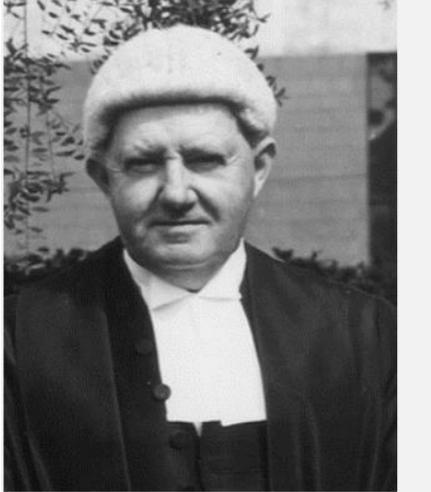


The Sir Owen Woodhouse Memorial Lecture
Susan St John
Reflections on the Woodhouse legacy for the 21st century
16th October 2019 Wellington,
22nd October 2019 Auckland



This lecture commemorates the life of one of our most distinguished judges and citizens, **Sir Owen Woodhouse**. His compassion, generosity of spirit and social conscience were reflected in his work as President of the Court of Appeal, President of the Law Commission, and Chairman of the Royal Commission on Compensation for Injury that recommended a no-fault accident compensation scheme and laid the foundations for ACC. He made an immense contribution to New Zealand's law and society.

Abstract:

The Sir Owen Woodhouse legacy can be described as a 'paradigm shift' in the thinking around compensation for accidents, prevention and rehabilitation. The 1967 report provided a no-fault compensation benchmark blueprint for New Zealand, and the subsequent ACC legislation has been admired if not fully adopted by other countries. Enduringly today, the Woodhouse principles and thinking are influencing the next paradigm shift that is occurring in welfare. The widespread reform needed requires relinquishing 19th century thinking to embrace a modern inclusive wellbeing-focused welfare state fit for the changing roles of women, work, and uncertainty in the 21st century. A paradigm shift is a "...disjunctive process associated with periodic discontinuities in policy" (Hall 1993: 279). It requires the world is viewed in a different way and thus paradigm changes are painful, resisted, and often subject to reversionary changes. Nevertheless, they are the way in which progress is made. The lessons since the ACC scheme began, are that entrenched thinking dies hard and clear guiding principles can be easily lost. The Owen Woodhouse vision that moves us to a unified welfare system requires eternal vigilance, education of policy makers and the public, and a resolve not to slip back into to old habitual thinking.

Introduction

I am hugely honored and delighted to have been asked by the Woodhouse family to deliver the third Woodhouse memorial lecture. The first memorial lecture was Sir Kenneth Keith's, *From this nettle, danger we pluck the flower, safety* (Keith, 2018), and the second Sir Geoffrey Palmer's, *A retrospective on the Woodhouse report: the vision, the performance and the future* (Palmer, 2018). Tonight, I follow with trepidation in the footsteps of these giants.

I am also conscious of the many whose contribution has helped sustain, improve and protect the Woodhouse legacy. I am particularly indebted to Alan Clayton, Richard Gaskins, Don Rennie, Michael Timmins, Richard Madden, Grant Duncan, Brian Easton, Felicity Lam, Hazel Armstrong, Warren Forster to name but a few and all the members of the ACC Futures Coalition that has been set up to promote and protect the Woodhouse principles.

In revisiting the remarkable contribution of Sir Owen, I have been struck by the wealth of analysis and sheer volume of literature that has emerged over the past 50 years. I tried to reread much of it in the last few weeks and it is a bit daunting to think there might still be things to say. I don't pretend to bring legal expertise to tonight's lecture, but I want to reflect on the Woodhouse legacy as an economist, a policy advocate, and a woman in the context of the fraught policy environment of the 21st century that cries out for the next paradigm shift.

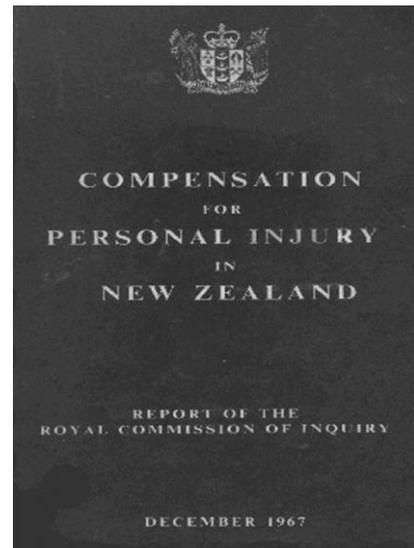
Like many others who work in public policy I am greatly indebted to the Woodhouse vision. He provided the gold standard of how-to-do good policy work. There have been many occasions when I have been honored to be part of events that have examined his path-breaking work in light of current developments.



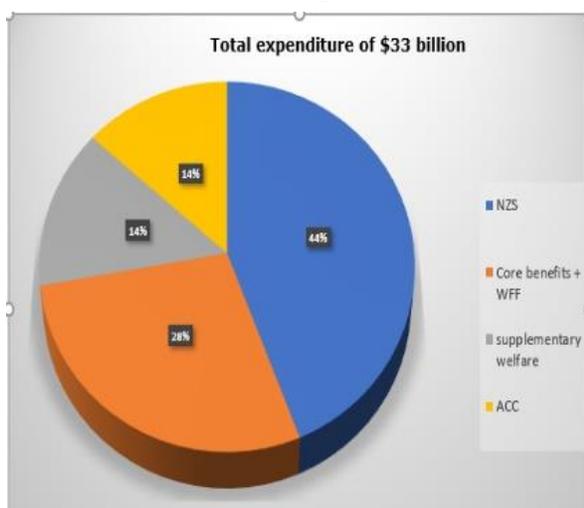
This one was my favorite- the very happy celebration (with cake) of the 40 years anniversary of the publication of the 1967 report. I like this photo- we all look so young!

For that occasion, the University of Auckland digitalized and reprinted the entire 1967 report. At that event, now retired Supreme Court Judge Sir Ted Thomas recalled these words from a speech he made in 1969.

*“This beautifully crafted Report is the work of a man with a deep-rooted social conscience fully aware of the needs and aspirations of the **common man and woman** (importantly). His Report reflects his vision of a more humane, harmonious and responsible society. As such, it represents the most far-reaching exhortation to the community to engage significantly with those **who are less fortunate** since the enactment of the Social Security Act in 1938.*



52 years ago, Owen Woodhouse offered a paradigm leap that went well beyond the Royal Commission’s narrow terms of reference he had been given. In doing so he wanted to create a scheme for mitigating the inequality and injustice inherent in free market insurance arrangements. Tonight, in that light, I will examine NZ’s three major social programmes: ACC, , New Zealand Superannuation (NZS), welfare including Working for Families. While they each have **as their fundamental reason for being** the improved justice and equality for the less fortunate, they form a highly incoherent system of income maintenance.



The chart compares the expenditure on each programme to show the relative size. We can see the dominance of NZ Super that grows in size by nearly \$1 billion a year with little scrutiny¹. It is painfully clear that the welfare system of benefits is no longer fit for purpose. As Sir Geoffrey’s lecture last year so clearly explained the different treatment of people who have

¹ ACC includes treatment and rehabilitation spending. Supplementary welfare is made up assorted subsidies and means tested top-ups.

equal need, but their disability has different causes has become utterly intolerable (Palmer,2019).

Social disintegration, rapidly rising inequality, homelessness, child poverty, return of third world diseases and injustice has not yet produced a sense of urgency or an irresistible social pressure for the next paradigm shift. I argue tonight that our systems of income maintenance can be made more coherent and humane, if we have the courage to look at the three systems as a whole, and reinterpret the Owen Woodhouse principles for the 21st century.

Paradigm shifts

Paradigm shifts are light bulb moments: the earth is not flat; the sun does not go around the earth. A mind once expanded by the new conceptual thinking cannot return to its previous contracted unconscious state. So it was with the paradigm shift that Woodhouse demanded.

All the more remarkable, this came not from some leftwing lunatic socialists, but came with support of the legal profession, many of whom would be severely disadvantaged by the abolition of the right to sue.

Pre ACC “The Forensic Lottery”

- **Workers compensation.** Very limited no fault earnings-related payments.
If fault proven claimant may or not hit the jackpot.
- **Non-work accidents:** compensation only if fault proven under common law.
- Backstop of miserable welfare benefits.

Sir Owen challenged the old fault and insurance-based paradigm. The “forensic lottery” of the former arrangements does not need labouring for this audience tonight. In essence, the common law could award compensation but only for proven fault and even that could be lessened for

contributory negligence. While there was no fault compensation for work accidents, it was very limited. A subsistence welfare benefit awaited those who fell outside these parameters.

The famous Woodhouse principles for the paradigm shift were truly radical. *Community responsibility* not individual responsibility was key. *Comprehensive entitlement* meant coverage of all accidents, even to ‘housewives’. *Complete rehabilitation* and *Real compensation* were

generous concepts. And above all *Administrative efficiency* meant they it could be provided simply and at no greater cost than the previous inequitable arrangements.

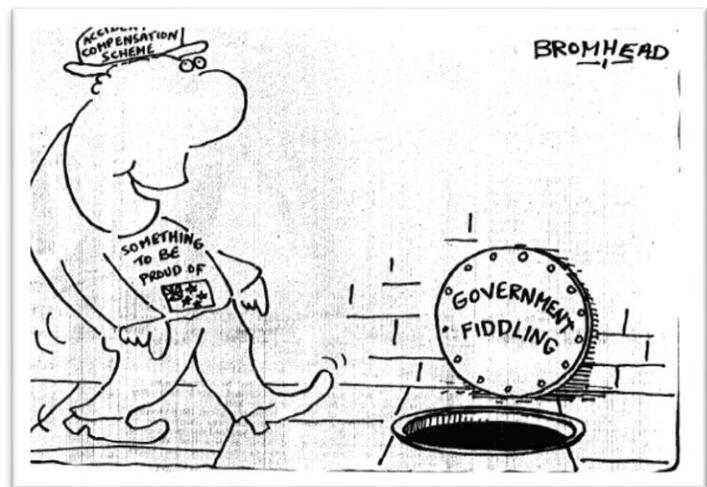
But there was much opposition: not all in legal circles were pleased, nor was the insurance industry and even trade unions saw merit in being able to sue bad employers. The average person probably had little inkling of how bad the common law arrangements actually were, and not all were willing to have their minds expanded by the radical Woodhouse vision.

The full paradigm shift required that It should not matter if the accident was work-related; if the injured was employed; whose fault it was; when or where it happened. He argued that private insurance principles should be replaced by inclusive and expansive *social insurance principles- this was the paradigm shift:*

- A state compulsory social contract;
- Flat rate levies because all economic activity is interrelated;
- Compensation separated from prevention, timely and adequate;
- No actuarial-based funding required; some reserves held for prudence as the scheme built up.

Paradigm shifts can be painful; they require the world to be viewed in a different way. When thinking is reactionary and highly entrenched, especially when there are economists around, backsliding is inevitable. Even at first, some of the insurance trappings of the old Workers Compensation thinking were just too powerful to be relinquished and were carried over to the new legislation. Then in the 1980s and 1990 a neoliberal market economics paradigm took hold within New Zealand.

The Bromhead cartoon captured the zeitgeist of the period. Coming under this new and extreme thinking, ACC was to be transformed into a “fairer” scheme, emphasising *individual responsibility, choice, private insurance, reduced role for the state*



and the primacy of paid work as the goal.

The powerful resistance to the Woodhouse paradigm shift was amplified in numerous attempts to reform ACC to reflect private insurance principles and conform with the imposed economics paradigm.

Onslaughts to the new paradigm

- Language
- Corporate structure
- Differential levies based on risk
- Experience rating
- Full funding

9

The language was changed with the insertion of the term insurance into the name of the Act; levies were even renamed premiums at one point. The Commission became a Corporation with a board focusing on cost minimisation. Various amendments reduced coverage and tightened the fine print insurance contractual approach where recourse to the courts was the way to challenge ACC

decisions. Experience rating to modify risk-related levies by rewarding the good and punishing the bad employers was supposed to provide a safety incentive. By 1998 the scheme was set up for privatization of the work account based on the economist's blind belief in the value of having competing insurance providers.

ACC- my experience

I want to take this opportunity to here to insert my own experience of the Woodhouse vision as a young academic and acknowledge my personal debt to Sir Owen. Back in the 1970s I had returned to the university for a degree in economics, while I raised our small children.

I found the constraints of traditional economics almost unbearable with its growing free market bias, and I became interested in the concepts of the social wage, and in social insurance. I must have seemed a bit of an oddity to Sir Owen Woodhouse, as a young, pregnant, female economist, but he was extremely helpful and encouraging. During the late 1970s we had many in depth discussions about ACC, especially the role of the cumbersome differential levy system whereby different industries or groupings had different levies that were supposed to reflect the risk. Carrying that levy system over from the old workers compensation had clearly undermined his

insight of the high interdependence we have in the modern world and the need to share the risks involved in the activities that allow our high standard of living.



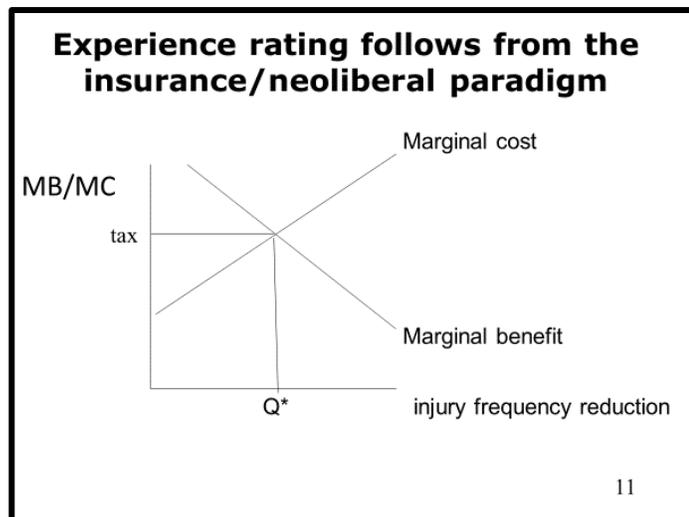
Back then, I was married to a GP who practiced occupational medicine and serviced Westfield and Southdown Freezing works. ACC had just been introduced with fascinating implications in that high profile, high-accident risk

industry. I decided to examine the role of levies in accident prevention and the modifications of those levies by rebates and penalties, using the freezing works as a case study. My reasoning was that if experience rating was going to work anywhere it would work in that industry.

To fulfil the requirements of an economics degree it was necessary to have some underpinning statistical basis and very fortunately for me, there was comprehensive accident data for 36 companies published in the 1977 Nordmeyer report on freezing works.

In many industries, accidents are rare events and long periods are required to track any one company's performance. In this industry they were very frequent events so I thought it should be possible to identify the companies whose records were worse or better than the average.

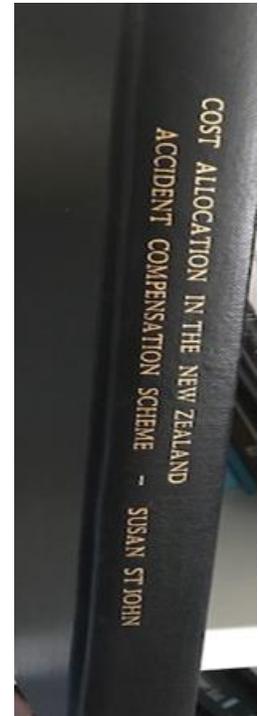
Welfare economics and cost benefit analysis were dominant frameworks. There seemed to be lessons from environmental economics where diagrams (pretty pictures beloved of economists) show that by taxing units of pollution you *internalize the externality* and bring about an *optimal* level of pollution reduction. Not zero



pollution, but only to the point where the cost of reducing pollution by another unit is finely balanced against the benefits of doing so. By analogy, was there an optimal level of accidents and could experience-rating bring it about?

I devised a method of comparing these companies in a statistically valid way. Given accidents are random, the industry would have an expected range of numbers of accidents. If a firm accident frequency was outside the norm, could a rebate/penalty approach incentivise optimal prevention? I assumed that the overall starting levy was correct for this industry (which was unlikely) and asked what kinds of rebate or penalty should apply to each of these companies based on their experience. I came up with some highly contradictory results depending on how accident experience was defined. My fourth child was born at the end of 1977. A few months later I handed my tediously long Master's thesis, pretentiously titled "Cost allocation in the ACC scheme." It felt like I had delivered a fifth child.

But where was the logic in the levies? What I did learn was that the system of levies based on an industry's risk that had been imported from the old Workers Compensation scheme were highly questionable, and that trying to make adjustments



While the Government continues to review the Accident Compensation Act, Auckland economist Susan St John asks...

WHERE'S THE LOGIC IN THE LEVIES?



Are policemen at a rate of 75c per \$100 of w...

Contradictory results dependent on which measure of accident frequency used.

Were these companies comparable?

Was experience rating more about wrong classification?

15

for good and bad accident experience was a real dead end to go down if you cared about safety or even just about equity or accuracy.

The light bulb moment for me was realizing that even if nirvana of $MB=MC$ can be reached in theory, there is actually a huge and unforgivable sleight of hand.

The costs that are internalized are not the true cost of accidents but only the costs that happen

to be there in a particular system of compensation. For example, the costs of a fatal accident can be minimal in this system, simply because there is no way of compensating a dead person apart from his/her dependents. I acknowledge my debt to the perceptive insights of Richard Gaskins who has been a strident critic of the welfare economics approach in ACC and how it focuses on a minimisation of accident prevention costs rather than the needs of the injured and society.

He saw so clearly how the no fault approach to accidents in the US was snuffed out by the rise of the seemingly scientific economic paradigm of market-based solutions to social problems:

“Welfare economics colonised public policy debates in America during the 1960s for many reasons. One major cause was the professional commitment to impartial scientific inquiry at leading universities. Welfare economics brought nothing in the way of empirical data, but it offered its champions the mantle of objectivity... [They] used these analytical tools to insulate their policy prescriptions from standard partisan attack.” (Gaskins, 2003, p. 222)

The more I thought about it the sillier the concept of differential levies and experience rating became. A poorly managed construction site that result in injuries to passing pedestrians do not have those costs attributed to them as work accidents. A fire at the site caused by inattention to safety protocol might result in few actual injuries to the onsite workers, but cause hugely expensive property damage, and injuries and ongoing health issues for the firemen who are not part of the construction industry. Unsafe gym equipment may injure members not employees. These and many other realities make the allocation of cost of work accidents to the firm that employs workers a nonsense, and increasingly so in a world of intersecting work environments, and where there is a growing fudging of work and non-work space.

The 1980s bonus scheme

- Timid experiment November 1980
- \$1 million paid in bonuses
- flat 12.5% work levy rebate
- Statistical basis was ACC claims record for 1 April 1976- 31 March1979.
- Reward was well-divorced from experience.
- Air New Zealand rewarded in spite of the worst aviation disaster in New Zealand’s history in November 1979

Any rebate or penalty has to relate to evidence collected over several years to build a picture of accidents. I was disgusted to see that shortly after finishing my thesis, the government of the day did proceed with a system of rebates and

penalties. **In 1980, Air NZ received a bonus, despite experiencing the worst aviation accident in NZ history in 1979 (St John, 1981).**

We still have a hugely complex and finely grained set of different levies for different industrial groupings. The different industrial classification units (536) and sub risk groups 130 are set out in a daunting 132 pages of levy tables. Of course, individuals who also pay an ACC levy- for non-work activities currently pay only a flat rate of 1.21% regardless of whether they engage in risky activities or not.

The graphic is titled "ACC Levy Guidebook" in a blue header. Below the header, it states "536 classification units" and "130 risk groups". To the left is a circular icon of a person in a red cap and white shirt, labeled "SAM'S PAINTING". To the right of this icon, text reads: "The ACC Classification Unit for Sam's business is 42440 Painting and decorating services." Below this, it says "For example, in Sam's group you will find: Plastering and ceiling services". A central diagram shows four trucks arranged in a circle, each with a different color and label: a yellow truck labeled "SAM'S PAINTING" (CU:42440), a yellow truck labeled "PETE'S PLASTERING" (CU:42412), a red truck labeled "TONY'S TILES" (CU:42430), and a blue truck labeled "GRAHAM'S GLAZING" (CU:42450). The number "17" is in the bottom right corner of the graphic.

I was horrified to see the idea of experience rating resuscitated in 2011. If small rebates and penalties are applied they aren't worth worrying about, if they are significant- say up to 50% rebate or 100% penalty as was proposed, they just incentivise the limiting of claims, passing off work injuries as non-work, getting people back to work too quickly. They perpetrate complexity by needing to have fully funded accounts that separate **work accidents to earners**, from **non-work accidents to earners**, from **non-work accidents to non-earners**. With AUT researchers I examined the proposals to implement experience rating and found them to be complex, incomprehensible and unworkable.

In the meantime, the country experienced three major disasters –the Pike River Mine Disaster, the Christchurch earthquakes, and the underground explosion in Watercare Services pipeline, all with serious loss of life and injury- not just to employees. We concluded

*"It would be a tragedy for New Zealand to rely on such complex schemes to improve safety while downplaying or ignoring more obvious ways of achieving that end."
(Lamm, McDonnell, & St John, 2012)*

It is fair to say ACC has struggled to do experience rating well. Yet astonishingly, we learn from the website that rebates and penalties are again promised for 2022. The true tragedy is that this approach is unchallenged and takes us ever further away from the principles of Woodhouse- it further contaminates ACC with insurance type thinking, introduces enormous complexity, opens

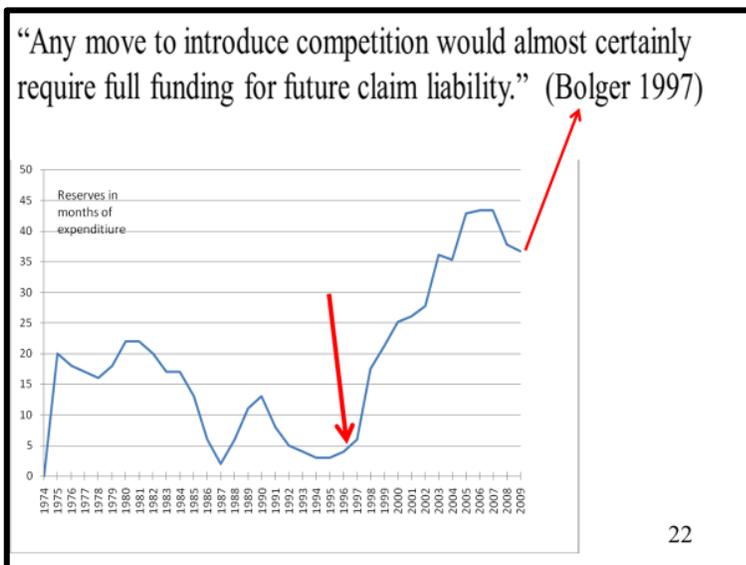
up further litigation, impedes further progress to accepting more gradual process injury, occupational disease and mental illness cases as befits our new understandings, and sadly diverts the eye from other ways to address safety.

Let's leave the last word on this with Sir Owen:

"... from the outset, on the income side of the ledger the whole emphasis was left unchanged. As previously, the cause or location of the accident was made to decide everything. Adopted as a hangover from the days of private insurance, individual trades and businesses have been charged unevenly. Each must meet the estimated cost of injuries expected to occur within its own area of operation. It is self-evident that these decisions - to collect income based on cause, on who should be held responsible for accidents - have resulted in much subsequent contention about costs and benefits."
(Woodhouse, 2003)

Funding

Just as experience rating and differential levies hold back ACC from achieving the Woodhouse vision so does the insistence on full funding. The beauty of social insurance is that it releases us from the straightjacket of private insurance. While private insurance needs to hold enough reserves to meet all the current obligations in case it goes out of business, full funding has never been necessary for social schemes like ACC although a build-up of reserves in the early years provided a useful buffer. The power of the neoliberal economic paradigm tricked politicians both left and right into thinking the same must apply for ACC.



At various times in the last 30 years I have been involved in numerous debates over funding. Here I measure reserves in terms of the number of months expenditure held in the fund have fluctuated markedly depending on the prevailing power of the market paradigm (St John, 2010).

In 1997 PM Jim Bolger said that full funding was necessary for the next step which was privatisation of the work account and

introduction of competing insurance companies. Levies increased dramatically and privatisation occurred in 1998. Sadly, even though Labour won the 1999 election and abolished the privatisation experiment, full funding has been the goal of both political parties.

Today the ACC fund is now awash with riches and at around \$42 billion, or over 100 months it is off the scale. Like Scrooge in the treasure trove, funding has become a well-paid career path for many, and an end in itself.

Recently there have been absurd claims that somehow ACC is running a deficit and levies will have to increase—simply because the discount rate has fallen, and this has increased the actuarial calculation of the outstanding liabilities. One wonders how increased levies will gel with the proposed rebates and penalties.

Now the curious implications of plenty of money.... but never enough

ECONOMY

ACC levies likely to rise as fund hits deficit

Although ACC ran a \$570 million operating surplus this year, the future is murky as interest rates push its liability to \$53 billion, leaving a record-high accounting deficit. Marc Daalder reports.

25

"[Actuarial projections] as a scientific exercise almost as pointless as the debate in mediaeval scholasticisms as to the number of angels that can dance on the end of a pin."

Alan Clayton, 2003

We have failed to appreciate that social insurance allows us to escape the straightjacket of the fine print of private insurance. The adherence to old thinking: risk-related levies, the notion of full actuarial funding, restricted and complex exclusions, a corporate model

of administration, an emphasis on cost limitation, has inhibited the evolution of ACC that the Owen Woodhouse vision of social insurance invited.

Sadly, the hope of Sir Owen that wasteful and adversarial court action would disappear has not been realized. He did not want the cause of the disability to determine the response of the state. But over time the boundary war between events that qualify as accidents under ACC definition and those that don't has intensified. Coverage is extended and then contracted by amendments to the Act that reflect the power of the neoliberal paradigm at the time. For example, 2010 amendments reversed the decision to cover suicide raising yet more boundary issues and seeming inequities: what is suicide and what is accidental death? Desperate people denied coverage may ask for a review of ACC decisions that are made by the private company Fairway.

ACC aggressively defend cases taken through the courts and have all the resources behind them. Once again, we have a forensic lottery: those less fortunate are not at the heart of the system.

Let me give just one example, from my friends who run a dental practice. The regulations around what is covered are horrendously complex- apparently breaking a tooth by biting on something hard is not an accident. Nor is an implant offered when there are other missing teeth: How that improves social equity when poor

Has ACC lost its way?

The client must have a continuous maxillary and mandibular dentition, with no other un-filled edentulous spaces from first molar to first molar (an existing fixed bridge; missing 7's and 8's; teeth extracted as part of comprehensive orthodontic treatment; or congenitally missing teeth are acceptable). If the client does have a pre-existing edentulous space but the rest of their mouth meets this criterion, they can choose to have an implant before seeking an ACC-funded implant. Please note that ACC will only consider funding an implant for a 7s if all other second molars are present and in good condition.

The review process is stacked against the individual ACC usually wins.

27

people are the ones who have poor dental health is hard to fathom.

ACC or welfare? It really, really matters
Annual net maximums

rate	ACC	NZS	SLP	JS
up to				
single living alone	78,000	21,380	14,232	11,387
single sharing	78,000	19,735	14,232	11,387
married person	78,000	16,446	11,860	9,488
married person	100%	21%	15%	12%

28

Just looking at the income maintenance side, because of the miserable nature of the welfare system, it really matters if an event was an accident or not. Or if a gradual process claim fails to be identified with a work injury or disease. Take the example of young high powered highly paid male executive on his lime green scooter

on the way to work. He collides with a 60 year old woman on her way to her highly valuable unpaid work taking care of grandchildren. She ends up on the supported living payment at about 15% of what he gets. But worse, she gets less than that, or even nothing, if her husband is earning. Earnings-related compensation is based on an out-moded idea that a person's paid work reflects the value they contribute.

As ACC has got mired in complexity, few questions are raised about the privileging of work injuries or disease, of accidents to earners, or the insensitivity to the biases that affect Maori, Pasifika, women and other marginalised groups, the conflation of return to work with rehabilitation. There is very little appreciation of PTSD and perversely limited coverage for mental injury.

And what of unconscious bias in ACC?

- Privileging of paid work as measure of value
- Privileging of injuries to earners
- 1960s view of women's work

If ACC had evolved as social insurance instead of dressed up private insurance, inclusion to reflect new thinking about these things might have occurred.

29

In 1967 Sir Owen Woodhouse acknowledged the work that 'housewives' did in supporting productive activity *of others*. That was indeed a big step forward for that era. He even proposed a periodic payment in lieu of earnings-related compensation.

But women were described as *enabling the productive work of others* and therefore worthy of support. Times have moved on. It is of interest to me that the most productive work and often the most dangerous, is the work of procreation- work done by women. Some of the traumas of birth are never healed and can vastly affect women in a gradual process as they age. Many of these women are struggling to get treatment in Aotearoa NZ in 2019. If ACC had evolved as social insurance instead of dressed up private insurance, inclusion to reflect new thinking about these things might have occurred.

I have been pondering the contribution of the Owen Woodhouse legacy for the next paradigm shift. I think he would welcome a re-interpretation the principles for the modern world:

As one grows older it is wise to realize that the continuing value of earlier ideas is best assessed by those who will continue to be affected by them. after a time, patch and repair, however well-intentioned, is likely to obscure the wider needs, together with the principled base which should support them. In relation to benefits, for example, there is the situation of the hardworking housewife who is injured at home or on the highway or indeed anywhere else. In terms of principle, has her entitlement kept pace with that of her hardworking partner who is injured at his place of work, or indeed anywhere else? (Woodhouse, 2003)

The Owen Woodhouse vision of the well-being of anyone injured regardless of circumstances has been replaced by a legalistic, mean-spirited corporate and regulatory approach that seeks above all to save costs and that has elevated a return to paid work above the long-term wellbeing of claimants. I argue tonight this is symptomatic of a deeper malaise—a paralysis of policy making that has seen the judicial system increasingly asked to solve social problems that it is largely incapable of solving. The paradigm shift that is needed today requires the removal of these impediments.

NZ Super

Let's briefly examine the other major paradigm shift in the 1970s that has proved remarkably durable and largely immune from attacks from neoliberal economic thinking. The genesis of National Super was not some well thought out highly crafted report that had at the heart the well-being of people-as was the OW report. Let's face it- Muldoon wanted to be elected. I am grateful to Sir Geoffrey Palmer in his edited book "The Welfare State Today" for setting out the history (Palmer, 1977). If the problem was identified by National at all it was in terms of the needs of these older persons who were suffering hardship as the superannuation payment was so low. I am also old enough to remember the poverty of old people and the sadness of some neighbours who subsisted on the low-level universal superannuation. Labour's competing 1974 funded compulsory savings scheme was only for future retirees: the poorer old people of the day were ignored.

Using the lens of paradigm shifts, a livable superannuation was to be provided universally from the public purse, not through individuals saving for themselves. The NZ Super compulsory personal savings scheme was abolished as we got our contributions back.

Using the criteria of the Woodhouse report, NZ Super ticks all the boxes:

The Superannuation paradigm shift

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



Community responsibility: just as the aim of the ACC was the prevention of accidents and share the costs when they occurred, National Super was to prevent poverty and share the costs of old age. It was markedly successful- overnight, poverty of old people dropped away as of concern.

Comprehensive entitlement: -Even women who may not have been in paid work were recognised in their own right—not as appendages of their husbands. We don't realise how radical all this is until we look internationally. Ireland for example has not been able to make this leap and many women do not get full pensions in their own right. There is: no previous contributions required; no fault assigned; no arguments that you should have taken better care or saved for yourself; no penalty for marriage from a welfare type joint income test.

Complete rehabilitation: Health often improves with security of a wage linked pension. NZ Super ensures full participation and belonging for all in old age while allowing choices to continue paid work. There is **Real compensation** for the risk of longevity. The pension if it had to be purchased with a capital sum at age 65 would have been well beyond the means of virtually all older people.

Administrative efficiency: NZ Super is VERY simple, probably the simplest state pension system in the developed world and far cheaper to run than private sector savings schemes. There is: no discounts for good behavior; no penalty for living too long; no division into deserving and undeserving; no corporation needed to administer it, no actuarial- based funding thinking,

Like the original ACC idea, NZ Super is extreme, and seemed too good to be true. However, while it suffered some political setbacks, the new paradigm was quickly embedded and popular with everyone, except economists. The first full on assault came in 1991 when the dominant free-market economic paradigm was at its most virulent. We may forget, but the 1991 budget legislation passed on budget night was to have made NZ Super a welfare benefit with a joint income test for couples. The intent was to encourage people to save privately and make it clear that it was welfare only for the poor. The outrage at this visionless attack and political power of the superannuitants got this legislation reversed. An ACCORD in 1993 of multiparty support produced peace in our time. Compromise between those who saw it only for the poor and those who wanted it fully universal was reached, in the form of the surcharge on a person's other income that essentially clawed back only from high income people.

NZS expenditure is very high compared to other parts of the welfare system absorbing one half of welfare spending but no-one much notices and increases each year are built in to accommodate wage growth and increased numbers without the need to justify or debate the extra spending.

It is hard to fault NZ Super but the wasteful generosity to the well-off is questionable as is the use of marital status and living arrangements as a basis for paying different amounts. Such is the power of the paradigm shift that it is very difficult to even raise options for modest cost containment by tweaking the tax system as the Retirement Policy and Research Centre has done this month without a deluge of outrage and misinterpretation (St John & Dale, 2019).

Unlike ACC, there have been few definitional problems that would necessitate judicial appeal. I am aware of only one problem that has been the subject of major unresolved court dispute. This case highlights my contention tonight that we are not good at resolving issues of equity in the courts even when they are glaring inequities.

Spousal deduction for those married to people with overseas pensions

[Nelson retiree takes overseas pension case to Human Rights Review Tribunal](#)



- Years of protest
- 2015 Labour agrees it is a human rights abuse
- \$2m pa to fix
- April 2018 Three superannuitants take a case to HRRT
- October 2019.. expect to wait another two years? ³¹

This is the spousal provision whereby, someone, usually a woman, who may have lived all her life in NZ, finds at age 65 that she is not entitled to a full NZS and in some cases no NZS, because of her husband's overseas pension. It has remained unresolved despite 10-15 years of lobbying and is an obvious inequity. This illustrates nicely

too, that setting out the unassailable logic of an inequity is not enough to get action. Groups like Retirement Policy Research Centre and the Retirement Commissioner have complained about this outright discrimination in the public arena for the past decade. In sheer desperation as a last resort, at huge personal cost three superannuitants achieved a long and expensive hearing in the

Human Rights Review Tribunal. Sitting through the obtuse arguments used by MSD and Crown law to justify the clearly unjustifiable was a dismal experience. They are still waiting after 18 months for a decision.

Set against the multitude of extenuated litigation cases in ACC, this case may seem trivial, but it illustrates the system's inertia and the entrenched attitudes to the assumed dependency of married or defacto women. Privately the politicians agree. In 2015 Jacinda Ardern denounced it in parliament as a human rights violation. Government eventually promised to fix it in the budget last year as the provision needed "modernisation" and the system should be moved towards "individualization". But, not until next year and now apparently only if they get the legislation passed in time. Sadly, many have died while waiting for this small inexpensive policy tweak that would have made all the difference to their lives. There has been no talk of backpay or compensation when it is finally resolved. Justice delayed is justice denied.

The Welfare system

The welfare paradigm

*The inspiration for the **Social Security Act 1938** was the determination to end poverty in New Zealand. -MSD website*



Social Security Act 1964

“An Act to provide for ...Superannuation Benefits and of other Benefits designed to **safeguard** the People of New Zealand from Disabilities arising from Age, Sickness, Widowhood, Orphanhood, Unemployment, or other Exceptional Conditions; . . . and, further to provide such other Benefits as may be necessary to **maintain** and **promote the Health and General Welfare of the Community** 32

The Michael Joseph Savage visionary 1938 act did not survive the onslaught of neoliberal economics. From 1991 the intent was to change hearts and minds with a new paradigm called Welfare that Works.

The 1991 budget introduced: **Benefit cuts**, User pays/low tax, Welfare confined to the poor by tightly targeted assistance only for

those in "genuine need"

The problems intensified when the purpose and principles of the Act were amended in 2007 to enshrine the role of paid work. This amendment under the then Labour government mentions paid work 9 times:

Purpose and principles of the Social Security Act (2007)

- to help people to support themselves and their dependents while not in **paid employment**;
- to help people to find or retain **paid employment**;
- to help people for whom **work** may not currently be appropriate because of sickness, injury, disability, or caring responsibilities, to support themselves and their dependents.
- Work in paid employment offers **the best opportunity for people to achieve social and economic well-being**;
- the priority for people of working age should be to find and retain **work**;
- people for whom **work** may not currently be an appropriate outcome should be assisted to plan for **work** in the future and develop employment-focused skills; and
- people for whom **work** is not appropriate should be supported in accordance with this Act.

The purposes were to:

- to enable in certain circumstances the provision of financial support to people to **help alleviate hardship**;
- to ensure that the financial support takes into account— **that where appropriate they should use the resources available to them before seeking financial support under this Act**;
- to impose **administrative** and, where appropriate, **work-related requirements** on people seeking or receiving financial support under this Act.

2008-2017 No holds barred reforms

- Relentless focus on work
- Work work work- any work so long as paid
- Tighter and tighter targeting of assistance
- Sanctions for non compliance
 - Poverty as a weapon
- **Ugly culture in WINZ**
 - **Power to decide what is a relationship**
 - **To decide what is income**
 - **Appeals process stacked in MSD's favour**
 - **Benefit fraud and disputed overpayments conflated**
 - **Incarceration of women with children**

37

The amendment paved the way for an attack not on poverty, but on welfare recipients. It is painfully clear that the welfare system of benefits is no longer fit for purpose.

The indicators of social distress are all around us and I am not going to take time tonight to outline the breadth of this

disaster. It is there for all to read in the Whakamana Tangata report.

The \$2m Welfare Expert Advisory Group report that argued for a paradigm shift- a change to the principles and purposes of the Act was the first step. They claimed the system is broken and needs \$5.2 billion more per year. Worryingly I have met few people who know anything about this report that so far has been buried.

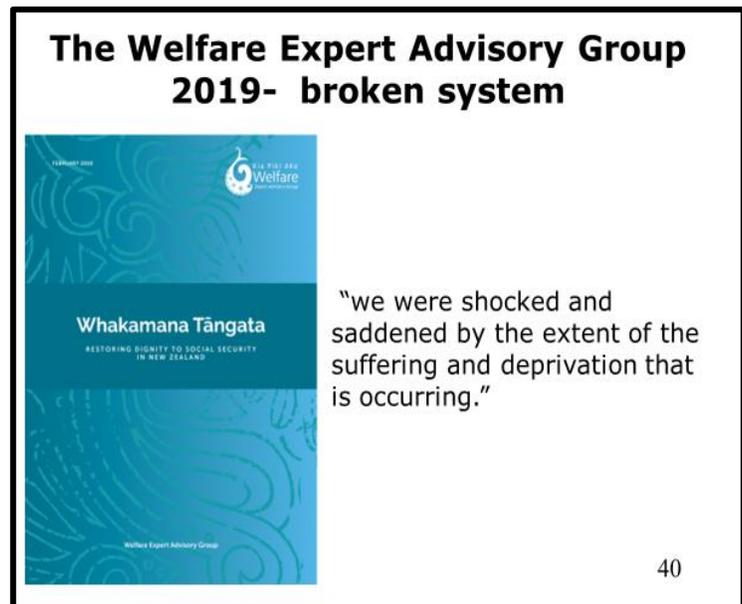
The welfare system fails the 5 principles of Woodhouse miserably. It no longer prevents poverty, it creates and entrenches it. The idea of full participation and belonging for all is a

pipe dream. People are urged to get a job, any job. Paid work is prioritised over work of any other kind no matter how socially destructive. A climate of fear and 'othering' of beneficiaries has been created. Work has been the only answer to poverty.

The relationship basis of welfare payments is in desperate need of modernisation. Women don't get benefits if their husbands earn too much and the couple rate of benefit is miserably low. Marital status as determined by WINZ, penalises sole parents who try to re-partner. Children's tax credits based on notions of the deserving and undeserving so the poorest families don't get the full package of family assistance to alleviate their poverty.

Benefits are well below average wages creating the need for a vast expansion of means-tested top ups and pressures on private charities and foodbanks. Data show that beneficiaries owe \$1.6 billion of debt for so called overpayments and fraud and recoverable loans burden already vulnerable people who may also borrow from loan sharks to stay afloat. There are no discounts for good behaviour, but damaging sanctions of so-called bad behavior. The system is highly complex and expensive to administer and police.

Individuals arguing their case for justice have been caught up in Kafkaesque-like experiences where unresponsive officials impose anachronistic rules and laws made for a different time and



era. For those who don't cave in at this point, there may be appeals to the Benefit Review Committee, the Social Security Appeals Authority, and then the daunting prospect of higher courts. Some disappear for years in the labyrinth of the Office of Human Rights Proceedings (OHRP) and the Human Rights Review tribunal (HRRT). While getting to a hearing in the HRRT can take years, after the hearing an actual decision can take many more years and even then, a finding of unlawful discrimination does not bind the Crown to reform the laws.

As the years drag by, the people affected lose their faith in truthfulness and rationality. They see their savings run down and with the unrelenting fight, they become sick and too often, may die without any resolution. Like the irrationality of the worst Kafka play, the state can willfully withhold for years, even decades, the power to correct the things that are obviously and incontrovertibly wrong. That can't be good for democracy.

Over the years I have followed or been involved with many such cases where issues have been unresolved for decades. The spousal provision already discussed tonight was one example.

Can children look to the law to protect them?



CHILD POVERTY ACTION GROUP

UNCROC ratified 1993

Children have specific human rights that recognise their special need for protection.

1. Provision rights include **the right to an adequate standard of living, free education, adequate health resources, and legal and social services**

41

Another is the CPAG legal case against discrimination in Working for Families. It was in desperation after trying all other rational means to get the policy changed that CPAG went to court ably represented, first by Cathy Rogers and Jenny Ryan, and then Frances Joychild QC. The case was heard in the HRRT in 2008 after 6 years of fighting just to

establish the right to take the case. After appeal In the High Court the judge found the policy to be discriminatory but let the government off the hook with weak arguments about justification. After various appeals, an inadequate ruling from the Court of Appeal, saw CPAG take the issue into the court of public opinion rather than continue the expensive battle with the same narrow

legal setting up to the Supreme Court. By 2019, the discrimination had cost the worst-off families in New Zealand an accumulated sum approaching \$8-10 billion. Is it surprising that child poverty is so entrenched? Ultimately the removal of this discrimination is inevitable, because it is clear that this will provide a very cost-effective way to help meet Government's child poverty reduction targets, but the harm to children of years of neglect by politicians cannot be readily forgiven.

And then there was Ms F who was investigated after an ex-partner vindictively doxed her in, alleging she was not declaring income. I was pleased to see this case referred to by Sir Geoffrey in his lecture last year. This entailed an eight-year battle in the courts for her to establish the patently obvious, that loans are not income and she should not have a




Ms F case
"Loans treated as income"



- 2005- doxed in by vindictive ex partner
- 2008 \$120,000 to repay
- 8+ years fighting in the courts
- High Court 2017
- 2018 Decision
- 2019 partial resolution

42

\$127,000 debt. This landmark case taken for Ms F by Frances Joychild has not resulted in a wide investigation of injustices for other beneficiaries who have been treated similarly, or any assurance that the state is even interested in clarifying the legislation. Nor has the nasty practice of encouraging dobbing in, especially when by ex-partners been denounced. So much for our

system of improving policies.

Tribunal declares MSD's ACC law discriminatory

4 Feb, 2019 4:12pm

© 4 minutes to read



- Accident 2002 while a sole parent working part time
- 2010 accepted claim
- She only received \$576 of her ACC \$89,000 for eight years work.
- 2018 HRRT declaration of discrimination. MSD did not appeal
- What next?

43

Then there is the case of Maree, a parent on her own with two young children, further illustrates the neo-liberal obfuscation, and the impotency of legal processes to get better policy. She had few resources and had been supplementing her benefit with a small part-time job. She had an accident in

2000 that forced her to stop work completely in 2002. That meant she should have been entitled to some earnings-related compensation. After a long 8 years battle with ACC, she was awarded a gross amount of \$89,000 in backdated weekly compensation, which after being treated as income and her benefit abated should have given her \$40,000 or \$5,000 for each of these 8 years. Except that she wasn't given this at all, but only a token \$576 or just over a \$72 for each year, as her ACC was deducted dollar for dollar from her benefit because of a wrongheaded principle that says you can't have benefits from both Work and Income and ACC.

It took five years for Maree's appeal to be heard in the HRRT. The decision, finally delivered recently, is a declaration that this is indeed unlawful discrimination. But after nearly two decades since the accident, in 2019 she will still get nothing because: "But the government department can't stop enforcing the law until the wording of the Social Security Act is changed." At least the Government conceded the case avoiding further court appeals but in the meantime her dollar for dollar abatement has "caused years of severe financial strain for her and her family." It must be little consolation to Maree to hear Greg Robins, a senior solicitor at the Office of Human Rights Proceedings say: "It is disappointing that the abatement can't be reversed, but we are pleased she has won a clear declaration about the Social Security Act 1964 and the law that replaced it, the Social Security Act 2018." MSD will apparently "provide further advice to the Minister as required."

Finally there is Kathryn's story. Kathryn, after a shocking life of abuse and trauma, dobbed in by a vindictive ex-partner, was imprisoned for the so-called crime of relationship fraud. Her children's lives were devastated and her health lost. CPAG commissioned barrister Catriona MacLennan to document the history of her life to show how the legal system needed to know far more before judging her to

Kathryn's Story

[The full story here](#)

How the Government spent well over \$100,000 and 15 years pursuing a chronically-ill beneficiary mother for a debt she should not have.

By Catriona MacLennan



- 2001 convicted of "relationship fraud"
- Prison 6 months
Debt \$120,000
- 2001-2016 fights in the courts against this debt
- 2016 sent back to SSAA
- Appeal to Supreme court disallowed
- 2019 sick and old she awaited MSD's pleasure

44

A Child Poverty Action Group Background Paper
Catriona MacLennan

CHILD POVERTY ACTION GROUP

be in a relationship in the nature of marriage. Pleading not guilty and not showing remorse can result in a ton of bricks. When sent to prison in 2000 for 6 months, she had a vulnerable 4 year old and other distressed children. Her history shows, she was suffering Post Traumatic Stress Disorder because a former partner had killed her 2 year old, ten years before. The story of her life after the child's death is far worse than I have time to explain but she was told to get into a stable relationship to get her children back. The new partner abused her children and Kathryn took him to court. The children were not believed and he later doxxed her in for being on a benefit while with him. On release from prison MSD said she must still repay \$120,000 they said she owed, out of her meagre benefit. MSD spent hundreds of thousands of dollars fighting her appeals against this debt, again brilliantly conducted by Frances Joychild QC. In 2019, the debt still hung over her even as a very ill beneficiary and was used against her when she needed hardship assistance from Work and Income. She died recently at the age of 58 after a life that was ruined. Her PTSD should have been treated and she should have been fully rehabilitated and assisted. She should never have been found guilty in the first place. Government should have wiped the debt.

The next paradigm shift

We cannot rely on marginal extensions to ACC produced by the adversarial court system to solve the very deep problems and clearly court action is impotent to get justice in the welfare system. We must not expect the judicial system to achieve the paradigm shift.

It was the simple coherence and attractiveness of the Woodhouse concept which in the end muted the criticism of its opponents. The scheme which no one asked for had an impetus of its own. Peter McKenzie QC 2003.*

Income Maintenance and Wellbeing Commission: Woodhouse for the 21st century

Goals: Prevention, Full Rehabilitation, and Adequacy of Income for all

- Look to the Australian National Disability scheme
- Challenge traditional thinking
 - **Remove influence of insurance concepts and welfare economics.**
 - **Don't use the courts to get changes in policy**
- Move the three schemes of income maintenance closer together: challenge:
 - Earnings related compensation
 - Paid work focus
 - Universality
 - Unconscious bias against women

46

We desperately need simplicity and clear purpose to bring the three schemes closer together. The next vision needs to look at NZS, ACC and welfare with one lens—the lens of maximising

wellbeing of each person. Appropriate goals are full rehabilitation, the prevention of disease, poverty and accidents, and an adequate standard of living for everyone. The paradigm shift will challenge the traditional thinking and eliminate private insurance and reliance on the courts.

If we know where we are going, over time we might get there. In the final few minutes, I can but pose a few suggestions of how the necessary paradigm shift may unfold. We may need a Royal Commission. Perhaps it will recommend an Income Maintenance and Wellbeing Commission based on Woodhouse principles for the 21st century. For treatment and rehabilitation we could look to the Australian National disability scheme. For income maintenance, we must move the three schemes of income maintenance closer together by challenging the sacred cows:

- Couple-based welfare
- Earnings related compensation
- Paid work focus as a source of value
- Universality of NZ Super
- Unconscious bias against women

NZ Super could become a basic income using the tax system to claw back from wealthy superannuitants much as Sir Geoffrey Palmer suggested in 1977. Then this basic income could be extended to the long term disabled and sick and then to other groups such as sole parents (St John and Dale 2019). While it may be viewed as absolute heresy, we do need to revisit the lottery of the earning-related basis of ACC. The provision of an adequate basic income may suffice in most cases if full rehabilitation and treatment for accident and illness is at the heart.

References

- Gaskins, R. (2003). The fate of "No-fault" in America *Victoria University of Wellington Law Review*, 34
- Hall, P. 1993. Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain. *Comparative Politics* 25 (3): 275-296.
- Keith, K. (2018). Promoting Safety Through Law, National and International, and by Other Means :From this nettle (danger) we pluck the flower (safety),The 2017 Sir Owen Woodhouse Memorial Lecture. *Victoria University of Wellington Law Review*, 49(2), 229-244.
- Lamm, F., McDonnell, N., & St John, S. (2012). The Rhetoric versus the Reality: New Zealand's Experience Rating. *New Zealand Journal of Employment Relations*, 38(2), 21-40.
- Palmer, G. (1977). Accident Compensation in New Zealand: The First Two Years. In G. Palmer (Ed.), *The Welfare State Today*. Wellington: Fourth Estate Books Limited.

- Palmer, G. (2018). A Retrospective on the Woodhouse report: the Vision, the Performance and the Future. The 2018 Sir Owen Woodhouse Memorial Lecture. . *Victoria University of Wellington Law Review*
- St John, S. (1981). Safety Incentives in the New Zealand Accident Compensation Scheme. *New Zealand Economic Papers*, 15
- St John, S. (2010). ACC Lessons from history. *Victoria School of Government Policy Quarterly*, 6(i)
- St John, S., & Dale, M. C. (2019). *Intergenerational impacts: the sustainability of New Zealand Superannuation*. Auckland: Retirement Policy and Research Centre, University of Auckland.
- Woodhouse, O. (2003). Opening remarks. *New Zealand Law Journal*, 34, 189-190.