

Took away common law action of torts to sue

s317 bar: statutory bar

- Torts pre-ACC was seen as a form of lottery with inconsistent solutions and meagre compensation; a fragmented and capricious response to a social problem
- Real aim of tort law is for people to be compensated and rehabilitated

The Woodhouse Report, five guiding principles:

1. Community responsibility: everyone accepts responsibility

- Idea that society as a whole benefits from the productive labour of other people.
- If people out of labour force = detriment of us.
- Society as a whole wants them completely rehabilitated to benefit the community.
- Modern lifestyle extremely risky = statistically certain that humans will make mistakes, can think of accidents as a type of disease.
- Want people to do risky things (builders at RH) = society as a whole should bear the cost "in the national interest"

2. Comprehensive entitlement

- All injured persons should receive compensation regardless of the causes that gave rise to their injuries
- Doesn't matter how you got injured, not just supporting workers but everybody

3. Complete rehabilitation: not just handing out money

- Real measure of money compensation for losses
- But also measures to urge forward the physical and vocational recovery (maximum recovery in the minimum amount of time)

4. Real compensation: relative to income (80%)

- In modern conditions a compensation system of the type under discussion should rest upon a realistic assessment of actual loss, followed by a shifting of that loss on a suitably generous basis

5. Administrative efficiency: compared to tort inefficiency

- System will be eroded if benefits are delayed, inconsistently assessed, or economically wasteful

Why have tort law as opposed to ACC?

- Deterrence
- Ombudsman:
- Educator: learning moral lessons from being held liable.
- Issue: people not compensated all the time.
 - o Henderson: **Common law tort system never purported to address all unexpected financial hardships of individuals**
 - Tort law never set out to compensate victims of misfortune
 - True objective of tort law is the enhancement of social utility and shared notions of fairness, NOT compensation
 - So new focus on no-fault compensation system could only be justified if it ignores fundamental arguments about the purpose of tort law
 - o Woodhouse: it is the outcome that matters regardless of cause

Opinions?

Palmer:

Likes it, likes idea of community responsibility

- But says it replaces one lottery for another
 - Lottery of the court, now lottery of whether your injury is caused by accident or disease etc.
- Legislation is poor, doesn't actually follow Woodhouse's recommendations

Henderson:

- Critical
 - Doesn't acknowledge that the purpose of tort is not to compensate everyone
 - Tort is based on deterrence, substantive fairness etc
 - This is just social welfare
 - ACC doesn't cover what torts did
 - But ACC actually has a different purpose, which is public well-being, community responsibility, social contract.

Gaskin:

- Likes it, likes the ecological approach to proceedings, not individualised
- Instead of looking at fault, acknowledges that there could be other social reasons for accidents/harm etc.

Illness vs. Accident

- Illness not covered: as random with no clearly attributable fault; and were too expensive to provide for (promise to Parliament that introducing ACC would equal cost of Court proceedings)
 - Argument that as a person could never sue for illness under tort law
 - Exception of illness linked to workplace
- Issues: preferential treatment for accident sufferers
 - Overarching point of ACC is to rehabilitate people back into the workforce; seems unfair to prioritise accident sufferers.
 - **Henderson** took issue with this: the proposers of ACC argued that tort law was fault and needed replacement, ironic that they didn't improve it
 - **Community responsibility**: idea of looking out for everyone, does this undermine?
 - **Social contract**: people gave up the ability to sue in order to get ACC, should be receiving something really fundamental in return, arguably the Govt broke their end of this social contract
- Yet, letting perfect be the enemy of good: some positive difference rather than nothing, is the argument enough to warrant scrapping the entire system?

Deterrence

- ACC allocated \$34m to 'injury prevention'
- Deterrence: individual (personally having to pay and subsequently deterred from engaging in future) and general (seeing someone else suffering consequences and being deterred from that behaviour)
- Tort system curbs risky behaviour
 - **Henderson** argued that deterrence was the most important feature of tort law, as it stops people from doing risky activities due to the economic risk of having to pay, ACC would not deter but encourage
 - Also that those who don't partake in the risky behaviour now bear the cost of it, which seems inequitable
- **Gaskin**: argued that deterrence was not the only thing stopping a person
 - Difference between economic deterrence and 'injury prevention'
- **Woodhouse**: deterrence comes from accident compensation itself, as prevention is a key focus
 - This injury prevention (\$34m) though not economic deterrence could also deter risky behaviour (e.g. victims of drink driving talking to HS students), question of whether this is sufficient or fulfilling Woodhouse's vision for ACC

Is there personal injury?

S 20 – must be personal injury

(2)(a) – accident to the person

(2)(b) – treatment injury suffered by the person

(2)(e) – work-related gradual process, disease or infection, or (f) gradual process from treatment injury.

S 26 – personal injury

(a) – death

(b) – physical injuries (e.g. strain or sprain)

(c) – mental injuries consequential to physical injuries

(d) – work-related mental injury

Adlam – treatment injury s 20 (2 (b))

- Infant suffered cognitive problems (cerebral palsy) after Dr did not perform emergency caesarean.
- Test is whether there was treatment given and whether injury was caused by the treatment **and not a necessary part of it/necessary consequence**
- Here, the injury was not the result of treatment injury as the doctor thought it was a necessary thing to do at the time

Priddle – s 20 (2)(e)

- Priddle suffered mesothelioma after workplace exposure to asbestos, barred by cl (55) as preceded 2002; argument that he was covered by s 30 (3) and cl (55) only applied to s (30) (2)
- Allowed lump-sum payment

Harrild – s26

- Mother and baby treated as one, stillbirth resulting in death of baby is an injury to the mother and therefore covered by ACC and cannot sue
- Stillbirth constitutes a personal injury as consequences to mother are greater than ‘sprain or strain’ in (b)

Personal injury that is mental injury

1992 legislation removed cover for mental injury except in three limited situations:

1. Mental injury caused by physical injury to the person - s 26 (1) (c)

2. Mental injury caused by certain criminal offending's - s 21

3. Work related mental injury - s 21B, process below

Mental injury that does not fit into one of these categories is open to common law claim (e.g. Van Soest)

S 21B

S 1 (b) – caused by a single event described in ss 2

S 2 (a) experiences/sees/hears directly in circumstances of s 28

s 28 – (a) purposes of employment ...

s 21 B s 2 (b) – event could reasonably be expected to cause mental injury to people generally

Toomey – s 21B, work related mental injury

- Toomey was volunteering during the Christchurch earthquake at the PCG building, but was not there for the purposes of his employment (s 28 (a))
- Argument that this was to cover employees who were on call, shouldn't allow Toomey to recover
- However, he became agent of fire service, and was a business owner (so pays himself out of drawings)
- Considered the intent of ACC, wider interpretation of purpose allowed Toomey to recover

Yarrall – s 26 (1) (c), mental injury caused by physical injury

- Plaintiff's mental injury was caused by a number of factors (not just the physical injury)
- Allowed for an apportionment approach between factors covered by ACC, and factors that would not be barred

Has there been an accident?

Section 25 (1)(a) – event or series of events, not a gradual process

- (i) involves application of external force to body
- (ii) sudden movement to avoid such a force (including gravity)
- (iii) twisting of the body

Other circs under (b), (c), (d) etc.

G v Auckland Hospital

- Accident is from sufferers' perspective
- Rape is an accident: adopts broad meaning of accident as being if the victim is hurt where she did not intend to be

What about pregnancy?

- Could be an accident, under s 25 (application of force, rape)
- Could be a treatment injury under s 33/32 (failed sterilisation)

Allenby

- Failed sterilisation, pregnancy, child → mental injury
- "Pregnancy" removed from legislation in 1992. Was this a sign of removing it from cover, or would they have been explicit if they actually want it removed.
- Pregnancy can be covered under ACC as a gradual process illness s 20 (2)(b) –(f) –(g): though this case rests on it being medical misadventure
- **Policy:** ACC as a social contract vs. ACC as social insurance; allows ACC to be interpreted expansively to allow more people to get compensation
- *Be careful that not all consensual sex is an accident – application of force:* Tipping tries to make a distinction on consent, but it is not mentioned in the Act, Elias CJ doesn't comment.

J

- J received compensation for her pregnancy following a failed sterilisation treatment, attempted to claim earnings related entitlements for being unable to work after the birth of the child
- Found to get entitlements, a person must be physically/mentally incapable of working

Statutory Bar

S 317 – no proceedings if covered under ACC.

McGougan v DePuy International Limited

- Plaintiffs trying to sue a foreign manufacturer of hip implants
- Already covered under ACC for personal injury
- S 317 barred them, idea of social contract

Queenstown Lakes

- Classic nervous shock case
- Saw wife drown
- Nervous shock not covered under ACC (unless one of the three categories), so successfully sued at common law.

Harrild

- Damage to foetus
- Foetus sufficiently connected to mother to be considered personal injury, so covered under the scheme and no right to sue.

(ED not barred)

ACC and Criminal Law

- S 120 = No entitlement for conviction of murder
- S 121 = No entitlement while in prison
- S 122 = No cover for injuries sustained for serious offences
 - If you suffer an injury committing an offence, and you receive a punishment of over 2 years, you don't get any cover.

Davies

- Careless driving, injury
- Ordered to pay a top up to the victim, for the 20% gap
- s 32 – can't sue if you have entitlement under ACC. This refers to the type of entitlement. Debate over interpretation of 'entitlements' (wide vs. narrow)
- Majority: If Parliament wanted to allow top ups, they would have said. Purpose of ACC is a social contract, **integrity** approach looking at comprehensive entitlement and complete rehabilitation. Allowing top-up. Look at ACC s 3 – purpose – social contract – compensation, no fault, but lose right to sue at common law. Would run contrary to the purpose of ACC to allow top up – notions of fault. Tipping – “abhorrent to the philosophy of ACC”. Undermine integrity of the scheme – doesn't allow for incentive for rehab if you get full compensation.
- Minority: McGrath went the other way – said compensatory purpose of Sentencing Act was sufficient to allow a minor erosion of ACC principles.

S 32 now amended.

Interpretative principles/policy discussion of ACC

INTEGRITY APPROACH

ACC as a **social contract**: people gave up fundamental right of being able to sue in exchange for a **no-fault liability scheme**.

ACC offers **comprehensive entitlement**: like people are treated alike.

- Favoured by Elias CJ

McGougan v DePuy: social contract; comprehensive entitlement. To find for DePuy would be violating the integrity of the scheme.

Davies v Police: Elias CJ, looking at the scheme as a whole.

Priddie: ACC should be interpreted favourably (generously) due to social contract not allowing right to sue. Unfairness of 1992 amendments to cut-costs.

Harrild: Elias CJ, concerned about upholding integrity of the ACC scheme; i.e. social contract, cannot allow compensatory damages.

Allenby: ACC interpreted expansively to allow more people to get compensation.

ACCIDENT/ILLNESS (PART OF INTEGRITY APPROACH)

Adlam: line-drawing, though decision seems to conflict with morality – his was a disability from birth and cannot be covered. Seems to conflict with Woodhouse's vision for ACC (integrity?).

NO FAULT SCHEME

Davies v Police: Allowing top-up payment would run contrary to the 'no-fault' approach

Adlam: No fault-scheme, law amended to ensure doctors are not liable/hindsight analysis used.

INDIVIDUAL JUSTICE VS. COLLECTIVE RESPONSIBILITY

G v Auckland Hospital: Accident → unexpected mishap. Want to take a broad interpretation and make sure she is covered because of future precedent for future victims of rape not to have to go through court proceedings to gain compensation. Integrity approach upholding collective responsibility.

COMPLETE REHABILITATION

J: ACC scheme wants people to get back into the workplace, “Fair not full” compensation for rehabilitation. Plaintiff could have gone back to work, must be mentally/physically incapable of working.

Personal Injury

- s 20 – Cover in NZ
 - (1)(a) – NZ After 2002
 - (b) – described in 26 (a)(b)(c)(e)
- s 26 – Personal Injury
 - (a) death
 - (b) physical injury
 - (c) mental caused by physical
 - (e) damage to prosthetics or dentures
 - (2) gradual process not covered unless is of a type described in 20(2)e-h
- s 20(2) – the personal injury has to be caused by one of the things in here
 - (a) accident
 - (b) treatment
 - (c) infection from treatment transmitted by another person
 - (d) other treatment circumstance
 - (e) work-related gradual process
 - f-h – other gradual processes

Is it an accident?

- s 25 – Accident
 - (1)(a) – specific event or series of events, not a gradual process
 - (i) application of force
 - (ii) sudden movement to avoid such force
 - (iii) twisting of the body
 - And there are some other options too.

Is it a treatment injury?

- s 33 – Treatment
 - Giving treatment
 - Diagnosis on treatment
 - Failure to provide etc
- S 32 – Treatment injury
 - (a) Suffered by a person seeking or receiving treatment
 - (b) Caused by treatment
 - (c) Not a necessary and ordinary part of the treatment
 - Beware sub s (3) – failure to achieve desired result alone is not enough

Is it mental caused by physical?

- s 27 – Mental injury
 - Just have to prove it is a clinically significant behavioural, cognitive or psychological dysfunction
- And that you have a physical injury (though not the usual high standard)

Is it a work-related gradual process?

- 28 – Work-related
 - While at work
 - Break at work
 - Travelling to work
- 30 – Work-related gradual process, disease or infection
 - (1) suffered by the person, gp, (2)
 - (2)
 - (a) particular property or characteristic
 - (b) causes the injury, not found outside employment
 - (c) risk of suffering higher for those who have that job, than those who do not.

Is it mental injury?

If mental caused by physical – as above

- If it comes from s 26(1)(d) or (da), it has to be described in s 21 or 21B
- 21 – Caused by a criminal act
- 21B – Work-related mental injury
 - Has to be described in s 28(1)

EXEMPLARY DAMAGES

One cannot claim compensatory damages for ACC-covered injury (s 317).

In NZ ED are awarded on top of what is necessary to compensate the victim. Purpose = **punishment** (not deterrence).

s 319 of Act “Exemplary damages”

(1) Nothing in this Act, ... Prevents any person from bringing proceedings in any court in New Zealand for exemplary damages for conduct ... that has resulted in...

- (a) personal injury covered by this Act; or
- (b) personal injury covered by the former Acts.

(2) The Court may make an award of exemplary damages ... even though

(a)–(e) : the defendant has been charged/convicted/discharged of an offence involving the conduct concerned.

Subs (3) tries to alleviate the risk of double-punishment by taking into account already imposed penalties.

= can bring claims for exemplary damages for actions covered by ACC, even if defendant has been charged, highlighting the punitive purpose.

When can you claim?

“outrageous” conduct is the general touchstone.

- Intentional outrageous conduct (**subjective**).
 - o Outrageousness determined by the degree of risk appreciated and the seriousness of the injury that was likely to ensue if the risk materialised.
- **Bottrill** comments that conduct worthy of exemplary damages is “malicious, vindictive, oppressive...”.
- ED are **extremely restrictive**.
 - o Judges wary of allowing large awards for personal injury
 - o Doctrinal and quantum restraint.

Case	Issue	ED awarded?
<p>Donselaar [1982] COA Brother attacked another with hammer, concussed and hospitalised him.</p> <p>Concerned provisions under 1972 Act barring civil damages – how is this to be construed? Are compensatory and ED barred?</p>	<p>Section 317 equivalent at that time, s 5 – Cannot bring claims for damages for any injury covered by the Act.</p> <p>Does damages mean CD or ED?</p> <p>s 319 did not exist at the time, does now to reflect <i>Donselaar principle</i>.</p>	<p>No (on facts) Though recognised that ED could be awarded despite ACC provisions</p> <p>Only way of not intruding into ACC compensation would be to allow actions for damages for purely punitive purposes and accept that as CD can no longer be awarded, ED will take over part of their former role.</p>
<p>Bottrill [2002] PC Dr systematically failed to properly read cervical smears. Did not set out to harm, old and had fallen out of training.</p>	<p>Is the standard for ED subjective/objective recklessness?</p> <p>Especially when the actions seem to be a gross departure from the reasonable standard in hindsight.</p>	<p>Yes</p> <p>Their Lordships consider that under the common law of New Zealand the court’s jurisdiction to award exemplary damages in cases of negligence is not rigidly confined to cases where the defendant intended to cause the harm or was consciously reckless as to the risks involved.</p> <p>= can be objectively recklessness.</p>

		<p>Though to make an award of ED in the absence of OR = extremely rare.</p> <p>But, acknowledge that there are some circumstances where the departure from RS is so gross as to import objective reck. as standard.</p>
<p>Couch (No 2) [2010] SC</p> <p>Susan Couch brings a claim for ED against the A-G for failure to exercise reasonable care in the parolees supervision.</p>	<p>Whether exemplary damages are barred by ACC legislation + whether they can be awarded without compensatory damages and whether subjective or objective recklessness required.</p>	<p>SC declined to follow PC</p> <p>Tipping J</p> <p>The fact CD have not been awarded is no bar to awarding ED.</p> <p>Subjective recklessness needed, the defendant must consciously run the risk of the harm to the plaintiff. Obj, reck still has a part to play in determining “outrageous” behaviour.</p> <p>Elias CJ dissenting, relied on <i>Bottrill</i>: favours objective recklessness. Subj. reckl restricts ability to mark society’s condemnation of outrageous behaviour.</p>

Exemplary Damages Test

1. In the case of *Donselaar* [1982] the COA recognised that as compensatory damages were barred by ACC (s 5 at the time, now s 317), exemplary damages would take over part of their former role and actions for exemplary damages would be allowed for injuries covered by ACC. This solidified the punitive purpose of exemplary damages. Section 319 of the ACC Act codified the *Donselaar principle*.
2. The UK PC considered ED in *Bottrill*, ruling that **to make an award of ED in the absence of objective recklessness** (the reasonable person would have appreciated the risk) **would be extremely rare. The conduct of the defendant must be outrageous:** behaviour worthy of ED is that which is “vindictive, malicious, oppressive” etc.
3. The SC in *Couch (No 2)* declined to follow the PC, and in a leading judgement Tipping J **required subjective recklessness**, whereby the **defendant must consciously run the risk of harm to the plaintiff.** Obj recklessness still has a part to play in determining “outrageous” behaviour.

1. Is the personal injury covered by ACC?

- If **yes**, then barred from suing for compensatory damages by s 317.
- Can bring actions for exemplary damages per **s 319**. Codification of the *Donselaar* principle whereby ACC does not bar claims for ED.

2. Did the defendant consciously and deliberately run the risk to the plaintiff? (Subjective Recklessness)

- **Couch (No 2):** per Tipping J, the defendant must knowingly and willingly run the risk of harm. Objective recklessness has part to play in determining “outrageousness”.

3. If above are satisfied, ED should be rewarded

- Especially consider the outrageousness of the behaviour and whether it warrants “punishment” following the *Bottrill* punitive approach.
- ED are subject to doctrinal and quantum restraint (likely to not be more than eventual litigation costs).