

Overturning the social contract?

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asks what the legislative reversal of *Davies* means

The Sentencing Amendment Act 2014 received assent on 6 June 2014 and will come into force six months after that date. The Act, which implements a number of the government's reforms concerning victims of crime, is one of a number of Acts that formerly comprised the Victims of Crime Reform Bill.

The particular reform that I wish to address is the reversal of the Supreme Court decision *Davies v Police* [2009] NZSC 47, [2009] 3 NZLR 189. I have touched on this issue before ("Justice for Victims of Injury" (2012) 25 NZULR 181 at 197–8 and 205–206), and the overturning of *Davies* is an opportunity to revisit the issue. A legislative reversal of a Supreme Court decision suggests some kind of difference of view between that Court and legislators. The reasoning of a majority in the Supreme Court was based on the idea of the accident compensation (ACC) scheme as a "social contract", raising a question of whether the case's reversal, in effect, overturns the ACC social contract.

TOPPING-UP ACC ENTITLEMENTS

The question of law in *Davies* is relatively straight-forward: can a sentence of reparation top-up entitlement to compensation for lost earnings paid under the ACC scheme? Reparation is a payment from offender to victim and, in contrast to a fine, is compensatory (*Police v Ferrier* HC Auckland CRI-2003-404-195, 18 November 2003).

The facts are also uncomplicated. *Davies* was towing a trailer with an insecurely attached mattress. The mattress fell off, causing a collision in which a cyclist was injured. The injuries were serious enough for the cyclist to need some time off work. The cyclist received cover for the injury under the ACC scheme and was paid entitlements including weekly compensation for lost earnings. ACC weekly compensation is limited to 80 per cent of lost earnings, leaving a shortfall of 20 per cent. *Davies* was convicted of careless driving causing injury and the District Court ordered him to pay \$20,500 reparation to the victim. That reparation included \$11,555 for the shortfall of lost earnings ACC provided no compensation for, thereby "topping-up" the cyclist's compensation from 80 per cent to 100 per cent.

The question is one of statutory interpretation. Section 32(5) of the Sentencing Act 2002 states that a court must not order reparation:

in respect of any consequential loss or damage ... for which the court believes that a person has entitlements under the Injury Prevention, Rehabilitation and Compensation Act 2001.

"Consequential loss or damage ... for which ... a person has entitlements" could refer to a type of loss (for example "lost earnings") for which a person has entitlement. Alternatively, it could refer to an actual loss for which a person has received

an actual payment. If the former, the cyclist already had an entitlement to compensation for lost earnings under the ACC scheme, so *Davies* could not be ordered to provide reparation for the same type of loss. If the latter, the cyclist's entitlement only extended to the 80 per cent of lost earnings that the ACC scheme would pay for. That is, the cyclist had no entitlement under the ACC scheme to the remaining 20 per cent, meaning there was no barrier to an order that *Davies* provide compensation for that shortfall.

THE LOWER COURTS

Davies appealed the District Court's topping-up of ACC entitlements by reparation on the basis that it was barred by s 32(5). In two short decisions (of around 30 paragraphs each) the High Court and Court of Appeal had little difficulty in endorsing the topping-up (*Police v Davies* (2007) 8 NZELC 98.691 (HC) and [2008] 2 NZLR 645 (CA).) Wilson J, for the Court of Appeal, noted that:

s 7(1)(d) of the Sentencing Act provides that one of the purposes of sentencing is "to provide reparation for harm done by the offending". That purpose could not be achieved if a court were unable to order reparation for that part of a victim's lost earnings which are not compensable under the [Accident] Compensation Act.

THE SUPREME COURT

A majority of the Supreme Court (Elias CJ, and Blanchard, Anderson and Tipping JJ) disagreed. Key to this decision was the idea of the ACC scheme as a "social contract". The "social contract" explanation of the introduction of New Zealand's no-fault accident compensation scheme is as follows: the people of New Zealand, mindful of the inconsistent outcomes provided by a fault-based system of accident compensation, exchanged their right to sue a wrongdoer for full compensation for personal injury for the right to receive fair compensation under a no-fault scheme. Elias CJ, giving the judgment for herself and Blanchard and Anderson JJ, stated at [18] that the decision to pay only 80 per cent of lost earnings had to be considered in the context of the decision to pay fair, rather than full, compensation.

The loss of the right to sue for personal injury is expressed in s 317 of the Accident Compensation Act 2001, which bars proceedings for damages arising directly or indirectly out of personal injury covered by the ACC scheme. A sentence of reparation, though compensatory, is not proceedings for damages, so is not barred by s 317. However, Elias CJ stated at [27] that s 317 was a pivotal provision in the social contract implemented through the ACC legislation and an important consideration for interpreting s 32(5) of the Sentencing Act. She noted at [28] that allowing top-ups of ACC entitlements by reparation would "revive" the ability to

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obtain compensation from wrongdoers for victims of crime, but not victims of civil wrong, and stated that there was no clear justification for that position.

Tipping J picked up on that same point in his concurring judgment, stating at [48] that:

It would go against the whole philosophy and purpose of the accident compensation scheme to allow those suffering injury as a result of an offence to have the potential to gain greater compensation than those suffering the same injury when no offence is involved or no one is prosecuted.

McGrath J dissented. His view, summarised at [81], was that allowing reparation to top-up ACC entitlements was inconsistent with some of the policies underlying the accident compensation legislation: the principle that one cannot claim compensation based on fault and the incentive for rehabilitation provided by paying an injury victim less than full compensation for lost earnings. In contrast with Tipping J's strong language ("against the whole philosophy and purpose of the [ACC] scheme"), McGrath thought that these mere clashes with aspects of the scheme should not be over-stated. Instead, McGrath J thought that they should be set aside in light of the clear imperative set out in the Sentencing Act to provide for the interests of victims of crime.

LEGISLATIVE REVERSAL

The Supreme Court decision was dated 25 May 2009. Early the following year, then Justice Minister, the Hon Simon Power MP, announced an intention to overturn the decision ("Reparation and ACC entitlements", press release, 28 January 2010.) This intention manifested itself in the Victims of Crime Reform Bill, introduced on 16 August 2011. The Explanatory Note to the Bill specifically referred to the "overturn" of *Davies*. The Bill had its first reading on 4 October 2011 and second reading on 6 March 2014. The Bill was divided by committee of the whole House, with the part relating to *Davies* becoming part of the Sentencing Amendment Act 2014. Section 6 of the Act, when it comes into force, amends s 32(5) of the Sentencing Act to state that a court must not order reparation:

in respect of any consequential loss or damage ... for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.

That s 6 overturns *Davies* could have been made clearer. The new wording is susceptible to the same two readings as the old: "loss or damage ... for which compensation has been, or will be paid" could refer to a type of loss for which compensation has been, or will be, paid or it could refer to the actual loss. If I have lost \$100 of earnings and been paid \$80 by ACC, then it can be said that I have been paid compensation for my lost earnings. However, it can also be said that I have not been compensated for the \$20 shortfall.

I suggest that the latter reading (which overturns *Davies*) is correct, for the following reasons. First, the wording has been carried over from the Victims of Crime Reform Bill, the Explanatory Note for which specifically referred to the overturn of *Davies*. Second, although there might be some merit to merely clarifying the Sentencing Act for it is more likely that Parliament's intent was to change the law.

Finally, the shift in language from a focus on whether someone has entitlements to whether someone has been paid is more consistent with the latter reading. This is also reflected in s 7 of the Amendment Act, which amends s 33 of the Sentencing Act. That section currently allows a court to order a reparation report on:

the extent to which the person who suffered the loss or damage is likely to be covered by entitlements under the Accident Compensation Act 2001

The amended section instead allows for a report on:

the amount or extent of compensation paid or payable under the Accident Compensation Act 2001 to the person who suffered the loss or damage in respect of that loss or damage

This unclear drafting is not ideal: we should not need to turn to Parliamentary materials or other parts of the legislation to shed light on an ambiguity. The section could have barred the award of reparation:

in respect of the proportion of any consequential loss or damage ... for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.

The following analysis proceeds on the assumption that this interpretation is correct.

EXAMINING THE CLASH

The overturning of *Davies* puts the majority of the Supreme Court at odds with the legislature (as well as the lower courts.) At the heart of the issue here is a clash between the majority's "social contract" account of the ACC scheme and the idea that an offender is responsible for putting right losses caused to a victim.

For the majority in the Supreme Court, this clash had already been resolved back in 1974 by the implementation of the ACC Scheme in the first place: full compensation for some gave way to fair compensation for all. Despite arising as a question about the interpretation of the Sentencing Act 2002, the issue in *Davies* had effectively already been decided.

In contrast, the lower courts, McGrath J in the Supreme Court, and the legislature, put corrective justice for victims of crime first. How are we to understand this schism?

One possible explanation for the split between the Supreme Court and the lower courts is that the latter were overly concerned with providing better outcomes to the victim of *Davies*' offending and somehow overlooked the philosophy of the scheme. This does not seem plausible, and in any case the same cannot be said for Parliament, who had full access to the majority's reasoning and, nevertheless, made a conscious decision to overturn the case.

The reversal of *Davies* could therefore be seen as an overturning of the "social contract" philosophy of ACC. Allowing reparation to top-up ACC entitlements means that victims of injury who also happen to be victims of crime (and happen to be victims of an offender with deep enough pockets to pay reparation) are better off than other victims of injury. Inconsistent treatment of victims of injury is one of the reasons we have the ACC scheme in the first place — but that is something of an oversimplification.

There is an important difference between the pre- and post- ACC compensation landscape. The ACC Scheme provides a baseline level of compensation for all victims of injury. A distribution where everyone receives fair compensation, and some full, is surely not as dire as a distribution where a few receive full compensation, many receive meager compensation, and some receive none at all. Perhaps McGrath J is right that topping-up ACC entitlements is not so bad after all. Indeed, the courts have decided that victims of injury are

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not barred from seeking exemplary damages (*Donselaar v Donselaar* [1982] 1 NZLR 81 (CA), affirmed in *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149) even though exemplary damages mean a minority of victims of injury can receive additional payments.

A further point to consider is that the Royal Commission whose Report led to the ACC scheme did not criticise only the outcomes produced by negligence actions for personal injury. The Commission also argued that the “fault principle” philosophy of negligence was “illogical”, stating that “it is really not possible to equate negligence as an independent tort with moral blameworthiness” (*Compensation for personal injury in New Zealand: Report of the Royal Commission of Inquiry* (1967) at 47–51). That is, the tort of negligence did not have sufficient moral backing to justify making the negligent tortfeasor pay compensation. Setting aside the validity of that argument, we must consider the matter afresh if we are instead talking about making criminal wrongdoers pay. Breaches of the criminal law might have a better claim to moral blameworthiness than civil acts of negligence, and proof of wrongdoing beyond reasonable doubt is required for a conviction. This could provide a justification for different treatment of civil and criminal wrongdoing that Elias CJ thought was lacking.

CONCLUSION

Davies is a breach of the ACC social contract, but only if we adopt the strong “social contract” account of the majority of the Supreme Court. A more relaxed conception of the philosophy of the ACC scheme, one which allows for some inconsistent outcomes between victims of injury as long as all receive adequate compensation, could account both for the overturning of *Davies* and the availability of exemplary damages for victims of injury.

The idea of the ACC social contract is a kind of origin myth — a sort of fairy tale to tell Torts students. Like most origin myths, it contains a grain of truth but should not be taken too seriously. The enactment of the ACC Scheme clearly involved political bargaining: for example, the lobbying by various groups, particularly unions, to include lump sum payments despite the Royal Commission's recommendation in favour of periodic payments. The passage of all but the most mundane of Bills results in some lobbying, yet we do not often elevate the result of the process to a “social contract”.

The idea that the scheme is an exchange for the right to sue implies that there is some worth and validity in the right to sue in the first place — otherwise, how could it be reasonable to demand something in exchange for giving it up? The Royal Commission, however, seems to have seen little merit in negligence actions for personal injury, and, I would suggest, saw their proposal as an outright replacement, rather than some kind of trade-in.

A further reason not to treat the scheme seriously as a “contract” is that the state has made a series of unilateral changes its scope — an action not normally available to a contracting party. The Accident Compensation Rehabilitation and Insurance Act 1992 made the scheme considerably less generous (some might even say it did not meet the ideal of “fair” compensation.) The Injury Prevention, Rehabilitation and Compensation Act 2001, despite referring to reinforcing the social contract in its “purpose” section (s 3), retained a number of the 1992 retrenchments.

With respect, the majority of the Supreme Court in *Davies* erred in taking the “social contract” account of the ACC scheme too seriously. The legislative reversal of *Davies* thus is not the overturning of a genuine “social contract” that ought to be protected by the law. It is a reminder that the ACC Scheme exists at the nexus of a number of different competing policy objectives, and that courts should not put one of those policies ahead of the others based on a “social contract” which is, upon close examination, illusory. □