

JUSTICE FOR VICTIMS OF INJURY: THE INFLUENCE OF NEW ZEALAND'S ACCIDENT COMPENSATION SCHEME ON THE CIVIL AND CRIMINAL LAW

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New Zealand's accident compensation scheme replaced compensatory damages for personal injury with a no-fault redistributive scheme. The central thesis of this article is that the scheme, and its influence on the civil and criminal law in New Zealand, can be better understood in terms of the interplay between corrective, retributive and distributive justice. The orthodox view that the scheme was an abandonment of the corrective and retributive justice for injury victims in favour of distributive justice is challenged, and it is argued that Parliament has a crucial role in deciding between conceptions of justice. Parliament's performance of that function is assessed, as is the performance of the Courts in terms of implementing statute law and developing the common law. Ultimately, the article concludes that the ACC scheme has had major unintended consequences, resulting from attempts to serve competing conceptions of a just outcome between causer and victim of injury.

A. Introduction

The introduction of New Zealand's accident compensation scheme (the "ACC"¹ scheme) meant the death of claims for compensatory damages for personal injury – "an unparalleled event in our cultural history, the first casualty among the core legal institutions of the civilized world."² This article explores the influence of ACC on the civil and criminal law in New Zealand.

Corrective justice, retributive justice and distributive justice can provide competing accounts of a just outcome for victims and causers of injury. Underpinning this paper is the idea that the scheme and its influence can be better understood by considering the interplay between these conceptions of justice. Pre-ACC personal injury actions to some extent served all three of these conceptions of justice.³ Abolishing damages for personal injury and replacing them with the redistributive ACC scheme was a significant step in the pursuit of distributive justice. The orthodox view is that the introduction of ACC was an abandonment of corrective and retributive justice in favour of distributive justice. I will argue that the law continues to pursue corrective and retributive justice for injury victims. I demonstrate this by identifying two areas of law, in statute and cases, where society continues to pursue corrective

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1 References to "ACC" in this paper generally mean the scheme, but may, as context requires, mean the Accident Compensation Corporation that administers it.

2 John G Fleming and Pablo Drobny "A Word from the Editors" (1973) 21 AJCL at xi.

3 By "served" I mean that personal injury actions could produce outcomes which provided "justice" in each sense – which is not to say that these outcomes were necessarily intended to pursue one sense of justice in particular. See the discussion of the distinction between performative function and purposive function in Allan Beever "The Law's Function and the Judicial Function" (2003) 20 NZULR 299.

and retributive justice for injury victims by providing compensation to injury victims and by responding to wrongdoing that causes injury.

As a consequence of showing that different conceptions of justice are still appropriate to pursue after ACC, the role of Parliament in clarifying when one conception trumps another becomes important, if not crucial. Thus it remains to assess Parliament's performance, and I will identify two areas where Parliament has failed to act clearly and consistently. It is also appropriate to consider the performance of the courts, in terms of the interpretation of legislation and the development of the common law.

Ultimately, I conclude that the ACC scheme has had major unintended consequences for the civil and criminal law in New Zealand. These consequences can be better understood by considering the scheme, and the developments that followed it, as being a result of attempts to serve different conceptions of a just outcome between victim and causer of injury.

B. Conceptions of Justice

1. Corrective justice

In the context of injury, corrective justice is concerned with wrongful losses inflicted by one person on another.⁴ In the context of law, it is the idea that liability rectifies the injustice inflicted by one person on another.⁵ For corrective justice, a just outcome following a wrongful loss inflicted by one person on another is that the wrongdoer puts right the loss he or she has caused, typically by a payment of compensation.

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 he or she has caused. Legal liability recognises that moral obligation and allows it to be enforced thereby ensuring that corrective justice is done. The pursuit of corrective justice thus presupposes 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.⁶

In relation to injured persons, corrective justice only provides an account of what ought to happen when a person suffers a loss due to an injury that was wrongfully inflicted by another person. A remedy involving a transfer from a defendant to a plaintiff may resemble corrective justice in form, but is not

4 In other contexts, corrective justice can be concerned with gain. See, for example, the discussion of unjust enrichment in cases of mistaken payments in Lionel Smith "Restitution: the Heart of Corrective Justice" (2001) 79 Tex L Rev 2115 at 2132–2135. That said, in the context of personal injury, corrective justice is concerned with loss and harm, not gain.

5 Ernest J Weinrib "Corrective Justice in a Nutshell" (2002) 52 UTLJ 349 at 349.

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

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 that defendant is better able to absorb the loss 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. However, 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 relevant to 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.

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.

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. The first concerns the extent to which an individual injury sufferer is alleviated of the burden of the injury, and the second concerning how that burden is then distributed across society.

Just 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. 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 of 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 on this there are a range of differing views reflecting a broad political spectrum.

4. These conceptions of justice can conflict

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:

- A just outcome in terms of corrective justice is when the wrongdoer puts right the loss caused by the injury;
- A just outcome in terms of distributive justice is when the victim is alleviated of some of the burden of their injury, based on the consistent application of the same criterion for alleviation of burden applied to all victims of injury; 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 in a single legal response. Corrective justice is achieved only if the loss is put right, so is not satisfied with a less than complete alleviation of the burden of injury that might satisfy distributive justice or retributive justice. Even if a distributive justice system were to alleviate the entire burden, corrective justice would not be satisfied because a broad re-distributive scheme does not effect justice as between the doer and sufferer of harm. Distributive justice is not satisfied if some injury victims are treated differently than others 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. Retributive justice will only coincide with corrective justice if the wrongdoer putting right any losses he or she has inflicted on another party also satisfies the desire for punishment and deterrence.

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.

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. As will be seen, the answers to these questions have changed over time.

C. Justice for Injury Victims Before ACC

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 failed to compensate a great many injury victims, so it was unsatisfactory in terms of distributive justice.⁷ 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 which can be challenging to describe as moral wrongdoing. The objective test also meant that a defendant could be held liable for a standard he or she 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.⁸

However, distributive justice could not provide the principled basis for the tort of negligence either, because the action still fell far short of actually

7 As long as one's conception of a just distribution of compensation demanded more than a lottery.

8 I must acknowledge the view that negligence was based on corrective justice and the developments I have discussed are consistent with corrective justice and should not be seen as a move towards the pursuit of distributive justice through tort law. See Allan Beever *Rediscovering the Law of Negligence* (Hart, Oxford, 2007). Even if it is not the case that the development of the independent tort of negligence brought the action to the point where it could not be justified in principle by corrective justice, the more important point here is that negligence was unsatisfactory in terms of distributive justice, and this led to ACC.

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 principled basis for the tort, because it was still poor at actually delivering better outcomes for victims.

D. A Brief History of ACC

The ACC scheme was introduced to address the position outlined above: society was increasingly demanding distributive justice for victims of injury, but the existing measures to assist victims of injury fell well short. As well as the civil law, injury victims could receive compensation from private insurance, and various statutory schemes: Social Security the Workers' Compensation Scheme, and the Criminal Injuries Compensation Scheme. Each of these schemes had significant limitations. Social Security was intended as a safety-net and provided means-tested assistance with basic needs rather than compensating actual losses.⁹ Workers' Compensation, in theory, paid compensation to workers injured at work at a level of eighty per cent of lost earnings.¹⁰ However, that compensation was subject to a statutory maximum that was not inflation adjusted and most workers received far less than eighty per cent of their lost earnings. The Criminal Injuries Compensation scheme provided compensation to injured victims of crime for lost earnings on a similar basis to Workers' Compensation.¹¹ That scheme also provided, on a similar basis to the common law, awards for pecuniary loss other than that caused by incapacity to work, and compensation for pain and suffering. Unlike the common law, these awards were subject to a statutory maximum. The scope of the Criminal Injuries Compensation Scheme was limited, since it could only assist injured victims of crime.

A Royal Commission of Inquiry was formed to consider how to improve this position. The resulting report,¹² usually known as the "Woodhouse Report" after its chairman Sir Owen Woodhouse, provided a cutting criticism of the status quo and a revolutionary vision of an alternative.

The Report's criticism of the status quo was twofold. Firstly, it criticised the manifestly unfair distribution of the burden of accidents. Secondly, it

9 Social Security Act 1938.

10 Workers' Compensation Act 1956.

11 Criminal Injuries Compensation Act 1963.

12 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for personal injury in New Zealand; Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967).

argued that the negligence action had departed from 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 was 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: to replace all the existing measures of compensation with a comprehensive scheme available to all victims of injury, which paid compensation based on actual losses.

The ACC scheme commenced operation on 1 April 1974, after the Accident Compensation Act 1972 (“the 1972 Act”) came into force. The Act provided cover for “personal injury by accident” which was not exhaustively defined.¹³ Entitlements payable included compensation for lost earnings, based on eighty per cent of pre-injury earnings, treatment, rehabilitation, and lump sum compensation for permanent impairment and mental suffering. The statute barred proceedings arising “directly or indirectly” for personal injury by accident covered by the scheme.¹⁴

The scheme has had numerous statutory revisions over the years, including changes to almost every aspect of the scheme, from its funding to the scope of cover and the detail of entitlements. The most significant changes for present purposes came with the Accident Rehabilitation Compensation and Insurance Act 1992 (“the 1992 Act”). Following New Zealand’s general election in 1990, a new right-wing government came into power. The 1992 Act was a response to public perceptions that the scheme had become expensive, and that the courts had expanded cover of the scheme too far. The statutory language of the 1992 Act was prescriptive, in contrast to the original legislation which allowed a lot more room for discretion. The 1992 Act was less generous both in terms of the scope of what the scheme covered, and what entitlement were payable. Lump sum compensation for permanent impairment was replaced by periodic payments at a much less generous rate, and lump sum compensation for pain and suffering was done away with entirely.

Underlying the Act, and hinted at by the reference to “insurance” in its title, was a different philosophy of the 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. In changing the funding of the scheme, the government responded to employers who had 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 community taking responsibility for its injured citizens, not as a series of insurance policies to

13 Accident Compensation Act 1972, s 2.

14 Accident Compensation Act 1972, s 5(1).

individuals. The right-wing take on the ACC scheme was taken even further by the Accident Insurance Act 1998 (“the 1998 Act”), which partially privatised the scheme. The period of privatisation was short-lived though, since the left came back into power in 1999 and almost immediately re-nationalised the scheme.¹⁵

The left then provided a new principal Act: the Injury Prevention, Rehabilitation and Compensation Act 2001 (“the 2001 Act”).¹⁶ 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, and the removal of any reference to “insurance” in its title, 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. 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. The 2001 Act retained the more narrow prescriptive definition of cover. Although lump sum compensation was re-introduced, lump sum compensation for pain and suffering was not. If the original scheme was overly generous, and the 1992 scheme was overly concerned with cost, the reference to a “fair and sustainable” scheme in the purpose section perhaps suggests that the 2001 Act was intended to achieve a balance between the two.

E. The Justice of Compensation

Compensation is the primary function of the civil law, and can serve both distributive justice (in terms of achieving the desired distribution of the burden of accidents) and corrective justice (in terms of a defendant correcting a wrongful loss). The ACC scheme serves distributive justice for all injury victims. However, the bar on proceedings for personal injury means that the civil law cannot serve corrective justice for injury victims.¹⁷

15 Accident Insurance Amendment Act 2000 and Accident Insurance (Transitional Provisions) Act 2000.

16 Following the Accident Compensation Amendment Act 2010, the 2001 Act is now the “Accident Compensation Act 2001”.

17 “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.

Sir Geoffrey Palmer wrote in 1994 that the ACC scheme represented a decision to sacrifice corrective justice for distributive justice and declared:¹⁸

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 reparation, a payment from the offender to the victim which a court was required to award unless it was inappropriate to do so.¹⁹ Later, the Sentencing Act 2002 introduced a stronger presumption in favour of reparation²⁰ and allowed for awards of reparation for a greater range of losses.²¹

Clearly, Parliament is responding to a public demand for corrective justice, evidenced by the results of the citizens-initiated²² justice referendum in 1999²³

18 Geoffrey Palmer "New Zealand's Accident Compensation Scheme: Twenty Years On" (1994) 44 UTLJ 223 at 247–253.

19 Criminal Justice Act 1985, s 22 introduced the sentence of reparation, which originally was only available for damage to property and did not extend to consequential losses. Section 11 stated that a sentencing Court was required to impose a sentence of reparation unless it was satisfied that it was inappropriate to do so. Reparation for emotional harm, which was available in cases of injury, was introduced in 1987.

20 Sentencing Act 2002 under s 12 a sentencing court must impose a sentence of reparation 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, s 12(3) requires a court which does not award reparation to give reasons for doing so.

21 Sentencing Act 2002, s 32(1)(c) allows for reparation for "loss or damage consequential on any emotional or physical harm or loss of, or damage to, property".

22 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.

23 A citizens initiated referendum held alongside the 1999 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", with an 83 per cent turnout. Electoral Commission "1999 General Election – Return of Citizens Initiated Referenda Poll Votes – Reform of the Criminal Justice System" (1999) Electoral Commission website

and submissions to the 2007 Inquiry into Victims Rights.²⁴ 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. However, it does not follow that New Zealand had no great fondness for corrective justice, only that New Zealand had no great fondness for the tort of negligence.²⁵

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.

Like compensatory damages in the civil law, awards of reparation in the criminal law can serve distributive justice as well as corrective justice.²⁶ Like the tort of negligence did with victims of injury, reparation provides inconsistent outcomes to victims: not all crimes result in a conviction, and not all convicted offenders can pay. Even after the stronger presumption in favour of reparation introduced in the Sentencing Act 2002, reparation was not often awarded,²⁷ the most common reason being that the offender was unable to pay.²⁸ Like the tort of negligence, these inconsistent outcomes resulted in a legislative response: the offender levy scheme.

The offender levy scheme was introduced by an amendment to the Sentencing Act 2002.²⁹ The scheme collects revenue by applying a levy of \$50 to all offenders, and the funds are used to provide various services to victims approved by the Secretary for Justice. Thus far, the government has chosen to

<http://electionresults.org.nz/electionresults_1999/e9/html/e9_partXIV.html>. The election itself had a turnout of 85 per cent.

- 24 Justice and Electoral Committee *Inquiry into Victims’ Rights* (Government Printer, Wellington, 2007) at 5, which 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.”
- 25 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.
- 26 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.
- 27 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).
- 28 Ministry of Justice *The Sentencing Act 2002: Monitoring the First Year* (Wellington, 2004) at 30.
- 29 Sentencing (Offender Levy) Amendment Act 2009.

focus the funding on victims of serious crime,³⁰ so the offender levy assists only a small subset of victims of crime.

One of the services funded by the offender levy scheme is funeral grant top-ups to families of victims of homicide. The families of victims of accidents are entitled to a grant from ACC to assist with funeral costs, and the families of victims of homicide (which is covered under the scheme) receive an extra grant.

Although the services to victims provided by the offender levy scheme are funded by offenders, the scheme cannot draw on corrective justice as a justification. 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.

The previous legislative response to inconsistent outcomes for victims of crime was the 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.³¹ In 2009, over thirty years later, a new scheme to address the inconsistent compensation to victims of crime was introduced. The existence of both schemes suggests that there is some political will for injured victims of crime to receive assistance from the state in addition to that received by other injury victims. It is difficult to justify in principle why some victims of injury should receive more assistance than others because they happen to have been victims of crime.³² Corrective justice can provide no justification for the criminal injuries compensation scheme – so we are left in the somewhat uneasy position where political will has lead legislators to establish a scheme with no clearly principled basis.

I suggest that we can conclude that the principle that people who suffer personal injury from the culpable behaviour of another ought to have a remedy in the courts has not fallen out of favour, nor has it been completely abandoned in favour of the distributive justice of ACC. Instead, it has found a new home in the criminal law.

30 Ministry of Justice “Additional support for victims of serious crime” (2011) Ministry of Justice website <<http://justice.govt.nz/policy/supporting-victims/new-entitlements-and-services-for-victims-of-serious-crime/>>.

31 Accident Compensation Amendment Act 1974.

32 See New Zealand Law Commission *Compensating Crime Victims* (NZLC IP11, 2008) at 324, Peter Duff “The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog’s Dinner?” (1998) 18(1) OJLS 105 and Andrew Ashworth “Punishment and Compensation: Victims, Offenders and the State” (1986) 6 OJLS 86.

F. Response to Wrongdoing after ACC

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. Let us 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.³³

Following *G v Auckland Hospital Board*,³⁴ 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.

In *Donselaar v Donselaar*,³⁵ the Court of Appeal found that while compensatory and aggravated damages were barred for injury victims following the introduction of the ACC scheme, exemplary damages could be awarded to fulfil the traditional function of exemplary damages: punishing outrageous wrongdoing. Thus, 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

33 Aggravated damages to compensate the victim because of the advertent aspect of the wrongdoing and exemplary damages to punish the wrongdoer.

34 *G v Auckland Hospital Board* [1976] 1 NZLR 638 (HC).

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

wrongdoing, albeit a more limited one since the civil law can only reach injury-causing advertent wrongdoing if it is outrageous.

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 personal injury by awards of compensatory damages. Following *McLaren Transport v Somerville* in 1996,³⁶ 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*,³⁷ the majority of the Court of Appeal found that exemplary damages should be restricted to advertent wrongdoing, and in *Daniels v Thompson*³⁸ 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,³⁹ it was restored by a majority of the Supreme Court in *Couch v Attorney-General*.⁴⁰ 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.⁴¹ Similarly, various motor vehicle offences penalise departure from an objective standard of driving.⁴² 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

36 *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 (HC).

37 *Bottrill v A* [2001] 3 NZLR 622 (CA).

38 *Daniels v Thompson*, [1998] 3 NZLR 22 (CA), see below page 34 at “H. Assessing the Performance of Parliament”.

39 *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721.

40 *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149.

41 The Health and Safety Act 1992 imposes various obligations on employers, primarily an obligation at s 6 to take “all practicable steps to ensure the safety of employees while at work”.

42 For example Land Transport Act 1998, s 8 imposes a duty on drivers not to be careless.

provision.”⁴³ 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 v Attorney-General*,⁴⁴ 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 nominal⁴⁵ and aggravated⁴⁶ damages. In *Simpson v Attorney-General*,⁴⁷ 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 v Attorney-General*⁴⁸ 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 Ombudsmen Act 1975, an Ombudsman can investigate administrative acts, decisions or recommendations,⁴⁹ but this does not easily encompass the issue of systemic fault causing injury.

The facts of the *Couch* case illustrate the problem here. 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.

43 *Daniels v Thompson*, above n 38, at 19.

44 *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA) at [75].

45 *Re Chase* [1989] 1 NZLR 325 (CA).

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

47 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA).

48 *Wilding v Attorney General* [2003] 3 NZLR 787 (CA).

49 Ombudsmen Act 1975, s 13(1).

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 Mt Wellington-Panmure Returned and Services' Association ("RSA") Club. In 2003, Mr Bell robbed the Mt-Wellington-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 Ms Couch survived with serious injuries.

Ms Couch brought proceedings in negligence against the Department of Corrections, arguing that the Department had a duty to warn staff at the Mt Wellington-Panmure RSA, and had failed in its duty to supervise Bell. A majority of the Court of Appeal struck out her negligence claim on the basis that there was no prospect of establishing such a duty on the part of the Department.⁵⁰

The Supreme Court found that the striking out of the claim was premature; that a finding that the Department owed a duty of care to Ms Couch had been ruled out too early.⁵¹ If such a duty was recognised, then Ms Couch's injuries could potentially be regarded as resulting from a breach of that duty due to systemic negligence – as opposed to advertent wrongdoing – on the part of the Department of Corrections. However, the only way to address that negligence would be an award of exemplary damages. A majority of the Supreme Court later found that exemplary damages are available in negligence actions only in cases of advertent and outrageous carelessness.⁵² So, the civil law provides no response if the Department was negligent but not advertently and outrageously so.

The legislation available to protect against inadvertent wrongdoing is not of assistance here. 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.⁵³ 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 also 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".⁵⁴ 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*,⁵⁵ and taken up in minority judgments by Thomas J in *Bottrill*⁵⁶ and later *Daniels*

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

51 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

52 *Couch v Attorney-General*, above n 40.

53 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".

54 HSE Act 1992, s 15.

55 *Donselaar v Donselaar*, above n 35, at 107.

56 *Bottrill v A* [2001] 3 NZLR 622 (CA).

v Thompson,⁵⁷ and most recently by Elias CJ in her dissent in *Couch*.⁵⁸ Developing exemplary damages to serve that purpose would mean a fundamental change to the kind of conduct that exemplary damages typically addressed and would attract traditional criticisms of exemplary damages relating to punishment in the civil law and the anomaly of the windfall to the plaintiff. Despite a 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.⁵⁹

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.⁶⁰ 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 important, and the HSE Act 1992 could potentially provide a model: a duty could for example be imposed on 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.⁶¹ The meaning of “all practicable steps”, like the concepts of duty of care and reasonable care in negligence law, has room for flexibility. This could allow the courts to develop the offence in such a way 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

57 *Daniels v Thompson*, above n 38.

58 *Couch v Attorney-General*, above n 40.

59 When the judiciary took a restrictive position on exemplary damages in *Daniels v Thompson*, above n 38, it was rejected by the legislature, see below at 34 “H. Assessing the Performance of Parliament” – we have yet to see whether *Couch*, above n 40, provokes a legislative response.

60 Indeed, in *Couch* above n 40, at [258] Wilson J mused that if exemplary damages were being newly introduced, there is an argument that the award should be paid to the state, like a fine.

61 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 44, at [122].

be insufficient to justify the expense of a trial if there is no effective punishment or deterrent.

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 Tragedy⁶² and the Royal Commission of Inquiry into Building Failure Caused by the Canterbury Earthquakes.⁶³ The ACC scheme arose out of the Woodhouse Report which was the culmination 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.

G. Resolving Conflicts of Justice after ACC

I have stated that the proper way to resolve conflicts between the competing conceptions of justice at play here is through the democratic process. 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. It is clear that the distributive justice philosophy of the architects of the first Accident Compensation Act differed from that of those responsible for the Accident Rehabilitation Compensation Insurance Act 1992, and for that matter the philosophy of the Woodhouse Commission.

Further, the law's approach to resolution of conflicts between the distributive justice of the scheme, and corrective and retributive justice, has changed over time. Two particular interactions illustrate this: the relationship between ACC and reparation, and the scheme's treatment of injuries caused during serious criminal offending.

1. Topping-up ACC entitlements with reparation

The sentence of reparation involves a payment from the offender to victim and serves corrective justice. This treatment cannot fit with distributive justice because some injury victims receive additional compensation simply because they are also victims of crime. This clash was considered in the case of *Davies v Police*,⁶⁴ where the Supreme Court addressed whether reparation could be awarded for the 20 per cent of lost earnings that the ACC scheme provides no compensation for.

A majority in the Supreme Court 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

62 See "The Pike River Royal Commission" (2011) <<http://pikeriver.royalcommission.govt.nz/>>.

63 See "The Canterbury Earthquake Royal Commission" (2011) <<http://canterbury.royalcommission.govt.nz/>>.

64 *Davies v Police* [2008] NZSC 4, [2009] 3 NZLR 189.

wrongdoers.⁶⁵ The majority also stressed 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.”⁶⁶ The minority view was that the practice of topping-up ACC entitlements with reparation was inconsistent with aspects of the philosophy of the ACC scheme, but that had to be weighed against the purpose of the Sentencing Act, which included providing for the interests of victims of crime.⁶⁷

Until *Davies* reached the Supreme Court, it was common for courts to award reparation topping-up ACC entitlements. The High Court⁶⁸ and Court of Appeal⁶⁹ both had no objection to the practice. The Court of Appeal’s decision is six pages long, and reveals no suggestion of the dire clash of philosophy that concerned the majority of the Supreme Court.

It seems that *Davies* will not be the final word on this issue, as the Government has introduced a Bill that would overturn the decision.⁷⁰

2. Withholding entitlements from offenders

The Accident Compensation Act 1972 did not distinguish between accidents suffered during lawful acts and accidents suffered during the commission of criminal acts. This is entirely consistent with a distributive justice philosophy of consistent treatment for all victims of injury. However, retributive justice holds that wrongful acts should receive a response, and limiting a wrongdoer’s access to entitlements under the ACC scheme is one way of achieving this. However, the public became dissatisfied with the idea that criminals could receive compensation for injuries suffered while committing crimes⁷¹ (or, at least, legislators considered that the public held this view⁷²). This led to a new

65 See “1. Inconsistent understandings of the scheme” at page 22 for further discussion of the “social contract” philosophy of ACC.

66 *Davies v Police*, above n 64, at [48].

67 At [81] per McGrath J.

68 *Davies v Police* (2007) 8 NZELC. 98,691 (HC).

69 *Davies v Police* [2008] 2 NZLR 645 (CA).

70 Victims of Crime Reform Bill 2011, cl 46. The explanatory note to the Bill explicitly states that the intention is to overturn the Supreme Court’s decision in *Davies*. At the time of writing, the Bill has passed its first reading and is being considered by the Justice and Electoral Committee.

71 In New Zealand reference is sometimes made to ACC paying compensation to offenders injured while evading capture as the archetypal example of when it is appropriate to withhold compensation. This scenario has actually happened at least twice. In 1982 a prisoner was injured while escaping prison, although the prisoner in question was never charged, convicted or sentenced for the escape (see (14 October 2004) 620 NZPD 15184). In 2007, a convicted murderer had a leg amputated after he was shot by police who were pursuing him after he breached parole. (*R v Burton* HC Wellington CRI-2007-085-736, 3 April 2007).

72 The Government Cabinet/Caucus Committee Report *The New Zealand Accident Compensation Scheme: A Review* (October 1980) stated at 13 that “[t]here is clearly a strong public feeling that injuries received in the course of and as a result of committing certain crimes should not come under the umbrella of comprehensive entitlement.” During the

provision under the Accident Compensation Act 1982 which allowed the Corporation to withhold entitlements from an offender injured during the commission of a serious criminal offence, if providing entitlements would be “repugnant to justice”.⁷³

The idea that payment of compensation for an accidental injury could be “repugnant to justice” seems alien to the distributive justice philosophy of the scheme. However, the sentiment behind this new provision was not entirely alien to the common law. It is reflected in the maxim of “ex turpi causa non oritur action” or “no right of action arises from a shameful cause”.⁷⁴ The Court of Appeal discussed the meaning of the phrase “repugnant to justice” in *ACC v Curtis*,⁷⁵ and found that the principled basis for overriding the no-fault philosophy of the ACC scheme was concerned with “community responses to serious criminal offending.”⁷⁶ 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 objectives of justice” – primarily retribution, but also condemnation, deterrence and reparation.⁷⁷

The purpose of the “repugnant to justice” provision is therefore to set out a test for when the conflict between retributive justice and distributive justice should be resolved in favour of retribution. It is a clear rejection of the idea that compensation should only be governed by distributive justice, and shows that retributive justice has enough political value to override the philosophy of the scheme, but only in cases where compensation would be especially offensive to retributive justice.

The “repugnant to justice” test remained in place until 2010, when it was replaced by a stricter provision.⁷⁸ The new provision raised the threshold of seriousness of the offence required⁷⁹ and replaced the “repugnant to justice” test for withholding entitlements with a presumption that entitlements would

introductory speech for the Bill that, after amendment, became the Accident Compensation Act 1982, the Minister of Labour repeated the sentence quoted above and stated that “[i]t is considered that the public should not be called on to compensate the authors of their own misfortune when relatively serious criminal activity is involved.” 435 NZPD 4799.

73 Accident Compensation Act 1982, s 92. The section required that offence be serious enough that the offender was sentenced to imprisonment. The Corporation could withhold compensation payments and rehabilitation but not treatment.

74 The purpose of this principle is not to protect a defendant from the consequences of their conduct but in an appropriate case to withhold relief from an undeserving plaintiff. The scope of the principle remains disputed and its application is uncertain, see Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 1020–1021.

75 *ACC v Curtis* [1994] 2 NZLR 519 (CA).

76 At 525.

77 At 525. The reference to “reparation” is odd since withholding ACC entitlements does not seem to provide any reparation to the victim.

78 Accident Compensation Amendment Act 2010, s 13.

79 Accident Compensation Act 2001, s 122. The original section required that the offender was sentenced to imprisonment. The amended section required that the offender was sentenced to imprisonment or home detention, and in addition required that the offence was punishable by a maximum term of two years or more.

not be paid.⁸⁰ This presumption is subject to a discretion by the Minister for ACC to allow entitlements to be paid if “there are exceptional circumstances relating to the claimant.”⁸¹ The strictness of the new provision in contrast to the previous legislation reflects an ideology that sees criminal wrongdoing in terms of personal responsibility rather than as a social problem.

3. *The consequences of leaving these questions of justice to the political system*

Leaving the question of which distributive justice criterion ought to underpin the scheme to be determined by the political process leads to continual changes in the scheme’s scope and funding because the idea of what is a just distribution of the cost of accidents varies over time. The resulting conflicts between the scheme and corrective or retributive justice leads to inconsistent treatment of different injury victims. These consequences are necessary evils and are preferable to the alternative, which is to adhere to a particular ideal as just for injury victims, notwithstanding that that ideal may once have been accepted in New Zealand’s history but no longer is. Distributive justice cannot always trump corrective and retributive justice. 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.

H. *Assessing the Performance of Parliament*

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 the current popular concept of what is just 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. In implementing its political policy, Parliament should enact legislation that demonstrates that policy, to guide the Courts. If a principle is to be adopted, it should be applied consistently. Let us consider two incidents in the history of ACC where Parliament has failed to do these things.

First, there is the legislative overturn of *Daniels v Thompson*.⁸² The decision concerned the relationship between exemplary damages and the criminal law. A majority of the Court of Appeal found that the civil law should defer to the criminal in matters of punishment.⁸³ *Daniels v Thompson* was

80 As with the earlier version of the section, there is no provision to withhold treatment.

81 Accident Compensation Act 2001, s 122A. The legislation gives no guidance as to what might qualify as exceptional circumstances.

82 *Daniels v Thompson*, above n 38.

83 The majority view sees the function of exemplary damages as to punish and deter outrageous wrongdoing. This function overlaps with the criminal law. Where criminal sanctions have already been applied, it would be double punishment to impose a further penalty by an award of exemplary damages. Where a person has been acquitted, it is undesirable to re-litigate the same facts for the purpose of punishment. 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

overturned by a provision of the 1998 Act, providing that a criminal conviction or acquittal did not prevent a court awarding exemplary damages.⁸⁴

If there was a principled basis for this provision, it certainly is not clear from the legislation.⁸⁵ The legislature's conception of the proper purpose of exemplary damages is not at all clear – all that is clear is that the thinking of the majority in *Daniels v Thompson* was rejected. 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 this legislative action, it is not really possible for the courts to reform exemplary damages without risking contradicting that rationale. Perhaps this leaves the legislature responsible for cleaning up the somewhat confused position of exemplary damages in New Zealand.

The second example of the legislature acting inconsistently with principle is 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 in cases of physical, as did the original ACC scheme. The original ACC scheme was more generous, and also provided compensation on the same basis 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 began to appear elsewhere in the law: the criminal law began to provide reparation for emotional harm in 1987,⁸⁶ and since then various legislative measures have allowed for compensation for mental suffering in a number of different contexts involving fault,⁸⁷ 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."⁸⁸

Lump sum compensation for mental suffering was removed from the scheme because of concerns over cost. These later developments impose that

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.

84 Accident Insurance Act 1998, s 396.

85 Or from the legislative debate: see Allan Beever "The Future of Exemplary Damages in New Zealand" (2010) 24 NZULR 197 at 217–218.

86 Criminal Justice Amendment Act 1987, s 2.

87 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)).

88 John Smillie "Exemplary Damages for Personal Injury" [1997] NZ L Rev 140 at 152.

cost on parties considered to be at fault. Yet, 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.⁸⁹

Cost to the community provides a justification for limiting compensation – but does 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 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.

Although I argue that the choice of which principle should govern the ACC scheme is the proper domain of Parliament, this does not justify legislation with no clear principled basis. The legislative repeal of *Daniels v Thompson* was an unhelpful step and has left the law of exemplary damages in New Zealand in a muddled state. Similarly, the inconsistent position regarding lump sum compensation for mental suffering is open to criticism. This appears to be the result of ad hoc lawmaking rather than a deliberate principled policy choice.

1. Assessing the Performance 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 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.

I have already mentioned that the Government has introduced legislation to overturn *Davies*, suggesting that the majority of the Supreme Court gave too

89 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. Furthermore, as the Woodhouse Report, above n 12, recognised at 50, insurance provides an additional mechanism whereby costs initially imposed on parties found to be at fault are spread across the community.

much weight to their conception of the social contract philosophy of the ACC scheme and did not fully consider the corrective justice/compensatory role of today's criminal law.⁹⁰ The legislative overturn of *Daniels v Thompson* suggests an additional difference of views over the function of exemplary damages.⁹¹

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 and as 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 illness⁹² and injuries caused by intentional torts.

The first approach is exemplified by decisions like *Wallbuton*⁹³ and *ACC v Mitchell*,⁹⁴ which extended cover to illness-related conditions, and *G v Auckland Hospital Board*,⁹⁵ which found that an injury caused by an intentional tort was an “accident” and covered by the scheme. These cases all adopted an approach developed in English workers’ compensation decisions⁹⁶ that what is an “accident” is to be considered from the point of view of the victim. Thus, a back injury to an already-diseased spine caused by bending over (*Wallbuton*), the death of an infant who stopped breathing during a sleep apnoea attack (*Mitchell*) and a rape (*G v Auckland Hospital Board*) were all regarded as accidents, since they were unlooked for from the point of view of the victim.

The second approach is exemplified by Cooke J’s comment in *Donselaar*⁹⁷ 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*⁹⁸ 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.

90 See above page 17 at “1. Topping-up ACC entitlements with reparation.”

91 See above page 20 at “H. Assessing the Performance of Parliament”.

92 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.”

93 *Wallbuton v ACC* [1983] NZACR 629 (HC).

94 *ACC v Mitchell* [1992] 2 NZLR 436 (CA).

95 *G v Auckland Hospital Board*, above n 34.

96 In particular, Lord Diplock’s comments in *Jones v Secretary of State for Social Services* [1972] 1 AC 944 at 980.

97 *Donselaar v Donselaar*, above n 35, at 104.

98 *Willis v Attorney-General* [1989] 3 NZLR 574 (CA) at 5–6.

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.⁹⁹ Holland J used Cooke P's comments in *ACC v F*¹⁰⁰ 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.¹⁰¹

Later, the higher courts appeared to prefer the idea that the ACC scheme should be understood as a social contract: the scheme is not merely a replacement for negligence, but was received in *exchange* for giving up the right to sue. As the Court of Appeal put it in *Wilding*:¹⁰²

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 runs as follows: 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. The right to sue for compensation was exchanged for the right to claim under the scheme. So, any return to a situation that makes compensation available to some victims of

99 For example, in *JRB v ARCIC* DC Wellington 42/98, 18 March 1998 and *Estate Black v ARCIC* 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.

100 *ACC v F* [1991] (HC) 1 NZLR 234. The case concerned whether one person could receive cover for their own mental consequences resulting from an accident suffered by another 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. Approaching this case from the point of view of F as a victim, his wife's injury was surely an unlooked for misfortune and on that basis an "accident". However, Holland J's finding that Mr F was not covered by the scheme does make sense if considered in the context of the scheme being a replacement for negligence, because, as a secondary victim, Mr F may well not have been able to succeed in a claim for his mental injury (see the discussion on secondary victims in *The Law of Torts in New Zealand*, above n 74, at 187–199).

101 For example, *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) (injury to foetus causing stillbirth was injury to mother), *ACC v D* [2008] NZCA 576 (unwanted pregnancy following failed sterilization not an injury (overturning *ACC v D* [2007] NZAR 679 (HC)) but later overturned by *Keith Allenby v H* [2012] NZSC 33.

102 *Wilding*, above n 48, at [11] (emphasis added).

injury and not others undermines the exchange. Furthermore, 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 contract philosophy was used to justify the finding in *Queenstown Lakes District Council v Palmer*¹⁰³ that the civil law would expand when the scheme was drawn back. The majority of the Supreme Court in *Davies*¹⁰⁴ reasoned that the social contract meant that reparation should not top up ACC entitlements and provide full compensation. And 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 in New Zealand.¹⁰⁵

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 NZBORA¹⁰⁶ and the criminal law.¹⁰⁷ If the scheme is an exchange for the right to sue for compensation then *Re Chase*,¹⁰⁸ where the Court of Appeal found that the bar on proceedings for personal injury extended to nominal damages, 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.¹⁰⁹ 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

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

104 *Davies v Police*, above n 64.

105 For example, Tipping J in *Couch v Attorney-General*, above n 40, [108] opined that "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".

106 *Wilding v Attorney General*, above n 48.

107 *Davies*, above n 104. 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.

108 *Re Chase*, above n 45.

109 *Donselaar v Donselaar*, above n 35, affirmed in *Auckland City Council v Blundell* [1986] 1 NZLR 732 (CA), and recently in *Couch*, above n 40.

Supreme Court in *Couch*, which included four members of the same Court that sat in *Davies*,¹¹⁰ 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.¹¹¹

The courts have thus been 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 branches of government 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. Political bargaining affected the content of the first Accident Compensation Act. The Report had not recommended compensation in the form of lump sums, or compensation for mental suffering, but they were ultimately included in the legislation after lobbying by various groups, particularly the unions. 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 purpose of the 2001 Act refers to reinforcing the social contract of the first scheme,¹¹² that Act retained a number of the retrenchments effected by the 1992 Act, including the removal of compensation for mental suffering.

*ACC v Mitchell*¹¹³ and *ACC v F*¹¹⁴ probably extended the scheme beyond what the legislators intended by taking a particularly generous approach to the meaning of "personal injury by accident." Following their election in 1990, the National government certainly claimed that judicial decisions had extended the scheme's boundaries beyond what was originally intended.¹¹⁵ 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.

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

110 Elias CJ, Blanchard, Tipping and McGrath JJ.

111 *Couch v Attorney-General*, above n 40, at [86].

112 Accident Compensation Act 2001, s 3.

113 *ACC v Mitchell*, above n 94.

114 *ACC v F*, above n 100.

115 Hon W F Birch *Accident Compensation: A Fairer Scheme* (Wellington, Department of Labour, 1991) at 8.

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”¹¹⁶ did not say that compensation for injury was a proper function of exemplary damages.

The courts have failed to develop a widely-accepted jurisprudence of exemplary damages in New Zealand following the introduction of the ACC scheme, and the issue has generated a series of inconsistent judgments. The most recent example of this is the Supreme Court in *Couch*, where the Court displayed attitudes towards the legitimacy and function of exemplary damages ranging from enthusiastic support¹¹⁷ to discomfort.¹¹⁸ 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*¹¹⁹ provided an opportunity for the Court of Appeal to ensure that the common law could continue to vindicate common law rights post-ACC. The House of Lords recently considered nominal damages in *Ashley v Chief Constable of Sussex Police*,¹²⁰ a case with “strikingly similar”¹²¹ 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.¹²² The majority of the House of Lords ensured that the English civil law continues 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.

116 *Daniels v Thompson*, above n 43, at 71.

117 *Couch v Attorney-General*, above n 40, at [4] per Elias CJ who spoke of “the vitality of the exemplary principle in meeting the needs of modern New Zealand society”.

118 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.

119 *Re Chase*, above n 45.

120 *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962.

121 At [131], per Lord Neuberger.

122 At [81]. Lord Carswell thought that “the civil courts exist to award compensation, not to conduct public inquiries [or] provide explanations”. 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”.

The introduction of the ACC scheme has been a catalyst for questions about the function of the post-ACC civil law. The differing views expressed by different Judges about the role of exemplary damages in New Zealand can be attributed to a failure to agree over the role of retributive justice in the civil law. The Court of Appeal's decision in *Re Chase* follows from taking a particular view on the civil law, one where the function of the civil law is confined to compensation and does not allow for vindication.¹²³

J. 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 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.

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 expect 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.¹²⁴

123 *Couch* gave the Supreme Court an opportunity to revisit the decision on nominal damages in *Re Chase*, but the opportunity was not taken.

124 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.

Acknowledgements

I would like to acknowledge the support of the University of Otago Graduate Research Committee, by means of the University of Otago Postgraduate Publishing Bursary (Master's). I would also like to thank the anonymous NZULR reviewer for several helpful suggestions.

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