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TORT REFORM IN THE WELFARE STATE: THE NEW ZEALAND ACCIDENT COMPENSATION ACT

By Richard Gaskins*

The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beast.¹

I. INTRODUCTION

Holmes's suggestion is no longer merely a rhetorical possibility. New Zealand's Accident Compensation Act² (ACA) abolishes common law tort actions in virtually all personal injury cases.³ It thus eliminates the central role of judges, juries, and lawyers and by-passes the services of insurance companies in the settlement of personal injury claims. In place of the common law, the ACA establishes a state administrative commission to award compensation in accordance with a detailed body of rules and schedules.⁴ In moving to a state-run scheme, the ACA also abolishes the notorious fault principle; the compensation commission makes no inquiry into the negligence of anyone connected with the accident.

The New Zealand statute constitutes an important option in the reform of tort law that is largely absent from recent discussions in the United States.²

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³ ACA, s. 5. For an analysis of this section and for speculations on which common law rights may have survived, see Willy, The Accident Compensation Act and Recovery for Losses Arising from Personal Injury and Death by Accident (1975), 6 N.Z.U.L. Rev. 250.
⁴ ACA, s. 6.
States. There, as in Canada, legislative action has been limited to specific classes of accidents, notably automobile accidents, and the suspension of common law remedies has been only partial. Meanwhile, academic debate in the United States has flourished with regard to economic consequences of liability rules; statutory reform is now seen primarily as facilitating market processes in defining optimal social outcomes.

In contrast, the New Zealand ACA views tort reform in the context of welfare state values and legislative policies. Such a view is not satisfied with piecemeal change for limited classes of accidents, nor does it accept the individualistic, market-oriented terms of the American theorists. The ACA presents both a distinct philosophy of social responsibility and a detailed scheme to put that philosophy into practice in the field of accident compensation. In what follows, an attempt is made to articulate the premises of that philosophy and to criticize the statutory form in which it has been enacted.

In addition to its imaginative solution to the problems of tort law, there is another reason for close analysis of the New Zealand law. The ACA can be seen as a new development in modern social legislation, based on an unusual transposition of common law concepts into a welfare state value framework. At a time when welfare state policies are moving toward universal rather than selective eligibility standards, and income-related rather than means-tested benefits, the ACA recognizes both trends and justifies them by complex analogy with values recognized under common law. The statute does far more than create procedural welfare rights; it makes use of legal concepts in offering a structure and philosophical basis for welfare programs. The model embodied in the ACA may have implications for legislation well beyond the area of accident compensation.

This paper looks first at the basic principles behind the legislation, in particular at the distinctive values of "real compensation" and "community responsibility." It is these principles that make possible the creative adaptation of traditional common law notions to policies based on a broad view of com-

5 For example, a recent survey of trends in tort reform gives New Zealand only cursory mention in a chapter on "blind alleys." See O'Connell, Ending Insult to Injury (Chicago: U. of Illinois Press, 1975) at 73-76.
munity welfare. The critique of the ACA that follows measures the details of the statute according to its underlying principles, both to see those principles in action and to identify inconsistencies or conflicts within them. This discussion focusses especially on the major types of loss covered by the statute, on the categories of injuries excluded from coverage and on the financing of the scheme. The conclusion raises questions about the inevitable compromises that occurred in the drafting of the scheme, questions that in no way are meant to detract from the boldness of the experiment, nor to weaken the challenge to other countries to search for equally compelling values for guiding the reform of tort law.

II. UNDERLYING BASES OF THE ACA

The process by which traditional legal concepts have been absorbed and transformed in the New Zealand law needs some preliminary explanation. In essence, these concepts are removed from the highly individualistic framework of common law and are reinterpreted within the collectivist social assumptions of welfare state philosophy. Two examples of this process are the concepts of “real compensation” and “community responsibility,” both of which were key principles in the debate leading to the passage of the ACA.10

A. Real Compensation

In tort law, “compensation” means the replacement of a loss that is deemed capable of objective assessment; compensation as a principle tries as far as possible to return the victim to the status quo.11 The New Zealand statute adopts this important concept: its benefits (called “real compensation”) are conceived as replacements of something lost rather than public charity based on need.12 How in actual cases should we define the “loss” that results from personal injury, and is therefore deserving of compensation? In order to answer this question, the architects of the ACA were forced to look critically at some highly ambiguous and controversial doctrines of the common law.

Tort law recognizes several distinct categories of loss, from which the ACA was forced to make a selection.13 These include relatively tangible sums, such as earnings lost during absence from work and out-of-pocket medical

12 See Woodhouse Report, supra note 10, paras. 61, 297(a) and (b).
expenses. There are also more speculative categories such as the reduction in future earning capacity caused by permanent disability—a relaxation of the metaphor of loss, which recognizes that one might "lose" sums that one never actually had. In addition, courts make awards for non-monetary forms of loss under such headings as loss of enjoyment of life, bodily disfigurement, and pain and suffering. Finally, the common law recognizes certain collateral losses to relatives of the victim, known as wrongful death, loss of services and loss of consortium.

Obviously, one of the first problems in creating a legislative replacement for common law compensation is to determine which categories of loss should constitute the statutory definition of "compensation." The common law provides only the options, not the principles of selection. As we shall see, the planners of the ACA (partly for political reasons) were gradually led to the point of accepting virtually the entire list, accompanied by statutory ceilings on awards for pain and suffering as well as some important administrative guidelines and schedules to insure uniform treatment.

Further anticipating the analysis below, it should be noted that the ACA also restricts the scope of "real compensation" by assuming the burden of personal loss while ignoring property loss. Property loss in New Zealand is still compensated under traditional tort law and is not preempted in any way by the ACA. More troublesome for a piece of welfare state legislation that professes the principle of universal eligibility is the differential treatment of accidents and illness. The ACA singles out personal loss caused by accidents and ignores loss caused by illness or other natural disabilities. It seems obvious that the victims of illness have equal entitlement to benefits on the basis of need. The proponents of the ACA conceded that this exclusion made little sense and justified it as part of a one-step-at-a-time approach to reform. However, they must also have sensed that to provide compensation on the level of common law damages to victims of ordinary illness is to strike out well beyond the limits of the legalistic concept of compensation on which the ACA is based. People who get sick ordinarily do not have a cause of action at law, and it might have created serious conceptual strains to treat them on the same basis as accident victims under the ACA, for reasons that are explored below in some detail.

Nevertheless, for those losses that are covered, the ACA adopts the common law method of measuring the extent of loss and thus reaches very different results from those flowing from the needs-related standard of benefits of most welfare legislation. Other aspects of the common law, however, are significantly changed, in that individual claims are no longer considered within the particular interpersonal context in which the accident occurred. The loss from an accident is deemed "compensable" without reference to the fault of the defendant, or to contributory negligence of the victim, or indeed to any precise relation to human agency. The notion of compensable loss is freed

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14 "Comprehensive Entitlement" is among the basic principles enunciated by the Woodhouse Commission. See Woodhouse Report, supra note 10, paras. 5 and 57.
15 Id. at para. 17.
10 See text accompanying notes 145-46, infra.
from the situational context of the common law, in which the existence of a right to compensation depends on the discovery of an individual with the corresponding duty to exercise care in the situation.

B. Community Responsibility

The change in legal concepts imposed by a collective framework becomes somewhat clearer with the concept of "community responsibility," which speaks to the question of the duty to make compensation. The common law roots of this concept are not immediately apparent. One must first look beyond the fault principle, which is a comparatively recent qualification on the larger doctrine that responsibility to make compensation is based on causal agency. Before the early nineteenth century, the crucial test of liability in tort was whether the defendant's behaviour was a cause in fact of injury. As the common law developed, the defence was slowly established that the defendant could escape liability, despite his causal agency, if the accident was not also his "fault," a doctrine carrying vague connotations of culpability and that was later elaborated into Holmes's theory of the social duties of the ordinary prudent man. The New Zealand statute, like other modern legislation abrogating the fault principle such as workmen's compensation acts, returns to the earlier common law theory of responsibility based on causation.

Yet, under the collective philosophy of the ACA, the causal theory of responsibility undergoes an important change. Whereas in common law the causal agent must be a distinct individual before there arises the responsibility to provide compensation, the ACA adopts the premise that society as a whole is the relevant agent of most accident-producing activities; consequently, the responsibility to compensate all accident victims falls on the community as a group.

This unusual assumption can best be understood as a response to the increasing complexity of social action in modern industrial society. It is a possible interpretation of events in a world where it is no longer plausible to isolate discrete causes and effects of human action. Since the Industrial

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18 *Supra* note 1, at 72-129.

19 See *Woodhouse Report, supra* note 10, para. 173.
Revolution, individuals have acted increasingly through other individuals and through the use of machines and other manufactured products. According to some commentators, this growing social and technological complexity, even in the nineteenth century, posed a decisive challenge to the theory of responsibility based on causal agency of individuals. Liability would have expanded rapidly had courts continued to apply the early standard of cause-in-fact, and the most vulnerable defendants would have been the developers of industry and technology. Most authorities agree that the fault principle entered the common law at precisely this moment in order to insulate new industry from the rigours of an unrestrained causal theory of responsibility. Henceforth an injured plaintiff was required to prove that the causal agent-defendant owed him a duty of care and had negligently breached that duty. In Holmes's influential statement of this new doctrine, a further assumption seemed to be that practically no social duties are owed to anyone—this despite Holmes's later disparagement of the social theories of Herbert Spencer.

The ACA's response to the complexity of modern society can therefore be seen as a rejection of the rugged individualism of nineteenth century law and as a movement to the opposite extreme in treating social action as irreducibly interrelated. This important premise, combined with the causal theory of responsibility derived from common law, constitutes the theoretical foundation of a new concept of "community responsibility."

More than any other aspect of the New Zealand law, the principle of community responsibility suggests that the statute is more than an administrative reform of one troublesome area of tort law. We will speculate on the further applications of this principle in the analysis below, but it is worth pointing out here that, even in the limited area of tort reform, the ACA differs significantly from reforms in other legal systems. It differs, for example, from doctrines of vicarious or strict liability, which have been the focus of debate in most common law countries. These doctrines remain tied to the

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21 Holmes, supra note 1. This interpretation of Holmes rests on reading his dictum that "loss from accident must lie where it falls" and the surrounding discussion (Holmes, op. cit. at 94–95) in conjunction with his theory that liability should be recognized only in specific situations (op. cit. at 108–12). My statement in the text was influenced by Gilmore's characterization of Holmes' theory as based on the "proposition that, ideally, no one should be liable to anyone for anything." See The Death of Contract (Columbus: Ohio State Univ. Press, 1974) at 16.


23 See Woodhouse Report, supra note 10, para. 67 (citing the analysis of Fleming, supra note 17, at 108). For an interpretation of the nineteenth century development of tort law in terms of the growth of individualism, see Harper and James, 1 Law of Torts, supra note 20 at xxvii–xxxix.

24 For modern developments in vicarious liability see, e.g., Atiyah, Vicarious Liability (London: Butterworths, 1967); Fleming, supra note 17, at 335–63; and Harper and James, 2 Law of Torts, supra note 20, §§ 26.1–15. The artificial manipulation of this concept in the service of public policy was suggested in a classic article by Douglas, Vicarious Liability and Administration of Risk (1929), 38 Yale L.J. 584.
administrative structure of courts and call on the courts to "shift" responsibility for certain types of accidents onto particular classes of people in cases where recovery might otherwise be frustrated. The doctrine of respondeat superior, for example, makes an employer vicariously responsible to third parties for the torts of his employees. Under judicial and legislative standards adopted in most American states, manufacturers are held "strictly" responsible for injuries caused by their defective products, regardless of whether they were negligent under the fault principle. By requiring drivers to insure themselves against most ordinary losses, no-fault automobile insurance limits the occasions for courts to hear evidence on the often vexatious question of who was at fault in an accident.

All of these reforms abandon the fault principle to some degree, but they retain the notion that specific individuals must be held responsible for compensating accident victims. These individuals might not be selected because of their causal agency but for quite different reasons, such as administrative simplicity, economic efficiency, or merely because someone must be found who has money in his pockets. The quest for the viable defendant becomes increasingly artificial under these approaches, and under the New Zealand statute that quest is abandoned. The ACA is an implicit rejection of the legal fictions behind most theories of vicarious or strict liability. It also suggests skepticism about the economic allocational virtues of liability rules as advanced by some American theorists. Under the ACA it is the injury alone that gives rise to a valid compensation claim, not the fact that the law has chosen to recognize a suitable defendant.

This leads us back to the related principle of real compensation, which, as we saw, was patterned closely on the kinds of compensation recognized by common law. The ACA combines this standard of benefits (more generous than what social welfare programmes commonly award, and defined with reference to "loss" rather than need) with a new doctrine of social responsibility which allows recovery to all victims of accidents. This programme clearly transforms the common law concepts on which it is built. It is also a cautious first step toward discovering a rationale in law for a new approach to social welfare legislation based on principles of universal eligibility and earnings-related benefits.

25 For the development of strict liability for defective products, see Harper and James, 1 Law of Torts, supra note 20, §§ 28.1–33. It should be noted that New Zealand law did not follow this trend to any major degree. See Franklin, Personal Injury Accidents in New Zealand and the United States (1975), 27 Stan. L. Rev. 653 at 667.

26 For a conceptual survey of reform schemes for auto accidents, see Kalven, A Schema of Alternatives to the Present Auto Accident Torts System (1968), 1 Conn. L. Rev. 33.

27 Atiyah, supra note 11, at 98. For an argument that public policy rather than cause-in-fact should control this process of imputing responsibility through tort law, see Harper and James, 2 Law of Torts, supra note 20, § 14.1. See also Friedmann, Social Insurance and the Principles of Tort Liability (1949), 63 Harv. L. Rev. 241.

28 See Woodhouse Report, supra note 10, para. 88.

29 See text accompanying notes 184-99, infra.
III. INTERACTION OF COMMON LAW DOCTRINES AND WELFARE POLICIES

Throughout its long gestation, the ACA was publicly discussed as a step toward reforming tort law, not as a radical change in the theoretical basis of welfare legislation. The defects of the tort system as a method for delivering compensation to accident victims were well-documented in several decades of scholarship and were the subject of discussion in legal circles in New Zealand when the Woodhouse Commission was appointed. These included the Workers' Compensation Program—itself part of an earlier wave of tort law reform that swept most common law legal systems—and the Social Security Program, which was later the subject of independent review. The original mandate of the Woodhouse Commission was in fact an investigation of workmen's compensation, and it was primarily Mr. Justice Woodhouse's own initiative that led to the simultaneous critique of private law and public law compensation schemes.

The Report of the Woodhouse Commission found the tort system inadequate on two distinct standards of performance. First, using an intuitive or common sense standard of equity and adequacy in meeting the essential needs of accident victims, the Commission found that the common law was successful in only a small fraction of cases. This criticism was made still sharper when the Commission applied another standard of adequacy implicit in the common law itself: the standard of objective loss. By this latter standard, very few accident victims were able to recover "adequate" compensation. The two major reasons for this failure were diagnosed as the administrative inefficiencies of civil litigation and the barring of numerous claims because of the fault principle.

It is equally important to note the Commission’s criticisms of workers' compensation and social security, whose functions were understood to be filling some of the gaps in the common law system of compensation. While


31 In New Zealand the discussion began with the release in 1963 of the Report of the Committee on Absolute Liability (Wellington: A. R. Shearer, Government Printer, 1963). Despite the evidence of failure of the tort system, the majority of the Committee did not recommend major changes. However, in a spirited minority appendix to the Report the Solicitor-General, Sir Richard Wild, used the evidence to recommend sweeping legislative changes. This report was cited in the Woodhouse Report, supra note 10, para. 80 n. 15. See also Wild, Social Progress and Legal Process (1965), 27 N.Z.J. Pub. Admin. 1.


33 Id. at parts 4 and 5.


35 Woodhouse Report, supra note 10, para. 79.
generally these schemes were administered more efficiently than the common law, the level of benefits that they provided was also judged inadequate by both the standard of common sense and the legal standard of objective loss.\textsuperscript{36}

This critique suggests that the Woodhouse Commission assumed from the very start that the common law and welfare policies should be judged by the same standards of performance, and more particularly that the standards of one system were relevant for judging the performance of the other. This is by no means an obvious premise. As Atiyah points out, it is often assumed that the two systems of compensation have no common ground at all. Prior to criticizing this assumption, Atiyah attempts to capture some of its rhetoric in the following passage contrasting torts and social security:

They are utterly different from each other in structure, philosophy and execution. Torts offer[s] "full compensation," social security a good deal less. Torts pays compensations for pain and suffering; social security does not—though it does pay something for some disabilities. Torts compensates in money alone; social security compensates with a wide variety of welfare benefits as well as with money. Torts pays lump sum compensation; social security compensation is nearly all made by periodical payments. Torts depends in practice on liability insurance; social security broadly utilizes a mixture of personal (but compulsory) insurance and taxation—though the insurance element is becoming somewhat artificial. Tort claims are mainly administered by the State, but the tort system is vastly more expensive to operate than the social security systems. Above all, tort claims are in the main confined to cases in which fault can be proved against someone covered by liability insurance; in the social security systems fault is utterly irrelevant.\textsuperscript{37}

The Report of the Woodhouse Commission saw beyond these differences in "structure, philosophy, and execution." It not only initiated the proposal to combine some of the administrative features of both systems; it also laid the basis for a deeper conceptual synthesis in its critique, by the simple method of evaluating the performance of one system in terms of the ideals of the other.

As mentioned above, there was already ample literature criticizing the tort system for failing to deliver compensation to large numbers of accident victims.\textsuperscript{38} This line of criticism depends on identifying something more than strictly "legal" errors in adjudication. As far as common law procedure is concerned, the lack of reversible error in a case is consistent with justice, as is the dismissal of a claim for failure to state a cause of action, or the defeat of a claim for failure of the plaintiff to carry the burden of proof. A claim settled out of court is likewise acceptable to the law, as is the often erratic behaviour of juries that set damages awards, but the justice that results from seeing each case simply on its own legal merits is not the same as justice conceived in a social and collective environment. The fact that some victims are compensated while others are not—even though all the rules of the legal system are fol-

\textsuperscript{36} Id., para. 39.  
\textsuperscript{37} Supra note 11, at 14-15.  
\textsuperscript{38} Supra note 31.
lowed—violates the basic norms of a welfare state philosophy, especially when it is the cases of extreme need that tend to be least successful. The Woodhouse Commission was not original in this critique; it joined a large chorus of critics.\textsuperscript{39}

On the other hand, the Commission did provide a novel critique of the various public programmes designed to supplement the common law by providing accident compensation. It would have been possible merely to say that these programmes failed to provide “enough” compensation; but this is a slippery standard to apply, even when it is clear in the most glaring cases of need that more should be done. Philosophies of welfare cannot clearly articulate what “enough” means and whether it is limited to a social minimum or should be set at some more generous level.\textsuperscript{40} The use of a means test\textsuperscript{41} under the New Zealand social security scheme implied that need was the reference point for judging adequacy. Given financial restraints, that point was not likely to be set very high.

However, the common law offers a convenient standard for passing judgment on the level of benefits: the accident victim should not only be permitted to subsist, but should be restored as closely as possible to his position prior to injury. That society’s obligation to compensate should be measured by this standard is a new approach to welfare policy. The benefits are high, but the amount is defined by the objective standard of measuring the “loss.” Mr. Justice Woodhouse concluded, in effect, that compensation at any lower standard is an avoidance by the community of its real responsibilities.

We can now summarize the point of view that finds a positive interaction between welfare policy and the common law. On the one hand, the tort system must be newly conceived to conform with social interests, collective action, and public administration—in order to avoid the anachronism of the common law’s individualistic analysis of action and the anomalies of case-by-case adjudication.\textsuperscript{42} On the other hand, welfare policy must be reconstructed on a new basis of objectivity in setting levels and categories of benefits.

In many countries, public programmes are increasingly caught between the demand for social services and the political restraints created by the inability of reformers to legitimate broad collective action. The common law may be able to provide legitimacy for a greatly increased level of benefits,

\textsuperscript{39} The Commission independently reached conclusions strikingly similar to those found in Ison, \textit{The Forensic Lottery}, supra note 20, which the Commission read in manuscript and cited favourably in the \textit{Woodhouse Report}, supra note 10, para. 97.

\textsuperscript{40} See, e.g., Titmuss, supra note 8, at 182-85.

\textsuperscript{41} In 1967, benefits under the social security scheme were available only to those accident victims whose incomes fell below a prescribed level. Those who met this means test based on income received only the basic flat-rate benefit, rather than compensation related to the amount of loss. See the \textit{Woodhouse Report}, supra note 10, paras. 241-74.

\textsuperscript{42} Titmuss argues for a shift from an individual to a social understanding of causation as one approach to justifying universal rather than selective distribution of benefits: see supra note 8, at 133.
since in many societies the appeal for "rights" has greater force than the appeal for needs. At least, this is the position that the Woodhouse Report seems to represent. Whether it is a coherent philosophy capable of wider extension remains to be investigated. In the analysis below, we will explore the content of the ACA, which evolved out of long debate over the specific recommendations of the Woodhouse Commission. In doing so we shall try to identify the strengths and weaknesses of this new philosophy which is put to the test in a very complex scheme, and which is subject to financial and political pressures as well as to conflicting philosophical views.

IV. A CRITIQUE OF THE ACA

While the central values of the ACA suggest a new approach to social legislation, the Act itself shows certain internal conflicts that may be an inescapable part of that approach. When it comes to setting precise boundaries to eligibility (for example, in defining "injury by accident"), to defining the limits of "real compensation," or to allocating the costs of the scheme, the combination of legal and welfare approaches shows itself to be, at best, an uneasy compromise. Much of the tension can be understood against the background of the law's evolution over a period of six years, from the time of the Woodhouse Report in 1967 to the important amendments of 1973. Political pressures and special interest groups exploited these tensions, making the final legislation anything but a perfect model for future extension.

The discussion below will focus on three specific themes in the ACA: (A) categories of "compensable loss," (B) exclusions from coverage and (C) distribution of costs. In each case we shall try to follow the debates that took place during the long period in which the ACA reached its finished form. We shall also examine the trade-offs that occurred at each crucial stage in the process. The final legislation is full of compromises that can be understood only in light of this complex legislative history. The main documents we shall consider are the following: the statute itself as amended through 1978; the

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43 For a somewhat polemical statement of this point, see Scheingold, The Politics of Rights (New Haven: Yale Univ. Press, 1974) at 50:

The language of the law in political discourse is largely metaphorical. No one can realistically expect public debate to sort effectively through the claims and counterclaims over what is, in fact, the applicable rule. Instead, legal symbols are used to persuade those involved in the conflict that it makes sense to think of the problem at hand in terms of rights and obligations—thus tapping the latent sensitivity to the need for rules and, at the same time, framing the issue in readily comprehensible fashion.

44 These amendments are discussed in the text accompanying notes 122-27, infra.


A. Categories of Compensable Loss: The Contours of "Real Compensation"

Despite important differences between the two major reports on the ACA prior to its drafting—the reports of the Woodhouse Commission and the Gair Committee—there is at least one point of major agreement: benefits under the ACA are conceived as compensation rather than welfare. Yet the term "compensation" can be highly ambiguous, as evidenced by the very different specific recommendations in each report as to the kinds of loss deemed "compensable."

The following headings of loss are now recognized by the ACA and will be discussed in turn:

1. lost earnings during a period of temporary incapacity;
2. lost future earnings caused by permanent disability;
3. non-economic loss.

The first category, which is the most easily measured kind of loss, was endorsed in principle by both reports. The reports differed only on the method of calculating lost future earnings and on the still more speculative process of measuring non-economic losses.


49 The drafting was done by the McLauchlin Committee, whose precise role is difficult to document. For a discussion of the work of the committee, see Orbell, supra note 45; and Palmer and Leons, supra note 46, at 724.

50 "In the present context the principle must be compensation for losses, not assistance for need. . . ." See the Woodhouse Report, supra note 10, para. 260. See also the Gair Report, supra note 48, para. 5.

51 ACA, ss. 112-13.

52 Id., ss. 114, 116 and 118.

53 Id., ss. 119-20. The Act also authorizes payments for medical expenses (ss. 107-11), but these provisions will not be discussed in the text. For an overview of these headings for compensation and their relation to common law categories, see Willy, supra note 3.
1. Lost Earnings During a Period of Temporary Incapacity

The ACA currently compensates accident victims for lost earnings during a temporary period of absence from work. Benefits are awarded by the Accident Compensation Commission (ACC) at the rate of eighty percent of actual earnings, except that during the first week of incapacity a worker may request directly from his employer compensation at the rate of one hundred percent. There is thus no period of incapacity excluded from coverage, no minimum or maximum period of eligibility.

Both the Woodhouse and Gair reports acknowledged that the eighty percent factor represents a reduction of benefits compared to what a successful plaintiff could receive under tort law. They justify the figure in terms of the general social goal of giving injured workers an incentive to return to work as soon as possible, passing quickly over the obvious fact that this is already a serious compromise with the goal of full compensation based on the objective loss principle. The Gair Committee answered trade union criticisms of this limit by predicting that workers as a group would still come out ahead under the scheme, even though the occasional worker might have achieved greater benefits under the common law. Apparently the much decried "lottery" aspect of the negligence system still had some appeal to the working man.

The provisions on lost earnings are taken from the Gair Committee Report. The Woodhouse Commission had recommended a radically different scheme, excluding from full coverage all "short-term" injuries, defined as injuries causing up to four weeks' incapacity. The Commission urged the concentration of benefits where "need" was greatest and expressed special concern for the victims of serious injury under existing compensation programmes. Making no effort to reconcile this naked distributive choice with the overall legalistic posture of the legislation, the Commission recommended nominal payments (up to twenty-five dollars per week) for the first four weeks of lost earnings. This amount was roughly equal to the current weekly maximum under the Workers' Compensation Act, which the Commission elsewhere criticized for being too low and for following the "social assistance principle that need should be the test for assistance rather than loss the measure of recompense."
According to statistics in the 1969 White Paper, short-term temporary incapacity claims would have comprised 86.3 percent of all industrial injuries.\(^{65}\) Assuming a similar percentage of short-term injuries for accidents outside of industry, it appears that the Woodhouse Commission was in fact prepared to abandon wage-related benefits for the substantial majority of accident cases. At the same time, common law remedies for all injury victims were to be abolished.\(^{68}\)

The Gair Committee recognized that this was a major departure from the objective loss principle. In responding to pressures mentioned above, it draped itself in the legalistic standard of full compensation and eliminated the Woodhouse Commission's four-week exclusion, even increasing the first week's benefits to the full amount of the loss. The Committee expressed sympathy for the needs of long-term victims but saw no reason why the worker injured for only the short term should "sacrifice" his benefits for their sake.\(^{67}\) The full compensation principle thus provided a simple excuse for enlarging benefits in response to trade union demands while avoiding the appearance of a value choice. Note, however, that the Gair Committee too was willing to compromise with the full compensation standard in advocating an eighty percent rate of compensation after the first week.

In a different area, the Gair Committee was possibly overzealous in invoking the common law full compensation standard. The Woodhouse Report had proposed benefits for injured non-workers—both a nominal weekly benefit and compensation for non-economic loss.\(^{68}\) To this the Gair Committee responded with simple logic: where there are no earnings, there can be no lost earnings. The purpose of the ACA was compensation for loss, not social assistance.\(^{69}\) On this analysis, the Committee recommended the complete exclusion of non-workers from coverage,\(^{70}\) and this suggestion was followed in the Act as originally passed in 1972. However, in 1973 (before the law took effect in 1974) Parliament amended the ACA to allow compensation to non-workers for losses other than past or future earnings.\(^{71}\) In retrospect, it seems that the Gair Committee was prepared to "sacrifice" certain benefits of non-workers in order to save costs, in its own departure from the legal standard of full compensation.

While the Gair Committee thus used the objective standard of loss in selective ways in response to interest group pressure and financial constraints,\(^{65}\) \(^{66}\) \(^{67}\) \(^{68}\) \(^{69}\) \(^{70}\) \(^{71}\)
the Woodhouse Commission was selective in a very different sense. The Commission appealed to the common law standard in order to criticize low benefits under workers' compensation and social security programmes, but it was also willing to compromise, as we saw, in serving the needs of the long-term disabled. The Report contains frequent appeals to the objective loss principle: "Real compensation demands that income-related benefits should be paid for the whole period of incapacity." However, we have also listed the departures from this principle recommended by the Commission: an eighty percent rate of compensation for lost earnings, exclusion of claims for short-term injuries, and flat-rate benefits for non-workers.

It seems clear that any public programme of this sort will be sensitive to costs and that financial limitations may ultimately be responsible for compelling the adherents of "full compensation" to reach certain compromises. This is illustrated in another recommendation of the Woodhouse Commission regarding a ceiling on weekly awards related to lost earnings. The Commission proposed a limit of $120 per week, rejecting an earlier proposal of $80. It justified the higher figure by the logic of objective loss: under the higher figure, more people would receive "full compensation." No resort to criteria of need was made in this case, unlike the Commission's method of justifying more favourable treatment for long-term over short-term injuries. The Commission also noted, however, that the additional cost of the $120 ceiling was slight, tacitly acknowledging that a distributive choice might have been necessary here if major resources hung in the balance. We can see this interesting blend of full compensation rhetoric and appeals to cost limitations in the following statement on the whole issue of whether earnings-related benefits are "equitable":

A final issue was put on the basis of equity. We were asked to consider whether the community should "maintain a person at his pre-accident income if the income was well above what an average person would receive in full-time employment." Our answer is that if such a person should become the chance victim of socially acceptable activity it would be wrong to leave him to make drastic adjustments in his standard of living merely to pay lip service to egalitarian doctrines unneeded by any economic consideration. The community should accept responsibility for all victims of accident: and if that responsibility is to be fairly discharged every man should be provided with a fair measure of his actual losses. The calculations as to cost contained in the appendices to this Report make it clear that this can be done for all citizens without affecting the claims of any. Real compensation is the aim, and in our view injustice by discrimination must be avoided.

There are many occasions on which the Woodhouse Commission acknowledged that, while "real compensation is the aim," considerations of cost could make the universal extension of such benefits impossible. The Commission was frank in stating its value preferences where substantial savings

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72 Woodhouse Report, supra note 10, para. 55.
73 Id., para. 300(e).
74 Id., para. 440.
75 Id., para. 267.
76 Id., paras. 434-35.
were possible: it wished to concentrate resources where need was greatest, namely, on victims of serious accidents. The Gair Committee drew back from formulating its distributive goals and instead used the language of objective loss to support its selective modifications of the Woodhouse Commission's proposals. The statute itself masks these distributive choices still more completely by simply using common law language to support its notion of "compensable loss," as though the common law possessed clear answers to hard questions of social choice.

2. Lost Future Earnings Caused By Permanent Disability

For further evidence that the common law can be an uncertain guide, we may turn to a relatively speculative category of "loss" recognized by courts and represented in the ACA: lost future income for the permanently disabled victim.

For speculative losses generally, the common law theory of objective loss becomes highly artificial. A state-administered scheme, however, has an opportunity to minimize certain inequities in the civil judicial process by devising in advance detailed compensation schedules for such forms of loss. The goals of the ACA clearly include eliminating the "lottery" features of the common law and emphasizing swift and responsible settlement of claims. However, the ACA still justifies preempting this area on the legal theory of objective loss; wherever losses occur, even speculative losses, the state should cover them if compensation is to be "real" or "full." Nevertheless, since there is no easy way to measure the amount of loss in these instances, the state has a great deal of leeway within the common law conceptual framework for standardizing benefits, for setting limits on recovery for pain and suffering, and for streamlining administration.

Lost future income is still economic loss, even though its precise measurement is difficult. None of the background debate on the ACA questioned the propriety of compensation under this heading, even though one might argue that accident victims are not the only ones who lose opportunities for future income, and thus should not be singled out for special treatment. The only controversy was how to calculate the amount of compensable loss. On this matter, interestingly, the proponents of the ACA were critical of the common law practice of awarding lump sum damages, although eventually the statute called for a combination of periodic payments and lump sums for compensating speculative losses as a whole.

Under the current statute, the formula for assessing lost future earnings is complex. First, the past weekly earnings of a worker during a base period

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77 Id., para. 226.
78 See, e.g., Atiyah, supra note 11, at 187-96; and Ogus, Damages for Lost Amenities (1972), 35 Mod. L. Rev. 1.
79 Woodhouse Report, supra note 10, paras. 94 and 278(a).
80 See id., para. 291(c).
81 See Atiyah, supra note 11, at 484.
82 Woodhouse Report, supra note 10, paras. 115-22.
83 ACA, s. 114(1).
are determined. These earnings are then multiplied by point eight (the discount applied also to past earnings) and by another factor that represents "the percentage which that permanent loss . . . bears to permanent loss of his capacity to earn." This last factor raises an important question of equity. The loss of a finger may have a greater impact on future earnings for a secretary than for a corporate executive. Nonetheless, uniform percentages may be applied in cases of similar permanent disabilities, regardless of the specific job that the accident victim was best suited to perform.

The main conceptual puzzle, however, is that the ACA, in its attempt to find a formula for calculating lost future earnings for the permanently disabled, relies on two factors that have no simple relation to future earnings: past earnings and the degree of incapacity. Even the discretion allowed the ACC to adjust such awards (which up to now the ACC has used very sparingly) would not be sufficient to rule out unfairness. We may concede that, where disability is total, the inequities of this formula may be minimal; but for only partial permanent disability, our example of the secretary and the corporate executive illustrates the possible impact.

The proponents of the ACA struggled with this problem. Here the common law practice was of little help, since no simple formulae have been established by the courts. At least the ACA promised a degree of uniformity in basing awards on two specific factors, suggesting certainty if not equity. None of the alternative approaches suggested by the two commissions made conceptual sense in terms of the professed goal to compensate for "real" losses. Instead, ease of administration and the desire to keep benefits at least as generous as under the common law have forced a compromise with the objective loss principle.

The Woodhouse Commission authored the current formula; however, their approach drew criticism from the Gair Committee. Once again flying the flag of "objective loss," the Committee wanted the ACC to estimate future earnings in each individual case at the time a claim was processed. This is in fact what the ACA in its original adopted form required. Nonetheless, the law was amended in 1975 to return to the simpler but conceptually confused Woodhouse approach. The ACC experienced real difficulty estimating future earnings losses, and, based on this experience, Palmer concluded that, under the original law, "many people permanently incapacitated would have had considerable difficulty securing anything." The restored Woodhouse formula, which determines lost future earnings with reference to past earnings and the degree of permanent incapacity, was clearly easier to administer and

84 Id., s. 114(1)(c).
85 Woodhouse Report, supra note 10, paras. 291 and 303.
86 Gair Report, supra note 48, para. 80.
89 Palmer, Accident Compensation in New Zealand: The First Two Years (unpublished paper presented to the Australian Universities Law Schools Ass'n Conference, August 1976) at 28.
yielded more generous benefits to claimants. In the absence of any clearer way to determine the "real loss" in this kind of situation, the values of simplicity and generosity prevailed.90

3. Non-Economic Loss

Even though the whole notion of real compensation is modeled on common law terms, we saw that there is no escape from distributive and administrative choices in applying this notion to an essentially speculative loss. The common law certainly provides no foolproof formula. The leeway for policy choice is still greater where the speculative loss is non-economic. For example, despite its reliance on the common law theory of objective loss, the Woodhouse Report made no reference to pain and suffering as a possible basis for compensation.91

The ACA currently recognizes as compensable two forms of non-economic loss: "non-economic loss related to permanent loss or impairment of bodily function"92 and a residual category encompassing loss of amenities or "capacity to enjoy life" and "pain and suffering, including nervous shock and neurosis."93 Both awards are made in lump sums with upper limits prescribed by the Act ($7,000 for impairment of function, $10,000 for pain and suffering), whereas the other payments for economic loss discussed above are periodic. The award for impairment of function is calculated by multiplying $7,000 by a fraction representing a percentage loss of total bodily function, as specified in an elaborate schedule.94 For example, the loss of an arm represents an eighty percent disability, loss of a thumb twenty-eight percent, and so on. The calculation of pain and suffering awards is not made by reference to degrees of disability or schedules of any kind, but rather is established in each case "as the Commission thinks fit."95 Here is the wild card in the whole New Zealand scheme—the "lottery" element of the common law system that the drafters were unable to resist.

Precisely where these categories came from and why they are in the law is somewhat mysterious. English law recognizes all three categories but provides no precise definitions or guidelines for calculation.96 It seems too simple to assume that these categories deserve recognition in a law of this sort simply because common law judges have admitted them at one time or another. The evidence shows that there was great uncertainty over what to include in this portion of the law. It does appear that there was pressure from trade unions

90 Woodhouse Report, supra note 10, para. 200.
91 See White Paper, supra note 13, para. 123. The suggestion in this paragraph opened the way for the recognition by the Gair Committee of a separate category of compensation for non-economic loss. See the Gair Report, supra note 48, Recommendation No. 22.
92 ACA, s. 119.
93 Id., s. 120.
94 Id., s. 119(2) and the second schedule.
95 Id., s. 120(1).
96 See, e.g., Street, supra note 13, at 43-73; and Luntz, supra note 13.
to adopt the "loss of bodily function" provision, and pressure from the legal profession to include pain and suffering.

Some of the evidence of interest group pressure is indirect. The Woodhouse Commission first took the approach of recognizing no separate category of non-economic loss. Recall that the Commission's formula for calculating future earnings losses caused by permanent incapacity included a factor based on the extent of physical incapacity (which was then refracted through the amount of prior earnings). These awards were intended not only to compensate for lost future income but were graded to benefit more generously the most serious injuries. The Woodhouse formula begins to make some sense in this light. If the corporate executive receives the same proportion of his past income as the secretary, both of whom have lost a finger, this is not purely designed to cover the future economic losses of both; it was also meant to recognize an independent, non-pecuniary loss, stemming from the "loss of physical capacity itself."97 As a result, the Commission recommended no separate categories of non-pecuniary compensation, but expressed the hope that the ACC would use liberal discretion in setting awards for future earnings losses so as to deal fairly with the "unusual case."98

The Woodhouse approach to this whole area of speculative losses thus had great administrative simplicity, but it appeared to ignore some of the traditional categories of common law damages. When the Gair Committee surveyed this area, it introduced major changes. First it dropped the Woodhouse formula for calculating future earnings losses in favor of a more realistic estimation on a case-by-case basis.99 Furthermore, the Gair Committee recommended lump sum compensation "principally for loss of enjoyment of life from loss of bodily function."100 In addition to restoring much of the common law appearance to compensation under the ACA, this combination of provisions also made consistent sense. Since future earnings losses were no longer to be measured by the extent of permanent physical incapacity, it seemed proper to recognize this traditional form of non-pecuniary loss in a separate way.

This approach was also a response to pressure from trade unions to include a lump sum provision somewhere in the Act—to retain some element of the old, much-maligned "lottery" of the common law. By creating an additional category of compensation, the Gair Committee strengthened its argument that the complete compensation package under the ACA would leave workers as a group no worse off than they were under common law.101 Once again, the Gair Committee was able to justify its revision of the Woodhouse plan by reference to the hallowed categories of common law: non-economic loss was "real" and deserved separate recognition because the common law said so. At the same time, the Committee was not disposed to follow

97 Woodhouse Report, supra note 10, para. 291(d).
98 Id., para. 303(e).
99 Gair Report, supra note 48, paras. 80-81.
100 Id., Recommendation No. 22.
101 Gair Report, supra note 48, para. 12.
common law practices slavishly when it came to the extravagant benefits sometimes awarded by juries. It set a maximum on awards of $10,000, with partial payments to be calculated according to a schedule of medical injuries similar to what the Woodhouse Commission had recommended as part of its plan to compensate future earnings losses.\footnote{102}{Id., Recommendation No. 22 and para. 111.}

While the two background reports suggested alternative coherent models, these two methods for compensating speculative losses became confused in the original text of the \textit{ACA}. The Gair Committee's recommendations were followed for future earnings and for a separate category of non-economic loss (although the former provision was replaced, as we saw, in 1975).\footnote{103}{See notes 87 and 88, \textit{supra}.} However, the name of this separate category was changed: instead of compensation for loss of enjoyment of life, as the Gair Committee intended, this section simply recognized "non-economic loss related to permanent loss or impairment of bodily function."\footnote{104}{\textit{Supra} note 92.} In addition, a new category of compensation was created to cover both "loss of enjoyment of life" and "pain and suffering." This last category was not limited to cases of permanent disability and was tied to no schedule. The awards were to be entirely discretionary up to a maximum of $10,000.\footnote{105}{\textit{ACA}, s. 120.}

Ironically, with the return in 1975 to the Woodhouse Commission's formula for calculating future earnings losses, the \textit{ACA} diverged even farther from the original Woodhouse approach to the whole field of speculative losses caused by permanent incapacity. The Commission had envisaged a periodic payment that would reflect both future earnings losses and the extent of physical impairment. The Act now contains this provision, but it also contains the additional sections just described: a lump sum payment for "non-economic loss related to permanent loss or impairment of bodily function," and a lump sum payment for further psychic loss, "loss of capacity for enjoying life" and "pain and suffering." The former lump sum award is determined by a schedule of disabilities applied to a statutory maximum of $7,000. The latter lump sum knows few bounds: it is limited to $10,000, but may be awarded at the discretion of the ACC in any case of injury by accident covered by the \textit{ACA}.

At the drafting stage, it must have been difficult to argue against the pain and suffering provision. This is, after all, a doctrine known to common law, which was sufficient justification to the Gair Committee to recognize other categories of compensation as self-evident. One can also detect the special interests of the legal profession behind this provision. Geoffrey Palmer confirms that it was included at the urging of negligence lawyers, who saw an opportunity to keep their skills sharp. Palmer reports that this is one of the most heavily contested provisions of the law. Each case requires review by the ACC on its individual merits; applications for review of ACC awards in this
area are high, "and lawyers seem to be involved in these claims much more frequently than they have been with other sections of the Act."\(^{108}\)

All that one can conclude is that the \textit{ACA} is now impossibly muddled. There is no coherent theory of what "real compensation" should mean in the area of speculative loss. The phrase is invoked simply to lend an impression of objectivity to a package of benefits inspired by a mixture of public welfare goals and special interests. The current posture of the law is more confused than either the Woodhouse or Gair recommendations. It is a hybrid of these inconsistent theories plus a third approach (the pain and suffering provision), whose only apparent function is to sweeten the pot.

B. \textit{Exclusions from Coverage: The Limits of "Community Responsibility"}

Having surveyed the kinds of loss which the \textit{ACA} deems compensable, consideration must now be given to a second major set of qualifications contained in the law. The concept of community responsibility is given great importance in all the background discussions of the \textit{ACA}.\(^{107}\) Once a loss has been incurred, the social duty to compensate is understood to follow. As the Woodhouse Commission stated: "Few would attempt to argue that injured workers should be treated by society in different ways depending upon the cause of injury."\(^{108}\) If this is so, why is the community's responsibility to compensate limited only to losses caused by \textit{accidental} injury? Income is lost just as much by a worker who is unable to work because of an illness completely unrelated to accidental injury. If the cause of accidental injury is irrelevant to society's duty to compensate,\(^{109}\) should the \textit{ACA} not go farther and say that the cause of the loss is also irrelevant?

The most significant exclusion from coverage under the \textit{ACA} is this exclusion of losses caused by circumstances other than "accidents." No feature of the \textit{ACA} raises more questions than this central limitation. It is fair to say that all the background reports were aware of this anomaly. For example, the Woodhouse Commission acknowledged that the "logic" of the accident compensation scheme would require similar treatment of losses caused by illness. "But logic on this occasion must give way to other considerations."\(^{110}\) These included the prudence of proceeding step-by-step in introducing far-reaching social legislation, the problems of coordinating existing health programmes and the lack of statistical resources for planning a national sickness compensation scheme. Of course, cost and financing are further factors left unmentioned by the Woodhouse Report. By exploring some of these reasons for limiting "real compensation" to accidental injuries, we may learn more about the considerations that were strong enough to frustrate the "logic" of the compensation ideal.


\(^{107}\) See, \textit{e.g.}, \textit{White Paper}, \textit{supra} note 13, paras. 91 and 92.

\(^{108}\) \textit{Woodhouse Report}, \textit{supra} note 10, para. 6.

\(^{109}\) \textit{Id.}

\(^{110}\) \textit{Id.}, para. 17.
Other broad exclusions are property loss, economic loss in the nature of contract damages and injuries to personal privacy and reputation. While “illness” as such has never been the basis of a cause of action under the common law, these other forms of loss are often deemed compensable in civil actions. Does the “logic” of the accident scheme apply to them as well? There is no discussion of these issues in the background reports or in the legislation itself, but we will want to return to this question.

1. Exclusion of Certain Accidental Injuries

We should look at several specialized exclusions contained in the ACA which may give us important clues as to the nature of the values in conflict with the principle of compensation. Among these exclusions are benefits for non-workers (until the ACA was amended in 1973111), for the elderly,112 and for victims of deliberately self-inflicted injuries, including suicide.113 Persons injured while carrying out a crime are apparently eligible for benefits,114 but dependents cannot recover their survivors’ benefits if they have been convicted of murder or manslaughter of the decedent.115

The omission of non-workers in the law as originally passed is a striking example of the selective approach to the principles of universal eligibility and community responsibility. The Act was divided into two distinct programmes to be financed separately: an Earners’ Scheme116 and a Motor Vehicle Accident Scheme.117 The former covered all employed workers, whether or not their accidents were work-related in the sense required under most workmen’s compensation programmes.118 The Motor Vehicle Accident Scheme applied to workers and non-workers alike and covered all injuries incurred in motor accidents.119 Left unprotected by either scheme were unemployed persons, notably housewives and children, whose injuries were not caused by motor accidents. This wholesale exclusion meant that the common law had to be retained for the class of non-workers, thus creating an awkward dual system of accident compensation.120

By amendment in 1973, before the law took effect in 1974, Parliament added a Supplementary Scheme to cover non-workers121 and authorized separate funding of this scheme out of general revenues.122 Financing seems to

112 ACA, s. 128.
113 Id., s. 137.
114 See the White Paper, supra note 13, para. 326.
115 ACA, s. 138.
116 Id., ss. 54-90.
117 Id., ss. 91-102.
118 Id., s. 55(1); see also ss. 84-89.
119 Id., s. 92.
120 See Gair Report, supra note 48, para. 15.
121 ACA, ss. 102A-D.
122 Id., s. 102D(1)(a).
have played a key part in the evolution of the ACA. The Earners' Scheme was to be financed from levies on employers similar to those collected under the existing Workers' Compensation Act. The Motor Vehicle Accident Scheme also had a ready source of funds in the insurance premiums paid by car owners; private insurance against liability for personal injury was made unnecessary, and comparable fees were imposed by the Act in place of insurance. However, there was no such fund waiting to be tapped to compensate non-workers, and the great reluctance of Parliament to authorize payments from general revenues must be seen as relevant to the legislative understanding of the term "community responsibility."

The Gair Committee played the decisive role in eliminating non-workers from the original scheme. (It should be kept in mind, however, that non-workers injured in motor accidents were covered under that scheme.) The Committee's statement on this matter is worth quoting in full:

The one field covered by the Royal Commission's scheme but not funded under our proposals is that of other accidents to non-earners apart from vehicle accidents. We felt doubtful as to the practicality of covering this field. The costs of compensation for the estimated number of accidents in this sphere are not particularly high. But we were influenced to some extent by the warnings of the Manager of the State Insurance Office and of the representatives of the insurance industry that costs would not be easy to control in this field. Medical witnesses also pointed out the difficulties of drawing the line between accidental injuries and sickness with elderly people. Thus, after considering the difficulty of raising finances for this field, the doubts about the control of costs, and the demarcation problems, we concluded that progress in this field should await the report of the Royal Commission on Social Security but it should not eventually be left unresolved.

The Committee did not raise the question why non-workers as a group should be asked to "sacrifice" their just benefits in order to protect the fiscal health of the Act. Instead, their decision was justified by criteria fully appropriate to the traditional design of a social security scheme in which policy makers are free to be selective—no reference was made here to the "objective" losses recognized by common law that would not be compensated under the ACA. The fact that the negligence action was temporarily left in existence for the sake of these non-workers was little consolation, given the dubious regard in which every investigative panel claimed that it held the common law method of administration. The only way in which one can reconcile the Gair Committee's simultaneous slighting of non-workers and its legalistically justified enlargement of benefits for the short-term injured worker is to take note of trade union pressures on the Committee. Cost alone would have favoured the Woodhouse Commission's policies of excluding major benefits for lost earnings for injuries shorter than four weeks rather than cutting off housewives, children, and the elderly from ACA coverage.

Under the Supplementary Scheme passed in 1973, which came into force with the other two schemes in 1974, all non-workers except the elderly receive

123 Id., ss. 71 et seq.
124 Id., ss. 98 et seq.
125 Gair Report, supra note 48, para. 35.
the same benefits as workers. Of course, they receive nothing in the way of lost earnings, but they do receive compensation for medical expenses and non-economic loss. The law did not return to the suggestion by the Woodhouse Commission to provide non-workers with a minimum flat-rate weekly payment, presumably because that would be too much in the spirit of social security rather than "real compensation."

The special exclusion of payments to persons over 65 (unless the accident occurred when the victim was over 60, in which case more specialized rules apply) under any of the three compensation schemes may be attributable to prospects for a new policy on superannuation in New Zealand. Both the Labour Party and the National Party recommended comprehensive programmes in this area, and it was expected at the time that the ACA was passed that major changes in this policy were forthcoming. The National Party plan, which eventually became law, provides a high level of benefits, so one should not view the exclusion of the elderly from the ACA as a suspension of "community responsibility."

A further grab-bag of exclusions from coverage under the ACA are apparently based on the moral or criminal culpability of the claimant. Although these exclusions will apply to very few people, they raise interesting questions for the purpose of clarifying the Act's commitment to universal entitlement—especially since the financial savings from these exclusions are negligible. The ACA disqualifies from coverage anyone whose injuries were "wilfully self-inflicted," dependents of persons who have committed suicide (although, in cases of "special need," the families may receive some survivors' benefits) and any person who has been convicted of murder or manslaughter of a covered decedent.

The background reports provide little illumination of these exclusions. No doubt they seem intuitively plausible and uncontroversial as social policies, but conceptually they raise the issue of whether community responsibility to provide compensation can be avoided by flagrant acts of individuals. In general, the ACA imagines its beneficiaries as the "statistically inevitable victims" of complex social life. The spirit of the statute differs fundamentally from tort doctrines in that it generalizes the issue of responsibility; in place of duties owed between particular persons, the ACA finds a general social duty to provide for the victims of accident regardless of the cause of injury. If someone is injured by industrial machinery or a defective product—situations in which culpable defendants are frequently hard to catch under modern negligence doctrines—society in general has the responsibility

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129 Woodhouse Report, supra note 10, para. 300.
127 ACA, s. 128.
129 ACA, s. 137(1)(a).
130 Id., s. 137(1)(b).
131 Id., s. 138.
133 See Woodhouse Report, supra note 10, para. 1.
134 See id., paras. 5 and 6.
to compensate. If someone is the victim of violent crime, there is no difficulty in placing immediate responsibility on the perpetrator; yet here too the ACA requires that society shoulder exclusive responsibility for compensation (while the criminal may also be punished for his offence against the social order).

In other words, social responsibility to provide compensation is not confined in the statute to a residual class of cases in which a defendant satisfactory to the common law cannot be found. The implication is that, even where individual action appears to supersede the general causative force of "society's" activities, the responsibility to compensate the victim still rests with society.

Consider now the individual claimant who is injured not by the deliberate act of another, but by his own "wilful" act. If we construe this word narrowly (as the common law would) to avoid reintroducing a concept of contributory negligence or "gross" contributory negligence, we are left with the relatively small number of situations in which people intentionally execute their own injuries: for example, shooting off a "great toe" in order to supplement one's income by ten percent under the new Act. Was this what the drafters were concerned about? To a law-trained person like Mr. Justice Woodhouse, this exclusion may have made sense as a type of anti-fraud measure, a guarantee against inducing self-inflicted injuries with the creation of the whole state compensation scheme. Yet the specific intent to defraud is not mentioned in the statute.

Nevertheless, the general exclusion of benefits to the families of suicide victims goes well beyond any safety provision against fraud. There is no way to reconcile this provision with the general theory of community responsibility, except to see it as a specific exception based on social custom. For this and the exclusion of self-inflicted injuries, there is also the legal maxim that "no one shall profit from his own wrong," an axiom that would satisfy any backer of the ACA who saw the scheme as essentially a substitute for private law rights. The maxim applies most clearly, perhaps, to the exclusion of survivors' benefits to dependents who are convicted of murder or manslaughter of the decedent. This exclusion is narrowly drawn, requiring "conviction" of the stated offences rather than some independent showing of intentional killing. The dependent acquitted by procedural technicalities or acquitted by reason of insanity is therefore able to claim benefits as a survivor.

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135 ACA, s. 137(1)(a).
136 Id., s. 137(1)(b). For a comparison of rights under this section with rights under preceding law, see Coote, Suicide and the Claims of Dependents, [1976] N.Z.L.J. 54.
137 See the famous discussion of this maxim as it applied to homicides as life insurance beneficiaries: Cardozo, The Nature of the Judicial Process (New Haven: Yale U. Press, 1921) at 40-44.
138 In a recent review hearing, the Commission implicitly acknowledged the right to file a claim of a husband who was acquitted, by reason of insanity, of murdering his wife. The claim was denied on other grounds, however. ACC Review Hearings, 74/R00267, February 26, 1975, reprinted in ACC Report (1976), infra note 172, at 17.
The exclusions discussed so far reveal certain limits to the values of universal eligibility and the corresponding community responsibility to provide "real compensation." The Gair Committee and the drafters of the original bill permitted the glaring exclusion of non-workers, on the grounds of their concern for overall costs and an appropriate source of funding. Further exclusions were allowed pending new policies of community responsibility in other areas such as superannuation. Finally, \textit{ad hoc} exclusions were recognized for claimants who stood to profit from their "own wrong," despite the inconsistency with the very broad principle of social responsibility implicit in the Act. We should note, however, that a similar group of claimants was not excluded, namely persons injured during the course of committing a crime.\textsuperscript{139} Such persons can recover under the Act for their injuries, even though they may also be subject to penalties for their criminal actions. On this point, the statute does remain consistent with the principle of community responsibility.

2. The Exclusion of Compensation for Sickness and Congenital Defects

The provisions just reviewed represent exceptions to the principles of universal entitlement to compensation for accidental injuries. With the addition of the Supplementary Scheme to bring non-workers into the plan, the exceptions are not major in terms of persons affected, although they reveal a willingness to compromise with universality for the sake of other goals.

Our perspective changes greatly, however, when we identify a different form of selectivity in the fact that the Act as a whole singles out for "real compensation" only those losses caused by personal injuries from accidents. We saw earlier that the Woodhouse Commission was fully aware that the "logic" of its basic principles could not support preferential treatment for losses caused by accidents rather than by ordinary illness, congenital defects, or other causes.\textsuperscript{140} Likewise, the Gair Committee declared that it found the principle of community responsibility most compelling "when used to support the uniform treatment of all disabled, the sick, as well as the injured."\textsuperscript{141} Yet it is not surprising, where major legislative innovation is concerned, that a country chooses to move cautiously, starting with a single area like accident compensation instead of moving directly to a comprehensive programme covering all forms of disability. The institutions that have dealt in the past with accident compensation are different for the most part from the public institutions responsible for health services, and reform in the latter area is likely to create distinct problems, which are entitled to separate treatment.

At the present time, New Zealand faces the decision whether to extend its compensation programme beyond the field of accidents.\textsuperscript{142} Moreover, in

\textsuperscript{139}See \textit{White Paper, supra} note 13, para. 326. For an interesting discussion of the policy reasons for including convicted criminals within this scheme, see Palmer, \textit{Compensating Criminals,} [1975] N.Z.L.J. 608. The proposed Australian scheme (see note 143, \textit{infra}) specifically excludes compensation for persons injured in the course of committing specific serious crimes. See \textit{National Compensation Bill, 1975,} s. 13, reprinted in 1 \textit{Compensation and Rehabilitation in Australia,} see note 143, \textit{infra}.

\textsuperscript{140}\textit{Woodhouse Report, supra} note 10, para. 17.

\textsuperscript{141}\textit{Gair Report, supra} note 48, para. 8.

\textsuperscript{142}See \textit{supra} note 45.
1974, the architects of the original New Zealand scheme were invited by the Whitlam Labour government in Australia to propose a compensation law for that country that would encompass all disabilities, extending earnings-related benefits to victims of disease and natural disability. Both these proposals raise enormous questions of cost and administration. Unlike the more limited scheme in New Zealand, financing would come largely from general taxation, and existing social security and health programmes would have to be overhauled. While the "logic" of the New Zealand scheme is compelling to many legislators, the practical difficulties of extending the programme remain large indeed.

Practical concerns aside, the question of "logic" requires deeper investigation. In examining the concept of real compensation, we saw that it was possible to utilize the same categories of "objective" loss regardless of the precise source of loss. Lost earnings can result just as easily and, probably more often, from illness as from accident. The psychic costs of permanent incapacity are no less for the victim of disease than for the victim of a motor accident. Nothing in the recognized concepts of loss would prevent their use as a standard for measuring compensation in a much wider scheme.

However, it does seem strange to speak of compensating the cancer victim for pain and suffering or for loss of capacity to enjoy life, in part because these common law concepts have never been applied by the judicial process to victims of ordinary disease. Being ill does not create a cause of action; against what defendant could the sick person complain? The common law recognizes no losses from illness as such, because it cannot assign the responsibility within its essentially individualistic, interpersonal framework. On the other hand, we saw how the ACA represents a radical change of the traditional private law notion of responsibility, putting in its place community responsibility for accidental injuries and abolishing individual liability. Does the "logic" of this concept of community responsibility carry over into new fields of compensation where the common law has never ventured?

The ACA and its background reports hoped to find in the common law a new justification for collective social action in the field of accident compensation. The rationale for collective action was based on an analogy with common law theories of responsibility placing liability on individual persons who cause injury to others. In the New Zealand scheme, the element of causation is essentially retained but the liability is assigned to society as a collective whole. To push the legal analogy only slightly, the ACA imposes vicarious liability on the state for the torts of its citizens committed on each other. It is no longer individuals who are recognized as the legal cause of accidental injury, but society, working through its individual members. The

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144 Woodhouse Report, supra note 10, para. 89.
concept that the injury is still caused by some agent, although a collective
agent, is depended upon very heavily.

The Woodhouse Report clearly assumes this novel theory that society is
the collective agent of losses through accident. The community's responsibil-
ity is based on the premise that accidents are caused by the collective partic-
ipation of all its members in modern technological society. In its opening
section, the Commission declares that "the toll of personal injury is one of
the disastrous incidents of social progress, and the statistically inevitable
victims are entitled to receive a co-ordinated response from the nation as a
whole." Emphasis has been added to the statistical concept of causation
in this premise, which is a sudden removal from strict common law doctrine,
although still analogous to the more concrete legal understanding of cause.

The Commission acknowledged what commentators have long told us: with
technological progress comes an inevitable increase in accidents. The
victims of progress are not precisely identifiable, but their number must in-
crease as more powerful instruments are produced and social interaction
grows more complex. While in many cases, such as motor accidents, we can
point to an individual who was "at fault," perhaps even grossly or wantonly
negligent, the total number of such accidents would not occur if the use of
the automobile were not so much a part of modern life. Even the drunk
driver—the perfect defendant in an ordinary tort suit, provided that he has
insurance—could not cause the same degree of damage if society did not
make available such powerful instruments of destruction. Society's respon-
sibility is thus conceived on a level distinct from the responsibility of indi-
viduals in particular cases, though both levels may exist simultaneously. It
is, nonetheless, by analogy with the legal responsibility of individuals that this
related notion of community responsibility should be understood. "Society"
as a responsible agent cannot, obviously, possess a culpable state of mind—
or any state of mind, for that matter. However, even here the analogy holds
with legal responsibility in tort, which likewise requires no particular culpable
mental state of the defendant, despite the connotations of the language of
fault and the fiction of the ordinary prudent man.

Having developed a new theory of social responsibility, the Woodhouse
Commission made no rigorous examination of how far the logic of the theory
extended. For example, the Commission made no effort to explain why, on
this principle, society should be responsible to victims of "exposure to the
elements." Anyone struck by lightning would presumably qualify under

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146 Id., paras. 1 and 56 [emphasis added].
147 As noted above, the Woodhouse Commission was greatly impressed by the
scheme proposed by Ison in the Forensic Lottery, supra note 20. See the Woodhouse
Report, supra note 10, para. 97.
148 Woodhouse Report, id., para. 87. See Holmes, supra note 1, at 108; and Harper
and James, 2 The Law of Torts, supra note 20, § 12.1.
149 Woodhouse Report, id., para. 289 [Contingencies to be Covered]: "(d) Incapaci-
ty ... should be protected when the injury resulted from an unexpected or undesigned
external cause, including exposure to the elements ..." This explains why the injury
qualifies as a compensable loss, but it does not connect the loss with the principle of
community responsibility.
the ACA, even though it is hard to cast him as one of the statistically inevitable victims of social progress. One might also question the sense in which society is responsible for injuries from criminal assaults. There are theories to support such an idea, but we cannot assume that a distinguished Supreme Court Justice of New Zealand necessarily embraced them.

The weakness of this concept of social responsibility is plain: "society" is such a large abstraction that it becomes a platitude to say that it is "responsible" for everything that happens. Is this responsibility any different when connected with a statistical increase in automobile accidents, with injuries from medical malpractice, or with assaults by psychopathic killers? Must "society" always act through some human agency? Apparently not, if injury from "exposure to elements" qualifies for compensation.

It is in this context that the issue of compensation for illness should be considered. If the community's responsibility to compensate is justified by the causal impact of social progress, this logic may not, in fact, compel the state to assume responsibility for organic disease or congenital defects. Many diseases and birth defects can be linked to environmental causes or otherwise associated with technological growth and the march of social progress. However, links of this sort remain to be proved in many instances, and in any case the supervening effects of individual biology cannot be ignored. Any programme of compensation for illness that attempted an empirical assessment of society's impact would involve itself in extreme complexity. However, to ignore the question of the limits of society's effects and to assume that society is responsible for every illness that occurs is to adopt a platitude. The more nebulous this notion of society as causal force, the weaker the argument for community responsibility will be to skeptics.

The Woodhouse Report contains a second argument in favour of its concept of community responsibility, one modeled on contract theory rather than torts. In a modern twist of the concept of a social contract, the Commission argued that, if society is willing to benefit economically from individual action, it should shoulder the costs which fall on innocent but "statistically necessary" victims of accidents. This argument is related to the doctrine of quasi-contract, and it also has some resemblance to the tort principle of assumption of risk. However, neither doctrine advances beyond the more basic argument for responsibility based on causation. In the absence of any precise legal analysis uncovering the limits of society's implied contractual obligations or the limits of the risks that society has assumed, both doctrines become vague, analytically useless appendages. Doubtless each one makes intuitive sense when applied to particular classes of accidental injuries, but neither is sufficient to reach all of the injuries already covered under the ACA.

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149 For an historical treatment of these theories, see Kittrie, The Right to be Different (London: John Hopkins Press, 1971).

150 Woodhouse Report, supra note 10, para. 56.

151 On the recent convergence of contract and tort doctrines, see generally Gilmore, The Death of Contract, supra note 21.
To summarize, it is not at all clear that the logic of the principle of community responsibility applies to compensation for illness or congenital defects. For that matter, the rationale for this principle contained in the Woodhouse Report, modeled on common law concepts of responsibility, may not even suffice to justify the state's duty to compensate all cases currently covered under the existing ACA. The theory is nevertheless very compelling for most accidents in modern society, provided that we accept the idea that society's actions are linked statistically with rising accident rates. Whatever reservations one might have about the use of a causal theory of responsibility, it seems to be more compelling in the area of accident compensation than in the areas of sickness and birth defects. It is no doubt fortunate for the principle of community responsibility that it gains its foothold in the area of torts, where jurists have been long accustomed to manipulate the concept of cause. The principle would surely face more serious challenge as the basis for a comprehensive programme of earnings-related sickness benefits.

3. The Outlook for Extending Compensation Beyond Personal Injury

In looking at the broad selectivity involved in limiting the ACA to compensation for losses resulting from "personal injury by accident," we have explored the conceptual pressures created by dropping the limitation to "accidents." We should now look at the reasons for the limitation to losses "from personal injury." There are other routes to economic and psychic loss besides personal injury, and the common law of torts thrives on them. Most important is property loss, which can result from accidents as well as from a variety of other causes such as breach of contract, deceit, and natural disasters. Certainly the amount of property loss incurred by members of society has grown enormously with technological progress; here too we find victims of progress who are "statistically inevitable," even though complex factors sometimes obscure the link between property loss and social progress. Property losses in automobile accidents are just as easily attributed to technological change as are personal injury losses. Property losses, moreover, are essentially economic and are probably easier for a commission to assess than the kinds of non-economic loss associated with personal injury.

The legislative reports on accident compensation in New Zealand are surprisingly silent about property loss—even property loss associated purely with "accidents" and long recognized under the common law as com-
Pensable. There is not even a whisper that personal injuries constitute a more urgent social problem than property loss. The impact on the victim whose car is demolished in a road accident or whose house is destroyed by fire can be serious, perhaps more serious than a temporary injury caused by the same accident. In short, nothing in the logic of real compensation, community responsibility, or the social welfare needs of individuals appears to exclude property loss from the scheme. One would expect its inclusion, absent special reasons for omission. Why then is the matter passed over in the ACA?

No doubt one reason is the magnitude of the undertaking. One scarcely knows where to begin in assigning a value to property loss suffered by an entire society. However, if such losses are limited only to those caused by "accidents," the problems are no greater than those that the Woodhouse Commission faced in estimating the costs of personal injuries.

A more likely reason why property loss escaped the attention of the Commission is that a wider group of claimants would have had to be considered. Only individuals can be injured physically, but associations of many kinds, including corporations, suffer property loss. There would have been little basis for compensating the individual whose home is lost in a fire while ignoring the claim of the corporation whose factory is destroyed. To be sure, many kinds of social policy apply to both individuals and associations, and private law treats corporations as legal persons, but the creation of a comprehensive social scheme from which businesses would stand to receive compensation raises large political questions. The fact that this option was not exercised may shed some light on the welfare state underpinnings of the ACA.

Still another reason for ignoring property loss in this kind of law is the plausible claim that private insurance works more satisfactorily in this area than with personal injuries. Those with property often have the extra resources and prudence to secure the property against accidental loss. Whether this assumption is plausible in New Zealand was not established by the Woodhouse Commission or by any later inquiry, and there is no evidence that the Commission even posed the issue of compensation for property loss. The ACA simply follows the conventional welfare-state policy of concentrating on the urgent needs of individuals. It leaves to traditional tort law and private insurance the task of mitigating risks and damage to personal property.

Just as the scheme ignores compensation for property loss, it passes over other recognized sources of loss, both economic and non-economic. These include the traditional economic torts (unfair competition, business libel, and the like) and the so-called "intentional torts" (libel and slander, assault, false imprisonment, malicious prosecution, invasion of privacy, and sundry others). Personal physical injury may result from assault and battery, and the New Zealand law would properly apply to such injuries. However, no recognition is given to the individual's interest in his reputation, personal

154 Ison, id. at 97.
155 This argument is made by Atiyah, supra note 11, at 573.
privacy, or physical freedom of movement—interests protected in some common law jurisdictions. Frequently, courts award punitive damages in cases involving intentional torts—damages over and above "actual" damages. Perhaps we would not expect a state-run compensation scheme to pay punitive damages where the state's "responsibility" for the injury does not amount to a form of intentional infliction of loss. Nevertheless, nothing would prevent a compensation scheme from recognizing only "actual" losses\(^{156}\) to reputation or privacy, and a statutory ceiling could be imposed even on these awards, much as the ACA has done in recognizing pain and suffering associated with physical injury.

We can conclude this discussion with the summary observation that both conceptual and administrative complexities would be heaped upon any state compensation programme that recognized loss to personal property, reputation, privacy, and freedom of movement. Furthermore, political repercussions would doubtless result from such a programme where corporations and other groups stood to receive large sums, or where a well-developed private insurance market (in the case of most types of property loss) already exists. Finally, the financial cost of such a scheme would expand the size of the economic undertaking well beyond the present level of the ACA. Resistance to increased costs and to plans for financing these additional categories of compensation would add to the political infeasibility of the entire programme.

In a practical sense, it comes as no surprise that the ACA limited its coverage to losses following upon "personal injury" by accident. It does, however, provide some perspective on the concepts of real compensation and community responsibility, whose philosophical breadth and "logic" argue against any exclusions, that they are here implemented in a selective manner. While the Woodhouse Commission and later investigators—predominantly jurists—noted the anomaly of restricting the scheme to accidents as opposed to sickness, they apparently saw no issue in ignoring major areas of tort law completely.

C. Costs and Financing of the ACA

The financial provisions of the ACA cast important light on certain difficulties noted elsewhere in this survey. Reasons for some of the exemptions from coverage, in addition to the political and conceptual considerations considered above, can be found in financial exigencies. The law as conceived by the Woodhouse Commission and through its passage in 1972 had two economic features of overriding importance: the costs of the scheme were promised to be equal to or less than the amounts spent on accident compensation under the existing mixture of public and private programmes.\(^{157}\)

\(^{156}\) The United States Supreme Court has ruled that damage awards in defamation suits beyond "actual" damages are in conflict with interests protected by the First Amendment. See Gertz v. Robert Welch, Inc., 418 U.S. 323 at 349-50, 94 S. Ct. 2997 at 3012 (1974). The Court declined to define "actual injury" except to point out that it is "not limited to out-of-pocket loss." It remains to be seen whether trial courts are able to implement this standard.

\(^{157}\) Woodhouse Report, supra note 10, para. 10.
and the funds to finance the scheme were to come from essentially the same sources, namely from employers who paid Workers' Compensation premiums and from drivers who purchased automobile insurance. The sources of funds adequate to finance a programme of accident compensation were already in existence, and the ACA promised to provide more comprehensive coverage for society as a whole without disturbing to any major degree the amounts or kinds of premiums. Above all, there was no plan to finance any part of the scheme out of general revenue—until 1973, with the belated passage of the Supplementary Scheme to protect non-workers.

The law is divided into three distinct schemes, primarily, it would seem, for accounting purposes. The Earners' Scheme is the outgrowth of Workers' Compensation and is financed completely out of contributions by employers. Under the ACA, there is no requirement that an accident be work-related in order for an earner to qualify for compensation, and benefits are scaled on the more generous common law model rather than on the more penurious Workers' Compensation formula. The increased benefits, however, were expected to come out of savings in administration under the publicly administered programme, not from increased premiums placed on employers. These premiums are only slightly modified from the old Workers' Compensation schedules. Levies are differentiated through a complex classification of industries and employers, with a uniform percentage of wages charged against all employers within each class. The ACA left room for the ACC to penalize specific employers with bad accident records and to grant rebates to those with good records. However, according to Palmer, "it has so far been impossible to use either of these provisions," apparently because adequate statistics on which to base penalties and rebates do not yet exist.

The Motor Vehicle Accident Scheme is much simpler. Levies are imposed on all automobile owners based on the rates established under private insurance contracts, which were compulsory in New Zealand prior to the Act. A separate provision authorizing additional levies on drivers as opposed to owners has not as yet been implemented. Here too the backers of the Act hoped to cover the more generous benefits under the ACA by reducing administrative costs below the levels of private insurance companies—not by increasing premiums.

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158 Id., para. 312.
159 Id., paras. 9 and 433.
160 See text accompanying notes 121-26, supra.
161 ACA, ss. 31 and 71.
162 See Woodhouse Report, supra note 10, para. 240.
163 Id., para. 434; White Paper, supra note 13, para. 177. The Woodhouse Report, id., also expected to achieve savings by excluding compensation for short term injuries.
164 Palmer, supra note 89, at 38.
165 ACA, s. 73.
166 Palmer, supra note 89, at 39.
167 ACA, s. 98; see White Paper, supra note 13, para. 96.
168 Id., s. 100.
However revolutionary the ACA might appear, these financial provisions of the original Act were scarcely designed to create shock waves in financial terms. The law was sold as a more efficient way of dispensing approximately the same amount of money acquired from roughly the same sources. In addition, the Woodhouse Commission noted that some pressure would actually be taken off general revenues, since the more comprehensive compensation of losses would reduce the number of needy cases requiring aid under social security.160

As we saw above, resistance to coverage for non-workers injured in non-motor accidents can be attributed to the desire not to upset this neat continuation of the status quo in financing.170 The Gair Committee expressed concern that the costs in this area might grow out of control, and there was no pre-existing scheme of premiums designed to cover precisely this class of claims. Thus, the 1973 amendments creating the Supplementary Scheme for non-workers crossed a large symbolic barrier in authorizing general revenues to finance this particular scheme.171 As it turns out, premiums collected under the other two schemes in the first years of operation have far outdistanced claims, in part because it will take years for long-term claims to accumulate.172 At the same time, anticipated expenses under the Supplementary Scheme have been consistently underestimated, and the ACC has had to make supplementary requests to cover these costs.173

What should be made of this acceptance of the financial status quo in a law that otherwise appears so innovative? In relation to our entire discussion up to this point, we need to inquire how this method of financing qualifies the principle of “community responsibility,” because in reality, as certain critics have pointed out,174 it is not the community as a whole that pays for all parts of the programme. In making this inquiry, we shall encounter various acknowledgments of theories popular in the United States on the importance of allocating costs of accident compensation in accordance with standards of economic “efficiency.” Finally, we will speculate on the relation of financial constraints to the more serious exemptions to coverage under the Act, both with respect to the categories of loss recognized and to the possibility of extending coverage to losses beyond those caused by accidents.

The Woodhouse Commission anticipated the challenge that community responsibility for accidents should lead to financing the entire scheme out of general revenue.175 It met that argument as follows: It pointed out that in-

170 See text accompanying notes 121-26, 157-62 and note 160, supra.
171 Supra note 160.
172 See the annual Accident Compensation Commission: Report (Wellington: A. R. Shearer, Gov't Printer, 1975-76) for 1975 and 1976, s. 6 [hereinafter ACC Report].
173 Id.
174 See White Paper, supra note 13, para. 200.
175 Woodhouse Report, supra note 10, para. 461.
Industries were already operating under a regime of Workers' Compensation premiums that have been passed on to consumers. Based on the assumption that costs of goods do not change to reflect reduced costs of production, particularly in industries with high premiums to transfer the burden suddenly to taxpayers would make them bear the costs twice. This reasoning restricts itself to the economic short run, however, and includes no argument for why long-run adjustments in industrial prices would not reflect at least part of the reduction in premiums. As an empirical prediction of what would happen to industrial prices, the argument is scarcely enlightening.

An even more problematic argument was added by the Woodhouse Commission: "[T]o the extent that the amount of these premiums has been passed on by industry their cost is already being shared by the community, even though indirectly. Accordingly, the broad principle of community responsibility is in this way being satisfied already." The community that elsewhere is said to have collective responsibility for all accidents—the community of persons passing through unprecedented periods of technological and social progress—has momentarily become the community of the free market. They are not, however, the same notions. The community of price-takers in the free market must accept prices that are influenced by premiums differentiated by industry, some of which doubtless cover accidents beyond those that happen in a particular firm. In the absence of assurance that premiums are perfectly coordinated with real accident costs in every case, some industries are doubtless subsidizing others, and some consumers are paying more than their free market share of accident costs. True, all consumers will pay something toward accident costs no matter how imperfect the match between premiums and accident records of particular firms. In this sense, society in the aggregate will bear the costs of accidents. But the share paid by each member will be determined by the vagaries of fixed premium schedules and other departures from pure market processes. The proportions paid by each person, based on his preferences as a consumer, will not necessarily express the extent of his proper responsibility for bearing these costs, which ought to be communal in nature, in keeping with the sense of community responsibility.

General revenues, were they to bear the costs of accident compensation, would also assign differing burdens to individuals. In theory, at least, general tax burdens are established according to a society's particular sense of equity, its sense of a fair balance between the total tax burden and the individual's capacity to contribute to the whole. There is no reason to assume that these differentials are identical to the differing burdens on consumers to whom accident costs are shifted under a market pricing mechanism. The Woodhouse Commission's suggestion that community responsibility can be effectively discharged through market mechanisms is thus difficult to take seriously.

176 Id., para. 462.
177 Id., para. 463.
178 Cf. Titmuss, supra note 8, at 184.
The Woodhouse Commission in fact placed little trust in the market as a means for apportioning equitably the costs of accident compensation. This is evident from its bold suggestion that premiums imposed on individual industries and firms should be set at a flat one percent of wages and should take no account of different accident rates either among classes of industries or among firms within each class. Declaring that "all industrial activity is interdependent," the Commission in effect repudiated the market as an equitable means of apportioning costs to consumers. Instead, funds were to be drawn from industrial and commercial activity as a whole, and consumers would bear these costs in proportion to their level of consumption. This is at least a gesture in the direction of communal responsibility, based on the premise that contributions to the scheme should be proportional to each person's level of expenditure.

This suggestion met criticism on various grounds. In the first place, employers who had evidently not accepted the full communal implications of the Commission's concept of "community responsibility" felt that some industries were being asked to subsidize the accidents "caused" by others. Within particular industries, firms with relatively good accident rates were asked to subsidize their more careless competitors. The belief that accidents are caused exclusively by individual agents, and that the corresponding duty to compensate was tied to individual culpability, still had strong adherents. Not incidentally, these beliefs coincided with the self-interests of employers in low-risk industries, thus guaranteeing that exponents of the individualistic view would come forth. The employers who stood to have their premiums raised drastically in proportion to other employers were not persuaded by the rhetoric of communal responsibility to the extent that it reduced their competitive advantage. We should look on this not so much as a conflict of values, but rather as a conflict between the concept of the "community" and the viewpoint of particular interests. Such a conflict arises in any legislation which imposes community values on the private sector, whose members still see their actions solely on the level of individuals.

The Woodhouse Commission thus bowed to political pressures to keep the costs of the scheme roughly within the limits of existing sources for earlier compensation programmes. It made no plausible case for its suggestion that the costs were equitably shared by the community as a whole by virtue of being imposed on employers and owners of automobiles. However, it did remain consistent with its communal values by refusing to define causal responsibility on the level of individual industries, firms, or drivers through the mechanism of differential levies. The argument that some particular industries, firms, or drivers caused more accidents than others was not enough, in the Commission's view, to justify a proportional division of the duty to compensate. Given this position, the only imaginable reason for sticking with levies on employers and owners, rather than turning to general revenues, is

179 Woodhouse Report, supra note 10, paras. 314 and 468.
180 Id., para. 467.
181 See Gair Report, supra note 48, para. 62.
the political simplicity of tapping pre-existing sources. As we saw above, one of the difficulties in extending the New Zealand program to cover losses from sickness is that the necessary funds are not being collected through any existing mechanism. Dependence on general revenue would be certain to raise conflicts between the collectivist values of a broader scheme and the still prominent forces of particular interests.

The debate that followed the Woodhouse Report could not long ignore the developing American academic discussion of accident costs, a discussion that offered some support to all sides of the New Zealand debate. The American theory, steeped in a market-oriented economic philosophy, emphasized the standard of economic "efficiency" as the leading principle for apportioning the costs of compensating accident victims. The spirit of this theory is to dismiss as abstract and mysterious any effort to distribute costs according to a principle of social justice. Justice is understood rather as the outcome of market forces, operating either unrestricted or modified by social fiat. In the absence of a well-articulated and popularly accepted principle of social justice, the ideal of cost efficiency has undeniable appeal. It is therefore no surprise that some proponents of the ACA turned to the American theory to help rationalize the move toward a new kind of welfare philosophy whose premises were still very uncertain.

The American theory, although there are several important variants, asserts generally that the standard of economic "efficiency" should be the guiding principle for apportioning the costs of compensating accident victims. According to the most elaborate presentation of this theory, there are at least three separate goals wrapped up in the criterion of efficiency: reducing the administrative costs of providing compensation, selecting liability rules that maximize the incentive to prevent accidents from occurring, and allowing the market to select an "optimum" rate of accidents by treating costs as internalized by particular accident-producing activities. This last point is the

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183 Calabresi admits that non-market concepts of justice set a framework within which market determinations are permitted to operate, but he treats such concepts of justice as unanalyzable ends of social policy. Supra note 7, at 24-26.

184 The economic perspective was first introduced into the New Zealand discussion by Palmer, who was largely responsible for producing the 1969 White Paper, supra note 13, para. 205. Palmer had just returned from the University of Chicago Law School, where he had been immersed in the economic approach. In recent years he has grown skeptical about the practical relevance of these theories to public policy. See Palmer, supra note 89, at 38 and 40. Palmer has continued this description of his role and of his changing attitude in a telephone conversation of December 5, 1977.

185 In addition to the arguments presented in the White Paper, supra note 13, the Gair Report, supra note 48, para. 21, echoed the concerns about the effects on the accident rate of removing levies from employers.
overriding principle; it states that society should learn to live with the number of accidents that it is able and willing to afford, assuming that everything else is done to make the costs of avoiding accidents as low as possible.

While this theory of cost efficiency played little part in the drive for accident law reform in New Zealand, it did play a minor part in shaping the final legislation. Primarily it provided sophisticated arguments for shoring up controversial features of the law, and all sides of the debate were able to find something in it to help their argument. The Woodhouse Commission took a very simple view of efficiency—the reduction of administrative costs by substituting a state commission for the prevailing system of courts, lawyers, and private insurance. At no point in the development of the ACC was it seriously doubted that this goal could be achieved.

The Commission invoked an additional notion of efficiency in defence of its plan to impose the costs of the scheme on employers and drivers, rather than using general revenues. As discussed above, the Commission here departed from its value of community responsibility, most probably in response to political pressure to finance the program out of existing resources. The Commission justified this proposal with the suggestion that diffusing costs through the free market was an equitable means of spreading the burden to "society." If the costs of compensation are placed directly on those activities that generate the majority of accidents—industrial production and automobile driving—social and technological progress will begin to "pay for itself." Innocent accident victims will no longer subsidize economic growth; their burden will be shifted to all those who enjoy the fruits of accident-producing activities.

However, this was only a half-hearted embrace of the economic approach, and it opened the way for opponents of the Commission to argue for important changes in the Commission's recommendations. In the first place, internalizing accident costs would arguably require differentiating among categories of industries and among individual firms within each category. It follows that the Commission's plan to tax all employers at the same rate would have required low-risk industries and firms to subsidize their higher-risk competitors. The Commission's basic collectivist thinking—"all industrial activity is inter-related"—was lost in the return to the particularistic premise that specific activities cause specific accidents. The logic of this economic ideal of internalizing accident costs leads farther than anyone in New Zealand wished to go. Although the statute authorizes the ACC to make particular adjustments in levies according to specific accident records in individual industries and firms, the ACC has not yet used this power. One reason given is that the necessary statistics are not yet available. However, if

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186 Woodhouse Report, supra note 10, paras. 443-47.
187 Id., paras. 43-44 and 463.
188 Id., paras. 43-44 and 463.
189 See White Paper, supra note 13, para. 205.
190 ACA, s. 73.
there is any sense in the Woodhouse Commission's notion that industrial activity is interrelated, there are conceptual barriers to the development of satisfactory statistical records. At present, the ACC has simply retained the industrial classifications of the old Workers' Compensation Scheme as the basis for differentiating levies under the Act. The argument for greater internalization of accident costs has not led beyond the status quo.

The standard of pure economic efficiency threatens still deeper premises of the ACA. The rigorous internalization of costs revises the whole individualistic framework of social causation and represents the precondition for efficient allocation of resources. To the extent that accident-producing activities are not pinpointed to the level of individual action, whether for lack of data or for political or bureaucratic reasons, the programme as a whole cannot establish itself as efficient. From here it is a small step to questioning the basic justice of the ACA: if it is not efficient in the economic sense, then it must be redistributing resources, shifting the burden of accidents to those who have not caused them. We have already seen that this line of reasoning appealed to industries that stood to lose under the collectivist assumptions of the Woodhouse scheme of levies.

The same argument also proved useful in changing more basic features of the Woodhouse plan. Coverage for non-workers was easier to oppose on the argument that certain accident-producing activities would be "subsidized" out of levies on industry and automobile drivers. The costs of covering non-workers was small, even though hard to predict, as the Gair Committee said in excluding them. The main worry about cost was not the amount of disbursements, but the sources of income: who would "subsidize" non-workers? A similar debate about cost will undoubtedly arise with every attempt to extend the reach of compensation beyond losses caused by accidents—for example, to losses from illness. Not only will these costs be high, but it will be necessary to tap new sources of financing. This will, in turn, encounter not only political opposition, but also the complaints of individuals on whom the tax burden falls most heavily that they are "subsidizing" certain costs which are not the results of their particular activities. The goal of compensation will be regarded as conflicting with economic efficiency, requiring some uneasy forms of compromise.

191 Calabresi, supra note 7, at 6n. 8, admits the difficulty of setting precise limits to the concept of "cause":

I am using 'cause' here and throughout this book as a 'weasel' word. I do not propose to consider the question of what, if anything, we mean when we say that specific activities 'causes' in some metaphysical sense, a given accident; in fact, when we identify an act or activity as a 'cause', we may be expressing any of a number of ideas. The concept of cause has long been subject to artificial uses, in the name of policy goals.

192 Gair Report, supra note 48, para. 34.

193 Id., para. 35.

194 A concern about costs is evident in an Australian Senate Report on the draft legislation that would extend a New Zealand-type scheme to include loss from illness and congenital disease. See note 143, supra, at 43.
An identical conflict already occurs under the ACA with regard to certain types of accidents. It is surprising, for instance, that employers did not raise stronger opposition to the inclusion of non-work-related accidents to workers under the Earner's Scheme, which is fully funded by employers. Apparently many employers did not immediately understand that they would bear the burden of compensating employees who injured themselves by slipping in the bathtub at home or by breaking a leg on the ski slope. (This responsibility extends to 100 percent compensation for the first five days of lost earnings and comes directly from the individual employer.) There is evidence that employers in growing numbers feel that they are subsidizing activities that are causally unrelated to their operations. By internalizing costs unrelated to their actual production, economically marginal businesses may consequently be placed in jeopardy. Such businesses are likely to argue for a greater emphasis on economic efficiency at the expense of providing comprehensive coverage.

It should be remembered that this concept of economic efficiency did not in the least impress the Woodhouse Commission. Their report rests on premises that are deeply antagonistic to this whole method of analysis. Community responsibility in the sense understood by the Commission does not refer to the particular causal influences proximate to specific accidents; it is a collective responsibility shared by everyone who participates in modern society and cannot be apportioned on the basis of individual patterns of consumption. On this view, no adequate criteria exist even in theory for internalizing the costs of accidents in such a way as to promote microeconomic efficiency. Thus we found the Woodhouse Commission endorsing a flat one percent levy on the wages paid by all employers; in their view, when it comes to assigning responsibility for accidents caused by modern technology, all industrial activity is “interdependent.” Despite this, in an effort to avoid the political costs of finding new methods of financing accident compensation, the Commission helped itself to the efficiency argument in order to rationalize its plan to tax employers to pay for accidents to workers and to tax drivers to pay for automobile accidents. This, however, opened the door to a line of reasoning that encouraged the individual firm or driver to ask why he should pay for the accidents of others more careless than he.

Ironically, the position of the ACA comes closest to the economic-inspired theory of general deterrence on its broad, macroeconomic level.

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195 See note 161, supra.
196 ACA, s. 112. Due to last minute complaints by employers, the ACA limited employers' liability for the first week compensation to work related accidents only. See Palmer, supra note 89, at 36.
197 ACC Report, supra note 172, at 8. According to the 1975 annual Report of the Accident Compensation Commission, op. cit. at 4, the Commission is re-examining the whole issue of first week compensation and will consider recommending changes.
199 Woodhouse Report, id., paras. 467-68.
200 Id., para. 464.
General deterrence sees internalization of costs as the condition for allowing society, on a macroeconomic level, to determine the optimum rate of accidents across society at large. The goal is neither to eliminate all accidents nor to immunize certain actors from bearing the direct burden of proximately related accident costs. Instead, it is the market which dictates how many accidents it is willing to pay for through the costs of production passed on to consumers.\textsuperscript{201} The \textit{ACA} does not share this degree of faith in broad social policy decisions made spontaneously by the free market, but it does suggest that, up to now, the price of technological progress has not been paid by the majority of those who benefit from it. As a result of the fault principle and the cumbersome processes of civil litigation (common targets of the theorists of general deterrence), most accident costs fall on "the statistically inevitable victims" of social progress.\textsuperscript{202} By shifting this burden directly onto the activities of industry and automobile driving, the \textit{ACA} will have the effect of making those activities more expensive and may consequently retard their growth.

This result will appeal to anyone who feels that the pace of growth should be slowed, by whatever means. However, it will not satisfy those economic philosophers who take just as seriously the goal of microeconomic efficiency. Higher premiums on employers and drivers will force marginal actors out of the picture, but the \textit{ACA} gives us no guarantee that the individuals so eliminated were those most responsible for accidents. A small accounting firm with a low margin of profit as well as a low accident rate may suffer more under the employers' tax than a high-risk growth industry. Similarly, the low-income driver with a safe driving record will be deterred from driving sooner than the high-income driver with a horrible record. These are microeconomic effects which the backers of the \textit{ACA} cannot entirely ignore. Social progress has its costs; but so does deterrence, and both may fall unfairly on individuals. We may agree with the advocates of the \textit{ACA} who have rejected the market mechanism for apportioning and optimizing these costs, but we may also note weaknesses in the financing method of the current \textit{ACA}. The statute presents no coherent theory of what a just apportionment of costs should be. Such a theory would undoubtedly call into question the basic fairness of general tax policies and would lead to a much deeper examination of New Zealand's attachment to a new concept of collective responsibility. The Woodhouse Commission's avoidance of this issue made political sense, but any effort to expand the \textit{ACA} into more ambitious areas of compensation will need to confront it.

\textit{Conclusion}

This review of the financial provisions of the \textit{ACA} helps explain some of the compromises, exceptions, and inconsistencies that were noted in the above critique of the \textit{ACA}'s substantive provisions. The unwillingness of New Zealand to depart significantly from the financial \textit{status quo} made it

\textsuperscript{201} Calabresi, \textit{supra} note 7, at 135-40.
\textsuperscript{202} \textit{Woodhouse Report}, \textit{supra} note 10, para. 1.
possible, on the one hand, for the ACA to appear generous in providing benefits comparable to those granted under schemes whose financing structures were absorbed by the state. On the other hand, the ACA appears rather conservative in failing to award such benefits for previously uncompensated types of disabilities (such as illness and congenital incapacity). Future studies of the ACA should be sure to compare substantive changes in the statute with changes in New Zealand's fiscal and public finance policies.

More important, the problem of financing major new categories of social benefits also needs to be seen as qualifying the main values underlying the ACA. In particular, the concept of community responsibility, as described above, enabled New Zealand to justify extending benefits to a greatly enlarged number of accident victims. For this purpose it was enough to leave that concept in abstract form; the "community" is the agent that pervades the actions of individuals and that makes their activities irreducibly interdependent. However, no such concept can conjure up the funds from its own collective bank account. The money must come from individuals (including businesses and other associations), and this re-particularizes the concept of community responsibility in an important way. In future extensions of the ACA, the concept of collective responsibility should be elaborated to include a more coherent account of how that responsibility should be apportioned among individuals. Until then, the ACA will retain potentially serious conflicts between collectivist rhetoric and the individual interests of those whose burdens are increased.