

**NEW ZEALAND'S ACCIDENT
COMPENSATION SCHEME –
MENTAL INJURY COVER AT THE
MARGINS**

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New Zealand's Accident Compensation Scheme – Mental Injury Cover at the Margins

I Introduction

Since the inception of New Zealand's no-fault accident compensation scheme, the mind/body dichotomy has been drawn.¹ This distinction has developed through numerous reforms to the scheme, resulting in cover for accidental mental injury being limited to specific circumstances. The difficulties with limited mental injury cover was thrown into the public sphere following the recent case of *Toomey v Accident Compensation Corporation*.² In *Toomey*, the Court reversed the Accident Compensation Corporation's (ACC) decision and granted Mr Toomey cover for his mental injury suffered following his assistance of emergency services in the Christchurch earthquake.³

An examination of mental injury cover under the Accident Compensation Act 2001⁴ ("2001 Act") illustrates that coverage is illogical, arbitrary and inconsistent. Drawing together the common themes of dysfunction, it is apparent that the cover provisions for mental injury are ambiguous and have no clear principled basis. In analysing the principles which govern the cover boundaries of the 2001 Act, the author will argue that the current inconsistencies can be resolved through expanding cover for mental injury through legislative reform. The final part of the analysis will provide suggestions on how such reform could be undertaken to remove the current inequity and arbitrary line-drawing whilst ensuring that mental injury cover remains consistent with the conceptual framework of the Act.

¹ Accident Compensation Act 1972, s 2 provided cover for 'the physical and mental consequences' of an accident or injury.

² *Toomey v Accident Compensation Corporation* [2017] NZACC 44.

³ For media reports on *Toomey* see: Cecile Meier "Christchurch quake rescuer Bill Toomey wins fight for ACC cover for post-traumatic stress" *Stuff* (online ed, New Zealand, 1 May 2017), Emma Cropper "Earthquake rescuer with PTSD wins landmark pay out" *Newshub* (online ed, New Zealand, 1 May 2017) and Tim Graham "Quake rescuer wins landmark court case" *Radio Live New Zealand* (online ed, New Zealand, 1 May 2017).

⁴ Accident Compensation Act 2001.

II Legislative history of the Accident Compensation Scheme

A Background to the Accident Compensation Scheme

Before the introduction of the first Accident Compensation Scheme (“ACC scheme”), the primary mechanism for compensating accidental mental harm was through negligence action in tort.⁵ A plaintiff would be compensated for psychological harm if it was caused by a defendant who breached a ‘duty of care’ putting the plaintiff at foreseeable risk of suffering mental harm.⁶ Compensation was awarded in the form of damages for actual economic loss, pain and suffering and loss of enjoyment of life. The right to bring a claim for mental harm at common law was barred following the enactment of the Accident Compensation Act in 1972 (“the 1972 Act”).⁷

The ACC scheme was born from the 1967 Royal Commission into Workers’ Compensation in New Zealand. The Commission investigated the law relating to compensation for incapacity arising out of accidents suffered by employees.⁸ The report produced from the investigation, referred to as the ‘Woodhouse Report’ identified numerous problems with the common law process of compensating personal injury by accident.⁹ The report’s criticism focused on the ‘fault principle,’ where to receive compensation a person would need to prove that the defendant was at fault.¹⁰ The report identified numerous other disadvantages. These included that the economic consequences of negligent conduct were spread via insurance over the whole community, that compulsory insurance undermined the threat of damages incentivising people to act cautiously and the inefficiencies of the litigation process.¹¹

⁵ Other mechanisms of compensation for mental injury included workers’ compensation under Workers’ Compensation Act 1956 and criminal injuries compensation under Criminal Injuries Compensation Act 1963.

⁶ *King v Phillips* [1953] 1 QB 429 (CA) at 441 approved in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388 (PC) at 426.

⁷ Accident Compensation Act 1972, s 5.

⁸ S Todd *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at 23.

⁹ 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) [*The Woodhouse Report*].

¹⁰ *Ibid* at 49-50.

¹¹ *Ibid* at 78.

In light of these disadvantages, the Commission recommended replacing the existing compensation schemes,¹² with a comprehensive, no-fault system of accident prevention, rehabilitation, and compensation.¹³ It was hoped that through a comprehensive no-fault system, based on the guiding principles in the report, difficulties presented by the common law would be avoided.¹⁴ Following the Woodhouse Report, a White Paper¹⁵ and a Select Committee report¹⁶, Parliament enacted the first Accident Compensation Act in 1972.¹⁷

B Development of cover for mental injury under the Accident Compensation Acts

Under the first ACC schemes,¹⁸ ‘personal injury by accident’ was not fully defined, but included ‘the physical and mental consequences of any such injury or of the accident’.¹⁹ Cover could be sought for the physical and mental consequences that arose from either the injury *or* the accident and as what constituted ‘mental consequences’ was also left undefined this provided generous scope of cover for mental injuries.²⁰

Accident Compensation Corporation v E is a paradigm example of the broad scope of cover afforded by the initial ACC schemes.²¹ In *ACC v E*, the claimant suffered no physical injuries but had a psychiatric breakdown during an intensive four-day work-related management course. The Court of Appeal determined that cover for mental consequences did not have to be dependent upon a physical injury because cover was provided for mental consequences from the injury or the accident.²² The Court

¹² Such as tort, workers’ compensation, and criminal injuries compensation.

¹³ The Woodhouse Report, above n 9, at 108-113.

¹⁴ The principles referred to are the principles of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency stated in The Woodhouse Report, above n 9, at 40-41. For further discussion of these principles see Chapter IV.

¹⁵ Department of Labour *Personal Injury: A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (1969) cited in S Todd, above n 8, at 25.

¹⁶ Select Committee *Report of the Select Committee on Compensation for Personal Injury in New Zealand* (1970) cited in S Todd, above 8, at 25.

¹⁷ Accident Compensation Act 1972.

¹⁸ Accident Compensation Act 1972 and Accident Compensation Act 1982 (“the 1982 Act”).

¹⁹ Section 2.

²⁰ *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA) at 433 and *Cochrane v Accident Compensation Corporation* [1994] NZAR 6 (HC) at 5.

²¹ *Accident Compensation Corporation v E*, above n 20.

²² *Ibid* at 433. The Court of Appeal believed there was no reasons construe the word ‘or’ disjunctively.

considered that the management course was an ‘accident’, and concluded that there was cover for personal injury by accident because the management course was an instrumental factor leading to the respondent’s breakdown despite other predisposing factors.²³

The generous scope of cover for mental injury was short lived as the ACC scheme sharply changed direction in 1992. Following a change in Government in 1990, the Minister of Labour issued a policy statement – *A Fairer Scheme* – which reviewed the state of the 1982 Act.²⁴ While the report recognised the value of the no-fault scheme, it criticised the fairness and affordability of the scheme finding that the cost of accident compensation had risen on average by 25% per year from 1985-1990.²⁵ Expansive judicial interpretation by the Courts was identified in the report as one of the reasons for an increase in the scheme’s cost.²⁶

In response to the financial concerns, *A Fairer Scheme*, recommended replacing the overarching concept of ‘personal injury by accident’ with precisely defined types of covered personal injury.²⁷ This approach was adopted in the Accident Rehabilitation and Compensation Insurance Act 1992 (“the 1992 Act”). The 1992 Act defined ‘accident’ and ‘personal injury’ in exhaustive terms.²⁸ Cover for mental injury was limited to mental injury caused by physical injury or certain specified sexual offences.²⁹ This had the effect of excluding cases such as *ACC v E*, reintroducing the right to sue for psychiatric injury suffered in circumstances outside those covered in the ACC scheme.³⁰

²³ At 432.

²⁴ W F Birch *Accident Compensation: A Fairer Scheme* (Office of the Minister of Labour, Wellington, 1991) [*A Fairer Scheme*].

²⁵ *Ibid* at 8.

²⁶ *Ibid* at 31. A Fairer Scheme was published in July 1991, before the Court of Appeal’s decision in *Accident Compensation Corporation v E*, above n 20, but after the High Court’s decision in favour of cover in the case. Examples of other cases which took an expansive approach to the scheme include: *Green v Matheson* [1989] 3 NZLR 564 (CA), *Willis v Attorney General* [1989] 3 NZLR 574 (CA) and *Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436 (CA).

²⁷ *A Fairer Scheme*, above n 24, at 31.

²⁸ Sections 3 and 4.

²⁹ Sections 4 and 8.

³⁰ *Queenstown Lakes District Council v Palmer* [1998] NZCA 190; [1999] 1 NZLR 549 (CA).

The 1992 Act also introduced the definition of mental injury as being ‘a clinically significant behavioural, cognitive, or psychological dysfunction’.³¹ This definition of mental injury was based on the American *Diagnostic and Statistical Manual of Mental Disorders* (“DSM IV”).³² What is determined as ‘clinically significant’ is dependent on psychiatric and psychological evidence provided by clinicians – therefore, this definition indexed mental injury to clinical progress.

By employing a definition of ‘mental injury’ based on the DSM IV criteria, a clear policy choice was made to set the threshold for mental injury claims higher than the original schemes ‘mental consequences.’ The definition had the result of limiting the scope of cover as claims of emotional suffering, fear and shock which did not amount to a clinically significant condition were excluded from the ACC scheme.³³ Entitlements were also limited by the 1992 Act reform which removed lump sum compensation for pain and suffering, and loss of enjoyment of life for physical injuries.³⁴

The 1992 Act transitioned ACC from providing comprehensive cover for mental injury to a scheme limited in scope by rigid statutory requirements. The effects of the 1992 reform remain apparent. Following two new statutes,³⁵ the 2001 Act broadly reflects the scope of cover for mental injury of the 1992 Act.

III Mental injury cover under the current law

A Introduction

To receive entitlements for an injury under the 2001 Act a person must have ‘cover’. For a condition to have ‘cover’³⁶ it must fall within the definition of ‘personal injury’

³¹ Section 3.

³² American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, Washington, 1994).

³³ *Comerford-Parker v Accident Compensation Corporation* [2011] NZAR 481 at [13] and *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [IPA 27.3].

³⁴ S Todd, above n 8, at 29.

³⁵ Accident Insurance Act 1998 and Injury Prevention, Rehabilitation and Compensation Act repealed as from 3 March 2010, and renamed the “Accident Compensation Act 2001” by s 5(1)(a) Accident Compensation Amendment Act 2010 (2010 No 1).

³⁶ Section 20.

in s 26. The definition of ‘personal injury’ limits cover for mental injury to 3 specific categories:

- Mental injury because of physical injury;³⁷
- Mental injury because of specified offences;³⁸ and
- Work-related mental injury.³⁹

Where people suffer a mental injury outside of these listed circumstances, they will not be covered by the Act and damages can be sought at common law.⁴⁰

This chapter will examine the three categories of covered mental injury and the difficulties associated with each cover provision.

B Mental injury definition

The 2001 Act retained the definition of mental injury from the 1992 Act. Therefore, for a person to have a claim for a mental injury they must have a ‘clinically significant’ dysfunction.⁴¹ There is contention around what dysfunctions are encompassed by this definition, for example, whether chronic pain syndrome (CPS) could be a ‘mental injury’. While authors like Tennant,⁴² advocate that CPS should receive cover as a physical injury, it is possible that CPS could be covered as a ‘mental injury’ under s 26(1)(c).⁴³ Arguably, CPS could constitute a mental injury caused by physiological changes being the ‘physical injury’.⁴⁴ The Courts have not made a decisive ruling on

³⁷ Section 26(1)(c), see Appendix One.

³⁸ Section 21, see Appendix One.

³⁹ Section 21B, see Appendix One.

⁴⁰ *Queenstown Lakes District Council v Palmer*, above n 30 and S Todd, above n 8, at 51.

⁴¹ Section 27.

⁴² Doug Tennent “Pain as Physical Injury” (2014) 4 NZLJ 157 and Doug Tennent “Pain as a physical injury: issues arising out of *Cone v Accident Compensation Corporation*” (2015) 8 NZLJ 309.

⁴³ The International Association for the Study of Pain and American Psychiatric Association as international authorities on the diagnosis and classification of pain conditions recognise pain syndromes pronominally as mental injuries see Department of Labour "*Paper 2: Legislative Options for Expanding Cover for Work-Related Gradual Process, Disease, and Infection*" (Wellington, 18 May 2007) (Obtained under Official Information Act 1982 Request to Ministry of Business, Innovation and Employment) at 11.

⁴⁴ Simon Connell “Chronic pain, physical injury and mental injury” (2015) 11 NZLJ 425 at 427.

this precise argument,⁴⁵ however, there is potential that s 26(1)(c) can provide cover for CPS.

C Cover for mental injury because of physical injuries

Cover is available for a person who suffers a mental injury ‘because of’ their physical injuries.⁴⁶ Interestingly, any physical injury is sufficient to support a claim for mental injury, even if the physical injury is itself not covered by the Act.⁴⁷

The wording of s 26 requires the physical injury to be the cause of the mental injury.⁴⁸ It is not sufficient that an accident triggers a pre-existing mental injury to meet the cover specifications under s 26(1)(c) as per the Court of Appeal in *Hornby v Accident Compensation Corporation*.⁴⁹ In *Hornby*, the Court canvassed three possible situations where cover might arise under s 26(1)(c):⁵⁰

1. Mental injury arising out of an accident and resultant physical injuries;
2. A pre-existing mental condition maybe aggravated somehow, solely because of the physical injuries; and
3. Physical injuries may have been a contributing cause, although not the only contributing factor to, the resurgence of a prior mental affliction.

While medical evidence is relevant in determining the existence of a causative link, it is not necessarily determinative of causation. The Court of Appeal in *Accident Compensation Corporation v Ambros* established causation as a legal test, determined by a wide range of evidence, ranging from medical opinion to the claimant’s own

⁴⁵ Along a similar vein however is *Seddon v Accident Compensation Corporation* HC Wellington CIV-2005-485-1235, 19 May 2006. In *Seddon* a claim under s 26(1)(c) was made for CPS (mental injury) arising from a strained neck (physical injury). The Court declined cover because of an insufficient causal connection between CPS and the neck strain.

⁴⁶ Section 26(1)(c).

⁴⁷ *Monk v Accident Compensation Corporation* [2012] NZCA 615, [2013] NZAR 1 at [30].

⁴⁸ *Hornby v Accident Compensation Corporation* [2009] NZCA 576, (2010) 9 NZELC 93, 476 and *Jones v Accident Compensation Corporation* [2015] NZACC 36.

⁴⁹ *Hornby v Accident Compensation Corporation*, above n 48.

⁵⁰ *Ibid*, at [34].

opinion.⁵¹ The Court held that the legal test should be whether a ‘robust inference’ of causation can be drawn.⁵²

I Issues with cover under s 26(1)(c)

The difficulty with cover under s 26(1)(c) is the fundamental limitations the section places on ‘pure mental injury’ and the anomalies this creates between physical and mental injury cover.

Situations where people suffer mental injury but no physical injury (“pure mental injury”), because of an accident, are excluded for cover unless the circumstances fall within those prescribed in s 21 and s 21B.⁵³ *O v Accident Compensation Corporation* is a seminal example of the inequity created by only providing cover for pure mental injury in limited circumstances.⁵⁴ In *O*, the claimant was involved in a car crash where he witnessed the accidental death of his partner who was 8.5 months pregnant with his unborn child. Physically, the claimant suffered only minor physical injuries, but because of the traumatic accident, he developed post-traumatic stress disorder (PTSD).⁵⁵ The claimant could not seek cover for his mental injury which developed from the car accident as it was apparent that it was the witnessing of the death of his family which caused the mental injury not his minor physical injuries.⁵⁶

Because *O*’s physical injuries did not cause his mental injury, he is considered a “secondary victim” – meaning his mental injury developed from witnessing a physical injury to another person.⁵⁷ Previously, secondary victims suffering mental injury could seek cover. For example, the claimant in *Cochrane v Accident Compensation*

⁵¹ *Accident Compensation Corporation v Ambros* [2008] 1 NZLR 340 (CA) at [67]. The test for causation in *Ambros* was affirmed in *Hornby*, above n 48, as being applicable to determining causation in the context of s 26(1)(c).

⁵² At [67].

⁵³ This contrasts with historical cover under the 1972 and 1982 Acts under which claimants could seek cover for ‘pure’ mental injury in a wider range of circumstances.

⁵⁴ *O v Accident Compensation Corporation* [2016] NZACC 215.

⁵⁵ *Ibid* at [3].

⁵⁶ *Ibid* at [28].

⁵⁷ This terminology comes from the common law which distinguishes between ‘primary victims’ being those directly involved in the accident and ‘secondary victims’ who suffer an injury from witnessing an accident relating to a primary victim. See generally *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA) and *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.

Corporation who developed a mental disorder after witnessing her son die in hospital from being tortured by a gang was successfully able to get compensation under ACC.⁵⁸

The limited scope of s 26(1)(c) creates anomalies between cover for mental and physical injuries. If *O* had suffered only ‘pure physical injuries’ such as a broken leg from the car accident, this would have been covered without contention.⁵⁹ But pure mental injuries which arise from the same circumstances, without any physical harm, are provided no cover under the 2001 Act. It is highly conceivable that a mental injury suffered by *O*, is more detrimental to a person’s wellbeing than physical damage.⁶⁰ As per Stevens “the loss of our mental health is a more fundamental violation of our sense of self than a loss of a finger”⁶¹ – yet our ACC scheme does not recognise it as the same sort of incapacity.

D Cover for mental injury caused by specified criminal acts

Section 21 provides cover for mental injury caused by an act within the description of an offence specified in schedule three of the Act. Schedule three,⁶² lists all the major sex crimes in the Crimes Act 1961 such as sexual violation and indecent assault as well as the crime of infecting with a disease. Under s 21, a causative link between the mental injury and a specified offence must be established, but a person does not need to be charged or convicted of the offence for a claimant to be covered.⁶³

There is uncertainty about what the phrase ‘within the description of the listed offences’ incorporates, creating ambiguity in the scope of cover under s 21.⁶⁴ Billie Little suggests if the sexual conduct in question does not meet any or some of the statutory requirements of the sexual offence it is arguable that this may still fall within the meaning of an act ‘that is within the description of’ a listed offence.⁶⁵ For example,

⁵⁸ *Cochrane v Accident Compensation Corporation*, above n 20.

⁵⁹ It would have been covered as a personal injury caused by an accident as per s 20(2) Accident Compensation Act 2001.

⁶⁰ This was recognised by the House of Lords in *Bourhill v Young* [1943] AC 92 (HL) at 103.

⁶¹ Robert Stevens *Torts and Rights* (Oxford University Press, Oxford, 2007) at 55.

⁶² See Appendix One.

⁶³ Section 21(5).

⁶⁴ Billie Little and others *Personal Injury in New Zealand* (online loose-leaf ed, Thomson Reuters) at [AC21.02] and S Todd, above n 8, at 50.

⁶⁵ *Ibid.*

someone who suffers a mental injury from being shown pornographic material as a form of sexual harassment could potentially be covered under s 21. It is possible that such circumstances could come within the description of ‘indecent assault’ which is a listed schedule three offence.⁶⁶ Showing pornographic material to another person would meet the criteria of being ‘indecent’, but without some application, attempt or threat of force it is unlikely to constitute an ‘assault’.⁶⁷ Potentially, however, these circumstances could still be sufficient to come ‘within the description’ of indecent assault.

This issue was partially discussed in *KSB v Accident Compensation Corporation*⁶⁸ where the Court of Appeal analysed whether all of the elements of sexual violation were required for cover under s 21.⁶⁹ The Court found that the absence of reasonable belief in consent, an element of the crime of sexual violation,⁷⁰ did not need to be established to seek cover under ACC.⁷¹ The Court reasoned that because ‘reasonable belief’ of consent is unlikely to reduce trauma to the claimant, there is no clear reason why this element should control cover under ACC.⁷²

The *KSB* decision expands potential arguments where the sexual conduct in question does not meet some of the statutory requirements. However, given the statutory language and history of s 21,⁷³ it is unlikely that a claim would be successful where it does not meet any of the statutory elements of a scheduled offence.

⁶⁶ Indecent assault requires an ‘assault’ and ‘circumstances of indecency’ as per *R v Leason* (1968) 52 Cr App R 185 (CA) at 187.

⁶⁷ Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CA2.03.02].

⁶⁸ *KSB v Accident Compensation Corporation* [2012] NZCA 82, (2012) 25 CRNZ 599.

⁶⁹ *Ibid*, at [4].

⁷⁰ This element prevents the finding of the offence in criminal law.

⁷¹ *Ibid*, at [31].

⁷² *Ibid*, at [30].

⁷³ The legislative history of s 21 shows Parliament deliberately limiting cover of mental injury caused by criminal acts by reference to specified sexual offences. As commented by Randerson J in *M v Accident Compensation Corporation* [2006] 3 NZLR 127 (HC) at [19] if Parliament had intended to include all offences of sexual nature or generally then it would have done so in the various opportunity it has had for amendment.

1 *Issues with cover under s 21*

Many of the difficulties under s 21 stem from the complicated relationship between ACC and criminal law. Other problems include anomalous cover for some specified criminal events and uncertainty surrounding the extent of cover for secondary victims.

The biggest issue with cover under s 21 is that it is dependent on sexual crimes. The controversial decision of *KSB* illustrates this difficulty. In *KSB*, the appellant sought cover for PTSD which she suffered upon discovering her partner was HIV-positive, although she was not infected herself. The appellant sought to bring her claim ‘within the description’ of sexual violation to receive cover under ACC.⁷⁴ The main issue on appeal was whether the partner’s failure to disclose his HIV positive status vitiated the appellant’s consent to sexual intercourse as to fall within the description of sexual violation.⁷⁵

In New Zealand, consent to sexual intercourse is vitiated where there is a mistake as to the ‘the nature and quality’ of the act.⁷⁶ The limits to such a mistake and whether this includes an error about HIV status prior to *KSB* was unexplored in New Zealand.⁷⁷ The Court of Appeal recognised the different overseas authority on this issue but aligned with the Canadian approach in *R v Currier*,⁷⁸ concluding that deception of HIV status vitiated the appellant’s consent. Therefore, sexual violation was established for the purposes of providing cover under s 21.

While *KSB* expands cover under s 21 by widening the scope of sexual violation, this decision has created several difficult problems for the criminal law. Numerous commentators such as Gallavin, Connell and Todd have criticised the decision which radically changes the substantive law on sexual offending by imposing a positive duty to disclose HIV status.⁷⁹ The decision additionally raises numerous other questions in

⁷⁴ Sexual violation is an offence included in Schedule 3 Accident Compensation Act 2001. The partner was convicted of criminal nuisance under s 145 Crimes Act 1961, but as this is not a scheduled offence the appellant had to bring her claim under sexual violation.

⁷⁵ *KSB v Accident Compensation Corporation*, above n 68, at [4].

⁷⁶ Section 128A(7) Crimes Act 1961.

⁷⁷ S Todd, above n 8, at 50.

⁷⁸ *R v Currier* [1998] 2 SCR 371.

⁷⁹ Simon Connell “ACC infects the criminal law?” (2012) 4 NZLJ 135 at 136 and Chris Gallavin “Fraud vitiating consent” (2012) 5 NZLJ 156 at 156 and S Todd, above n 8, at 50.

a criminal law context such as fair labelling and other circumstances which may vitiate consent.⁸⁰

Due to cover being parasitic on the criminal law under s 21 the Court was forced to decide the case for both the purposes of ACC and the criminal law.⁸¹ This relationship is troubling because the imperatives which lead to a decision in an ACC context do not necessarily align with those in a criminal law context.⁸² Even if the Court of Appeal had decided that consent was not vitiated by non-disclosure of the appellant's partner's HIV status, why should technicalities of the criminal law, based on an entirely different set of principles, determine cover for mental injury? Whatever the outcome of *KSB* there seems to be an unnecessary complication by tying together ACC and criminal law.

Cover under s 21 being dependent on specified sexual offences links to another general difficulty – anomalous cover. Section 21 provides cover for mental injury caused by specific criminally identified offences but not other crimes involving equally serious criminality.⁸³ For example, the appellants in *Woodd v Accident Compensation Corporation* and *Wells-Henderson v Accident Compensation Corporation* who suffered a pure mental injury following an assault during a burglary were afforded no cover under the Act.⁸⁴ The factual scenario of *Woodd* and *Wells-Henderson* highlights the unfairness of the anomalous cover as it is plausible that such situations could cause a mental injury.

The rationale of s 21 focusing on specified offences is likely to be based on a societal assumption that sex crimes are particularly likely to cause mental injury as opposed to

⁸⁰ S Todd, above n 8, at 50.

⁸¹ Andrew Beck “Accident Compensation and the Supreme Court” (2012) 5 NZLJ 162 at 164

⁸² An example of the conflict between ACC and criminal law is the relevance of the state of mind (mens rea) of the perpetrator. In a criminal context, this is seminal to a conviction, in contrast to the ACC scheme mens rea of the person who inflicted the injury is not relevant at all, the focus of the no-fault scheme is the consequences of an accident.

⁸³ S Todd, above n 8, at 50.

⁸⁴ *Woodd v Accident Compensation Corporation* DC Wellington Decision No. 54/2003, 2 April 2003 and *Wells-Henderson v Accident Compensation Corporation* [2015] NZACC 209. In both cases, the appellants only suffered minor physical injuries thus they had no claim under s 26(1)(c). In *Woodd* the appellant attempted to bring her claim under the umbrella of s 21 due to her belief that she was going to be raped. This was rejected by the Court at [44].

other distressing events.⁸⁵ There is some truth to this societal presumption, as PTSD is one of the most prevalent mental injuries following some form of sexual abuse.⁸⁶ However, PTSD can also occur outside of sexual abuse cases. PTSD is framed in terms of trauma; which include exposure to sexual violence but also to threatened death or serious injury.⁸⁷ This suggests that anomalous cover might not be justified if one considers the broad causes of mental injury.

While cover under s 21 is likely to exclude secondary victims, as it requires that the crime is ‘performed on with or in relation to the person’ who suffers a mental injury,⁸⁸ there is an argument that it could encompass secondary victims in some circumstances. Billie Little suggests that it is possible the words ‘in relation to’ could include claimants where the crime committed on one person is intended to harm another.⁸⁹ For example, an offender who sexually assaults a child as an attack on a parent could be performing an act ‘in relation’ to a parent.⁹⁰ This is another area of interpretative uncertainty within s 21.

E Cover for work-related mental injury

Section 21B provides cover for mental injury on a standalone basis where a claimant witnesses a sudden incident during their employment. Cover under s 21B is tightly defined. Section 21B only provides cover for a mental injury that is caused by a single event that:

- a person experiences, sees or hears directly;⁹¹

⁸⁵ *AB v Accident Rehabilitation Compensation Insurance Corporation* 1996] 1 BACR 336 at 343 Justice Ongle states s 21 provides cover for ‘recognised situations of social concern because it is notorious that profound psychological consequences can follow sexual assaults even though no physical injury occurs’.

⁸⁶ Kaitlin A. Chivers-Wilson ‘Sexual Assault and post-traumatic stress disorder: A review of the biological, psychological and sociological factors and treatments’ (2006) 9(2) MJM 111 at 112.

⁸⁷ American Psychiatric Association, above n 32.

⁸⁸ Section 21(2).

⁸⁹ Little, above n 64, at [21.07].

⁹⁰ *Ibid.* At common law mental injury suffered in similar circumstances to the hypothetical scenario above were compensated in *W and Others v Essex County Council and Another* [2001] 2 AC 592. See Chapter IV, Part E for further explanation.

⁹¹ Section 21B(2)(a).

- is in circumstances that are ‘work-related’, meaning broadly, that the personal injury is suffered at any place the person is at ‘for the purposes of employment’;⁹² and
- is an event that could be reasonably expected to cause mental injury to persons generally.⁹³

A person ‘experiences, sees or hears directly’ an event if they are involved in or witness the event and are near the event at the time it occurs.⁹⁴ Experiencing, seeing or hearing the event through a secondary source such as a television or radio, however, is insufficient.⁹⁵

The event must be ‘sudden’ or ‘a direct outcome’ of a sudden event.⁹⁶ Witnesses who are not present at the time of the accident are captured by the concept of a ‘direct outcome’ of a sudden event.⁹⁷ The definition of ‘event’ includes a ‘series of events’ that arise from the same cause or circumstance and together comprise a single incident or occasion but do not include gradual process.⁹⁸ This terminology is similar to the s 25(1)(a) definition of accident.

Distinguishing a ‘series of events’ from ‘gradual process’ is often a grey-area in ACC disputes.⁹⁹ Judge Ongley in *Waghorn v Accident Compensation Corporation* observed that a distinction must be drawn between events which are so gradually incremental that they cannot be distinguished from one another, as against a series of forceful events each contributing in some gradual process.¹⁰⁰ An example of a gradual process is the

⁹² Section 21B(2)(a).

⁹³ Section 21B(2)(b).

⁹⁴ Section 21B(5).

⁹⁵ Section 21B(6).

⁹⁶ Section 21B(7)(a).

⁹⁷ For example, using the facts in *Penman v Accident Compensation Corporation* (District Court, Palmerston North Decision No 186/2009, 30 October 2009, Judge Beattie) the claimant suffered PTSD after witnessing a colleague crushed to death by building machinery. If the claimant did not see the actual accident of his colleague being crushed by building machinery but witnessed the direct aftermath, such as seeing his colleagues body the claimant may still have cover under s 21B.

⁹⁸ Section 21B(7)(b) and (c).

⁹⁹ This is also a difficult area of interpretation under s 25(1)(a).

¹⁰⁰ *Waghorn v Accident Compensation Corporation* [2013] NZACC 2 at [33].

case of *OCS v Accident Compensation Corporation*.¹⁰¹ The respondent had been subjected to years of harassment by fellow employees and suffered a mental injury following one incident where a colleague ‘squashed’ her face. The Court held that the squashing of the respondent’s face was part of a “long-running pattern of bullying... it was the ‘final straw’ event.” Therefore, the respondent’s mental injury was not caused by a single traumatic event of the kind required by s 21B, rather by a gradual process of harassment.¹⁰²

1 Issues with cover under s 21B

Difficulties with cover under s 21B ultimately come down to unfair boundary matters. These include the differentiation between mental injury suffered in the workplace and other injury environments and the distinguishing of a ‘series of event’ from ‘gradual process’. Such boundary issues have been subject to recent Court disputes.¹⁰³ In these decisions, the tension between interpreting the strict statutory requirements, the Court’s interpretation of the 2001 Act’s social purpose and desire to uphold individual justice is apparent. This has resulted in some questionable judicial interpretation, making the scope of cover under s 21B uncertain.

Section 21B provides cover for individuals who suffer a personal injury because of a traumatic event in the workplace, but not elsewhere. Section 21B is limited to injuries that occur in ‘a place of employment’, defined as a place where ‘work is carried out for the purposes of pecuniary gain or profit’.¹⁰⁴ This creates anomalous cover for mental injury between workers’ and non-workers. Volunteers, persons undertaking work experience and people whom are in the workplace but are not employees, may witness the same traumatic event which causes mental injury to workers but are excluded from cover.¹⁰⁵

¹⁰¹ *OCS Ltd v TW and Accident Compensation Corporation* [2013] NZACC 177.

¹⁰² At [81] – [82].

¹⁰³ *Toomey v Accident Compensation Corporation*, above n 2, and *MC v Accident Compensation Corporation* [2014] NZHC 1394.

¹⁰⁴ Section 28(1) and Section 6.

¹⁰⁵ *Mazengarb’s Employment Law*, above n 33, at [IPA 28.02].

The inequity of this distinction was brought into the public sphere in the recent case *Toomey v Accident Compensation Corporation*.¹⁰⁶ Mr Toomey, a self-employed builder, assisted the Fire Service in Christchurch central city following the February 22nd Earthquake.¹⁰⁷ Following his assistance, Mr Toomey suffered PTSD from witnessing the aftermath of the earthquake.¹⁰⁸ ACC declined Mr Toomey's initial application because he was acting voluntarily; meaning his claim fell outside the scope of being 'work-related'.¹⁰⁹ However, on appeal, the Court held that Mr Toomey was not a volunteer but rather an agent of the Fire Service, making his claim was 'work-related'.¹¹⁰ The Court reasoned that because he offered his services as a builder, in the form of his specialist knowledge and received pecuniary gain from drawings as a self-employed builder this was sufficient to meet the definition of a 'work-related' injury.¹¹¹ The Court supported their conclusion with the particular and extreme factual scenario and a 'generous and unniggardly interpretation' of the legislation to allow the ACC scheme to be 'consistent with the overall statutory purpose'.¹¹²

As a question of interpretation, this decision is dubious. The s 28 definition of 'work-related injury' and s 6 definition of 'employment' meaning 'for the purpose of pecuniary gain' create clear boundaries in the Act. If Mr Toomey were properly an 'agent' of the Fire Service for employment (rather than a volunteer), then it would be expected that payment would come from the Fire Service – yet this was not the case. The Court emphasised the circumstances of Toomey's case being those of a national disaster, analogising to instances of emergency and wartime where a broad interpretation has accounted for the specific extreme circumstances.¹¹³

The decision in *Toomey* has created uncertainty about the cover boundaries of s 21B. It raises many questions such as; how would of this case be decided if Mr Toomey was

¹⁰⁶ *Toomey v Accident Compensation Corporation*, above n 2.

¹⁰⁷ *Ibid* at [2].

¹⁰⁸ *Ibid* at [5]. Mr Toomey witnessed extremely traumatic incidents whilst assisting the earthquake recovery – people died in front of him and he comforted a lady who was alive but crushed by the building.

¹⁰⁹ *Ibid* at [6].

¹¹⁰ *Ibid* at [33].

¹¹¹ *Ibid* at [35].

¹¹² *Ibid* at [32] quoting Kos J in *Murray v Accident Compensation Corporation* [2013] NZHC 2967.

¹¹³ *Ibid* at [38].

not self-employed? Would the Court be able to stretch the legislature to include such a person? Why should the extremity of the circumstances be decisive of cover in an accident compensation scheme?

ACC has sought leave to appeal the decision in *Toomey* to clarify this area of law. The outcome of the appeal aside, *Toomey* highlights the inequity of limiting cover for pure mental injury to that which occurs in the workplace.

The requirement that the mental injury is caused by a ‘single event’ is another source of difficulty. A single event under s 21B(7) includes a sudden or series of events which have arisen from the same circumstances but excludes gradual process. Labelled by the media as a ‘watershed’ case,¹¹⁴ the recent decision of *MC v Accident Compensation Corporation*, is the first successful claim for cover under s 21B ‘series of events’ criteria.¹¹⁵ In *MC*, the appellant served as a reserves force soldier in Afghanistan in 2009. He had a particularly horrific time on tour, witnessing rocket attacks and an explosion of a helicopter which resulted in a great loss of life.¹¹⁶ In 2013, the appellant was diagnosed with PTSD and sought cover under s 21B.¹¹⁷ The appellant argued that the tour of Afghanistan and the traumatic events which occurred during this tour amounted to a ‘single event’ as a ‘series of events’ that arose from the same causal circumstances and together comprised a single event.¹¹⁸ The Court accepted this argument.

The outcome of the Court’s decision in *MC* is arguable. The Court distinguished the circumstances of *MC* from ‘gradual process’ cases such as *OCS* where the appellant was bullied over a period of time and eventuated in the development of mental injury because the “background of other stressors and the final event are of an entirely

¹¹⁴ Max Towle “Ex-soldier wins ‘watershed’ post-traumatic stress case” *Radio New Zealand* (online ed, New Zealand, 2 November 2016).

¹¹⁵ *MC v Accident Compensation Corporation*, above n 103.

¹¹⁶ *Ibid* at [14].

¹¹⁷ *Ibid* at [14]. The beginning of the judgment discusses whether the mental injury was attributable an accumulation of events which occurred over a decade in the course of the appellant’s employment as a Police Officer as well as a Reserve Force Soldier. The Court accepted, based on medical evidence that there is a strong linkage between the events in Afghanistan and the PTSD and proceeded on this basis. The Court then went on to assess whether the events in Afghanistan can properly constitute an ‘event’ as defined in s 21B(7).

¹¹⁸ *Ibid* at [23].

different degree” to the events in *MC*.¹¹⁹ While that is true, it is questionable whether the ‘degree of stressors’ is a relevant consideration in determining whether the circumstances amount to a ‘series of events’ or a ‘gradual process’. Such a consideration would be more relevant in determining whether the ‘events could be reasonably expected to cause mental injury in people generally’. Because of this weak distinguishing from other cases of gradual process it is hard to determine why such circumstances constitute a series of events as opposed to gradual process. Arguably, the events which occurred in Afghanistan could be a series of forceful individual events which contributed to the gradual development of the appellant’s mental injury. Therefore, the effect of this decision is that it creates more uncertainty as to how to determine the boundaries between a ‘series of event’ or ‘gradual process’ under s 21B.

F Common themes of dysfunction

Following the above analysis, this part categorises the difficulties associated with mental injury cover into common themes of dysfunction. Such common issues include arbitrary distinctions and anomalies, inconsistency in cover standards and uncertainty in interpretation.

1 Arbitrary distinctions and anomalies

Arbitrary distinctions resulting in anomalous and inequitable cover is a reoccurring theme within each of the three categories of mental injury cover. One of the greatest arbitrary distinctions is the exclusion of cover for pure mental injury, except where the injury is a result of a specified crimes or is ‘work-related’.¹²⁰ Such distinctions create anomalous cover on numerous levels.

Those whom suffer a pure mental injury at work are covered by the 2001 Act. This creates inconsistencies between pure mental injuries sustained outside the work environment. When thinking about the numerous environments one can suffer a mental injury, such a distinction can be difficult to justify. Why should paramedics who suffer a mental injury following their work at the scene of a traumatic car crash be covered

¹¹⁹ Ibid at [77].

¹²⁰ Section 21 and section 21B.

but a person in the car crash, who suffers a pure mental injury from witnessing the death of their family be excluded from cover?

Section 21 providing cover for pure mental injury caused by specifically identified criminal offences but not other criminal offences is another example of anomalous cover.¹²¹ As a result, those who suffer a mental injury from offences such as terrorism, aggravated burglary and assault but are not physically harmed will be excluded from coverage under the 2001 Act.¹²² As elaborated in Part D of this Chapter, such a distinction perhaps lacks legitimacy if one considers the broad range of causes of mental injury.

More holistically, limited cover for instances of pure mental injury creates an anomaly between the scope of cover for accidental physical and mental injury. There are numerous ways a person can be covered if they suffer a physical injury,¹²³ but there are limited ways a person with a mental injury can receive cover.

There is a growing understanding in the medical profession that mental well-being is equally as important as physical well-being to a person's overall 'health'.¹²⁴ Globally, there has been a shift to facilitate and support those with psychiatric disorders as it is recognised that the relationship between the brain and body is comprehensive, complex and reciprocal.¹²⁵ One of the most significant recent developments in the understanding of mental disorder is its interactions with other health conditions.¹²⁶ Research has

¹²¹ S Todd, above n 8, at 50.

¹²² Examples of cases where claimants who suffer mental injury from a criminal offence have fallen outside of the accident compensation scheme are *Woodd v Accident Compensation Corporation*, above n 84; *Wells-Henderson v Accident Compensation Corporation*, above n 84; *JW v Accident Compensation Corporation* [2013] NZACC 6 and *A v Accident Compensation Corporation* DC Wellington, No 157/2002, 10 June 2002.

¹²³ Cover can be received for a physical injury because of an accident, treatment injury, work-related gradual process, treatment injury gradual process.

¹²⁴ M Prince and others "No health without mental health" (2007) 370 *The Lancet* 859 at 859-861 and Sue Bailey and others "Whole-person care: from rhetoric to reality, achieving parity between mental and physical health summary" (Royal College of Psychiatrists, occasional paper OP88, March 2013) at 3-5.

¹²⁵ *The Mental Health Context* (World Health Organisation, Mental Health Policy and Service Guidance Package, 2003) at 20.

¹²⁶ Prof M Prince, above n 124, at 862-867; Sue Bailey, above n 124, at 2 and 9; Murray Patton "Keeping Body and Mind Together" (The Royal Australian and New Zealand College of Psychiatrists, Report, April 2015) at 9 and PriceWaterhouse Coopers *Accident Compensation Corporation New Zealand Scheme Review* (PriceWaterhouse Coopers Australia, Scheme Review, March 2008) at 22.

shown that mental disorders are risk factors for the development of diseases and contribute to an increase of accidental and non-accidental injuries – illustrating that the effect of mental injury on individuals and society can be far-reaching.¹²⁷

If a person’s health is understood in terms of both physical and mental well-being,¹²⁸ this would suggest that there should be greater equality in the scope of cover between accidental physical and mental injuries. As per Sir Geoffrey Palmer:¹²⁹

The question you have to ask – is this sort of damage to someone worse than a motor accident that leaves them maimed and disabled as a result of physical injury? It is certainly palpable and clear and psychiatrists can recognise it. You can bring evidence about it... why wouldn’t you treat that the same as the sort of incapacity that arises from physical injury?

2 *Inconsistent standards between cover provisions*

Each cover provision imposes different statutory requirements. While this is a consequence of providing cover for mental injury in a segmented fashion, it has resulted in inconsistent standards of cover between the provisions and unfairness.

A key example of this is the treatment of secondary victims who suffer a mental injury. Secondary victims are excluded by the statutory language of s 26(1)(c). But there is a possibility that they could receive cover under 21,¹³⁰ and they do receive cover under s 21B if they are sufficiently proximate to the traumatic incident. While cover of secondary victims under s 21 is a speculative argument, it highlights the different standards of cover under the 2001 Act and how this results in the inconsistent treatment between covered mental injuries. Why should a pedestrian whom witnesses numerous people die in the Christchurch CBD as a consequence of an earthquake be excluded from cover when the shop assistant who saw the same events fall within the scope of cover under s 21B?

¹²⁷ Ibid.

¹²⁸ World Health Organisation states ‘health’ is inclusive of mental well-being, above n 125 and see n 124 generally.

¹²⁹ Interview with Sir Geoffrey Palmer (Kim Hill, Nine to Noon, Public Radio, 20 June 2000) transcript provided by Public Radio as cited in Paul Heslin “Pushing the Boundaries of Cover for “Purely” Mental Injury” [2001] ELB 115 at 117.

¹³⁰ See Chapter III, Part D.

Another example of inconsistent standards is the different statutory language and boundaries of s 21 in comparison to s 26(1)(c) and s 21B. For example, cover under s 21 can be sought for mental injury caused by an act that falls ‘within the description of’ a listed offence.¹³¹ As elaborated in Part D of this Chapter, this makes the coverage requirements flexible in certain circumstances.¹³² There is no equivalent flexibility in the other mental injury cover provisions. For example, there is no provision in s 21B which provides cover for ‘something like work-related circumstances’ which could extend cover to volunteers. Nor is there flexibility in s 26(1)(c) for mental injury suffered by a person because ‘of something which is similar’ to a physical injury, which could provide cover for mental injury suffered because of conditions such as chronic pain. In contrast to s 21, cover under s 21B and s 26(1)(c) is tightly prescribed.

3 *Uncertainty in interpretation*

All three categories of mental injury cover contain some ambiguities and tricky points of interpretation. There is uncertainty as to whether conditions such as chronic pain can be covered as a ‘mental injury because of a physical injury’.¹³³ Cover under s 21 raises questions as to whether an offence can be targeted at a secondary victim in a manner which would grant them cover and the boundaries of what the phrase ‘within the description of listed offences’ includes.¹³⁴ A difficult area of interpretation under s 21B is distinguishing a series of events from gradual process, and now, following *Toomey*, the extent to which something is ‘work-related’.¹³⁵

G Conclusion

Two conclusions can be drawn from collecting together the common features of dysfunction. First, the number of arbitrary line-drawing and inconsistencies reflect an unprincipled approach to mental injury cover. Second, and injustices aside, the cover

¹³¹ Section 21(2)(c).

¹³² See Chapter III at Part D, specifically the decision of *KSB v ACC*, above n 68.

¹³³ See Chapter III at Part C.

¹³⁴ See Chapter III at Part D.

¹³⁵ *Toomey v Accident Compensation Corporation*, above n 2 and Chapter III at Part E.

provisions all contain areas of ambiguity. Both of these conclusions provide scope to discuss how the law for mental injury cover could be improved.

IV Principled rationales for expanding mental injury cover

A Introduction

Mental injury cover could be improved by expanding the scope of coverage to eliminate the inconsistencies and ambiguities plaguing the Act. As unjust as the limitations on mental injury are, an expansion of cover under ACC cannot occur for this reason alone. Reform must have a principled premise to ensure the scheme remains a coherent and fiscally feasible compensation system. Such principled premise can be found within the conceptual framework of the 2001 Act. The Act's cover provisions operate following a set of concepts that can be used to analyse whether there are principled grounds for expanding mental injury cover. Such concepts include; community causal responsibility, rehabilitation, replacement of the right to sue and fiscal responsibility.¹³⁶ These ideals have developed from the original Woodhouse vision and various reforms to the ACC schemes. These principles will be assessed in this Chapter.

B The Woodhouse Principles

The Woodhouse Report formulated five general principles which provided the 'backbone' for the first no-fault scheme. These were; community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.¹³⁷ The principles of community responsibility and comprehensive entitlement were the 'pillars' of the Woodhouse Report.¹³⁸

Two distinct theories of community responsibility can be distinguished within the Woodhouse Report.¹³⁹ The first theory is based on the notion of social solidarity.¹⁴⁰

¹³⁶ These principles do not represent an exhaustive list of those which currently shape New Zealand's Accident Compensation scheme. They are principles which the author has identified as fundamental to rationalising the current cover boundaries for accidental injury under the 2001 Act.

¹³⁷ The Woodhouse Report, above n 9, at [4].

¹³⁸ Ibid, at [4]- [7].

¹³⁹ Ibid, at [56].

¹⁴⁰ This terminology comes from Ken Oliphant 'Beyond Woodhouse: Devising New Principles for Determining ACC Boundary Issues' (2004) 35 VUWLR 915 at 915 and Maria Hook, 'New Zealand's Accident Compensation Scheme and Man-Made Disease' [2008] 289 VUW 15 at I. Other authors have referred to this as 'the reciprocity norm' see Jesse Wall "No-fault compensation and unlocking tort law's 'reciprocal normative embrace'" (2017) 27 NZULR 125 at 128.

This argues that as the community benefits from a productive work-force, the community should reciprocate and compensate individuals who are incapacitated.¹⁴¹ The social solidarity theory of community responsibility imposes an obligation on the state because:¹⁴²

Just as a modern society benefits from productive work of its citizens, so should society accept responsibility for those willing to work but prevented from doing so by physical incapacity.

The second theory of community responsibility, referred to by Oliphant as community *causal* responsibility is subtly different.¹⁴³ This theory looks at the cause of incapacity, suggesting that society should bear the risk and responsibility for injuries that result from collectively beneficial activities:¹⁴⁴

Since we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so we should all share in sustaining those who become the random but statistically necessary victims.

The Woodhouse Report concluded the principle of comprehensive entitlement “follows automatically” from community responsibility.¹⁴⁵ It is evident from this conclusion that the social solidarity limb of community responsibility was determinative in the Woodhouse Report rationale for a no-fault scheme. By stating that comprehensive entitlement follows ‘automatically’, this logic argues that it is not the cause of the injury which attracts compensation, it is the injury itself – consequently every person who is injured should be entitled to compensation.

The principle of community responsibility and comprehensive entitlement rationalise an expansion of mental injury cover under the 2001 Act. As the incapacity experienced from mental injury is great, it is inevitable that people suffering mental injury will

¹⁴¹ Richard Gaskins ‘Reading Woodhouse for the Twenty-First Century’ [2008] NZLR 11 at 17 and Jesse Wall “No-fault compensation and unlocking tort law’s ‘reciprocal normative embrace’”, above n 140, at 128.

¹⁴² The Woodhouse Report, above n 9 at [56].

¹⁴³ This terminology comes from Ken Oliphant Beyond Woodhouse: Devising New Principles for Determining ACC Boundary Issues’, above n 140.

¹⁴⁴ The Woodhouse Report, above n 9, at [56].

¹⁴⁵ Ibid, at [6].

become less productive to the detriment of the New Zealand community.¹⁴⁶ The principle of community responsibility deems that society should bear the costs of accidental mental injury in recognition of previous contributions of the individual. Therefore, it is counterproductive to exclude some classes of people who suffer a mental injury from ACC.

However, these principles go further than justifying expansive mental injury cover. The Woodhouse Principles point towards a wholly comprehensive scheme which is inclusive of all incapacity, such as disease and illness. The social solidarity theory provides cover on the *fact* of incapacity. As cancer and car crash victims are both deprived of “their ability to contribute to general welfare”, under the principle of social solidarity, they would be equally deserving of compensation.¹⁴⁷

The Royal Commission recognised that the logic of the principles pointed towards a universal scheme,¹⁴⁸ yet, in the last 45 years, there have been no successful attempts at establishing a fully comprehensive scheme.¹⁴⁹ Because the Woodhouse Principles support comprehensive cover for all incapacity, the application of the principles in determining the cover *boundaries* of the current scheme is questionable.¹⁵⁰ The 2001 Act reflects a limited scheme with tightly defined borders. Such limitations, which were mainly introduced by the 1992 Act, were not formulated on the Woodhouse Principles but rather those of ‘economy and fairness’.¹⁵¹

Because ACC has shifted away from the comprehensive vision expelled by the Woodhouse Report, a sound argument for expanding cover under the current Act must extend beyond the Woodhouse rationale. Principles to guide decision-making under a

¹⁴⁶ Malcom Hopwood and others “The economic cost of serious mental illness and comorbidities in Australia and New Zealand” (The Royal Australian and New Zealand College of Psychiatrists (RANZCP), Report prepared for RANZCP and the Australian Health Policy Collaboration by Victoria institute of strategic economic studies, 2016) at 5. Based on National Survey of Psychosis in Australia, the report estimated that the cost to society of lost productivity from mental illness in New Zealand is around \$1.3 billion per annum.

¹⁴⁷ Maria Hook ‘New Zealand’s Accident Compensation Scheme and Man-Made Disease’, above n 140, at III.

¹⁴⁸ Woodhouse Report, above n 9, at [290].

¹⁴⁹ Discussions of a fully comprehensive scheme occurred in New Zealand Law Commission *Personal Injury: Prevention and Recovery: Report on the Accident Compensation Scheme* (NZLC R4, 1988).

¹⁵⁰ PriceWaterhouse Coopers *Accident Compensation Corporation New Zealand Scheme Review*, above n 126, at 4.

¹⁵¹ A Fairer Scheme, above n 24, at iii and 37-38.

limited ACC scheme are found within the conceptual framework of the 2001 Act. The current cover provisions for accidental injury operate in accordance with the principles of community causal responsibility, rehabilitation, replacement of the right to sue for personal injury and fiscal responsibility. Each principle will be analysed in the following part.

C Community causal responsibility

This principle derives from one of the two theories which formed the basis of the Woodhouse Principle of community responsibility. Because the notion of social solidarity rationalises a fully comprehensive scheme, this concept cannot provide a principled basis for determining the boundaries of the current scheme; or whether those boundaries should change. However, the notion of community causal responsibility does provide one basis for understanding the current cover limitations of the 2001 Act and a justification for expanding mental injury cover.

Restricting compensation to personal injury caused by accidents sits comfortably with the concept of community causal responsibility which distinguishes between cause and consequences.¹⁵² This principle suggests that the boundaries of the ACC scheme should be set in reference to distinctions between natural conditions and injuries that arise from the matrix of social activities that communities participate in.¹⁵³ This distinction can be seen in the definition of ‘personal injury’ which includes injuries caused by accidents or treatment injury but excludes personal injuries ‘caused wholly or substantially by a gradual process, disease or infection.’¹⁵⁴

The exception of cover for gradual process, disease or infection where the incapacity is caused by a covered physical injury, treatment injury or work-related injury can also be justified by the principle of community causal responsibility.¹⁵⁵ The adverse effects of a treatment injury, work-related injury or covered physical injury can be distinguished from adverse outcomes attributable to ‘natural’ or ‘underlying’ conditions. The former is associated with human activity, being the practice of medicine or work which the

¹⁵² PJD comments in Brown and Smille “The Future of Accident Compensation” 7 [1991] NZLJ 249 at 249.

¹⁵³ Ken Oliphant, above n 140, at V.

¹⁵⁴ Section 26(2).

¹⁵⁵ Section 20(2)(e), s 20(2)(f) and s 20(2)(g) provide cover for gradual process, disease or infection in the stated specified circumstances.

community benefits from, hence the principle of community causal responsibility deems society should bear the costs of incapacity which arise from these activities.¹⁵⁶

The current scope of mental injury can be understood through this principle as well. To receive cover for a mental injury, the fundamental question is whether the injury is attributable to underlying health or is a result of recognised human activities that cause incapacity being; physical injury, specified criminal activity or work. Community causal responsibility is connected to the s 21B requirement that the mental injury must be caused by ‘an event that could reasonably be expected to cause mental injury to people generally’. The very nature of the circumstances of s 26(1)(c) and s 21 meet this threshold. Hence there is no need for the explicit legislative requirement. But such a test is necessary for s 21B to exclude claims which are caused by a pre-existing propensity for mental injury which community causal responsibility rationalises is something that the community should not be responsible for; and therefore, should fall outside the scope of ACC.

By limiting mental injury cover, there is an inconsistent application of community causal responsibility and hence, a lack of a principled approach in the current cover boundaries. Community causal responsibility justifies an expansion of coverage for *all* mental injury caused by the interplay of social forces which extends beyond the current limited categories of cover. Events such as car crashes, burglary, terrorism and volunteering at the scene of accidents are all examples of events which occur as a result of human activities which could cause mental injury. Yet, people whom suffer a pure mental injury in such situations are excluded from cover.

An expansion of mental injury is a necessary adjustment to provide a dependably principled basis for the cover boundaries of the 2001 Act. Options for expanding mental injury in a manner which is consistent with this principle are discussed in Chapter V.

¹⁵⁶ Ken Oliphant, above n 140, at V.

D Rehabilitation

Rehabilitation has been a primary focus of the ACC scheme since its inception.¹⁵⁷ It remains a key aim as well as compensation and prevention in the 2001 Act.¹⁵⁸ A person who has cover is entitled to both social and vocational rehabilitation, with the goal of restoring the claimant's health to the maximum extent possible.¹⁵⁹ To achieve this goal, ACC has specific rehabilitation policies.¹⁶⁰ As a result of ACC's focus on rehabilitation, New Zealand has the most successful back-to-work statistics in comparison to state monopoly schemes in Australia.¹⁶¹

The principle of rehabilitation is poignant to mental injury cover because of the s 27 definition of mental injury. Mental injury being tied to clinical significance reflects a policy intent to include only claims for which diagnosis, treatment and rehabilitation can be undertaken by a professional clinician. If society wishes to minimise the impact an accident has on the individual and the community then the goals of rehabilitation and prevention should be prioritised for all accidental mental injury claims. This provides a principled reason for expanding the scope of cover. It is of particular importance to prioritise rehabilitation for mental injury given the flow-on effects of poor mental health which are associated with higher levels of physically presenting chronic disease and injury.¹⁶²

The principle of rehabilitation makes ACC the most appropriate forum to address cases of accidental mental injury. In contrast to ACC, tort law does not place any emphasis on the principle of rehabilitation. Proceedings in tort only seek to restore the plaintiff as much as can be done through *monetary* compensation.¹⁶³ In turn, if we value

¹⁵⁷ The Woodhouse Report, above n 9 and S Todd, above n 8, at 76.

¹⁵⁸ Section 3.

¹⁵⁹ Section 69(1)(a). For the Corporation's account of rehabilitation outcomes, see Accident Compensation Corporation *Annual Report 2016* (Accident Compensation Corporation, Annual Report, 2016) at 25.

¹⁶⁰ Accident Compensation Corporation, *ACC Treatment Provider Handbook 2017* <www.acc.co.nz> at 64.

¹⁶¹ PriceWaterhouse Coopers, above n 126, at 12. Under ACC 88% of claimants returned to work within six months of being injured. This outperforms the Australian average of 85% which is based on three comparable state monopoly schemes in New South Wales, Victoria and South Australia. There were similar results for durable, longer-term return to work.

¹⁶² PriceWaterhouse Coopers, above n 126, at 22 and see Chapter III, Part F.

¹⁶³ S Todd, above n 8, at 2.

comprehensive rehabilitation this provides a principled reason to legislate more comprehensive mental injury cover.

E Replacement of the right to sue

When New Zealand enacted the first ACC scheme, it dismissed the private law test of fault as the criteria for compensation in exchange for a no-fault system where citizens gave up their right to sue.¹⁶⁴ The no-fault system sought to replace existing compensation schemes at the time such as tort, workers' compensation and criminal injuries compensation which all focused on accidental injury.¹⁶⁵ The Woodhouse Report found these existing mechanisms were unable to distribute the burden of accidents fairly and that seeking compensation through the negligence action in tort was 'a forensic lottery'.¹⁶⁶

As per the Court of Appeal in *Donselaar v Donselaar*, the 'mischief' which ACC sought to remedy was the uneven and inadequate scope of common law negligence actions in modern society.¹⁶⁷ Therefore, at the origins of the no-fault system was the aim to provide compensation for harm that would otherwise be actionable at common law.¹⁶⁸ Given this goal of replacing personal injury claims at common law, one may expect the grounds for mental injury cover under the Act to focus on covering the sorts of situations that led to common law claims. At common law, one can sue for mental injury in a wide range of circumstances; for example, for pure mental injury suffered outside the work environment.¹⁶⁹ The 2001 Act does not reflect this. Despite *A Fairer Scheme* stating the "the principles of no-fault and no right to sue... will remain unaffected"¹⁷⁰, such principles were not sustained in the ACC schemes following the 1992 reform.¹⁷¹

¹⁶⁴ Ibid, at 34.

¹⁶⁵ This also explains why illness was excluded from the first ACC scheme as at common law a person cannot sue for naturally occurring sickness or disease.

¹⁶⁶ The Woodhouse Report, above n 9, at 19.

¹⁶⁷ *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA) at 104.

¹⁶⁸ Ibid, at 104 and *Willis v Attorney-General* [1989] NZLR 574 (CA) at 576.

¹⁶⁹ *Page v Smith* [1996] AC 155, 197.

¹⁷⁰ A Fairer Scheme, above n 24, at 18.

¹⁷¹ *Queenstown Lakes District Council v Palmer*, above n 30.

If an actual substitution of the tort system is to be upheld, then the scope for mental injury cover should be expanded. The principle of no-fault and no-right to sue support an expansion of ACC as the survival of tortious claims in the realm of personal injury is undesirable for the following reasons:

- the Courts are an inappropriate forum to address the policy-laden issue of mental injury; and
- there is a range of deficient outcomes produced by partially upholding the principle of the replacement of a right to sue.

These are addressed in turn.

1 Inappropriate forum

Inherent policy considerations in compensating mental injury mean the common law's case-by-case approach does not produce coherent, principled outcomes.¹⁷² This is because, in determining the scope of claims in tort for psychiatric injury, Courts must balance many conflicting ideals such as: economic considerations, public policy and advancing medical science. The policy-driven approach taken by the Courts has resulted in the law of compensation for psychiatric harm being a "patchwork quilt of distinctions which are difficult to justify".¹⁷³ Because of these difficulties, compensating mental injury is best dealt with by Parliament through expanding the ACC scheme to encompass a wider range of mental injury – thus fully upholding the principle of replacement of the right to sue.

In New Zealand, the Courts have not made a decisive ruling on the governing test/s in determining a duty of care for mental injury. *Van Soest v Residual Health Management Unit*, provides the most comprehensive discussion on negligence law for psychiatric injury in New Zealand.¹⁷⁴ In *van Soest*, which involved claims by relatives of victims of medical negligence, the Court of Appeal determined that firstly for a mental injury claim to be actionable, the plaintiff must have a 'recognisable psychiatric injury' – this

¹⁷² Gerald Schaefer 'The development of the law on psychiatric injury in the English legal system' [2006] The New Zealand Postgraduate Law e-Journal at 2.

¹⁷³ *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1 at 38 cited in *van Soest v Residual Health Management Unit*, above n 57, at [78].

¹⁷⁴ *van Soest v Residual Health Management Unit*, above n 57.

accords with the s 27 definition in the 2001 Act.¹⁷⁵ This has been affirmed in *Hobson v Attorney General*¹⁷⁶ and *Xi v Howick Baptist Healthcare Limited*.¹⁷⁷

Because the plaintiffs in *van Soest* did not suffer a recognisable psychiatric injury, the requirements for liability were not definitively considered.¹⁷⁸ Later mental injury cases *Hobson* and *Xi*, have however, commented that the scope of recovery would be limited by additional requirements beyond reasonable foreseeability in regards to secondary victims, following English jurisprudence.¹⁷⁹ The influence of the English approach, however, is questionable as the English law remains unsettled and other common law jurisdictions take diverging approaches.¹⁸⁰

In England, the ambit of the duty of care is limited in cases where a claimant is outside the foreseeable risk of physical harm by the imposition of additional liability requirements.¹⁸¹ Seeking to restrict mental injury claims, the House of Lords in *Alcock v Chief Constable of the South Yorkshire Police* affirmed that foreseeability was not the only criteria in psychiatric harm cases involving secondary victims and that three more elements were required.¹⁸² These were; close ties of love and affection between the plaintiff and the injured, proximity of the plaintiff to the accident in both time and space, and a sudden reception of a single event or immediate aftermath.¹⁸³

In *Alcock*, the Court faced claims of psychiatric injury following the Hillsborough stadium accident where 96 people were killed and 400 injured as a result of police negligence. The plaintiffs were relatives of spectators caught up in the disaster who

¹⁷⁵ At [66] and [70].

¹⁷⁶ *Hobson v Attorney General* [2007] 1 NZLR 374 (CA) at [140].

¹⁷⁷ *Xi v Howick Baptist Healthcare Ltd t/a Auckland Home Healthcare* [2014] NZHC 1058 at [48].

¹⁷⁸ At [73].

¹⁷⁹ *Hobson v Attorney General*, above n 176, at [141] and *Xi v Howick Baptist Healthcare Ltd*, above n 177, at [48].

¹⁸⁰ S Todd, above n 8, at 207.

¹⁸¹ English Courts distinguish between primary and secondary victims. In *Page v Smith* [1996] AC 155, 197 the House of Lords determined where there is foreseeable risk of physical injury (even if in fact there is no physical injury) the victim is a 'primary victim' and foreseeability of the injury is the only requirement. Where the victim is outside the range of foreseeable risk of physical injury the claimant is a 'secondary victim' and the additional requirements in *Alcock*, above n 57, must be met.

¹⁸² *Alcock v Chief Constable of the South Yorkshire Police*, above n 57.

¹⁸³ *Ibid*, at 398

witnessed the mayhem either live at the stadium or on television. None of the plaintiffs successfully sought compensation. From the Court concluding that there is no general assumption of close ties between siblings, even when they directly witnessed the death of a brother or sister, it is clear that economic considerations and the fear of indeterminate liability were determinative of the outcome.¹⁸⁴

The boundaries of these requirements, however, are ambiguous following the House of Lords comments in *W and Others v Essex County Council and Another*.¹⁸⁵ In *W and Others*, two parents sought compensation after suffering a mental disorder from learning that their children had been raped because of negligence from social workers who fostered a child with sexual abuse history to the family.¹⁸⁶ The parents were not in any danger themselves and learned of the suffering of their children four weeks after the attacks occurred. The Court, however, considered that the parents may still be sufficiently proximate in time and space to the ‘immediate aftermath’ as to be considered primary victims.¹⁸⁷ In contradiction to the restrictive approach in *Alcock*, the comments by the House of Lords in *W and Others* show how the English law governing this area is far from settled.

In Australia, a recognisable psychiatric injury is required for there to be an actionable claim. However, the High Court in *Tame v New South Wales* explicitly rejected the additional requirements in *Alcock*.¹⁸⁸ The High Court stated the only requirement is whether psychiatric injury could be ‘reasonably foreseeable’.¹⁸⁹ The majority believed proximity may be relevant to assessing reasonable foreseeability, causation and remoteness but were not themselves decisive to liability, as to do so would produce arbitrary outcomes for plaintiffs substantially in the same position.¹⁹⁰

¹⁸⁴ Gerald Schaefer, above n 172, at 6.

¹⁸⁵ *W and Others v Essex County Council and Another* [2001] 2 AC 592: Previous cases starting with *McLoughlin v O’Brien* [1983] 1 AC 410 (HL) and then *Alcock* demonstrate a clear intent to limit the scope of possible plaintiffs, the more recent case of *W and Others* loosens the requirements of proximity in time and space widening the classifications of primary victims.

¹⁸⁶ *Ibid*, at 592.

¹⁸⁷ *Ibid*, at 600-602.

¹⁸⁸ *Tame v New South Wales* [2002] HCA 35, (2002) 211 CLR 317.

¹⁸⁹ *Ibid*, at [200].

¹⁹⁰ *Ibid*, at [190].

Canada takes the most liberal approach to compensating mental injury. The groundbreaking 2017 Supreme Court decision *Saadati v Moorhead*, rejected the requirement for a recognisable psychiatric illness and the *Alcock* requirements.¹⁹¹ The Court drew heavily on the unjust differential treatment between physical and mental injury.¹⁹² It rejected any additional limitations for compensating mental injury on the basis that an obligation to take reasonable care to avoid interference with one's mental health exists to the same extent as the duty to take care to avoid physical harm.¹⁹³

Even if New Zealand does not take a liberal approach like Canada and tends towards the approach taken in *Tame*,¹⁹⁴ it is the opinion of this author that the common law remains ill-equipped to compensate psychiatric injury. The inherent characteristics of mental injury mean the Courts are confronted not just with questions of law, but matters of public policy, advancing medical science and public opinion. The result of this policy-driven approach has created artificial categorical distinctions and injustice.¹⁹⁵ Where floodgate and economic concerns are politically fuelled it should be Parliament's role to define public policy through creating a clear legal basis for the scope of claims. This is particularly important where outcomes of cases can have a significant impact on individual's health.

To address the tort system's limited capacity to create satisfactory law, the ability to seek damages for mental injury at common law should be removed in New Zealand. Through expanding mental cover, the 'mischief' that the ACC scheme sought to remedy would be fully addressed. Therefore, the replacement of the right to sue provides a principled rationale for the extension of mental injury cover.

¹⁹¹ *Saadati v Moorhead* 2017 SCC 28.

¹⁹² Ibid, at [2]: "This Court has...never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury. Nor, in my view, would it be desirable for it to do so now. Just as recovery for *physical* injury is not, as a matter of law, conditioned upon a claimant adducing expert diagnostic evidence in support, recovery for *mental* injury does not require proof of a recognizable psychiatric illness."

¹⁹³ Ibid, at [19]-[23]. Whilst there is no requirement for a recognisable psychiatric disorder claimants must still show more than just mere emotional disturbance, the disturbance suffered must be "serious and prolonged and rise above the ordinary annoyances".

¹⁹⁴ S Todd, above n 8, at 226: Stephan Todd believes that the minority approach in *van Soest* rejecting the *Alcock* requirements will prevail given the influential support in *Tame v New South Wales*.

¹⁹⁵ *van Soest*, above n 57, at [79].

2 *Undesirable outcomes produced by tortious mental injury claims*

Tortious claims for mental injuries produces a range of deficient outcomes which could be remedied through comprehensive cover for mental injury under ACC.

Firstly, allowing common law claims can result in disparity in compensation. This is because damages awarded in tort are intended to award full compensation to repair losses suffered,¹⁹⁶ whereas ACC only provides compensation at 80% of lost earnings.¹⁹⁷

Secondly, it undermines the no-fault principle. As the body of medical knowledge surrounding the cause of mental injury expands, it is possible that negligence actions for mental injury could increase. The Courts' restrictive approach to compensating psychiatric harm is partially attributable to uncertainty surrounding psychiatric diagnoses and the causal assumptions adopted by psychiatry.¹⁹⁸ Historically, the Courts have adopted a sceptical attitude towards the discipline of psychiatry, treating psychiatric disorders not as an 'injury', but a product of the imagination.¹⁹⁹ This scepticism has persisted into the last century such that mental injury was not compensable unless it accompanied a physical injury.²⁰⁰

While the Court's resistance has decreased with medical developments in the understanding of psychiatric disorders, residues of resistance remain because of evidentiary gaps in the aetiology of psychiatric disorders.²⁰¹ Therefore, the linking of the psychiatric harm to a negligent action still presents barriers in some tort litigation.²⁰² As understanding of the relationship between the brain and mental injuries develops

¹⁹⁶ S Todd, above n 8, at 1306.

¹⁹⁷ Accident Compensation Act 2001 Schedule 1, cl 32(3).

¹⁹⁸ Michael Jones "Liability for Psychiatric Damage: Searching for a Path between Pragmatism and Principle" in Neyers, Chamberlain and Pitel *Emerging Issues in Tort Law* (1st ed, Hart Publishing, Portland, 2007) at 114.

¹⁹⁹ *Ibid* and see cases such as *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222 at 226 and *Miner v Canadian Pacific Railway Co.* (1911) 18 W.L.R 476 at 478 for denial of mental shock claims because such claims were held to be imaginary cited in *Saadati v Moorhead*, above n 191, at [14].

²⁰⁰ *King v Phillip* (1953) 1 QB 429 (CA) in England was one of the first cases to recognise 'pure' mental injury.

²⁰¹ Michael Jones, above n 198, at 114.

²⁰² Peter Cane *Key Ideas in Tort Law* (2nd Vol, Hart Publishing, Oxford, 2017) at 89 and S Wessely "Liability for Psychiatric Illness" (1995) 39 *Journal of Psychosomatic Research* 659 at 667.

causation barriers are likely to reduce, potentially encouraging negligence actions for mental injury in the future. This has the potential to bring back the ‘fault’ element in the realm of personal injury and the costly adversarial and administrative processes associated with it.

Thirdly, re-emergence of the fault element may inhibit desirable societal activity and create substantial costs.²⁰³ Research from blended systems indicates that access to common law benefits, even when they are significantly limited in nature, is extremely costly for the economy and one of the primary drivers of cost blow-outs.²⁰⁴ Furthermore, the health outcomes and return-to-work rates for people under blended systems are poorer than those on a no-fault system.²⁰⁵ As noted by John Miller, even where a plaintiff fails to establish a claim, the costs awarded are meagre and do not take into account the large opportunity and real costs to businesses “in shifting staff and resources from profitable core tasks to costly defences”.²⁰⁶ Thus, the original Woodhouse principle of administrative efficiency, which emphasised the cost-gain from eliminating the costly process of litigation, remains relevant today and provides support for an expansion of mental injury cover to remove the ability to sue.

A range of undesirable and deficient outcomes are produced by mental injury claims in tort. How ACC cover could be expanded to fully uphold the principle of replacement of the right to sue and address the deficiencies will be elaborated in the following Chapter.

F Fiscal Responsibility

The principle of ‘fiscal responsibility’ originates from ‘*A Fairer Scheme*’.²⁰⁷ It is similar to the Woodhouse Principle of ‘administrative efficiency’ because it addresses the

²⁰³ Richard Gaskins, above n 141, at 22.

²⁰⁴ PriceWaterhouse Coopers, above n 126, at 6. Blended system is that which there is access to both tort and no-fault compensation schemes.

²⁰⁵ Ibid, and Kirsten Armstrong and Daniel Tess *Fault versus No Fault – Reviewing the International Evidence* (Institute of Actuaries of Australia’s, Report for 4th Financial Services Forum, 12 November 2008) at 19-22.

²⁰⁶ John Miller ‘Returning Stress to the ACC Fold’ *Safeguard* September/October, 2000 at 116 cited in Paul Heslin, above n 129.

²⁰⁷ *A Fairer Scheme*, above n 24, at 37-38.

economic costs of compensation. However, the principles are distinguishable in their *focus* on costs. The principle of administrative efficiency concentrates on the substantial cost gain from departing from common law compensation to a no-fault system.²⁰⁸ The principle of fiscal responsibility focuses on the distribution of the economic cost of compensation to society and whether such cost is reasonable to bear.

As this principle has underpinned reform of the Act since 1992, it is imperative that any potential changes of cover accord with this principle. There are two concerns in expanding cover which fall under the umbrella of fiscal responsibility. The first issue is a costing concern; that any changes will significantly increase costs to the public without corresponding benefits.²⁰⁹ The second issue is whether changing the scope of cover would lead to a ‘torrent’ or ‘floodgate’ of claims, some of which could be ‘non-meritorious’.

Addressing the first concern; there is a fear that the benefits received from expanding mental injury cover, such as reducing the likelihood of long-term mental health problems, would be outweighed by the costs of funding such a change.²¹⁰ As a result, the change will result in an economically unjustified expense. This was the view held by the Treasury in 2001 when mental injury cover was investigated by the Labour Market Policy Group.²¹¹ The Treasury supported this concern with research from Professor Beverly Raphael whom noted the difficulty of treating psychological victims and the impact this had on costs.²¹²

Advocates for an expansion of mental injury cover, such as John Miller, claim cost concerns are overstated.²¹³ The economic consequences of expanding coverage to work-related mental injury support Miller’s claim. In 2010, s 21B was intended to be

²⁰⁸ The Woodhouse Report, above n 9, at 57-59

²⁰⁹ Labour Market Policy Group, *Cover for Mental Injury Arising from Witnessing a Traumatic Incident* (24 March 2000) at [45]-[54].

²¹⁰ *Ibid*, at [62].

²¹¹ *Ibid*. The Policy Group considered options in this document for expanding mental injury. In the policy analysis, the Treasury stated its view on economic considerations. The Treasury believed that benefits of expanding mental injury coverage would be unlikely to outweigh the costs involved.

²¹² This research was from the *Disaster Mental Health Response Handbook* for the New South Wales Health Department in July 2000 at 69, the Professor notes how even with some of the most common psychiatric treatment, such as psychological debriefing following a traumatic event, there is little evidence that this should be offered to all victims.

²¹³ John Miller, above n 206, at 116.

repealed in cost-cutting measures.²¹⁴ This decision was withdrawn because of the insignificant financial impacts s 21B had on the scheme.²¹⁵ The small financial impact was likely to be due to the specific grounds of cover only allowing a limited number of successful claimants.²¹⁶ Currently, the costs of s 21B entitlements remains relatively insignificant only accounting for 3.11% of the total cost of all ACC entitlements in 2016.²¹⁷ This suggests that expansion of mental injury cover could remain consistent with the principle of fiscal responsibility if such change is made with appropriate limitations.

The concern of a ‘floodgate’ of claims is not a new worry in the realm of compensating mental injury. This concern stems from the notion that an expansion of mental injury cover would create an incentive to seek compensation under ACC, resulting in an influx of claims.²¹⁸ While floodgate issues should not be dismissed, they can be partially alleviated by the fact that many will not establish the required degree of mental injury.²¹⁹ Only mental injury that is a clinically significant behavioural, cognitive, or psychological dysfunction is eligible for cover.²²⁰ This sets a high-threshold of eligibility for cover.

In discussing the ‘floodgate’ issue at common law, the Court in *Tame*, maintained that floodgate concerns recede if full force is given to the distinction between emotional distress and recognisable psychiatric injury.²²¹ Properly understood, the Court believed that the requirement of a recognisable psychiatric injury restricts recovery to disorders

²¹⁴ Cabinet Minute “Injury Prevention, Rehabilitation, and Compensation Act 2001: Changes” (29 August 2010, CAB Min (09) 29/8).

²¹⁵ Ibid.

²¹⁶ In 2009 one year after the amendment came into force, 75 claims were made, 57 of those were declined, 16 were under investigation and only two received cover see *Mazengrab’s Employment Law*, above n 33, at [IPA21B.4].

²¹⁷ See Appendix Two and Three for cost of entitlements for s 21B claims in comparison of total cost of entitlements for all other ACC claims.

²¹⁸ Labour Market Policy Group, above n 209, at [3].

²¹⁹ Desmond Butler ‘An assessment of competing policy considerations in cases of psychiatric injury resulting from negligence’ (2002) 10 LTJ 13 at 21.

²²⁰ Section 27.

²²¹ *Tame v New South Wales*, above n 188, at [193].

which are ‘capable of objective determination’, creating a real distinction based on professional medical opinion.²²²

Such ‘objective determination’ however, should not be overstated. In diagnosing psychological dysfunction medical practitioners often use DSM-5 and ICD-10 criteria to assist diagnosis. Such guidelines are not solely ‘objective’. For example, one of the criteria for PTSD is that the trauma-related arousal began or worsened after the trauma in any of the number of listed ways such as; irritability, hypervigilance, difficulty concentrating or heightened startle reaction.²²³ As this provides a broad range of possible responses, it allows for professional subjectivity in diagnosis. The English Law Commission highlighted this in their overview of the medical background of mental injury.²²⁴ The Commission’s research concluded that distinguishing mental distress from recognisable psychiatric injury is not clear-cut and reliance on diagnostic criteria is not always sufficient to make such a distinction.²²⁵

Because of this uncertainty, there will always be a level of concern that there will be a flood of ingenuine claims following an expansion of ACC. This risk, however, is not confined to the realm of psychiatric injury. Any intangible damage poses such concerns. Certain physical injury, such as a bad back, are just as susceptible to fraud as a complex mental injury.²²⁶ As ACC compensates such injuries without expressing concern over an influx of ingenuine claims, it again raises questions of further unjustified differentiation between mental and physical injury cover. Practically, however, it should be recognised any change to mental injury cover would not be politically achievable without putting in place appropriate legislative mechanisms to limit such a problem. As per Miller, “the supposed spectre of thousands of fictitious claims” would be adequately held in check by the screening mechanisms used by the Corporation, coupled with their attitude towards “prompt, effective rehabilitation”.²²⁷

²²² Ibid, at [194].

²²³ American Psychiatric Association, *American Diagnostic and Statistical Manual of Mental Disorders* (5th ed, Washington, 2013).

²²⁴ United Kingdom Law Commission *Liability for Psychiatric Illness* (Law Com No 249, 1998) at III.

²²⁵ Ibid.

²²⁶ Desmond Butler, above n 219, at 20.

²²⁷ John Miller, above n 206, at 116.

The principle of fiscal responsibility has played a decisive role in setting the cover boundaries of the 2001 Act. For consistency with this principle, any expansion of mental injury cover must limit the potential for a large increase in claims.

G Conclusion

Looking beyond the Woodhouse Report, the principles embedded within the current ACC regime such as community causal responsibility, rehabilitation and replacement of the right to sue provide rationales for extending the scope of mental injury cover. The principle of fiscal responsibility requires that expansion is pragmatic to limit costing and floodgate concerns. Expanding mental injury cover would alleviate many of the anomalies and injustices which current plague mental injury cover.²²⁸ Furthermore, it would provide consistency in the application of the concepts which currently define the Act's cover boundaries – creating a principled basis for mental injury cover.

V Options for Reform

This Chapter suggests potential options on how to expand mental injury cover. The suggestions illustrate ways to reform the 2001 Act to eliminate the inconsistencies and arbitrary line-drawing, while being politically pragmatic and adhering to the principled framework discussed in Chapter IV.

There are two approaches which can be taken to reforming mental injury cover; a unitary approach or a segmented approach.

A unitary approach removes the current categories of covered mental injury and creates a single provision incorporating the numerous ways which one can suffer a mental injury. An example of this is the s 25 definition of accident, which includes various types of accident in one provision. An advantage of this approach is that it is simple and provides a broad ambit of cover. The difficulty of reforming in this manner is deriving a clear way of incorporating the numerous causes of accidental mental injury. Maintaining clarity is particularly challenging if statutory limitations are placed on the provision, for example, to address fiscal concerns.

²²⁸ See Chapter III.

A segmented approach to reform would retain the current categories of mental injury with an addition of a new cover provision. This approach to reform aligns with how the 2001 Act has previously expanded, for example, the addition of cover for work-related mental injury.²²⁹ An advantage of this approach is that change occurs incrementally, making reform more politically feasible because it happens on a smaller scale. However, as a segmented approach retains the current cover provisions some of the inconsistencies and arbitrary boundaries will remain within the realm of mental injury cover.

In this Chapter, unitary and segmented approaches to reform will be analysed. The following options for reform will be explored:

1. A broad unitary approach: Where cover for mental injury will be reformed into two provisions; mental injury because of a traumatic event and mental injury because of physical injury.
2. A unitary approach with limitations: The broad unitary approach will be retained with limitations on proximity and the nature of the traumatic event.
3. A segmented approach: All the current heads of cover will remain with the addition of s 21C, for cover because of a traumatic event, with limitations on proximity and the nature of the traumatic event.

While the unitary approach with limitations provides the most equitable option for reform, the segmented approach presents the most likely option. This is because it allows for incremental change and hence is more politically palatable.

A Mental injury definition retained

The definition of mental injury as a clinically significant dysfunction,²³⁰ will be retained in all suggested reforms. The value of this definition at common law was recently questioned in *Saadati v Moorhead*.²³¹ The Supreme Court of Canada rejected the requirement of compensable mental injury being a clinically recognisable condition. The Court believed such a condition was “inherently suspect as a matter of legal

²²⁹ Section 21B was inserted by s 6 of the Injury Prevention, Rehabilitation and Compensation Amendment Act 2007 (2008 No 46), effective 1 October 2008.

²³⁰ Section 27.

²³¹ *Saadati v Moorhead*, above n 191.

methodology” because there is no necessary relationship between the reasonable foreseeability of a mental injury and clinical diagnosis.²³² As ‘reasonable foreseeability’ is not relevant in a no-fault scheme, this argument is less persuasive in an ACC context. As explained in Chapter IV, clinical diagnosis of a mental injury is important for treatment and rehabilitation purposes – as these are key goals of ACC this also supports retention of the s 27 definition in reform.²³³

Most importantly, the requirement of mental injury being ‘clinically significant’ acts as an important restriction on the number of possible claims. This helps ensure that reform is ‘fiscally responsible’, because as per Kirby J in *Tame v New South Wales* floodgate concerns tend to recede if full force is given to the distinction between emotional distress and recognisable psychiatric injury.²³⁴ Because of the low-cost barrier to claiming under ACC the ‘floodgate’ concern is more pertinent than in common law jurisdictions, where the cost of litigation erects barriers to the potential number of claimants. For these reasons, there is value in keeping the s 27 definition in any mental injury reform.

B Broad Unitary Approach

In this approach to reform, the author has begun by focusing on the type of events that currently attract cover and the proposition that the boundaries of current cover are fashioned by the principle of ‘community causal responsibility’.²³⁵

Currently, cover is provided for mental injury because of a physical injury, specified sexual offence or work-related incidents. The common theme between each of the categories of cover is that they have an element of the event being ‘traumatising’. This common theme has been drawn on in the following suggested options for reform.

The broad unitary approach proposes replacing the current categories of mental injury cover with the following provisions:

- mental injury because of a traumatic event or series of traumatic events; and

²³² Ibid, at [32].

²³³ See Chapter IV, also see *Saadati v Moorhead*, above n 191, at [32] which the Court recognised the value in clinical diagnosis for treatment.

²³⁴ *Tame v New South Wales*, above n 188, at [193].

²³⁵ See Chapter IV at Part C.

- mental injury because of physical injury.

Such a reform would look like the following:

20 Cover for personal injury suffered in New Zealand

- (1) A person has cover for a personal injury if –
- (a) he or she suffers the personal injury in New Zealand on or after April 2002; and
 - (b) the personal injury is any of the kinds of injury described in sections 26(1)(a) or (b) or (c) or (d)...

26 Personal injury

- (1) **Personal injury** means –
- a) the death of a person; or
 - b) physical injuries suffered by a person, including, for example, a strain or a sprain; or
 - c) mental injuries suffered because of physical injuries suffered by a person; or
 - d) mental injury suffered because of a traumatic event or series of traumatic events;

Cover under 26(1)(c) would be retained because it is unlikely that mental injury because of a traumatic event would incorporate all situations where a person would currently receive cover under s 26(1)(c). It would be important to retain mental injury because of physical injury for cases where a mental injury develops because of an on-going presence of a debilitating physical injury rather than the original accident.²³⁶ Other mental injury claims which previously fell under s 21 and s 21B would be subsumed into cover under s 26(1)(d) as being caused by a ‘traumatic event’.

1 Benefits of reform

Reforming cover to mental injury caused by a traumatic event, or physical injury eliminates the inconsistencies, anomalies and arbitrary distinctions of the current cover provisions.

The broad unitary reform would expand the reach of ACC to cover a wider range of pure mental injury claims for both primary and secondary victims. For example, the claimant in *Queenstown District Lakes v Palmer*, who sought compensation at common law for PTSD and a major depressive disorder after witnessing the death of his wife in a boating accident, would be likely to be covered by the suggested reform.²³⁷ Such a

²³⁶ For example, *King v Accident Compensation Corporation* [2014] NZACC 320.

²³⁷ *Queenstown Lakes District Council v Palmer*, above n 30.

reform would fully up-hold the fundamental principle of ‘replacement of the right to sue’ for recognisable mental injury. Only claims of emotional distress which do not amount to a clinically significant condition, such as work-related stress or emotional upset would be actionable at common law.²³⁸ This ensures that Parliament as the most appropriate body balances the competing policy considerations of compensating personal injury. By upholding ‘replacement of the right to sue’ for mental injury, this fully removes the element of ‘fault’ from compensating personal injury and the poor outcomes produced by costly adversarial and administrative processes associated with the common law.

The inclusion of a wider class of secondary victims eliminates differential treatment between primary and secondary victims. For example, if a parent witnessed the sexual abuse of their child under the current cover provision, only the child could seek cover if a mental injury developed. Under the proposed reform the parents (secondary victims) in addition to the child (primary victim), may seek cover – dispelling the arbitrary distinction between primary and secondary victims.

Broad cover for people who suffer a pure mental injury addresses many of the anomalous cover boundaries. Firstly, the reform would provide cover for people experiencing or witnessing traumatic events both inside and outside the work environment. Claimants in situations like *Toomey* would receive cover through clear statutory change rather than dubious statutory interpretation.²³⁹ Secondly, claimants who suffer a mental injury because of the traumatic circumstances of the accident rather than any physical injuries would also be covered under the proposed reform. The claimant in *O v Accident Compensation*, who suffered PTSD and minor cuts to his hand after attempting to save his pregnant wife following a car crash, would be covered under the reform.²⁴⁰ This removes complicated causation issues between determining whether a mental injury is caused by a physical injury or the traumatic circumstances which the injury was suffered.²⁴¹

²³⁸ *Francisc Catalin Deliu v Boon Gunn Hong* [2013] NZHC 735 at [91]-[95] for a claim of emotional distress and S Todd, above n 8, at 211-217.

²³⁹ *Toomey v Accident Compensation Corporation*, above n 2.

²⁴⁰ *O v Accident Compensation Corporation*, above n 54.

²⁴¹ There are numerous cases where mental injury claims have failed because the minor physical injury did not cause the mental injury rather it was the traumatic circumstances of the accident which caused

As sexual offence cases would be subsumed within mental injury because of a traumatic event,²⁴² this removes the difficult connection between criminal law and ACC. Cases such as *KSB v Accident Compensation Corporation* and *CLM v Accident Compensation Corporation* where the claimants developed a mental injury upon learning that their respective partners were HIV positive could be decided under the new provision, without significantly impacting the criminal law.²⁴³ The reform also removes anomalies between cover for sex crimes and other criminal offences. Victims of any traumatic crime, such as aggravated burglary, as in the cases of *Wells-Henderson v Accident Compensation Corporation* and *Woodd v Accident Compensation Corporation* could seek cover.²⁴⁴

One of the greatest benefits of the suggested reform is that it reduces the differential treatment between physical and mental injury cover. The reform provides comprehensiveness in cover for mental injury in line with the comprehensiveness of cover for physical injuries. This change would begin to give force to the proposition that New Zealand society considers a person's mental wellbeing as equally important as their physical wellbeing. It would update our ACC scheme to reflect medical developments which are increasingly recognising the need to prioritise the treatment of mental conditions.²⁴⁵

2 Issues with reform

The proposed change raises several contentious boundary matters. Providing cover for mental injury caused by a 'traumatic event' and a 'series of traumatic events' without defining such concepts or proximity parameters expands cover in a way which is

the mental injury. Such cases include: *Wells-Henderson v Accident Compensation Corporation* [2015] NZACC 209, *KL v Accident Compensation Corporation* [2017] NZHC 1870 and *Comerford-Parker v ACC* [2011] NZAR 481 (HC), *Accident Compensation Corporation v Simmonds* DC Wellington 349/2002 17 December 2002.

²⁴² Victims of sexual offences would be considered a mental injury caused by physical injury or from traumatic event.

²⁴³ *KSB v Accident Compensation Corporation*, above n 68 and *M v Accident Compensation Corporation*, above n 73. See discussion at Chapter III at Part D of how such decisions impacted the criminal law.

²⁴⁴ *Woodd v Accident Compensation Corporation*, above n 84 and *Wells-Henderson v Accident Compensation Corporation*, above n 84.

²⁴⁵ PriceWaterhouse Coopers, above n 126, at 22.

unlikely to be consistent with the principle governing the cover limitations of the 2001 Act.

This will be discussed in the following part:

(a) Lack of definition of traumatic event:

By not defining a ‘traumatic event’, this has potential to cover a wide range of circumstances, giving ACC and the Courts substantial discretion to determine what ‘events’ meet this threshold.²⁴⁶

Cover could possibly be sought for the consequences of minor events that cause a person with a natural pre-disposition to mental harm to suffer a mental injury. For example, the claimant in *OCS v Accident Compensation Corporation* who suffered a mental injury from workplace bullying, and the claimant in *Jeffery v Accident Compensation Corporation* who suffered a mental injury from stress could receive cover under the proposed reform.²⁴⁷ Cover could also be granted for events which are outside the typical understanding of an ‘accident’ caused by social activities. For example, a child who suffers depression from witnessing their parents die slowly from cancer could potentially seek cover under the suggested reform.

Cover for such events would be contrary to the principle of community causal responsibility. This principle distinguishes between mental injury caused by ‘forces of nature’²⁴⁸ and mental injury caused by the operations of social activity, like for example, mental injury caused by being a victim of a traumatic crime. Not defining what constitutes a ‘traumatic event’ blurs the cover boundaries, providing cover for circumstances which may contradict the principle of community causal responsibility.

(b) Cover for series of events:

Cover for a ‘series of traumatic events’ broadens the present scope of cover as claimants can point to numerous events which they believe ‘caused’ their mental

²⁴⁶ See Chapter II. This discretion might not be desirable. *A Fairer Scheme* believed broad judicial interpretation was one of the primary reasons for the substantial cost increase in the 1990’s.

²⁴⁷ *OCS v ACC*, above n 101 and *Jeffery v Progressive Enterprises Ltd v Accident Compensation Corporation* [2015] NZACC 004.

²⁴⁸ PJD, above n 152.

injury. This could allow cover for mental injuries resulting from gradual process. Cover in such circumstances would be contrary to the current cover boundaries of the 2001 Act which excludes naturally occurring gradual process injuries.²⁴⁹

(c) Proximity boundaries:

The proposed option for reform does not distinguish between primary and secondary victims nor explicitly limit cover through requirements of relational, temporal or spatial proximity.²⁵⁰ Arguably, people experiencing the traumatic event from a secondary source such as seeing a traumatic event on television or hearing about it from another person could be covered.

One rationale for not defining the proximity requirement is that it removes arbitrary distinctions when the cause of mental injuries is considered. For example, analysing the diagnosis of PTSD as per DSM-V manual. The diagnostic criteria state that the following must be met:²⁵¹

- (1) the person was exposed to death, threatened death, actual or threatened serious injury or sexual violence; and
- (2) Such exposure occurred directly, through witnessing the trauma, learning that a relative or close friend was exposed to the trauma and indirect exposure to aversive details of the trauma.

The diagnosis of PTSD does not impose any relational boundaries where people have been exposed to a traumatic incident. Any exposure to a traumatic event, whether or not there are ‘close-ties of love and affection’²⁵² between the primary and secondary victim, is sufficient. The diagnosis applies whether the claimant personally perceived the traumatic event or whether it was perceived through third party communication.²⁵³ As the sense of harm and loss remains the same,

²⁴⁹ See Chapter IV at Part C.

²⁵⁰ Issues of proximity have been subject to large debate at common law. In England, at common law, there are additional requirements for secondary victims over and above foreseeability of harm. These are: close ties of love and affection between the plaintiff and the injured, proximity of the plaintiff to the accident in both space and time, and a sudden reception of a single event or immediate aftermath. See *Alcock*, above n 57 and Chapter IV, Part E.

²⁵¹ American Psychiatric Association, above n 223.

²⁵² A proximity requirement at common law in England in *Alcock*, above n 57.

²⁵³ For example, a third party explaining the traumatic event.

limitations based on relational proximity and the means of perception is possibly an arbitrary line without medical legitimacy.²⁵⁴

Not specifying the proximity parameters, however, does not align with the principle of fiscal responsibility. Allowing for cover in instances where the claimant is not required to be in close physical proximity to the accident significantly expands the schemes cover. People witnessing terrorist attacks on YouTube, such as September 11, could fall under the definition of witnessing a traumatic event.²⁵⁵ As violence, death and disturbing events become more commonly reported and recorded (through live-streaming for example)²⁵⁶, failure to specify proximity boundaries significantly increases the ways that a person can seek cover for mental injury from a ‘traumatic event’. This gives great force to the ‘floodgate concerns’ and fear of ‘fraudulent’ claims.²⁵⁷

Secondly, if we justify cover for under ACC through community causal responsibility, then the proximity boundaries should be defined. If people can claim for witnessing traumatic events through a secondary source that occur internationally, cover would be provided for people because of accidents which occur outside our New Zealand community. This is contrary to the ideology underlying community causal responsibility.

For consistency with the concepts of fiscal responsibility and community causal responsibility, legislative reform should initially proceed by clearly defining situations

²⁵⁴ Desmond Butler, above n 219, at 17. It is becoming more accepted by mental health experts that trauma can be suffered through visual media see Ahern and others “Television images and probable post-traumatic stress disorder after September 11: the role of back-ground characteristics, event exposures and perievent panic” (2004) 3 *The Journal of Nervous and Mental Disease* 192 cited in Pinchevski “Screen Trauma: Visual Media and Post-Traumatic Stress Disorder” (2016) 33 *Theory, Culture & Society* 51 at 62.

²⁵⁵ Survey done by 10 psychiatrists following September 11 in America showed that 44% of adults and 35% of children who viewed the attack through a secondary source reported substantial stress symptoms. See: Schuster and others “A national survey of stress reactions after the September 11, 2001, terrorist attacks” (2001) 345 *New England Journal of Medicine* 1507 cited in Pinchevski “Screen Trauma: Visual Media and Post-Traumatic Stress Disorder” (2016) 33 *Theory, Culture & Society* 51 at 62.

²⁵⁶ Recent terror incidents were documented on film and camera see “Paris attacks: What happened on the night” *BBC News* (online ed, France, 9 December 2015) and “Manchester attack: What we know so far” *BBC News* (online ed, Manchester, 12 June 2017).

²⁵⁷ Labour Market Policy Group, above n 209, at [3d]. This was a large concern for the Policy Group.

which mental injury can be covered. This is what the second option, ‘a unitary approach with limitations’ aims to achieve.

C *A unitary approach with limitations*

This suggestion builds upon the broad unitary approach. It suggests providing cover for mental injury because of physical injury and mental injury because of a single traumatic event or series of traumatic events, but with legislative limits on what constitutes a traumatic event, series of events and proximity limitations.

(a) Defining traumatic event

Under this suggested reform, ‘traumatic event’ would be defined in s 6 as ‘an event that could reasonably be expected to cause mental injury to people generally, such as sexual assault or a bank holdup’. This definition imports the objective test in s 21B. The objective criterion determines the boundaries of the scheme in accordance with community causal responsibility.²⁵⁸ Claims which do not meet this standard are likely to be caused by natural pre-disposition to mental injury and should be excluded.²⁵⁹

Within s 21B the objective test has achieved the purpose of limiting cover in accordance with community causal responsibility. In cases where mental injury was caused by minor trauma and likely natural pre-disposition to mental injuries, such as *OCS* (face-squashing incident) and *Jeffery* (work-place stress incident), the Courts concluded the claims would fail on the basis that these events were not ones which could be reasonably expected to cause mental injury in people generally.²⁶⁰

The s 27 definition of mental injury combined with the objective definition of ‘traumatic event’, creates clear cover boundaries, providing the means for distinguishing between real and fraudulent claims.²⁶¹ The use of examples in the

²⁵⁸ As discussed in Chapter IV at Part C.

²⁵⁹ As per the Amendment Bill legislating s 21B, the purpose of the objective test was to exclude mental injuries caused by minor events or gradual process. See Injury Prevention, Rehabilitation and Compensation Amendment Bill (No 2).

²⁶⁰ *Jeffery v Progressive Enterprises Ltd v Accident Compensation Corporation*, above n 247, at [56] and *OCS Ltd v TW and Accident Compensation Corporation*, above n 101, at [82].

²⁶¹ Labour Policy Market Group, above n 209, at [3c] held the concern that it would be difficult to make a distinction between real and fraudulent claims. The suggested reform imposing the s 27 and objective test from s 21B, is one suggestion which the author believes helps address such concern.

definition such as ‘sexual assault or a bank holdup’ set a high-threshold as to what constitutes a ‘traumatic event’. These examples are important to provide clarity for the New Zealand community to what sort of events could be covered.²⁶²

(b) Cover for series of events

The suggested unitary approach with limitations would provide cover for mental injury caused by a ‘single’ traumatic event or ‘a series of traumatic events’ but ‘excludes gradual process’. Phrasing the reform in this manner prevents cover for mental injury caused by gradual process and creates consistency within the cover provisions of the 2001 Act. The use of this terminology mirrors s 25(1), which defines accident as a ‘specific event or series of events other than a gradual process’.²⁶³

This language differs from that currently used in s 21B. The rationale from departing from the terminology used in s 21B and following that in s 25 to appropriately limit cover is two-fold.

Firstly, the language used in s 21B is unnecessarily complex and round-about. It allows cover for a ‘series of events’ but these must effectively comprise of a ‘single incident’.²⁶⁴ As explained in Chapter III Part E, the recent case of *MC*,²⁶⁵ illuminates the difficulty of the s 21B terminology. If the goal of the legislature is to exclude personal injury caused by gradual process this can be more succinctly done by importing the terminology of s 25(1)(a). While this terminology still provides scope for debate in distinguishing a ‘series of events’ from ‘gradual process’²⁶⁶ like the s 21B(7) terminology, it removes the additional requirements of s 21B which no Court has been able to provide a clear example of circumstances which meet these requirements.

²⁶² Bevan Marten “ACC’s cover provisions need a makeover” (2016) 6 NZLJ 223 at 223. There is value in making cover provisions understandable for ‘the man on the street’ because ACC touches the lives of most New Zealanders.

²⁶³ See *White v Attorney-General* [2010] NZCA 139 at 144-146 in interpreting a series of events under s 25(1) the Court of Appeal held that continuing assault and abuse were a series of discrete accidents.

²⁶⁴ Section 21B includes a series of events but the series of events must ‘arise from the same cause or circumstance, and together comprise a single incident or occasion, but exclude gradual process’.

²⁶⁵ *MC v Accident Compensation Corporation*, above n 103.

²⁶⁶ *Waghorn v Accident Compensation Corporation*, above n 100, at [33] notes the difficulty of distinguishing series of events with gradual process.

Secondly, using the same terminology as s 25(1)(a) provides consistency between the cover provisions for accidental physical and mental injury. If it is considered that accidents which cause mental injury are equally as deserving of cover as accidents which cause physical injury, then there should be parity in the scope of cover provisions.

(c) Proximity limitations

Proximity limitations can be built into the suggested reform by legislating physical proximity requirements. Relational proximity requirements are not proposed in this reform because this would restrict claims of pure mental more than current cover under s 21B. In the opinion of this author, relational proximity requirements are unduly strict if physical proximity barriers are tightly defined as is suggested in this option for reform.

Physical proximity parameters can be defined by importing the current requirement under s 21B(2)(a) that the claimant must ‘experience, see or hear directly’ to satisfy ‘mental injury because of a traumatic event’. The physical proximity requirements limit claims to those who are directly affected by the accident.²⁶⁷ Secondary victims would still be covered where they are sufficiently proximate to the traumatic incident. However, secondary victims like those in *van Soest*,²⁶⁸ would be excluded from cover because they would not meet the physical proximity requirements. In *van Soest* the plaintiffs suffered mental harm upon learning from clinicians of medical negligence which caused physical injuries to their loved ones. The current s 21B(6) requirements could additionally be imported to clarify that experiencing or witnessing the traumatic event through a secondary source is not sufficient.

Putting together these requirements, expanding cover for mental injury through the suggested unitary approach with limitations would look like the following:

20 Cover for personal injury suffered in New Zealand

- (1) A person has cover for a personal injury if –
 - (a) he or she suffers the personal injury in New Zealand on or after April 2002; and

²⁶⁷ Fiona Thwaites “Mental Injury Claims under the Accident Compensation Act 2001” (2012) 18 *Canta LR* 245 at 277.

²⁶⁸ Assuming the secondary victims suffered a clinically significant mental injury; *van Soest v Residual Health Management Unit*, above n 57.

- (b) the personal injury is any of the kinds of injury described in sections 26(1)(a) or (b) or (c) or (d)...

26 Personal injury

(1) **Personal injury** means –

- a) the death of a person; or
- b) physical injuries suffered by a person, including, for example, a strain or a sprain; or
- c) mental injuries suffered because of physical injuries suffered by a person; or
- d) mental injury suffered by a person in the circumstances described in s 21;

21 Mental injury because of traumatic event

(1) A person has cover for a personal injury that is a mental injury if –

- (a) the mental injury is caused by a single traumatic event or a series of traumatic events but excludes gradual process.

(2) Cover under subsection (1)(a) applies to a traumatic event that –

- (a) the person experiences, sees or hears directly the circumstances which constitute a traumatic event;
- (b) A person experiences, sees or hears directly if that person is –
 - i) involved in or witnesses the event him or herself; and
 - ii) is in close physical proximity to the event at the time it occurs.

(3) To avoid doubt a person does not experience, see, hear a traumatic event directly if that person sees, or hears it through a secondary source, for example, by –

- (a) Seeing it on television; or
- (b) Seeing pictures of it or reading about it; or
- (c) Hearing the event by telephone, radio or another person.

(4) Section 36(1) describes how the date referred to in (5) is determined.

6 Interpretation

(1) In this Act, unless the context otherwise requires, -

Traumatic event means –

- (a) an event that could reasonably be expected to cause mental injury to people generally, such as a sexual assault or a bank holdup.

It should be noted that this option for reform does not provide *fully* comprehensive cover for mental injury. There will be cases of debilitating mental injury, such as a child whom suffers depression after watching her parent die from cancer who will not be covered.²⁶⁹ However, this reform does provide comprehensive cover for accidental

²⁶⁹ This reform does not provide cover for any mental injury caused by gradual process.

mental injury on par with accidental physical injury. It would provide all the key benefits of a unitary approach described in detail at Part B(1) of this Chapter, while creating clear cover boundaries limiting the potential for a ‘floodgate of claims’ and remaining consistent with the current limits of the Act.

The suggested unitary reform with limitations may still be considered ‘radical’. In contrast to previous expansions of cover which was achieved through incremental reform,²⁷⁰ this option for reform suggests a global change. Therefore, the segmented approach to reform is likely to best align with previous changes to cover under the 2001 Act and represent the most politically feasible initial option for expansion.

D A segmented approach

This approach to reform retains the three current categories of mental injury cover with the addition of s 21C, which provides cover for mental injury caused by a single traumatic event. The limitations on proximity and the definition of traumatic event would be used in the new provision to define the boundaries of the scheme appropriately.

Such a reform would look like the following:

20 Cover for personal injury suffered in New Zealand

- (1) A person has cover for a personal injury if –
- (a) he or she suffers the personal injury in New Zealand on or after April 2002; and
 - (b) the personal injury is any of the kinds of injury described in sections 26(1)(a) or (b) or (c) or
 - (d)...

26 Personal injury

- (1) **Personal injury** means –
- a) the death of a person; or
 - b) physical injuries suffered by a person, including, for example, a strain or a sprain; or
 - c) mental injuries suffered because of physical injuries suffered by a person; or
 - d) mental injury suffered by a person in the circumstances described in s 21; or
 - e) work-related mental injury that is suffered by a person in the circumstances described in s 21B;
- or

²⁷⁰ For example, the expansion of cover to include work-related mental injury in 2008, see above n 229 and reform of medical misadventure to treatment injury see Injury Prevention, Rehabilitation, and Compensation Amendment Act (no 2), 2005.

- f) mental injury suffered by a person because of a traumatic event in the circumstances described in 21C; or...

21C Mental injury because of traumatic event

- (1) A person has cover for a personal injury that is a mental injury if –
 - (a) the mental injury is caused by a single traumatic event of a kind described in subsection (2)
- (2) Cover under subsection (1)(a) applies to a traumatic event that –
 - (a) the person experiences, sees or hears directly the circumstances which constitute a traumatic event;
 - (b) A person experiences, sees or hears directly if that person is –
 - i) involved in or witnesses the event him or herself; and
 - ii) is in close physical proximity to the event at the time it occurs.
- (3) To avoid doubt a person does not experience, see, hear a traumatic event directly if that person sees, or hears it through a secondary source, for example, by –
 - (a) Seeing it on television; or
 - (b) Seeing pictures of it or reading about it; or
 - (c) Hearing the event by telephone, radio or another person.
- (4) Section 36(1) describes how the date referred to in (5) is determined.

6 Interpretation

- (1) In this Act, unless the context otherwise requires, -

Traumatic event means –

- (a) an event that could reasonably be expected to cause mental injury to people generally, such as sexual assault or a bank holdup.

Because the existing cover provisions are retained, some of the current difficulties associated with cover will remain. For example, the interpretive uncertainties of series of events in s 21B, the tricky connection between ACC and criminal law under s 21 and the inconsistency in legislative standards between cover provisions. On the face of it, the segmented reform expands inconsistencies. Section 21C only provides cover for pure mental injury caused by a single traumatic event whilst s 21B provides cover for pure injury for a single or series of events. However, given only one case has received cover under 21B ‘series of events’, and such series of events must together comprise a ‘single event’, practically, s 21C is unlikely to provide a substantially narrower scope of cover.

The suggested segmented reform provides the major benefits of expansion described at Part B(1) of this Chapter, by removing inconsistent cover barriers. The reform

eliminates irregular cover between individuals who suffer a personal injury because of a traumatic event in and outside the workplace and those who suffer a personal injury from a crime which is not specified in schedule three – such claimants could seek cover under s 21C. The segmented reform additionally expands cover for secondary victims outside of the work environment who are proximate to the traumatic event.

This option for reform provides an incremental approach to expanding mental injury cover. Extending cover in this manner initially would allow for Parliament and ACC to ‘test the waters’ and monitor the costs and benefits of such expansion. For these such reasons, practically this option presents the most realistic approach to reform.

E Conclusion

The purpose of this Chapter is to suggest numerous ways which mental injury cover could be expanded. A unitary reform with limitations provides the best compromise between providing comprehensive mental injury cover and adherence to the principles which establish the 2001 Act’s cover boundaries. However, given the role politics have played in the development of ACC,²⁷¹ and the concerns of an influx in unmeritorious claims,²⁷² the most politically-pragmatic option for reform is the segmented approach. As ACC cover has previously expanded in this fashion, it is logical to initially reform cover for mental injury in this way – ideally with the future goal of unitary cover for mental injury. Accordingly, the three suggested options for reform holistically provide one way to incrementally expand mental injury beginning from a limited segmented approach.

VI Conclusion

Present cover for mental injury under the 2001 Act is inadequate. The limited cover provisions have no principled basis and this produces a range of difficulties such as; inconsistencies in legislative standards, anomalous cover and inequitable treatment between accidental physical and mental injuries. The tenants which currently define the 2001 Act’s cover boundaries being community causal responsibility, rehabilitation, replacement of the right to sue, and fiscal responsibility provide a rationale for

²⁷¹ See S Todd, above n 8, at 23-31 on the development of ACC and how the scheme changes under different Governments who hold different political views on the role of ACC.

²⁷² ‘Unmeritorious’ meaning the claims are ingenuine; merely an attempt to defraud the ACC system.

expanding the scope of mental injury cover. While there are many ways reform to ACC could be undertaken, a segmented approach, providing cover for ‘mental injury because of a traumatic event’ is the most politically feasible option. New Zealand society should be extremely proud of our ACC scheme which boasts some of the best treatment and rehabilitation statistics for accidental injury in the world.²⁷³ As we approach the 50th anniversary of the first ACC scheme, it is time for New Zealand to take another brave step forward and lead the way in establishing the first no-fault scheme to provide expansive cover for physical *and* mental accidental injuries.

²⁷³ PriceWaterhouse Coopers, above n 126, at 11-14 and Kirsten Armstrong, above n 250, at 32.

VII Appendices

A Appendix One – Relevant Legislation

Section 21 Cover for mental injury caused by certain criminal acts

- (1) A person has cover for a personal injury that is a mental injury if—
 - (a) he or she suffers the mental injury inside or outside New Zealand on or after 1 April 2002; and
 - (b) the mental injury is caused by an act performed by another person; and
 - (c) the act is of a kind described in subsection (2).
- (2) Subsection (1)(c) applies to an act that—
 - (a) is performed on, with, or in relation to the person; and
 - (b) is performed—
 - (i) in New Zealand; or
 - (ii) outside New Zealand on, with, or in relation to a person who is ordinarily resident in New Zealand when the act is performed; and
 - (c) is within the description of an offence listed in Schedule 3.
- (3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.
- (4) Section 36 describes how the date referred to in subsection (3) is determined.
- (5) For the purposes of this section, it is irrelevant that—
 - (a) no person can be, or has been, charged with or convicted of the offence; or
 - (b) the alleged offender is incapable of forming criminal intent.

Section 21B Cover for work-related mental injury

- (1) A person has cover for a personal injury that is a work-related mental injury if—
 - (a) he or she suffers the mental injury inside or outside New Zealand on or after 1 October 2008; and
 - (b) the mental injury is caused by a single event of a kind described in subsection (2).
- (2) Subsection (1)(b) applies to an event that—
 - (a) the person experiences, sees, or hears directly in the circumstances described in section 28(1); and
 - (b) is an event that could reasonably be expected to cause mental injury to people generally; and
 - (c) occurs—
 - (i) in New Zealand; or
 - (ii) outside New Zealand to a person who is ordinarily resident in New Zealand when the event occurs.
- (3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.
- (4) Section 36(1) describes how the date referred to in subsection (3) is determined.
- (5) In subsection (2)(a), a person experiences, sees, or hears an event directly if that person—
 - (a) is involved in or witnesses the event himself or herself; and
 - (b) is in close physical proximity to the event at the time it occurs.
- (6) To avoid doubt, a person does not experience, see, or hear an event directly if that person experiences, sees, or hears it through a secondary source, for example, by—

- (a) seeing it on television (including closed circuit television):
 - (b) seeing pictures of, or reading about, it in news media:
 - (c) hearing it on radio or by telephone:
 - (d) hearing about it from radio, telephone, or another person.
- (7) In this section, event—
- (a) means—
 - (i) an event that is sudden; or
 - (ii) a direct outcome of a sudden event; and
 - (b) includes a series of events that—
 - (i) arise from the same cause or circumstance; and
 - (ii) together comprise a single incident or occasion; but
 - (c) does not include a gradual process.

Section 26 Personal injury

(1) **Personal injury** means—

- (a) the death of a person; or
- (b) physical injuries suffered by a person, including, for example, a strain or a sprain; or
- (c) mental injury suffered by a person because of physical injuries suffered by the person; or
- (d) mental injury suffered by a person in the circumstances described in section 21; or
- (da) work-related mental injury that is suffered by a person in the circumstances described in section 21B; or

...

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

....

Schedule 3: Cover for mental injury caused by certain acts dealt with in Crimes Act 1961

- 124A Indecent communication with young person under 16
- 128B(1) Sexual violation
- 129(1) Attempted sexual violation
- 129(2) Assault with intent to commit sexual violation
- 129A(1) Inducing sexual connection by threat
- 129A(2) Inducing indecent act by threat
- 130 Incest
- 131(1) Sexual connection with dependent family member
- 131(2) Attempted sexual connection with dependent family member
- 131(3) Indecent act with dependent family member

131B	Meeting young person following sexual grooming, etc
132(1)	Sexual connection with child under 12
132(2)	Attempted sexual connection with child under 12
132(3)	Indecent act on child under 12
134(1)	Sexual connection with young person under 16
134(2)	Attempted sexual connection with young person under 16
134(3)	Indecent act on young person under 16
135	Indecent assault
138(1)	Exploitative sexual connection with person with significant impairment
138(2)	Attempted exploitative sexual connection with person with significant impairment
138(4)	Exploitative indecent act with person with significant impairment
142A	Compelling indecent act with animal
194	Assault on a child, or by a male on a female. For the purposes of this schedule, section 194 of the Crimes Act 1961 must be regarded as relating only to situations where a female sexually assaults a child under 14 years old.
201	Infecting with disease
204A	Female genital mutilation
204B	Further offences relating to female genital mutilation

B Appendix Two – ACC mental injury claims and entitlement cost statistics

Operations Services, Analytics and Reporting (ACC) – Official Information Act response

Table one: The total count of Accepted and Declined claims lodged with a mental injury, in the period 1 January 2016 to 31 December 2016

Decision	Count of Mental Injury Claims
Accept	2,037
Decline	5,741
Grand Total	7,778

Table two: The total count of Accepted and Declined work-related claims lodged, in the period 1 January 2016 to 31 December 2016. Claims counted in table two are a subset of the claims counted in table one

Decision	Count of Sensitive Claims
Accept	1,741
Decline	5,126
Grand Total	6,867

Note: The count of claims in table two is a subset of the count of claims in table one

Cost of entitlements

Section 21B: Total cost spent on work-related mental injury, in the period 1 January 2008 to 7 September 2017. Providing a breakdown per Entitlement Group and includes the total overall cost spent per year.

Entitlement Group	Cost Ex GST									
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017 to 7 September 2017
Conveyance by Ambulance	\$11,630	\$16,870	\$12,108	\$14,473	\$18,232	\$19,819	\$21,712	\$1,416		
Conveyance for Medical Treatment	\$367,831	\$350,521	\$235,284	\$239,919	\$258,720	\$330,600	\$413,094	\$556,024	\$907,339	\$766,443
Death Benefits - Grants							\$17,747			
Death Benefits - Weekly Compensation								\$100,329	\$3,000	
Dental Treatment	\$3,513	\$10,063	\$11,188	\$2,313	\$2,289	\$4,817	\$3,939	\$4,729	\$3,158	\$10,655
Hospital Treatment	\$55,887	\$67,376	\$17,319	\$59,484	\$43,541	\$88,832	\$28,513	\$52,778	\$37,717	\$67,321
Independence Allowance	\$17,963,570	\$23,005,631	\$17,625,187	\$17,326,234	\$18,553,852	\$19,853,840	\$24,782,427	\$20,564,613	\$22,727,120	\$16,027,258
Lump Sums	\$972,959	\$1,331,765	\$973,126	\$604,428	\$792,998	\$828,248	\$1,253,629	\$1,410,741	\$1,769,777	\$1,659,799
Medical Treatment	\$14,915,866	\$15,357,017	\$10,473,336	\$10,148,097	\$10,775,192	\$12,188,729	\$14,373,477	\$26,186,953	\$38,486,111	\$33,506,105
Miscellaneous Benefits / Expenditure	\$148,557	\$83,861	\$114,351	\$95,459	\$133,208	\$210,823	\$302,602	\$318,433	\$149,310	\$69,831
Support for	\$689,415	\$838,467	\$932,731	\$1,104,348	\$595,269	\$125,046	\$172,385	\$187,847	\$146,128	\$142,012
Independence - Capital	\$32,241	\$34,806	\$10,180	\$9,477	\$14,466	\$31,007	\$20,531	\$21,999	\$38,197	\$44,637
Support for Independence - Care	\$1,103,366	\$1,066,573	\$479,659	\$308,832	\$211,172	\$396,343	\$603,717	\$447,068	\$666,999	\$596,321
Support for Independence - Other	\$1,070,007	\$1,612,062	\$1,273,247	\$580,836	\$712,923	\$848,604	\$1,051,729	\$1,021,957	\$986,848	\$961,203
Vocational Rehabilitation	\$274,540	\$366,317	\$393,167	\$282,401	\$318,534	\$292,239	\$331,227	\$288,514	\$337,594	\$429,514
Weekly Compensation	\$13,882,110	\$16,022,726	\$13,090,778	\$12,415,987	\$12,848,932	\$14,060,699	\$17,658,459	\$22,482,082	\$26,020,090	\$21,882,282
Grand Total	\$51,491,491	\$60,164,057	\$45,641,661	\$43,192,286	\$45,279,328	\$49,279,645	\$61,035,189	\$73,645,483	\$92,279,388	\$76,163,380

Caveats / notes on data

The count of claims in tables one and two have been identified where the lodgement date is in the period 1 January 2016 to 31 December 2016.

The 2017 calendar year is only a partial year and so payments are only current to 7 September 2017

As at 1 December 2014, the way ACC funded conveyance by ambulance changed from provider billing to bulk funding. Due to this change ACC no-longer has claim related cost data for conveyance by ambulance.

Data was extracted on 8 September 2017 and may differ if re-run at a later date.

C Appendix three – Total entitlement costs for all ACC Claims

Response:

The data have been extracted based on the following criteria:

The pay date is between 1 January 2016 and 31 December 2016.

Mental injury claims were identified using relevant injury/read codes.

Table 1: Mental injury costs and costs of all other claims, during the period 1 January 2016 and 31 December 2016, broken down by entitlement group.

Entitlement Group	Entitlement payments	
	Mental Injury claims	All other Injuries
Conveyance for Medical Treatment	\$626,584	\$27,290,532
Death Benefits - Grants	\$1,064	\$14,894,349
Death Benefits - Weekly Compensation	\$15,895	\$72,141,944
Dental Treatment	\$3,976	\$27,444,850
Hospital Treatment	\$146,795	\$324,236,327
Independence Allowance	\$12,174,895	\$35,420,120
Lump Sums	\$1,557,580	\$39,399,632
Medical Treatment	\$21,943,025	\$656,296,433
Miscellaneous Benefits / Expenditure	\$165,324	\$8,037,522
Support for Independence - Assessment	\$152,872	\$22,614,997
Support for Independence - Capital	\$181,050	\$129,808,928
Support for Independence - Care	\$907,650	\$404,965,634
Support for Independence - Other	\$546,137	\$59,088,686
Vocational Rehabilitation	\$491,124	\$87,623,248
Weekly Compensation	\$25,241,255	\$1,056,084,872
Total costs	\$64,155,226	\$2,965,348,074

*Calculation for cost of entitlement of s 21B as % of total cost of entitlements =
 $92,279,388 / 2,965,348,074 = 3.11\%$*

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