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THE TRIPLE LOTTERY

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Abstract

Under s 32 of the Sentencing Act 2002 reparation may be imposed for “emotional harm” and “loss or damage consequential on [...] physical harm”. This conflicts with New Zealand’s Accident Compensation Scheme (ACC) if the physical or emotional harm is covered by ACC. Following the Supreme Court decision in Davies v Police, amendment to s 32 allows reparation to be imposed for “statutory shortfalls” in ACC entitlements. In practice the sentence has been misapplied and is a triple “lottery” for victims. Judicial misapplication of reparation has resulted in layering of compensation, facilitating double recovery. Reparation for “emotional harm” and “loss or damage consequential on [...] physical harm” was inserted to include victims of “real crime” in the sentencing process and provide them with more avenues to obtain compensation, but in practice reparation payments have disproportionately affected offenders under the Health and Safety at Work Act 2015 (HSWA). The purpose of this paper is to assess whether the sentences of reparation for “emotional harm” and “loss or damage consequential on [...] physical harm” should be retained in light of the conflict with ACC and recent HSWA cases.

Key terms: Sentencing Act 2002 – Reparation – Health and Safety at Work Act 2015 – Accident Compensation Scheme – Accident Compensation Act 2001 – Statutory Bar.

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I Introduction

A 27-year-old Wai Shing employee is struck in the back of the neck while unloading a pumpkin and squash harvester from a transport truck.¹ He lies unconscious at the site of the workplace accident for three hours and awakes a tetraplegic.² The life-changing consequences of the accident prevent him and his young wife from achieving their family and business aspirations.³ Their relationship becomes “more like a mom and child” than husband and wife.⁴ Her life now revolves around caring for her husband, waking to turn him three or four times during the night.⁵ The employer, Wai Shing, failed to take “all practicable steps to ensure the safety of employees while at work”.⁶ In further breach of their statutory obligations they interfered with the scene of the accident and failed to notify WorkSafe.⁷ The accident was brought to WorkSafe’s attention six months later by the victim’s wife.⁸ During sentencing \$226,000 reparation was imposed on Wai Shing to compensate the victim for “emotional harm” and “loss or damage consequential on [...] physical harm”.

On 20 November 2005, Davies was driving down Dyers Pass Road in Christchurch when the double mattress inside his trailer crate was caught by the wind and thrown onto the road. A cyclist rode into the mattress and tumbled from her bike, suffering serious head injuries. She was unable to work for five months.⁹ Davies was convicted of careless driving causing injury.¹⁰ The victim sought reparation for “emotional harm” and “loss or damage consequential on [...] physical harm”.

In both situations the victim’s “emotional” and “physical harm” was caused by an accident and therefore covered by the “no fault” Accident Compensation Scheme (ACC).¹¹ Yet, these victims may obtain additional compensation through reparation imposed on the

¹ *WorkSafe New Zealand v Wai Shing Ltd* [2017] NZDC 10333 at [1] and [7].

² At [7]-[8].

³ At [9].

⁴ At [11].

⁵ At [11].

⁶ Health and Safety in Employment Act 1992, s 6.

⁷ Sections 25(3)(a) and 26.

⁸ “Company and director fined for incident that left a man a tetraplegic” (22 May 2017) WorkSafe New Zealand <www.worksafe.govt.nz>.

⁹ *Davies v New Zealand Police* HC Christchurch CRI-2006-409-203, 23 November at [2]-[4].

¹⁰ Land Transport Act 1998, s 38.

¹¹ Accident Compensation Act 2001, ss 20 and 26.

offender under s 32 of the Sentencing Act 2002. Reparation permeates ACC's sphere of influence by allowing victims to obtain additional compensation for "personal injury" covered by the Scheme. Whether this has a detrimental effect on ACC depends on the conceptualisation of the Scheme and its perceived place in New Zealand's legal system. A reparation "top-up" of comprehensive ACC entitlements may seem justifiable in the Wai Shing employee's situation where he suffered life-altering injuries and the employer clearly failed to discharge their duties, but arguably the Davies situation is more akin to an accident. This paper explores whether reparation for "emotional harm" and "loss or damage consequential on [...] physical harm" is a practical development or undermines the integrity and operation of ACC.

A sentence of reparation may be imposed for a range of different offences such as "real crime" prosecuted under the Crimes Act 1961, breach of duty under the Health and Safety at Work Act 2015 (HSWA) and traffic offences under the Land Transport Act 1999. The nature of these offences and the effect on victims varies significantly. Reparation was included in the Sentencing Act to provide victims of "real crime" with compensation in a greater range of circumstances. The conflict between reparation and ACC was not fully understood, and the extent of potential awards, particularly for health and safety offences, was unlikely anticipated.

The purpose of this paper is to assess whether the sentences of reparation for "emotional harm" and "loss or damage consequential on [...] physical harm" should be retained in light of the conflict with ACC and recent HSWA cases.

The paper begins by explaining the policy and purpose of ACC. It then discusses the law of reparation as it pertains to "physical harm" before exploring the tension between ACC and reparation for "emotional harm" and "loss or damage consequential on [...] physical harm". The paper then moves on to consider whether "top-up" reparation conceptually conflicts with ACC. Issues with judicial misapplication of s 32(1)(c) and externalities of the sentence are then identified and discussed. Given the findings in these sections, the paper concludes by recommending that "physical harm" is removed as a basis for imposing reparation for consequential loss under s 32(1)(c) of the Sentencing Act and that s 32(1)(b) is amended to exclude reparation where the "emotional harm" is caused by personal injury covered by ACC.

II Policy and Purpose of ACC

This section details the policy, purpose and structure of ACC in order to provide background for analysing whether reparation for “emotional harm” and “loss or damage consequential on [...] physical harm” is a practical development, or undermines the integrity and operation of ACC.

When implemented in 1972, ACC was a “social equity replacing a moribund common law”.¹² It is a scheme of comprehensive social insurance that covers personal injuries caused by accidents.¹³ The Scheme provides comprehensive entitlements to accident victims amounting to “fair”, but not necessarily “full”, compensation.¹⁴

ACC is based on the five principles of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.¹⁵ These principles were devised in 1967 by Sir Owen Woodhouse in the *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (Woodhouse Report)*.¹⁶ Funding constraints and multiple reforms mean that the extent to which ACC actually embodies these principles is disputed. Commentators such as Oliphant argue that the Accident Compensation Act 2001 (ACC Act) should be interpreted based upon the “principles for the compensation scheme that actually exists, not the one that many would like to see exist”.¹⁷ Though there are some differences between the Woodhouse principles and the principles reflected in the current Scheme, Oliphant’s comments overstate any discrepancy. The *Woodhouse Report* is still used when interpreting the ACC Act¹⁸ and the principles are implicitly referred to in the express purpose of the Act, which is:¹⁹

¹² Richard Gaskins “Reading Woodhouse for the Twenty-First Century” (2008) NZLR 11 at 13.

¹³ Doug Tennent *Accident Compensation Law* (LexisNexis, Wellington, 2013) at xiii; Accident Compensation Act, at ss 20 and 26.

¹⁴ Section 3(d).

¹⁵ Tennent, above n 13, at 3.

¹⁶ 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, 1967) [*Woodhouse Report*].

¹⁷ Ken Oliphant “Beyond Woodhouse: Devising New Principles For Determining ACC Boundary Issues” (2004) 35 VUWLR 915.

¹⁸ *WorkSafe New Zealand v Wai Shing Ltd*, above n 1, at [47].

¹⁹ Accident Compensation Act, s 3.

... 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, or 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)...

(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) ...

Though some of the principles may be subject to reasonable limitations within the ACC Act, they remain relevant to upholding the purpose and intention of the Scheme and are therefore used throughout this paper.

ACC has become a cornerstone of New Zealand's social security system. Unlike many other Common Law countries, under ACC people who suffer "physical injuries" caused by either "accident to the person" or "work related gradual process, disease or infection" are not compelled to rely on private insurance or sue the person or company responsible to obtain compensation.²⁰ ACC covers everyone for these injuries irrespective of fault.²¹ The Scheme is resourced through contributions from all New Zealanders through a range of levies and general taxation.²²

ACC streamlines the process of obtaining compensation for personal injury. To ensure that the expensive Common Law personal injury system does not continue to operate in parallel to ACC, individuals with cover under the Scheme cannot obtain additional compensation for their injuries, unless, as is the case for reparation, another statute expressly allows an exception.²³ The Scheme provides comprehensive entitlements for the injury such as 80 per cent of lost weekly earnings and lump sum payments for permanent incapacitation.

²⁰ Accident Compensation Act 2001, ss 20 and 26.

²¹ Section 20.

²² Accident Compensation Commission "ACC Levy Guidebook: Your Guide to 2016/17 levy rates, industry classifications and invoices" (Wellington).

²³ Accident Compensation Act, s 317.

Medical costs associated with the injury, including rehabilitation, are also paid by ACC.²⁴ The self-contained and independent functioning of ACC is considered essential to ensuring equal treatment of injured persons.²⁵

The compromise reached between ACC and the Common Law right to sue for personal injury “has frequently been spoken of as a social contract or social compact”.²⁶ The Supreme Court in *Davies v Police* based much of their conclusion on ACC’s founding instrument, the social contract, which all New Zealanders accepted in exchange for foregoing the right to sue for personal injury.²⁷ The social contract theory of ACC continues to be used by judges to explain the interaction between the Common Law and the Scheme.²⁸ This conceptualisation of ACC has been criticised as a “kind or origin myth – a sort of fairy tale to tell Torts students”.²⁹ As Connell explains, like all contracts some of the intention behind ACC was lost in the bargaining and compromise.³⁰ The Law Commission is equally sceptical of social contract theory in general because:³¹

The notion of a social contract is a fiction – a useful, but ultimately limited, heuristic device for explaining the nature of principles of justice and fairness that ought to characterize social arrangements. It does not signify what people who participate in a particular society have agreed to (since they are generally placed in a particular position in that society at birth rather than voluntarily entering it).

Although the analogy may be considered idealistic, the ACC Act expressly describes the Scheme as a “social contract”³² and the explanation is a helpful mechanism for explaining the tension between ACC and other legal courses of action. ACC is intended to be the sole provider of compensation for personal injury covered by the Act.³³

²⁴ Schedule 1.

²⁵ Tennent, above n 13, at xiii.

²⁶ *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA) at 555.

²⁷ *Davies v Police* [2009] NZSC 47, [2009] 3 NZLR 189 at [15], [18], [27] and [37].

²⁸ *McGougan v Depuy International Ltd* [2016] NZHC 2511, [2017] 2 NZLR 119 at [64]-[65].

²⁹ Simon Connell “Overturning the social contract?” [2014] NZLJ 314 at 316.

³⁰ At 316.

³¹ Law Commission *Compensating Crime Victims* (NZLC IP11, 2008) at 6-7.

³² Accident Compensation Act, s 3.

³³ Section 317.

Both parties to the social contract give consideration:³⁴

One cannot deny that the victim has obtained a degree of ‘benefit’ from the accident compensation scheme. Therefore the question turns to what value one can put on this benefit. The victim has avoided the time, cost and stress of litigation that would be necessary if we did not have the current scheme. The ACC scheme provides a degree of certainty to the victim. The victim has not had to initiate his own proceedings to benefit from the system.

In return, the victim surrenders their right to sue for personal injury at Common Law.

As a flow on consequence of ACC, New Zealanders are able to engage in activities without fear of personal liability for injuries.³⁵ Though this has avoided the development of a blaming, litigious culture of personal injury like that seen in other countries, particularly the United States,³⁶ this aspect of ACC is criticised as encouraging high risk activities and poor health and safety practices.³⁷ Critics of ACC, usually from outside of New Zealand³⁸, argue that ACC removes the deterrence effect of personal liability for personal injury. However, Palmer dismisses this criticism, concluding after “thirty years of thinking about this question [...] within the context of a universal coverage scheme, it is not possible to design an effective system of general deterrence”.³⁹ This criticism is less valid following the enactment of the strictly enforced HSWA in 2015. The HSWA is risk and duty based with a primary focus on prevention.

ACC pays compensation on a “no fault” basis. This does not mean that offenders are not held accountable for actions which cause injury to themselves or others. The ACC Act only prevents people with cover by the Scheme from suing for damages for personal injury covered by the Act.⁴⁰ All other legal avenues, such as criminal prosecutions, are open to hold people accountable for their actions. The action is available provided the claim is not seeking damages “arising directly or indirectly out of personal injury covered by” the ACC

³⁴ *WorkSafe New Zealand v Wai Shing Ltd*, above n 1, at [88].

³⁵ James Henderson “The New Zealand Accident Compensation Reform” (1981) 48 U Chi L Rev 781 at 794.

³⁶ Geoffrey Palmer “Accident Compensation in New Zealand: Looking Back and Looking Forward” [2008] NZ L Rev 81 at 87.

³⁷ Richard Gaskins “New Dynamics of Risk and Responsibility: Expanding the Vision for Accident Compensation” (2004) 35 VUWLR 951 at 953; Henderson, above n 35, at 794.

³⁸ See Henderson, above n 35.

³⁹ Palmer, above n 36, at 93.

⁴⁰ Accident Compensation Act, s 317.

Act. For example, an assault victim cannot sue for injuries suffered in the attack, but the offender is still held accountable for their actions through criminal prosecution. The “no fault” principle protects victims rather than offenders. It is based on the premise that the best outcome for society is to rehabilitate the injured person to enable them to return to productive work as soon as possible.⁴¹ Immediate, universal, no fault compensation achieves this objective. It is also more efficient for the Scheme to pay compensation on a no-fault basis than to contest liability.⁴²

In substance Woodhouse was “not trying to solve a legal problem, but rather a social problem”.⁴³ As Palmer explains, although ACC may be subject to criticism:⁴⁴

There is no support in New Zealand for a return to the tort law system, and that is unlikely to happen in the future. It is dead. Nevertheless, there are some peripheral problems around the extent to which some Common Law actions may still be available. These do need some attention, but the truth is that the New Zealand ACC scheme has endured. While there have been a series of problems with the administration of the ACC scheme, by and large, it has met with public satisfaction. There is no appetite to return to what was there before. This bold New Zealand policy must be judged to have been a success.

For these reasons, the inherent features of ACC are carefully safeguarded by the court and legislators, guided by the founding principles of the Scheme and the express purpose of the ACC Act.⁴⁵

III Reparation

This section provides an introduction to the sentence of reparation. A sentence of reparation may be imposed on a convicted person by means of the Sentencing Act. This Act governs the sentencing of a range of offences. This paper focuses on offences that involve “personal injury” because that is the basis for ACC cover. Those offences are prosecuted under the Land Transport Act 1998, the Dog Control Act 1996, the Crimes Act 1961 and the

⁴¹ *Woodhouse Report*, above n 16, at 40.

⁴² Palmer, above n 36, at 88.

⁴³ Richard Gaskins “Reading Woodhouse for the Twenty-First Century” [2008] NZLR 11 at 12.

⁴⁴ Palmer, above n 36, at 90-91.

⁴⁵ *Davies v Police*, above n 27; Sentencing and Parole Reform Bill 2001 (148-2) (select committee report) at 17; Ministry of Justice *Sentencing and Parole Reform Bill – Report of the Ministry of Justice, Department of Corrections and the Department of Courts to the Justice and Electoral Select Committee (4)* (18 December 2001) at 7.

HSWA.⁴⁶ Health and safety cases have produced a large body of case law on reparation so form a large portion of this paper. The majority of the case law relates to HSWA's precursor, the Health and Safety in Employment Act 1992. The new Act was introduced as part of the response to the Pike River Mine Tragedy whereby the Independent Taskforce recommended that health and safety legislation in New Zealand be completely overhauled.⁴⁷ The new Act is supplemented by WorkSafe as an active and well-resourced enforcement entity.⁴⁸

The ability to impose a sentence of reparation consequential on "physical harm" was first introduced by the Sentencing and Parole Reform Bill 2001⁴⁹ and enacted in the Sentencing Act the following year. Under s 32 of the Sentencing Act:

- (1) A court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer –
 - (a) loss of or damage to property; or
 - (b) emotional harm; or
 - (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

Though s 32 states that "a court *may* impose a sentence of reparation...", judicial discretion is significantly constrained by s 12(1) which states that:

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

In situations where a fine is also appropriate it may be imposed in addition to reparation because they serve different purposes. The purpose of reparation is to compensate whereas the purpose of a fine is to punish.⁵⁰ However, if "it appears to the court that the offender has or will have the means to pay a fine or make reparation, but not both, the court must sentence the offender to make reparation".⁵¹ Reparation is given priority because it is paid

⁴⁶ Health and Safety at Work Act 2015, s 151.

⁴⁷ *The Report of the Independent Taskforce on Workplace Health & Safety He Korowai Whakaruruhau* (April 2013) at 51.

⁴⁸ WorkSafe New Zealand Act 2013.

⁴⁹ Sentencing and Parole Reform Bill 2001 (select committee report), above n 45, at 11.

⁵⁰ *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) at [33].

⁵¹ Sentencing Act 2002, s 14(2).

to the victim.⁵² It is for this reason that the sentencing of health and safety offences follows the three-step process set out in *Department of Labour v Hanham & Philp Contractors Limited*^{53,54}

1. Assessing the amount of reparation;
2. Fixing the amount of the fine;
3. Making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and the fine.

Mason argues that prioritising a sentence of reparation over a fine ignores the deterrence objective of sentencing under the HSWA.⁵⁵ He contends that the first sentencing step should be setting a fine that accurately reflects the offending and then reparation deducted.⁵⁶ Mason's formulation has not been adopted by the courts and the three step approach continues to be followed.⁵⁷ Prioritising reparation ahead of a fine is intended to favour victim compensation over fines which are paid to the Crown. The quantum of reparation imposed varies significantly on a case by case basis, but is usually related to the seriousness of the injury suffered. For example, in the workplace context, loss of fingers results in reparation between \$10,000 and \$15,000.⁵⁸ In more serious cases, such as degloving, reparation increases to \$20,000.⁵⁹ In 2013 the 29 Pike River families were awarded a record \$3,410,000 in reparation.⁶⁰

A Double Cover: Reparation for “loss or damage consequential on [...] physical harm” and ACC

The following section outlines the development of s 32(1)(c) of the Sentencing Act which allows imposing reparation for “loss or damage consequential on [...] physical harm”. The conflict between ACC and this ground of reparation was identified at the select committee

⁵² Sentencing and Parole Reform Bill 2001 (select committee report), above n 45, at 13.

⁵³ *Department of Labour v Hanham & Philp Contractors Ltd*, above n 50, at [41]-[71].

⁵⁴ *WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* [2017] NZDC 17395 at [22].

⁵⁵ George Mason “Reparation in sentencing under HSE” [2008] NZLJ 33 at 35.

⁵⁶ At 35.

⁵⁷ *WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd*, above n 54, at [22].

⁵⁸ *Affco New Zealand Ltd v Muir (Department of Labour)* [2008] 6 NZELR 281 (HC); *Department of Labour v Polarcold Stores Ltd* DC Dunedin CRN 08012501380, 31 March 2009; *Department of Labour v Griffiths Goods Ltd* DC Papakura CRI-2009-055-2437, 29 June 2010; *Department of Labour v Tegel Foods Ltd* DC Christchurch CRI-2011-009-4955, 27 September 2011.

⁵⁹ *WorkSafe New Zealand v Fletcher Steel Ltd* [2015] NZDC 8262.

⁶⁰ “WorkSafe New Zealand Bill, Health and Safety in Employment Amendment Bill, Mines Rescue Bill – Third Readings” (14 November 2013) New Zealand Parliament <www.parliament.nz>.

stage and since then s 32(1)(c) has been the subject of discussion and ongoing amendment. In contrast the conflict between reparation for “emotional harm” under s 32(1)(b) and ACC is not recognised or acknowledged so there is no development of the sentence to discuss other than its initial uncontended inclusion in the Sentencing Act. The following section therefore focuses on the development of s 32(1)(c) and how it conflicts with ACC. Reparation for “emotional harm” is discussed in the next section.

ACC covers “physical injuries” caused by “accident to the person” or “work related gradual process, disease or infection”.⁶¹ Intentionally inflicted “physical injuries” are considered an “accident to the person” and therefore covered by ACC. The majority of physical injuries caused by offences that are sentenced under the Sentencing Act meet these criteria and are therefore covered by ACC.⁶² As a result, the same physical harm that is covered by ACC may be used as a basis for awarding reparation under s 32 of the Sentencing Act. For example in *WorkSafe New Zealand v Northpower Limited* an employee received \$30,000 reparation for burns suffered in an arc flash event.⁶³ These injuries were also covered by ACC. As this case illustrates, a person who suffers “physical harm” through an offence sentenced under the Sentencing Act is likely to already have ACC cover for the injury. The ACC cover is comprehensive⁶⁴ so when reparation is imposed it acts as a “top-up” over and above ACC entitlements rather than primary compensation. The concurrent operation of reparation and ACC cannot be justified on the basis that they serve different purposes as the purpose of both is to compensate the accident victim for the loss caused by their injury.

The Sentencing Act’s predecessor, the Criminal Justice Act 1985, allowed part payment of fines to victims. This was frequently criticised as reparation under another label.⁶⁵ Judges made it clear that these payments were permissible by law and did not amount to compensation or a “top-up” of ACC entitlements.⁶⁶ However, in some cases judges did lament a perceived shortfall in ACC compensation and this may have had a subconscious

⁶¹ Accident Compensation Act, ss 20 and 26.

⁶² John Hughes “Editorial: Reparation sentences: Restorative justice or back-door compensation?” [2007] ELB 113 at 113.

⁶³ [2017] NZDC 17527.

⁶⁴ Accident Compensation Act, s 3(c).

⁶⁵ John Hughes “Reparation Orders and Health and Safety Offences” [2002] ELB 121 at 122.

⁶⁶ At 122.

influence on the apportionment of the fine between the victim and the Crown. Moore J noted in one case:⁶⁷

This unfortunate man, in trying to be a good employee, has suffered a serious loss for which, one has to say, Accident Compensation will not adequately compensate him. This is the third aspect of the changes. Whereas, in earlier years, accidents of this sort normally attracted very substantial common law damages or, later on, resulted in quite sizeable lump sum payouts of Accident Compensation such payouts have now ceased or become reduced – in many cases – to a level which many sections of the community regard as almost contemptuous.

Such a practice erodes a fundamental principle of ACC whereby the Scheme provides cover to the exclusion of all other forms of compensation.⁶⁸ One of the mechanisms through which ACC’s self-contained and independent functioning is protected is the “statutory bar” in s 317 of the ACC Act, whereby:

- (1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of -
 - (a) personal injury covered by this Act; or
 - (b) personal injury covered by the former Acts.

The express wording of s 317 only bars “proceedings” for “damages”. Reparation is not a proceeding “for damages”, it is a form of compensation, imposed by way of a court sentence. Reparation is therefore not barred by s 317.⁶⁹ However, reparation is nevertheless inconsistent with the purpose of the statutory bar because it allows victims to obtain further compensation for injuries covered by ACC.

The conflict between reparation for “loss or damage consequential on [...] physical harm” and ACC was not realised until the select committee stage of the Bill.⁷⁰ Business New Zealand submitted its concern that “courts may instead make use of [reparation] to provide a form of compensation to injured employees, accident compensation legislation notwithstanding”.⁷¹

⁶⁷ *Department of Labour v Alexandra Holdings Ltd* [1994] DCR 50 (DC) at 3.

⁶⁸ Doug Tennent, above n 13, at xiii.

⁶⁹ *Police v Davies*, above n 27, at [27]; *McGougan v Depuy International Ltd*, above n 28, at [69] and [89].

⁷⁰ *Kapa v R* [2012] NZSC 119 at [22]; Ministry of Justice *Submission to the Justice and Electoral Committee Sentencing and Parole Reform Bill* (4 September 2001) at 4 and 6.

⁷¹ Ministry of Justice, above n 45, at 4.

Insertion of the provision was intended to facilitate “the use of sentences of reparation to recompense victims in a greater range of circumstances”.⁷² Reparation was inserted to benefit victims of “real crime”, that is crime that has an element of intentionality or mens rea, usually prosecuted under the Crimes Act 1961. It was a government response to a perceived public demand for more victim involvement in the criminal process.⁷³ This perception derived from the 1999 Referendum which asked “should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious offenders?”. An overwhelmingly positive 91.8% of valid votes agreed with the statement.⁷⁴ Despite critics arguing that the wording of the question was designed to ensure a positive response,⁷⁵ the results of the referendum were interpreted as highlighting “a need to encourage greater use of reparation for victims of offending”.⁷⁶ As the Ministry of Justice explained in 2006 to the Justice and Electoral Select Committee Inquiry into Victims’ Rights:⁷⁷

Government policy on reparation is reflected in the Sentencing Act 2002 and the Prisoners’ and Victims’ Claims Act 2005, which underscore the principle that offenders should be held personally accountable for their actions and that victims should be compensated, to the extent possible by offenders for any loss, damage or harm resulting from their crime.

There was a strong general sentiment amongst submitters on the 2001 Bill that reparation should be used in the same way as contract damages, that they should return the victim, as much as is fiscally possible, to the position they were in before the commission of the crime.⁷⁸ Other submitters adopted a stronger stance, advocating for reparation to exceed the quantum of the loss suffered so that it would serve a deterrent and compensatory purpose.⁷⁹

⁷² Sentencing and Parole Reform Bill 2001 (select committee report), above n 45, at 2.

⁷³ Law Commission, above n 31, at 5.

⁷⁴ “Referenda” (4 August 2016) Elections Electoral Commission <www.elections.org.nz>.

⁷⁵ Julian Roberts “Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002” (2003) 36 ANZJ Crim 249 at 251.

⁷⁶ Ministry of Justice, above n 70, at 1.

⁷⁷ At 7.

⁷⁸ Ministry of Justice, above n 45, at 2.

⁷⁹ At 2.

When “physical harm” was first suggested as a ground for reparation the Ministry of Justice recommended that reparation be used for its own distinct purpose, which is to compensate the victim.⁸⁰ Unlike the rest of the sentencing process, the victim, rather than the offender, is the primary consideration.⁸¹ The Ministry warns against suggestions that reparation be used as a means to achieve the other purposes of sentencing, namely deterrence, retribution and incapacitation.⁸²

The Justice and Electoral Select Committee (Select Committee) considered the implications of the cross over between ACC and reparation for loss or damage consequential on physical harm:⁸³

The advantages of allowing reparation for physical harm were seen as being compensation for the removal of the ability to award part or all of fines to victims where physical harm had been caused; the provision of a “top-up” for accident compensation payments to victims; and a restorative justice element. The corresponding disadvantages were seen as being arbitrary differentiation between victims of accidents, depending upon whether any criminal conduct was involved; an assumption that accident compensation payments were inadequate; further compliance costs of employers; and the absence of any cap on reparation sentences.

The Ministry of Justice also submitted their reasons for not supporting the extension of reparation to cover “loss or damage consequential on [...] physical harm”. The Ministry acknowledged the benefits of the extension, specifically that it effectively continues the practice under the Criminal Justice Act 1985 of awarding part of the fine to the victim, and also that it allows victims to obtain compensation additional to ACC cover without going through the exemplary damages process.⁸⁴ Furthermore, the victim gains a sense of offender culpability because the offender is held personally liable for some of the damage caused.⁸⁵ However, the countervailing disadvantages were considered more significant. The Ministry viewed a reparation “top-up” as inconsistent with ACC because it suggests current entitlements are inadequate and treats persons injured through crime differently.⁸⁶

⁸⁰ At 7.

⁸¹ At 7.

⁸² At 7.

⁸³ John Hughes, above n 65, at 122.

⁸⁴ Ministry of Justice, above n 45, at 6.

⁸⁵ At 6.

⁸⁶ At 6.

The additional cost to employers who already contribute to ACC was also considered unjustifiable.⁸⁷

Ultimately the Select Committee recommended deleting “physical harm” from s 32(1)(c).⁸⁸ For reasons that are not apparent, the House of Representatives rejected both the Ministry of Justice and the Select Committee’s recommendations. This decision may have been politically motivated by concern of being perceived as taking rights away from victims. The House of Representative’s solution to the ACC conflict was to insert the following proviso:⁸⁹

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

An ambiguity in this proviso became apparent when the courts sought to apply it. The issue was whether “entitlements” referred to general cover by ACC or to the “compensation actually payable” under the Scheme.⁹⁰ This was the central issue in *Davies v Police*, the case mentioned in the introduction where Davies was convicted of careless driving causing injury after a mattress flew out of his trailer and collided with a cyclist. The cyclist was covered by ACC, but ACC cover only compensates individuals for 80 per cent of their lost earnings while injured⁹¹ to encourage accident victims to return to work as soon as they are able.⁹² The Police sought to obtain the 20 per cent not covered by ACC as a loss consequential on the physical harm and not paid by ACC.⁹³

The District Court and Court of Appeal both held that “entitlements” under s 32(5) referred to the “compensation actually payable” under the Scheme, but this was overturned by the Supreme Court.⁹⁴ Following the appeal, reparation could not be imposed for “loss or damage consequential on [...] physical harm” if the victim’s “physical harm” was covered by ACC irrespective of the amount of compensation actually paid to the victim. This conclusion was considered necessary to maintain the integrity of ACC, particularly to

⁸⁷ At 6.

⁸⁸ Sentencing and Parole Reform Bill 2001 (select committee report), above n 45, at 17.

⁸⁹ Sentencing Act, s 32(5) (repealed).

⁹⁰ *Davies v Police*, above n 27, at [4].

⁹¹ Accident Compensation Act, sch 1 cl 32(3).

⁹² *Woodhouse Report*, above n 16, at 181.

⁹³ *Davies v Police*, above n 27, at [4].

⁹⁴ At [37].

uphold the social contract and ACC's key principles of community responsibility and comprehensive entitlement.⁹⁵

The Government clearly disapproved of the outcome in *Davies v Police*, amending s 32(5) after the decision was released.⁹⁶ *Davies v Police* was expressly referred to in the Amendment Bill's Explanatory Note:⁹⁷

Clause 46 amends section 32 to clarify that the court may not order reparation for consequential loss or damage if compensation has been, or is to be, paid under the Accident Compensation Act 2001. However, a court would be able to impose a sentence of reparation for consequential loss or damage to meet any statutory shortfall in compensation. The effect of this amendment is to overturn the Supreme Court decision in *Davies v New Zealand Police* SC 83/2007 [2009] NZSC 47.

In this context the "statutory shortfall" refers to the difference between the injured person's entitlements under the ACC Act and the loss or damage suffered as a consequence of the physical harm. The 20 per cent "top-up" of wages is a form of "statutory shortfall". For example, in *WorkSafe New Zealand v Affco NZ Limited* the defendant was ordered to pay \$40,000 reparation to a worker who was impaled through the head by a meat hook.⁹⁸ The reparation was for the "statutory shortfall" in wages and compensation for ongoing physical and psychological effects.⁹⁹ In *WorkSafe New Zealand v Rentokil Initial Limited* a cleaner who contracted hepatitis B was paid \$4,998.64 in reparation for out of pocket expenses caused by the physical injury.¹⁰⁰

Submitters to the 2011 Victims of Crime Reform Bill, which reversed *Davies v Police*, supported the amendment because it recognises that victims should:¹⁰¹

- Be acknowledged as an integral part of the justice system;
- Be given a voice in court proceedings;
- Be treated with empathy and respect; and
- Have their views taken into account.

⁹⁵ At [28].

⁹⁶ Sentencing Amendment Act 2014.

⁹⁷ Victims of Crime Reform Bill 2011 (319-1) (explanatory note) at 14.

⁹⁸ *WorkSafe New Zealand v Affco NZ Ltd* [2016] NZHC 2862.

⁹⁹ At [28].

¹⁰⁰ *WorkSafe New Zealand v Rentokil Initial Ltd* [2016] NZDC 21294.

¹⁰¹ Ministry of Justice *Departmental Report for the Justice and Electoral Committee Victims of Crime Reform Bill* (April 2012) at 3.

Following *Davies v Police*, as amended s 32(5) reads:¹⁰²

(5) Despite subsections (1) and (3), the court must not order the making of reparation in respect of any consequential loss or damage described in subsection (1)(c) for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.

On the basis of the wording of this section it is arguable that reparation cannot be imposed for “physical harm” if some form of compensation has been paid for the injury under the ACC Act, however, the Explanatory Note to the 2011 Bill makes the purpose sufficiently clear to override any ambiguity in the language.¹⁰³

The Supreme Court decision in *Davies v Police* satisfactorily settled the tension between reparation for “loss or damage consequential on [...] physical harm” and ACC, whereby reparation does not operate within ACC’s sphere of influence. The Government’s subsequent decision to amend s 32(5) upsets the compromise reached and as a result:¹⁰⁴

has revived the notion that reparation constitutes “back-door” compensation [...], sidestepping the bar on recovering damages arising from personal injury covered by accident compensation legislation.

The provision as amended allows reparation to “top-up” any shortfall in ACC compensation. This encourages a cross over between ACC compensation and reparation and therefore undermines ACC’s central purpose which is to provide exclusive cover for “personal injury” caused by accident in New Zealand.

The approach taken by the courts following the amendment to s 32(5) is well illustrated by cases such as *Department of Labour v Eziform Roofing Products Limited*.¹⁰⁵ In this case an employee of Eziform Roofing Products fell 5.5 metres from a roof onto concrete, fracturing his knee and shattering two vertebrae.¹⁰⁶ The employee suffered permanent impairment.¹⁰⁷ Eziform Roofing Products Limited was found in breach of ss 6 and 50(1)(a) of the Health and Safety in Employment Act and ordered to pay a fine of \$60,000 and reparation of \$40,000.¹⁰⁸ Considerations taken into account when determining the

¹⁰² Sentencing Amendment Act 2014, s 6.

¹⁰³ Connell, above n 29, at 315.

¹⁰⁴ Hughes, above n 62, at 113.

¹⁰⁵ [2013] NZHC 1526, (2013) 11 NZELR 1.

¹⁰⁶ At [2]-[3].

¹⁰⁷ At [3].

¹⁰⁸ At [4] and [74].

appropriate quantum of reparation focused on both the employer and the employee.¹⁰⁹ The employee's injuries and continuing impairment, and the employer's actions following the injury such as remorse, offers of payment and his capacity to pay reparation, were taken into account.¹¹⁰

This case illustrates the tension between ACC and reparation. The employee suffered a physical injury by accident while at work and was therefore fully covered by ACC.¹¹¹ ACC cover paid for the employee's medical costs and compensated him for 80 per cent of his lost wages.¹¹² Through reparation he received additional entitlements for his personal injury at the employer's expense. It should be noted that the employer already contributed to the employee's ACC entitlements through levies.¹¹³ These externalities will be elaborated in the following sections.

B Emotional Harm

The purpose of this paper is to assess the conflict between ACC and reparation. This section explains the conflict between ACC and reparation for "emotional harm".¹¹⁴

Reparation for "emotional harm" caused by an offence may be imposed under s 32(1)(b) of the Sentencing Act. Judicial interpretation allows "emotional harm" reparation for "mental anguish", "clinical conditions", "traumatic stress disorders" and "psychotic conditions".¹¹⁵ ACC covers a smaller sub-set of "emotional harm". There is an overlap between reparation and ACC if the emotional harm is "mental injury suffered by a person because of physical injuries suffered by the person" or mental injury caused by specified criminal acts committed after 1 April 2002 such as sexual violation.¹¹⁶ It is therefore possible for a person to meet both the ACC and reparation criteria for emotional harm compensation. This is illustrated by the circumstances in *WorkSafe New Zealand v Totally Rigging Limited* where a worker who fell from an unsecured ladder onto concrete, breaking both arms, was awarded \$20,000 for economic loss and psychological harm caused by the

¹⁰⁹ At [8].

¹¹⁰ At [8].

¹¹¹ Accident Compensation Act, s 20.

¹¹² Schedule 1 cls 2 and 32(3).

¹¹³ Sections 168-169.

¹¹⁴ Sentencing Act, s 32(1)(b).

¹¹⁵ *Sargeant v Police* (1997) 15 CRNZ 454 (HC) at 458.

¹¹⁶ Accident Compensation Act, ss 26(1)(c)-(d), 21, sch 3. John Hughes, above n 65, at 123.

physical injuries.¹¹⁷ In the services sector PLM Ltd was ordered to pay a customer \$9,000 emotional harm reparation after they suffered significant burns while driving a go kart. The fuel cap was loose, and petrol spilled onto the customer's lap and ignited.¹¹⁸ Large payments of reparation may be imposed under s 32(1)(b) for "emotional harm". In *WorkSafe New Zealand v Wai Shing Limited*, the employee received \$110,000 emotional harm reparation for the injuries he sustained in a workplace accident that left him tetraplegic.¹¹⁹

These cases illustrate that the overlap between "emotional harm" and ACC frequently occurs, yet, inexplicably, reparation for "emotional harm" is not restricted by s 32(5) which requires the court to "not order the making of any reparation in respect of any consequential loss or damage [...] for which compensation has been, or is to be, paid under the Accident Compensation Act 2001".¹²⁰ Section 32(5) applies to "loss or damage *consequential* on any emotional" harm under s 32(1)(c), but not to reparation *for* the "emotional harm" itself under s 32(1)(b). This issue would be partially resolved, and constrain reparation for "emotional harm" to the same extent as reparation for "loss or damage consequential on [...] physical harm", by amending s 32(5) to include s 32(1)(b) as follows:

Despite subsections (1) and (3), the court must not order the making of reparation in respect of *subsection 32(1)(b)* or any consequential loss or damage described in subsection (1)(c) for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.

In their submission to the Select Committee, the Ministry of Justice confirmed the links between physical injury, emotional harm and ACC cover; stating that emotional harm "is likely to be a consequence in all cases of physical harm".¹²¹ The Ministry made this observation when arguing that "physical harm" could be removed from s 32 because almost all victims of physical harm would already be entitled to reparation for "emotional harm". Neither the Select Committee nor the Ministry of Justice appreciated that as a corollary of this observation emotional harm arising out of physical injury would also already be covered by ACC. The connection between physical and mental injury was further acknowledged in *WorkSafe New Zealand v Totally Rigging Ltd* where the Judge noted that the employee who fell from the ladder "suffered extensively, not only from the physical

¹¹⁷ *WorkSafe New Zealand v Totally Rigging Ltd* [2016] NZDC 21266.

¹¹⁸ *WorkSafe New Zealand v PLM 5456 Ltd* [2016] NZDC 17664.

¹¹⁹ *WorkSafe New Zealand v Wai Shing Ltd*, above n 1, at [95].

¹²⁰ At [77].

¹²¹ Ministry of Justice, above n 45, at 7.

injuries but, more particularly, the emotional harm that arose as a result of those injuries”.¹²²

Hughes acknowledges that often physical injury and the resulting mental injury are inextricable and “it will be necessary to ensure that no element of reparation is ordered for any physical injury that gave rise to the emotional harm”.¹²³ However, the legislation does not require the court to do this. Therefore, provided the victim is seeking reparation for the emotional harm, and not loss consequential on emotional harm, they can do so without limitation even if the emotional harm is covered by ACC. For example, in *Davies v Police*, the victim suffered emotional harm as a result of the injuries from the cycling accident for which they were awarded \$7,000 reparation.¹²⁴ There was no acknowledgement that the reparation was for “emotional harm consequential upon her physical injuries”, and was therefore covered by ACC. Inexplicably the reparation for “emotional harm” was not contested in conjunction with the 20 per cent “top-up” as double-recovery for personal injury covered by ACC.¹²⁵ The cross over between reparation and ACC is more pronounced when the emotional harm is suffered during the commission of a violent crime and the victim suffers personal injury from which they develop a recognised mental injury. For example, where a victim develops post-traumatic stress disorder following rape.

Reparation can only be imposed to compensate people who are a “victim” as defined in s 4 of the Sentencing Act. In general, this requires the person to have a direct link to the offending. Immediate family members only qualify for reparation if the victim dies or is “incapable” as a result of the offence.¹²⁶ In *WorkSafe New Zealand v Oropi Quarries Limited* \$100,000 reparation was paid to the deceased’s spouse and daughter for emotional harm.¹²⁷ In *Department of Labour v Pike River Coal Ltd*, the families of the 29 men killed by the gas explosion at Pike River Mine on 19 November 2010 were each paid \$110,000 reparation for emotional harm.¹²⁸ The Pike River Mine disaster instigated health and safety

¹²² Above n 117, at [20].

¹²³ John Hughes, above n 65, at 123.

¹²⁴ *Davies v Police*, above n 9, at [6].

¹²⁵ *Davies v Police*, above n 27, at [3].

¹²⁶ Sentencing Act, s 4(a)(iv).

¹²⁷ *WorkSafe New Zealand v Oropi Quarries Ltd* [2016] NZDC 10755, [2017] DCR 97.

¹²⁸ *Department of Labour v Pike River Coal Ltd* [2014] DCR 32 (DC). See also: *Department of Labour v Hanham & Philp Contractors Ltd*, above n 50; *Department of Labour v Fletcher Concrete & Infrastructure Ltd* DC Nelson CRI-2009-042-1043, 20 August 2009; *Department of Labour v Fonterra Co-Operative Group Ltd* DC Hawera CRI-2009-021-958, 20 January 2010; *WorkSafe New Zealand v Lyttleton Port Co Ltd* [2015] NZDC 15922; *R v Burr* [2015] NZHC 2675, (2015) 13 NZELR 357; *R v*

reform in New Zealand and was responsible for the nationwide change in compliance with, and enforcement of, health and safety law.

ACC covers “the death of a person”¹²⁹ which is caused by an “accident”¹³⁰. Cover entitles the deceased’s estate to a grant of up to \$4,500¹³¹ and weekly compensation for dependents.¹³² The surviving spouse is also entitled to a survivor’s grant and weekly compensation.¹³³ There is potential in this situation for survivors of the deceased to obtain double recovery, first from ACC and then through reparation for “emotional harm” from the offender who caused the accident, and there is no provision in s 32 to avoid this occurring.

As this section shows, the overlap between ACC and reparation is not restricted to section 32(1)(c) which allows imposition of a sentence of reparation for “loss or damage consequential on [...] physical harm”. The overlap also occurs when reparation is for “emotional harm”. Unlike reparation for “loss or damage consequential on [...] physical harm”, there was no conscious policy decision to allow reparation for loss for emotional harm already covered by ACC. As a result there is no awareness of the potential for people to recover compensation through both avenues. Furthermore, while s 32(1)(c) is limited to compensation which has not been paid by ACC, reparation for “emotional harm” is not limited in the same way. This means double recovery as well as a “top-up” of ACC entitlements is possible through s 32(1)(b). Conceptually this is inconsistent with ACC’s purpose of being the sole comprehensive provider of compensation.

IV Does Reparation Remove the Constraints of Exemplary Damages?

The following section assesses whether reparation can be justified because it provides victims who seek money from an offender with an alternative to exemplary damages.

Exemplary damages are an anomalous private remedy in tort, awarded to punish the defendant where compensation alone does not reflect the “outrageousness” of the

New Zealand School of Outdoor Studies Ltd [2016] NZDC 3081; *E v Steelcon Construction Ltd and Rodney Bishop* [2016] NZHC 494.

¹²⁹ Accident Compensation Act, s 26(1)(a).

¹³⁰ Section 25.

¹³¹ Section 64.

¹³² Sections 70-71 and 76-78.

¹³³ Sections 65-66.

defendant's actions.¹³⁴ Though subject to criticism, exemplary damages are currently available if:¹³⁵

the defendant deliberately and outrageously ran a consciously appreciated risk of causing personal injury to the plaintiff. Whether running such a risk should be regarded as outrageous will depend on the degree of risk that was appreciated and the seriousness of the personal injury that was foreseen as likely to ensue if the risk materialised.

Exemplary damages are available at Common Law, and also for criminal offences where the claimant has suffered personal injury covered by ACC.¹³⁶

Most significantly, reparation is more advantageous to victims because awards of reparation are far greater than awards of exemplary damages. Marten maintains that New Zealand courts take a conservative approach to awards of exemplary damages.¹³⁷ The purpose of exemplary damages is punishment and deterrence, not compensation.¹³⁸ Therefore, exemplary damages are limited to the amount of punishment deemed appropriate.¹³⁹ The highest exemplary damages award for personal injury was in *M v L*.¹⁴⁰ Exemplary damages of \$100,000 was awarded against a teacher who committed sexual assault on pupils.¹⁴¹ In another compelling case a woman who was assaulted by her partner eight times over their three year relationship obtained \$80,000.¹⁴² The assaults involved sexual and physical violence which led to post-traumatic stress disorder when the relationship ended. Given the extent of abuse in this case and the quantum of the award other victims of criminal offending are unlikely to obtain awards higher than were made in these cases. In comparison, a reparation award of \$226,300 was made in a case this year.¹⁴³

¹³⁴ *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [19].

¹³⁵ At [179].

¹³⁶ Accident Compensation Act, s 319.

¹³⁷ Bevan Marten "Exemplary Damages" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 521 at 544.

¹³⁸ *Couch v Attorney-General (No 2)*, above n 134, at [19].

¹³⁹ Marten, above n 137, at 544.

¹⁴⁰ *McDermott v Wallace* [2005] 3 NZLR 661 (CA) at [97].

¹⁴¹ *M v L* [1998] 3 NZLR 104 (HC).

¹⁴² *G v G* [1997] NZFLR 49(HC).

¹⁴³ *WorkSafe New Zealand v Wai Shing Ltd*, above n 1.

In addition to being more financially advantageous, reparation is also a more accessible avenue for victims.¹⁴⁴ As it is imposed during the sentencing process at no additional cost to the victim it does not have the emotional and financial barriers that victims face when claiming for exemplary damages.¹⁴⁵ As the Law Commission explains:¹⁴⁶

The rationale for the sentence of reparation is that it would be both unfair to the victim, and costly for the victim and the state, to require the victim to prove wrongdoing by the offender and establish the quantum of loss in separate civil proceedings when this can be done as part of the criminal proceedings.

In comparison, exemplary damages are a private remedy, brought at the cost and risk of claimants.¹⁴⁷

It is possible for a victim to seek exemplary damages as well as reparation. This suggests that reparation does not replace exemplary damages. The court is required to consider this under s 32(3) of the Sentencing Act:

In determining whether a sentence of reparation is appropriate or the amount of reparation to be made for any consequential loss or damage described in subsection (1)(c), the court must take into account whether there is or may be, under the provisions of any enactment or rule of law, a right available to the person who suffered the loss or damage to bring proceedings or to make any application in relation to that loss or damage.

This requires the court to take into consideration whether a victim is likely to pursue exemplary damages. Victims are unlikely to bring an action for exemplary damages unless it is part of another claim because the court costs exceed the potential award. Marten considers the cost of bringing an action for exemplary damages unjustifiable for claimants when weighed against the potential quantum of the award and the consideration that they already have comprehensive ACC cover.¹⁴⁸ Furthermore, this only considers the maximum amount legally available, practically the defendant may not have the means to pay reparation which is another factor for claimants who consider bringing an action.¹⁴⁹

¹⁴⁴ *R v O'Rourke* [1990] 1 NZLR 155 (CA) at 158.

¹⁴⁵ At 158.

¹⁴⁶ Law Commission, above n 31, at 4.

¹⁴⁷ Accident Compensation Act, s 319.

¹⁴⁸ Marten, above n 137, at 547.

¹⁴⁹ Connell, above n 29, at 315-316.

Reparation is a more advantageous mechanism for victims than exemplary damages. Both allow additional money to be paid by the offender to victims with ACC cover. However, that is where the similarities end. Reparation and exemplary damages serve distinctly separate purposes. The purpose of reparation is to compensate, and the purpose of exemplary damages is to punish.¹⁵⁰ The amounts awarded reflect these different purposes. Though it is an attractive justification to perceive reparation as curing the ills of exemplary damages, this does not withstand critical analysis because they serve distinctly separate purposes.

V Is “top-up” Reparation a Practical Development or Does It Undermine the Integrity and Operation of ACC?

The conflict between reparation and ACC is concerning because ACC’s unique role in New Zealand’s legal system is the product of a carefully balanced compromise which seeks to treat all people who suffer personal injury fairly and equally within funding constraints. Restricting people to their entitlements under ACC ensures that costs for personal injury claims are not incurred outside of the Scheme. It is also essential to ensuring that all victims are treated equally. The five principles set out by Woodhouse in 1967 are the key means of fulfilling the purpose and intention of the Scheme within the constraints of this compromise. Any legal course of action inconsistent with these principles has the potential to erode the foundations of ACC and threaten the Scheme’s long-term sustainability. This section will explore whether “top-up” reparation conceptually conflicts with ACC through an analysis of the five fundamental Woodhouse principles. The principles are:¹⁵¹

1. Community responsibility
2. Comprehensive entitlement
3. Complete rehabilitation
4. Real compensation
5. Administrative efficiency

¹⁵⁰ *Department of Labour v Hanham & Philp Contractors Ltd*, above n 50, at [33]; *Couch v Attorney-General (No 2)*, above n 134, at [18].

¹⁵¹ *Woodhouse Report*, above n 16, at 20.

A *Community Responsibility*

The concept of “social interdependence” was central to Woodhouse’s design and justification of ACC.¹⁵² Woodhouse essentially argued that everyone in the community is at risk of being injured and therefore everyone has a responsibility to support injured persons.¹⁵³ Woodhouse reasoned that under ACC “individual liability [should] disappear in favour of national responsibility”.¹⁵⁴ As everyone is equally at risk they equally bear the cost of the injury. For this reason, ACC is funded through levies paid by the entire community.¹⁵⁵ Reparation is not funded in this way as instead, the cost is born by individuals.

ACC’s funding is divided into five accounts which fund different types of injuries.¹⁵⁶ The work account covers injuries related to work and is funded by employers.¹⁵⁷ Employers pay a work levy and a working safer levy. The work levy is set on the basis of the risk of injury in the employer’s line of business.¹⁵⁸ Risk is the sum of the total number of claims from the previous year in that industry and other factors such as anticipated change in injury type or cost of providing ACC services.¹⁵⁹ The working safer levy is 0.8 per cent of a business’ payroll income and this funds WorkSafe.¹⁶⁰ PAYE employee’s also pay 1.21 per cent of their wages towards levies.¹⁶¹ These levies fund the earners’ account which covers non-work injuries.¹⁶² Levies on petrol and road user charges fund the motor vehicle account which vehicle related injuries that occur on the road.¹⁶³ The non-earner’s account is levied through general taxation and covers injuries to non-earners.¹⁶⁴ The earners’ and non-earners’ account funds the treatment injury account.¹⁶⁵ Bram Lemson, who submitted

¹⁵² Gaskins, above n 12, at 18.

¹⁵³ *Woodhouse Report*, above n 16, at 40.

¹⁵⁴ At 489.

¹⁵⁵ Accident Compensation Act, ss 168-169.

¹⁵⁶ Accident Compensation Commission, above n 22, at 3.

¹⁵⁷ At 3.

¹⁵⁸ “How Levies Work” (22 August 2017) Accident Compensation Commission <www.acc.co.nz>.

¹⁵⁹ Accident Compensation Commission, above n 22, at 6.

¹⁶⁰ Accident Compensation Commission, above n 158.

¹⁶¹ Accident Compensation Commission, above n 158.

¹⁶² Accident Compensation Commission, above n 22, at 3.

¹⁶³ At 3.

¹⁶⁴ At 3.

¹⁶⁵ At 3.

against the 2011 amendments, argued that reparation was inconsistent with ACC's funding arrangements.¹⁶⁶

The quantum of reparation payable by an offender depends on their means to pay compensation. Offenders are personally liable for reparation. The funding of ACC which increases for higher income earners, coupled with means based reparation, creates a compounding inequity on high income earners. Higher income earners have more means to pay reparation, they are also making greater contributions to ACC than offenders who have limited, to no, means to pay reparation. One of the considerations that led the Ministry of Justice to not support the extension of reparation to loss or damage consequential on physical harm was that it would be an additional expense for employers to cover on top of the ACC contributions they already pay.¹⁶⁷ When formulating ACC "the entire logic of the Woodhouse Commission's reforms was to capture the money and make better use of it".¹⁶⁸

Conversely low-income earners who have limited ability to pay reparation contribute comparatively small amounts of income into ACC and their means prevent them from paying large amounts of reparation. This inequity is most evident when comparing reparation payments for different types of offences. Criminal offences where significant physical harm is caused often result in minimal reparation payments because the offender has insufficient means to pay. In contrast, injuries caused by motor accidents or health and safety offences result in high reparation because the offenders, or their insurers, have the ability to pay.¹⁶⁹

Reparation is particularly disproportionate in its effect on offenders whose victims are high income earners. Under ACC, the risk of victims being high income earners is borne by the Scheme. ACC's weekly contribution of 80 per cent of lost wages is capped at \$1,341.31 per week.¹⁷⁰ Reparation enables the victim to obtain any consequential loss not covered by ACC. Where a victim's income exceeds the ACC payment threshold the offender is potentially liable for the 20 per cent "top-up" as well as any income above the maximum ACC entitlements. This may be justifiable for intentional offences, but it is more difficult to justify in negligence type offences, such as those under the Land Transport Act or the

¹⁶⁶ Bram Lemson "Submission to the Justice and Electoral Committee on the Victims of Crime Reform Bill" at 1.

¹⁶⁷ Ministry of Justice, above n 45, at 6.

¹⁶⁸ Palmer, above n 36, at 91.

¹⁶⁹ Mason, above n 55, at 35.

¹⁷⁰ Accident Compensation Act, sch 1 cl 46.

Dog Control Act, where there was no intention to hurt the individual and the victim has fair cover under ACC.¹⁷¹

The extent of potential liability for high income earner's 20 per cent "top-up" was highlighted in *WorkSafe New Zealand v Wai Shing Limited*. The Court accounted for loss of future earnings with reference to the Labour Cost Index when imposing reparation for the 20 per cent "top-up". This was calculated to be \$455,600. The Court halved this to \$266,300 to account for the "degree of 'benefit'" the victim has received through the ACC system.¹⁷²

Beadle criticises this method because it follows the process used in Common Law personal injury cases, rather than the method used by ACC.¹⁷³ There is therefore no consistency between the approach used by ACC to calculate the 80 per cent weekly compensation for lost wages and the court's method of calculating the 20 per cent "top-up". The approach taken to the calculation is important because loss of future earnings is largely hypothetical, and court's determination of the appropriate amount will place a substantial burden on the liable defendant. The longer the period of impairment, the more likely the estimation is to be inaccurate. Loss of future earnings can be more accurately determined when an individual is nearing the end of their career than when, as in *WorkSafe New Zealand v Wai Shing Ltd*, they are in the early stages of their working life. The assessment is based on multiple assumptions including retirement age, KiwiSaver contributions and investment returns on the reparation payment.¹⁷⁴ In *WorkSafe New Zealand v Wai Shing Ltd*, WorkSafe's estimation was supported by a report from Price Waterhouse Coopers (PWC).¹⁷⁵ The PWC report may improve the accuracy of the estimation, but it cannot remove the inherent hypothetical nature of the calculation.

Reparation for future loss is within the scope of s 32 because it is loss consequential on physical harm. McGuire J maintained that loss of future earnings "is the very kind of loss the Sentencing Amendment Act 2014 intended to address".¹⁷⁶ Though the purpose of reparation was to involve victims in the sentencing process and facilitate "the use of sentences of reparation to recompense victims in a greater range of circumstances", Parliament unlikely intended such significant sums to be borne by individual offenders for

¹⁷¹ *Davies v Police*, above n 27.

¹⁷² *WorkSafe New Zealand v Wai Shing Ltd*, above n 1, at [88].

¹⁷³ Neil Beadle "New test for reparation topping-up ACC" (26 May 2017) DLA Piper <www.dlapiper.com>.

¹⁷⁴ *WorkSafe New Zealand v Wai Shing Ltd*, above n 1, at [65], [96], [98] and [99].

¹⁷⁵ At [96].

¹⁷⁶ At [79].

consequential loss or damage.¹⁷⁷ Though McGuire J implicitly, and without reasons, stopped short of imposing reparation for lost earnings from career progression, this may in future cases be imposed as a form of “loss or damage consequential on [...] physical harm” provided causation can be established. This would further increase the burden on defendants.

Imposing reparation on individuals for “personal injury” covered by ACC, particularly in large sums undermines the community responsibility principle of ACC.

B Comprehensive Entitlement

Under ACC “injury, not cause, is the issue”.¹⁷⁸ The Scheme provides “immediate compensation without proof of fault for every injured person”.¹⁷⁹ As Woodhouse explained:¹⁸⁰

The solution does in fact lie “in a completely unified scheme for disability without demarcation by the cause of the disability”; and if real effect is to be given to such a scheme then clearly no class within it could be marked out for preferential treatment.

Compensation is injury—not individual—driven.¹⁸¹ To ensure that people “do not receive more than their entitlements under the Act”, ACC has the ability to deduct damages obtained through other legal mechanisms from compensation under the Scheme.¹⁸² This has only occurred in 21 cases, but the existence of the provision re-enforces the policy intent behind the Scheme to provide all victims with the same extent of compensation irrespective of the payment’s source.¹⁸³

Reparation for “emotional harm” and “loss or damage consequential on [...] physical harm” is available to a small proportion of people who suffer a personal injury covered by ACC. To meet the criteria for reparation, first, the injury must be caused by the actions of an offender who is convicted of an offence that is sentenced under the Sentencing Act. Second,

¹⁷⁷ Sentencing and Parole Reform Bill 2001 (select committee report), above n 45, at 2.

¹⁷⁸ *Woodhouse Report*, above n 16, at 20.

¹⁷⁹ At 26.

¹⁸⁰ At 38.

¹⁸¹ At 40.

¹⁸² Accident Compensation Act, s 321; *McGougan v Depuy International Ltd*, above n 28, at [90].

¹⁸³ At [90].

successful prosecution is required.¹⁸⁴ Third, the offender must have the means to pay reparation.¹⁸⁵ Injured persons who meet these criteria receive additional entitlements for injury while others do not. This significantly undermines the comprehensive entitlement principle of ACC. As Elias CJ explained in *Davies v Police*:¹⁸⁶

If reparation can be ordered under the Sentencing Act to make up for perceived inadequacies in entitlement under [ACC], victims of crime stand outside the general prohibition. If “entitlements” for the purposes of reparation eligibility depend on what is actually paid, ineligibility under [ACC] would revive the ability to obtain redress through reparation for victims of crime, but not victims of civil wrongs.

Furthermore, additional reparation for victims of crime is unnecessary when ACC already provides comprehensive entitlement, including medical costs and compensation for lost wages, for an injury.¹⁸⁷

Reparation also threatens ACC because the perceived need for additional compensation calls into question the adequacy of the “comprehensive entitlements” provided by the Scheme. As the Ministry of Justice explained, reparation consequential on physical harm “assumes that the level of compensation available under the ACC scheme needs supplementing”.¹⁸⁸ Hughes rejects this analysis because s 32(5) prevents imposition of reparation for consequential loss or damage paid by ACC.¹⁸⁹ Hughes’ rebuttal correctly identifies that s 32(5) prevents double recovery, but it does not prevent topping up total compensation for loss consequential on physical injury such as the 20 per cent wages shortfall. This is not double recovery so it does not breach s 32(5), but it amounts to additional recovery for loss or harm consequential on physical harm. The fact the court considers the reparation necessary to cover the loss or damage suggests current levels of compensation are insufficient. Nicholson and Mrkusich reason that if the Government supports the 20 per cent “top-up” of wages, this must be taken as an indication that they consider “fair compensation” as the entirety of their lost wages and everyone’s entitlements should be increased accordingly.¹⁹⁰

¹⁸⁴ Sentencing Act, s 32; *Department of Labour v Hanham & Philp Contractors Ltd*, above n 50, at [42].

¹⁸⁵ Sentencing Act, s 12(1).

¹⁸⁶ *Davies v Police*, above n 27, at [28].

¹⁸⁷ Accident Compensation Act, Sch 1 cls 2 and 32(3).

¹⁸⁸ Ministry of Justice, above n 45, at 6.

¹⁸⁹ John Hughes, above n 62, at 113.

¹⁹⁰ Grant Nicholson and Richard Mrkusich “Back-door damages for injury” *New Zealand Lawyer* (New Zealand, 8 June 2007) at 16.

C Complete Rehabilitation

ACC's paramount concern is quickly returning an injured person to work.¹⁹¹ The main reason that compensation is fair but not full is to motivate timely rehabilitation and incentivise individuals to return to work.¹⁹² Awarding reparation for the remaining 20 per cent undermines this objective because it brings the victim's wage entitlements up to 100 per cent, reducing their incentive to return to employment.

There is also a risk, as occurred under the previous tortious system, that injured persons act inconsistently with rehabilitation, and other helpful initiatives, following their injuries to ensure the amount of reparation is not reduced by reference to their improved health.¹⁹³

In substance reparation is a form of "lump sum" compensation. ACC abolished lump sum payments in 1992, replacing it with weekly compensation.¹⁹⁴ Woodhouse did not support lump sums. He considered them an inaccurate estimation of future loss, which may under-compensate the victim.¹⁹⁵ Lump sums also tempt victims to "mortgage the future".¹⁹⁶ Periodic payments can be continually adjusted and encourage responsible management of funds. Lump sums were capped at \$27,000 and only available for permanent impairment.¹⁹⁷ Lump sum payments were reintroduced in a more restricted form in the 2001 Act. Lump sum payments range between \$2,500 for 10 per cent impairment and \$100,000 for 80 per cent impairment.¹⁹⁸ "Permanent impairment" is a personal injury that has caused "a degree of whole-person impairment of 10 per cent or more".¹⁹⁹ The degree of impairment is determined by the Accident Compensation Commission.

Arguably in the context of permanent impairment reparation can be justified where the offender has the means to pay, it enables the victim to obtain full compensation for their injury from the person at fault. The 80 per cent rationale is less applicable when the injury does not allow rehabilitation to full employment. Though permanent injury does require

¹⁹¹ Accident Compensation Act, s 3(c); *Woodhouse Report*, above n 16, at 40.

¹⁹² At 181.

¹⁹³ At 152.

¹⁹⁴ John Miller "Trends In Personal Injury Litigation: The 1990s" (2003) 34 VUWLR 407 at 407.

¹⁹⁵ *Woodhouse Report*, above n 16, at 60.

¹⁹⁶ At 61.

¹⁹⁷ Miller, above n 194, at 408.

¹⁹⁸ Accident Compensation Act, sch 1 cl 56.

¹⁹⁹ Schedule 1 cl 54.

rehabilitation to enable the victim to function with their impairment, it is unlikely to have as great an effect as on a fully-recoverable injury.

D Administrative Efficiency

Reparation does not significantly undermine the administrative efficiency of ACC. Sections 264A and 264B of the ACC Act formalise the relationship between ACC and WorkSafe, requiring the two agencies to work together to prevent injury. ACC is not involved in the sentencing of offenders for crimes and health and safety breaches. Sentencing for reparation is efficient because the case is already before the court. The time spent determining whether to impose a sentence of reparation and the appropriate quantum is unlikely to incur significant additional marginal cost to the overall justice system.

VI Misapplication Of s 32 By the Court

Another issue with reparation for “loss or damage consequential on [...] physical harm” is that it is misapplied by the courts as evidenced by the cases outlined in this section. Incorrect application of the sentence may have artificially accentuated the reparation - ACC cross over. This section sets out how the courts are misapplying the sentence and questions whether bringing application of the sentence back within the confines of the express wording of the section will have a material impact on the observed ACC – reparation double recovery.

A Reparation “consequential” on Physical Harm or “for” Physical Harm

Section 32 provides for reparation to be imposed for loss or damage consequential on physical harm, but not for the physical harm itself.²⁰⁰ Adams’ commentary explicitly states that “reparation for consequential loss or damage under subs (1)(c) is concerned with indirect loss or damage. It cannot be used to cover direct loss or damage”.²⁰¹ For this reason, in *Davies v Police* the Police were seeking reparation for the remaining 20 per cent of the victim’s wages not covered by ACC. Reparation was not sought for the expenses of the injury itself. Lost wages are consequential loss distinguishable from the actual physical injuries sustained in the accident.

²⁰⁰ *Davies v Police*, above n 9, at [22].

²⁰¹ Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Westlaw) at [SA 32.06].

Section 32(5) is also clear that:

The court must not order the making of reparation in respect of any consequential loss or damage described in subsection (1)(c) for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.

The purpose of this provision is to prevent “double dipping”.²⁰² To assist compliance with s 32(5) the court may order a reparation report containing:²⁰³

In the case of any loss or damage consequential on physical harm, -

- (i) The nature and value of the loss or damage; and
- (ii) The amount or extent of compensation paid or payable under the Accident Compensation Act 2001 to the person who suffered the loss or damage in respect of that loss or damage.

The court is not required to obtain a report if they consider it unnecessary.²⁰⁴

To comply with these sections the court is required to firstly distinguish between direct and indirect losses from physical harm. Reparation can only be awarded for indirect losses.²⁰⁵ Secondly the court deducts from the amount of indirect loss any compensation which “has been, or is to be, paid under the Accident Compensation Act 2001”.²⁰⁶ Thirdly reparation is reduced if the offender cannot pay the full amount.

However, the court does not follow this approach which would ensure compliance with the empowering provisions of the Sentencing Act and some judges are not careful to distinguish between direct and indirect losses. Instead they make reference to other cases where reparation has been imposed for similar injuries and adjust the amount if the physical harm in the case before the court is distinguishably more or less severe than in the previous decision. This approach is consistent with general sentencing principles which require judges to “take into account the general desirability of consistency with respect to similar offenders committing similar offences in similar circumstances”²⁰⁷, but this operates within the constraints of s 32. Imposing reparation purely on the basis of similar cases, without consideration of the victim’s specific circumstances, amounts to reparation for the actual

²⁰² *Davies v Police*, above n 9, at [22].

²⁰³ Sentencing Act, s 33(c).

²⁰⁴ Section 33(2).

²⁰⁵ Section 32(1)(c).

²⁰⁶ Section 32(5).

²⁰⁷ *WorkSafe v Wai Shing Ltd*, above n 1, at [64].

physical injury rather than consequential loss or damage actually suffered by the individual. In a number of cases, as demonstrated below, judges do not make specific deductions for the amount of ACC entitlements received by the particular individual.

This approach is illustrated in a recent reparation case, which is also the first sentencing decision under the HSWA. In *WorkSafe New Zealand v Budget Plastics (New Zealand) Limited*, a worker suffered a hand amputation while using a plastic extrusion machine.²⁰⁸ Budget Plastics breached their primary duty of care under the HSWA.²⁰⁹ Pankhurst J's analysis of reparation was limited to the following:²¹⁰

[24] The HSW Act does not affect ss 32 to 38A of the Sentencing Act 2002.

[25] the cases of *WorkSafe v Firewood Direct (Motueka) Limited*, *WorkSafe New Zealand v New Zealand Timber Limited*, and *WorkSafe New Zealand v NZ Woodtex Limited* provided by WorkSafe are the most comparable to the present case with orders of reparation between \$35,000 to \$40,000.

[26] I fix reparation in this case at \$37,500.

From this analysis, it is apparent that reparation was assessed on the basis of comparable physical injuries rather than the specific loss suffered by the victim consequential on the physical injury less their ACC entitlements. A similar approach was taken in *WorkSafe v Northpower Limited Wellington Electricity Lines Limited* where reparation was determined by reference to previous awards for similar types of burn injuries.²¹¹

Imprecision in calculating the amount of reparation may be partially caused by the judicial mindset whereby judges “do not see that the assessment of quantum for a reparation payment is all an exact science. There is a good degree of subjectivity applied to the process overall”.²¹² This approach may be a product of the general impreciseness of sentencing in New Zealand, but whatever the cause may be:²¹³

Sentences of reparation have remained uniformly consistent in their average amount since 2003 [...]. This despite the fact that generally such sentences lack any coherent or logical basis in the calculation of reparation for emotional harm or loss or damage

²⁰⁸ Above n 54, at [1].

²⁰⁹ At [2].

²¹⁰ *WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* [2017] NZDC 17395 at [24]-[26].

²¹¹ Above n 63, at [26]-[28].

²¹² *WorkSafe New Zealand Limited v Macready Building Supplies Ltd* [2017] NZDC 1760 at [41].

²¹³ Mason, above n 55, 33 at 34.

consequent on emotional or physical harm in the case of serious harm injuries or death. As a result, such matters tend to be something of an unknown quantity in the application of the sentence. The difficulties in setting appropriate and consistent amount for this harm or consequent loss are compounded by the variability of settlements reached between an offender and victim outside the sentencing process, as is permitted by s 10 of the Sentencing Act, but which are factored into that process.

Hughes justifies the variability in sentences of reparation on the basis that most sentences are inconsistent and difficult to anticipate as a product of the sentencing process.²¹⁴ Also:²¹⁵

On a busy list court day a District Court Judge is under extreme pressure and it is unreasonable to expect a lengthy dissertation as to the reasons for a sentence. To which District Court Judges might add the intrinsic difficulty in clearly identifying the various elements of a reparation award in the absence of adequate evidence, extending sometimes to the absence of a restorative justice conference and reparation report.

This is an explanation rather than an acceptable justification for the inconsistency.

McGuire J's decision in *WorkSafe New Zealand v Wai Shing Limited* earlier this year introduced another variable to the calculation. When determining the amount of reparation to impose for loss of future earnings he made a 50 per cent deduction to account for the "degree of 'benefit'" the victim gained through ACC by receiving immediate, guaranteed compensation and not incurring litigation expenses.²¹⁶ Though this duly recognises the advantages New Zealander's receive from ACC, the Sentencing Act does not direct judges to make this arbitrary deduction. The "statutory shortfall" includes compensation not paid by ACC, s 32 does not require this to be reduced to account of the unquantifiable benefit a victim has received through ACC. McGuire J considered the lump sum for personal impairment to be part of this "benefit", but this would be more accurately classified as compensation that "has been, or is to be, paid under the [ACC Act]" and therefore subject to s 32(5).²¹⁷ Whether this aspect of McGuire J's unprecedented decision will be followed is unclear, but it is not supported by the Sentencing Act.

Quantifying indirect or consequential loss can be difficult and time-consuming. Unlike ACC, weekly compensation and direct payment of compensation for injuries to victims is

²¹⁴ John Hughes, above n 62, at 114.

²¹⁵ At 114.

²¹⁶ *WorkSafe New Zealand v Wai Shing Ltd*, above n 1, at [88]-[90].

²¹⁷ At [90].

not pre-determined.²¹⁸ The loss depends on the specific facts of each case. Section 32 has reached a careful compromise with ACC. When inexact sums of reparation are imposed double recovery is possible. It is also unjust to impose an inaccurate quantum of reparation, in excess of the victim's actual loss, on individual offenders. Caution is required to ensure that the line between reparation, which is purely compensatory, and punishment does not blur.²¹⁹ The appropriate award is therefore based on restoration rather than punishment.²²⁰ Reparation is only appropriate where it recompenses actual loss. Specifically, only loss consequential on physical harm. Where the defendant's culpability exceeds the quantification of the victim's loss, the balance of the pecuniary penalty should be imposed as a fine rather than reparation to ensure that reparation remains purely compensatory.²²¹

Hughes makes a valid observation of the practical constraints on court time. However, reparation payments are significant and onerous for offenders. Even if the court is more careful to act within the constraints of s 32, precise determination of loss is difficult. The courts are not currently equipped to confine ACC and reparation to their respective purposes as dictated under s 32(5). Rather than attempting to improve the accuracy of the calculation the cross over between ACC and reparation should be avoided entirely by preventing "top-up" of ACC entitlements. If additional compensation is necessary for victims of crime, ACC is the appropriate mechanism. ACC is skilled and well equipped to assess this specific type of loss and better placed to ensure that all victims are equally compensated.

VII Taking Part in the Triple Lottery

A central principle of ACC is that all people who suffer personal injury receive comprehensive compensation irrespective of how it is caused. All people who suffer personal injury covered by the Scheme are treated equally. Reparation it is not equally available to all people who suffer personal injury. As this section explains, reparation is a triple lottery because a victim's entitlement to reparation depends on three key circumstances: the type of offence, the offender's means, and prosecutorial discretion.

²¹⁸ For weekly compensation rates see Accident Compensation Act, sch 1 cls 33-45.

²¹⁹ *Department of Labour v Hanham & Philp Contractors Ltd*, above n 50, at [33]; George Mason, above n 55, at 35.

²²⁰ At 35.

²²¹ *Police v Ferrier* HC Auckland CRI-2003-404-195, 18 November 2003 at [15].

A Offence Type

Reparation may only be imposed if the offence under which the person is convicted is sentenced under the Sentencing Act. Such sentences include health and safety breaches, criminal offences under the Crimes Act 1961, the Dog Control Act 1996, and contraventions of the Land Transport Act 1998. Victims of civil offences cannot obtain reparation.²²²

B Means of the Offender

Reparation is paid by the offender to the victim, the State does not contribute. The amount of reparation imposed is therefore constrained by the means of the offender.²²³ Sentencing judges have the flexibility when an offender has insufficient means to pay both a fine and reparation, to reduce the fine.²²⁴ Insured offenders are more likely to be able to pay reparation so there is increasing support for compulsory car insurance.²²⁵ Health and safety insurance covering reparation is also encouraged.²²⁶ However, insurance cover is not available for “real crime”, it is only available for negligent criminal offending.²²⁷

An assessment of the means of the offender is purely monetary. Though the court is required to take offers of work or service into consideration when setting reparation, the court cannot order the offender to provide “work or service” as a form of reparation.²²⁸ This prevents the court from devising creative ways of compensating victims through reparation when offenders are of limited monetary means, but it also recognises that some victims do not desire an ongoing association with offenders. Businesses, particularly large companies, are more likely to have adequate means to pay reparation than individuals. Businesses also are more frequently offenders in health and safety offences than individuals, and vice-versa in the case of “real crime”. Therefore, restricting the means of providing reparation to monetary forms disadvantages victims of “real crime” more than victims of health and safety offences. Victims seeking offers of “work or service” must

²²² *McGougan v Depuy International Ltd*, above n 28, at [61].

²²³ Sentencing Act, s 12(1).

²²⁴ Section 14.

²²⁵ Rob Stock “Personal injury reparation is a ‘game-changer’ in compulsory car insurance debate” (11 April 2016) Stuff <www.stuff.co.nz>.

²²⁶ *Department of Labour v Hanham & Philp Contractors Ltd*, above n 50, at [74].

²²⁷ Beadle, above n 173, at 1.

²²⁸ Sentencing Act, s 32(6)-(7).

rely on restorative justice, which facilitates this type of agreement between the offender and victim, rather than reparation.²²⁹

Some submitters to the Sentencing and Parole Reform Bill 2001 argued that reparation should be imposed as community work where the offender has insufficient means to meet reparation payments.²³⁰ This suggestion was correctly rejected by the Select Committee. Community service is a separate and distinct sentence that the victim does not directly benefit from. Extending reparation in this way is inconsistent with the purpose of the sentence, which is to compensate the victim.

The constraint of the means of the offender re-introduces the offender “lottery” that plagued personal injury claims before ACC.²³¹ Victims of similar offences who suffer equivalent physical injuries receive disparate reparation payments depending on the means of their offender. This causes inequity between victims. Though there are no reparation statistics referenced against the type of the offence, case law evidences that victims of health and safety offences usually receive significantly more reparation than victims of “real crime” because the offenders have greater means to pay reparation.

C Prosecutorial Discretion

As mentioned above, reparation is available where a defendant is convicted of an offence that is sentenced under the Sentencing Act. Other than a restricted range of offences under the HSWA which can be brought through private prosecution²³², offences sentenced under the Sentencing Act are brought by public prosecution. Reparation can therefore only be obtained if the prosecution decides to pursue a conviction and is successful in doing so.

Victims have limited influence over the Crown’s decision to prosecute. The Crown is likely to prosecute an offence when the Test for Prosecution is satisfied. This occurs when both the Evidential Test and Public Interest Test are met.²³³ The Evidential Test assesses whether there is a “reasonable prospect of conviction” on the basis of the admissible evidence.²³⁴ The Public Interest Test requires prosecutors to weigh public interest

²²⁹ Ministry of Justice, above n 45, at 8.

²³⁰ At 2.

²³¹ *Woodhouse Report*, above n 16, at 52.

²³² Health and Safety at Work Act, s 144.

²³³ *Crown Law Solicitor-General’s Prosecution Guidelines* (1 July 2013) at 6.

²³⁴ At 6.

considerations for and against prosecution.²³⁵ Reparation, which can be a significant amount of money for the victim, is not a major consideration.

As a Crown entity, WorkSafe's enforcement actions follow their own specific Prosecution Policy.²³⁶ When deciding to prosecute WorkSafe is required to appraise:²³⁷

- The factors set out in the SG's Prosecution Guidelines
- The facts of each case
- The relevant legislation
- WorkSafe's Enforcement Policy and any relevant internal operational policies/guidelines

On the basis of this assessment, WorkSafe staff advise their managers who then pass the case on to the Chief Inspector.²³⁸ The case then progresses to WorkSafe's Legal Services Group, and finally to prosecution review.²³⁹ The Prosecutor applies the Evidential and Public Interest Tests with reference to specific health and safety considerations.²⁴⁰

As the considerations in prosecution policy highlight, the victim's interest in reparation is not a primary factor in decision making. A prosecutor's primary goal is not to seek maximum reparation for victims, but rather to prosecute in accordance with their desired outcomes such as punishment. In the case of WorkSafe, their primary goal is deterrence.²⁴¹ Therefore:²⁴²

Where the prosecution results in a finding of guilt, a range of sentencing options are available to the court. WorkSafe will seek sentencing options that take into account the circumstances of each case, are proportionate to the offending, consistent with precedent and aimed at reducing reoffending.

²³⁵ At 8-10.

²³⁶ WorkSafe New Zealand *Prosecution Policy* (2016).

²³⁷ At 11.

²³⁸ At 13.

²³⁹ At 13.

²⁴⁰ At 15.

²⁴¹ At 5.

²⁴² At 18.

WorkSafe will pursue reparation “where appropriate”²⁴³, but:²⁴⁴

In seeking reparation, WorkSafe is fulfilling its role as a prosecutor and is not acting as an advocate for victims(s). Where the victim(s) or their representatives wish to volunteer information to assist the Court in determining reparation, WorkSafe will receive this, consider it, and where relevant, provide it to the court.

WorkSafe appears to acknowledge the divergent interests by allowing victims to have their own advocates during prosecution.²⁴⁵

Hughes argues that the solution is simply to change prosecution policy so that there is “more vigorous enforcement, and more prosecutions” because reparation is “a key aspect of restorative justice and the fact that investigations of accidents are a considered and deliberative process”.²⁴⁶ However, more vigorous enforcement will not align the interests of prosecutors and victims.

D Winning the Triple Lottery

These three key criteria culminate to establish a “lottery which only a few ever get into”.²⁴⁷ Reparation provides additional compensation to a fortunate few. “Unlucky” victims who do not win the triple “lottery” cannot obtain “top-up” compensation because they are barred by the ACC Act from bringing proceedings for personal injury covered by the Act.²⁴⁸

VIII Settlement of Criminal Proceedings

Reparation for “emotional harm” caused by personal injury and for “loss or damage consequential on [...] physical harm” potentially encourages settlement of criminal proceedings. In private disputes, the goal of the parties is to resolve the matter at the lowest cost possible. This is frequently done by way of agreement between the parties. In contrast criminal prosecution serves a greater purpose than merely obtaining the best deal for the parties involved. Public denunciation is an important part of the process. The issues caused

²⁴³ At 18.

²⁴⁴ “7.9 Sentencing Options” (10 January 2017) WorkSafe New Zealand <www.worksafe.govt.nz>.

²⁴⁵ WorkSafe New Zealand, above n 244.

²⁴⁶ Hughes, above n 62, at 114.

²⁴⁷ Paul Jarvie “Compensation lottery prevents fair go for employers and employees” (press release, 28 February 2006).

²⁴⁸ Accident Compensation Act, s 317.

by settlement between prosecution and criminal defendants were highlighted in the recent high profile judicial review of WorkSafe’s prosecution deal with Peter Whittall, the former director of Pike River Coal Limited.²⁴⁹ WorkSafe accepted Whittall’s offer to pay \$3.41 million to the Pike River Families if WorkSafe did not “offer any evidence in support of the charges against Mr Whittall”.²⁵⁰ The families viewed the deal as “an unlawful bargain to stifle a prosecution in exchange for payment”.²⁵¹ The reparation was covered by insurance.²⁵² As no evidence was presented against Whittall, the full extent of his involvement and culpability for the Pike River Mine tragedy was never established, arguably to the detriment of the families and public interest.

Section 32(6) of the Sentencing Act requires the court to “take into account any offer, agreement, response, measure, or action” by the offender, though how much weight is given to the offer is discretionary, offers may be perceived as wealthy defendants attempting to buy their way out of criminal sanction. Settlement may result in higher payments for victims, but an agreement is usually not in society’s best interests if the offer of reparation is in exchange for reduction in other elements of the sentence.

IX Potential Deterrent Effect Reducing Moral Hazard

This section assesses whether reparation for “emotional harm” or “loss or damage consequential on [...] physical harm” beneficially supplements ACC by introducing an element of personal responsibility and deterrence.

A Discourage Free Riding on ACC?

As mentioned in the introduction to ACC in Part II, an issue debated when introducing ACC was whether it encourages “free riding” whereby individuals engage in risky activities knowing that they are not assuming the full cost of the risk.²⁵³ There were questions of equity between individuals who do not engage in these risky activities funding other community member’s appetite for risk.²⁵⁴ To an extent, this criticism has been

²⁴⁹ *Osbourne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.

²⁵⁰ At [3].

²⁵¹ At [5].

²⁵² At [13].

²⁵³ *Woodhouse Report*, above n 16, at 184.

²⁵⁴ At 184; Maree Hill “Insurance Law Principles, Social Insurance and the Accident Rehabilitation and Compensation Insurance Act: How Do They Interrelate?” (Victoria University of Wellington, 1994) at 1; Henderson, above n 35, at 794.

mitigated through setting levies on the basis of the risk involved in the work activity.²⁵⁵ The threat of reparation in the future may plausibly act as a deterrent on people who engage in risky activities or industries, but the majority of New Zealanders are not currently aware of their potential liability to pay reparation.²⁵⁶ The deterrent effect on engaging in risky activities that are costly to ACC is therefore limited. Furthermore, insurance can be obtained to cover reparation.²⁵⁷ Insured individuals are unlikely to be deterred by the threat of reparation as they will not personally bear the loss.²⁵⁸

Reparation is often imposed in conjunction with other sentences, particularly fines.²⁵⁹ It is therefore unlikely that the existence of a sentence of reparation for “emotional harm” or “loss or damage consequential on [...] physical harm” significantly adds to the deterrence objective of sentencing.

X Insurance

Woodhouse explicitly stated that under ACC “there can be no place for the insurance companies”.²⁶⁰ Under Woodhouse’s formulation of ACC insurance was deemed unnecessary because “in the absence of personal liability and with the disappearance of any element of voluntary contribution there can be no place for insurance companies”.²⁶¹ Insurance companies were excluded from the Scheme for three main reasons:²⁶²

1. Private sector should not be involved in “a comprehensive and compulsory scheme of social insurance”;
2. A state funded and supervised authority is more likely to assess claimant’s entitlements on the basis of principle than profit, avoiding conflict; and
3. Administrative costs of private insurance exceed those of public authorities

²⁵⁵ Accident Compensation Act, ss 168-169.

²⁵⁶ Marta Steeman “Workplaces face huge bills for injuries” (5 December 2014) Stuff <www.stuff.co.nz>.

²⁵⁷ *Department of Labour v Hanham & Philp Contractors Ltd*, above n 50, at [72]; George Mason, above n 55, at 37.

²⁵⁸ *Woodhouse Report*, above n 16, at 51.

²⁵⁹ Sentencing Act, s 13.

²⁶⁰ *Woodhouse Report*, above n 16, at 181.

²⁶¹ At 180.

²⁶² At 24.

The Sentencing Act requires reparation to “be paid to the person who suffered the harm, loss, or damage, or, with that person’s consent, to that person’s insurer”.²⁶³ It is unclear when people would elect for their reparation to be paid to their insurer.

HSWA prohibits insuring against fines or infringement fees,²⁶⁴ but the Act does not bar insurance cover for reparation. Hughes notes that “no clear explanation of this discrepancy seems to be available and it is tempting to assume that it results from a legislative oversight”.²⁶⁵ Another explanation for this discrepancy is that the purpose of fines is to punish so is appropriately the responsibility of the offender, whereas the purpose of reparation is compensation and insurance facilitates this objective.

Insurance for reparation creates several issues. It is difficult to determine the “means” of an offender when they have insurance without introducing an element of artificiality to the sentencing process. The courts are also reluctant to grant any concession for offenders who responsibly obtain insurance. Furthermore, insurance perpetuates the effect of the offender “lottery”.

A “Means of the offender” With Insurance?

A number of car insurance policies now include reparation cover. Insurance companies offering this cover include Vero²⁶⁶, New Zealand Insurance²⁶⁷, State Insurance²⁶⁸ and Swann Insurance²⁶⁹. Statutory liability insurance policies have also been extended to cover reparation under the HSWA. Statutory liability policies including reparation cover are offered by many insurance companies, to name a few: Lumley²⁷⁰, New Zealand Insurance²⁷¹, State Insurance²⁷² and Farmers Mutual Group²⁷³.

²⁶³ Sentencing Act, s 38(1).

²⁶⁴ Health and Safety at Work Act 2015, s 29.

²⁶⁵ Hughes, above n 62, at 114.

²⁶⁶ “Car Insurance” Vero <www.vero.co.nz>.

²⁶⁷ “Distinction Motor Vehicle Policy Wording Change Summary” New Zealand Insurance <www.nzi.co.nz>.

²⁶⁸ State Insurance “Policy Wording Care Comprehensive Insurance” (July 2017) at 4.

²⁶⁹ “An Important Update To Your Policy” Swann Insurance <www.swanninsurance.co.nz>.

²⁷⁰ “Liability Insurance” Lumley <www.lumley.co.nz>.

²⁷¹ “Statutory Liability” New Zealand Insurance <www.nzi.co.nz>.

²⁷² State Insurance “Statutory Liability Claims Made Wording” (December 2015) at 1.

²⁷³ Farmers Mutual Group Advice and Insurance “Liability Policy” at 11.

Before ACC many people were insured against personal injury liability. Though the defendant presented themselves as a witness, most people were aware that this was an artificial pretence and the real defendant was the insurer of adequate means to meet an award of damages.²⁷⁴ This situation is likely to recur as insurance cover for reparation becomes more common. The current approach of the court when an offender has insurance for reparation, begins with the premise that:²⁷⁵

... an offender is not to be penalized because insurance cover has been arranged to cover reparation, but the existence of the cover is material in assessing the overall financial capacity of the offender to meet reparation and fines.

Therefore, insurance cover will not justify an overly generous award of reparation, but it will enable the court to impose reparation which the defendant would not have the means to pay without insurance.

Insurance cover for reparation affects the quantum of the fine imposed if insurance relieves the offender of culpability.²⁷⁶ If the defendant is not personally liable for the reparation, the fine may need to be increased to adequately reflect their responsibility for the offending.²⁷⁷ The approach of the courts to the means of an offender with insurance may be criticised because reparation is taken into account when setting the quantum of the fine. A fine is not necessarily reduced by the amount of reparation imposed, it is merely a relevant consideration.²⁷⁸ If insurance covers the reparation the offender is only liable to actually pay the fine. This is perceived by critics as reducing the deterrence impact of the sentence.²⁷⁹

The courts do make a “modest allowance” in order “to recognize the employer’s responsible approach in securing insurance cover to provide for injured employees”.²⁸⁰ This modest allowance is unlikely to reflect the full cost of insurance premiums and the resulting increase in future premiums due to loss of no-claims bonus. Furthermore,

²⁷⁴ New Zealand Committee on Absolute Liability *Report of the Committee on Absolute Liability* (Government Printer, 1963) at 44.

²⁷⁵ *Department of Labour v Hanham & Philp Contractors Ltd*, above n 50, at [72].

²⁷⁶ *Department of Labour v Street Smart Ltd* (2008) 5 NZELR 603 (HC) at [56] and [58].

²⁷⁷ At [62]; *Department of Labour v Eziform Roofing Products Ltd*, above n 105, at [60];

²⁷⁸ *Department of Labour v Preco Ltd* DC Tauranga CRI-2007-070-3246, 26 September 2007 at [20], as affirmed in *Department of Labour v Hanham & Philp Contractors Ltd*, above n 50, at [71].

²⁷⁹ *Department of Labour v Preco Ltd* DC, above n 278, at [20], as affirmed in *Department of Labour v Hanham & Philp Contractors Ltd*, above n 50, at [71]; Mason, above n 55, at 38.

²⁸⁰ *Department of Labour v Hanham & Philp Contractors Ltd*, above n 50, at [74].

premiums are likely to increase given the growing quantum and frequency of reparation awards.²⁸¹ Insured people indirectly pay for the cost of reparation through their premiums. The fortunate insured parties who are not subject to a reparation obligation subsidise the costs imposed on others. As Clark astutely recognises, if an insured person is deemed to have greater means to pay reparation and the fine than a person without insurance, there is limited incentive to insure.²⁸²

Also, from a practical perspective insurance for reparation creates a conflict of interest between the insurer who is liable for the reparation and the offender who is liable for the fine. The interests of the insurer and the insured may not align when defending the prosecution.²⁸³ Both parties are likely to seek to reduce their liability and given that the division between the reparation and fine is fluid on the facts of each case, depending for example on the means of the offender, self-preservation tactics may arise. The divergence of interests is likely minimised by commercial considerations such as the insurer's public image, but self-interest may nevertheless influence an insurer's actions.

Overall, the interdependence of society means that indirectly the community as a whole bears the cost of reparation. This adds another layer of compensation that is paid for by the community in addition to ACC. Unlike ACC, the amount of reparation payments is not strictly prescribed, and the cost is not equally distributed across the community. The cost to society is therefore indeterminate.

XI Are Victims of Crime Different?

In New Zealand there appears to be a common conception that victims of crime are distinguishable from victims of civil offences and therefore deserve different treatment.²⁸⁴ Reparation for loss or damage consequential on physical harm advantages victims of crime, but given the nature of criminal offending this differential treatment may be justifiable. The following section explores this idea.

²⁸¹ Nicholson and Mrkusich, above n 190, at 16; Beadle, above n 173, at 1.

²⁸² Anna Clark "Reparation and Sentencing" [2008] NZLJ 437 at 438.

²⁸³ Hughes, above n 62, at 114.

²⁸⁴ Law Commission, above n 31.

The Ministry of Justice expressed sympathy for victims of crime when assessing the 2011 amendment which overturned *Davies v Police*, stating the Government's position as follows:²⁸⁵

The Government considers that reparation orders should be able to include injury costs not covered by ACC entitlements. Victims of crime, and in particular victims of serious crimes, face significant financial and emotional costs.

Empathy was expressed by submitters to the Justice and Electoral Select Committee in the 2007 Inquiry into Victims' Rights:²⁸⁶

... advocated more compensation for victims. Some described financial hardships resulting directly from crime, and argued that current reparation was inadequate. It was argued that victims should not be financially disadvantaged by crime, and that they should, at the very least, be restored to their financial positions before the crime.

Some submitters also argued for more general financial support for victims, beyond compensation. Queries were raised about the role of the ACC in compensating victims, and its ability to provide appropriate support. Some submitters expressed a view that the Crown should accept the initial burden of reparation to victims.

Civil and criminal offences are distinguishable on the basis of mens rea. The intentional commission of a crime invades people's personal sense of security in a way that civil offences do not. This may justify allowing reparation for victims of crime even though it conflicts with ACC, but not for other offences. However, this then raises the question whether statutes correctly delineate between criminal and civil offending. Arguably health and safety is neither. Health and safety is not "real crime", but it is also not merely a civil wrong. Health and safety offences are usually committed when people fail to exercise due care. Rarely are they the result of actions intended to cause harm. Health and safety offences are "strict liability offences, in which intention plays no part [...] no employer deliberately sets out to cause a workplace accident".²⁸⁷ Reparation in the Sentencing Act was aimed at "real crime". The prevalence and extent of reparation in health and safety sentencing was unlikely anticipated or intended, but if the government were to now remove the sentence they would be negatively perceived as taking away victim's rights.

²⁸⁵ Ministry of Justice, above n 101, at 39.

²⁸⁶ *Inquiry into Victim's Rights: Report of the Justice and Electoral Committee* (2007) at 16.

²⁸⁷ Ministry of Justice, above n 45, at 4.

Mason contends that “while putting it right (to the extent actually possible) is important, the preventative message of the HSE Act [now the HSWA] is that “it’s the getting it right that counts””.²⁸⁸ Hughes argues that there is no tenable distinction between reparation for physical harm caused by crime and physical harm caused by health and safety breaches because reparation is “redress for harm done by offending” irrespective of the circumstances in which it occurred.²⁸⁹ This correctly identifies the purpose of reparation but it is inconsistent with the purpose of the HSWA which is to prevent injury and protect workers. The purpose section of the Act does not mention compensation for victims.²⁹⁰

The dominant purpose of health and safety prosecutions is to deter deviant behaviour, restitution is sought where available but it is not the main reason for holding offenders to account. Sentencing criminal offenders seeks to achieve a different purpose. Deterrence is an objective of sentencing, but the main focus is on punishment.

Reparation is consistent with policy of HSWA that penalties should deter non-compliance.²⁹¹ Fines under the HSWA are capped on the basis of the type of the offence and the type of the offender, whether they are a company or a natural person. There is no express limit on reparation²⁹², other than the defendant’s means. Reparation may be imposed in addition to a fine, therefore, a sentence may exceed the maximum amount intended by Parliament.

XII Conclusion

Under the Sentencing Act reparation may be imposed for “emotional harm” and “loss or damage consequential on [...] physical harm”. ACC covers personal and mental injury caused by accident to the person. This includes most physical and emotional harm. ACC is a self-contained and independent scheme for compensating all personal injury caused by accident in New Zealand. Reparation therefore conflicts with ACC when it provides compensation for personal injury covered by the Scheme. Legislators have attempted to reach a compromise between reparation and ACC by providing that reparation can only be imposed for “statutory shortfall” in ACC entitlements. However, judicial application of the

²⁸⁸ Mason, above n 55, at 33.

²⁸⁹ Hughes, above n 62, at 114.

²⁹⁰ Health and Safety at Work Act, s 3.

²⁹¹ Section 3(1)(e).

²⁹² Mason, above n 55, at 35; Ross Wilson *Health and Safety in Employment: Act and Analysis* (Thomson Reuters, Wellington, 2012) at 145.

provision has not followed the express wording of the section. Rather than calculating the amount of consequential loss or damage caused by physical harm as the section states, judges in practice frequently determine the appropriate amount of reparation by reference to previous similar cases. This amounts to reparation for the actual injury suffered rather than consequential loss or damage. Where the amount imposed by reference to other cases does not take the actual claimant's ACC entitlements into account, double recovery occurs.

Reparation was included in the Sentencing Act in response to the 1999 Referendum. The section sought to involve victims of "real crime" in the sentencing process and provide them with compensation in a greater range of circumstances, but in practice the sentence has led to inequitable outcomes for the victims it was intended to support, and inadvertently disproportionately benefited victims of negligence based offences. To obtain reparation victims enter the triple "lottery" which requires them to have suffered injury through an offence that is sentenced under the Sentencing Act, that is successfully prosecuted and was perpetrated by an offender who has the means to pay. In practice these criteria are most likely to be satisfied in health and safety cases.

Initial drafting and subsequent amendments to s 32 have sought to prevent crossover between ACC and reparation, but the absence of express legislative safeguards, coupled with judicial misapplication of the sentence has resulted in layering of ACC compensation and reparation. The process for quantifying reparation is not prescribed facilitating reparation by consequence rather than design.

Any cross over between ACC and reparation undermines the integrity and functioning of the Scheme as a whole. Reform is required to exclude reparation from ACC's sphere of influence by removing the ability to "top-up" ACC compensation. This paper recommends removing the ability to obtain any form of reparation for loss or damage associated with personal injury covered by ACC.

Specifically, s 32(1)(b) requires amendment so that reparation for "emotional harm" may only be imposed when not caused by personal injury covered by ACC. Amendment rather than repeal of the provision is recommended so that victims who suffer emotional harm not covered by ACC can continue to obtain reparation. It is also recommended that the issue with reparation for "loss or damage consequential on [...] physical harm" be resolved through the deletion of "physical harm" from s 32(1)(c).

This paper opened by describing the life changing consequences for victims of other people's negligence. The paper does not deny the seriousness of these injuries, but these accidents are not the intended target of reparation under the Sentencing Act. Reform of s 32 is required to realign the provision with its initial purpose. If the entitlements for victims, such as the Wai Shing employee, are considered inadequate, the appropriate means for providing additional compensation is through ACC. Denunciation and punishment of the offender is achieved through fines and other sentencing options. Keeping compensation for personal injury and accountability of the offender separate will allow ACC to operate as it was intended, independent of all other forms of compensation.

XIII Word count

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises exactly 14,803 words.

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