

OVER AND ABOVE:
COMPENSATION FOR LOSS OF EARNINGS UNDER THE
NEW ZEALAND CRIMINAL JUSTICE REPARATIONS SCHEME
WHERE ACC WEEKLY COMPENSATION ENTITLEMENTS ARE
PRESENT

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I Introduction

A Research Question

How should courts determine the quantum of reparation for lost earnings consequential on physical harm that an offender is ordered to pay a victim where the physical harm is covered under the accident compensation scheme?

II Status Quo

This chapter will set out the background to this research question, including the reparations scheme in the Sentencing Act 2002, and the Accident Compensation Scheme¹ as it is applied today.

A Legislative Background

B Sentencing Act 2002

The sentence of reparation is a sentence whereby an offender must pay money to their victim to compensate them for losses they have caused through, or by means of, their offending.² Section 32 of the Sentencing Act sets out what losses may be compensated by the sentence of reparation. Where a person is injured in circumstances for which an offender is convicted of a criminal offence, section 32(1)(c) of the Sentencing Act provides that the victim may receive reparation³ for:

(c) **loss consequential on physical** or emotional **harm**, or damage to, property.⁴

It is reparation under s 32(1)(c)⁵ that we are most concerned with, as these reparations can be used to compensate a victim of crime for loss of earnings. Reparation for physical harm itself cannot be awarded, as direct physical harm itself is compensated by the Accident Compensation Scheme (ACC Scheme). This is discussed from Subchapter D. The consequential losses that may be covered by an award of reparation can include lost earnings.⁶

Section 32(5) provides that:

32 (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 2001.⁷

The application of the sentence of reparation will be most relevant to this research question where the offender has the financial capability to pay reparations, and where the victim has an incapacity resulting in a long-term loss of earnings.

¹ Accident Compensation Act 2001.

² Sentencing Act 2002, s 32.

³ Section 12(1).

⁴ Section 32(1).

⁵ Section 32(1)(c).

⁶ Discussed at Chapter III C 1 below.

⁷ Sentencing Act 2002.

C The Sentence of Reparation

If an individual pleads guilty to, or is found guilty of, a criminal offence, they will be subject to a sentencing process.⁸ Reparation is one sentence that may be imposed on an offender, as well as, for example, fines and imprisonment.⁹

A sentence of reparation is a sentence of its own right. A sentence of reparation may be imposed in the absence of any other sentence.¹⁰

(a) Reparation prior to the Sentencing Act 2002

The sentence of reparation was first introduced in s 22 of the Criminal Justice Act 1985.¹¹ Initially, reparation was only available to compensate damage to property,¹² and was not available to compensate for any losses consequential on physical harm, such as compensation for loss of earnings.¹³ Under section 11, a court was required to impose reparation so long as the court did not consider it inappropriate to do so.¹⁴

Though not part of the sentence of reparation itself, under s 28, a court could order that up to 50 per cent of a fine be paid to the victim, to compensate for physical harm.¹⁵ This was only possible where the victim's physical harm was the result of unprovoked violence.¹⁶ The Act specifically provided that payment to the victim would not affect their rights to compensation under the ACC Scheme, and ability to recover civil damages above the amount of the award.¹⁷

⁸ Sentencing Act 2002.

⁹ Section 12, Section 13, Section 16.

¹⁰ Section 12(2).

¹¹ Criminal Justice Act 1985, s 22.

¹² Section 22(1).

¹³ Section 22(5).

¹⁴ Section 11.

¹⁵ Section 28.

¹⁶ Section 28(3)(a).

¹⁷ Section 28(4).

(b) Sentencing Act 2002:

A referendum held at the 1999 General Election showed public desire for reform of the sentencing system, with a greater value placed on the needs of victims.¹⁸ Parliament listened to these desires, and the Sentencing Act 2002 gave compensation for victims of crime a strong priority.¹⁹ In particular, “providing for the interests of victims of crime” was made a purpose of sentencing,²⁰ as was providing for reparation.²¹ The presumption in favour of reparation was strengthened, requiring Courts to impose reparation so long as it did not impose “undue hardship” on the offender,²² and where the Court did not award reparation, the Court was required to give reasons.²³ Where an offender only has the means to pay a fine, or reparation, but not both, a court is required to impose a sentence of reparation rather than a fine.²⁴

Under s 32(1), Courts can award reparation to compensate for loss or damage to property,²⁵ emotional harm,²⁶ or “loss or damage consequential on any emotional or physical harm or loss of, or damage to, property”.²⁷

The Sentencing and Parole Reform Bill, the Bill which became the Sentencing Act 2002, initially allowed for reparation to be awarded in respect of physical injury.²⁸ However, this was amended to avoid interference with the ACC Scheme.²⁹ The ability to recover reparations for loss consequential on physical harm was added.³⁰

Additionally, s 32(5) was inserted, which prevents a court from ordering reparation:³¹

“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.”³²

¹⁸ Simon Connell “What is the Place of Corrective Justice in Criminal Justice?” (2011) 19 *Waikato L Rev* 134 at 137; Phillip Gendall, Janet Hoek and Angela Willis “Respondent Understanding of the 1999 Referendum Question on a Reform of the New Zealand Justice System” (2002) 37(2) *Australian Journal of Political Science* 303 at 311; Julian Roberts “Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002” (2003) 36(3) *Australian and New Zealand Journal of Criminology* 249 at 251

¹⁹ Connell above n 18, at 137; Sentencing Act 2002 s 3(d); Sentencing and Parole Reform Bill 2001 148-1 at 2.

²⁰ Sentencing Act 2002 s 7(1)(c).

²¹ Section 7(1)(d).

²² Section 12(1).

²³ Section 12(3).

²⁴ Section 14(2).

²⁵ Section 32(1)(a).

²⁶ Section 32(1)(b).

²⁷ Section 32(1)(c).

²⁸ Sentencing and Parole Reform Bill 2001 (148-1) at 11, cl 29(1)(a).

²⁹ Sentencing and Parole Reform Bill 2002 (148-2) at 17, cl 29(1).

³⁰ Clause 29(1)(c).

³¹ At 17, cl 29(2B).

³² Sentencing Act 2002, s 32(5).

(c) Reparations for offences under the Health and Safety at Work Act 2015

The Health and Safety at Work Act 2015 (HSWA) creates duties³³ that certain legal or natural persons conducting a business or undertaking, (“PCBU”)³⁴ must perform.³⁵ For example, the Primary Duty of Care,³⁶ requires a PCBU to “ensure, so far as is reasonably practicable, the health and safety”³⁷ of those carrying out work for that PCBU.³⁸ Failure to comply with this, and other duties is an offence.³⁹ These offences rise in seriousness on a scale from non-compliance with a duty,⁴⁰ to “reckless conduct in respect of (a) duty”.⁴¹

As part of the process for sentencing offenders convicted of offences under the Health and Safety at Work Act, the decision of Full Court of the High Court in *Stumpmaster v WorkSafe New Zealand* provides that the reparation payable to a victim is to be assessed first, before the appropriate level of any fine is set.⁴² The Court found that where the defendant’s ability to pay a fine and reparations together was at issue, that the level of the fine should be lowered, rather than the award of reparation.⁴³

³³ Health and Safety at Work Act 2015, ss 36-46.

³⁴ Sections 16, 17.

³⁵ Sections 30, 31.

³⁶ Section 36.

³⁷ Section 36(1).

³⁸ Sections 36(1)(a) - 36(1)(b).

³⁹ Sections 47-49.

⁴⁰ Sections 49.

⁴¹ Sections 47.

⁴² *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881 at [35].

⁴³ At [56].

D Accident Compensation Act 2001

The ACC Scheme provides cover, and potentially entitlements, to victims of personal injury caused by accident.⁴⁴ This chapter will set out the history and functioning of the ACC Scheme.

E Brief History of ACC

(a) Compensation for Injury prior to ACC

Prior to the development of the ACC Scheme, victims of injury had resort to various remedies to rectify their loss, access to which depended on the circumstances of their injury.⁴⁵

Compensation for victims of injury could be accessed through civil proceedings in the tort of negligence,⁴⁶ the Workers' Compensation scheme,⁴⁷ and the Criminal Injuries Compensation scheme.⁴⁸ Social welfare payments were also available for those unable to meet basic needs.⁴⁹

By the late 1960's, these remedies were showing serious deficiencies as effective methods of compensating loss from injury.⁵⁰ The "Royal Commission to Inquire into and Report Upon Worker's Compensation" was formed to assess what could be done to improve the existing state of affairs.⁵¹ The Commission produced a report known as the "Woodhouse Report", after the Commission's Chair, Sir Arthur Owen Woodhouse.⁵²

(b) The Woodhouse Report

The Woodhouse Report roundly criticised the existing schemes.⁵³ In particular, the existing schemes were criticised for the inconsistent way the burden of injury was

⁴⁴ Personal injury by accident is not the only grounds for cover under the Accident Compensation Act 2001; see further at section 8, and sections 20-24. They are the grounds most relevant to criminal offending. For the range of available entitlements, see further at sections 73-113.

⁴⁵ Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand; Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967) at 19, hereafter "Woodhouse Report"; Simon Connell "Justice for victims of injury: The influence of New Zealand's Accident Compensation Scheme on the Civil and Criminal Law" (2012) 25(2) NZULR 181 at 186.

⁴⁶ Woodhouse Report, above n 45 at 47.

⁴⁷ Woodhouse Report, above n 45 at 79-80, 91-92.

⁴⁸ B J Cameron "The New Zealand Criminal Compensation Act, 1963" (1965) 16 UTLJ 177 at 177-179.

⁴⁹ Woodhouse Report, above n 45 at 98-99.

⁵⁰ Connell, above n 45, at 185; Woodhouse Report, above n 45 at 19, 47, 79-80, 91-92, 98-99.

⁵¹ Woodhouse Report, above n 45 at 11-13. Though convened to examine compensation for injuries suffered through employment, the Royal Commission expanded the scope of its inquiry to include all injuries, suffered "whether at work, or during the remaining hours of the day" at 30-31.

⁵² At 3, 17.

⁵³ Woodhouse Report, above n 45 at 42-106; Connell, above n 45 at 187-186; Stephen Todd (ed) and others *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 2.2.01.

placed on society, with only a privileged few able to access any remedy resulting in compensation which covered actual losses from their injuries.⁵⁴ This included describing the process of receiving compensation through actions in negligence as “a form of lottery”.⁵⁵

The Report recommended the existing piecemeal compensation schemes were replaced with a comprehensive scheme covering all victims of injury, regardless of fault.⁵⁶ This included recommending providing compensation for lost earnings at a level that covered actual losses and rehabilitation for injured victims.⁵⁷ The Report also recommended that all existing compensation schemes be abolished, so that the funding used to run those could be pooled into running the new scheme.⁵⁸ If the new scheme provided a sufficiently high level of compensation, the existing remedies, including civil proceedings in the tort of negligence, would be unnecessary.⁵⁹

(c) The ACC Scheme from inception through today

The Woodhouse Report led to the passing of the Accident Compensation Act 1972.⁶⁰ Cover under the Act was provided for “personal injury by accident”, a term which was not exhaustively defined in the Act.⁶¹ Entitlements available under the Act included weekly compensation of up to 80 per cent of pre-injury earnings, treatment and rehabilitation costs, and compensation for mental injury.⁶² In line with recommendations in the Woodhouse Report, the Act barred proceedings arising from personal injury where cover was present,⁶³ effectively ending the application of the tort of negligence as it applied to personal injury in New Zealand, except in proceedings for exemplary damages.⁶⁴ Proceedings for exemplary damages are not barred,⁶⁵ as exemplary damages have a punitive, not compensatory purpose.⁶⁶ In practice, the definition of “personal injury by accident” was often determined in a very generous way by the courts,⁶⁷ which led to concerns about the expense of the scheme.⁶⁸

⁵⁴ Woodhouse Report, above n 45 at 19.

⁵⁵ Woodhouse Report, above n 45 at 19.

⁵⁶ Woodhouse Report, above n 45 at 26.

⁵⁷ Woodhouse Report, above n 45 at 39-41.

⁵⁸ Woodhouse Report, above n 45 at 39, 129-130.

⁵⁹ Woodhouse Report, above n 45 at 108.

⁶⁰ Connell, above n 45 at 187.

⁶¹ Todd, above n 53 at 2.2.02.

⁶² Connell, above n 45 at 187.

⁶³ Accident Compensation Act 1972, s 5.

⁶⁴ Todd, above n 53 at 2.3.03.

⁶⁵ At 2.3.03; See further at Accident Compensation Act s 319(1).

⁶⁶ At 2.5.02.

⁶⁷ At 2.2.05.

⁶⁸ At 2.2.05.

In 1992, concerns about the expense of the scheme led to the passing of the Accident Compensation Rehabilitation and Insurance Act 1992, including changes which to a large extent involved reducing cover for victims of accident.⁶⁹ Included was an exhaustive, and more restrictive definition of “accident”.⁷⁰

The term “Insurance” in the title of the Act indicated the move of the scheme to one based on concepts of insurance, where one makes payments to an insurer to transfer their risk, from the original scheme conceived on ideals of community responsibility, as envisaged by the Royal Commission.⁷¹

In 2001, however, the Act was reformed into the Injury Prevention, Rehabilitation and Compensation Act 2001,⁷² since 2010 called the Accident Compensation Act 2001.⁷³ This new Act is perhaps an attempt to strike a balance between the originally expansive scheme and the reduced cover offered by the 1992 scheme.⁷⁴ In particular, the purpose of the 2001 Act emphasises that compensation is provided on the basis of the social contract, and does not feature the word “Insurance”.⁷⁵ Though cover is more expansive, in form and structure, the wording of the current Act is closer to the 1992 scheme than it is to the original 1974 scheme.⁷⁶

⁶⁹ At 2.2.05.

⁷⁰ At 2.2.05.

⁷¹ Connell, above n 45 at 187-188.

⁷² At 188.

⁷³ Accident Compensation Amendment Act 2010, s 5(1)(a).

⁷⁴ Connell, above n 45 at 188.

⁷⁵ Connell, above n 45 at 188; Accident Compensation Act s 3(d).

⁷⁶ Connell, above n 45 at 188.

F Functioning of the ACC Scheme

(a) The process to receive entitlements to Weekly Compensation

If the victim has suffered a personal injury⁷⁷ by accident,⁷⁸ they will receive cover.⁷⁹ If an injury is covered, the victim may receive entitlements,⁸⁰ which can include weekly compensation for loss of income due to incapacity.⁸¹ Personal injuries by accident include injuries caused by conduct which may become the subject of a HSWA prosecution.

If an individual has cover under the ACC Scheme, they are prevented from bringing personal legal proceedings for damages which arise directly, or indirectly from a covered personal injury.⁸² The bar on proceedings applies even where an individual with cover is not eligible to receive any entitlements.⁸³ An award of reparation is not a proceeding for damages, as it is the result of a criminal prosecution.⁸⁴

ACC weekly compensation will only cover up to 80 per cent of the victim's pre-injury earnings⁸⁵, subject to a cap on weekly payments.⁸⁶ ACC weekly compensation payments are increased annually to account for increases in inflation.⁸⁷ The level of these payments are calculated based on the victim's earnings in the year prior to their injury. This means that individuals receiving ACC weekly compensation will have a shortfall in their take home "earnings" of 20 per cent compared to their pre-injury earnings, as calculated under the Accident Compensation Act, whilst receiving ACC weekly compensation.

(b) Justifying the level of Weekly Compensation entitlements

The justification for setting the level of weekly compensation at 80 per cent of the injured's pre-injury earnings comes from the desire to balance two competing factors: the need for compensation for losses at a level that reflects actual losses, and the need

⁷⁷ Accident Compensation Act ss 26, 28, 29.

⁷⁸ Section 25.

⁷⁹ Section 20; See further at n 45; Personal injury by accident is not the only ground for cover; It is possible for example to receive cover through personal injury by work-related gradual process or disease. See further at section 28(4). Injury in these circumstances could also amount to an offence under the Health and Safety at Work Act 2015. The other grounds of cover are less relevant to this research question, as we are interested in a victim who already has cover under the ACC Scheme.

⁸⁰ Section 67.

⁸¹ Section 100.

⁸² Section 317(1); However, as discussed above at II E (c), this bar does not include proceedings for exemplary damages; See further at section 319(1).

⁸³ Section 317(7)(c).

⁸⁴ *Davies v Police* [2007] NZCA 484, [2008] 2 NZLR 645 at [10].

⁸⁵ Accident Compensation Act, Schedule One, cl 32(3).

⁸⁶ Schedule One, cl 46.

⁸⁷ Section 115; Injury Prevention, Rehabilitation and Compensation (Indexation) Regulations 2002, reg 6(1)

to incentivise rehabilitation and keep the costs of the scheme at a fair level for society.⁸⁸ The Royal Commission considered that compensation at a level that covered the actual losses of injured victims was necessary as the financial burdens of life do not immediately dissipate with injury.⁸⁹ Compensation premised on meeting basic needs, such as provided by the social welfare scheme, is therefore inadequate. On the other hand, society bears the burden of compensation out of fairness alone, rather than fault, and this coupled with a need to incentivise rehabilitation justifies setting compensation at 80 per cent.⁹⁰

Although the Royal Commission did not write about the scheme in terms of a social contract, the New Zealand Courts have linked the idea of the ACC Scheme as a social contract to the 80 per cent figure: the people of New Zealand choose to give up the right to pursue full compensation from wrongdoers who cause injury,⁹¹ in exchange for fair, but not full, compensation without having to establish fault.⁹²

⁸⁸ Woodhouse Report, above n 45 at 91, 115.

⁸⁹ Woodhouse Report, above n 45 at 39-41.

⁹⁰ At 40.

⁹¹ Accident Compensation Act s 317(1).

⁹² Venning J states that “Importantly a central plank in the social contract implemented through the legislation is compensation for loss which is fair rather than full” in *Oceana Gold v WorkSafe New Zealand* [2019] NZHC 365 at [48]. See further *Davies v New Zealand Police* [2009] NZSC 47, [2009] 3 NZLR 189 at [18]-[19].

III Status Quo Ante

This chapter will set out the relevant provisions of the Sentencing Act prior to 2014, which may help us understand why the current legislation is worded in the way it is, and will also show that current legislation does not cure the ambiguity which made the application of s 32(5)⁹³ problematic prior to 2014. This chapter will also examine the decision of the New Zealand Supreme Court in *Davies*.⁹⁴

A Sentencing Act 2002, s 32(5), Prior to 2014

Prior to 2014, section 32(5) was worded as follows:

32 (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, Compensation, and Rehabilitation Act 2001.

1 The ambiguity in s 32(5) prior to 2014

In the circumstances most relevant to the research question, with a victim who has ACC entitlements to weekly compensation, and an offender who has the financial capacity to pay reparations, the wording of s 32(5) is ambiguous. The court must not order reparation in respect of any loss “for which the court believes that a person has entitlements”⁹⁵ under the ACC Scheme. The interpretation of s 32(5), and to what extent it allowed reparations to be ordered where a victim had ACC weekly compensation entitlements was the central issue in *Davies*,⁹⁶ which I now consider.

B Davies v New Zealand Police [2009] NZSC 47

Davies was driving a vehicle with an insecurely attached mattress that flew off and injured a cyclist. The cyclist received ACC weekly compensation for their lost earnings. *Davies* was convicted of careless driving causing injury.⁹⁷ Prosecutors sought to recover the 80 per cent of their pre-injury earnings unpaid to them by ACC.⁹⁸ At the District Court,⁹⁹ High Court,¹⁰⁰ and Court of Appeal,¹⁰¹ they were successful, as a “top up” award to the victim’s ACC weekly compensation, of \$11,555 was awarded and successively upheld. The Supreme Court overturned this award of reparation.¹⁰²

⁹³ Sentencing Act 2002.

⁹⁴ *Davies v New Zealand Police* [2009] NZSC 47, [2009] 3 NZLR 189.

⁹⁵ Sentencing Act, s 32(5), prior to the Sentencing Amendment Act 2014.

⁹⁶ *Davies*, above n 94.

⁹⁷ Land Transport Act 1998, ss 8, 38.

⁹⁸ “Judges cannot order ACC top-up payments, court rules” *The New Zealand Herald* (online ed, Auckland, 25 May 2009), *Davies*, above n 94 at [1].

⁹⁹ *Police v Davies* (District Court, Christchurch, CRN 05009025688, 26 September 2006, Judge M J Green).

¹⁰⁰ *Davies v Police* (2007) 8 NZELC 98,691.

¹⁰¹ *Davies v Police* [2007] NZCA 484, [2008] 2 NZLR 645.

¹⁰² *Davies*, above n 94 at [37].

(a) High Court

In the High Court, Panckhurst J considered that there were two possible interpretations of s 32(5),¹⁰³ one that considers the class of (or “generic”) entitlement the victim would receive, and one that considers the actual value (or “actual provision”) of entitlement the victim would receive.¹⁰⁴ Although considering that both interpretations were reasonable, Panckhurst J settled on the “actual provision” interpretation. He was influenced by the presence of provisions in the Sentencing Act allowing the Court to seek a report into the likely extent of the victim’s entitlements, which suggested courts could examine a victim’s level of entitlement, and emphasis in the Sentencing Act on awarding reparations. These factors motivated Panckhurst J to seek a “more generous approach to the availability of reparation”.¹⁰⁵

(b) Court of Appeal

The Court of Appeal upheld Panckhurst J’s decision and reasoning and added their own comments. They considered that if the ACC only paid 80 per cent of pre-injury earnings to a victim of injury, the 20 per cent that remained unpaid was not an entitlement, and was not subject to the restriction in s 32(5).¹⁰⁶ The Court also considered the legislative history of s 32(5) and the Sentencing Act: amendments had been made to the Sentencing and Parole Reform Bill¹⁰⁷ to bar reparation in respect of physical harm, yet the Select Committee did not do the same in respect of the equivalent clause to s 32(5). This influenced the Court to find that s 32(5) only prevented reparations in respect of loss compensated by the ACC.¹⁰⁸ The Court also noted that a purpose of sentencing was “to provide reparation for harm done by the offending”,¹⁰⁹ and that they would be unable to do so if reparation was barred in these circumstances.¹¹⁰

(c) Supreme Court

At the Supreme Court, I consider the issue became a question of how much influence the principles of the ACC Scheme should have on the process of awarding reparations to a victim of crime: The ACC Scheme values the integrity of the social contract,¹¹¹ yet the Sentencing Act prioritises providing for the interests of victims of crime.¹¹²

¹⁰³ Sentencing Act 2002.

¹⁰⁴ *Davies*, above n 94 at [20].

¹⁰⁵ At [20].

¹⁰⁶ At [21].

¹⁰⁷ Sentencing and Parole Reform Bill 2001 (148-1), Sentencing and Parole Reform Bill 2002 (148-2).

¹⁰⁸ *Davies*, above n 94 at [21].

¹⁰⁹ Sentencing Act 2002 s 7(1)(d).

¹¹⁰ *Davies*, above n 94 at [21].

¹¹¹ Accident Compensation Act, s 3.

¹¹² Sentencing Act, s 3(d), s 7(1)(c), s 7(1)(d), s 8(1)(f), s 12(1).

(i) Majority Opinion

A majority of the Court overturned the reparations award in respect of the \$11,555 “top up” for loss of earnings.¹¹³ McGrath J dissented, and would have allowed the award to stand.¹¹⁴

(ii) No good reason for distinctions among victims of injury

The majority declined to allow top ups to reparation because to do so would interfere with the integrity of the social contract basis of the ACC Scheme. If victims of crime were able to seek a top up to their ACC weekly compensation, they would be in a unique position among those receiving cover for injuries under the ACC Scheme: they would be able to recover compensation from those who caused their injuries.¹¹⁵ The Court considered there was no good reason to draw this distinction between victims of crime, and other victims of injury.¹¹⁶ Justice Tipping stated that:

It would go against the whole philosophy and purpose of the accident compensation scheme to allow those suffering injury as a result of an offence to have the potential to gain greater compensation than those suffering the same injury when no offence is involved or no one is prosecuted.¹¹⁷

Preventing top ups would also be consistent with the goal of the ACC Scheme to encourage rehabilitation.¹¹⁸

(iii) Unsuitability of inquiring into loss of earnings at reparations

The majority also considered that the interpretation of s 32(5),¹¹⁹ and the Sentencing Act more broadly, did not allow inquiries into what shortfall in earnings the victim was suffering as a result of receiving the ACC weekly compensation entitlement.¹²⁰ The majority considered that the term “entitlements” in s 32(5) referred to the class, or type of entitlements, rather than a specific dollar value of compensation.¹²¹ Inquiry into whether an individual has entitlements can be done without inquiring as to the value of entitlements: An individual either has entitlements, or they do not.¹²² They noted that a court only needed to have “belief” in the existence of entitlements, which indicated against a detailed inquiry into the level of entitlement.¹²³ This was supported by the

¹¹³ *Davies*, above n 94 at [37].

¹¹⁴ At [82].

¹¹⁵ At [28].

¹¹⁶ At [28].

¹¹⁷ At [48].

¹¹⁸ At [30].

¹¹⁹ Sentencing Act 2002.

¹²⁰ *Davies*, above n 94 at [35].

¹²¹ At [22].

¹²² At [22].

¹²³ At [24].

view that calculating this shortfall could be a complicated and tedious process unsuitable for carrying out during the summary sentencing process.¹²⁴

Under s 33(1)(c), the court was able to order a report into the “extent to which the person who suffered the loss... is likely to be covered by entitlements..”.¹²⁵ The majority considered the term “likely to be covered” suggested a broader examination of whether a victim had cover at all, rather than a precision analysis of the level of cover.¹²⁶

The Court also considered s 32(3),¹²⁷ which requires the court to take account of other means a victim may use to recover their losses, was no barrier to this interpretation: Though a victim in receipt of ACC Cover would have no ability to bring legal proceedings to cover any shortfall between actual loss and the entitlement the Corporation paid¹²⁸, the Court considered that s 32(3)¹²⁹ was concerned with the “right” for a victim to make a claim through an alternative avenue of compensation, rather than the outcome that a specific compensatory approach would produce.¹³⁰ This was reinforced by s 32(4), which stated that the fact a right to make a claim had expired, or had not been exercised was not relevant to the application of s 32(3).¹³¹ The majority considered what mattered was whether a head of claim existed, not the value able to be recovered under that head of claim.¹³² In this case, the relevant head of claim was “loss or damage consequential on any...physical harm”.¹³³

(iv) Minority Opinion

McGrath J, in the minority, agreed with the findings of the High Court and Court of Appeal: The definition of “entitlement” only extended to the specific dollar value of compensation the ACC would pay victim. Compensation unpaid by ACC was not an entitlement, and not barred from recovery by s 32(5).¹³⁴ McGrath J was influenced by the purposes of the Sentencing Act, which places an emphasis on providing for the “interests of victims of crime”.¹³⁵

McGrath J acknowledged that this interpretation created tensions with the policies underpinning the ACC Scheme, in particular the policy that compensation should be

¹²⁴ At [35]-[36].

¹²⁵ Sentencing Act, s 33(1)(c).

¹²⁶ *Davies*, above n 94 at [12], [24].

¹²⁷ Sentencing Act 2002.

¹²⁸ Accident Compensation Act s 317(1).

¹²⁹ Sentencing Act 2002.

¹³⁰ *Davies*, above n 94 at [23].

¹³¹ Sentencing Act, s 32(4).

¹³² *Davies*, above n 94 at [23].

¹³³ *Davies*, above n 94 at [23]; Sentencing Act, s 32(1)(c).

¹³⁴ *Davies*, above n 94 at [56], [64].

¹³⁵ *Davies*, above n 94 at [74]-[76], Sentencing Act s (3)(d).

limited as an incentive to rehabilitation and a return to work. However, he considered that the inconsistencies with the ACC Scheme were not significant enough to suggest that the interests of victims of crime should be set aside.¹³⁶

¹³⁶ *Davies*, above n 94 at [81].

C Legislative Response to Davies

This chapter sets out the legislative response to *Davies*, in amending s 32(5),¹³⁷ what little material is available to assess the intentions of legislators, and why this response has been inadequate in clarifying the application of s 32(5).¹³⁸

1 Victims of Crime Reform Bill

On the 28th of January 2010, the Justice Minister announced:

Up until May 2009, courts were including consequential injury costs not covered by ACC in orders of reparation. ACC provides compensation for loss of income at a rate of 80 per cent of a claimant's pre-injury weekly earnings. The courts were including the 20 per cent of earnings not compensated by ACC in orders of reparation, where appropriate. The amendment to section 32(5) of the Sentencing Act will ensure the courts can resume including consequential injury costs not covered by ACC in orders of reparation.¹³⁹

The explanatory note to the Victims of Crime Reform Bill 2011 stated that one of the policy objectives of the amendment was to “strengthen the existing general provisions in legislation for victims of crime”.¹⁴⁰ The Bill was to amend the Sentencing Act 2002, the Parole Act 2002 and the Victims' Rights Act 2002.¹⁴¹

The purpose of the relevant amendment to the Sentencing Act 2002 was to clarify that court reparation orders can include costs consequential on injury that are not covered by entitlements under the Accident Compensation Act 2001.¹⁴²

The explanatory note to the Bill refers to a regulatory impact statement,¹⁴³ which is presumably Ministry of Justice *Regulatory Impact Statement: Enhancing Victims' Rights Review* (4 July 2011). That regulatory impact statement does not refer to the issue discussed in this dissertation.¹⁴⁴

The clause by clause analysis of the Bill stated that the bill:

...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

¹³⁷ Sentencing Act 2002.

¹³⁸ Sentencing Act 2002.

¹³⁹ New Zealand Government “Reparation and ACC entitlements” (press release, 28 January 2010).

¹⁴⁰ Victims of Crime Reform Bill 2011 (319-1), at 1.

¹⁴¹ At 2.

¹⁴² At 5.

¹⁴³ At 5.

¹⁴⁴ Ministry of Justice *Regulatory Impact Statement: Enhancing Victims' Rights Review* (4 July 2011); This only discusses amendments to the Victims' Rights Act 2002.

shortfall in compensation. The effect of this amendment is to overturn the Supreme Court decision in [*Davies*], which ruled that reparation orders cannot be made in respect of any consequential loss or damage where the victim has an entitlement under the Accident Compensation Act 2001, even if the amount payable under that Act does not meet the full extent of the loss.¹⁴⁵

The term “statutory shortfall” was not clarified.

(a) Wording of the Amendment to s 32(5)

The specific wording of the amendment, as passed:

“(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.”¹⁴⁶

(b) Lack of thought given legislators to the Amendment

Hansard for the First Reading debates shows that little thought was given to the issue of compensation for victims of crime, except that Charles Chauvel MP discussed the system of Victim Compensation existing in the Australian State of Victoria, which he said placed the victim at the centre of proceedings where compensation was concerned.¹⁴⁷

Other speeches by Members discussed the merits of giving victims of crime greater roles in the criminal justice system. There was no discussion of issues caused by the decision in *Davies*¹⁴⁸, or of s 32(5).¹⁴⁹

The Justice and Electoral Committee did not amend s 32(5).¹⁵⁰ Debate at the second reading, does not substantively cover s 32(5), except where the Minister of Justice explained that the effect of the amendment would be “to enable victims to be compensated for losses not covered by ACC”.¹⁵¹ In response, the Labour Spokesperson for Justice spoke of greater access to reparations not being enough; that victims required support and advocacy through the criminal justice process, however he did not address issues surrounding ACC Weekly compensation and the interaction with reparations.

¹⁴⁵ Victims of Crime Reform Bill 2011 (319-1) at 14.

¹⁴⁶ Sentencing Act 2002 s 32(5).

¹⁴⁷ (4 October 2011) 676 NZPD 21681.

¹⁴⁸ *Davies*, above n 94.

¹⁴⁹ Sentencing Act 2002.

¹⁵⁰ Victims of Crime Reform Bill 2011 (319-2) at 5.

¹⁵¹ (5 March 2014) 696 NZPD 16392 .

There was no further discussion of the s 32(5) at any further stage of the legislative process.¹⁵²

D Effect of the Amendment to s 32(5)

As Simon Connell notes,¹⁵³ this amendment on its own does not clarify the situation: the phrase “loss or damage described in subsection (1)(c)...for which compensation has been, or is to be, paid”¹⁵⁴ can still reasonably be given two distinct meanings.

(a) Two distinct interpretations are still possible

Does “loss” refer to the actual loss? In this case, ACC will only pay 80 per cent of that loss, so the remaining 20 per cent is recoverable through reparation. If “loss” refers to the type of loss, then a victim in receipt of weekly compensation for loss of earnings has “compensation” and can recover no more.¹⁵⁵

We know that the second interpretation (Compensation refers to the class or type of loss) is untenable under the new legislation, because the explanatory note to the Bill¹⁵⁶ states that the effect of the amendment is to overturn *Davies*, which adopted that second interpretation.¹⁵⁷

Parliamentary drafters could have more clearly stated the ability to recover compensation in terms of the first interpretation. An example of how s 32(5) could have been worded more clearly follows:

(5) Despite subsections (1) and (3), with respect to reparation for consequential losses for which a person has been, or is to be, paid under the Accident Compensation Act 2001, a court may only order the making of reparation in respect of the extent of the loss for which the person has not been, or will not be, paid under the Accident Compensation Act 2001.

This would have made it clear that the Court could not award reparation in respect of the actual losses for which ACC compensation has covered; explicitly allowing for reparations to made in respect of loss the ACC does not cover.

The legislation offers no guidance on precisely how a court is to go about calculating the consequential losses that a court *can* award under s 32(5).¹⁵⁸ As a result, decisions on the quantum of reparations have employed a variety of methodologies. What follows

¹⁵² (8 April 2014) 697 NZPD 16951, (16 April 2014) 698 NZPD 17350, (27 May 2014) 699 NZPD 18369.

¹⁵³ Simon Connell “Overturning the Social Contract?” [2014] NZLJ 314 at 315.

¹⁵⁴ Sentencing Act, s 32(5).

¹⁵⁵ Connell, above n 153 at 315.

¹⁵⁶ Victims of Crime Reform Bill 2011 (319-1) at 14.

¹⁵⁷ Discussed at Chapter III B above.

¹⁵⁸ Sentencing Act 2002.

is a survey of selected reported cases relating to Health and Safety at Work Act offences committed after s 32(5) was amended.

IV Application of s 32(5) Post Amendment

This chapter will set out a selection of the reported cases that followed the amendment of s 32(5),¹⁵⁹ showing how Courts have struggled to apply the provision and determine the quantum of reparation to be awarded under s 32(1)(c).¹⁶⁰ In the cases set out here, reparations to top up ACC weekly compensation were ordered under s 32(1)(c).

A Variations in Application of s 32(5)

1 Case Review

In *Transport Waimate Limited*,¹⁶¹ Judge Maze set the level of consequential loss on the basis of submissions made by Transport Waimate, at \$25,000.¹⁶² It is not clear from the judgement how this figure was calculated.

In *Gordon Developments Limited*¹⁶³ Judge Fields held that reparation for the shortfall in earnings should be capped at \$10,000, because liability could not be for an indefinite period of time, even if that shortfall was ongoing.

In *Corboy Earthmovers Limited*¹⁶⁴ Judge Harland quoted a paragraph from Adams on Criminal Law.¹⁶⁵ This stated that whilst reparation for loss of income going forward is in keeping with the ethos of the reparations scheme, liability could not be for income loss into the indefinite future because of the contingencies associated with future income calculations. Adams recommends limiting liability to “...the period during which the offender can realistically be held liable to make reparation payments.”¹⁶⁶

Judge Harland noted that while actuarial calculations are normally used to calculate future sums where a number of variables are in contention, he considered that too many

¹⁵⁹ *Police v Freightlines Ltd* [2016] NZDC 9452 discusses what happens where an offence was committed whilst the old version of s 32(5) was in force, and where sentencing takes place after the new s 32(5) is in force: Section 6 of the Sentencing Act states that where legislation has been altered, between the offending and sentencing, the lesser penalty is to apply and no disadvantage is to befall the offender. Judge Gilbert concluded that no top up could be awarded in favour of the victim. This decision is less relevant to the research question, as any decision post-*Davies*, but prior to the Sentencing Amendment Act 2014 will include no top up for loss of earnings, as the effect of *Davies* is to bar this.

¹⁶⁰ Sentencing Act 2002.

¹⁶¹ *WorkSafe New Zealand v Transport Waimate Ltd* [2016] NZDC 9468.

¹⁶² At [10].

¹⁶³ *WorkSafe New Zealand v Gordon Developments Ltd* [2016] NZDC 5535 at [26].

¹⁶⁴ *WorkSafe New Zealand v Corboy Earthmovers Ltd* [2016] NZDC 21982.

¹⁶⁵ *Corboy Earthmovers*, above n 164, at [61], citing Simon France (ed) *Adams on Criminal Law – Sentencing* (online loose-leaf ed, Thomson Reuters) at SA32.06A (It is unclear which edition Judge Harland cited, so I have cited the online loose-leaf edition, where SA32.06A has the same wording as quoted by Judge Harland at time of submission of this dissertation, 4 October 2019).

¹⁶⁶ France, above n 165 at SA32.06A.

variables were involved, especially if the victim had planned to continue working after the age of 65, so settled on a “global” figure, of \$20,000 reparation.¹⁶⁷

In *Hamilton City Council*,¹⁶⁸ Judge Clark cited the *Transport Waimate*¹⁶⁹ decision, and the same paragraph of Adams as in *Corboy Earthmovers*,¹⁷⁰ to justify setting the period of time for which loss of earnings would be compensated at 5 years.¹⁷¹ Judge Clark only awarded reparation for consequential loss to the children of the deceased victim.¹⁷² Judge Clark declined to order any other reparation for consequential loss, on the basis that the Hamilton City Council made substantial payments to the family, that ACC childcare payments provided an effective top up for the family’s earnings, and that any significant losses would occur outside the five year time frame set for compensating the loss.¹⁷³

In *Pitango Pty Ltd*,¹⁷⁴ Judge Winter, in calculating the victim’s reparations under s 32(1)(c), considered that the shortfall in earnings was between the 80 per cent level of pre-injury earnings that ACC pays as weekly compensation, and the “victim’s full earnings”.¹⁷⁵ However, the Judge awarded reparations on the basis that the defendant company agreed to meet the shortfall in the victim’s earnings for six months.¹⁷⁶ Reparations also included a top up for the period between the accident, and the date of sentencing.¹⁷⁷

In *Delta Utility Services*,¹⁷⁸ WorkSafe submitted that the reparation award should include \$14,600 to cover the 80 per cent unpaid by ACC from the Date of Injury up to the Date of Trial. WorkSafe also asked for an “ongoing” award of \$218.98 per week to cover the shortfall, due to uncertainties regarding the length of time that the injuries would last.¹⁷⁹ However, Judge Cook declined to make an ongoing award of reparations. He considered the victim’s own conduct¹⁸⁰ was partially causative of the injury, and that the victim had been terminated from his employment with Delta Utility Services.¹⁸¹

¹⁶⁷ *Corboy Earthmovers*, above n 164, at [62]-[65].

¹⁶⁸ *WorkSafe New Zealand v Hamilton City Council* [2016] NZDC 18590.

¹⁶⁹ At [21]; Notably, Judge McGuire in *WorkSafe New Zealand v Wai Shing Limited* [2018] NZDC 10333 considers it is not possible to determine how reparation was calculated in *Transport Waimate*, as Judge Maze did not provide details of the calculation, at [62].

¹⁷⁰ France, above n 165, at SA32.06A.

¹⁷¹ *Hamilton City Council*, above n 168, at [22].

¹⁷² At [25].

¹⁷³ At [24].

¹⁷⁴ *WorkSafe New Zealand v Pitango Pty Ltd* [2016] NZDC 8537.

¹⁷⁵ At [35].

¹⁷⁶ Unstated, but presumably from the date of sentencing.

¹⁷⁷ *Pitango*, above n 174 at [34]-[37].

¹⁷⁸ *WorkSafe New Zealand v Delta Utility Services* [2016] NZDC 9452.

¹⁷⁹ At [38]-[39].

¹⁸⁰ In breaching his employer’s health and safety policy; at [40]-[43].

¹⁸¹ At [58]-[62].

taking these factors into account when setting a “conservative” award of reparations.¹⁸² Reparations were awarded for the shortfall between accident and the trial, but not for the ongoing future shortfall.¹⁸³

In *Agricentre South Limited*,¹⁸⁴ *Hamilton Flooring Ltd*,¹⁸⁵ *Luke Martin Roofing Ltd*¹⁸⁶ and *Oropi Quarries Ltd*,¹⁸⁷ the parties agreed on the value of compensation to be awarded as reparation and there is no discussion as to how this was calculated.

2 A clear method?

Wai Shing Limited,¹⁸⁸ and *Ask Metro Fire*¹⁸⁹ provide the clearest consideration of the issue so far until *Oceana Gold*.¹⁹⁰

In *Wai Shing*, both WorkSafe and the offender submitted detailed actuarial evidence concerning the victim’s lifelong loss of earnings.¹⁹¹ The submissions for WorkSafe included lifetime loss of earnings calculated using the victim’s actual rate of earnings at the time of injury, and using the “ACC formula”.¹⁹² Submissions for the offender calculated the victim’s lifetime loss of earnings using the “ACC methodology”.¹⁹³

Judge McGuire briefly set out the advantages the ACC Scheme has over the common law litigation for damages, and the history, to that time, of s 32(5).¹⁹⁴ He considered that the victim’s loss of earnings was a type of loss the Sentencing Act intended to address,¹⁹⁵ and that no time limit could be placed on the length of time of compensation, as the offender’s actions caused a young victim to lose his livelihood.¹⁹⁶ He also considered the tortious approach to damages, which he noted to be an imperfect calculation against the speculative nature of the calculations involved.¹⁹⁷

He also considered that a discount on the final sum of reparation was necessary, as he considered that the victim would derive a benefit from the compensation provided by the ACC Scheme, which the victim would be able to enjoy without having undergone the

¹⁸² At [58]-[62].

¹⁸³ At [61]-[62].

¹⁸⁴ *WorkSafe New Zealand v Agricentre South Limited* [2018] NZDC 7756.

¹⁸⁵ *WorkSafe New Zealand v Hamilton Flooring Ltd* [2016] NZDC 15489.

¹⁸⁶ *WorkSafe New Zealand v Luke Martin Roofing Ltd* [2018] NZDC 11547.

¹⁸⁷ *WorkSafe New Zealand v Oropi Quarries Ltd* [2016] NZDC 10755.

¹⁸⁸ *WorkSafe New Zealand v Wai Shing Limited* [2017] NZDC 10333.

¹⁸⁹ *WorkSafe New Zealand v Ask Metro Fire* [2017] NZDC 13314.

¹⁹⁰ *Oceana Gold v WorkSafe New Zealand* [2019] NZHC 365; Discussed at Chapter V below.

¹⁹¹ *Wai Shing*, above n 188 at [22]-[34] and [42]-[46].

¹⁹² At [32], [34].

¹⁹³ At [43].

¹⁹⁴ At [47]-[62]; Sentencing Act 2002.

¹⁹⁵ At [78]-[80].

¹⁹⁶ At [80], [83].

¹⁹⁷ At [84], [86].

stress and expense of litigation themselves.¹⁹⁸ For this, he reduced the award by half.¹⁹⁹ He also concluded for reasons of “pragmatism and predictability”, a risk-free interest rate should be adopted to determine the discount rate on the lump sum of the victim’s life long loss of earnings not covered by the ACC.²⁰⁰

(a) Process of calculation of reparation top up award

Judge McGuire then sets out the process of determining the award, being the amount of earnings the victim would lose out on, not paid by ACC.²⁰¹ The formula he adopts is more clearly set out by Judge Maude, in *Ask Metro Fire*:²⁰²

- (a) Calculating the victim's earnings based on his actual accident date earnings increased annually by the labour cost index.
- (b) Discounting the above amount by using a risk-free discount rate. As I read the judgment the Judge assumed that it was prudent to adopt the views of what a low-risk investor would adopt.
- (c) Discounting the final figure arrived at by 50 percent to take account of the certainty advantage associated with receipt of funds on a regular basis from ACC and avoidance of the financial and emotional stress of litigation.

At step (a), Judge McGuire noted this figure is not to include any allowance for promotion,²⁰³ and also deducted the value of employer Kiwisaver contributions, as self employed victims would not have the same benefit.²⁰⁴

In *Ask Metro Fire*, at step (c), Judge Maude discounted the final figure by only 15 per cent, considering a discount of 50 per cent to be too great.²⁰⁵ In all other respects, Judge Maude followed Judge McGuire’s methodology in *Wai Shing*.²⁰⁶

3 Analysis of past decisions

All these decisions show that Courts have struggled to find a consistent method in determining the quantum of the top up reparations under s 32(1)(c)²⁰⁷ and s 32(5).²⁰⁸ Whilst *Wai Shing* and *Ask Metro Fire* bring clearer method, there were still disagreements, such as the quantum of discount for the avoidance of the stress of litigation, and if such discount is justified at all.

¹⁹⁸ At [88]-[90].

¹⁹⁹ At [90].

²⁰⁰ At [93], [100].

²⁰¹ At [100].

²⁰² *Ask Metro Fire*, above n 189 at [21].

²⁰³ *Wai Shing*, above n 188 at [97].

²⁰⁴ At [98].

²⁰⁵ *Ask Metro Fire*, above n 189 at [27]-[32].

²⁰⁶ At [21]-[33].

²⁰⁷ Sentencing Act 2002.

²⁰⁸ Sentencing Act 2002.

V Oceana Gold v WorkSafe New Zealand

*Oceana Gold*²⁰⁹ is the first High Court case since the Sentencing Amendment Act 2014 was passed, where the reparation payable to a victim, or the family of a victim²¹⁰ is at issue. The central issue is: How should the quantum of reparation for consequential loss be determined where that victim has entitlements to ACC weekly compensation? This chapter will set out Venning J's decision in *Oceana Gold*.

A Background

Oceana Gold is a combined case where two individual prosecutions both have the same legal issue: The victims in both *Oceana Gold* and *Cropp Logging* suffered injuries (In *Oceana Gold*, the victim died) that rendered them permanently incapable of earning an income, and reliant on ACC weekly compensation for their remaining forecast working lives.²¹¹

Venning J briefly considered whether reparations for loss consequential on physical harm were payable to the family of the deceased victim. The Court found that the Sentencing Act allows reparations to be awarded to the family of a deceased victim, the family under certain circumstances falling within the definition of victim within s 4 of the Sentencing Act.²¹²

B What method of calculation should be applied?

Venning J identified two competing approaches to the calculation of lost earnings consequential on physical harm, for the purposes of reparation:²¹³ The “statutory shortfall” and “open-ended” approaches.

The statutory shortfall approach considers the victim's potential future earnings as determined by the ACC Scheme (based on pre-injury earnings as calculated under the Accident Compensation Act), and the shortfall compensable by reparation is difference between that figure, and value of ACC weekly compensation payable to the victim.²¹⁴

The alternative method was described as the “Open-ended approach”.²¹⁵ This approach aims to capture the victim's actual loss of earnings, and is calculated using actuarial

²⁰⁹ *Oceana Gold*, above n 190.

²¹⁰ Sentencing Act 2002, s 32(1)(c).

²¹¹ *Oceana Gold*, above n 190, at [6]-[11].

²¹² At [13]-[39].

²¹³ At [41].

²¹⁴ At [41].

²¹⁵ At [42].

means.²¹⁶ The reparation award is calculated by deducting the value of the actual ACC weekly compensation payable to the victim from the actuarially calculated figure.²¹⁷

Venning J stated the issue:

How is the reparation for loss of earnings reparation to be calculated? Is it to be on a basis consistent with the principles of the Accident Compensation legislation and the social contract upon which that legislation is based, or is it to operate as a true exception to the Accident Compensation legislation and the social contract?²¹⁸

C Discussion of prior case law in Oceana Gold

Venning J then discussed the case history on the process of computing the quantum of reparation for loss of income consequential on physical harm.²¹⁹

Venning J then went on to consider statements from the Supreme Court in *Davies v Police*²²⁰ regarding the status of reparation. He considered comments by the Court in *Davies* favoured taking a restrained approach to reparations, which justified implementing the statutory shortfall approach.²²¹ He noted the Court in *Davies* considered that reparation was intended to be a “speedy and inexpensive”²²² approach of compensation for victims of crime, and that the court should consider other remedies available to a victim of crime.²²³ He noted that *Davies* held that the ACC Scheme is designed to provide fair, and not full compensation to injured,²²⁴ and that this could justify limiting reparations available to top up ACC weekly compensation.²²⁵

He also considered the opinions of Elias CJ, and Tipping J in *Davies*, who found it illogical that under s 317 of the Accident Compensation Act,²²⁶ victims of crime would be barred from pursuing a civil claim for damages against the offender who harmed them, but yet could receive compensation through reparations for the same damages they could not sue for.²²⁷

²¹⁶ At [42].

²¹⁷ At [43].

²¹⁸ At [40].

²¹⁹ At [44]-[45]; Venning J considered that *WorkSafe New Zealand v Transport Waimate Ltd* [2016] NZDC 9468, and *WorkSafe New Zealand v Gordon Developments Ltd* [2016] NZDC 5535 did not consider the issue in any detail. He considered that *WorkSafe New Zealand v Corboy Earthmovers Ltd* [2016] NZDC 21982, *WorkSafe New Zealand v Hamilton City Council* [2016] NZDC 18590 and *WorkSafe New Zealand v South Port New Zealand* [2017] NZDC 8050 resolved the issue on a “pragmatic” basis. He noted that *WorkSafe New Zealand v Wai Shing Limited* [2017] NZDC 10333 considered the issue with some detail.

²²⁰ *Davies*, above n 94.

²²¹ *Oceana Gold*, above n 190 at [45].

²²² At [46], *Davies*, above n 94 at [10]-[11].

²²³ At [46], *Davies*, above n 94 at [10]-[11].

²²⁴ *Oceana Gold*, above n 190 at [48].

²²⁵ At [47].

²²⁶ Accident Compensation Act 2001, s 317.

²²⁷ *Oceana Gold* above n 190, at [49]-[50].

Whilst Venning J noted that the effect of the Sentencing Amendment Act 2014 was to overturn *Davies*, he considered that the Accident Compensation legislation was still relevant, and provided “useful context” to the determination of the quantum of reparation payments where ACC entitlements are being paid, in the context of the social contract.²²⁸

Venning J noted that the majority of the Supreme Court had concerns about determining what ACC compensation would be payable at a summary sentencing hearing,²²⁹ and that even where Courts are equipped with actuarially prepared figures, they may use a “broad-brush” approach to avoid “over-compensating”.²³⁰

D Ancillary issues

Venning J found that a victim’s own contributory conduct to their injuries should not reduce the level of fine levied against an offender.²³¹ He considered this applied to setting reparations too.²³² To allow an employer to reduce their liability for fines or reparations because an employee’s perhaps unwise conduct would undermine the primary duty of care of health and safety.²³³

E Outcome

Venning J found that though some have considered the social contract to be an illusory concept,²³⁴ the social contract should be given some consideration, because of its express presence in the purpose section of Accident Compensation Act: The scheme is intended to “reinforce the social contract”.²³⁵ He also considered that had Parliament intended to allow reparations to sit outside the ACC Scheme, and the social contract, they would have clearly stated so in the Sentencing Amendment Act.²³⁶

Venning J reached the decision that the approach of reparation to be awarded for loss of earnings consequential on physical harm was that of statutory shortfall approach.²³⁷ He reached this decision on the basis of best fit with the social contract conception of the ACC Scheme, the fact that it would make reparation hearings a simpler and less

²²⁸ At [52].

²²⁹ At [55].

²³⁰ At [56].

²³¹ At [59]-[61], Citing *Department of Labour v Eziform Roofing Products* [2013] NZHC 1526; *Department of Labour v Hanham & Philp Contractors* (2008) 6 NZELR 79 (HC).

²³² At [62].

²³³ At [63].

²³⁴ At [65], Citing Simon Connell. Though uncited presumably Venning J was referring to Simon Connell’s article “Overturning the Social Contract?” [2014] NZLJ 314.

²³⁵ Accident Compensation Act, s 3.

²³⁶ *Oceana Gold*, above n 190 at [66].

²³⁷ At [68].

uncertain exercise for all parties involved, and because it could avoid litigating the basis of the actuarial reports required of the open-ended approach. The actual reparation to be awarded was to be the difference between the income they would have received had they continued working, and the value of the entitlement to ACC weekly compensation, both figures calculated under Schedule One of the Accident Compensation Act.²³⁸

F The Substantive Appeal

Venning J then considered the appeal in *Oceana Gold*.²³⁹ At the District Court, Judge Ingram considered that the victim's loss of earnings was, \$700,000.²⁴⁰ Judge Ingram then halved that figure, on the basis that the mine in which the deceased worked was due to close in five years time, there was limited underground mining work available in New Zealand and the Judge's own assessment of the local Waihi economy.²⁴¹

At the High Court, WorkSafe did not seek reparations for loss of income, considering that payments already made to the deceased's family, and life insurance policies taken out by Oceana Gold, provided sufficient compensation.²⁴²

Venning J considered that Judge Ingram had adopted the open-ended approach. He found under the statutory shortfall approach, the victim's loss of earnings was \$121,275.36.²⁴³ Given this, Venning J set the District Court reparation order aside, but made an order that Oceana Gold could not seek repayment of the reparation already paid.²⁴⁴

In *Cropp Logging*, at the District Court, Judge Ingram set a combined award for reparation of \$80,000, not identifying the component of this which was reparation for loss of earnings, or emotional harm.²⁴⁵ Venning J found that the victim's loss of earnings on a statutory shortfall basis was \$6337.15.²⁴⁶ This was awarded along with a \$50,000 award for emotional harm.²⁴⁷

²³⁸ At [68].

²³⁹ At [70]-[78].

²⁴⁰ *WorkSafe New Zealand v Oceana Gold (New Zealand) Ltd* [2018] NZDC 5274 at [34] [*Oceana Gold (District Court)*].

²⁴¹ *Oceana Gold (District Court)*, above, n 240 at [36]-[37].

²⁴² *Oceana Gold*, above n 190 at [85].

²⁴³ At [86].

²⁴⁴ At [89].

²⁴⁵ At [93]; *WorkSafe New Zealand v Cropp Logging Limited* [2018] NZDC 20232 at [16].

²⁴⁶ *Oceana Gold*, above n 190 at [99].

²⁴⁷ At [100].

VI Decisions applying Oceana Gold and the Statutory Shortfall

Since the decision in *Oceana Gold* has been released, two decisions applying the statutory shortfall approach in District Court have been reported - *WorkSafe New Zealand v Crafar Couch Construction (Picton) Ltd*,²⁴⁸ and *WorkSafe New Zealand v Supermac Group*.²⁴⁹ *Supermac* is a straight-forward application of the “statutory shortfall” approach. However, *Crafar* involves applying the statutory shortfall approach to fatal entitlements. I will set out, and critique, these decisions.

A WorkSafe New Zealand v Supermac

WorkSafe New Zealand v Supermac is an example of a straightforward application of the statutory shortfall approach. WorkSafe submitted a loss of future earnings calculation to the Court, which was prepared on the statutory shortfall basis.²⁵⁰ This included:

an after – tax risk free rate of return, makes no allowance for promotional increases or change of hours and is for future loss of earnings to age 65.²⁵¹

Counsel for the defence questioned whether the victim’s entitlement to lump sum compensation should be considered relevant to calculating the top up; however this argument was not “pressed”,²⁵² and Judge Mabey considered the point should be argued another day.²⁵³

1 Discounting or reducing the top up award

Judge Mabey also considered whether a discount or reduction of the top award was necessary due to the victim receiving the benefit of entitlements under the ACC Scheme.²⁵⁴ After noting that in *Wai Shing* and *Ask Metro Fire* the level of discount was set at fifty per cent, and fifteen per cent respectively, he declined to make such a reduction considering that:

The ability to claim at common law for personal injury was removed when the Accident Compensation Scheme was introduced. That scheme has been described by the Courts as a social contract with the citizens of this country. It is difficult to rationalise why reparation should be discounted for the benefit of not having to go to litigation to recover compensation when that ability no longer exists. It is equally difficult to rationalise why reparation should be discounted because a given victim is receiving statutory benefits which are a right under the social contract.²⁵⁵

²⁴⁸ *WorkSafe New Zealand v Crafar Couch Construction (Picton) Ltd* [2019] NZDC 8209.

²⁴⁹ *WorkSafe New Zealand v Supermac Group Resources Limited* [2019] NZDC 15023.

²⁵⁰ *Supermac*, above n 249 at [43].

²⁵¹ At [43].

²⁵² At [45]-[46].

²⁵³ At [47].

²⁵⁴ At [48]-[53].

²⁵⁵ At [52].

Judge Mabey also noted that the statutory shortfall approach as set out by Venning J made no account for any discount to be taken off the top up award.²⁵⁶

B WorkSafe New Zealand v Crafar Couch Construction

Judge Zhorab acknowledged that *Oceana Gold* allows the court to make top up awards for the difference between ACC weekly compensation paid at 80 per cent of pre-injury earnings, and pre-injury earnings as calculated under Schedule One of the Accident Compensation Act.²⁵⁷

However, WorkSafe New Zealand requested Judge Zhorab to award a top up of \$59,354.66, being the difference between the amount of compensation that the deceased's partner would have received, at 60 per cent of the 80 per cent possible weekly compensation entitlement of the deceased, for five years,²⁵⁸ and the 80 per cent entitlement of the deceased had they survived their injuries and received weekly compensation.²⁵⁹

1 ACC Weekly entitlements in Fatal Cases

Fatal weekly compensation entitlements for spouses or partners of deceased victims are the combined result of two policy decisions. The first is that victims of injury should receive 80 per cent of their pre-injury earnings as calculated under Schedule One of the Accident Compensation Act 2001.²⁶⁰ The second is that the spouses or partners of deceased victims of injury should receive at most²⁶¹ 60 per cent of this 80 per cent total possible weekly compensation figure for up to five years,²⁶² or 48 per cent (60% * 80% = 48%) of the victim's pre-injury earnings.

(a) Applying the Statutory Shortfall to fatal claims

The ethos behind the decision in *Oceana Gold* can be read as a combination of two policy decisions: Strict adherence to the social contract underpinning the ACC Scheme; and reading this into process of determining the quantum of reparations at sentencing. This results in the statutory shortfall approach. The top up under the statutory shortfall approach is between the victim's pre-injury earnings as calculated under the ACC

²⁵⁶ At [53].

²⁵⁷ *Crafar Couch*, above n 248 at [12].

²⁵⁸ At [14]; Accident Compensation Act, Schedule One, cl 66(5)(a).

²⁵⁹ At [15].

²⁶⁰ Accident Compensation Act, Schedule One, cls 32-46.

²⁶¹ Under the Accident Compensation Act, Schedule One, cl 70, children of the deceased victim may receive up to 20 per cent of the deceased's weekly compensation entitlement. Under cl 74, the total payable to the family of the deceased must not exceed the deceased victim's weekly compensation entitlement. This means the spouse or partner may receive less than 60 per cent of the deceased victim's weekly compensation entitlement, if that the total compensation payable under cl 66, and 70 would be greater than the deceased victim's weekly compensation entitlement. Under cl 74(2) ACC may reduce the compensation payable to the family on a pro-rated basis.

²⁶² Accident Compensation Act, Schedule One, cl 66(2).

Scheme in Schedule One of the Act,²⁶³ and the actual Weekly Compensation figure awarded to the victim, at 80 per cent of the former figure,²⁶⁴ or (100% - 80% = 20%).

If we apply this “statutory shortfall” rationale to fatal entitlements and weekly compensation, it is possible that victims of crime may receive up to 100 per cent of their pre-injury earnings as calculated under the ACC Scheme. Then, spouses or partners of deceased victims are entitled to 60 per cent of this figure. This results in the top up being the difference in Weekly Compensation actually paid to the spouse or partner, at 48 per cent of the victim’s pre-injury earnings, and the maximum entitlement Parliament consider the spouses or partners of victims of crime should receive, 60 per cent of the victim’s pre-injury earnings. The top up should be (60% - 48% = 12%).

(b) The result in *Crafar Couch Construction*

What WorkSafe New Zealand appeared to ask the Court to award is the difference between what the spouse or partner receives, at 48 per cent of pre-injury earnings, and 80 per cent of the deceased victim’s pre-injury earnings, which makes the top up (80% - 48% = 32%).²⁶⁵ Presumably this figure (\$59,354.66) is 5 years of Weekly Compensation top up totaled and discounted, though this is unclear from judgement as there is no discussion of what comprises this figure, and the Judge accepted WorkSafe’s figure without further discussion.²⁶⁶

It is possible that the Judge was distracted by a frivolous, and ultimately unsuccessful argument made by the defendant about the jurisdiction of the Court to award reparations for loss consequential on physical harm, to the family of the victim,²⁶⁷ as there is little discussion on the basis of what makes up the reparations payment ordered under s 32(1)(c).

²⁶³ Schedule One, cls 32-46.

²⁶⁴ Schedule One, cl 32(3).

²⁶⁵ *Crafar Couch*, above n 248 at [15].

²⁶⁶ At [15]-[16], [29]-[31].

²⁶⁷ At [17]-[29].

VII Analysis of the Statutory Shortfall, and Open-Ended Approaches

This chapter will break down the statutory shortfall and open-ended approaches and examine in detail how they function. The process of calculation in this chapter draws on information received from an Official Information Act Request made to WorkSafe New Zealand. To protect the privacy of the victims in these cases I have chosen not to release this information; and have anonymized detail where possible. Any non-anonymized detail given is taken from the reported cases and is cited accordingly. The layout of both methods include elements of speculation, as the cases and Official Information Requests do not give exact details of the calculation process.

A Statutory Shortfall Approach

The focus of the statutory shortfall approach is on the ACC weekly compensation entitlements of the victim, and methodology ACC use to calculate pre-injury earnings.

1 Process of calculation

(a) Step One

The first step is to determine the victim's weekly earnings under Schedule One of the Accident Compensation Act.²⁶⁸ This varies depending on whether the victim drew income as an employee, self-employee, or shareholder-employee.²⁶⁹

As an example, if the victim took earnings as an employee, their pre-injury earnings would be calculated under cl 34.²⁷⁰ Under cl 34, for the first four weeks after the incapacity begins, the victim's average weekly earnings are calculated by taking the victim's total earnings over the four weeks immediately prior to the incapacity, divided by the number of full, or part weeks in which the victim earned them.²⁷¹

For any subsequent period, the victim's average weekly earnings are calculated by taking the victim's earnings in the 52 weeks immediately prior to the incapacity, divided by the number of full or part weeks in which the victim earned them.²⁷²

(b) Step Two

The second step is to project the victim's weekly earnings as calculated above, forward over the expected duration of the victim's incapacity. However, if the incapacity is lifelong, this will only continue until the victim reaches the age of New Zealand

²⁶⁸ Accident Compensation Act 2001, Schedule One, cl s32-45.

²⁶⁹ Schedule One, cls 34-40.

²⁷⁰ Schedule One, cl 34.

²⁷¹ Schedule One, cl 34(1).

²⁷² Schedule One, cl 34(2).

Superannuation eligibility.²⁷³ The weekly earnings figure will only increase at the rate of increase of the Labour Cost Index.²⁷⁴

(c) Step Three

Thirdly, the value of earnings over the duration of the injury are then totaled.

(d) Step Four

Fourthly, this total weekly earnings figure must then be discounted, at a rate reflecting the fact that the victim will need to invest this sum at a risk-free investment rate, as they will rely on this sum to live off. If investment or discount rates are forecast to change, it is possible multiple discount rates, for different periods may need to be used.

(e) Step Five

Finally, the value of ACC weekly compensation to be paid to the victim over the same period of time is calculated and totaled using the same discount rate, and Labour Cost Index rates for the same periods, and is deducted from the victim's projected earnings as calculated above, resulting in the final figure awarded to the victim as reparation.

B Open-Ended Approach

The open-ended approach awards the top up based on a personalised prediction of what the injured person would have earned had they not been injured. The focus shifts from the ACC entitlements of the victim, to the victim's anticipated lifetime earnings.

The open-ended approach requires calculations based on factors such as: will this individual get a pay rise; what type of industry do they work in, what is their expected working life.

1 Process of calculation

(a) Step One

The first step is to set the assumptions upon which actuarial calculations will be made. These assumptions relate to factors such as the victim's working lifetime, chances of promotion within the industry they were employed pre-injury, chances of early death before the end of their working lifetime, reduction in working hours as they near

²⁷³ Schedule One, cl 52.

²⁷⁴ The Labour Cost Index measures movements in the cost of labour for a fixed volume and quality of work. Statistics New Zealand remove any changes that are due to promotion. Statistics New Zealand "Labour Market Statistics: March 2019 quarter" (1 May 2019) Statistics New Zealand <<https://www.stats.govt.nz/information-releases/labour-market-statistics-march-2019-quarter>> ; See this press release where ACC details the increase in Weekly Compensation rates from 1 July 2019: Accident Compensation Corporation "New client payment rates and interest rates from 1 July" (press release, 20 June 2019) . ACC use increases in the Labour Cost Rate to index weekly compensation under section 115 of the Accident Compensation Act, and the Injury Prevention, Rehabilitation and Compensation (Indexation) Regulations 2002, reg 6(1).

retirement, the expected duration of the incapacity, the rate of inflation (Consumer Price Index), and the risk-free interest rates (Pricewaterhouse Coopers, the actuaries, considered the victim would need to invest in a “conservative asset class” as the victim would rely on this top up to supplement income.) forecast over the expected duration of the incapacity. This is based on statistical evidence published by Statistics New Zealand,²⁷⁵ and the New Zealand Treasury.²⁷⁶

(b) Step Two

The second step is to value the victim’s future earnings, including Kiwisaver employer contributions, making allowances for the assumptions as noted above. In *Wai Shing*, *Ask Metro Fire*, and *Oceana Gold*, PwC used a “probabilistic cash flow model” detail of which are not given.²⁷⁷ It appears that this involves growing the victim’s actual pre-injury earnings rate, by a multiplier which reflects the assumptions set in the first step. It is enough to say that earnings should be valued according to best actuarial practice.

(c) Step Three

Then the victim’s ACC weekly compensation entitlements are valued, allowing for early death as above, and ACC weekly compensation increases at the Labour Cost Index rate. These calculations are also performed using the “probabilistic cashflow model”.

(d) Step Four

These ACC weekly compensation entitlements, and any sums paid by the defendant, are then deducted from the victim’s future earnings as calculated above, to arrive at the victim’s true loss requiring rectification through topping up.

(e) Step Five

Once this figure has been determined, Courts in New Zealand have so far reduced this figure, because of the benefit the victim gains from receiving ACC weekly compensation without having to resort to litigation themselves.²⁷⁸

Because the assumptions as set at Step One are based on forecast figures, it may be necessary to have multiple forecasts, depending for example, on the potential future

²⁷⁵ This table sets out average weekly earnings, categorized by occupation, gender, age and ethnicity. Statistics New Zealand “NZ (dot) Stat – Earnings from main wage and salary job by occupation (ANZSCO 2006), sex, age groups and ethnic groups” <<http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7475>> NZ (dot) Stats.

²⁷⁶ The New Zealand Treasury “Discount Rates and CPI Assumptions for Accounting Valuation Purposes” (30 June 2019) <<https://treasury.govt.nz/information-and-services/state-sector-leadership/guidance/financial-reporting-policies-and-guidance/discount-rates/discount-rates-and-cpi-assumptions-accounting-valuation-purposes>> The New Zealand Treasury.

²⁷⁷ *Wai Shing*, above n 188 at [34]; *Ask Metro Fire*, above n 189 at [24].

²⁷⁸ *Wai Shing*, above n 188 at [88], [90]; *Ask Metro Fire*, above n 189 at [28], [32].

economic status as that relates to salary increases and job availability. This may result in multiple calculations with multiple loss of earnings figures, in a range.

C Variations on application in practice

The open-ended approach is not one standardised approach as the statutory shortfall approach is. Each Court has taken a slightly different variation on this approach.

In one case, WorkSafe requested that PwC prepare a future loss of earnings calculation as calculated above, but without making any allowance for income increase at any level above the rise in the Labour Cost Index (Which PwC estimated to be CPI + 0.2%). This would mean no allowance made for any increase in earnings due to promotion.

PwC considered that this methodology did not truly reflect the victim's future income loss, as they noted that rises in the Labour Cost Index are merely a rise in the base rate (cost) for labour, given a fixed quantity and quality of labour input, which does not make any allowance for promotion or merit based wage increases of individual employees.

What this means is that there are now effectively two variations on the open-ended approach: First, where the victim's actual pre-injury earnings are grown at a rate which includes promotional increases, and secondly, where the victim's actual pre-injury earnings are only grown at the rate of increase of the Labour Cost Index. The second approach has been applied in subsequent cases where the open-ended approach has been used.²⁷⁹

In *Wai Shing*, Judge McGuire excluded the value of Kiwisaver employer contributions, on the basis that if the victim were self-employed, they would not receive those contributions.²⁸⁰ The victim in *Wai Shing* was not self-employed,²⁸¹ rather he was an employee on wages, so it is difficult to see why Kiwisaver employer contributions were deducted for this reason.

D Comparison of Outcomes under the Statutory Shortfall and Open-Ended Approaches

Given the different factors that the statutory shortfall and open-ended approaches consider, it is understandable that these methods produce vastly different outcomes.

²⁷⁹ *Wai Shing*, above n 188 at [96]; *Ask Metro Fire*, above n 189 at [21], [24].

²⁸⁰ *Wai Shing*, above n 188 at [98].

²⁸¹ At [7], [9].

For example, in *Wai Shing*, a case where a worker suffered injuries rendering them paraplegic, the statutory shortfall approach produces a top up of between \$226,800 and \$259,700.²⁸² The open-ended approach produced a top up of between \$455,600 and \$495,500.²⁸³

In *Oceana Gold*, a case where the victim died, using the figure from the High Court Judgement, the statutory shortfall approach produces a top up of \$121,275.36.²⁸⁴ The open-ended approach was based on three predictions of the victim's potential for future income increase, which led to top ups of between \$700,000 and \$2,770,000.²⁸⁵

Case	Statutory shortfall	Open-ended
<i>Wai Shing</i>	\$226,800-\$259,700	\$455,600-\$495,500
<i>Oceana Gold</i>	\$121,275.36	\$700,000-\$2,770,000

In *Wai Shing*, this disparity is explained by the fact the victim received a pay rise shortly before being injured.²⁸⁶ Under the ACC methodology for determining pre-injury earnings, the victim's earnings in the year prior to injury are averaged over the same period.²⁸⁷

This means that the full effect of a pay rise pre-injury, on future earnings is not fully captured unless the victim was earning at the higher rate for the entire year prior to injury. This factor is noted by PwC in one letter to WorkSafe, as limiting the accuracy of an approach where loss of earnings are calculated based on the ACC methodology.

E Advantages and Disadvantages of the Statutory Shortfall Approach

The statutory shortfall approach does not accurately capture a victim's earnings. *Wai Shing* provides an example of how a pay rise shortly before injury will not be fully captured by this methodology.

No account is taken of the victim's possibility to earn future promotional earnings increases. In a letter to WorkSafe, PwC also noted that the statutory shortfall was unlikely to compensate the victim adequately in the long term as increases in ACC weekly compensation are at the increase of the Labour Cost Index, which PwC considered was slightly below actual salary inflation. Neither are the victim's

²⁸² At [34]; Without Kiwisaver Employer Contributions: \$226,800, With Kiwisaver \$259,700; Discussed at Chapter VII E below; Statutory shortfall is calculated without Kiwisaver Employer Contributions.

²⁸³ At [34]; W/O Kiwisaver; \$455,600, W/ Kiwisaver: \$495,500; Discussed at Chapter VII F below; Open-ended approach as applied in practice has not included Kiwisaver Employer Contributions.

²⁸⁴ *Oceana Gold*, above n 190 at [86].

²⁸⁵ *Oceana Gold (District Court)*, above n 240 at [34].

²⁸⁶ *Wai Shing*, above n 188 at [9], [34].

²⁸⁷ Accident Compensation Act, Schedule One, cl 34.

Kiwisaver employer contributions included, as ACC does not pay these to a victim receiving weekly compensation.²⁸⁸

Though Venning J noted in *Oceana Gold* that the statutory shortfall approach could be prepared without the use of actuarial calculations,²⁸⁹ it is likely that without the use of actuarial expertise, these calculations would be performed incorrectly. Future cash flows occurring over periods of time cannot be accurately added together without performing actuarial calculations. Because the victim's earnings are already calculated by the Accident Compensation Corporation, it will require less input on the part of the Court to determine the top up under the statutory shortfall approach. However, as the ACC pay periodic weekly compensation for loss of earnings, and not a lump sum, actuarial expertise will still be required to ascertain the total present value of the shortfall.

The simplicity in this method is only illusory; the application of the statutory shortfall in *Crafar Couch Construction* shows that there are still reasonable variations possible to this approach.²⁹⁰

The statutory shortfall approach also appears to be an excessively restrictive interpretation of the combination of s 32(1)(c) and s 32(5) of the Sentencing Act.²⁹¹ The effect of these two sections can be said to bar reparations for consequential loss in respect of compensation paid by ACC; to prevent double recovery of loss. Beyond that, the wording gives no other restriction on awarding reparations to compensate the victim for their loss. It certainly does not appear to import conceptions of the social contract.

This interpretation is supported by Todd, who notes that s 32(5) was specifically intended to overturn *Davies*, stating that reparation can be ordered (my italics):

in respect of that 20 percent and, *indeed, of any other shortfall* suffered by the victim in obtaining full compensation for his or her loss. The Supreme Court made its decision in *Davies* based on the logic of the accident compensation scheme's universal no-fault coverage, which logic is disregarded by the words of s 32(5).²⁹²

F Advantages and Disadvantages of the Open-Ended Approach

It is also the case that the open-ended approach has no one accepted methodology, as each court has applied its own method. This creates a lack of consistent outcomes, making it difficult for WorkSafe, on behalf of victims, to assess the level of

²⁸⁸ Helen Twose "Kiwisaver: ACC earners miss out on boss top-ups" *The New Zealand Herald* (online ed, Auckland, 15 May 2016).

²⁸⁹ *Oceana Gold*, above n 190 at [67]-[68].

²⁹⁰ Discussed at Chapter VI B.

²⁹¹ Sentencing Act, s32(1)(c), s 32(5).

²⁹² Todd, above n 53 at 2.3.03(4).

compensation victims are likely to receive. Victims in similar circumstances may receive different reparations awards from different Judges. Offenders may also find it difficult to assess their potential level of liability in the event of a successful prosecution.

This lack of consistency gives judges a great deal of discretion to make deductions and discounts as they see fit, even where this may not be technically correct in terms of the actuarial methodology which underpins the open-ended approach.

Though this discretion can at times lead to poor outcomes for both defendants and victims, undeniably the customized nature of the open-ended approach allows Judges, with the assistance of actuarial evidence, to tailor the award of compensation to the circumstances of the particular victim.

For example, in *Oceana Gold* at the District Court, Judge Ingram reduced the figure produced by the PwC actuaries, on the basis that the inflation figures adopted by PwC were unrealistic, as was the interest rate PwC determined for discounting purposes.²⁹³ He considered that the victim's future career prospects, as forecast by PwC, presumably based on statistical assumptions as discussed above, were incorrect.²⁹⁴ Judge Ingram decided this:

based at least in part on my knowledge of Waihi and its economy, and hearing a good deal about that subject as a sitting Judge routinely rostered to sit in Waihi.²⁹⁵

The amount of discretion implicit in the open-ended approach allows for other deductions to be made too. For example, in *Wai Shing*, and *Ask Metro Fire*, Judges reduced the end top up award by 50%, and 15%²⁹⁶ respectively, due to the perceived benefit of the victim receiving ACC compensation without having to resort to costly litigation themselves.²⁹⁷ The reduction was also made because of the certainty that ACC provides in giving the victim a steady stream of income, and a desire to preserve the integrity of the ACC Scheme.²⁹⁸

The sentencing process can also become convoluted if the correctness of the underlying actuarial calculations are questioned by the offender.²⁹⁹

²⁹³ *Oceana Gold (District Court)*, above n 240 at [34]-[37].

²⁹⁴ At [36].

²⁹⁵ At [37].

²⁹⁶ *Wai Shing*, above n 188 at [90].

²⁹⁷ At [88].

²⁹⁸ At [88], [89].

²⁹⁹ *Wai Shing*, above n 188 at [19]-[46], *Ask Metro Fire*, above n 189 at [18]-[26].

VIII Alternative Methodologies for Computing Loss of Earnings

This chapter will examine potential alternatives to the statutory shortfall and open-ended approaches. Chapter VII identifies that neither the statutory shortfall, or the open-ended approaches on their own produce entirely satisfactory results. I will briefly examine how other jurisdictions compensate loss of earnings for victims of crime. No other jurisdiction features a comprehensive no-fault ACC Scheme, and notionally financially uncapped awards of reparation in the criminal justice system. Accordingly, I have focused on methodologies from other jurisdictions that are of assistance in addressing my research question.

A Criminal Injury Reparations Overseas

This section will detail Criminal Reparation Schemes operating in Australia and the United Kingdom, and why they are unsuitable as models to guide the New Zealand Reparations Scheme.

B Analysis:

Both the Australian schemes and the Criminal Injuries Compensation scheme are targeted at correcting different losses to the New Zealand Criminal Justice Reparations scheme. In the case of the Australian schemes, this is only short-term, actual or past loss. This is clear from the low caps on maximum payments under these schemes.³⁰⁰ Most Australian states also have Workers' Compensation Schemes that pay weekly compensation in a similar way to ACC.³⁰¹

In the case of the Criminal Injuries Compensation Scheme, this is as a compensation vehicle of last resort.³⁰² Though the cap is more generous,³⁰³ loss of earnings is only compensated at the National Statutory Sick Pay rate rather than at the victim's actual loss of earnings.³⁰⁴

Significantly, in both Australia and the United Kingdom, victims of injury are not precluded from bringing civil litigation to recover loss that results from injury. This

³⁰⁰ For example, in New South Wales, loss of income can only be compensated up to AU\$20,000; See "Financial Support – Financial assistance for economic loss" <https://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_financial_support/vs_financial-support-page.aspx>.

³⁰¹ For example, in New South Wales, periodic Workers Compensation is available for injuries sustained at work up to a maximum cap: See "Weekly payments for Workers Insurance – How weekly payments are calculated" <<https://www.icare.nsw.gov.au/injured-or-ill-people/workplace-injuries/payments/weekly-payments/>>.

³⁰² Ministry of Justice *The Criminal Injuries Compensation Scheme 2012* (13 June 2019) (UK) at [98] (b); See also "Criminal injuries compensation: a guide – How do you apply for a payment?" <<https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide>>.

³⁰³ Total award, including loss of earnings, is 500,000 Pounds; See *The Criminal Injuries Compensation Scheme 2012* above n 302 at [31].

³⁰⁴ *The Criminal Injuries Compensation Scheme 2012*, above n 302 at [47]-[48].

means that schemes that give victims of crime compensatory awards do not need to be as expansive as they are in New Zealand, where victims of injury are unable to recover their losses outside of what entitlements ACC, and the compensation available under the reparations scheme provides.³⁰⁵

³⁰⁵ Accident Compensation Act s 317(1).

C Compensation for Loss of Earnings under United Kingdom Tort Law Damages

This review of compensating loss of earnings under Tort Law damages in the United Kingdom is based on Sweet & Maxwell’s “McGregor on Damages”, 20th edition.³⁰⁶ It is important to examine this methodology, as in the absence of a no-fault ACC Scheme, and expansive criminal justice reparations or injuries scheme, tort law is the main method victims of injury in overseas jurisdictions can use to recover their losses.

The basic measure of tortious damages is to place the injured in the position they would have been had they not been injured in the first place.³⁰⁷ There are two ways in which the measure of damages are assessed in tort; the most commonly used “General Method of Assessment”, and the “Blamire Award”.³⁰⁸

*1 The General Method of Assessment*³⁰⁹:

- (A) Determine the claimant’s pre-injury annual earnings (A)
- (B) Determine the claimant’s post-injury annual capacity for earnings (B)
- (C) Determine the “Multiplicand” by deducting (B) from (A). The multiplicand represents the claimant’s annual loss of earnings that can be attributed to the injury
- (D) Determine the “Multiplier”. The multiplier is a figure that represents the number of years the claimant’s incapacity is expected to last, adjusted, “discounted” for the rate of interest they can earn by investing the award.
- (E) The Multiplicand (C) and Multiplier (D) are multiplied together to arrive at the loss of earnings figure to be awarded.
- (F) This figure may be adjusted to reflect the probability of a future increase or decrease in earnings, inflation, taxation, and the vicissitudes of life.

Formula:

$$\left(\frac{\text{pre-injury earnings} - \text{post-injury earnings}^\dagger}{\text{earnings}^\dagger} \right) \left(\frac{\text{years of lost earnings}^\dagger * \text{discount}}{\text{lost earnings}^\dagger} \right) * \text{adjustment}$$

The † denotes an estimate.

³⁰⁶James Edelman (ed) *McGregor on Damages* (20th ed, Sweet & Maxwell, London, United Kingdom, 2018).

³⁰⁷ Lord Blackburn, in *Livingstone v Rawyards Coal Co.* (1880) 5 App. Cas. 25 (HL) defined damages as “that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation” at 39, cited by Edelman, above n 306 at 2-002. Though both loss of earnings pre-trial, and future loss of earnings can be compensated for, pre-trial loss of earnings (Actual loss to the date of the trial) should be pleaded as special damages, whilst future loss of earnings should be pleaded as general damages. There is no distinction on the method of calculation. Edelman, above n 306 at 40-062.

³⁰⁸ Edelman, above n 306 at 40-066 – 40-068.

³⁰⁹ At 40-066.

2 *Blamire Award*

Courts can also adopt a discretionary, or broad brush approach generally described as the *Blamire* award.³¹⁰ *Blamire* awards tend to be used in situations where there are too many uncertainties to calculate claimant's future earnings. This may occur where the claimant was injured as a child, has little or no employment history, or an unclear career path.³¹¹ *Blamire* awards can also be used to compare against an award calculated under the general method of assessment.³¹²

D Fatal claims

Where the victim has died, dependents are unable to claim for the loss of earnings of the victim;³¹³ they can only claim for the "Pecuniary Benefit" the relationship with the victim would have provided.³¹⁴ The surviving spouse or partner is generally only able to claim up 66.6% of the pre-injury earnings of the deceased victim, where no children are present, and where dependant children are present, this rises to 75%.³¹⁵ However, the earnings of the surviving spouse or partner can also affect the amount of earnings they are able to claim.³¹⁶

E Analysis:

Whilst the general method of assessment as set out³¹⁷ appears relatively simple and formulaic, in practice it becomes very complex to apply. In particular, the determination of the multiplier is difficult as there are so many speculative variables at play. Similar to the speculation is required in calculating compensation under the open-ended approach.³¹⁸

This process is unlikely to produce "speedy and inexpensive determination" of reparations at sentencing, which the majority of the Supreme Court in *Davies* considered was the legislative intent in developing the reparation provisions.³¹⁹ In the United Kingdom these concerns have been partially resolved through the development

³¹⁰ At 40-067.

³¹¹ At 40-068; See further *Blamire v South Cumbria HA* [1993] PIQR Q1.

³¹² At 40-068.

³¹³ At 41-026.

³¹⁴ At 41-026.

³¹⁵ At 41-043; A similar policy is adopted by ACC when determining weekly compensation for surviving spouses, or partners, and children, however the exact percentages differ: Discussed at Chapter VI above, and clauses 66, and 70 of Schedule One of the Accident Compensation Act.

³¹⁶ At 41-045 – 41-049.

³¹⁷ At 40-066.

³¹⁸ Discussed at Chapter VII.

³¹⁹ *Davies*, above n 94 at [11].

of the Ogden tables. The Ogden Tables provide a process for determining a multiplier for claimants in different circumstances.³²⁰

The Ogden Tables have been developed using average life expectancies and social statistics from the United Kingdom.³²¹ This means that the Ogden Tables could not be “imported” into the New Zealand justice system, to simplify actuarial calculations. New tables would have to be made, bespoke for New Zealand.

Elias CJ in *Davies* noted that “Where there is substantial dispute as to....measure of loss, the court may take the view that compensation is not appropriately dealt with through the summary criminal procedure for ordering reparation.”³²² The majority also were reluctant to incorporate more complex calculations of the quantum of loss suffered by a victim, over and above what is paid for by the ACC as weekly compensation, for the same reasons.³²³ These concerns were also identified by Venning J in *Oceana Gold*, noting that Parliament did not intend for actuarial calculations to be imported into the sentencing process, and that New Zealand courts prefer a “broad brush” approach to these matters.³²⁴ Whilst the comments made by Elias CJ were made in the context of deciding that no top up could be awarded at all, I consider they still have relevance for determining the quantum of a top up. These comments emphasise the need for a simple and quick process of calculation, something which still becomes an issue when determining the quantum of the top up.

As New Zealand does not currently have an equivalent to the Ogden Tables, calculations of loss of earnings under a tort law damages method would be calculated in a similar way to how the open-ended method computes damages, with the use of actuarial expertise. There would be no advantage in adopting the method used to compute tort law damages for injury unless equivalent Ogden Tables were to be created for New Zealand.

³²⁰ Government Actuary’s Department *Actuarial Tables, With explanatory notes for use in Personal Injury and Fatal Accident Cases, Prepared by an Inter-disciplinary Working Party of Actuaries, Lawyers, Accounts and other interested parties, Seventh edition* (1 August 2011) at 5, 8.

³²¹ At 8, 14.

³²² *Davies*, above n 94 at [10].

³²³ At [35]-[36].

³²⁴ *Oceana Gold*, above n 190 at [55]-[57].

IX Final Analysis: The Way Forward for New Zealand

In this chapter, I explain why none of the approaches discussed thus far produce a satisfactory result, and put forward a better approach.

A Overseas Methods of Compensation

Tort law damages as implemented in the United Kingdom are complex to apply, requiring legal and technical infrastructure New Zealand has not developed. The development of actuarial tables for New Zealand will not necessarily make tort law damages simple to apply within the criminal justice sentencing process. There will always be issues of complexity and speculation, as individual circumstances make future income calculation in this manner difficult.³²⁵ These same issues are also present for determining loss of earnings under the open-ended approach.³²⁶

Criminal compensation schemes overseas are targeted at compensating short term loss, paid for by the state, rather than the New Zealand reparations scheme which covers broader losses, but is paid for by the offenders.³²⁷ Overseas claimants are generally able to bring litigation in tort to recover damages for personal injury, which is impossible within the New Zealand legal framework.³²⁸

B The Statutory Shortfall and Open-ended approaches

The open-ended approach produces the fairest outcomes for victims, capturing their true loss of earnings after an injury. However, at times this has only been in theory; Deductions made by Judges have at times been quite unfair. The open-ended approach is also complex, almost certainly requiring actuarial expertise to determine the victim's lifetime loss of earnings.³²⁹

The statutory shortfall approach produces more easily calculable outcomes, promoting certainty of outcome for victims, WorkSafe, and offenders, and will result in fewer funds being spent litigating the correctness of calculations. However, due to fact that the ACC do not allow for increases in earnings above inflation when determining weekly compensation,³³⁰ the statutory shortfall will not truly capture a victim's lifetime loss of earnings over a long period of time.³³¹

This tension can ideally be resolved by applying two different methodologies based on the length of time the loss of earnings or incapacity is expected to last.

³²⁵ Discussed at Chapter VIII C above.

³²⁶ Discussed at Chapter VII F above.

³²⁷ Discussed at Chapter VIII A above.

³²⁸ Accident Compensation Act, s 317(1).

³²⁹ Chapter VII F above.

³³⁰ Accident Compensation Act, s 115; See further at n 274 above.

³³¹ Discussed at Chapter VII E above.

C Legislative change required?

The explanatory materials for the Bill which overturned *Davies* spoke of allowing victims to recover loss not compensated by ACC.³³² Victims would not be able to recover their full loss if the statutory shortfall approach was applied in all circumstances.

There is nothing in the provisions governing awards of reparation for consequential loss³³³ to restrict the quantum of awards, except to prevent double recovery of losses.³³⁴ Though ambiguous, the lack of restriction in s 32(5) makes it possible for an open-ended approach to be adopted, especially as this will maximize compensation to victims of crime. This falls in line with promoting the interests of victims of crime, as set out in the Sentencing Act.³³⁵

I consider that Venning J interpreted s 32(5) too restrictively, by reading into calculations for the quantum of reparations, the ACC methodologies for calculating loss of earnings. In reaching his decision, Venning J relied very heavily on the “social contract” reasoning³³⁶ of the majority of the Supreme Court in *Davies*, a decision overturned by Parliament.

If Parliament had intended for reparations for loss of earnings to be calculated according to the ACC methodology or the statutory shortfall, this could have been stated in the revised wording of s 32(5). Parliament could have expressly imported conceptions of the social contract into reparations legislation, as was done for the ACC Scheme.³³⁷ They have not.

It is possible that courts can find a solution to this problem as a matter of interpretation, rather than requiring a revised statute. I am not suggesting that the wording of s 32(5) could not clearer.³³⁸ Rather, the wording does not need to be changed to allow Courts to consistently determine the quantum of reparations payable under s 32(1)(c).³³⁹

The solution I propose are guidelines the Courts can apply to interpret s 32(1)(c) and s 32(5).³⁴⁰

³³² Victims of Crime Reform Bill (319-1) at 14.

³³³ Sentencing Act, s 32(1)(c), s 32(5).

³³⁴ Discussed at Chapter VII E above; See further at n 294 above.

³³⁵ Sentencing Act, s 3(d), s 7(1)(c), s 7(1)(d), s 8(1)(f), s 12(1).

³³⁶ Discussed at Chapter III A above.

³³⁷ Accident Compensation Act, s 3(d).

³³⁸ Discussed at Chapter III B.

³³⁹ Sentencing Act 2002.

³⁴⁰ Sentencing Act 2002.

D Proposed Guidelines

1 Short Term Loss of Income

Where the victim's injury is expected to last five years or less, the statutory shortfall approach should normally be applied. Given that the income differential between the statutory shortfall and open-ended approaches is not likely to be significant in the short-term period, this will reduce the complexity of calculating reparations for the majority of short-term incapacity loss of earnings cases.

I have chosen a five year period for a short-term loss period as it is unlikely that a victim's earnings will change significantly over this period. The chances are small of the victim having a promotional pay increase of significance during this period. Though actuarial expertise will be needed to compute the final award, without needing to forecast earnings increases due to promotion, and other contingencies, the calculations will be simplified.

The statutory shortfall approach is relatively simple to calculate. All that needs to be done to determine the value of the top up is to calculate the total value pre-injury earnings as calculated under the ACC Scheme over the duration of the incapacity. The value of ACC weekly compensation to be paid to the victim over the same period of time is then deducted.³⁴¹

(a) Significant Disparity Exception

However, there are examples where this will still produce a significant disparity between the victim's actual earnings over the five-year period, and earnings as calculated under this method. An example of this is in *Wai Shing*, where the victim received a pay rise shortly before his injury.³⁴² This will also be the case where the victim receives a pay rise prior to the injury, but where that pay rise will only take effect after the date of injury.

Accordingly, there should be some discretion to depart from the statutory shortfall approach in exceptional cases. That discretion should only be applied where there is clear evidence that there would be a significant disparity between the statutory shortfall and actual earnings. Mere speculation is not sufficient. *Wai Shing* is an example of where there is sufficient evidence, since the pay rise had already occurred.³⁴³ Where there is clear evidence of a likely significant disparity, it may then be necessary to make use of actuarial expertise to calculate the proper reparation payment.

³⁴¹ Discussed at Chapter VII A above.

³⁴² *Wai Shing*, above n 188 at [9], [34].

³⁴³ *Wai Shing*, above n 188 at [9], [34]

However, “Significant Disparity” should not be formularised, in terms of percentages or figure, as this will undermine the discretion this “safety valve” will give Judges. The “Significant Disparity” exception will allow Judges to do justice in the circumstances facing the Court. Exercise of this discretion may well need to involve the use of actuarial expertise, as in the open-ended method, to determine the significance of the shortfall.

E Long Term Loss of Income:

Where the victim suffers an injury, or death, that results in a long-term loss of income, greater than five years, the differential in future earnings between earnings calculated under the ACC methodology, and the victim’s likely future earnings, are likely to be much greater. This makes it more appropriate to consider more complex methodologies involving the use of actuarial expertise, as the potential injustices from undercompensating victims are much greater.

If the calculations are performed incorrectly, the victim will have little recourse to get this corrected. Even if the use of actuarial expertise is costly, and time consuming in these situations it can be justified by the need for precise and accurate calculations, rather than the more imprecise statutory shortfall approach that applies to short term loss, where the risk of under compensation is lessened.

For long term loss of income, the top up should be calculated according best actuarial practice at the time of sentencing. This is likely to be similar to the open-ended approach.³⁴⁴

This may involve taking into account statistical indicators, for example of the victim’s likelihood of promotion within their industry, the rise in the cost of living over the incapacity period, the victim’s expected (pre-injury) working lifetime, and the chances of early mortality, ahead of the victim’s life expectancy pre-injury.³⁴⁵

This will ensure calculations are carried out according to best practice at the time of sentencing, rather than tying actuaries down to one method, which may with the passage of time and the building of institutional knowledge, become outdated.

Adopting a methodology requiring the use of professional actuarial expertise for each case where the long-term approach is to be applied, will avoid the need to create legal infrastructure, such as the Ogden Tables.³⁴⁶ While the creation of officially endorsed

³⁴⁴ Discussed at Chapter VII B above.

³⁴⁵ Discussed at Chapter VII B above.

³⁴⁶ Discussed at Chapter VIII E above.

actuarial tables will make the calculation of loss of earnings over the period of the incapacity easier, by prescribing the multiplier, there are disadvantages to this approach. Tabularized actuarial calculations may not be able to fully capture the victim's circumstances, in contrast with best actuarial practice. If not frequently updated, the tables will not keep up with changes in social statistics and other factors which underpin the calculations.

1 Promotional increases

Allowance should be made in those calculations for promotional increase of the victim, as professional actuaries are able to make these calculations. Whilst there is an element of speculation, absent evidentially clear indicators to the contrary (Disciplinary issues at work, showing an inability to perform the job description, for example), victims should be allowed the benefit of promotional increases they likely would have received.

2 Employer Kiwisaver Contributions

In *Wai Shing*, Judge McGuire declined to include the victim's Kiwisaver employer contributions, because self-employed individuals would not receive the benefit of employer contributions.³⁴⁷

I consider that Kiwisaver employer contributions should be included in the calculation for loss of earnings, if an employee is no longer able to work, this is part of their income that they will no longer receive. Where the victim is a self-employed person, or an independent contractor, it is appropriate to exclude Kiwisaver employer contributions, as those individuals do not receive that benefit.

3 Fatal Claims

For compensation in fatal cases, the question arises as to how long the partner or spouse of victim should be compensated for. ACC weekly compensation for fatal claims continues for five years,³⁴⁸ or in some cases until care of any children ceases, or those children reach age 18.³⁴⁹

The spouse or partner of the victim can only receive up to 60 per cent of the 80 per cent possible entitlement to weekly compensation of the victim (60% * 80% = 48% of Pre-injury Income).³⁵⁰ The remaining 20 per cent is apportioned between the children, if present.³⁵¹

³⁴⁷ *Wai Shing*, above n 188 at [98].

³⁴⁸ Accident Compensation Act, Schedule One, cl 66(5)(a).

³⁴⁹ Schedule One, cls 66(5)(b) – 66(5)(d).

³⁵⁰ Discussed at Chapter VI B 1 above; Accident Compensation Act cl 66(2).

³⁵¹ Accident Compensation Act, Schedule One, cls 70(2), 74.

Under tort law, the question is one of the actual loss suffered by the victim.³⁵² For fatal claims, the length of that loss is the likely remaining extent of the victim's working life, and the length of time for which the relationship, or dependency, between the deceased victim and dependents is expected to last.³⁵³

The offender should not compensate the surviving spouse or partner for loss they do not incur. If the victim's spouse or partner enters a new relationship at some time after the death of the victim, the combined family income will increase, potentially to level of income prior to the victim's death, or to a higher level of income. This may not be the case for every surviving spouse or partner. A balance must be struck between compensating the surviving spouse or partner for a period of time long enough to give financial security, without giving the spouse or partner a windfall if they enter a new relationship and cease to suffer from a shortfall in earnings.

(a) Length of the shortfall in income being compensated for

The cut off to long term compensation for fatal claims would be set at; up to the lesser of 25 years, or until the victim would have reached the age of New Zealand Superannuation eligibility.³⁵⁴ This will in most circumstances be longer than the five years weekly compensation that the spouse or partner will receive from ACC, and so would give the surviving spouse or partner some level of security in the continuation of their income.

(b) Quantum of shortfall being compensated for

The court in *Crafar Couch* held that the surviving spouse or partner should receive a top up between the 60 per cent level of weekly compensation for surviving spouse or partners, and the 80 per cent level of weekly compensation that was the victim's entitlement had they survived.³⁵⁵ The true loss of income for the surviving spouse or partner is between the level of entitlement they receive, and the combined partnership or family income they were receiving pre-injury.

Surviving spouses or partners should receive a top up between the level of entitlement they receive, at effectively 48 per cent of the victim's pre-injury earnings, and the victim's full pre-injury earnings as calculated under the open-ended approach. This is

³⁵² Edelman, above n 306 at 40-057, 41-038.

³⁵³ At 41-051 - 41-071.

³⁵⁴ See further at: New Zealand Government "NZ Superannuation age to lift to 67 in 2040" (press release, 7 March 2017). Age of eligibility for New Zealand Superannuation has risen to 67 for individuals born after the 30th of June 1972. For persons born prior to this date, it is 65.

³⁵⁵ Discussed at Chapter VI B 1 above.

consistent with the open-ended approach, promoting victim interests, and the concept of meeting the victim's full loss.³⁵⁶

(c) Weekly Compensation for children

To avoid “double-recovery”, any ACC weekly compensation paid to a child of the deceased³⁵⁷ should be deducted from the top up award, just as the victim's ACC weekly compensation entitlements are. These entitlements are paid until the later of the child turning 18 years of age, or if the child continues full time study, the earlier of until that child ceases or completes study or turning 21 years of age.³⁵⁸ To prevent speculation of the child's scholarly goals, the deduction should be made on the basis of the child turning 18 with no further study ongoing.

F Discounts on Top ups

In the tort law system of damages it is usual to reduce the award as the victim is receiving funds presently, which are future cash flows, that they can invest and earn a return upon.³⁵⁹ This ability to earn a return on the award is accounted for in the discount rate,³⁶⁰ when calculating the future loss of income, so further discount should not be made on that basis for reparations awards.

It is hard to see why discounts should be justified on the basis the victim has received a benefit from the ACC Scheme, as was done in *Wai Shing*, and *Ask Metro Fire*.³⁶¹ Although the victim has received compensation for loss of earnings without having to engage in the time consuming and costly exercise of litigation, it is not a true benefit, as the victim could not have brought legal proceedings themselves.³⁶²

Judge Mabey was correct to state that in *Supermac Group*³⁶³ that ACC weekly compensation was a right, and that weekly compensation without litigation could not be a benefit as victims of injury could no longer bring proceedings for their loss.

In *Wai Shing*, Judge McGuire also justified the discount on the basis of the need to protect:

“the integrity of the system and the societal benefits gained out of the no fault system.”³⁶⁴

³⁵⁶ Discussed at Chapter VI B 1, VII, IX C above.

³⁵⁷ Accident Compensation Act, Schedule One, cl 70.

³⁵⁸ Schedule One, cl 70(5).

³⁵⁹ Edelman, above n 306 at 40-119.

³⁶⁰ At 40-119.

³⁶¹ *Wai Shing*, above n 188 at [88]-[90]; *Ask Metro Fire*, above n 189 at [27]-[32].

³⁶² Accident Compensation Act s 317(1).

³⁶³ *Supermac*, above n 249 at [52]; Discussed at Chapter VI A above.

³⁶⁴ *Wai Shing*, above n 188 at [89].

It is arguable that the integrity of the ACC Scheme is protected by the statutory bar on proceedings,³⁶⁵ which will prevent the victims from making any additional claim against the individual who caused their injury.

No discount should be made on the basis that the victim has receiving other ACC payments, such as lump sum compensation for permanent impairment,³⁶⁶ or child care following a fatal accident,³⁶⁷ This is because these payments compensate losses other than earnings, that Parliament has decided are compensable separately, by distinct payments.

Any discount or reduction made on the final award should be based on statistical or actuarial evidence before the Court, or to prevent the victim from recovering loss they have already been compensated for, such as payments made by an employer.

G Contributory Conduct of the Employee

Section 9(2)(c) of the Sentencing Act requires the Court to consider the conduct of the victim as a mitigating factor during sentencing.³⁶⁸

In *Delta Utility Services*, Judge Cook declined to make an award to compensate for future, or ongoing loss, considering that the victim's conduct in part contributed to his injuries.³⁶⁹

In *Oceana Gold*, Venning J agreed with Duffy J in *Eziform Roofing Products*,³⁷⁰ who held that an employer's sentence should not be mitigated due to the unwise conduct of the employee resulting in the injury³⁷¹. To do so would undermine the Primary Duty of Care³⁷² required of the employer, which may include preventing (so far as is "reasonably practicable"³⁷³) the unwise conduct of that employee in causing their own injury.³⁷⁴ Venning J also held that this applied to determining the quantum of

³⁶⁵ Accident Compensation Act, s 317(1).

³⁶⁶ Schedule One, cl 54, Section 69(1)(d); Lump sum compensation for permanent impairment provides compensation for the physical or mental harm caused by an injury itself, for example, the loss of an arm. Loss consequent on physical harm is compensated by, for example, weekly compensation; Schedule One, cls 32-46.

³⁶⁷ Schedule One, cls 76, 78(1); ACC childcare payments are a compensation to allow the surviving spouse or partner to arrange for childcare, where that childcare may have been taken care of by the deceased victim.

³⁶⁸ Sentencing Act, s 9(2)(c).

³⁶⁹ *Delta Utility Services*, above n 178 at [61]-[62].

³⁷⁰ *Department of Labour v Eziform Roofing Products* [2013] NZHC 1526.

³⁷¹ *Eziform*, above n 370 at [52], cited in [61] of *Oceana Gold*, above n 190.

³⁷² Health and Safety at Work Act, s 36.

³⁷³ Section 36(1).

³⁷⁴ *Eziform Roofing Products*, above n 370 at [52].

reparation.³⁷⁵ Venning J also agreed with Duffy J that the importance of the Primary Duty of Care could carry more weight than the importance of applying s 9(2)(c).³⁷⁶

I consider on this basis that Venning and Duffy JJ reached the correct conclusion, that the contributory conduct of an employee should not be used reduce the award of reparation.

³⁷⁵ *Oceana Gold*, above n 190 at [62]-[63].

³⁷⁶ *Oceana Gold*, above n 190 at [61]-[62].

X Conclusion

In terms of providing compensation for victims of injury, New Zealand is unique worldwide in having a comprehensive, no fault ACC Scheme. New Zealand is also unique in terms of allowing victims of crime to recover loss of earnings as a result of criminal offending from an offender through a notionally uncapped reparations scheme.³⁷⁷

This dissertation aims to address an issue at the nexus of those two unique features of New Zealand law. I have outlined why the current wording of s 32(5)³⁷⁸ is ambiguous, resulting in a lack of consistency when computing the quantum of reparations for loss of earnings. Review of case law to date has also shown why the existing methods of compensation are on their own unsatisfactory. The statutory shortfall approach is simple to calculate, but in the long term denies victims full compensation for their losses. The open-ended approach attempts to capture a victim's true loss, but is technically difficult to calculate, and ambiguous.³⁷⁹

The two-stage approach I have chosen attempts to trade off the disadvantages of each of the existing approaches against each other: The statutory shortfall approach will apply where its disadvantages are least felt, for short term loss of earnings, of less than five years. The open-ended approach will apply for losses beyond this period, and for fatal claims, where the greater range of factors the open-ended approach considers will allow this approach to fully capture a victim's loss, including for example future increases in salary due to promotion.³⁸⁰

Reparations are the only means victims have to recovering loss of earnings above that covered by the ACC Scheme.³⁸¹ To achieve Parliament's intentions to adequately compensate victims of crime for their actual losses, it is important that the methodologies applied by the Courts accurately capture a victim's loss of earnings. The recommended methodologies set out in this dissertation will, if adopted by the Courts, allow for fairer and more just outcomes for victims. These methods will also bring clarity and consistency for WorkSafe and offenders.

Behind the detail of calculations which have been at issue is the contest between the social contract conceptions underpinning the ACC Scheme and the desire to provide for the interests of crime. At times, Courts have tried to uphold the "integrity" of the ACC Scheme. Parliament has attempted to give priority to victim interests, but without

³⁷⁷ Discussed at Chapter VIII above.

³⁷⁸ Sentencing Act, s 32(5).

³⁷⁹ Discussed at Chapter VII above.

³⁸⁰ Discussed at Chapter IX above.

³⁸¹ Accident Compensation Act, ss 317(1), 319(1).

considering how this should be applied in practice. This has resulted in decisions such as *Davies*,³⁸² and *Oceana Gold*.³⁸³

Contrary to the opinions of some Judges, and the Law Commission,³⁸⁴ I consider the interests of victims of crime should be given priority over more general interests such as the integrity of the ACC Scheme. Where an individual has been given a lifelong incapacity to earn, through the carelessness or recklessness of their employer, it is right that the employer should be made to top up the earnings they will lose out on as a result of living off the ACC Scheme for the rest of their lives. It is not as if people engage in risky employment purely out of the enjoyment of, for example, driving heavy machinery, or servicing electric power lines. People engage in risky employment because they need to earn a living.

This produces inconsistent outcomes for victims of injury, as not all victims injured by the actions of their employers will have their wrongs vindicated through prosecution by WorkSafe. But it is those victims, whose injuries become the subject of prosecution, who we can do the most right by. That is what I have hoped to achieve in writing this dissertation.

Those victims who are not able to receive top up earnings through reparations will still benefit from the ACC weekly compensation they receive, at 80 per cent of their pre-injury earnings.³⁸⁵ Allowing some victims to recover full compensation whilst others receive a fair level of compensation is in my opinion a more just solution than denying any victim full compensation, merely for the reason that all victims of injury cannot receive full compensation.³⁸⁶

³⁸² *Davies*, above n 94.

³⁸³ *Oceana Gold*, above n 190.

³⁸⁴ Law Commission *Compensating Crime Victims* (NZLC R121, 2010) at 12-16.

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