation on accident compensation. The first of which had marked impact on the insurance industry. The latest in the line of Acts, as that noted above, is the Accident, Rehabilitation and Compensation Insurance Act 1992 (herein after referred to as the 1992 Act). The aim of the most recent Act is:

> "...to establish an insurance-based scheme to rehabilitate and compensate in an equitable and financially affordable manner those persons who suffer personal injury."

The seeds of change appeared soon after the turn of the century with the introduction of the Motor Vehicles Insurance (Third Party Risks) Act 1928. The Attorney General, after introducing the legislation, expressed the hope that the scheme could eventually be extended to cover risks, irrespective of how the accident happened. In 1937 a Bill was drafted which would have gone some distance towards that goal in cases of motor accidents, though it would have left the common law rights unaffected. There was strenuous

opposition to the Bill and it was never introduced. The idea, however continued to simmer.[3]

In 1938, the fifth Dominion Law Conference resolved by a majority to approve the principle of absolute (ie no fault) liability for personal injuries in motor collision cases.[4]

Almost thirty years later in 1962, a committee was formed to report on the possibility and desirability of introducing some form of compensation scheme, based on absolute liability, for those injured or died in motor vehicle accidents. The general conclusion was that although impressed with the advantages of a comprehensive insurance scheme based on absolute liability, the committee considered it illogical and unacceptable to recommend a system for the victims of motor accidents when disability from other causes would be less adequately covered. A powerful dissenting opinion was presented by the committee chairman, the then Solicitor-General and later Chief Justice, Sir Richard Wild.[5]

Five years later, Justice Woodhouse (now Sir Owen Woodhouse), Messrs Bockett and Parson were commissioned to inquire and report "upon Workers Compensation".

(ii) The Woodhouse Report

The comprehensive accident compensation legislation genesis began with the 1967 Report of the Royal Commission of Inquiry entitled "Compensation for Personal Injury in New Zealand" (herein after referred to as the Woodhouse Report). The evolution of the report had much to do with the replacement of workers compensation schemes and third party motor vehicle schemes as well as the Criminal Injuries Compensation Act 1963.

Problems had arisen in the insurance industry after the amendment to the Workers Compensation legislation in 1947 which gave the monopoly of all the workers compensation business to the state owned insurer, State Insurance. State Insurance was a competitor of the other companies in all the remaining areas of insurance business, and many considered that it was

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3 Fahy "Accident Compensation Coverage" 8th ed 1984 page 8
4 Above n 3 page 8
5 Above n 3 page 8

unfair that it should be put in the position of being able to attract the other types of insurance business away from the private insurers by reason of the fact that every employer in the country had "willy nilly"[6] become its customer.

The Woodhouse report recommended a comprehensive compulsory accident compensation scheme on a similar basis to that recommended by Sir William Meredith in Canada in 1913. The scheme was to be based on the following five principles: -

- Community responsibility
- Comprehensive entitlement
- Complete rehabilitation
- Real compensation
- Administrative efficiency

It was not surprising that the insurance industry had very little liking for the Woodhouse report or for the subsequent legislation. Even less surprising was what the opinion the Woodhouse report had about private insurers:[7]

> In the absence of personal liability and with the disappearance of any element of voluntary contribution there can be no place for the insurance companies. Their purpose is to seek business from individuals who might wish to cover themselves at their own choice in respect of personal contingencies of their own definitions.
>
> It is said that the State should hesitate before interfering with private enterprise in what is claimed to be a legitimate field of operation. There is much confusion of thought about this matter. Private enterprise cannot claim as of right to handle fund such as the compulsory road injury fund or workers' compensation fund in New Zealand. Those funds have arisen not because owners of vehicles or employers have been persuaded to provide the business, but because Parliament has ordained that they must do so.
>
> More over, the insurance system itself can offer no central impetus in the important areas of accident prevention and rehabilitation. It is operating in an area which ordinarily would be handled by the Central Government as a social service. It cannot avoid adversary problems. In terms of administration it is very expensive."

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6 Woodhouse "Compensation for Personal Injury in New Zealand" Report of the Royal commission of Inquiry December 1967 page 80

7 Above n 6 page 181, 182

As seen by the statement above, the Woodhouse report expressed a disbelief that what they were proposing was an insurance scheme. After mentioning the other schemes - the Workers Compensation Scheme and Motor Vehicle (Third Party) the report stated:-[8]

> It is not an insurance scheme at all. It has always been treated as such in New Zealand, but in truth it is a compulsory and universal method of sharing one of the costs of social activity. The interpolation of private enterprise between the group of beneficiaries and the ordained fund has arisen simply because the contributions to the fund have been required and collected, not in the form of tax from employers as a general class, but as individuals in terms of individual risks."

After the Woodhouse Commission reported, the Government of the day put in motion what was to become the Accident Compensation Act 1972 (herein after referred to as the 1972 Act).

(iii) The 1972 Act

About two months before the legislation was introduced into Parliament in 1971, a senior officer in one of the largest New Zealand insurance business, the Prudential Insurance Office, hinted that his company might not take part in the scheme as agent for the Accident Compensation Commission:[9]

> "We don't like Government agencies coming into insurance. We feel we should be able to produce all the insurance cover the public requires."

The insurance industry was most incredulous that a National Government would introduce such a scheme and had not contemplated being locked out of the personal injury market. They continued with this attitude when after the Government announced the recommendations of the Gair Committee, one industry spokesman stated:[10]

> "The industry cannot help but believe that the Government will give appropriate consideration ... to the wisdom of replacing insurance companies by bureaucratic control.. before making a final decision."

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8 Above n 6 page 44
9 Palmer "Compensation For Incapacity" (Oxford University Press 1979) p 119
10 Above n 9 page 118

The Government of the day took a seemingly indifferent attitude to the plight of insurers, perhaps as Sir Geoffrey Palmer pointed out, this stemmed from the fact that the insurance industry never made any direct submissions indicating that they could help in the event of the Royal Commission's scheme going ahead. They tended to lobby the Government MP's privately, without any cohesion throughout the industry:[11]

> "Members of the industry were in competition with one another and they did not want to reveal to each other the state of their reserves or the extent of premium cutting.... That inability to make a common response became a familiar feature of the insurance industry's behaviour in Australia."

The legislation went ahead and in 1972 the First Accident Compensation Act was passed. Its aim:

> "An Act to make provision for safety and the prevention of accidents; for the rehabilitation and compensation of persons who suffer personal injury by accident in respect of which they have cover under this Act; for the compensation of certain dependants of those persons where death results from the injury; and for the abolition as far as practicable of actions for damages arising directly or indirectly out of personal injury by accident and death resulting therefrom and certain other actions."

This Act revolutionised the concept of accident compensation through out the industrialised World, as it not only covered work and motor vehicle accidents but it covered accidents in the home, on the sports field and later introduced the concept of medical misadventure. All New Zealanders were covered by the scheme whilst in New Zealand whether they directly paid into the scheme or not. Interestingly there was no mention of the word "insurance" although as it was seen as an extension of the Berridge report that came out of England and many throughout the world saw it as "social insurance".

The scheme came into force on 1 April 1974 and as noted applied to all those who suffered personal injury by accident after this date. It also took over the functions of the Workers Compensation and Criminal injuries Compensation legislation. Initially the scheme was run by a Commission, and State Insurance continued to deliver the service.

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[11] Above n 9 page 353

Ten years on the legislators once again reviewed the legislation.

(iv) The 1982 Act

The aim of the Accident Compensation Act 1982 (herein after referred to as the 1982 Act) was simple. It was an act to consolidate and amend the 1972 Act and amendments. Again there was no mention of the word "insurance". There was little if any fundamental change from the earlier act. The Commission had earlier, by amendment in 1981 become a Corporation and its functions were carried out by a Corporation with a Board and Chairperson rather than State Insurance. The 1982 Act also increased lump sums by $10,000, although there was much discussion about getting rid of the lump sums. The early 1980's were relatively quiet in respect of the scheme.

There was however some rumblings of discontent in the mid 1980's on two distinct fronts. Employers were concerned with the excalating costs and what appeared to be indiscriminate decision making. Contrary to this some felt that legislation had a very narrow focus. They wanted to extend the scheme to include "sickness". This was something the then Labour Government was keen to see. During this time the Law Commission became involved.

(v) The Law Commission Report

The Law Commission produced a report in 1988 on the accident compensation scheme entitled "Personal Injury: Prevention and Recovery."

The Commission was asked to report largely due to the disquiet being expressed about the scheme's administration. The scheme, for example had made in 1986, a large and sudden demand for levy from employers. It would appear that in 1985 the scheme was virtually bankrupt.

The Law Commission tracked the scheme history, but was quick to point out in its summary at the beginning of the report that this: -[12]

> "scheme [was] not in any sense an insurance scheme."

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[12] Law Commission "Personal Injury: Prevention and Recovery" Report No 2 1988 page x

"Its benefits" stated the Law Commission were:[13]

> "...provided as of right and without reference to causes and regardless of risk."

It saw the scheme as an extension of the social welfare provisions of the country.

The Commission did however temper this slightly in the body of its report and instead found that the scheme was not an insurance in the "conventional" sense but:-[14]

> "Quite properly it can be regarded and its performance judged as a part of our arrangements for citizen-wide *social insurance*" (their emphasis)

Even later in the paper, the Law Commission stated: -[15]

> It is not an insurance scheme, the essence of which is that the seller and buyer of insurance settle by voluntary agreement (perhaps within broad limits fixed by public law) their rights and duties as reflect in the benefits and premiums. The accident compensation scheme by contrast is about rights recognised in or conferred by the general law of the land. And to emphasise the taxation point the scheme is supported by levies and not by premiums."

The Commission argued that as both the 1972 and 1982 Acts do not refer to "premiums" nor does the word "insurance" appear in either act, this can not be considered an insurance scheme. If they were wrong in this, the question they then asked that if the 1982 act was an insurance scheme, what is it that the payer is insuring against? There is no longer civil liability for personal injury.

It did however highlight that something needed to be done. In 1991 the then National Government set up a Ministerial Working Party on "Accident Compensation Corporation and Incapacity" convened by Mr Bernie Galvin (herein after referred to as the Galvin Report).

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13 Above n 12 page X
14 Above n 12 page 4
15 Above n 12 page 71

(vi) The Galvin Report

It was apparent from the outset that the Government intended radical changes to the scheme and that changes were likely to emit from this report. The terms of reference (annexed as Appendix A) were such that the very fundamentals of the accident compensation scheme were up for discussion.

The principal recommendation of the report was that of an "insurance based scheme which [would] limit Government funding to targeting assistance to those who would otherwise find it financially burdensome to take out their own insurance cover."[16] And further to those injury victims who under the proposals would move from receiving compensation from an insurer to receiving income support from the social security system.

In terms of minimising the costs to society of an injury compensation system, the working party considered that a good theoretical case existed for proposing that the delivery and the administration of injury compensation insurance should be opened up to competing private sector insurers. However, the working party noted that empirical evidence did not clearly demonstrate greater efficiency from competition.

The working party considered the advantages and disadvantages of allowing private sector insurer to compete in the injury compensation market with the ACC. On balance they favoured a multi-insurer approach to delivery over a sole-insurer approach. They did note that if the provision of injury compensation insurance was opened up to competition, then the two schemes would have to be fully funded. They also considered that self insurance (where a firm meets any injury compensation costs as they arise rather than purchasing cover from an insurance company) should be allowed if the firm could meet certain prudential requirements.

The working party did identify two difficulties with this approach:

- Some individuals might not be able to afford, or even obtain cover.
- prudential regulation of insurers would need to be looked at.

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[16] Ministerial Working Party on "The Accident Compensation Corporation and Incapacity" Report 1991 - Mr Galvin, convener page 2

The working party saw the role of the insurer as three fold:

- to provide income compensation and health care insurance cover for employers and individuals.
- to manage the provision of that cover in such a way that the costs of obtaining that cover reflected the likelihood of an injury occurring.
- to operate in a way that was impartial, financially sustainable, prudent, and fair.

They also saw the role of insurers to:

- ensure that injured earners were rehabilitated as quickly as possible, in order that they could be moved off income compensation and returned to work.
- act as gatekeepers (along with employers), making sure that claims under each of the separated schemes were genuine.
- negotiate with medical practitioners over the health status of injured individuals who had been receiving rehabilitation and discussing whether they were fit to return to work.
- maintain databases in order to monitor injury trends and costs in various industries.

As will be seen some but not all of the recommendations of the Galvin report were carried over into the 1992 Act. The fundamental recommendation - that accident compensation be open to multi-insurers was not accepted. ACC remains the "sole insurer".

(vii) The 1992 Act

This Act is markedly different from its predecessors although it still retains the underlying concept of twenty-four hour, no fault cover for all New Zealanders. It did however purport to introduce the concept of "insurance" and the term "levy" was dropped in favour of "premium". It did not however go as far as the Galvin report recommended in that ACC remained as the sole "insurer". It is likely that this was due to the need for the scheme to be "fully funded" to remain on equal footing with any potential competitors. Private insurance schemes operate on a "fully funded" basis, however the decision was made many years ago to establish ACC as a "pay as you go"

scheme. There is however a prospect of limited competition in service delivery in the introduction of "exempt" employers in the 1992 act.[17] Employers may be able to control and pay for their own work claims for a period of 12 months in exchange for a reduction in premium. This may see ACC and employers competing for services. It will also allow private insurers to develop a package in order to manage these claims on behalf of the employer. Experience rating has also been introduced for employers, this operates in much the same way as the "no claims bonus."

The underlying basis however of the Law Commissions reasoning as to why the 1982 scheme was not in any sense the conventional insurance scheme - that is that the premium is still mandatory to one "insurer", was not addressed in the 1992 Act. There is still no freedom of negotiation. And the premium is not based on "individual risk".

It has become increasingly obvious in the last two years this new accident compensation scheme has suffered a crisis of identity between a fully fledged insurance scheme and a welfare measure. The term "social insurance" became the conventionally accepted term to describe the 1992 Act, as this is supposedly somewhere in the middle of insurance and welfare. It would appear that this concept "social insurance" was not discussed by the working party involved in the Galvin report. Essentially the Galvin report recommended a fully fledged insurance scheme with competition and freedom to negotiate, with the ACC being the "insurer of last resort".

So what is this social insurance? Is it valid for the 1992 scheme to be described as such?

III SOCIAL INSURANCE

(i) Definition

It must be said from the outset that many of the definitions and descriptions of social insurance are of academic interest only. New Zealand does have a unique scheme and one which has possibly gone further than any other scheme in the world - generally due to its comprehensiveness and range of

[17] section 105

cover. New Zealand's scheme could be considered a hybrid. Nevertheless it does, as will be seen, have some elements of "social insurance". The Committee on Social Insurance Terminology of the American Risk and Insurance Association has defined social insurance thus:[18]

"A device for the pooling of risks by the transfer to an organisation, usually governmental, that is required by law to provide pecuniary or service benefits to or on behalf of covered persons upon the occurrence of certain predesignated losses under all of the following conditions:

1. Coverage is compulsory by law in virtually all instances.
2. Except during a transition period following its introduction, eligibility for benefits is derived, in fact or in effect, from contributions having been made to the program by or in respect of the claimant or the person as to whom the claimant is a dependent: there is no requirement that the individual demonstrate inadequate financial resources, although a dependency status may need to be established.
3. The method for determining the benefits is prescribed by law.
4. The Benefits for any individual are not usually directly related to contributions made by or in respect of him but instead usually redistribute income so as to favour certain groups such as those with low former wages or a large number of dependents.
5. There is a definite plan for financing the benefits that is designed to be adequate in terms of long-range considerations.
6. The cost is borne primarily by contributions which are usually made by covered persons, their employers, or both.
7. The plan is administered or at least supervised by the government.
8. The plan is not established by the government solely for its present or former employees."

Social insurance is based on the principle of "social solidarity"[19] and brings about a "maximum socialisation of risks".[20] Instead of imposing liability on one person, the burden (financial) and the consequences of the damage to

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18 Bulletin of the Commission on Insurance Terminology of the American Risk and Insurance Association, Vol 1 No 2 (May 1965) and Vol 2. No.2 (July 1966)

19 Miller "Should Social Insurance Pay Compensation for Pain and Suffering (1982) 31 International and Comparative Law Quarterly 550 page 552

20 Above n 19 page 552

the person is distributed to the public at large.[21] Or broadly speaking insurance is the:[22]

> Pooling of risks of fortuitous losses by transfer of such risks to insurers who agree to indemnify insureds for such losses, to provide other pecuniary benefits on their occurrence, or to render services connected with the risks."

(ii) History

It would appear that the Germans were one of the first to introduce the concept of social insurance with the German Workmen's Compensation Act 1884:-

> "... it embodied the archetype of social insurance in our time for the injured and symbolises the birth of such insurance."

It essentially severed an area from the tort law into a unique new field of compensation for personal injury. Just as significantly it introduced liability insurance in respect of employers of major proportions in the form of compulsory insurance. Furthermore the injured person was no longer required to prove fault.[23]

The growth of such schemes continued throughout the 1900's with many evolving into universal systems of social protection which have been among the central features of social development in the 20th Century.[24]

There is now possibly over 140 countries at present who have social insurance schemes of one form or another. Some, like the New Zealand scheme, no longer recognised the right of an insured injured person to file a complementary tort claim against a negligent tort feasor or wrongdoer

Social insurance grew largely due to the inefficiencies of the tort based law. There was a strongly felt view that there was a need to "get rid of the

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21 Above n 19 page 552

22 Above n 18 page 1

23 There was however still a necessity to prove causal connection between the work and the injury.

24 Social Insurance and Social Protection Report of the Director General - International Labour Conference 80th Session 1993

nuisance of litigation."[25] The social costs of industrial injury should be met by the cheapest form of the comprehensive insurance. Negligence action was a form of lottery and in the case of industrial accidents it provided inconsistent solutions for less than one victim in every hundred.[26] The New Zealand Workers Compensation Act provided meagre compensation for workers, and only if their injury occurred at their work. The Social Security Act assisted with the pressing needs of those who remained, provided they could have met the means test. All others were left to fend for themselves.[27]

(iii) Conventional Insurance v Social Insurance

Private insurance utilises the pooling technique for meeting risk.[28] The processes used to determine this is to take a large number of similar "exposure units"[29] and group them so that the insurance company can accurately predict the future losses. Although more difficult the social insurance actuary preforms the same task.

Fortuitous loss is also another element that is familiar to both private and social insurance schemes as both deal with unforseen and unexpected losses which are outside the insured's control. Similar comments could be made in relation to risk transfer and indemnification. Other similarities include specific and complete descriptions of all conditions relating to coverage benefits, and financing. In the case of private insurers this takes the form of a contract or policy, in the case of social insurance this takes the form of legislation. Both are funded through premia.

The major differences can be summarised:[30]

SOCIAL INSURANCE	PRIVATE INSURANCE
Compulsory	Voluntary
Minimum floor of income protection	Larger amounts available, depending on individual desires and ability to pay

25 Above n 6 page 87
26 Above n 6 page 19
27 Above n 6 page 19
28 Rejda "Social Insurance and Economic Security" 2nd Ed Prentice Hall Inc Englewood Cliffs New Jersey 1984 page 36
29 Above n 28 page 36
30 Above n 28 page 40

Emphasis on social adequacy element)	Emphasis on individual equity (Welfare (Insurance Element)
Benefits prescribed by law that can be changed (statutory right)	Benefits established by legal contract (contractual right)
Government monopoly	Competition
Costs difficult to predict	Costs more readily predicable
Full funding not needed because of compulsory contributions from new entrants and because the program is assumed last indefinitely	Must operate on a fully funded basis without reliance on new entrants' contributions.
No underwriting	Individual or group underwriting
Widespread difference of opinion regarding objectives and results	Opinions generally more uniform regarding objectives and results
Taxing power readily available to combat erosion by inflation.	Greater vulnerability to inflation

On first glance it would appear that the 1992 act shows all the hallmarks of being more in common with social insurance and it will be remembered that the Law Commission said of the 1982 act that it may be described as social insurance. However how close is the 1992 act to a conventional insurance scheme? To ascertain this requires a closer look at the act itself and how it compares with the principles of insurance law.

IV INSURANCE LAW PRINCIPLES V 1992 ACT

(i) General

There can be no doubt as will be seen that the 1992 Act possesses some unique characteristics not normally found in conventional insurance At the same time, however, there are basic requirements that are not found in social insurance which are found in the private insurance market. One such basic criteria is a "contract or policy"[31] there are other features such as third party claims, breach of warranty, premiums, misrepresentation/non-disclosure, double insurance and wilfully self inflicted/suicide. These concepts will be discussed below, briefly defined and compared with the 1992 Act in terms of how it deals with these principles.

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31 This will be discussed in more detail later in the paper.

(ii) Contract.

The whole basis of insurance law is the presence of the contract. A contract which has three fundamental elements:[32]

- It must be a contract by which the insurer, in return for some consideration ie premium agrees to pay a sum of money or provide some benefit upon the happening of an specified event.
- The event must involve some degree of uncertainty as to whether, or when it will happen.
- The insured must have some interest in the outcome of the event.

Taking the 1992 Act as a whole, it could not be said that by any stretch of the imagination there exists a contract between ACC and its premium payers. Whereas the 1992 Act does all the above it is not embodied in a policy or a contract. Does this however defeat the concept that ACC is an insurance? There is some support that it might be in the "business of insurance" which has been described as:[33]

> "Device which furnishes protection against a risk of loss by distributing the losses of the few among the many who are subject to the same risk."

R v Cohen Exparte Motor Accidents Insurance[34] may provide a guide. The Motor Accidents Insurance Board ("the Board") was under a statutory obligation to provide public liability insurance to owners and drivers of motor vehicles. They were to provide fixed benefits to persons injured as a result of motor vehicles accidents. Drivers were under a statutory obligation to pay periodic amounts (premium) in return for cover. The Board's liability however was not conditional upon payment of the premium.[35] The Board sought to make an order nisi for a writ of prohibition against the Australian Conciliation and Arbitration Commission ("the Commission") and the Australian Insurance

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[32] Prudential Insurance Co v Commissioner of Inland Revenue [1904] 2 K B 652
[33] Fleck "Reasonable Expectations: Insurers Dilemma 24 Drake Law Review 853 at 856
[34] (1979)141 CLR 577 See also Booth v Police Benefit Fund Board (1931) WALR 48
[35] Above n 34 page 587 "It is true that this obligation is not strictly conditioned upon the payment of a "premium" under Pt V of the Act."

Employees' Union ("the Union"), restraining them from proceeding with a hearing of an "industrial dispute".

A situation arose when the employees of the Board served a number of claims on their employer via the Union. The Union's eligibility criteria provided that its members should be employed in the "business of insurance". The Board argued that its employees were not "in the business of insurance" and as such they could not in fact be members of the Union. Therefore there was no "industrial dispute". Mason J disagreed. He found that the Board's obligation was in the nature of insurance not withstanding the fact there was no contract.[36] Mason J stated:[37]

> "The expression is, in such a context, no doubt intended to have a wide meaning and it should be interpreted and applied in accordance with its ordinary and popular denotation rather than with some narrow or formal construction. Thus the question is whether, as a matter of ordinary usage, the Board can properly be said to be in the "business of insurance"."

Mason J answered that in the affirmative and explained that as the Board was obliged to indemnify a person owning or using a motor vehicle "... in respect of a common law liability incurred by him in respect of the death of, or bodily injury to, any person caused by or arising out of the use of that motor vehicle in Tasmania..." carried on the "business of insurance".

Mason J also believed that the Board was engaged in the "business of insurance" as a "matter of legal analysis":[38]

> "...the nature of the obligation imposed upon the Board by Pt III of the [Motor Accidents (Liabilities and Compensation) Act 1973 (Tas)] is at least analogous to the nature of the obligation imposed upon the insurer under a third party insurance policy in the context of motor vehicle insurance."

On the question of the contract, Mason J stated:[39]

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[36] It was clear that the words "business of insurance" were construed in the context of the clause in the Trade Unions registered rules.
[37] Above n 34 page 587
[38] Above n 34 page 588
[39] Above n 34 page 588

> "Despite the Board's contrary argument, I very much doubt whether the existence of a contract is of itself essential to the legal concept of "insurance". There is much to be said for the view that it is the relationship of indemnity that exists between insurer and insured, rather than the source of that relationship, that is the essence of the concept of insurance, so that it matters not whether the relationship arises by statute or by contract."

There was a contrary view expressed in the judgment, Barwick J stated:

> The business of insurance in its ordinary meaning involves, in my opinion, the selling of insurance, the carrying on of a commercial activity in engaging in indemnity contracts. One, of course engages in insurance when one enters into a contract of indemnity: the Board may therefore be said to be involved in the indemnity insurance. But the eligibility clause goes further than that. It requires, in my opinion, a commercial repetitive activity of selling indemnity contracts. The word "business" in the clause is not, in my opinion, equivalent to the word "activity." It carries the connotation of commercial activity of the indicated kind.
>
> The Board, for its part, is quite clearly not engaged in a commercial activity. It is administering a statutory scheme which in truth is designed to displace commercial activity in the field of car accident indemnity. It seems to me little to the point that in expressing that statutory scheme language is used which has been borrowed from the commercial field of insurance, such as "premium" and "indemnify". The Board in no sense sells an indemnity contract; indeed it does not enter into any contract of indemnity. It issues no policy. So far as appears, it does not reinsure.
>
> Consequently, I have reached the conclusion that the Board is not carrying on the business of insurance and that its employees are not within the eligibility clause of the respondent industrial organisation."

It is obvious that the Cohen case could be distinguished on its facts, however, notwithstanding the above contrary view, it may give a guide as to how the courts may treat 1992 act in the future.

(iii) Third Party v First Party

One of the distinctions between the 1992 Act and conventional insurance contacts is third and first party. With respect to the "first party", this can be

disposed of fairly quickly. All owners of motor vehicles and drivers of motor vehicles[40] pay a premium into the motor vehicle fund. If they have a motor vehicle accident, their expenses or compensation is paid from the motor vehicle fund. A direct association. Similarly, an earner pays directly into an earner account and if they have a non-work, non motor vehicle accident,[41] payment of compensation is paid directly from the earners account. Direct premium paid for direct compensation paid. The Galvin Committee did discuss "first party" in their report.[42] They were concerned that the first party, no fault regime "may not carry particularly strong incentives to take care with respect to others."[43] The distinction here perhaps between conventional and the 1992 Act is that both the motor vehicle premium and the earner premium are set amounts and there are no distinctions between the individuals. For example earners pay 0.60c of premium for every $100 of earnings whether or not they participate in risky sports or activities such as bungy jumping. There is no distinction between age groups for the payment of motor vehicle premium as there are in conventional insurance. Although there is some distinction as to whether you drive a motor vehicle or ride a motor cycle. The latter pays a slightly higher premium.[44]

Nevertheless the difficultly arises where there are third party situations. The third party is a person who is not a party to the contract between insurer and insured, but has an interest in benefiting from that contract.[45] The difficulty arises in insurance law as the position of the third party at common law is poor, being caught by the rule of privity of contract, that is no one may enforce all or part of a contract to which he or she is not a party.[46] The law in Australia, prior to the Insurance Contracts Act 1984(cth) was a little different. In Trident General Ins. Co. Ltd v McNiece Bro. Pty. Ltd[47] a workman who was injured, was able to obtain damages from the main contractor and able to enforce a liability policy between the main contractor and the company. This was in spite of the fact that he was not a party to the contract and had not provided any consideration. The Court of Appeal held that the action succeeded on the basis that at common law the

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40 All drivers pay 0.02c per litre of petrol
41 That is where no vehicle is involved.
42 Above n 16
43 Above n 16
44 Motor Vehicle Premium regulations
45 Clarke M "The Law of Insurance Contracts (Lloyd's of London, Press London 1989) page 87
46 Above n 45 page 87
47 (1988) 62 ALJ 508

beneficiary of an insurance contact can sue on the contract. This was on a slightly different ground that the New South Wales Supreme Court which held that the main contractor was acting as McNiece's agent in taking on the policy.

In New Zealand the indemnity principle and privity of contract rule have given rise to problems in respect of third party cover.[48]

In some respects section 9 of the Law Reform Act 1936 (NZ) assists. Essentially a third party who has a loss due to the fault of another party (the insured) may in certain circumstances recover from the wrongdoer's insurer. The added burden however is that before the third party can have any rights by way of a charge against the insurer he or she must establish that the insurance money "is or may become payable in respect of the liability to her or him."[49] Clearly the distinction between this and the 1992 act, is that the action of the wrongdoer, with the scheme being "no fault" is irrelevant to cover. For example third party situation exists in work accidents. Employers fund the employers account which pays for accidents that occur at work. There is no direct association between the employee who is injured and the fund. They become the beneficiaries of this fund when they have an accident. Furthermore they can claim from this account whether or not their accident was caused by the employers or their own negligence. In respect of the latter the definition of "arising out of employment" states that it will not be relevant if:-

"(a) The person may be acting in contravention of any Act or regulations applicable to the employment, or in contravention of any instructions, or in the absence of instructions; or

(b) The person may be working under an illegal contract; or

(c) The person may have indulged in or been the victim of misconduct, skylarking, negligence, or been a victim of any force of nature."

It is this that clearly makes the distinction between that of conventional insurance law and the 1992 Act. It is unlikely in a conventional insurance situation were the accident is caused by the employee's own negligence, that employee would legally have call on the employers liability insurance.

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48 Tarr and Kennedy "Insurance Law In New Zealand" (The Law Book Company 1992 2nd ed) page 41

49 Above n 48 page 454

Similarly a pedestrian who is knocked over by a motor vehicle will claim from the motor vehicle account, although they will not have made a direct contribution to this fund, at least not for this accident. Again it is irrelevant that they, as the pedestrian may have been at fault.

The working party involved in the Galvin report did discuss this issue. They advised that the working party did spend some time looking at the alternatives of requiring third party cover especially in regards to motor vehicle accidents. This was to be over and above the current scheme. They stated: -[50]

> We reluctantly concluded that third party liability would only lead to the insurer of an innocent victim seeking to recover "damages" from the negligent driver who had caused an accident; and this would amount (albeit by another means) to a return to the fault based system."

Clearly if the 1992 act was a conventional insurance, the concept of "fault" would have to be reconsidered especially in light of third parties.

(iv) Breach of Warranty

A warranty in the insurance context, is a term of the contract of insurance which if breached, entitles the insurer to repudiate the contract. At common law the matter warranted need not be material[51] to the risk and it was irrelevant that no causal link existed between the breach and the loss that occurred.[52] Tarr and Kennedy provide an example of this in Mackay v London General Insurance.[53] The insured omitted to advise the insurer when applying for a motor vehicle insurance that he had been fined several months previously for driving a motor cycle without sufficient brakes. Although Swift J found that this non-disclosure was not material, the insured had warranted

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50 Above n 16 page 30

51 Section 6(2) of Insurance Law Reform Act 1977 states of materiality, inter alia :

> "...a statement is material only if that statement would have influenced the judgment of a prudent insurer in fixing the premium or in determining whether [it] would have taken or continued the risk upon substantially the same terms."

The concept of materiality does have limited application to the ARCI Act. Although it does not relate to the fixing of a premium it does have significant as to whether ACC will continue to compensation, ie continue to carry the risk, of a claim.

52 Above n 48 page 141

53 (1935) 51 Li L Rep 201

that he had never been convicted. The insurer could rely on this breach of warranty however as a defence to a claim brought on the policy.

The Insurance Law Reform Act 1977 (here in after referred to the ILR Act) does however go some way in restricting the circumstances in which policies can be avoided. It regulates the consequences that flow from failure of an insured to comply with a clause requiring notice of claims, and curtails the efficacy of non causative or temporal exclusions. Section 9 of the ILR Act states:-

"**Time limits on claims under contracts of insurance** - (1) A provision of a contract of insurance prescribing any manner in which or any limit of time within which notice of any claim by the insured under such contract must be given or prescribing any limit of time within which any suit or action by the insured must be brought shall-

(a) If that contract of insurance is embodied in a life policy and the claim, suit, or action relates to the death of the insured, not bind the insured; and

(b) In any other case, bind the insured only if in the opinion of the arbitrator or court determining the claim the insurer has in the particular circumstances been so prejudiced by the failure of the insured to comply with such provision that it would be inequitable if such provision were not to bind the insured.

(2) Where -

(a) The insured under any contract of insurance to which subsection (1)(b) of this section applies fails to give notice of any claim in any manner or within any limit of time prescribed by the contract; and

(b) The cost of repairing, replacing, or reinstating any property when it falls to be met is greater than that which would have applied if the notice had been given in the manner or within the time so prescribed, -

that greater cost shall not constitute prejudice to the insurer for the purposed of subsection (1)(b) of this section, but the insurer shall not be obliged to apply or pay in repairing, replacing, or reinstating the property a greater sum than that for which he would have been liable if the notice of claim had been given in the manner or within the time so prescribed."

Or similarly with section 11 of the ILR Act:-

Certain exclusion forbidden - Where-

(a) By the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the

liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and

(b) In the view of the Court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or on the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring, -

the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances."

Compare this with section 63(2) of the 1992 Act which requires a claimant to lodge a claim within 12 months "after the date on which personal injury is suffered" if payment is to be made. There is no discretion to allow a claim after the twelve month period. It is likely that had this been a term of a conventional insurance contract that pursuant to section 9 of the ILR act, it is very likely that a clause similar to section 63(2) would not be valid. It is interesting to compare section 63(2) with the earlier legislation which had a similar provision. Section 98(2) of the 1982 Act stated:-

(2) A failure to forward any such claim within the time specified in subsection (1) of this section shall be no bar to the claim if the corporation is of the opinion that it has not been prejudiced in the determination of the case by the failure, where in the making of inquires or otherwise, or that the failure was occasioned by mistake of fact, or by mistake of any matter of law other than the provisions of this section, or by say other reasonable cause."

The above subsection appears to be more in keeping with the provisions of the ILR Act. It is some what ironic that an act that purports to be less "insurance" orientated, appears to be more in keeping with some fundamental elements of insurance reform, than the one that purports to be an "insurance."

Breach of warranty also has a direct correlation with Section 7(6) of the act. This also has relevance to "utmost duty of good faith" and "non-disclosure". Section 7(6) states:

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Notwithstanding anything in this section, no person shall be entitled to any treatment, service, rehabilitation, related transport, compensation, grant, or allowance in respect of personal injury caused by gradual process, disease, or infection arising out of and in the course of employment where that person ... represented himself or herself in writing to the employer before commencing employment, in response to a specific request for the information from the employer, as not -

a) Suffering or having suffered from that personal injury; or

b) Suffering or having suffered from a specified condition likely to materially contribute to that personal injury caused by gradual process, disease, or infection arising out of and in the course of employment. -

knowing that representation to be untrue."

Therefore if a person does not make such a disclosure to his or her prospective employers, the claim whilst will still be covered, there will be no entitlement under the Act.

This leads on to the misrepresentation of claims

(v) Misrepresentation

Misrepresentation and non disclosure are terms which have continued relevance through out the life of the claim as continuing evidence is required as to work ability or extent of the injury. Not only could this lead to the rejection of the claim but could result in prosecution. Its thrust is not dissimilar to that of insurance law perse.

(vi) Assignment/Subrogation

An assignment of a contract takes place when the liabilities imposed or the rights acquired, are transferred to a person who was not a party to the original contract. This may occur either by the act of the parties or by operation of law.[54] Assignment of a chose-in-action was not recognised at common law, however equity did recognise such an assignment.[55] An assignment requires an express agreement between the parties. Furthermore an insurer who becomes and assignee under a statutory assignment may sue

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54 Above n 48 page 47

55 Kelly & Ball "Principles of Insurance Law In Australia and New Zealand" (Butterworths Sydney & Wellington 1992) page 483

in his/her/its own name.[56] An example of statutory assignment can be found in the Life Insurance Act 1908. This contains many provisions that relate to assignment of life policies, prescribing form and manner that the assignment is to take. It requires assignments to be by way of memorandum of transfer endorsed on the policy.[57] Clearly there is little or no problem in an assignment of conventional insurance contracts.

Not so with the 1992 Act. Assignment is virtually contra-indicated except for a very limited number of exceptions.[58] All compensation, grants, or allowances are absolutely inalienable whether by way of or in accordance with sale, assignment, charge, or execution, bankruptcy, or otherwise.[59] Furthermore to strengthen this, the Act also requires, again with limited exceptions,[60] payments of compensation grant or allowance shall be paid to the claimant only. There are however two notable exceptions that require further discussion. The first relates to independence allowance. Section 87(3) states:

> "Nothing in subsection (1) of this section shall apply in respect of any independence allowance that is assigned to a company within the meaning of the Life Insurance Act 1908 where that assignment is for a period of not more than five year."

This was placed in the 1992 Act at the eleventh hour to allow claimants to capitalise on their entitlement to independence allowance. However after the two years the 1992 Act has been in operation, no life insurance company has been able to offer a package to claimants.[61] The other exception is section 15 of the 1992 Act. Section 15 leads on to subrogation.

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56 Above n 48 page 47

57 section 43(1) Life Insurance Act 1908

58 Sections 4 and 5 of the Maori Housing Act 1935; Section 87(1)(b), 88(3)(a), 103, 104, 105, 106, 106A, and 106B of the Summary Proceedings Act 1957; Sections 27Y and 71 of the Social Security Act 1964; Section 400 of the Income Tax Act 1976; Sections 105, 110, 118, 121 of the Family Proceedings Act 1980; Section 84F to 84M of the District Courts Act; The Child Support Act 1991 and Any right of the Corporation or exempt employer to recover any amounts under this Act or to make any deductions authorised by this Act from any Compensation, grant, or allowance payable under this Act - section 86(2)

59 section 86

60 Section 80 payment to children, Section 85 payment after death, and Section 87(3) Independence allowance.

61 The reason payment for independence allowance can only be made every quarter in advance. It can not pay the Insurance Company the five years entitlement to Independence in one lump sum. Insurance Company's have not to date, prepared to take the risk that the person will be disabled or alive for the five years.

Subrogation is literally to "stand in the shoes" of an insured and to receive all the benefit of the rights and remedies which the insured may have against a third party in respect a loss.[62] Essentially as Tarr and Kennedy point out the doctrine of subrogation may be regarded as a remedy against unjust enrichment.[63] Put another way, it is used to ensure that the insured does not recover twice in respect of the same loss and therefore may not relate to contingency insurance, such as life insurance or in some cases personal accident insurance.[64]

Turning back to the 1992 Act, as already discussed the scheme is a "no fault" and there is no right to recover from a negligent wrongdoer. Therefore in normal circumstances subrogation does not have relevance to a scheme as there is no ability to sue to mitigate the financial loss of the personal injury. There is however limited subrogation in the 1992 Act where people have a remedy overseas. Where a person has a right to bring proceedings in New Zealand or elsewhere, the Corporation may require that person who has such a right to: -[65]

> "To take all reasonable steps to enforce the right; or
> To assign the right to, and do all other things necessary to enable the right to be enforced by, the Corporation within a reasonable period."

If that person or the Corporation receives money by way of damages, compensation, or settlement of that claim, the Corporation shall:-[66]

> "Deduct from the cost of the treatment, service, rehabilitation, or related transport or from the compensation, grant, or allowance payable, a sum equivalent to the net amount received by way of damages, compensation, or settlement; or
> Recover from the person as a debt due any amount that is in excess of the amount properly paid to the person, having regard to the provisions of this subsection."

Therefore clearly limited subrogation allowable in a no-fault system. These claims generally relate to New Zealanders who have accidents overseas and

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62 Above n 48 page 237
63 Above n 48 page 238
64 As Tarr & Kennedy(Above n 48)point out where personal injury insurance policies are on an indemnity basis may in fact allow subrogation.
65 Section 15(1)(a) and (b)
66 section 15 (3)(a) and (b)

are able to sue a negligent wrongdoer in that Country. Or people who are injured as a result of an overseas product - often in the medical area, Dalkon Shield, breast implants.

Interestingly however nothing in section 15 will apply to any moneys paid in respect of a claim by the inured person under any insurance policy. Which leads on to the next topic - Double insurance.

(vii) Double insurance

As noted in the previous paragraph, payment of compensation under the 1992 Act is paid regardless of whether a person is able to recover under and insurance policy.

Double insurance exists where, at the same time of the loss, there is in existence two legally enforceable policies which cover the same interest. It is those components that are important - that is they must have the same subject matter, the same interest, the same risk and must be in force and legally binding.[67] There is nothing illegal about insuring twice over, but the principle here is that with respect to contracts of indemnity, an insured cannot recover more than the actual loss that he or she has sustained. The insurer who is called upon to pay out can call upon any others to contribute their share of the loss of the amount already paid under the first insurers policy.

This was confirmed in Legal & General Assurance Society Ltd v Drake Insurance[68] where two policies existed for the same risk, one insurance company was called to pay under the policy (the "first insurer"). It did so and then claimed on the second insurer to contribute 50%. The second company argued that as the policy holder had not claimed from them, there was no basis for the first insurer to seek a contribution from them. Rishworth J stated:-[69]

> "If that argument were to prevail it would ride horse and cart through the doctrine of contribution since in cases where contribution is sought, it is obviously going to be the case that the insured has not claimed against the insurer who has not yet paid."

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67 Above n 48 Chapter 12 page 267
68 ([1990] NZ Recent Law 113
69 Above n 68 page 116

The 1992 Act does not recognise the doctrine of contribution. It does not have this type of luxury. As it is statutory bound to provide compensation in defined circumstances, it can not require a private insurer who has insured the same risk, such as income protection or medical insurance, to contribute to the cost.

However the converse true. Many insurance policies require the policy holder to first seek payment from ACC and if this is not done then the policy is voided. For example private surgery. ACC is able to pay for private hospital costs as long as the claimant seeks prior approval. If they do not do this then ACC can not fund the procedure. Private insurers require their policy holders to go through this process with ACC. If they do not do so then the insurer will likewise decline their claim. Essentially the private insurer is using the Corporation to control the acceptance of the private insurers claims in ACC's role as funder of first resort.

(viii) Suicide/Wilfully Self Inflicted

One of the many comparisons between insurance law principles and the 1992 Act is the provision relating to suicide/wilfully self inflicted injury. The principles between the two are very similar.

The fundamental principle of insurance law is that an insured can not recover from a policy were the insured has by his or her own intentional act caused the loss or event upon which the insurance moneys were expressed to be payable. A common provision in accident policies is:[70]

> "This policy does not cover death... resulting from suicide or attempted suicide or intention self-injury, or from deliberate exposure to exceptional danger (except in an attempt to save a human life), or from an insured person's own criminal act, or sustained whilst the insured person is in a state of insanity."

Compare this with section 81 which states:-

> **Wilfully self-inflected personal injuries and suicide** - (1) No compensation shall be payable or provided under this Act in respect of-

[70] Evans "Suicides and Policies; Causing the Risk to Happen Under Insurance Contracts (1990) Vol 21 Australian Business Law Review 410 at page 417

(a) personal injury that a person wilfully inflicts on himself or herself, or, with intent to injury himself or herself, causes to be inflicted upon himself or herself or death resulting therefrom; or

(b) The death of any person where the death was due to suicide.

(2) Nothing in this section shall affect the entitlement of any person where the personal injury or suicide was the result of mental injury conduct of a kind described in section 8(3) of this Act."[71]

Clearly there are two distinctions between this and the insurance law principle - that is dangerous activity and when a claimant is suffering from a mental injury. However the general concepts are very much the same and operate in the same manner.

(ix) Premium

New Zealand's ACC scheme is funded by four main accounts - employers, earners, motor vehicles and government.[72] Every woman, child and man pays into the scheme in some way whether it be directly (earners, motor vehicle registration) or indirectly through government taxation and employers for their employees. Many have the expectation, that as an insurance scheme, if they are injured they will get a return for their "premium". However the calculation of premium does not operate on the same basis as a private insurer. A private insurer has the ability use mortality rates and individual circumstances to strike a premium rate. ACC however strikes a rate based on the incidences of accidents over the whole population and

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[71] Section 8(3) states:-

"Cover under this Act shall also extend to personal injury that is mental or nervous shock suffered by a person as an outcome of any act of any person performed on, with, or in relation to the first person (but not on, with or in relation to any other person, being -

(a) An act that is within the description of any offence listed in the First Schedule to this Act; and

(b) An act that was performed in New Zealand, or outside New Zealand where the person on, with, or in relation to whom the act was performed was ordinarily resident in New Zealand when the act was actually performed (even if the person is ordinarily resident in New Zealand on the date on which the personal injury is deemed to have been suffered)."

Note the First Schedule is attached as Appendix B

[72] There are two other accounts the subsequent injury account which crosses all other accounts and the medical misadventure account which has not and does not look like being utilities. No premium to date has been struck.

every earner pays the same premium, every motor vehicle owner pays the same premium and every employer in one of the 27 industrial classes pays the same premium.[73] The difference is between the Scheme and the private insurance is that premium payers ie All New Zealanders, theoretically at least, protect themselves against negligence claims. Another important difference is that cover under the ARCI Act is not dependant upon the payment of a premium.[74]

IV CONCLUSION

Clearly this last part of the paper was perhaps a snapshot of some basic insurance law principles, but should leave the impression that the 1992 does have much in common with generally accepted insurance law principles. The 1992 Act could eventually translate into a conventional insurance scheme with very little difficulty. The overall difficulty with this and the major difficulty is the unfunded liability the scheme carries. It is this that makes it so unattractive to private insurers. A further difficulty is the comprehensiveness of cover. Many private insurers would like to see the employers and motor vehicle fund divested to private enterprise but see no future in compensating those that are non-earners. For them say the private insurer, there should be a state funded scheme! Nevertheless insurance law principles would not have to move very far to accommodate such a scheme.

Even given the above there is some legitimacy in calling the 1992 scheme a "social insurance" but equally it has some components that are normally seen in our welfare system. Clearly there are some philosophical problems that need to be sorted out before ACC can be pigeoned holed. Currently it seems the scheme is in limbo, trying to be all things to all people. Until this dilemma is discussed and resolved it will be almost impossible to label the scheme or to attempt to ascertain what its focus is.

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[73] The 1992 legislation introduced experience rating for employers. Effectively employers who show a good accident record could expect a "rebate" on the premium already paid. Conversely those that have a poor accident record will get a loading payable in the next financial year.

[74] Although ACC has the ability through its agents IRD to recover unpaid premium there is no question that a person injured either in or by an unregistered motor vehicle will not have cover. Further For example overseas visitors are covered while they are in New Zealand, they do not directly pay any premium although this group may indirectly pay premium when they buy goods and services and petrol.

APPENDIX A
TERMS OF REFERENCE FOR THE MINISTERIAL WORKING PARTY ON THE ACCIDENT COMPENSATION CORPORATION AND INCAPACITY

Policy Goal

The basic goal of the Government is to ensure that, in the event of incapacity, everyone is eligible for an acceptable level of income support and has access to health care services on fair terms.

Objectives

Reforms of the Accident Compensation Corporation and of provisions for incapacity will be directed at re-designing policies and institutions to achieve the following objectives:

(a) to ensure that, in the event of incapacity, everyone has access to an acceptable level of income support and to health care services;

(b) to ensure that the costs of providing income support and health care services in the event of incapacity fall fairly among Government, employers, motorists and individuals;

(c) to recognise the obligations on the Government that flow from the removal of the right to sue for personal injury by accident;

(d) to recognise and foster the responsibility to take care of all those (employers, motorists and individuals) who are in a position to prevent accidents and other causes of incapacity;

(e) to minimise the cost to society of the system of compensation for incapacity. This may require:

i) greater freedom of choice among alternative insurers;

ii) competition between public and private sector insurers;

iii) minimising barriers to competition among insurers and ensuring that they compete on a neutral basis.

Description of the Task

The Working Party will:

A. Identify and investigate options for defining the roles of the Government, motorists, employers, and individuals in the funding of income support and health care costs arising from incapacity. In investigating the options the Working Party will first address itself to these issues:

i) is it desirable that funding for incapacity-related health care costs (ie those resulting from motor vehicle, work and other accidents, and from sickness) be provided through the same mechanism as funding for other health care costs, or are separate funding mechanisms desirable?

ii) what forms of incapacity might be provided for by private insurers, and what forms (if any) are uninsurable and require that the Government establish special schemes to ensure access to income support and health care services?

iii) where insurers might provide cover for income support and health care costs arising from incapacity so that an insurance-based approach is appropriate:

- what should be the required minimum level of coverage against the costs of income support and health care arising from incapacity?
- to what extent could individuals supplement the required minimum coverage?
- how should the required minimum coverage be funded?
- who should be able to act as an insurer and on what terms?

iv) where there is a need for the Government to provide assistance so that a social welfare based approach is appropriate:

what criteria should be used to determine eligibility for income support and assistance with health care costs in the event of incapacity?

what pause-periods should apply before Government-funded assistance is available?

what should be the level of Government funded benefits provided?

to what extent should benefit levels be earnings-related, flat-rate or income-tested?

(The Working Party will receive further instructions from Ministers once these issues are resolved.)

B. Advise the Ministers on the options identified under A above, and recommend a preferred approach.

C Develop an implementation plan for the option that Ministers prefer, specifying:

i) required changes in legislation;

ii) required changes in policy not involving changes in legislation;

iii) mechanisms and institutions for the provision of policy advice, the administration of funding (including the targeting of Government assistance, if appropriate), the regulation of insurers and the provision of insurance services.

The Working Party will coordinate its work with that of the Ministerial Task Force on the Funding and Provision of Health services, the Minister of Social Welfare's reviews of welfare benefits and systems and, as appropriate, the Change Team on Targeting Social Assistance, which will consider targeting across a number of areas.

Responsibility and Reporting Arrangements

The responsibility for the Working Party will lie with the Minister in Charge of the Accident Compensation Corporation and the Minister of Health. The Working Party will report directly to the Ministers.

The Ministers will report on the work of the Working Party to the Prime Ministerial Committee on the Reform of Social Assistance and thence to the Cabinet Strategy Committee. The Prime Ministerial Committee will ensure that the policy review and development activities being undertaken by Government are coordinated and consistent.

Timetable

- Appointment of the Working Party - December 1990
- Preliminary Recommendations to Cabinet Strategy Committee -March 1991
- White Paper released - April 1991
- Consultation - May 1991
- Announcement of decisions - July 1991

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