

UNDERSTANDING THE PROBLEM: An analysis of ACC appeals processes to identify barriers to access to justice for injured New Zealanders

(9 July 2015)





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The New Zealand Law Foundation – Te Manatū a Ture o Aotearoa – is an independent charitable trust that provides funding for legal research and for public education on legal matters.

This is the second Acclaim Otago project that has received Law Foundation funding. The funding provided the impetus for this important work to be carried out. The research built on the work undertaken in Acclaim Otago's Shadow Report to the United Nations following the Law Foundation's Shadow Report Award in 2013. By providing an understanding of how the appeal system is operating and identifying the problems that exist, we are another step closer to meaningful reform.

The Legal Issues Centre – Te Pokapū Take Ture at the University of Otago has a special interest in access to justice. It was established in 2007 by a generous donation from the Gama Foundation and the University of Otago Foundation Trust. Its goals are to:

- i) Conduct research on how a more accessible, affordable and efficient legal system can be created for all New Zealanders
- ii) Conduct research on how courts can best ascertain the truth and arrive at a fair and just outcome
- iii) Deliver independent and high quality research that informs and influences legal policy

A special thank you to Dr Jennifer Moore of Otago University for her expert assistance – any errors that remain are ours alone – and to the other members of the Otago Law Faculty and the practitioners who reviewed our research and attended our seminars.

The authors would like to thank the committee and members of Acclaim Otago Inc, for their patience and courageous support for this and other projects that we have undertaken. Together we hope we can achieve lasting change.

Finally, we express our gratitude to the Honourable Justice Winkelmann for her attention to access to justice issues, including to this report and in preparing the enclosed foreword.

FOREWORD

A lot is written about access to justice, but this is an important contribution to that body of writing. People writing or speaking on the topic often observe the absence of research to assist in identifying the critical barriers to people utilising our courts and tribunals to enforce their rights, and as to the experience of those who do make it through the doors of a courthouse. This report contributes data to better inform discussion. It focuses on one area, the Accident Compensation Appeals process, yet the conclusions the data supports have implications for policy and procedure across a far wider field.

The authors make the case that in order to understand the problem, it is necessary first to understand the interplay between substantive and procedural law, and human aspects such as the vulnerability of many of the claimants. A feature of the report I regard as unique is that the report writers who interpret the research for us bring to bear many years of study of the ACC appellate structure and how it impacts upon those who seek to use it. The authors are therefore able to draw detailed and nuanced conclusions from the data in a field where the legislative and procedural complexity is great. They are able to speak in specifics in an area plagued by general statements, a few of which I have contributed myself over the years.

The report writers also make recommendations as to policy based on these conclusions. I make no comment on those recommendations. As a judge, a member of the third branch of government, it is not appropriate that I comment on or endorse those recommendations. Nevertheless I believe the research presented in this report is a vital reminder of the importance to our society of a fair and open system of courts and tribunals, of the advantages of a repeat litigant before any judicial or quasi-judicial body, and the corresponding disadvantages of the self represented.

The Hon Justice Winkelmann Wellington 6 July 2015

A note from the Authors

This report has sought to describe and understand the access to justice problems in the ACC dispute resolution process with a view to meaningful and comprehensive reform. It has done this by analysing court decisions. In doing so, the authors do not seek to criticise individual judges, representatives, litigants or claimants.

We hope this report will be received with the good faith in which it has been written with a view to understanding and improving access to justice in New Zealand for all involved in the justice system, including members of the executive, the Accident Compensation Corporation and its staff, reviewers, representatives, claimants and members of the judiciary.

We look forward to dialogue with all stakeholders about our findings and our recommendations.

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VIEWS FROM THE BAR

I was happy to add my support for the Law Foundation funding for this research project. In my view, the outcome represents outstanding value for money. As a practitioner approaching 40 years of experience in ACC work, I have seen and experienced many of the things which the researchers have found and reported on. Anecdotal evidence from a sole practitioner is but a faint whisper: the product of this research project speaks with a louder and more authoritative voice. The lofty aim of achieving justice and facilitating access to it is reducible to practice steps, provided there is a will to do so. The report concludes with a call to action. Bold and courageous leadership are now required to respond to the challenges identified and to accept, in the exercise of good governance, the invitation to initiate reform.

Peter Sara

Peter Sara Law Dunedin 2 July 2015

This report is a high quality study establishing that the ACC dispute resolution process is not providing effective access to justice for most injured New Zealanders. I am the principal of a firm employing 13 lawyers. My staff and I have decades of experience in ACC law and have seen the problems identified in this report arise in individual cases. While I was reading the report, I recalled examples of the themes from my own experience. Nonetheless, this innovative research is the first detailed systemic overview of the ACC appeals process and it paints a chilling picture of how the system of appeals is operating.

I fully support and endorse this excellent study and its recommendations. It provides knowledge that until now has not existed, in turn providing an opportunity for learning and systemic improvement. It must be fully considered by the government before any changes to the current appeals process are suggested or implemented. Put simply, the focus of any change to the appeals process must be on addressing the problems identified in this report in order to enhance the public good of our accident compensation scheme.

John Miller John Miller Law Wellington

7 July 2015

There is general agreement from ACC, claimants and legal practitioners about the need to reform the current review and appeal system. Plans for change are currently being considered by the government. It is important these reforms are based on evidence and knowledge of the current system. The research in this report has been conducted by practitioners familiar with the system, using one of the most reliable sources of evidence available, namely decided cases in the District Court, High Court and Court of Appeal. Consequently, the research should be taken seriously by those considering the new system. The research details problems with access to justice – problems the new system should seek to address. This report should mark the beginning of longer-term research on the effectiveness of the review and appeal system. That system, which has replaced the right to sue for personal injury, must be cost effective and reliable. The report details how the current system is falling short of those goals and mirrors my own experience of more than twenty years' practice in this area.

Philip Schmidt

Schmidt and Peart Law Onehunga, Auckland 7 July 2015

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THE IDEA

No longer should artificial barriers be allowed to work injustice in particular cases.

The Woodhouse Report at 23

It is so easy in the pursuit of what is called absolute justice to slide into the error of making the procedure of justice itself so expensive and so drawn out that the objective of the rehabilitation of the worker might be lost.

The Woodhouse Report at 70 quoting the then Minister of Labour, (1964) 340 NZPD 2303.

Sometimes the review and court cases go in ACC's favour and sometimes they go in the claimant's favour. This is how a fair system works and ACC abides by the review or court decisions.

ACC spokesperson in Martin Johnston "The ACC files: Haggling delays urgent surgery" New Zealand Herald, 15 December 2010

As will become apparent the history of this proceeding from the time at which the Accident Compensation Corporation made its initial decision to decline cover does not reflect well on the administration of justice in this country.

O'Neill v ACC [2009] NZHC 2297 at [3]

When requested by the Court to indicate what submissions he had in relation to the decision under appeal, the appellant simply contended that the decision was not fair, that his life had been changed by the injuries that he had received, and he did not think it right that he should not be eligible for an independence allowance.

Te Huia v ACC [2009] NZACC 219 at [4]

I accept Ms Hawke's argument that this results in a complex and drawn out procedure for people in the same position as Ms Hawke. The Appeal Authority having jurisdiction, as it would in Ms Hawke's case but for the application, is the desirable outcome. Yet it is not the correct outcome.

ACC v Hawke [2014] NZHC 1098 at [56]

The rather unusually intense spotlight currently trained on the civil courts has been said to reveal a system in crisis: procedures that are too complicated; courts that are too slow; lawyers who are too aggressive; litigants who are bewildered and traumatised by their experiences; and an unquantified body of citizens whose access to the courts to vindicate rights is barred by these features. But where is the evidence for these assertions?

Hazel Genn *Paths to Justice* (Hart Publishing, Portland, Oregon, 1999) at 1

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Executive Summary

The problem

1. The ACC appeals process contains widespread and systemic barriers to access to justice. There is consensus among claimants and their support groups, government officials, the judiciary, and lawyers that action is required, but that is where consensus ends.

Current proposals

- 2. Officials have considered the two most easily measurable symptoms of the access to justice problem, rather than looking into its causes. They have measured the cost of administering justice, and length of delay. Officials propose to reduce cost by creating a tribunal eventually saving ACC \$400,000 per year, and to be intolerant to delay by legislating for appeals to be struck out after 60 days, with an exceptional circumstances provision for a 60 day extension.
- 3. By measuring the symptoms of the access to justice problem, officials have not identified or analysed the nature of the problems causing those symptoms. It follows that the solutions proposed by officials will not improve access to justice.
- 4. Put simply, these changes will produce fiscal savings to ACC at the expense of injured people, who were not consulted on the changes.

The barriers that exist to access to justice

- 5. We set out to provide a better understanding of the ACC appeals problem to allow informed consultation and discussion.
- 6. To do this we used a mixed research method (Chapter III), by undertaking a thematic analysis of court decisions to identify themes or categories of access to justice barriers, and by quantitatively and qualitatively coding a sample of those judgments.
- 7. Having analysed over 500 judgments issued since 2009, including a random sample of District Court (Chapters V–VIII) and all the appellate cases (Chapter IX), we have identified four systemic barriers

to access to justice. We recommend that any proposed reform to the current appeals process must be considered in light of these four existing barriers.

- a. There are barriers to access to the law, including to the courts, the statute, a coherent body of case law and competent legal counsel (Chapter VI).
- b. There are barriers related to evidence, including access to evidence, protection of the principles of evidence law, an inability to present expert medical evidence that is crucial to determining most ACC disputes, and the comparative disadvantage to claimants caused by ACC's control over the investigation process (Chapter VII).
- c. There are barriers to a claimant feeling like they are being heard, including the perception that justice is being done, that an impartial person is listening to the legal issue and that, in light of the other barriers identified, there has been a fair hearing that will secure a meaningful remedy (Chapter VIII).
- d. There are barriers to representation, including access to a lawyer who represents the claimant's interests and can navigate the complicated process of litigation (Chapter X).
- 8. The implications of these findings are that the current system does not provide access to justice. There are two conceptions of ACC that are used in litigation depending on which will benefit ACC in any particular case, and ACC has obtained the advantages of a repeat player in a litigation system (Chapter XI).
- 9. Any proposed changes must be considered against these four criteria with a human rights focus, taking into account the Convention on the Rights of Persons with Disabilities. It requires consultation with people with disabilities themselves, their Disabled Persons Organisations and their representatives (Chapter XII).
- 10. We recommend that the causes of access to justice problems we have identified above must be overcome with solutions targeted to address those causes rather than the symptoms.

11. To achieve this, substantial knowledge gaps identified in this report need to be overcome. Official data and statistics need to be collected and provided in a transparent way. More research needs to be conducted to understand the relationships between the themes we have identified and finally, this information needs to be disseminated to the users of the system – to claimants, ACC, lawyers and judges and to the policy makers who are tasked with improving access to justice for injured people.

BACKGROUND

WHY WAS THIS STUDY PROPOSED AND FUNDED?

Key Goal: to provide data to guide reform

There is an identified systemic problem with access to justice for injured New Zealanders challenging decisions of the Accident Compensation Corporation. The process must be improved and all parties involved have stated that action is required ... There is, however, disagreement on how to fix the problem, because there has not been a good understanding of what exactly constitutes the problem.

- ... What are not yet known, however, is the scope of this problem and an understanding of the factors that have led to the problem.
- ... Acclaim Otago, along with advocates and representatives, are seeking to work with the Government in remedying perceived issues, but there is a clear need for better data on the way ACC claimants access the Courts in disputes with ACC.

There are two goals for this data collection project: (i) to inform the current reform and (ii) to provide useful accessible information on the appeals process.

Reform is both inevitable and necessary; nonetheless, uninformed reform risks exacerbating the problem. The current model is unsustainable. All involved in shaping the reform will benefit from properly understanding the problem. This includes staff of the Ministries, Ministers (and their advisors), members of relevant Select Committees, members of the profession, and injured people.

Acclaim Otago's grant application to the Law Foundation, 29 August 2014

Why is this study being done?

- 12. In 2014, while preparing its report to the United Nations,¹ Acclaim Otago was accidentally made aware of a radical and unpublicised² proposal by the New Zealand Government: replacing the two existing specialist appeal bodies³ for ACC claimants with a tribunal.
- 13. Little is known about the current proposal, except that officials have raised concerns about what were framed as unacceptable cost and delay in the ACC jurisdiction requiring immediate action. However, as noted above, there has been poor communication with the Law Society about any proposal, and no consultation. This is despite the United Nations Committee on the Rights of Persons with Disabilities recommending on 3 October 2014 that the New Zealand Government consult people with disabilities and their representatives regarding the proposed changes.
- 14. The ensuing knowledge gap is large and meant the proposals were not informed by reference to systemic data or any real understanding of the current appeal process and its flaws. We set out to obtain data to provide a more reliable basis on which to shape reform.
- 15. This chapter will give some context to the proposal by contrasting it with the current structure of the appeals process. It will also explain what we mean by "access to justice" in this report, before giving some indication of what our research is able to show.

What is the current appeals system?

16. The Accident Compensation Corporation receives approximately 1.7 million claims and makes hundreds of thousands of decisions about how to implement New Zealand's accident compensation scheme every

Acclaim Otago Inc "The Costs of Paradigm Change: Access to Justice for People with Disabilities Caused by Personal Injury in New Zealand" 24 July 2014, available from http://acclaimotago.org/wp-content/uploads/2014/08/Acclaim-NZ-Shadow-Report-for-UN.pdf.

The proposal was not put to the New Zealand Law Society in the usual manner, despite Ministry officials stating that it had been. This was the subject of a letter dated 24 June 2014 from the President of the New Zealand Law Society, Chris Moore, expressing his concern about how the proposal was handled according to documents released to Acclaim Otago under the Official Information Act 1982.

The District Court's ACC Appeals division, and the Accident Compensation Appeal Authority.

year. Certain kinds of those decisions can be legally challenged. To a large extent, ACC controls access to the dispute resolution process by its ability to choose what kind of decision it will issue and when that decision will be issued. Exactly what kinds of decisions can be challenged is an area of dispute that is constantly evolving.⁴

- 17. ACC claimants are empowered under the Accident Compensation Act 2001⁵ to dispute those decisions according to a process set out in the relevant Act that governs what ACC can or cannot do in implementing the accident compensation scheme.
- 18. Claimants are entitled to have their claims processed according to the legislation that was in force at the time. The Accident Compensation Corporation ("ACC") is the statutory body⁶ with responsibility for administering New Zealand's Accident Compensation Scheme.
- 19. ACC law is about defining the acceptable differences between the policy and practice of the Accident Compensation Corporation and the standards of conduct established by the relevant statute that governs its rights and obligations.
- 20. ACC is consistently described by the judiciary and by legal practitioners as "a creature of statute", although this characterisation tends to overlook the fact that the only means to hold "the creature" to that statute is the dispute resolution process. The dispute resolution process is tightly constrained by at least three privative provisions, which are relied on by ACC to resist even fundamental legal remedies such as judicial review, let alone civil proceedings in negligence or breach of statutory duty. 10
- 21. Over time, ACC has been governed by the following legislation:
 - a. Accident Compensation Act 1972;
 - b. Accident Compensation Act 1982;

See Gibson v ACC [2015] NZHC 221; Splite v ACC [2014] NZHC 2717; ACC v Hawke [2015] NZCA 189; McGrath v ACC [2011] NZSC 77.

With variations on that same power under the previous legislation.

Technically a Crown Entity under the Crown Entities Act 2004.

⁷ See for example *McLean v ACC* [2008] NZHC 615 (2 May 2008) at [23].

Under the 2001 legislation, these are: s 317 that prevents proceedings for personal injury in New Zealand otherwise covered by the Act; s133(5) that prevents any Court from granting a remedy where there is a right of review in relation to that matter; and; 149(3) that limits the Court's examination of complaints under the Code of Claimants' Rights.

⁹ Buis v ACC [2008] NZHC 419; Howard v ACC [2014] NZHC 2431.

¹⁰ Naysmith v ACC [2006] 1 NZLR 40.

- c. Accident Rehabilitation, Compensation and Insurance Corporation Act 1992;
- d. Accident Insurance Act 1998; and
- e. The Accident Compensation Act 2001.
- 22. Each piece of increasingly complex¹¹ legislation has fundamentally different tests that deal with what can be covered and what entitlements can be provided. There are also different legal restrictions governing how claims should be processed. Each Act also has different dispute resolution processes, which have changed according to how much control ACC has and how far reviews of its decisions should be independent. For example, there was a much wider range of "reviewable decisions" under the 1982 legislation than under subsequent legislation.
- 23. These fundamental differences between the various pieces of legislation are the chief reason for having two different specialist appellate bodies. Both bodies hear appeals against decisions given by "independent reviewers" conducting review hearings:
 - a. The Accident Compensation Appeal Authority ("the Authority"); and
 - b. The Accident Compensation Appeals division of the District Court ("the District Court").

The Authority

24. The Authority hears disputes made by the Accident Compensation *Commission* under the 1972 and 1982 legislation, where the tests for cover were comparatively more generous and much easier to prove on the balance of probabilities.

25. The procedures for dispute resolution are also more consistent with an informal but wide-ranging investigative ability to inquire into any aspect

Even in 1979 this complained was able to be leveled against the legislation: see Geoffrey Palmer "Compensation for incapacity: a study of law and social change in New Zealand and Australia" (Oxford University Press, Wellington, 1979) at 405.

There is no legal test as to what is required before a reviewer is independent, and there is no clearly defined statutory mechanism for any situation where a reviewer's independence is in question.

of ACC's conduct.¹³ The Authority holds all the powers of a Commissioner under the Commissions of Inquiry Act 1908 and has the power to make recommendations to the Corporation regarding any matter. Its jurisdiction is not limited to a claim and a decision on that claim.

- 26. For much of the period the current proposal examines, there was no person holding permanent office as the Appeal Authority, which is obviously a significant cause for delay. It is not clear whether Ministry officials took this into account in the calculations forming the basis of the current proposal and the data has not been made publicly available. Because of the low number of Appeal Authority decisions and their highly specialised nature, we did not conduct an analysis of the Authority's decisions. There were not many of these decisions compared with the District Court and our position is that the Appeal Authority should simply be left to hear the remaining appeals under the former Acts.¹⁴
- 27. When a new Authority, Robyn Bedford, was appointed to that role, she made significant headway through complex historical disputes¹⁵ only to have her job advertised by the Ministry of Justice while she was still deciding cases. At that time, the Minister of Justice and the Minister of ACC were the same individual. Taking the hint that her position was untenable, in late 2013 the Authority resigned.
- 28. The treatment of the previous Appeal Authority is a source of utmost concern when considering the new proposal. It shows the importance of having judicial authorities that can resist government or ACC interference. In essence, the Minister for ACC had ministerial responsibility for the same Ministry capable of exerting influence over a sitting judicial figure. It is important that any reform consider the potential public perception of a conflict of interest.
- 29. ACC has also appealed a number of cases to the appellate courts which have the effect of limiting the Authority's jurisdiction to hear disputes. The Authority hears disputes that require a lower legal standard to be

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There are more nuanced differences which are explored elsewhere, most prominently in *ACC v* Langhorne [2011] NZHC 1067.

The Court of Appeal recently confirmed the Authority's ongoing jurisdiction and relevance in *ACC v Hawke* [2015] NZCA 189.

These disputes had backlogged over a number of years while there were no regular hearings of the Authority, which had caused delay and extended the timeframes for these already historic disputes.

met by claimants before cover is given and disputes commonly result in substantial amounts of backdated weekly compensation and interest. It is only natural (although arguably constitutionally improper) for ACC to attempt to limit its exposure to historic claims. Claimants are commonly disadvantaged by ACC's destruction or loss of historic records that might have assisted the claimant's case, and by ACC's consequent ability to claim prejudice in processing a claim.¹⁶

- 30. Appeals against decisions of the Appeal Authority are to the High Court on a question of law, or a question of public importance.¹⁷ Appeals require the leave of the Authority, or the special leave of the High Court.
- 31. The Appeal Authority can be contrasted with the ACC Appeals division of the District Court.

The District Court

- 32. The District Court was first given jurisdiction over appeals against review decisions of decisions made by the Accident Rehabilitation and Compensation Insurance *Corporation* under the similarly titled Accident Rehabilitation and Compensation Insurance Act 1992. The District Court hears appeals against decisions under all subsequent ACC legislation.
- 33. The primary differences under subsequent ACC enactments relate to substantive cover and entitlements, along with other institutional changes to the Accident Compensation Corporation.
- 34. The differences between the two legislative systems of the Commission and the Corporation were so great that during the initial period in the 1990s, staff were only allowed to administer claims under one system and not both. The historic legislation continues to be poorly understood by current ACC staff, whose training and computer programs are understandably tailored to the 2001 Act.

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ACC v Hawke [2015] NZCA 189; ACC v Langhorne [2011] NZHC 1067; Jones v ACC [2014] NZHC 280. In Morgan v ACC [2012] NZHC 1789, the Court required an affidavit to be produced confirming the representations made by previous representatives of "the Corporation" that records could not be found, despite the reviewer and District Court appearing to take those representations at face value.

Accident Compensation Act 1982, ss 111 and 112.

- 35. The District Court is distinguishable from the Appeal Authority by the procedure it adopts, the law it applies and the fact that its disputes are decided by warranted judges of the District Court. The fact that judges have warrants giving them security of appointment is crucial given the politicised nature of accident compensation law in New Zealand.
- 36. The establishment of District Court appeals when ACC became a Corporation is part of an observable trend that conceptualises ACC as merely a party to a dispute before an independent judiciary. Since then there has been a drift to legalism and the reintroduction of many of the problems of the negligence action. Because judging generally "reflects the process of argumentation, in that most judgments are constructed to a greater or lesser extent around the arguments advanced by each party's counsel", 18 it comes as little surprise that reintroduction of many of these legalistic hurdles and reductive interpretations of the legislation has been in no small part from arguments and suggestions made to the Court by the Corporation itself. There are indications the Corporation enjoys the advantages of being a repeat player against a one-off participant in the litigation process. 19
- 37. Appeals against District Court decisions are to the High Court by question of law only, and require the leave of the District Court or special leave of the High Court.

Why District Court and High Court decisions are important

- 38. A key feature of the current system is that questions of fact, including those forming the basis of a finding about causation, cannot be appealed to the High Court.
- 39. ACC Board documents show ACC will only change its policy based on decisions of the High Court, meaning most issues addressed in ACC appeals will never be considered by decision-makers within ACC. This presents a substantial barrier to systemic learning.

See generally Geoffrey Samuel *Epistemology and Method in Law* (Ashgate, Hampshire (UK), Vermont (USA), 2003) at 115.

See Marc Galanter "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law and Society Review 1 at 3-9.

40. It is evident from official information that decision-makers have little understanding of the statutory appeals process. In particular, the officials sent to confer with the Advocates and Representatives Group had never attended a review hearing and appeared to have little idea of the duplications the tribunal proposal would create with that process. If the benefits of a tribunal are desired, policy makers might consider strengthening the current review process, which is already akin to a tribunal, ²⁰ into a full tribunal with powers to compel evidence and witnesses. Reviewers are currently disadvantaged by the level of investigation they are statutorily required to take by contrast with their limited (if any) authority or power to enforce their own decisions.

The current proposal - more detail

- 41. To the extent that the current proposal removes access to judges, it is of constitutional significance.
- 42. The nature of the Government's proposal has been able to be gleaned from redacted official information. Other sources of information about the proposal include:
 - a. Cabinet papers and "key messages" briefings obtained under the Official Information Act 1982;
 - A letter from Schmidt & Peart Law Ltd written to the Minister for ACC, and annexed to Acclaim Otago's 2014 shadow report;
 and
 - c. Information given to the Advocates and Representatives' advisory group by the ACC Chief Executive.
- 43. The proposal's key features have been identified as follows:
 - a. A set of procedural rules that impose timeframes on claimants but not on ACC; and
 - b. Replacement of judges with members of a tribunal, who do not need to have specific ACC experience, and need only have been admitted to the bar for seven years in any area of practice.

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It is required by statute to put aside ACC's decision (s 145), be independent (s 138), take an investigative approach (s 140), hold a hearing (s 141), comply with the principles of natural justice (s 140) and due diligence (s 140) in decision making.

- 44. There has been no consultation outside government ministries and the proposal was not part of the review of tribunals undertaken by the Law Commission.²¹ Despite what was publicly stated by Ministry officials, the New Zealand Law Society was not consulted on the proposal.²² The New Zealand delegation to the United Nations Committee on the Rights of Persons with Disabilities also misstated that consultation had been undertaken with the Advocates and Representatives Group.
- 45. At a time when the Government was actively responding to Acclaim Otago's report about the human rights of people with disabilities, and was aware of Acclaim's findings, Cabinet was told that the tribunal proposal raised no human rights or disability rights issues.
- 46. The Ministry of Justice identifies the primary motivations for the proposal as being the cost and delay of the current process. The justifications for the proposal are not based in any data that have been provided. There has also been no investigation identified that might have shown a cause for delay. The data used to calculate "delay" has not been made publicly available.
- 47. Official information shows that Chief District Court Judge Jan-Marie Doogue indicated to Ministry officials that a tribunal was unsuitable for the complexity of ACC disputes. Her Honour also indicated that the delay in the District Court could be remedied by the appointment of one or two additional judges.²³
- 48. Similarly, by statute the costs of the ACC dispute resolution process (as administered by the Ministry of Justice) are borne entirely by ACC there is no cost to the Ministry of Justice. At the time the proposal began, it is significant that these ministerial portfolios were held by the same individual. The identified cost saving is only \$400,000, which officials calculated would not be realised for several years. No explanation has been given about how this figure was reached.

Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008); Law Commission *Tribunal Reform* (NZLC SP 20, 2008); see also Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004).

Letter dated 24 June 2014 from Chris Moore, President of the Law Society to Minister Chester Burrows, released under the Official Information Act to Acclaim Otago by Ministry of Justice, August 2014.

Letter in response to consultation by the Ministry of Justice with Chief District Court Judge Jan-Marie Doogue, released under the Official Information Act 1982 to Acclaim Otago.

- 49. Despite the opaque motivations for change, there is widespread acceptance among claimants and their representatives that the statutory ACC dispute resolution process is not providing access to justice for injured New Zealanders.²⁴
- 50. We suggest that properly remedying barriers to access to justice will limit the cost of the system, and will substantially reduce avoidable delay. We therefore sought to obtain data to assess the extent to which the barriers to access to justice identified in previous research could be found in the only publicly-available record of proceedings in the dispute resolution system: the judgment or decision issued by the court determining the proceedings.²⁵

Previous research by Acclaim Otago: from anecdote to understanding

- 51. Acclaim Otago has previously conducted research into barriers to access to justice: in particular via a publicly-available self-selected online survey of injured people to gather their experiences, and also by an analysis of the legal structure of the appeals system.
- 52. The structural barriers to access to justice were addressed in its reports to the United Nations Committee on the Rights of Persons with Disabilities.²⁶ Barriers include:
 - a. Lack of procedural safeguards and enforcement mechanisms;
 - b. Lack of reliable evidentiary procedures that ensured a fair proceeding was held;
 - c. Costs barriers that meant access to justice was unattainable or came at often unbearable financial and non-financial cost to the individual and their community; and

Acclaim Otago's report was endorsed (at appendix 1) by the overwhelming majority of injured peoples' representatives in New Zealand interacting with ACC's dispute resolution system. 85% of the more than 600 respondents to Acclaim Otago's access to justice survey stated they believed the process did not provide access to justice. See Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, available from:

< http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf>.

Review decisions are not publicly available documents and must be individually requested according to a unique identifier.

Acclaim Otago "Adopting Issues: an Interim Report to the United Nations Committee on the Convention on the Rights of Persons with Disabilities" 28 February 2014, available from: http://acclaimotago.org/wp-content/uploads/2014/07/Report_to_UN.pdf. See also "The Costs of Paradigm Change", above.

- d. An approach that relied on the discretion of the relevant decision-maker, meaning claimants were supplicants to the exercise of a discretion, rather than rights-holding persons who could compel compliance with those rights against representatives of the State.
- 53. Acclaim Otago also sought to gather the experiences of injured New Zealanders proceeding through the dispute resolution process in a publicly available survey.²⁷ We make use of that data again in this report where it illustrates a point or can be related to the barriers we have discovered.
- 54. The biggest shortcoming of those survey findings is illustrated by the Government's response to them: they have been largely ignored. However the value of the previous studies is also somewhat limited by their having to make claims at a high level of generality based on the structure of the law (the interim reports and shadow report), or that the claims were based on self-selected individual experiences (the survey data) that are not reflective of the wider operation of the system the "few bad apples" response. The present study avoids these difficulties by moving away from the survey approach to understanding.

What is access to justice?

- New Zealand has ratified²⁹ the United Nations Convention on the Rights of Persons with Disabilities and played a significant part in drafting it.³⁰ The Convention adopts a social conception of disability and is drafted in view of the failure or other human rights instruments to advance the human rights of people with disabilities. It envisages positive obligations on a state party to uphold rights of people with disabilities. Article 13 of the Convention states:
 - 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, ...

See "Crying for Help from the Shadows", above.

See the New Zealand Government response to the Concluding Observations of the Committee on the Rights of Persons with Disabilities, available from: http://www.odi.govt.nz/what-we-do/un-convention/monitoring-implementation/2015/index.html.

Disabilities (United Nations Convention on the Rights of Persons with Disabilities) Act 2008.

Much was made of this fact at the examination of state parties in Geneva, Switzerland, in September 2014.

- 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice ...
- 56. After having the opportunity to respond to the Committee's questions and examination, which was informed by Acclaim Otago's reports, the New Zealand Government received the following recommendation from the Committee:³¹
 - 23. ... The Committee notes that persons who have suffered injuries are concerned over the lack of access to justice in pursuing their claims. There is concern over the limited amount of legal aid funding which is available and over the exercise of the discretions to award legal costs. There is also concern that the Accident Compensation Corporation machinery lacks a human rights focus.
 - 24. The Committee recommends that the State party examine the processes for assessing compensation by the Accident Compensation Corporation ... and finally to ensure that this mechanism has a human rights focus.

. . .

- 26. The Committee recommends that organisations representing persons with disabilities be consulted about the proposal to establish an Accident Compensation Tribunal. ...
- 27. The Committee is concerned that no specific training of judges by the Institute of Judicial Studies has been given either on the Convention or on the requirement that justice be accessible to all persons with disabilities, including those persons with intellectual or ... psychosocial disabilities.
- 57. In Gibson v ACC,³² the High Court relied on another source of law for the proposition that people were entitled to access to justice, stating:
 - ... it is a corollary of the orthodox application of the rule of law, including within that a commitment to substantive and procedural fairness.
- 58. The right to access to justice therefore derives from multiple sources in New Zealand law. The Convention further compels the government to provide *effective* access to justice, in light of the social conception of disability adopted by the Convention, and the Government's stated international commitment to upholding human rights, particularly for people with disabilities.

At the time of writing, there had been no consultation, and the Government has entirely rejected this recommendation except to the extent that it will revise legal aid rates. This is unacceptable and reflects a lack of education in the specifics of the Convention.

Gibson v ACC [2015] NZHC 221 at [54]. Disclosure that the appellant in this case was represented by Warren Forster as counsel and assisted by Tom Barraclough, both of whom were among the researchers compiling this report and are two of its authors.

- 59. Considering the emphasis on access to justice, and its growing prominence as a topic of public discussion,³³ it is worth briefly considering what access to justice is. Although "[r]esearch on legal problems has often proceeded without explicit, detailed definitions" of that concept,³⁴ isolating its nature or core assumptions can "assist in formulating the right policy questions and in reducing the risk that unrealistic expectations will be created of the justice system."³⁵
- 60. So, what do we mean by access to justice? This can best be answered first by considering the historical waves of the movement, then summarising four of its main current conceptions, before finally settling on the most appropriate of those conceptions for this project: the notion that improvements in *legal* mechanisms are a necessary and significant part of the solution to access to justice problems.

Conceptions have changed over time

61. Conceptions of access to justice appear to change according to what goals the access to justice movement is pursuing at any particular time, ³⁶ making it useful to keep the historical waves of that movement in mind. The access to justice movement gained traction in the 1960s³⁷ and was certainly in full force by 1978. Three historical waves of that movement have been consistently identified. First was access to justice as "the provision of legal services for the poor"; ³⁹ then, it meant reform of "the representation of group and collective ("diffuse") interests other than those of the poor"; and third, it was characterised by "the

See issue 860 of "Law Talk", the New Zealand Law Society's publication for practitioners. See also Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) available from: http://www.lawfoundation.org.nz/wp-content/uploads/2014/11/Ethel-Benjamin-Address-2014-Justice-Helen-Winkelmann.pdf.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 3.

Justice Ronald Sackville "Some thoughts on access to justice" (2004) 2 New Zealand Journal of Public and International Law 85 at 111.

Christine Coumarelos and others Legal Australia-Wide Survey (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 3-5.

Justice Ronald Sackville "Some thoughts on access to justice" (2004) 2 New Zealand Journal of Public and International Law 85 at 88.

With the famous report: Mauro Cappelletti and Bryant Garth "Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report" in Mauro Cappelletti and Bryant Garth (eds) Access to Justice: Vol 1: A World Survey (Sijthoff and Noordhoff, Alphen aan den Rijn, 1978).

Representing a charitable model of disability now explicitly rejected by people with disabilities and the Convention on the Rights of Persons with Disability because of the expectation of gratitude and charity it carries with it.

emergence of the full panoply of institutions and devices, personnel and procedures, used to process or prevent disputes in modern societies."⁴⁰ Some suggest a current fourth wave of "competition policy reform as applied to the provision of legal services ... to strike down restrictive practices in the legal services market in the expectation that legal services will become available to consumers more cheaply and in more accessible form."⁴¹

Two things are notable from this brief historical introduction. First, although each wave of access to justice efforts may overlap with others, there is evidence for each wave having occurred in New Zealand as elsewhere: at different times the call for "access to justice" has justified greater access to legal aid, loosening of standing requirements and broadening of the scope of review, and the creation of countless Commissioners, Ombudsmen and other institutional watchdogs, protectors or auditors. Second, whatever the precise boundaries of any of the waves, it is clear that each has "a concept of 'availability' at [its] core." Our working definition of access to justice will similarly focus on availability.

Four conceptions of access to justice

63. There are many ways to think about access to justice. The main four abstract categories that we have encountered are: (1) access to justice as a synonym for equality before the law; (2) a multi-factorial account of access to justice that includes legal and extra-legal institutions; (3) a more extreme version that limits access to justice to non-legal institutions and (4) a version that emphasises the relative importance of legal institutions. Each is briefly summarised before we justify why our working definition largely adopts the fourth conception.

Justice Ronald Sackville "Some thoughts on access to justice" (2004) 2 New Zealand Journal of Public and International Law 85 at 90. See a similar account in Christine Coumarelos and others Legal Australia-Wide Survey (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 3; Roderick A Macdonald "Access to justice and law reform #2" (2001) 19 Windsor Yearbook of Access to Justice 317; Martin Partington "The relationship between law reform and access to justice: a case study – The Renting Homes Project" (2005) 23 Windsor Yearbook of Access to Justice 375 at 376.

Justice Ronald Sackville "Some thoughts on access to justice" (2004) 2 New Zealand Journal of Public and International Law 85 at 90.

Martin Partington "The relationship between law reform and access to justice: a case study – *The Renting Homes Project*" (2005) 23 Windsor Yearbook of Access to Justice 375 at 376.

(1) Equality before the law

- 64. First, access to justice as equality before the law. This account emphasises the importance of "equal access to justice", which "would mean that different groups in a society would have similar chances of obtaining similar resolutions to similar kinds of civil justice problems." Its underlying rationale is "that all people should enjoy equality before the law. That principle in turn derives from the notion that the foundations of justice rest on recognition by the state of the values of human dignity and political equality." This conception is closely linked to "wider human rights concerns and the need to promote equality and fairness". 45
- This account appears hard to criticise who could be against dignity, 65. political equality, and fairness? However, a significant limit to this conception is that it brushes over the fact that equality before the law "is not a guarantee of equal justice" – fair substantive outcomes. 46 The reason there is no guarantee is that "A law of general application may have adverse discriminatory outcomes because of the different circumstances and attributes of those to whom it applies."47 Personal injury provides a good example: the largest ever study of unmet legal need measured "finalisation" rates (how often the litigation was concluded), finding that "People with a disability constituted the only disadvantaged group that had lower finalisation levels in most jurisdictions [of Australia]."48 This supported its finding that "social exclusion drives much of the experience of legal problems". 49 In short, the flaw of this conception is that it overlooks that certain laws will have a special kind of impact on one's life, which they will not necessarily have on the lives of others.⁵⁰

Rebecca L Sandefur "The fulcrum point of equal access to justice: legal and nonlegal institutions of remedy" (2009) 42 Loyola of Los Angeles Law Review 949 at 951.

Justice Ronald Sackville "Some thoughts on access to justice" (2004) 2 New Zealand Journal of Public and International Law 85 at 86. See generally Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge (MA), 1977) and Ronald Dworkin *Law's Empire* (Belknap Press, Cambridge (MA), London (UK), 1986).

Martin Partington "The relationship between law reform and access to justice: a case study – *The Renting Homes Project*" (2005) 23 Windsor Yearbook of Access to Justice 375 at 376.

Justice Robert French "Equal justice and cultural diversity: the general meets the particular" (2015) 24 Journal of Judicial Administration 199 at 199 and see at 206.

Justice Robert French "Equal justice and cultural diversity: the general meets the particular" (2015) 24 Journal of Judicial Administration 199 at 199.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xxiii.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 26.

Justice Robert French "Equal justice and cultural diversity: the general meets the particular" (2015) 24 Journal of Judicial Administration 199 at 200-201.

66.

One implication of this criticism is that meaningful "access to justice" needs to deliberately take into account "the specific needs and differences between people and their lived experiences in order to treat those people as equals." This was a central driving force behind the Convention on the Rights of Persons with Disabilities: the continued experience of people with disabilities emphasises that this first conception of access to justice does not guarantee justice. The Convention emphasises that peoples' experience of disability is often a product of society, as much as any particular impairment. As a study of peoples' perceptions of access to justice put it, "it is clear that an accessible justice system must be one that understands and can embrace the importance of social context for those who use it". So while equality is important, it will not be achieved by equating it to the separate concept of access to justice.

(2) The multifactorial conception of access to justice

67. With that in mind we turn to the second broad conception: the multifactorial account. The key to this conception is that "access to justice encompasses a wide range of legal and non-legal pathways to resolving legal problems". Access to justice under this conception comprises disparate criteria. The legal pathways include having the right to be heard and informed, access to legal aid, the cost and procedural requirements of the court process, and dealing appropriately with self-represented litigants. In addition, the non- or extra-legal components of access to justice under this conception include the ability to easily identify and access the appropriate, high quality legal services that are needed, or services in other areas such as health, as well as being

Trevor C W Farrow "What is access to justice?" (2014) 51 Osgoode Hall Law Journal 957 at 980.

Paul Harpur "Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities" (2012) 27 Disability & Society 1.

Trevor C W Farrow "What is access to justice?" (2014) 51 Osgoode Hall Law Journal 957 at 980.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 46-47.

Equal Before the Law: towards disability justice strategies (Australian Human Rights Commission, February 2014) at 9.

The Cost of Justice: weighing the costs of fair & effective resolution to legal problems (The Canadian Forum on Civil Justice, 2012) at 2.

See Helen Thompson and Anna Chalton "Equal Justice Project" (paper presented to the Equal Justice Project Outreach Symposium "Access to justice: is it in the budget?", 6 October 2014) at 2-16.

Equal Before the Law: towards disability justice strategies (Australian Human Rights Commission, February 2014) at 9; Access to Justice Arrangements (Australian Productivity Commission, Inquiry Report vol 1 no 72, 5 September 2014) at 77.

treated with dignity,⁶⁰ referrals by courts to other resources or services,⁶¹ and even ensuring physical access to the courts regardless of disabilities.⁶² This final example has been emphasised by counsel for ACC in the case law, with the submission that access to justice might mean only the installation of ramps to the courthouse.

68. This conception is remarkably broad, and it will be easier to assess its viability as a working definition after examining the remaining two conceptions of access to justice. The third and fourth respectively emphasise the "non-legal" and "legal" components of this second conception as the most important aspect of access to justice.

(3) The societal conception

69. The third, dominantly non-legal conception of access to justice is comprehensive. It says "society, not law, is where justice truly resides". The rationale of this conception is the extensive body of research showing that "The most significant concerns about justice felt by [people] have little to do with legal rights". It also appears to come from disillusionment with the lack of successful reform; as one study asked, "given the efforts made to reform the law to assist people with disabilities before the courts – why are the outcomes described by community members so often unsatisfactory? Is it still the law? Or is it something else?" Consequently, this conception of access to justice says social problems are the biggest barrier to access to justice, including "disengage[ment] from the hard work of building a more just society". Relatedly, this school of thought argues that the solutions must also be extra-legal, and ideas for successful reform include "re-

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 19.

Equal Before the Law: towards disability justice strategies (Australian Human Rights Commission, February 2014) at 9.

See Helen Thompson and Anna Chalton "Equal Justice Project" (paper presented to the Equal Justice Project Outreach Symposium "Access to justice: is it in the budget?", 6 October 2014).

Making Tribunals Accessible to Disabled People (UK Council on Tribunals, November 2002) at 31-35.

Roderick A Macdonald "Access to justice and law reform #2" (2001) 19 Windsor Yearbook of Access to Justice 317 at 318.

Roderick A Macdonald "Access to justice and law reform #2" (2001) 19 Windsor Yearbook of Access to Justice 317 at 323. See Rebecca L Sandefur "The fulcrum point of equal access to justice: legal and nonlegal institutions of remedy" (2009) 42 Loyola of Los Angeles Law Review 949 at 950, 953; Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xvi.

Equal Before the Law: towards disability justice strategies (Australian Human Rights Commission, February 2014) at 21.

Roderick A Macdonald "Access to justice and law reform #2" (2001) 19 Windsor Yearbook of Access to Justice 317 at 325.

orientation in the way we think about conflicts, rights, adjudication and all-or-nothing remedies";⁶⁷ and ensuring the law is "designed and enforced as non-coercively as possible.⁶⁸

70. This conception of access to justice resonates in the ACC context – the accident compensation system was set up to provide an extra-legal scheme for compensating for personal injury. The third conception is also the approach in the Convention on the Rights of People with Disabilities to which the Government has committed itself.

(4) Improving the mechanisms and substance of the law

71. In stark contrast sits the fourth conception, in which access to justice is mainly about improving the mechanisms and substance of the law. A good example of this conception is that adopted in Lord Woolf's wellknown civil justice reforms: access to justice requires "that the civil justice system should be just in the results it delivers; fair in the way it treats litigants; capable of dealing with cases at reasonable speed and at reasonable cost; and understandable to those who use it."69 This view accepts that "access" is important – the ability to approach or make use of something⁷⁰ - but it emphasises "justice" in "access to justice", because justice is the very thing that people are seeking access to.⁷¹ And justice "has a number of components. First, a competent and impartial judiciary; secondly, accessible courts; thirdly, properly administered courts; fourthly, a competent and honest legal profession; fifthly, an effective procedure for getting a case before the courts; sixthly, an effective legal process; seventhly, effective execution; eighthly, affordable justice."72

Roderick A Macdonald "Access to justice and law reform #2" (2001) 19 Windsor Yearbook of Access to Justice 317 at 318 and 323.

Justice Ronald Sackville "Some thoughts on access to justice" (2004) 2 New Zealand Journal of Public and International Law 85 at 87 and at fn 7.

Justice Ronald Sackville "Some thoughts on access to justice" (2004) 2 New Zealand Journal of Public and International Law 85 at 87. See too Les Arthur "Reform of the civil justice system: the new meaning of justice and the mitigation of adversarial litigation culture" (2012) 19 Waikato Law Review 160 at 160 for justice as a balance between accuracy of decision, affordability and timeliness.

Access to Justice Arrangements (Australian Productivity Commission, Inquiry Report vol 1 no 72, 5 September 2014) at 74.

Access to Justice Arrangements (Australian Productivity Commission, Inquiry Report vol 1 no 72, 5 September 2014) at 74.

Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 3, and at fn 3 citing Lord Neuberger's definition (see now (2014) 13 Otago Law Review 229).

Our working definition of access to justice

- 72. In this report we largely adopt the fourth conception: the belief that improvements in legal mechanisms, process and substance are a necessary and significant part of the solution to access to justice problems. We do this for several reasons. First, we see problems in adopting any of the other conceptions. The first conception, as explained above, wrongly assumes that equality before the law equates or leads to access to justice. It does not, and the Convention on the Rights of Persons with Disabilities specifically rejects that approach as a failure.
- 73. The literature suggests that the second and third conceptions create a dilemma for the justice system, because "The more that is done to enhance access to the courts, the less the public will be interested in wasting time in possibly fruitless self-help remedies or alternative dispute resolution processes", and vice versa. This difficulty does not apply to ACC disputes with equal force, because there is little opportunity for alternative dispute resolution and no opportunity to negotiate with the Corporation.
- 74. However, there are other problems for the second and third conceptions. Reform of the extra-legal variety has been found to be useful only at the individual level; its success is heavily dependent "upon a clear and close alignment between the goals and motivations of the providers and the immediate practical needs of the users" in particular instances. This means that lasting improvement on a systemic level is harder to achieve with the second or third conceptions of access to justice. We suggest however that the second, holistic conception of access to justice may be required as a matter of policy, and that it is an attainable goal for government and ACC given the ACC scheme's unique nature, and intersection with the UN Convention. But for our research, which seeks to identify most clearly what is happening in the jurisdiction, extra-legal conceptions are not helpful.

Hazel Genn *Paths to Justice* (Hart Publishing, Portland, Oregon, 1999) at 263.

There is an ACC review process, which has become a mandatory barrier that must be overcome in order to access the courts as the right of appeal is against the review decision.

Merran Lawler, Jeff Giddings and Michael Robertson "Opportunities and limitations in the provision of self-help legal resources to citizens in need" (2012) 30 Windsor Yearbook of Access to Justice 185 at 226.

- 75. Another reason we adopt the legal conception of access to justice is a democratic one. Arguably, access to justice should mean whatever the public thinks it should, and a recent survey showed the general public recognised the important role courts play in any conception of access to justice. Similarly Acclaim's previous survey data indicated that while there was a strong sense of injustice resulting from treatment by ACC, there was also a strong expectation that such treatment would be investigated and cured by a proper look from a competent judicial authority.
- 76. Our final reason for adopting a law-centric approach is drawn from the role courts play in the disability context.⁷⁷ Legislation, and the words of the Convention require interpretation. The words used in the text of the Convention are given meaning by the social context in which they are read. 78 A key deficiency of previous human rights instruments is that they have been "read down" or read restrictively to avoid requirements to uphold human rights for people with disabilities. The social context that shapes interpretation of text by the courts therefore must include people with disabilities, as must discussions about the meaning of the Convention's text. This is also true of the Accident Compensation legislation. The Convention's text reflects this view and has strong requirements for consultation with people with disabilities themselves (and not just their representatives). By this logic, people with disabilities must have a say in how courts give effect to the Convention and to legislation. A prominent means of achieving this is by ensuring access to the courts, and the resources to make a persuasive and cogent argument with full appreciation of the consequences of any proposed interpretative approach.
- 77. The short point is that courts *are* central to justice and access to justice. Given the time constraints and limited access to data in this present project, we have relied on decisions of the judiciary as our primary data source. The judiciary also plays a fundamental role in bringing the practice and policy of the Corporation into alignment with the safeguards under the Act. The Corporation and its staff must always act under the assumption they will be held accountable to the statute by the Court.

Trevor C W Farrow "What is access to justice?" (2014) 51 Osgoode Hall Law Journal 957 at 968 onwards.

Teodor Mladenov "The UN Convention on the rights of persons with disabilities and its interpretation" (2013) 7 European Journal of Disability Research 69.

For an excellent account of this anti-foundational thinking, see generally Michael Robertson Stanley Fish on Philosophy, Politics and Law (Cambridge University Press, London, 2014).

78. As is very well described in these words:⁷⁹

Put simply, courts are the backstop. If they are not accessible, then they are not effective as a way of enforcing legal rights. If they are not effective, then people will not have regard to what the views of courts are, or what a person's legal rights may be ... If this occurs, it is a breakdown of the rule of law.

Our research approach

- 79. Within this conception of access to justice, and in light of the limits of our previous research, in this study we sought to identify the key barriers to access to justice in the ACC context. In short, we did this by undertaking a retrospective study of court decisions. Researchers read and re-read several hundred court decisions in search of any barriers to access to justice that emerged from their text. These were recorded and broad themes of response were identified, using thematic analysis. The aim at all stages was to describe what is happening in the courts in detail. This report is a record of what we found.
- 80. Because our coding did not specifically look for cost or delay, but rather was a search for whatever barriers to access to justice were able to be found in the court decisions, we gained a macroscopic view of this jurisdiction. This approach was appropriate given that the ACC dispute resolution system has unique features and is constituted of interrelated parts that should not be considered in isolation from one another. Rather than causing the problem, cost and delay are simply two effects most easily measured, and most easily measurable without any detailed understanding of the process.
- 81. Analysis of the access to justice problem commonly begins with an emphasis on how little data there is to assess the scale of the problem.⁸¹

Access to Justice Arrangements (Australian Productivity Commission, Inquiry Report vol 1 no 72, 5 September 2014) at 75, citing the Law Society of Western Australia. See also Justice Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 7 (see now (2014) 13 Otago Law Review 229): only resolve disputes outside the courtroom if that can be done in a way that roughly reflects their rights and obligations, but that is often not possible especially for the already vulnerable.

Our methodology is explained in more detail in the next chapter, Chapter III.

See for example Jeff Giddings and others "Helping those who help themselves: Evaluating QPILCH's Self Representation Service" (2015) 24 Journal of Judicial Administration 135 at 138; Hazel Genn *Paths to Justice* (Hart Publishing, Portland, Oregon, 1999) at 1; Hazel Genn "Do-it-yourself law: access to justice and the challenge of self-representation" (2013) 32 Civil Justice Quarterly 411 at 437; Rebecca L Sandefur "The fulcrum point of equal access to justice: legal and

82. The present study takes current understanding of the barriers to access to justice faced by people challenging decisions of the Accident Compensation Corporation from anecdotal experience and academia, to data, and thus to greater understanding of the state of play in this jurisdiction. It is a systemic approach that we insist needs to be adopted in assessing access to justice for injured New Zealanders with disputes against the Accident Compensation Corporation.

nonlegal institutions of remedy" (2009) 42 Loyola of Los Angeles Law Review 949 at 977; *The Cost of Justice: weighing the costs of fair & effective resolution to legal problems* (The Canadian Forum on Civil Justice, 2012) at 5 and fn 9 (recording a study on the lack of studies being done); Mary Anne Noone "Access to justice research in Australia" (2006) 31 Alternative Law Journal 30; Lorne Sossin and Steven J Hoffman "The elusive search for accountability: evaluating adjudicative tribunals" (2010) 28 Windsor Yearbook of Access to Justice 343 at 353; Laura K Abel "Evidence-Based Access to Justice" (2009) 13 University of Pennsylvania Journal of Law and Social Change 295 at 297; Patricia Hughes "Advancing access to justice through generic solutions: the risk of perpetuating exclusion" (2013) 31 Windsor Yearbook of Access to Justice 1 at 2; Saskia Righarts and Mark Henaghan "Delays in the New Zealand justice system? Opinion v fact" (2011) 13 Otago Law Review 455.

METHODOLOGY

... debate proceeds too often on the basis of anecdote, and that policy, formulated within the void of information black holes, is rarely subjected to systematic evaluation. The consequence is that it is difficult to know when a policy might have succeeded; and when it has failed, we are not in a position to learn from policy mistakes.

Hazel Genn "Do-it-yourself law: access to justice and the challenge of self-representation" (2013) 32 Civil Justice Quarterly 411 at 420.

... one of the most powerful benefits which can be derived from consideration of taxonomy is that it forces judges and practitioners to think beyond the narrow confines of the facts before them and to focus upon the coherence of principles across different areas ...

Justice James Edelman "Taxonomic reasoning" (paper presented to Conference of Judicial College of Victoria and Melbourne Law School, 14 March 2014) at 6.

83. This chapter provides a summary of our research aims, approach and methods. After giving an overview, it provides a detailed account of our approach to data collection and analysis, before considering limitations.

Overview

- 84. Our research question was: What are the barriers to access to justice facing injured New Zealanders engaged in the ACC dispute resolution process? To answer that question we undertook a retrospective study of court decisions using thematic analysis.
- 85. Thematic analysis meant we read and re-read the text (in this case, judicial decisions) in search of themes or categories of response barriers to access to justice. This was done until the point at which no new themes appeared to emerge and established themes or categories of response began to repeat.
- 86. We selected thematic analysis as the most appropriate for the purpose of discovering what, if any, access to justice barriers existed. One reason is that it is primarily descriptive. In other words, "The primary purpose of the inductive approach is to allow research findings to emerge from the frequent, dominant, or significant themes inherent in raw data". 82
- 87. Given the present lack of knowledge in the ACC area, description is just what was required to inform any proposals for change. In seeking to describe the data (barriers identified in the cases), inductive analysis also benefits from being non-partisan. It is distinguishable in that regard from approaches where a formal hypothesis is suggested on the contrary, our research did not seek to prove or disprove anything; its aim was to identify any barriers to access to justice that were evident from court decisions.
- 88. The value in and process of conducting such research is well established, and was well summarised by David R Thomas' account of the "general inductive approach". 83 However, an inductive approach

David R Thomas "A General Inductive Approach for Analaysing Qualitative Evaluation Data" (2006) 27 American Journal of Evaluation 237 at 238.

David R Thomas "A General Inductive Approach for Analaysing Qualitative Evaluation Data" (2006) 27 American Journal of Evaluation 237. Google Scholar alone indicates this step-by-step articulation of the approach has been cited over 2000 times.

has been most commonly used in evaluative work in the social sciences, as for example in coding interview transcripts or some documentary material. But qualitative research and thematic analysis are applicable in legal or socio-legal research.⁸⁴

- 89. Another feature of the present study is that we coded the entire sample of court decisions from the High Court and Court of Appeal (both leave to appeal applications and substantive decisions). This means where we indicate the presence of certain themes in relation to these cases, the theme speaks for the entire data set.
- 90. Finally, while the focus of our study was to gain descriptive data from the cases, it could properly be labelled a mixed methods approach given that we also collected some quantitative data. This included measuring recorded timeframes between each step in the ACC process, recording the gender of the claimant, and so on. Where recorded, we use the findings from those measures throughout this report.

Undertaking the thematic analysis

91. This part describes each stage of undertaking a thematic analysis of court decisions.

Stage 1: Creation of categories and development of research tools

Overview of the creation of categories and development of the research framework

- 92. This stage involved preparing the judgments, creating categories and conducting consistency checks to ensure credible data was collected.
- 93. First we conducted "pre-testing". 85 A random sample of 30 judgments was selected from the total judgment pool. We were prepared to read

See generally Lee Epstein and Andrew D Martin (eds) An Introduction to Empirical Legal Research (2014, Oxford University Press, New York) at vii: "In ever-increasing numbers, legal academics throughout the world" are turning to empirical legal research; and see at 81-83. See also use of that approach by an author of this report, in Tiho Mijatov "Why and How to Internationalise Law Curriculum Content" (2014) 24 Legal Education Review 143. And for a thematic analysis of court decisions in New Zealand see Tiho Mijatov "How to Use a Dissent" (2015) 9 Dispute Resolution International 69

See Lee Epstein and Andrew D Martin (eds) *An Introduction to Empirical Legal Research* (2014, Oxford University Press, New York) at 101 and 105.

additional cases but agreed that themes of response were beginning to repeat so that step was unnecessary. Each of the cases was printed, read and re-read by each of the researchers.

- 94. Those researchers then each independently came up with a first run of categories or themes (by asking what barriers to access to justice could be identified), emerging from those 30 cases. Next, the researchers compared results, and subsequently developed a unified system of categories or codes, which were used by all researchers when translating the access to justice variables identifiable in the judgments into a measurable qualitative form.
- 95. That system comprised of the data entry tool, using SurveyMonkey, an online data collection software that was arranged to provide a data entry tool for the researchers. The tool consisted of a series of questions organised around each of the major themes we had identified. The questions were presented by a mix of Yes/No responses, selection of one or some of many options, and manual data entry (such as date and surname entry, and entering quotes that summarised a particular theme). The common aim of all of the questions was to enable researchers to record whether the judgment being coded presented any of the themes our early sample had suggested. The online tool provided for freeform data entry for any new themes that researchers thought were emerging from the judgments.
- 96. After the development of the coding system, the research team undertook consistency checks to ensure that credible data was created (described below).

Preparing the raw data

- 97. The raw data files, consisting of a number of sample judgments from each year were prepared. These were printed and provided to each researcher.
- 98. The study was limited to decisions from 2009 to 2014 inclusive. The decision was made to not go further back in time, because the aim of this research was to identify current barriers to access to justice, rather than historic ones to the extent that they differ.

99. These judgments were accessed either through the New Zealand Legal Information Institute (NZLII) or the research facilities of the Legal Issues Centre at the University of Otago.

Creation of categories

- 100. As summarised above, there was an initial coding process of creating categories, by reading a sample of judgments until all relevant barriers to access to justice present in each judgment had been identified. These codes were then used for the rest of the data analysis.
- 101. We decided to randomly select forty substantive judgments from the District Court during each year between 2009 and 2014, resulting in the coding of 240 cases. Again, we were prepared to read beyond this sample, but found that codes and themes began to repeat by the time these 240 had been coded. We used an accredited randomisation tool to generate a given number of random integers, which were then applied to particular cases according to the number of the individual decision for the particular year, for example decision 23 of 2009.

Stage 2 – Checking integrity of research method by survey of stakeholders to inform the research framework

- 102. We then undertook a number of consistency checks. 86
- 103. One consistency check was independent parallel coding. A sample of the relevant judgments was sent to each researcher, who independently coded those cases in accordance with the data entry tool. The responses were then compared, and this led to changes being made to the data entry tool, to ensure that the same piece of data from the same judgment would be coded the same way by any researcher. In particular, refinement in the tool was along the lines of ensuring the values were exhaustive, mutually exclusive and accurately expressed.⁸⁷

See the selection of checks in David R Thomas "A General Inductive Approach for Analaysing Qualitative Evaluation Data" (2006) 27 American Journal of Evaluation 237 at 243 and following.

As suggested by Lee Epstein and Andrew D Martin (eds) An Introduction to Empirical Legal Research (2014, Oxford University Press, New York) at 100-112.

- 104. Another check was on the clarity of the categories themselves. This involved reverse application of the categories to a previously unexamined data sample, to examine to what extent different coders came up with similar examples for each category. Several new codes common to different researchers did emerge during the data collection stage, for example: claimants using the wrong legal process; and, resentment towards assessors.
- 105. This independent parallel coding and checking on the clarity of categories occurred with stakeholder and member checks, 88 and was reinforced through another online survey with claimants. In short, it involved asking other practitioners, researchers, and claimants who have participated in the dispute resolution process to comment on the categories we identified. We asked to what extent the various codes accorded with their own experience of access to justice barriers in the ACC context. 89 The survey was online on 2 February 2015 and by 3 March 2015 it had 119 responses (it remained online for the duration of the research project and as of 2 May 2015 it had 146 responses). The survey provided opportunity for free form comment and, while those comments put experience in the stakeholders' own words, confirmed that the barriers we had identified were also being experienced by stakeholders.
- 106. Another check on consistency was ensuring researchers understood that coding was an ongoing process of revision of categories as data analysis took place. We also heavily emphasised adherence to the exact text of the judgment, and were constantly aware of the need to limit interpretation to acceptable qualitative induction, while avoiding inferring something from the text that was not present in the data.
- 107. While researchers were trained to search out any barriers to access to justice, it was emphasised that part of their task was to remain alert to any emerging but hitherto unrecorded themes or subthemes. We found that some codes we had found in our initial coding of the thirty judgments were not present at all in our random sample and this was a good indicator of our fidelity to the given approach.

An idea taken from D A Erlandson and others *Doing Naturalistic Enquiry: a guide to methods* (Sage, California, 1993) at 142; and David R Thomas "A General Inductive Approach for Analaysing Qualitative Evaluation Data" (2006) 27 American Journal of Evaluation 237 at 243-244.

For example, we asked "did you experience any of the following in relation to your appeal?"

Stage 3: Data collection - coding

District Court

- 108. This stage involved evaluation of judgments by reference to the developed categories. This is the main stage where the data entry tool was used to record the data being collected.
- 109. The total cases in the six-year period we studied (2038 District Court judgments) were randomly sampled and made available in a secure online pool of cases. The researchers then used the coding tool and coded each case. We selected and coded approximately 15% (222 decisions)⁹⁰ of the total sample of substantive decisions during the period of the study between 1 January 2009 and 31 December 2014. As explained above, all researchers were agreed that towards the end of data collection, no new themes were emerging from the cases and established themes were reappearing with regularity.
- 110. Before the researchers began coding, they were required to read a comprehensive guide to coding developed specifically by one of the researchers for our research project and were encouraged to refer to that throughout the coding process. This guide gave detailed explanations of questions, what each question was directed at, and how to answer questions in particular cases with examples of paradigmatic responses being provided as well.
- 111. There was additionally a continuous email forum in which all researchers recorded any issues with coding they had experienced. Every query was responded to, and in general this forum was useful in reminding all researchers about common pitfalls arising in the data entry. A good example was how to enter the data entry field for review decision date when the District Court appeal decision being coded recorded multiple review decisions. While some researchers used this feedback facility more than others, because all information was shared between all researchers, each could benefit from the observations of any other researcher.

This number is lower than the 240 indicated above, because some decisions were coded twice or thrice; this depended on what the random number generator dictated.

Another in-built consistency check was effected by coding some judgments multiple times. This was done on a blind basis, so that researchers were unaware which judgments were being multi-coded. Because judgment selection was random, some cases were selected more than once. The random sample of coded cases generated five cases that had been coded by two researchers, and one case that had been coded by three researchers. These cases provided a window into the level of consistency in coding between researchers beyond our own impressions and discussions and was useful at the data analysis stage.

Appellate courts

- 113. As noted above, all applications between 1 January 2009 and 31 December 2014 seeking leave to appeal from the District Court to the High Court were coded. All appeals heard in the High Court or Court of Appeal between 2009 and 15 May 2015 were coded. We coded:
 - a. 192 applications to the District Court for leave to the High Court.
 - b. 31 applications to the High Court for special leave to appeal to the High Court.
 - c. 34 decisions of the High Court on substantive appeals for which leave had been granted.
 - d. 13 applications for special leave to appeal against substantive decisions.
 - e. 15 applications for which the Court had no jurisdiction.
 - f. 6 costs applications.
 - g. 7 applications for special leave of the High Court to appeal to the Court of Appeal.
 - h. 11 decisions of the Court of Appeal on substantive appeals.

Identifying leave to appeal decisions among the District Court appeals

114. Leave to appeal decisions from the District Court to the High Court were difficult to identify. We searched "leave to appeal" in Westlaw's Briefcase and in NZLII. We also searched by legislative provision (s 162).

All appeals purusuant to ss 162 and 163, as the numbers were low, to allow the 2014 leave to appeal applications which had been granted by the District Court, the High Court and Court of Appeal cases up until 15 May 2015 were included in the analysis.

- 115. We then manually checked all responses, some of which were false positives and easy to exclude. There were a significant number of appeals not identified using either database or method. As there were patterns where decisions on leave to appeal were issued around the same time, we checked several cases either side of identified leave applications. This manual checking identified many more decisions which did not appear through database searches.
- 116. A special data entry tool was created for these 192 cases, using the same processes described above. The main differences were that this tool was simpler than the tool for the main data set, the District Court appeals; and that some of the themes were not present in these decisions. These were all coded by two researchers.

Identifying ACC cases among High Court appeals

- 117. These cases were also difficult to identify. A list was created from NZLII using the search terms "Accident" and "Compensation" and "Corporation" and "ACC" and, where known by the researchers, by conducting name searches.
- 118. The cases were printed and read by one researcher who assessed them as one of: applications for special leave, substantive decisions, leave to appeal to the Court of Appeal and other (including judicial review, declaratory judgment, and criminal appeals). This categorisation was then checked by a second researcher.
- 119. All of these cases were analysed in detail. A coding tool for appellate level cases was created and tested. The appeals were then all coded again following the above process.

Stage 4: Analysis and reporting

Analysis and Reporting

120. The results from our analysis of the decisions were then evaluated, and categories were critically reconsidered. While the results make up the majority of the remainder of this report, below we make two general observations about data analysis and reporting.

(a) Level of variation between researchers

- 121. As explained above, a small number of cases were coded by two or even three researchers. Because these were done on a blind basis, consistency could reliably be checked by comparing the level of variation in coding of the same case between researchers.
- When themes were generalised, we found consistency. However, at a detailed level (answers to specific coding questions), researchers sometimes recorded the data differently. We noticed that the cases coded later on in the research elicited greatly more consistent coding. That said, the following kinds of inconsistency emerged from the blind cross-coded cases:
 - a. Inconsistency by typographic error: in these instances, inconsistency arose from one researcher making an error (such as misspelling the claimant's surname or some date entry). These were largely inconsequential inconsistencies.
 - b. Choosing one over another similarly worded option in the tool: a good example of this type of inconsistency was to the question of whether the judgment acknowledged submissions being made by either side. On some occasions, the same case would get two responses from different researchers: that the judge "summarised" the submissions, versus that the judge "made submissions clear without summarising them".
 - c. Contradictory data entered: occasionally the blind sample suggested that researchers missed the presence of a particular code, which we knew because the other researcher selected that it was present.
 - d. Inconsistency due to value judgment: some questions were a matter of the researcher's judgment. To a large extent this is a consequence of conducting inductive research, in which "Inevitably, the findings are shaped by the assumptions and experiences" of the researchers. 92

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See David R Thomas "A General Inductive Approach for Analaysing Qualitative Evaluation Data" (2006) 27 American Journal of Evaluation 237 at 240.

We coded for approximately 300 variables⁹³ and the answers for two were unusable due to variation in researcher response, meaning we did not have enough confidence in our data for those questions. Several questions fell into b) or c) above, but we found that the responses were consistent at a higher level of generality than what we coded for. For example, we were unable to state that the data showed the Judge resolved conflicts in evidence by preferring the evidence of a treating over that of a non-treating specialist, because individual researchers coded the same judgments differently in that regard. We have, however, been able to state that the Judge resolved conflicts in evidence in that case by invoking reasoning about the experience or status of the person from whom the evidence comes.

(b) Consensus on claims that could be made from data

Once all the coding was complete, all members of the research team went through the answers to each question to reach agreement on what claims could be made from the level of consistency in our data and similarly the limits of any claims that could be made from the state of the data. This process necessarily required critical reflection on our own experience coding cases, including which questions we found difficult to answer or differing understandings we had about claims that could be drawn from the data. This post-coding reflection and assessment was rigorous and lengthy in that it involved going back through a lot of the data and justifying certain coding decisions, as well as generally expressing researcher perceptions about the major themes emerging.

Conclusions and limitations

- 125. We are pleased to present this report on the basis of empirical legal research, using a thematic analysis which we found to have real utility in answering what are the barriers to access to justice in the ACC dispute resolution process.
- 126. There are of course limits to this as with any approach: the greater number of researchers who are involved, the more variation in coding

In accordance with best practice that is to "create more, rather than fewer, values": see Lee Epstein and Andrew D Martin (eds) *An Introduction to Empirical Legal Research* (2014, Oxford University Press, New York) at 101-105.

detail is likely to result. We believe that more cross-coding early on, before the later sample of cases began to be analysed, would have helped increased consistency in researcher responses and allowed more detailed reporting of reliable data.

- 127. One of the very advantages of thematic analysis that it describes dominant themes is also a limitation. By definition, this means there is a lot it cannot do. For instance, it cannot draw any causative links between variables; it only describes their presence or absence. It also cannot record any data not already recorded in the text: in terms of access to justice, this meant we could only assess barriers referred to by a judge in a judgment. The function of judgments is not to comprehensively record barriers to access to justice, but they nonetheless present the best data source for our purposes.
- 128. Despite these limits, "it does provide a simple, straightforward approach for deriving findings linked to focused evaluation questions", 94 in this case as to the nature of the barriers to access to justice in ACC dispute resolution processes.
- 129. In the next chapter, we aim to provide some context to the data derived from judgments with previous research conducted by Acclaim Otago. This includes a survey of injured persons and more orthodox legal research into the structure of the law.

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David R Thomas "A General Inductive Approach for Analaysing Qualitative Evaluation Data" (2006) 27 American Journal of Evaluation 237 at 246.

ACC disputes resolution process and barriers to appealing

... a sizeable proportion of people take no action to resolve their legal problems and consequently achieve poor outcomes ...

Christine Coumarelos and others Legal Australia-Wide Survey (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xiv

When one examines how people actually handle their civil justice problems, one observes both a widespread resignation to these problems and an enormous variety of attempted remedies, a minority of which involve the explicit use of law.

Rebecca L Sandefur "The fulcrum point of equal access to justice: legal and nonlegal institutions of remedy" (2009) 42 Loyola of Los Angeles Law Review 949 at 950

Barriers that could inhibit access include: costs and delays associated with accessing the system, complexity of the system and the law which underpins it, an absence of mechanisms to enforce rights in certain circumstances. Barriers to access can also arise from the traits of those seeking access, including their personal resources, capabilities and perceptions about the system.

Access to Justice Arrangements (Australian Productivity Commission, Inquiry Report vol 1 no 72, 5 September 2014) at 74-75

An overview of the ACC dispute resolution process

- 130. Whilst not the focus of our report, questions have arisen from the Law Foundation and in other research about the barriers that exist to injured people actually getting to Court. Those sorts of barriers by definition are unlikely to be recorded in our primary data source (completed judgments). To a large extent, the barriers we have recorded as existing in the judgments may only indicate the tip of the iceberg and further research is required.
- 131. Without straying from our focus of access to justice as the mechanics and substance of the court process, it is relevant to consider the overall process of disputing ACC's decision, including the steps prior to getting into court and to acknowledge that these processes might be playing a role in preventing people getting their appeal heard.

The existing statutory dispute resolution process

- The appeals hierarchy ordinarily proceeds as follows with certain exceptions. ⁹⁵ We aimed to record the date of the different steps in this process during the course of coding District Court judgments. ⁹⁶ Many of these steps have been overlaid with complex procedural requirements which can result in claimants having to meet several requirements before their claim will even be accepted. ⁹⁷ To give an idea of scale, the number of times these processes have been followed in the six year study period are included after the heading as an estimate based on official information such as ACC annual reports.
 - a. A person suffers some form of personal injury (numbers unknown), which may or may not meet the tests for cover and entitlements under the Act. The situations in which someone can suffer an accident, treatment injury, or a work-related gradual process are open-ended, as are the pre-existing environmental and genetic characteristics of that person. An injured person's appeals process begins at this point. An injured person may seek assistance from a medical expert soon after this point, however

The chief exceptions are where there are deemed cover decisions under ss 54-58, or a deemed review decision under s 146 of the Act.

Accident Compensation Act 2001, s 134(1)(b).

See various precedents of the High Court and Court of Appeal included in the footnotes to paragraphs (a)-(o): some were settled by ACC (or attempted to be settled), arguably in order to maintain a status quo to its advantage.

that assistance is seldom directed towards procuring evidence directed toward the relevant accident compensation legislation. Evidence from this period is likely to include records such as GP notes or notes of a physiotherapist that were not prepared with a view to legal proceedings or information about the accident, usually not recording the physical injury.

- b. A claim is lodged with ACC (estimated 10-12 million claims during study period). A claimant or their authorised representative lodges a claim with ACC for a specified entitlement, or cover and entitlements, or just cover. 98 ACC then has a statutory period to investigate matters of cover with an optional extension of the relevant time period. If ACC does not issue a decision on cover (as opposed to entitlements) within the statutory timeframe, the claimant is deemed to have cover as a penalty to ACC for administrative delay. For any delay in processing an entitlement, the remedy is to lodge a review application for unreasonable delay. 99 The most important point to note about the beginning of the claims process is that it marks the beginning of the period in which ACC can investigate with a specific view to the tests under the ACC legislation. That investigation includes requesting historic information from anyone willing to offer it, 100 and ACC also relies on the "maintenance of the law" exception in the Privacy Act 1993 to require information and avoid privacy controls. 101
- c. **ACC** makes a decision to decline a claim (estimated 600,000 adverse decisions during study period). ACC makes a decision on a claim made by the claimant after considering information

In *Sinclair v ACC* [2012] 2564, Dobson J granted leave to appeal to the Court of Appeal. At the Court of Appeal hearing, judges expressed their surprise that ACC was continuing to defend the appeal. ACC accordingly settled the case, leaving a state of affairs whereby the onus is on the claimant to specify what they are claiming according to the specific subsections to s 48 of the Act, an unduly technical approach that puts the onus on the claimant rather than ACC to investigate what the person is claiming.

Accident Compensation Act 2001, s 134(1)(b). Deemed entitlements were available under the 1998 legislation, however these have been repealed. Under the 1982 Act, any failure to investigate by ACC after a certain period was taken to be a declinature of the claim.

This ability to investigate was significantly expanded by the use of the ACC 167 form. Claimants were told their claim could not be processed until the form was signed. The form went much further than ACC was required to demand and many claimants had entitlements refused or ceased on the basis of their refusal to sign the form: *Powell v ACC* [2014] NZACC 89; *K v ACC* [2014] NZACC 90. Before the use of the form was successfully appealed, claimants were being declined costs for seeking to challenge ACC's use of it through the review and appeal process.

ACC holds information of tens of millions of claims in its data warehouse. Information is gathered and compared with other information held by ACC to assist in making decision on claims.

provided by the claimant and conducting an investigation of its own. Its investigation has both permissible and mandatory elements and in some cases the decision is made as a result of a statutory discretion. There is no obvious limit to ACC's investigation and ACC retains discretion as to how far it will pursue its investigation. ACC's position is that it is guided solely by the medical evidence, however there is an obvious discretion to keep investigating until ACC is "satisfied". 102

- d. Claimant lodges application for review (estimated 40,000 review applications lodged during study period). Claimants have a statutory period in which they can lodge an application to "review" ACC's decision. If this period is not met, claimants must show extenuating circumstances that prevented them from making their review application. A "decision" by ACC about whether extenuating circumstances existed is capable of review of itself like any other decision by ACC, and sometimes essentially creates a set of interlocutory proceedings. The District Court's approach to extenuating circumstances can be inconsistent and our analysis indicates substantial discretionary decision-making by judges. 103
- e. **A review hearing is conducted** by a reviewer appointed according to the criteria in the relevant accident compensation legislation there are differing criteria under different legislation, although these are often overlooked by reviewers. There was indication that High Court judges do not understand the review process, with it commonly mislabelled as being internal or run by ACC itself, ¹⁰⁴ possibly a reflection of the state of affairs under older legislation. There is no dedicated mechanism to ensure compliance with the required characteristics of a reviewer. ¹⁰⁵ The

Whether or not ACC makes a decision is the subject of hundreds or disputes per year. The High Court has recently considered when ACC made a "decision" in *Gibson v ACC* [2015] NZHC 221. ACC attempted to settle this case and render the issue moot between leave being granted and the High Court hearing the appeal.

Leave to appeal was granted for the High Court to determine three questions of law on this point of law in *Adams-Richardson v ACC* [2012] NZACC 143 but the High Court did not issue a decision as the appellant was unable to proceed to the High Court.

Without suggesting this made a difference to the outcome it may be indicative of general understanding of the process: see *Mills v ACC* [2012] NZHC 1055, *Prasad v ACC* HC Auckland CIV-2008-485-340, 21 April 2009, *ACC v Studman* [2013] NZHC 2598, *Morgan v ACC* [2012] NZHC 1789.

Judicial review may be a remedy, however it is also potentially caught by s 133(5) requiring a District Court appeal. It is highly likely ACC would apply to strike out any such application and insist that appeal was the proper mechanism. The effect is that matters of procedure on review are very seldom subject to judicial analysis.

District Court and High Court have been reluctant to pass comment on the conduct of a review hearing. The reason given is that appeals are by de novo rehearing, by which any procedural defects are cured by the subsequent appeal. This rationale does not take into account the added cost and delay caused by another appeal. Despite the reluctance to consider procedural and evidential objections to the review hearing, evidence (including oral evidence and cross-examination) is admitted directly from the review hearing under s 155 and forms the record from which the District Court must make its decision. 106 In some cases, the Court will condemn a reviewer's behaviour, for example where the reviewer relied on their own internet research over sworn expert evidence. 107 Until recently, the company that conducted the review process was wholly owned by ACC, reflecting a similar state of affairs to under previous legislation. Perhaps due to a perception of bias, the review process is now conducted by Fairway Resolution Services Ltd, a company whose shares are held jointly by the Minister of Justice and Minister of Finance.

- f. A written review decision is issued by the reviewer (estimated 25,000 review decisions). Claimants have a right of appeal directly to the District Court but any notice of appeal must be lodged within a statutory timeframe. If the review was heard under the 1982 or 1972 legislation, appeal is as of right to the Appeal Authority.
- g. The District Court (or Appeal Authority) holds a de novo rehearing. Under the 1992 2001 legislation, the District Court can admit all evidence from the review hearing and can admit "any relevant evidence" whether or not it can be heard in a court. Our research found significant issues with courts failing to consider concepts of evidence law, despite their ability to admit any relevant evidence. It is ACC's responsibility to pass the record of hearing and exhibits from the review to the District Court, however this is rarely done by ACC's counsel, reflecting a growing tendency to viewing ACC as simply a party to the dispute rather than having a systemic role. This is the final level in the appeals process where factual findings can be made, unless

Interpretation of the Accident Compensation Act 2001 in an application for judicial review in *Weal v ACC* [2011] NZHC 1166. Interestingly, the review is against a power exercisable by the District Court, however ACC is named as the defendant.

See *Vaks v ACC* [2010] NZACC 63 as one example. There are numerous others in the authors' experience, including decisions issued by reviewers in reliance on Wikipedia.

on a question of law that the finding was unsustainable on the evidence. The High Court is particularly resistant to hearing anything approximating a finding of fact, and will commonly decline to hear questions of causation, despite numerous findings of the appellate courts that causation is a question of law.¹⁰⁸

- h. The District Court (or Appeal Authority) issues its written decision (1,946 appeal decisions). It is these decisions that formed the initial focus of our research to identify barriers to access to justice. A random sample of these appeals between 2009 and 2014 are the subject of analysis in Part II.
- Claimants wishing to appeal to the High Court need to apply to the District Court for its leave to appeal on a question of law (192 appeal decisions). All appeals during the study period from this point in the process onwards are analysed at Part III. By convention, leave to appeal is heard on the papers, without a hearing being held. Our research found this process takes an average of 70 weeks. The timeframes for this appeal are strict: a claimant has 21 days to lodge an application for appeal or their appeal rights are lost entirely. There is no discretion for the Court to extend the time for filing, although ACC may waive the timeframe. The District Court is required to consider the various tests for leave to appeal laid out by the Courts over the years. There is no ability to appeal a leave to appeal judgment; the only remedy for an error of law in a leave to appeal judgment (for example by identifying the incorrect test) is by special leave to the High Court. Claimants wishing to appeal a decision of the Appeal Authority must seek the Authority's leave.
- j. Claimants can seek the special leave of the High Court to appeal to the High Court on a question of law (35 decisions on applications for special leave). The High Court has imposed a high threshold for special leave, and generally it must be shown that the District Court's error of law was significant or of public importance. Appeal is by question of law only. By contrast with the District Court, special leave applications are by way of oral hearing.

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See ACC v Ambros [2007] NZCA 304 as one example. This case was an appeal by ACC against a High Court decision. ACC was represented by Queen's Counsel and the Court appointed another Queen's Counsel as amicus curiae. The claimant was self-represented and the case involved a claim for treatment injury in relation to the death of his wife soon after the birth of her first child.

- k. Substantive appeal hearing is heard in the High Court on a question of law (25 substantive decisions on appeals). This hearing is limited to a question of law. The Court will generally refuse to consider evidence, although in practice a diverse range of evidence is often considered without making specific findings. The High Court's analysis is sometimes inhibited by lack of detail and clarity in District Court or Appeal Authority judgments. We found the High Court's approach varied when a claimant succeeded on a question of law. On some occasions, ¹⁰⁹ the Court simply made a decision giving the claimant what they were seeking under the Act. In other High Court judgments, ¹¹⁰ the Court referred the matter back to the District Court (or even the review officer) for an entirely new hearing, which extends the length of the appeal process by several years. ¹¹¹
- Claimants can seek the High Court's leave to appeal to the Court of Appeal on a question of law (15 applications for leave). The High Court in some cases imposed a correspondingly higher threshold on the question of law given the cost of a further appeal, and often explicitly took the costs burden on ACC into account.
- m. Claimants can seek special leave from the Court of Appeal to appeal to the Court of Appeal (10 decisions on special leave). There has been one successful application for special leave in the entire study period. ACC has never sought special leave.
- n. The Court of Appeal hears a question of law (11 decisions on substantive appeals). The Court of Appeal is the final court in the Part 5 dispute resolution process, and this of itself is a barrier to access to justice. The role of the Court of Appeal is different in ACC appeals to that in many other proceeding as it is the final court. The Supreme Court can only hear issues about the interpretation of the Accident Compensation Act by judicial

See for example *Jones v ACC* [2013] NZHC 2458.

¹¹⁰ MacPherson v ACC [2009] NZHC 547; Young v ACC [2014] NZHC 2972.

See for example *Ellwood* where the entire dispute resolution process took over 10 years. Importantly, the Court of Appeal in *Ambros v ACC* [2007] NZCA 304 at [64] made obiter comments on the importance of all aspects of a claim being identified and evidence provided by ACC so that once the matter reaches an appeal, it can be determined to avoid sending the case back for determination.

review, or by proceedings in negligence against medical professionals, depriving claimants of access to New Zealand's highest court, which has produced some of the most generous interpretations of the Accident Compensation Act 2001.

Significant barriers exist to getting to appeal in the first place

- What is obvious when the appeals process is laid out as above is how many steps a claimant must take before having a hearing before a High Court judge. There are also numerous procedural and litigation hurdles that have been imposed by the Court. This can be compared with the Accident Compensation Act 1972, under which a person had to simply show that they had suffered an accident.
- Each additional step in the process significantly reduces the number of people who actually take the step, and this is clear from the numbers at each level.
 - a. Fewer than 10% of people who receive an adverse decision lodge a review application (estimated 600,000 down to 40,000).
 - b. Around 10% of people who lodge a review application lodge a notice of appeal in the District Court (estimated 40,000 to 4,000).
 - c. Around 10% of people who receive a decision of the District Court seek leave to appeal to the High Court (1,946 to 192).
 - d. Around 20% of people who are denied leave seek special leave in the High Court (155 to 31).
 - e. Fewer than 0.1% of people who initially thought ACC's decision was wrong and could get to the point of challenging ACC's decision about the implementation of the Accident Compensation Act to their situation have a hearing in the High Court.

The effects of ACC's adverse decision

135. Acclaim Otago's access to justice survey presented to the United Nations in August 2014 showed the significant problems faced

by people who received an adverse decision from ACC. This was an online self-selected survey of over 600 people about their experiences. It found that their experiences were largely inconsistent with the articles of the Convention dealing with substantive rights. Attempts to remedy or mitigate breaches of these rights were unsuccessful due to the systemic failure of various access to justice mechanisms. 85% of respondents believed that the ACC dispute resolution process did not provide access to justice. Only 9% of respondents believed it did.

- Adverse decisions made by ACC and the resulting dispute resolution process had significant impacts upon people and their homes and families. Most respondents had dependents at the time of the adverse decision (55%). Three quarters of respondents had significant ongoing costs for housing for mortgage payments or rent (75%).
- 137. More than a quarter of total respondents had to move out of their home because of injury or losing their ACC entitlements. Of this group, about half were renting (47%) and the other half had a mortgage on their house (48%), meaning ongoing payments to remain in their accommodation.
- When asked about their experience as a result of ACC's adverse decision, the responses were clear. Nearly all (91%) experienced stress. Most experienced relationship stress (65%), reduced independence (65%), and deterioration in physical health (65%). Half (50%) developed mental health issues. Many respondents lost friendships (41%), had a breakdown in their personal relationships (32%), or lost their job (30%). A quarter experienced increased drug and alcohol use (25%). Some lost their house (20%) and experienced verbal violence (22%). A small but significant group experienced physical violence (7%). Few experienced none of these (7%).
- 139. Acclaim Otago's survey data is consistent with the many studies¹¹² which have shown "that legal problems often have considerable adverse

See for example Christine Coumarelos and others Legal Australia-Wide Survey (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xvi, xx, and 18-19; Mary Stratton and Travis Anderson Social, Economic and Health Problems Associated with a Lack of Access to the Courts (Canadian Forum on Civil Justice, March 2006) at 1-2; The Cost of Justice: weighing the costs of fair & effective resolution to legal problems (The Canadian Forum on Civil Justice, 2012) at 1; KM Research and Consultancy Ltd Access to Justice: a review of the existing evidence of the experiences of adults with mental health problems (UK Ministry of Justice, Research Series 6/09, May 2009) at iv-v, 21; Hazel Genn Paths to Justice (Hart Publishing, Portland, Oregon, 1999) at 251; Trevor C W Farrow "What is access to justice?" (2014) 51 Osgoode Hall Law Journal 957 at 964, and at fn 83 citing Canadian Institute for Health Research "Does your health depend on your access to justice?"

impacts on a broad range of life circumstances, including health, financial and social circumstances" and vice versa (meaning that people with disabilities are more likely to have legal problems in the first place as well).¹¹³

140. It also suggests that people find it difficult to focus on a dispute with ACC, which requires strict adherence to timeframes or facing a two year process of going to court to resolve the "procedural" timeframe issue before beginning anew so that a review can finally be held. This was highlighted in a recent case:¹¹⁴

[10] The Reviewer accepted that Ms Percival felt stressed, depressed and anxious but then said after reviewing the medical evidence she "could not find any support for Ms Percival's belief that she had been so affected mentally". The Reviewer placed a lot of weight upon the fact that Ms Percival had been properly informed by ACC of her review rights.

[11] Having looked at the medical evidence myself, there is no doubt that Ms Percival has a number of psychological conditions which I do not propose to set out. It does not require medical training to be satisfied about the effects of depression, which Judges in the District Court see almost on a daily basis. Depressed people do not act rationally and at times can be focused on any one thing at a time to the detriment of other obvious and pressing matters.

141. It is fundamental that any reform that seriously seeks to provide access to justice will need to take some account of these extra-legal factors, which must also have an impact on claimants' rehabilitation, regardless of how far reformers seek to deal with those factors. The appeals process cannot, for example, assume that the average litigant will be represented or failing that, a purely rational self-interested utility-maximising individual who orders their affairs according to procedural timeframes.

Barriers that must be overcome before getting to appeal

142. While we could not determine such from our present data, there is other statistical evidence that indicates there is likely to be a very large problem with unmet legal need in the ACC jurisdiction. When the overall volume of declined claims is considered along with the barriers identified in our survey and in literature, it appears that a large volume of people are simply not accessing the dispute resolution process.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xvi.

¹¹⁴ Percival v ACC [2014] NZACC 307.

- 143. The disparity between the numbers of reviews and appeals being heard and the number of decisions issued by ACC means that it would be difficult to explain this disparity solely according to the substantive merits of the dispute. It cannot be assumed that all of these decisions to decline are meritorious.
- Each step in the appeals process identified above presents significant barriers to accessing justice and is worthy of consideration in any reform, which cannot take place purely by reference to what happens once a claimant has entered the doors of the courtroom. Each step in this process requires a claimant to start a new relationship with yet another agency and justify their concerns yet again to a new decision-maker. Each step requires them to file another notice within a timeframe and then engage with another unfamiliar process.
- Nonetheless, it is important to remember that our working definition of access to justice is the mechanics and substance of the law. From this perspective, the privative provisions prevent any access to courts unless a person has been through a mandatory review process. Therefore the review process itself is worthy of detailed consideration as it could be operating as a barrier to injured people getting to courts.
- We acknowledge the existence of significant barriers to challenging ACC's decision to a review hearing and then actually getting the dispute to a District Court appeal. These were investigated in detail in the Acclaim Otago Shadow Report to the United Nations in 2014¹¹⁶ and in the Survey Data for the United Nations.¹¹⁷

Accident Compensation Act, s 133(5) prevents courts from considering ACC matters unless they have been advanced though the statutory review and appeal process. Part 5 of the Act prescribed that process and the only access to the Court is against a review decision. This review decision must be made before an appeal can be lodged.

Acclaim Otago Inc, "The Cost of Paradigm Shift: access to justice for people with disabilities caused by personal injury in New Zealand: a shadow report to the United Nations committee on the convention on the rights of persons with disabilities to be considered at the 12th session", 24 July 2014 available from:

http://acclaimotago.org/wp-content/uploads/2014/08/Acclaim-NZ-Shadow-Report-for-LIN pdf

Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, available from:

http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf.

What the data showed about barriers to getting through the review process in to get to the appeal stage

147. The survey for the United Nations in August 2014 is the only publicly available data on barriers to accessing the ACC review process. It was an online survey of over 600 people who were self-selected and therefore not representative. Nonetheless, as with other studies of peoples' perceptions, 118 its findings provide the best insight into the barriers to accessing the review process. While the data may not be representative of the population as a whole, from a human rights perspective, access to justice must be applied on the individual level. Below, we briefly describe the survey's findings.

Direct barriers to reviewing ACC's decisions

(a) Funding

- 148. Nearly all respondents to the survey believed ACC made decisions that were wrong. Nearly all wanted to obtain independent representation and dispute ACC's decision. Almost insurmountable barriers prevented many people obtaining representation and disputing ACC's decision:¹¹⁹
 - a. Because of their injury, people were sometimes in debt (to community and commercial lenders) before ACC made its adverse decision. People did not have the ability to pay for representation at the time they received the adverse decision.
 - b. The private legal market had failed and the effects are widespread. It was difficult for people to obtain representation. The market was not competitive. There is a lack of development of expertise. There is not a pool of qualified and experienced lawyers or necessarily strong connections between them.
 - c. Legal aid did not provide access to justice because:

See for example Trevor C W Farrow "What is access to justice?" (2014) 51 Osgoode Hall Law Journal 957; Saskia Righarts and Mark Henaghan "Public perceptions of the New Zealand court system: an empirical approach to law reform" (2010) 12 Otago Law Review 329.

Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, at p 6, available from:

http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf.

- i. the amount of the award was not adequate (15-40% of the actual cost),
- ii. it was very difficult to obtain representation given limited legal aid providers, and
- iii. it was a loan which the person has to repay, which is likely to be difficult if they lose their dispute but remain unable to earn income (given they are injured).
- d. Costs awarded for the review did not allow access to justice because:
 - costs were not available until 6-12 months after they were incurred making it ineffective to allow someone to pay for services,
 - ii. the amount of the payment was too low (12.5-30% of the actual cost of the process),
 - iii. the award was not being made (most people disputing ACC's decision had not received a cost award) because they did not seek costs, ACC opposed costs or the reviewer did not award costs.
 - (b) Procedural barriers at review hearings
- 149. In addition, there were significant problems with procedural fairness.¹²⁰ Prior to the hearing, injured people who responded to the survey tried to address issues involved with their ACC dispute in the following three different ways, none of which was effective in resolving the problem of incorrect information being provided to the review hearing by ACC:
 - a. Stopping the incorrect information getting on the file in the first place by:
 - i. choosing assessors,
 - ii. refusing to attend assessments with particular assessors, and
 - iii. enforcing professional standards on assessors.

Acclaim Otago, *Crying for help from the Shadows* at p 14. Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, at p 14, available from:

http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf

- b. Complaining about the assessor or the incorrect information using the existing statutory complaint mechanisms and then requiring ACC to correct the information it has provided to the review.
- c. Obtaining another assessment from an independent assessor that contains the correct information and providing that to review.
- 150. At the review hearing itself, people were not being heard, reviewers were perceived not to be independent, the principles of natural justice were not complied with, reviewers did not take an investigative approach and the hearings were adversarial without any of the safeguards that have developed to ensure the adversarial system works properly. People's experiences included:
 - a. Not enough time was allocated for the hearing (only 20-30 minutes for each side to present their case, including giving evidence).
 - b. They did not have all of ACC's information in time to prepare their case.
 - c. Nearly every respondent reported the files that were provided contained unfair or prejudicial information.
 - d. Some had particularly negative experiences influenced by how ACC attended the hearing (in person, by telephone, not at all) and how the ACC case was presented (what ACC said, how they said it).
 - e. Reviewers failed to comply with the legislative safeguards and there was no remedy for this.
- 151. After the hearing, survey respondents' experiences included:
 - a. the principles of natural justice were not being complied with as reviewers relied on information that was not presented at the hearing;
 - b. the reviewer lacked independence;
 - c. people were being left without a remedy if ACC did not comply with the review decision.

(c) Unreliable evidentiary procedures at review hearings

- 152. There were significant problems identified with evidence at review.¹²¹
 Reviewers have wide discretion with regard to admitting evidence at review hearings. The survey data showed that the way reviewers were exercising this discretion was to allow all of the information provided by ACC in their file, and all information provided orally by ACC staff, to be relied upon at the hearing. Information was not sufficiently tested to ensure it was reliable. Reviewers seldom gave reasons why such discretion is exercised and it appeared there may be some unidentified policy, or alternatively an institutional bias toward accepting ACC's position. This was a significant issue where subsequent judicial figures would rely on evidence admitted at the review as being reliable.
- 153. The survey data made it clear that many injured New Zealanders were not afforded the protections of development of evidence law and procedure. Peoples' experiences as recorded in the survey identified the following systemic problems:
 - a. Nearly all respondents stated ACC relied on "evidence" from their file that was wrong, inaccurate, out of date or misleading.
 - b. Nearly all respondents stated ACC relied on information that was properly seen as "hearsay" that cannot be effectively tested by injured people at the hearing.
 - c. Nearly all respondents stated ACC relied on "opinion" evidence from their staff that cannot be tested at the hearing.
 - d. There was no way of testing the "expert" evidence from ACC's assessors, who almost always give evidence by report, and there was no way of ensuring that what has been provided meets the legal thresholds of expert opinion evidence.
 - e. Reviewers relied on evidence in their decisions that was not presented at the review hearing.
 - f. Reviewers reinterpreted the conclusions of expert independent assessors.

Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, at p 34, available from:

http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf

What happens prior to appeal?

ACC decisions leading to lodging a notice of appeal

As outlined earlier in this chapter, at a systemic level during the six years of our study period, ACC issued over 600,000 adverse decisions. 40,000 of these decisions were challenged by people lodging an application for review because they thought ACC's decision was wrong. 25,000 hearings were held by Fairway (formerly Dispute Resolution Services Limited), an independent tribunal that hears reviews of ACC's decisions. Approximately 4000 appeals were lodged in the District Court against review decisions. 122

Known barriers to claimants lodging an appeal in the District Court

- 155. Information is limited about why so few appeals against review decisions were lodged. As part of our consultation for this research, we asked claimants who had been to review but not appealed why they did not. The main reason identified was cost. The next was people lacking the energy, motivation or resilience. The third tier of reasons was unavailability of expert evidence and/or legal services, and being told by ACC that the appeal would not be successful. Less frequently, a lawyer or advocate advised people that they would not be successful and finally, some thought the review decision was correct. Many of these factors are interrelated.
- 156. Although the sample size and response rates varied, this pattern of factors is entirely consistent with two previous surveys where injured people were asked why they did not appeal to the District Court against a review decision, in 2012¹²⁵ and May 2014.¹²⁶

Only 2000 were heard but 4000 were lodged. There is a significant time lag between lodging of the appeal and the hearing of the appeal. Appeals lodged in 2013 and 2014 against review decsions in 2013 and 2014 will be heard in 2015-2017.

¹²³ Information about the barriers to reviewing ACC's decision is explained above at background.

Survey of stakeholders conducted as part of this research project; see above Chapter III, Methodology.

Acclaim Otago Inc Survey "ACC claimant experience survey", unpublished (August 2012).

Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, available from:

http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf

These barriers may be creating a justice gap

- 157. Official data shows there are 1.062 million people in New Zealand with long-term disabilities. Accident or injury is the most common cause for men and the third most common for women. 320,000 people were identified as living with a long-term disability caused by accident or injury. 127 ACC provides long-term support to around 10,000.
- 158. Outside the ACC context, however, there have been investigations into the barriers discouraging people from accessing formal dispute resolution mechanisms. A recent comprehensive study of unmet legal need found that "a sizeable proportion", i.e. "close to one-fifth", "of people take no action to resolve their legal problems". 128 The leading early study into how people deal with legal problems similarly found that while "only a tiny minority of people faced with a justiciable problem does nothing at all ... The kinds of problems about which people do absolutely nothing are those where some harm might flow from taking action ... where [people] believe they are powerless, or where they believe that the process of gaining recompense will be too traumatic."129 It further found that "The types of problems most likely to be "lumped" by [people] were those to do with ... injury [or] clinical negligence" among others. 130 These findings are useful in beginning to explain why so many people might lump certain legal problems in the ACC context.

The knowledge gap

159. There remains a knowledge gap and we do not know whether the large number of New Zealanders living with a disability without support from ACC are victims of a justice gap. ¹³¹ Further research into this is required.

Statistics New Zealand "2013 New Zealand Disability Survey" (14 July 2014), available from: < http://www.stats.govt.nz/browse_for_stats/health/disabilities.aspx>

¹²⁸ Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xiv and 31-32. See generally Rebecca L Sandefur "The fulcrum point of equal access to justice: legal and nonlegal institutions of remedy" (2009) 42 Loyola of Los Angeles Law Review 949.

Hazel Genn *Paths to Justice* (Hart Publishing, Portland, Oregon, 1999) at 250. Broadly similar reasons were recently found in Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xvii.

Hazel Genn *Paths to Justice* (Hart Publishing, Portland, Oregon, 1999) at 250.

See Access to Justice Arrangements (Australian Productivity Commission, Inquiry Report vol 1 no 72, 5 September 2014) at 98-111 for an attempt to fill that information gap.

160. We suggest three representative samples of claimants who: (1) have had their entitlements ceased but did not lodge a review application; (2) lodged a review but did not obtain a review decision; and, (3) have reviewed a decision but did not obtain an appeal decision. The barriers to appeal need to be addressed further, along with the barriers to accessing justice through the appeals process set out in this report.

Review decisions that were appealed but no District Court decision issued

- 161. The online responses identified another group that had gone to review and then appealed to the District Court and had their appeal settled in their favour by ACC. The size of this group is unknown, but its likely size could be inferred from official data. We know that there were approximately 1000 appeals disposed of by the District Court between 1 July 2013 and 30 June 2014. During this time around 400 decisions were released meaning that approximately 600 were disposed of without a decision of the District Court. These could have been withdrawn by the appellant for reasons including ACC settling cases and claimants withdrawing them without being settled. We have found no official statistics regarding what occurred in each of these appeals. ACC legal services' key performance indicators should be considered in relation to this access to justice barrier.
- The failure to keep any such statistics (or at least to make them available) unfortunately puts this jurisdiction squarely in line with a concerning international access to justice trend. In the UK, albeit in the context of self-represented litigants, there is a "paucity of academic research and official statistics", arising because "No systematic data ... are collected or kept."¹³³ A recent Canadian study described the challenge of improving access to civil justice as being hampered by a similar "dearth of evidence-based research, or even basic statistical information, about this system in Canada and internationally."¹³⁴

Response to Ministers Adams' and Kayes' questions on ACC proposals dated 11 December 2014 at p 1, released under the Official Information Act to Acclaim Otago by Ministry of Justice, May 2015.

Hazel Genn "Do-it-yourself law: access to justice and the challenge of self-representation" (2013) 32 Civil Justice Quarterly 411 at 422-423.

The Cost of Justice: weighing the costs of fair & effective resolution to legal problems (The Canadian Forum on Civil Justice, 2012) at 5.

- 163. Lack of information in the access to justice context is particularly problematic because it means there are "information gaps about what actually helps and how best to direct appropriate resources". 135
- 164. This is a significant knowledge gap and further research into the review process needs to address it. People with disabilities will need to be consulted so that all relevant information is collected. The Convention on the Rights of People with Disabilities provides for this.

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The Cost of Justice: weighing the costs of fair & effective resolution to legal problems (The Canadian Forum on Civil Justice, 2012) at 5.

PART II

District Court Appeals

UNDERSTANDING THE PROBLEM

Informal and simple procedure should be the key to all proceedings within the jurisdiction of the Board. Applications should not be made to depend upon any formal type of claim, adversary techniques should not be used, and a drift to legalism avoided.

On such a basis the whole process of assessment will become one of inquiry and investigation. There should be discretion to deal with any unusual circumstances and every decision should be based on the real merits and justice of the case.

Woodhouse Report at 126-127

Whether a broad discretion to allow for possible unfairness in individual cases is appropriate is a question for Parliament. The court cannot ameliorate any perceived inequity which results from a situation which Parliament has clearly legislated for.

Milne v ACC [2007] NZACC 140 at [16].

The High Court judgment in question, commonly now simply referred to as *Vandy*, has had far-reaching consequences and, in a number of cases, has led to outcomes in this Court which in terms of sheer fairness are hard to support ... Warwick Gendall J, who decided *Vandy*, was very much alive to that prospect. He nevertheless considered that, given the language of the statute, no option was available to the High Court but to determine the question of law before him ...

Waitere v ACC [2013] NZACC 166 at [2]-[3].

Understanding the problem

165. This chapter turns to our primary research for this report. It takes a close look at important background information about what happens prior to appeal, the characteristics of appellants, the time taken in the District Court process and possible reasons for delay, and the main subject matter of disputes. It draws heavily from the results derived from our analysis, but also from what official or statistical information is available and from previous studies into ACC and access to justice barriers in civil justice more generally.

District Court appeal numbers

166. In the six years from 2009 and 2014 the District Court, sitting in its Accident Compensation jurisdiction issued 2038 decisions on appeal. 1946 were decisions of the District Court on appeals against review decisions and related District Court matters. 192 of these were decisions on whether or not to grant leave to the High Court. During that time more than 4000 appeals were lodged with the District Court. 136

Results of quantitative analysis of sample of District Court appeals

167. This sample size was approximately 15% of District Court appeals under s 149 during the period 2009-2014. The following section excludes data on applications for the District Court's leave to appeal, which is dealt with separately.

Who was appealing?

The parties

168. The appeals almost always involved two parties, the ACC and the Claimant. In very few cases, accredited employers were additionally involved. As ACC was always one party, they potentially have a significant advantage in litigation strategy, gaming precedents and all of the other advantages of repeat litigants identified in literature.

This is an estimate based on official data that records in financial years, the years between 2008/09 and 2013/14 resulting in 4,340 appeals being lodged. The rate of lodging in 2008/09 was higher than in 2013/2014 so if this trend continued to the end of 2014, the numbers would be less than 4,340 but more than 4,000.

- 169. ACC is the quintessential repeat player. It has had and anticipates repeat litigation, it has low stakes in the outcome of any one case, but has the resources to pursue long-term interest, just like another identified repeat player an agency who is the defendant in claims brought by a welfare beneficiary.¹³⁷
- 170. The advantages of the repeat player are well established: 138
 - a. They have advanced intelligence, they can structure the transactions and build a record.
 - b. They have expertise and ready access to specialists, enjoy economies of scale and have low start-up costs for any case.
 - c. They have opportunities to develop facilitative informal relationships with institutional incumbents.
 - d. They must establish and maintain credibility as a combatant.
 - e. They can play the odds, as the stakes for them are comparatively small, they can adopt strategies calculated to maximise gain over a long series of cases.
 - f. They can play for rules as well as immediate gains, it pays for them to expend resources to changing the rules and the expertise they have developed allows this to be done persuasively.
 - g. They can play for rules in litigation itself, where anything that will favourably improve the outcome of future cases is worthwhile. They would settle cases where there is a likelihood of an unfavourable outcome for the rules of litigation, and fight cases that are likely to produce the most favourable rules for them. Thus, there is an ability to pursue a body of precedent composed of cases that influence the outcome of future cases by being relatively skewed in favour of the repeat player.
 - h. They can discern which rules are likely to become relied upon and those that are merely symbolic.
 - i. They have the resources to ensure that the favourable rules become entrenched by investing the resources necessary to entrench the rules that are favourable to them.
- 171. ACC therefore has a series of long-run advantages secured purely by virtue of the fact that it is a party to litigation in so many cases. That can be contrasted with claimants, most of whom will be facing one of few litigation battles they may ever face.

Marc Galanter "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law and Society Review 1 at 3 and 14.

Marc Galanter "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law and Society Review 1 at 4-9.

Who was the appellant?

172. Of our random sample of substantive District Court appeals, nearly all appeals were brought by claimants, although seven judgments recorded ACC as appellant. These appeals by ACC were mainly high cost issues including cover for treatment injury resulting in pregnancy, two attendant care cases, two weekly compensation cases, and two independence allowance cases. This suggests that ACC may have a criterion related to the cost of any particular claim involved in their decision to appeal. ACC was successful in four of the seven appeals.

Sex of claimant

- 173. The appellants were mostly male (63%) compared to female (35%). This appears to be at odds with some research on access to justice. For instance a 2012 Australia-wide study, which had the largest sample of unmet legal needs surveys undertaken anywhere in the world, found that women were more likely than men to take action and to seek advice, and that women were "more likely (relative to men) to experience particular legal problems [such as] accidents ... personal injury and rights problems" in the first place.
- 174. However, that study noted the relationship it found between gender and participation in legal proceedings was not a strong one. Our gender split is also consistent with more claims for entitlements being by males (62% male and 38% female) and greater numbers of long-term claimants being male (67% male and 33% female). As well, and consistent with the Australian study, another study has found that "men

Both ACC and claimants have the right to appeal against a review decision: Accident Compensation Act 2001, s 149.

These figures do not add up to 100% due to rounding and the occasional non-recording of this data in the judgments.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 2.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xvii.

Christine Coumarelos and others Legal Australia-Wide Survey (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) summarised in Access to Justice Arrangements (Australian Productivity Commission, Inquiry Report vol 1 no 72, 5 September 2014) at 97.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xvii.

¹⁴⁵ ACC claims data for 2013/2014.

are more likely to be unrepresented than women", ¹⁴⁶ so that it makes sense in the ACC context – where self-representation is extensive – that our sample describes more men than women taking appeals to the District Court. In particular, the gender split was slightly higher with self-represented litigants (68% v 29%) and advocates (69% vs 30%) and lower with counsel (59% v 41%) meaning that women more frequently obtained representation than took their own appeal or appointed an advocate. This difference with representation has implications on the gender rates in the appellant courts, which will be discussed below.

Age of claimant

- 175. Age was not normally recorded in the judgment. When age was recorded, most of the injured persons were between 40 and 65 years old. This could either suggest a judicial recording bias where age was mainly recorded for some age brackets, i.e. in the 40 to 65 group or it may reflect the age of litigants who are challenging decisions.
- 176. If it is an accurate reflection on the age of litigants, then it is significant and concerning, because it would be quite at odds with other research including the Australia-wide survey, which found that "accidents ... personal injury and rights problems peaked between 15-24 years of age". The concern would be that access to justice or peoples' inclination to access it varies depending on the age of the injured person. Yet again, however, the finding first and foremost calls for further research.

Result of appeal – allowed or dismissed

177. Overall, about a third of the appeals were allowed with two thirds dismissed. There was, however, significant variation across the years of the study and between the judges, and when measured against factors notably including whether the claimant was legally represented.¹⁴⁸

Hazel Genn "Do-it-yourself law: access to justice and the challenge of self-representation" (2013) 32 Civil Justice Quarterly 411 at 433.

Christine Coumarelos and others Legal Australia-Wide Survey (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) cited in Access to Justice Arrangements (Australian Productivity Commission, Inquiry Report vol 1 no 72, 5 September 2014) at 97.

For that reason an entire chapter is devoted to representation.

Time taken for problem to manifest, claim to be made, ACC investigation to occur and finally for ACC to make a decision

- 178. We looked for the time taken between the accident, the development of the problem, the date ACC was made aware of the problem, the formal claim for cover and/or entitlement and the date of ACC's decision under appeal. We hoped that this would allow us to develop a picture of the length of time ACC investigates claims so that the strike out provisions would allow claimants at least the same amount of time before allowing a claim to be struck out.
- 179. We found that the judgments were a limited tool to be used for this purpose as much of this information was not recorded. For instance, the date of claim was recorded in fewer than a third of cases. This finding that judges are seldom recording a detailed chronology of what happened in the case is itself interesting and is potentially an information barrier to accessing justice, because it is an entire category of facts that future litigants or their representatives are unable to draw from.
- A better assessment of timeframes would require analysis of ACC claim files which would provide comprehensive data. We strongly recommend this data be made available to allow further study to identify the duration of ACC's investigation processes.

Time taken for dispute resolution

- 181. By the time matters reached the stage of an appeal to the District Court, people had been suffering the effects of their accident for about seven years.
- This is significant because it means it is likely people are experiencing chronic effects of their disabilities, including loss of income and savings before ACC's decision is made. This is because, as another study put it, "Issues related to the disabilities experienced by a litigant may be the reason for going to court in the first place, but [barriers, including

delay] exacerbate already difficult circumstances."¹⁴⁹ The injury is therefore itself a barrier *and* the reason why one is bothering to appeal to the District Court to get access to justice. That makes it understandable why a long delay before even getting to the Court is a serious concern.

- 183. Our finding confirms the conclusions drawn from Acclaim Otago's survey of injured people presented to the United Nations in August 2014.¹⁵⁰
- 184. This time-period is also consistent with other major studies, which have found that the effects of not getting access to justice such as by the long time-period between injury and resolution that we found are serious, and most seriously detrimental to injured people or people with disabilities. The largest ever survey of unmet legal need, for instance, found that injured or disabled people singly "stood out" as the disadvantaged group that "had significantly higher prevalence of legal problems overall, substantial legal problems, [and] multiple legal problems"¹⁵¹ than any other measured group, including indigenous people, the unemployed, single parents, and beneficiaries.
- 185. The reason this is a concern is that, as noted above, many studies¹⁵² have shown "that legal problems often have considerable adverse impacts on a broad range of life circumstances, including health, financial and social circumstances" and vice versa.¹⁵³ The passing of a long period of time before even getting to the Court can only add to these adverse impacts.

Cam Schwartz and Mary Stratton *The Civil Justice System and the Public: Communication and Access Barriers for those with Disabilities* (Canadian Forum on Civil Justice, January 2006) at 3.

Acclaim Otago, Access to Justice Survey (unpublished) May 2014.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xv. See also at 2.

See for example Christine Coumarelos and others Legal Australia-Wide Survey (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xvi, xx, 18-19; Mary Stratton and Travis Anderson Social, Economic and Health Problems Associated with a Lack of Access to the Courts (Canadian Forum on Civil Justice, March 2006) at 1-2; The Cost of Justice: weighing the costs of fair & effective resolution to legal problems (The Canadian Forum on Civil Justice, 2012) at 1; KM Research and Consultancy Ltd Access to Justice: a review of the existing evidence of the experiences of adults with mental health problems (UK Ministry of Justice, Research Series 6/09, May 2009) at iv-v, 21; Hazel Genn Paths to Justice (Hart Publishing, Portland, Oregon, 1999) at 251; Trevor C W Farrow "What is access to justice?" (2014) 51 Osgoode Hall Law Journal 957 at 964 and at fn 83 citing Canadian Institute for Health Research "Does your health depend on your access to justice?".

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xvi.

Timeframes in weeks between key events Who is the appellant Claimant ACC Allowed and Appeal Appeal allowed Dismissed dismissed Time from accident to ACC decision 358 240 Dispute resolution timeframes from DC appeals ACC decision to review decision 35 42 35 Review decision to District Court hearing 86 84 91 District Court hearing to iudement 17 12 Total time from ACC decision to District Court judgment¹⁵⁴ 134 132 163

Figure 1 – Timeframes in weeks between key events

- 186. Figure 1 shows the timeframe between certain points in the appeals process, which includes time since the accident date. The time between accident and ACC decision is highly fact-specific and length of time does not of itself indicate slowness on ACC's part: a person could have been in receipt of entitlements for much of that time. The time from accident to ACC decision does indicate the length of time for which a person has been dealing with their particular accidental injury.
- 187. Figure 1 records that delay when ACC is the appellant is slightly higher than when a claimant is the appellant. This suggests albeit limited by the very small number of cases in which ACC was the appellant that factors other than claimants filing submissions are responsible for delay.
- 188. Similarly, the fastest to process appeals appear to be those where claimants are self-represented. This indicates those who have representation are often waiting longer. While this could reflect poor practice on the part of representatives, or failure of the market for legal services for injured people, caution is needed in making any such claim.

These numbers vary slightly due to rounding, and the fact that not all data is available for each date. This total time is calculated from all cases where the ACC decision and District Court decision were both recorded in the judgment.

- 189. A major reason for caution is what some have called a false economy. 155
 "It is a false economy because of the greater demand that is placed upon court resources and court time by the unrepresented litigant". 156

 Judges have noted "the extra time ... needed to spend with litigants in person", 157 and other studies have found that self-representation often also leads to greater workloads on the other side to absorb the lack of representation. 158 Even if the appeal gets processed faster, it is likely to be a more resource-intensive experience for all those in the courtroom.
- 190. Further caution is called for, given that comparable "evidence on the impact of litigants in person on case duration is mixed", with various "high quality" studies going either way, and some pointing out that cases with lawyers or advocates were concluded more efficiently overall even "although cases involving representatives may have increased delay initially", in the end people represented by lawyers had shorter case duration overall because having representation "reduced the number of post-judgment motions filed." A conclusion beginning to emerge is therefore that concepts like delay are symptoms of underlying barriers, and complicated ones at that. Delay is also heavily specific to the particular jurisdiction under examination.

The reasons for the delay

191. Much is made in official figures of the delay in filing submissions for appeal. The figure quoted suggests that appellant submissions are sometimes not filed for over 500 days. The data to support this claim has not been made available despite repeated requests under the Official Information Act for all information held by officials regarding the proposals.¹⁶⁰

Justice Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 7 (see now (2014) 13 Otago Law Review 229).

Justice Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 7 (see now (2014) 13 Otago Law Review 229).

Kim Williams *Litigants in person: a literature review* (UK Ministry of Justice, Research Summary 2/11, June 2011) at 5.

Kim Williams *Litigants in person: a literature review* (UK Ministry of Justice, Research Summary 2/11, June 2011) at 5.

Kim Williams *Litigants in person: a literature review* (UK Ministry of Justice, Research Summary 2/11, June 2011) at 5-6.

The original complaint made in June 2014 is now being investigated by the Chief Ombudsman.

- 192. The claim that the claimant is responsible for the delay is the key driver behind the policy decision to implement strike out after 60 days with a single extension possible. However, the delay of claimants filing submissions did not feature as a theme in the judgments we read and coded. Whatever the limits are of coding hundreds of District Court decisions, it must be notable that judges in the jurisdiction are not complaining about claimants filing submissions in a languid manner.
- 193. Another explanation for the claim that claimants are responsible for delay could be that submissions are usually filed once a fixture is made available. In most other jurisdictions, submissions are timetabled once the notice of appeal is filed. If the oversight is indeed simply one of measuring the time taken from a mistaken starting point (i.e. fixture availability), then it is hard to see how the claimant is or should be held responsible for the long reported delays.
- 194. As well, until recently, there was no case management of files and many representatives simply filed submissions in the months leading up to hearing.
- Our analysis showed that the reason cited for delay is not present in the decisions themselves, but beyond the possibilities just described our analysis cannot show what exactly does cause the delay. However, the nature of delay in civil proceedings has been a major research focus in this country and overseas. It shows that delay is at most a symptom of other, more serious access to justice barriers.
- 196. By way of brief overview, research reveals there are many moving parts to the causes of delay in civil justice systems. Main causes include lack of judicial control over proceedings, discovery processes, increase in case complexity over time, lack of judicial specialisation, counsel behaviour and the adversarial culture of litigation. Most of these have little to do with claimants, some are only able to be addressed by significantly reforming the current legal system, while others, such as abolishing the adversarial approach, are widely regarded as impossible beyond perhaps "softening" some aspects of the adversarial approach. 162

Helpfully collected in Saskia Righarts and Mark Henaghan "Delays in the New Zealand justice system? Opinion v fact" (2011) 13 Otago Law Review 455 at 462-468.

Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 Civil Justice Quarterly 355 at 372; Les Arthur "Reform of the civil justice system: the new meaning of justice and the mitigation of adversarial litigation culture" (2012) 19 Waikato Law Review 160 at 160; Justice Helen Winkelmann, Chief High Court Judge "Access to justice – who

- 197. It is because the answer is complicated that a narrow conception of the causes of delay (and thus remedies to those causes) is likely to fail, as it has done in the past. A prime example is the UK's automatic strike-out provisions introduced in the 1990s. Described by the most famous access to justice reformer in at least a generation, Lord Woolf, as "simple and crude" and the result as a "disaster". Another example is the simplification of procedure in the District Court, which Justice Winkelmann recently summarised as "widely regarded as problematic . . . They have now been repealed."
- 198. Finally, it is worth keeping the problem of delay in perspective: it is not a new complaint. Over 100 years ago it was said that "Dissatisfaction with the administration of justice is as old as law itself" and that delay was largely responsible for that dissatisfaction. And much more recently but notably still in the early years of ACC, there was a "a tendency for delays to increase in the holding of hearings both on applications for review and appeals." What is more, delay seems to affect personal injury law more than it does other areas of law. This brief history again suggests that a successful approach to reform will have to consider the causes of delay, which itself is an old symptom.

Location of the hearing

199. Having a limited number of specialist full-time judges in this jurisdiction meant the hearing time was largely circuit based. Nearly half the appeals were recorded as being heard in Wellington. Auckland was next highest with around 15% of the appeals we read, followed by

needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 13 (see now (2014) 13 Otago Law Review 229); Neil Andrews "The Adversarial Principle: Fairness and Efficiency: Reflections on the Recommendations of the Woolf Report" in A A S Zuckerman and Ross Cranston (eds) Reform of Civil Procedure: Essays on 'Access to Justice' (Clarendon Press, Oxford, 1995) 170.

- Lord Woolf "Medics, Lawyers and the Courts A Defence of the Access to Justice Recommendations" in Christopher Camphell-Holt (ed) Lord Woolf The Pursuit of Justice (Oxford University Press, Oxford, 2008) 323 at 332-333.
- Helen Winkelmann, Chief High Court Judge "Access to justice who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 12 (see now (2014) 13 Otago Law Review 229). See also Saskia Righarts and Mark Henaghan "Delays in the New Zealand justice system? Opinion v fact" (2011) 13 Otago Law Review 455 at 460-461.
- Roscoe Pound "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 29 ABA Rep 395
- Geoffrey Palmer "Compensation for incapacity: a study of law and social change in New Zealand and Australia" (Oxford University Press, Wellington, 1979) at 400.
- KM Research and Consultancy Ltd Access to Justice: a review of the existing evidence of the experiences of adults with mental health problems (UK Ministry of Justice, Research Series 6/09, May 2009) at 38.
- This may be a recording error as the default registry of the District Court is Wellington, however the largest concentration of claimant lawyers is in Wellington.

Christchurch (8%) and Dunedin (7%) with small numbers of appeals in Whangarei, Hamilton, Invercargill, Napier, Palmerston North, Rotorua, Hastings, Tauranga, Greymouth, Gisborne. Two from the random sample were heard on the papers.

200. The locations of the hearings were not reflective of New Zealand's population. Auckland heard a similar number of appeals as Dunedin and Christchurch combined. This could suggest that access to justice varies by region, but the data could also reflect the location of counsel who filed the appeal. Either explanation invites consideration of the recent Australia-wide finding that geography can be an access to justice barrier: "people sometimes needed to travel large distances for face-to-face consultations, particularly in non-urban areas." ¹⁶⁹

What was the dispute about?

- A significant proportion of the appeals in the sample were complicated. Many judgments recorded more than one accident, or more than one claim for cover. Often this means the dispute is more complicated and can raise jurisdictional and procedural issues. In some cases the appeal was part of a wider dispute between the parties, which again indicates complexity. The success rates for this group appeared to correlate with whether the person had legal representation, a barrier to which we have devoted a separate chapter.
- 202. All these themes are consistent with major international studies on access to justice barriers, which have all recently identified the "clustering" of legal problems, particularly for people with disabilities. A Canadian study, for example, found that "the experience of multiple problem clustering does not affect people uniformly across the population ... People who are ... vulnerable to social exclusion for other reasons such as disabilities ... tend to have high rates of intersection with civil legal problems." A UK study similarly found "a tendency for legal problems to cluster". ¹⁷¹

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xxii.

The Cost of Justice: weighing the costs of fair & effective resolution to legal problems (The Canadian Forum on Civil Justice, 2012) at 3.

KM Research and Consultancy Ltd Access to Justice: a review of the existing evidence of the experiences of adults with mental health problems (UK Ministry of Justice, Research Series 6/09, May 2009) at 7. See also at 19 and 26.

- 203. In Australia the comprehensive unmet legal need study found that "some people, most notably disadvantaged people, are particularly vulnerable to legal problems, including substantial and multiple legal problems". While "around 22 per cent of [total] respondents to the survey said they had experienced three or more legal problems during the previous year", "people with disabilities were more likely to have a legal problem (relative to those who do not have a disability)". 174
- 204. Another insight from the various studies was their ability to show which kinds of dispute tended to cluster, for example that "'rights and injury/health' issues, comprising the employment, health, personal injury and rights problem groups" often clustered together. While interesting, these links are obviously at quite a generalised level of abstraction. The next part of this chapter hopes to improve on that approach by providing a detailed breakdown of exactly what kind of issues were faced by appellants in the District Court.

Cover disputes

205. Disputes involving cover were common. Half of these were characterised as personal injury by accident, and a third as treatment injury. A significant amount involved work related gradual process and slightly fewer involved mental injury.

Entitlement disputes

206. Most disputes involved entitlements and half of these were about entitlement to weekly compensation. One third involved treatment and some involved independence allowance, with a small number involving

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xiv. See also at 2, 18-19.

Christine Coumarelos and others Legal Australia-Wide Survey (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xiv; Access to Justice Arrangements (Australian Productivity Commission, Inquiry Report vol 1 no 72, 5 September 2014) at 95.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) cited in *Access to Justice Arrangements* (Australian Productivity Commission, Inquiry Report vol 1 no 72, 5 September 2014) at 97.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xiv-v.

On this process generally see S I Hayakawa Language in Thought and Action (4th ed, Harcourt Brace Jovanovich, San Francisco, 1978) at 152-156; Alfred Korzybski Science and Sanity: An Introduction To Non-Aristotelian Systems and General Semantics (4th ed, Institute of General Semantics, Lakeville, Connecticut, 1958) at 371-451; Oliver Wendell Holmes Jr "The Path Of The Law" (1897) 10 Harv L Rev 457 at 474-475.

social rehabilitation and almost no appeals involved vocational rehabilitation. This is indicative of the current approach to the interpretation of "decision" in the Act, which means claimants cannot review "procedural" decisions (except for under s 53) but can only access the review process at the point where ACC makes a decision that their entitlements will be ceased.

Issues in the judgments

(a) Major issue - Causation

- 207. The dominant theme, present in most cases in our sample, to arise from the issues in the judgments was causation. Although ACC ostensibly provides a "no-fault" personal injury system, ¹⁷⁷ many analogous aspects of the common law action for negligence appear to have been reinvented and new barriers introduced. An injured person must now: (1) prove exactly what their injury is, (2) prove their injury is caused by the accident, and (3) prove their need for entitlements is caused by the injury.
- 208. The de facto reintroduction or expansion of the common law's causation requirement has occurred through precedents interpreting the statutory language in a legalistic manner. These changes mean the difficulties surrounding that concept now pose access to justice barriers in the ACC context as well. Wherever causation needs to be proved, it becomes possible to argue the claim should be excluded on the ground that it is "the result of a variety of factors, including uncertain aetiology [the study of causes] of the plaintiff's condition, a long latency period before the condition manifests, its multifactorial nature, or the plurality of possible explanations for the condition." Like the common law negligence action, there remains a large institutional party adopting adversarial tactics in seeking to put an injured person to proof that their current status was caused by their accident.
- 209. Other research has shown that such causation difficulties are "particularly acute in medical cases" because there are additionally "inevitable risks flowing either from the pre-existing morbid process in which [the claimant] is involved, or from those inherent therapeutic

By this we mean there is no need for a claimant to establish a duty of care or a breach of that duty.

Lara Khoury "Causation and health in medical, environmental and product liability" (2007) 25 Windsor Yearbook of Access to Justice 135 at 136.

risks which cannot be ascribed to anyone's negligence. Thus, distinguishing between injury caused by non-negligent background risks and that resulting from the defendant's fault may be an impossible task." Requiring the claimant to achieve the impossible is clearly an access to justice concern¹⁸⁰ and yet we found acknowledgment in the judgments that some propositions are simply incapable of medical proof.

(b) Other issues

- 210. Second tier issues in our sample, arising less frequently than the everpresent issue of causation, were:
 - a. questions of law, statutory interpretation or application of a precedent, and
 - b. the validity of the assessment process.
- 211. The emphasis on the assessment process is likely to be one effect of preventing claimants from reviewing "procedural" or "administrative" decisions involved in the investigation process, and requiring that a claimant's entitlements actually be ceased before there can be access to the review process. Claimants' only choice is to dispute the assessment process at the appeals stage because they have been prevented from doing so during the course of their rehabilitation.
- 212. Even less frequently, but still emerging sufficiently as a theme from the issues in the appeals were:
 - a. the exercise of a discretion by a decision maker,
 - b. the reasonableness of the parties' conduct,
 - c. disputes involving more than one "primary decision" from ACC,
 - d. whether information had been correctly supplied or recorded,
 - e. whether the claimant had followed the correct process, and
 - f. whether timeframes had been met or could/should be extended.

See generally Lon L Fuller *The Morality of Law* (New Haven, Yale University Press, 1969).

Lara Khoury "Causation and health in medical, environmental and product liability" (2007) 25
Windsor Yearbook of Access to Justice 135 at 136-7. It must be noted that treatment injury is a wider concept than negligence which was reflected in the removal of the medical misadventure test and replacing it with treatment injury in 2005, nonetheless, similar problems remain.

See generally Lon L Eyller The Morality of Law (New Haven Vale University Press, 1969)

Dates

213. Finally, dates have become critical to entitlements. Nearly one in ten cases involved disputes about dates. This is particularly important since *V andy*¹⁸¹ as claimants now have to prove they were earning when they were injured, and when they were incapacitated. Date of injury and date of incapacity is now regularly the subject of litigation along with the evidential problems inherent in proving particular dates.

¹⁸¹ ACC v Vandy [2011] 2 NZLR 131.

ACCESS TO THE LAW

Access to the Law

- 214. This chapter considers the ways in which the law was a source of access to justice barriers in the District Court. Again, it does not include applications for leave of the District Court to appeal.
- 215. The Accident Compensation Corporation has a self-contained disputes resolution process. Part 5 creates the District Court's jurisdiction to hear appeals. These appeals are by way of rehearing. The Court is required to consider and apply the statute. The major themes from the judgments made it manifestly clear, however, that this is not what is happening in every case.

Judgments do not refer to the Accident Compensation Act or any other statute

Accident Compensation Act

- 216. The prerequisite for the dispute resolution process to be triggered is a decision from ACC on cover and entitlements or a delay in processing a claim for entitlements. The entire procedure and substance followed by ACC are statutory decisions. In short, ACC is a creature of statute and the District Court appeal is a statutory appeal by way of rehearing.
- 217. In a quarter of the cases, the legislation was not cited. This is even though the threshold was quite low for this code to be identified as present. All that was required was that the text of the judgment referred to "the Act" or cited a single section number.
- 218. This low rate varied between 2009 and 2014, with the later years more often citing the legislation. There was significant variation between judges. Some always or nearly always cited the Act while others cited it in fewer than half the cases. The legislation was more often cited when the central issue was a question of law, statutory interpretation, or application of a precedent. The number of times where the legislation was cited did not appear to correlate with the fact that the issue in the appeal was causation.

Accident Compensation Corporation, Part 5.

- We also considered whether the legislation was explained or a particular test identified and this code was identified in less than a third of the cases. This we considered was present if the judgment summarised the content of a particular provision of the Act, paraphrased its requirements or put them into a test. We found the Act was explained more often when claimants were self-represented or represented by advocates. As with citations to the law, explanations of the law increased in number in the later years of our study relative to the earlier years.
- 220. The trend to increased citing of the Act in later years coincided with an increase in allowing questions of law to be appealed to the High Court. This might reflect the changing practice of the Court in allowing leave, or that the earlier difficulty in identifying errors in law where there was no law cited was partially resolved as more law was cited in judgments.

Appeals requiring resolution of questions of statutory interpretation

How the judge resolved questions

221. Perhaps remarkably in a system governed wholly by statute, in most cases there was no question of statutory interpretation identified in the judgment. This was particularly surprising given causation is a question of law.¹⁸³ In a number of cases, the judge identified questions of statutory interpretation or competing approaches to statutory interpretation. The main ways the judge resolved this question was by use of case law as precedent or by adopting a purposive interpretation. A literal interpretation was only seldom recorded as being used.

Representation in this group

- 222. Importantly, in most of the appeals where the judge identified and resolved questions of statutory interpretation, ACC was represented by counsel and claimants were not.
- 223. There were no cases where counsel for claimants was successful in persuading the court to adopt a literal interpretation whereas counsel for ACC sometimes was successful in making such an argument.

¹⁸³ See *ACC v Ambros* [2007] NZCA 304 and *ACC v Stanley* [2013] NZHC 2765.

Advocates lost nearly all appeals where the judge resolved statutory interpretation questions. Self-represented litigants fared significantly better, losing in fewer than half of these cases.

Public law tests

How judge resolved questions

224. The exercise of discretion was at issue in a small but clearly present number of appeals. The public law tests for overcoming the exercise of discretion were referred to much less frequently and mainly when claimants were represented by counsel, or ACC was the appellant. Those tests require that the decision be shown to be plainly wrong, that it rested on a wrong principle, took account of an irrelevant consideration or failed to consider a relevant consideration. It imposes a higher threshold for overturning ACC's decision than does a rehearing on the evidence. Notably, a small number of cases involved a self-represented litigant or an advocate facing public law tests, including a case where ACC successfully appealed against a self-represented claimant arguing that ACC's initial exercise of discretion should not have been disturbed by the reviewer. Concerningly, this theme emerged despite the Court of Appeal's decision in Wildbore on 27 February 2009 - right at the start of the period of our study -holding that the District Court appeal is a general right of appeal and there was no need to overcome strict public law tests. 184

225. This picture presents some obvious access to justice barriers:

- a. Certain kinds of reasoning or arguments are only referred to when both sides have lawyers. At most this appears to be a double standard and is clearly offensive to equal treatment before the law, but at least suggests this is one area in which selfrepresented litigants are disadvantaged by a lack of information or knowledge.
- b. Binding Court of Appeal authority is being ignored. Key purposes of having the hierarchy of courts are fairness (treating like cases alike) and efficiency (having binding authority obviates the need for every issue to be re-litigated in every case in which that issue arises). Even ignorance of binding authority somewhat undermines these established and sensible assumptions.

Wildbore v ACC [2009] NZCA 34.

c. From the perspective of the New Zealand Bill of Rights Act 1990, it is concerning that sometimes the Court prefers the more restrictive of two available interpretations (either to apply the stricter public law test to an appeal against a discretion, or to set aside the lower decision and start again).¹⁸⁵

The role of the District Court sitting in this jurisdiction

Precedent value?

- 226. The District Court is a court of record and its decisions have important precedential value, particularly to reviewers who hear thousands of cases per year, although it is not bound by itself. Decisions of the High Court and Court of Appeal are binding on the District Court.
- 227. Since the enactment of the Accident Compensation Act 2001, the District Court has been the basis for several thousand substantive appeal judgments but fewer than fifty substantive High Court appeals and fewer than 20 substantive Court of Appeal decisions.¹⁸⁶
- ACC's governing board has resolved not to change its policies with a District Court decision, only with High Court decisions. This might be appropriate if there were significant numbers of High Court cases, but where the numbers are so low, it effectively allows ACC to manipulate the appeals process to obtain favourable precedents, and to settle questions which have been determined by the District Court when leave has been granted to the High Court.

Public availability of judgments

Judgments of the District Court, High Court and Court of Appeal are publicly available through the New Zealand Legal Information Institute (NZLII) and the government highlighted the availability of these in response to access to justice in its official response to the United Nations Committee on the Rights of Persons with Disabilities in Geneva in September 2014.

New Zealand Bill of Rights Act 1990, s 6.

The exact numbers are not available, however given that the average journey to the High Court is over seven years, and the total number of appeals from 1 January 2009 (less than seven years after the Accident Compensation Act 2001 came into force) to 1 June 2015 was 40 substantive appeals heard, the numbers would be low.

ACC board minutes released under the Official Information Act.

- 230. NZLII data shows that decisions from the ACC appeals database are regularly downloaded with over 150,000 accesses per year to this database. Anecdotally, Judges have referred to claimants using nzlii.org and printing judgments from this website for the Court.
- 231. We were concerned to find that some judgments of significant precedent value were not available on NZLII. Public availability of the law is a key component of the rule of law. As of the date of writing, the Ministry of Justice's website refers claimants to NZLII if they are searching for ACC precedents. If the Ministry continues to rely on NZLII's good work, the Ministry should take steps to ensure that the record on NZLII is complete, or has sufficient resources to be completed.

Judgments' use of case law

- 232. Fewer than half of the judgments in the sample cited any cases. This varies significantly across years ranging from a third of judgments citing other cases in 2010 to more than two thirds citing other cases in 2014. It also varied widely by judge. Three judges, who only had a small number of appeals in the sample, always cited cases, whilst one judge cited cases in fewer than a quarter of the random sample that we analysed.
- Unlike statutory provisions which were more often cited in judgments involving self-represented litigants and advocates, case law was more frequently cited in cases involving lawyers (55%) when compared with self-represented litigants (40%) and advocates (33%). This is likely to reflect lawyers' advantage in having better access to case law and training to use case law in argument.

Legal reasoning from case law

234. The use of legal reasoning from case law was recorded from the appeals. There was little reasoning from case law recorded in the judgments between 2009 and 2013. There was a marked increase in the use of legal reasoning from case law, from 2014, about 3 or 4 times

Up from 7000 in 2008 when the database was first put online according to NZLII.

This included distinguishing cases on the facts or the law, preferring one by reference to words of the statute or its purpose, by the level of the court which decided the case and by reference to their own reasoning as a judge in previous cases.

more frequent. 2014 also saw a marked increase in judgments citing cases from the Court of Appeal and Supreme Court – twice as many as in previous years.

How was the review decision dealt with by the Judge?

- 235. The statute requires the appeal be by way of rehearing. This requires the District Court to put aside the review decision and make up its own mind by reference to the statute and evidence before the Court. The Court of Appeal has ruled that this is the correct statutory construction of the Act. 190
- 236. The main theme to emerge in relation to the Court's treatment of review decisions was that the vast majority of judgments mentioned the review decision in some way. This is significant given the statutory requirement to set aside the review would seem to eliminate the need for any reference to the review decision except in identifying jurisdiction. Only a small number (14%) made no mention at all of the review decision. More concerning was the very small number of cases (3%) in which the judge expressly said the review decision was being set aside.
- Against this concerning finding is this qualifier: the most common use of the review decision was to mention it as part of the chronology or history of the dispute. This happened in almost three quarters of the studied cases. Similarly, the next most common use of review decisions, apparent in about a third of the cases, was the Court giving a summary of the substance of the review decision.
- There were, however, a small number of cases in which the Court did more than neutrally summarise the review decision. The Court stated the review decision was wrong in about the same number of cases as it adopted or commended the reviewer's decision or analysis. And in at least one case the Court "propose[d] not to spend any further time on [two of the four reviews] save to confirm the correctness of the review decision". The underlying theme is a notion that some sort of deference should be afforded to the review decision. But as explained, that runs counter to the statute and binding case law. That presents a serious barrier to access to justice in this jurisdiction.

Wildbore v ACC [2009] NZCA 34.

EVIDENCE

The appeal tribunal should comprise three persons including a doctor and a lawyer. ...

Woodhouse report at 126

Evidence

Judges rely on evidence

- 239. Apart from strike-out applications¹⁹¹ and appeals involving questions of law, judges recorded and relied on evidence in nearly all cases.
- 240. There are three possible ways that evidence comes before the Court. The first is by the claimant bringing it, the second is by the Corporation producing it 192 and the third method is by the court obtaining it.
- All appeals heard in this jurisdiction must start their life as a claim for cover and/or entitlements. ACC has a duty to investigate all aspects of the claim before issuing a decision. In most cases, by the time the claimant disputed ACC's decision, ACC already had information, records and expert opinion evidence to *prima facie* justify their decision. Previous data suggests that in most cases ACC has spent months to years obtaining this evidence using a well-developed system of obtaining information, records and expert opinion. In this study we were not able to measure the time taken to do so as it was not accurately recorded in most judgments.
- But our study did show that at the point of ACC's decision, most claimants were disadvantaged as they had not obtained relevant evidence to address the statutory test. The overwhelming theme that emerged was that a claimant simply must obtain enough evidence to at least reach equilibrium with ACC's evidence.
- 243. The details of this summary are described below and links are made with findings and trends from other studies where appropriate.

A small but significant number of District Court appeals were struck out by the Court exercising its powers under s 161(3)(b). It is not clear whether current Ministry decision-makers are aware the District Court has this power.

ACC has a duty to provide a record of evidence at the review to the Court (s 156). This way, whatever was produced at the review hearing, is made available to the Court, including all of ACC's records and a transcript of the review hearing.

Review rights, and therefore rights of appeal against a review decision, only exist against decisions of ACC or delay in processing claims for entitlement (ss 134(1) and 149)

Accident Compensation Act 2001, Part 3, ss 54, 56-58, and Part 4.

Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, available from:

http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf.

When the evidence is collected

- 244. The judgments show that ACC's evidence is collected prior to its decision and claimants obtain evidence after ACC's primary decision.
- 245. The tactical advantage from this is overwhelming. ACC controls the investigative process, has the choice of what evidence it will obtain and whom it will obtain it from, what it will issue a decision about and when it will issue its decision. ACC starts the process in a position of relative power.
- 246. This finding is directly relevant to reforms to the dispute resolution process: claimants must be allowed opportunity to obtain relevant evidence on the issue to be determined, and given time for ACC's experts to comment on this, and if required, a claimant's right of reply.
- ACC's evidential procurement is a fully funded, well-developed system. The endpoint of its evidential process and the start of its litigation process is that ACC has all evidence it requires.

Judge comments on the quality or lack of evidence brought by the parties

- In most cases, judges commented on the quality of, or lack of, evidence in the appeal. Judges often commented that the onus was on claimants to prove their claim for cover or entitlements. Claimants' evidence was described by judges as non-existent, not specific enough or wrong. Comments of this sort were made ten times more frequently about evidence brought by claimants than about evidence produced by ACC.
- 249. The judgments also commented on the credibility or reliability of the evidence. Such a comment was made twice as often about claimants' evidence as it was about ACC's evidence. This finding is potentially concerning in the light of the disability context that is relevant to many claims.
- 250. Research has firmly established there are "high levels of discrimination and stigma" against people with disabilities in general, but there is

Particularly regarding mental health: KM Research and Consultancy Ltd Access to Justice: a review of the existing evidence of the experiences of adults with mental health problems (UK Ministry of Justice, Research Series 6/09, May 2009) at 18, 45-48.

also specific recent evidence that these attitudes leak into assessments of credibility. A good example is an Australian study that found "Negative attitudes and assumptions about people with disabilities", which "often result in people with disabilities being viewed as unreliable, not credible or not capable of giving evidence". The result is that "People with disabilities are not being heard because of perceptions they are unreliable [or] not credible" and that "This has the potential to preclude people with disabilities from accessing justice."

251. Our findings are unfortunately consistent with this international research showing that a person's disability makes it inherently harder for them or their evidence to be assessed (including by judges) as credible or reliable.

Evidence not provided to the Court

- 252. In a small number of cases, allegations were made that ACC lost or destroyed evidence and some judgments made such findings. Nonetheless, the claimants were still unsuccessful in most of those cases. This loss of access to records at least exacerbates the information disadvantage faced by claimants, and is likely to be a negative message that it takes more to win on appeal than showing the record keeper who has an investigative duty (ACC) has lost or destroyed those records.
- 253. There were examples of review hearing transcripts not being provided to the Court. This is concerning in cases where there was significant dispute about what evidence was given at the hearing or how evidence was obtained. This is because, while the review decision itself is set aside, all the evidence produced and heard at the review hearing is required to be before the District Court on appeal.

Judge resolved issues with lack of evidence

254. Where issues arose about the low quality or lack of evidence in the appeal, the judge usually resolved this by dismissing the appeal,

Equal Before the Law: towards disability justice strategies (Australian Human Rights Commission, February 2014) at 8.

Equal Before the Law: towards disability justice strategies (Australian Human Rights Commission, February 2014) at 21.

This was also prominent in High Court appeals, dealt with below in Chapter IX.

sometimes by granting leave to obtain more evidence, and in one case by invoking the Court's power under s 157 of the Accident Compensation Act 2001 to obtain expert opinion evidence. A subsequent database search of *all* District Court decisions revealed only one other case where s 157 was invoked.

- 255. Other research persuasively explains why claimants fall at the evidence hurdle in civil disputes generally, and especially where they represent themselves. It is worth briefly summarising the findings given the high rates of self-representation in the ACC context.
- One early major study found that for the self-represented litigant, "Coping with evidence was a major problem: knowing who to get witness statements from, failing to put their own evidence in the form of a statement, knowing what documents to produce, knowing whether and how they could introduce evidence late." More recently, a comprehensive review of studies concluded that "most research ... pointed to problems with understanding evidential requirements, difficulties with forms, and identifying facts relevant to the case". Or, as the former Chief High Court Judge has put it, "The unrepresented litigant has none of the knowledge of the law to make decision as to ... what evidence is relevant to the case."
- 257. Similarly, but of course limited by the fact the study was conducted in the criminal context, it has been found that "The court system, and cross-examination in particular, is stressful and difficult ... [and] there is an ever-present risk that in the absence of support [people with disabilities] will give inconsistent evidence or plead guilty to get the process over". ²⁰³ If people are taking such risks in the criminal law, it is possible they are doing so in the high-stakes personal injury context.
- 258. These barriers likely arise from claimants often lacking two features: "First, basic legal knowledge is proposed to be an essential component of legal capability." "Second, beyond legal knowledge, people must

Hazel Genn "Do-it-yourself law: access to justice and the challenge of self-representation" (2013) 32 Civil Justice Quarterly 411 at 434-435, citing Moorhead and Sefton *Litigants in Person:* Unrepresented Litigants in First Instance Proceedings (Department of Constitutional Affairs, Research Series 2/05, 2005) at 177.

Kim Williams *Litigants in person: a literature review* (UK Ministry of Justice, Research Summary 2/11, June 2011) at 5.

Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 9 (see now (2014) 13 Otago Law Review 229).

Equal Before the Law: towards disability justice strategies (Australian Human Rights Commission, February 2014) at 26.

have the necessary skills to pursue legal resolution effectively."²⁰⁴ While of course not all ACC claimants who appeal to the District Court are self-represented, or live with a disability, many do, so that it will pay to think very carefully about the appropriateness of judges making adverse reliability or credibility findings.

Reasoning judges used to resolve conflicting evidence

- 259. Unlike other jurisdictions, there is almost no testing of evidence in the usual way (through cross-examination) in the ACC appeals process.
- 260. Judgments often recorded resolution of conflicts in evidence. The judges used a number of approaches to resolve these evidential conflicts. Often the judges used a combination of more than one approach. These approaches can be grouped as follows:
 - a. Content specific the judge focussed on what the evidence said.
 - b. Person specific the judge focussed on the characteristics of the person who said it.
 - c. Judge specific the judge was actively involved in taking some step(s) to resolve the question.
 - d. Reliance on legal tests the judge relied on where the onus lies, or whether the public law threshold for overcoming exercise of discretion was met.

Content-specific approach

- 261. Content specific resolution was most common, with the judge citing consistency between pieces of evidence as a reason to prefer a certain evidential conclusion in more than half the cases. Cogency of reasoning²⁰⁵ was used to justify a preference for one evidential viewpoint in a third of cases.
- ACC also has an advantage in this area compared to claimants, arising from the same features described above. These features increase the likelihood that what appears to be consistent and cogent evidence will be presented to the Court.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 29.

We took this to include explicitly reasoned compared to statements without reasons.

263. Self-represented litigants and advocates are further disadvantaged in this regard as they often do not provide sworn evidence at review or appeal. Instead they make submission on factual points that are unsupported by evidence. This leads to consistency findings against them. The studies referred to above provide equally powerful explanations and cause for concern in this regard as well.

Person-specific approach

- 264. Person-specific resolution of conflicting evidence was sometimes used by judges. The expert's specialisation, the reliability of a claimant, preference for a treating as opposed to non-treating specialist (and the reverse in other cases) were the major reasoning tools that we identified from this group.
- Self-represented litigants are particularly disadvantaged as they often do not have the skills to identify exactly what evidence is required or from whom. They frequently obtained evidence from the wrong person. Examples include: an opinion from a GP when ACC had obtained a specialist; an occupational therapist instead of an occupational medical specialist, and a practitioner in traditional Chinese medicine when ACC had obtained the opinion of an orthopaedic surgeon.

Judge-specific

266. Experience as a judge and their view of the justice in the case²⁰⁶ were sometimes used by judges to resolve conflicts in the evidence. Other judge-directed ways of testing evidence – in particular through cross-examination, obtaining more evidence, or s 157 assessments – were almost never used.

Reliance on legal tests

267. Judges sometimes relied on legal tests to resolve evidence. These included the onus of proof, the standard of proof and the need to meet public law thresholds to overcome an exercise of discretion by ACC. They did not include specific tests under the Evidence Act 2006.

The paradigm statement for which we searched was along the lines of: "It cannot be the case that X is correct because that would be unjust".

Impact of representation

268. The judgments often recorded the submissions made by lawyers about evidence and the inconsistencies in that evidence. Self-represented claimants are not trained to identify these and put these succinctly. For example, one unsuccessful claimant was recorded in the judgment as producing 200 pages of submissions complaining about a doctor's report. This is a barrier to access to justice.

Judgments dealing with evidential concepts

- 269. The sample of appeals shows judgments did not often explicitly refer to concepts of evidence law, such as hearsay, reliability or opinion.
- 270. Where judgments did record reference to evidential concepts, onus and standard of proof were the most commonly used. Sometimes, the concepts of expert evidence were used in the judgment, but we found no reference to the "substantially helpful" test used in the Evidence Act. Occasionally the judgments referred to cogency, reliability, rejection of lay opinion evidence, and judicial notice of facts including one case in which the Judge took judicial notice of the fact that racquet-ball sports strain the knees.
- 271. In *Wakenshaw*, the High Court stressed the onus would only rarely be relevant to the resolution of a case. Nonetheless, it was the most common tool we found being used by the District Court to dismiss appeals. There are cases of the District Court deciding cases on the onus rather than clear factual findings about which evidence was accepted and which evidence was rejected.²⁰⁷
- 272. Evidential concepts that might be expected to be seen in judgments such as freshness, area of expertise, substantial helpfulness, propensity and veracity did not appear. There was one example of reference to "double hearsay".

Wakenshaw v ACC [2003] NZAR 590 (HC). This was the exact problem identified in an earlier High Court decisions, not part of the study but which is often cited: Ellwood v ACC HC CIV-2005-485-536, 6 December 2006 at [17], see also Doyle v ACC HC Auckland 159/96, 10 July 1997 at 3.

Judge was required to resolve conflicting medical evidence

273. There was conflicting medical evidence in around half the cases. Where there was conflicting medical evidence, this conflict was resolved in ACC's favour twice as often as it was resolved in a claimant's favour.

Variations over time

- 274. There was wide variation in the response to this question depending on the type of representation and over time. Between 2009 and 2014, the number of cases where the judge was required to resolve conflicts of evidence increased. There was a marked increase between the years 2011 and 2012. This may be as a result of changing behaviour of litigants following the overruling of the *Ramsay* principles by the High Court in *Martin* in 2009.²⁰⁸ It may also be a result of judges changing their approach to resolving conflicts of evidence.
- Also between 2009 and 2014, there were increases in the number of cases in our sample where conflicting evidence was resolved in favour of claimants. The biggest increase occurred in 2011-2012 and coincides with the increase in judges being required to resolve conflicts in medical evidence.

Variations by type of representation

- 276. When a claimant was represented by counsel, there was conflicting medical evidence in about two thirds of cases and the conflict was resolved in the claimant's favour slightly more than half the time.
- 277. When a claimant was represented by an advocate, there was conflicting medical evidence in half of the coded cases, and it was resolved in the claimant's favour in 15% of those cases.
- When a person was self-represented, there was conflicting medical evidence in fewer than half of the cases, and it was resolved in the claimant's favour in only a quarter of those appeals.

See *Martin v ACC* [2009] NZHC 974. This ruling meant that reviewers and courts could consider medical evidence other than that of ACC's assessors. Because of delays, it would take two or three years for cases where alternative medical evidence was sought to work their way through the system into the courts.

Variations by judge

Our sample shows significant variation between judges. Some judges resolved conflicts in ACC's favour five times more often in our sample than they did in the claimant's favour whereas one judge resolved conflicting evidence in favour of claimants rather than in favour of ACC about twice as often.

Expert opinion evidence in response to other party's expert evidence

- 280. The major theme was that the judgments did not record expert evidence being adduced in response to the other side's expert.
- 281. There were however some instances where judgments recorded evidence in reply was provided by one or both parties' experts. Expert responses from both parties' experts mainly occurred when claimants were represented by counsel. A response from ACC's experts (but not a claimant's experts) occurred more often when claimants were self-represented or represented by an advocate.

Towards solutions

- In the ACC context directly there have been comments from senior counsel in this jurisdiction that obtaining medical evidence and comment on medical evidence takes time and thus causes delay. Officials have rejected this suggestion out of hand, with official information stating "experience suggests delays in obtaining expert evidence are not the cause of delays." Our analysis of judgments is not able to shed further light on which is correct.
- 283. However other research is helpful in providing some measure against which to consider improvements in this area. It is not really in dispute that medical expert evidence is important in dispute resolution. As Lord Woolf puts it, "The courts are very conscious that in many fields of litigation they depend on expert medical advice in order to come to a just decision." Rather, research shows the major current problem with medical expert evidence is lack of accessibility to (independent) expert evidence.

Lord Woolf "Medics, Lawyers and the Courts – A Defence of the Access to Justice Reommendations" in Christopher Camphell-Holt (ed) *Lord Woolf The Pursuit of Justice* (Oxford University Press, Oxford, 2008) 323 at 324.

- One part of this problem is the "tendency for medical experts to be categorised as plaintiffs or defendants experts. ... as hired guns, brought in to fight to the best of their ability on behalf of the side which is employing them." We found multiple examples of both ACC and claimant making this allegation. As well, "it can still be difficult to find an expert if you are a plaintiff. This is because of the understandable reluctance, on the part of health care professionals, to criticise colleagues."
- 285. This problem is exacerbated in these disputes by ACC already having chosen the ground on which the dispute will be decided by deciding what kind of decision it will issue, and obtaining its own expert evidence accordingly. The starting point for an injured person finding an expert is to find one who is not reluctant to criticise colleagues if the evidence supports such a conclusion. Such a tactical advantage has been described as one of the advantages of a repeat player.²¹²
- Various solutions addressing these aspects of this problem have been suggested. One solution requires the expert's report to be made *to the court* with the related paramount duty to the court, rather than to the party commissioning the report. Another is a call for a "breakthrough" along the lines of "a more cooperative approach" but that comes with the caveat that it "will only arise if the independence of the expert is clear. Other solutions draw from international practice. For instance, in many civil law countries the court appoints (usually one) expert who is independent of the parties and who is responsible for resolving technical issues by way of answering the court's questions on particular issues. The overriding message from all these solutions is the critical importance of independence.

Lord Woolf "Medics, Lawyers and the Courts – A Defence of the Access to Justice Recommendations" in Christopher Camphell-Holt (ed) Lord Woolf The Pursuit of Justice (Oxford University Press, Oxford, 2008) 323 at 337.

Lord Woolf "Medics, Lawyers and the Courts – A Defence of the Access to Justice Recommendations" in Christopher Camphell-Holt (ed) *Lord Woolf The Pursuit of Justice* (Oxford University Press, Oxford, 2008) 323 at 338. See also Lord Woolf "Are the Courts Excessively Deferential to the Medical Profession?" in Christopher Camphell-Holt (ed) *Lord Woolf The Pursuit of Justice* (Oxford University Press, Oxford, 2008) 343 at 344.

See Marc Galanter "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law and Society Review 1 at 3 and 14.

Lord Woolf "Medics, Lawyers and the Courts – A Defence of the Access to Justice Recommendations" in Christopher Camphell-Holt (ed) Lord Woolf The Pursuit of Justice (Oxford University Press, Oxford, 2008) 323 at 338.

Lord Woolf "Medics, Lawyers and the Courts – A Defence of the Access to Justice Recommendations" in Christopher Camphell-Holt (ed) Lord Woolf The Pursuit of Justice (Oxford University Press, Oxford, 2008) 323 at 338.

Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka in "The Oxford Study on Costs and Funding of Civil Litigation" in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds) *The Costs and Funding of Civil Litigation: A comparative analysis* (Hart Publishing, Oxford and Portland, Oregon, 2010) 1 at 15-16. See also at 16 for further details including as to whose responsibility costs are and how rates are set.

- 287. There are currently no legal mechanisms to investigate and determine claimants' complaints about independence as the Health and Disability Commissioner and Medical Council send matters to ACC. The ACC complaints process refuses to investigate because the matter relates to a dispute about cover and entitlements and this decision is not reviewable. The experts do not give evidence in person or agree to abide by a Code of Conduct.
- 288. The ability of experts to comment on each others' evidence prior to submissions being made at an oral hearing appears to be a sensible improvement, and policy decisions around timeframes for filing submissions should take account of the time it takes for this review to happen.

BEING HEARD

[6] Care must be taken to ensure that claimants attain their day in court for the effects of a personal injury to be considered unless there are clearly no proper extenuating circumstances.

[12] ... the time should be extended to give her a "day in court". Often, although that is not necessarily appropriate in this case, it is better to allow for a substantive hearing rather than provide for an ever increasing grudge against the system.

Percival v ACC [2014] NZACC 307

[6] I consider that costs should not be ordered notwithstanding that the ACC has succeeded and notwithstanding that the costs regime is intended to be predictable. The costs order sought is a substantial sum in respect of an application that, from ACC's perspective, was not complex. To burden Mr Jones with that order, which he is not in a position to pay, would only be for the purposes of holding him accountable for pursuing a meritless application and to deter him from pursuing further meritless applications. The nature of the application (made so long after his medical misadventure claim) indicates that, consistent with the psychologist report referred to above, Mr Jones has had long-standing difficulties. In those circumstances a costs order to punish Mr Jones seems inappropriate and it is unlikely to serve a deterrent purpose.

Jones v ACC [2014] NZHC 2867

Being heard as a barrier in the District Court appeals

- 289. This chapter examines what we have called "being heard". By this we mean the injured person being able to have a competent independent person in power examine the problem they present and decide that problem. It can involve that person in power passing judgment on someone perceived to be a wrongdoer. It can also involve the wrongdoer acknowledging the effect of their wrong. For some people, this is an important part of the process for their rehabilitation.
- 290. For many people, the no-fault aspect of ACC can be seen as a barrier to being heard as the behaviour of any perceived wrongdoer is irrelevant to their claim for cover or entitlement which is the subject of the dispute.

Previous research

Auditor General's report into ACC complaints

291. The Auditor-General recently found a relationship between people being heard and the development of problems in their interactions with ACC.²¹⁶

Survey data

292. Previous survey data from Acclaim Otago recorded peoples' experiences. The shadow report survey, which was a self selected group of over 600 injured people, looked at this in the process leading up to ACC's decision including assessments and at review. ²¹⁷

(a) The ACC assessment process

293. Most people have limited face-to-face interactions with ACC. The main way in which people are heard is through ACC's assessors. Respondents' experiences with ACC's assessors varied, but the survey data showed definite trends overall. Although most people went along

Office of the Auditor-General of New Zealand "Accident Compensation Corporation: How it deals with complaints." August 2014. See para 1.10-1.12.

See Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, available from:

http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf.

to see the assessor happily, they had a very negative experience. Most (60%) respondents were happy to attend the assessment. Only a small percentage (11%) felt the assessor was independent and of those who did not think they were independent (89%), they indicated this was strongly the case. 40% felt the assessor was qualified. Most (81%) felt the assessor did not listen to them and this was a strongly held view. Less than half (42%) felt the assessor allowed enough time for the assessment. Tellingly, nearly all (87%) said they would not choose to see the assessor again, and only a handful (14%) felt the assessor understood their condition. (79%) indicated they would not consent to being in a treating relationship with the assessor. Nearly all respondents (90%) disagreed with the assessor's conclusions. ²¹⁸

(b) The review process

- Of the respondents to the review questions, some felt that the reviewer listened to their concerns, many (44%) did not, and some felt somewhat listened to (29%).
- 295. There were also significant issues at review hearings relating to the time for hearings. At the hearing itself, 69% of respondents either felt there was not enough time to deal with all the issues, or did not know if there was enough time.
- 296. Two thirds (64%) of respondents felt the reviewer was not independent, some (17%) felt the reviewer was independent, and some (15%) felt the reviewer was somewhat independent. Of note, 63% felt that the reviewer did not take an investigative approach, some (15%) did, and some felt the reviewer took a somewhat investigative approach (20%).

Comments made in the judgments

297. Judges sometimes commented on the personal characteristics of a claimant. We found that when a judge expressed sympathy for a self-represented litigant, the claimant frequently lost the appeal. Also, judges infrequently recorded medical specialists' comments on the claimant's credibility, including legitimacy of symptoms and pain behaviour when the person was self-represented.

Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, at p 18 available from:

http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf.

- 298. Sometimes judgments commented on ACC's duty to investigate or recorded concerns about ACC's conduct. When the judgment expressed doubt or concern about ACC's conduct, the claimants usually won the appeal, but when the judgment recorded that ACC had a duty to investigate, ACC was usually successful. We infer that this may suggest judges consider that arguments about failure to investigate "ring hollow" in an adversarial appeal, where the underlying assumption is that an injured person can conduct their own investigation using experts and bring the proceeds to the Court.
- 299. Judges are not commenting on the nature of the relationship between the parties, including trust and communication. This can be contrasted with nation-wide surveys indicating very low levels of trust and confidence in ACC.²¹⁹

Injury as a result of third parties

- 300. The sample was analysed to identify whether a perception held by the claimant of fault or causation by a third party had a role in people bringing appeals. Available data prior to this study suggested that person's health and socio-economic outcomes following the injury related to their experience during the claims process.²²⁰
- 301. Similarly, research has linked being a victim of crime to poorer outcomes,²²¹ including that the link strengthens with greater victimization: "multiple crime victimization increases the risk of civil legal problems by 192 per cent".²²² It has also found that certain groups are more likely to be victims of crime in the first place. Those groups include litigants in person,²²³ and people living with a disability.²²⁴ In fact, people with a disability are said to be 3.5 to 4 times more likely to

Radio New Zealand "Call for ACC to restore public trust", 23 October 2014, available from: http://www.radionz.co.nz/news/national/257558/call-for-acc-to-restore-public-trust.

Genevieve Grant and David Studdert "Poisoned Chalice? A Critical Analysis of the Evidence Linking Personal Injury Compensation Processes with Adverse Health Outcomes" Melbourne University Law Review, Volume 33, Issue 3, 2009.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 24.

Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 24.

Kim Williams *Litigants in person: a literature review* (UK Ministry of Justice, Research Summary 2/11, June 2011) at 4 ("sometimes displayed").

Christine Coumarelos and others Legal Australia-Wide Survey (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 19 ("strong propensity"); KM Research and Consultancy Ltd Access to Justice: a review of the existing evidence of the experiences of adults with mental health problems (UK Ministry of Justice, Research Series 6/09, May 2009) at 21.

be victims of crime than are members of the general population.²²⁵ While these literature findings would need to be considered on the facts of each case, this data is clearly applicable in the ACC context both because of the high proportion of self-represented litigants and the incidence of disability, which by its very nature will always feature in personal injury law.

We did not find information recorded in the judgments that support these understandings. Fault/blame was only sometimes recorded. Where it was recorded, just over half the time it was for injury caused by treatment (around 15% of total sample of appeals), it was sometimes recorded for injuries as a result of assault (5% of overall appeals)²²⁶ and motor vehicle accidents (5% of overall appeals). The judgments almost never recorded that the injury was a result of employer or other third party negligence.

Why are there so many appeals related to treatment, motor vehicle accidents and assaults?

- 303. Our data could not answer this question because it was not recorded in the judgments. To see whether the high rates of appeal were because of the number of claims, or the number of declined claims, we looked at the claim rates for treatment injury when compared to the total claims and the rates of claims were comparably low.²²⁸ The rate of appeals for assaults and vehicle-related injuries were also relatively high when compared to their low claim rates.
- 304. The reasons for such high rates of appeals need to be explored with further research. It could be that the need to be heard is being transferred from processes that would ordinarily attribute civil or criminal blame and bringing the impact of that to the ACC disputes process. There could however be other reasons including that treatment injuries, assaults and motor vehicles accidents are high cost claims making them more likely to be declined or for other reasons.

Louise Ellison "Responding to the needs of victims with psychosocial disabilities: challenges to equality of access to justice" [2015] Criminal Law Review 28 at 29-31.

In 2013/2014, ACC had a total of 2,086,275 new claims, ACC data does not break this down by Assault, but only by criminal offending which was recorded as less than 0.01% of claims.

In 2013/2014, ACC had a total of 2,086,275 new claims, 28,463 of which are listed by ACC as driving related making these 1.4% of claims, yet these made up 5% of appeals.

In 2013/2014, ACC had a total of 2,086,275 new claims, 6,018 of which were treatment related claims making these 0.3% yet these made up 15% of appeals.

Resentment of claimants towards others

- 305. In a quarter of appeals, the judgment recorded claimants' resentment towards others. This theme did not correlate with the outcome of the appeal. In order of decreasing occurrence, the resentment was towards:
 - a. ACC,
 - b. Changes in personal situation and circumstances caused by the injury,
 - c. Medical practitioner or equivalent in relation to treatment injuries,
 - d. ACC's assessor
 - e. the perpetrator of the assault and the injury caused by assault.

Relationship between injury as a result of third party and resentment

306. There appeared to be a correlation between resentment being recorded in the judgment and the injury being caused by a third party. This is consistent with much of the international research. Further research needs to be conducted into the effect of "being heard". Plausibly, improving peoples' sense of justice when third parties are involved in causing their injury is likely to improve their rehabilitation experience and reduce the flow-on dispute with ACC. ²²⁹

Distress

- 307. In fewer than 10% of cases, the judgment recorded that claimants had been distressed at the hearing or otherwise. When this was recorded for self-represented claimants, it appeared to correlate with the outcome of their appeal. It may have some impact on an injured person's ability to present their case.
- 308. Consistent with the substantial research efforts revealing the "clustering" of legal and health issues and the negative effect each has on the other, summarised above, we found that in more than half the appeals the judgment recorded that the claimant had ongoing health problems from their injury or another non-specified health condition or a co-morbidity. In order of prevalence these were:

See Office of the Auditor-General of New Zealand "Accident Compensation Corporation: How it deals with complaints." August 2014. See para 1.10-1.12.

- a. non-specified ongoing health problems from injury or other (for example, claimant had health problems or ongoing effects of injury),
- b. specified general medical condition (for example, the claimant's diabetes, cancer),
- c. pain syndrome,
- d. mental illness (depression, bipolar disorder),
- e. another accident or injury (whether covered or not) and,
- f. brain injury.

Problems with attendance and filing submissions

- 309. Above we explained that our study did not find any support for the assertion that claimants' lack of filing timely submissions are a cause of delay.
- 310. Separate from that analysis, we found that in around 10% of cases the judgment recorded the failure to attend a hearing or file submissions at review or appeal. The judgments recorded this problem both at review and appeal level.

Language or communication barriers

- 311. There was almost no record in the judgments identifying language barriers. There was one example of a person with hearing loss having their appeal heard "on the papers", but it did not record the reason for hearing on the papers. ²³⁰ There was an example of a person who could not read well enough to understand the letters from ACC, and there was one case where the judge recorded English was not the person's first language, but further noted she was easy to understand and intelligent.
- Based on New Zealand's population demographics, we would expect to see language and communication barriers more often. This might reflect low rates of claiming with ACC, or a reluctance or inability to exercise rights of appeal. It may also be a reporting bias and simply seldom recorded in judgments. International research suggests it is

There is a subset of international research about improving access to justice for people with deafness: see for example *Making Tribunals Accessible to Disabled People* (UK Council on Tribunals, November 2002) at 28 and Douglas M Pravda "Understanding the rights of deaf and hard of hearing individuals to meaningful participation in court proceedings" (2011) 45 Valparaiso University Law Review 927.

unfortunately likely to be explained by non-English speakers' lack of participation with the law in the first place.²³¹

Non-covered financial effects of injury

- 313. ACC support does not extend to all financial effects of injury. There is an immediate 20% drop in earnings, the first week off work is not paid, and many entitlements, including treatment and transport are not fully funded.
- In some cases (10%) judgments recorded that the claimants had suffered financial effects of their injuries that were not covered by ACC. These effects were not usually recorded, either suggesting it is not a significant issue, or it was not relevant to a resolution of the dispute dealt with in the judgment.
- 315. Previous survey data (discussed above) suggests there is a significant barrier to access to justice caused by the mounting financial effects of the injury for which no ACC support is provided resulting in reduced ability to obtain legal services when ACC support is ceased.
- 316. In the access to justice survey undertaken for presentation to the United Nations committee (a self selected survey of over 600 injured people), peoples' financial situation was a significant barrier to accessing justice. Because of their injury, injured people may already be heavily in debt (to community and commercial lenders) before ACC makes its adverse decision. Of those who received compensation, most respondents (75%) had their weekly compensation stopped and most of this group (57%) were then without any other source of income. Those who had income mainly received it from Work and Income New Zealand ("WINZ"). Of those who did not receive WINZ support, this was because either their partner or spouse is in paid employment (67%), meaning they are ineligible. Alternatively, they did not know they could receive WINZ support (33%). Nearly all (90%) respondents said that challenging ACC's decision would be a significant impact on their financial position. Of this group, most respondents (80%) strongly agreed (when given the option to "agree" or "strongly agree"). 232

See Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xv.

See Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, at p 15 available from:

http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf.

Our findings provide further but muted support for that past data, for the research discussed above about the clustering of legal and health issues and the negative effect each has on the other, and for the substantial research efforts showing that legal problems lead to further economic, health and social problems.

Non-covered non-financial effects of injury

- 318. By comparison, a quarter of judgments recorded non-covered non-financial effects. These included marriage breakups, the effects of ongoing pain, loss of house, loss of hope and no sense of future, inability to fill societal roles as a parent, a spouse or a family member.
- 319. Previous data suggests that the incidence of this is much higher.²³³ Again, the omission of non-financial non-covered effects is most likely a reflection of our sample source. Those matters, while very important to the claimant, are not often directly relevant to resolution of the issues on appeal and so seldom need to be recorded in the judgment.

The Potential Outcomes of Injury Study produced many publications on this, see for example: S Derrett, J Langley, B Hokowhitu, S Ameratunga, P Hansen, G Davie, E Wyeth, R Lilley "Disability outcomes following injury: results from phase one of the prospective outcomes of injury study (POIS)" (2010) Inj Prev 16; John Langley, Sarah Derrett, Gabrielle Davie, Shanthi Ameratunga and Emma Wyet "A cohort study of short-term functional outcomes following injury: the role of preinjury socio-demographic and health characteristics, injury and injury-related healthcare" (2011) 9 Health and Quality of Life Outcomes 68.

See also: See Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, at p 15 available from: http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf.

PART III

Appellate Courts

FURTHER APPEALS ABOVE THE DISTRICT COURT

[30] A grant of leave requires that the intended appellant show an arguable case that the decision of the District Court is wrong in law. Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources.

On the Go (New Zealand) Ltd v ACC [2011] NZACC 11

[12] Pursuant to s 162(1) of the Act, the applicant is only entitled to leave to appeal to the High Court on questions of law. It is settled law that the contended point or points of law must be capable of bona fide and serious argument to qualify for the grant of such leave to appeal. Care must be taken to avoid allowing issues of fact to be dressed up as questions of law, as appeals on the former are proscribed. However, a mixed question of law and fact is a matter of law and the Judge's treatment of fact can amount to an error of law.

[13] Even if the qualifying criteria are made out, this Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources; and leave to appeal is not to be granted as a matter of course.

K & R Belling Trust v ACC [2011] NZACC 2

Further Appeals

320. There are two further appeals beyond decisions of the District Court (and Appeal Authority). One to the High Court and one to the Court of Appeal. There is no appeal as of right – both are at the discretion of the Court and therefore require leave. There is no appeal to the Supreme Court.

321. The High Court can hear an appeal against the District Court's decision with leave. Leave to appeal to the High Court can be granted by the District Court, or Special Leave to appeal to the High Court can be granted by the High Court.

LEAVE TO APPEAL TO THE HIGH COURT

The leave of the District Court

- Over the 6 years from 2009 to 2014 there were 192 decisions from the District Court on applications for leave to appeal to the High Court. All of these decisions were coded in search of access to justice barriers and so the following statistics assume a complete data set for District Court leave decisions.
- 323. Leave to appeal to the High Court was granted on 37 occasions of the 192 decisions coded.²³⁴
- There was significant variation in granting leave depending upon: (1) the claimant's representative (which will be analysed below in the Representation chapter), (2) the judges involved in both the first decision and the leave application, and (3) the year in which the application was made.
- 325. Some judges granted leave in 40% of the applications they heard and others in fewer than 10%. Some judges usually granted leave against the decision of a particular judge. Others never gave leave against the decision when a particular judge decided the appeal.

Not all of these were actually heard in the High Court, 17 applications did not result in a judgment of the High Court.

Of the declined judgments, the judgment did not record a test for leave to appeal in 2/3 of the cases. The 1/3 where a test was recorded, referred to a wide variety of different tests and the bar is generally set very high. Further, another case was cited in less 1/3 of the dismissed appeal decisions. The reasons given for dismissal was mainly questions of fact being raised, followed by the question of law not being seriously arguable, or also because no question of law was identified, then dismissed for want of prosecution and finally for failure to meet the strict statutory time limits.

- 327. Only 3 applications were granted across the two least "successful" years combined (2009 and 2013). A total of 20 applications were granted across the combined two years with the highest number (2011 and 2014).
- 328. The variations may be a reflection of the small numbers of successful applications, but it may reflect the changing leadership and personnel within the Court. For example in 2011 and 2014, judges new to the jurisdiction started issuing decisions and appear to have had an impact on how the Court operated.
- Many of the cases where the District Court granted leave did not appear in the High Court. Of 37 where leave was granted in the six years from 2009-2014, 17 were not actually heard in the High Court, despite a judicial finding that there were seriously arguable questions of law of public significance.
- To consider the reasons for this perhaps surprising finding, appellant representatives were contacted and interviewed about their cases in which leave had been granted and there was no High Court decision. We could not contact representatives in 3 of these 17 cases. Of those 14 to which we had a response, the reasons for not proceeding with the appeal in the High Court are:
 - a. Settled in favour of claimant (9)
 - b. Claimant could not afford to proceed (2)
 - c. Claimant did not want to proceed (1)
 - d. Claimant did not want to proceed because of the risk of an adverse costs award (1)
 - e. Claimant could not afford the filing fees (1).

Outcome of litigation where District Court granted leave

- Of the 37 that were granted leave to appeal to the High Court by the District Court, most had a positive outcome for claimants.
 - a. 20/37 were settled in the claimant's favour or ultimately decided in the claimants favour on appeal (by the High Court or the Court of Appeal).
 - b. 14/37 were decided in ACC's favour.
 - c. 3/37 had an unknown outcome.
- 332. The rate of success was significantly higher where the claimant was represented by one of the main three legal practices in the leave to appeal stage (Law firm A, B and C, and Barrister D). Of the 20 times claimants represented by this group were granted leave to appeal, the outcomes were:
 - a. Settled in claimants favour (9).
 - b. Proceeded and ultimately won (8).
 - c. Proceeded and ultimately lost (3).²³⁵
- 333. Being granted leave largely resulted in represented claimants being successful.
- 334. The systemic effect of having questions of law settled after leave has been granted to resolve questions of law is troubling. We know that ACC is able to (and does) continue to rely on the precedent from the District Court in litigation and in the review process. This is a barrier to accessing justice. Nonetheless, the High Court has little appetite for hearing moot or academic questions.²³⁶

The District Court as a gatekeeper to the High Court

335. In addition to the quotes at the beginning of the chapter, the judgments record that the District Court properly considers its role to be as a gatekeeper to the High Court:²³⁷

There is also one case where the claimant was ultimately unsuccessful, where Barrister D was appointed Amicus Curiae.

²³⁶ Sinclair v ACC [2013] NZHC 374.

²³⁷ Kaulima v ACC [2012] NZACC 402.

[27] I deal first of all with ACR 229/11 - Mr Kaulima's application for leave to appeal to the High Court. The way in which I deal with it is to dismiss it. I dismiss it because, in the end, no good reason has been shown why Mr Kaulima should have leave to appeal on a point of law to the High Court.

[28] In particular: (i) the issues of calculation he originally pursued have in no clear way been shown to engage questions of law. (ii) No arguable as legally flawed determination or consideration is identifiable in Judge Beattie's judgment. (iii) It would be wrong, given all that has now happened, for Mr Kaulima to have leave on a point never taken before (one first identified as a possibility by me) when for some time now, there has been (and for the moment still remains available) another way back to the 24 March 2009 merits.

[29] In these circumstances, there is no justification for the High Court to be troubled by the matter at all.

336. In another where the claimant was self-represented:²³⁸

[47] In any event, and given the limited (to a case of seriously arguable legal error) ability to appeal to the High Court, I am bound simply to record that I find nothing in what has been promoted that comes near raising the possibility, even, of a serious argument of legal error on the part of Judge Barber.

337. In another self-represented case:²³⁹

[40] In any event, and in the circumstances I have identified, no question or questions of law as might properly be put before the High Court are identifiable, thus issues of the exercise of discretion in the context of a leave application do not even arise.

Special Leave to Appeal

338. If the District Court declines leave to appeal, an application can be made in the High Court for special leave to appeal. Special leave was sought in 31 appeals against District Court decisions,²⁴⁰ which can be compared to 155 cases for which leave was declined by the District Court between 2009 and 2014.²⁴¹ Special leave was granted in five of the 31 cases,²⁴² all to claimants. Barrister D appeared for the claimants in two, Barrister G in one and two were self-represented.

339. By contrast with leave from the District Court, none of the cases where special leave was granted by the High Court appear to have been settled.

Special leave was also sought successfully against an Appeal Authority decision.

Note that we looked at all cases decided in the sample period, so some may have been through the District Court in 2008 but the High Court in 2009 so would not appear in the District Court sample.

Special leave was also granted to appeal against the appeal authority in one case brought by ACC, see below.

²³⁸ Bartkus v ACC [2012] NZACC 186.

²³⁹ *McTague v ACC* [2012] NZACC 151.

Conclusions on leave to appeal

340. The leave to appeal mechanism is an effective gate to accessing the High Court operated largely by the District Court judges.

341. From an access to justice perspective, it is important that the Court does not apply that bar so high that claimants are deprived of access to the High Court. In particular, it is important to remain open to novel legal arguments, even those that may disturb settled law, where those arguments could result in greater access to justice.

HIGH COURT

- We coded every High Court case where ACC was identified as a party to the dispute from 2009 up until 2015 to the point in time where cases were selected and coding began. This means our sample includes five High Court decisions from 2015. The overall numbers of cases in the High Court were low, and with each judgment being a comparatively significant impact on ACC law, they were all seen as important.
- 343. In total 93 High Court cases were read and coded according to a simplified and open-textured version of the Survey Monkey data tool.
- 344. It became clear that some judgments which are widely known to be precedents in this jurisdiction were not available on the NZLII website and this is highly concerning. A notable example is the *Vandy*²⁴³ case, which has had a significant impact on claims for weekly compensation. It illustrates the sweeping impact that can be caused in the jurisdiction by a single High Court case. The District Court has said of *Vandy*:²⁴⁴
 - [2] The High Court judgment in question, commonly now simply referred to as *V andy*, has had far-reaching consequences and, in a number of cases, has led to outcomes in this Court which in terms of sheer fairness are hard to support ...
 - [3] Warwick Gendall J, who decided *Vandy*, was very much alive to that prospect. He nevertheless considered that, given the language of the statute, no option was available to the High Court but to determine the question of law before him in terms that would (to give two examples) effectively deny weekly compensation on account of incapacity to a range of claimants who were not in employment when the actual or total

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ACC v V andy [2011] 2 NZLR 131.

²⁴⁴ Waitere v ACC [2013] NZACC 166.

consequences of earlier injuries became apparent or who, on account youth, had not reached an employable age when actually injured.

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- [7] I say that because, although in one or more of the individual cases that are the subject of judgment today there are differences, the fundamental impediment to this Court granting leave lies in it surely being bound to adhere to V and y.
- 345. The sample was therefore expanded to include notable omissions from the NZLII website by reference to other legal databases such as LexisNexis and WestlawNZ. Clearly self-represented litigants are disadvantaged by this incomplete information, as even best efforts to pursue public databases are evidently not sufficient. Access to the law is fundamental to the idea of the rule of law. Similar problems existed in the District Court cases and in Leave to Appeal from the District Court. Court.
- Only 13 judgments in the High Court were identified as being heard on the papers. 247 The High Court has adopted the practice of hearing oral argument on special leave applications, by contrast with the District Court's procedure of determining leave to appeal on the papers. We have been unable to identify any reasoned basis for this distinction, particularly given that the District Court's practice is to have a different judge determine leave to appeal from the judge who heard the substantive proceeding. Similarly, the High Court would hear applications for leave to the Court of Appeal on the basis of an oral hearing, and not solely on the papers.
- 347. Of the overall High Court sample, there were 31 special leave applications, 34 substantive hearings of appeals to the High Court against a District Court decision, and 13 applications to the High Court for leave to appeal to the Court of Appeal. There were six judgments that dealt exclusively with costs. Four applications were for judicial review of an ACC decision heard by the High Court during the given period.

Access was generously provided by the University of Otago's Centre for Legal Issues and gratefully received.

See above in Chapter III – Methodology, and Chapter IV – Access to the Law.

They were generally costs judgments. Some of these still involved oral representations, for example by teleconference. Regardless of exact figures, there is obviously a much lower overall proportion of hearings being held on the papers in the High Court than the District Court, particularly with regard to applications for leave. The consequences between a hearing on the papers and in person can be significant: see *O'Neill v ACC* HC Auckland CIV-2008-404-8482, 31 March 2010 at [3]-[4]. *O'Neill* became a leading precedent in the Court of Appeal and would not have become such without Heath J's persistence in understanding Mr O'Neill's objections.

Of particular note for access to justice, there were five judgments where a self-represented claimant attempted to appeal the High Court's decision to decline special leave to the Court of Appeal. It is regarded as being settled law that this is impossible.²⁴⁸ In one case, ACC made a Calderbank offer to a self-represented litigant who was attempting this course of action, and then pursued an increased award of costs against the claimant accordingly.²⁴⁹

[8] When the respondent corporation sent Mrs McCafferty [sic] a copy of the *McCafferty* decision in May 2011 it invited her to discontinue her application at that stage. They indicated that they would be prepared to agree to the withdrawal then without seeking costs. Ms Lister, however, has continued with her application.

[9] I have considered, therefore, whether I should make an award of costs against Ms Lister when having read the *McCafferty* decision she must have known that this application could not possibly succeed. I understand and appreciate that Ms Lister feels aggrieved by the process and feels that she has not been fairly treated. However, she has had all of the review and appeal rights accorded to her by law.

349. The judge took it for granted that the claimant understood the content and significance of this communication, including the decision of the Court attached to the letter as precedent. The Court's record of the claimant's legal argument was as follows:

[4] As far as the McCafferty decision is concerned she said that her reading of the law was that there was always a right of appeal from a High Court decision and that she could not accept the Accident Compensation legislation could overrule that right.

[5] I am satisfied that based on the reasoning of the Court of Appeal in *McCafferty* that there is no jurisdiction to entertain such an application. ...

350. These examples reflect findings in other studies that a misunderstanding of legal mechanisms is a major access to justice barrier. For instance, a comprehensive review of studies recorded that "A number of sources also pointed out that litigants in person may have difficulty understanding the nature of proceedings, [and] were often overwhelmed by the procedural ... demands of the courtroom".²⁵⁰

In Lister v ACC [2011] NZHC 1082, the Corporation and the Court relied on McCafferty v ACC [2004] NZAR 97; (2003) 16 PRNZ 843. This judgment cannot be located on NZLII.

See *Lister v ACC* [2011] NZHC 1082. The passage is notable for the conception of access to justice it adopts – that she has had all of the review and appeal rights accorded by law, and that this is enough to deal with her grievance.

Kim Williams *Litigants in person: a literature review* (UK Ministry of Justice, Research Summary 2/11, June 2011) at 5.

These findings are hardly surprising if it is even somewhat accurate, as one study has found, that there are "193 separate tasks that self-represented litigants needed to complete during litigation". However that is explicable, there is no doubt that serious misunderstandings about the available mechanisms of law nonetheless leave self-represented litigants vulnerable. This misunderstanding is exacerbated by the behaviour of the Corporation seeking costs.

- 351. There was a notably high level of appeals against decisions of the Accident Compensation Appeal Authority, which indicates the Authority still has a vital function to play in applying the specialist provisions under the 1972 and 1982 legislation. Some 30-40 years later, courts are still coming to terms with how those pieces of legislation are to be interpreted. The number of these appeals adds another level of complexity for complainants to deal with, but is also indicative of the often historic nature of ACC disputes.
- A major theme in the High Court judgments was how long the dispute had taken. Excluding historic cases, which necessarily have a lengthy history, there were multiple instances of the Court remarking on the length of a dispute's procedural history. In a few cases, the dispute had been through various stages of the appellate process multiple times, for example multiple review hearings, District Court hearings, or even multiple High Court hearings.²⁵² This was not explained solely by self-represented litigants attempting to re-litigate previous disputes, although this was a common feature of the disputes, recorded either as an allegation by ACC or by the judge making a finding of the same.
- As well as attempts to re-litigate, there were instances where the claimant was required to undergo the appeal and review process more than once in relation to the same dispute as a result of judges referring cases back to lower courts. In other situations, the High Court would simply make the decision itself.

Patricia Hughes "Advancing access to justice through generic solutions: the risk of perpetuating exclusion" (2013) 31 Windsor Yearbook of Access to Justice 1 at 5, cited in Laura K Abel "Evidence-Based Access to Justice" (2009) 13 University of Pennsylvania Journal of Law and Social Change 295 at 305-306.

In the Ellwood proceedings, ACC issued a decision on 11 October 1999, the first District Court appeal was: Ellwood v ACC [2002] NZACC 102, then the first leave to appeal Ellwood v ACC [2005] NZACC 59, the first High Court appeal Ellwood v ACC [2007] NZAR 205 (HC), the second ACC District Court hearing Ellwood v ACC [2011] NZACC 145, the second leave to appeal Ellwood v ACC [2012] NZACC 195, the application for special leave to appeal to the High Court Ellwood v ACC [2012] NZHC 2887. See also Roborgh v ACC HC Wellington CIV-2009-485-321, 6 July 2009 per Miller J.

There were other instances of the High Court encouraging the claimant to work with ACC and begin the claims process over again, however this is undesirable from an access to justice perspective as it leaves the question of law unresolved, and the claimant returning to the same process that they have already endured.

Subject of disputes in High Court is linked to cost

- 355. The subject matter of the disputes, while diverse, was heavily dominated by disputes about weekly compensation.²⁵³ This reflects the subjects of dispute in the District Court as discussed previously.
- 356. Experience suggests that this is because few other disputes will be financially viable: it is simply not worth the cost to bring a dispute purely about, for instance, obtaining more computer training or similar rehabilitation. The concentration of the subject of the dispute on monetary concerns indicates that the cost of the dispute resolution process is operating as an overwhelming barrier to access to justice. Cost is such a barrier that people simply do not bring disputes about rehabilitation to the High Court level.
- 357. In order to present any case about rehabilitation entitlements to the High Court, a claimant would have to be prepared to enter into a process that will last years, and pay for legal counsel and medical evidence to move from review hearing, to District Court hearing, to leave to appeal to the High Court, to special leave to the High Court, and finally to a substantive hearing. Any attempt to obtain declaratory judgment or judicial review in order to circumvent this lengthy hierarchy is prevented by s 133(5) of the Act. From a practical perspective, this means there is little incentive for ACC to settle such a case. The burden faced by claimants seeking to bring a dispute to the dispute resolution system means non-monetary disputes are seldom likely to be realistic. This means the High Court will seldom have the opportunity to consider the proper interpretation of certain provisions of the Accident Compensation Act.
- 358. Decisions whether to litigate a civil dispute (or any legal dispute) are heavily dominated by costs concerns, which means the primary dispute resolution mechanism under the Act is only feasible in relation to monetary disputes.

This not only involves the direct costs of the dispute but the actuarial cost of the claim into the future, which increases the value of the dispute and the incentives to litigate.

This strong theme about the driving force of cost is by no means unique to the ACC appeals jurisdiction. Across civil justice systems in New Zealand, peoples' perception is that costs are too high. In a recent New Zealand study, over half of those sampled "disagreed" with the statement that "the average New Zealander can afford to bring a case to court", with a further 20% "strongly disagreeing" with that claim. Even stronger findings were revealed in an annual Ministry of Justice survey in 2009, in which just under three quarters of the 1000 respondents agreed or strongly agreed with the statement that "most people cannot afford to take cases to court". As well, in the High Court filing fees alone amount to about \$6500 for a simple one-day case. And we are not alone.

In the UK, "abdication of the responsibility to cut down to 360. proportionate size the costs of litigation is the biggest impediment to access to justice."257 In Canada, cost is accepted as the key barrier to accessing civil justice. A specially constituted and ongoing investigation has been set up in response to "mounting evidence that the public cannot afford to resolve their legal problems through formal litigation processes". 258 Australia faces the problem of what one judge has called the "club sandwich class" - the vast majority of people who are not poor enough to qualify for legal aid but are not wealthy enough to afford the costs of legal representation without aid.²⁵⁹ By way of final example, the comprehensive Oxford study on the costs and funding of civil litigation consistently found around the world "a general concern amongst (potential) litigants, practising lawyers, judges governments that the costs of resolving a dispute through the courts are too high."260

Saskia Righarts and Mark Henaghan "Public perceptions of the New Zealand court system: an empirical approach to law reform" (2010) 12 Otago Law Review 329 at 336 (figures 2 and 3).

Saskia Righarts and Mark Henaghan "Public perceptions of the New Zealand court system: an empirical approach to law reform" (2010) 12 Otago Law Review 329 at 331.

Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 4-5 (see now (2014) 13 Otago Law Review 229). See too Judge Jeremy Rawkins "Access to justice – diversions ahead" [2005] New Law Journal 419 – rising court fees.

Judge Jeremy Rawkins "Access to justice – diversions ahead" [2005] New Law Journal 419 at 419. See also the Woolf Report, as summarised in A A S Zuckerman "Lord Woolf's Access to Justice: plus ça change ..." (1996) 59 Modern Law Review 773 – cost as a key problem.

The Cost of Justice: weighing the costs of fair & effective resolution to legal problems (The Canadian Forum on Civil Justice, 2012) at 3. See also an extensive bibliography at 14-23.

Justice Wayne Martin, Chief Justice of Western Australia "Access to justice" (Eminent Speaker Series, Inaugural Lecture, University of Notre Dame Australia, 26 February 2014) at 3.

Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka in "The Oxford Study on Costs and Funding of Civil Litigation" in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds) *The Costs and Funding of Civil Litigation: A comparative analysis* (Hart Publishing, Oxford and Portland, Oregon, 2010) 1 at 7.

Not only is it well known that costs are too high; some research efforts have made inroads into answering why they are so high, as well as what are the effects of high costs. Both avenues are worth briefly summarising to help put the ACC costs problem in perspective and to avoid viewing this jurisdiction in a vacuum.

- As for causes of rising cost, the simple answer is that there is no simple answer. High costs are the result of failures by various institutions. Some say the cause is that "Public funding has been allowed to wither on the vine". 261 Others say the adversarial culture of lawyers is responsible, 262 although the point has been well made that it is probably more useful to look instead to what incentives drive that culture. 263 A multitude of other causes have been suggested, including the fact that lawyers charge by reference to input costs rather than the value of the outcomes for which they are litigating; duplication arising from the structure of the profession; reduced competition and market entry due to tight market regulation of legal services; information asymmetry and others. 264
- 363. Whatever the reason(s) why costs are high, it is also important to consider research about the effects of those high costs. The most obvious effect is that access to lawyers and courts is limited for that large group of people who cannot afford legal services but who do not qualify for legal aid. And even for those who are sufficiently in need which in the case of people with disabilities is thought to be about 45 per cent²⁶⁵ legal aid cuts have been shown to have serious negative effects on access to justice.²⁶⁶

Judge Jeremy Rawkins "Access to justice – diversions ahead" [2005] New Law Journal 419 at 419.

For example see Justice Wayne Martin, Chief Justice of Western Australia "Access to justice" (Eminent Speaker Series, Inaugural Lecture, University of Notre Dame Australia, 26 February 2014) at 5 and following.

Samuel Issacharoff "Too Much Lawyering, Too Little Law" in A A S Zuckerman and Ross Cranston (eds) Reform of Civil Procedure: Essays on 'Access to Justice' (Clarendon Press, Oxford, 1995) 245 at 256; A A S Zuckerman "Lord Woolf's Access to Justice: plus ça change ..." (1996) 59 Modern Law Review 773 at 775 and following (summarising the Woolf Report).

See Justice Wayne Martin, Chief Justice of Western Australia "Access to justice" (Eminent Speaker Series, Inaugural Lecture, University of Notre Dame Australia, 26 February 2014) at 6-7.

Equal Before the Law: towards disability justice strategies (Australian Human Rights Commission, February 2014) at 12: "In Australia, 45 per cent of people with disabilities live in poverty or near poverty. This situation has worsened since the mid-1990s. Employment rates for people with disabilities have been decreasing".

See Hazel Genn "Do-it-yourself law: access to justice and the challenge of self-representation" (2013) 32 Civil Justice Quarterly 411.

364. Finally, "issues raised by costs and funding are important for litigants, intermediaries (lawyers and experts) and system providers (governments and courts)."²⁶⁷ For litigants, "the size and predictability of the costs of a dispute, and of a dispute resolution process, need to be evaluated to see whether the risks and benefits of using the process are favourable in pursuing a legal action ..." "If the costs or risk are too high, and there is no better alternative pathway, the result will be a denial of access to justice ..." "Further, the extent of any shortfall in the recoverability of costs raises similar issues." ²⁶⁸

- 365. For "intermediaries", "the costs rules govern the amount of remuneration that can be earned or expenses that can be reimbursed, and this will affect the quality and quantum of supply of such services." And for the state, "there needs to be a balance between various, partly contradictory values ... promotion of the rule of law and the importance of social and economic stability" But "the very same values require that pointless claims be suppressed and settlements be promoted, ie costs should be sufficiently high to deter frivolous or vexatious litigants and incentivise the resolution of disputes with a formal judgment." ²⁷⁰
- 366. The short point is that significant research shows that costs are too high, it begins to explain the complex causes of that state of affairs, and it comprehensively analyses why costs are critical to securing access to justice.
- 367. In the light of this broader understanding we can usefully return to consider possible effects of this emphasis on disputes that will result in monetary compensation. Firstly, the Court's primary impression of ACC claimants seeking to challenge ACC decisions is that they are "beneficiaries" seeking money from the state. While no disrespect is meant to the Court's impartiality and commitment to justice, there is an undeniable difference between presenting one's case as the right to be

Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka in "The Oxford Study on Costs and Funding of Civil Litigation" in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds) *The Costs and Funding of Civil Litigation: A comparative analysis* (Hart Publishing, Oxford and Portland, Oregon, 2010) 1 at 4.

Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

This is not the correct term for ACC claimants and is largely a result of reconceptualising a tortious approach to compensation (where a claimant is seeking what is already legally theirs from a party causing loss) as a charitable model of disability (where claimants are seeking others' resources out of charity to compensate for their own deficiencies).

compensated for wrong caused by another, and presenting a case in an attempt to get more from the state's charity than the state has decided one is entitled to receive.²⁷²

- 368. After weekly compensation, other prominent issues were independence allowance calculations and entitlement to surgery. Again, these indicate a heavy focus on financial entitlements.
- 369. The high proportion of financially-oriented disputes also means a disproportionate emphasis on financial considerations and perceived motivations for ACC litigants. In one case, while the High Court explicitly acknowledged that the dispute related to an amount of \$4,500, it found that amount of money was not worth the cost of a further dispute. It explicitly took the burden on ACC's resources into account, but did not apply the same analysis to the burden on the claimant. Instead, the fact that the figure was so low in relative terms (to the High Court judge and to ACC) mean that a further appeal was not justified. It could have equally been reasoned, however, that given ACC's superior resources, and the claimant's own relative poverty, that an appeal was amply justified because of its relative importance to the vulnerable party.
- One reason for the high number of disputes with a financial focus may also be the Court's approach to the definition of decision. The Court's presently restrictive interpretation of the word "decision" means that claimants only obtain access to the review process once a decision has been made suspending their entitlements. On the whole, ²⁷³ claimants have no ability to review the process leading up to that suspension, even where the claimant has reason to believe its likely outcome is obvious.

Cases where ACC was applicant or appellant

371. ACC was the applicant or appellant to the High Court in 10 judgments we coded. Of this sample:

a. One judgment was for special leave;

See *Rijlaarsdam v ACC* [2009] NZACC 149 at [63] and *Deme v ACC* [2006] NZACC 290 at [39] and [41] for two prominent examples of the Court criticising a claimant's conduct in view of their obligation to the generosity of the taxpayer.

The litigation in Farquhar appears to be the exception: Farquhar v ACC [2012] NZHC 1038 (special leave) and Farquhar v ACC [2012] NZHC 2703 (hearing of appeal).

b. Seven judgments dealt with a substantive appeal under the ACC Act; and

- c. Two judgments dealt with ACC's application for leave to appeal to the Court of Appeal.
- The low number of special leave applications is consistent with our District Court figures, where ACC almost always receives leave of the District Court to appeal a decision and seldom requires the High Court's special leave.
- All seven of the substantive High Court judgments or their Court of Appeal incarnations are commonly cited as precedents in this jurisdiction. This is consistent with the identified advantages of litigating for precedents that are available to the repeat player.²⁷⁴

High Court applications brought by claimants or other

- 374. Apart from judgments already addressed, this leaves 83 judgments where a claimant was identified as the applicant/appellant.
- 375. Only one of these 83 was brought by a company challenging its levy classification under the Act.²⁷⁵ Given the high numbers of businesses who pay levies, this may also indicate an access to justice problem for business owners in dealing with ACC.
- 376. 52 of the 83 applications brought by the claimant were dismissed. Only 19 were successful, with one further dispute being identified as allowed in part. Of the 20 that were successful (in whole or in part), the nature of the dispute was as follows:
 - a. Six applications related to an application for special leave;
 - b. Ten applications were for a substantive hearing of an appeal under the Act against a District Court decision; and
 - c. Three were applications for leave to appeal to the Court of Appeal.

Marc Galanter "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law and Society Review 1 at 3 and 14.

²⁷⁵ On the Go (New Zealand) Ltd v ACC [2011] NZHC 1136.

One of the above was not identified as being either special leave or a substantive appeal: it was allowed by consent in the High Court where ACC accepted the District Court had overlooked a report.²⁷⁶ The judgment does not identify its jurisdiction, although it is probably properly classified as being a decision on special leave and a substantive hearing of the appeal in one judgment.

- One of the judgments quashed the District Court's reliance on a purported "soldiering on" principle, which was found to have no basis in law. It is not clear whether the judge had applied such a principle in other cases and in effect, there may be New Zealanders without entitlements whose appeal was decided on an error of law. It shows the importance of access to appellate courts. The appellant was represented by his son on the special leave application and the son's submissions were specifically stated to be unhelpful by the Judge: it was fortunate leave was granted at all and that was only due to the Judge's efforts.
- Another case quashed the District Court's purported decision to order a stay of the payment of entitlements pursuant to a deemed review decision under s 146 of the Act. The District Court judge completely failed to identify or even consider his jurisdiction to make such an order. That order was quashed by the High Court and is again an example of the need for regular appellate reviews of the District Court's approach to the statute by the High Court.

Representation in the High Court

Appeal to the High Court is by question of law only. The low numbers of High Court decisions mean that each one of them creates binding precedent capable of radically reforming the practice and application of the law in the District Court below and in review hearings. These factors mean that it is vital to this jurisdiction that any legal matter is fully argued in view of all relevant law and policy. The decision in *Martin*²⁷⁷ is a good example of the sea-change that can be brought about by High Court decisions at all levels of the appeals process.

Young v ACC [2014] NZHC 2972. The claimant represented himself at all stages prior to this appeal, but apparently obtained representation for the purposes of the High Court appeal. The appeal was heard on the papers and remitted to the District Court for rehearing. The Judge specifically took into account the fact that Mr Young was not at "fault".

²⁷⁷ Martin v ACC [2009] NZHC 437.

381. Yet in a quarter of all High Court judgments issued since 2009 the claimant had no legal representation whatsoever.

- When these unrepresented appeals are broken down according to the Court's jurisdiction:
 - a. 6 of the 34 judgments on substantive appeals were decided where the claimant was unrepresented, and three of these related to the *O'Neill* dispute; and
 - b. 10 of 31 total applications for special leave were decided where the claimant was unrepresented.
- These findings particularly strongly mirror a common conclusion that too much self-representation begins to challenge the very notion of an adversarial system. It does so partly by putting judges in a dilemma: they have to be impartial, but often find themselves having to assist the self-represented party to ensure a fair hearing. As it has been recently put in the Australian civil justice context, "civil justice processes have traditionally been structured with an expectation that litigants will have had the benefit of legal advice and that they will have legal representation. This can no longer be taken for granted as the numbers of self-represented litigants have increased."
- This realisation has led some to suggest stronger or weaker versions of the somewhat "radical proposal of changing the nature of court proceedings so that litigants would not be disadvantaged by the lack of legal representation. Central to this proposal is the idea that the court should take an active role in the process so as to ensure that justice is done whether or not a litigant is legally represented."²⁸⁰

Helen Thompson and Anna Chalton "Equal Justice Project" (paper presented to the Equal Justice Project Outreach Symposium "Access to justice: is it in the budget?", 6 October 2014) at 16; Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 10 (see now (2014) 13 Otago Law Review 229); Micah B Rankin "Access to justice and the institutional limits of independent courts" (2012) 30 Windsor Yearbook of Access to Justice 101.

Jeff Giddings and others "Helping those who help themselves: Evaluating QPILCH's Self

Representation Service" (2015) 24 Journal of Judicial Administration 135 at 137.

Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33

Civil Justice Quarterly 355 at 357. See also at 357-361. See others' suggestions for change, including Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 13 (see now (2014) 13 Otago Law Review 229); Les Arthur "Reform of the civil justice system: the new meaning of justice and the mitigation of adversarial litigation culture" (2012) 19

Waikato Law Review 160; Neil Andrews "The Adversarial Principle: Fairness and Efficiency:

385. But the more sophisticated calls for change themselves recognise "there is a limit" to their suggestion that "judicial assistance can redress the disadvantage suffered by litigants in person in an adversarial process". The advantages of an adversarial system – it provides a rational, objective and even-handed dispute resolution process – can only be enjoyed so long as the process "distanc[es] the decision maker from the investigatory process and thereby prevent[s] the judge from taking on the task of presenting the parties' cases."

386. In the ACC context, the data in this part of our study begins to show that something needs to change; the wider research suggests that, while caution is needed, part of the solution may well come from softening features of the adversarial system. At the very least, given the long history of self-representation, it cannot be appropriate to continue taking the precepts of the adversarial system as given or for granted in this jurisdiction and in any reform.

Mention of review decision

- 387. Two thirds of the judgments coded from the High Court mentioned the review decision.
- 388. It was generally described as part of the history of the dispute with some indication of outcome. Beyond that, it was described in the following ways or for the following reasons:
 - a. Because the conduct of the reviewer or legal requirements of the review or a review application was directly in issue;
 - b. To justify a decision to decline a claimant's application because their claims had already been heard by the reviewer and the District Court;

Reflections on the Recommendations of the Woolf Report' 170–183 in A A S Zuckerman and Ross Cranston (eds) Reform of Civil Procedure: Essays on 'Access to Justice' (Clarendon Press, Oxford, 1995) 170.

Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 Civil Justice Quarterly 355 at 372.

Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 Civil Justice Quarterly 355 at 372; Hazel Genn "Do-it-yourself law: access to justice and the challenge of self-representation" (2013) 32 Civil Justice Quarterly 411 at 435 and following.

c. By directly relying on oral evidence given at the review hearing, often without any apparent critical analysis of proper procedure at the review hearing; and/or

- d. To help determine whether there was jurisdiction for a review and for the appeal process as a matter of law.
- 389. In our analysis of District Court appeals, we outlined concerns with any sort of deferential treatment of review decisions. To the extent the High Court treated them in a similar manner, the concerns apply in this context with equal force. The additional kinds of treatment, not really seen in the District Court context, mainly those at (b) and (d) above, raise similar access to justice concerns. From an applicant's perspective, there is little point seeking to have the appeal heard by a High Court judge when the High Court judge will readily defer to the legitimacy of the reviewer, whose analysis is substantially less rigorous and qualified than that of a High Court judge. The theme we observed and record at (b) appears to reveal a judicial view that there is such a thing as too much access to justice, while (d) appears to delegate the core function of having an appeal to the High Court on a question of law. Both are concerning for both the "access" and "justice" limbs of access to justice.

Leave of the High Court to appeal to the Court of Appeal

- 390. Unlike the District Court, leave to appeal to the Court of Appeal against the High Court is heard by the same judge who heard the substantive High Court appeal.²⁸³
- 391. Between 2009 and 2014, there were 11 judgments on leave to appeal against District Court decisions (and two against Appeal Authority decisions). Of the 11, ACC was the appellant in one and leave was granted, and claimants appealed 10 and were successful in three appeals. These figures did not include claimants' attempts to appeal special leave decisions of the High Court to the Court of Appeal, of which there were five examples.
- Many of the decisions where leave to appeal was granted did not appear to have formal judgments. That is to say no judgments were available on either Westlaw's "briefcase" service or on NZLII. There appears to

This approach was recently confirmed by the Supreme Court in Geary v ACC [2015] NZSC 12.

be a practice of a memorandum being issued and then the appeal filed in the Court of Appeal. This is a barrier to access to justice as it is not clear how the law is being applied and it makes it more difficult for selfrepresented litigants to understand. It is also a benefit that only appears to be available to represented parties. With respect to the Court, this practice mitigates against legislative and judicial policies of transparency.

393. There is a stark difference between the overall number of appeals being granted leave to the Court of Appeal compared with the number of appeals given leave to appeal to the High Court. There were 42 successful applications for leave to the High Court in total, of which 37 were granted by the District Court and 5 by the High Court. By comparison, only 11 applications to appeal to the Court of Appeal were successful. This is the case even though the statutory tests in ss 162 and 163 of the Act governing leave to appeal are materially identical. The figures are lower still when considering the 192 cases where the leave of the District Court was sought and the many examples in our random sample of District Court appeals where the judges recorded that questions of law arose. It also makes it difficult to observe if there is a theme of settling of appeals once leave has been granted in the way that was possible with the District Court.

COURT OF APPEAL

Special leave to appeal to the Court of Appeal

- Over the 6 years from 2009 to 2014, only claimants sought special leave of the Court of Appeal. Seven judgments were issued on whether or not to grant special leave to appeal and it was granted only once. In that one where special leave was granted, the substantive appeal was ultimately dismissed.
- 395. Three of these unsuccessful applications were by non-lawyers. Four were by lawyers and one of those four was successful. Costs were awarded in favour of ACC against two of the self-represented applicants.
- 396. It clearly emerged that this second tier leave to appeal mechanism has enjoyed only limited use in the past six years.

Decisions on other related applications

397. Leave to intervene was sought in two cases, successfully by the Medical Protection Society Ltd represented by Queens Counsel, and unsuccessfully by Acclaim Otago Inc, represented by one of the authors. The Court's judgment in the Medical Protection Society's application was recalled and reissued to grant a suppression order in relation to the appellant. The Attorney-General also intervened in one appeal and was represented by the Solicitor-General at the time.²⁸⁴

398. Self-represented litigants unsuccessfully brought additional applications. One sought to recall the Court's decision to decline special leave and another sought special leave of the Court of Appeal against the High Court's decision to decline special leave against the District Court. Costs were awarded against both applicants. The same points made earlier about the widespread confusion by self-represented litigants apply with equal force here.

Substantive decisions of the Court of Appeal

399. During the study period, there were 11 substantive decisions from the Court of Appeal, but there were no substantive appeals against questions of law under s 163 of the Act for 2014 or 2015:

i. 2009 - 3 decisions

ii. 2010 - 2 decisions

iii. 2011 - 0 decisions

iv. 2012 - 3 decisions

v. 2013 - 3 decisions

400. The issues in those appeals involved the following:

- i. Cover for mental injury, including one which was also treatment injury (4)
- ii. Cover for treatment injury, including one relating to mental injury (3)
- iii. Interest on backdated weekly compensation (2)
- iv. Vocational independence and the procedures that the District Court should follow in relation to exercising discretion (1)
- v. Deemed review decisions (1)

There was no available decision on leave to intervene although it was clearly granted as recorded in KSB v ACC [2012] NZCA 82, (2012) 25 CRNZ 599, [2012] NZAR 578 at [5].

vi. Attendant care (1)

401. There are notable absences in relation to causation tests, cover for accidental injury, cover for work-related gradual process, disease or infection, entitlements to independence allowance or lump sum compensation for impairment – all key components of the ACC scheme. Omissions about entitlements included: contentious areas relating to weekly compensation, tests for incapacity, dates of injury; entitlement to treatment including surgery, physiotherapy; and procedures relating to administration of justice (other than the approach of the District Court to ACC's exercise of discretion).

Representation

- 402. ACC was represented by lawyers in all appeals. Their representatives were:
 - i. (ACC) Barrister D, QC (4)
 - ii. Barrister E, QC (1)
 - iii. Law Firm A (3 Lawyer 1 (2), Lawyer 2(1))
 - iv. Barrister F (1)
- 403. Claimants were represented by lawyers in nearly all appeals at the Court of Appeal level. Their representatives were:
 - i. Law Firm A (4)
 - ii. (Claimant) Barrister D (3)
 - iii. Law Firm B (1)
 - iv. Barrister E (1)

Gender

404. More appellants in the Court of Appeal were female (6) than male (5). All females were represented by lawyers. Four males were represented by lawyers and one was self-represented. Although a small number which limits what can be concluded, this is consistent with research that shows females being more likely to obtain representation²⁸⁵ and the data from this study which shows representation has a significant impact on appeals from the District Court to the High Court and Court of Appeal.

²⁸⁵ Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at xvii.

PART IV

Representation

REPRESENTATION

Representation

Overview

405. Representation merits consideration in its own chapter because it was a major theme arising from our analysis of the coded judgments – not only the more than 200 District Court decisions, but also the complete set of all other decisions on appeal from the District Court and above. The ACC appeal context also provides good material with which to consider the effects of representation, because ACC was represented by counsel in every single case we read, while representation for the claimant varied significantly between each point that we measured.

- 406. It is also sensible to preface the following close description of the major themes we observed with the not insignificant body of research on the relevance of representation on access to justice. Earlier in this report we identified the phenomenon that self-representation is on the rise in New Zealand and overseas. But even earlier, in 1979, it was optimistically suggested that the high rate of self-representation, or representation by a friend, accountant or neighbour, was a praiseworthy feature of the ACC dispute resolution system.²⁸⁶
- 407. Today, years later, there is specific research on how those who represent themselves perform. This is a very important measure after all, if self-represented litigants enjoy success rates on par with represented claimants, the claim that they are a "problem" becomes at least a little harder to defend.
- 408. Some choose to argue from intuition or experience that self-represented litigants do worse because "fundamental aspects of our system of justice are build upon the assumption that parties will be legally represented." Accordingly they face what have been termed efficiency and justice deficits. Judges have written that while "Some manage it commendably. ... Others do not. They run the risk of being denied justice because they do not have the skills or the legal knowledge to properly present their claims." A good justification for these sorts

Geoffrey Palmer "Compensation for incapacity: a study of law and social change in New Zealand and Australia" (Oxford University Press, Wellington, 1979) at 401.

Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 8 (see now (2014) 13 Otago Law Review 229).

Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 Civil Justice Quarterly 355 at 355 and following.

²⁸⁹ Judge Jeremy Rawkins "Access to justice – diversions ahead" [2005] New Law Journal 419 at 419.

of claims is to point out that self-represented "parties with both strong and weak cases will seek to vindicate or defend claims without the benefit of advice or representation".²⁹⁰

- 409. Others have preferred to isolate particular factors which influence success rates for self-represented litigants. Claim complexity, for instance, has been identified as an important factor: "As claims become more complex, specialised legal and factual knowledge becomes more important for plaintiffs. For example, when liability, causation, and damages are obvious ... self-representation is more practicable than when one or more elements are difficult to gauge and likely to be disputed (as is usually the case in medical malpractice cases). When claims are complex, simply knowing how to develop and package them for consideration ... is valuable. Thus, it is easier for legal services to "add value" to complex cases than to simple ones."291 There are also suggestions that success depends on the kind of self-represented litigant the court is faced with. The tentative suggestion appears to be that "one-off" genuine litigants fare much better than "vexatious or querulous" self-represented litigants. 292
- Others still have taken a birds eye view, with a leading literature review concluding that "Most evidence ... including some high quality studies, indicated that case outcomes were adversely affected by lack of representation ... This was across a wide range of case types. ... [It] found that attorneys obtain significantly better results in tried cases than unrepresented litigants, after controlling for the amount at stake, complexity and party characteristics. ... [Studies] found that representation significantly and independently increased the probability that a case would succeed in tribunal cases."²⁹³
- 411. Finally, there may be other useful measures of whether self-representation is a problem. One is resolution rates. Under this rubric, self-represented litigants do fairly badly: "About half of those ... who dealt with their problem without advice or assistance eventually abandoned the matter. This is a relatively high figure that demonstrates

Hazel Genn "Do-it-yourself law: access to justice and the challenge of self-representation" (2013) 32 Civil Justice Quarterly 411 at 418.

Charles Silver and David A Hyman "Access to justice in a world without lawyers: evidence from Texas bodily injury claims" (2010) 37 Fordham Urban Law Journal 357 at 368-70.

Hazel Genn "Do-it-yourself law: access to justice and the challenge of self-representation" (2013) 32 Civil Justice Quarterly 411 at 422-432. See too Kim Williams *Litigants in person: a literature review* (UK Ministry of Justice, Research Summary 2/11, June 2011) at 5.

²⁹³ Kim Williams *Litigants in person: a literature review* (UK Ministry of Justice, Research Summary 2/11, June 2011) at 6.

the difficulty of achieving a resolution for many types of problem and the need for advice and assistance in enforcing rights and defending claims."²⁹⁴ Another measure, already explained above, could be the "false economy" measure – at what cost to other participants in the system does self-representation come? A further possible measure is the effects on health of self representing, under which it has been found that: "it takes a toll. About half of those who had failed to resolve their problem after taking some action ... reported that they had found the whole business stressful, and one in five reported that their health had suffered."²⁹⁵

- 412. Our research was broadly consistent with this united voice from the research: however it is measured, self-representation does not lead to good outcomes, particularly relating to success rates as against the rates for those who enjoy representation of some kind.
- 413. What follows is a close analysis of our findings on representation.

DISTRICT COURT SUBSTANTIVE APPEALS

ACC's representatives

- 414. ACC was represented by a lawyer in every appeal that was analysed.
- 415. At the District Court level, ACC's representation was dominated by four firms (figures in 5% brackets):
 - a. Law Firm A (a quarter of sample)
 - b. Law Firm B (20% of sample)
 - c. Law Firm C (15% of sample)
 - d. Barrister G (5%)
 - e. Law Firm H (significant in later years)
 - f. Law Firm I (significant in later years)
- 416. There was less range in leave to appeal applications where the three major law firms undertook all of the work (see below for detail).

Hazel Genn Paths to Justice (Hart Publishing, Portland, Oregon, 1999) at 250-251.

²⁹⁵ Hazel Genn *Paths to Justice* (Hart Publishing, Portland, Oregon, 1999) at 251.

Claimants' representatives

417. Lawyers represented claimants in less than 40% of our random sample of appeals in the District Court.

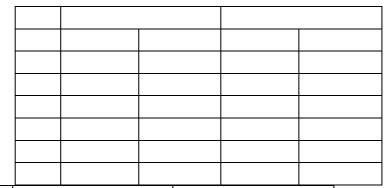
- 418. The type of representation appeared have a significant correlation with the outcome. Of the sample we coded, lawyers were successful in half of their appeals, self-represented claimants in 30% and advocates in 20%.
- When compared to appellate courts, there was significant variation of lawyers. They were in order of number of appearances and the percentage of the overall total:
 - a. Law Firm A (12.5%)
 - b. Law Firm C (7.5%)
 - c. Law Firm B (5%)
 - d. Law Firm F (5%)
- 420. There were also advocates who were involved in a significant number of appeals:
 - a. Advocate A (5%)
 - b. Advocate B (5%)

APPEALS TO THE HIGH COURT AND COURT OF APPEAL ON QUESTIONS OF LAW

Leave of the District Court to appeal to the High Court

- 421. The first step in appeals to the appellate courts is to seek the leave of the District Court to appeal to the High Court on questions of law. By convention (as opposed to any other reason we have been able to identify), this application is decided on the papers without an oral hearing. In the early part of the sample, it was recorded this was done by consent, however in the later part, this approach was not recorded and judgments on the papers were issued.
- 422. In the six years from 2009 to 2014, a total of 190 judgments on leave to appeal were issued by the District Court, all of which we coded. There was a significant increase in leave to appeal applications during this period.

Figure 2 – Leave to Appeal decisions by year 2009-2014



	Claimant Appeals		ACC Appeals	
Year	decisions	leave	decisions	leave
		granted		granted
2009	14	1	0	0
2010	25	4	1	1
2011	37	8	1	0
2012	46	6	1	1
2013	33	2	3	2
2014	30	11	0	0

ACC's representation

- 423. ACC was the respondent in 186 leave to appeal applications. 17 of its lawyers were involved in two or more leave to appeal applications.
- 424. Law Firms A, B and C represented ACC in most appeals (just over 2/3) where the name of ACC's representative was recorded.
- ACC was the appellant in only six appeals and leave was granted in four of those. When ACC was the appellant, the claimant was represented by an advocate, a lawyer where the application was dismissed, and by a lawyer in one case where the application was granted leave to appeal. There were ACC appeals where representation was unknown, leave was granted in one and not in the other.
- 426. ACC appointed a Queens Counsel (Barrister A, QC) in three leave to appeal applications, and were unsuccessful in all three, one where ACC was the appellant was dismissed and in two, ACC were opposing leave had leave was granted.

Claimants' representation

Applications represented by non-lawyers

427. In most cases claimants who applied for leave to appeal to the High Court on a question of law were represented by non-lawyers (106/186 where the representation status was known or inferred).

428. Most leave applications are brought by self-represented litigants and they almost never succeed (only two were successful). Advocates bring comparatively few applications when compared to the District Court appeals brought by advocates but they too enjoy limited success (only 4 out of 12 were successful).

Applications by lawyers

- 429. Only four law practices did more than one leave to appeal application on behalf of a claimant:
 - a. Law Firm A (3 lawyers)
 - b. Law Firm B (2 lawyers)
 - c. Barrister D (1 lawyer)
 - d. Law Firm C.²⁹⁶
- 430. There are now three experienced law practices (six lawyers) that take leave to appeal applications in New Zealand. Between them, these three practices did approximately three quarters of the claimants' applications for leave to appeal where lawyers' representation was recorded resulting in half of the successful appeals. Other "one-off" lawyers had some success obtaining leave to appeal. This can be compared with the 17 lawyers who did more than two appeals for ACC (126 of 133 cases where representation was recorded or inferred).

Applications for special leave of the High Court for the High Court to hear the question of law

431. If the application to the District Court for leave to appeal was unsuccessful, parties can seek special leave of the High Court.

One law firm took three applications and no longer does these.

Applications brought by ACC

432. ACC sought special leave of the High Court on both the appeals where the District Court declined leave. They were successful in both.

Applications brought by claimant

433. Claimants sought special leave in 25 cases. They were successful in 5, only with a lawyer.

Substantive decisions of the High Court on an appeal against the District Court

434. If the application to the District Court for leave to appeal is unsuccessful, parties can seek special leave of the High Court.

Implications of representation

- 435. Our data is strongly consistent with research that has established self-represented litigants have lower rates of success.
- Acknowledging that there is a difference between what is argued in court and what is recorded in the judgments, our data shows lawyers for ACC make regular appearances. The main six ACC representatives were involved in three to five times the number of cases as claimants' representatives. This experience is likely to give them a better knowledge of the courts, the personalities involved, the developing jurisprudence and the arguments that are likely to be successful.

The market for claimant representatives

437. The market for legal services for claimants is dysfunctional. Previous research by Acclaim Otago for presentation of a Shadow report to the United Nations Committee on the Rights of Persons with Disabilities concluded that the market for legal services for injured New Zealanders had largely failed. ²⁹⁷

Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, at p 6 available from:

http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf; and

438. Supply is low and this is one of the factors that has resulted in the growth of advocacy. There have been no new law firms (as opposed to individual lawyers) enter into the market for legal services in the last decade.²⁹⁸ The two advocacy groups that reached the 5% threshold volume are both run as charitable trusts.

Costs awards by the Court

- 439. Costs were awarded by the District Court in 20% of appeals in our random sample. The amounts awarded in this jurisdiction were very low. They ranged from \$750 to \$3000. The higher figure had increased over time from \$2000 to \$2500, to \$3000.
- Disbursements were awarded in 15% of cases in our random District Court sample and in only one case in the sample did the Court award costs specifically for medical evidence obtained by the claimant.
- 441. Perhaps it suffices to simply point out that costs have been identified as a problem in New Zealand, as part of a global examination of costs. In particular that survey pointed out policymakers themselves readily admitted in 2002 that "There is no systematic basis for the existing fee structure in civil courts. Some fees are at or near full cost recovery, while others are only token in nature." What is more, those same policymakers accepted that this state of affairs "results in inequities between users, as some are likely to pay a higher proportion of the actual cost of processing their case than others." Of course, it also results in many people not accessing justice in the first place.

Legal aid

442. Legal aid is not effective in increasing the market for legal services.

Acclaim Otago Inc, "The Cost of Paradigm Shift: access to justice for people with disabilities caused by personal injury in New Zealand: a shadow report to the United Nations committee on the convention on the rights of persons with disabilities to be considered at the 12th session", 24 July 2014 available from:

http://acclaimotago.org/wp-content/uploads/2014/08/Acclaim-NZ-Shadow-Report-for-UN.pdf

- There has been one Barrister enter the market who did not meet the 5% threshold, and several advocates.
- Kim Economides and Graham Taylor "New Zealand" in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds) *The Costs and Funding of Civil Litigation: A comparative analysis* (Hart Publishing, Oxford and Portland, Oregon, 2010) 431 at 451 and at fn 65, citing the Ministry of Justice *Equitable Fees in Civil Courts October 2002 at* 1.2.1.

300 Ibid.

Although it was increased from a capped rate of around \$1,000 to a capped rate of around \$1,500, it does not go near the actual cost of representation. There is a fixed amount under legal aid for medical evidence and this is also well under the market rate for medical evidence.

- 443. Official figures provided to Cabinet show that in 2012/2013 there were 117 legal aid applications for District Court appeals, of which 91 were approved. It is likely that this figure has dropped significantly since 2012/2013 following the introduction of fixed fees³⁰¹ and the effect that this had on the market for legal services. The Ministry acknowledged the small number of Legal Aid providers in this jurisdiction and noted that setting these low rates would further limit the number of Legal Aid providers who do this work. Discussions with practitioners suggest there are concerns about this system with a resulting a reduction in numbers of:
 - a. applications,
 - b. law firms who offer legal aid, and
 - c. the number of new cases each firm will take on.
- 444. In this legal aid environment, our communities are unfortunately placed to suffer the same problem identified in Australia and the United Kingdom, as already explained above: a vast majority of people who are unable to qualify for increasingly miserly legal aid, but are not wealthy enough to access legal services without that aid.

Private fee paying clients

Our survey data shows that by the time injured people challenge ACC's decision by way of appeal, they are nearly always unable to engage a lawyer on a private retainer arrangement. Previous studies undertaken by Acclaim Otago showed that the 20% reduction in income whilst in receipt of weekly compensation quickly erodes any savings.

New fee framework for civil (ACC) Legal Aid providers, Ministry of Justice, April 2012. The fixed fees for legal representation were \$980 for a review hearing and \$810 for an appeal (\$1080 if the lawyer was not involved in the review hearing). This was increased in 2014 announced by the Government at the United Nations during the first examination of New Zealand's compliance with the Convention on the Rights of Persons with Disabilities.

The market for ACC representatives

There is a well-developed market for representation for ACC and there is indication that new medico-legal firms and existing corporate firms are seeking to secure retainers with ACC. Despite these new entries, the market to represent ACC in disputes does not appear to be particularly open to competition.

- During the study period, there were two entries into the market for legal services representing ACC: Law Firm H and Law Firm I. This market has grown from \$500,000 in 1995.
- 448. ACC's representatives are paid from ACC's publicly collected funds regardless of the outcome of the appeal. How they are paid is unknown.

PART V

The Way Forward

IMPLICATIONS

Implications

- There is a proposal of constitutional and national significance to implement changes to the way accident compensation appeals are dealt with. The current proposal measures only two factors: time and money. Tellingly, official information shows strong input by the Ministry of Business, Innovation and Employment and official information from the Ministry of Justice speaks of "justice services", as some kind of transferrable alienable commodity. Our study shows this is the wrong approach. It is an inaccurate and artificial way of describing the dispute resolution system.
- 450. The purpose of this study was to provide a better understanding of the problems contributing to delay and cost to allow the relevant policy decisions to be made with that fuller understanding.
- 451. To that end, the previous chapters of this report examined what we identified are the major access to justice barriers in the ACC dispute resolution process. Instead of summarising those findings again, this chapter draws general implications from that analysis.
- 452. The main conclusion we draw from our interpretation of the data is that the twin problems of cost and delay are better understood as symptoms of a deeper access to justice problem in this jurisdiction barriers about the law, about evidence, about being heard, and about representation. A closely related implication is that any solution needs to address these underlying problems if reform is to be successful and sustainable. For those reasons, this chapter reconsiders delay and cost in the jurisdiction in light of other important factors that appear to have been entirely omitted from previous analysis by the relevant ministry officials.
- 453. We then provide a high-level account of ACC as an institution that emerged from the coded cases. We suggest these high-level views of ACC need to be taken into account by all stakeholders in the system before making any policy or legislative decisions.

The access to justice problem

Factors that have been considered to date

454. Two symptoms of the problems have been emphasised to date, delay and cost. They have been wrongly identified as causes of the access to justice problem. Rather, they are the effects.

Delay

455. There are undoubtedly delay problems which must be addressed. Previous claims from officials were that delay was caused entirely by claimants and their representatives filing submissions late. There has unfortunately been no evidence produced to justify that assertion prior to this report's attempt to assess that claim. The data from this research shows that appeals brought by ACC³⁰³ took significantly longer than those brought by claimants, putting the Ministry's claims in doubt and suggesting that other factors are at play.

(a) Length of delay

- 456. There are unacceptable levels of delay in accessing justice that is not accounted for solely by reference to claimants filing submissions. A typical case can anticipate long delays for example.
 - a. ACC's decision to District Court's decision 2 years
 - b. District Court's decision to leave to appeal 18 months
 - c. Leave to appeal to substantive High Court decision 1 year
 - d. High Court substantive decision to Court of Appeal substantive decision 1 year.
 - (b) Cause of delay

Background

457. There was a significant increase in the number of reviews³⁰⁴ and subsequent appeals³⁰⁵ following the "tightening up"³⁰⁶ of ACC in 2009.

Official Information Act responses dated August 2014 and May 2015; Regulatory Impact Statement dated 25 June 2014.

Even though there were comparatively few of these appeals.

Around ten thousand disputes with ACC were brought in 2010, having increased by 64 per cent in two years (Dispute Resolution Services Limited Annual Report 2010, p 17).

⁸⁹² appeals were lodged in the financial year 2010/2011, following review decisions in the year 2010/2011 of ACC decisions in 2009 and 2010. By contrast only 239 decisions were issued by the District Court in 2010 (ACC District Court Registry and ACC Appeals Case load data sheet dated 25 June 2014), released under the Official Information Act.

For example the number of elective surgeries declined by ACC more than doubled between 2007/08 and 2009/10 (Martin Johnston "ACC admits hardline too tough" New Zealand Herald, 14 May 2011) and the number of long-term claimants was reduced from 11,000 to 8,000 (Adam

But there are no official records to show the effect on the dispute resolution process was anticipated by the stakeholders in the disputes resolution process or that extra judicial resources were allocated to deal with nearly four times as many appeals being lodged than were being decided by the Court.

Delay caused by access to legal services for claimants

- 458. The market for legal services has failed in this jurisdiction. There is unmet legal need. Previous research has shown that the market for expert legal services has failed. Most respondents to our survey thought ACC's decision was wrong and wanted a representative to challenge ACC's decision, but could not.³⁰⁷
- 459. In this study, the effect of this is most visible in appeals from the District Court to the High Court and Court of Appeal. Only four legal practices, including one barrister, represented claimants in more than one application for leave to appeal to the High Court between 2009 and 2014. One of these practices no longer offers these services. Official data acknowledges the state of the market for legal services. Concerns were raised in 2012 about the impact of fixed fees on the already very low number of lawyers who did ACC legal aid.³⁰⁸
- A main reason for the failure is likely to be injured peoples' inability to pay for legal services. The available data shows that, even as a best case scenario receiving weekly compensation, by the time people are attempting to appeal to the courts they have already been without 20% of their income for a significant period. This often can mean that any savings have been exhausted and assets liquidated. Legal aid is not an effective way to get access to the appeal process, as the amounts are ineffectively low when compared to the cost. 309

UNCRPD-Aug-2014.pdf>.

Bennett "Workers and bosses lose out to motorists in ACC levy cuts" New Zealand Herald, 6 August 2014).

See Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, at p 6 available from: <a href="http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-white-data-for-

Ministry of Justice "New fees framework for civil (ACC) legal aid providers: Summary of submissions, response and final decisions" April 2012 at p 11.

See Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, at p 6 available from: http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf.

- 461. There is also great uncertainty caused because of ACC's ability to command more medical evidence, including "Academic Review Boards" and "Clinical Advisory Panels", and its ability to hire even higher quality legal representation such as Queens Counsel, and including an ability to make procedural objections at the appellate court level.
- As the need and consequent demand for legal services increased, no significant providers of legal services entered the market for providing extra legal services for claimants. A consequence of this failure is that rather than claimants' representatives deliberately delaying filing submissions, there is significant extra demand on those few who do provide services to claimants. This demand has taken several years to work though and resulted in providers refusing new clients due to excessive work pressures.

Delays in obtaining expert medical evidence

- 463. Claimants' failure (or inability) to bring competing evidence to properly address the issue in dispute was a very significant theme from the research. There are only a small number of specialists providing expert medical opinions to claimants and/or their representatives. This often leads to pressure on these providers and leads to delay.
- As claimants generally cannot afford medical evidence at the market rate, medical professionals must fit this work in amongst their regular practice and this leads to further problems with availability. This exacerbates injured persons' experiences as being objects of charity, according to a charitable model of disability, and is inconsistent with a human rights based framework for disability.
- 465. Combining responses from ACC's experts to claimants' medical expert opinion evidence, and the right of claimants to reply to ACC's experts, the process of obtaining medical evidence can go on for upwards of 12 months. This is in addition to the often overwhelmingly large historical files that some disputes can accumulate.

Delay caused by lack of judicial resources

466. A significant reason for the delay may be the availability of judicial resources. As the Chief District Court Judge noted in her letter to the

Minister of Justice,³¹⁰ the backlog of appeals could be resolved by the appointment of one additional full-time judge.

- Ministry officials have suggested they have no control over how the District Court assigns its judicial officers and therefore a tribunal is required. This ignores the reality that the Chief District Court Judge has expressly set out, when she was consulted for that very reason, that the solution is to appoint another District Court judge with an ACC warrant. It is difficult to see any constitutional objection to a suggestion by a member of the judiciary that more judges be appointed.
- 468. The impasse appears to be the cost of appointing a full-time judge. This was one of the factors against solving the problem in this manner set out in the regulatory impact statement.
- 469. The impact of the lack of judicial resources stands out from data recently provided under the Official Information Act.³¹¹ Between 2008/09 and 2012/13 there were 1,210 more appeals lodged in the District Court Registry than were disposed of. What is also clear is that this trend has been reversed by both falling numbers of appeals being lodged and hard work at proactive case management with the result that the number of appeals on hand was nearly halved in the 18 months from prior to February 2015.³¹²
- 470. If the current trend of more appeals being disposed of than being lodged continues, then by the end of 2015/2016, there will be no more problems with delay, except the delay caused by the failure of the market for legal services and medical evidence, 313 the blame for which can be laid directly at the feet of the Ministry of Justice and ACC.

Letter in response to consultation by the Ministry of Justice with Chief District Court Judge Jan-Marie Doogue, released under the Official Information Act 1982 in August 2014 to Acclaim Otago.

ACC District Court Registry and ACC Appeals Case load data sheet dated 25 June 2014, released under the Official Information Act, May 2015.

Aide Memoire to Minister of Justice on the ACC Appeal Tribunal dated 17 February 2015, released under the Official Information Act, May 2015.

The Regulatory Impact Statement was issued on 25 June 2014 and did not have the benefit of this data. It wrongly claimed that the length of delays would continue to climb and would have nearly doubled by 2017/2018 to over 1100 days (RIS 25 June 2014, at paragraphs 11-14). It also compared ACC appeals with the Social Security Appeal Authority, which does not consider the same causations tests and therefore does not require the same expert evidence in every case.

Caseload Data from District Court Net **Appeals Appeals Appeals** change³¹⁴ lodged disposed on hand 2004/05 626 827 649 23 2005/06 575 613 751 - 38 2006/07 481 547 673 - 66 2007/08 471 455 711 16 2008/09 655 446 920 209 380 2009/10 741 361 1065 2010/11 892 691 1578 201 2011/12 540 1822 243 783 1995 177 2012/13 785 608 2013/14 484 920 1559 - 436

Figure 3 – Caseload data from the District Court

Costs

471. There are direct and indirect costs of having an ACC appeals process in its present form.

a. Direct costs to ACC:

- i. legal representation paid pursuant to the contract for services between ACC and the various law firms it retains,
- ii. in-house lawyers,
- iii. medical evidence in response to claimants.

b. Indirect costs to ACC:

- i. the administrative and judicial costs to the Ministry of Justice of courts' time in hearing appeals that ACC is required to fund each year according to s 164 of the Act,
- ii. the cost of paying the entitlements on each successful appeal, including the actuarial cost of the lifetime of the claim.

c. Direct costs to claimants:

This column was not provided in official figures but calculated separately by subtracting appeals disposed of by appeals lodged, negative numbers indicate more appeals were disposed off than lodged.

- i. Court filing and other administrative fees,
- ii. legal representation:
 - (a) private fee-paying claimants,
 - (b) legally aided claimants who take a loan and have to repay this to the Legal Services Agency,
- iii. medical evidence required to win their case.
- d. Indirect costs to claimants the financial, social, personal and other costs of the effort to access justice.

The calculated costs savings

472. Officials claim that a move to a tribunal will save Ministry of Justice "\$0.4 million" per year over a period of 5 years.³¹⁵ The regulatory impact statement analysed the options on the basis of the "Cost to Government" of the District Court appeals being high.³¹⁶ Nonetheless, officials have conflated the costs to government with the cost to ACC. All the costs to the Ministry of Justice of the ACC judicial process are met by the Accident Compensation Corporation under s 164:

164 Recovery of costs of appeals

- (1) The Corporation must in each financial year pay to the Ministry of Justice such amount as the Corporation and that Ministry agree as being—
 - (a) the reasonable administrative costs of appeals under this Part; and
 - (b) the reasonable costs of appeals under this Part in relation to judicial salaries, fees, and allowances.
- (2) Subsection (1) applies to costs that are not met by the parties to appeals under this Part.
- 473. This legislative provision suggests a policy decision by Parliament to keep ACC at arm's length in matters of administration of justice.

Official information Act release dated August 2014.

Regulatory Impact Statement, Tribunals Enhancements 25 June 2014, at paragraph 16 available from: http://www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement-tribunal-enhancements/improving-administration-cost

- There will be no savings to the Ministry of Justice, or the Government, because there is, technically, no cost to the Ministry of Justice. The costs are paid by ACC according to agreement between the Corporation and the Ministry. Officials were therefore wrong to be concerned that "Costs to government will continue to be high per case and rise if more Judges are able to be provided. 3.5 full time judges are needed to meet current demands." 317
- 475. The cost savings are not to the government, they are to ACC. Cost saving to ACC are simply not a relevant factor for the Ministry of Justice to consider in resolving this problem. The costs should simply be passed on to ACC as is required by law. Parliament has legislated for the costs of appeals in s 164.
- 476. The proposed saving of \$400,000 from overhauling the current system therefore calls for reconsideration. As well, the value of any given dispute in immediate cash terms to the parties, while variable, was commonly at over \$50,000 a year for 20 years of weekly compensation, and ranged from this to \$10,000 for an elective surgery appeal, to disputes with no direct cost but with costs down the track such as decisions on cover. A sense of proportion is required in this regard given the high value and significant consequences of ACC disputes.

Effect of factors that have been considered on the proposal

477. Not only have an incomplete set of factors been considered in the tribunal proposal, but those factors have only been partially considered. The cost implications have only been considered from the viewpoint of the government (or ACC). There has been extensive consultation between the Ministry of Business, Innovation and Employment, the Ministry of Justice, and ACC. There has been no consultation with injured people or the disabled persons organisations that represent them resulting in an incomplete picture.

Regulatory Impact Statement, Tribunals Enhancements 25 June 2014, at paragraph 16 available from:

http://www.justice.govt.nz/publications/global-publications/r/regulatory-impact-statement-tribunal-enhancements/improving-administration-cost.

Understanding ACC and its two conceptions

- 478. Now we turn to an implication of a different kind. Reading such a large volume of judicial decisions on accident compensation disputes has allowed us to draw conclusions on how the Accident Compensation Corporation sees itself and is perceived by others in the dispute resolution system at a high level of generality. We again emphasise that this high level of analysis does not purport to comment on the merits of the disputes, merely perceptions that can be gained of ACC's behaviour in litigation. The following analysis is a reflection on ACC law at that level, by reference to specific examples drawn from the case law.
- 479. We state these conclusions before moving to recommendations on what can be done to solve the access to justice problems that have brought governmental calls for reform. Fundamentally, all stakeholders in the reform process need to be aware that there is more than one face to the Accident Compensation Corporation, and that citizens disputing its actions are often presented with a starkly different face than is presented to high-level decision-makers.
- Again, we emphasise there is no criticism made of individual judges hearing the disputes, or ACC's counsel. Instead, we hope this analysis will enable all parties to see both sides of the equation from an empathic perspective: there has been no consultation to allow this to occur directly.

The shift from the "Commission" to the "Corporation"

481. It is not unreasonable to suggest there is a bilateral relationship between New Zealand's ACC scheme and its socio-political history. In that regard, it is telling that ACC today plays a substantial role in New Zealand's fiscal and political discussions nationally. Similarly, the impact of ACC's \$30 billion financial reserves cannot be understated in relation to New Zealand's fiscal position as a whole.

We do not purport to make any comment on the strength of this relationship or its nuances. The shift towards privatisation of workplace insurance in the Accident Insurance Act 1998 perhaps being the most obvious example.

New Zealand Herald "Government unexpectedly in surplus as tax fills coffers" 9 June 2015 http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11462241.

- A symbolic indicator of this shift is how, over time, ACC has become conceptualised as a "corporation", from its previous conception as a "commission". This transition, while primarily cosmetic, is indicative of a broader shift. A change in nomenclature does indicate a changing conception of what ACC does and what it is meant to be. The governance has changed from Commissioners to directors responsible to a Board.
- 483. In *Langhorne*, the High Court described the changes in ACC's dispute resolution process since it was first laid out in the Accident Compensation Act 1972:³²¹
 - [45] An overview of the various statutory review schemes discloses a progression from an internally run review process under the 1972 Act under which the Corporation was largely in control both of procedural and substantive decision making, to something closer to an adversarial procedure, with an emphasis on natural justice principles, under the 1992 Act where the Corporation has party rights, including rights of appeal.
 - [46] In between came the 1982 legislation where the Corporation retained some, but not all, of the powers conferred on it by the 1972 Act. In particular, it was able to set the procedure for review hearings and might (if the review officer declined to make a decision) become the decision-maker itself.

. . .

- [54] In a case under the 1972 Act, Maulder v Accident Compensation Commission, Davison CJ pointed out that review applications under the earlier Act were investigatory and not adversarial in nature. He said: It is not the function of a Hearing Officer to try and refute an applicant's claim but rather to take a fresh look at the Commission's primary decision aided by such information as may be put forward by the applicant at the review hearing, and decide whether the original decision of the Commission should be revised. There are no parties to the proceeding in an adversary sense as one normally finds in a Court of law and questions relating to the onus of proof and the duty of an applicant to mitigate his loss do not arise as in the normal way.
- We have seen no indication that officials considered the history of the dispute resolution provisions before becoming enthusiastic about what was essentially a return to the 1972 approach. This passage indicates a

We do not suggest there is any inherently negative difference between a commission and a corporation and we are aware of the substantial body of literature that critically examines the modern business corporation. The Accident Compensation Commission (as it then was) is recorded to have engaged in behaviour which is more commonly attributed to a negative view of corporations: Peter J Trapski CBE "Report of the Inquiry into the Procedures of the Accident Compensation Corporation"

³²¹ ACC v Langhorne [2011] NZHC 1067 at [45]-[54].

statutory reflection of how expectations of ACC have changed when it comes to holding it to its statutory obligations. That change has become apparent in the kinds of arguments that ACC makes to the Court, its practice in litigating cases, and what judges regard as being a reasonable course of action by "the Corporation", but might not have been when it was statutorily constituted as "the Commission".

What is "ACC"?

- 485. It is common when dealing in this jurisdiction for judges, counsel and parties to refer to "ACC" both as an individual ("ACC sent me a letter") and as a group ("they sent me for an assessment"). In reality, ACC is a system, and it is composed in a descending hierarchy of the following elements:
 - a. ACC law in ACC legislation and the interpretation of that legislation by the judiciary;
 - b. ACC policy, designed to be applied by staff in dealing with particular problems or best-practice ways of doing things, and is made available within ACC to ACC staff; and
 - c. ACC's practice, being what its individual staff members and its agents do both together and independently, in purporting to exercise ACC's powers conferred under legislation and in line with ACC policy.
- 486. The policy and practice of the Accident Compensation Corporation and its staff changes regularly, as directed by the Minister for ACC and other high-ranking staff. These policy changes occur in a manner that is seldom subject to the same public scrutiny as prominent legislative change. This is appropriate: legislation cannot be the tool for every job and there is a tolerable level of discretion available to ACC in the legislation. There is an obvious need for changes in policy in response to identified administrative issues, changing privacy practices, and changes in medical knowledge.
- 487. Despite the need for change, regular and haphazard change runs the risk that ACC's practice (as influenced by its policy) will depart too sharply from the standards required in the Accident Compensation Act.

It can be difficult to obtain these policy documents and there is a similar problem of delay in relation to the Official Information Act 1982 and the Ombudsman's office.

488. This is the fundamental reason for a strong and independent dispute resolution system. There are too many examples of ACC's conduct in implementing the Act becoming intolerable to the New Zealand public. Each time another public outcry arises, the public's trust and confidence in ACC faces another setback. These examples become indicative of individual citizens' inability to hold ACC to its governing statute through judicial processes, an inability which is exacerbated by the barriers to access to justice that we have described.

Constraining the power of the State: ACC law as public law

- ACC is a leviathan:323 it has overwhelming state-sponsored power and 489. influence in terms of its employees, its finances, its reach within the New Zealand political and legal systems, its access to information, and its legal powers. ACC has its own ministerial portfolio. It reports directly to Parliament and makes direct and highly persuasive recommendations on primary and delegated legislation. ACC funds the entire ACC dispute resolution system administered by the Ministry of Justice. It has contracts with a significant proportion of the New Zealand medical profession. It funds New Zealand's hospitals, injury prevention programs, and work-safety programs. It funds research into medical and rehabilitative science. It collects taxes in the form of levies and along with Fonterra and the New Zealand Superannuation fund, is one of the largest institutional investors in New Zealand. It is a significant source of revenue and financial reserves to the government of the day, whose representatives have acknowledged an interest in maintaining financial reserves in relation to overall Government surplus, raising party-political motivations.
- 490. The cases showed that accident compensation law is not private civil law; it is public law. ACC disputes and reform need to be considered according to public law considerations, and this is one of the most important characteristics of our research findings. Judicial and research findings that treat ACC law as a civil law dispute between two parties on an equal footing simply do not reflect reality.
- 491. ACC law is about ensuring ACC complies with the checks and balances imposed on it by Parliament in defence of the rights of New Zealand citizens. ACC has been given comprehensive powers. In exchange, it must manage personal injury according to the social contract explicitly recognised in the purpose section to the Act. It must do so

Thomas Hobbes "Leviathan" 1651.

transparently³²⁴ and generously following an expansive interpretation of the legislation.³²⁵

- 492. There are a number of ways that ACC can be held to its governing legislation:
 - a. By using complaints mechanisms within ACC, such as to ACC's complaints service, including under the Code of Claimants' Rights, or for example to the Board of Directors;
 - By complaints to external institutions and individuals such as MPs, the Minister for ACC, the Privacy Commissioner or the Health and Disability Commissioner, which can include independent inquiries;³²⁶ or
 - c. By directly examining ACC's conduct in a hearing before the judiciary in accordance with the Accident Compensation Act.
- 493. The latest Auditor-General report on ACC's complaints system states that ACC has 3000 staff, of which approximately 1900 are involved in claims management.³²⁷ The complaints mechanism has almost entirely failed: the Auditor General found that there is no systemic monitoring of whether ACC complies with complaints decisions upheld against it.³²⁸ She noted a decline in complaints volume possibly reflected this fact.³²⁹ Like any large institution, it is impossible to verify that all of these employees are acting properly at all times. There are similar problems with identifying accountability of individuals when it is not clear who in particular has made a decision.³³⁰

³²⁴ Gibson v ACC [2015] NZHC 221.

Harrild v Director of Proceedings [2003] 3 NZLR 289; Allenby v H [2012] NZSC 33; Cumberland v ACC [2013] NZCA 590.

Office of the Auditor-General of New Zealand "Accident Compensation Corporation: How it deals with complaints." August 2014. The Auditor-General's report at 2.36-2.39 describes a complex web of complaints mechanisms that all run through ACC's Issues Management Team, that specializes in "problems that involve reputational risk to ACC."

Office of the Auditor-General of New Zealand "Accident Compensation Corporation: How it deals with complaints." August 2014. See para 1.10-1.12.

³²⁸ Ibid, at 4.36 - 4.38.

³²⁹ Ibid at 4.44 - 4.46

Decision letters from ACC commonly state that "ACC considers", and a recent response to an official information act request to Acclaim Otago was signed (in blue pen) "Government Services".

- 494. There are also incentives to adopt procedures that, for instance, will minimise cost to ACC and its liability for future claims.³³¹ There is a risk that interactions between ACC and the government emphasises financial measures of performance, so that, within ACC, financial concerns become more important than fidelity to the law and to the pursuit of meaningful rehabilitation.
- 495. Only limited numbers of ACC's staff have legal training and they cannot be expected to fully understand the legislation. A key result of this has been heavy reliance on computer programs and policy manuals that are often slow to change in response to developments in law and policy, particularly as they arise in the court system.³³²
- 496. This gap between ACC's policy and the interpretation of its governing statute can sometimes result in drastic corrections where ACC's practice is, "even [at] a casual glance", starkly out-of-step with what ACC is empowered to do by law.
- 497. Yet the state of the dispute resolution system means it can take years for this correction to occur both because litigants lack the human or capital resources to present a fully arguable case. Given delays in the dispute resolution process, and because the Corporation's staff turnover rate means lessons may not be being learned.³³⁴
- 498. The conflict between financial measures of performance, insisted upon at a high level by the Board and by Ministers (and the media), and authentic rehabilitation and compensation required by vulnerable people, can mean a conflict of interest for ACC staff, who are essentially caught in the middle and placed in an impossible position.
- 499. In the light of this broader political context, our study revealed that in a general sense, ACC is conceptualised in two different ways. This can lead to different behaviours by ACC, but this is only observable with a

Office of the Auditor-General of New Zealand "Accident Compensation Corporation: How it deals with complaints." August 2014. The report notes that local office culture is often a stronger influence on behaviour than ACC's culture overall, and the use of performance targets at the local level.

This is not a problem unique to ACC: Frances Joychild QC "Review of Department of Work and Income Implementation of the Court of Appeal Decision Ruka v Department of Social Welfare [1997] 1 NZLR 154." 18 June 2001.

³³³ See *K v ACC* [2014] NZACC 90 and *Powell v ACC* [2014] NZACC 89.

ACC Third Quarterly Report 2014/2015, 31 March 2015 at p 45, Appendix B: staff turnover identified as 12.8%, and it is unclear whether this takes contractors into account or the level of contractors engaged by ACC.

topographical or systemic view of this jurisdiction. Because of this, we found that the courts could transition seamlessly between two largely inconsistent conceptions of ACC depending on the circumstances of the case.

- 500. The conceptions are primarily distinguished by whether ACC can be taken to pursue the wording and purpose of the legislation in good faith, or whether it will generally only take such an approach when forced to do so. ³³⁵ Neither approach can be said to be "correct" ACC is constantly changing. From a policy point of view, however, all participants in the ACC system and its dispute resolution system could benefit from becoming aware of the legitimate basis for each conception, and being more empathetic toward the consequences of those conceptions for individuals and the system.
- We again emphasise that no criticism is made of individual judges or counsel, and we do not comment on the merits of the cases we discuss. Many of the propositions in these conceptions may be justified on the facts of individual cases, but equally they should not form part of an overall attitude without careful attention to the facts.

Conception One: the Commission – a disinterested charitable assistant to the claimant and the Court

On the first conception, ACC could be described as a paternalistic, disinterested, altruistic rehabilitation manager. ACC's only goal is getting people "back to work" in the sense of a meaningful and fulfilling job, both economically and socially, that means the person is "better at work" than receiving weekly compensation.

[&]quot;You've got to fight to get anything": response to Acclaim Survey Data, Acclaim Otago Inc "Crying for help from the shadows: the real situation in New Zealand, a summary of survey data" 4 August 2014, available from:

http://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf;

Adam Bennett "ACC shows kinder face, cuts back-to-work goals." New Zealand Herald, 29 June 2012. See also questions for oral answer, q 3, Hansard, Kevin Hague to Hon Judith Collins, 21 June 2012. Volume:681; Page:3215

Accident Compensation Corporation "The Better at Work Approach: The evidence and benefits", ACC5464 available at

http://www.acc.co.nz/PRD_EXT_CSMP/idcplg?IdcService=GET_FILE&dID

^{=46591&}amp;dDocName=WPC086795&allowInterrupt=1>; accessed 22 June 2015 at 13:00 NZT. This approach is specifically relied on by ACC assessors, some of whom conduct high numbers of assessments: see Judge Ongley's skeptical treatment of one assessor's explicit reliance on this approach in *Kidd v ACC* [2013] NZACC 202 at [48], which is not always treated so skeptically.

- 503. If needed, ACC will support an injured New Zealander for life.³³⁸ ACC is essentially charitable, and like a charity, the ends will generally justify the means. It would be perceived as being ungrateful or taboo³³⁹ to seek to challenge ACC's conduct as long as its actions can be broadly linked to the pursuit of its charitable purpose.
- ACC is given the benefit of the doubt in relation to behaviour that on its face appears wilfully negligent.³⁴⁰
- 505. On this conception ACC will, for example, be asked by the High Court to correct an error of law that has consistently been made by the District Court registrar to the prejudice of claimants.³⁴¹
- 506. When a claimant does not have a lawyer to do it for them, ACC will be asked to clarify a piece of contested medical evidence that will be determinative of the dispute before the Court with no suggestion that ACC might have an interest in the outcome of that inquiry.³⁴²
- 507. ACC is unlikely to be questioned about the motivations of its investigation into a claim, including referral for assessments or further investigation, and a judge will assume or be assured that any investigation related solely to attempts to rehabilitate.
- 508. ACC will only make unfortunate errors, which are understandable given the difficulty of its task, and it will seldom be taken to have adopted an actively destructive or counter-productive tactics. There will be a high evidential burden on any person alleging such.
- 509. Courts may assume that if either of the parties were likely to be gaming the compensation or appeals systems, it is more likely to be the claimant or potential future claimants, and not ACC.
- 510. ACC is bound by the current state of medical knowledge and has no stake or interest in influencing the acceptability or otherwise of particular medical approaches.

Representations made to the UN Committee on the Rights of Persons with Disabilities by New Zealand's delegation in September 2014, Geneva, Switzerland.

See Rijlaarsdam v ACC [2009] NZACC 149 at [63] and Dewe v ACC [2006] NZACC 290 at [39] and [41] for two prominent examples.

Contrast *Morgan v ACC* [2012] NZHC 1789 and the other destruction of records cases referred to above. See also *ACC v Langhorne* [2011] NZHC 1067.

³⁴¹ *Gob v ACC* [2014] NZHC 533.

³⁴² Stanley v ACC [2013] NZHC 2765.

- 511. ACC is taken to have no interest in the outcome of the dispute before the Court, and is simply trying to do its job in implementing a "generous statutory scheme", 343 over which it is taken to have little control, influence, or interest.
- 512. ACC prefers to simply deal with the merits of the case at hand and it can similarly resist objections to its behaviour of a procedural nature because they are really only trivial matters that limit ACC from managing rehabilitation.³⁴⁴
- 513. ACC will, without prompting, adopt a "generous and unniggardly" approach to the wording of the statute and to the interpretation of documents³⁴⁵ and any ambiguity in statutory wording or in the evidence will be resolved in favour of the claimant.
- ACC will settle out of court because it is in the best interests of the claimant and because ACC is willing to be accountable for its errors, and in the interests of the efficient resolution of ongoing disputes.
- 515. ACC will generally allow the admission of any kind of evidence brought before the Court by a claimant and will put all relevant evidence and authorities before the Court.
- At the same time, asking the Court to examine the evidence and the law is an indulgence by ACC and the Court to a claimant's generally unjustified concerns. The Court sees many disputes brought by self-represented litigants making allegations against ACC that those litigants cannot substantiate. Most of the disputes are about money. The disputes generally impose an undue burden on the resources of the Court and of ACC, and by association the New Zealand public. ACC has already performed its own investigations to the best of its abilities according to its own best understanding of the law.
- 517. The fact that a claimant has reached the High Court level is generally an indication that they have unreasonably refused to accept the findings of properly constituted decision-makers below.

See *Rijlaarsdam v ACC* [2009] NZACC 149 at [63] and *Dewe v ACC* [2006] NZACC 290 at [39] and [41] for two prominent examples.

See for example Splite v ACC [2014] NZHC 2717; Howard v ACC [2013] NZHC 188; Howard v ACC [2014] NZHC 2431.

³⁴⁵ See *Borst v ACC* [2012] NZHC 2657 and *Borst v ACC* [2013] NZHC 176.

See Armstrong v ACC [2011] NZHC 1065 at [22] for a high watermark of this approach.

Any troublesome or concerning conduct by ACC is simply a case of "one bad apple", and the Court is not concerned with any need to follow up or ensure that the "one bad apple" and the circumstances that allowed their conduct to occur have been dealt with.

Conception Two: the Corporation – a legitimately adversarial party to a full-scale legal dispute acting in the interest of its shareholders

- 519. The first conception can be contrasted with a more aggressive and adversarial conception of ACC, which is generally more pessimistic about ACC's motives and behaviour, and takes account of overall systemic incentives faced by ACC as an institution, the people steering that institution, and the corresponding actions of people attempting to comply with those directions within that institution.
- 520. ACC is seen as simply one party to an adversarial civil dispute, who enjoys the same rights as any other litigant.
- 521. Despite the Government's statements to the United Nations, the Minister for ACC will publicly state, as a positive thing:³⁴⁷

"...we've been able to decrease the amount of people on long-term benefits from 11,000 to 8000" ... "If there was a change of Government and we went back to the same old be-on-ACC-for-life-type situation that we inherited, then it could be turned around."

- 522. The Minister will also publicly acknowledge that case managers, who coordinate claimants' rehabilitation, are being remunerated up to 15% of their total performance remuneration for exiting claimants.³⁴⁸
- 523. At the same time, arbitrary reductions in the overall claims pool will be stated as a matter of priority to the ACC board by the Minister, ³⁴⁹ despite obvious concerns at the perverse impact such targets may have on staff behaviour, as acknowledged by other independent agencies. ³⁵⁰

Adam Bennett "Workers and bosses lose out to motorists in ACC levy cuts" New Zealand Herald, 6 August 2014.

Questions for Oral Answer, Kevin Hague to Minister for ACC, 21 June 2012. Volume:681; Page:3215.

Adam Bennett "ACC shows kinder face, cuts back-to-work goals." New Zealand Herald, 29 June 2012.

Office of the Auditor-General of New Zealand "Accident Compensation Corporation: How it deals with complaints." August 2014, at para 5.22 acknowledges the consequences, which are assumed to be unintended, of identifying "targets" on an "absolute number". See a stronger statement of this concept at paras 5.23-5.25 that explicitly takes performance pay into account as an incentive. "ACC told us that the complaints target is unlikely to encourage unwanted behaviour among local office staff because it does not form part of their peformance objectives."

- 524. ACC will object to allowing an appeal to be heard out of time, even where the application has been lodged out of time due to misinformation by the Ministry of Justice's tribunals unit,³⁵¹ but was lodged in time according to the erroneous information.
- 525. ACC is under assault in the legal system from a large number of generally unmeritorious and vexatious disputes.³⁵²
- 526. ACC is protected from repeat claims by the doctrine of res judicata and issue estoppel, meaning it should not have to argue the same thing over again if it has already defended itself.³⁵³
- 527. ACC is prejudiced by the unreasonable demands of claimants, for example seeking to have the Court resolve a historical dispute that should have been appealed closer to the time³⁵⁴ or claimants insisting on inquiring into the credentials and independence of ACC's nominated medical assessor.³⁵⁵
- 528. It is not ACC's responsibility to conduct a claimant's affairs for them, even where that claimant is medically or psychologically impaired.³⁵⁶ Judges will commonly agree with ACC that an injured person has appealed the wrong decision, or failed to review the correct decision, meaning the appeal is dismissed for want of jurisdiction.
- 529. ACC is entitled to defend its rights vigorously according to all means possible within the law, for example by making procedural and technical objections based on the High Court Rules to the behaviour of self-represented litigants and the admission of evidence.³⁵⁷
- 530. ACC will pursue costs applications against self-represented litigants for their deterrent effect, 358 and against people bringing legal issues of public interest before the High Court. 359 ACC will even make

³⁵¹ Armstrong v ACC [2011] NZHC 1065.

See for example *Jones v ACC* [2014] NZHC 2867, *Lister v ACC* [2011] NZHC 1082, *Howard v ACC* [2013] NZHC 188; *Howard v ACC* [2014] NZHC 2431, *Gob v ACC* [2014] NZHC 533.

Hollis v ACC [2014] NZHC 530 – compare this case with Goh v ACC [2014] NZHC 533, where no issue of res judicata was raised despite being determinative in the Hollis case.

³⁵⁴ See *Howard* and *Borst v ACC* [2012] NZHC 2657 and *Borst v ACC* [2013] NZHC 176.

See *Howard* (above).

³⁵⁶ Borst v ACC [2012] NZHC 2657 and Borst v ACC [2013] NZHC 176.

³⁵⁷ Reddell.

See for example Jones v ACC [2014] NZHC 2867, Lister v ACC [2011] NZHC 1082, Howard v ACC [2013] NZHC 188; Howard v ACC [2014] NZHC 2431.

In *Buis v ACC* [2009] NZHC 1531 and its related costs judgment *Buis v ACC* [2010] NZHC 280, ACC argued the case was not brought in the public interest, but later relied extensively on the precedent in other litigation and even admitted two affidavits from the *Buis* proceedings in that litigation to answer the same issue: see *Reddell v ACC* [2009] NZHC 1842.

"Calderbank offers" on the assumption that a claimant will conduct their affairs accordingly,³⁶⁰ and with the full expectation they will be penalised if they proceed despite the offer.

- 531. Where ACC is suspicious about a claimant's behaviour it will be entitled to pursue any tactics and investigations as far as it thinks is required until it uncovers something that will enable it to exit that claimant on any grounds available to it. ACC will count the actuarial saving of claimants exiting the scheme as a result of investigations, whether or not they proceed to prosecution and conviction before a Court.³⁶¹
- 532. ACC will go so far as to say that the ACC scheme is voluntary, and that a claimant does not have to make a claim if they choose not to.³⁶²
- 533. ACC is entitled to rest on its right to demand that claimants bear the onus of proof on the balance of probabilities.
- ACC is entitled to adopt whatever tactics not expressly forbidden by law. For example, there is no problem with ACC engaging a Queen's Counsel³⁶³ or large corporate law firm³⁶⁴ to argue its case, even against a self-represented litigant,³⁶⁵ because it is entitled to do so by law as a party to the dispute.
- ACC is conceptualised as a defender (rather than facilitator) of the statutory scheme, who conducts extensive investigations to ensure that not a single claimant receives any benefit that the claimant cannot show, according to the legal standard of proof, at a particular point in time, that they are entitled to according to a strict and restrictive assessment of the statutory wording.³⁶⁶

³⁶⁰ Lister v ACC [2011] NZHC 1082.

Response to Official Information Act request released to Radio New Zealand, stating "In cases where these tests [in the Crown Law Prosecution Guidelines] are not met prosecution will not be considered, however savings will still be measured where clients exit the scheme as a result of an investigation." Actuarial savings are measured in the tens of millions (up to \$35,795,816.04 for 2011/2012), whereas savings from prosecution are only \$41,581.15 and actuarial savings of \$1,474,775.75 for the same financial year.

Submissions to the District Court by Counsel for ACC in *K v ACC* (ACA 419/10), currently awaiting decision. Counsel contended that K, a person with covered PTSD and sensitive claims, could simply choose not to sign an information declaration if he objected to its terms and could forego weekly compensation.

As it has done at the District Court Leave stage, and on High Court and Court of Appeal applications.

Including Meredith Connell, Claro Law, Russell McVeagh, and Buddle Findlay.

See ACC v Stanley [2013] NZHC 2765; O'Neill v ACC [2011] NZHC 283; ACC v O'Neill [2012] NZCA 219; while not a QC, Counsel of approximately twenty years' experience in Studman v ACC [2013 NZHC 2598.

³⁶⁶ Splite v ACC [2014] NZHC 2717.

ACC is entitled to settle out of court to minimise its own costs liability. There is no suggestion that it is doing so to avoid a precedent that will disturb its operations, or to avoid negative comment on its behaviour by the High Court or Court of Appeal. It is entitled to vigorously defend its interests and has no responsibility for a claimant's wellbeing or rehabilitation beyond what ACC can be compelled to take responsibility for by law. Its responsibilities are to the scheme, and not to injured people.

The effect of these differing conceptions

- Our data indicates that ACC benefits from lack of awareness about these differing conceptions of its image. On either conception, ACC is able to resist any examination of its behaviour at a systemic level. For example, in one case it can argue that certain decisions should be reviewable in order to maintain the cohesion of the statutory scheme, ³⁶⁷ perhaps to resist a claim in civil or public law. In another case, it will argue that a claimant is unable to review a particular decision because the scheme does not allow it, and suggest that a claimant could instead pursue a claim in civil or public law. ³⁶⁸ ACC may argue for differing and inconsistent interpretations of the same statutory provision depending on its own interests in the particular case. On one conception, ACC cannot inequitably benefit from its own wrong: on another conception it is entitled to adopt a minimalist reading of the statute to limit its statutory obligations.
- 538. Both conceptions of the Accident Compensation Corporation and its statutory obligations can be justified by reference to the legislation and by policy factors. It is impossible to impute any blame to any particular individuals for either conception. The successive changes to the legislation indicate how policy has changed to render one conception more powerful in any given circumstance.

By way of illustration only, see *ACC v Hawke* [2015] NZCA 189; *McGrath v ACC* HC Wellington CIV-2008-485-2436, 1 May 2009 at [14].

Splite v ACC [2014] NZHC 2717; also see the Howard litigation in relation to a s 72 direction to undergo assessment which was neither reviewable under the Act nor capable of judicial review: Howard v ACC [2014] NZHC 2431. That approach can be contrasted with the Court's decision in Farquhar v ACC [2012] NZHC 2703 where a claimant successfully appealed ACC's decision to require the appellant to undergo an assessment.

- These dual conceptions can only really be observed from reading a large number of cases and official information: a systemic approach. In the complaints context, the Auditor-General has found that ACC fails to take a systemic approach and there is no overall systemic monitoring of whether ACC is complying with complaints that are upheld against its staff.³⁶⁹ It noted there were similar issues identified in external reviews of ACC's complaints system in 2005 and 2008,³⁷⁰ indicating perhaps an institutional lethargy or lack of coordination or incentives to dealing with its complaints process. The Auditor-General stated:
 - 6.4 ... Apart from privacy complaints, ACC does not learn from complaints data, which is a Code obligation. ACC has been aware of this for some time but has not made improving this a priority.

. . .

6.5 ... Good leadership on complaints is vital. Valuing complaints must begin at the top of an organisation and complaints must be welcomed. Good leaders understand that more complaints are not always a result of deteriorating service.

. . .

6.16 ACC's research team has carried out several pieces of analysis, but there is little evidence that this has led to improvements. Senior managers could not explain why many previous reviews had not resulted in more improvements.

. . .

6.26 The best organisations think of complaints services as adding value, not as just an overhead cost. Complaints can be an important source of information about people's experiences and can help to identify systemic problems and poor service. Analysing past complaints can help organisations respond and adapt to prevent future complaints.

The disparity between the dual conceptions of ACC is likely to be simply a case of the difficulty of coordinating such a vast organisation. In this respect, the dispute resolution process, like complaints, is an invaluable tool for coordinated systemic learning. The Auditor-General recommended that ACC change its approach and begin to see the complaints system as a valuable feedback system that will increase public trust and confidence and ACC's financial and non-financial performance. We hope that our data and our report will also see ACC moving towards an enthusiasm for the Part 5 dispute resolution process too as a meaningful, invaluable and necessary part of organisational learning and improving how ACC operates.

Office of the Auditor-General of New Zealand "Accident Compensation Corporation: How it deals with complaints." August 2014 at 4.36-4.38, and parts 5 and 6 in particular.

³⁷⁰ Ibid, at paras 2.15 - 2.18.

³⁷¹ Ibid at parts 5 and 6, and specifically paras 5.1-5.5 and 6.19 and 6.21-6.28.

Change is needed but it must be informed

- 541. It is important to remember that the transition to the dispute resolution system involves a rapid shift in the perceived role of the Corporation. From the moment a review application is lodged, ACC transitions from being a claimant's rehabilitation manager with that claimant's interests at heart, to being a party to an adversarial dispute. Our research shows that ACC is adopting aggressive litigation tactics, sometimes against people without legal representation. These tactics are sometimes explicitly directed to deterring litigation.
- Literature identifies several advantages for a party who is repeatedly involved in litigation that must be considered. For example, settlement may be efficient between the parties, but it is inefficient for the wider system. A party that repeatedly engages in litigation is able to selectively pursue fact patterns that will allow it to succeed on points of law that will have a greater long-term advantage. From an access to justice perspective, it is vastly preferable to have the interpretation of the Act fully argued and conclusively considered than for the same fundamental legal issues to be raised in every dispute in a different manner.
- 543. The High Court and Court of Appeal are hearing predominantly issues about weekly compensation and treatment injury (which accounts for a low proportion of claims, but could open the floodgates in any particular case³⁷² to very high-cost claims). While our data cannot prove it, this indicates that the costs and delay of a dispute are so overwhelming that they can only be brought where there is a substantial financial sum involved.
- 544. Fundamentally, we call for a consideration of the multiple roles played by ACC and the conflict of interest this may pose. ACC cannot be the bank, the tax-collector, the payroll, the investigator, the policeman, the carer, the rehabilitator, the decision-maker and the adversarial litigator. Our recommendations also call for considering the advantages conferred on ACC by playing all these roles.
- 545. We suggest a re-orientation of the dispute resolution scheme towards a human rights focus. This focus specifically requires a rejection of the reductive, legalistic and procedural approach to the statute and to the rights of ACC claimants.

See Roborgh v ACC HC Wellington, CIV- 2009-485-321, 6 July 2009, where the Court was required to consider whether a hospital administrator's failure to organize an appointment directed by a specialist could be treatment injury.

- A comprehensive conception of access to justice that takes substantive fairness and overall justice in society into account is formidable and appears unattainable. However it should be fairly obvious that, when it comes to justice for people with disabilities challenging ACC decisions, ACC and the Ministry of Justice are uniquely within the government's control. Those institutions are already tasked with the administration of justice, and the social and vocational rehabilitation of injured people.
- 547. What is required is a systemic approach to access to justice.

RECOMMENDATIONS

Perhaps the single most troubling aspect of the way in which the preparation of legislation has changed within the last few decades is simply the reduction in trouble taken in the preparation of legislative policy.

Daniel Greenberg "Dangerous Trends in Modern Legislation" [2015] PL 96 at 106

Recognizing what we do not know should serve as an impetus for future empirical research. Part of making access to justice "for everyone" will be gaining better understanding about the impact of institutions of remedy.

Rebecca L Sandefur "The fulcrum point of equal access to justice: legal and nonlegal institutions of remedy" (2009) 42 Loyola of Los Angeles Law Review 949 at 977

The dearth of externally focused empirical research is not only a missed opportunity, in our view, but may also pose a significant risk. The lack of an empirical rationale for the benefits of a tribunal may render it vulnerable to opposition or simply to general cost-cutting initiatives, or to pursue policy directions that undermine rather than advance its purposes. ... If you are running in the dark, there is no way to know whether you are moving forward, or further away from your destination, or simply going in circles.

Lorne Sossin and Steven J Hoffman "The elusive search for accountability: evaluating adjudicative tribunals" (2010) 28 Windsor Yearbook of Access to Justice 343 at 353

Conclusion

548. For citizens disputing decisions of the Accident Compensation Corporation, our data shows there are significant issues with access to the law, access to evidence, access to legal representation, and issues with being heard on matters important to them.

- 549. In conducting our research, we have taken previous survey data collected by Acclaim Otago, and conducted a mixed-methods qualitative and quantitative analysis of over 500 judgments of the entire judicial hierarchy in this jurisdiction. We conducted a literature review and found many correlations between its findings and the issues described in our research.
- Having analysed this data, we have identified a serious problem with access to justice for people disputing decisions of the Accident Compensation Corporation. That finding means the cost and delay to the Corporation and to the Ministry of Justice are merely symptoms of a deeper access to justice problem in this jurisdiction.
- 551. We conclude that the current suggestions based on problems identified by officials within the Ministry of Justice, Ministry of Business, Innovation and Employment, and the Accident Compensation Corporation are ill-considered.

How this chapter is structured

- 552. In this chapter, we set out the lens through which any recommendations must be made. We then summarise what literature revealed was a whole catalogue of ideas for reform, and which the current proposal appears to have overlooked.
- 553. We conclude with a list of factors that must be considered before any moves toward reform are made. We strongly suggest that further research be done by an independent party, that the government comply with its obligations to consult under the UN Convention on the Rights of Persons with Disabilities, and that competent and experienced individuals are given meaningful involvement in a transparent process looking at options for access to justice reform in this jurisdiction.

Significantly, if any system of law in the world has a chance at comprehensive and successful access to justice reform, it is New Zealand's own premier personal injury system. Unlike a civil justice system, both the Accident Compensation Corporation and the Ministry of Justice are within the direct influence of the New Zealand government. There may be no better legal microcosm to implement ground-breaking access to justice reforms.

Lens through which to measure recommendations

The knowledge gap

- There is a knowledge gap about the ACC appeals process. For a system designed to limit litigation over personal injury, the volume (and potential volume) of litigation is staggering. There are more disputes annually than the entire workers compensation schemes and negligence actions that existed before the development of the system designed to end litigation. The perception that it is an informal process governed by competent decision-makers with access to all the information and resources that they require has meant the process has not been critically examined. This has often led to criticisms of the process being ignored for want of information.
- The lack of knowledge is by no means unique to our study of access to justice barriers. In the self-representation context, for example, it has been observed: "Regardless of their differing fundamental philosophies, leaders in the ... movement, judges, and academics all agree that there is insufficient evidence about what type of intervention is appropriate when." Our study is a comprehensive attempt to build that evidence.
- Our research indicates that officials responsible for implementing the proposal have not addressed existing literature, or data describing the nature of the problem they are looking to fix. We hope our analysis will assist the decision-makers, given "It is widely accepted that data-driven strategies are more likely to help decision-makers achieve their goals in a cost-effective way than policies pursued in the absence of evidence."³⁷⁵

Warren Forster "Back to the Future: Compensating injured workers for lost income" (2011)

Laura K Abel "Evidence-Based Access to Justice" (2009) 13 University of Pennsylvania Journal of Law and Social Change 295 at 297.

Lorne Sossin and Steven J Hoffman "The elusive search for accountability: evaluating adjudicative tribunals" (2010) 28 Windsor Yearbook of Access to Justice 343 at 353 citing K

Whilst our research goes some way to shedding light on this particular access to justice problem, a lot remains unknown, including the nature and strength of the relationships between many of the themes we identified. More research is necessary before some conclusions can be drawn.

559. Further empirical legal research is urgently required. We believe it would be difficult for the proposal to proceed in good faith without addressing this report. We again emphasise the fundamental concerns raised by the majority of independent practitioners in the jurisdiction,³⁷⁶ the Law Society, the Chief District Court Judge, and the United Nations Committee on the Rights of People with Disabilities.

A human rights lens: the Convention on the Rights of People with Disabilities

- The appeals system must be considered through a human rights lens. The Convention on the Rights of Persons with Disabilities is designed to go further than the negative rights under previous human rights instruments; this is a position the government can be expected to adhere to given the emphasis it places on its role in having drafted the Convention.
- A human rights lens means viewing people with disabilities "as rights-holders, afforded dignity and seen as experts in the solutions that are most likely to be successful." This approach also requires embracing the Convention on the Rights of Persons with Disabilities and its requirements of an effective access to justice system. An early step in measuring this will be reaching agreement about how to interpret and achieve "effective" access to justice as required by the Convention. The Government's public rejection of the UN's recommendations on access to justice is a poor start.
- 562. Compliance with our celebrated international obligations is not the only reason to consider disability and personal injury perspectives when

Chalkidou and others "Comparative Effectiveness Research and Evidence-Based Health Policy: Experience from Four Countries" (2009) 87 Milibank Quarterly 339.

See the "Views from the Bar" section at the opening to this report and Acclaim's UN reports.

Equal Before the Law: towards disability justice strategies (Australian Human Rights Commission, February 2014) at 9-10.

designing reform. It is also a good idea because people with a disability – including 320,000 New Zealanders – have been found time and again to have a "strong propensity ... to experience legal problems"³⁷⁸ and to be a group that particularly "encounter[s] layers of barriers to access to justice."³⁷⁹

563. If reform takes a disability rights approach, it has a better chance of providing meaningful access to justice for everyone who is disabled most by these social barriers.

Any solution needs meaningful input from injured people

- There must be meaningful input from, and consultation with claimants.

 This is both a requirement on the executive branch of government³⁸⁰ and a requirement on the legislative branch of government.
- It has been observed that "Far too often people with disabilities ... are absent from any genuine process to identify and develop solutions, and only consulted in the final stage, if at all." This rings particularly true of the Government's repeated assertion that consultation at select committee will suffice. Proper consultation is at the heart of the Convention the Government so prominently claims that it drafted.
- 566. Consulting about potential solutions to access to justice problems brings the users of that system in to be a part of the solution. As one study recently explained it, "When voices of the public are heard, they are typically the voices of those who have been involved in the justice system ... All of these people and groups are clearly important and will ultimately be part of an access to justice solution." It is the citizens of New Zealand that will be part of the solution because they are the ones using the system.

For example Christine Coumarelos and others *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs vol 7, August 2012) at 19.

Gam Schwartz and Mary Stratton *The Civil Justice System and the Public: Communication and Access Barriers for those with Disabilities* (Canadian Forum on Civil Justice, January 2006) at 11.

United Nations Convention on the Rights of Persons with Disabilities, Article 4.

Equal Before the Law: towards disability justice strategies (Australian Human Rights Commission, February 2014) at 9-10. See also Making Tribunals Accessible to Disabled People (UK Council on Tribunals, November 2002) at 4.

Trevor C W Farrow "What is access to justice?" (2014) 51 Osgoode Hall Law Journal 957 at 959.

Trevor C W Farrow "What is access to justice?" (2014) 51 Osgoode Hall Law Journal 957 at 961; Saskia Righarts and Mark Henaghan "Public perceptions of the New Zealand court system: an empirical approach to law reform" (2010) 12 Otago Law Review 329 at 329-330.

Expect appeal numbers to rise: this is a good thing

Regardless of the solution that is adopted, if it provides better access to justice, people currently excluded from that system will begin to use it. If ACC takes no other action to mitigate the number of disputes, this may mean that appeal numbers rise.

- In light of ACC's poor public perception and its difficulty in monitoring all of its employees all of the time, ACC must adopt the dispute resolution system in the same way suggested by the Auditor-General regarding the complaints system. A system that is perceived to provide better access to justice is likely to have more people engaging with it. The pool of potential is very high in this jurisdiction (with approximately 5000 unsuccessful reviews per year). Any reform that the Government adopts must be able to absorb an increased participation rate, and embrace that as a good thing.
- Increasing uptake of the dispute resolution system will ultimately benefit all New Zealanders, and even the Accident Compensation Corporation. Greater accountability and greater identification of problems in the system can only lead to better decisions within ACC, which are ultimately more cost-effective to the wider system. Accordingly, we strongly suggest, similar to the Auditor-General, that ACC's Board and the ACC Minister adopt specific measures to embrace the dispute resolution system rather than seeing it as a burden to ordinary operations.
- 570. If there are issues with cost or implementation of the system, these should be brought out into the open so that they can be dealt with critically, transparently and through consultation.

Alternatives to a tribunal that have not been considered

571. Although not the focus of our report, our literature review yielded a number of other reform approaches. We have seen no evidence that these have been considered by relevant officials. We therefore briefly describe a framework of alternatives below to indicate the scale and number of alternative solutions that are available, and to place the current proposals for reform in their appropriate context.

A broad framework for reform could first split up the various options for reform into legal versus extra-legal solutions.³⁸⁴ The panoply of legal options available includes changes to the substantive law applied in the courts, to its procedural rules (such as greater case management), to the very nature of the adjudicative institution (such as by suggesting replacement of courts with a tribunal). The range of extra-legal options, on the other hand, could be categorised into those solutions targeting ACC (such as culture change), targeting claimants (such as providing them with greater information or more access to legal services), targeting the legal profession (such as by reform of fee structures or pro bono obligations) and even targeting a fourth, currently non-existent group (such as by suggesting the creation of an independent watchdog or commissioner of ACC).

573. This report is not the place to assess the merits of any or all of these suggestions for reform. But we think it would be useful to give a slightly expanded account of just some of the above suggestions for reform. We consider three mainly for their variety – calls to change the law, replacement of the Court with a tribunal, and scrutinising the administrative culture of the scheme. The following, truncated analysis should make it apparent that any serious suggestion for reform has nuances that require scrutiny of the detail of the proposal, but also consideration of how each part fits into the whole machinery of change.

Change the law

574. Some call for change in the substantive law. There are significant changes that can be made to the substantive law governing the ACC scheme in order to provide better access to justice. In particular, given that causation featured as an issue in an overwhelming number of cases we examined, that would be a sensible possible starting point for legislative change.

575. Such reform should keep in mind that the state of the Act has been criticised since its infancy: "One of the obstacles to public understanding of the ... Scheme in New Zealand lies in the prolixity of the legislation." Any reform would also need to consider the source

As did, for example, Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 Civil Justice Quarterly 355; and Deborah L Rhode "Access to justice: a roadmap for reform" (2014) 41 Fordham Urban Law Journal 1227.

Geoffrey Palmer "Compensation for incapacity: a study of law and social change in New Zealand and Australia" (Oxford University Press, Wellington, 1979) at 405.

of that prolixity. It has been argued that it stems from the drafting decision that "everything that could be spelled out would be so. [But] Then separate schemes were established ... and these were grafted on to the existing Act, when logic dictated that the Act should have been redrafted."³⁸⁶

- Others have argued for overhauling court procedures, most notably by increasing case management. In other areas of law and in other countries, case management has been lauded as a key to improving access to justice by reducing delay.³⁸⁷ The Court of Appeal has even described it as "fundamental to the efficient administration of justice".³⁸⁸ But since it has only recently taken hold in the ACC environment, proposed reform by way of strike out provisions would appear to be premature; given the chance, case management is likely to significantly decrease delays³⁸⁹ and there is evidence as described above that it is already doing so.
- 577. Lessons could also be learned from other civil justice research, suggesting that such "effective case management might only be achieved by statutory reform obliging, rather than merely *empowering*, judges to control ... proceedings." This transformation has been suggested in contexts as varied as controlling the pace of proceedings, ³⁹¹ to cases where a self-represented litigant in involved. ³⁹² Arguably,

Geoffrey Palmer "Compensation for incapacity: a study of law and social change in New Zealand and Australia" (Oxford University Press, Wellington, 1979) at 405.

³⁸⁸ Bevan-Smith v Reed Publishing NZ Ltd [2006] 18 PRNZ 310 (CA) at [34].

Note though that even case management is not believed to be the perfect panacea: Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 Civil Justice Quarterly 355 at 372; Hazel Genn "Do-it-yourself law: access to justice and the challenge of self-representation" (2013) 32 Civil Justice Quarterly 411 at 356-357.

Saskia Righarts and Mark Henaghan "Delays in the New Zealand justice system? Opinion v fact" (2011) 13 Otago Law Review 455 at 463; see also Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 Civil Justice Quarterly 355 at 357 in relation to litigants in person.

Saskia Righarts and Mark Henaghan "Delays in the New Zealand justice system? Opinion v fact" (2011) 13 Otago Law Review 455 at 463.

Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 Civil Justice Quarterly 355 at 357.

See A A S Zuckerman "Lord Woolf's Access to Justice: plus ça change ..." (1996) 59 Modern Law Review 773 at 775 summarising the Woolf Report; Justice Wayne Martin, Chief Justice of Western Australia "Access to justice" (Eminent Speaker Series, Inaugural Lecture, University of Notre Dame Australia, 26 February 2014) at 12; Les Arthur "Reform of the civil justice system: the new meaning of justice and the mitigation of adversarial litigation culture" (2012) 19 Waikato Law Review 160 at 163-167; Judge Jeremy Rawkins "Access to justice – diversions ahead" [2005] New Law Journal 419 at 419; Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 Civil Justice Quarterly 355 at 357-61; Saskia Righarts and Mark Henaghan "Delays in the New Zealand justice system? Opinion v fact" (2011) 13 Otago Law Review 455 at 461-468; Samuel Issacharoff "Too Much Lawyering, Too Little Law" in A A S Zuckerman and Ross Cranston (eds) Reform of Civil Procedure: Essays on 'Access to Justice' (Clarendon Press, Oxford, 1995) 245 at 247-256.

similar redrafting could be undertaken to help revive s 157, which our study found was referred to – let alone used – on two occasions. It may be as simple a matter as adding a requirement that s 157 be used by a judge where the state of the evidence is unsatisfactory, with an appropriate "exceptional reasons" exception built in.

Other reforms, even to procedure, are unlikely to be successful by such crude means as redrafting. Take for example the procedural rules that govern how a dispute is to be pursued. Generally, access to justice research has levelled criticism against such rules: complaints about "opaque language and spurious complexity" and constant calls for "significant simplification" are well rehearsed

However, research and rationale emphasises the need for caution in reforming this area. The purpose of having procedural rules needs to be kept in mind. As one Judge has explained, "The current processes of the courts have been developed to ensure fair and open hearings. It is difficult to see just how the simplification of the essential processes ... can be taken without compromising these objectives." Or put another way, "Complexity is the inevitable result of the commitment of treating like cases alike. This commitment produces a continuing refinement of court practice and the build up to precedents to ensure that like cases are treated alike", so that no amount of simplification can totally level the playing field. Procedures will be complicated for as long as peoples' disputes are complicated; and our study has shown that, in this area, disputes often are.

Replace the Court with a tribunal

580. Research about replacing courts with tribunals is an excellent example of the fact that reform is complicated. For one thing, the idea to replace the court with a tribunal first appeared in the personal injury context, in 1908, at a time where the government was, as it is now, disenchanted

Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 Civil Justice Quarterly 355 at 373.

Justice Wayne Martin, Chief Justice of Western Australia "Access to justice" (Eminent Speaker Series, Inaugural Lecture, University of Notre Dame Australia, 26 February 2014) at 13.

Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 12 (see now (2014) 13 Otago Law Review 229).

Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 Civil Justice Quarterly 355 at 373.

with the courts "as an efficient and effective means" of doing justice.³⁹⁷ This alone might be enough to raise some doubts about viewing the present tribunal proposal as a silver bullet.

- As well, any reform along these lines would have to consider research about what characteristics a successful tribunal is likely to have. Studies have identified the most important values that a tribunal needs to have in order to be successful, ³⁹⁸ as well as the particular operational features which work better than others. ³⁹⁹
- 582. Literature reveals there to be further complications to any suggested reform alone tribunal lines. One is that "Although courts and tribunals operate within different sets of rules and procedures, they are essentially aiming to achieve the same result: a just decision". ⁴⁰⁰ This conclusion should cause reformers to wonder why then outright abolition of access to the court is a required or desirable response.
- Another complication with tribunal-based reform is that there are many limits to the tribunal model, however it is designed. This is because "tribunals are not the answer to the broader issues. As soon as the issues before a tribunal become complex, the same disadvantages ... arise." Moreover, by way of final illustrative analysis, independence has been identified as a concern about any tribunal model of justice. Even the possibility for incentives to interfere for political, financial or other reasons in the appointment or removal of adjudicative members should be seen as unacceptable.

Roy Sainsbury and Hazel Genn "Access to Justice: Lessons from Tribunals" 413-429 in A A S Zuckerman and Ross Cranston (eds) Reform of Civil Procedure: Essays on 'Access to Justice' (Clarendon Press, Oxford, 1995) 413 at 417.

Franks Committee, cited in Roy Sainsbury and Hazel Genn "Access to Justice: Lessons from Tribunals" 413-429 in A A S Zuckerman and Ross Cranston (eds) Reform of Civil Procedure: Essays on 'Access to Justice' (Clarendon Press, Oxford, 1995) 413 at 418. See also Justice David Berman "Court management and leadership enhancing public trust and confidence in courts and tribunals" (paper presented to Cultural Diversity and the Law, Access to justice in multicultural Australia, Sydney, 13–14 March 2015) at 4-5.

Roy Sainsbury and Hazel Genn "Access to Justice: Lessons from Tribunals" 413-429 in A A S Zuckerman and Ross Cranston (eds) Reform of Civil Procedure: Essays on 'Access to Justice' (Clarendon Press, Oxford, 1995) 413 at 420-426.

Roy Sainsbury and Hazel Genn "Access to Justice: Lessons from Tribunals" 413-429 in A A S Zuckerman and Ross Cranston (eds) Reform of Civil Procedure: Essays on 'Access to Justice' (Clarendon Press, Oxford, 1995) 413 at 423.

Helen Winkelmann, Chief High Court Judge "Access to justice – who needs lawyers?" (Ethel Benjamin Commemorative Address 2014, University of Otago, Dunedin, 7 November 2014) at 14 (see now (2014) 13 Otago Law Review 229).

Lorne Sossin and Steven J Hoffman "The elusive search for accountability: evaluating adjudicative tribunals" (2010) 28 Windsor Yearbook of Access to Justice 343 at 347.

In short, any proposal to switch to adjudication by tribunal needs to be considered carefully against the historical, practical and conceptual context in which that access to justice solution exists.

Reforming culture

- Culture, or the way in which the Act and dispute resolution process are administered, is another suggestion for reform evident in the literature. It has a surprisingly high impact on access to justice. For instance, overly bureaucratic approaches have an "isolating and unnerving impact" on people, and are cited "as being a cause as well as consequence of mental health problems" in some cases.⁴⁰³
- The same point was made nearly 40 years ago, in the ACC context directly. It was suggested that: "The scheme's functioning has little to do with proper statutory interpretation or even the ideas that lie behind the provisions in the legislation. ... The legislation does not say whether the people at the desk must greet claimants with a smile, whether they should adopt a suspicious approach to claims or take up an open and generous attitude." These matters of administration could not be controlled by wide rights of appeal and review; rather, the source was at the operational, cultural level. They are undoubtedly part of the access to justice solution.

Key features of any reform going forward

587. ACC is a system that has its own unique policy concerns and legal and extra-legal features. Each part of that system interacts and few disputes can be dealt with in isolation.

ACC is not an ordinary civil justice system. Nearly every dispute involves a large specialist statutory monopoly engaging a person with disabilities in an adversarial dispute. That monopoly is also exclusively geared towards meeting the legal tests in the statute.

KM Research and Consultancy Ltd Access to Justice: a review of the existing evidence of the experiences of adults with mental health problems (UK Ministry of Justice, Research Series 6/09, May 2009) at 45.

Geoffrey Palmer "Compensation for incapacity: a study of law and social change in New Zealand and Australia" (Oxford University Press, Wellington, 1979) at 404.

Geoffrey Palmer "Compensation for incapacity: a study of law and social change in New Zealand and Australia" (Oxford University Press, Wellington, 1979) at 404.

589. People trying to dispute ACC's decisions suffer from the following barriers to access to justice.

- a. There are barriers to access to the law, including to the courts, the statute, a coherent body of case law and competent legal counsel.
- b. There are barriers related to evidence, including access to evidence, protection of the principles of evidence law, an inability to present expert medical evidence that is crucial to determining most ACC disputes, and the comparative disadvantage to claimants caused by ACC's control over the investigation process.
- c. There are barriers to a claimant feeling like they are being heard, including the perception that justice is being done, that an impartial person is listening to the legal issue and that, in light of the other barriers identified, there has been a fair hearing that will secure a meaningful remedy.
- d. There are barriers to representation, including access to a lawyer who represents the claimant's interests and can navigate the complicated process of litigation.
- 590. These are the likely causes of current inefficiencies in the dispute resolution system. Addressing these barriers will assist ACC as an organisation to take a systemic approach to its implementation of the scheme.
- 591. These barriers must be addressed, but before this can be achieved, substantial knowledge gaps identified in this report need to be overcome. Official data and statistics need to be collected and provided in a transparent way to shed light on the gaps identified in this report. More research needs to be conducted to understand the relationships between the themes we have identified and finally, this information needs to be disseminated to the users of the system to claimants, to ACC, to lawyers and to judges and to the policy makers who are tasked with improving access to justice for injured people.

About Acclaim Otago

- 1. Acclaim Otago is a support group for injured New Zealanders and their families. We are an incorporated society based in Dunedin with members throughout New Zealand. Established in 2003, we have been advocating for systemic change to improve the lives of injured people for the last ten years. We are active in the area of human rights in New Zealand.
- 2. For the last eight years, Acclaim Otago has had a seat on ACC's Consumer Outlook Group, which provides advice to the ACC CEO on issues facing consumers and for the last year has been a member of the Advocates and Representatives Group (ARG) providing direct input into policy and strategy at ACC. We have good working relationships with Members of Parliament from across the political spectrum and seek to work collaboratively to improve the experiences of injured New Zealanders.
- 3. We have a significant public profile when it comes to ACC claimants' issues and we have a significant media presence.

The Report's Authors

- 4. The key people involved in researching and writing this report were Dr Denise Powell, Mr Warren Forster and Tom Barraclough of Dunedin, and Tiho Mijatov, law clerk and tutor in legal research and writing, Victoria University of Wellington. Extensive critical analysis, data preparation, data collection and analysis was also conducted by two research scholars: Curtis Barnes and Ben Bielski of Otago University's Faculty of Law. Mr Barnes graduates at the end of 2015 and looks forward to further developing his skills in practice. Mr Bielski will graduate at the end of 2016 and looks forward to a career in litigation.
- 5. Dr Powell was president of Acclaim Otago for ten years. She is an experienced researcher having worked for the Dunedin Multidisciplinary Study, the Potential Outcomes of Injury Study and she undertook her doctoral research into the experiences of deaf students in tertiary education in New Zealand. Dr Powell has published internationally in peer-reviewed journals and is well known in the disability community. She has also been living with a disability for the last two decades. At a recent disability conference, Dr Powell was inspired to submit shadow

- reports as she did in Geneva in 2014. She is committed to improving injured New Zealanders' experiences.
- 6. Warren Forster is a Barrister with wide experience in resolving legal disputes with ACC, identifying systemic problems and implementing change through courts and parliamentary processes. He has represented clients in reviews and appeals to the District Court, High Court and Court of Appeal, along with many other disputes mechanisms.
- 7. Mr Forster was awarded an LLB(Hons) from the University of Otago and his dissertation on compensating injured workers was published in the 2011 Otago Yearbook of Legal Research. He has worked with Acclaim Otago on many of their major projects. He has succeeded in incorporating his ideas into legislation through presentations to parliamentary select committees.
- 8. Tom Barraclough completed a BA(Politics)/LLB(Hons) in 2013 at the University of Otago. His dissertation focussed on environmental law and philosophy. Tom has experience working with Warren Forster and Denise Powell since 2010. He has a great interest in the ACC system because of the fascinating intersection it presents between politics, philosophy, and law. He believes that the ACC system will be capable of great things once it gives due respect to human rights and individual justice.
- 9. Tiho Mijatov graduated from the University of Otago with an LLB (Hons) (First Class) in 2013. He continues his interest in multidisciplinary research for social change. He has conducted and internationally published research using an inductive analysis. He works as a law clerk, and tutor in legal research, writing and advocacy at Victoria University of Wellington.