

**ACCIDENT COMPENSATION IN SWISS AND
NEW ZEALAND LAW –
SOME SELECTED ISSUES THAT UNDERMINE
THE PURPOSE IN BOTH SCHEMES**

By

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A dissertation
submitted to the Victoria University of Wellington
in partial fulfilment of the requirements for the degree of
Master of Laws

Victoria University of Wellington

2009

ABSTRACT

This dissertation analyses selected issues that undermine the coherence and the purposes of the Swiss and New Zealand accident compensation schemes. Unlike other European states the Swiss accident compensation provides cover for non-work related accidental injury, which makes it a useful subject of comparison with the New Zealand accident compensation scheme which provides a comprehensive, no fault compensation scheme for personal injury. In undertaking a largely comparative approach the paper argues that both schemes have drifted away considerably from the original underlying purpose to provide compensation for work incapacity and, on the other hand, to restore the claimant to a level of work capacity as soon as possible. This thesis is illustrated by examining the vulnerability of the schemes to political change, the arbitrary dichotomy between incapacity to work caused by accidental injury and incapacity caused by sickness, the definitions of an accident in both schemes and the assessment of evidence. The paper finds that both schemes should be amended and suggests alternative approaches for each issue.

STATEMENT ON WORD LENGTH

The text of this paper (excluding abstract, table of contents, table of cases, bibliography, materials, and footnotes) comprises approximately 33,450 words.

TOPICS

Swiss and New Zealand accident compensation – incoherence – legal framework – dichotomy between accident and sickness – evidence

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I INTRODUCTION

Accident compensation is one of the major parts of the social security schemes in New Zealand and Switzerland. Even if the schemes have different roots and have emerged from different political backgrounds, they share the same underlying purposes; to provide cover compensation for work incapacity caused by accidental injury and to restore the claimant to a level of work capacity as soon as possible. Unlike other European states the Swiss accident compensation provides cover for non-work related accidental injury. This characteristic makes the Swiss system a useful subject of comparison with the New Zealand accident compensation scheme which provides a comprehensive, no fault compensation scheme for personal injury. Both schemes provide a good basis for providing a level of social security. However, the current schemes as they are shaped today have drifted away considerably from the original underlying purpose, leading to arbitrariness and incoherence of the legal framework. In the New Zealand accident compensation scheme, such arbitrariness and inconsistency may be more the result of the legislative and political systems, whereas in the Swiss accident insurance scheme, jurisprudence plays the major role in creating these factors.

The focus of this paper is to identify and explain selected issues in the New Zealand and Swiss accident compensation schemes on a thematic basis in order to increase understanding of both schemes and to make suggestions for improving the scope and limitations of both schemes. This analysis is more carried out in regard to the Swiss system as this paper argues that it has more limitations than the New Zealand system. Eventually this paper, in analysing selected issues about both systems, argues that certain identified limitations result in a level of legal incoherence, perhaps even legal insecurity which undermines the underlying purpose of both schemes. This thesis will be illustrated by selected issues with observations on both schemes.

First, this paper will show that the New Zealand accident compensation scheme is much more vulnerable to political change than the Swiss accident insurance scheme. This vulnerability is largely due to the different political systems. Whereas the Swiss government is constituted of continuous balanced coalition of the major political parties, in New Zealand, the Prime Minister nominates the government. This difference

in political systems is reflected in the accident compensation schemes. The Swiss scheme has only undergone minor amendments over time, whereas the New Zealand scheme has been rewritten five times reflecting the ruling party's ideology. It is suggested that a modern democracy should provide a stable social security policy by maintaining the core entitlements such as weekly compensation, medical expenses and a comprehensive rehabilitation plan for the injured person. It is certainly difficult to define those notions because law and politics are undeniably interrelated. However, this paper argues that these core components should not mirror the political ideology of the ruling party. Rather should the content of the core entitlements be defined, based on a consensus between the political parties in order to outlive a change of government.

Second, this paper will demonstrate that both schemes perpetuate an arbitrary dichotomy between incapacity caused by accidental injury and incapacity caused by sickness. Both schemes provide cover for specific occupational diseases within the accident compensation scheme, but not for non work-related diseases. However, the need of the claimant to cover the financial loss due to work incapacity is the same as for incapacity caused by accidental injury or incapacity caused by sickness. There is no logical reason for this distinction.¹

Third, the definitions of "accident" as a threshold for cover in both schemes will be analysed. The definitions of an accident and personal injury in the New Zealand scheme results in more legal security because significant weight is given to the medical report determining causation. In contrast, the question of causation tends to be a more legal than a medical question in Swiss law because jurisprudence has developed a two-step test: There must be a natural *and* adequate causal connection. Whereas the natural causal connection will be decided on the basis of the medical report, the adequate causal connection is a purely legal question which gives the judge the discretion to even decide against the result of the medical report.² In addition, the Swiss scheme has developed a primary (article 4 ATSG) *and* a secondary definition of an accident (article 9 UVV) along with an often incoherent or inconsistent jurisprudence.

¹ New Zealand Royal Commission of Inquiry into Compensation for Personal Injury *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967) para 17 and 290 [*Woodhouse Report*].

² Part VA 2(a).

Through selected examples of cases it will be shown that the requirement of what is known in the Swiss accident insurance scheme as the “unusual factor” in the definition of an accident (article 4 ATSG) is an arbitrary criterion that has been inconsistently interpreted and applied by Swiss courts. This criterion sets the bar for granting cover too high, and, therefore, should be repealed.

Fourthly, what is termed “the maxim of the declarations of the first hour” in Swiss law also imposes an unjustified burden upon the claimant in the Swiss accident insurance scheme. This requirement, which holds that the statements made by the claimant in the first hour after the accident must be given more weight than subsequent statements, is completely unknown in the New Zealand accident compensation scheme. On the one hand, the spontaneous declarations of the first hour might be more unbiased and reliable than later descriptions, which might be, consciously or unconsciously, influenced by insurance law or other considerations. On the other hand, those declarations might not necessarily be the most truthful because very often it is very difficult to assess the precise sequence of events of an accident and its cause. Therefore, evidence should be considered based on the whole circumstances of the case instead of giving the declarations of the first hour a predominant weight to assess credibility of the insured person’s declarations.

Both schemes were very innovative at the time of implementation, but should now be amended because both purposes of the schemes have been undermined. In the Swiss accident insurance scheme, the driving forces for this development are seen more in the incoherent jurisprudence as a consequence of the difficulty to amend current legislation within a short time. The New Zealand accident compensation scheme’s jurisprudence is on the whole seen as more coherent. However, the inconsistency of the legal framework of the New Zealand scheme can be seen in the political system allowing the legislature the possibility of substantially redesigning the scheme at each change of government.

II PURPOSE AND LEGAL FRAMEWORK

A Purpose of both Accident Compensation Schemes

The Swiss and New Zealand accident compensation schemes are both principally social insurance schemes providing compensation for loss of income as a consequence of an accident. They are both an answer to the inadequacies of the previous workers' compensation legislation and mark a milestone in the development of modern social security. Without such schemes in place, the injured person would have to bear the economic consequences of the accident on his or her own and would be threatened by poverty as a consequence of work incapacity and, therefore, loss of income. Both schemes are built on similar underlying purposes of the prevention of accidents, rehabilitation of the injured person and compensation for loss of income in order to restore the person to health and gainful employment. Ideally, the schemes provide only short-term help in the form of medical expenses, social and vocational rehabilitation and compensation to bridge the gap until the injured person has regained work capacity and no longer needs the scheme in the long run.³

The aim of this section is to set out an overview of the purpose, principles and relevant sections of each scheme that will be discussed in this thesis. In order to demonstrate that these schemes fall short of their stated purposes, the enquiry will be limited to a few facets of both schemes. It is beyond the scope of this thesis to examine all the relevant areas where there may be inconsistency. The comparative approach taken in this paper aims at identifying advantages and limitations of both schemes in order to find options for improvements with the inspirations of the other scheme and finally the confirmation or disapproval of the efficiency and good functioning of one's own scheme.

³ *Woodhouse Report*, above n 1, para 2; Report of the Federal Council of 18 August 1976, 141.

1 Swiss accident insurance

In Switzerland, private insurance played an important role in the development of the social security scheme.⁴ While the origins of fire and sea transport insurances can be traced to the Middle Ages, the broader development of private insurance started in the second half of the 19th century. The most important life insurance companies, whose task was very close to social security, such as providing cover for certain social risks, were founded between 1857 and 1895. The State soon showed interest in using private insurance companies to fulfil the increasing need of social security. The State recommended citizens take out insurance and partially subsidised the premium. Switzerland's legislation regarding employment in factories was influenced by Chancellor Bismarck in Germany, who suggested a number of employment-based schemes in 1881 to cover income loss caused by work-related accidents, sickness, old age and disability.

The purpose of the modern accident insurance scheme is stated under the heading “purpose” in article 6 of the Federal Act on Accident Insurance of 20 March 1981 (UVG):

Article 6

(1) Entitlements for work-related accidents, non work-related accidents and occupational disease will be granted, if this act does not state otherwise.

(2) The Federal Council can include personal injuries similar to an accident into the scope of the insurance.

This general provision does not provide a lot of detail. Therefore, the structure of the Act and the reports of the Federal Council (Executive of the Swiss Government) must be taken into account. The purpose is visible from the structure and the headings of the Act: Titel 3 “Insurance entitlements” with sub-headings entitlements for medical care (article 10-14 UVG), monetary entitlements (Article 15 – 35 UVG) and prevention of accident (Article 81 – 88 UVG). The key provision for income compensation is set out in Article 16 UVG.

⁴ Gabriela Riemer-Kafka „Hintergründe des Solidaritätsgedankens bei den Sozialversicherungen“ (2007) 2 CHSS 61.

Furthermore, the purpose arises from the Report of the Federal Council on the Accident Insurance Act. The underlying idea is to provide accident compensation in the form of a direct claim to accident insurance instead of a civil action against the liable person. The different types of entitlements such as income replacement (Article 16 and 17 UVG), medical care including rehabilitation plans (Article 10-14 UVG) aim all at restoring the claimant's work capacity.⁵

At the time of the introduction of the compulsory accident insurance in 1918 the most urgent concern was for the liability of factory-based employers for the personal injuries suffered by their employees. The idea behind this concept was "insurance instead of liability". The state would provide compulsory cover for employers and employees, even if this task was delegated to private insurance companies. Another characteristic was contributions by the insured persons, and also subsidies by the State.⁶ Prior to the passage of this legislation factories were deemed to have a special liability. Not only was it difficult and time-consuming for an injured person in urgent need of entitlements to win a case against the employer, but this system also led to the bankruptcy of especially small- and medium-sized employers who faced large claims:⁷

Bei der Einführung der obligatorischen Unfallversicherung war der Ersatz der Haftpflicht durch die Versicherung das dringendste Anliegen. Anstelle der oft unsicheren und prozessträchtigen Haftpflichtansprüche erhielt der verunfallte Arbeitnehmer einen Direktanspruch auf Leistungen der Unfallversicherung, als Gegenstück dazu wurde die spezielle Fabrikhaftpflicht aufgehoben und die allgemeine Verschuldenshaftung des Arbeitgebers eingeschränkt.

English translation:[my translation]

At the time of the introduction of the compulsory accident insurance the most urgent concern was for the liability of factory-based employers for the personal injuries suffered by their employees. It was often very difficult and time-consuming for the employee to win the case against the employer. Thus, the employee was given a direct claim to accident insurance. In return, the special liability of factories was repealed and the liability of employers limited.

⁵ Report of the Federal Council of 18 August 1976, 160; see also Report of the Federal Council of 10 December 1906 on the Sickness and Insurance Act (KUVG), 16-17. In 1981, the part of the KUVG regarding accident insurance became an independent Act, the Accident Insurance Act (UVG). However, the purpose of accident insurance has not been changed.

⁶ Erwin Murer *Einführung in das Bundes-Sozialversicherungsrecht (unter Ausschluss des Medizinalrechts)* (Fribourg, 2008) 106-114; MP Olivier "The Concept of Social Security" in M Olivier, N Smit and E R Kalula (Eds) *Social Security: A Legal Analysis* (Butterworths, 2003) 29.

⁷ Report of the Federal Council of 18 August 1976, 160-161.

With the introduction of compulsory accident insurance in 1918 the special liability of factories was repealed and the liability of employers was limited in return for the availability of a direct claim to accident insurance.⁸

2 *New Zealand accident compensation*

The New Zealand scheme is much more clear and precise about the purpose and underlying principles of the accident compensation scheme. The scheme is based on the five principles elaborated by the “Woodhouse Commission” under the direction of High Court Judge Sir Owen Woodhouse:⁹

- Community responsibility
- Comprehensive entitlement
- Complete rehabilitation
- Real compensation and
- Administrative efficiency.

The first principle of the New Zealand accident compensation scheme is community responsibility. It is fundamental and based on “the problem” triggering the scheme:¹⁰

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

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

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

The negligence action is a form of lottery. In the case of industrial accidents it provides inconsistent solutions for less than one victim in every hundred. The Workers’

⁸ For more details on the particular nature of the Swiss insurance system see Part II B.

⁹ *Woodhouse Report*, above n 1.

¹⁰ *Woodhouse Report*, above n 1, para 1.

Compensation Act provides meagre compensation for workers, but only if their injury occurred at their work. The Social Security Act will assist with the pressing needs of those who remain, provided they can meet the means test. All others are left to fend for themselves.

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

This crucial and most fundamental passage of the Woodhouse report explains that the vital *principle of community responsibility for physical injuries* is required due to the fact that modern society benefits from the productive work of its citizens. Injuries are a by-product of social progress. Against this background, society should accept responsibility for those willing to work but prevented from doing so by physical incapacity. As everybody participates in community activities which inevitably will result in a certain number of injured persons, the community should bear the inherent costs on the basis of equity. Because physical incapacity of workers has a negative effect on the economy, the community has an interest and duty to provide physical and economic rehabilitation.¹¹

Furthermore, the scheme should provide comprehensive entitlement: All insured persons should be entitled to compensation from any community financed scheme, assessed by the same method, regardless the cause of the injury and whether it is work-related or not.¹² The underlying argument for this principle is that “*a worker does not cease to be a worker as he leaves this factory at 5 o’clock*”¹³, whereas the previous framework provided inconsistent results, namely the Workers’ Compensation legislation and the Social Security Fund, for non-work related accidents.¹⁴

The third principle is complete rehabilitation of the injured person. Not only should the loss of income be compensated, but the scheme must also aim at recovering the best degree of bodily health and vocational utility in a minimum of time. Such are

¹¹ *Woodhouse Report*, above n 1, para 56; Owen Woodhouse “The function of ACC: Social Welfare, not Insurance” (1 September 2008) www.accfutures.org.nz (accessed 26 March 2009); Garry Wilson “ACC and Community Responsibility (2004) 35 VUWLR 973.

¹² *Woodhouse Report*, above n 1, para 46.

¹³ *Woodhouse Report*, above n 1, para 57.

¹⁴ *Woodhouse Report*, above n 1, para 46.

the “*real interests of the man himself and the interest which the community has in his restored productive capacity.*”¹⁵

Real compensation should be granted without means or needs testing for work incapacity and permanent disability. As a matter of fact, the additional social hazards emerging from industrial and social progress should be met by a modern accident compensation system, as this society can better afford their real cost.¹⁶

Finally, the scheme should be based on administrative efficiency, avoiding delays, inconsistent assessments and economically wasteful methods.¹⁷

Recently, Sir Owen Woodhouse has emphasised the importance of those principles:

“As I say, for about 40 years those principles have had acceptance in this country, both in Parliament, and by the professionals and the public generally. I have put a little flesh on the headings, however, because I have wondered at times whether their acceptance has been remembered sufficiently in practice”.¹⁸

The title of the current New Zealand accident compensation scheme describes its goal: Injury Prevention, Rehabilitation, and Compensation. The purpose is set out in detail in section 3 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 (IPRC):

3 Purpose

The purpose of this Act is to enhance 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), through

(a) establishing as a primary function of the Corporation the promotion of measures to reduce the incidence and severity of personal injury:

(b) providing for a framework for the collection, co-ordination, and analysis of injury-related information:

¹⁵ *Woodhouse Report*, above n 1, para 58.

¹⁶ *Woodhouse Report*, above n 1, para 59-61.

¹⁷ *Woodhouse Report*, above n 1, para 62.

¹⁸ *Woodhouse*, above n 11.

(c) ensuring that, where injuries occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation:

(d) ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment:

(e) ensuring positive claimant interactions with the Corporation through the development and operation of a Code of ACC Claimants' Rights:

(f) ensuring that persons who suffered personal injuries before the commencement of this Act continue to receive entitlements where appropriate.

This purpose underlines in section 3(c) that where injuries occur the primary focus should be on rehabilitation and restoration of health, independence and participation. Section 3(d) contains the principle of fair compensation for loss from injury in the form of weekly compensation and lump sums for permanent impairment.

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After giving an overview over the legal framework in both schemes, this paper is going to explore if both accident insurance schemes still reflect the underlying purposes of the schemes. It is argued that both schemes have considerably drifted away from the underlying purposes. This argument will be demonstrated through the selected issues in Part III to VI and it will be shown how the purposes have been undermined.

B Overview over the Legal Framework in both Schemes

1 Swiss accident insurance

In order to explore in Part III to VI how the purposes of both schemes have been undermined, this chapter gives an overview over the legal framework in both schemes and explains the place of each accident compensation scheme within the social security system.

¹⁹ For case law see for example *Jones v ACC* (5 November 2004) DC CHCH 342/04.

Swiss Accident Insurance is one of the ten branches of social insurances within the social security scheme.²⁰ The social security scheme is divided between these social insurances and social assistance. Broadly speaking, the difference between social insurance and social assistance is that social insurance will automatically grant entitlements when the social contingency occurs. Social assistance will only provide benefits if there is a need in the specific case. The word “assistance” implies in the context income adjustment, whereas the “insurance” will grant entitlements in return for premium or contributions. A second difference is that social insurance is funded by contributions and social assistance is financed out of public funds.²¹ Social insurances are causally based. This means that entitlements will be granted based on the cause of the social risk, such as accident, sickness, unemployment, might vary depending on those risks and will not be granted based on the need of person. Social insurances provide cover for the social risks such as sickness, accident, unemployment, age, maternity, invalidity and death.²² They are intended to replace income where primary earnings are interrupted, as for example, in the case of an accident.²³ Social insurances are regulated in Federal Acts and mostly funded by a percentage of one’s salary. On the contrary, social assistance is needs based, regulated by the Cantons²⁴ and funded by taxes. Social assistance plays a role where there is no or insufficient cover by social insurance. For example, unemployment insurance grants a maximum of currently 400 daily allowances within a period of two years.²⁵ If the person seeking employment has still not found a job after receiving 400 daily allowances, cover under the unemployment act will expire. Thus, he or she will have to apply for social assistance if he or she cannot cover living costs.

In the Swiss social insurance scheme, broadly spoken, each different risk is regulated in a specific Act. There are currently eleven Federal Acts comprising the ten social insurance branches and one Act on the General Part Part of Social Insurance Law

²⁰ See Part IX table 1 and 2.

²¹ Thomas Locher *Grundriss des Sozialversicherungsrechts* (3 ed, Staempfli, Bern, 2003) 47; Jos Berghman “Basic Concepts of Social Security” in Danny Pieters (ed) *Social Security in Europe: Miscellanea of the Erasmus-Programme Social Security in the EC* (Bruylant, Brussels, 1991) 15.

²² See also social risks of the ILO Convention 102 on minimum standards for social security protection. www.ilo.org (last accessed on 30 March 2009).

²³ Locher, above n 21, 47.

²⁴ Switzerland has 26 cantons which are the states of the country which a limited sovereignty (article 3 of the Federal Constitution).

²⁵ Article 18 Federal Act on Unemployment Insurance, AVIG.

(ATSG) comprising the provisions about the key definitions and coordination between the different types of insurances. However, one risk might be covered under more than one Act. Appendix B provides a detailed overview over the different insurances and contingencies.

The principles of social insurance are considered to be basically the social objectives in article 41 of the Federal Constitution. The social objectives state that the Confederation and the canton shall,

“as a complement to personal responsibility and private initiative, endeavour to ensure that (a) everyone has access to social security.”

In addition, every branch of social insurance has its own principles, mentioned in the purpose article of the Act. However, especially the acts of the older social insurance branches, such as accident insurance, more describe the scope of the insurance rather than the purpose.²⁶

One of the main features of the Swiss accident insurance scheme is that it is a worker insurance scheme (Article 1 UVG). Thus, non workers are not covered under the accident compensation scheme. However, non workers are covered for the contingency accident under the sickness insurance scheme, which is compulsory in Switzerland (Article 1 KVG). The main disadvantage for non workers is that entitlements of the sickness insurance are not as comprehensive as in the accident insurance scheme.²⁷ The Accident Insurance Act does however provide cover for work-related *and* non-work related accidents and occupational disease (Article 6 UVG). Non occupational diseases are covered for workers and non-workers by sickness insurance.

The accident insurance scheme is funded by a percentage of a worker’s salary, depending on the type of work, by the employer (approximately 0.1%) for work-related accidents and occupational disease (Article 91 UVG). The percentage is 1-2% of the salary, and this is paid by the employee for non-work related accidents (Article UVG).

²⁶ Part II A 1, for article 6 UVG.

²⁷ Part IV and Part IX.

Another characteristic of the Swiss accident insurance scheme is that the right to sue is replaced (to a point) by accident insurance to the extent that the entitlements provided for by insurance match the costs incurred by the injuries sustained. (Article 72 ATSG). However, the right to sue persists to the extent that there is a difference between the total loss sustained by the claimant and the total costs of the accident insurance entitlements. For example, if the insured person has a total loss of 100,000 and the social accident insurance grants entitlements in the form of income replacement and medical costs in the amount of 80,000, the insured person may sue the liable person for the outstanding 20,000. Accident insurance pays only 80% of the salary (article 17 UVG). Moreover, material items such as damaged glasses are not covered under accident insurance. Thus, the difference of 20,000 might comprise, for example, loss for damaged goods and the 20% loss of income not covered by the accident insurance.

A further feature of the Swiss accident insurance scheme is that the monopoly of the “Schweizerische Unfallversicherungsanstalt” (Suva) has been repealed. However, the Suva is still the most important insurance provider and still holds the monopoly to provide cover for certain high risk professions.

In order to be granted cover for accident (or occupational disease), the insured person first needs to show that he or she is working in Switzerland (Art. 1 UVG). The second step is to show that he or she has suffered from an accident. The Swiss accident insurance scheme has two different definitions of an accident: A primary definition in article 4 ATSG and a secondary definition in article 9 UVV (“article 9 UVV injuries”):

Article 4 ATSG

An accident is defined as sudden and involuntary impact by an external unusual factor which results in a physical, mental, or psychic injury caused to the human body or causing death.

Article 9 UVV

² The following, exclusively mentioned physical injuries are, if they are not clearly caused by sickness or degeneration, also without an unusual external factor equate with accidents:

- a. broken bones;
- b. dislocations of joints;
- c. torn knee cartilages;
- d. torn muscles;
- e. strained muscles;
- f. torn tendons;
- g. ligament lesions;
- h. eardrum injuries.

An injured person who suffered from an accident has to show that either the requirements of article 4 ATSG or article 9 UVV are fulfilled. Article 9 UVV is an alleviated version of the definition of an accident of article 4 ATSG. For article 9 UVV injuries, an “unusual factor” is not required. As it will be demonstrated in Part V, the unusual factor in the article 4 ATSG definition sets the bar for cover too high. Furthermore, it will be shown that the requirement of an unusual factor has been introduced “through the backdoor” into article 9 UVV by case law. Thus, jurisprudence requires an “increased potential of danger” to the usual and day-to-day action.²⁸

This paper argues in Part V that the unusual factor and the “backdoor jurisprudence” of Article 9 UVV are undermining the underlying purpose of the Swiss accident insurance scheme.

2 *New Zealand accident compensation*

New Zealand’s social security scheme is a dual system, with on the hand, a accident compensation scheme that is mainly regulated in the Injury Prevention, Rehabilitation, and Compensation Act 2001, broadly speaking, in the form of social insurance providing compensation for loss of income, and, on the other hand, the Social Security Act 1964 providing social assistance.

²⁸ BGE 129 V 466.

The Social Security Act 1964 regulates a three tiers system with flat rate benefits paid according to the categories of need and supplementary assistance.²⁹ The scheme provides entitlements for income replacement and income adjustment. Section 1A states the purpose of the Act:

1A Purpose

The purpose of this Act is

- (a) to enable the provision of financial and other support as appropriate
 - (i) to help people to support themselves and their dependants while not in paid employment; and
 - (ii) to help people to find or retain paid employment; and
 - (iii) to help people for whom work may not currently be appropriate because of sickness, injury, disability, or caring responsibilities, to support themselves and their dependants:
- (b) to enable in certain circumstances the provision of financial support to people to help alleviate hardship:
- (c) to ensure that the financial support referred to in paragraphs (a) and (b) is provided to people taking into account
 - (i) that where appropriate they should use the resources available to them before seeking financial support under this Act; and
 - (ii) any financial support that they are eligible for or already receive, otherwise than under this Act, from publicly funded sources:
- (d) to impose administrative and, where appropriate, work-related requirements on people seeking or receiving financial support under this Act.

According to this provision the purpose is, in a nutshell, to protect people from damage caused by certain social risks when they interrupt the income stream.

²⁹ Thaddeus McCarthy (Chair) *Social Security in New Zealand Report of the Royal Commission of Inquiry – Chapter 2: “The History and Evolution of Social Security I New Zealand”* 50; Robert Stephens “Poverty, Family Finances and Social Security” in Jonathan Boston, Paul Dalziel and Susan St John (eds) *Redesigning the Welfare State in New Zealand – Problems, Policies, Prospects* (Oxford University Press, Auckland, 1999) 240.

The main features of the Accident compensation scheme are that it is a non-fault social insurance scheme, but benefits do not directly link to contributions. Further, it is comprehensive scheme for everyone living in New Zealand. Thus, it is not only a worker compensation scheme.³⁰

In the New Zealand accident compensation scheme, the principal situations where there is cover are those in section 20 IPRC Act 2001:

20 Cover for personal injury suffered in New Zealand (except mental injury caused by certain criminal acts [or work-related mental injury])

- (1) A person has cover for a personal injury if
 - (a) he or she suffers the personal injury in New Zealand on or after 1 April 2002; and
 - (b) the personal injury is any of the kinds of injuries described in section 26(1)(a) or (b) or (c) or (e); and
 - (c) the personal injury is described in any of the paragraphs in subsection (2).
- (2) Subsection (1)(c) applies to
 - (a) personal injury caused by an accident to the person:**
 - (b) personal injury that is treatment injury suffered by the person:
 - (c) treatment injury in circumstances described in section 32(7):
 - (d) personal injury that is a consequence of treatment given to the person for another personal injury for which the person has cover:
 - (e) personal injury caused by a work-related gradual process, disease, or infection suffered by the person:
 - (f) personal injury caused by a gradual process, disease, or infection that is treatment injury suffered by the person:
 - (g) personal injury caused by a gradual process, disease, or infection consequential on personal injury suffered by the person for which the person has cover:
 - (h) personal injury caused by a gradual process, disease, or infection consequential on treatment given to the person for personal injury for which the person has cover:
 - (i) personal injury that is a cardio-vascular or cerebrovascular episode that is treatment injury suffered by the person:
 - (j) personal injury that is a cardio-vascular or cerebro-vascular episode that is personal injury suffered by the person to which section 28(3) applies.
- (3) Subsections (1) and (2) are subject to the following qualifications:
 - (a) section 23 denies cover to some persons otherwise potentially within the scope of subsection (1):

³⁰ *Woodhouse Report*, above n 1, para 55-63.

- (b) section 24 denies cover to some persons otherwise potentially within the scope of subsections (1) and [(2)(e)].
- (4) A person who suffers personal injury that is mental injury in circumstances described in section 21 has cover under section 21, but not under this section.

Under section 20(2)(a) IPRC Act, an accident is just one of the categories for cover. The requirements for an accident are defined in section 25 IPRC Act:

25 Accident

(1) Accident means any of the following kinds of occurrences:

(a) a specific event or a series of events, other than a gradual process, that

- (i) involves the application of a force (including gravity), or resistance, external to the human body; or
- (ii) involves the sudden movement of the body to avoid a force (including gravity), or resistance, external to the body; or
- (iii) involves a twisting movement of the body:

(b) the inhalation of any solid, liquid, gas, or foreign object on a specific occasion, which kind of occurrence does not include the inhalation of a virus, bacterium, protozoan, or fungus, unless that inhalation is the result of the criminal act of a person other than the injured person:

(ba) the oral ingestion of any solid, liquid, gas, fungus, or foreign object on a specific occasion, which kind of occurrence does not include the ingestion of a virus, bacterium, or protozoan, unless that ingestion is the result of the criminal act of a person other than the injured person:

(c) a burn, or exposure to radiation or rays of any kind, on a specific occasion, which kind of occurrence does not include a burn or exposure caused by exposure to the elements:

(d) the absorption of any chemical through the skin within a defined period of time not exceeding 1 month:

(e) any exposure to the elements, or to extremes of temperature or environment, within a defined period of time not exceeding 1 month, that,

- (i) for a continuous period exceeding 1 month, results in any restriction or lack of ability that prevents the person from performing an activity in the manner or within the range considered normal for the person; or
- (ii) causes death.

(2) However, accident does not include

- (a) any of those kinds of occurrences if the occurrence is treatment given,
 - (i) in New Zealand, by or at the direction of a registered health professional; or
 - (ii) outside New Zealand, by or at the direction of a person who has qualifications that are the same as or equivalent to those of a registered health professional; or
 - (b) any ecto-parasitic infestation (such as scabies), unless it is work-related; or
 - (c) the contraction of any disease carried by an arthropod as an active vector (such as malaria that results from a mosquito bite), unless it is work-related.
- (3) The fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.

In order to accept a claim for an accident, a personal injury described in section 26 IPRC Act must be affirmed:

26 Personal injury

(1) Personal injury means

- (a) the death of a person; or
- (b) physical injuries suffered by a person, including, for example, a strain or a sprain; or
- (c) mental injury suffered by a person because of physical injuries suffered by the person;
or
- (d) mental injury suffered by a person in the circumstances described in section 21; or
- (da) work-related mental injury that is suffered by a person in the circumstances described in section 21B; or
- (e) damage (other than wear and tear) to dentures or prostheses that replace a part of the human body.

(2) Personal injury does not include personal injury caused wholly or substantially by a gradual process, disease, or infection unless it is personal injury of a kind described in section 20(2)(e) to (h).

(3) Personal injury does not include a cardio-vascular or cerebro-vascular episode unless it is personal injury of a kind described in section 20(2)(i) or (j).

(4) Personal injury does not include

- (a) personal injury caused wholly or substantially by the ageing process; or

(b) personal injury to teeth or dentures caused by the natural use of those teeth or dentures.

(5) For the purposes of subsection (1)(e) and to avoid doubt, prostheses does not include hearing aids, spectacles, or contact lenses.

This brief overview over the legal framework in both schemes has set out the core provisions that will be discussed mainly in Part V.

III THE VULNERABILITY OF THE SCHEMES TO POLITICAL CHANGES

In order to demonstrate that both accident compensation schemes tend to create a level of legal incoherence which is contradictory to the purpose of both systems, it is necessary to explain the political contexts of each scheme. In the New Zealand context, it is political changeability that most threatens the scope and purpose of the accident compensation scheme. In the Swiss context, there is less political changeability, but the political system granting citizens extraordinary participation in the process of legislation has caused an inconsistent legal framework for the implementation of the accident insurance scheme.

In New Zealand, accident compensation, and social security in general, is a major political issue and reflects each current government's ruling party's policy. With every change of government either comes benefit cuts or reintroduction. In contrast, the Swiss accident insurance scheme is not so vulnerable nor an object of major policy or legislative change. This disparity is due to the different political systems of both countries.

A Swiss Accident Insurance

Switzerland's unique direct democracy political system is said to be today's most stable democratic system, granting citizens extraordinary participation in the process of legislation through referendum and popular votes.³¹ It is even suggested that it could "turn out to be a model for everybody's 21st century democracy".³² The country's territory (41,285 km²) is not even the size of Canterbury (45,845 km²), but has 27 main political systems (one federal and 26 cantonal systems) and a diversity of different cultures, mentalities, languages and dialects.

The Swiss Parliament and legislative authority is composed of two chambers having the same power, the National Council and the Council of States. The National Council has 200 members who represent the population of the country as a whole. Each

³¹ www.democracy-building.info (last accessed 17 March 2009).

³² Brian Beedham, United Press International, in a book review on Gregory Fossedal's "The road to full democracy", www.democracy-building.info (last accessed 17 March 2009).

canton is represented in proportion to the number of their inhabitants. The Council of States has 46 members and represents the 26 cantons.³³ The Swiss Parliament is not a regular parliament in the sense that sessions of several weeks are held several times a year. Members of Parliament are rarely full-time politicians, usually having another job, and therefore, are closer to the everyday life of their electorate. They devote around 60% of their working hours in sessions and preparation for the sessions in-between in numerous parliamentary commissions.³⁴

As mentioned before, Swiss citizens have far-reaching rights of co-determination in the Swiss political system, especially in the legislation process. First, a Bill is prepared by the federal administration. Second, the cantons, political parties, entrepreneurs, unions and other interested groups in that field are consulted. Third, Parliament debates the Bill in both chambers and the final version is passed by vote. Citizens have various possibilities to give their opinion during this process as individuals, members of interested groups or as members of Parliament. In addition, Federal Bills are voted under the condition of an optional referendum. If 50,000 signatures of citizens are collected within 100 days of a Bill's publication, a popular vote must be held where voters decide by a simple majority whether to accept or reject the Bill. This veto-like right of referendum is an important element of citizens' co-determination of the Swiss political system. It favours willingness to compromise, and blocks extreme Bills, but, on the other hand, it causes delay in implementation of the Bill.³⁵

The Swiss government (executive) constitutes seven members of the Federal Council, elected by the United Federal Assembly³⁶ for a four-year term. There is no prime minister as in New Zealand, only a president elected for a one year period acting as *Primus inter pares*, or first among equals. He has only a leading role in meetings and above all, representational duties.

³³ www.eda.admin.ch (last accessed 17 March 2009).

³⁴ www.direct-democracy.geschichte-schweiz.ch; www.parlament.ch (last accessed 17 March 2009).

³⁵ www.eda.admin.ch and www.democracy-building.info (last accessed 17 March 2009).

³⁶ The United Federal Assembly is the assembly of the National Council and the Council of States (bicameral Parliament), see www.parlament.ch (last accessed 17 March 2009).

Since 1959, the government has been composed according to the ‘magic formula’, when the seats allocated to parties represent approximately their share of the vote. The Swiss Social Democratic Party (SP) (26.3%), the Radical Free Democratic Party (FDP) (23.7%) and the Christian Democratic People’s Party (CVP) (23.3%) each are represented by two seats in the Federal Council, while the Swiss People’s Party (SVP) (11.6%) used to have one. With this formula in place, a change of government is not possible as in New Zealand and it should be a guarantee for a balanced and sustained policy taking into account the different political interests while making amendments to legislation. However, this formula was changed after the National Council elections in 2003 where the SVP became the strongest party in Parliament (26.9%) and the CVP the weakest party (14%). Thus the Parliament chose to elect two representatives from the SVP and only one from the CVP for the Federal Council. Even after this slight change of the “magic formula”, the Swiss political system has ensured and maintains a stable policy.³⁷ In general, Swiss policy is characterized by taking into account the interests of the 26 cantons and different mentalities of different linguistic regions³⁸. In addition, a lot of amendments to legislation are decided by popular vote. This constitutional background results in a steady tendency to compromise, and radical reversals of any status quo, such as the social security system, would be almost impossible.

The first Report of the Federal Council of 12 February 1896 describes the Swiss mentality and the political climate very well in which the accident insurance scheme has emerged. The report underlines both the slow process due to the Swiss mentality and direct democracy to get approval for a new idea. In return, once the idea is well accepted, it will be well rooted and will persist:³⁹

Wir haben keine Zeit mehr zu verlieren. Man hat schon lange von der Sache gesprochen. Demokratie arbeitet etwas schwerfällig; es bedarf langer Zeit, bis sich neue Ideen in der Einsicht eines jeden von siebenhunderttausend stimmberechtigten Bürgern fest eingewurzelt haben; dafür besitzt dann ein solches Gebilde allerdings starke Wurzeln und widersteht jeder Reaktion. Das Schweizervolk hat sich mit der Idee der Kranken- und Unfallversicherung vertraut gemacht. Schreiten wir zum Handeln und setzen wir diese Idee in die Wirklichkeit über! Damit ist dann der Grund für die Entwicklung der

³⁷ Federal Chancellery *The Swiss Confederation a brief guide* (Bern, 2008) www.bk.admin.ch (last accessed 17 March 2009).

³⁸ Switzerland has four official languages: German, French, Italian and Rhaeto-Romanic (article 4 Federal Constitution).

³⁹ Report of the Federal Council of 12 February 1896, 219.

Volksversicherung durch den Staat gelegt und wird es noch der heute lebenden Generation möglich sein, weiter zu bauen. Wir geben uns der Hoffnung hin, daß sich die neuen Institutionen bewähren werden. Überzeugt sich das Schweizervolk davon, daß, was es von den öffentlichen Mitteln an die Kranken- und Unfallversicherung verwendet, gut verwendet ist, so wird es nicht anstehen, für neue verwandte Versicherungszweige neue indirekte oder direkte Steuer.

English translation: [my translation]

We do not have time to lose. This matter has been discussed for a long time. Democracy works a bit slowly. It takes a long time until new ideas have rooted in the head of each of the 700,000 citizens who have the right to vote. In return, such a scheme will have strong roots and will resist every reaction. The Swiss people are acquainted with the idea of sickness and accident insurance. Let's act and realise this idea! Hereby, the foundation for the development of insurance for everyone by the state will be laid and the current generation will be able to build on it. If the Swiss people are convinced that public means for sickness and accident insurance are wisely spent, there will be no resistance to funding by indirect or direct taxes for related insurance branches.

The other side of the coin of this political climate of co-determination is that reforms take a long time to elaborate and accomplish because they have to go through a long process of consultation and compromise. Another disadvantage of this process is that the consistency of the legal framework sometimes suffers considerably and causes gaps within the structure of the Act.

An example is the definition of an accident (article 4 ATSG), which will be examined more fully in Part V. At the time of implementation in 1984, the current Accident Insurance Act (UVG) did not contain a definition of an accident. Parliament found it unnecessary to depart from the definition developed by jurisprudence.⁴⁰ Moreover, a couple of years later, the definition was not integrated into the Act itself, due to the complicated procedure of amending acts, but into the Federal Regulation on Accident Insurance (UVV), second paragraph of article 9. However, with the 2003 introduction of a complementary Act, the Federal Act on the General Part of Social Insurance Law (ATSG), article 9 UVV was repealed and reintroduced in article 4 ATSG. Therefore, the basic principles and definitions of the current accident insurance legislation are spread over several acts and regulations, thereby lacking a consistent legal framework. This is the consequence of the difficulty of completely rewriting an Act within the Swiss political system. For the same reasons, the Accident Insurance Act (UVG) has only been slightly amended since its implementation, and certainly not overhauled as thoroughly as New Zealand's accident compensation legislation.

⁴⁰ Report of the Federal Council of 18 August 1976, 165.

B *New Zealand Accident Compensation*

New Zealand's accident compensation scheme has been rewritten several times, usually with each rewrite reflecting the political ideology of the dominant part in government.⁴¹ This characteristic has brought about major differences, with each rewrite of the scheme, in the scope of cover for insured persons and the rate and extent of entitlement. In addition, very complicated and unsatisfactory transitional provisions have emerged which are often subject to interpretation and debate in court.⁴² These several changes in accident compensation legislation must be understood in the context of the constitution of the New Zealand Executive. It is composed of the Prime Minister, Cabinet and public sector. The Cabinet consists of Ministers who are members of the governing party or parties in Parliament and is conducted by the Prime Minister.⁴³ New Zealand's last government was a Labour coalition government, led by Prime Minister Helen Clark from 1999 until November 2008.⁴⁴ Under that government, the current Injury Prevention, Rehabilitation, and Compensation Act 2001 repealed the former 1998 Act, reintroducing lump sum compensation which had previously been abolished, and other ameliorating amendments to the range of injuries covered by the former Act.⁴⁵

It is too early to predict the development of the accident compensation scheme under the new National-led government elected in November 2008. Will the Act be rewritten and trimmed similar to former accident compensation legislation under national-led governments?⁴⁶

⁴¹ Accident Compensation Act 1972, Accident Compensation Act 1982, Accident Rehabilitation and Compensation Insurance Act 1992, Accident Insurance Act 1998 and Injury Prevention, Rehabilitation, and Compensation Act 2001.

⁴² Injury Prevention, Rehabilitation, and Compensation Act 2001, Part 11. See for example *Te Wake v ACC* [2008] 1 NZLR 251 (HC).

⁴³ Ministry of Justice *The New Zealand Legal System* www.justice.govt.nz (last accessed 17 March 2009); W R Atkin "New Zealand" in International Encyclopaedia of Law series (ed) *Social Security Law* (Kluwer Law International, The Hague, 2004) para 4.

⁴⁴ www.teara.govt.nz (last accessed 17 March 2009).

⁴⁵ John Miller "Trends In Personal Injury Litigation: The 1990s" (2003) 34 VUWLR 407-42; John Miller "ACC Basic Overview", www.jmlaw.co.nz (last accessed 17 March 2009).

⁴⁶ Miller, above n 45.

For instance, the Government has announced an increase of levy rates for 2009/2010 claiming that previous Labour Government left the country with a massive fiscal hole. In addition, an increase of claims is expected.⁴⁷ Voices critical of the Government suggest that the latest moves by the Government in replacing the chairman of the ACC Board and highlighting such fiscal issues are precursors to opening up the earner's account to competition from private insurers, thereby ending ACC's monopoly. Such commentators observe that ACC has always been a "political football".⁴⁸ They further claim that ACC's financial problems are largely a result of lower returns on investments in the recession, bookkeeping changes and policy changes which have broadened coverage, associated with the ageing population, worsening injury rates and medical advances allowing people with serious injuries to live longer and rising medical costs, which are partly caused by wage rises for doctors and nurses.⁴⁹ This recent development of the New Zealand's Accident compensation scheme reveals again how vulnerable the scheme is to political change.

C Observations

The scope of legislative changes in the accident compensation scheme is influenced by the political system. The Swiss political system is built on a more continuous balanced coalition of the major political parties than the New Zealand system. In Swiss law, the accident insurance scheme has never undergone such far-reaching changes as the New Zealand scheme. This continuity provides on the one hand, a level of legal security. On the other hand, necessary legislative amendments take a long time to come into force. In order to overcome this main disadvantage, provisions are often formulated very broadly and such broadness leaves greater discretion to the decision-maker for interpretation. As a consequence, often a very complicated and inconsistent jurisprudence has been developed, for example, regarding

⁴⁷ www.beehive.govt.nz (16 December 2008 and 4 March 2009); PricewaterhouseCoopers *Results for the valuation of outstanding claims liabilities as at 31 December 2008* (Melbourne, 2009).

⁴⁸ Geoff Cumming "Truth the casualty of crisis management" (14 March 2009) www.nzherald.co.nz (accessed 27 March 2009).

⁴⁹ Cumming, above n 48; Brian Fallow "ACC hostage to a changing world" (12 March 2009) www.nzherald.co.nz (accessed 27 March 2009).

the primary (article 4 ATSG) and secondary definitions (article 9 UVV) of an accident.⁵⁰

In contrast, the New Zealand political system is more vulnerable to political change and creation and application of legislation are very much influenced by the ruling party's policy. The advantage of this system is more flexibility to amend existing legislation in order to clarify a provision or legalise jurisprudence. The other side of the coin is that the whole accident compensation scheme can be completely changed within a short time leading to legal insecurity and complicated transitional provisions.

Law and politics are closely interrelated. The purposes of the accident compensation schemes in both jurisdictions are constantly challenged by political ideologies and jurisprudence and also reflect the present state of the economy. These factors result in the fact that both schemes have drifted away from the initial purposes. However, no accident compensation scheme should be a vehicle to enforce the ruling party's ideology. This paper argues that it is very important for a modern democracy to provide a stable social security policy by maintaining the core entitlements, such as cover for medical expenses, best possible rehabilitation and compensation, of the injured person. This can be achieved and funded by focusing on rehabilitation, retraining and compensation in order to prevent disability and long-term unemployment. The latter may cause short-time financial consequences for the welfare state, but will clearly pay off in the long run as the injured person will not have to rely on social welfare. An injured person being able to return to (part-time or full-time) work, adapted to his or her disability and, if necessary, in a different profession, is rewarding and increases self-esteem.⁵¹ What Woodhouse recognized in 1972 by stating that "*real interests of the man himself and the interest which the community has in his restored productive capacity*"⁵² is still valid today in both jurisdictions.

⁵⁰ Part V.

⁵¹ Erwin Murer Die UV- und IV-rechtliche Auseinandersetzung mit reaktiven psychischen Störungen: eine Zwischenbilanz (Fribourg, 2002) 44.

⁵² Woodhouse Report, above n 1, para 58.

IV THE ARBITRARY DICHOTOMY BETWEEN INCAPACITY CAUSED BY ACCIDENTAL INJURY AND INCAPACITY CAUSED BY SICKNESS

Another issue that demonstrates the undermining of the underlying purposes of both schemes is the arbitrary dichotomy between incapacity caused by accidental injury and incapacity caused by sickness. Both social security schemes make a clear distinction between incapacity caused by accidental injury and incapacity caused by sickness, with the accident compensation schemes of both countries providing better benefits than the respective sickness compensation/benefit schemes. This distinction is arbitrarily ‘causally’ based, rather than “needs” based. However, the condition of the person suffering from work incapacity persists, irrespective of the cause. As it will be shown there is no logical reason for this dichotomy other than a political decisions based on costs. Moreover, this distinction has resulted in inconsistencies in the legal framework of both countries. This paper suggests that, in the long run, a new approach of merging accident and sickness compensation should be considered, even if, in the short run, change is unlikely in the light of the economic and political situation New Zealand and Switzerland.

A The Underlying Purpose of the Dichotomy

The development of the current accident and sickness insurance scheme must be understood in the light of the political system described in chapter III A. In this section, it will be shown that, in the Swiss social security scheme, accident and sickness insurance was intended as a complement to personal responsibility and private initiative. Moreover, the dichotomy between compensation for incapacity caused by accidental injury or incapacity caused by sickness has historically evolved, having been questioned at the end of the 19th century, but subsequently upheld until today.

1 *Swiss accident insurance*

As mentioned in Part II, in 1883, compulsory sickness insurance for workers was introduced, followed in 1884 by compulsory accident insurance. In 1896, the Federal Council considered whether the two social insurances should be merged, but finally rejected the proposal: One of the main reasons was that it was believed that claimants were far more likely to seek to fraudulently claim sickness insurance than accident insurance. It was considered that the consequences of an accident were visible, whereas as far as sickness is concerned, the insurance was much more dependent on the declarations of the insured person. Therefore, sickness insurance could not provide as comprehensive entitlements as accident insurance, because the financial outlay could lead to its bankruptcy. However, it was recognized that both contingencies were closely interrelated. Thus, it was suggested that two different kinds of insurances should be upheld, but - for both sickness and accident - short-term entitlements should be covered by the sickness insurance and long-term entitlements by the accident insurance.⁵³ Nevertheless, this suggestion was also rejected by Parliament, and the two different Acts were developed further within the political process, leading to the adoption in 1912 of the “Kranken- und Unfallversicherungsgesetz” (KUVG)⁵⁴ by popular vote. This Act was widely inspired by the German model, but its novelty was that it suggested separate cover for non work-related accidents which is, still today, unique in comparison with other European countries. The part of this Act regarding sickness insurance came into force in 1914. The part concerning accident insurance only came into force in 1918, after the foundation of the insurance company, the “Schweizerische Unfallversicherungsanstalt” (Suva)⁵⁵ to provide cover for accident insurance. In 1981, the part of the “KUVG” regarding accident insurance became an independent Act, the “Unfallversicherungsgesetz” (UVG).⁵⁶ However, the dichotomy between accident and sickness and their very different entitlements has remained, even though the two insurances were regulated in one act.

⁵³ Report of the Federal Council of 12 February 1896, 220.

⁵⁴ Sickness and Accident Insurance Act.

⁵⁵ The “Suva” can be compared to the Accident Compensation Corporation (ACC) in New Zealand. However, the Suva does not hold the monopoly of accident compensation anymore in comparison to the New Zealand ‘ACC’. New Zealand’s next government might abolish the ACC’s monopoly.

⁵⁶ Murer, above n 6, 171-173.

In addition to this intended scheme that provided two different classes of compensation for two different risks the Swiss social insurance scheme must be understood as a complement to personal responsibility and private initiative.

As a consequence, historically, there was no underlying purpose of creating a comprehensive scheme including entitlements for both accident and sickness, nor a completely comprehensive scheme for the contingency, accident, alone.

The legal basis for the Accident Insurance Act is article 41 of the Federal Constitution (completely rewritten and came into force on 1st January 2000):

Article 41 (Social Objectives)

¹ The Confederation and the Cantons shall, *as a complement to personal responsibility and private initiative*, endeavour to ensure that:

- a. everyone has access to social security;
- b. everyone has access to the health care that they require;
- c. families are protected and encouraged as communities of adults and children;
- d. everyone who is fit to work can earn their living by working under fair conditions;
- e. anyone seeking accommodation for themselves and their family can find suitable accommodation on reasonable terms;
- f. children and young people as well as persons of employable age can obtain an education and undergo basic and advanced training in accordance with their abilities;
- g. children and young people are encouraged to develop into independent and socially responsible people and are supported in their social, cultural and political integration.

² The Confederation and Cantons shall endeavour to ensure that everyone is protected against the economic consequences of old-age, invalidity, illness, accident, unemployment, maternity, being orphaned and being widowed.

³ They shall endeavour to achieve these social objectives within the scope of their constitutional powers and the resources available to them.

⁴ No direct right to state benefits may be established on the basis of these social objectives.

Subsection 1 of article 41 Federal Constitution states the principle that the social political engagement of the state shall *complement personal responsibility and private initiative*. Historically, many of today's public institutions have evolved from a private initiative, for example, aid for disabled or old people. The importance of this principle

of subsidiarity⁵⁷ and complementarity⁵⁸ of the state depends on the type of social objectives. Personal responsibility plays a minor role in regard to access to social security (litera a) providing cover for social risks and aiming at preventing poverty. In this context, this principle has a predominantly declarative character.⁵⁹ On the other hand, personal responsibility is more visible in health insurance insofar as, for example, insurance can be taken out with levels of excess (CHF 300 to CHF 2,500 per year). The insured person must at least pay the first CHF 300 of medical expenses per year. However, it is also possible to take out insurance with higher excess (up to CHF 2,500 per year). In regard to accident insurance, personal responsibility can be seen in the possibility of the Suva to reduce or refuse entitlements for gross negligence when the insured person is taking risks (article 39 UVG). This subsidiarity and complementarity clause is also a legal basis for federal and cantonal contributions to private institutions, which fill in the gaps of state social security. Such organizations are, for example, Pro Infirmis (support for disabled people), Pro Senectute (support for older people), and also associations active in the fields of equality between men and women and AIDS help.⁶⁰

⁵⁷ The principle of subsidiarity means that the state will be the secondary provider of social security after the individual person.

⁵⁸ The principle of complementarity means the state will only complement personal responsibility and private initiative regarding social security.

⁵⁹ Provisions with declarative character in Swiss law do not give a direct right to individual person which can be claimed in court. They are not enforceable by law.

⁶⁰ Bernhard Ehrenzeller, Philippe Mastronardi, Rainer J Schweizer and Klaus A Vallender (eds) *Die schweizerische Bundesverfassung* (2 ed, Schulthess, Zurich, 2008) 792.

Subsection 4 of article 41 Federal Constitution stating that *no direct right to state benefits may be established on the basis of these social objectives* has to be understood in the context of the fundamental rights (article 7 – 36) set out in articles 7 (human dignity)⁶¹, 8 (equality before the law)⁶², 9 (protection against arbitrary conduct and principle of good faith)⁶³ and 10 (right to life and personal freedom)⁶⁴.

In contrast to the Social Objectives in article 41, these fundamental rights are directly enforceable. Case law has defined the scope and the inalienable core content of these rights, for example, the fundamental right to cover basic needs⁶⁵ and the right to medical care⁶⁶. Therefore, even if the social objectives stated in article 41 of the Federal Constitution give no direct right to state benefits, certain social rights are still enforceable under the title of fundamental rights.⁶⁷

According to article 117 of the Federal Constitution the Confederation (and not the cantons) legislates on sickness and accident insurance. It may declare sickness and the accident insurance to be compulsory, either in general terms or for individual sections of the population.

These two constitutional legal bases reflect the two main ideas of the Swiss social security scheme: First, it is complementary to personal responsibility, and second, there is no direct right to state benefits. However, the principle of personal responsibility is softened insofar as sickness insurance is compulsory for everyone living in Switzerland, and premiums are subsidised for people on lower income. In regard to accident insurance, it has been declared compulsory for all workers, and non-

⁶¹ Art. 7 Federal Constitution: Human rights must be respected and protected.

⁶² Art. 8 Federal Constitution: Everyone shall be equal before the law (sec 1). No one may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability (sec 2). Men and women shall have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women shall have the right to equal pay for work of equal value (sec 3). The law shall provide for the elimination of inequalities that affect persons with disabilities (sec 4).

⁶³ Article 9 Federal Constitution: Everyone has the right to be treated by state authorities in good faith and in a non-arbitrary manner.

⁶⁴ Article 10 Federal Constitution: Everyone has the right to life. The death penalty is prohibited (sec 1). Everyone has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement (sec 2). Torture and any other form of cruel, inhuman or degrading treatment or punishment are prohibited (sec 3).

⁶⁵ BGE 121 I 367.

⁶⁶ BGE 102 Ia 306.

⁶⁷ Ehrenzeller, above n 60, 804.

workers must take out cover within their compulsory sickness insurance. However, benefits from this accident insurance are significantly less comprehensive for non-workers as for workers.⁶⁸

To sum up, the dichotomy between accident and sickness insurances has historically evolved from the coexistence of sickness and accident insurance schemes. The question of merging the two schemes was examined at the end of the 19th century, but rejected, based on the higher risk of feigning sickness and the associated financial consequences for the insurance provider.

2 *New Zealand accident compensation*

The dichotomy between incapacity caused by accidental injury and incapacity caused by sickness is also found in the New Zealand social security scheme. At the time of the Woodhouse Report, it was envisaged that the accident compensation scheme would be expanded to cover sickness as well as accident.⁶⁹ Although, this has not yet happened nevertheless, the accident compensation scheme was intended to be comprehensive.⁷⁰

New Zealand's system derives from similar roots as the British system, but each system reflects unique geography and demography. Today, New Zealand has a dual system for compensating incapacity. On the one hand, New Zealand has a social security system based on social assistance principles and, on the other hand, the accident compensation system, based on social insurance and contributory principles, but benefits of the latter are not linked directly to contributions. The accident compensation system provides cover for incapacity caused by accidental injury and some occupational diseases. Generally, benefits are better than from social assistance.⁷¹

⁶⁸ Ehrenzeller, above n 60, 1205.

⁶⁹ Judith Ferguson "The line between sickness and accidental injury in New Zealand's Accident Compensation Scheme" (2004) 12 TLJ 61; *Woodhouse Report*, above n 1, para 17 and para 290.

⁷⁰ *Woodhouse Report*, above n 1, para 278.

⁷¹ Stephen Todd (ed) *The Law of Torts in New Zealand* (4 ed, Brookers, Wellington, 2005) 21; Margaret McClure "A Decade of Confusion: The Differing Directions of Social Security and Accident Compensation 1969-1979" (2003) 34 VUWLR 272; Atkin, above n 43, para 18.

In the early 1900s, a “non fault” scheme was introduced under the Worker’s Compensation Act providing cover for work-related injuries for workers.⁷² In 1967, the Government constituted a Royal Commission of Inquiry, the “Woodhouse Commission” under the direction of High Court Judge Sir Owen Woodhouse, to analyse the scope of compensation for personal injury in New Zealand, not only for workers.⁷³ The “Woodhouse report” was a response to the inappropriate mechanism for dealing with personal injuries such as the failure of compensation for significant numbers of accident victims, high costs for the parties, long delays and lack of rehabilitation.⁷⁴

As has been shown, the accident compensation scheme has evolved on the basis of the need for cover for industrial accidents.⁷⁵ The underlying purpose was to provide cover and comprehensive compensation for work incapacity, for both work- and non-work related accidents. There is no logical reason, why this extension to non-work related accidents should not have been applied to non-occupational diseases as well, other than on a pragmatic cost basis.⁷⁶ This dichotomy has led to anomalies and inconsistencies and has been criticized in the literature.⁷⁷ A report by the New Zealand Law Commission recommended that sickness and accidental injury be dealt with under the same legislative scheme in 1988. As summarised by Sir Kenneth Keith, a member of the Commission in 1988, the Report recognised the pragmatic basis for the dichotomy between sickness and accidental injury:⁷⁸

For historical and pragmatic reasons sickness incapacities were not included in the new comprehensive scheme. The concept of earnings related benefits across the whole field of personal injury was itself a new one. Funds which already were supporting the compulsory work and road accident systems could be applied to the wider injury scheme. And there were questions about the additional and uncertain cost of extending cover to sickness. So it seemed wise to take only one step, at least for the time being. But clearly the demarcation is anomalous. It is the kind of situation which gives hard emphasis to what has been called the

⁷² Param Jegatheeson *Injury Prevention, Rehabilitation, and Compensation, Act and Analysis* (Brookers, Wellington, 2002) 1.

⁷³ Atkin, above n 43, para 16; Jegatheeson, above n 72, 1.

⁷⁴ Brian Easton “The Historical Context of the Woodhouse Commission” (2003) 34 VUWLR 210-211; Atkin, above n 43, para 16.

⁷⁵ *Woodhouse Report*, above n 1, para 1 “The Problem”.

⁷⁶ *Woodhouse Report*, above n 1, para 17 and para 290.

⁷⁷ Ferguson, above n 69, 61; Easton, above n 74, 207; Robert Stephens “Horizontal equity for disabled people: Incapacity from Accident or Illness” (2004) 35 VUWLR 783; Grant Duncan “Boundary Disputes in the ACC Scheme and the No-Fault Principle” (2008) 27 NZ Law Rev 32-33.

⁷⁸ Sir Kenneth Keith “The Law Commission’s 1988 Report on Accident Compensation” 34 VUWLR 293.

inequality of luck. It ought to disappear. And sooner rather than later. But how?

Even if it were proper in the face of the compact so recently arrived at, can the way be opened only by taking an axe to the value of injury benefits? For reasons of free market theories in 1988 some will at once say that the 1974 consensus should be ignored. Some will assume that otherwise there would be insurmountable expense. As happened when claims were made against the injury proposals (sometimes with actuarial as well as lay confidence) that it would be impossible to afford such a comprehensive scheme.

In 1990 the then Labour Government drafted the Rehabilitation and Incapacity Bill 1990, incorporating much of the Law Commission's report, proposing the merging of both systems. This Bill was never enacted and the new National government took power shortly thereafter.⁷⁹

3 *Observations*

Both social security schemes make a clear distinction between incapacity caused by accidental injury and incapacity caused by sickness, with the accident compensation scheme providing cover for work and non work-related accidents and occupational diseases and better benefits than the sickness compensation scheme. This distinction is arbitrarily "causally" based, rather than "needs" based. Neither in the Swiss accident insurance scheme nor the New Zealand accident compensation scheme, is there a logical reason for this dichotomy other than a political decision based on costs. The main argument advanced in the Swiss legislation process was the inherently higher danger of feigning sickness rather than accident, where the consequences are visible. Thus, it was argued that, if the same better entitlements were provided for sickness as for accident, the financial loss would be too great. The New Zealand scheme originally intended to extend cover for sickness later in time, but successive governments have failed to do extend the scheme. Nevertheless, the need of the incapacitated person's for cover persists, no matter the cause of the incapacity.

It is advocated that it is high time to reconsider the unequal treatment of incapacity by accident and by sickness, especially given the consequences of this arbitrary distinction which will be set out in the next chapter.

⁷⁹ Rehabilitation and Incapacity Bill 1990.

B The Consequences of the Arbitrary Dichotomy for the Person Suffering from Work Incapacity

Both social security schemes are crafted on the arbitrary dichotomy between incapacity caused by accidental injury and incapacity caused by sickness. This distinction is “causally” based, rather than “needs” based. For the injured person, the need for cover in the case of incapacity, caused by chance by accident or sickness, persists. Entitlements from the accident compensation scheme in both social security schemes are considerably better than from the sickness compensation scheme. In both jurisdictions, occupational diseases are included in the accident compensation scheme. However, the underlying purpose of both schemes is to provide medical care and restore work capacity as soon as possible. This process is considerably inhibited in the case of work incapacity caused by non occupational disease because the sickness compensation scheme in Switzerland only provides medical care, not the necessary measures to promote rehabilitation, nor weekly compensation. In New Zealand, the scheme only provides flat rate social security sickness benefits and not earnings-related accident compensation.⁸⁰

1 Swiss accident insurance

The Swiss social security system makes a clear distinction between incapacity caused by accidental injury and incapacity caused by sickness. Apart from this distinction there is also a second distinction between compensation for workers and non workers.

The Accident Insurance Act (UVG) provides cover for work-related accidents (article 7), non work-related accident (article 8) and occupational diseases (article 9). Insured under this act are those who are employed, self-employed or on unemployment benefits (article 1a).

⁸⁰ Atkin, above n 43, para 18; Easton, above n 74, 211.

Regarding accidents, the scheme provides compensation for medical costs and income replacement (maximum CHF 126,000 per year, 80% of the last salary), lump sum compensation for damage of integrity, complete cover for medical expenses (GP, specialist and hospital), disability pensions depending on the degree of disability, widow/widower's and orphan's pension and ancillary services related to rehabilitation. The scheme is funded by a percentage of one's salary, depending on the type of work. The contribution for work-related accidents is paid by the employer (approximately 0.1%) and for non work-related accidents, by the employee (approximately 1-2%).

The accident insurance scheme provides the same benefits for occupational diseases. The damaging substances and occupational diseases covered under the scheme are listed in appendix I of the Federal Regulation on Accident Insurance (UVV). Other diseases not specifically listed are also covered if there is evidence that they were exclusively or with predominant probability caused by work (article 9(2) UVG). This requirement is, however, rather difficult to fulfill.

For example, the claim of a brick layer suffering from a medical condition affecting on the elbow was denied in the case 126 V 183.⁸¹ The Federal Supreme Court held that "with predominant probability" meant that the occupational disease must be caused with 75% probability by the occupation. In this case, there was insufficient medical evidence that the condition was the result of his repetitive physically demanding job as a brick layer.

The Sickness Insurance Act (KVG) provides sickness, maternity and accident cover for non workers. All persons living in Switzerland must be insured, but may freely choose their insurer. Benefits include medical and pharmaceutical care and hospital treatment. However, there is a minimum excess of CHF 300 per year and a maximum excess of CHF 2,500 per year. In addition to this, there is a share of 10% of costs exceeding the excess up to CHF 700 for adults and CHF 350 for children.

⁸¹ BGE 126 V 183.

The contribution to board and accommodation in the case of hospital stays is CHF 10 per day. The insured person pays a monthly premium which – for excess of CHF 2,500 per year – currently costs between CHF 150-180 per month. The cantons provide a system of subsidies for low income earners.

In contrast to the accident insurance scheme, the (social) sickness insurance scheme does not provide income replacement. Cover for income replacement caused by sickness can be taken out through private insurance. Another difference of this distinction between the accident and sickness schemes is that the Sickness Insurance Act only provides minor benefits like medical expenses, after deduction of the annual excess (between CHF 300 and 2,500). Therefore, if a non worker suffers from an accident, he or she will not be insured by the accident compensation scheme, but only entitled to the minor benefits like medical expenses after deduction of the annual excess.

In regard to workers suffering from sicknesses other than occupational disease, 80% of the salary is covered for a fixed period, depending on the sickness preceding duration of the employment (article 324a and 324b Obligations Law Act, OR).

To sum up, the arbitrary dichotomy is seen in the different types of benefits for incapacity caused by accidental injury and incapacity caused by sickness. A second dichotomy is the different benefits for workers and non workers. Benefits for sickness other than occupational disease are considerably less comprehensive than for accident and occupational disease. This distinction is in contradiction to the underlying purpose of providing cover for medical expenses and promoting the restoration of work capacity.

2 *New Zealand accident compensation*

The dichotomy between incapacity caused by accidental injury and incapacity caused by sickness is also found in the New Zealand social security scheme. The second dichotomy between benefits for worker and non workers is not as distinct in the New Zealand scheme also because non workers are covered under the accident compensation scheme.

The current accident compensation scheme (IPRC Act) 2001 provides cover for accident (section 25), personal injury (section 26), mental injury (section 27), work-related personal injury (section 28), personal injury that is both work-related and motor vehicle injury (section 29), personal injury caused by work-related gradual process, disease, or infection (section 30), treatment injury (section 32), motor vehicle injury (section 35). Therefore, sickness, other than work-related disease, is not covered under this scheme.

Regarding work-related gradual process, disease, or infection (section 30), the scheme differentiates between work-related gradual process, disease or infection mentioned in Schedule 2 and those not mentioned in Schedule 2. “Schedule 2” diseases do not require an assessment of causation under subsection (1)(b) or (c) which is an alleviation of the burden of proof for the insured person. Section 31 provides that ministerial advisory panel will advise the Minister whether Schedule 2 should be amended.

In the case of a work-related gradual process, disease, or infection not mentioned in Schedule 2, the insured person must first fulfill the requirements of section 30 (1): The personal injury must be (a) suffered by a person, (b) caused by a gradual process, disease, or infection, and (c) caused in the circumstances described in subsection (2).

Section 30(2) sets out the three-tier test for considering whether a personal injury is a work-related gradual process, disease, or infection⁸²:

(a) What property or characteristic in the workplace, caused or contributed to the personal injury?

(b) Is that property or characteristic found to any material extent in the person’s non-employment activities or environment?

(c) Is the risk of injury significantly greater for persons performing that task in that environment?

The insured person can claim cover if tests (a) and (c) are answered in the affirmative, and test (b) in the negative.

⁸² Brookers, commentary ad section 30, IP30.02 www.brookersonline.co.nz (accessed 18 February 2008).

Where incapacity arises through sickness, the New Zealand social security scheme provides two different types of benefits. Broadly, the sickness benefit may be claimed for temporary incapacity, and the invalid's benefit for long-term incapacity.⁸³

Sickness, other than occupational disease, is covered under the Social Security Act 1964, section 54 – 57. The standard eligibility requirements relate to employment. According to the requirements for the sickness benefit set out in section 54, the person is (a) not in full-time employment, willing to undertake it, but because of sickness (...) is limited in his or her capacity to seek it, undertake, or be available for full-time employment or is (b) in employment, but is losing earnings because, through sickness is (...) not actually working (...). Under section 54A a sickness benefit may be granted to a person on grounds of hardship.

According to section 39F of the Social Security Act 1964 the purpose of the invalid's benefit is to provide income support to people who (a) have, and are likely to have in the future, a severely restricted capacity to support themselves through open employment because of sickness, injury, or disability; or (b) are totally blind. Sections 40 – 46 set out the requirements for the invalid's benefit.

3 *Observations*

In both accident and sickness compensation schemes, entitlements from the accident compensation scheme are considerably better than from the sickness compensation scheme. In both jurisdictions, occupational diseases are included in the accident compensation scheme. There is also a second dichotomy between workers and non workers providing better entitlements for workers. This distinction is not as obvious in the New Zealand scheme because non workers are covered for accident under the accident compensation scheme. However, a non worker under the New Zealand scheme would have to fulfill the requirements of hardship (section 54A Social Security Act 1964) to qualify for a sickness benefit. This requirement is much for

⁸³ Atkin, above n 43, para 129.

difficult to fulfill and grants more discretion to the chief executive than the standard eligibility requirements of section 54.

To sum up, the arbitrary dichotomy has severe consequences for a person suffering from work incapacity. As entitlements in both jurisdictions are better in the accident compensation scheme, the consequences are not only financial in nature, but also inhibit the person's rehabilitation and restoration of work incapacity caused by sickness. The purpose of both accident compensation schemes was to extend the schemes to work incapacity by sickness at a later stage. Instead, this dichotomy persists in both schemes. Thus, the dichotomy is undermining the purpose of the schemes.

C A New Approach and its Political Feasibility

1 Swiss accident insurance

The question arises whether a change in the current Swiss social security scheme is desirable and politically feasible. It has been shown that the dichotomy between work incapacity caused by accidental injury and incapacity caused by sickness has been last examined at the end of the 19th century. It will also be shown in Part V that the two definitions of an accident have been almost unaltered for over 90 years⁸⁴, and the scheme as a whole has never undergone radical changes.⁸⁵ Further, Switzerland has a steady political system due to the permanent equilibrium of the major parties in the Federal Council.⁸⁶

In a recent comparison with the Dutch social security law scheme, the Swiss social accident insurance has been subject to a profound study in regard to an unequal treatment of accident and sickness.⁸⁷

⁸⁴ Part V C.

⁸⁵ Part III A.

⁸⁶ Part III A.

⁸⁷ Olivier Steiner *Die Abschaffung der Unfallversicherung, Eine Untersuchung zur Ungleichbehandlung von Unfall und Krankheit im schweizerischen und niederlaendischen Sozialrecht* (Schulthess, Zuerich, 2007).

The Dutch scheme has not had separate accident insurance since 1967. Since then, entitlements are no longer caused based, but still remain different for workers and non-workers because they are earnings-related. In this scheme, it does not matter whether work incapacity is caused by accidental injury or by sickness. Thus, workers will be entitled to income replacement not only for work incapacity as a result of an accident, but also as a result of sickness.⁸⁸

This comparative study found that the dichotomy of independent accident and sickness insurance in Switzerland was questionable for several reasons⁸⁹:

First, the current Swiss scheme privileges people suffering from an accident over those suffering from a sickness. Supposing that the needs of the claimant, such as income replacement, medical expenses and rehabilitation, is the same irrespective of the cause of the incapacity, there must be a justification for this unequal treatment.⁹⁰ The majority of Swiss literature holds that there is no convincing argument for this inequality.⁹¹ The legislature examined the question of inequality between accident and sickness in the 1970s, but, decided that the abolition of the social accident insurance would be premature, because the second pillar (Compulsory Company Pension Fund providing cover for accident, old age, disability and death for employees)⁹² was not into force at the time. Moreover, the structure of the social sickness insurance did not allow merging the two systems at the time.⁹³ When the second pillar was introduced in the 1980s, the question was neither examined again⁹⁴ nor in later partial revisions of other social insurances, such as the introduction of the sickness insurance act in the 1990s⁹⁵, the various revisions of the disability insurance⁹⁶ and the 1st revision of the BVG (Compulsory Company Pension Fund)⁹⁷.

⁸⁸ Steiner, above n 87, 67-68.

⁸⁹ Steiner, above n 87, 197-200.

⁹⁰ Steiner, above n 87, 198.

⁹¹ Steiner, above n 87, 124.

⁹² See Part IX B.

⁹³ Report of the Federal Council of 18 August 1976, 141, 161-162.

⁹⁴ Report of the Federal Council of 18 August 1976, 149, 246 and 274-277.

⁹⁵ BBl 1992 I 93, 206.

⁹⁶ BBl 1985 I 17 (2. IVG-Revision), BBl 1988 I 1333 (3. IVG-Revision), BBl 2001 I 3205 (4. IVG-Revision), BBl 2005 II 4459 and BBl 2006 II 8313 (5. IVG-Revision).

⁹⁷ BBl 2000 II 2637.

Secondly, the main argument in favour of a merger of the sickness and accident insurance schemes is the difficulty of differentiating an accident from a sickness. This task involves tremendous costly undertakings on the part of lawyers, medical doctors and case workers. It has to be determined if the contingency is an accident, an article 9 UVV injury, an occupational disease or an “ordinary” disease. This process also results in expenses and legal uncertainty for the insured person.

Thirdly, the present coordination of the accident insurance with the social insurance scheme is very complicated. Apart from the accident insurance, two other social insurances (Compulsory Company Pension Fund and Disability Insurance) basically provide cover for an accident.⁹⁸ These schemes have, furthermore, to be coordinated with the sickness insurance scheme and any private accident insurance taken out by the insured person.

In the light of these difficulties, the Netherlands in 1967 repealed the accident insurance and introduced entitlements for health damages notwithstanding whether they are the result of a sickness or an accident. By doing so, the inequality and problems of delimitation have been removed, and questions of coordination with the rest of the social insurance scheme have been simplified.⁹⁹ This scheme is funded by a combination of contributions of the insured person with subsidies for those with a low income and the state.¹⁰⁰

It is advocated here that the suggested repeal of the Swiss accident insurance and integration into the social security scheme would be the answer to the inconsistencies and problems raised in this dissertation. However, it is also important to examine the question of the political feasibility of such a model which is, as it is suggested here, the crucial point.

On the 1st July 2008, the Federal Council published the Federal Report in regard to the reform of the accident insurance act (UVG) for the attention of the Parliament. The project comprises modifications concerning the organisation of the Suva and its

⁹⁸ For details see Part IX B table 3 overview of insurances for the contingency accident.

⁹⁹ Steiner, above n 87, 199.

¹⁰⁰ Steiner, above n 87, 69–76.

rehabilitation hospitals, improvement of surveillance of the accident insurance companies, coordination of the invalid benefit with the first pillar (state old age and life insurance), and harmonisation of the medical tariffs in accident and sickness insurance. The question whether it would be suitable to merge the accident and sickness scheme or introduce a new definition of an accident, is regretfully not the object of the reform.¹⁰¹

As a conclusion, it can be said that a radical change of the current social accident insurance scheme is not realistic in the near future, especially in the light of the recent pending reform in Parliament. However, it is suggested that, at least, the definition of an accident should be reconsidered. As it will be argued in this paper, the repeal of the requirement of the unusual factor would solve the problems of inconsistencies in between an accident and a sickness.

2 *New Zealand accident compensation*

New Zealand's political system allows for reforming the accident compensation scheme in order to include cover for non occupational disease within a reasonable time. However, this has not been seriously reconsidered since the implementation of the scheme. Despite the critiques in literature,¹⁰² Parliament has contented itself with regularly amending the current legislation, for example, introducing the category of treatment injury (section 32 IPRC). Other suggestions have been made to include man-made disease.¹⁰³ Also the Law Commission in the 1988's Report on Accident Compensation recommended a gradual expansion of the scheme to include cover for sickness by stages, including occupational diseases.¹⁰⁴ Recently, Sir Owen Woodhouse has claimed that the Law Commission had demonstrated that the expansion would have been an *economically acceptable* path.¹⁰⁵

¹⁰¹ BBI 2008 II 5395.

¹⁰² Ferguson, above n 69, 61; Easton, above n 74, 207; Stephens, above n 77, 783; Duncan, above n 77, 32-33.

¹⁰³ Maria Hook "New Zealand's Accident Compensation Scheme and man-made disease" (2008) 39 VUWLR 289.

¹⁰⁴ Keith, above n 78, 301; Ken Oliphant "Beyond Woodhouse: Devising New Principles for Determining ACC Boundary Issues" (2004) 35 VUWLR 915.

¹⁰⁵ Woodhouse, above n 11.

3 *Observations*

A merger of the current accident and sickness compensation schemes is fairly unlikely in both jurisdictions. In the Swiss scheme, the political system is crafted on the basis of balance of interests among the Government, Parliament and citizens rights, which has proved to be a guarantee for social peace and stability. The other side of the coin, radical changes of any well established scheme are almost impossible. In New Zealand, a merger of the accident and sickness compensation schemes would not have to overcome as many hurdles. However, in the light of the current economic situation and the announced increase of levy rates for ACC, which might forecast the direction of the development of the scheme, an extension of the accident compensation scheme to sickness seems unrealistic today.

Nevertheless, on the grounds of the success of the Dutch model and the current issues concerning the dichotomy in both jurisdictions, such a merger merits being examined further and analysed regarding costs. It is expected that potential additional costs for funding such a scheme would be balanced by people incapacitated by sickness regaining work capacity earlier with the same entitlements as the accident compensation scheme. Therefore, claims for other benefits such as unemployment or sickness benefits would decrease and provide funding for the new benefits.

V DEFINITIONS OF AN ACCIDENT IN BOTH ACCIDENT COMPENSATION SCHEMES

Despite arising in different legislative, political and jurisprudential contexts there is much that is similar between Switzerland and New Zealand in their respective definitions of what constitutes injury by accident for the purpose of the legislative schemes. Both schemes require a strong causal nexus between the event of the accident and the resultant injury, although Swiss jurisprudence places significant emphasis on requiring sufficient the gravity of an accident before cover will be granted. Both schemes require that accidental injury occur within a limited time-frame so as to prevent cover for illness or gradual processes. In addition both schemes usually require that accidental injury be the result of some external force or action external to the body. A key difference between the schemes however is visible when examining the Swiss requirement for a qualifying accident to involve an external “unusual factor”. The Swiss courts’ interpretation of what is required to show this “unusual factor” is another example of how the development of the scheme has drifted away from the underlying purpose of providing cover and compensation in order to restore work capacity as soon as possible.¹⁰⁶

In this Part the application of the definition of an accident in Swiss accident insurance law will be demonstrated by case studies. The case law that has arisen from the interpretation of the Swiss definition is very technical and intricate and far away from the ordinary person’s understanding and general language use of the term “accident”. The definition is formulated very broadly and leaves much discretion for interpretation by the decision-maker. As a result, incoherent jurisprudence has been developed. Furthermore, the jurisprudence has developed two definitions of an accident which have now been enacted in legislation:

¹⁰⁶ Part II A 1.

- The primary definition is set out in Article 4 ATSG;¹⁰⁷ and
- the secondary definition, set out in Article 9 UVV,¹⁰⁸ only applicable for certain specific injuries where the requirements of Article 4 ATSG cannot be met.

As a result of this complicated jurisdiction, some injured persons miss out on cover, even if, from a medical point of view, an accident causing injury has undeniably occurred. As the scope for cover has been narrowed and as claims are accordingly denied, the insured person has no access to entitlements including rehabilitation and the restoration of work capacity is considerably more difficult and time-consuming. Through selected examples of jurisprudence, mainly concerning sport injuries, it will be demonstrated that, what is termed the “unusual factor” in the definition of an accident (Article 4 ATSG), is an arbitrary criterion. This requirement sets the bar for granting cover too high, and, therefore, should be repealed.

In New Zealand accident compensation, the definitions of an accident and personal injury do not require an unusual factor, and more effectively define the boundary between an accident and sickness.

A *The Primary Definition of an Accident (Article 4 ATSG)*

The word accident is often associated by the ordinary person with physical injury caused by mechanical forces like a kick or fall.

The German word “Unfall” is defined as an event involving a sudden impact (external injury or organic disease), which causes physical or mental damage to the health of a human being. The etymology of the German word “Unfall” has its origins in the word “Unval” which means “Unglueck, Missgeschick”¹⁰⁹. It is a combination of the

¹⁰⁷ Federal Act on the General Part of Social Insurance Law (SR 830.1).

¹⁰⁸ Regulation on Accident Insurance (UVV) of 20 December 1982 (SR 832.202).

¹⁰⁹ English: misfortune, mishap; Günther Drosdowski (ed) *DUDEN Etymologie* (2 ed, Dudenverlag, Zürich 1989) 770.

two words “un” interpreted as “uebel”, “schlecht”, “miss”¹¹⁰ and “fall”,¹¹¹ and expresses the meaning of a “bad fall”.¹¹²

The English word “accident” has its origins in middle English and at the root Latin, “accident”, from “accidere”, from *ad-* “towards, to” and *cadere* “to fall”.¹¹³ An accident can be defined as “anything that happens without foresight or expectation, an unusual event, which proceeds from unknown cause, or is an unusual effect of a known cause; a casualty, a contingency, a mishap, an unfortunate event”.¹¹⁴

Even if the words in both languages have different root words, the meaning is the same. An accident generally means a (unfortunate) fall.

However, not every event that the insured person counts as an accident *is* an accident under the accident compensation legislation in either Swiss or New Zealand law. As it has been shown in Part III, the definition of an accident in Swiss law is the criterion to distinguish between accident compensation and sickness compensation. It is crucial to determine the boundaries between an accident and a gradual continuous process, and a sickness. Its function is to delineate cover of the accident insurance and sickness insurance.

Swiss accident insurance utilises the definition developed by the Swiss Supreme Court in 1939.¹¹⁵ The court defined an accident as a sudden and involuntary injury caused to the human body by a “more or less external unusual factor”.¹¹⁶ This phrase was interpreted by the courts over the succeeding decades, but only in 1984 was this definition integrated into article 9(1) UVV.¹¹⁷ The new definition included a small

¹¹⁰ English: bad, miss.

¹¹¹ English: fall or case.

¹¹² Dudenredaktion (ed) *DUDEN Synonymwörterbuch* (4 ed, Dudenverlag, Zürich 2007) 913; Drosdowski, above n 109, 770.

¹¹³ Judy Pearsall (ed) *The Concise Oxford English Dictionary* (3ed Oxford University Press, Oxford 2002) 7.

¹¹⁴ J.A. Simpson and E.S.C. Weiner *The Oxford English Dictionary* (2ed Clarendon Press, Oxford 1998) 74; Tony Deverson and Graeme Kennedy *The New Zealand Oxford Dictionary* (Oxford University Press, Auckland 2005).

¹¹⁵ EVGE 1939 E. 3 S. 112.

¹¹⁶ EVGE 1939 E. 3 S. 112.

¹¹⁷ The Regulation on Accident Insurance (UVV) of 20 December 1982 (SR 832.202) came into force on 1st January 1984. However, art. 9 UVV was abolished, when the ATSG (art. 4 definition of the accident) came into force on 1st January 2003.

amendment; the expression “more or less” was deleted. This description was meant to give the judge the necessary discretion to interpret the notion of “unusualness” in every specific case.¹¹⁸ Case law has defined that the external unusual factor must involve “a disruption of the framework of the ordinary or usual in the respective area of life”.¹¹⁹

Meyer-Blaser’s comparative study of the definition of an accident in Germany, Austria, France, Italy and the UK has shown that only the Swiss scheme requires this unusual factor. In Switzerland, it was argued that a special threshold for cover was needed because there was no reason to include non occupational accidents in the scheme. In other countries, non occupational accidents are not included in the accident insurance scheme. At the same time, it was admitted that there is no logic for the criterion of the unusual factor for occupational accidents. In addition, this criterion would be difficult to apply.¹²⁰

In New Zealand accident compensation, the Woodhouse Report found that cover should be provided for “bodily injury by accident which is undesigned and unexpected so far as the person injured is concerned, but to the exclusion of incapacities arising from sickness or disease”.¹²¹ The former Accident Compensation Acts 1972 and 1982 defined the term of “personal injury by accident”, but, did not contain a definition of an accident prior to the Accident Rehabilitation and Compensation Insurance Act 1992. Previously, the Court of Appeal held that it meant an unlooked for mishap or untoward event which was not expected or designed.¹²² In the Injury Prevention, Rehabilitation, and Compensation Act 2001, the notion of accident is defined in section 25 and the term of personal injury is separately described in section 26.¹²³ Accident is just one ground for cover (section 20(2)a) IPRC 2001. The other categories are set out in section 20 and 27 – 35 IPRC 2001.

¹¹⁸ Paul Piccard *Haftpflichtpraxis und soziale Unfallversicherung* (Orell Füssli, Zuerich, 1917) 15.

¹¹⁹ BGE 116 V 147.

¹²⁰ Meyer-Blaser Ulrich, *Unfallbegriff im Sozialversicherungsrecht*, St. Gallen 1995, 289 – 292.

¹²¹ *Woodhouse Report*, above n 1, para 289.

¹²² *Green v Matheson* [1989] 3 NZLR 564 (CA) and *Willis v Attorney-General* [1989] 3 NZLR 574 (CA), applying *Fenton v Thorley & Co Ltd* [1903] AC 403, 408 (HL).

¹²³ Brookers, IP25.02 commentary ad s 25 www.brookersonline.co.nz (accessed 20 March 2009).

1 *Physical or mental injury*

(a) Swiss accident insurance

The primary definition of an accident is that it must be a sudden and involuntary injury caused to the human body by an external unusual factor (article 4 ATSG).

The “injury” requirement of the definition of an accident is fulfilled, if the event causes damage to the claimant’s health. This damage can be of physical or mental nature.¹²⁴ The damage must either entail medical care, work incapacity, or death.¹²⁵ Therefore, the requirement of an injury is not fulfilled by the event itself, such as a fall, but only when the event causes an injury, for example a fracture, sprain or strain. On the other hand, the harmful impact on the human body is already sufficient, not only its further consequences, such as pain, sickness or death. Further, minor, non-harmful, but surely unpleasant impacts, such as headache, insignificant bruises or skin abrasions are not considered an injury.¹²⁶

In Swiss law, in contrast to New Zealand accident compensation, mental injuries are covered independently from a preceding physical injury. However, the threshold for cover often is the causal connection between the event and the mental injury, which can be difficult to demonstrate.¹²⁷

(b) New Zealand accident compensation

In New Zealand accident compensation, the Woodhouse Report found that cover should be provided for “bodily injury by accident which is undesigned and unexpected so far as the person injured is concerned, but to the exclusion of incapacities arising from sickness or disease”.¹²⁸

¹²⁴ BGE 122 V 232 E. 1; Locher, above n 21, 73.

¹²⁵ Alfred Maurer *Schweizerisches Unfallversicherungsrecht* (2 ed, Staempfli, Bern, 1989) 172.

¹²⁶ André Largier *Schaedigende medizinische Behandlung als Unfall* (Schulthess, Zürich, 2002) 22-23.

¹²⁷ Part V A 2.

¹²⁸ *Woodhouse Report*, above n 1, para 289.

The former Accident Compensation Acts 1972 and 1982 defined the term of “personal injury by accident”, but, did not contain a definition of an accident prior to the Accident Rehabilitation and Compensation Insurance Act 1992. Previously, the Court of Appeal held that it meant an unlooked for mishap or untoward event which was not expected or designed.¹²⁹ In the Injury Prevention, Rehabilitation, and Compensation Act 2001, the notion of accident is defined in section 25 and the term of personal injury is separately described in section 26.¹³⁰ Accident is just one ground for cover (section 20(2)a) IPRC 2001. The other categories are set out in section 20 and 27 – 35 IPRC 2001.

In New Zealand accident compensation, the requirement of a physical injury is set out in section 26 IPRC 2001, and is not a constitutive element of the definition of an accident in section 25 IPRC 2001.

As set out in Part II section 26 IPRC 2001 defines the personal injury:

26 Personal injury

(1) Personal injury means

- (a) the death of a person; or
 - (b) physical injuries suffered by a person, including, for example, a strain or a sprain; or
 - (c) mental injury suffered by a person because of physical injuries suffered by the person; or
 - (d) mental injury suffered by a person in the circumstances described in section 21; or
 - (da) work-related mental injury that is suffered by a person in the circumstances described in section 21B; or
 - (e) damage (other than wear and tear) to dentures or prostheses that replace a part of the human body.
- (2) Personal injury does not include personal injury caused wholly or substantially by a gradual process, disease, or infection unless it is personal injury of a kind described in section 20(2)(e) to (h).
- (3) Personal injury does not include a cardio-vascular or cerebro-vascular episode unless it is personal injury of a kind described in section 20(2)(i) or (j).

¹²⁹ *Green v Matheson* [1989] 3 NZLR 564 (CA) and *Willis v Attorney-General* [1989] 3 NZLR 574 (CA), applying *Fenton v Thorley & Co Ltd* [1903] AC 403, 408 (HL).

¹³⁰ Brookers, IP25.02 commentary ad s 25 IPRC Act www.brookersonline.co.nz (accessed 18 February 2008).

- (4) Personal injury does not include
 - (a) personal injury caused wholly or substantially by the ageing process; or
 - (b) personal injury to teeth or dentures caused by the natural use of those teeth or dentures.
- (5) For the purposes of subsection (1)(e) and to avoid doubt, prostheses does not include hearing aids, spectacles, or contact lenses.

This section does not provide an exhaustive set of criteria to determine exactly what counts as a physical injury. As in Swiss law, jurisprudence therefore has specified the term ‘physical injury’. In a very influential judgment *Teen v ACC*¹³¹ the Court accepted a broad definition of the term ‘physical injury’ as ‘damage or hurt’ that ‘is of or relating to the body, as distinguished from the mind or spirit’. A precise label for the injury is not required as long as the effects are seen and manifest.¹³² However, pain alone is not sufficient evidence for an injury.¹³³ Further, the claimant has to establish that the injury results from an accident, but does not have an onus to determine or label the precise nature of the injury.¹³⁴

When pain is accompanied by swelling the claimant is not usually entitled to cover: In *Govind v ACC*¹³⁵ the Court held that swelling is the result of an inflammation, and therefore, the required physical injury had been established. Later, it was specified that this ruling could not apply in every case, but it would be decisive whether there is evidence of a physical injury.¹³⁶ In *Rose v ACC*, in regard to tenosynovitis, cover under the ACC scheme was first affirmed, as the swelling and pain were assessed as evidence of physical injuries, namely carpal tunnel syndrome and tenosynovitis.¹³⁷ Subsequently, the court held that the claimant’s tendon sheath swelling might be the result of muscle tension pain among other possible causes, and denied cover for tenosynovitis.¹³⁸

Requirements for a qualifying mental injury are more strict in the New Zealand scheme. Section 27 IPRC 2001 defines a *mental injury* as a clinically significant

¹³¹ *Teen v ACC* (3 September 2002) DC WN 244/02, Beattie J.

¹³² *Te Puna v ARCIC* (11 May 1999) DC CHCH 117/99, p 15, Beattie J.

¹³³ *ACC v Arnold* (18 July 2003) DC WN 157/03, Beattie J.

¹³⁴ *Te Puna v ARCIC* (11 May 1999) DC CHCH 117/99, p 15, Beattie J.

¹³⁵ *Govind v ACC* (11 November 2002) DC AK 310/02, Beattie J.

¹³⁶ *Edwards-Atkinson v ACC* (15 November 2005) DC WN 335/05, Hole J.

¹³⁷ *Rose v ACC* (19 July 2000), DC CHCH 179/00, Beattie J; 19; *Baker v ACC* (5 July 2002) DC Huntly 186/02, Beattie J.

¹³⁸ *Westpac Trust v ACC* (12 December 2005) DC WN 356/05, Ongley J.

behavioural, cognitive, or psychological dysfunction. Section 26(1)(c) IPRC 2001 limits cover for mental injuries suffered by the claimant “because of” physical injury already suffered by the claimant. Work-related mental injuries are now also covered under s26 (d). Section 21B IPRC 2001, introduced on 1st October 2008, sets out cover for work-related mental injury. The courts have determined, in a number of decisions, that in seeking cover for mental injuries under section 26(c) the claimant has the onus to establish a direct causal nexus on the balance of probabilities between the physical injury and the mental injury.¹³⁹ The court held that an indirect causal link is not sufficient to claim cover.¹⁴⁰ In regard to minor injuries, it was found that the courts can be reluctant to affirm a mental injury caused by a minor injury when the effects of that injury are spent.¹⁴¹

In *Seddon v ACC*¹⁴² cover for a mental injury, namely chronic pain, caused by a strained neck injury while playing rugby, was denied. The court held a direct causal link had not been shown on the balance of probabilities. Further, an indirect causation, such as brooding or worry, is not sufficient.¹⁴³

(c) Observations

The main difference between the two schemes is that, in Swiss law, mental injuries are basically covered independently from a physical injury. However, as a second step, the threshold for cover in Swiss law is to establish a causal nexus between the accident and the mental injury with predominant probability. On the other hand, in New Zealand accident compensation, cover is, initially, limited to mental injuries directly caused by a physical injury or work-related mental injury before even taking a causal nexus between an accident and the mental injury into consideration.

¹³⁹ *Dorrington v ACC* (16 February 2004) DC NEL 16/04, Beattie J.

¹⁴⁰ *Robinson v ACC* (17 September 2003) DC WN 230/03, Cadenhead J.

¹⁴¹ *ACC v Geerders* (8 July 2004) DC WN 188/04, Cadenhead J.

¹⁴² *Seddon v ACC* (8 October 2004) DC WN 320/04, Cadenhead J.

¹⁴³ *Seddon v ACC* (8 October 2004) DC WN 320/04, para 23, Cadenhead J.

2 Causality

Both the Swiss and New Zealand schemes focus on the causes of accidental injury in determining whether cover should be granted, rather than on the outcomes of the accidental injury or the needs of the claimant.

Broadly speaking, the requirement of the natural causal connection will be decided based on the medical report. As a second step, the requirement of the adequate causal connection gives discretion to the judge and allows him or her to limit the scope for cover in interpreting the general-abstract clause developed by jurisprudence.¹⁴⁴

(a) Swiss accident insurance

In Swiss accident insurance, a causal connection between the event that results in the damage and the physical or mental injury must be established. Swiss literature and jurisprudence distinguish between the natural and the adequate causal connection. Both causal connections are conditions that must be fulfilled for a successful claim.¹⁴⁵

*Natural causal connection*¹⁴⁶

First, a natural causal connection must exist between the damaging event and the bodily harm. All circumstances are in a natural causal connection without which the result would not have occurred either not in the same way or not at the same time. Therefore, it is not necessary that the accident is the exclusive or immediate cause of health disturbances, in order to affirm the natural causal connection. It is sufficient that the damaging event, as well as other conditions, has impaired the physical or mental integrity of the insured person and is, therefore, a partial cause for these health disturbances.¹⁴⁷

For the assessment of the natural causal connection, the state of health before the accident must be compared with the state of health after the damaging event.¹⁴⁸

¹⁴⁴ BGE 115 V 135; BGE 122 V 416 E. 2a.

¹⁴⁵ Locher, above n 21, 70.

¹⁴⁶ Locher, above n 21, 319.

¹⁴⁷ BGE 112 V 32; BGE 119 V 337 E. 1.

¹⁴⁸ RKUV 1990 No. K 849.

*Adequate causal connection*¹⁴⁹

Second, there must be an adequate causal connection between the accident and the damage. An event is an adequate cause of a result, “if after the usual run of things and in general life experience, the event is likely to cause that kind of result. Thus, this result appears as generally probable”.¹⁵⁰

This clause is an excellent example within the requirements of the definition of an accident to show the extent of discretion for interpretation given to the decision-maker in Swiss law. The rich jurisdiction of the Swiss Supreme Court, in particular regarding psychological accident sequences¹⁵¹ and injuries of the cervical spinal column, is very intricate and complicated, setting the threshold for cover very high.

According to jurisprudence, the event of the accident (“Unfallereignis”) is relevant for the assessment of the adequate causal connection of psychological accident sequences, not the experience of the accident (“Unfallerlebnis”), in other words, the gravity of the accident itself, not the way the claimant has experienced the accident. This criterion of an objective observation of the accident is based on the principles of equal treatment and legal certainty of the claimants. In order to affirm the adequate causal connection, the accident must objectively have certain gravity. Jurisprudence has created three categories of accidents:

- 1 Minor accidents (“leichte Unfaelle”);
- 2 Major accidents (“schwere Unfaelle”); and
- 3 Accidents in between those two categories (“Unfaelle im mittleren Bereich”).

In the case of minor accidents, the adequate causal connection can normally be denied. In contrast, for major accidents, the adequate causal connection between the accident and the psychological consequences can normally be affirmed. For accidents in between those two categories, the question whether the adequate causal connection must be affirmed or denied cannot be decided only on the basis of the event of the accident. Jurisprudence has developed further *objective circumstances*,

¹⁴⁹ Locher, above n 21, 320.

¹⁵⁰ BGE 115 V 135; BGE 122 V 416 E. 2a.

¹⁵¹ Psychological accident sequences are defined here as a form of mental injuries caused by the accident.

which are immediately related to the accident and seem to be direct or indirect consequences, which must be considered for the overall assessment of causation:

- Particularly dramatic concomitant circumstances or particular impression of the accident
- The severity or particularity of the suffered injury, namely if it is empirically likely to result in psychological sequences
- Unusually long medical treatment
- Chronic physical pain
- Medical misadventure which has significantly worsened the sequences of an accident
- Difficult healing process and significant complications
- Degree and duration of work incapacity.

It is not necessary that all these circumstances must be present. Depending on the case, one additional circumstance might be sufficient. This is namely where the accident must be qualified as a major accident within the category of in between accidents, or must even be qualified as situated at the threshold of the category of major accidents. On the other hand, one of these further circumstances can be sufficient if it is fulfilled in a particularly distinctive way. If there is no distinctive circumstance, several further circumstances must be given, particularly the more minor the accident is. The more the accident must be qualified as situated at the threshold of minor accidents, the more the additional circumstances must be present.¹⁵²

The practical relevance of mental injuries plays a role where the claimant suffers from psychological consequences, but not from a physical injury. In the context of sport accidents, this is, for example, the case where a group undertakes a ski expedition and several members of the group are buried by an avalanche. However, the claimant does not suffer from any physical injuries, but has psychological consequences. Second, psychological accident consequences might occur as well as a physical injury, but not be in an adequate causal connection with the accident.

¹⁵² BGE 115 V 140 E. 6c, most recently confirmed in BGer of 19 February 2008 (U 394/06).

This jurisdiction has been largely criticised in the literature, but never overruled. It is submitted in the literature that the subjective experience of the accident should be relevant for assessing the adequate causal connection between psychological accident sequences and the accident.¹⁵³

(b) New Zealand accident compensation

Section 20(2)(a) IPRC Act 2001 states that the person has cover for a personal injury if it is caused by an accident to the person.

Causation is the decisive element in many New Zealand cases. It is especially important for cases regarding gradual process injury. When assessing whether the injury or event is connected to the present symptoms, the judge has to take into account intent and policy considerations of the Injury Prevention Rehabilitation, and Compensation Act 2001 (IPRC Act 2001).¹⁵⁴

The claimant has to prove the causal relationship between the accident and the personal injury on the balance of probabilities. The scope of the IPRC Act 2001 is upon outcomes and not risks, in other words, risk or potentiality of injury does not result in any entitlements under this Act.¹⁵⁵ Cover for personal injury requires probability, not possibility, nor loss of chance. The required probability must be more than 50%.¹⁵⁶

In New Zealand law, the modern causation test consists basically of a twofold enquiry.¹⁵⁷ The first step is the so called ‘threshold’ or ‘but for’ test. The question has to be answered whether a claimant would have suffered the loss without (‘but for’) the earlier event or happening. In the affirmative, there may be a causal link between the

¹⁵³ Ueli Kieser *ATSG Kommentar* (Schulthess, Zürich, 2003) 68.

¹⁵⁴ M.J. Beattie and J. Cadenhead “A sketch of some issues pertaining to the appellate jurisdiction and practice of the district court concerning accident compensation appeals” unpublished, para 55.

¹⁵⁵ *Atkinson v ACC* (9 October 2001) CA 137/01.

¹⁵⁶ This was confirmed in the case of *Gregg v Scott* ([2005] UKHL 2, 27 January 2005).

¹⁵⁷ Beattie, above 154, para 68.

event and the injury.¹⁵⁸ Whereas the aspect of procedure is concerned, the causal requirements are a question of fact.¹⁵⁹

In later cases¹⁶⁰, the ‘threshold’ or ‘but for’ test has been fine-tuned insofar, as a second step, the policy or scope of the statute must be interpreted on the specific factual background and taken into account while analysing causation.¹⁶¹

(c) Observations

Where causation is concerned parallels can be drawn between the requirements in Swiss and New Zealand law.

The New Zealand ‘but for’ test (*causa sine qua non*) seems to be the equivalent to the Swiss law for natural causation (*condition sine qua non*). Both principles aim at the question whether the insured person would have suffered the loss without the earlier event or happening.

It is very interesting to note that also the formula of the Swiss Federal Supreme Court for adequate causation¹⁶² is very close to the formula in the *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 All ER 305, 338, where Lord Hoffmann says that the causal requirements represent “what in ordinary life would normally be regarded as the reasonable limits for attributing blame or responsibility for harm”. On the other hand, the adequate causal link is established when “if after the usual run of things and in general life experience, the event is likely to cause that kind of result. Thus, this result appears as generally probable”.¹⁶³ Both decision-making aids are formulas with which the judge decides, based on common sense, in the specific case at hand, at the end of the day.

¹⁵⁸ Beattie, above 154, para 55.

¹⁵⁹ Beattie, above 154, para 59.

¹⁶⁰ *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 All ER 305, 340 para 57-58.

¹⁶¹ Beattie, above 154, para 70-74.

¹⁶² BGE 115 V 135; BGE 122 V 416 E. 2a.

¹⁶³ BGE 115 V 135; BGE 122 V 416 E. 2a.

3 *External force or resistance*

Both Swiss and New Zealand accident compensation law generally require that the relevant accident be the result of forces and incidents external to the body.

(a) Swiss accident insurance

The primary definition of an accident requires an external factor, must affect the body. This external factor is fulfilled if the body is affected by forces such as mechanical (being beaten or cut), chemical, thermal (as extreme heat impact) and electrical or rays; likewise if the supply of oxygen for the human body is missing (as with strangulation or also in case of penetration of water or other substances into the airways); and finally also by explosions, which cause damage to hearing. On the contrary, for example a heart attack or stroke is a cardio-vascular event and is considered not as an accident, but as an illness.¹⁶⁴

The event must have occurred outside the body.¹⁶⁵ The consequences can, however, show up, perhaps exclusively inside the body.¹⁶⁶ For example, a blow to the head might not cause an external injury, but a concussion. The oral cavity belongs in this context. Thus, the external factor is affirmed in the case of swallowing a needle, dentures, or a bone fragment, or biting one's own tongue.

The external factor has been affirmed by the Supreme Court in the following cases:

- Water that penetrates into the respiratory system¹⁶⁷
- A large fish whirling up sand while diving¹⁶⁸
- Sting (of a wasp, bee, hornet, tick)¹⁶⁹

¹⁶⁴ Locher, above n 21, 72; Ueli Kieser *Schweizerisches Sozialversicherungsrecht* (Dike, Zuerich, 2008) n° 34.

¹⁶⁵ Kieser, above n 164, n° 34.

¹⁶⁶ Koller Alfred (ed) *Haftpflicht- und Versicherungsrechtstagung 1995* (Dike, St. Gallen, 1995) 225.

¹⁶⁷ EVGE 1945 91.

¹⁶⁸ SUVA annual report 1984 n° 2 p. 3.

¹⁶⁹ BGE 122 V 239-240.

The external factor has been denied by the Supreme Court in the following cases:

- With a diver, if he or she breathes out insufficiently on surfacing, because this is a body-internal, physiological happening and not an external factor.¹⁷⁰

(b) New Zealand accident compensation

Section 25(1)(a)(i) requires that the event or series of events must involve the application of an *external force or resistance (including gravity)*. A minor external force or resistance also fulfils the requirement. The determining factor is only if the (minor) external force or resistance can be pinpointed by evidence as causal to the injury.¹⁷¹

I would like to illustrate this with the case of *Brock v Accident Compensation Corporation (ACC)*¹⁷² where the District Court dismissed an appeal of a claimant who suffered a traumatic hernia caused by a single strenuous event in the course of rowing. However, the insured only sought medical treatment seven months after the event. The court held that it was not proven on the balance of probabilities that the rowing had caused the hernia.

Like in Swiss accident insurance law, internal forces are not covered. The injury must occur during the application of any external force or resistance such as lifting a heavy object, or falling and striking a hard surface. Where there is no impact between the insured person's body and any other force or source of force or resistance whatsoever, the injury may be caused by the interaction of two or more body parts.

¹⁷⁰ Kieser, above n 164, n° 36.

¹⁷¹ Brookers, IP25.06 (1) ad section 25 IPRC Act 2001 www.brookersonline.co.nz.

¹⁷² *Brock v Accident Compensation Corporation (ACC)* (10 August 2004) DC WN 240/2004, Cadenhead J.

A lot of cases can be found regarding back injuries such disc prolapse,¹⁷³ nerve root compression¹⁷⁴ and herniation.¹⁷⁵ Such interaction is internal only and not from any external force and therefore, the element of an external factor is not fulfilled.¹⁷⁶

The requirement of an external factor has only been included in the Accident Rehabilitation and Compensation Insurance Act 1992 following the case of *ACC v Mitchell*.¹⁷⁷ In this case, the court interpreted the definition of “personal injury by accident” so broadly so as to give an infant who ceased breathing due to unknown causes cover under the Accident Compensation Act 1982.

The external factor has been affirmed by courts in the following cases:

- The effect of wearing heavy boots¹⁷⁸
- Digging holes, lifting dirt, and pulling roots¹⁷⁹
- Making the bed by bending over, pulling the mattress up and back¹⁸⁰

The external factor has been denied by courts in the following cases:

- Sudden twisting around while climbing some stairs¹⁸¹
- Leaning over and turning on a bedside light with both feet on the floor and one hand on the bed for support¹⁸²
- Sneezing that caused a disc prolapse.¹⁸³

¹⁷³ For example *Lovelace v ACC* (6 October 2000), DC CHCH 264/00, Barber J.

¹⁷⁴ For example *Shore v ACC* (22 December 2003) DC DUN 334/03, Beattie J.

¹⁷⁵ *ARCIC v Stephens* (7 September 1998) DC AK 196/98, Beattie J.

¹⁷⁶ *ARCIC v Stephens* (7 September 1998) DC AK 196/98, para 5-6, Beattie J.

¹⁷⁷ *ACC v Mitchell* [1992] 2 NZLR 436.

¹⁷⁸ *Hurunui v Carter Holt Harvey Ltd* (4 October 1999) DC WN 276/99, Middleton J.

¹⁷⁹ *Fitzsimons v ACC* (4 August 2000) DC PMN 197/00, Beattie J.

¹⁸⁰ *Shore v ACC* (22 December 2003) DC DUN 334/03, Beattie J. Judge Beattie said that it was more probable than not that the insured person was bending over, pulling the mattress up and back, and as such there was external force involved. In the inferior instance, the judge held that making the bed by only bending over did not fulfil the external factor.

¹⁸¹ *ARCIC v Stephens* (7 September 1998) DC AK 196/98, para 5-6, Beattie J. According to section 25(1)(a)(iii) (twisting movement of the body) IPRC 2001, this case would now be covered.

¹⁸² *Biggart v HIH Workable Ltd* (30 October 2000) DC DUN 290/00, Barber J.

¹⁸³ *Lovelace v ACC* (6 October 2000) DC CHCH 264/00, Barber J.

As an example for gravity as an external force or resistance the following case has been affirmed:

- Slipping of sofa cushion which involved stretching and extension of the neck.¹⁸⁴

(c) Observations

Comparing the requirement of an external factor in the Swiss and New Zealand accident compensation schemes, it can be concluded that both systems stipulate an external element to the human body. Generally, within Continental law, such as Swiss law, it is more common to codify, whereas in Common law countries, such as New Zealand, case law tends to predominate. However, in this case, this is the exception to the general rule: Whereas the wording of Article 4 ATSG does not specify the undefined legal term “external unusual factor”, case law does. In the New Zealand context the wording of section 25(1) IPRC 2001 codifies a long list of categories to assist in the determination of the external factor. Whether requirements are codified or decided on a case by case basis is a crucial issue in regard to legal security, discretion and non-arbitrary and uniform decisions on cover.

4 *Time limitation*

Both legislative schemes place limitations on granting cover for injuries that are incurred gradually. The definition of an accident not only in the legal, but also in the ordinary’s person understanding implies an element of suddenness which distinguishes an accident from a gradual disease. Thus, both schemes require this element in the definition of an accident, even if it is differently worded.

¹⁸⁴ *Johnson v ACC* (29 September 2004) DC WN 311/04, para 34, Beattie J.

(a) Swiss accident insurance

The unusual external factor required by the primary definition of accident in Article 4 ATSG must affect the human body *suddenly*; in other words, within seconds (e.g. impact, fall) or minutes of the causal event.¹⁸⁵ The unusual external factor must be unpredictable and unique. Jurisprudence has not set a time limit to determine what constitutes “suddenness”. Suddenness is the criterion to differentiate between a gradually developed illness and health damage caused by a sudden event, an accident.¹⁸⁶

The body movement must be suddenly and unusually interrupted by a static obstacle. It is insignificant whether the pain suddenly arises, since this already belongs to the health disturbance (and not to the external factor). The more obviously the suddenness is established, the more likely it will be that the element of unusualness will probably be fulfilled in the primary definition of accident.¹⁸⁷

The suddenness - and therefore usually also the unusual external factor - is denied in circumstances involving thermal damage, such as sun stroke, sun burn and frost bite, except if the damage arises under unusual circumstances.¹⁸⁸

Suddenness of the impact of the external factor has been affirmed in the following cases:

- Soccer player kicks into the air and suffers an strained trauma¹⁸⁹
- Climbing gloves being torn, and thus rapidly and abruptly causing frostbite.¹⁹⁰

¹⁸⁵ Koller, above 166, 207.

¹⁸⁶ Locher, above n 21, 71; Kieser, above n 164, n° 27.

¹⁸⁷ Koller, above 166, 210.

¹⁸⁸ RKUV 1997, 373.

¹⁸⁹ RKUV 1990, 375.

¹⁹⁰ RKUV 2001 n° U 437.

Suddenness of the impact of the external factor has been denied in the following cases:

- Repeated efforts during work, e.g. when operating a hammer or drill¹⁹¹

In Swiss accident insurance, the primary definition of an accident in Article 4 ATSG with the required element of a sudden movement of the body allows the differentiation between a gradually developed illness and health damage caused by a sudden event; an accident.¹⁹²

(b) New Zealand accident compensation

In New Zealand accident compensation, s25(1)(a)(ii) extends cover to a specific event or a series of specific events, other than gradual process, that involves the sudden movement of the body to avoid force (including gravity), or resistance, external to the human body. This amendment to the definition of an accident goes back to the cases such as *O'Regan v ARCIC*¹⁹³. In this case a dairy farmer suffered from a back injury by twisting while dodging a kicking cow's hoof in a cow shed. Under the 1998 Act the event was not covered because the injury was not the result of an external force or resistance.

The definition of an accident requires a specific event or a series of specific events and cannot be the result of a gradual process. The definition requires, as an alternative element, the element of 'suddenness' which is missing in a gradual process. Under the accident compensation scheme, gradual process injuries are only covered for work-related injuries in section 30.¹⁹⁴

¹⁹¹ EVGE 1947, 9.

¹⁹² Locher, above n 21, 71; Kieser, above n 164, n° 27.

¹⁹³ *O'Regan v ARCIC* (21 January 1999) DC Huntly 5/99, Beattie J.

¹⁹⁴ Brookers, IP25.05 (1) commentary ad s 25 www.brookersonline.co.nz (accessed 18 February 2008).

In the case of *Chaplow v Accident Compensation Corporation (ACC)*,¹⁹⁵ the District Court decided an appeal from the claimant, who suffered from an injury caused by a treadmill exercise. The court quashed the decision revoking cover, based on the main argument that the injury could have been caused either by a gradual process or by a series of events amounting to an accident. In another case regarding a sport accident, the District Court dismissed an appeal against the ACC decision. Principally, the decision states that the rupture of the abdominal wall was more likely to be caused by a gradual process of muscle weakening than a specific event while the insured was doing a sustained number of Russian Twist Sit-ups in a gym. As a matter of fact, the insured person felt pain after the training, but did not immediately consult a general practitioner.¹⁹⁶

(c) Observations

The slight difference between the Swiss and New Zealand law is that, whereas, in Swiss law, the suddenness is an explicit criterion of the primary definition of accident, in New Zealand law, it is only an option where there is no external force or resistance. However, both schemes aim at differentiating an accident from a sickness which has been examined in Part IV.

5 *Involuntariness*

(a) Swiss accident insurance

The primary definition of accident in Article 4 (ATSG) also requires that a qualifying accident involve an *involuntary* injury caused to the human body by an external unusual factor. This element cannot be met, when someone voluntarily damages him- or herself. The intention must be aimed at causing damage. It is not sufficient that certain behaviour is voluntary, but also the resulting damage.¹⁹⁷ For example in regard to sport accidents, skiing or playing rugby is probably practised voluntarily in most cases. Merely practising those sports voluntarily will not be enough

¹⁹⁵ *Chaplow v Accident Compensation Corporation (ACC)* (21 December 2006) DC WN 321/2006, Ongley J.

¹⁹⁶ *Sonter v Accident Compensation Corporation* (8 November 2006) DC AK 279/2006, Beattie J.

¹⁹⁷ Koller, above 166, 211.

to prevent cover being granted. Rather the insured person must have intended to experience an injury while practicing sports.

This level of intention requires that the insured person is able to judge under Article 16 Zivilgesetzbuch (ZGB).¹⁹⁸ Thus, if an insured person is not able to make such a judgment when voluntarily damaging him or herself, cover will principally be granted. Under Article 48 UVV suicide or self-inflicted injuries fulfill the definition of an accident, under the condition that the insured person was completely unable to act reasonably without fault.¹⁹⁹

An exception to this principle is risks stated under article 50 UVV. The insured person voluntarily takes the risk of an injury. Practice has determined a list of adventures and risk sports where cover will be completely or partially denied.²⁰⁰

(b) New Zealand accident compensation

The IPRC Act 2001 does not require that a personal injury be incurred voluntarily either in s25 (accident) or s26 (personal injury) as a requirement to fulfil the definition of an accident. This characteristic is in keeping with the scheme being a no fault scheme. To require the demonstration of voluntariness would necessarily lead to consideration of fault which would be beyond the scope of the scheme.²⁰¹ For personal injuries wilfully incurred before 1 August 2008, entitlements may be denied under s 119 of the IPRC 2001. This section dealt with wilfully self-inflicted personal injuries and suicide. No entitlements (except treatment) are provided for such a personal injury if the claimant wilfully inflicts on himself or herself or, with intent to injure himself or herself, causes harm to be inflicted upon himself or herself. Furthermore, there was a provision for disentitlement where the death of a claimant occurred due to an injury inflicted in the circumstances described in paragraph (a), or (c) the death of a claimant due to suicide. Section 119(2) no longer applies for injuries incurred after 1 August 2008).

¹⁹⁸ Broadly speaking, “be able to judge” in the wording of this article means “be able to think clearly”. Someone would not be “able to judge”, for example, if he or she is (mentally) ill or drunk.

¹⁹⁹ Koller, above 166, 213.

²⁰⁰ For example car, boat and ski races, full contact boxing, diving below 40 metres.

²⁰¹ *Woodhouse Report*, above n 1, para 89.

(c) Observations

In New Zealand, as the accident compensation scheme is based on “need”, it would be inconsistent for cover to be determined on the basis of fault. This goes back to the fact that the right to sue, a liability compensation system, has been replaced by a compensation system based on need.²⁰² The Swiss accident insurance scheme is not truly a non-fault scheme insofar as the injury must be incurred involuntarily. This paper argues that this requirement is in line with the underlying purpose of the Swiss scheme because it would be beyond the scope of the scheme to cover self-inflicted injuries. The non-fault element in the Swiss scheme is seen in the fact that the insured person does not have to demonstrate someone else’s fault.

6 *Unusualness*

(a) Swiss accident insurance

Besides causality, the requirement of an unusual factor in the primary definition of accident in Article 4 (ATSG) is a very high threshold for cover, an arbitrary criterion which should be repealed. As with causality, the “unusual factor” is a very broad term leaving too much discretion and arbitrariness for interpretation to the decision-maker. The jurisdiction surrounding the definition is very intricate and inconsistent, as it will be shown in this chapter.

The external factor must be unusual, in other words, “a disruption of the framework of the ordinary or usual in the respective area of life”.²⁰³ This has to be assessed by objective criteria.²⁰⁴ The unusualness refers to the factor itself and not to its effect on the human body.²⁰⁵

²⁰² *Woodhouse Report*, above n 1, para 14.

²⁰³ BGE 116 V 147.

²⁰⁴ BGE 122 V 233.

²⁰⁵ BGE 122 V 232.

The unusualness has to be affirmed with uncoordinated movements, if the normal sequence is interrupted by something unprogrammed like slipping, stumbling or avoiding a fall.²⁰⁶

The unusual factor was affirmed in the following cases in Swiss jurisprudence:

- Nutshell in nut bread²⁰⁷
- Bone fragment in a sausage²⁰⁸
- Stone in a rice dish²⁰⁹
- Transfusion of incompatible blood²¹⁰
- If the course of motion of an amateur soccer player is interrupted by an opponent in an unexpected way and he or she suffers a twist of the knee.

The unusual factor was denied in the following cases:

- A figurine in a “Three-King cake”²¹¹
- Hitting an incisor on the glass while drinking²¹²
- A cake decoration pearl that was intended to be eaten²¹³
- An unpopped kernel of popcorn²¹⁴
- A hard biscuit like e.g. Totenbeinli²¹⁵

²⁰⁶ RKUV 2000 n° U 368 S. 100 E. 2d.

²⁰⁷ BGE 114 V 170.

²⁰⁸ BGE 112 V 205.

²⁰⁹ RKUV 1999 n° U 349.

²¹⁰ EVGE 1961 n° U 205.

²¹¹ BGE 112 V 205.

²¹² RKUV 1996 n° U 137.

²¹³ BGE 112 V 204.

²¹⁴ BGE of 16 January 1992.

²¹⁵ BGE 103 V 181.

- Intervertebral disc degeneration, which developed without hitting, fall or other uncoordinated movement²¹⁶
- Observation of a solar eclipse²¹⁷
- Strong impact of sun or cold resulting in a sun stroke, sun burn or frostbite. On the contrary, an accident is affirmed, if these harmful consequences occur due to extraordinary procedures e.g. if the insured person cannot move as a consequence of a broken leg, und thus, is exposed to the sun.²¹⁸

There is no special definition for *sport injuries*, but the Swiss Federal Supreme Court has refined the requirement of the unusual factor for this type of injuries. Essentially, sports injuries are treated somewhat differently to other types of accidental injuries in the Swiss law.

The Court has decided that basically a sports accident fulfils the external factor because there is often a mechanical impact (fall, collision) involved. According to literature and jurisdiction, the criteria of the unusual external factor can consist of an uncoordinated movement. The principle is applicable concerning movement of the body where the requirement of an unusual external impact is only fulfilled, if an external event influenced the natural sequence of the body movement in an “unprogrammed” way.²¹⁹

The element of the unusual factor must be *denied* for a sport injury if there is no specific event present.²²⁰ Furthermore, there is no unusual factor when the inherent risk of the physical exercise realises itself.²²¹ In addition to this, the unusual factor must also be denied when a physical exercise is not executed perfectly, but the quality of execution is still within the usual range.²²²

²¹⁶ SUVA annual report 1988 n° 8.

²¹⁷ SUVA annual report 1984 n° 1.

²¹⁸ RKUV 1987 n° U 25.

²¹⁹ BGE 130 V 117 E. 2.1.

²²⁰ BGE 130 V 117 E. 2.2. p. 118; RKUV 2004 Nr. U 502 S. 183, U 322/02 E. 4.4.

²²¹ BGE of 1st February 2005 (U 313/2004) E. 2.2.

²²² RKUV 2004 n° U 502 E. 4.4. p. 185.

The unusual factor was **affirmed** in the following cases regarding sport activities:

- *Involuntary sliding into a snow tube.*²²³ While snow tubing a person slid down a special slope on a rubber tyre. In this case, the injured did not precisely slide into the tube on departure, but on the hard snow surface and hurt her coccyx. The court affirmed the definition of an accident and the unusual factor, because the slide happened differently than planned.

- *Collision with the board by an ice hockey player.*²²⁴ The Swiss Supreme Court affirmed the definition of an accident and, especially the unusual factor, in case of an injury caused by a collision with the board by an ice hockey player.

- *Impact on the shooting arm of a handball player.*²²⁵ Another handball player grabbed the insured person's arm while she was trying to throw the ball. This impact on the lower arm resulted in a crack in the shoulder joint which caused her pain for several days.

- *Pain in the ankle immediately after practising a cartwheel.*²²⁶ The court held that the exercise was not executed in the correct way and the claimant had landed badly. Furthermore, the claimant was a trained gymnast. Therefore, the bad landing was unprogrammed and seemed unusual.

²²³ BGE of 11 May 2007 (U 411/05).

²²⁴ BGE 130 V 117 U 172/03.

²²⁵ BGE of 7 July 2003 (U 96/03).

²²⁶ RKUV 1992 n° U 156 p. 258-260.

- *Twisting of a knee of a soccer player.*²²⁷ A soccer player twisted his knee when an opponent tackled him. As a consequence of this attack, the external element, the sequence of movements of the insured person was disturbed in an “unprogrammed” way.

- *Sliding of a skier on a camel-backed skiing field.*²²⁸ A skier slid on a camel-backed skiing field on an icy surface. Instead of falling, he took the next camel-back in an uncontrolled way which resulted in a twist of the upper body and subsequent fall. The court saw the “unprogrammed” body movement in the sliding on the icy surface and the fall after the uncontrolled taking of the next camel-back.

The unusual factor was **denied** in the following cases regarding sport activities:

- *Slipping of a horse while changing from gallop to canter.*²²⁹ A horse slipped while changing from gallop to canter. As a consequence, the rider suffered from a whiplash spine injury. The court denied the claim of the insured due to insufficient evidence. However, according to the court, it is not unusual for a horse to slip when changing from gallop to canter. Therefore, the unusual factor of the definition of an accident was denied.

- *Pain in the neck after a cartwheel forwards.*²³⁰ A gymnastic teacher practised a cartwheel forwards. The unusual factor was denied.

²²⁷ RKUV 1993 n° U 165 p. 58-60.

²²⁸ RKUV 1999 n° U 345 p. 424 E. 4.

²²⁹ BGE of 14 February 2006 (U 296/05).

²³⁰ BGE of 28 June 2002 (U 98/01).

- *Spinal injury during a Jiu-Jitsu practice.*²³¹ A claimant suffered a spin injury when he got under his opponent and tried to push him upwards to free himself. This movement resulted in a big pressure on his spine, because the head was tucked in and his spine was sprained. The court held that the pushing upwards must not be qualified as an uncoordinated movement, because the sequence of movements was not disturbed by an external factor in an unprogrammed way.

- *Back pain after a smash while playing volleyball.*²³² A player suffered a back injury after he played a “smash” in volleyball. He got into a stretched back posture and sensed low-back pain. The court said that such movements are part of the usual range of type of movements of volleyball and therefore, not unusual.

- *Jump into water from the swimming pool edge.*²³³ A swimmer jumped into water from the swimming pool edge and indicated that he sensed a strong pain in his cervical spine. The court held there was no evidence of an unusual external element such as bumping into the pool edge or slipping).

- *Blistering of feet in hiking boots with subsequent infection.*²³⁴ A tramper got blisters on his feet from his hiking shoes with subsequent infection. The court stated that there is no unusual external factor because the bacteria causing the infection did not occur as a result of the injury.

²³¹ BGE of 10 January 2003 (U 385/01).

²³² BGE of 10 May 2004 (U 199/03).

²³³ BGE of 17 August 2004 (U 243/03).

²³⁴ RKUV 2004 n° U 519 p. 439.

- *Stress fracture after a long tramp in Tasmania with hard striking of the heel on the ground.*²³⁵ The insured person was climbing down a mountain in Tasmania and hit her heel hard on the ground. The court held there was no evidence of an unusual external element and hitting the heel hard on the ground alone could not be considered as an “unprogrammed” movement.

By setting out these cases, it has been demonstrated how inconsistent and contradictory the interpretation of the unusual factor is. In analysing these cases, it has been found that cases with similar fact scenarios have been treated differently. Thus, it seems to depend entirely on the interpretation of the judge treating the case if the unusual factor is affirmed or denied. This is a result of the notion “unusual” which is formulated too broadly. Thus, the purpose of the scheme to provide cover for accidents is undermined because in all these cases the injured person will miss out on cover, even though an accident has clearly occurred.

(c) Observations

It has been shown that the most difficult element to meet in the primary definition of an accident under Article 4 (ATSG) is the unusual factor. This element is an arbitrary criterion because it is formulated too widely leaving too much discretion for interpretation to the decision-maker.

The New Zealand scheme does not require an unusual factor which makes the New Zealand definition less arbitrary than the Swiss definition. In New Zealand law, there is no unusual factor required in the definition of an accident. The following case study “Piece of Shot in Venison” will demonstrate the difference between the two schemes in defining accidental injury. It will be demonstrated that the New Zealand definition still leaves a considerable flexibility for interpretation.

²³⁵ BGE of 23 November 2006 (U 258/04), E. 3.2.

B Case Study ('Piece of Shot in Venison')

It is very important to be able to demonstrate by way of a case study how both systems would work differently with the same injury. In this chapter, the main issues deriving from the strongly employment-based Swiss scheme will be illustrated, such as the definition of an accident and the disparity in insurance cover between injured workers and non-workers, by the 'piece of shot in venison' case ruled by the Swiss Supreme court in 2005²³⁶. Afterwards, the same case and the legal solution according to New Zealand law will be presented in order to reveal the differences and inconsistencies in both accident compensation schemes.

1 Under Swiss accident insurance

The primary definition of an accident in Article 4 (ATSG) is crucially important.²³⁷ The primary definition of an accident is the criterion to differentiate social accident compensation from social sickness compensation. When a claimant can establish a personal injury by accident, the Swiss Accident Insurance Act provides better benefits than the Sickness Compensation Act.

Apart from those two categories above, a further disparity exists in both systems between injured workers and non-workers. Indeed, the former are entitled to compensation for loss of income whereas the latter can claim only minor benefits like, for example, medical expenses.

The 'Piece of Shot in Venison' case²³⁸

The material facts are set out as follows. Mr L was an employee, and as a consequence, was insured for work-related and non-work related accidents. On 7 November 2002, he went for lunch around 1 pm to a little restaurant in a countryside

²³⁶ BGE of 18 October 2005 (U 367/04).

²³⁷ An accident is defined as sudden and involuntary injury caused to the human body by an external unusual factor (art 4 ATSG).

²³⁸ BGE of 18 October 2005 (U 367/04).

village of French-speaking Switzerland, and ordered a dish of venison. While he was enjoying the delicious dish, he suddenly bit on a pellet ball, broke a filling and a molar. The accident insurance declined cover for the dentist's bill for the amount of 434 Swiss francs. Mr. L brought the case before the Swiss Supreme Court after his claim had been declined by the lower courts.

The legal question was if Mr L was entitled to cover from the Swiss accident insurance scheme for this event. More specifically, does the incident fulfil all the elements of the primary definition of an accident under Article 4 (ATSG)? In that Article an accident is defined as sudden and involuntary injury caused to the human body by an external unusual factor.²³⁹

As discussed in Part II, this primary definition contains six elements that must be fulfilled in order to accept a claim:

- 1) A sudden and
- 2) involuntary
- 3) injury
- 4) caused to the human body by
- 5) an external
- 6) unusual factor.

In this case, the *injury* is given, because Mr L broke a filling and a molar which is a physical injury.

Next, the injury must have happened *suddenly*, in other words, within seconds or minutes. In our case, the accident has happened suddenly, because Mr L broke his filling and molar within seconds of biting on the pellet.

Furthermore, the definition of an accident requires an *external factor*. This external factor is fulfilled if the body is affected by, for example, in the present case, mechanical forces. The external factor is affirmed in the case of swallowing a needle, dentures, or a bone fragment, or biting one's own tongue.²⁴⁰ In our case, the external

²³⁹ Federal Act on the General Part of Social Insurance Law (SR 830.1).

²⁴⁰ Locher, above n 21, 72.

factor is the biting of the pellet in Mr L's oral cavity. This is uncontested an external factor.

The injury was *involuntary*²⁴¹, because there is no indication in the case that Mr L bit on the pellet on purpose.

There is also a *causal connection*²⁴² between the causing event, the pellet, and the physical injury, the broken filling and molar in our case.

The hardest element to fulfil in the case is, as in most cases regarding the primary definition of an accident, the *unusual factor*. The external factor must be *unusual*, in other words, according to the constant formula of the Swiss Supreme Court, "a disruption of the framework of the ordinary or usual in the respective area of life".²⁴³ In our case, the question is whether it is ordinary or usual to find a pellet in a deer dish in a restaurant.

The Swiss Supreme Court found there was no unusual factor. The court stated that one must expect pellets in a deer dish while eating in a restaurant. Further, it held that after general experience, the presence of a piece of shot in venison is not unusual.²⁴⁴

Lorsque l'on mange de la chasse au restaurant, on peut s'attendre à ce que se trouve dans la viande un reste de projectile. En effet, selon l'expérience générale (ATF 112 V 203 consid. 1), la présence d'un reste de projectile dans du gibier n'a rien d'inhabituel.

English translation: [my translation]

When eating venison in a restaurant, one must expect a piece of shot in the meat. After the general experience, the presence of a piece of shot in venison is not unusual.

To underline this argument, the Court referred to a case of teeth damage caused by a home-made cherry cake still containing stones²⁴⁵ and the case of bone splinter in a chicken²⁴⁶. In those two cases, the Court held that the unusual factor must be denied

²⁴¹ Locher, above n 21, 71.

²⁴² Locher, above n 21, 70.

²⁴³ BGE 116 V 147; BGE 121 V 38 E. 1a.

²⁴⁴ BGE of 18 October 2005 (U 367/04) E. 4.3.

²⁴⁵ BGE 112 V 205 E. 3b.

²⁴⁶ BGE 112 V 205 E. 3b (obiter dictum).

because, in the first case, it was not unusual that cherry cake still contained stones, and, in the second case, that there was a bone splitter in the chicken.

This paper argues that this comparison is flawed. A pellet in venison simply cannot be compared with a cherry stone in a home-made cherry cake made of cherries still containing stones. Such a cake obviously contains stones. Likewise it is obvious that a chicken contains bones. On the other hand, a pellet is a foreign object in a deer which is not the same as a bone in a chicken, nor a cherry stone in a home-made cherry cake made of cherries still containing stones. Therefore, the conclusion by analogy of the Swiss Supreme Court is questionable. This court decision has been commented on and criticized in Swiss literature, but not overruled yet.²⁴⁷

The *Piece of Shot in Venison* case demonstrates the two issues of the primary definition of an accident in the Swiss context, namely the unusual factor in the definition of an accident and the disparity between workers and non-workers.

It has been shown that the definition of an accident, and often the element of the unusual factor, is the criterion to differentiate accident compensation from sickness compensation. The Swiss Supreme Court has interpreted the unusual factor as “a disruption of the framework of the ordinary or usual in the respective area of life”²⁴⁸. This abstract formula opens the door to a very broad scope of interpretation of the facts and creates a legal uncertainty for the insured person, because one decision-maker might conclude that the unusual factor is ordinary or usual in the respective area of life and another might deny it under the same circumstances.

As discussed in Part V B 1, for the insured person, it makes a huge difference, if he or she is covered under the Accident Insurance Act or Sickness Insurance Act.²⁴⁹

²⁴⁷ Michael Ausfeld „Das Bundesgericht als ungewöhnlicher Faktor“ (2006) 6 plaedoyer 23-24.

²⁴⁸ BGE 116 V 147.

²⁴⁹ See also Part IX table 4.

2 *Under New Zealand accident compensation*

If the '*Piece of Shot in Vension*' case had happened in New Zealand, the insured person would have entitlements under the New Zealand accident compensation scheme.

A claim for cover of an injury caused by an accident is successful, if it fulfils the requirements of three gateways. Unlike the Swiss scheme, before examining the definition of an accident, two other requirements must be fulfilled:

First, it must be determined if there is a personal injury in terms of section 26(1) and (4) of the Injury Prevention, Rehabilitation, and Compensation Act (IPRC) 2001:

26 Personal injury

(1) **Personal injury** means

(b) physical injuries suffered by a person, including, for example, a strain or a sprain; or

(4) **Personal injury** does not include

(b) personal injury to teeth or dentures caused by the natural use of those teeth or dentures.

In this case, section 26(1)(b) is fulfilled as Mr L broke a molar which is a physical injury suffered by a person. Furthermore, it is not natural use of the teeth to bite a pellet (section 26(4)(b)).

Second, the requirements for cover under section 20 IPRC 2001 must be fulfilled:

20 Cover for personal injury suffered in New Zealand (except mental injury caused by certain criminal acts or work-related mental injury)

(1) A person has cover for a personal injury if:

(a) he or she suffers the personal injury in New Zealand on or after 1 April 2002; and

(b) the personal injury is any of the kinds of injuries described in section 26(1)(a) or (b) or

(c) the personal injury is described in any of the paragraphs in subsection (2).

(2) Subsection (1)(c) applies to

(a) personal injury caused by an accident to the person:

Mr L has cover for the incident because he suffered the personal injury in New Zealand after 1 April 2002 (section 20(1)(a) IPRC) and the break of a molar is a personal injury described in section 26(1)(b), (section 20(1)(b) IPRC) and the personal injury is described in 20(2)(a) IPRC 2001 because the break of a molar was caused by an accident.

Finally, the definition of an accident described in section 25 IPRC must be fulfilled in order to accept a claim:

25 Accident

(1) **Accident** means any of the following kinds of occurrences:

- (a) a specific event or a series of events, other than a gradual process, that—
 - (i) involves the application of a force (including gravity), or resistance, external to the human body; or

According to sec 25(1)(a)(i) an accident is a specific event or a series of events, other than a gradual process, that involves the application of a force (including gravity), or resistance, external to the human body.

The element of the personal injury is not mentioned in section 25, but is defined in a separate section 26. Moreover, the accident compensation scheme requires a causal connection. This requirement is set out in section 20(2)(a) IPRC Act 2001 which states that the person has cover for a personal injury if it is caused by an accident to the person.

In the case of the '*Piece of Shot in Vension*' case, Mr L would be covered under the IPRC 2001, as biting the pellet was a specific occasion that involves the application of a force, the bite, external to the human body.

Furthermore, the New Zealand accident compensation scheme is not restricted to cover for workers, it provides also cover for everybody in New Zealand, even

tourists.²⁵⁰ The disparity between workers and non workers plays a role regarding entitlements such as weekly compensation,²⁵¹ because the latter will not be entitled to weekly compensation as a consequence of not having a salary. There are certain exceptions to this principle, such as an insured person in training,²⁵² on parental leave²⁵³ who will be entitled to a minimum weekly compensation.

3 *Observations*

In a nutshell, the New Zealand accident compensation scheme, in contrast to Swiss accident insurance law, favours the insured person and especially non workers, because the definition of an accident does not require an unusual factor which is the gist of the definition in Swiss law nor does it necessarily require a sudden movement. The sudden movement is just optional as set out in section 25(1)(a)(ii) as a separate scenario. Moreover, involuntariness is not required. Even if Mr L intended to bite the pellet, he would still be covered.

Furthermore, it provides cover for non-workers. However, the scheme does distinguish regarding cover between work-related and non work-related accidents insofar as personal injury caused by work-related gradual process, disease, or infection is covered (section 20(2)(e) IPRC 2001).

C *Conclusion*

The comparison of the two different definitions of an accident in the Swiss accident insurance scheme and the New Zealand accident compensation scheme has shown that the significant difference is the fact that the requirement of an unusual factor is unknown in the New Zealand scheme. However, it is exactly this element which has revealed itself as being the heart of the problem and decisive element in regard to cover in most of the cases in Swiss law.

²⁵⁰ IPRC Act 2001 section 20, exception in section 23.

²⁵¹ IPRC Act 2001, Schedule 1, part 2.

²⁵² IPRC Act 1002, Schedule 1, s 47.

²⁵³ IPRC Act 2001, Schedule 1, s 44.

The Swiss definition of an accident has only been slightly changed²⁵⁴ since the first definition of Piccard²⁵⁵ over 90 years ago. Since then, both the primary definition of an accident and the secondary definition of an accident, which will be explained in the next chapter and which was developed by jurisprudence, have been enacted in legislation. Jurisprudence has developed several specific criteria for determining different categories of accidents, for example, for sport accidents, tooth damage, infections, and medical misadventure. The aim of these decision-making aids is to have specific criteria for specific areas of life in addition to the more general primary definition of an accident to judge the case in hand from an objective point of view, and to differentiate an accident from a sickness. The resultant case-law has led to some unsatisfactory results, and is not very coherent or consistent as has been shown above.

Particularly, the element of the unusual factor in the primary definition of an accident has the purpose of excluding cover for day-to-day injuries. In the light of sport activities, Parliament has intended that social insurance should not provide cover for sport accidents, if the injury is within the framework of the usual or intended. Basically, cover is affirmed when the sport activity takes another course than planned. However, if the risk inherent to the type of sport realizes itself, the definition of an accident is denied.²⁵⁶ Further, it is also denied if the exercise is not executed perfectly, even if the quality of execution is still within usual range.²⁵⁷

It is not very comprehensible why an accident should be affirmed when the sport activity takes another course than planned (in an “unprogrammed way” according to the wording of jurisprudence) and why, in contrast to this, an accident should be denied when the exercise is not executed perfectly, but the quality of execution is still within the usual range. The sports person works basically towards an accident free execution. If this fails, the social accident insurance should cover the event irrespective from the quality of execution. It is not logical why an experienced gymnast should be entitled to cover when practising a cartwheel which was not executed with perfect quality²⁵⁸, whereas cover should be denied cover for cartwheel backwards outside of a

²⁵⁴ On 1st January 2004, the word „psychic“ has been added to the definition (BBl 2001 3205).

²⁵⁵ Piccard, above n 118, 15.

²⁵⁶ BGE of 1 February 2005 (U 313/2004), E. 2.2.

²⁵⁷ RKUV 2004 n° U 502 E. 4.4. p. 185.

²⁵⁸ RKUV 1992 n° U 156 p. 258-260.

sporting context.²⁵⁹ In a recent “backwards cartwheel case”²⁶⁰, the Swiss Federal Supreme Court has again denied cover considering the circumstances of the case.

The criterion of requiring those who seek cover to have incurred their accidental injury while acting in an “unprogrammed” way is not very convincing because the accident is logically the result of an exercise which takes an “unprogrammed”, in other words, unexpected course. An accident is always unprogrammed and unexpected. In addition, the criterion requiring that an injury be unintended examines whether the claimant had planned the injury or, in other words, self-inflicted the injury. In requiring that the external event influenced the natural sequence of the body movement in an “unprogrammed” way under the criteria of the unusual factor, the Swiss Federal Supreme Court confuses the unusual factor with the unintended injury.

In addition to that, it is not convincing to make a distinction between trained and untrained sportspeople. As it has been demonstrated above, the external factor is unusual if a trained gymnast practises a cartwheel which results in an injury, however, not, if an untrained gymnast does the same. It is suggested that cover should be affirmed in both scenarios. A reduction of benefits might be considered, at a later stage, as a second test, for cases, where sportspersons take risks which do not correspond with their ability to practise the exercise.

In a nutshell, the unusual factor and its fine-tuned specifications developed by jurisprudence, such as “unprogrammed way”, have revealed themselves as very complicated, inconsistent, arbitrary and not suitable as the criteria for delimitation between an accident and a sickness. The purpose of the Swiss accident insurance scheme is to provide cover for *accidents*. The unusual factor and above all the requirements developed by case law is setting the threshold for cover so high that only a specific category of accidents, in other words, the accidents which fulfill these requirements, will be affirmed. This is clearly undermining the purpose of the Swiss accident insurance scheme.

²⁵⁹ RKUV 1993 n° U 165 p. 58-60.

²⁶⁰ BGE of 7 October 2003 (U 322/02).

D The Secondary Definition of an Accident in Swiss Law (Article 9 UVV)

I Theoretical and historical underpinning of the definition

As has been shown above, the Swiss accident insurance scheme sets a strict threshold for cover by requiring an unusual factor in the primary definition of an accident in article 4 ATSG. This requirement is very unsatisfactory and hard to fulfil, especially for sport injuries.

From a legal point of view, the event is not considered an accident, where someone tears a muscle because she or he was not warmed up enough before doing sports, because there is no unusual factor, nothing “unprogrammed” has happened. Nor, from a medical point of view, is this condition considered a sickness. In case-law and literature,²⁶¹ examples can be found of cover being denied for injuries such as dislocated shoulders or sprained ankles, muscle rupture, fractures or meniscus injuries.

As a consequence of this difficulty, an exception developed in the practice of accident insurance law which relieved claimants of the requirement to show the unusual factor for common injuries, which are often sport injuries. This practice of the Swiss Accident Insurance Company (Suva) was eventually enacted in legislation in 1984 by the introduction of Article 9(2) Regulation on Accident Insurance (UVV)²⁶² as an exception to the primary definition of an accident of Article 4 ATSG. As this part will show, this secondary definition of an accident was intended to alleviate problems that arose from the primary definition of an accident. However, the development and the application of this secondary definition has given rise to the same difficulties of arbitrariness and inconsistency as have been found with the primary definition of an accident. These difficulties provide further evidence that the Swiss accident insurance scheme has moved away from its underlying purposes as set out in Part II.

²⁶¹ Gertrud Bollier *Leitfaden schweizerische Sozialversicherung* (8ed, Stutz, Waedenswil 2003), 309.

²⁶² Regulation on Accident Insurance (UVV) of 20 December 1982 (SR 832.202).

Article 9 UVV Injuries similar to an accident (Unfallähnliche Koerperschaedigungen)

(2) The following, exclusively mentioned physical injuries are, if they are not clearly caused by sickness or degeneration, even if they occur **without an unusual** external factor considered to be an accident: [emphasis added]

- a. broken bones;
- b. dislocations of joints;
- c. torn knee cartilages;
- d. torn muscles;
- e. strained muscles;
- f. torn tendons;
- g. ligament lesions;
- h. eardrum injuries.

2 Elements of the secondary definition

(a) Physical injury or mental injury

In contrast to the primary definition of an accident in Article 4 ATSG, only physical injuries, but not mental injuries, are covered under Article 9 UVV. Furthermore, cover is only provided for the mentioned injuries in litera a – h. In addition to this, the injury must not be due to sickness nor caused by degeneration.²⁶³ This list is exhaustive and cannot be extended by analogy to other similar conditions.²⁶⁴ Only the Federal Council is competent to extend this list. There is also no discretion for extension of this list by court.²⁶⁵ The Swiss Federal Supreme Court has held that this Article must be qualified as an exceptional provision and it must be interpreted in the sense and scope of the Act.²⁶⁶

Broken bones (Article 9(2)(a) UVV) are not covered, if they are exclusively caused by a sickness. Medicine distinguishes between stress and pathological fractures. Stress fractures are gradually caused by stress over a long period. Therefore, this condition lacks suddenness and, thus, cover is denied under the secondary definition of an accident (UVV). However, they might be covered under the category of an occupational disease (Article 9 UVG). Pathological fractures, resulting from a sickness,

²⁶³ Locher, above n 21, 116.

²⁶⁴ BGE 114 V 303 E. 3e.

²⁶⁵ Locher, above n 21, 116; Alfred Bühler „Die unfallaehnliche Koerperschaedigung“ (1996) 40 SZS 97.

²⁶⁶ BGE 114 V 303 E. 3e; Part II.

must be examined for causation. As we have seen before, cover is only affirmed if the fracture is not exclusively the consequence of a sickness. Thus, if an insured person suffers a bone fracture while, for example, playing soccer, and the cause is due to bone neoplasm, the event will not be covered, even if all the elements of the definition are fulfilled. On the other hand, cover will be granted for a fracture caused by a sudden external impact, even if the insured person had osteoporosis as a pre-existent condition. Tendon and ligament fractures are also interpreted as bone fracture. On the contrary, a broken tooth is not been considered as a broken bone.²⁶⁷

Dislocation of joints (article 9(2)(b) UVV) are not simply distortions, but the bones connecting the joints must be horizontally dislocated. Distortions might be considered under ligament lesions (litera g).²⁶⁸

Torn knee cartilages (litera c) are part of bodily harm with an injury character for which the Suva already had provided cover before the legal implementation (article 9 UVV) under the condition that there was no pre-existent degeneration (meniscopathy). In most of the cases, this injury consists of an internal body trauma such as an uncontrolled rotation with bent knee joint or straightening up after a squat. Those internal body traumata fulfil the elements of a sudden and external and damaging impact.²⁶⁹

Torn muscles (litera d) and strained muscles (litera e) are very frequent sport injuries. A (partial) torn muscle injury is frequently caused without external impact by problems of physical coordination, incorrect application of force, cramp, bad training or by inadequate warming up. In those circumstances, the primary definition of an accident (ATSG) is not fulfilled, but the secondary definition of an accident (UVV) might very often be met.

Torn tendons (litera f), for example, the achilles tendon, could be the result of overstress of sport activities, sickness, degenerative change or excessive abrasion. If a sudden, external event meets the elements of the secondary definition of an accident

²⁶⁷ Bühler, above n 265, 99-100.

²⁶⁸ Bühler, above n 265, 101-102.

²⁶⁹ Bühler, above n 265, 102-103.

(UVV), cover is provided. On the other hand, the Suva has denied cover for a torn rotator cuff because, after the age of 40 years, degenerative abnormalities are visible in everybody and, therefore, the primary definition of an accident (ATSG) was said to apply and an unusual factor was required.

Common sports which result in degenerative modifications are tennis, golf, swimming, shot-put and archery.²⁷⁰ Furthermore, tendosynovitis is not considered as falling into the category of torn tendons for the purposes of Article 9 (UVV). However, a claimant might be covered under the provision of occupational disease.²⁷¹

Ligament lesions (litera g) comprise ligament ruptures and ligament strains. Bursitis (tennis elbow) is regularly the result of a long period of overstress or repeated exertion, and, therefore, not caused by a singular (sudden) event similar to an accident. However, it might be covered under the provision of occupational disease.

Eardrum injuries (litera h) are either eardrum ruptures or perforations. These injuries are common as a result of explosions or in water sports.²⁷²

(b) Causation, suddenness and involuntariness

Article 9 UVV injuries require similar to article 4 ATSG injuries a natural and adequate causal connection between the event and the injury.²⁷³ The injury similar to an accident in the meaning of article 9(2) UVV must have been caused by a sudden, involuntary, external impact to the human body. Causal requirements are therefore exactly the same as in the primary definition of an accident (ATSG).²⁷⁴

The element of suddenness is the same as in the primary definition of an accident of Article 4 ATSG. The external factor must affect the human body suddenly, in other words, within seconds (e.g. impact, fall) or minutes.²⁷⁵

²⁷⁰ BGE of 29 August 2000 (U 441/99).

²⁷¹ Bühler, above n 265, 104-106.

²⁷² Bühler, above n 265, 108.

²⁷³ Bühler, above n 265, 92-97.

²⁷⁴ See chapter C 1 (b).

²⁷⁵ Koller, above 166, 207.

Every day, discrete, harmful and external impacts, in other words, gradual abrasions, are excluded from cover as they are qualified as sickness.²⁷⁶ In the words of the Swiss Federal Supreme Court “repeated microtrauma caused by everyday life” are excluded.²⁷⁷ For example, a rupture of the achilles tendon caused exclusively by repetitive stress in everyday life which results in a gradual abrasion, and finally needs to be medically treated is not considered as a article 9 UVV injury.²⁷⁸

As with the definition of an accident under article 4 ATSG, article 9 UVV injuries must have happened involuntarily. When someone voluntarily damages him- or herself, cover is basically denied. A special regime has been stated for risks (article 39 UVG).

As can be seen above there is difference in most of the elements required to find an accident pursuant to the secondary definition of accident (Article 9 UVV). The main difference in the requirement for the external factor is set out below.

(c) External force

Like in the primary definition of an accident (ATSG), most often the external force is mechanical. However, in regard to Article 9 UVV injuries, and, in particular, an eardrum injury (Article 9(2)(h) UVV), the damaging impact may be caused by sonic waves or water.²⁷⁹ The damaging external factor can be day-to-day, common and discrete. The impact can also consist in a body’s own movement, such as acute movement of several parts of the body, for example, kicking into the air while playing soccer²⁸⁰ or standing up after crouching.²⁸¹

²⁷⁶ Ueli Kieser „Begriff des Unfalls, unfallaehnliche Koerperschaedigungen, Art. 6 UVG, Art. 9 UVV“ (1997) 8 AJP 1042.

²⁷⁷ BGE of 19 February 1997 (U 124/96).

²⁷⁸ Bühler, above n 265, 88.

²⁷⁹ Bühler, above n 265, 87.

²⁸⁰ RKUV 1990 n° U 112, p. 375 E. 3.

²⁸¹ BGE 116 V 148 E. 2c.

The Swiss Federal Supreme Court has fine-tuned the requirements for this element in a recent case.²⁸² In this case, an insured person tore her knee when she got out of bed. The first physician diagnosed a pinched medial meniscus. The diagnosis of a specialist found a meniscus bucket handle lesion.²⁸³

The Court held in that case that “the activity causing pain has to be done in the framework of a **general increased situation of danger**” [Emphasis added].²⁸⁴ As a consequence of this case, increased potential of damage is required, caused by a general increased situation of danger or uncontrollability of a usual and day-to-day action.²⁸⁵ Therefore, on the facts of that case, because the sequence of movements was executed in the usual framework and was usual and common, there was no increased potential of an injury and there is no external factor present for the purposes of the secondary definition of accident (UVV). Cover was denied under that Act, and also under the primary definition of accident (Article 4 ATSG).

3 Practical implications of the external factor requirement of Article 9 UVV, especially for sport injuries

Neither Articles 4 ATSG nor 9 UVV mention sport accidents as a special case. In practice, Article 9 UVV injuries are the most relevant in regard to sport injuries. The mentioned physical injuries in litera a-h are very often the result of sport activities. In addition to that, it was intended by the Federal Council to provide cover for certain common physical injuries without requiring an unusual factor.

Despite this intention to alleviate the “unusual factor” requirements for sports injuries by the enactment of Article 9 UVV, cases have shown that the secondary definition of accident is just as problematic in application, due to the requirement for claimants to now show that “the activity causing pain has to be done in the framework

²⁸² BGE 129 V 466.

²⁸³ BGE 129 V 466.

²⁸⁴ BGE 129 V 466 E. 4.2.2.

²⁸⁵ BGE 129 V 466 E. 4.3.

of a **general increased situation of danger**” [Emphasis added].²⁸⁶ Cover was *affirmed* in the following cases regarding sport activities:

- *Jumping over a branch while walking.*²⁸⁷ The claimant jumped over a branch while walking and suffered from a meniscus rupture. The pain has not been caused by an everyday activity such as walking or climbing steps. Jumping over a branch on an uneven ground has an external element. As a consequence, the Court found an increased potential of damage has been added to the usual and day-to-day action “walking” which caused the uncontrollability of the movement.
- *Achilles tendon rupture while changing to a sprint movement in volley ball.*²⁸⁸ During the “Serve-and-Volley-game” the player immediately advanced after the service to the net to hit a return. The Court affirmed an increased potential of damage for this sequence of movements because numerous uncommon movements, such as jumping, straightening, turning, running, and bending, impact on the whole body, namely, stress the heel in different manners. This potential of danger was in this case and caused the Achilles tendon rupture.
- *Inner ligament knee injury while skiing with carving skis.*²⁸⁹ A skiing instructor suffered from an inner ligament knee injury in executing a turn. The Court stated that even for a skiing instructor dynamic, driving with carving skis is not a usual day-to-day action and must be interpreted as representing an increased potential of danger.

²⁸⁶ BGE 129 V 466 E. 4.2.2.

²⁸⁷ BGE of 19 November 2007 (U 8C_228/2007).

²⁸⁸ BGE of 21 November 2006 (U 398/06).

²⁸⁹ BGE of 27 October 2005 (U223/05).

On the other hand cover was *denied* under Article 9 UVV injury in the following cases regarding sport activities:

- *Exercising with a band on the floor while sitting.*²⁹⁰ The claimant strained her inner knee ligament by sitting on the floor and practising thigh exercises with a band when she suddenly experienced a pain in the knee. Cover was denied due to the lack of an external factor, in that there was no increased potential of danger.
- *Knee injury while jogging downhill.*²⁹¹ In this case the Court said that normal jogging was not a general increased situation of danger. There was no external element in the regular movements while jogging. The activity misses out on sudden and uncontrollable movements.

These cases have in common, that the claimant has been injured by a mishap of some kind. However, not every mishap that results in an injury fulfils the external factor for the purposes of the secondary definition of accident (Article 9 UVV). These cases have shown that it is now crucial to have an increased potential of damage added to the usual and day-to-day action which caused the uncontrollability of the movement. For example, jumping over a branch had been added to the day-to-day action “walking” in a case where cover was affirmed.²⁹² On the contrary, such an increased potential of damage was denied for exercising with a band while sitting on a floor²⁹³ and normal jogging.²⁹⁴ It is submitted here that it seems very difficult to draw the line between this additional requirement for a day-to-day action, and there is a huge discretion while interpreting the circumstances of the case. In the case of the knee injury caused by exercising with a band, the facts could have interpreted in the sense that the day-to-day action comprises sitting and moving the thighs. The increased potential of added damage consists here in exercising with a rubber band. Thus, it is submitted, that exercising with a rubber band is not a day-to-day action, but a normal sport activity where injuries can occur. Consequently, it is advocated that this requirement, of an

²⁹⁰ BGE of 7 November 2007 (U 8C_74/2007).

²⁹¹ BGE of 23 October 2008 (U 8C_118/2008).

²⁹² BGE of 19 November 2007 (U 8C_228/2007).

²⁹³ BGE of 7 November 2007 (U 8C_74/2007).

²⁹⁴ BGE of 23 October 2008 (U 8C_118/2008).

increased potential of damage developed by jurisprudence, has not proven itself as helpful or equitable in practice because the discretion of interpreting is arbitrarily too broad to lead to fair and consistent decisions in similar cases. While Article 9 UVV was enacted to alleviate the requirement of the unusual factor in the primary definition of accident under Article 4 (ATSG), it has merely imposed a similar type of threshold for claimants to meet. Further, it is important, in the light of the scope of the accident compensation scheme, not to split hairs, but rather decide on the basis of the medical report, if the suffered injury is the consequence of an accident or sickness.

The following case study will illustrate the problems of the primary (Article 4 ATSG) and secondary (Article 9 UVV) definitions of accident.

E Case Study ('Lunge while Playing Tennis')

I Swiss accident insurance

In this chapter, the main issues deriving from this two-fold definition of an accident will be illustrated and the differences between the two definitions presented, by the “lunge while playing tennis” case ruled by the Swiss Federal Supreme Court in 2006²⁹⁵. Afterwards, the same case will be presented and the legal solution according to New Zealand law will be given in order to reveal the differences and inconsistencies in both accident compensation schemes.

The “Lunge While Playing Tennis” case.²⁹⁶

Ms S suffered from a rupture of the meniscus while she was playing tennis in September 2003. She ran to the net in order to return a short ball of her opponent when she misstepped. The accident insurance declined cover for this event. Ms S brought the case before the Swiss Federal Supreme Court after her claim had been declined by the lower courts.

²⁹⁵ BGE of 21 December 2005 (U 368/05).

²⁹⁶ BGE of 18 October 2005 (U 367/04).

The legal question was if Ms S was entitled to cover from the Swiss accident insurance scheme for this event. More specifically, does the incident fulfil all the elements of the primary definition of an accident (Article 4 ATSG) or all the elements of secondary definition of accident under Article 9 UVV?

First, the court examined if the elements of an accident (Article 4 ATSG) were fulfilled.

The gist of the matter in the case is, as in most cases regarding the definition of an accident, the *unusual factor*. The external factor must be *unusual*, in other words, according to the constant formula of the Swiss Supreme Court, “a disruption of the framework of the ordinary or usual in the respective area of life”.²⁹⁷ The unusualness refers to the factor itself and not to its effect on the human body.

This formula has been fine-tuned for *uncoordinated movements*. According to a constant jurisdiction, the unusualness is affirmed for uncoordinated movements, when the normal sequence of movements is disturbed or interrupted by something unprogrammed such as slipping, stumbling or avoiding of a fall.²⁹⁸

The Swiss Supreme Court denied the unusual factor in this case with the argument that it was not proven that the claimant made an uncoordinated movement which disturbed her normal sequence of movements by something unprogrammed such as slipping, stumbling or avoiding a fall. Especially, the Court held that there is no evidence with predominant probability that she stumbled over the white centre line.

Therefore, the definition of an accident was denied because the requirement of an unusual factor was not fulfilled.²⁹⁹

Second, the Swiss Federal Supreme Court examined if the requirements for cover of the secondary definition of an accident under Article 9 UVV were present.

²⁹⁷ BGE 116 V 147; BGE 121 V 38 E. 1a.

²⁹⁸ RKUV 2000 n° U 368 p. 100 E. 2d.

²⁹⁹ BGE of 21 December 2005 (U 368/05) E. 3.1.

According to this alleviated definition of an accident, cover is provided, where all the elements of the definition of an accident (Article 4 ATSG) are fulfilled, except the unusual factor, and the injury must be one of the injuries mentioned in litera a - h.

The claimant suffered a rupture of the meniscus when she played tennis. A meniscus rupture is one of the mentioned injuries (article 9(2)(c) UVV).

The gist of the problem in this case was the external factor. Most external force is mechanical. However, the impact can also consist in a body's own movement, such as acute movement of several parts of the body, for example, kicking into the air while playing soccer³⁰⁰ or standing up after crouching.³⁰¹ The Court looked to whether an increased potential of damage could be detected, caused by a general increased situation of danger or by uncontrollability of a usual and day-to-day action.³⁰² The court was convinced with predominant probability that the claimant must have done a lunge in the direction of the coming ball when she attempted to return a short ball played by her opponent. This sudden and acute movement was stressful for the knee and characteristic of playing tennis. The stressing movement is even more intensive, when playing on tennis on sand and sliding in it. When such a lunge turns into a misstep, the required increased potential of damage is present. As a consequence, the external factor of the damaging impact while moving the body was fulfilled and the definition of an article 9 UVV injury was affirmed by the Court.³⁰³

It has been shown in this case that the Swiss jurisdiction regarding the definition of an accident (article 4 ATSG) and the definition of an article 9 UVV injury is very intricate, fine-tuned and complicated. As a point of comparison, it would be instructive to see how the same case would have been treated under New Zealand accident compensation law.

³⁰⁰ RKUV 1990 n° U 112, p. 375 E. 3.

³⁰¹ BGE 116 V 148 E. 2c.

³⁰² BGE 129 V 466 E. 4.3.

³⁰³ BGE of 21 December 2005 (U 368/05) E. 3.1.

2 *New Zealand accident compensation*

The “Lunge While Playing Tennis” case will now be examined under the New Zealand accident compensation legislation. There is no equivalent secondary definition of an accident in the New Zealand context, because New Zealand accident compensation knows only one definition of an accident. Therefore, the case is to be examined under the Injury Prevention, Rehabilitation, and Compensation Act (IPRC) 2001 Section 25 (definition of an accident).

First, the meniscus rupture was caused by an accident (section 20(2)(a)). It is also a personal injury under section 26, because the meniscus rupture is a physical injury.

Furthermore, there is no evidence in the case that the injury may have been caused by a gradual process (s 25(1)).

Next, the question arises if this event (i) involves the application of a force (including gravity), or resistance, external to the human body; or (ii) involves the sudden movement of the body to avoid a force (including gravity), or resistance, external to the body, or (iii) involves a twisting movement of the body. This case can be compared to *Hodgson v ARCIC*³⁰⁴ which affirmed an application of force or resistance external to the human body concerning a “heel strike” while a claimant was running and experienced pain when his foot struck the ground. The court considered that the “heel strike” was caused by an impact, and the action of running did involve force to the heel which resulted in the injury.

In our case, the tennis player lunged in the direction of the coming ball when she attempted to return a short ball played by her opponent. This sudden and acute movement resulted in a misstep and caused the meniscus rupture. In application by analogy of *Hodgson v ARCIC*³⁰⁵ the “knee strike” must be interpreted as an action

³⁰⁴ *Hodgson v ARCIC* (31 March 2000) DC WN 53/00, Middleton J.

³⁰⁵ *Hodgson v ARCIC* (31 March 2000) DC WN 53/00, Middleton J.

which involved force to the knee which resulted in the injury. Therefore, the external factor must be affirmed.

As a conclusion, the definition of an accident under section 25 IPRC Act 2001 is affirmed and the claimant is entitled to cover under this Act.

3 Observations

It has been shown that the “Lunge While Playing Tennis” case would be covered under both accident compensation schemes. However, this case has allowed me to demonstrate that the Swiss accident compensation scheme is much more strict and complicated in determining when an accident can be said to have occurred. The event did not fulfil the element of the unusual factor in the primary definition of an accident (article 4 ATSG). It is in such cases, where the unusualness is denied, that the definition of article 9 UVV injuries comes into operation. On the one hand, this provision does not require an unusual factor, but, on the other hand, the physical injury must be one of the stated injuries in the provision which sets the bar again higher for cover. In our case, cover must be affirmed under Swiss law, because meniscus rupture is one of the mentioned injuries (article 9(2)(c) UVV).

F Conclusion

In the Swiss accident insurance scheme, the introduction of secondary definition accident under Article 9 UVV injuries was an attempt to alleviate the strict requirement of the unusual factor in the primary definition of an accident (ATSG) for specific injuries which are most common caused by sport injuries. This certainly has brought alleviation for the insured person and for commonly injuries such as broken bones, dislocations of joints, torn knee cartilages, torn muscles, strained muscles, torn tendons, ligament lesions and eardrum injuries. However, it has been shown by presenting “The Lunge While Playing Tennis Case” that, even if the crucial point of the unusual factor is not required, jurisprudence has, instead, raised the benchmark higher for the element of the external factor, by requiring an increased potential of danger added to the usual

and day-to-day action.³⁰⁶ This new development of jurisprudence is working against the will of the Federal Council and the purpose to lighten the burden of proof for the insured person and to shift the difficult distinction between an accident and sickness in favour of the insured person.³⁰⁷

From a broader point of view, this system of a primary (article 4 ATSG) and secondary definition of an accident (article 9 UVV injuries) and the requirements of its intricate jurisprudence compromises the underlying purpose of providing cover and compensation for an accident in order to restore work incapacity as satisfactorily as possible. By narrowing the requirements for cover and denying insurance, the insured person has no access to entitlements such as rehabilitation and the restoration of work capacity may be more difficult and takes more time.

³⁰⁶ BGE 129 V 466.

³⁰⁷ Bühler, above n 265, 84.

VI EVIDENCE

The required standard of evidence developed by jurisprudence in Swiss law is a further issue of how the scheme has drifted away from the underlying purpose of providing cover and compensation for an accident in order to restore work capacity. Especially the maxim of the declarations of the first hour imposes an unjustified burden upon the claimant in the Swiss accident insurance scheme, which is completely unknown in the New Zealand accident insurance scheme. According to this maxim, the spontaneous declarations of the first hour after an accident by the claimant are supposed to be more unbiased and reliable than later descriptions, which might be, consciously or unconsciously, influenced by insurance law or other considerations. On the other hand, those early declarations might not necessarily be the most truthful because very often it is very difficult to assess the precise sequence of events of an accident and its cause. Furthermore, the injured person's capacity to give accurate information might well be compromised by his or her state of health, such as physical and mental pain, immediately after the accident. In addition, declarations might not be correctly logged due to various reasons, for example, in cases where the insurance does not ask the injured person the relevant questions at all.

It is submitted that the standard of evidence required can be too high in Swiss law, in a case where the claimant has no means of proof other than his or her own description of an accident, because there are no witnesses and the accident insurer must assess cover only on the basis of that description. In such a case, the benchmark on the claimant's credibility to decide whether the accident has happened with predominant probability should not be too high.

A Standard of Proof

1 Swiss accident insurance

In Swiss social security law, the standard of proof of the predominant probability basically applies. This standard of proof lies between the possibility or hypothesis and the strict acceptance of the fact that can be proven. The probability of

circumstances is predominant, if no concrete objections oppose the appropriate conviction of the judge in this case. If deciding between two or several possibilities, the circumstances qualified as the most truthful are predominantly probable.³⁰⁸ In other words, it is necessary to follow the description of the circumstances that the social security insurer judges as the most probable of all possible sequence of events³⁰⁹.

The principle of the standard of proof of the predominant probability is a social security-legal characteristic, which applies in the same way, whether it concerns the proof of an accident, a natural causal link between cause and effect or work incapacity.³¹⁰ Therefore, the proof of an accident is achieved, if an event, that fulfils all elements of the definition of an accident (article 4 ATSG), appears probable. The court must be convinced of the correctness of a certain description of the circumstances. Which measure of doubt the probability of proof has, is difficult to quantify (for example in per cent); it depends on the possibilities of proof given in the individual case and the existing evidence.³¹¹ In accordance with Bühler, larger doubts are permitted, when it could have also happened differently in reality and the less evidence is available in the individual case, despite the requirements of the investigation principle of appropriate clarification of circumstances. However, the doubts of the accident insurer may not be so significant that he judges a happening other, than the one submitted by the insured person, just as probable.³¹²

³⁰⁸ Ueli Kieser *Das Verwaltungsverfahren in der Sozialversicherung* (Schulthess, Zürich, 1999) 104; Locher, above n 21, 451; Kieser, above n 153, 436; BGE 111 V 374, E. 2b; Koller, above 166, 262; Jean-Louis Duc *Les assurances sociales en Suisse, survol de l'assurance-maladie, de l'assurance-accidents, de l'AVS, de l'assurance-invalidité, du régime des prestations complémentaires à l'AVS/AI ainsi que de la prévoyance professionnelle vieillesse, survivants et invalidité, avec un aperçu de l'assurance-chômage* (IRAL, Lausanne, 1995) 1336.

³⁰⁹ Locher, above n 21, 451; Ulrich Meyer-Blaser "Die Beweisführung im Sozialversicherungsrecht" in *Nicht objektivierbare Gesundheitsbeeinträchtigungen: Ein Grundproblem des öffentlichen und privaten Versicherungsrechts sowie des Haftpflichtrecht*, *Freiburger Sozialrechtstage 2006* (Staempfli, Bern, 2006) 219; BGE 126 V 360 E. 5b.

³¹⁰ Locher, above n 21, 452; BGE 120 V 37 E. 3c; Koller, above 166, 262.

³¹¹ Koller, above 166, 263.

³¹² Koller, above 166, 263.

This paper argues that it is exactly characteristic of accidents that they occur suddenly, within a few seconds and often without witnesses. Even in a case, where witnesses are present, they mostly cannot give details about the sequence of the events of an accident, since they were potentially not concentrating on the happening of the accident in the first place, but on their own activity.

The following example will illustrate this. When a skier falls, the persons in the proximity can seldom state whether the skier has fallen due to a bump, an icy surface, the crossing over of the skis or a loss of equilibrium as a consequence of tiredness. It is also mostly very difficult to determine the exact place of the fall, due to the long braking distance of several meters. In addition, the probative value of the declarations of the first hour has to be evaluated with great caution.

This paper submits that the requirements of the proof of circumstances for accidents should not be too strict for this reason. Exactly the same extreme caution is required, when the claimant's version of the circumstances would be questioned by the insurer, because he or she has small possibility to prove an accident. While judging whether the description of the accident given by the insured person can be doubted, all the circumstances of the individual case must be considered, like the description of the circumstances, the severity of the injuries, the existing witnesses and their credibility, the time interval between the accident and its logging and the reliability of the insured person.

2 *New Zealand accident compensation*

The IPRC Act 2001 does not contain a section about the standard of proof. Neither does the Woodhouse report contain any commentary about the standard of proof in accident compensation.³¹³

It can be distilled from the cases that the standard of proof is on the *balance of probabilities* by applying common sense. This standard requires that the judge finds

³¹³ *Woodhouse Report*, above n 1.

that a particular event occurred, based on the evidence on hand, is *more likely* to have occurred than not. If he or she comes to the conclusion with cogent reasons that the occurrence of an event is extremely improbable, the finding that it is nevertheless more likely to have occurred than not is not in accordance with common sense. This is particularly applicable when it is up to the judge to determine that the evidence leaves him in doubt whether the event has occurred or not.³¹⁴

Whereas jurisdiction has never required a more severe standard of proof than the balance of probabilities, this issue has been discussed in the literature. Ison referring to Sutcliffe is of the opinion that ‘something more akin to “beyond reasonable doubt” seems to be the required standard of proof for some of the cases examined’. He suggests the formula that any doubtful questions of fact should be decided according to the balance of probabilities. In other words, where any facts are doubtful, the claims officer must seek to determine the best available hypothesis.³¹⁵

3 Observations

In both New Zealand and Swiss law, the standard of proof cannot be found in legislation, but has been developed by jurisprudence. On the one hand, further development and interpretation of legislation by jurisprudence is in both jurisdictions part of the political system. However, there is also the danger of drifting away from the underlying purpose of the legislator of the accident compensation scheme.

Whereas in New Zealand law, the required standard of proof is the balance of probabilities, in Swiss law, the standard of proof of the predominant probability applies. It is interesting to note that both systems do not require a strict evidence of the facts. However, the Swiss standard of proof, the degree of probabilities, is more strict than the New Zealand one. In other words, a Swiss claimant will have to establish that his or her description of the circumstances of an accident is more predominantly probable than

³¹⁴ *Rhesa Shipping Co SA v Edmunds* [1985] 2 All ER 712, 718.

³¹⁵ Ison, 94-95.

other possible descriptions. If deciding between two or more possibilities, the circumstances qualified as the most truthful are the most predominantly probable.³¹⁶

In New Zealand law, a description of an accident has to be more probable than another, in other words, 51 percent are required for the legal test on the balance of probabilities.³¹⁷

In New Zealand literature, the formula was suggested, that where any facts are doubtful, the claims officer must seek to determine the best available hypothesis. This formula is indeed very close to the required standard of evidence in Swiss law. Whereas the New Zealand claims officer looks for the best available hypothesis, the Swiss decision-maker relies on the circumstances that appear the most truthful.

As a conclusion, both New Zealand and Swiss law do not require that the claimant has to strictly prove his or her case. The standard of proof is milder in the social insurance system than in tort law. The decision-maker has to investigate the case but the insured person has to assist in the assessment of evidence.³¹⁸

B Burdens of Allegation and Proof of the Insured Person

I Swiss accident insurance

The burden of proof rule³¹⁹ implies that the party who requires the entitlements based on the facts, has the burden of proof to show these facts³²⁰. Due to the investigation principle in Swiss social security law where the judge will investigate the case, the parties do not have a burden of proof. However, the parties carry the burden of proof insofar as, if the degree of proof of the predominant probability is not reached, the Court must decide against that party, who wanted to derive rights from these

³¹⁶ Locher, above n 21, 451; Kieser, above n 153, 436; BGE 111 V 374, E. 2b; Koller, above 166, 262; Duc, above 308, 1336.

³¹⁷ *Dunn v ACC* (27 November 2003) DC WN 307/03, Hole J.

³¹⁸ IPRC Act 2001, s 56(2); Art. 43 ATSG.

³¹⁹ Article 8 Civil Code (ZGB).

³²⁰ Koller, above 166, 258.

circumstances. Therefore, where an accident is not proven, the insured person cannot claim entitlements.³²¹

An example is the very recent case of an insured person who damaged a tooth, when he was eating a plaited loaf and bit on a hard object. The Swiss Federal Supreme Court held that, in a case of lack of evidence, the burden of proof is upon the claimant. In this case, the insured person had swallowed the hard object which caused the teeth damage. Thus, it was not possible to assess whether this particular object is an unusual factor.³²²

It is not necessary that the insured person gives proof of all legally relevant elements of the definition of an accident. Rather it is sufficient that he or she makes the course of the event of an accident credible. He or she cannot be content, however, to claim a personal injury which is possibly the result of any accident. It is, rather, necessary that in regard to the concrete accident, true, exact information, and if possible, detail about the happening of an accident is submitted in order that the insurer is able to make a decision on this grounding.³²³ The insured person does not have to furnish thereby a strict proof for all temporal and local circumstances.³²⁴

However, when the insured person does not want nor cannot submit the description of an accident, he or she does have, to that extent, a burden to submit and give proof of the circumstances of the accident insofar as the accident insurance cannot be expected to undertake more investigations and clarifications.³²⁵ An accident without witnesses should not be considered as unproven. However, the statements of the insured person must appear credible and agree with the existing indications about the accident.³²⁶ This paper argues that if the accident insurer did not ask for details of the accident in time and, as a consequence, they are not in the file, the absence of these data may not lead to the insured person carrying the consequences of the lack of evidence. For example, in case of a water sports accident, a claim must not be denied for the only

³²¹ BGE 121 V 204 E. 6a p. 208; BGE 116 V 136 E. 4b p. 140; Kieser, above 153, 438; Locher, above n 21, 451.

³²² BGE of 3 June 2008 (9C_196_2008).

³²³ Koller, above 166, 259.

³²⁴ SUVA annual report 1972 n° 3b p 15.

³²⁵ Erwin Murer and Hans-Ulrich Stauffer (eds) *Rechtsprechung des Bundesgerichts zum Sozialversicherungsrecht, Bundesgesetz über die Unfallversicherung* (3 ed, Schulthess, Zürich, 2003) 20; Koller, above 166, 259.

³²⁶ SUVA annual report 1986 n° 1 p 1.

reason that the insured person has not informed the insurer about rough sea, if the insurer has not asked about it.³²⁷

In recent cases³²⁸ the Swiss Federal Court holds that the accident insurer has an obligation to clarify the circumstances of an accident on the basis of the investigation principle. This is the counterpart of the obligation of the insured person to assist in the establishment of cover and entitlements. Due to interaction of the two obligations the insured person has to indicate all those circumstances, which are important, to the accident insurer for the evaluation of the case. If the data provided by the insured person are insufficient or unclear for the assessment of entitlements, the accident insurance has the obligation to inquire and clarify the ambiguities. It is not necessary, however, after these investigations to request the insured person for further substantiating of the events. These cases have alleviated the burden of proof to a certain extent for the insured person.

This paper underlines that caution is required, if the insured person is unable to make a statement about the circumstances of the accident. In such a case, the accident insurer is obligated to employ additional clarifications and investigations. Such a case occurs if the insured person is incapable, for a medical reason, such as memory loss or a severe injury, during a long period, to provide details of the sequence of events. A severe road accident may be most likely to result in such a case. A reconstruction of the accident is possible in severe cases due to the existing traces and police records, so that the sequence of events can be sufficiently reconstructed. However, police records are not usually available in major sport accidents, as, for example, mountain-, ski- and diving accidents. In such cases reconstructions can be problematic. Thus, insurance has to rely on the insured person's and witness's description.

Apart from the medical issues sports accidents often occur without witnesses and without any recorded documents. An accident is frequently not noticed at all in the heat of the match and the fast sequence of the events. Therefore, strict requirements on the burden of submitting evidence and the burden of proof cannot be required in regard

³²⁷ Jürg Senn "Das „Schleudertrauma“ der Halswirbelsäule – Bemerkungen zum Stand der Diskussion, 1. Teil" (1996) 40 SZS 326.

³²⁸ BGE of 15 June 2007 (U 71/07), E. 4.2.

to the unusual factor of the movement, if the suffered injury is, in the medical sense, of typically traumatic genesis. Furthermore, a plausible and non-contradictory description of the accident must be sufficient, if it appears as exactly as possible and gives cause to no serious doubts, particularly in accidents, where, for lack of witnesses, only the declarations of the claimant are available. The medical findings should be qualified as indications, which either confirm the description of the circumstances of the insured person or arouse doubts about its correctness.³²⁹

2 *New Zealand accident compensation*

The Injury Prevention, Rehabilitation, and Compensation Act 2001 does not contain any clauses about the burden of allegation or proof.

However, ACC must make every decision on a claim on reasonable grounds, and in a timely manner, having regard to the requirements of this Act, the nature of the decision, and all the circumstances (s 54 IPRC). ACC has an obligation to investigate fairly before making a decision.³³⁰ In decision *ACC v Ambros* [2007] NZCA 304, the Court of Appeal names the ‘essentially inquisitorial’ role of ACC to investigate all aspects of the claim including causation before matters reach the courts. On the other hand, the claimant has an obligation to assist in establishment of cover and entitlements (s 55 IPRC), to give a medical certificate (a), give any relevant information (b), authorise ACC to obtain medical and other records that are or may be relevant to the claim 9(c), undergo a medical assessment (d) or undergo any other assessment at ACC’s expense (e). Principally, the claimant cannot refuse to undergo an assessment if she or he is claiming an entitlement.³³¹

Basically, the onus of proof is upon the claimant. He or she has to establish on the balance of probability that an accident has happened, as well as to prove

³²⁹ RKUV 2003 n° U 485 p. 259 E. 5; Murer, above n 326, 21.

³³⁰ *Rowe v ARCIC* (31 March 1999) DC Huntly 82/99, Beattie J; *Patangata v ACC* (28 April 2006) DC WN 104/06, Ongley J.

³³¹ *Beadle v ARCIC* (4 May 1999) DC WN 113/99, Middleton J.

causation.³³² The onus has to be borne by the person for a proposition or fact which is not self-evident.³³³ On the contrary, s145 (2) reverses the burden of proof and places it on ACC when the review concerns a revised decision by ACC under s 65.

It is very interesting to note from a Swiss point of view, that in the first place, the burden of proof does not play such an important role in New Zealand law. Viscount Dunedin said that the first step is to hear, consider and weigh all the evidence as a whole. It is only where the court comes to the conclusion that the evidence pro and con is so evenly balanced, that the onus of proof is crucial. Then, as a second step, the onus will decide the case. However, the onus will not be considered where the evidence on hand allows the court to come to a determinate conclusion.³³⁴

3 *Observations*

In both New Zealand and Swiss law, the burdens of allegation and proof basically lie upon the claimant. However, the accident insurance has an obligation to investigate all aspects of the claim. The counterpart of the ‘inquisitorial’ role of both accident insurances is the obligation to assist in establishment of cover and entitlements of the insured person.

This paper finds that, in practice, the gist of the issue is to what extent the insurance has the obligation to inquire and clarify ambiguities by employing additional clarifications and investigations. As a complement to this obligation, the question is how far the injured person has to substantiate the accident from his or her own impulses without being asked by the insurance company.

³³² *Raimona v ACC* (19 December 2001) HC AK M820-IM01, Harrison J; *ACC v Ambros* [2007] NZCA 304.

³³³ *Robins v National Trust Co* [1927] AC 515 Viscount Dunedin, 520.

³³⁴ *Robins v National Trust Co* [1927] AC 515 Viscount Dunedin, 520.

C Assessment of Evidence

1 Swiss accident insurance

In Swiss social security law, the principle of judicial freedom in weighing evidence applies in the non-contentious and contentious procedures (article 61(c) in fine ATSG). This means that the court and the accident insurance company assess the evidence freely, comprehensively and independently without being bound by formal proof rules. The sole determinant is whether the available documents objectively permit a reliable evaluation of the contentious legal claim. The amount of the evidence is not crucial, but rather whether it is convincing. So, for example, the number of witnesses is not relevant, but their reliability, the certainty and the clarity of their statements are.³³⁵ Thus, only if it is convinced due to the existing evidence will the court accept circumstances as predominantly probable, after its conscientious examination of the facts.³³⁶

The court and accident insurer have to state the reasons for the results of the assessment of evidence on the basis of the constitutional right to be heard (article 29(2) BV). It is to be indicated by the entire assessment of the entire evidence given, why one and not other descriptions of the circumstances have been assessed as truthful and relevant.³³⁷

This paper argues that while assessing evidence of an accident in particular, the following elements are to be considered³³⁸:

- Time of and reason for the accident notification as well as the time interval between event and notification: Was the notification lodged by the insured person or supported by references of the treating physician or other third persons?

³³⁵ BGE 122 V 157, 160 E. 1c; Koller, above 166, 260, 264; Kieser, above 153, 436; Locher, above n 21, 451.

³³⁶ BGE 115 V 133 E. 8b.

³³⁷ Koller, above 166, with reference to RKUV 1991 n° U 133, 312 E. 1b.

³³⁸ Koller, above 166, 265.

- Do the events described in the accident notification correspond with the medical data given to the first treating physician?
- Crucial meaning is attached to the first description of the accident. The description is more credible when it is without contradictions and appears true-to-life and was made by the insured person in a condition able to judge and make statements. If a later description of the accident deviates from the first description in substantial points (time, place, manner of the unusual factor etc.), this is an invitation to the accident insurance to submit the accident described by the insured to a critical examination. However, the insurance company may not automatically conclude under any circumstances that the insured person's declarations are not plausible. The reasons for the different accident descriptions have to be identified on the basis of the maxim of investigation. Human memory fades relatively rapidly over the course of time. As a consequence, this is the reason that minor contradictions, which are contained in accident descriptions months or years after the accident, cannot have a fundamental meaning.

2 *New Zealand accident compensation*

The claims process is described in s 48 – 59 of the IPRC Act 2001. According to the IPRC Act 2001, s 56(2), the ACC must investigate the claim at its own expense to the extent reasonably necessary to enable it to make its decision or obtain additional information. The IPRC does not contain a clause regarding the assessment of evidence nor the onus of proof. The claimant has to assist in the establishment of cover and entitlements (s 55). Once the evidence is assessed, the ACC makes a decision on the cover and entitlements and gives notice of the decision and informs the claimant about the review rights (s 59 – 66).

Regarding evidence at appeal, Section 156 states that the court may hear any evidence that it thinks fit, whether or not the evidence would be otherwise admissible in a court of law. From the cases the principle can be distilled that the judge is not always

bound to make a finding based on the facts submitted by the parties.³³⁹ The judge must consider all the evidence, medical and non medical, together with any temporal considerations.³⁴⁰

The decision is made on the truthfulness of the evidence given by the parties. Where the truthfulness of a witness is directly challenged, he or she must be questioned about the issues.³⁴¹

3 *Observations*

In Swiss law, the principle of judicial freedom in weighing evidence applies. The amount of the evidence is not crucial, but rather whether it is convincing. In New Zealand law, the decision is made on the truthfulness of the evidence given by the parties. Both jurisdictions state, that where the truthfulness of evidence is challenged, the issues must be investigated.

D Maxim of Evidence of the Declarations of the First Hour

In this chapter, it will be shown that the maxim of evidence of the declarations of the first hour developed by case law is an instrument to narrow the requirements for cover which undermines the purpose of the accident insurance scheme in Switzerland.

1 *Swiss accident insurance*

The court makes a decision on the basis of the description of facts that is assessed as the most truthful of all the probable versions of the description of the facts. If the insured person gives a contradictory description of the circumstances of the accident, the maxim of the declaration of the first hour, developed from the jurisprudence, should be applied. The spontaneous declarations of the first hour should normally be more unbiased and reliable than later descriptions, which are, consciously

³³⁹ *Rhesa Shipping Co SA v Edmunds* [1985] 2 All ER 712, 718.

³⁴⁰ Beattie, above 154, para 53.

³⁴¹ *Sutherland v ARCIC* (8 September 1995) DC CHCH 108/95, Ongley J.

or unconsciously, influenced to insurance law or other considerations. When the insured person changes his or her description of the facts over time, in this case, the declaration made shortly after the accident should be given more weight than the declaration after a negative decision by the accident insurer.³⁴²

This maxim of proof is not a formal rule of proof excluded by the principle of free consideration of evidence, regarding the probative force of declarations made by parties. However, it is a standard won out of experience that should be considered within the scope of consideration of evidence.³⁴³

This paper argues that the declarations of the first hour are not necessarily the most truthful and accurate for various reasons as it will be shown. Also in literature, certain authors disagree that the practice that principally the declarations of the first hour should have more weight.³⁴⁴

In Bühler's view this maxim is a standard won out of life experience and should not be applied where the declaration is the first written account of the circumstances of the accident and occurs a long period after the incident, because the human capacity for remembering the details of an incident is limited. In such a situation a description of the accident, to an insurer or physician, for the first time, given only after months, should not be qualified as more credible in the first place than later descriptions. This maxim of proof should only be applied in the case where other means of obtaining evidence would not bring more results. In Swiss law, the principle of investigation, the right to be heard (article 29 (2) BV) and the right to a fair trial (article 6(1) EMRK) are violated where relevant and suitable investigation of the facts is omitted and entitlements are refused, based on the maxim of proof of the declarations of the first hour. In such a case, there is an illegally anticipated assessment of evidence on hand.³⁴⁵

³⁴² BGE 121 V 45 S. 47 E. 2a; Duc, above 308, 1335.

³⁴³ Koller, above 166, 267.

³⁴⁴ Locher, above n 21, 451; Kieser, above 153, 437.

³⁴⁵ Koller, above 166, 267-268; confirmed in BGer of 21 August 2001 (U 26/00) E. 1b.

Pantli/Kieser/Pribnow³⁴⁶ summarise the critique in the literature as follows:

First, it is only a maxim of proof and not a strict rule of proof.³⁴⁷ Contradictions can thus be the consequence of inability of the insured person and could be avoided by questioning the person.³⁴⁸ In the case of contradictory declarations, it has to be examined, which one is to be accepted as true.³⁴⁹ Furthermore, the declarations of the first hour may be problematic, because they are often incomplete and do not contain the necessary detail.³⁵⁰

Especially, in case of clinical symptoms that are difficult to objectify it may happen, that the relevant questions that are required to later assess the accident insurance's entitlements are not asked immediately after the accident. It may be very problematic to rely only on the declarations of the first hour, because these declarations, made to the police at the scene of the accident, in the emergency unit of a hospital, or to an inexperienced GP, very often do not contain the necessary detail.

Next, the insured person's memory may be fragmentary as a consequence of variations in consciousness (for example due to confusion, shock, painkillers) or wrong perception. This should and must not lead to ‚lack of evidence‘. If the jurisdiction bases the judgments in such a case on the fragmentary declarations of the first hours, it leads to obviously random results.³⁵¹

Pantli/Kieser/Pribnow³⁵² come to the following conclusions after a detailed study in linguistic and legal regard:

From a linguistic view they mark that, by putting the declarations into written form, the declarations are removed from the communication situation and become independent, practically uncontrollable texts. The nonparaverbal and paraverbal levels

³⁴⁶ Anna-Katharina Pantli, Ueli Kieser and Volker Pribnow “Die „Aussage der ersten Stunde“ im Schadenausgleichsrecht – und die Mangelhaftigkeit ihrer Auszeichnung“ (2000) 10 AJP 1196.

³⁴⁷ Locher, above n 21, 451.

³⁴⁸ Maurer, above n 125, 263.

³⁴⁹ Kieser, above n 153, 456.

³⁵⁰ Senn, above n 327, 325-26.

³⁵¹ Pantli, above n 346, 1196-97; Senn, above n 327, 325-26.

³⁵² Pantli, above n 346, 1195-97.

of communication are not logged. So for example gesturing and miming, additions, corrections as well as sentence breakups are not visible in the minutes. Often minutes do not contain the original wording and sometimes not even the original language (for example High-German instead of Swiss German), but are written in linguistically more beautiful sounding sentences. If questions asked to the insured person are not logged, it cannot be examined whether the circumstances were completely clarified. For this reason not only the answers should be logged completely in the original wording, but also the questions and auxiliary questions.³⁵³

From a legal and in particular social security-legal view, the priority of the declarations of the first hour has a true core, but they may, however, be used only with reservation. The accident insurer must be aware that the first declarations may be without foundation or imprecise, because the insured person was in an abnormal physical or mental condition. Declarations of the first hour may be rated only as priority, if they were logged as true and complete. In addition, the questions must also have been logged. The investigation principle requires that the relevant circumstances are clarified so far as evidence is available, until possible contradictions are eliminated. In a case of lack of evidence, it should be examined carefully who caused this lack and why. It is to be noted that a lack of evidence can also result from the fact that the accident insurer or the physician of the insured person did not ask the relevant questions at all. Due to the principle of judicial freedom in weighing evidence, the declarations of the first hour should not necessarily be given a special weight.³⁵⁴

According to recent cases of the Swiss Federal Court, the maxim of the declarations of the first hour is an admissible maxim of evidence as a decision making aid, which can be considered in the context of the principle of judicial freedom in weighing evidence. It is only applicable if no new findings are expected from additional proof measures.³⁵⁵

³⁵³ Pantli, above n 346, 1202-3.

³⁵⁴ Pantli, above n 346, 1203.

³⁵⁵ BGE of 15 June 2007 (U 71/07), E. 4.1; BGE of 18 July 2001 (U 430/00), E. 3b (Italian); BGE of 21 August 2001 (U 26/00), E. 1b.

On the basis of this recent jurisdiction, this paper argues that the declarations of the first hour should be important only as a decision making aid.³⁵⁶ The accident insurer always has to examine, under consideration of all circumstances, whether the declarations of the first hour are predominantly probable.

2 *New Zealand accident compensation*

In New Zealand accident compensation law, the maxim of evidence of the declarations of the first hour does not exist. The decision-maker has to investigate the lodged claim and make a decision applying the standard of proof of the balance of probabilities.³⁵⁷ Statements made shortly after the accident are not given more weight and are not necessarily considered more credible in New Zealand law than those made at a later time.

3 *Observations*

In Swiss law, the declarations of the first hour are presumed to be more truthful than later descriptions of an accident. This maxim has been discussed in Swiss literature, because there can be circumstances why these declarations may not be reliable, for example, the physical and mental condition of the claimant. However, the maxim has been accepted in jurisdiction and literature as at least a decision-making aid, but not as a formal role of proof.

In New Zealand law, the maxim of the declarations of the first hour does not exist. However, the New Zealand decision-maker might consider applying the Swiss maxim as a decision-making aid, in case of doubt; that is when there is not enough evidence available, and if these declarations appear reliable.

In Swiss law, the maxim of evidence of the declarations of the first hour is still of major importance in practice, which will be shown in the “backwards cartwheel case” as an example of the issue.

³⁵⁶ BGE of 15 June 2007 (U 71/07), E. 4.1.

³⁵⁷ IPRC Act 2001, s 56(2); Ison, 94.

E Case Study (“Backwards Cartwheel Case”³⁵⁸)

In March 2001, Ms Z practised a cartwheel backwards in a compulsory gymnastic class. In her accident notification she wrote that she had “to execute a cartwheel backwards which resulted in an injury in the neck and shoulder.” A medical report stated Ms Z suffered from a “sudden neck pain”. In a complementary accident form of April 2001, she declared three weeks later, that she had sensed a “strong pain in her left shoulder after cartwheeling backwards”. She denied whether something special (such as falling or hitting) had occurred. After the insurance company had declined cover in June 2001, she described the sequence of the event in more detail in July 2001. Hereby, she declared that she had slipped while moving backwards and had landed awkwardly, where she had hit her shoulder while attempting to avoid the fall. When the insurance company asked her why she had previously denied that something special (such as falling or hitting) had happened, she declared that “slipping” was not mentioned in the form. Furthermore, she emphasised the sequence of cartwheeling backwards consists of a movements which are very difficult to describe.³⁵⁹

The Swiss Federal Supreme Court denied cover for the incident, because, neither the primary definition of an accident (article 4 ATSG), nor the secondary definition of an accident (article 9(2) UVV) were fulfilled on the grounds of the submitted facts. The Court said that the complementary description of the accident in more detail was not “really contradictory” to the earlier description. However, it stands out that the insured person had earlier denied whether something special had occurred. On the basis of this version of the facts, the court concluded that there was no unusual factor, nor a mentioned injury under article 9(2) UVV.³⁶⁰

This example demonstrates that it depends decisively on the precise wording of the insured person’s description on the initial accident notification form whether cover is granted. Furthermore, the court decided the case on the grounds of the first description of the accident and refused to consider the complementary description after cover had been denied by applying the maxim of the declarations of the first hour.

³⁵⁸ BGE of 7 October 2003 (U 322/02).

³⁵⁹ BGE of 7 October 2003 (U 322/02) E. 3.1.

³⁶⁰ BGE of 7 October 2003 (U 322/02) E. 4.

In New Zealand, a judge would examine on the balance of probabilities if the evidence given was convincing and credible on a common-sense basis. While close attention is always paid to the statements made by claimants on their ACC45 (initial claim forms) there is no evidence rule or necessary presumption such as the maxim of the declarations of the first hour.

This paper argues that it is arbitrary to dismiss any later description of an accident. On the one hand, the claimant might not have given enough details of the sequence of movements. She might have thought that a brief description is sufficient or was not able to remember the exact circumstances, due to various reasons such as physical pain or long period between the accident and its notification. On the other hand, the possibility that the insured person had intentionally added elements to the description of an accident in order to claim cover for the accident cannot be excluded.

This paper submits that the whole circumstances of the case must be considered and credibility of evidence assessed against this background. In Swiss law, the maxim of evidence of the declarations of the first hour should not be given predominant importance when assessing evidence. In addition, the principles and underlying purpose of the accident compensation scheme intended by the legislature must not be compromised by narrowing the requirements for cover by jurisprudence. The maxim of evidence of the declarations of the first hour as applied by accident insurance companies and courts today imposes an unjustified burden upon the claimant in the Swiss scheme, which is unknown in the New Zealand scheme.

VII CONCLUSION

The paper has compared the current issues in New Zealand's and Swiss accident compensation scheme on a thematic basis in order to find suggestions for improvement for the limitations of both schemes. The thesis has been elaborated that in both countries the underlying scope of the schemes has been undermined, but for different reasons. Both schemes are grounded on the same underlying purposes of the prevention of accidents, rehabilitation of the injured person and compensation for loss of income in order to restore the person to health and gainful employment.

First, it has been found that the stability of any accident compensation scheme depends on the underlying political system. The Swiss political system and legislation process is quite rigid, which leads to more continuity of the social security scheme, but also means less flexibility to remedy efficiently detected limitations. The New Zealand political system allows more space to even completely rewrite the accident compensation scheme, but this creates arbitrariness for injured persons suffering different accidents through the application of different schemes.

Secondly, the paper has held that both schemes are grounded in an arbitrary dichotomy between incapacity caused by accidental injury and that caused by sickness, which was a politically pragmatic decision based on costs and state-of-the-art of science at the time the schemes were set up. However, the needs of the affected person are similar in both cases and financial support is crucial in order to cover medical expenses and restoring the person's work capacity. Acknowledging the current reality of the economic situation, the issue still needs to be addressed, and further research is necessary to determine whether a merger of both schemes would really result in surplus costs. It is advocated that the additional costs in order to achieve equal treatment of entitlements for accident and sickness might, to a large extent, be compensated by a faster return to work capacity by the person incapacitated by sickness.

Thirdly, this paper has found that the system of a primary (article 4 ATSG) and secondary definition of an accident (article 9 UVV injuries) has not alleviated the issue of the requirement of the "unusual factor" in the Swiss accident insurance scheme. This

requirement holds that the external factor in the definition of an accident (article 4 ATSG) must be unusual. Jurisprudence has defined this term as a “disruption of the framework of the ordinary or usual in the respective area of life”.³⁶¹ This notion has led to incoherent jurisprudence, especially for sport injuries, which leads to arbitrary results due to the difficulty of interpreting the overly broad notion of “unusual factor”.

Fourthly, there is a need for improvement in the Swiss accident insurance scheme regarding the maxim of declarations of first hour. Notwithstanding the fact that those declarations might seem more unbiased, at the same time they might also be inaccurate because of the physical and mental stress shortly after the accident. Consequently, more weight should be given to the medical assessment and overall circumstances as in the New Zealand scheme.

To sum up, both accident compensations schemes have advantages and limitations, with more research needed to improve the limitations in a cost-effective manner. Despite the current global economic situation, the underlying purpose of both schemes, to continue to provide social security, cover for medical expenses, benefits and restoration of work capacity should not be compromised. Any shortcuts of the schemes might mirror back by increasing the need for social welfare.

³⁶¹ BGE 116 V 147.

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IX APPENDIX: OVERVIEW OVER THE SWISS SOCIAL SECURITY SYSTEM

Table 1 The Three pillar system to cover the social risk of retirement, death and disability³⁶²

The Swiss Social Security consists of three pillars to cover for the contingencies of retirement, death and disability. It is a combination of federal company-sponsored and individual retirement plans.

The first pillar (Alters- und Hinterlassenenversicherung, AHV) is the federal retirement fund providing cover for the elderly and bereaved such as widows, widowers and orphans. The pension of the first pillar should cover a minimum living wage. The Invalidenversicherung (IV) is the second insurance within the first pillar providing cover for disability. These two insurances are funded by 8.4% of salaries for the AHV (4.2% from the employer and 4.2% from the employee) and 1.4% for the IV (0.7% from the employer and 0.7% from the employee). Self-employed people pay 7.8% contributions into the AHV and 1.4% into IV. Those not engaged in paid employment have to contribute between Swiss francs (CHF) 353 and 8,400 towards AHV, and CHF 59 – 1400 per year towards IV, depending on circumstances. Additionally, public authorities participate in financing the AHV (Confederation: 16.36% of annual insurance expenditure; Cantons: 3.64% of annual insurance expenditure; Value added tax (VAT): 13.33% of total annual revenue of the VAT; a certain % of tax revenue on gambling clubs). The IV is complemented by public authorities to the value of 50% of the annual insurance expenditure, 75% of this sum from the Confederation and 25% from the Cantons.

The 2nd pillar is the company-sponsored pension plan (Berufliche Vorsorge, BV). It is financed equally by employer and employees to a percentage of the salary (7-15%) providing benefits for retirement, disability and death. The 2nd pillar is compulsory for all workers earning more than approximately CHF 2000 per month. Together with the first pillar, it is supposed to guarantee the continuation of the insured's living

³⁶² MP Group Switzerland AG, www.mb-group.ch (accessed 28 March 2008).

standard after retirement or to provide 80% of the income. There is no participation by public authorities, but there are federal regulations for the provident institutions and safety fund.³⁶³

The 3rd pillar is the private retirement plan in the form of either (fixed) bank accounts or insurance. The contributions are determined by the insured person. However, they are deductible from taxable income up to CHF 6,192 per year for workers and to a maximum of CHF 30,960 per year for self-employed.

	Social risk	Title and abbreviation of the act	What is it?	Who is insured?	Benefits	How is it funded?
1 st pillar	Old age	Gesetz ueber die Alters- und Hinterlassenenversicherung (AHVG)	State old age and life insurance	Everyone living or working in Switzerland; Swiss living abroad working for the Confederation or Swiss institutions.	Old age pension, pension for widows/widowers and orphans. Pension is minimum 13,260 per year and to a maximum of 26,520 per year. Widow/er pensions to a maximum of 80 %, orphans pension 40% or 80% for full orphans	8.4% of the salary for the AHV (4.2% from the employer and 4.2% from the employee). Self-employed person pay 7.8% contributions. Those not engaged in paid employment have to contribute between CHF 353 and 8'400.- towards AHV depending on circumstances.

³⁶³ Overview of Swiss social security, Bern 2006: www.bsv.admin.ch/publications (accessed 28 March 2008).

1 st pillar	Disability	Gesetz ueber die Invalidenversicherung (IVG)	State disability insurance	Everyone living or working in Switzerland; Swiss living abroad working for the Confederation or Swiss institutions.	Pension in case of disability. Disability pensions are depending on the degree of disability: 40% → 25% pension, 50% → 50% pension, 60% → 75% pension, from 70% → 100% pension	1.4% for the IV (paid by 0.7% by the employer and 0.7% by the employee). Self-employed pay 1.4% into IV. Those not engaged in paid employment have to contribute between CHF 59 – 1400 per year towards IV depending on social conditions (like contributing husband or wife).
1 st pillar	Supplementary benefits	Gesetz ueber die Ergaenzungsleistungen (ELG)	State supplementary benefits to the 1 st pillar	People entitled to pensions of the 1 st pillar whose basic needs are not covered	Means tested supplementary benefits to meet basic needs	Non-contributory, financed by Confederation, Cantons and local bodies
2d pillar	Old age Accident Disability death	Gesetz ueber die Berufliche Vorsorge (BVG)	Compulsory Company Pension Fund	Employed persons with an annual salary of over CHF 19,890.	Old age, disability, accident and death benefits	Percentage of the salary; normally paid half by employer and half by employee (approx. 7-15%, depending on the various factors)
→ The first pillar should cover the existence minimum. 1 st and 2d pillar should allow the retired person to have 80% of the previous income while he or she was working						
3d pillar	Old age Death disability	Private retirement plans	Private savings and pension in form of life insurance or bank account	Employed and self-employed persons on a optional basis	Voluntary sums are paid out of a bank account or insurance at retirement	By private people, in case of tax privileged savings on bank accounts or life insurance (in form of premium)
→ The 3d pillar consists of the private savings of a person that may top up income after retirement from the 1 st and 2d pillar.						

Table 2 The additional branches of social security in Switzerland³⁶⁴

Apart from this three pillar system, the Social Security Scheme has additional branches to cover the contingencies of sickness, unemployment, military service, maternity and child-rearing - and accident.

Social risk	Title and abbreviation of the act	What is it?	Who is insured?	Benefits	How is it funded?
Accident Disability Death Occupational disease	Unfallversicherungsgesetz (UVG)	Accident insurance	Employed and self-employed, those on unemployed benefits	Medical costs and income replacement (maximum CHF 126,000 per year, 80 % of salary), disability pensions depending on degree of disability, widow/er and orphan's pension	Percentage of the salary
	Berufsunfall (UVG)	Compulsory accident insurance for work-related accidents	Employed and self-employed, those on unemployed benefits	Medical costs and income replacement (maximum CHF 126,000 per year, 80 % of salary), disability pensions depending on degree of disability, widow/er and orphan's pension	Percentage of the salary, depending on type of work, paid by employer (approx. 0.1%)
	Nichtberufsunfall (UVG)	Accident insurance for non-work-related accidents; compulsory for employees, who work more than 8 hours a week	Employed and self-employed, those on unemployed benefits	Medical costs and income replacement (maximum CHF 126,000 per year, 80 % of salary), disability pensions depending on degree of disability, widow/er and orphan's pension	Percentage of the salary, depending on type of work, paid by employee (approx. 1-2%)

³⁶⁴ Federal Social Insurance Office (FSIO), Overview of Swiss Social Security, www.bsv.admin.ch; Swiss social insurance system; Sojourn in Switzerland and departure, Information for foreign nationals, publisher; Federal Office for Migration (FOM), in cooperation with the Federal Social Insurance Office (FISO), the Federal Commission for Foreigners (FCF). www.bbl.admin.ch/bundespublikationen, Bern 2005.

Sickness	Krankenversicherungsgesetz (KVG)	Sickness insurance and optional daily allowance	All persons living in Switzerland, but may freely choose their insurer.	Medical and pharmaceutical care insurance, hospital treatment, minimum franchise per year CHF 300, maximum franchise per year 2,500, share of 10% of costs exceeding the franchise up to CHF 700 for adults and CHF 350 for children, contribution to the cost of board and accommodation in the case of hospital stays CHF 10 per day	Monthly premium paid by insured person, individual subsidies of premium by canton if conditions apply (premium with franchise of CHF 2,500 costs currently between CHF 150 and 180 per month)
Unemployment	Gesetz ueber die Arbeitslosenversicherung (ALVG)	Unemployment insurance	Employees	Unemployment benefits like daily allowance, reduced work allowance, bad weather allowance, allowance in case of insolvency of the employer, financial benefits for active labour market programs.	2% of salary, paid equally by employer and by employee
Child-rearing	Gesetz ueber die Familienzulagen (FZG) and cantonal legislation	Family allowances, partial compensation for family expenses	Special allowances for farmers Employees and self-employed	Children allowances vary between CHF 154 and 344 per month according to canton, principally paid until child is 16 years old (except apprentices and students until 25 years)	Public authorities (confederation, cantons and communities)
Military service Maternity	Gesetz ueber den Erwerbsersatz (EOG)	Salary replacement during military service, maternity compensation	Person serving in the Swiss army or in the Red Cross, persons carrying out a civilian service or civil defense service	Payment per day during military service; 14-week 80% income compensation for gainfully employed women (max. CHF 172 per day)	0.3% of salary, paid by employer and 0.3% by employee
Accident while serving in the Swiss army, Red Cross or civil defense service	Gesetz ueber die Militaerversicherung (MVG)	Income replacement insurance for accidents happening in the army	Person serving in the Swiss army or in the Red Cross, persons carrying out a civilian service or civil defense service	80% income replacement to a maximum of CHF 137,545, medical expenses, disability pension	by Confederation

Table 3 Overview of insurances for the contingency accident

An insured person suffering from an accident will basically be entitled to claim benefits from the following (social) insurances.

	Title and abbreviation of the act	When?	Who is insured?	Benefits	Coordination
Social insurance	Unfallversicherungsgesetz (UVG)	In case of a work-related or non work-related accident	Employed and self-employed, those on unemployed benefits	Medical costs and income replacement (maximum CHF 126,000 per year, 80 % of salary), disability pensions depending on degree of disability, widow/er and orphan's pension Cover for work-related accidents and non work-related accidents if weekly hours of work at least 8 hours	The sum of income replacement based on UVG, IVG and BVG must not be higher than 90% of the insured's salary
Social insurance	Gesetz ueber die Berufliche Vorsorge (BVG)	In case of a work-related or non work-related accident	Employed persons with an annual salary of over CHF 19,890.	Disability, accident and death benefits in form of pensions, compensation for loss of income	
Social insurance	Gesetz ueber die Invalidenversicherung (IVG)	If the accident results in a permanent disability	Everyone living or working in Switzerland; Swiss living abroad working for the Confederation or Swiss	Pension in case of disability depending on the degree of disability: 40% → 25% pension, 50% → 50% pension, 60% → 75% pension, from 70% → 100% pension	
Private insurance	Gesetz ueber den Versicherungsvertrag (VVG)	If the insured person has taken out voluntary private insurance			In addition to social insurance

Table 4 Overview dichotomy in entitlements between employed and non-employed for the contingency accident

Table 4.1. Basic overview

	UVG (social accident insurance)	BVG (social pension plan)	IVG (social disability insurance)	KVG (social sickness insurance)	VVG (private insurance)
Employed	✓	✓	✓	✗	✓ / ✗
Unemployed	✗	✗	✓	✓	✓ / ✗

Table 4.2. Detailed table on the differences in entitlements

	Title and abbreviation of the act	When?	Who is insured?	Benefits for EMPLOYED PERSONS	Benefits for NON-EMPLOYED PERSONS
Social insurance	Unfallversicherungsgesetz (UVG)	In case of a work-related or non work-related accident	Employed and self-employed, those on unemployed benefits	Medical costs and income replacement (maximum CHF 126,000 per year, 80 % of salary), disability pensions depending on degree of disability, widow/er and orphan's pension Cover for work-related accidents and non work-related accidents if weekly hours of work at least 8 hours	None

Social insurance	Gesetz ueber die Berufliche Vorsorge (BVG)	In case of a work-related or non work-related accident	Employed persons with an annual salary of over CHF 19,890.	Disability, accident and death benefits in form of pensions, compensation for loss of income	None
Social insurance	Gesetz ueber die Invalidenversicherung (IVG)	If the accident results in a permanent disability	Everyone living or working in Switzerland; Swiss living abroad working for the Confederation or Swiss	Pension in case of disability depending on the degree of disability: 40% → 25% pension, 50% → 50% pension, 60% → 75% pension, from 70% → 100% pension	Pension in case of disability depending on the degree of disability: 40% → 25% pension, 50% → 50% pension, 60% → 75% pension, from 70% → 100% pension
Social insurance	Gesetz ueber die Krankenversicherung (KVG)	Only for non-employed persons in case of an accident	Non-employed persons must take out a compulsory accident insurance	None	Medical and pharmaceutical care insurance, hospital treatment, minimum franchise per year CHF 300, maximum franchise per year 2,500, share of 10% of costs exceeding the franchise up to CHF 700 for adults and CHF 350 for children, contribution to the cost of board and accommodation in the case of hospital stays CHF 10 per day. No income replacement.
Private insurance	Gesetz ueber den Versicherungsvertrag (VVG)	If the insured person has taken out voluntary private insurance		According to insurance policy	According to insurance policy