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JUSTICE FOR VICTIMS OF INJURY:
THE INFLUENCE OF ACC ON THE CIVIL AND CRIMINAL LAW IN NEW ZEALAND

LLM THESIS

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Abstract

This paper considers the influence of the accident compensation ("ACC") scheme on the civil and criminal law in New Zealand.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 44,000 words.

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I THE STATUS QUO ANTE: COMPENSATION FOR INJURY BEFORE ACC

A Introduction

This chapter outlines the status quo ante of compensation for injury in New Zealand prior to the introduction of the Accident Compensation Scheme. Historically, compensation for accidents was dealt with as a private matter. Individuals were left to obtain private insurance or take an action in private law against a wrongdoer who injured them. Society’s role in compensation was to facilitate these private measures. In cases of wrongdoing, society had a role in responding to the wrongdoing with punishment, deterrence and denunciation, but not compensation. By the late 1960s, New Zealand was well along the track of regarding compensation for injury as a social problem rather than a private one.

A key change was the development and expansion of liability for negligence, which took the law of torts away from its historical focus on intentional wrongdoing as:

\[ \text{[T]he individualistic fault dogma began to yield to the mid-20th century quest for social security, and the function of the law of torts came to be seen as less in its admonitory potential than in ensuring compensation of accident victims and distributing the cost among those who can bear it.} \]

Even though its scope was expanding, the tort of negligence still compensated a small minority of victims of injury. As a result, various statutory measures were introduced to provide compensation to victims of injury not assisted by tort. However, even the expanded tort of negligence supplemented by those statutory measures left many injury victims with limited assistance. Society was increasingly pursuing the goal of providing compensation to all victims of injury, but the mechanisms it was using to do so were incoherent and ill suited for that purpose.

B Compensation for injury under the status quo ante

1 The civil law

Before the development of an independent tort of negligence, the civil law was primarily concerned with intentional acts that interfered with certain protected interests. Wrongful interference with those interests attracted a right to compensation. The torts of assault and battery in particular, falling under trespass to the person, dealt with interference with personal bodily integrity.

The civil law provided compensation to a limited subset of victims of injury. First, the civil law only assisted injury victims whose injury was caused by a defendant who

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1 “The ACC scheme”.

had committed a tort. Second, the civil law could only provide compensation from defendants who had the means to pay.

This changed significantly with the rise of the negligence action, as Fleming describes:\(^3\)

> In the first quarter of the 19th century … hitherto disconnected threads of embryonic liability for neglect began to combine into a discernible principle of wider application, from which gradually emerged the modern concept of negligence as a separate basis of tort liability. Its rise broadly coincided with the Industrial Revolution and was undoubtedly stimulated by the advent of machinery, urbanisation and the faster traffic along turnpike and railway. Untold new sources of risk and losses made their appearance and confronted the law with problems it was unable to solve by recourse to its inherited, archaic tort remedies. At this crucial stage of social and economic transformation, the courts responded to the call for a new pattern of loss adjustment by fastening on the concept of negligence.

Negligence changed over time, and the following developments in particular transformed its focus from responding to individual wrongdoing to spreading the cost of accidents across society:

- Adoption of the objective standard of reasonable care, which extended liability to people who were not morally culpable, allowing for compensation in cases of inadvertence and omission;
- Abandonment or dilution from the “unholy trinity”\(^4\) of defences to negligence: common employment, voluntary assumption of risk and contributory negligence (which originally was a complete defence);
- Vicarious liability for employers, which gave plaintiffs a greater chance of finding a defendant with deep pockets, even though the employer may be less morally blameworthy than the injurer; and
- Finally, liability insurance, which reduced the punitive and deterrent consequences of a damages award to the defendant but allowed the cost of an injury to be distributed across the community.

The main vehicle for compensation for injury under the civil law was the negligence action. The tort of breach of statutory duty was sometimes used in work injury cases, on the basis of a breach of a duty imposed by one of the various statutes aimed at promoting workplace health and safety. Some such statutes imposed duties qualified by reasonable practicality, and others did not. This meant that in some cases it was

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\(^3\) Ibid, 101-102.

easier for an injury victim to establish a breach of statutory duty than to prove negligence.

Common law compensation took the form of damages, assessed under three heads: actual economic loss, pain and suffering and loss of enjoyment of life. Damages were intended to completely indemnify loss, and were paid as lump sums so that they could be final.

2 Workers’ Compensation

Workers’ compensation was originally introduced in New Zealand in 1900 as a reaction to the restrictive fault-based common law of the time. The first workers’ compensation legislation essentially required employers in specified dangerous trades to insure their employees against injury or death by paying a levy. The scope of the scheme was expanded over time, and by 1956 it covered essentially all workers for incapacity by injury suffered in the course of employment, as well as certain industrial diseases.

Workers’ compensation was based on the idea that industrial injuries should be the responsibility of industry not individual workers, and that over time insuring against injury would become a normal cost of doing business. Employers therefore were responsible for paying the compensation under the workers’ compensation scheme (via insurance) and no fault was required, only total or partial incapacity with an appropriate causal connection to work.

The level of compensation paid was based on 80 per cent of the injured worker’s earnings, subject to two conditions: a maximum weekly payment, and maximum duration of payment of six years. The maximum weekly payment was not inflation adjusted and the actual payments to many workers fell to substantially less than 80 per cent of their actual earnings. Compensation for permanent incapacity was usually capitalized to a lump sum. Small supplementary payments were also payable to a dependant wife or child during periods of temporary incapacity.

Injury victims who received workers’ compensation were not barred from making a civil claim for damages, although compensation already paid under the workers’ compensation scheme was deducted from any award of damages if the civil claim was successful.

3 Social Security

New Zealand’s social security scheme was introduced in the Social Security Act 1938. The philosophy of the social welfare scheme was to provide a safeguard for

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5 Workers’ Compensation Act 1900.
6 Workers’ Compensation Act 1956.
those who needed the assistance of the state; the whole of society assumed responsibility for those who were worst-off. Accordingly, the Social Security scheme was funded via general taxation.

Unlike workers’ compensation, social welfare was aimed at meeting basic needs rather than compensating actual pecuniary loss. The benefits payable were accordingly flat-rate and means-tested on income. In contrast with workers’ compensation, social security also did not provide any assistance in cases of partial incapacity.

4 Criminal Injuries Compensation

Historically, the criminal law had limited (and little-used) provision for convicted offenders to pay compensation for loss of damage to property. To seek compensation from the offender for personal injury, a victim needed to take a civil action in tort.

In many cases an injured victim of a crime may have also been a victim of the tort of battery. Often, however, the offender would not have the means to pay damages, making an action fruitless. And, unlike negligence, liability insurance was not available for intentional torts on policy grounds, which further decreased the likelihood of an action leading to compensation.

The criminal injuries compensation scheme was introduced to address this position. The scheme compensated injury and not property damage due to concerns about cost and because it was considered that injury to the person was felt to be more deserving of special compensation, that ownership of property and damage to property were private matters which should be dealt with by private first party insurance (which was widespread).

The Criminal Injuries Compensation Act 1963, which came into force in 1964, established a Crimes Compensation Tribunal which could make awards of compensation to injured victims of crime. The basis of compensation for lost earnings was similar to that of the workers’ compensation scheme. In addition, awards for pecuniary loss other than that caused by incapacity to work and pain and suffering similar to those paid under the common law were available. Unlike the common law, there was a maximum of £500 payable for pain and suffering.

The criminal injuries compensation scheme provided against double recovery: the Tribunal was required to deduct from any criminal injuries compensation payable payments a victim had received from compulsory third-party motor vehicle insurance,

7 Crimes Act 1961, s 403.
9 Including at s 19(3)(a) a maximum of ten pounds five shillings per week for loss of earnings for a maximum period of six years.
workers’ compensation, social security or the offender. If a victim received a damages payment after receiving criminal injuries compensation, they had to refund the Tribunal.

The scheme was funded via general taxation, but the Tribunal was authorised to seek recovery of amounts paid from the offender.

C Problems with the status quo ante
There were two substantial problems with the status quo ante. The first is that it resulted in an inconsistent distribution of the cost of accidents, leaving many victims of injury with very meagre assistance following injury.

The second is that it was incoherent: there was no principled basis to justify the fragmented mechanisms of compensation, no underlying rationale why certain victims of injury should be treated so much more generously than others.

D Conceptions of justice
The philosophically incoherent status quo ante of accident compensation is in part a result of seeking “justice” for victims of injury while drawing on different conceptions of what justice is. These conceptions of justice differ in terms of the subject matter they apply to - that is what set of things each conception of justice provides an account of a “just” outcome for. However, these sets of subject matter overlap, so different conceptions of justice can provide an account of a just outcome following an injury. The status quo ante is underpinned by a mixture of corrective justice, retributive justice and distributive justice, and as a result is unable to fully deliver “justice” as defined by any one of these conceptions.

1 Corrective justice
Corrective justice is concerned with wrongful losses inflicted by one person on another. It is the conception of justice appealed to in statements like:

- “It is a general principle in our law that if a person causes someone cost, or does someone harm, it is up to that person to put it right.”;\(^\text{10}\) and
- “Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another.”\(^\text{11}\)

For corrective justice, a just outcome following a wrongful loss inflicted by one person on another is that the wrongdoer puts right the loss they cause, typically by a payment of compensation.

\(^{10}\) Amy Adams MP, during the first reading of the Sentencing (Offender Levy) Amendment Bill (12 February 2009) 652 NZPD 1278.

\(^{11}\) Ernest Weinrib “Corrective justice in a nutshell” (2002) 52 U Toronto LJ 349 at 349.
Corrective justice operates on *moral* wrongdoing, not wrongdoing in a technical legal sense. The moral character of the wrongdoing provides the principled justification for imposing liability on the wrongdoer. So, the “wrongful losses” corrective justice is concerned with are wrongful in the sense that they are inconsistent with the plaintiff’s moral obligations towards the defendant. By breaching those obligations, the defendant incurs a moral obligation to put right the loss they cause. Legal liability recognises that moral obligation and allows it to be enforced and corrective justice to be done. The pursuit of corrective justice thus requires a normative account of what kind of losses that occur in the context of interactions between individuals are wrongful and generate such a moral obligation.¹²

Corrective justice only provides an account of what ought to happen when a person suffers a loss that was wrongfully inflicted by another person. A transaction involving a transfer from a defendant to a plaintiff may resemble corrective justice in form, but is not necessarily justified by corrective justice unless the principled basis for the transfer is that the defendant is performing their moral obligation to correct a wrongful loss caused to the plaintiff. For example, making a particular defendant responsible for a loss because they are better able to absorb it than the plaintiff results in a transaction between two parties but it is not justified by corrective justice.

2  *Retributive justice*

Like corrective justice, retributive justice is concerned with moral wrongdoing. While corrective justice is concerned with rectifying the consequences of wrongdoing between individuals, retributive justice is concerned with providing society’s response to wrongdoing. The moral character of the wrongdoing provides the principled basis for providing society’s response, by way of punishment, deterrence and denunciation.

The performance of retributive justice therefore requires an account of what kind of acts are moral wrongdoing deserving of a retributive response, and an account of how to determine what response is appropriate for a particular act of wrongdoing.

Although corrective justice and retributive justice are both concerned with moral wrongdoing, their subject matter does not necessarily exactly coincide. The moral wrongdoing of corrective justice is wrongdoing that generates an obligation to put right harm caused. The moral wrongdoing of retributive justice is wrongdoing that ought to receive a response from society in terms of punishment, deterrence and denunciation.

¹² For example, Weinrib argues that argues that the normative content of corrective justice is provided by Kantian Right. See Ernest Weinrib “The Idea of Private Law” (Harvard University Press at 1995) at 84.
3 Distributive justice

Distributive justice is concerned with the distribution of a benefit or burden across society and is typically pursued by machinery that achieves the particular desired distribution across society. For example, a progressive taxation system seeks to achieve a certain distribution of wealth. As corrective justice requires a normative account of which losses are wrongful, assessing the justice of the distribution of a particular benefit or burden requires a criterion that sets out what a just distribution is.

Compensation is a benefit to the injury victim, which serves the purpose of alleviating the victim of some or the entire burden of injury. Approaching injury as a matter of distributive justice therefore means taking the view that justice for victims of injury is measured with reference to how the burden of injury is shared across society. There are two interconnected elements to this. First, the extent to which an individual injury sufferer is alleviated of the burden of the injury, and second, how that burden is then distributed across society.

Strictly speaking, any distribution of a benefit or burden across society in accordance with some criterion for distribution can be said to be in accordance with distributive justice. Distribution the cost of accidents based on an arbitrary criterion like skin colour is in a theoretical sense distributive justice. Realistically, of course, a modern society is likely to adopt a criterion for the distribution of the cost of accidents based on various competing considerations such as affordability, providing for victims of injury and rehabilitation. There is, of course, room for disagreement over what is a fair way to distribute the cost of accidents without adopting an arbitrary criterion, and the left and rights wings of politics tend to have different things to say about such matters.

Even though there might not be universal agreement over the criterion for distribution, the shift to dealing with accidents as matters of distributive justice is significant.

4 Conflicting conceptions of justice

An injury caused by wrongdoing can fall within the subject matter of corrective justice, distributive justice and retributive justice. The three conceptions of justice provide different accounts of a just outcome following wrongfully inflicted injury:

- Corrective justice is achieved by the wrongdoer putting right the loss caused by the injury;
- Distributive justice is achieved by the consistent application of the same criterion for distribution that is applied to all injuries; and
Retributive justice is achieved by providing a response appropriate for the seriousness of the wrongdoing, for which the victim’s loss may be relevant but is not determinative.

It is not generally possible to satisfy all three conceptions of justice at once. Corrective justice is only achieved if the loss is put right, so is not satisfied with the less than complete alleviation of the burden of injury provided by distributive justice or retributive justice. Distributive justice is not satisfied if some injury victims are treated differently because they happen to have been injured by wrongdoing, and determining wrongdoing consumes resources that cannot be redistributed to injury victims. Retributive justice is unlikely to be served by distributive justice machinery focused on shifting the burden from the victim of wrongdoing, and only coincides with corrective justice if the effect of the wrongdoing on the victim is on the same level as the blameworthiness of the wrongdoer.

This raises the dilemma of whether one particular conception of justice should dictate the outcome for wrongdoer and victim following an injury caused by wrongdoing, and if not, how to determine the outcome.

Each conception of justice has some political value, in the sense that society values the pursuit and achievement of “justice” as described by each conception of justice. Over time, the political value of these different conceptions of justice has changed. As a result, the solution to the dilemma has changed over time.

E Justice for injury victims under the status quo ante

1 Negligence, corrective justice and distributive justice

The common law position before the development of negligence as an independent tort strongly resembles a system of compensation for injury based on corrective justice. A plaintiff could only receive compensation by showing that a defendant had intentionally interfered with a protected interest of the plaintiff, a high threshold that can be equated with moral wrongdoing. If successful, a plaintiff’s remedy was an award of damages intended to address their loss.

This illustrates a distinction between corrective justice and distributive justice. A system of compensation for injury based on corrective justice is not the same thing as a system of compensation that distributes the cost of accidents across society based on fault. Corrective justice only operates on wrongful losses inflicted by one person on another, and achieves justice by way of a transaction between doer and sufferer of harm. This means that corrective justice provides nothing for the “innocent injured” who suffers a loss due to no fault or wrongdoing of his or her own. In contrast, a distributive justice system that distributes the cost of injury across society based on
fault must address such an innocent injured, because the criterion of fault does not justify the cost of an accident falling on a faultless victim.

The pre-negligence common law did not provide any compensation for many injury victims, so it was unsatisfactory in terms of distributive justice. The development of negligence as an independent tort, and the various statutory schemes that supplemented it were a reaction to this unjust distribution of the cost of accidents. This occurred in the context of an increasing number of injuries due to social progress, and a growing departure from the idea that injury was a private matter between injurer and victim. That is, society was increasingly seeking to achieve distributive justice for victims of injury.

The introduction and expansion of the tort of negligence allowed the common law to provide compensation to an increasing proportion of injury victims, at the cost of its corrective justice credentials. The objective standard of care meant that defendants could be held responsible for inadvertent acts or omissions that it is difficult to describe as moral wrongdoing without a degree of philosophical gymnastics. The objective test also meant that a defendant could be held liable for a standard they might be personally incapable of meeting. Vicarious liability and a wider approach to proximity in contrast with the direct link between act and injury required for intentional torts meant that defendants could be held responsible for acts that occurred outside the context of any immediate interaction of plaintiff and defendant. Liability insurance mitigated the effect of a damages award on the defendant, so allayed any concerns that negligence liability was unfairly penalising a morally innocent defendant. These developments brought the tort of negligence to a point where the notion of corrective justice could not provide a strong principled basis for the existence of the action.

However, distributive justice could not provide the principled basis for the tort of negligence either, because the action still fell far short of actually achieving a consistent distribution of the cost of accidents across society. The ability of negligence to achieve distributive justice was constrained by two features of the action. First, the requirement to prove fault meant that the negligence action could not reach all injury victims, even though negligence was easier to establish than moral wrongdoing. Second, the tort of negligence was clumsy and inefficient at spreading the burden of injury. The form of the action only allowed a transfer of burden from one individual defendant to one individual plaintiff, although vicarious liability and liability insurance meant that the burden could be spread further. While the development of the independent tort of negligence was driven by a desire to provide better outcomes for victims of injury, distributive justice did not provide a strong

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13 As long as one’s conception of a just distribution of compensation demanded more than a lottery.
principled basis for the tort, because it was still poor at actually delivering better outcomes for victims.

2 Retributive justice, the civil law and the criminal law

Retributive justice is traditionally associated with the criminal law, normally seen as the proper outlet for society’s response to wrongdoing. However, tort law also has a long history of providing punishment, deterrence and denunciation.

From the perspective of the defendant, a damages award is a penalty and thus a punishment, even if in theory the award is for the purpose of compensation. The sole purpose of exemplary damages is the pursuit of retributive justice, to bring the total penalty to the defendant to a level which provides an appropriate response to their wrongdoing.

3 Workers' compensation, criminal injuries compensation and social security

No-fault workers’ compensation and social security are based on distributive justice: a desire to broadly distribute across society the burden of work injuries and other unfortunate circumstances which generate a need for financial assistance.

The criminal injuries compensation scheme also reflected a desire to more broadly distribute the burden of criminally inflicted injuries. However the criminal injuries compensation scheme also reflects corrective justice in two ways. First, the scheme only provides assistance for injury caused by criminal wrongdoing, and the criminal law is normally associated with moral wrongdoing. Second, in some cases the offender could be made to pay for the loss they caused. To the extent that making the offender pay for the loss can be regarded as a punishment, the criminal injuries compensation scheme also provides retributive justice.
II THE WOODHOUSE REPORT

A Introduction


The Report’s criticism of the status quo ante was twofold. Firstly, it criticised the manifestly unfair distribution of the burden of accidents. Secondly, it argued that the negligence action had departed its own fault principle, that principle being in any case the wrong one to determine where the burden of accidents should fall.

From the outset, it is clear that the Report approached the question of what is a just distribution of the cost of accidents in terms of distributive justice, and took the view that meeting the needs of accident victims trumped the pursuit of corrective justice, retributive justice or other goals. This allowed the Report to provide a coherent principled basis for its alternative proposal, aside from the exclusion of illness.

However, corrective justice and retributive justice still have some political value, and the Report did not anticipate society’s desire to provide a retributive response to injuries caused by wrongdoing, and fully compensate victims of injury caused by wrongdoing, even after the implementation of a generous and comprehensive distributive scheme.

This chapter examines the Woodhouse Report in terms of providing:

• A critical evaluation of the status quo ante of compensation for injury;
• Specific criticism of the negligence action in practice and principle; and
• A clear vision of an alternative way of dealing with injury, and a principled argument for that vision.

\textsuperscript{14} Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand \textit{Compensation for personal injury in New Zealand; Report of the Royal Commission of Inquiry} (Government Printer, Wellington, 1967), hereafter “Woodhouse Report”.
B Critical evaluation of the status quo ante

1 “The problem”

To set out the Report’s powerful criticism of the status quo ante as failing to provide fair compensation for victims of injury, it is difficult to go beyond the description of “The Problem” in the Report itself:15

One hundred thousand workers are injured in industrial accidents every year. By good fortune most escape with minor incapacities, but many are left with grievous personal problems. Directly or indirectly the cost to the nation for work injuries alone now approaches $50 million annually.

This is not all. The same work force must face the grave risks of the road and elsewhere during the rest of every 24 hours. Newspapers up and down the country every day contain a bleak record of casualties.

The toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole. They receive this only from the health service. For financial relief they must turn to three entirely different remedies, and frequently they are aided by none.

The negligence action is a form of lottery. In the case of industrial accidents it provides inconsistent solutions for less than one victim in every hundred. The Workers’ Compensation Act provides meagre compensation for workers, but only if their injury occurred at their work. The Social Security Act will assist with the pressing needs of those who remain, provided that they can meet the means test. All others are left to fend for themselves.

Such a fragmented and capricious response to a social problem which cries out for co-ordinated and comprehensive treatment cannot be good enough. No economic reason justifies it. It is a situation which needs to be changed.

2 Criticism of the negligence action

With respect to the negligence action in particular, the Report gave four principal criticisms:

• The philosophy is illogical;
• The outcomes of the procedure for injury victims are uncertain and affected by chance;
• The procedure is costly and slow-moving; and
• The nature of lump sum awards and the process as a whole are an impediment to rehabilitation.

15 Woodhouse Report, at 19.
These criticisms seek to establish that the tort of negligence is poor at both responding to fault and meeting the needs of victims.

I will briefly outline the latter three criticisms before examining the first criticism in more detail, because it is a principled argument, whereas the other criticisms are more pragmatic, and the other three criticisms have generally been accepted.

**Inconsistent outcomes**

The Report noted that the risks of the adversarial system - difficulties of proof and possible lack of eye-witnesses, the ability of advocates, the reactions of juries and mere chance itself, as well as the possibility of a finding of contributory negligence reducing the award - mean that the compensatory outcomes for victims of injury provided by the negligence action are a kind of lottery.

The description of the negligence action as a lottery is backed up by an analysis of personal injury actions in the Wellington Registry of the Supreme Court during the years 1962 and 1963. No more than 61 of the 364 actions were brought to trial, and outright victories were achieved in 22 cases – 6.1 per cent of cases overall. All the other cases ended in either a verdict for the defendant, settlement, abandonment of the case, or a deduction for contributory negligence.\(^{16}\)

**Costly and slow-moving**

The Report notes that as well as being uncertain in terms of outcome, negligence actions can suffer serious delays, which puts the plaintiff at a serious disadvantage, as no compensation will be received until there has been a trial or settlement. In the Wellington analysis, there was an average time lag of 13 to 14 months before the first formal step was taken in court, and a further period averaging six months before the action came to trial.\(^{17}\)

The Report shows that the negligence process consumes money as well as time. The Royal Commission considered it likely that 40 per cent of the amounts paid into the system comprised administrative and legal charges, even though it considered that in general administrators exercised “reasonable control” over their costs.\(^{18}\) So, administrative costs were a necessary part of the fault-based system.

It clear that the need to establish fault in an adversarial system generates administrative cost: both parties need advocacy, and judges and juries are required to make determinations of disputed issues of facts and law, informed by expert evidence.

**Lump sums**

\(^{16}\) Ibid, at 55.
\(^{17}\) Ibid, at 57.
\(^{18}\) Ibid, at 59.
The Report argued that in general, the negligence system is an impediment to rehabilitation. The uncertainty and delays already mentioned can lead to anxiety neurosis.\(^{19}\)

The Report also argued that lump sum awards specifically hinder rehabilitation. It sets out the arguments in favour of lump sums:

- Capital in hand can be used to plan for the future, for example to buy a small business or a house;
- There is administrative convenience in bringing a claim to finality; and
- Lump sum awards provide certainty to the injured party.

The Report then compared the arguments against lump sums:

- Lump sum awards depend on making an assessment of future costs, which, due to the uncertainty involved, will often be inaccurate. The finality of lump sum awards means inaccuracies cannot be corrected in the plaintiff’s favour; and
- The attraction of a capital sum is “illusory” and “The risk which the situation is said to carry is the temptation to mortgage the future.”\(^{20}\) Some injured people would find it difficult to resist the immediate temptation to make decisions that would make them worse off in the long-term.

The Report found that, on balance, lump sum awards are an impediment to plaintiffs and their rehabilitation. It concluded:

> Those in favour of lump sum awards argue that even if plaintiffs were unwise enough to squander the capital amount paid over to them, nobody could object as the matter should be regarded as one entirely for themselves. We do not doubt that people are entitled to handle their affairs as they themselves might decide, but we do not think this is the real issue. The question is the form in which the damages should take. There could be no injustice to plaintiffs if their future periodic losses were reimbursed to them as they arose, and the problem is simply whether this should be done. In any event it can reasonably be said that if the community as a whole must stand behind a man who is injured and once again when his damages have gone, it has some sort of claim to determine the method of paying him.\(^{21}\)

The Report’s view was that the “right” to receive a lump sum award as a remedy was a merely a legal device representing society’s pragmatic response to injury, but lacking any principled justification. Society can therefore replace negligence with a better compensation scheme which makes payments in a different way.

\(^{19}\) Ibid, at 61-2.

\(^{20}\) Ibid, at 61.

\(^{21}\) Ibid, at 61.
Damages awards were made in the form of a lump sum because of the pragmatic need to put an end to litigation. The quantum of the lump sum was intended to fully compensate for the plaintiff’s loss, both past and future.

With a shift to distributive justice, neither of these factors apply. First, while there is a need to bring litigation to an end and close the matter between the parties, there is no reason why the community cannot continue to absorb ongoing injury-related costs as they arise. Second, “full compensation” is replaced with the goal of providing a level of compensation which is considered by the community to be appropriate for all accident victims.

No evidence of deterrent

The Report notes that it received submissions in favour of retaining the common law on the basis that it provided a deterrent against unsafe behaviour and played an important role in industrial safety. The Report’s response to this is that there is no evidence to support the view any deterrent effect actually exists.\(^\text{22}\)

C Criticism of the philosophy of negligence

The Report provides a compelling case that the distribution of compensation under negligence is unfair. The report anticipates the argument that negligence should be retained on the basis that it promotes some conception of justice where a “just” outcome following an accidental injury is judged by what happens to a wrongdoer who caused that injury and not solely the victim. So, the Report considers the principled basis of negligence and provides five arguments against the logic of that principle, as reflected in the law of negligence.

I The fault principle

The Report starts with the premise that the philosophical basis of negligence is the fault principle:\(^\text{23}\)

The critical question in the common law action is whether or not the defendant was at fault. If fault is not proved, then no matter how innocent the plaintiff, the common law will leave him to bear the whole burden of his losses, even though they might have been catastrophic... It is supported by feelings that those at fault deserve to pay, even if they have not intended the consequences of their actions. The attitude is described by Lord Atkin in the famous case of *Donoghue v. Stevenson*.\(^\text{24}\) He said:

\(^\text{22}\) Ibid, at 51.
\(^\text{23}\) Ibid, at 49.
\(^\text{24}\) *Donoghue v Stevenson* (1932) AC 562 at 580.
“The liability for negligence, whether you style it as such or treat it as in other systems as a species of ‘culpa’, it is no doubt based upon a general principle of moral wrongdoing for which the offender must pay.”

The Report’s five arguments about negligence and the fault principle are as follows:

I. Penalty to the defendant is not proportional to wrongdoing

The Report argues that if negligence is concerned with wrongdoers paying for their wrongdoing, we would expect that the sum they are required to pay would reflect the seriousness of their wrongdoing. However:

It is a curious fact that [the action of negligence] stops short of attempting to see that the damages do not become disproportionate to the conduct which is said to justify them. The extent of liability is not measured by the quality of the defendant’s conduct, but by its results. Reprehensible conduct can be followed by feather blows, while a moment’s inadvertence could call down the heavens.25

Negligence does not assess compensatory damages awards with reference to the defendant’s blameworthiness. However, there are features of the action which operate to limit the burden on an individual defendant in the case where a moment’s inadvertence results in a substantial loss. Vicarious liability and liability insurance limit the impact on an individual, and a jury sympathetic to a defendant could conclude that they were not at fault.

II. Innocent injured

… the plaintiff’s conduct is entirely disregarded until the defendant is shown to be legally responsible. There is no thought that a person who is the innocent cause of an injury might reasonably be asked to share with his equally innocent victim the loss he has caused.26

If the purpose of the tort of negligence is to make wrongdoers pay, then we would not expect innocent injurers to be penalised, even if that means that the innocent injured are worse off. This argument does not reveal any inconsistency between the fault principle and negligence.

Argument II does provide an argument that the fault principle should not be used as the basis for distributing the costs of accidents. To do so we must accept a new principle, a kind of no-fault principle, that “innocent victims of injury should not pay” instead of “wrongdoers should pay.” The shift from the fault principle to a no-fault principle focuses on the injured rather than the wrongdoer. This shift moves us from a conception of justice concerned with responding to wrongdoing to a distributive one

25 Woodhouse Report, above n 14, at 49.
concerned with where the costs of accidents fall, a shift from assigning blame to responding to need.

III. Defendant’s subjective state of mind

Argument I suggests that the common law action is inconsistent with the fault principle because the test for determining how much a wrongdoer pays is not proportional to their wrongdoing. Argument III shows that the test for who is considered to be a wrongdoer is also inconsistent.27

The fact should be faced that despite the moralizing which has enabled the fault theory to develop it is really not possible to equate negligence as an independent tort with moral blameworthiness. Negligence is tested not in terms of the state of mind or attitude of the actual defendant, but impersonally against the (occasionally remarkable) performance of a theoretical individual described as “the reasonable man of ordinary prudence”. If in all the circumstances which surround the defendant it is likely that the reasonable man would have avoided the accident, then the defendant’s failure to measure up will be regarded as negligence, irrespective of his mental attitudes or even his ability to reach the required standard. It is for such reasons (as the textbooks usually are at pains to point out) that the use in law of the word “negligence” to describe an independent civil wrong has created a good deal of confusion even among lawyers. Because the word carries in its ordinary application overtones which seem to warrant some disapproval, the name of the remedy tends to become its vindication.

The Report goes on to state that “[c]onduct can hardly deserve moral censure unless it reflects a subjective and moral attitude (which the objective standard of the reasonable man displaces).”28 This claim is questionable. It is possible to maintain that the independent tort of negligence cannot be equated with moral blameworthiness but that conduct which departs from community standards of behaviour deserves some degree of moral censure, even if inadvertently so.

IV. Insurance and legal fiction

This argument shows how insurance makes the notion that loss is allocated to wrongdoers a legal fiction:29

The fact is that through compulsory insurance (at least for industrial and highway risks) society has considered in New Zealand that it is appropriate to spread the economic consequences of negligent conduct over the whole community. Everybody must share in the losses whether characteristically inclined to this sort of negligence, or whether marked by the uniform prudence

27 Ibid, at 50 (emphasis added).
28 Ibid, at 50.
29 Ibid, at 50.
of the reasonable man. Against this background the search for negligent defendants who might deserve to pay is really a search to control the aggregate sum that will become payable. In a modern world of many accidents and community-wide insurance to cover them the fault theory has developed into a legal fiction.

Indeed, it can be argued that the fault theory always was a fiction with respect to negligence, and community-wide insurance only made this fiction more apparent. Negligence arose because the individual fault-based common law failed to respond adequately to the needs of the victims of the injuries that came with social and industrial progress. So, from the beginning negligence had to depart from any serious commitment to allocating loss based on individual fault.

V. The “man in the street”

Finally, the Report questions whether the “fault theory” is accepted by the community:

Nor is the philosophy behind the fault theory currently accepted by the man in the street. People have begun to recognise that the accidents regularly befalling large numbers of their fellow citizens are due not so much to human error as to the complicated and uneasy environment which everybody tolerates for its apparent advantages. The risks are the risks of social progress, and if there are instinctive feelings at work today in this general area they are not concerned with the greater or lesser faults of individuals, but with the wider responsibility of the whole community. It is for these reasons that compulsory insurance for highway and industrial accidents is generally acceptable.

As with Argument II, this argument does not show that the tort of negligence is inconsistent with the fault principle. Instead, it is an argument that the fault principle is the wrong principle for deciding the distribution of the costs of accidents, because in modern times accidents occur as an inevitable result of social progress not because of individual fault.

2 Assessing the philosophical arguments

The Report’s philosophical arguments against the common law action can be set out as follows:

1. The philosophical basis of the common law action is the fault principle.
2. The common law action does not promote the fault principle (arguments I, III and IV.)
3. In any case, the fault principle should not be accepted as a basis for the distribution of the costs of accidents (arguments II and V.)

30 Ibid, at 50.
3 Justice and the fault principle

A principle of “moral wrongdoing for which the offender must pay” contains two key ambiguities. The first is the issue of what kind “moral wrongdoing” leads to the wrongdoer deserving to pay. Prior to the development of negligence, the law of torts tended to deal with clear cases of moral wrongdoing: intentional acts which interfered directly and immediately with the protected interests of another party. The development of negligence, spurred on by the desire to help victims of accidents, brought the law to a point where the “fault” which led to negligence liability was no longer associated with a clear sense of moral wrongdoing, even though the language of fault and wrongdoing was retained.

The second ambiguity is whether “deserves to pay” means that the wrongdoer should pay a penalty that reflects the gravity of their wrongdoing, or rather pay the cost of repairing the consequences of their wrongdoing for the victim.

These ambiguities reflect the points of difference between retributive justice and corrective justice. Society tends to consider a higher level of moral blameworthiness is needed to deserve retribution as opposed to compensating for harm done. An emphasis on response to the wrongdoing is typical of retributive justice, and an emphasis on the consequences of wrongdoing for another party is typical of corrective justice.

So, both retributive justice and corrective justice can be considered to provide the “feeling that those at fault deserve to pay” of the fault principle that “wrongdoers deserve to pay.” Indeed, the law of torts can be said to serve both conceptions of justice to some extent.

We can then go on and consider the Report’s arguments that negligence law is inconsistent with the fault principle in light of these two conceptions of justice.

4 Negligence is inconsistent with the fault principle

Argument I centres on the damages awarded in negligence, which are assessed with reference to the consequences of the negligent act, not the blameworthiness of the act. This makes negligence inconsistent with retributive justice, but not corrective justice.

Argument III centres on the objective test of negligence, which undermines subjective determination of moral wrongdoing deserving punishment. This makes negligence inconsistent with retributive justice. An objective standard of fault that leads to liability is not inherently inconsistent with corrective justice. The normative content of corrective justice that supplies the rule for when one party has inflicted an injustice on another does not necessarily have to provide a subjective test. But it must identify conduct that will be recognised as morally “wrong”, to provide the justification for making the defendant pay.
Argument IV centres on liability insurance allowing a wrongdoer to pass on the burden of damages on instead of “paying” themselves. This undermines the punitive and deterrent effects of a damages award, and makes negligence inconsistent with retributive justice. For the purposes of corrective justice, the importance of a damages award is that it is a transaction that corrects the injustice between a plaintiff and defendant, not that it is a burden for the defendant. Liability insurance lessens the burden of the damages award on a defendant, but allows the transaction to occur. So, arguably, liability insurance does not undermine corrective justice to the same extent that it does retributive justice.

So the Report’s arguments that negligence is inconsistent with the fault principle have a stronger application to retributive justice than to corrective justice.

5 Curious omissions: exemplary damages and intentional torts

After taking the premise that the philosophical basis of negligence is the fault principle, the Report is curiously silent on other features of the common law which are more clearly aimed at responding to moral wrongdoing:

• Intentional torts, concerned with intentional acts that interfere directly with protected interests; and

• Exemplary damages, which are awarded when compensatory damages are considered to provide an insufficient response to the defendant’s wrongdoing.

Although the Report is silent on these measures, we can consider whether the arguments it provides apply to them.

The Report’s main criticism of the status quo ante is that the outcomes for victims of accidents is like a lottery. Intentional torts contribute to the lottery by allowing some victims and not others to receive compensation, because of how they were injured. Exemplary damages mean that some of the victims who do happen to receive compensation receive an even bigger payment.

With respect to the philosophical criticisms of the law of negligence:

Exemplary damages undermine Argument I to some extent by providing the Courts with a way of making the damages award a proper penalty for wrongdoing in cases where, as the Report puts it, reprehensible conduct is followed by feather blows.\(^3\)

Argument I does arguably apply to intentional torts in “eggshell skull” cases, where an intentional act by a defendant causes an unforeseen level of harm to the victim or, as the Report puts it, calls down the heavens.\(^3\) In such cases, it was considered

\(^3\) Ibid, at 49.
\(^3\) Ibid, at 49.
acceptable to shift the entire loss to the wrongdoer, since the intentional torts deal with more egregious intentional acts and not moments of mere inadvertence.

Argument III clearly does not apply to exemplary damages or intentional torts, because for both the defendant’s subjective state of mind is critical.

Argument IV does not apply to intentional torts because contracts for insurance for deliberate wrongdoing are unenforceable as a matter of policy.

Why the Report did not deal with intentional torts and exemplary damages is not clear. Intentional torts were perhaps not mentioned specifically because they were minor players in compensation for injury compared to negligence. At the time the Report was being prepared, the availability of exemplary damages in New Zealand was unclear but appeared very limited. The House of Lords in 1964 held in *Rookes v Barnard*\(^{33}\) that exemplary damages were limited to three categories, only one of which had real potential to apply to personal injury cases: oppressive, arbitrary or unconstitutional action by state servants. The High Court of Australia refused to follow *Rookes v Barnard* in 1966 in *Uren v John Fairfax & Sons Pty Ltd*,\(^{34}\) but the New Zealand position was not considered by our Court of Appeal until 1982.\(^{35}\)

### D The Woodhouse principles

The essence of the Report’s alternative to the status quo ante, and the principled justification it provides for it, is found in the five “Woodhouse principles”:

1. Community Responsibility;
2. Comprehensive Entitlement;
3. Complete Rehabilitation;
4. Real Compensation; and
5. Administrative Efficiency.

### I Community Responsibility

The idea of the principle of community responsibility is that the whole community should take responsibility for the cost of accidents. The Report provides a two-pronged argument for why this should be:

- A modern society benefits from the work of its productive citizens, so should accept responsibility for those willing to work but unable to do so because of physical incapacity; and

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\(^{33}\) *Rookes v Barnard* [1964] AC 1129.

\(^{34}\) *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

Activities performed collectively by the community inevitably result in injury by accident, so the community should absorb that cost collectively.

The second argument expands the workers’ compensation philosophy that industrial accidents should be the responsibility of industry to the idea that the community should be responsible for injuries caused by community activities that “year by year extract a predictable and inevitable price in bodily injury”. Other than industry, motor vehicle use is the other main community activity which regularly results in injury. Even taking a broad meaning of “community activities”, the second prong by itself falls short of providing a principled basis for a scheme that covers all injuries – some injuries occur in a private setting and are not the result of “community activities”. The first argument, however, does provide an argument for the community taking responsibility for injuries that occur in a private setting.

2 Comprehensive Entitlement

Once the community has taken responsibility for all injury victims, the Report argues, there is no justification for providing different awards depending on the cause of injury. The scheme should be “comprehensive” in the sense of being all-encompassing. There is a limited exception: “the productive section of the community must sustain the elderly and the young, and the latter groups cannot reasonably expect to be provided with a form of social insurance on the same level.”

3 Complete Rehabilitation

The Report states, even though it considers it was stating the obvious, that “the consideration of overriding importance must be to encourage every injured worker to recover the maximum degree of bodily health and vocational utility in a minimum of time.” This can be contrasted with the common law position, which was more concerned with compensating victims of injury than rehabilitating them.

4 Real Compensation

The Report states that compensation should attempt to meet actual losses and should rest on “a realistic assessment of actual loss, both physical and economic, followed by a shifting of that loss on a suitably generous basis.”

The Report rejects the “earlier philosophy” of meeting only need, ie the social security philosophy, as a relic of an earlier time:

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36 Woodhouse Report, above n 14, at 40.
37 Ibid, at 40.
38 Ibid, at 40.
39 Ibid, at 41.
40 Ibid, at 41.
[W]here poverty was a widespread evil demanding considerable mobilisation of the country’s financial resources. But average modern households, geared to the regular injection of incomes undreamed of at the turn of the century, have corresponding commitments which do not disappear conveniently if one of the hazards of modern life suddenly produces physical misfortune.

The Report’s basis principled basis for providing “real compensation” aimed at meeting actual loss can be contrasted with corrective justice. Corrective justice sees meeting actual loss as necessary to fully correct an injustice between two parties.

“Real Compensation” sees addressing actual loss as necessary to adequately provide for an injured citizen of a modern society with various financial commitments and expectations. The Report recommends generous but not full compensation: “Real Compensation” should be based on actual loss, not need, but need not meet the entire loss, so the level of cost shifted is one the community is prepared to absorb, taking into account the importance of rehabilitation.

5 Administrative Efficiency

The Report proposed that “the collection of funds and their distribution as benefits should be handled speedily, consistently, economically and without contention.”

It might seem self-evident that any compensation scheme, or indeed any enterprise at all, should strive for administrative efficiency. However, after seeing the resources consumed by administration in the negligence system, the Royal Commission concluded that achieving genuine administrative efficiency meant departing from making compensation dependant on fault or causation.

So, the principle of administrative efficiency gives another reason for a no-fault scheme, in addition to as the comprehensive entitlement argument that it is unjust to treat accident victims differently depending on how they were injured.

E The Woodhouse Alternative

The key features of the Woodhouse Commission’s proposed scheme are as follows:

1 Scope of the scheme

The scope for which injuries could receive compensation under the scheme was broad:

The general basis for protection should be bodily injury by accident which is undesigned, and unexpected so far as the person injured is concerned, but to the exclusion of incapacities arising from sickness or disease.

41 Ibid, at 41.
42 Ibid, at 113.
The report specified that victims of criminal violence should be included, but deliberately self-inflicted injury should be excluded.

2 Replacement of stats quo ante measures

The scheme would largely replace, rather than supplement, the status quo ante of accident compensation. There were two reasons for this. Firstly, the Report considered that compensatory measures under the status quo ante would become unnecessary: “[g]iven a suitably generous scheme … it follows automatically that previous ways of seeking to achieve the same or a similar purpose become irrelevant.” Secondly, abolishing the status quo was necessary so the new scheme could take advantage of the funding of the status quo ante.

Accordingly, the Report recommended the abolishment of common law rights in respect of personal injuries, the repeal of the Workers’ Compensation Act, and a merger of benefits under the Social Security Act where appropriate. The Report considered that private insurance and liability insurance would generally be unnecessary but individuals could still seek cover for additional contingencies.

3 Entitlements

The report specified four general types of compensation:

**Compensation for incapacity to work**

Compensation for incapacity to work was to be based on eighty per cent of pre-injury income. The Report also proposed compensation for “housewives and others without direct earnings losses” who became incapacitated.

The Report was concerned that funding incapacities of short duration could “rise to a point where the majority with lesser troubles are satisfied at the expense of those whose problems are great”, so proposed a maximum payment for the first four weeks of incapacity.

**Compensation for permanent physical disability**

Compensation for permanent physical disability was to be based on an updated version of the schedule contained in the Workers’ Compensation Act. The Report suggested that compensation for permanent physical disability should come in the form of periodic payments, other than minor permanent disabilities which could be compensated by small lump sums.

**Compensation for dependants after accidental death**

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41 Ibid, at 108.
44 Ibid, at 120.
In cases of accidental death, the Report proposed that the widow of the deceased should receive half the compensation her husband would have received, which would cease following remarriage. A small lump sum was also payable to widows, as well as a small payment for funeral expenses. Compensation was also recommended for children of the deceased. The Report states that “invalid widowers” should be compensated on the same basis as widows.\footnote{Ibid, at 121.}

**Compensation for medical and other expenses**

With respect to medical expenses, the Report recommended that health care should continue to be provided by the national health service, but as part of compensation and for the promotion of rehabilitation all medical and specialist services should be free. The Report also recommended provision for travelling expenses to and from medical treatment, care for incapacitated persons who needed assistance, and reasonable expenses associated with rehabilitation and prosthetic appliances.

4 **Accident prevention**

The Report recommended setting aside a substantial amount ($600,000) to deal with the promotion of rehabilitation and safety

5 **Funding**

The scheme would take over the following sources of funding under the status quo ante:

- Industry premiums paid into workers’ compensation, as well as payments by the Government and employers who self-insured;
- Motor vehicle insurance premiums paid under the compulsory third-party insurance scheme; and
- Additional costs borne by social security and the Health Department with respect to injuries.

The scheme would also be funded by the self-employed, and drivers rather than owners of motor vehicles, both of which did not fund compensation in the status quo ante.

For employers and the self-employed, the Report recommended a flat one per cent levy on all wages and salaries. It rejected an industry risk-based classification system on that basis that it failed to recognise that all industrial activity is interdependent.
6 Operation

The scheme should be run by a newly-established independent authority, as opposed to an existing government department or insurance companies. The scheme was to be compulsory with no contracting out.\textsuperscript{46}

\textsuperscript{46} Ibid, at 131.
III FROM REPORT TO A NEW SCHEME: 1967 – 1972

A Introduction

The Woodhouse Report was published in December 1967. Almost four years later, in October 1972, legislation to implement a new accident compensation scheme was passed, however the scheme itself did not commence operation until April 1974.

The Royal Commission’s argument that the status quo needed replacing was quickly accepted, and consensus developed that the replacement should be, at least in part, some kind of no-fault scheme. The length of time from publication of the Woodhouse Report to the scheme finally coming into force was because the details of the scheme took time to resolve through the political process. This chapter gives a brief chronology of this political process, and sets out the scheme established by the first Accident Compensation Act.

B A brief chronology

1 Reception of the Woodhouse Report

The Woodhouse Report itself was made public on December 15, 1967. Editorial response in major newspapers was “cautious but favourable”\(^47\), while the response of the National government of the time was simply cautious. The government set up an Interdepartmental Committee to investigate the feasibility of implementing the Royal Commission’s recommendations, which reported at the end of 1968 to a Caucus Committee established to discuss the Woodhouse Report. The focus of the members of Parliament at this stage was costing the proposed scheme to prepare for later decision-making.

2 The White Paper

The government then prepared a White Paper\(^48\) which provided a commentary on the Woodhouse Report and the Royal Commission’s proposed scheme, as well as setting out possible variations on the scheme.

The White Paper readily accepted the Royal Commission’s findings that “the toll of personal injury is one of the disastrous incidents of social progress”\(^49\) and that the state of compensation for accidental injury in New Zealand was problematic and needed to be addressed.

\(^47\) Geoffrey Palmer Compensation for Incapacity (Oxford University Press, Wellington, 1979) at 74.


\(^49\) Ibid, at 9.
The White Paper’s reception of the principled arguments in the Woodhouse Report was, in contrast, lukewarm. The White Paper did not endorse the “Community Responsibility” argument that the community should absorb the cost of all injuries. Instead, it simply commented that accident compensation was “a question involving the relationship of the individual and society.”50 The White Paper noted that even if the principle of Community Responsibility was not accepted, then a comprehensive compensation scheme could be justified on economic grounds.

The White Paper canvassed a number of possible variations of the Royal Commission’s proposed scheme, particularly in the area of the quantum of benefits, where it stated that “there would be widely differing views on what the Commission’s principle of ‘Real Compensation’ means in practice.”51 The White Paper argued that the lack of provision of compensation for “aspects of the injury which harm the victim’s dignity as a human being”52 could be considered lacking when compared with the common law. With respect to the method of payment however, the White Paper accepted the Royal Commission’s conclusions that periodic payments were preferable to lump sums.53

The White Paper raised particular concerns over the Royal Commission’s proposed funding mechanism of a flat levy on salary and wages. The White Paper noted that normally matters of community responsibility are funded through general taxation on a progressive basis but accepted the Royal Commission’s arguments that a flat levy was straight-forward and meant that funds were absorbed within industry.54 However, the White Paper was less sympathetic towards the Royal Commission’s rejection of the idea of modifying levies according to industry risk. The White Paper argued that such a system would be more efficient at deterring accidents.55

3 The Gair Select Committee

After the White Paper was tabled in the House of Representatives on 23 October 1969, the paper was then referred to a Select Committee, so the Select Committee could consider and report on the Woodhouse Report.56 The resulting Select Committee, chaired by Mr G F Gair MP, was the point where the Government’s response to the Woodhouse Report moved past commentary and costing and towards developing concrete policy that would lead to legislation.

50 Ibid, at 45.
51 Ibid, at 53.
52 Ibid, at 54-5.
53 Ibid, at 63.
54 Ibid, at 83.
55 Ibid, at 84-5.
Like the White Paper, the Gair Select Committee was quick to accept the Royal
Commission’s conclusions regarding the need for change, but did not accept the
Commission’s view that community should take responsibility for all injuries.
Instead, the Gair Select Committee recommended the establishment of two schemes:
an earners’ scheme which covered employees and the self-employed for injuries
sustained at any time and a road accident scheme which covered motor vehicle
accidents. The former scheme was to be funded by risk-based levies on employers and
the self-employed, and the latter by levies on motor vehicle drivers. The Gair Select
Committee’s proposed scheme thus covered those injured as a result of the increased
industrial and vehicular injuries that came with social progress, and covered earners
for injuries suffered outside work, but did not go further than that.

This meant that non-earners who suffered injuries other than motor vehicle injuries
were excluded from the new scheme. The reasons for this were concerns over cost
and raising finance as well as the difficulty of distinguishing between illness and
injury for the elderly. The Gair Select Committee saw their proposed schemes as
replacing the common law action and workers’ compensation, but recommended that
the common law action be preserved with respect to injuries not covered by either
scheme.

The Gair Select Committee received a number of submissions. One major theme,
particularly from the trade unions, was that if the common law was replaced then its
replacement should provide benefits at a level similar to that of the lump sum award
to a successful plaintiff in a tort action, including compensation for pain and suffering
and loss of enjoyment of life. The Select Committee considered that compensation for
pain and suffering should be available, but little weight should be given to it. The
Select Committee considered that lump sum compensation for permanent disability
was important, but not so important that compensation should be available to the level
that was sometimes awarded to successful plaintiffs in civil cases. The Select
Committee preferred an approach based on the existing schedules of workers’
compensation rather than the common law.

The recommendations of the Gair Select Committee were drafted into legislative form
and the Accident Compensation Bill was introduced to the House on 15 December
1971. The Bill was then referred to a further Select Committee, chaired by Mr A. A.
C. McLachlan. The major policy decisions to partially abolish the common law and
introduce earners’ and road accident schemes were already made, so the focus of the
McLachlan Select Committee was on the specifics and mechanics of the legislation.

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58 Ibid, at 47-8.
The McLachlan Select Committee received a number of submissions that the availability of common law remedies for some injuries and not others was problematic: it was unfair to deprive some people and not others of their common law rights, and was bound to result in litigation over the demarcation lines. The New Zealand Law Society’s submission argued for abolishing the common law entirely for the sake of simplicity. Further submissions from the trade unions drew on the fact that workers were having their common law rights taken away but non-earners were not to bolster the argument that benefits under the scheme should be comparable to common law damages payments if the common law was to be abolished.

The McLachlan Select Committee did not result in any fundamental policy changes, but did result in substantial redrafting of a number of provisions. Although the National Government did not shift its position on excluding non-earners it did make a concession by including a provision which required the Accident Compensation Commission to report back after three years of operation on the feasibility of expanding the scheme.59

5 Accident Compensation Act 1972 and Amendment Acts

The Accident Compensation Bill was passed on 3 October 1972, and the Accident Compensation Act 1972 allowed for a transitional period before the new scheme was to come into force on 1 October 1973. However, Labour won power following the general election in November 1972, and amended the Accident Compensation Act to include a third scheme, the supplementary scheme, which covered any injury victims not covered under the road accident or earners’ schemes. This did away with any need to retain the common law for accidental injury suffered by non-earners. Labour also extended the commencement date of the scheme to 1 April 1974 to allow further time to prepare. Before that date, further amendments were made to the scheme, including an Amendment Act in 1974 which made changes to some of the detail of entitlements, and provided the more detailed definition of “accident” set out below.

C Overview of the first accident compensation scheme

Key features of the scheme under the amended Accident Compensation Act 1972 were:

1 Purpose

The Act had three main purposes:

• To promote safety;
• To promote the rehabilitation of injured people; and

59 Accident Compensation Bill, cl 17A.
• To provide compensation for injury victims and the families of victims of accidental death.  

2 Scope
The scheme covered “personal injury by accident” which was not exhaustively defined, but included:

• The physical and mental consequences of injury or accident;
• Medical misadventure;
• Incapacity resulting from certain occupational diseases; and
• Bodily harm caused by certain criminal offences relating to sexual abuse and assault.

Cover was expressly excluded in cases of:

• cardio-vascular and cerebro-vascular episodes except in limited work-related circumstances; and
• damage caused exclusively by disease, infection, or the ageing process.

3 Replacement of status quo ante measures
The Accident Compensation Act 1972 abolished the workers’ compensation scheme and the criminal injuries compensation scheme was abolished by the 1974 Amendment Act. Common law proceedings in relation to injury were barred under s 5(1) of the 1972 Act which provided:

Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independent of this Act, whether by that person or any other person, and whether under any rule of law or any enactment. (emphasis added)

4 Entitlements
The scheme provided compensation for various costs including hospital and medical expenses, rehabilitation costs and transport costs. The other main types of entitlement were:

Compensation for lost earnings

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60 Accident Compensation Act 1972, s 4(1).
61 Accident Compensation Act 1972, s 2.
62 The 1974 Amendment Act provided that the Criminal Injuries Compensation Scheme would cease on 1 April 1975, so the ACC scheme and the Criminal Injuries Compensation Scheme co-existed for a brief time.
Earnings-related compensation was payable weekly from the seventh day after the accident, based on eighty per cent of pre-injury earnings. The legislation gave the Commission some discretion in determining a level of earnings which fairly represented the claimant’s normal weekly earnings. In cases of potential earnings, the Commission similarly had a degree of discretion in gradually increasing compensation to reflect that, if the potential earner had continued earning, their income would have increased. The legislation provided a maximum level of weekly earnings of $200 for the purposes of calculating earnings-related compensation. This was substantially higher that the maximum weekly payment under workers’ compensation. The original scheme provided specifically for assessment of and compensation for permanent loss of earning capacity. In cases of work injury, compensation commenced on the day of the accident and was payable by the employer.

**Lump sum payments for permanent impairment**

The 1972 Act provided for lump sum compensation for permanent loss or impairment of bodily function, up to a maximum of $5,000. Schedule 2 of the 1972 Act set out the percentage of the maximum payment that various injuries attracted. For example, total loss of an arm or the greater part of an arm qualified for 80 per cent of the maximum, while total loss of one segment of an index finger qualified for 10 per cent. For injuries not listed in Schedule 2, the Commission was required to determine if a lump sum was appropriate using Schedule 2 as a kind of benchmark.

**Lump sum payments for mental suffering**

Section 120 of the 1972 Act also provided for lump sum compensation for mental suffering, more specifically for “the loss suffered by the person of amenities or capacity for enjoying life, including loss from disfigurement” and “Pain and mental suffering, including nervous shock and neurosis”. The maximum payable for such lump sums was $7,500. The Commission could pay a lump sum under s 120 if it considered that the lump sum paid for permanent bodily impairment was inadequate,
as long as the total lump sum compensation for bodily impairment and mental suffering did not exceed $12,500.\textsuperscript{70}

**Entitlements payable in cases of accidental death**

- Earnings-related compensation based on what the deceased would have received had they lived was payable to surviving dependant spouses, children and other dependants,\textsuperscript{71}

- A lump sum payment of $1,000 was payable to the spouse of the deceased, and payments of $500 to the children;\textsuperscript{72} and

- The Commission could pay funeral expenses to the extent that it considered reasonable by New Zealand standards.\textsuperscript{73}

**Commutation**

Although earnings-related compensation was normally paid periodically, \textsuperscript{70}s 133 of the 1972 Act gave the Commission the discretion to commute such payments into a lump sum in “very exceptional circumstances.”

**5 Funding**

The funding for each of the three schemes was kept separate:

- The earners’ scheme was funded by risk-based levies paid by employers and the self-employed;

- The motor vehicle accidents scheme was funded by levies on motor vehicle owners; and

- The supplementary scheme was funded by general taxation.

**6 Operation**

The 1972 Act established the Accident Compensation Commission\textsuperscript{74} to run the scheme which commenced on 1 April 1974 and covered injuries suffered on or after that date.

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\textsuperscript{70} 1972 Act, s 120(4).
\textsuperscript{71} 1972 Act, s 123. Payments to dependant spouses continued until death, remarriage or reaching superannuation age, while payments to children continued until the Commission considered that the child would no longer have been dependant on the deceased.
\textsuperscript{72} 1972 Act, s 124, although the total payable to the spouse and children could not exceed $1,500.
\textsuperscript{73} 1972 Act, s 122.
\textsuperscript{74} A body corporate as per 1972 Act, ss 6-14. The Commission later became a Corporation (Accident Compensation Amendment Act 1980).
7 Differences from the Royal Commission’s proposed scheme

The main ways in which the 1972 Act scheme differed from the Royal Commission’s proposed scheme were:

- The scheme compensated permanent impairment by way of a lump sum, where the Royal Commission had recommended periodic payments;
- The scheme was funded by risk-based levies on employer, where the Royal Commission had recommended a flat rate levy; and
- The Royal Commission recommended that non-earners such as housewives receive periodic compensation for loss of earnings capacity, while the 1972 Act scheme only provided earnings-related compensation for earners and potential earners.
IV THE ORIGINAL SCHEME IN ACTION: 1974 - 1992

A Introduction

The original ACC scheme commenced operation on 1 April 1974. The scheme ran until major changes brought by the Accident Rehabilitation and Compensation Insurance Act 1991 (“the 1992 Act”). The legislation was consolidated with minor amendments in the Accident Compensation Act 1982 (“the 1982 Act”). This period of the scheme’s history was notable for:

• The role that the courts took in determining the scope of cover under the scheme and its relationship with proceedings for damages under the civil law; and
• The introduction of the sentence of reparation, giving the criminal law an important compensatory function.

B The post-ACC role of the civil law

Inevitably and almost immediately after the commencement of the scheme, litigation tested two important demarcation lines: the boundary between “personal injury by accident”75 (hereafter “piba”) and illness, and the boundary between the scheme and the common law. The statutory bar on proceedings meant that a decision on the first boundary line was also a decision on the second: taking an expansive view on which injuries were compensated by the scheme meant taking a restrictive view of which injuries could be compensated by the common law.

That said, many cases that fell near the boundary line between injury and illness would have had no real prospect of recovering any compensation under the common law. In such cases, ACC compensation was preferable to relying on the health or social security systems, so the injury victim sought to bring themselves within the ACC scheme. In contrast, in injury cases where the victim may have been able to recover damages it was often the prospective defendant who sought to invoke the statutory bar on proceedings for damages arising from piba, while the injury victim may have preferred damages to ACC compensation.

The Courts generally took a generous approach to the scope of the scheme, both in terms of the boundary between piba and illness and the boundary between piba and tort. This was consistent with the philosophy of the Woodhouse Report, and also consistent with the same desire to obtain better outcomes for injury victims that led to the development of negligence as an independent tort. The expansive approach that the Courts took to negligence meant that negligence ultimately strayed from its justificatory principles. Similarly, the expansive approach that Courts took to the

75 The 1972 Act scheme provided cover for “personal injury by accident” so to receive cover a claimant must have suffered a condition which was regarded as “personal injury” in circumstances which were considered “an accident”.
scope of the scheme arguably pushed too far into the realm of disease, which eventually led to legislative retrenchment.\textsuperscript{76}

1 G v Auckland Hospital Board – ACC and the intentional torts

\textit{G v Auckland Hospital Board}\textsuperscript{77} addressed the question of whether an intentional tort amounted to an accident. It was clear that the ACC scheme was intended to replace the negligence action in cases of personal injury but neither the 1972 Act nor the Woodhouse Report explicitly dealt with intentional torts. If an intentional tort was not an accident, then the civil law would still have a compensatory role for the class of injuries caused by intentional tort. If an intentional tort was an accident, then the civil law’s compensatory function for injury would be very limited, if it existed at all.

The plaintiff alleged that she was raped by an employee of the Hospital Board, and claimed $15,000 for general and special damages. The Hospital Board sought to use the bar on proceedings as a shield.

Henry J considered that the essential question was whether the plaintiff was a person who suffered phiba in terms of s 2 of the 1972 Act. If so, the bar to proceedings would apply, and if not, the claim could proceed. On the meaning of piba, he said:\textsuperscript{78}

\begin{quote}
The inquiry must be whether, on the true construction of the statute, the personal injury to plaintiff was suffered by her in such a state of circumstances that it was “by accident”. The use of the word “suffer” clearly indicates that it is from the viewpoint of the person who undergoes or sustains the injury that the term “injury by accident” must be construed. What is important is the question: what was the quality of the event (which caused the injury) when viewed as happening to the person injured? Thus the actor may intend the injury whereas, from the point of view of the injured person may be quite unintended, unexpected or even merely fortuitous.
\end{quote}

Henry J also drew on some English workers’ compensation decisions\textsuperscript{79} on the meaning of accident, adopting the definition that “accident” encompassed:\textsuperscript{80}

1. An event which was not intended by the person who suffered the misfortune; and
2. An event which, although intended by the person who caused it to occur, resulted in an unintended misfortune.

Approaching “accident” from the point of view of the victim clearly encompasses the inevitable industrial and vehicular injuries that led to the scheme, but also includes

\textsuperscript{76} See below at V.B-C, especially V.C.1.
\textsuperscript{77} \textit{G v Auckland Hospital Board} [1976] 1 NZLR 638 (HC).
\textsuperscript{78} \textit{G v Auckland Hospital Board}, above n 77, at 640.
\textsuperscript{79} In particular, Lord Diplock’s comments in \textit{Jones v Secretary of State for Social Services} [1972] 1 AC 944 at 980.
\textsuperscript{80} \textit{G v Auckland Hospital Board}, above n 77, at 641.
injuries which are less easily described as the inevitable result of social progress, such as battery or rape.\textsuperscript{81}

Henry J found that the event in the present case, the rape, was “unintended, unexpected, unlooked for and was in every way an untoward event”\textsuperscript{82} for the victim. Accordingly, the plaintiff was covered by the accident compensation scheme and her claim for compensation from the Hospital Board was barred.

The judgment focused on the interpretation of the 1972 Act and did not independently consider the functions of the intentional torts. Henry J noted that intentional torts were often also breaches of the criminal law, but thought that this was irrelevant because the criminal law is in general concerned with the mens rea of the offender which is irrelevant if “accident” is considered from the point of view of the victim. It can be argued that proceedings for damages for intentional torts provide valuable outcomes to society concurrent with compensating the victim, such as punishing and deterring moral wrongdoing, or even providing a cathartic effect for the victim.\textsuperscript{83} Any question of loss of such functions must arguably be balanced against the function of providing compensation to the victim.

Henry J does not mention the criminal injuries compensation scheme. The rape in question occurred on 2 April 1974, one day after the accident compensation scheme commenced operation. At the time, the Accident Compensation Act 1974 had been passed, but the provision disestablishing the criminal injuries compensation scheme was yet to come into force. \textit{G v Auckland Hospital Board} was decided in the High Court around a year later, by which time the criminal injuries compensation scheme was no longer in place. Although the plaintiff in \textit{G v Auckland Hospital Board} might have been able to benefit from the criminal injuries compensation scheme, a decision by Henry J that assault was \textit{not} an accident would mean that future assault victims could not receive compensation from either the accident compensation scheme or the criminal injuries compensation scheme. Assault victims could attempt to recover compensation by taking proceedings for damages against the defendant who assaulted them (or another party who was vicariously liable), but the outcome of such proceedings would be uncertain.

\textsuperscript{81} It can be argued that crime is an inevitable result of social inequality. However, the claim is not as clear as the claim that if you have motor vehicles, people will have motor vehicle accidents. Further, the rise of negligence and the development of ACC were responses to additional injuries occurring as a result of social progress - increased industrialisation and motor vehicle use. There is no clear equivalent change in social circumstances that led to an increase in criminal injuries.

\textsuperscript{82} \textit{G v Auckland Hospital Board}, above n 77, at 641.

If the criminal injuries compensation scheme had remained in place, then perhaps it might have been feasible to keep injuries inflicted by intentional torts out of the ACC scheme. Victims of criminal injury could seek compensation in proceedings for damages, but would have the criminal injuries compensation scheme as a fall-back source of compensation if their proceedings were unsuccessful. This would have allowed the non-compensatory functions provided by proceedings for damages to continue in the civil law. However, the removal of the criminal injuries compensation scheme meant that, if assault was not an accident, victims of intentionally inflicted injuries may have been worse off than victims of inadvertently inflicted injury.

2  Taylor v Beere and Donselaar v Donselaar – exemplary damages in New Zealand

The decision in *G v Auckland Hospital Board* meant that the civil law’s compensatory function for victims of injury caused by wrongdoing was replaced by the ACC scheme. The availability of awards of exemplary damages, which are awarded to punish and deter, but not to compensate, remained unsettled until two Court of Appeal decisions which were released at the same time: *Taylor v Beere*84 and *Donselaar v Donselaar*85. Prior to the matter reaching the Court of Appeal, the issue of exemplary damages for injury had received some academic discussion86 and a series of inconsistent High Court decisions.87

*Taylor v Beere* addressed generally the function of exemplary damages in New Zealand. The Court of Appeal found that the function of exemplary damages was to punish and deter outrageous conduct, which it considered was a valued social outcome. The Court wholeheartedly rejected the idea that punishment was not a proper function of the civil law. Richardson J noted that tort law served various social purposes in addition to compensation and loss distribution, and that various statutes allowed the criminal law to provide compensation, which he considered added doubt to the notion that compensation and punishment were, or could be, kept in “water-tight compartments.”88 The Court also rejected the restrictive approach that the English courts had taken to exemplary damages89 on the basis that it was an

84 *Taylor v Beere* [1982] 1 NZLR 81 (CA).
85 *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA).
88 *Taylor v Beere*, above n 84, at 90-91.
89 See II.C.5 above.
unnecessary fetter on the ability of exemplary damages to respond to exceptional wrongdoing.

_Donselaar v Donselaar_ concerned an assault by a man on his brother. The question was whether claims for exemplary damages were proceedings arising directly or indirectly from personal injury by accident and therefore barred by section 5 of the 1972 Act. The Court of Appeal’s reasoning in _Donselaar v Donselaar_ was consistent with its reasoning in _Taylor v Beere_: the purpose of exemplary damages was to provide the valued social function of punishing and deterring outrageous conduct, and the Court did not consider that the policy or legislation of the accident compensation scheme provided a reason to extinguish that function. The Court disposed of section 5 by taking the view that a claim for exemplary damages arose from the outrageous character of the defendant’s conduct, which was not directly or indirectly from the personal injury to the victim.

The Court of Appeal’s discussed at length the history and function of exemplary damages, unlike _G v Auckland Hospital Board_ where Henry J had not discussed the function of the intentional torts at all. Cooke J stated that:  

> The "mischief" which the Accident Compensation Act set out to remedy must have been primarily the uneven and inadequate scope of common law negligence actions as a means of securing compensation for personal injury in modern society. There is no reason to suppose that any suggested deficiency in the common law remedies for intentional wrongs was a real source of concern.

This might have led the Court of Appeal to conclude that _G v Auckland Hospital Board_ was wrongly decided. Instead, however, Cooke J went on to say that “no one doubts” that Henry J was right that the meaning of accident was to be considered from the point of view of the victim.

The Court of Appeal raised the concern that the theoretical separation of exemplary and compensatory damages was difficult to achieve in practice. Cooke J, foreshadowing later developments, said that:  

> All in all, in a situation where the right course for this Court is far from self-evident I think that we should try to meet a problem occasioned by the Accident Compensation Act by consciously moulding the law of damages to meet social needs. The only feasible way of doing so, without intruding into the field of compensation which the Act has taken over, appears to be to allow actions for damages for purely punitive purposes; and to accept that, as compensatory damages (aggravated or otherwise) can no longer be awarded, exemplary damages will have to take over part of the latter’s former role. In other words, as

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90 _Donselaar v Donselaar_, above n 85, at 104.

91 _Donselaar v Donselaar_, above n 85, at 107.
benefits under the Act are in no sense punitive, exemplary damages will have to do not only the work assigned to them by *Broome v Cassell*\(^2\) but also some of the work previously done by the other heads of damages.

The Courts will have to keep a tight rein on actions, with a view to countering any temptation, conscious or unconscious, to give exemplary damages merely because the statutory benefits may be felt to be inadequate. Immoderate awards will have to be discouraged.

Cooke J’s second paragraph here seems like a sensible warning: perceived inadequacies in the compensation provided by the scheme are not a proper reason for judges to award exemplary damages. The comment that exemplary damages should “take over part of the latter’s former role” is more difficult to decipher sensibly, especially in light of the second paragraph. Perhaps Cooke J intended that actions for exemplary damages could provide a way to perform functions that went hand-in-hand with actions for compensatory damages for intentional torts, such as punishing and deterring wrongdoing, and making public bodies accountable. Perhaps Cooke J was allowing himself the opportunity to seize on these comments at some future time – though as things transpired he did not do so.

The Court of Appeal in *Taylor v Beere* and *Donselaar v Donselaar* was quite clear in its view that exemplary damages provided a valued social outcome, and most reluctant to place any fetters on the ability of the court to deliver a valued social outcome. Essentially, the Court wanted to preserve its ability to respond to wrongdoing. The Court’s focus was on the retributive function of exemplary damages, and that Court did not explicitly address the role of exemplary damages in providing inconsistent outcomes for victims of injury. Perhaps the Court simply did not turn its mind to this issue – or did, but thought that the utility of retaining exemplary damages the inconsistent results.

### 3 Wallbutton – the border with disease

*Wallbutton v ACC*,\(^3\) was an early decision on the line between illness and personal injury by accident. Mrs Wallbutton had a history of spinal degeneration and back problems. She bent over to pick up some milk bottles and suffered a back injury. It appeared that both the pre-existing diseased state of her back and the lifting contributed to her injury. The ACC declined her claim for cover, and she appealed.

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\(^2\) *Broome v Cassell* [1972] 1 AC 1028.

\(^3\) *Wallbutton v ACC* [1983] NZACR 629 (HC).
The Accident Compensation Appeal Authority took the view that “accident” required some kind of external factor operating on the victim and that a normal body movement like bending over was not an accident. The Authority considered that:

Taking into account that it is a fundamental purpose of the Accident Compensation Act to have a cut-off line from injury resulting from accident and injury resulting from disease, to hold that the kind of damage suffered by [Mrs Wallbutton] was the result of accident would erode that fundamental purpose because the reality of the situation was that the appellant’s back gave up not because of anything of a traumatic nature which occurred but because her back had reached the condition where a normal movement could bring about that result.

The High Court disagreed. Davison CJ considered that the Authority had “confuse[d] the real nature of accident.” As Henry J had in G v Auckland Hospital Board, Davison CJ followed the approach taken in the English workers’ compensation cases that “accident” included an event that a person intended but caused them some unintended misfortune, and did not require any external factor.

Wallbutton takes a generous approach to the line between injury and illness. The Authority’s concern about eroding the purpose of the scheme was a legitimate one: a deliberate policy decision had been made not to extend the scheme to illness, and the funding of the scheme would be put under pressure by an overly generous approach. However, there was a sound legislative basis for taking a generous approach to cover in cases where both a disease condition and an accident contributed: the definition of personal injury in section 2 of the 1972 Act only excluded damages caused exclusively by disease. Wallbutton was thus indicative of the generous approach that the Courts took to cover under the 1972 Act scheme, but did not itself clearly overstep the mark.

4 Re Chase – nominal damages

Re Chase concerned a gang member who was killed in a police raid. His family brought proceedings against the police, claiming compensatory damages, or nominal damages in the alternative, for assault and battery. The purpose of nominal damages is to formally recognise that a party’s legal rights have been breached, rather than to compensate them for loss – the sum sought in this case was one dollar. The Court of course found that the claim for compensatory damages was affected by the statutory bar.

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94 See Wallbutton v ACC, above n 93, at 631 and 634 for a further summary of the Authority’s reasoning.
95 Wallbutton v ACC, above n 93, at 634.
96 Re Chase [1989] 1 NZLR 325 (CA).
One might have expected the Court of Appeal to follow the reasoning in Donselaar v Donselaar that exemplary damages flow from the defendant’s contumelious conduct, not the injury, and conclude that nominal damages flow from the breach of the victim’s rights, not the injury, and are therefore not affected by the bar on proceedings. However, the Court found that there was “no justification”\textsuperscript{97} for treating proceedings for nominal damages as free from the statutory bar. The Court of Appeal clearly had no sympathy for the deceased gang member, and Cooke P thought that the claim for nominal damages was a “peg upon which to hang an inquiry"\textsuperscript{98} into the deceased gang member’s death, which would amount to an abuse of process.

If the purpose of nominal damages was to \textit{compensate} for a breach of rights, then the decision in \textit{Re Chase} might make some sense. However, the purpose of nominal damages is to \textit{vindicate} the rights of the plaintiff – indeed they are sometimes called vindicatory damages.

\textit{Re Chase} is difficult to explain in light of \textit{Donselaar v Donselaar}. Possibly the Court was seeking to discourage claims for nominal damages as a way of circumventing the statutory bar – that is, narrowing the floodgates the Court itself potentially opened by preserving exemplary damages in injury cases. The judgment in \textit{Re Chase} was also concerned with whether the Court would award the discretionary remedy of a declaration. Perhaps the Court was concerned that an award of nominal damages on the particular facts of \textit{Re Chase} would force its hand on the matter of a declaration.

Like \textit{G v Auckland Hospital Board}, \textit{Re Chase} shows that, in removing the function of compensation for injury from the common law, the introduction of the ACC scheme also potentially extinguished other associated functions. \textit{Re Chase} means that the introduction of the ACC scheme removed from the civil law the ability to formally recognise by nominal damages the breach of rights protected by the common law.

5 Green v Matheson and Willis v Attorney-General – “accident” versus tort

\textit{Green v Matheson}\textsuperscript{99} and \textit{Willis v Attorney-General}\textsuperscript{100} were two cases decided relating to the bar on proceedings which were decided contemporaneously by the Court of Appeal. In both cases, the Court stressed that the proper approach was to give “accident” its natural and ordinary meaning, in light of the non-exhaustive definition of accident including “the physical and mental consequences of any such injury or of the accident.”

\textsuperscript{97} \textit{Re Chase}, above n 96, at 8.
\textsuperscript{98} \textit{Re Chase}, above n 96, at 6.
\textsuperscript{99} \textit{Green v Matheson} [1989] NZLR 564 (CA).
\textsuperscript{100} \textit{Willis v Attorney-General} [1989] NZLR 574 (CA).
The litigation in *Green v Matheson* was brought by a woman regarding her treatment at National Womens' Hospital. She pleaded three causes of action: trespass to the person, breach of fiduciary duty and negligence, and sought compensatory and exemplary damages. The Court of Appeal’s decision was defined by what it referred to as “two basic propositions”:101

- None of the claims for exemplary damages are barred, as per *Donselaar v Donselaar*, which by that time had been reaffirmed in *Auckland City Council v Blundell*102; but
- All the plaintiff’s claims for compensatory damages under the various causes of action are barred as proceedings for damages arising directly or indirectly out of personal injury by accident, since what had happened was an accident when approached from the point of view of the victim.

*Willis v Attorney-General* concerned claims for false imprisonment, malicious prosecution and negligence following charges made by Customs officials against several individuals relating to imported vehicles. As Cooke P said, “On its face such an action is remote from the field of Accident Compensation legislation.”103 Regarding interpretation of “accident”, he went on to say that:104

As is well-known, the Act is designed fundamentally to supplant the vagaries of actions for damages for negligence at common law. It is not coincident with the field of such actions, but interpretations taking the bar in the Act beyond that field have to be carefully scrutinised. It has been settled for some time that physical and mental injuries caused by intentional torts or batteries (including rape) are personal injuries by accident … But that does not mean that the bar extends to other tort actions where a suggested link with the subject-matter of the Act is more tenuous.

The idea that any extension of the scheme beyond the kinds of injuries which might have been the subject of negligence actions requires careful scrutiny is difficult to reconcile with decisions such as *G v Auckland Hospital Board* and *Wallbutton* which took the view that meaning of “accident” is to be approached from the point of view of the victim, and whether the conduct that caused the injury was negligent or advertent was irrelevant. Indeed, it suggests an entirely different understanding of the kind of injuries that the scheme is fundamentally designed to address.

Cooke P considered that cases of malicious prosecution, or claims where “the duty of care alleged to have been broken is not one imposed for the protection of the

102 *Auckland City Council v Blundell* [1986] 1 NZLR 732 (CA).
103 *Willis v Attorney-General*, above n 100, at 3.
104 *Willis v Attorney-General*, above n 100, at 5-6.
plaintiff’s personal safety105 clearly had only a tenuous connection with accident compensation and are not affected by the statutory bar.

Cooke P thought that false imprisonment was less clear, but in ordinary speech someone who was falsely imprisoned would not be said to have suffered an accident. He conceded that this left a grey area in the case where a person who has been falsely imprisoned claims damages for mental suffering, but:106

… to make the Act work as Parliament must have intended … the clear rule must be adopted that any claims of any kind of damages for false imprisonment alone and for any distress, humiliation or fear caused thereby are outside the scope of the Accident Compensation system and unaffected by the Act.

Trial Judges will adopt a common sense approach, guided by what is within the broad spirit of the accident compensation system and what is outside it. Any difficulties are to be more theoretical than practical.

The idea of judges approaching “common sense” guided by the “broad spirit of the scheme” is of course difficult if there is no common idea of what the broad spirit of the scheme is and what “Parliament must have intended”.

In both Green v Matheson and Willis v Attorney-General, the context of the replacement of negligence with the accident compensation scheme as a means of compensating victims of injury was important for determining whether there had been an “accident”. The plaintiffs in Willis v Attorney-General were surely suffering the unintended consequences (being charged with Customs offences) of an unintended event (importing cars.) However, the circumstances which led to their claim were simply too far detached from injury and the kinds of circumstances which may have led to a negligence claim. In contrast, the circumstances of the plaintiff in Green v Matheson were much closer.

6 ACC v F – secondary victims

ACC v F107 concerned whether one person could receive cover for mental consequences resulting from an accident to a different person. Mr F’s wife suffered personal injury by accident by medical misadventure, and as a result sexual relations between F and his wife became impossible. F developed a reactive depression or neurosis. He sought cover from the ACC, which declined his claim.

Holland J considered that the wording of the statute suggested it was not designed to compensate any person other than the one who “suffered” the accident, aside from cases of accidental death, where the legislation was explicit.

105 Willis v Attorney-General, above n 100, at 6.
106 Willis v Attorney-General, above n 100, at 12.
Taking on Cooke P’s “common sense … guided by the broad spirit of the accident compensation scheme”\(^{108}\) approach from \textit{Willis v Attorney-General}, Holland J considered that Parliament had not “intended to provide compensation for persons who suffered mental injuries arising from an accident which caused no physical injury to that person but arose from an "accident" to another.”\(^{109}\)

Looking at “accident” purely from the perspective of the victim, arguably Mr F suffered an accident. His wife ceasing relations with him was (presumably) an unintended, unexpected, unlooked for and in every way untoward event from his point of view. However, applying \textit{Willis v Attorney-General}, the meaning of “accident” in the accident compensation legislation had to be considered in light of the history of the scheme being primarily a replacement for the negligence action as a way of compensating for injury. Looked at in this light, Holland J’s decision that the consequences of an accident on a secondary victim were not intended to be included make sense. \textit{Willis v Attorney-General} and \textit{ACC v F} together indicate a retreat from the expansive approach to cover that the Courts had hitherto been taking.

So, if ACC was not available, could a secondary victim have recourse to the common law? Holland J made the obiter comment that: \(^{110}\)

If the mental injury is suffered as a result of the actions of a wrongdoer it is possible that in some circumstances a right of action might exist at common law but compensation under the Accident Compensation Act is not available.

7 \textit{ACC v E} and \textit{ACC v Mitchell} – a generous approach to “accident”

\textit{ACC v E}\(^{111}\) and \textit{ACC v Mitchell}\(^{112}\), delivered at the same time, were two Court of Appeal judgments at the extreme end of the generous approach to the meaning of “accident”.

In \textit{ACC v E}, Ms E suffered a psychiatric breakdown during a management course, which was not attributable to any particular event. The breakdown lead to her admission to the psychiatric unit of Wellington Hospital.

\textit{ACC v Mitchell} concerned an infant who stopped breathing during an apnoea attack, which led to brain damage.

In both cases, the Court approached the meaning of “accident” from the point of view of the victim, stressed that there was no need for an external factor in the accident, and concluded that cover was available.

\(^{108}\) \textit{Willis v Attorney-General}, above n 100, at 12.

\(^{109}\) \textit{ACC v F}, above n 107, at 13.

\(^{110}\) \textit{ACC v F}, above n 107, at 13.

\(^{111}\) \textit{ACC v E} [1992] 2 NZLR 426 (CA).

\(^{112}\) \textit{ACC v Mitchell} [1992] 2 NZLR 436 (CA).
In *ACC v E*, that Court found that the definition of personal injury by accident including “[t]he physical and mental consequences of any such injury or of the accident” meant that cover could be granted for mental consequences alone. The Court of Appeal noted that the reference to physical injury in *ACC v F* and said that Holland J, “if he is to be understood as saying more than that the claimant must himself suffer an accident before he can be compensated for mental consequences, [was] in error.”

In *ACC v E* and *ACC v Mitchell*, the Court of Appeal extended the scope of the ACC scheme to conditions which would not easily have been the basis of proceedings for damages for negligence. The decisions are influenced more by a generous conception of the scope of the scheme, and a meaning of “accident” developed in the context of English workers’ compensation, than the “careful scrutiny” towards extending the scheme that Cooke P spoke of in *Willis v Attorney-General*. The Court of Appeal in *ACC v E* does refer to *Willis v Attorney-General* but not to Cooke P’s view of the scheme as fundamentally a response to negligence.

It is not clear whether the injuries in *ACC v E* and *ACC v Mitchell* fall within what was intended to be covered by the ACC scheme. Even if such circumstances were within the intent of Parliament at the time of the 1972 or 1982 Acts, by the time of *ACC v E* and *ACC v Mitchell*, there was less public appetite for an generous and expensive scheme.

### C The Accident Compensation Act 1982

1 Background and general comments on the 1982 Act

After the scheme had been running for several years, concerns began to grow around the cost of the scheme, including the cost of lump sum payments for pain and suffering. In addition, employers became increasingly vocal about paying for accidents that their employees suffered outside work. The government’s response to this was a Cabinet caucus committee chaired by the Hon Derek Quigley. The Quigley Committee led to a number of changes to the scheme in the Accident Compensation Act 1982. Most of these changes related to funding and the detail of

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113 *ACC v Mitchell*, above n 112, at 434.


115 The funding of the scheme was changed substantially. The funding model of the scheme was changed from “fully funded”, which meant that the scheme collected levies to build up reserves to pay for the future cost of covered injuries as well as the costs paid each year, to “pay-as-you-go”, which meant that the scheme collected levies each a year to pay only for the costs expected to be paid each year. The change to pay-as-you-go decreased levies.
entitlement, and did not affect the place of the scheme in relation to the civil or criminal law.

2 The “repugnant to justice” provision

Section 92 of the 1982 Act was a response to public dissatisfaction that the scheme was funding injuries suffered by criminals during the commission of offences.

One possible objection to providing offenders injured during the commission of criminal offences with compensation is that an injury suffered in such circumstances is not really an accident. This objection goes against the meaning of “accident” applied by the courts – while an offender may intend to commit a criminal act, the injury itself is not intended and therefore the result of an accident.

A different objection is to say that criminal offending deserves a response in terms of punishment, deterrence and denunciation and that withdrawing the publicly-funded compensation of the ACC scheme is an appropriate way to achieve those ends. That is, retributive justice can be achieved by limiting the offender’s access to the accident compensation scheme.

Section 92 provided that:116

Where a person suffers personal injury by accident in the course of committing any criminal offence, and the injured person is convicted of the offence concerned, and sentenced to a term of imprisonment, cover shall exist but the Corporation may decline, in whole or in part, to give rehabilitation assistance and pay compensation if, in the opinion of the Corporation, it would be repugnant to justice for such rehabilitation assistance to be given and such compensation to be paid.

The idea that payment of compensation for an accidental injury could be “repugnant to justice” seems alien to the no-fault principle of the scheme. The Court of Appeal discussed the meaning of the phrase in ACC v Curtis,117 and found that the principled basis for overriding the no-fault philosophy of the ACC scheme was concerned with “community response to serious criminal offending.”118

The Court concluded that: “it is impossible to escape the conclusion that fundamentally s 92 is there to penalise certain criminals for their conduct, albeit in very limited circumstances and in a highly specific way” to serve “certain familiar

116 Emphasis added.
118 ACC v Curtis, above n 117, at 6.
objectives of justice” - primarily retribution, but also condemnation, deterrence and reparation. ¹¹⁹

The Court considered that such objectives are familiar in criminal sentencing and that it was appropriate to look to sentencing for the kind of factors which were relevant to determining whether provision of entitlements would be repugnant to justice, while warning that: ¹²⁰

In every case in which s 92 falls for consideration, the claimant will have already been fully punished by a conventional criminal Court. The offender has already paid his debt to society. Section 92 presupposes that in very limited circumstances, and in a very limited way, certain offenders can be penalised again but it is not a pretext for a second sentencing… The exercise of the discretion under s 92 involves a careful balancing between the statutory objectives of comprehensive cover on the one hand and the demands of retribution, denunciation, deterrence and reparation on the other. No equivalent balancing is called for in the field of conventional sentencing.

The Court set out a series of factors which it considered relevant: ¹²¹

• The harm caused by the offence;
• The gravity of the offence
• The offender’s personal culpability for the offence;
• The personal circumstances of the offender;
• The nature of the entitlement in question;
• The strength of the offender’s need for entitlement; and
• The ability of the offender to meet that need.

Essentially, section 92 provides a rule for when the general no-fault distributive justice philosophy of the ACC scheme can be overridden by the pursuit of retributive justice. The threshold is that the offending must be serious enough to attract a sentence of imprisonment, and the payment of entitlements must be “repugnant to justice.” Instead of taking the approach that injuries suffered during the commission of criminal offences are not accidents, and amending the definition of “personal injury by accident”, Parliament took the approach that such injuries are accidents, but in some cases the offender ought to have compensation partially or wholly withdrawn.

¹¹⁹ ACC v Curtis, above n 117, at 7. The reference to “reparation” is odd since withholding ACC entitlements does not seem to provide any reparation to the victim.
¹²⁰ ACC v Curtis, above n 117, at 525-6.
The enactment of section 92 is significant because it entails a clear rejection of the idea that compensation outcomes should be governed only by the no-fault philosophy. It shows that retributive justice had enough political value to override the philosophy of the scheme, but only in cases where compensation would be especially offensive to retributive justice. Section 92 is also of interest because it makes penalising wrongdoing one of the functions of the scheme, albeit in limited circumstances.

**D  Compensating injury through the criminal law**

**1  Fine diversion awards**

Section 16 of the Criminal Justice Amendment Act 1975 provided under limited circumstances for up to one half of a fine that had been imposed on an offender to be paid to the victim “by way of compensation”. These fine diversion awards were only available when the victim suffered unprovoked “bodily injury”, and did not affect compensation under the ACC scheme or the right to recover damages by civil proceedings in excess of the amount of the award. This power was re-enacted in s 28 of the Criminal Justice Act 1985.

*Hall on Sentencing* comments that these fine diversion awards, which although awarded “by way of compensation”:

[W]ould appear to be a type of punitive damages rather than damages for actual injury or loss, although compensation for both pain and suffering and for any established financial loss incurred as a result of the physical harm is not precluded.

Fine diversion awards cannot be a criminal law equivalent of punitive damages, since they have at least some sort of compensatory purpose, and exemplary damages can only be awarded when the victim has already been compensated. The legislation does not specify what fine diversion awards are intended to compensate and, as Hall says, they can presumably compensate intangible harms such as pain and suffering as well as tangible harms such as loss of earnings.

Fine diversion awards can be seen as the opposite of exemplary damages. Exemplary damages are awarded in a civil proceedings when compensation has been served, and an additional award of damages means that the function of punishment and deterrence can also be performed. Fine diversion awards are awarded in criminal proceedings when punishment has been served, and the fine diversion award then allows the function of compensation to also be performed.

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122 Geoff Hall *Hall on Sentencing in New Zealand* (Wellington, Butterworths, 1987) at 140.
123 Either by the ACC scheme or by an award of compensatory damages.
124 By the sentencing Judge determining that a fine of a particular quantum is an appropriate sentence.
The compensation provided by fine diversion awards does not sit easily with the accident compensation scheme. The Criminal Justice Act 1985 does not specify what they are compensation for, so there is a risk of double compensation if the sentencing Judge diverts a fine after taking into account losses which will be compensated by the scheme. Providing more compensation for some victims of injury than others harks back to the pre-ACC common law position.

2 The introduction of the sentence of reparation

The Criminal Justice Act 1985 introduced the new sentence of reparation, in s 22. Reparation is a payment from the offender to a person who has suffered a loss or damage as a result of the offence. The Criminal Justice Act 1985 provided for reparation in cases of loss of or damage to property only. Reparation was limited to the cost of replacement or repair, and did not include consequential damage.\(^\text{125}\) The Court could order reparation to be paid as a lump sum or over time.\(^\text{126}\)

The Criminal Justice Act 1985 had a presumption in favour of reparation: a court was required to impose a sentence of reparation unless it was satisfied that it would be inappropriate to do so.\(^\text{127}\) The ability of the offender to pay reparation was an important factor in determining whether the sentence was appropriate, and if so how payment should be made.

The Criminal Justice Act 1985 provided machinery to assist the Court in determining whether reparation was appropriate. Section 22(3) allowed the Court to order a report on matters such as the quantum of damage suffered and the ability of the offender to pay, and section 23 required a probation officer or other person preparing such a report to seek agreement between the offender and sufferer of damage on the value of the damage, and how much reparation the offender should pay. Section 12 also required the Court to take into account “any offer of compensation made by or on behalf of the offender to the victim.” Section 12, in conjunction with the ability of the Court to order reparation, meant that an offer of amends made by the offender could be crystallised into an enforceable sentence.

Since reparation was only available for property damage, there was no need to provide for the interaction between reparation and the ACC scheme. Under section 24(f), an award of reparation did not affect the ability of the sufferer of loss to recover by civil proceedings any damages in excess of the amount recovered.

The introduction of reparation was a significant step in the growing compensatory role of the criminal law. Reparation allowed for compensation in more cases than fine

\(^{125}\) Criminal Justice Act 1985, s 22(5).
\(^{126}\) Criminal Justice Act 1985, s 24.
\(^{127}\) Criminal Justice Act 1985, s 11.
diversion awards, which could only be awarded in cases where a fine was imposed, and could only divert up to half of the fine. Furthermore, the presumption in favour of awarding reparation where appropriate meant that not only did the criminal sentencing take on a compensatory function, but that function was given priority.

3 1987 – Reparation for emotional harm

In 1987, the Criminal Justice Act 1985 was amended to give the Court the ability to award reparation for emotional harm as well as damage to property.\(^{128}\) At the same time, the Victims of Offences Act 1987 provided for the preparation of victim impact statements to ensure that the sentencing judge was informed about any harm caused to the victim.

Hammond J discussed the meaning of “emotional harm” in *Sargeant v Police.*\(^{129}\)

The Act is silent as to what is meant by “emotional harm”. The term could obviously span a range of phenomena. At the lowest end of the scale, it could mean simply “mental anguish” occasioned to a victim by a crime; at the other end of the scale, the particular harm might be manifested in identifiable, long term, clinical conditions such as traumatic stress, or even psychotic conditions.

Hammond J considered that taking a restrictive view on the meaning of “emotional harm” would go against the restitutionary purpose of reparation and that:\(^{130}\)

What the Court has to quantify is the grief, the bereavement, the anxiety, and the mental pain and suffering.

There is clearly an overlap with the ACC scheme, which provided cover for mental consequences of an accident and compensation for pain and suffering and loss of enjoyment of life. As with fine diversion awards, this raises the possibility of double compensation, and means that some injury victims are treated differently from others. These outcomes are difficult to justify if one takes a broad distributive justice approach. However, in the case of reparation, the justification is found in corrective justice rather than distributive justice.

A wide meaning of “emotional harm” must include emotional harm to the victim resulting from the manner in which the offender committed their offence, or the way in which the offender acted towards the victim after the offence. Prior to the ACC scheme, aggravated damages were available to compensate for these kinds of hurt feelings in tort cases. Following *Taylor v Beere*, it was clear that the bar on proceedings prevented claims for aggravated damages for injury. However, from

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128 Criminal Justice Amendment Act (No. 3) 1987, s 2.
129 *Sargeant v Police* (1997) 15 CRNZ 454 at 7 (HC).
130 *Sargeant v Police*, above n 129, at 8.
1987, while a victim of an assault could not seek damages for their hurt feelings, they could be awarded reparation for emotional harm in criminal proceedings.

This seems anomalous. In addition to the double compensation issue, why should victims of criminal but not civil wrongdoing be able to receive extra compensation for emotional harm? One possible response is that the criminal law tends to deal with more egregious cases of moral wrongdoing, which provides a stronger justification for compelling the wrongdoer to provide compensation. It could also be argued that the nature of criminal offending is more likely to result in emotional harm. However, these responses are not wholly satisfactory, since many criminal offences require limited forms of mens rea and are not necessarily particularly morally offensive to society or traumatic to the victim.

E The comprehensive scheme that almost was

The 1982 Act did not resolve ongoing dissatisfaction with the scheme. In the late 1980s, a series of reports highlighted the issue of exclusion of illness. In 1987, an Officials Committee Report\(^\text{131}\) was published setting out the results of a review conducted by representatives from ACC, the Department of Social Welfare, the Department of Health and Treasury. A major theme of the report was the disparity between accident and illness. In light of this report, the government asked the Law Commission, chaired at the time by Sir Owen Woodhouse, to review the scheme.

The Law Commission’s report was published in 1988.\(^\text{132}\) Predictably enough, given the view expressed in the original Woodhouse Report that the exclusion of illness was illogical, and the recommendation in what is sometimes called the second Woodhouse Report\(^\text{133}\) of a comprehensive scheme that included illness for Australia, the Law Commission recommended extending the scheme to include illness. This was consistent with the recommendations of the Royal Commission on Social Policy\(^\text{134}\), which had been released a month before to the Law Commission’s report. To fund the extension of the scheme, the Law Commission recommended reductions in the level of compensation payable, including:

- Basing weekly compensation on average earnings for all New Zealanders, and paying weekly compensation to non-earners as well as earners; and


\(^{133}\) J F Keeler *Report of the National Committee of Inquiry, Compensation and Rehabilitation in Australia* (Canberra, 1974). The National Committee of Inquiry was chaired by Sir Owen Woodhouse.

Abolishing lump sum payments and replacing them with periodic payments. The Labour government started further exploring the possibility of including illness in the scheme. Two opposing objections to this plan arose. On the one hand, the logic of treating victims of injury and illness differently from other beneficiaries, such as the unemployed or elderly was questioned. On the other hand, the trade unions were concerned about the reduction in compensation necessary to include sickness, and again insisted that since the scheme was a replacement for common law damages so benefits should be payable at a similar level.

In the 1989 Budget, the Labour government announced that the scheme would be extended to include illness. The announcement stressed the inequity of treating accident and illness so differently, and stated that the new scheme would “enable a more equitable and efficient use of existing resources.”

Following the budget announcement, the changes were drafted into the Rehabilitation and Incapacity Bill 1990. However, the Bill was never enacted, because in 1990 the National party won power and took the scheme in a different direction.

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137 For a firsthand account of why the scheme was not extended to illness earlier following the Royal Commission’s 1988 Report, see Geoffrey Palmer “New Zealand’s Accident Compensation Scheme: Twenty Years On” (1994) 44 UTLJ 223 at 234-6.

A Introduction

The scheme was cut back significantly from 1 July 1992, following the passing of the Accident Compensation Rehabilitation and Insurance Act 1992 (“the 1992 Act”). The 1992 Act version of the scheme ran until major changes were made by the Injury Prevention Rehabilitation and Compensation Act 2001 (“the 2001 Act”). Major changes were made to the provision and funding of the scheme in the Accident Insurance Act 1998 (“the 1998 Act”), but like the 1982 Act, the 1998 Act made no other substantial changes. During the currency of the 1992 Act version of the scheme:

- The Health and Safety in Employment Act 1992 was introduced, consolidating the function of dealing with employers who fail to meet safety standards within the criminal law;
- The Courts expanded the role of the civil law in response to cutbacks to the scheme and continued to develop the law on exemplary damages in New Zealand.

B A change of direction for the scheme

1 “A fairer scheme”

Following the 1990 election, the various reports recommending extending the scheme to illness, and the Rehabilitation and Incapacity Bill, were basically abandoned by the new Government. The National government was more concerned with reducing the costs of the scheme than extending the scope of the scheme and it commissioned a new review. A Working Party was established, with terms of reference that suggested that one way to make the scheme more affordable would be to introduce competition. The Working Party reported back in 1991. The Working Party’s reports were followed by Hon Bill Birch MP’s “A Fairer Scheme”, which set out the Working Party’s recommendations and the Government’s policy on the scheme.

2 Reasons for change

“A Fairer Scheme” gave the following as the reasons for changing the scheme:

New Zealand has had one of the world’s most advanced schemes for compensating the victims of accidents since 1974. Today, the accident compensation scheme is showing signs of stress. It is no longer seen as being

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138 Now the Accident Insurance Act 2001 (Accident Compensation Amendment Act 2010, s 5).
141 Ibid, at introductory statement from the Minister of Labour.
fair, there is a significant level of abuse, and the costs of the scheme are not shared equitably.

Year by year, it has become evident that there is preferred treatment to victims of accident, compared to victims of sickness, as a consequence of coverage and assistance provided by the scheme.

The cost of the scheme has increased dramatically, at an average rate of 25 per cent per annum between 1985 and 1990, and last year, for the first time, expenditure on the scheme exceeded $1 billion.

Though the scheme is jointly funded by employers, motor vehicle owners, and the Government, it provides coverage for earners and non-earners, vehicle owners and non-owners, and all accidents whether work-related or otherwise.

Last year, employers’ contributions covered nearly 70 per cent of all payments, though less than 40 per cent of those payments were for accidents on the job.

The Government is committed to reforming the scheme in ways that make it both fair and affordable, and to correcting inequalities in the scheme without reintroducing the right to sue.

The substantial increases in cost were attributed in part to “a series of statutory, administrative and judicial decisions [that] resulted in an extension of the scheme’s boundaries beyond what was originally intended.”

Most of the Government’s concerns with the scheme related to the cost of the scheme, which could be addressed by cutting back cover and entitlements. Cutting back ACC entitlements meant reducing the gap between ACC and illness, mitigating to some extent the concern of unfair preferential treatment for accident victims.

3 No return of a right to sue

“A Fairer Scheme” dismissed the possibility of the return of a right to sue, noting that the Working Party was convinced that the no-fault system was more efficient that the status quo ante, and also was fairer to injury victims because it did not discriminate depending on the cause of injury. Further, the Working Party also doubted the deterrent effect of common law liability. “A Fairer Scheme” noted that where the scheme did not provide cover, common law remedies could become available and that “as the boundaries of the scheme are more clearly defined [ie limited by legislation] there will be more court action for damages than in the past.”

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142 Ibid, at 8.
143 Ibid, at 16.
144 Ibid, at 17.
145 Ibid, at 17.
With respect to medical misadventure, the Government noted that the removal of the right to sue had been criticised because it meant that medical practitioners could not be called to account. The Government preferred to introduce alternate means to effect disciplinary procedures for the medical profession to bringing back the right to sue.

4 **Cover**

Government policy was to reduce the costs of the scheme by reducing cover. In particular, the Government was concerned that new accident compensation legislation should more precisely spell out which types of conditions were intended to be covered, so a generous Court could not take a more expansive view than was intended.

The Working Party specifically considered whether stress should be included in the scheme. It decided that stress should be excluded because of concerns that stress was a major cost in overseas workers’ compensation schemes and because stress was a result of a number of interrelated factors not necessarily attributable to work or an accident. The Working Party also considered mental injury more generally, and recommended that mental injury cover be restricted to mental injury caused by a physical injury. The question of including compensation for mental injury suffered as a result of sexual crimes in the scheme was left open. The Government would later decide that such injuries should be included in the scheme.

“A Fairer Scheme” discussed whether the provision for denial of entitlements to people injured while committing serious crimes should be expanded to a more general principle of withholding compensation for irresponsible behaviour or serious misconduct, based on the concern that “no fault has come, in the minds of many, to be equated with no responsibility.” The Government policy was that withholding payments on the basis of serious and willful misconduct was too broad an exclusion, but that a more specific exclusion for drink driving should be considered.

5 **Entitlements**

“A Fairer Scheme” discussed changes to various types of compensation under the general principles of “compensation (making good financial loss), equity (fairness to all involved including the matching of costs and benefits) and economy (that is, keeping the costs within reasonable and affordable bounds).”

The Working Party recommended replacing lump sums for permanent disability with periodic payments, for three reasons: \[148\]

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\(^{146}\) Ibid, at 33.

\(^{147}\) Ibid, at 37-8.

• Until a lump sum is made, there is incentive for people to maximise their injury;
• Lump sums take an average of three years to be awarded because they require stabilisation and a specialist’s report; and
• Most recipients spend their lump sum within a few years and fall back on the ACC scheme or social welfare.

The Working Party recommended retaining compensation for permanent disability, but dispensing with compensation for pain and suffering and loss of enjoyment of life, because:\textsuperscript{149}

• lump sums for pain and suffering and loss of enjoyment of life were one of the most expensive elements of the scheme. Between 1985 and 1990, the amount paid on such lump sums trebled; and
• the quantum of such lump sums was “subjective, arbitrary and open to contention.”

\textbf{C The 1992 Act}

The 1992 Act implemented the Government policy set out in “A Fairer Scheme.” Generally speaking, the Act’s approach was prescriptive, setting out statutory definitions and formulae for cover and entitlements, in contrast with the wider and more discretionary provisions of the original legislation Act. Several provisions deliberately reversed some of the expansive decisions that the Courts had made regarding the scheme.

The purpose of the Act, found in the long title, was “to establish an insurance-based scheme to rehabilitate and compensate in an equitable and financially affordable manner those persons who suffer personal injury” - a focus on affordability. This was reinforced by name of the 1992 Act: the “Accident Compensation Rehabilitation and Insurance Act 1992”.

This focus on insurance and cost suggests a different conception of the nature of the scheme compared to the Woodhouse Report and the original scheme. The essence of an insurance contract is the transfer of a risk from the insured to the insurer, in exchange for a payment which reflects that risk. The scheme can be seen as the state providing accident insurance to each individual in the community. This then raises the question of whether each individual is making a fair contribution to the funding of the scheme for the value of the insurance that they receive. Employers argued that it was unfair that they provided nearly 70 per cent of all payments into the scheme when less than 40 per cent of payments related to work accidents. This kind of objection is alien to the thinking of the Woodhouse Commission which saw the scheme as the

\textsuperscript{149} Ibid, at 50-52.
community taking responsibility for its injured citizens, not as a series of insurance policies to individuals.

1 New definitions of accident and personal injury

Section 8(2) of the 1992 Act provided for cover for personal injury suffered in the following ways:

• accident;
• industrial disease;
• medical misadventure;
• “mental or nervous shock” caused by sexual offences;\(^{150}\) and
• treatment for an already covered injury.

The non-exhaustive definition of “accident” in the original scheme was replaced by an exhaustive decision at s 3:

> In this Act, unless the context otherwise requires,—

**Accident** means—

(a) A specific event or series of events that involves the application of a force or resistance external to the human body and that results in personal injury, but does not include any gradual process; and the fact that a personal injury has occurred shall not of itself be construed as an indication or presumption that it was caused by any such event or series of events; or

(b) The inhalation or oral ingestion of any solid, liquid, gas, or foreign object where the inhalation or ingestion occurs on a specific occasion; but does not include inhalation or ingestion of a virus, bacterium, protozoa, or fungi, unless that inhalation or ingestion is the result of a criminal act of another person; or

(c) Any exposure to the elements or extremes of temperature or environment within a defined period of time not exceeding 1 month that causes disability that lasts for a continuous period exceeding 1 month or death; or

(d) Any burn or exposure to radiation or rays of any kind on a specific occasion that is not a burn or exposure caused by exposure to the elements; or

(e) The absorption of any chemical through the skin within a defined period of time not exceeding 1 month but excludes any of the occurrences specified above that is treatment by or at the direction of a registered health professional

The definition of accident in s 3(a) was intended to give “accident” a more narrow meaning that the one it had been given in the Courts. The requirement of “the application of a force or resistance external to the human body” meant that cases like

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\(^{150}\) Such cover was added by the Accident Rehabilitation and Compensation Insurance Amendment Act (No 2) 1993.
those in *Wallbutton v ACC* or *ACC v Mitchell* would no longer fall within the scheme. The requirement of “a specific event or series of events” would also provide a barrier in cases like *ACC v E* where no identifiable event or series of events led to the injury.

“Personal injury” was defined by s 4 as being either death, physical injury or mental injury suffered in one of two circumstances: either as “an outcome” of a physical injury, or resulting from sexual crimes. Section 4 also limited the scope of cover for cardio-vascular or cerebro-vascular events.

The new definition of “personal injury” meant that cover, and accordingly entitlements, for mental consequences was available only in limited circumstances. Cases of mental consequences alone, like in *ACC v E*, would no longer be covered. “Mental injury” was defined by s 3 as meaning “a clinically significant behavioural, psychological, or cognitive dysfunction”, reflecting an intention that mental consequences had to meet a certain threshold of seriousness to attract cover, in addition to being caused in one of the limited circumstances that allowed for cover.

Medical misadventure had been covered by the 1972 Act, but was not further defined. Section 5 of the 1992 Act introduced a restrictive definition of medical misadventure. Medical misadventure was either “medical error” or “medical mishap.”

“Medical error” meant: the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances. It is not medical error solely because desired results are not achieved or because subsequent events show that different decisions might have produced better results.

“Medical mishap” was: an adverse consequence of treatment by, or at the direction of, a registered health professional, properly given, if—

(a) The likelihood of the adverse consequence of the treatment occurring is rare; and

(b) The adverse consequence of the treatment is severe.

This new definition meant it was much more difficult to obtain cover for medical misadventure compared to the 1972 legislation. The failure to observe reasonable care and skill required to obtain cover for medical error re-introduced an element of fault

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151 Strictly speaking, cover for mental injury for sexual abuse or assault was for “mental or nervous shock” rather than “mental injury.” The distinction was dropped in the 1998 Act, which provided cover for “mental injury” because of physical injury, and “mental injury” because of sexual crimes.
152 1992 Act, s 4(2).
153 1992 Act, s 5(1).
154 1992 Act, s 5(1).
into the scheme. Medical mishap required that the adverse consequence of treatment to the patient was both rare and severe. The reintroduction of “fault” into the scheme is inconsistent with the idea of the scheme providing no-fault comprehensive cover. However, it is consistent with the idea that cover under the scheme should be limited to the kinds of injuries which could have led to successful proceedings for damages in negligence.

Section 10 provided for “General exclusions from cover”, reflecting a general policy that the scheme did not extend to illness except in certain specified cases:

(1) For the avoidance of doubt, it is hereby declared that personal injury caused wholly or substantially by gradual process, disease, or infection is not covered by this Act unless it is—

(a) Personal injury caused by gradual process, disease, or infection arising out of and in the course of employment as defined in section 7 or section 11 of this Act; or

(b) Personal injury that is medical misadventure; or

(c) A consequence of personal injury or treatment for personal injury covered by this Act.

(2) For the avoidance of doubt it is hereby declared that—

(a) Personal injury caused wholly or substantially by the ageing process; and

(b) Personal injury to teeth that is caused by the natural use of those teeth is not covered by this Act.

The 1972 Act’s exclusion of injury caused exclusively by disease, infection or the ageing process was replaced by an exclusion for conditions caused “wholly or substantially” by gradual process, disease, infection or the ageing process. As with the definition of accident, this was a reaction to the generous view on the line between injury and illness that the Courts had taken under the 1972 Act.

2 Abolition of lump sums

The 1992 Act removed lump sum compensation for permanent disability and for pain and suffering and loss of enjoyment of life. Compensation for permanent disability was instead provided by a quarterly payment called an “independence allowance.” The scheme ceased to provide any compensation for pain and suffering and loss of enjoyment of life in any way. The 1992 Act also added a threshold of ten per cent impairment before compensation for permanent impairment could be paid. As well as changing the way in which permanent disability was compensated, the 1992 Act also drastically decreased the quantum of compensation. The 1982 Act allowed a

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155 1992 Act, s 54-5.
maximum total lump sum payment of $17,000 to compensate for loss of bodily function and mental suffering. The initial maximum independence allowance payment under the 1992 Act was $60 per week.\textsuperscript{156} A seriously impaired claimant would need to receive the maximum independence allowance for five years to receive close to the $17,000 payable under the 1982 Act.

3 The “repugnant to justice” provision

The 1992 Act continued to provide for disentitlement for persons injured during the commission of a serious criminal offence. Section 84 of the 1992 Act was essentially the same as the “repugnant to justice” provision of the 1982 Act, but made one important change: instead of being able to make a primary decision on the matter itself, the Corporation was required to apply to the District Court for a determination on withholding entitlements. This change suggests a policy that the decision to withhold entitlements on a punitive basis should be left to the Courts.

4 The effect of the 1992 Act on the role of the scheme

The overall effect of the 1992 Act was to restrict the compensatory function of the scheme. The scheme was restricted both in terms of cover – the kinds of circumstances which could lead to claims under the scheme – and entitlements – what successful claimants could receive.

The 1992 Act limited the scheme’s role in relation to mental consequences in particular. First, cover for mental consequences was restricted to mental injury that was an outcome of physical injury or mental or nervous shock resulting from sexual crimes. Second, compensation for pain and suffering and loss of enjoyment of life was removed from the scheme.

D The Health and Safety in Employment Act 1992

The Health and Safety in Employment Act 1992 (“the HSE Act”), which came into force on 1 April 1993, consolidated and reformed the law in the area of workplace injuries, replacing some thirty previous statutes. Previously, various statutes dealt with health and safety in the workplace in a rather piecemeal fashion, with various pieces of legislation, some of which overlapped. For example, failing to keep a machine safe could have been contrary to both the Construction Act 1950 and the Machinery Act 1955.

The object of the HSE Act 1992, set out in section 5, is to “promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work.”

\textsuperscript{156} 1992 Act, s 52(6), the rates were increased by regulation, but the increases were not generous.
The HSE Act 1992 imposes a series of duties on employers and employees, particularly a duty to take “all practicable steps to ensure the safety of employees while at work”. The Act also imposes a duty on employers to “take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person.” The Act creates a strict liability offence for failing to comply with the requirements of the Act as well as a knowledge-based offence relating to serious harm, the latter attracting a much more severe penalty. Prosecutions against employers for breaching the duty are taken by the Department of Labour.

Prior to the ACC scheme, the torts of negligence and breach of statutory duty dealt with many workplace injury cases. The removal of the right to sue meant that the civil law ceased to be involved in compensating workplace injury victims, but also in considering whether employers were at fault, in terms of negligence of breach of a statutory duty.

The combination of the ACC scheme and the HSE Act 1992 shifted the function of dealing with employers who breached workplace safety standards to the criminal law. Compensation was primarily provided by the ACC scheme, which left the civil law little or no role in relation to workplace injuries, other than possibly an action for exemplary damages.

The HSE Act 1992 was significant in terms of the role of the civil and criminal law in New Zealand for two main reasons. First, the HSE Act 1992 meant that the criminal law had a greater role in dealing with the kind of inadvertent wrongdoing that would have been dealt with by the civil law before ACC – wrongdoing in the sense of a failure to observe objective community standards of workplace safety rather than a deliberate act. Second, HSE Act 1992 prosecutions provided a fertile platform for reparation, since employers would normally have the means to pay reparation.

E The role of the civil law

1 McLaren Transport – exemplary damages and negligence

In *McLaren Transport Ltd v Somerville*, Tipping J considered the availability of exemplary damages for negligence, a question which had not previously reached the High Court.

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158 HSE Act 1992, s 15.
159 HSE Act 1992, s 50.
160 HSE Act 1992, s 49.
161 See VI.E.2-6 below.
Tipping J rejected submissions from counsel that the law of exemplary damage should take on an element of compensation to make up for the cut backs to the ACC scheme brought about by the 1992 Act, and considered that it would not be proper for the Courts to “undermine the statutory and social purpose of the accident compensation legislation by allowing actions for exemplary damages to contain an element of compensation.”

The proposition of exemplary damages for negligence is difficult. The tort of negligence developed to include acts of inadvertence and absentmindedness, acts with little or no moral blameworthiness, for which punishment seems inappropriate. However, this does not necessarily mean that there are no acts of negligence which are particularly worthy of punishment. The question is, how can one describe more precisely which kinds of negligence are deserve punishment in the form of an award of exemplary damages?

Tipping J thought that:

Once exemplary damages are allowed in cases of negligence causing personal injury, it is impossible to shy away from degrees of negligence. The higher the level of negligence the stronger will be the case for exemplary damages. No verbal formula can ever provide an automatic answer for a particular case. It will always be a matter of judgment and the formula can only encapsulate the essential ingredients of the injury.

Tipping J rejected bringing recklessness or gross negligence into the question, on the basis that while it had a “seductive simplicity”, gross negligence did not “sufficiently incorporate the various ingredients which go on to make up the totality of the criteria.” The Judge came to the conclusion that “the law of New Zealand allows a claim for exemplary damages for personal injury caused by negligence if the defendant’s conduct is bad enough.” He later refined that threshold, declaring that exemplary damages are available “if the level of negligence was so high that it amounts to an outrageous and flagrant disregard for the plaintiff’s safety, meriting condemnation and punishment.”

I am not convinced that this test is really any clearer than “bad enough.” Attempts to define the threshold for exemplary damages tend to invoke words like “flagrant”, “outrageous”, or contumelious” but piling on such words without acknowledging that they all suggest deliberate action provides no more real clarity than simply saying “bad enough.” “Meriting condemnation and punishment” adds little either, because it

163 McLaren Transport Ltd v Somerville, above n 162, at 20.
164 McLaren Transport Ltd v Somerville, above n 162, at 21.
165 McLaren Transport Ltd v Somerville, above n 162, at 22.
166 McLaren Transport Ltd v Somerville, above n 162, at 19, emphasis added.
167 McLaren Transport Ltd v Somerville, above n 162, at 23.
is essentially circular: if exemplary damages are for the purpose of punishment and condemnation, it does not tell us anything about what kind of conduct deserves punishment and condensation to describe such conduct as “meriting condemnation and punishment.” Tipping J’s test for exemplary damages for negligence seems to be an “I know it when I see it” kind of test.168

2 Queenstown Lakes District Council v Palmer – the return of the right to sue for compensatory damages

Queenstown Lakes District Council v Palmer169 gave the Court of Appeal an opportunity to comment on the role of the common law in relation to the retrenched version of the scheme brought about by the 1992 Act. The case concerns proceedings brought by Mr Palmer, who witnessed the accidental death of his wife in a rafting accident near Queenstown. Mr Palmer suffered no physical injury himself, but suffered serious mental injuries as a result of his wife’s death. He could not receive cover from ACC under the 1992 Act, because his mental injuries were not an outcome of a physical injury he suffered. Instead, he sought compensatory damages from the raft operator and the Council. The question was whether those proceedings for damages arose directly or indirectly from his wife’s death and therefore were caught by the statutory bar. If so, Mr Palmer would not be receive compensation for his mental injury from either the scheme or the civil law.

The Court of Appeal discussed the legislative history of the scheme noting that:170

It was amended by the current Act in 1992 to provide a more restrictive definition of which injuries constituted “personal injury by accident” in place of the more open concept which allowed the courts to adopt a “generous unniggardly interpretation” …

Essentially, the accident compensation legislation in both its original and amended forms denied those persons covered under the Act access to the courts at common law in return for the perceived advantages of the statutory scheme. The legislation reflected this policy from the outset. The exchange has frequently been spoken of as a social contract or social compact.

If the scheme represented such an exchange then the scope of over under the scheme should mirror the extent of the proceedings barred by the scheme. The Court of Appeal rejected the idea that producing a new compensation scheme and limiting the common law in cases of injury were intended to be two discrete functions. It considered that the purpose of the statutory bar on proceedings was to prevent double

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168 The phrase was used famously by Justice Potter Stewart in *Jacobellis v Ohio* 378 US 184 (1964) in reference to hard-core pornography.

169 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA).

recovery, not to bar proceedings as an end in itself.\textsuperscript{171} While dismantling the tort of negligence and doing away with all its inconsistencies and inefficiencies, might seem a worthy goal in itself, the Court of Appeal did not consider that Parliament had this in mind.

The mention of “social contract” brings to mind the political philosophy of Thomas Hobbes: trapped in the “state of nature” of constant conflict, the rational choice is to submit to the social contract offered by the state: protection in exchange for a degree of personal autonomy.\textsuperscript{172} The pre-ACC position of compensation can be equated with to Hobbes’s state of nature. Injury can come at any time and without warning, and compensation is not guaranteed. The rational way to escape that state of nature is to exchange a degree of personal autonomy (the right to sue) for access to the ACC scheme.

While Hobbes’s description of the state of nature is abstract, and does not refer to an actual bargain, the ACC scheme was the product of very real political bargaining. The trade unions repeatedly argued that the new scheme should provide compensation at a similar level to a common law damages award if the common law was to be abolished. The payment of lump sums under the 1972 Act scheme, as opposed to the periodic payments recommended by the Royal Commission, was a concession to these kinds of arguments. So, the scheme did represent a kind of an exchange, but more of a political bargain than a social contract in the political philosophy sense.

However, the notion of the scheme as an exchange does not fit easily with the Woodhouse Report. For the Royal Commission, the new scheme was a fairer and more efficient replacement for the suite of mechanisms that previously served to compensate injury, not a trade for the common law. With respect to the common law, the Royal Commission regarded the negligence action as having no justification in practice or in principle. There can be little principled basis to demand something in return for a legal right which for which there is no real justification.

The Court of Appeal in \textit{Queenstown Lakes District Council v Palmer} clearly did not consider that the right to seek damages at common law was without justification, since it upheld:\textsuperscript{173}

\begin{quote}
[T]he traditional principle, which enjoys fundamental constitutional status in our free and democratic society, that citizens are not to be denied access to the courts, save in rare and appropriate circumstances, and then only pursuant to explicit statutory language. The right to seek damages at common law for
\end{quote}

\begin{footnotes}
\item[171] \textit{Queenstown Lakes District Council v Palmer}, above n 169, at 9-10.
\item[172] Edwin Curley (ed) \textit{Hobbes Leviathan} (Hackett Publishing Company, Cambridge, 1994) see 74-78 re the state of nature which Hobbes famously describes life in as “solitary, poor, nasty, brutish and short”.
\item[173] \textit{Queenstown Lakes District Council v Palmer}, above n 169, at 10.
\end{footnotes}
personal injury suffered because of the fault or negligence of another was removed by the legislation, but the *quid pro quo* was the right to compensation under the statutory scheme.

Corrective justice provides some of the philosophical basis for giving citizens access to the courts: the courts facilitate the righting of wrongs between parties and the achievement of “justice” in the corrective justice sense. Corrective justice was set aside in cases of injury covered by the scheme in order to achieve the distributive justice goal of providing for all victims of injury instead of only those injured by someone else’s fault. However, if cover under the scheme is withdrawn, there is no longer any principled basis for suppressing the ability to pursue corrective justice.

The 1992 Act presents something of a challenge to the idea of the scheme as an social contract. One party to the bargain unilaterally changed the terms of the contract, cutting back both the scope of cover and level of entitlement under the scheme. This is not usually considered to be a reasonable way for a party to a contract to behave. The Court of Appeal’s response to this addresses the restriction on cover: when cover under the scheme is withdrawn, the scope of the common law expands to fill the gap: “[t]o the extent that the statutory cover is extended, the right to sue at common law is removed; to the extent that the cover is withdrawn or contracted, the right to sue at common law is revived.” So, the social contract would not be unilaterally varied without giving something back in return.

However, the same cannot be said for the restriction on entitlements. The combination of the policy of removing compensation for pain and suffering, and the policy of “no return to the right to sue” meant denying injury victims lump sum compensation for pain and suffering under both the scheme and the common law.

The Court of Appeal’s interpretation of the statutory bar required a strained interpretation of “proceedings for damages arising directly or indirectly out of personal injury covered by [the scheme],” as it had in *Donselaar v Donselaar*. Mr Palmer’s mental injury arose from his wife’s death, which would suggest that his proceedings for compensation for his mental injury arose directly or indirectly from a personal injury covered by the scheme. However, the Court of Appeal considered that the wording of the statutory bar had to be read in conjunction with other parts of the Act:

... s 14(1) must be read in conjunction with subs (1) and (2) of s 8, which defines the cover for personal injury occurring in New Zealand. Subsection (1) provides that the Act is to apply in respect of personal injury “in respect of which there is

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174 Queenstown Lakes District Council v Palmer, above n 169, at 10.
175 1992 Act, s 14(1).
176 Queenstown Lakes District Council v Palmer, above n 169, at 6.
cover under this Act.” (Emphasis added). Subsection (2) provides that cover under the Act is to extend to personal injury which “... is caused by an accident to the person concerned.” (Emphasis added). The scope of the Act, in other words, is coterminous with cover provided under the Act. This defining section has an obvious import for s 14(1), which necessarily relates back to s 8, when referring to proceedings for damages arising out of personal injury “covered by this Act”.

This construction is supported, in the second place, by the wording of the Long Title to the Act. The stated object of the Act is “to establish an insurance-based scheme to rehabilitate and compensate ... those persons who suffer personal injury”. Section 14(1) is necessarily complementary and correlated to that object. The notion of an insurance-based scheme implies that the persons who are entitled to rehabilitation and compensation are those persons who suffer a personal injury covered by the scheme.

Although the Court of Appeal was able to give an argument for its statutory interpretation, the point of the argument is to establish why the section should be read in a way consistent with the Court’s conception of the philosophy of the scheme, rather than given its plan meaning. So, the validity of this argument depends on whether the Court of Appeal correctly understood the philosophy of the scheme, which is questionable.

3 Daniels v Thompson – exemplary damages and the criminal law

In Daniels v Thompson, the Court of Appeal continued to develop its view of the place of exemplary damages in New Zealand. The issue in Daniels v Thompson stemmed from the overlap between exemplary damages and the criminal law: both exemplary damages and the criminal law penalise and deter wrongdoing, so how should a past or possible future criminal penalty affect exemplary damages?

Henry J, for the majority, took the opportunity to confirm the position that the purpose of exemplary damages was to punish and deter, and reject any idea that there was, or should be, any compensatory element to exemplary damages. He noted that:

The recent upsurge in such claims … is said to be attributable at least in part, to the Accident Compensation scheme, and more recently the reduction in benefits payable under it … It is perhaps not surprising that many of the cases … have the appearance of seeking compensatory as well as exemplary relief.

177 Daniels v Thompson [1998] 3 NZLR 22 (CA).
178 Richardson P and Gault, Henry and Keith JJ.
179 Ibid, at 8.
The majority view was essentially as follows: The function of exemplary damages is to punish and deter outrageous wrongdoing. This function overlaps with sentencing in the criminal law. The considerations of exemplary damages and criminal sentencing are not identical: exemplary damages are concerned with outrageousness of conduct, while sentencing takes into account factors such as rehabilitation, a guilty plea and previous good character. Sentencing always takes into account punishment and deterrence, even though it might also take into account additional factors, so to punish again by exemplary damages would always be double punishment.\(^{180}\) Therefore, where criminal sanctions have already been applied, exemplary damages should not be available.

An acquittal means that the elements of a criminal offence have not been made out, and does not bar a civil claim for compensatory damages.\(^{181}\) However, the only purpose of an exemplary damages claim is for society to express disapproval and punish and deter.\(^{182}\) Where a person has been exonerated from criminal offending, it becomes undesirable to re-litigate the same facts for the sole purpose of punishment.\(^{183}\) Therefore, where a person has been acquitted of a criminal charge relating to certain acts, there should be no action for exemplary damages in relation to those acts.

If conviction or acquittal bar proceedings for exemplary damages, then it would be an abuse of process to make a claim for exemplary damages after the commencement of a prosecution, because the claim may disappear. Where no criminal prosecution has been instituted it would be appropriate to stay civil proceedings until it becomes clearer whether there will be a prosecution. If it became clear that there would be no prosecution, the civil action could then proceed.\(^{184}\)

The majority position boils down to the civil law deferring to the criminal law in matters of punishment. Although the majority considered that punishment and deterrence was a legitimate function of both the civil and criminal law, their approach suggests that, given a choice between the two, the criminal law rather than the civil should mete out punishment. For the majority, the choice of “both” was not available because it would result in double punishment.

The majority considered and dismissed the “disenfranchisement argument” that the criminal law should not limit the ability of the victim to bring a claim in the civil law. Since the purpose of exemplary damages was punishment not compensation, limiting

\(^{180}\) Ibid, at 32-3.
\(^{181}\) Ibid, at 37.
\(^{182}\) Ibid, at 37.
\(^{183}\) Ibid, at 37-8.
\(^{184}\) Ibid, at 39.
the right to seek exemplary damages was not limiting access to the courts to seek a remedy for a civil wrong. The majority noted that the that the ability to seek a remedy for a civil wrong was already limited by the ACC scheme in injury cases.\footnote{Ibid, at 35.}

Clearly in personal injury cases the right of access to the Courts, including the right to invoke the law of torts and obtain the benefits of whatever functions it may now provide, has now almost entirely disappeared by reason of legislative intervention.

This comment raises the question of whether the right to access to the courts is really as fundamental as the Court of Appeal in Queenstown Lakes District Council v Palmer thought. Furthermore, it is an acknowledgement that by introducing the ACC scheme Parliament limited not only the right to seek compensation, but the right to obtain the benefits of other functions of the law of torts. This calls into question the reasoning of the Court of Appeal in Donselaar v Donselaar\footnote{Donselaar v Donselaar, above n 85.} that the accident compensation legislation was not intended to limit the availability of exemplary damages.

Thomas J dissented from what he considered the “radical”\footnote{Ibid, at 2.} approach of the majority. The majority’s approach was “radical” in the sense that it drew a bright line between cases suitable for exemplary damages and cases dealt with by criminal prosecution, with no overlap between the two, diverging from the greyer approach taken by other jurisdictions. Thomas J’s expansive view on exemplary damages could itself be considered radical. He thought that “the function of exemplary damages is part of the function of the law of torts”,\footnote{Ibid, at 19.} which he considered to include:\footnote{Ibid, at 19-20.}

- Compensation, the “first and foremost” function;
- Punishment and deterrence;
- Condemnation and the symbolic impact of a decision as an expression of disapproval;
- Education;
- Vindication and appeasement to the victim; and
- The avoidance of abuses of power.

Essentially, Thomas J’s view was that exemplary damages should be available to pursue all the various functions of tort law aside from compensation, which now belonged to the accident compensation scheme.\footnote{Ibid, at 22.}
It will at once be obvious that, with compensation put to one side, these various functions are exceedingly well served by exemplary damages. Although the compensatory function also serves to deter, appease, admonish, educate, and protect legal interests, the ability of the plaintiff to claim exemplary damages where the defendant’s conduct is flagrant fortifies each of these functions… It is difficult to see how the law of torts could satisfactorily accomplish these functions without the adjunct of exemplary damages.

Thomas J gave his view on Cooke J’s comments in *Donselaar v Donselaar* regarding moulding exemplary damages to meet social needs without undermining the Accident Compensation scheme. He considered that, rather than suggesting that exemplary damages should take on an element of compensation:

Lord Cooke was suggesting that, in order to ensure that the law of civil damages, including tort law, meets the purposes which social needs dictate, exemplary damages alone may need to serve the functions which tort law previously achieved with both compensatory and exemplary damages. To the extent those functions were inherent in compensation they are clearly not available in respect of accidents resulting in personal injury. Exemplary damages remain the only means of securing the wider functions of tort law.

Thomas J quite rightly observed that “[t]here are few aspects of a citizen’s conduct today which may not constitute a crime or a quasi-crime or a breach of a regulatory provision”, and further observed that this meant that barring claims for exemplary damages where there is or is likely to be a criminal prosecution would “limit the significance of *Donselaar v Donselaar* significantly and render idle many of Richardson J’s general observations as to the role of exemplary damages in our society.” This second observation is also correct, but the majority were deliberately attempting to limit the significance of exemplary damages in response to the recent upsurge in cases which had the appearance of seeking compensation.

Thomas J’s judgment brings to mind the Court of Appeal judgment in *Taylor v Beere* and *Donselaar v Donselaar*: he considered that exemplary damages provided a valuable social outcome, and was reluctant to adopt any rule that would limit the ability of the courts to use exemplary damages to achieve a desirable outcome in a particular case.

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191 See above n 90 and accompanying text.
192 Ibid, at 23-4.
193 Ibid, at 19.
194 *Taylor v Beere*, above n 84.
The Accident Insurance Act 1998

1 Legislative overturn of Daniels v Thompson

Section 396 of the 1998 Act marked a legislative rejection of the majority approach in Daniels v Thompson:

396 Exemplary damages

(1) Nothing in this Act, and no rule of law, prevents any person from bringing proceedings in any court in New Zealand for exemplary damages for conduct by the defendant that has resulted in—

(a) Personal injury covered by this Act; or

(b) Personal injury covered by the former Acts.

(2) The court may make an award of exemplary damages for conduct of the kind described in subsection (1) even though—

(a) The defendant has been charged with, and acquitted or convicted of, an offence involving the conduct concerned in the claim for exemplary damages; or

(b) The defendant has been charged with such an offence, and has been discharged without conviction under section 19 of the Criminal Justice Act 1985 or convicted and discharged under section 20 of that Act; or

(c) The defendant has been charged with such an offence and, at the time at which the court is making its decision on the claim for exemplary damages, the charge has not been dealt with; or

(d) The defendant has not, at the time at which the court is making its decision on the claim for exemplary damages, been charged with such an offence; or

(e) The limitation period for bringing a charge for such an offence has expired.

(3) In determining whether to award exemplary damages and, if they are to be awarded, the amount of them, the court may have regard to—

(a) Whether a penalty has been imposed on the defendant for an offence involving the conduct concerned in the claim for exemplary damages; and

(b) If so, the nature of the penalty.

It is clear that the intention of s 396 is to overturn Daniels v Thompson, however the justification for doing so is less clear. Professor Beever colourfully describes the legislative debate leading up to the passing of s 396:195

The then Minister of Justice, the Rt Hon Douglas Graham, appears almost as a sorcerer’s apprentice caught in a swirling vortex of argument from the left (Phil

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Goff and Lianne Dalziel, Labour) and the right (Derek Quigley, Act). Part of the reason the debate is so amusing is that the positions taken by the MPs are so true to stereotype. The left argued that exemplary damages should be promoted because victims were not receiving sufficient compensation under the current accident compensation legislation. Hence, they saw the point of the award to be to top up the inadequate levels of compensation available under ACC. The right, even more stereotypically, promoted exemplary damages because they saw it as compensating to a degree for the inappropriately lenient sentences handed out to criminals by criminal courts. Caught in the middle of this whirlwind, the Government — who really had no idea what the issue was, a fact openly conceded by the Minister of Justice — gave in despite much discomfort.

If part of the justification of section 396 is that the legislature intended that exemplary damages serve a compensatory purpose, there is little indication of this in the wording of the section itself. However, the legislative intent is not clear. All that can really be gleaned is that Parliament rejected the majority view in Daniels v Thompson, and that the penalty imposed on an offender can be a relevant factor in awarding exemplary damages. The latter suggests a legislative view that punishment is a purpose of exemplary damages, but not necessarily the only one.

Amending the accident compensation legislation was an unusual way of overturning Daniels v Thompson. As Professor Todd explains:197

Bizarrely, s 319 applies in the case of personal injury covered by the Act, but not in other cases. An offender who is convicted for breaking into a house and assaulting and injuring the occupier can still be sued for exemplary damages, whereas an offender who is convicted for breaking into a house, threatening the offender with a gun and burning the house down cannot. Perhaps the Court of Appeal might reconsider Daniels v Thompson in the light of s 319, yet it is by no means clear that the section represents a considered and well thought out conclusion of policy. If Parliament decided, after a serious analysis of the issues, that the view taken in Daniels v Thompson ought to be rejected, one might have expected that it would have been rejected across the board.

2 Codification of the factors in ACC v Curtis

The 1998 Act amended the “repugnant to justice” provision by codifying the factors that the Court of Appeal set out in ACC v Curtis as relevant to whether provision of entitlements would be “repugnant to justice”.198

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196 Under s 396(3), when awarding exemplary damages the Court may have regard to any penalty imposed on the offender.
3 A brief period of competitive provision of the scheme

With the 1998 Act, the National government continued its programme of making the scheme more friendly to business interests. The 1998 Act introduced competitive provision of the scheme, and made further changes to funding, however, the remainder of the scheme essentially stayed the same. The name of the 1998 Act “The Accident Insurance Act” reflected the insurance philosophy, and the language of the scheme was changed to be more-insurance based – where previous Acts had used “claimant”, the 1998 Act used “insured”. Competitive provision of the scheme did not last long – Labour returned to power in 1999 and quickly moved to re-nationalise accident compensation, with the Accident Insurance Amendment Act 2000 and Accident Insurance (Transitional Provisions) Act 2000.

199 The scheme was returned to a fully-funded scheme instead of pay-as-you-go (see above n 115).
VI THE ACC SCHEME FOLLOWING THE 2001 ACT: 2001 – PRESENT

A Introduction

After removing competitive provision of ACC, the new Labour government went on to further revise the scheme. The Injury Prevention, Rehabilitation and Compensation Act 2001 (“the 2001 Act”), which came into force on 1 April 2002, made various changes to the scheme, including the re-introduction of lump sums. The following occurred after the passing of the 2001 Act:

• The compensatory role of the criminal law was further expanded by the Sentencing Act 2002 and later the offender levy scheme;

• Various amendments to the 2001 Act under Labour widened the scope of the scheme, until National won power again; and

• The courts continued to develop the role of the civil law in light of the scheme, including a series of inconsistent decisions on exemplary damages for negligence.

B The 2001 Act and subsequent amendments

1 The Injury Prevention, Rehabilitation and Compensation Act 2001

The purpose of the 2001 Act set out at section 3 is to:

[E]nhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs).

The reference to the social contract underpinning the first accident compensation scheme suggested that the 2001 Act would herald a return to the original scheme rather than the more miserly insurance-based 1992 Act version, and in many ways it did. Lump sums were returned as the means of compensating for permanent impairment, with a maximum of payable of $100,000. The 2001 Act also placed greater emphasis on rehabilitation and injury prevention as functions of the scheme.

However, the 2001 Act retained a number of the more restrictive features of the 1992 Act. The structure of the 2001 Act resembles the 1992 and 1998 Acts rather than the original legislation. “Accident” and “personal injury” were defined exhaustively, with substantially the same wording as the 1992 Act. Mental injury cover was still limited to mental injury because of physical injury, or mental injury resulting from sexual offences. Although lump sum payments to compensate for permanent impairment were reintroduced, compensation for pain and suffering and loss of enjoyment of life was not.
2 Amendments to the 2001 Act under Labour

The 2001 Act was followed by a series of amendments under Labour, which gradually made the scheme more generous. The Injury Prevention, Rehabilitation and Compensation Amendment Act 2005 expanded the scheme, including replacing “Medical misadventure” as a basis for cover with “treatment injury.” Treatment injury simply required that a person suffered an injury caused by treatment, replacing the need for fault (for medical error) or a rare and severe condition (for medical mishap.)

200 The Injury Prevention, Rehabilitation and Compensation Amendment Act 2008 further expanded the scheme, including widening the scope of cover for work-related gradual process, disease and infection conditions. The 2008 Amendment Act also added cover for “work-related mental injury” to the scheme, adding a new section 21B:

21B Cover for work-related mental injury

(1) A person has cover for a personal injury that is a work-related mental injury if—

(a) he or she suffers the mental injury inside or outside New Zealand on or after 1 October 2008; and

(b) the mental injury is caused by a single event of a kind described in subsection (2).

(2) Subsection (1)(b) applies to an event that—

(a) the person experiences, sees, or hears directly in the circumstances described in section 28(1);201 and

(b) is an event that could reasonably be expected to cause mental injury to people generally; and

(c) occurs—

(i) in New Zealand; or

(ii) outside New Zealand to a person who is ordinarily resident in New Zealand when the event occurs.

(3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.

(4) Section 36(1) describes how the date referred to in subsection (3) is determined.

200 See above V.C.1.

201 Section 28 defines “work-related personal injury”.
In subsection (2)(a), a person experiences, sees, or hears an event directly if that person—

(a) is involved in or witnesses the event himself or herself; and

(b) is in close physical proximity to the event at the time it occurs.

To avoid doubt, a person does not experience, see, or hear an event directly if that person experiences, sees, or hears it through a secondary source, for example, by—

(a) seeing it on television (including closed circuit television):

(b) seeing pictures of, or reading about, it in news media:

(c) hearing it on radio or by telephone:

(d) hearing about it from radio, telephone, or another person.

In this section, event—

(a) means—

(i) an event that is sudden; or

(ii) a direct outcome of a sudden event; and

(b) includes a series of events that—

(i) arise from the same cause or circumstance; and

(ii) together comprise a single incident or occasion; but

(c) does not include a gradual process.

Section 21B was intended to allow cover in situations such as when a train or truck driver suffers a mental injury after someone commits suicide by jumping in front of their vehicle. Such mental injuries would probably have been covered under the original scheme as mental consequences of the accident, but were not able to meet the requirements for cover under the 1992 or 1998 Acts. Section 21B was clearly intended not to extend to workplace stress generally. Section 21B would not provide cover in the factual scenario of *ACC v E*, since there was no identifiable “event” in the management course that led to the breakdown. The requirement in s 21B(2)(b) that the event in question “could reasonably be expected to cause mental injury to people generally” further limits the scope of work-related mental injury cover. For example, a person with an abnormal propensity to develop mental injury at the sight of blood, could probably not obtain cover if they developed a mental injury after witnessing a co-worker’s paper cut.

Cover under s 21B is only available for work accidents. This means that, in the case of a suicide jumping in front of a train, the train driver can receive cover if they

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202 *ACC v E* [1992] 2 NZLR 426 (CA), see above IV.B.7.
develop a mental injury as a result. However, no cover is available to passengers who also develop a mental injury, unless they were working at the time. The extension of cover to work-related mental injury only is inconsistent with the philosophy of the Woodhouse Report and, like the limited extension of cover for disease to work-related conditions in the original scheme, is a result of politics: the Labour party catering to its union support base.

3 The Accident Compensation Amendment Act 2010

A new National-led government came to power in 2008, and made several changes to the scheme with the Accident Compensation Act 2010. The focus of the 2010 Amendment Act was containing costs. Several of the changes reversed expansions of the scheme by the Labour government under the 2001 Act and its subsequent amendments.

The name of the 2001 Act was changed to the “Accident Compensation Act.” The return to the “Accident Compensation Act” might on the face of it suggest a return to the original scheme of the Accident Compensation Acts 1972 and 1982, but the 2010 Amendment Act makes the scheme more restrictive and is focused on reducing cost, which makes it closer to the 1992 or 1998 Acts than the original scheme. The National government later announced that it intends to re-introduce competitive provision of the scheme for work injuries.203

The 2010 Amendment Act also took a more strict approach to disentitlement for injury suffered during the commission of serious crime than the pre-amendment 2001 Act. The threshold for disentitlement was raised to only apply to offences punishable for a maximum term of imprisonment of two years or more, although disentitlement could apply if the claimant was sentenced to home detention or imprisonment.204 Disentitlement did not apply to treatment or services ancillary to treatment, as with the earlier provisions, with an additional restriction added: the Corporation was only able to provide entitlement to surgery if “required to restore the claimant’s function to enable him or her to return to work.”205

Under previous disentitlement provisions, the default position was that compensation was payable to an offender who suffered an injury during the commission of a serious criminal offence for which they were sentenced to imprisonment, but either the Corporation206 or the District Court207 could determine that certain entitlements

204 Accident Compensation Act, s 122(1)(a).
205 Accident Compensation Act, s 122(3)-(4).
206 Under the 1982 Act.
should not be paid if it was “repugnant to justice.” The 2010 Amendment reversed this position: the default position is that such an offender does not receive compensation, but the Minister for ACC can exempt the claimant from disentitlement.²⁰⁸

Giving the Minister for ACC this discretion is quite extraordinary. Nowhere else does the accident compensation legislation empower the Minister to make decisions on entitlement for individual claimants. Little legislative guidance is given as to when the Minister can exercise this discretion. The Minister “may” exempt a claimant from disentitlement if “satisfied that there are exceptional circumstances relating to the claimant”, but there is nothing more to suggest what kind of exceptional circumstances ought to lead to exemption.²⁰⁹

Giving the discretion to the Minister appears to be a legislative vote of no confidence in the ability of the Corporation and the courts to make satisfactory decisions with respect to denying criminal offenders compensation. The strictness of the new provision in contrast to the previous legislation reflects a right-wing ideology that sees criminal wrongdoing in terms of personal responsibility rather than as a social problem.

The provision specifies that “nothing in this section gives a claimant the right to apply for an exemption.”²¹⁰ Normally, a claimant can seek an independent review of a decision by the Corporation,²¹¹ but since the power to grant an exemption is exercised by the Minister, a review is not available. Since there is no right of review, a decision by the Minister not to exercise the discretion should be judicially reviewable.²¹²

C The role of the civil law

1 Wilding – the statutory bar and Bill of Rights Act damages

In Simpson v Attorney-General,²¹³ the Court of Appeal found that monetary compensation could be awarded for breaches of the New Zealand Bill of Rights Act 1990 (“NZBORA”). Such damages are referred to as “public law damages” or “public

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²⁰⁸ Accident Compensation Act, s 122A.
²⁰⁹ The pre-amendment s 122 listed factors which would be relevant to applying its “repugnant to justice” test.
²¹⁰ Accident Compensation Act, s 122A(2).
²¹¹ Accident Compensation Act, s 134.
²¹² The accident compensation legislation has a privative clause (2001 Act, s 133(5)) that provides that no court can provide a remedy in relation to a matter if the person has a right of review or appeal under the Act. Since there is no right to review, the privative clause does not apply.

law compensation.” In *Wilding v Attorney-General*, the Court of Appeal considered the extent to which the statutory bar on proceedings for damages arising directly or indirectly from personal injury covered by the scheme applied to proceedings for public law damages.

Mr Wilding was bitten by a police dog and suffered physical injuries and allegedly post-traumatic stress disorder. He alleged that the police dog handler instructed the police dog to bite him after he had been handcuffed and was lying face down, and claimed that this was in breach of his right not to be subjected to torture or cruel treatment and, as a detained person, to be treated with humanity and respect. He also brought actions in assault and battery and misfeasance in public office.

The Court of Appeal considered that the bar could extend to public law damages, as long as those damages were to compensate for personal injury, because:

The philosophy of the personal injury compensation legislation, as is well known, is to substitute an entitlement to claim compensation, capped as to amount, on a no-fault basis for the right to bring a Court proceeding for damages for the injury or to seek in other ways damages or compensation. A proceeding for damages is therefore barred where the damages arise directly or indirectly out of personal injury covered by the scheme. Parliament has provided the remedy of compensation in terms of the accident compensation legislation, which must be taken to be an effective remedy, in place of the right to claim damages…

“[D]amages” in s 394(1) … must in context include all forms of monetary award intended to compensate for the personal injury suffered. Parliament was plainly intending to extend the bar widely when it referred to “proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand”.

Mr Wilding’s claim had been worded in such a way as to suggest that he was seeking compensatory damages for personal injury, and as a result the bar applied to his claimed damages. The Court of Appeal went on to say:

This does not mean, however, that the breach of a guaranteed right which results in physical injury cannot be marked out by an award of *Baigent* damages, merely that the award is not to be quantified so as to provide compensation for the injury itself. We are not called upon to do more than answer the reformulated preliminary question. It would be unwise to express more than a tentative view in the absence of factual findings made at trial, but it seems to us quite possible

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214 *Wilding v Attorney General* [2003] 3 NZLR 787 (CA), see above VI.C.1.
215 NZBORA, s 9.
216 NZBORA, s 23(5).
217 *Wilding v Attorney-General*, above n 214, at [11]-[12].
218 *Wilding v Attorney-General*, above n 214, at [16].
that, if Mr Wilding’s allegations can be proven, the High Court could decide to award him monetary compensation for the affront to his rights in being, for example, subjected to degrading treatment in having the dog set on him. That would not be barred … It might involve looking at the extent of the personal injury in order to judge the potential seriousness of a breach of this kind, but any monetary award would be directed at compensating only for the breach of the right. It would not be given in respect of the resulting injury. The compensation would be for the affront, not for its physical consequences. Putting it another way, there could be damages for the assault but not for the battery.

The Court also noted that exemplary damages might be available if Mr Wilding could demonstrate that the act or omission that led to a breach of NZBORA was deliberate or grossly negligent.219

This Court of Appeal’s reasoning in Wilding is consistent with Donselaar v Donselaar,220 to the extent that a claim for public law damages arises from a breach of NZBORA and is seeking compensation for the breach, the proceedings arise from the breach and not directly or indirectly from a covered personal injury, just as a claim for exemplary damages arises from the outrageousness of the conduct that causes injury, not the injury itself.221 If, however, a claim for public law damages is effectively seeking compensation for the injury itself, then it will be barred.

The Court’s view that compensation for the affront to rights is not barred is inconsistent with Re Chase,222 a decision which was not mentioned in Wilding. Both cases were concerned with damages sought as a result of alleged breaches of rights relating to actions taken by police against an individual. In Re Chase the rights in question were common law rights, and in Wilding the source of the rights was NZBORA. It is incoherent for the law to bar a nominal monetary award to recognise the breach of a right recognised by the law of torts, but allow a compensatory monetary award to recognise the breach of a right recognised by NZBORA, especially when the dollar amount of NZBORA damages relates to an intangible loss and is arbitrary.

Allowing awards of public law damages in cases where the breach of rights involved injury means that some injury victims are able to receive more compensation than others. The resulting distribution of compensation resembles to an extent the pre-ACC status quo ante: some injury victims receive more compensation as a result of how their injury was caused. Of course, those injury victims will have suffered an affront to their rights in addition to their injury, although this additional loss is an intangible

219 Wilding v Attorney-General, above n 214, at [17].
220 Donselaar v Donselaar [1982] 1 NZLR 97 (CA), see above IV.B.2.
221 In both cases though, the interpretation of “indirectly or indirectly” is somewhat strained.
222 Re Chase [1989] 1 NZLR 325 (CA), see above IV.B.4.
one. However, victims of high-handed breaches of common law rights cannot receive additional compensation, since aggravated damages are barred.

2 Bottrill in the Court of Appeal

In McLaren Transport v Somerville,223 Tipping J had opened the door for exemplary damages in cases of negligence. Bottrill v A224 gave the Court of Appeal, which included Tipping J, an opportunity to close the door or, if the door was to stay open, leave it only slightly ajar. The Bottrill litigation followed a claim by the plaintiff Mrs A against the defendant Dr Bottrill relating to his misreading and misreporting results of her cervical smear tests.

The opportunity to completely close the door on exemplary damages for negligence was not taken. Richardson P, with whom the majority225 agreed, thought that the “breadth of the formulation of the scope of exemplary damages” in decisions in New Zealand in the twenty years since Taylor v Beere226 would not justify confining exemplary damages to the intentional torts.227 Since exemplary damages were not to be confined to the intentional torts, the Court of Appeal needed to consider whether exemplary damages for negligence, an unintentional tort, were confined to advertent risk-taking or could be awarded in cases of inadvertent wrongdoing.228 That is, whether exemplary damages for negligence should be confined to cases where the defendant, although not intending to cause injury, was consciously aware that their conduct carried with it a risk of injury.

Richardson P noted that the kind of language used to describe conduct worthy of exemplary damages - words like “contumelious”, “outrageous”, “oppressive” and “flagrant” – applied much more readily to advertent acts than inadvertent ones. Further, since the purpose of exemplary damages is to punish and deter, it is appropriate to limit exemplary damages to the kind of conduct which in the criminal law is generally regarded as meriting punishment: advertent conduct. Of course, the language used to describe conduct meriting an award of exemplary damages applies more readily to deliberate conduct than conscious risk-taking, but Richardson P found that it was too late to confine exemplary damages to the intentional torts.

225 Richardson P and Gault, Tipping and Blanchard JJ.
228 Ibid, at [41].
Tipping J delivered a separate concurring judgment in which he spent some time distancing himself from McLaren Transport v Somerville and revising his test for when exemplary damages were available in cases of negligence to:

Exemplary damages for negligence causing personal injury may be awarded if, but only if, the negligence is at such a level and is of such a kind that it amounts to a conscious, outrageous and flagrant disregard for the plaintiff’s safety, meriting condemnation and punishment. The concept of conscious disregard means that the defendant consciously appreciated the risk to the plaintiff’s safety caused by his or her conduct but nevertheless chose to run the risk.

Thomas J dissented, as he had done in Daniels v Thompson, and his argument was along the same lines: exemplary damages serve all the functions of the law of torts, and a limit on the availability of exemplary damages is a limit on the ability of tort law to achieve the outcomes it is there to provide. There is “no reason to restrict the general principle that exemplary damages may be awarded in those exceptional cases where the defendant’s conduct is so outrageous and contumelious as to deserve condemnation.” Thomas J was heartened by Parliament’s rejection of Daniels v Thompson, and argued that the Court should “heed the direction of Parliament’s policy” because it was “undeniably implicit in this legislative reversal of the majority’s view that the idea [that] punishment is the decisive consideration in determining whether a claim for exemplary damages will lie has been rejected.”

None of the members of the Court said that exemplary damages should take on a compensatory function. However, Thomas J thought that the majority took this concern too far:

[T]he notion that, unless they are closely reined in, exemplary damages are somehow compensatory and compromise the accident insurance legislation remains an undertone in the majority’s legislation.

The concern that exemplary damages could become compensatory if not watched carefully is a reasonable one, and cannot be satisfied simply by reiterating that the purpose of exemplary damages is to punish and deter. The tort of negligence at its inception was associated with punishment and deterrence, but left those justifications behind in the quest for better outcomes for injury victims. Allowing exemplary damages to take on some small compensatory function could result in that function overtaking punishment and deterrence. It is quite proper for the Court of Appeal to formulate rules to ensure that exemplary damages will only be awarded in the kind of cases where the conduct in question is exceptional enough to deserve punishment.

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229 Ibid, at [174].
230 Ibid, at [76].
231 Ibid, at [141].
232 Ibid, at [120].
3 Bottrill in the Privy Council

The Court of Appeal’s decision was appealed to the Privy Council.233 A majority234 of the Privy Council overturned the Court of Appeal’s decision, reasoning that although the language of exemplary damage suggests advertent conduct, the law should “never say never” to exemplary damages for inadvertent conduct. Lord Nicholls, giving the judgment for the majority, said that:235

[I]f experience in the law teaches anything, it is that sooner or later the unexpected and exceptional event is bound to occur. It would be imprudent to assume that, in the absence of intentional wrongdoing or conscious recklessness, a defendant’s negligent conduct will never give rise to a justifiable feeling of outrage calling for an award of exemplary damages. “Never say never” is a sound judicial admonition. There may be the rare case where the defendant departed so far and so flagrantly from the dictates of ordinary or professional precepts of prudence, or standards of care, that his conduct satisfies this test even though he was not consciously reckless.

The majority considered that the test for exemplary damages should simply be whether the defendant’s conduct was outrageous enough that an award of exemplary damages was needed to punish the conduct and express society’s disapproval.236

Lord Nicholls noted that in New Zealand, compensation for injury was provided by the accident compensation scheme rather than the courts, but considered that:

This feature of the law of New Zealand throws no light on the answer to the question under consideration in this judgment. It does not assist in determining whether intentional wrongdoing or conscious recklessness is in every case an essential prerequisite to an award of exemplary damages. But it does serve to emphasise the need for much restraint in the exercise of this jurisdiction in New Zealand.

This comment suggests that the majority shared the concern of the Court of Appeal that exemplary damages should not take on a compensatory function, but did not consider that this weighed on the question at hand.

The minority in the Privy Council238 essentially agreed with the majority in the Court of Appeal, stressing that the rationale of punishment does not apply if the defendant

233 Bottrill v A [2002] UKPC 44, [2003] 2 NZLR 721. It was rare for appeals that relate to the function of the accident compensation scheme to be reach the Privy Council, because the ACC legislation only allows for appeals of decisions made under the scheme to go as far as the Court of Appeal (2001 Act, s 163).
234 Lord Nicholls, Lord Hope and Lord Rodger.
235 Ibid, at [26].
236 Or, al least, the Court’s disapproval.
237 Ibid, at [66].
had no intent to harm or was not subjectively reckless.\textsuperscript{239} The minority took the more restricted view that the purpose of exemplary damages is punishment, and did not share the majority’s conception of exemplary damages as a vehicle for society, via the court, to show disapproval of particularly outrageous conduct.

The Privy Council decision might have ended the question of exemplary damages for negligence in New Zealand. However, in 2004, the Judicial Committee of the Privy Council was replaced by the Supreme Court of New Zealand highest appellate court.\textsuperscript{240} Litigation following an armed robbery at the RSA Panmure would ultimately give a Supreme Court bench including two members of the majority in the Court of Appeal in Bottrill\textsuperscript{241} an opportunity to revisit the issue.

4 Hobson – ACC and duty of care

In 1997, Mr William Bell was sentenced to imprisonment following his conviction for the aggravated robbery of a service station. He was released in 2001 under a number of conditions relating to supervision by his probation officer. He was first placed under the supervision of a senior probation officer, but shortly afterwards his supervision was passed to a newly appointed probation officer. While under the supervision of his new probation officer, and allegedly with her knowledge, Mr Bell was accepted into a liquor licensing course. Part of the course involved working at the Panmure RSA Club. In 2003, Mr Bell robbed the Panmure RSA Club. During the robbery, he bludgeoned four people with a shotgun, and shot one in the chest. Three of the victims died, and a Ms Couch survived with serious injuries.

Mr Hobson, the husband of one of the deceased victims, and Ms Couch both claimed damages for pain and suffering and exemplary damages from the Department of Corrections. Mr Hobson’s claim was made on three grounds: negligence, breach of statutory duty and misfeasance in public office. Ms Couch’s claim was pleaded on negligence and misfeasance in public office.

Mr Hobson’s claims for negligence and breach of statutory duty were struck out by a decision of Heath J in the High Court,\textsuperscript{242} but the claim for misfeasance in public office was allowed to proceed. Mr Hobson appealed the decision to strike out the cause of action for negligence to the Court of Appeal. The question of whether Ms Couch’s statement of claim disclosed a reasonable cause of action was joined to Mr Hobson’s

\textsuperscript{238} Lord Hutton and Lord Millet.
\textsuperscript{239} Ibid, at [77]. In this context, subjective recklessness means that the defendant was aware of the risk of injury associated with their conduct.
\textsuperscript{240} Supreme Court Act 2003.
\textsuperscript{241} Tipping and Blanchard JJ.
\textsuperscript{242} Hobson v Attorney-General [2005] 2 NZLR 220 (HC).
appeal. So, the Court of Appeal in *Hobson v Attorney-General* considered both Mr Hobson and Ms Couch’s claims, for negligence and for misfeasance of public office. The claim for negligence was considered in terms of whether the Department was vicariously liable for negligence by the probation officer as well as whether the Department itself was negligent. William Young P, Hammond and Chambers JJ all gave separate judgments.

The Court was in agreement that the claims for misfeasance in public office had no prospect of success, since misfeasance in public office is an intentional tort and there was no suggestion that the officer had the necessary state of mind. The Court was also in agreement that Mr Hobson’s claim for negligence had no prospect of success due to issues of proximity. However, Hammond J dissented from the majority view that Ms Couch’s claim for negligence should be struck out.

William Young P summarised the tenuous position that Ms Couch’s claim was in:

> The accident compensation legislation means that Ms Couch is not entitled to seek compensatory damages. Claims for exemplary damages are not excluded by the accident compensation regime; but Ms Couch faces two difficulties: first, she probably has no claim for exemplary damages against the Department if its liability is merely vicarious (*S v Attorney-General*) and secondly, such damages are seldom awarded in negligence cases, see *Bottrill v A.*

William Young P later commented that it was “inconceivable” that a court could fairly conclude that any failures on the part of the Department were so outrageous as to warrant an award of exemplary damages.

Chambers J also discussed the vicarious liability point, and held that while the Crown might be held vicariously liable for exemplary damages in very rare cases, the facts of the present case were “a mile away” from being that sort of case.

So, Ms Couch’s claim for negligence could only succeed if she could demonstrate negligence by the Department itself. The suggested breaches of duty were a failure to

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243 On 8 September 2005, Associate Judge Sargisson made orders under rr 418 and 419 of the High Court Rules that the question of whether Ms Couch’s statement of claim disclosed a reasonable cause of action should be argued prior to trial, and that the question should be removed to the Court of Appeal for determination.

244 *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA).

245 Mr Hobson’s claim was based on his wife’s death, and the Court considered that there was no prospect of a finding that the probation officer or Department owned him a duty of care.

246 Ibid, at [109].

247 *S v Attorney-General* [2003] 3 NZLR 450 (CA).

248 *Bottrill v A.*, above n 233.

249 *Hobson v Attorney-General*, above n 244, at [129].

250 Ibid, at [153].
warn the RSA Panmure staff about Bell, and a failure to supervise Bell. The learned Judges all discussed the various competing policy considerations around whether the Department of Corrections owed a duty of care to Ms Couch, in particular the concern that the imposition of a duty might lead probation officers to take an over-cautious approach that could compromise inmates’ rehabilitation.\(^{251}\) William Young P and Chambers J considered that there was no prospect of establishing such a duty, and therefore the negligence action should be struck out. Hammond J took a more cautious approach, and considered it premature to strike out the action for negligence without further consideration.

William Young P and Hammond J’s judgments both considered the influence of the ACC scheme on the decision. William Young P said that:\(^ {252}\)

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\text{I would have reached these views even if the accident compensation scheme did not exclude the right to seek compensatory damages for personal injury. But the accident compensation entitlements of Ms Couch and the associated exclusion of a compensatory common law claim support the conclusions I have reached.}
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In jurisdictions in which compensatory damages for personal injury are available, claims comparable to Ms Couch’s at least have the purpose of enabling those who have been injured to receive compensation. The desirability of ensuring proper compensation for the injury is a factor to be weighed against policy considerations which might be compromised by the imposition of a duty of care, a counter-weight which is not available here.

It is clear that the development of negligence as an independent tort was in part due to judges seeking to ensure proper compensation for injury victims. This came at the expense of other policy considerations, such as the idea that the “fault” of negligence should reflect actual moral blameworthiness. William Young P’s comment is a clear judicial acknowledgement that ensuring proper compensation for injury victims affects the way judges develop the law. It also vindicates the concern that exemplary damages might take on a compensatory element if awarded because a judge sought to ensure that a particular injury victim received “proper” compensation, if compensation under the scheme was seen as inadequate.

Hammond J thought that:\(^ {253}\)

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\text{[T]here is a “structural” problem of some complexity in New Zealand. In this country, victims can sometimes obtain recompense from what is colloquially referred to as the “accident compensation” legislation. How is a prospective common law duty of care to be seen against such a context? In the northern hemisphere, there has been what is often described as an “explosion” of tort law}
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\(^{251}\) Ibid, at [122].

\(^{252}\) Ibid, at [127]-[128] (emphasis added).

\(^{253}\) Ibid, at [73]-[75].
liability. Some commentators – Professor Carol Harlow, in her *State Liability* (2004) is a good example – deprecate this phenomenon and urge “a new and less aggressive system of state responsibility, founded on values of community and social solidarity” (at 9). So tort law should be “shrunk” in favour of compensation in line with a simple, and narrow formula intended to cover “abnormal loss” and hardship, with “botheration payments” as Professor Harlow called them, in appropriate cases.

Many, perhaps most, jurists would accept the proposition that the allocation of resources between redress for individuals and public benefits should be determined by legislation, through the design of compensation schemes, and the making of exceptional compensation payments, rather than through the extension of tortious liability rules. But then there is the difficulty that “the state will look after itself” – hence protective clauses even in compensation schemes, and remedial limitations.

In New Zealand there is a real question whether the tort dress has been “over-shrunk”. That was always a potential consequence of the original ACC scheme, and it is hardly surprising that blisters are now forming at various points on the skin of the New Zealand polity, with increasing numbers of claims against the Crown for tortious redress, in one context or another. For at some level, tort law is concerned with social accountability. The sort of questions which necessarily arise are, how has a given institution – say the probation service – responded to incidents of the kind under consideration in this case? Are the huddled survivors of these appealing kinds of events to be left in the quagmire of an inadequate institutional response, if such it was? The service has not even been called upon – yet – to disclose fully what happened in this case. Unsurprisingly Ms Couch, in particular, sees her proceeding as one in which she seeks “public accountability” that she cannot get elsewhere. Hence the argument is run that, where it is apparent that resources or abilities have fallen woefully short, courts should not be deterred, and, beneficially, should lay down duties of care that may then require some executive response.

The presence of the ACC scheme affected William Young P and Hammond J’s approach to duty of care in quite different ways. William Young P thought that a narrow approach to duty of care could be taken without the concern of leaving victims without compensation. Hammond J was concerned that a narrow approach to duty of care would limit the civil law’s ability to hold the state accountable, similar to Thomas J’s concerns in *Daniels v Thompson*254 and *Bottrill*255 regarding restrictions on the availability of exemplary damages.

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254 *Daniels v Thompson* [1998] 3 NZLR 22 (CA), see above V.E.3.
255 *Bottrill v A* [2001] 3 NZLR 622 (CA), see above VI.C.2.
5 Couch in the Supreme Court – exemplary damages and unintentional torts

Ms Couch appealed the Court of Appeal’s decision to the Supreme Court. The Supreme Court in 2008 unanimously decided that it was premature to rule out the possibility of Ms Couch establishing a duty of care and so the Court of Appeal should not have struck out her negligence claim.\(^{256}\) The case was then adjourned to allow the parties to make further submissions on exemplary damages.

The Supreme Court’s further decision on Couch was made two years later.\(^{257}\) The majority of the Court decided to overturn the Privy Council decision of Bottrill,\(^{258}\) while the Chief Justice dissented. The five Justices all gave separate judgments, discussing the role of exemplary damages in New Zealand generally as well as the availability of exemplary damages for negligence. Although Ms Couch’s claim was based on negligence, the decision applies to all unintentional torts.

The majority position was essentially the same as the position of the Court of Appeal majority in Bottrill: since exemplary damages are concerned with punishment of outrageous conduct, it is appropriate to impose a requirement for conscious wrongdoing. Elias CJ’s dissent thought that limiting the availability of exemplary damages “saps the vitality of the exemplary principle in meeting the needs of New Zealand society”.\(^{259}\) Like Thomas J had been in Daniels v Thompson and Bottrill, and Hammond J in Hobson, Elias CJ was thought that requiring advertent risk-taking would limit the ability of the law to hold the state accountable:\(^{260}\)

[I]n modern society, in which the public may reasonably rely on the discharge of responsibilities by those entrusted with public power and resources, it may be that inaction which amounts to shrugging off responsibility to some circumstances is accurately described as high-handed or arbitrary even if the harm that eventuates is not consciously foreseen. That possibility should not be foreclosed.

Like the majority in the Privy Council, Elias J considered that “outrageousness” was a sufficient test for exemplary damages, and any further restrictions should be avoided on a “never say never” basis.

Elias CJ, like the Court of Appeal in Taylor v Beere\(^ {261}\) and Donselaar v Donselaar,\(^ {262}\) clearly considered that exemplary damages were a valuable part of the civil law that

\(^{259}\) Couch v Attorney-General, above n 257, at [4].
\(^{260}\) Ibid, at [27].
\(^{261}\) Taylor v Beere [1982] 1 NZLR 81 (CA), see above IV.B.2.
\(^{262}\) Donselaar v Donselaar [1982] 1 NZLR 97 (CA), see above IV.B.2.
should not be unduly fettered. However, other members of the Court seemed less content with the state of exemplary damages in New Zealand. Blanchard J said: 263

To my mind, there is a real question whether a civil court should involve itself in punishing people, especially those who have genuinely not been conscious of doing any wrong. However, although I do not feel comfortable with the idea that a court in its civil jurisdiction should, in the absence of any statutory power, engage in meting out punishment, I can nevertheless accept that there is a proper moral role for exemplary damages as a deterrent to outrageous harmful behaviour. In performing this role such damages may in this country provide a useful counter-balance to the absence of the sanction of compensatory awards for tortious infliction of personal injury. They may have especial value in cases of systemic fault which caused injury.

Wilson J considered that: 264

Exemplary damages are anomalous in that, if awarded, they confer a windfall on a plaintiff who has already been compensated to the extent prescribed by law … If exemplary damages were being introduced into our law, there would be a good argument that, if awarded, they should be paid to the State. Being punitive in nature, such damages are closely analogous to fines, which are paid to the State (in contrast to sentences of reparation which are paid to victims and are compensatory in nature.) A restrictive rather than an expansive approach should therefore be adopted in considering the scope of exemplary damages.

Tipping J discussed the issues surrounding vicarious liability and exemplary damages, and the difficulty of establishing conscious negligence at an organisational level. He concluded that: 265

[I]f an inference of subjective recklessness cannot properly be drawn from all the objective circumstances, the case should not qualify for exemplary damages. Society’s punitive instincts should be restrained by principle. It is part of the function of the law to achieve that outcome.

Tipping J also suggested that *Donselaar v Donselaar* 266 was wrongly decided: 267

[The decision] involved a narrow reading of the word “damages” and may have been a debatable conclusion at the time, but far too much water has gone under the bridge since then to contemplate taking a different view. Since *Donselaar* was decided Parliament has had several opportunities to include exemplary damages expressly within the bar and has not done so.

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263 *Couch v Attorney-General*, above n 257, at [59].
264 Ibid, at [258].
265 Ibid, at [157]-[161]. In this context, “subjective recklessness” means that the organisation was consciously aware of the risk.
266 *Donselaar v Donselaar*, above n 262.
267 *Couch v Attorney-General*, above n 257, at [86].
Tipping J thought that Parliament’s failure to overturn *Donselaar v Donselaar* must have meant that the legislature accepted the Court of Appeal’s conclusion that permitting exemplary damages claims for injury did not undermine the policy of the accident compensation scheme. This is not necessarily so: it may be that Parliament accepts that awarding exemplary damages to injury victims undermines the policy of the ACC scheme, but did not overturn *Donselaar v Donselaar* so exemplary damages could serve other policy objectives. That is, undermining the policy of the accident compensation scheme was not a sufficient reason to do away with exemplary damages.

Elias CJ\(^ {268}\) and McGrath J\(^ {269}\) thought that *Donselaar v Donselaar* was correct. Blanchard and Wilson JJ did not state a clear view.

The majority of the Supreme Court considered that the Privy Council in *Bottrill* had failed to understand that the ACC scheme provided a good reason to limit the availability of exemplary damages for negligence in New Zealand. Tipping J thought that:\(^ {270}\)

> New Zealand’s accident compensation scheme means it is particularly desirable that our legal system have a clear and principled line between cases of negligence causing personal injury which justify exemplary damages and those which do not. This feature of our legal system also means that we must keep conceptually as clear as possible the line between punishment and compensation.

Blanchard J considered that:\(^ {271}\)

> Allowing claims for inadvertent negligence may encourage the belief in some plaintiffs and their lawyers that exemplary damages are a means of topping up what they perceive to be inadequate payments under the scheme. Furthermore, some potential defendants may because of the nature of their businesses feel the need not only to pay for accident compensation but also to have and pay for third party insurance against the consequences of negligence in the form of personal injury. Many such potential defendants would not see that need if exemplary damages were confined to intentional acts, including subjective recklessness, for which in any event insurance cover may not be available, at least for the actual wrongdoer.

McGrath J thought that the Privy Council’s approach would be destructive of the exceptional nature of exemplary damages because:\(^ {272}\)

\(^{268}\) *Ibid*, at [29].  
\(^{269}\) *Ibid*, at [203].  
\(^{270}\) *Ibid*, at [108].  
\(^{271}\) *Ibid*, at [67].  
\(^{272}\) *Ibid*, at [241].
Since 1992, the accident compensation legislation has not provided lump sum benefits for non-pecuniary loss. Although this development cannot, as a matter of principle, justify lowering the threshold for awards, it has unsurprisingly resulted in an increased number of claims for exemplary damages. The reality is that the only way those suffering personal injury can obtain capital payments in civil proceedings is through bringing claims for exemplary damages when they are available and, as earlier discussed, plaintiffs may bring proceedings claiming such damages as the sole remedy.

Elias CJ disagreed and considered that:

No occasion to reassess the decision of the Privy Council in Bottrill arises on the basis of any misunderstanding about the operation of New Zealand’s accident compensation system because the statutory scheme operates outside the exemplary principle, as was made clear in Donselaar v Donselaar. Since the requirement of subjective recklessness imposed by other members of this Court is not confined to cases of personal injury, reliance upon the New Zealand accident compensation system as justifying the restriction is perhaps surprising. “Floodgates” concerns are not substantiated and seem inconsistent with the legislative endorsement of the exemplary principle.

With respect to the issue of exemplary damages and negligence, Couch was essentially a re-litigation of the arguments that had arisen in previous cases. Unlike the Court of Appeal in Taylor v Beere and Donselaar v Donselaar, the Justices of the Supreme Court in Couch differed not only in their conceptions of the function of exemplary damages but in their enthusiasm for exemplary damages as an institution.

The ACC scheme has been a significant influence on how the law of exemplary damages has developed in New Zealand. The introduction of the scheme and the divorce of compensation for injury from the civil law forced the courts to examine the post-ACC role of exemplary damages in New Zealand in Donselaar v Donselaar. Cutbacks to the scheme in 1992 have been a major cause of claims for exemplary damages, with plaintiffs seeking to supplement the compensation they receive from ACC. Much judicial thinking on exemplary damages is done with the underlying concern that exemplary damages, if left unchecked, might take on a compensatory function. The question of whether the civil law has been stripped of some its ability to address wrongdoing as a result of the introduction of the ACC scheme is still open.

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273 Ibid, at [5].
274 Taylor v Beere, above n 261.
275 Donselaar v Donselaar, above n 262.
The Sentencing Act 2002

1 The 1999 justice referendum

The Sentencing Act 2002 was a response to public dissatisfaction with the criminal justice system. A citizens’ initiated referendum^276 held at the same time as the 1999 general election asked:

Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

92 per cent voted “Yes” to the referendum, with a 83 per cent turnout.\textsuperscript{277}

2 Sentencing Act 2002

The Sentencing Act 2002 responded to the various issues raised in the 1999 referendum, which included changes to sentencing for violent offenders as well as changing the role of the victim in criminal sentencing. The Sentencing Act 2002 replaced the Criminal Justice Act 1985 as the primary piece of legislation for sentencing.

The four purposes of the Sentencing Act 2002 set out in section 3, included “to provide for the interests of victims of crime”, making compensation for victims of crime one of the main functions of sentencing law.

The Sentencing Act 2002 removed fine diversion orders and strengthened the sentence of reparation. The presumption in favour of reparation in the Criminal Justice Act 1985\textsuperscript{278} was replaced with an even stronger presumption in favour of reparation. Under s 12(1):

If a court is lawfully entitled under Part 2 to impose a sentence of reparation, it must impose it unless it is satisfied that the sentence would result in undue hardship for the offender or the dependants of the offender, or that any other special circumstances would make it inappropriate.

Further, a Court that does not impose a sentence of reparation is required under s 12(3) to give reasons for doing so.

\textsuperscript{276} The Citizens Initiated Referenda Act 1993 allows for a non-binding referendum to be held if proponents submit a petition to Parliament signed by 10 per cent of all registered electors, collected within 12 months.


\textsuperscript{278} Under the Criminal Justice Act 1985, s 11, the Court was required to impose a sentence of reparation unless it was satisfied that it was inappropriate to do so. See above IV.D.2.
As well as strengthening the presumption in favour of reparation, the Sentencing Act 2002 also increased the types of losses that an offender could be sentenced to make reparation for. Reparation under the Criminal Justice Act 1985 had been available for emotional harm, and loss or damage to property. Section 32 of the Sentencing Act 2002 also allowed for reparation for “loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.”

When the Sentencing and Parole Reform Bill, which eventually became the Sentencing Act 2002, was first introduced into the House it also allowed for a sentence of reparation when offending had caused physical harm. In the pursuit of better outcomes for victims of crime, it seems that the legislators had forgotten about the accident compensation scheme. Once the potential clash with the scheme was realised, the legislation was amended to remove reparation for physical harm, and introduce a provision to deal with the overlap with the scheme, which became s 32(5) of the Sentencing Act 2002:

Despite subsections (1) and (3), the court must not order the making of reparation in respect of any consequential loss or damage described in subsection (1)(c) for which the court believes that a person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001.

The Sentencing Act 2002 was a key turning point in the compensatory function of the criminal law. Although the Criminal Justice Act 1985 had introduced reparation, the Sentencing Act 2002 clearly provided for reparation to be the sentence of choice, and for compensating the victim to be a priority for a sentencing Judge. Allowing reparation for consequential loss also substantially widened the scope for what reparation could compensate, making the scope of reparation closer to the scope of damages that a civil court could award.

**E Reparation following the Sentencing Act 2002**

1 Police v Ferrier – fines and reparation serve separate purposes

Police v Ferrier\(^{279}\) was an early High Court decision following the Sentencing Act 2002, which demonstrated the change brought by that Act. Mr Ferrier was convicted of careless driving causing death – a case of a moment’s inadvertence calling down the heavens, to borrow a phrase from the Woodhouse Report.\(^{280}\)

The crown sought $18, 487\(^{281}\) reparation for the family of the deceased. The District Court was concerned that awarding the full amount of reparation would be a


\(^{280}\) Woodhouse Report, above n 14, at 49.

\(^{281}\) Presumably this sum of reparation for the family included emotional harm, and loss of earnings and funeral expenses not compensated by ACC.
punishment out of proportion to the wrongdoing, using the maximum fine payable of $4,500 as a kind of benchmark for the appropriate level of punishment for the offending in question. The District Court awarded reparation of $5,000 and gave the “totality principle” of sentencing as a justification: the total penalty should be appropriate considering the conduct in question.

The High Court noted that a fine and reparation are conceptually different and serve different purposes.\footnote{Ibid, at [15].}

A fine is essentially punitive, it is a pecuniary penalty imposed by and for the state. By contrast, an order for reparation is compensatory in nature, designed to recompense an individual or her family for financial loss or emotional harm suffered as a result of another’s offending.

In other words, a fine serves retributive justice and an order for reparation serves corrective justice. The District Court’s approach was to prioritise retributive justice over corrective justice. The High Court considered that this was inconsistent with the intent of the new Sentencing Act 2002, and that there was “no scope to apply a totality principle.”\footnote{Ibid, at [15].} Accordingly, the High Court substituted an order for the full amount of reparation sought, considering that “[i]t was a proper request falling squarely within Parliament’s clear prescription to compensate victims and their families in cases such as this.”\footnote{Ibid, at [17].}

*Police v Ferrier* illustrates starkly how the criminal law has changed: historically, imposing a punishment on an offender that was out of proportion with their moral wrongdoing for the purpose of compensating a victim would have been unthinkable.

The idea that reparation should not exceed fines was shortly afterwards again rejected by the High Court in *Read v Police*,\footnote{Read v Police HC Christchurch CRI-2003-409-000-70, 10 December 2003.} where William Young J found that there was “no limitation in the Sentencing Act provisions as to reparation confining the levels of reparation which can be ordered to the maximum fine applicable to the offence in question.”\footnote{Ibid, at [48].}

2 \textit{Financial capacity of the offender}

If an offender has insufficient means to pay, the Sentencing Act 2002 allows the court to sentence the offender to pay reparation for less than the total loss inflicted on the victim, or pay reparation by instalments.\footnote{Sentencing Act 2002, s 35.} The presumption in favour of reparation is
lifted if reparation would result in undue hardship for the offender. Professor Hall in *Sentencing Law and Practice* reads these provisions together as suggesting that “if there is no ability to make reparation, then it is not correct in principle to order reparation, no matter how appropriate that might otherwise be”. The Court Appeal has found that reparation “must be set at a level which makes it realistic given the financial circumstances of the person against whom it was made”.

The civil law, primarily concerned with compensation, has no principle that makes awards of compensatory damages to a plaintiff contingent on the defendant’s ability to pay. This is reflected in s 38(2) of the Sentencing Act 2002, which provides that a sentence of reparation does not affect any rights to recover by civil proceedings in excess of the amount of reparation awarded.

The principled basis for limiting the sentence of reparation based on the offender’s ability to pay, but allowing the victim to go on and make a civil claim for any unpaid damage, is unclear. Perhaps this reflects that sentencing still must serve retribution to some extent: an award of reparation which will never be paid is arguably ineffective as a punishment or deterrent. It can also be argued that putting the victim in a position of having an unpaid debt by the offender leaves them with a constant reminder of the offending.

### 3 Three Health and Safety in Employment (HSE) Act 1992 cases following the Sentencing Act 2002

In the following three High Court decisions, all appeals on sentence relating to HSE Act 1992 prosecutions, the courts continued to address the issue of how a judge should approach sentencing in light of the criminal law’s strengthened compensatory function. Reparation is awarded more often in HSE Act 1992 prosecutions than in offences generally, because the offender tends to be employers with the means to pay.

The HSE Act 1992 was amended in May 2003, increasing penalties substantially – the maximum penalty for failing to comply with duties under the Act on a strict liability basis was increased fivefold to $250,000. The amendments also expressly prohibited insurance against fines imposed under the HSE Act 1992, impliedly approving of insurance against reparation awards.

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288 Sentencing Act 2002, s 12(1).
290 *R v Bailey* CA306/03, 10 May 2004 at [25], followed in *R v Donaldson* CA227/06, 2 October 2006 at [43].
292 HSE Act 1991, s 56I.
4 Areva – compensation is not enough

In *Department of Labour v Areva T & D New Zealand Ltd*, prior to sentencing the employer paid $138,000 to the family of the deceased employee, $100,000 of which was covered under a liability insurance policy. The District Court discharged and convicted the employer without a fine, on the basis that they had already “done enough.”

The High Court considered that a conviction and discharge did not sufficiently serve the purposes of deterrence and denunciation, especially in light of the recent increases in penalties. In contrast with *Ferrier*, the High Court found that the totality approach was appropriate, and that a fine should be imposed to bring the total penalty up a level appropriate for the wrongdoing.

*Areva* is the reverse case of *Ferrier*: by the time of sentencing, corrective justice had already been satisfied, but retributive justice was not satisfied by the payments that the employer (with their insurer standing behind them) had made. *Areva* illustrates that while compensation may now be a primary function of the criminal law, it is not the only function.

5 Street Smart – penalties must bite

In *Street Smart Ltd v Department of Labour*, the High Court addressed what had become an established practice in the District Court: deducting reparation from fines on a dollar-for-dollar basis. $60,000 reparation had been agreed to by *Street Smart* and the parents of the deceased in a restorative justice conference. The Judge took a starting point of a fine of $175,000 before adjusting for mitigating factors by deducting:

1. $60,000, being the amount of reparation awarded, to recognise the payment of reparation; and
2. $60,000 to recognise the guilty plea.

This had the effect of reducing the fine to $55,000 – around thirty per cent of the starting point. The High Court considered that the reduced fine did not provide a sufficient response to the employer’s wrongdoing, and as in *Areva*, emphasised the totality approach, that “the impact of reparation on a fine will depend on the circumstances, with the totality of the combined penalty of reparation and the fine

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294 See *Areva*, above n 293, at [20] for the relevant paragraphs of the District Court decision.

295 *Department of Labour v Street Smart* (2008) 5 NZELR 603 (HC).

296 See Anna Clark “Reparation and Sentencing” (2008) NZLJ 437-8 at 437 “It was generally accepted that the offender could expect a dollar-for-dollar reduction from the starting point of a fine.”
being the guiding principle.” The High Court stressed the importance of responding to wrongdoing and that “penalties must bite, and not be at a ‘license fee’ level”. In contrast with Areva, where the Court mentioned the insurance element but did not address it, the Judge explicitly considered that the fact that the offender’s insurance company would meet the reparation was a relevant factor in determining the appropriate sentence.

6 Hanham – a full bench of the High Court on HSE Act 1992 sentencing

In Department of Labour v Hanham & Philp Contractors Ltd a full bench of the High Court set out its view on the proper approach to sentencing in HSE Act 1992 cases:

(i) Fix the amount of reparation, taking into account any offers of amends, and the financial capacity of the offender;

(ii) Fix the amount of fine, by determining the starting point and then adjusting upwards or downwards for aggravating or mitigating factors, including reparation;

(iii) A “consideration of the total imposition on the offender of reparation and fine. The total imposed must be proportional to the circumstances of the offending and the offender. This assessment is to be made against the background of the statutory purposes and principles of sentencing”.

While Hanham was a HSE Act 1992 prosecution, this structure could be applied to criminal sentencing generally, and shows that reparation and fines serve different functions and are accordingly treated as discrete tasks. Of those two functions, the first priority of the Court is compensation.

The first two steps resemble the civil law: compensatory damages address compensation and exemplary damages can be awarded to increase the total penalty to the level necessary to serve retributive justice. This would seem to make the third step unnecessary: if the court has already satisfied both compensation and retribution, in that order, then surely its work is done? The third step seems to be a kind of deference.

297 Department of Labour v Street Smart, above n 295, at [45].
298 Ibid, at [59].
299 Ibid, at [61].
301 Randerson and Panckhurst JJ.
302 Ibid, at [41]-[46].
303 Ibid, at [47]-[75]. Following Street Smart, if reparation is awarded a deduction of around 10 to 15 per cent is appropriate, rather than a dollar-for-dollar reduction, see [69].
304 Ibid, at [78].
305 For other offences, step two would involve considering sentences other than fines.
to the totality principle and a hedge against the case where an award of reparation could be grossly out of proportion with the wrongdoing. This comes at the expense of providing clarity over the relationship between compensation and retribution in sentencing. *Hanham* fails to give any real answer to the question of what should happen in a case like *Ferrier*, where fully compensating the victim results in a penalty out of proportion with the wrongdoing.

7 Davies - reparation and the ACC scheme

Mr Davies was convicted of operating a vehicle carelessly and causing injury when towing a trailer with an insecure load, after a mattress fell off a trailer he was towing, injuring a cyclist. Davies was sentenced to make reparation, including $11,555 which represented the cyclist’s lost earnings that were not compensated by the ACC scheme. Mr Davies appealed that aspect of the sentence, on the basis that “topping up” ACC entitlements via reparation was inconsistent with the ACC scheme.

His appeal was dismissed by the High Court and the Court of Appeal, but ultimately granted by a majority of the Supreme Court. The majority considered that the Sentencing Act 2002 was not intended to allow top-ups of ACC entitlements, as that would be inconsistent with the philosophy of the ACC scheme. The philosophy that the majority had in mind was the “social contract” explanation of the scheme: at a broad level, the scheme was a trade for the ability to claim damages from wrongdoers. The majority also noted that allowing reparation to top-up ACC entitlements would allow victims of crime to receive greater entitlements than those suffering injury when no offence was committed or no one is prosecuted. Tipping J used quite strong judicial language and found that the practice would “go against the whole philosophy and purpose of the accident compensation scheme.”

McGrath J dissented, acknowledging that allowing reparation to top-up ACC entitlements was inconsistent with some policies of the accident compensation legislation: the principle that those with entitlement to statutory compensation cannot bring claims based on fault, and the incentive for rehabilitation provided by paying an injury victim less than full compensation for lost earnings. However, he considered that these policies were to be weighed against the policy and purpose of the Sentencing Act 2002, concluding that:

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307 *Davies v Police* [2008] 2 NZLR 645 (CA).
309 Elias CJ, and Blanchard, Anderson and Tipping JJ.
310 Ibid, at [48].
311 Ibid, at [81].
[T]he extent of these tensions should not, however, be over-stated. In the special circumstances of punishment for criminal offending and providing for the interests of victims of crime, the departures can hardly be seen as undermining the Compensation Act scheme; they are merely inconsistent with aspects of it.

The majority of the Supreme Court opposed reparation topping-up ACC entitlements on the basis that it undermined the philosophy of the scheme, while the lower courts seemingly had no objection.\textsuperscript{312} This suggests quite different conceptions of the philosophy of the ACC scheme and of the importance of that philosophy in relation to other policy objectives. Or, perhaps the lower courts were so concerned with providing better outcomes for individual victims of crime that they did not consider the philosophy of the scheme.

The National Government has indicated that it will overturn Davies in a “Victims’ Rights Amendment Bill”, which has yet to be introduced.\textsuperscript{313} This suggests that the view of the majority of the Supreme Court is at odds with the legislature as well as the lower courts.

\textbf{F The Offender Levy scheme}

\textit{1 Background}

Although the Sentencing Act 2002 and Victims’ Rights Act 2002,\textsuperscript{314} gave victims a greater role in the criminal justice system, there was still a degree of public dissatisfaction with how victims of crime were treated. The Justice and Electoral Committee’s Inquiry into Victims Rights in 2007\textsuperscript{315} found that “the system appears to be focused heavily upon the needs of prosecutorial agencies and defence counsel, and too often victims’ rights are considered only as an afterthought” and recommended various changes including “the establishment of a compensation regime which focuses on recompensing victims for their loss.”\textsuperscript{316} The Justice and Electoral Committee referred the issue to the Law Commission for further consideration.

The public dissatisfaction was in part because reparation awards were not often made even though the Sentencing Act 2002 contained a strong presumption in favour of

\footnotesize{\textsuperscript{312} The Court of Appeal decisions is only six pages long, which suggest that that Court gave little thought to the idea that topping-up ACC entitlements via reparation could be such a philosophically problematic measure.}

\footnotesize{\textsuperscript{313} Hon Simon Power MP “Reparation and ACC entitlements” (press release, 28 January 2010).}

\footnotesize{\textsuperscript{314} The Victims’ Rights Act 2002 replaced the Victims of Offences Act 1987. It was intended to improve provision for the treatment and rights of the victims offences, and did so by providing principles to guide victims’ treatment, which included provisions on information to be given to victims, and the information victims can make available to agencies such as the courts.}

\footnotesize{\textsuperscript{315} Justice and Electoral Committee Inquiry into Victims’ Rights (Wellington, 2007).}

\footnotesize{\textsuperscript{316} Ibid, at 5.}
reparation. The Ministry of Justice monitored the Sentencing Act 2002 in its first year of enactment, and found that the low rate of reparation awards was because:

Section 12 requires a Court to impose a sentence of reparation unless it would result in “undue hardship” to the offender or any other “special circumstances” would make it inappropriate. By far the most common form of “undue hardship” recognised by the Courts is insufficient means to make reparation. As with other monetary penalties, the appropriateness of an order of reparation depends on the offender’s ability to pay. Judges have frequently acknowledged that “you cannot get blood out of a stone”. In many cases during the report period, reparation was not ordered because the offender did not have the means to pay it.

If a sentence of reparation is considered unavailable because the offender does not have the means to pay then other components of the sentence can be increased.

During the lead up to the general election in November 2008, National Party policy included establishing a Victim Compensation Scheme to:

[A]ssist with expenses faced by victims of serious crime that are not covered by ACC or other state help which could extend to help with travel to court and Parole Board hearings, additional counseling, etc.

In October 2008, the Law Commission published its Issues Paper on Compensating Crime Victims. The Commission considered that “[it] is difficult to identify good arguments in favour of a loss-spreading framework that would be confined to crime victims” echoing the comment in the Woodhouse Report that there was no logic to the exclusion of illness from the scheme. The Commission did consider that:

There may be some room for a separate arrangement for victims based on the symbolic value to the community of singling them out for special recognition. However, that is arguable and can only be considered case-by-case.

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317 In 2008, only fifteen per cent of the approximately 120,000 sentences imposed involved reparation see Ministry of Justice Initial Briefing to the Justice and Electoral Committee on the Sentencing (Offender Levy) Amendment Bill (2009).
319 For example Mills v Police [2003] DCR 725, where the appellant’s argument for a reduced term of imprisonment in favour of a higher reparation award was rejected because there was no ability to repay.
322 Ibid, at 6.
324 Ibid, at 8.
The Law Commission discussed an offender levy, putting the Commission in the interesting position of commenting on party policy almost immediately prior to a general election. The Commission set out the merits of an offender levy.\textsuperscript{325}

Imposing a levy on offenders at sentencing would be a way of raising revenue that could be ring-fenced for victims’ services. It would provide some guarantee that funding would be available, although it is not clear how much. It may also be seen by some as an appropriate way of bringing home to an offender the consequences of his or her actions by imposing an additional punishment that has a direct link to the victims of crime. Those who see a levy as having a benefit of this kind have contrasted it with other sanctions such as fines and imprisonment, which generally have no apparent connection with the consequences of the offending for the victim.

The Commission also thought that there were issues with such a levy, including that applying the same levy to all offenders regardless of the seriousness of the crime was difficult to justify in principle, and that funding provided by an Offender Levy would be unpredictable.\textsuperscript{326}

2 \textit{The Sentencing (Offender Levy) Amendment Act 2009}

Following the 2008 election, the new National-led government set about implementing various law and order policies, including the Offender Levy. In February 2009, the Sentencing (Offender Levy) Amendment Bill was introduced to the House. The legislation did not change substantially through the legislative process, and was given the Royal Assent in October 2009. The Amendment Act inserts a new subpart 4A “Offender levy and victims’ services bank account” into the Sentencing Act 2002.\textsuperscript{327}

The new section 105B states that “any offender who has been convicted of an offence” is required to pay a levy of $50,\textsuperscript{328} and it is paid “each time an offender is sentenced or otherwise dealt with by a court in relation to 1 or more offences”.\textsuperscript{329} The levy is not considered a sentence and is in addition to any sentence.\textsuperscript{330} In terms of priority of payments, the levy comes before fines but after reparation.\textsuperscript{331} A sentencing court must not take the offender levy into account when imposing a fine or a sentence of reparation.\textsuperscript{332}

\textsuperscript{325} Ibid, at 54.
\textsuperscript{326} Ibid, at 54-6.
\textsuperscript{327} Sentencing Act 2002, s 105A-J.
\textsuperscript{328} Sentencing Act 2002, s 105D. The amount can be increased by regulations.
\textsuperscript{329} Sentencing Act 2002, s 105B(2).
\textsuperscript{330} Sentencing Act 2002, s 105B(3).
\textsuperscript{331} Sentencing Act 2002, s 105C.
\textsuperscript{332} Sentencing Act 2002, s 12 and 25.
The levy is paid to the Secretary for Justice, who pays it into a “victims’ services bank account”. The Secretary can make payments from the account to an “approved agency”. To approve an organisation as an “approved agency”, the Secretary must be satisfied that it meets the conditions set out at section 105J(2):

(a) the organisation has as one of its roles providing services to victims of crime; and

(b) any amount paid to the organisation under section 105F will be applied to provide services to victims of crime; and

(c) the organisation has members with the knowledge, experience, and skills to provide services to victims of crime; and

(d) the organisation has in place administrative arrangements that will enable money received by the organisation to be accounted for.

Section 105I allows for regulations to be made for the purposes of:

(a) providing for the circumstances and manner in which money may or must be paid out of the account:

(b) providing for the manner in which, and the conditions subject to which, the Secretary may or must otherwise operate the account.

The 2009 Budget allowed $2.3m to set up the collection process, which included reallocation of money from Sentencing Council and Justice Advisory Board, both of which the National-led government disbanded.

“Services to victims of crime” is not defined and the Amendment Act does not set out how the Secretary should determine which services to victims of crime the finite funds provided by the scheme should be used to fund, or which victims to prioritise. There is no equivalent of section 32(5) of the Sentencing Act 2002, which deals with the overlap between reparation and the ACC scheme. The legislation essentially delegates the decision-making about approval of agencies and making payments to the Secretary for Justice.

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333 Sentencing Act 2002, s 105E.
334 Sentencing Act 2002, s 105F.
335 Hon Simon Power MP “Victims of crime to benefit from $50 offender levy” (press release, 21 May 2009.)
336 Subject to any future regulations.
3 The offender levy scheme in practice

The National government has announced several services to be funded under the scheme, all of which are only available to victims of serious crime.\(^{337}\) Families of victims of homicide are able to receive an additional $4, 570.68 on top of the funeral grant provided by ACC, up to $124 per person per day to attend the High Court, “practical and emotional support” from Victim Support’s homicide support service and a discretionary grant of up to $5, 000.\(^{338}\) Victims of sexual violence going through the justice process can receive assistance from specialist victim advisers, and a grant of $250.\(^{339}\) Additional travel funding is also available to victims of serious crime.

The Government has reported that it considers that the offender levy scheme a success, stating in March 2011 that the collection rate had exceeded expectations.\(^{340}\)

4 The justice of the offender levy

As the Law Commission noted, the Offender Levy has a superficial attraction in that it appears to provide a way of making wrongdoers correct the harm they cause. However, on closer examination, corrective justice does not provide a strong justification for the levy. The same levy of $50 is applied to all offenders regardless of the level of harm caused, or if any harm is caused at all. For offences with no readily available “victim” who has suffered harm, corrective justice cannot provide a justification for the levy. It could be argued that “victimless” offences such as drug use cause harm to society at large, but this still cannot justify the offender levy, since the levy is used to fund services in respect of offences that do have victims, not victimless crimes. Finally, the levy provides services only to victims who happen to qualify for the services that the Secretary for Justice happens to have decided to provide. This means that some offenders who have harmed the victim of their crime will pay the levy, but the levy will go towards correcting harm caused to different victims of other crimes.

Retributive justice does not provide a strong justification for the levy either, since the levy is the same regardless of the seriousness of the offender’s conduct. The legislation itself specifies that the levy is not a sentence.\(^{341}\)

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\(^{338}\) to assist with “loss of income and general costs” see Victim Support “Financial Assistance” (2011). This discretionary grant was available prior to the offender levy scheme, but only for up to $1, 000.

\(^{339}\) towards the costs of dealing with the immediate effects of the crime and investigation see Victim Support “Financial Assistance for victim/survivors of sexual violence” (2010).


\(^{341}\) Sentencing Act 2002, s 105B(3).
So, the only plausible justification for the offender levy scheme is that it provides better outcomes for some victims of crime. Whether this provides a sufficient justification for the scheme depends on one’s political preferences.

5 The offender levy scheme and ACC

The offender levy scheme and the ACC scheme were both responses to measures which had some basis in corrective justice, but failed to deliver satisfactory outcomes in terms of distributive justice. The ACC scheme was a response to the “forensic lottery” of the negligence action, and the offender levy scheme was a response to the lottery of reparation. In both cases, a system which only provided for transfers between one party to another lead to the development of a scheme which distributed the cost of assisting victims more broadly across society. Of course, with the development of vicarious liability and liability insurance, negligence had become a broad redistributive system but it was an inefficient system that still failed to assist most victims of injury.342 The funding of the offender levy scheme can also be compared with ACC. Different types of injuries are funded by different sources: work injuries are funded by levies on employers, motor vehicle injuries are funded by vehicle registrations and petrol levies, and so on. The offender levy scheme is funded by the community of criminals but, unlike ACC, only provides assistance to a limited subset of victims.

The offender levy scheme and the ACC clearly have the potential to overlap. Indeed, one of the services provided is a top-up to the funeral grant provided by the ACC scheme. The Government clearly does not share the view of the Law Commission that there is no justification for singling out victims of crime to receive additional assistance, or the view of the majority in Davies343 that the criminal law should not top-up ACC entitlements.

342 This development of vicarious liability and liability insurance has been mirrored in HSE Act 1992 prosecutions, as employers can insure against reparation.

343 Davies, above n 308.
VII THE INFLUENCE OF ACC

A Introduction

The introduction of the ACC scheme meant the death of claims for compensatory damages for personal injury in New Zealand - "an unparalleled event in our cultural history, the first casualty among the core legal institutions of the civilized world."\(^{344}\) The scheme was introduced as a response to the inconsistent compensation provided to injury victims by the pre-ACC status quo ante. The scheme itself has provoked a series of responses as judges and legislators have reacted to the demise of personal injury actions. In the process, the role and character of the civil and criminal law in New Zealand have been fundamentally changed. The criminal law now has compensation as one of its primary functions. The civil law in New Zealand, unlike the rest of the common law world, is no longer dominated by negligence actions for personal injury.

Pre-ACC personal injury actions performed valued functions in addition to compensation. The introduction of ACC could have extinguished these functions but instead, the legislative and judicial branches of government have adapted the civil and criminal law so that, for the most part, they can continue. The changes to the criminal law have been by legislation, while the changes to the civil law have been primarily driven by judicial decision-making. In this final chapter, I examine what has happened to these functions of the civil law following the introduction of the ACC scheme, and assess the role that Parliament and the courts have played.

B Compensation, corrective justice and distributive justice

1 Compensation, corrective justice and distributive justice

Compensation is the “first and foremost” function of the civil law.\(^{345}\) Compensation can serve both distributive justice (in terms of achieving the desired distribution of the cost of accidents) and corrective justice (in terms of a defendant correcting a wrongful loss).\(^{346}\) The introduction of the ACC scheme means that the civil law cannot serve corrective justice.\(^{347}\) Sir Geoffrey Palmer wrote in 1994 that the ACC scheme

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\(^{344}\) Fleming and Drobnay “A Word from the Editors” (1973) 21 Am J Comp L at xi.

\(^{345}\) Daniels v Thompson [1998] 3 NZLR 22 (CA) at 19 per Thomas J.

\(^{346}\) See I.D.3 above.

\(^{347}\) “Corrective justice has a value, of course... The position is simply this: if the [ACC] scheme is adopted, then corrective justice will no longer be realized and that will have a disvalue” Allan Beever “Corrective Justice and Personal Responsibility in Tort Law” (2008) 28 OJLS 475 at 499.
represented a decision to sacrifice corrective justice for distributive justice and declared.\textsuperscript{348}

The principle that people who suffer personal injury from the culpable behaviour of another ought to have a remedy in the courts is not the law of New Zealand. The corrective-justice analysis that an individual whose autonomy has been invaded ought to have it restored and paid for by the person who caused it holds no sway. There is no community expectation that the restoration needs to be carried out by the person who inflicted the injury, or that anything is to be gained socially by compelling those who cause personal injury to provide redress in damages to their victims…

[Corrective justice] lacks real power in the minds of people. They are interested in recompense and compensation for their injuries. They are interested in the amount of compensation and whether it compares with what they have lost. The source of the compensation is of secondary concern. The fact that the wrongdoer does not pay excites few. People who do wrong will be punished by the criminal law.

Parliament’s responses to the introduction of the ACC scheme suggest that this assertion that corrective justice lacks power in New Zealand is quite wrong. Corrective justice for injury victims may have been expunged from the civil law but has been resurrected in the criminal law. By 1994, the criminal law’s compensatory function had already been expanded with the introduction of the sentence of awards of reparation, a payment from the offender to the victim.\textsuperscript{349} Later, the Sentencing Act 2002 introduced a stronger presumption in favour of reparation\textsuperscript{350} and allowed for awards of reparation for a greater range of losses.\textsuperscript{351}

Clearly, Parliament is responding to a public demand for corrective justice, evidenced by the results of the justice referendum\textsuperscript{352} and submissions to the 2007 Inquiry into Victims Rights.\textsuperscript{353} The tort of negligence was not valued for delivering corrective justice because, as the Woodhouse Commission observed, the “fault” of negligence could not be equated with moral wrongdoing.\textsuperscript{354} However, it does not follow that New

\textsuperscript{348} Geoffrey Palmer “New Zealand’s Accident Compensation Scheme: Twenty Years On” (1994) 44 UTLJ 223 at 247-253.
\textsuperscript{349} Criminal Justice Act 1985, s 22 introduced the sentence of reparation, which originally was only available for damage to property. Reparation for emotional harm, which was available in cases of injury, was introduced in 1987. See IV.D2-3 above.
\textsuperscript{350} See VI.D.2 above.
\textsuperscript{351} Sentencing Act 2002, s 32 allows for reparation for “loss or damage consequential on any emotional or physical harm or loss of, or damage to, property”. See VI.D.2 above.
\textsuperscript{352} See VI.D.1 above.
\textsuperscript{353} Justice and Electoral Committee Inquiry into Victims’ Right (2007) see VI.F.1 above.
\textsuperscript{354} See II.C above.
Zealand had no great fondness for corrective justice, only that New Zealand had no
great fondness for the tort of negligence.355

If the introduction of the ACC scheme was a decision to sacrifice corrective justice
for distributive justice, then later decisions to increase the compensatory role of the
criminal law came at the expense of sacrificing the Woodhouse Commission’s
conception of distributive justice in the sense of consistent treatment of all victims of
injury. Making compensation the first function of criminal sentencing also means a
sacrifice of retributive justice, since some offenders may be ordered to pay a quantum
of reparation that does not reflect their personal culpability.356

Like compensatory damages in the civil law, awards of reparation in the criminal law
can serve distributive justice as well as corrective justice.357 Like the tort of
negligence did with victims of injury, reparation provides inconsistent outcomes to
victims of crime: not all offences result in a conviction, and not all offenders can
pay.358 Like the tort of negligence, these inconsistent outcomes resulted in a
legislative response: the offender levy scheme. The offender levy scheme means that
the burden of some more victims of crime is alleviated compared to reparation
alone,359 but although the offender levy scheme is funded by offenders it cannot draw
on corrective justice as a justification.360

The previous legislative response to inconsistent outcomes for victims of crime was
the 1964 criminal injuries compensation scheme, which ran for around ten years
concurrently with the law of tort until it was abolished following the introduction of
the ACC scheme.361 In 2009, over thirty years later, a new scheme to address the
inconsistent compensation to victims of crime was introduced.362 This raises the

355 Even among lawyers there was no united support for the fault principle of negligence. The New
Zealand Law Society’s submission to the Royal Commission noted a diversity of views and stated that
the Society could not express a view embracing the whole of the profession. See Geoffrey Palmer
Compensation for Incapacity (Oxford University Press, Wellington, 1979) at 89.
356 See VI.E.1 above.
357 Compensating victims of crime can be seen as an end in itself as well as a way of achieving
corrective justice. Like awards of compensatory damages to injury victims, reparation can be seen in
terms of alleviating victims of crime of a burden. See I.D.3 above.
358 See VI.F.1 above.
359 Although the offender levy only provides additional assistance to a limited subset of victims of
serious crime, see VI.F.3 above.
360 See VI.E.4 above.
361 See I.B.4 and III.B.5 above re the scheme and its abolishment respectively.
362 There are of course differences between the two schemes. The criminal injuries compensation
scheme was funded by general taxation as well as recovery from offenders, not an offender levy. Both
schemes assisted only a subset of victims of crime: injury victims for the criminal injuries
compensation scheme and victims of serious crime for the offender levy scheme.
question of whether the ACC scheme should have displaced the intentional torts and criminal injuries compensation scheme in the first place.

C Response to wrongdoing by the civil law

Although compensation may be the primary function of the civil law, the law of torts is concerned to some extent with responding to wrongdoing: punishing wrongdoers, deterring wrongful conduct, marking society’s disapproval and so on. The civil law performed this function in relation to wrongdoing which caused injury in a number of different ways. Compensatory damages could provide punishment and deterrence as well as compensation. Nominal damages, awarded as of right for trespass, recognise a breach of a common law right even if no actual damage was caused, thereby vindicating the right. Aggravated damages allowed the law to respond to particularly high-handed breaches of rights. The power to make a declaration provided the courts with an additional means of recognising a wrong. Exemplary damages allowed the law to respond to outrageous conduct.

The introduction of the ACC scheme and the statutory bar on proceedings for damages arising directly or indirectly from a covered injury means that compensatory damages can no longer provide these retributive functions in relation to conduct that causes injury. This has led to the criminal law becoming more concerned with wrongdoing that might previously have been dealt with by the civil law and caused ongoing pressure on the civil law. I will now consider how three particular types of wrongdoing have fared since the introduction of the scheme: advertent wrongdoing, inadvertent wrongdoing and state wrongdoing.

1 Advertent wrongdoing

Prior to ACC, the civil law could provide a response by awards of damages in relation to advertent wrongdoing – in relation to both acts deliberately intended to cause harm, and acts performed with the conscious knowledge that harm might follow. If an award of compensatory damages was not a sufficient response to the advertent wrongdoing in question, then additional awards could be made of aggravated and exemplary damages.363

Following G v Auckland Hospital Board,364 which found that a rape was an “accident” in terms of the 1972 Act, it is clear that advertent acts that cause personal injury fall under the ACC scheme and thus attract the statutory bar on proceedings for compensation. As per Donselaar v Donselaar365 compensatory and aggravated

363 Aggravated damages to compensate the victim because of the advertent aspect of the wrongdoing and exemplary damages to punish the wrongdoer.
364 G v Auckland Hospital Board [1976] (HC) 1 NZLR 638, see above IV.B.1.
365 Donselaar v Donselaar [1982] 1 NZLR 97 (CA), see above IV.B.2.
damages are barred, but the civil law can still respond to advertent wrongdoing by awards of exemplary damages in cases where the conduct is sufficiently outrageous that a court determines that a punitive award is appropriate. The civil law thus has a post-ACC role in responding to advertent wrongdoing, albeit a more limited one.

2 Inadvertent wrongdoing

Prior to ACC, work and motor vehicle injuries were often addressed through the civil law and not the criminal law: an award of damages was sufficient to both compensate the victim and punish and deter the wrongdoer, so the criminal law did not need to be involved. The kind of “wrongdoing” in such cases was usually wrongdoing in the sense of an inadvertent departure from the community standard for workplace safety or safe driving – as opposed to the kind of advertent moral wrongdoing normally associated with the criminal law. As well as responding to individual wrongdoing, the civil law also played a role in setting community standards through the objective standard of negligence in combination with the tort of breach of statutory duty and various industrial statutes.

Since the introduction of the ACC scheme, the civil law can no longer address inadvertent wrongdoing that leads to injury by awards of compensatory damages. Following McLaren Transport v Somerville in 1996, it appeared that the civil law could continue to address inadvertent wrongdoing by awards of exemplary damages in cases where the inadvertent conduct was outrageous enough to deserve a punitive response. However, the New Zealand courts came to take a more conservative approach to exemplary damages: in Bottrill, the majority of the Court of Appeal found that exemplary damages should be restricted to advertent wrongdoing, and in Daniels v Thompson the majority of the Court of Appeal thought that in matters of punishment the civil law should defer to the criminal law. Although the Court of Appeal’s decision in Bottrill was overturned by the Privy Council, it was essentially restored by a majority of the Supreme Court in Couch. Exemplary damages are now not available to address inadvertent wrongdoing.

The function of responding to inadvertent wrongdoing, at least in cases of industrial and motor vehicle injury, has now shifted to the criminal law. Breaches of workplace safety standards are addressed by the Health and Safety in Employment (HSE) Act 1992 which, like the tort of negligence, assesses the employer’s conduct against an objective standard. Similarly, various motor vehicle offences penalise departure from

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368 Daniels v Thompson [1998] 3 NZLR 22 (CA), see above V.E.3.
an objective standard of driving. As Thomas J observed, “[t]here are few aspects of a citizen’s conduct today which may not constitute a crime or a quasi-crime or a breach of a regulatory provision.” This is in part because of the ACC scheme: since compensatory damages cannot address inadvertent conduct causing injury, for it to be addressed at all it must be addressed by another means.

3 State wrongdoing

In the case of industrial and vehicular injuries, the decreased capacity of the civil law has been matched by an increased capacity of the criminal law to deal with inadvertent conduct. However, there is no equivalent legislation for state wrongdoing. Victims of injury caused by improper but inadvertent action by the state who want the state’s wrongdoing addressed and publicly condemned must turn to the civil law. The predictable result, as Hammond J observed in Hobson, is that “blisters are forming at various points on the skin of the New Zealand polity, with increasing numbers of claims against the Crown for tortious redress, in one context or another.”

The ability of the civil law to respond to wrongdoing that leads to injury is much reduced following the introduction of ACC. Compensatory damages are prohibited by the statutory bar on proceedings, and the courts have found that the bar extends to nominal and aggravated damages. In Baigent’s case, the Court of Appeal found that public law damages could be awarded to address breaches of New Zealand Bill of Rights Act 1990 (NZBORA) rights, and in Wilding the Court of Appeal found that public law damages could be awarded in cases of injury, as long as they served the purpose of addressing the breach and not compensating for injury. Public law damages can address breaches of NZBORA, but not common law rights that have no parallel in NZBORA. Declarations are only available at the discretion of the court.

The law is lacking a clear avenue to address inadvertent wrongdoing by state bodies that leads to injury – the kind of injuries that result from systemic neglect or oversight rather than a specifiable act or omission by an individual officer advertently taking a risk. Under the Ombudsman Act 1975, an Ombudsman can investigate administrative

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371 For example Land Transport Act 1998, s 8 imposes a duty on drivers not to be careless.
372 Daniels v Thompson, above n 368, at 19.
373 Injury caused in a medical context can potentially be addressed by the Health and Disability Commission.
374 Hobson v Attorney-General [2007] 1 NZLR 374 (CA) at [75], see above VI.C.4.
375 Re Chase [1989] 1 NZLR 325 (CA), see above IV.B.4.
376 Donselaar v Donselaar [1982] 1 NZLR 97 (CA), see above IV.B.2.
378 Wilding v Attorney General [2003] 3 NZLR 787 (CA), see above VI.C.1.
acts, decisions or recommendations, but this does not easily encompass the issue of systemic fault causing injury.

The Supreme Court in its first *Couch* decision must have thought it conceivable that Ms Couch’s injuries could be regarded as caused by systemic negligence on the part of Department of Corrections, because it found that it was premature for the majority of the Court of Appeal to rule out the possibility of Ms Couch establishing a duty of care. However, the only way to address that negligence would be an award of exemplary damages. Following the Supreme Court’s subsequent decision in *Couch* exemplary damages are available in negligence actions only in cases of advertent and outrageous carelessness. So, the civil law provides no response if the Department was negligent but not advertently and outrageously so. If Ms Couch had been an employee of the Department of Corrections then her injuries arguably could be regarded as resulting from a failure by the Department to take all practicable steps to ensure her safety while at work. In that case the Department would have committed an offence against the HSE Act 1992 – with no need to prove advertence or outrageousness. The HSE Act 1992 imposes a duty on employers in relation to third parties: to “take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person.” However, since the duty relates to specific actions or inactions by individual employees it does not readily apply to cases of systemic negligence.

Some judges have explored the possibility of expanding exemplary damages to bolster the civil law’s ability to address inadvertent systemic wrongdoing. This view was hinted at by Cooke J in *Donselaar v Donselaar*, and taken up by Thomas J in *Bottrill* and later *Daniels v Thompson*, and most recently by Elias CJ in *Couch*. Developing exemplary damages to serve that purpose would mean a fundamental change to the kind of conduct that exemplary damages typically addressed and attract traditional criticisms of exemplary damages relating to punishment in the civil law and the anomaly of the windfall to the plaintiff. Despite a

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379 Ombudsman Act 1975, s 13(1).
381 *Couch v Attorney-General*, above n 370.
382 HSE Act 1992, s 6, an employer is under a duty to “take all practicable steps to ensure the safety of employees while at work”
383 HSE Act 1992, s 15.
384 *Donselaar v Donselaar*, above n 365, at 107.
385 *Bottrill v A* [2001] 3 NZLR 622 (CA), see above VI.C.2.
386 *Daniels v Thompson*, above n 368.
387 *Couch v Attorney-General*, above n 370.
strong dissent from the Chief Justice, the majority of the Supreme Court has put a stop to this line of thought, for the moment at least.\textsuperscript{388}

The anomalies of exemplary damages could possibly be avoided if, like inadvertent conduct by employers or motorists that leads to injury, inadvertent conduct by state bodies that falls below a reasonable standard of care and concern for affected citizens was brought within the reach of the criminal law. A sentence of a fine might provide punishment, deterrence and condemnation for state fault leading to injury, while avoiding the anomaly of the entire exemplary damages award going to the plaintiff.\textsuperscript{389}

Reparation for emotional harm would essentially perform the function of aggravated damages. The concern that a criminal offence for inadvertent state conduct leading to injury might lead to an over-cautious and counter-productive approach by state officers is a fair one but could be addressed. If the focus is on systemic rather than individual fault, then the offence could be committed only by state entities. The wording of any such offence would of course be key, and the HSE Act 1992 could potentially provide a model: a duty could for example be imposed a state entity to take “all practicable steps to ensure the safety of citizens affected by its activities” or “all practicable steps to ensure that no action or inaction by the entity or any of its officers causes harm to any other person.” When interpreting the offence, the courts could give weight to the same kinds of policy considerations that come into play when assessing the scope of a duty of care in the civil law.\textsuperscript{390} The meaning of “all practicable steps”, like the concepts of duty of care and reasonable care in negligence law, has room for flexibility and could allow the courts to develop the offence so it allowed the criminal law to address systemic inadvertent conduct without making the state too over-cautious.

However, as with expanding exemplary damages, there are significant problems with this approach. It is questionable whether it makes any sense to punish a state entity, and even more questionable whether a fine can have any deterrent effect since the result is essentially a transfer from one column of the state’s account-book to another. Although a finding that a state entity has committed an offence might allow for condemnation, this purpose alone may be insufficient to justify the expense of a trial if there is no effective punishment or deterrent.

\textsuperscript{388} When the judiciary took a restrictive position on exemplary damages in Daniels v Thompson, above n 368, it was rejected by the legislature, see V.F.1 above – we have yet to see whether Couch provokes a legislative response.

\textsuperscript{389} Indeed, in Couch, above n 370, Wilson J at [248] mused that if exemplary damages were being newly introduced, then there is an argument that the award should be paid to the state, like a fine.

\textsuperscript{390} Which include the policy consideration that extending a duty of care too far may lead to over-cautiousness. See for example Hobson v Attorney-General, above n 374, at [122].
With respect to systemic fault, any proceeding that focuses on an individual case is limited in terms of the light it can shed on problems with the system, whether the proceeding is civil or criminal. One response in New Zealand to concerns of systemic fault is to hold an inquiry of some sort. Two such inquiries being currently conducted are the Royal Commission of Inquiry into the Pike River Coal Mine Tragedy and the Royal Commission of Inquiry into Building Failure Caused by the Canterbury Earthquakes, and of course the Woodhouse Report presented the findings of such an inquiry. Perhaps then, rather than relying on civil or criminal proceedings brought by individuals to address systemic fault, we should instead hope that the executive is vigilant at holding such inquiries where appropriate.

D The role of Parliament

1 Democracy and resolving conflicting conceptions of justice

Distributive justice, corrective justice and retributive justice can all provide different accounts of a “just” outcome following an injury, and it is generally not possible to satisfy all three conceptions of justice at once. Furthermore, changes to the scheme by successive compensation Acts show that the idea of a fair distribution of the cost of accidents varies over time and with changes of government. This means that conflicts between different conceptions of justice in relation to what ought to happen following an injury will always present a problem.

Several conflicts have arisen as a result of the introduction of the ACC scheme and later responses to it. Employing the criminal sentence of reparation, a payment from the offender to the victim, to top-up ACC entitlements serves corrective justice. Withholding ACC entitlements from offenders injured during the commission of serious criminal offences serves retributive justice. Both are inconsistent with the distributive justice philosophy of the Woodhouse Report of an consistent treatment of injury victims. However, the legislation enabling these measures shows that New Zealand is not prepared to completely sacrifice corrective and retributive justice for the Woodhouse Commission’s particular conception of distributive justice.

The questions of which distributive justice criterion we ought to adopt, and which conception of justice ought to prevail when there is a conflict are not questions we can answer with logic. These are political questions that should be addressed through the democratic process. But leaving the question of which distributive justice criterion ought to underpin the scheme up to the political process leads to continual changes in

393 See I.D.4 above.
the scheme’s scope and funding because the idea of a just distribution of the cost of accidents varies over time. The result of leaving the resolution of conflicts between the scheme and corrective or retributive justice up to the political process is inconsistent treatment of different injury victims. These consequences are necessary evils, and the alternative is that an idea of “justice” for injury victims that may have been accepted at one point in New Zealand’s history defines the state of accident compensation for all time. We accept that society’s distributive justice philosophy in relation to welfare and taxation will change over time and with changes of government. There is no reason that the philosophy of the ACC scheme should be exempt from the democratic process.

2 Assessing Parliament’s role

Changes like the cuts to the scheme under the 1992 Act should be seen as a natural result of the political process rather than an unconscionable breach of a social contract. Updating the accident compensation legislation to match its idea of justice for injury victims is a proper function of the legislature. Of course, one can dispute the currently prevailing idea of justice, but this is a political dispute over which principles should determine compensation and how to prioritise compensation alongside other policy objectives. However, this does not mean that the legislature is immune from criticism. There are several occasions in the history of ACC where the legislature has acted seemingly without principle, or acted in a way that seems inconsistent with its own stated principles.

If there was a principled basis for the legislative overturn of Daniels v Thompson, it certainly is not clear from the legislation.394 The failure of the legislature to set out a coherent rationale for the overturn of Daniels v Thompson means that it is impossible for the courts to develop the law of exemplary damages in New Zealand without risking a legislative rebuke: since it is not possible to know Parliament’s rationale for s 319 of the 1998 Act, it is not really possible to reform exemplary damages without risking contradicting that rationale. Since the courts seem unable to take a coherent position on exemplary damages, perhaps the responsibility to clean up the confused position of exemplary damages in New Zealand falls to the legislature.

The legislature has acted inconsistently with respect to lump sum compensation for mental suffering. The pre-ACC civil law provided compensation for mental suffering by making lump sum awards of damages for pain and suffering and loss of enjoyment of life. The original ACC scheme was more generous: as the common law had, the scheme provided lump sum compensation for pain and suffering and loss of enjoyment of life in cases of mental suffering where there was a physical injury, but

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394 The Parliamentary debate surrounding the legislation is of little assistance, see V.F.1 above.
the scheme also provided compensation for mental suffering that was not accompanied by physical injury.

However, from the 1992 Act onwards, the ACC scheme has not provided lump sum compensation for mental suffering as a separate head of entitlement. The 1992 Act provides cover for “mental injury” which could lead to entitlements, for example weekly compensation for lost earnings if the mental injury led to an inability to work. The 2001 Act re-introduced lump sum compensation, but not for pain and suffering or loss of enjoyment of life.

Following the introduction of the ACC scheme, the provision of lump sum compensation for mental suffering has began to appear elsewhere in the law: the criminal law began to provide reparation for emotional harm in 1987, and since then various legislative measures have allowed for compensation for mental suffering in a number of different contexts involving fault, leading Professor Smillie to remark in 1997 that “it seems that the only form of mental suffering that does not normally qualify for an award of lump sum monetary compensation is that which results from physical injury to the person.”

Lump sum compensation for mental suffering was removed from the scheme because of concerns over cost. Essentially, the public were not prepared to absorb the expensive and arbitrary cost of compensating intangible mental suffering. These later developments suggest that the public are, however, prepared to impose that cost on parties considered to be at fault. The idea that only those at fault pay compensation for mental suffering is a fiction since much of the cost will ultimately be absorbed by the community.

These concerns do not provide a principled basis for providing lump sum compensation for mental suffering in almost all cases other than physical injury to the person. The law in this area has developed haphazardly: there does not appear to be any consistent legislative policy behind who qualifies for lump sum compensation for emotional harm. If compensating mental suffering by way of lump sum payments is arbitrary and too expensive for the community then it ought not to be done at all. Given the prevalence of various statutory measures providing compensation for

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395 See V.C.1 above.
396 Criminal Justice Amendment Act (No, 3) 1987, s 2.
397 For example, breaches of privacy (Privacy Act 1993, s 88(1)) breaches of Human Rights (Human Rights Act 1993, s 86(1)) personal grievances in employment (Employment Relations Act 2000, s 123(1)(c)(i)).
399 The cost to a state entity paying compensation for mental suffering that it or an employee has caused becomes a cost to the community. An employer required to pay compensation for mental suffering can pass that cost on to consumers.
mental suffering, complete withdrawal of such measures seems politically unfeasible. If that is the case, then compensation for mental suffering should be returned to the scheme. Compensation for mental suffering need not be extravagant. Indeed, a modest provision for awards of compensation for mental suffering under the accident compensation scheme could provide a model for compensation for mental suffering in other areas.

E The role of the courts

Interpreting legislation in accordance with the intent of the legislature and developing the common law to meet the needs of society are two main functions of the courts. The courts’ performance of these functions in the aftermath of the ACC scheme has been quite inconsistent.

1 Inconsistent understandings of the scheme

Interpreting the accident compensation legislation in accordance with the intent of the legislature requires developing an understanding of what the legislature intended by implementing the scheme - what the scheme was introduced to achieve and what the principled or philosophical basis for doing so is. The courts’ understanding of the scheme has been internally inconsistent and on several occasions Parliament has rejected the approach that the courts have taken.

Early on, two different judicial approaches to the scheme emerged. The first approach, influenced by the philosophy of the Woodhouse Report, is to see the scheme as a response to the social problem of injury regardless of how the injury was caused. The second approach is to construe the scheme more narrowly a response to the inconsistent outcomes provided by the negligence action. If the scheme is merely a replacement for the negligence action, then it follows that the scope of the scheme, and with it the bar on proceedings for damages, should be restricted to the kinds of injuries which might have been the subject of negligence actions - which therefore excludes illness and injuries caused by intentional torts.

The first approach is exemplified by decisions like Wallbutton and ACC v Mitchell, which extended cover to illness-related conditions, and G v Auckland

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400 See the NZLJ editor’s response to Craig Brown and John Smillie’s “The future of Accident Compensation” [1991] NZLJ 249 at 249: “The view that accident injuries and sickness should be regarded as indistinguishable is not one that is necessarily just in the opinion of many people … Nobody of course has ever been able to sue Nature or some such entity for … the multitudinous ailments that the flesh is heir to … To treat negligence however as being of the same order as disease is contrary to any normal sense of justice.”

401 Wallbutton v ACC [1983] NZACR 629 (HC), see above IV.B.3.

Hospital Board, which found that an injury caused by an intentional tort was an “accident” and covered by the scheme.

The second approach is exemplified by Cooke J’s comment in Donselaar that the mischief that the scheme set out to remedy was primarily the inconsistent compensation provided by actions for negligence and his later remark in Willis v Attorney-General that the scheme was fundamentally a replacement for negligence law, and careful scrutiny must be applied to any extension of the scheme, and the bar on proceedings, beyond that.

In Willis, Cooke P thought that judges could apply common sense as to whether a claim fell within the broad spirit of the scheme. This might have been the case if there was a genuine consensus on the philosophy of the scheme. Judges applying their own personal conceptions of the spirit of the scheme leads to anomalous results. Holland J used Cooke P’s comments in ACC v F to reach the conclusion that the scheme did not provide cover to secondary victims, marking a retreat from the hitherto generous approach that the courts had been taking to the meaning of “accident” and showing that different courts had very different conceptions of the spirit of the scheme. The question of how generously to approach cover at the edges of the scheme continues to receive inconsistent responses from the judiciary.

Later, the higher courts latched on to the idea that the ACC scheme should be understood as a social contract: the scheme is not merely a replacement for

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403 G v Auckland Hospital Board, above n 364.
404 Donselaar v Donselaar, above n 365, at 104.
405 Willis v Attorney-General [1989] NZLR 574 (CA) at 5-6, see above IV.B.5.
406 For example, in JRB v ARIC DC Wellington 42/98, 18 March 1998 and Estate Black v ARIC DC Wellington 233/98, 11 November 1998 Judge Middleton interpreted the provisions of the 1992 Act relating to disentitlement for wilfully self-inflicted injuries and suicide in a way which was contrary to the clear wording of the statute, based on the Judge’s conception of Parliament’s intent for the scheme. This erroneous interpretation was addressed ten years later in Estate Hjaltason v ACC DC Wellington 111/2008, 29 May 2008. In the mean time, claimants for such injuries under the 1992 Act were denied their proper entitlements on the basis of one Judge’s conception of the spirit of the scheme.
408 For example, Harrild v Director of Proceedings [2003] 3 NZLR 289 (CA), relating to whether an injury to a fetus was an injury to the mother, or ACC v D [2008] NZCA 576. The High Court in ACC v D [2007] NZAR 679 (HC) had found that pregnancy resulting from failed sterilisation could be a personal injury, after a discussion that included, at [71]-[76], a discussion of the physical effects of pregnancy which concluded that “when viewed from the perspective of the woman’s body … I consider the physical impacts [of pregnancy] are capable of being described as “injury’” echoing the approach of viewing “accident” from the point of view of the victim. The decision was overturned by a majority in the Court of Appeal after a careful consideration of legislative intent.
negligence, but was received in exchange for giving up the right to sue. As the Court of Appeal put it in *Wilding*:\(^\text{409}\)

The philosophy of the personal injury compensation legislation, as is well known, is to *substitute* an entitlement to claim compensation, capped as to amount, on a no-fault basis for the right to bring a Court proceeding for damages for the injury or to seek in other ways damages or compensation.

The reasoning of the “social contract” philosophy of ACC developed as follows:

1. The scheme was a response to the unsatisfactory treatment of victims of injury under the status quo ante, primarily because the tort of negligence provided such inconsistent results for different victims of injury;

2. The right to sue for compensation was exchanged for the right to claim under the scheme; so

3. Any return to a situation that makes compensation available to some victims of injury and not others undermines the exchange; and

4. To the extent that the scheme is retracted, the right to sue expands to fill the gap.

This idea has been influential on the courts’ understanding of the relationship between the scheme and the civil and criminal law. The social contact philosophy was used to justify the finding in *Queenstown Lakes District Council v Palmer*:\(^\text{410}\) that the civil law would expand when the scheme was drawn back. The majority of the Supreme Court in *Davies*:\(^\text{411}\) reasoned that the social contract meant that reparation should not top-up ACC entitlements and provide full compensation. The risk of undermining the ACC social contract by allowing exemplary damages to take on a compensatory function is a common theme in decisions on exemplary damages.\(^\text{412}\)

Since it is based on the idea that the scheme is an exchange rather than a remedy for the social problem of injury, the social contract philosophy has more in common with the second understanding of the scheme set out above than the first. However, the social contract philosophy sees the scheme as a trade for the right to claim compensatory damages generally rather than as a replacement for negligence specifically – the bar on proceedings extends far beyond compensation for negligence, and bars claims for compensation for personal injury in cases of breaches of NZBORA:\(^\text{413}\) and the criminal law.\(^\text{414}\) If the scheme is an exchange for the right to sue


\(^{410}\) *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA).


\(^{412}\) See VI.C.2 above.

\(^{413}\) *Wilding v Attorney General*, above n 378.
for compensation then *Re Chase* must be wrongly decided since nominal damages are not compensatory. Payment of a nominal sum does not give some injury victims more compensation than others so cannot undermine the scheme.

The social contract philosophy of ACC is inconsistent with the decisions that allow exemplary damages in cases of injury.⁴¹⁵ If reparation payments that lead to inconsistent outcomes undermine the scheme, then clearly exemplary damages also undermine the scheme. It is no answer to the charge of undermining the scheme to say that exemplary damages are awarded to punish and deter, since it is the windfall to some injury victims and not others that creates the inconsistency, regardless of the reason for the payment. The Supreme Court in *Couch*, which included four members of the same Court that sat in *Davies*,⁴¹⁶ did not address this point – other than perhaps Tipping J’s musing that *Donselaar v Donselaar* may have been wrongly decided but was now too firmly entrenched to be overruled.⁴¹⁷

The courts have thus been continually internally inconsistent with respect to the understanding of the legislative intent of the scheme applied when interpreting the accident compensation legislation. There are also several cases where it appears that the judiciary and legislative have had different ideas about the ACC scheme and the relationship between the civil and criminal law in light of the scheme.

Whether the Accident Compensation Act 1972 really represented a social contract is unclear. The Woodhouse Report described a replacement for the status quo ante measures of compensation for injury, not an exchange for negligence or tort liability injury. There was political bargaining which led up to the first Accident Compensation Act – the inclusion of lump sum payments, and compensation for mental suffering being two results of that bargaining. However, the terms of that bargain were not clear, especially with respect to whether the bargain included giving up access to the intentional torts. The retrenchments to the scheme in the 1992 Act are not the work of a state respecting a social contract. Even though the 2001 Act refers to reinforcing the social contract of the first scheme,⁴¹⁸ that Act retained a number of the retrenchments effected by the 1992 Act, including the removal of compensation for mental suffering.

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⁴¹⁴ *Davies*, above n 411. Strictly speaking, the bar on proceedings under the accident compensation does not apply to reparation, which is not a proceedings. However, the majority of the Supreme Court interpreted the Sentencing Act 2002 in light of their understanding of the philosophy behind the bar.

⁴¹⁵ *Donselaar v Donselaar*, above n 365, affirmed in *Auckland City Council v Blundell* [1986] 1 NZLR 732 (CA), and recently in *Couch*, above n 370.

⁴¹⁶ Elias CJ, Blanchard, Tipping and McGrath JJ.

⁴¹⁷ *Couch v Attorney-General*, above n 370, at [86].

⁴¹⁸ Accident Compensation Act 2001, s 3.
ACC v Mitchell\textsuperscript{419} and ACC v F\textsuperscript{420} probably extended the scheme beyond what the legislators intended by taking a particularly generous approach to the meaning of “personal injury by accident.”\textsuperscript{421} Following their election in 1990, the National government certainly claimed that judicial decisions had extended the scheme’s boundaries beyond what was originally intended.\textsuperscript{422} Adopting the approach of considering “accident” from the point of the view of the victim that had developed in English workers’ compensation cases may have been consistent with the philosophy of the Woodhouse Report but did not necessarily reflect the intent of New Zealand legislators.

The legislative overturn of Daniels v Thompson\textsuperscript{423} suggests a difference of views over the function of exemplary damages. The Court of Appeal’s view is coherently set out in the majority judgment, unfortunately we can conclude little more about the legislators’ idea of exemplary damages other than they disagree with the majority of the Court of Appeal in Daniels v Thompson.

The Government has announced that it intends to overrule Davies,\textsuperscript{424} suggesting that the majority of the Supreme Court gave too much weight to their conception of the social contract philosophy of the ACC scheme and did not fully consider the corrective justice/compensatory role that today’s society is demanding from the criminal law.

2 Developing the common law

The ACC scheme has put pressure on the courts to develop the civil law so that it can continue to provide the function of responding to wrongdoing causing injury even though it no longer provides the function of compensating the victim. The courts’ development of the civil law has been tempered by the concern that the civil law could regain its former function of providing compensation to victims of injury, and thereby undermine the ACC scheme. Even Thomas J, the most enthusiastic promoter of developing exemplary damages for “securing the wider functions of tort law”\textsuperscript{425} did not say that compensation for injury was a proper function of exemplary damages.

The courts have failed to develop a coherent law of exemplary damages for New Zealand following the introduction of the ACC scheme, and the issue has generated a series of inconsistent decisions. The most recent example of this is the Supreme Court

\begin{itemize}
  \item \textsuperscript{419} ACC v Mitchell, above n 402.
  \item \textsuperscript{420} ACC v F, above n 407.
  \item \textsuperscript{421} See the discussion at IV.B.7 above.
  \item \textsuperscript{422} See V.B.2 above.
  \item \textsuperscript{423} Daniels v Thompson, above n 372.
  \item \textsuperscript{424} Hon Simon Power MP “Reparation and ACC entitlements” (press release, 28 January 2010).
  \item \textsuperscript{425} Daniels v Thompson, above n 372, at 24.
\end{itemize}
in *Couch*, where the Court displayed attitudes towards exemplary damages ranging from enthusiastic support\(^{426}\) to discomfort,\(^{427}\) as well as different conceptions of the function of exemplary damages.\(^{428}\) The confused position of exemplary damages in New Zealand is in part because of the legislative overturn of *Daniels v Thompson*, but the courts must take a fair share of the blame.

*Re Chase\(^{429}\)* provided an opportunity for the Court of Appeal to ensure that the common law could to continue to vindicate common law rights post-ACC. The House of Lords recently considered nominal damages in *Ashley v Chief Constable of Sussex Police*\(^{430}\), a case with “strikingly similar”\(^{431}\) facts. By a majority of three to two, the House of Lords found that a claim could be pursued solely to provide the function of vindicating the contention that the deceased’s death had been caused by unlawful battery, even though the chief constable had admitted liability for negligence and paid compensation. That is, the trespass claim could proceed even if corrective justice and compensation had been satisfied, because vindication of rights was a proper function of the civil law. The minority thought that vindication was not a sufficient basis for allowing the claim to proceed under the circumstances, and that once liability was accepted and compensation was paid the civil law’s job was essentially done.\(^{432}\) The majority of the House of Lords ensured that the English civil law continue to protect common law rights, recognising that for the common law to be a strong protector of rights it must be able to do more than simply facilitate compensation following a breach. The ability of the civil law of New Zealand to respond to wrongdoing has been limited as a result of the introduction of the ACC scheme - in part because of the Court of Appeal’s failure in *Re Chase* to ensure that following the introduction of the ACC scheme the civil law could still vindicate the right of citizens not to be subjected to unlawful battery.

**F Conclusion**

The ACC scheme was intended to forever change the civil law in New Zealand by taking over the function of compensating injury victims. The scheme has also had

\(^{426}\) *Couch v Attorney-Genera*, above n 370, at [4] per Elias CJ who spoke of “the vitality of the exemplary principle in meeting the needs of modern New Zealand Society.”

\(^{427}\) Ibid, at [59] per Blanchard J who was “uncomfortable” with the idea that a civil court should mete out punishment but thought there was a proper moral role for exemplary damages in deterring outrageous conduct.

\(^{428}\) See VI.C.5 above.

\(^{429}\) *Re Chase*, above n 375.

\(^{430}\) *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962.

\(^{431}\) Ibid, per Lord Neuberger at [131].

\(^{432}\) Ibid. Lord Carswell thought that “the civil courts exist to award compensation, not to conduct public inquiries [or] provide explanations” at [81]. Lord Neuberger said at [130] that pursuing the claim solely on the grounds of vindication on a point of principle was a “rather limited purpose”.
major unintended consequences for the civil and criminal law in New Zealand. These unintended consequences show that making a major change to the common law is no simple matter. The law of torts provided socially valued functions other than compensating the victim, leading to a desire that these functions survive the introduction of the scheme. The criminal law now promotes corrective justice and addresses certain types of inadvertent wrongdoing that would previously have been dealt with by the civil law. The civil law now has a very limited ability to address wrongdoing that causes injury and the development of exemplary damages in particular has been influenced by the scheme. The unintended consequences of the introduction of ACC themselves even had unintended consequences: the introduction of reparation produced inconsistent outcomes for victims of crime which Parliament responded to by introducing the offender levy scheme to provide additional compensation to some victims of crime.\(^{433}\)

Different conceptions of justice can provide an account of a “just” outcome following injury: corrective, retributive and distributive justice can all suggest a different way to achieve “justice” for causers and victims of injury. There is no logical meta-principle which can tell us which conceptions of justice should have priority, or which conception of distributive justice we should adopt: these matters are questions of politics and ideology. We should except conflicts between different conceptions of justice in the overlap between the ACC scheme and the civil and criminal law, and we should expect that the “philosophy” of how to resolve these conflicts and of the ACC scheme itself will vary over time and with changes of government. Attempting to understand the ACC scheme on the assumption that it has a coherent philosophy had led the courts horribly astray - the courts have not even been able to develop an internally consistent understanding of the philosophy of the scheme. Attempting to do so is a hopeless project because there is no coherent common philosophy underlying all the different accident compensation Acts.\(^{434}\)

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\(^{433}\) See above VI.F.

\(^{434}\) The fact that the scheme has remained in place does not imply a consistent principled reason for doing so. The “insurance-based” scheme of the 1992 and 1998 Acts is a quite different philosophical understanding of the scheme than that provided in the Woodhouse Report or represented in the scheme that came into force on 1 April 1974.
### VIII  TABLE OF CASES

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*Donselaar v Donselaar* [1982] 1 NZLR 97 (CA).


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IX TABLE OF LEGISLATION

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Accident Compensation Act 1972 ("the 1972 Act" in the text)
Accident Compensation Act 1982 ("the 1982 Act" in the text)
Accident Rehabilitation Compensation and Insurance Act 1992 ("the 1992 Act" in the text)
Accident Insurance Act 1998 ("the 1998 Act" in the text)
Accident Compensation Act 2001 (formerly the Injury Prevention, Rehabilitation and Compensation Act 2001,\textsuperscript{435} "the 2001 Act" in the text)

Criminal Law

Criminal Justice Act 1985
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\textsuperscript{435} The name of the Act was changed by s 5, Accident Compensation Amendment Act 2010.
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