Dispute resolution in ACC.

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Dispute Resolution in ACC

18.1 Introduction

An alternative dispute resolution mechanism was not simply a means of handling disputes arising in the accident compensation scheme in New Zealand. Rather it was inherent in the creation of the scheme, and might even be thought of as part of its rationale. The "no fault" accident compensation system (now commonly "ACC"[1]) was first formulated in the visionary *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* chaired by Sir Owen Woodhouse ('the Woodhouse Report'). Originally envisaged as evaluating only workers' compensation provisions, the Royal Commission took the daring step of extending its own remit to encompass all personal injuries, whether at work or not. Key to its proposals was a rejection of the common law and its court processes, which were judged to be failing to provide an equitable and efficient system of remedy for personal injury:

> "the common law action has provided a useful function in the past, but without doubt it has been increasingly unable to grapple with the present needs of society and something better should now be found."[2]

The Woodhouse Report proposed doing away with piecemeal personal injury remedies that included tort law, the Workers' Compensation Act, aspects of social security, and private insurance. These would be replaced with a nationwide scheme under which all persons injured by accident would be covered for treatment, rehabilitation, and compensation.

The philosophy of the Woodhouse Report still shapes the way that ACC dispute resolution is conceptualised today. The Woodhouse Report's recommendations rested on five guiding principles: community responsibility; comprehensive entitlement; complete rehabilitation; real compensation; and administrative efficiency.[3]

Although administrative efficiency is the last on the list, it is by no means an afterthought. Claims for injury would be dealt with by a statutory body without the need for litigation and its consequential delays and cost. Rather unrealistically, the Commission believed that by removing the issue of fault from the equation, the incidence of disputes would almost wither away. Any disputes that arose would be settled primarily through a non-litigious internal review with further resort to an appeal tribunal, modelled on Ontario's workmen's compensation scheme.[4]

The Report's proposals for a no-fault scheme of personal injury compensation survived a change of government and, with some amendment, found their way on to the statute book as the Accident Compensation Act 1972. The essentials of the scheme have remained similar over nearly half a century. Thus, regardless of fault, a person in New Zealand injured by an accident, whether at home, on the roads, on the sporting field, or in the workplace is covered for treatment, rehabilitation and

[1] "ACC" refers both to the overall scheme and to the corporation (a crown entity) that runs it.

[2] Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (Wellington: Govt Printer, 1967) [Woodhouse Report] at para [83]. For a recent challenge to the Commission's reasoning, see J Wall "No Fault Compensation and Unlocking Tort Law's 'Reciprocal Normative Embrace' (2016) 27 NZULR 125.

[3] What is "missing" in the underlying philosophy is the concept of fault which lies at the heart of the litigious tort mechanism of compensation for injury.

[4] Woodhouse Report at para [308].

replacement of earnings, as is a patient who suffers a 'treatment injury' at the hands of a health professional.

18.2 The enabling legislation/ legislative background

There have been five major statutes governing the ACC scheme which have reflected a change in ideology over 50 years.[5] The 1972 and 1982 Acts set up and enhanced, respectively, a fairly generous and comprehensive system of compensation, based on the Woodhouse Report's social welfare approach. The concepts they used were expressed inclusively, incorporating room for discretion, and excluded only heart attacks, strokes, and damage to the body or mind caused *exclusively* by disease, infection, or the ageing process.

Introduced for both ideological and fiscal reasons, the Accident Rehabilitation and Compensation Insurance Act 1992 brought about a significant tightening in the scope of cover and entitlements, reflecting an insurance-based model (albeit public insurance) with narrowly defined eligibility criteria.

For a brief period, in a radical departure from the social welfare ideology underpinning it, the accident compensation scheme was partially privatised by the Accident Insurance Act 1998, and the provision of cover for workplace injuries was opened up to competition from private insurance providers. Employers had to enter into a contract with the insurer of their choice to provide cover for work injuries. They were also responsible for arranging reviews of the decisions. Cover for all other categories of injury remained the responsibility of ACC.

The partial privatisation of insurance was reversed[6] by the Accident Compensation Act 2001, and some of the restrictions on cover and entitlements of the previous decade were removed. Reflecting the ethos of the times, a Claimants' Code of Rights was added.[7] But the resulting scheme was not as generous as that of the 1970s and 1980s.

The changing ideology behind the statutes has had a direct impact on the way that review of decisions has been conceptualised. Under the Accident Compensation Acts 1972 and 1982, reviews of initial decisions about cover and entitlement were made by employees ("hearing officers"[8]) of the Accident Compensation Commission, and were an informal, internal re-examination of the administrative decision. Hearing officers had the powers of a commission of enquiry and could subpoena witnesses. They could and did carry out further investigation and seek medical information if needed, a feature that led to lengthy delays in the review process. The Commission and the original decision maker did not have the right to attend the hearing. A claimant who was dissatisfied with the outcome of a review could appeal to a statutory body, the Accident Compensation Appeal Authority. The authority comprised one person, a specialist with the powers of a judge. There was a further appeal on points of law to the High Court.

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[5] Accident Compensation Act 1972 [1972 Act], Accident Compensation Act 1982 ['1982 Act'], Accident Rehabilitation and Compensation Insurance Act 1992 ['1992 Act'], Accident insurance Act 1998 ['1998 Act'], Injury Prevention, Rehabilitation, and Compensation Act 2001 (renamed "Accident Compensation Act 2001" in 2010) ['ACC Act 2001' or '2001 Act'].

[6] However, an "Accredited Employer" scheme remains , permitting employers to apply to implement the Act in their workplaces, as long as the benefits are the same as or of a higher standard than those provided under the ACC Act 2001.

[7] ACC Act 2001, ss 39-47.

[8] Renamed "review officers" under the 1982 Act, which also required them to reach their decisions "independently", s 102.

The greater legalism of the Accident Rehabilitation and Compensation Insurance Act 1992 brought with it a change in the review and appeal processes. Strict time limits for review applications were introduced. Review decisions became binding on the Corporation (as the Commission had become), rather than simply advisory, and the Corporation had the right to attend and be heard at the review hearing.[9] Appeal lay to the District Court rather than to the specialist appeal authority.[10] All of this meant that the review process became more technical, more legalistic and more adversarial. The period of competitive insurance for workplace injuries (1998 – 2001) left its impact too.[11] Following the reversal of privatisation and a retreat from the language of market insurance, some parts of the scheme remained tightly defined while others became negotiable and the option of mediation in dispute settlement was incorporated.

[9] It is worthwhile emphasising that, while ACC effectively becomes a party to the proceedings in the review, the tortfeasor (if any) does not.

[10] However, by virtue of s 152 of the 1992 Act and continued under later Acts (see s 391 of the ACC Act 2001), where a decision relating to a claimant had been made under either of the earlier Acts, the provisions for review and appeal in the 1982 Act continued to apply, until the Accident Compensation Appeal Authority was abolished in April 2019, by s 391(A) of the ACC Act 2001, following a recommendation of a Ministry of Justice briefing, *Proposal to merge Accident Compensation Appeal Authorities* (2013). *Hawke v Accident Compensation Corporation* [2015] NZCA 189 illustrates the complexity of having dual jurisdictions.

[11] As these relate primarily to the appointment and status of reviewers, they are considered more fully below in section 4.

18.3 Jurisdiction

The Accident Compensation scheme is unusual in that it has totally replaced an area of law (though it has also added compensation for some events that would not have been covered by the common law).[12] The legislation makes clear that it has not merely supplemented the common law, nor does it provide an alternative path to compensation.[13] Equally importantly, as the early case of *Donselaar v Donselaar*[14] established, no overlaps or gaps have been created between the area covered by ACC and the common law: thus if a remedy does not fall within - or has not been explicitly abolished by - the ACC scheme, then it (in this case punitive or exemplary damages) must still exist within the common law.[15] This was confirmed in relation to compensation for pure mental injury (by that time excluded from the Act) in *Queenstown Lakes District Council v Palmer*.[16] Nevertheless, where a statutory scheme of personal injury compensation carves an area out from existing common law remedies, there are necessarily going to be challenges over cases on the boundary between the two systems.

Thus, the first delimitation of the ACC scheme[17] is between the scheme and the residual common law.

As important is the boundary between injury caused by an accident on the one hand and injury (or an adverse condition) caused by illness or a gradual deterioration in health on the other.[18] The scheme does not cover every case of incapacity or impairment. ACC was designed to provide cover and entitlements where a person has been injured or incapacitated by an accident.[19] Most incapacities or conditions caused by sickness or disease or a congenital problem are excluded. Also excluded – since 1992 - are mental injuries that are not caused by physical injury. It is, therefore, important to identify the cause of the injury or incapacity, to differentiate between those injuries that are covered and those that are not. Inevitably, disputes arise over these matters. That illness is excluded from the scheme is significant at two levels. Firstly, it highlights a policy difference in the treatment of two categories of people, even if they display identical degrees of impairment or incapacity.[20] Secondly, this binary categorisation is artificial, and the way that Parliament has attempted to accommodate it in the legislation has led to a series of controversial decisions by the judiciary.[21]

Furthermore, since 1992, driven originally by a desire to reduce costs, key terms in the legislation such as “injury”, “accident”, “work-related injury” and “medical misadventure” were tightly defined where previously they had been left open. For example, “personal injury” was redefined to exclude mental

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[12] In contrast, social security entitlements were largely new and private provision is still permitted alongside public provision of health and education.

[13] ACC Act 2001, s 317 (which prohibits court proceedings for personal injury) and s 299 (which prohibits opting out).

[14] [1982] 1 NZLR 97.

[15] The Court held that punitive damages are not compensatory (and were not implicitly either subsumed within the accident compensation scheme nor abolished by the Act in personal injury cases). The case had the unfortunate consequence of giving punitive damages an unhealthy prominence in New Zealand tort law that is not found in other common law jurisdictions.

[16] CA83/98 [1998] NZCA 190; [1999] 1 NZLR 549. Although it can be said that whatever is not covered by ACC is by default left in the ambit of common law, exactly where that boundary is can be (and has been) shifted by Parliament over the years.

[17] And of the jurisdiction of the reviewer, a statutory creation with the sole purpose of hearing the first level of appeal.

[18] For a discussion, see K Oliphant “Beyond Woodhouse: Devising New Principles for Determining ACC Boundary Issues” (2004) 35 VUWLR 915.

[19] This is wider than the scope of tort law, as it includes, for instance, accidentally self-inflicted injury.

[20] The consequences are dramatically different for the injured person / patient, not least financially as ACC is an income-replacement scheme whereas NZ social security generally follows a safety-net only model.

[21] See belowin section 6.

injury except in cases of mental injury resulting from a sexual offence. The dividing line between those injuries that were covered and those that were not was shifted in another respect. Instead of excluding only injuries that were entirely caused by gradual processes, the new statute also excluded those that were "wholly or substantially caused" by a gradual process, a much more complex test to apply. "Accident" was defined at great length.[22] Similarly, what had been rather open-ended opportunities for rehabilitation became the subject of numerous sets of restrictive regulations. The tightening of the scope of the scheme through the replacement in 1992 of inclusionary definitions with exhaustive ones may have been intended to make the boundaries more precise. However, as signalled earlier, that has led to a significantly more legalistic and adversarial review process than was intended in the original conception of a "no-fault" injury compensation scheme. That legalism has been counteracted only to a small extent by the insertion of a mediation option in the case management process.

Reviewers need to be cautious about which legislation applies. While the vast majority of reviews will come under the 2001 Act, in cases where an injury was accepted for cover under the 1972 or 1982 Acts, certain provisions for entitlement have been "grand-parented" through subsequent statues and need to be applied to this diminishing set of cases.[23]

Whichever statute applies, a claimant is entitled to seek a review of decisions made by ACC.[24] Tension points giving rise to disputed decisions include:

(a) Cover. These are decisions about whether an injury or condition comes within the ambit of the ACC scheme or not. Having an injury accepted for cover is a pre-requisite for claiming entitlements.
(b) Entitlements. The issue here is what forms and amounts (or duration) of medical, rehabilitative and monetary benefits an injured person can claim from ACC. A significant number of reviews relate to decisions by ACC to not allow or to terminate these. The most contentious tend to relate to individual rehabilitation plans.
(c) Employers' responsibilities. Employers can challenge an ACC decision that the cause of an employee's injury was work-related.
(d) Levies. A levy payer can seek a review of a decision setting a levy.[25]

Additionally, a claimant can seek a review of an ACC decision on a complaint received under the Code of Claimants' Rights.[26]

An application for review must be lodged in writing within 21 days of a decision on an entitlement or three months of the decision in other cases.[27] However, a late application may be accepted where there have been extenuating circumstances that have meant that the claimant could not be held responsible for the lateness.[28] In such a case, the reviewer holds a separate "jurisdiction" hearing prior to the substantive matter, and will issue a decision (which for the sake of expediency may initially

[22] ACC Act 2001, s 25.
[23] ACC Act 2001, s 391.
[24] ACC Act 2001, s 134. An unreasonable failure to make a decision is also reviewable. Not every communication from ACC is a "decision". See *ACC v Hawea* [2004] NZAR 673.
[25] ACC Act 2001, s 134(5). ACC is funded from several sources, amongst which are levies on employers and the self-employed, which vary with the types of work undertaken in their businesses.
[26] However, there is no appeal from a review decision about the Code: ACC Act 2001, s 149(3).
[27] ACC Act 2001, s 135.
[28] Ibid s 135(3).

be issued orally to allow the substantive hearing to go ahead if jurisdiction has been found). A reviewer's decision about a matter of jurisdiction is appealable.[29]

While, on the face of it, the scope of ACC – and consequently of the review process – is self-evident (namely those personal injuries as defined in and delimited by the current Act), the application in practice of those definitions is immensely complex:

> Far from having eliminated litigation, the statutory process for dispute resolution contains a substantial body of substantive and procedural law … [30]

18.4 Appointment and qualifications of reviewers

Two features stand out in relation to the appointment of reviewers. Firstly, despite the complexity of the legislation that is to be applied, there is no statutory requirement that reviewers be legally qualified, though in practice reviewers appointed in recent years have been. Indeed, the legislation has never set out any list of attributes, knowledge or experience to be sought in appointing a reviewer. Nor do reviewers have any formal medical expertise, though they need to become familiar very quickly with basic anatomy and medical terminology, and be able to decide when the opinion of, say, an occupational physician might carry more weight than that of an orthopaedic surgeon or vice versa.[31] Secondly, the statute leaves it to ACC – a party to the dispute - to "engage and allocate reviewers".[32]

These otherwise surprising arrangements only make sense in the light of the previous history of the review process. When review was purely an internal administrative check on the reasonableness of initial decisions over which there was a certain amount of discretion, there were a number of advantages in its being done by an ACC employee (designated for these purposes as a "hearing officer"). It would be quick and cheap; the staff member would have specialist knowledge of the system and would be supported by policy manuals. In this context, there was no need for the process to be adversarial.

The changes brought about in the 1992 Act heralded a paradigm shift in the role of the reviewer. Because the existing review process was felt to be working reasonably well, only apparently minor, but far-reaching alterations, were made:

(a) making the review decision binding,

(b) giving ACC the right to appear before the review,

(c) re-emphasising review officers' duty to "act independently", and

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[29] *Dean v Chief Executive of ACC* [2008] NZAR 318.

[30] T Mijatov, W Forster, and T Barraclough, "Problems with Access to Law in Personal Injury Disputes" [2016] 27 NZULR 365 at 367.

[31] Considerations such as whether the specialist has personally examined the patient may be factors here in addition to the type of specialisation and its relevance to the injury. There is some unease about how well non-medically trained reviewers carry out that role and the possibility has been mooted of referring matters to a panel of medical experts to avoid a multiplicity of expensive reports on the one hand and the danger of reviewers exceeding the bounds of their competence, on the other. Section 157 of the ACC Act 2001 gives a District Court judge the power to appoint an assessor to sit alongside and assist with technical, professional or medical matters at appeal (though the power is not known to have been used). No such assistance is available to reviewers.

[32] ACC Act 2001, s 137. It is unfortunate that the term "allocate" has been retained in relation to reviewers. It raises suspicions in the minds of some claimants that there are ulterior motives behind the selection of a particular reviewer. Claimants are accorded no corresponding privilege of "challenging" the appointment of particular reviewers.

(d) removing their investigatory powers.

However, that involved a crucial switch from internal administrative process to adjudication in what had become a legalistic (and increasingly adversarial) framework.[33] The review officers took on a quasi-judicial role as, essentially, the first tier of an appeals process. They had to acquire, through in-house training, legal expertise to apply closely defined statutory provisions which had been supplemented by multiple sets of Regulations.[34] Yet, despite the requirement to act independently, they were still employees of ACC, albeit with the limitation that they could not hear a case in which they had previously been involved.[35] There was no structural change to guarantee their independence and no requirement for legal training.[36]

The review process was also reshaped by the shift in Government ideology about ACC in 1998. Again, the alteration of the review process was almost incidental, but outlived the factors that had brought it about. ACC's partial privatisation (of workplace injury management), meant that every insurer (or claims management company) was charged with engaging at least one person to be a reviewer. Some sought the services of law practitioners as reviewers, though there was still no requirement in statute for the reviewer to be legally qualified. To encourage independence, reviewers were required not to have an interest in the insurer, other than certain statutorily "accepted" interests, and had to be engaged on a contract for services and not as employees.[37] Ironically, that, combined with the fact that the allocation of a review to a reviewer was left to the discretion of the insurer (including ACC), created an opportunity for insurers to cease to allocate work to reviewers who appeared to find in favour of claimants too often.

To streamline the engagement process, some insurers, including ACC, decided to set up a separate company, Dispute Resolution Services Ltd (DRSL) - later renamed FairWay Resolution Ltd - to carry out their reviews. That had the advantage that, for the first time, reviews were carried out by organisations and individuals technically at arm's length from ACC. When the incoming Labour Government reversed the privatisation of work-based accident compensation, ACC was left as the sole owner of DRSL and its dominant customer. Although DRSL diversified into providing dispute resolution services in other areas (such a telecommunications), ACC remained a dominant customer of its services.

Questions have been raised regularly about DRSL's independence, both because of its relationship with ACC and because a high number of the reviewers employed by DRSL were former employees of ACC. There was some overlap in the membership of the Boards of Directors. These facts were raised by claimants in appeals to the District Court,[38] but were dismissed as not relevant to the validity of the review process or the resultant decisions. The situation was compounded by further, more subtle, aspects of the relationship between ACC and DRSL. For example, they shared a computer network and databases. ACC contracted with DRSL for the latter to provide a monthly "Adverse Decisions Report" in which DRSL provided analysis of the review decisions in which the claimant succeeded. The intention was for ACC to use this as a "learning feedback tool". As a corollary, ACC's comments on

[33] However, the review officers were still encouraged to view themselves primarily as fact-finders, leaving legal analysis to the District Court judges, an attitude that had not totally disappeared a decade later.
[34] Nevertheless, it was not until the 1998 Act that reviewers were required to ignore policy and procedure followed by ACC and decide the matter only on the basis of statute.
[35] 1992 Act, s 90.
[36] ACC did, however, carry out its own training for review officers and produced a guide for the role.
[37] 1998 Act, ss 138-142.
[38] Starting with *Eketone v ACC* [2000] NZACC 326.

individual decisions were relayed back to reviewers through DRSL's managers.[39] Whilst operating as feedback, this is a form of indirect influence, all the more so because its vehicle was the reviewers' employer.

In 2011, FairWay became a separate crown entity from ACC. Nevertheless, FairWay, and before it, DRSL have been extremely responsive to the demands of the service agreement with their main customer, ACC. Indeed, concerns about the relationship between ACC and FairWay were one of the issues looked at in a Ministry of Business Innovation and Employment review of ACC dispute resolution ("the Dean Report").[40] Aware of sensitivities around independence, Parliament amended the Act in 2016 to prohibit a reviewer from being employed or engaged by ACC or a subsidiary of ACC.[41] In 2017, FairWay Resolution Ltd was sold to its employees. Thus, in the main part,[42] disputes over accident compensation are contracted out to a private company which engages reviewers either as employees or on a contract for services. FairWay is a business with commercial imperatives that would tend to prioritise corporate loyalty and profit over a public service ethos. There are, however, robust quality assurance processes in place, including peer review, annual external assessment, customer satisfaction surveys, and staff training and development.

Various features of the appointment of reviewers that show it to be flawed are the result of pragmatic responses to changes in the context in which the review process operated, rather than a coherent evaluation of how best the review process can meet its objectives. These are:

(a) A lack of prescription about the qualifications of reviewers;
(b) One party being entitled to appoint reviewers;[43]
(c) No public scrutiny[44] of the main body that employs / contracts with the reviewers – despite the fact that the body whose decisions are being reviewed (ACC) is a Crown Entity, and the compensation scheme which it administers is a public good.

While there is no reason to doubt the impartiality, integrity or quality of the reviewers or their decisions, this is not an arrangement that demonstrably guarantees these values. To provide claimants and the public with greater reassurance that the impartiality of reviewers is not open to compromise there needs to be a reform of the framework for appointing and allocating reviewers.[45] An initial step toward allaying some widely expressed concerns would be moving the ACC review function into the Ministry of Justice. It is difficult to find any legitimate justification for retaining the present system any longer.

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[39] This still occurs with FairWay: "Monthly feedback given to FairWay with the reasons for any concerns about review decisions" ACC *Claim Review Process* (July 2018) at https://www.acc.co.nz/assets/im-injured/Flowchart-of-the-review-process.pdf.

[40] Miriam Dean, *Independent Review of the Acclaim Otago (Inc) July 2015 Report into Accident Compensation Dispute Resolution Processes* (MBIE, 2016) [Dean Report].

[41] ACC Act 2001, s 139(1). The ACC Act 2001 had allowed ACC to directly or indirectly (through a subsidiary) employ reviewers. This amendment reversed that.

[42] However, FairWay does not have a monopoly, since other reviewers can be engaged. In 2010, ACC contracted with a law firm in a South Island town to provide reviews in that town. Following a new tender process, from July 2019, three entities are contracted by ACC to carry our reviews: Fairway Resolution, the New Zealand Dispute Resolution Centre Group, and Clayton & Associates Ltd.

[43] In practice, DRSL / FairWay tend to decide who hears a review application. However, there have been requests not to have a particular reviewer hear a case (based on personal communication).

[44] Following FairWay's sale, when it became a private company.

[45] "Concerns about a lack of impartiality are perceived rather than real, but they nonetheless raise questions about whether changes are needed to remove such perceptions." Dean Report at p 2.

18.5 Practice and procedure

From the outset, reviews were intended to be quick, accessible (both physically and in terms of the process involved) and cheap. Increased technical complexity has acted to frustrate that to some extent. But there are factors which still assist these objectives. The legislation has, for example, imposed strict timeframes aimed at bringing about early resolution, and therefore avoid additional delays to treatment and rehabilitation. It has set out a schedule of costs which ACC is required to pay if the review is successful or was reasonable.[46] Hearings are held at various locations around the country (in motels and community centres as well as courthouses) and may be conducted by teleconference.

Reviews are governed by Part 5 of the 2001 Act,[47] which allows that a claimant - or a relevant employer - may apply to ACC for review within 3 months of an ACC decision on cover, or 21 days of a decision on entitlements, following a prescribed format.[48] There are about 6000 applications per year nationally, but some are withdrawn prior to any hearing taking place. There is a presumption that an oral hearing is to be held. [49] However, a hearing may be conducted on the papers by agreement of the parties. If a hearing date is not set within three months of the application being received, a decision is deemed in favour of applicant.[50] During the period prior to the hearing, ACC conducts an internal review and may reverse the original decision. FairWay case-manages the review and evaluates whether the dispute might better be dealt with through mediation.[51] The benefits of mediation can be seen, for example, when the content of a rehabilitation plan is being developed, and can help build a positive relationship between ACC and the claimant, but it is less useful where the dispute is a factual one over whether or not an accident occurred. There is also a need to maintain parity between similarly injured claimants, and, in settling, ACC might be acting ultra vires if it offered more to a particular claimant than the statute permitted. So, in a system where much is prescribed by the legislation, mediation has its limits.

If mediation fails, the claimant may still have a statutory right to review and a hearing on the original issue specified in the application. Natural justice (specifically referred to by the statute) requires that the mediator cannot have a further role as reviewer in the matter. The solution that has been adopted by FairWay is that mediation is carried out by specially trained staff, separate from the reviewer assigned to the case. While successful mediation may be speedier than a formal hearing, it appears, unfortunately, that the very process of evaluating whether the dispute is suitable for mediation itself leads to some delays in resolution.[52]

Where the case is going to a hearing, the reviewer receives the full ACC file in advance. Using implied powers to "case-manage", the reviewer may call a case conference ahead of the hearing and set a

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[46] Accident Compensation (Review Costs and Appeals) Regulations 2002.
[47] ACC Act 2001, ss 133-148.
[48] ACC Act 2001, s 134. It is an anachronism that the application needs to be made to ACC.
[49] ACC Act 2001, s 141.
[50] ACC Act 2001, s 146. The Court of Appeal held in *ACC v O'Neill* [2012] NZCA 219 that the setting of a jurisdiction hearing (as opposed to the substantive one) is sufficient to prevent s 146 from applying.
[51] See FairWay, *Guidelines for ACC Reviews* 6 June 2017. https://www.fairwayresolution.com/sites/default/files/ACC%20Review%20Guidelines%20-%20June%202017_7.pdf, accessed 5 Jan 2019.
[52] Dean Report: "It is troubling that 10 per cent of reviews are taking nine months or more to complete … This is far from timely" at p 27. Part of the delay is because when it receives an application, ACC reconsiders the original decision before passing it on to FairWay.

strict timetable for the case to proceed.[53] Parties are expected to produce and exchange submissions prior to the hearing.[54] Hearings are held at a range of locations around the country. Seven days' notice of the hearing must be given to all who are entitled to be present.[55] At the hearing, which is not open to the public, any party may be heard and may be represented (and capped costs are awardable against ACC). Most claimants are unrepresented. Moreover, many of those that are represented use a non-lawyer advocate or a claimants' support group to present their case. In practice, ACC (quite frequently), a claimant, or a claimant's representative (occasionally) participates by teleconference. A hearing is scheduled for usually no more than an hour, even though an award of weekly compensation can amount to many hundreds of thousands of dollars over the years for which it applies. Hearings may be adjourned part-heard to allow for further evidence to be produced.

The reviewer (who sits on his or her own) may conduct the hearing as he or she sees fit within the boundaries of natural justice.[56] The claimant, ACC and (in the case of work-related injury) the relevant employer is entitled to be present and heard. The burden is on the claimant to make out his or her case. Although there should be informality and the strict rules of evidence do not apply,[57] claimants are encouraged to give evidence under oath or affirmation. The proceedings are recorded.[58]

In reaching a decision, the reviewer must set aside the original ACC decision and any related policy, must act independently, but has to follow Court precedents. Decisions must be issued in writing within one month and with reasons. In interpreting statutory provisions, the reviewer is to avoid adopting "an ungenerous or niggardly approach".[59]

The reviewer's decision may (a) dismiss the application, (b) modify ACC's decision, or (c) quash the decision. If the decision is to quash ACC's original decision, the reviewer may substitute his or her own or may require ACC to make a new decision. Where the review is of a failure by ACC to make a decision, the reviewer's options are to dismiss the application, to instruct ACC to make a decision within a time frame, or to make the decision for ACC.[60] The review decision follows a set structure covering the background / identification of the issue, the evidence and arguments of each party, the relevant law, the decision and the reasoning behind it. The decision is binding on all parties, but the reviewer has no powers to enforce it. Appeal may be made to the District Court within 3 months. [61]

The formal position is that the onus of proof is on the applicant to show that on the balance of probabilities he or she has cover or entitlement or that ACC's initial decision was wrong.[62] However,

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[53] *Moir v IHC New Zealand Inc* [2018] NZHC 1360, a judicial review case, confirmed the existence of these implied powers and that the appropriate use of them was not contrary to natural justice.

[54] This rarely occurs if the claimant is unrepresented.

[55] This may include an employer, for example, in a work injury case.

[56] ACC Act 2001, s 140.

[57] ACC Act 2001, s 141(4) reads: "The reviewer may admit any relevant evidence at the hearing from any person who is entitled to be present and be heard at it, whether or not the evidence would be admissible in a court."

[58] This facilitates the provision of a transcript to the District Court should there be an appeal.

[59] *Harrild v Director of Proceedings* [2003] 3 NZLR 299 per Elias CJ at [19]. This has been recently restated well by Churchman J in *ACC v Ng* [2018] NZHC 2848 (2 Nov 2018): "In addition to the orthodox principles of interpretation, the Courts have identified some principles that are particular to the Act itself. One of those is the obligation to give the statute a generous interpretation."

[60] ACC Act 2001, s 145.

[61] Appeals to the District Court are heard de novo (*Wildbore v ACC* [2009] NZCA 34 at [29]).

[62] Section 25(3) of the ACC Act 2001 states that the fact of a personal injury "is not in itself to be construed as an indication or presumption that it was caused by an accident". *Atkinson v ARCIC* [2002] 1 NZLR 374 confirms that the burden of proof is on the claimant. This applies too when ACC has decided to terminate existing entitlements: *Wakenshaw v ACC* [2003] NZAR 590. There is a statutory exception where the decision being

this burden has been mitigated in various ways. For example, since ACC has an obligation under sections 54-57 to make "reasonable decisions" after investigating a claim,[63] where a reviewer considers that it has not done that, he or she can quash ACC's decision and require the Corporation to make the decision again in accordance with the reviewer's directions. Directions might include instructing that a further medical examination take place or a report from a different specialist be obtained.

Medical evidence is frequently crucial to the review outcome. For example, where a claimant is faced with an adverse medical report, it can only be countered by the claimant putting forward an equally authoritative one from an appropriately qualified medical practitioner.[64] The result has been a proliferation of medical reports, where a report supporting one party is immediately countered by one on the other side. These "duelling experts" have become a very costly ritual.[65] Inevitably in a small country such as New Zealand, the same experts are called on repeatedly. Over time, some experts can gain a reputation for being pro-ACC or pro-claimant and much of what appears in their reports loses its impact as a result.

The superior courts have eased the onus on the claimant to some extent, largely in acknowledgement of the unequal resources that claimants have at their disposal compared to those of ACC. The Court of Appeal in *ACC v Ambros* accepted the notion of a tactical (as opposed to a legal) onus shifting away from the claimant.[66] More recently in *Cumberland v ACC*,[67] the same Court approved a statement by Mallon J in the High Court that, in assessing whether a claimant has proved causation on the evidence, "the Court can take into account the absence of counter evidence which ought to have been in ACC's power to produce." [68]

Parliament too has stepped in, recognising the disadvantage that the claimant is at when making out his or her case. The legalism and technicality of ACC legislation means that claimants often struggle to know what to include in their evidence and arguments and how to present them. In a choice between moving to an adversarial trial of strength between lawyers and allowing the reviewer to make up for claimants' inadequacies by supporting their self-representation through active intervention, Parliament opted for the latter in the 2001 Act with the injunction to reviewers to "adopt an investigative approach". However, 15 years later, Miriam Dean QC's report notes:

> Some [reviewers] are "investigative", others "adversarial". ... Some are prepared to give directions requiring, for example, ACC to provide further medical evidence where appropriate. This is perfectly permissible as part of an investigative approach. Others, however, are not prepared to do so, believing such directions exceed their powers. Such inconsistency in approach is unacceptable.[69]

Behind this is lack of clarity over the scope and particularly the limits of a reviewer's investigatory actions. At a minimum, it means that the reviewer is not simply a passive recipient of evidence and

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reviewed is a revision (made by ACC under s 65(1)) of an earlier incorrect decision. In such cases ACC must show that the earlier decision was in error (and thus merited revision): s 145(2).

[63] *ACC v Ambros* [2008] 1 NZLR 340; *Ellwood v ACC* [2007] NZAR 205.

[64] *Ramsay v AIC* [2004] NZAR 1. Generally, the reviewer will have ACC reimburse the cost up to the maximum allowed under Regulations.

[65] Following comments in the Dean Report, ACC has been investigating options to ameliorate this problem.

[66] *ACC v Ambros* [2008] 1 NZLR at [55].

[67] *Cumberland v ACC* [2014] 2 NZLR 373 at [49]. This helps explain why, in *Wakenshaw* (supra n 61), Hansen J stated that it would be rare that the question of onus determined an ACC case.

[68] *Sam v ACC* HC Wellington CIV-2008-485-829, 4 November 2009 at [4].

[69] Dean Report at p 25.

argument, but (subject to the duty to natural justice) may question each party where either evidence or argument is not forthcoming. At the other extreme, the power does not extend to initiating investigations or making decisions when no previous decision has been made. So, for instance, the reviewer cannot, having investigated an injury which the claimant has said occurred as the result of an accident (perhaps wrenching a shoulder), rule that the claimant should have cover instead for the injury as a work–related gradual process injury (say, repetitive strain injury of the shoulder), even though the medical evidence suggests that. Instead the claimant is required to lodge a new claim for the injury citing the gradual process as the cause.

A reviewer can adjourn the hearing part-heard in order to obtain further information,[70] which may include the results of a further medical examination, with the reviewer identifying questions to be put to the medical examiner. Further investigation must be balanced against the reviewer's obligation to conduct the review in a timely and practical manner, avoiding undue delay. The reviewer should also avoid the danger of being thought to be losing impartiality by selecting evidence from a particular medical expert. A difficult question is whether, during preliminary case-conferencing, the reviewer can, without compromising reviewer impartiality, point out to the applicant what it is he or she will have to prove at the hearing, or indicate that a supportive medical report would be required to counter ACC's one if the applicant is to have any chance of success at the hearing.

It may be that these tensions can be avoided by a greater proportion of claimants having representation.[71] Essentially the argument is that complexity of the legislation and the legalistic way ACC treats disputes entail that claimants need legal advice and representation.

Although applicants can be legally represented, not many are. Costs are awarded, but these are detailed in Regulation and are set at a low level. Lawyers will charge significantly more, the legal aid provision is very limited, and hence few claimants have legal representation at hearings. Representation can increase the likelihood of success, though it also tends to increase delays.[72] A viable alternative are the various trade union representatives, claimant support groups and individual advocates who appear on behalf of claimants, but they are not regulated and their understanding of law is variable. Many lawyers, on the other hand, seem to struggle with the informal investigative style of the hearing.

There has been variable quality too among the ACC representatives. In many cases, it was the claimant's case manager who appeared at the hearing, albeit provided with a submission. Increasingly, trained "review specialists" now take on the cases once an application has been lodged. In only a few cases is ACC legally represented. Thus, even in cases that turn on a legal point, there can be a deficit of legal argument and submissions at hearings, and it is left to the reviewer to clarify and explain the key points of law. ACC and FairWay have initiated some training for claimant support groups in legal issues and in presenting a case at a review hearing.

As ACC law is exceedingly complex, claimants will likely need support in demonstrating at a hearing that an ACC decision was incorrect. The adoption of an investigative approach is one way of achieving that; but it is an answer that relies on all reviewers proactively intervening, and it appears that is not

[70] As it is very rare for medical professionals to attend hearings to speak to their report, the reviewer may wish to seek elaboration of opinions.

[71] Dean Report at pp 52-59. See also Acclaim (Otago) Inc, *UNDERSTANDING THE PROBLEM: An analysis of ACC appeals processes to identify barriers to access to justice for injured New Zealanders* (2015), available at http://acclaimotago.org/wp-content/uploads/2015/07/Understanding-the-problem-Access-to-Justice-and-ACC-appeals-9-July-2015.pdf, Part IV of which discusses representation at length.

[72] Dean Report supra n 40 p 26.

the case. It may be that reliance on effective representation by lawyers and skilled advocates is called for. However, leaving aside the challenge to the intended informality, speediness and cheapness of the process that this involves, the reality is that such a network of representation is not yet there. For the time being at least, reviewers need to exercise (and test the limits of) their investigative powers.

18.6 Important decisions and current issues

It might be assumed that by removing the fault element from personal injury law, the Accident Compensation scheme would make the law simpler, with a consequent reduction in litigation. And it did. There is no need to establish a duty of care or a breach of it to succeed in obtaining compensation. However, the exclusion from the scheme of illness and gradual process injuries switches focus from the fact that a claimant is suffering an injury or condition to the cause of that.[73] Causation has become the issue on which most review hearings turn.

The starting point for cover is that the claimant has to show that his or her condition was caused by one of the listed events.[74] Cases such as *Atkinson v ARCIC*[75] and *ACC v Ambros*[76] emphasise that the causal link, not simply a proximity in time, needs to be shown. To make the task more difficult, the claimant needs to show additionally that it was *not caused* "wholly or substantially by a gradual process, disease, or infection" or "wholly or substantially by the ageing process".[77] The situation is compounded for reviewers by the frequency with which medical reports go no further than stating that a set of symptoms is *consistent* or *compatible with* an accident, without committing to whether the medical specialist believes that they were *caused by* an accident.

In other areas of cover complexity is added by the use of different causal language: claims for cover may be lodged for mental injury "suffered by a person *because of* physical injuries";[78] while some treatment injuries can be "caused by" omissions: failure to diagnose or delay in treatment.[79]

Case law has made cover even more restrictive, holding that where an accident has rendered symptomatic ("triggered symptoms", "caused to flare up") an otherwise dormant condition, the accident is not the cause of the condition, and hence does not merit cover.[80]

Thus, it is both legal causation and factual causation which are difficult for claimants, medical practitioners, ACC staff and reviewers alike. Particularly perplexing for claimants is finding – some time after an injury has been accepted – that although there is still pain and impairment at the site of the injury, ACC declines to pay for treatment of it. This is because, even though an injury may have been caused by an accident – and was granted cover − it may be that over time a gradual process (such as osteoarthritis) overtakes the accident as the dominant cause of the claimant's condition. In those circumstances, it is open to ACC to suspend entitlements, and to, for example, end weekly

[73] Thus, the key section (s 20) refers to "personal injury *caused by* [inter alia, an accident to the person]".
[74] ACC Act 2001 s 20.
[75] Supra n 61.
[76] Supra n 62.
[77] See ACC Act 2001, ss 26(2) and (4). There are some exceptions to this.
[78] ACC Act 2001, s 26(1)(c). See, eg, *W v ACC* [2018] NZHC 937.
[79] ACC Act 2001, ss 32 and 33. See *ACC v Ambros*, supra n 62; *Adlam v ACC* [2017] NZCA 457; *Cumberland v ACC* supra n 65.
[80] The leading case is *McDonald v ARCIC* [2002] NZAR 970. This is a denial of the applicability of the "thin skull doctrine" in ACC cases. The effect has been mitigated for some circumstances where it can be shown that the underlying condition would have remained unsymptomatic permanently if the accident had not occurred: *Cochrane v ACC* [2005] NZAR 193.

compensation or refuse surgery on a joint on the grounds that the need for surgery is no longer attributable to the original accident. [81]

The issues around causation are hugely difficult and complex, and dominate ACC reviews. It would be beneficial to the parties and to the review process – leading to fewer cases – if all these matters could be explained clearly in appropriate language to claimants and medical practitioners. A more radical step to alleviate the numbers of the cases would be for Parliament to revisit the tightening of eligibility criteria that occurred in 1992 – and perhaps even remove or redraw the rigid line between the injured and the ill.

18.7 Conclusion

The ACC review system is still a prisoner of its history. There was a failure to acknowledge (and therefore an inability to act upon) the paradigm shift that occurred with the switch from an administrative to an adjudicative approach. While the Dean Report identified problems, such as access to information and representation, and suggested means of ameliorating them, what is needed is a radical rethink of the aims of the review process and how these could be achieved most effectively.

[81] ACC Act 2001, s 117. There is no option to "split the difference between" what was caused by the accident and what was degenerative.