

## Compensation for Motor Vehicle Injuries in New Zealand

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Résumé de l'article

En Nouvelle-Zélande, l'indemnisation des victimes d'accidents d'automobile n'est qu'une des composantes du régime général d'assurance sans égard à la responsabilité, prévu par la *Accident Rehabilitation and Compensation Insurance Act* de 1992. Cette loi remplace la *Accident Compensation Act* de 1982 en abolissant des droits auparavant reconnus aux victimes : indemnisation du préjudice moral sous forme de paiement forfaitaire et exclusion des réclamations pour les conséquences d'un traumatisme psychique.

La loi de 1992 s'est avérée largement impopulaire et a ramené les avocats dans le processus d'indemnisation pour les blessures de nature psychique. Ce retour en force des avocats a aussi entraîné une augmentation des réclamations pour dommages exemplaires ou punitifs.

Malgré cela, l'indemnisation des victimes d'accidents d'automobile pose peu de problèmes. Le financement du régime est adéquat et il est bien accepté par la population, si ce n'est de la remise en question des indemnités versées aux conducteurs ivres.

## Compensation for Motor Vehicle Injuries in New Zealand

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John Michael MILLER\*

*Compensation for Motor Vehicle injuries in New Zealand is included as part of the overall no fault accident compensation scheme in the Accident Rehabilitation and Compensation Insurance Act 1992. This Act replaced the Accident Compensation Act 1982 and abolished lump sum compensation for injuries and excluded mental trauma injury claims which were available under the previous Act.*

*This led to considerable public dissatisfaction with the 1992 Act and brought lawyers back into the compensation process with damages claims for mental trauma injuries. The renewed interest of lawyers in litigation also led to an increase in exemplary/punitive damages claims.*

*Despite this return to litigation the motor vehicle part of the no fault scheme presents few problems. It is well funded and is well accepted apart from the recurrent question of compensating drunken drivers for their injuries.*

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\* Barrister and Senior Lecturer in law, Victoria University of Wellington.

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*Malgré cela, l'indemnisation des victimes d'accidents d'automobile pose peu de problèmes. Le financement du régime est adéquat et il est bien accepté par la population, si ce n'est de la remise en question des indemnités versées aux conducteurs ivres.*

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New Zealand (NZ) does not have a separate no fault scheme for injuries from motor vehicle accidents. All accident victims whether they are injured on the road, at home, in a hospital, at play or at work are covered by the one Act—the *Accident Rehabilitation and Compensation Insurance Act, 1992*<sup>1</sup>. A person injured in a motor vehicle accident is therefore compensated in the same way as these other accident victims<sup>2</sup>.

### 1. Personal Injury and Cover

To come under the Act the injured person has to show :

a) A personal injury<sup>3</sup>

and

b) Cover<sup>4</sup> under the Act.

If a injured person has cover under the Act then there can be no resort to the New Zealand Courts for damages for the injury as section 14 of the Act bars «proceedings for damages arising directly or indirectly out of personal injury covered by this Act<sup>5</sup>».

Because motor vehicle accidents generally involve some form of forceful contact there is no problem with the vast majority of motor accident victims coming under the definition of :

a) personal injury — as they invariably suffer physical injuries<sup>6</sup>

and

b) cover — as their personal injuries are caused by an accident<sup>7</sup>.

Unlike other overseas motor vehicle schemes there is no need for the injured person to show that the injury happened through the use of a motor

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1. Which came into force on 1 July 1992 (hereinafter referred to as «the Act»). For the background to this Act and cases thereunder see : J. MILLER and D. RENNIE, *Brooker's Accident Compensation in New Zealand* Wellington, vol. 1 and 2, New Zealand, 1992.
  2. A person injured at work does receive compensation for the first week whereas compensation for non work injuries start after the first week sections 38 and 39 of the Act.
  3. Sections 4 and 8 of the Act. See *infra*, note 16 for the statutory definitions.
  4. Section 8 of the Act. See *infra*, note 17 for the definition of cover.
  5. This does not bar claims for compensatory damages for mental trauma (see *infra*, note 12) or claims for exemplary/punitive damages (see *infra*, note 37). Nor does it prevent actions being brought in Courts outside of New Zealand. Indeed the ACC may assist with such overseas litigation : section 15 of the Act.
  6. Sections 4 and 8 of the Act. See *infra*, note 17 for the statutory definitions.
  7. Section 3 defines accident as : a) A specific event or series of events that involves the application of a force or resistance external to the human body and that results in physical injury [...]. This clearly covers most motor vehicle injuries.

vehicle. An injured person simply comes under the general accident compensation scheme if they have a personal injury that has cover.

The New Zealand legislation therefore does not have the demarcation disputes that concern other stand alone motor vehicle schemes<sup>8</sup>.

## 2. Upsurge in Damages Claims and Reasons for That

Although obtaining compensation from the Accident Compensation Corporation<sup>9</sup> for motor vehicle injuries poses little difficulty<sup>10</sup> and the bar on damages claims remains, there has been a spectacular upsurge in damages claims being filed for mental trauma and exemplary damages in personal injury cases. They have mainly been for sexual abuse, medical negligence and work related injuries although there have been some as a result of motor vehicle accidents<sup>11</sup>.

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8. However the cause of the injury is of some importance in funding the scheme and in work injury claims. See *infra*, note 60.

9. Hereinafter referred to as the ACC.

10. Apart from any general compensation problems faced by all claimants. In 1997 the median time from registration of a claim to the payment of first week compensation was 30 days: *1997 ACC Annual Report*, p. 54.

11. Examples of some of the cases filed are:

*F. v. Northland Health Ltd.* (District Court, Whangarei, NP 868/93, 1993): \$150,000 exemplary damages sought by an employee for exposure to chemicals at the hospital; *M. v. Wellington Area Health Board* (High Court, Wellington, CP 205/93, Gallen J., 6 December 1994): \$250,000 exemplary damages sought against two doctors and the Hospital over the death of the plaintiff's wife. A further \$75,000 is being claimed for mental trauma;

*Akavi v. Taylor Preston* (High Court, Wellington, CP 93/94, Master Thomson, 13 September 1994): \$150,000 exemplary damages sought by employee after being scalped by machinery at work. Settled on confidential terms;

*W. v. Health South Canterbury* (High Court, Timaru, CP 2/95, 1995): \$1,500,000 compensatory damages sought for mental trauma from the switching of new born babies by a hospital. Settled on confidential terms;

*W. v. Counties Manukau Health Ltd* (High Court, Auckland, CP 583/94, Barker J., 13 April 1995): \$200,000 exemplary damages sought against the Hospital for sexual abuse of two children by a paedophile inadequately supervised on release from a Mental Hospital;

*Boe v. Hammond* (High Court, Wellington, M 3/95, Master Thomson, 26 May 1995): \$250,000 compensatory damages for mental trauma and \$75,000 exemplary damages from the death of a spouse in a motor vehicle accident;

*B. v. Counties Manukau Health Ltd.* (High Court, Auckland, 1995): \$75,000 exemplary damages sought against a doctor and the Hospital over the birth of a brain damaged child. A further \$250,000 is being claimed for mental trauma;

*R. v. Liddell and Auckland Area Health Board* (High Court, Auckland, 1995): \$250,000 exemplary damages sought for sexual abuse of two children by Liddell, a social worker employed by the Hospital;

There are three main reasons for this upsurge in damages claims. They are:

- 1) *Mental trauma* is now excluded from the definition of personal injury under the Act. This means that damages for mental trauma can now be claimed in Court.
- 2) *Exemplary damages* claims are now allowed in cases of negligent as well as intentional conduct.
- 3) The *abolition of lump sum compensation* by the Act.

## 2.1 Mental Trauma Claims

Under the previous *Accident Compensation Act 1982* the definition of personal injury by accident included «the physical and mental consequences of any such injury or of the accident<sup>12</sup>». Suffering mental consequences from an accident (an unlooked for mishap or untoward event<sup>13</sup>) was therefore sufficient to come under the Act. Such mental consequences ranged from transient emotional trauma such as humiliation through to unresolved grief reactions and serious psychiatric injury.

Thus in *ACC v. E*<sup>14</sup>, an employee who had a nervous breakdown as a result of being sent on a stressful management course was held to have

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*M. v. Counties Manukau Health Ltd.* (High Court, Auckland, 1996): \$75,000 exemplary damages sought against a doctor and the Hospital over the death of a baby. A further \$250,000 is being claimed for mental trauma;

*Innes v. AG* (High Court, Auckland, CP 152/95, Elias J., 10 July 1997): claim for damages by the estate of Matthew Innes for his death whilst being taken to Hospital in a police car;

*B. v. Residual Health Unit* (High Court, Timaru, 1997): \$1 million dollars compensatory damages claimed by parents for mental trauma and \$400,000 exemplary damages for brain damage caused to an infant in hospital;

*W. v. Health Waikato Ltd.* (District Court, Te Kuiti, CP 98/97, 1997): \$100,000 compensatory damages for mental trauma suffered by a family for the loss of the deceased's amputated legs;

*McGrory v. Ansett NZ Ltd.* (High Court, Auckland, CP 228/97, Smellie J., 11 December 1997): claim by passengers for unspecified exemplary and compensatory damages from an air crash;

*Jackson v. Burcher & Ors* (High Court, Hamilton, CP 56/94, Master Faire, 19 September 1997): a claim for \$1.5 million exemplary damages for medical negligence and alleged cover up of radioactive damage as the result of a scan.

Some of these claims have been abandoned or settled; the rest are still going through. In the spring of 1998, the Canadian dollar was quoted at 1,25 when compared to a NZ dollar.

12. Section 2, *Accident Compensation Act 1982*.

13. *Fenton v. Thorley*, [1903] AC 403.

14. [1992] 2 NZLR 426.

suffered personal injury by accident and in *Cochrane v. ACC*<sup>15</sup>, a mother who suffered mental trauma from watching her son die in hospital after he had been tortured by a gang was also held to have suffered personal injury by accident. However under the 1992 Act such claims are excluded from the scheme<sup>16</sup>. This is done through the definitions of personal injury and mental injury.

### 2.1.1 Definitions

The definition of personal injury is contained in section 4 and section 8 (3) of the Act and unlike the previous definition of personal injury by accident in the 1982 Act is a closed definition :

*S4 Definition of Personal Injury*—(1) For the purposes of this Act 'personal injury' means the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person and has the extended meaning assigned to it by section 8 (3) of this Act [...]

*S8 Cover for personal injury occurring in New Zealand*—(1) This Act shall apply in respect of personal injury occurring in New Zealand on or after the 1st day of July 1992 in respect of which there is cover under this Act.

(2) Cover under this Act shall extend to personal injury which —

- (a) Is caused by an accident to the person concerned ; or
- (b) Is caused by gradual process, disease or infection arising out of and in the course of employment as defined in s. 7 or s. 11 of this Act ; or
- (c) Is medical misadventure as defined in section 5 of this Act ; or
- (d) Is a consequence of treatment for personal injury covered by this Act.

(3) Cover under this Act shall also extend to personal injury that is mental or nervous shock suffered by a person as an outcome of any act of any other person performed on, with, or in relation to the first person (but not on, with or in relation to any other person), being —

- (a) An act that is within the description of any offence listed in the First schedule to this Act<sup>17</sup>

- 
15. [1994] NZAR 6. The writer appeared as counsel in this case. Although it was decided in 1994 it was case under the 1982 Act. The case enabled a large group of the families of crime victims killed by violent acts including motor vehicle crashes to gain compensation for their mental trauma under the 1982 Act. Their cases had been adjourned pending the test case of *Cochrane*.
  16. Because of pressure from employers groups who did not want such claims to come within the ACC scheme as it would increase their ACC premiums. Ironically it has led to this increase in litigation and the need to take out insurance against such claims.
  17. The offences listed in the First Schedule are the usual range of sex crimes sexual, violation, indecent assault, etc.

### 2.1.2 Type Of Mental Trauma Included

Therefore only mental trauma which is *an outcome* of physical injury is included in the Act<sup>18</sup>. Furthermore only very serious mental traumas included for the phrase « mental injury » is defined in section 3 as « a clinically significant behavioural, psychological or cognitive dysfunction<sup>19</sup> ».

In *ACC v. E*<sup>20</sup>, a case decided under the 1982 Act, the Court of Appeal said :

It would be a strange situation if cover under the Act for a person suffering serious mental consequences caused by an accident were to depend upon whether or not some physical injury however slight also is sustained. Further it would create major difficulties should it be necessary in particular cases to separate physical and mental injuries.

This « strange situation » is now the law under the 1992 Act.

### 2.1.3 Type Of Mental Trauma Excluded

As recognised under the 1982 Act mental trauma can range from transient emotional reactions of embarrassment, anger, humiliation, etc., through to more serious mental trauma such as shock and on to serious psychiatric damage.

The 1992 Act no longer recognises transient emotional trauma as a personal injury. This means that an injured person can sue for damages for transient emotional trauma. The Act does recognise *mental or nervous shock* as a personal injury but only as the result of a sex crime<sup>21</sup>. If there is no sex crime involved the injured person can sue for damages for this mental or nervous shock. The Act recognises *mental injury as an outcome of physical injury* as a personal injury but :

- 1) if the mental injury is not an outcome of the physical injury and happened *prior to* the physical injury as in the terror at the approach of a train while stuck on a level crossing ; or
- 2) if the mental injury happened at the *same time* as or *after* the injury but came from brooding over the horrific sights involved in the accident and not from the injuries then the mentally injured person can sue for damages.

18. Apart from the mental trauma suffered *as a result* of an act which is a sex crime — section 8 (3).

19. The phrase appears to be taken from the AMERICAN PSYCHIATRIC ASSOCIATION'S, *Diagnostic and Statistical Manual of Mental Disorders*, DSM III, 3<sup>rd</sup> edition, p. 6.

20. [1992] 2 NZLR 426, 434.

21. Section 8 (3).



Hence the upsurge in damages claims for mental trauma using the torts of assault, battery and negligence<sup>22</sup>.

#### 2.1.4 Assault, Battery and Negligence

Damages claims for assault and some batteries also became possible after the 1992 Act because mental trauma is not included in the Act and physical injury is not defined in the Act. Given the separate definition of « mental injury », the phrase « physical injury » cannot include any aspect of mental trauma. The legislation would not specify a restrictive definition of mental injury if lesser mental trauma could simply be included under physical injuries. It is also submitted that physical injuries must mean more than mere physical contact. The *Crimes Act 1961* defines « to injure » as meaning « to cause actual bodily harm<sup>23</sup> ».

In *R v. McArthur*<sup>24</sup>, this definition was referred to and Mahon J held that it was not an injury where the victim was only shaken and dazed after being knocked down by a car. An injury had to be something in the way of broken bones, bruising, cuts or lacerations.

It could be argued that there should be different interpretations given to injury in a criminal statute and that given in a compensation statute because of the different policy objectives. However, given the restricted nature of the definition in section 4 physical injuries have to be something more than mere hurt and be in the nature of cuts, wounds, bruises and fractures. Thus, any contact which did not result in these types of injuries would not be a physical injury. This has been confirmed in *Bell v. ARCIC*<sup>25</sup>, an Accident Compensation case in the District Court<sup>26</sup> where a cotton bud lodged in a ear was held not to be a personal injury even though medical attention was required to remove it.

22. NZ Law Schools suddenly had to start teaching nervous shock in Tort Law courses after neglecting it for nearly 20 years. The legal profession also had to be warned as they could be sued for negligent advice if they failed to advise injured clients of their possible damages claims — hence the Common Law Damages section in J. MILLER and D. RENNIE, *Brooker's Accident Compensation in New Zealand 1992* Wellington, New Zealand, Vol. 1.

23. Section 2 *Crimes Act 1961*.

24. [1975] 1 NZLR 486.

25. See J. MILLER and D. RENNIE, *op. cit.*, note 22, para. AC4.04.

26. The Review and Appeal structure is contained in sections 89-99 of the Act. In essence one applies for a review of an adverse ACC decision to a Review Officer, then there is a general appeal to the District Court exercising its Accident Compensation jurisdiction, followed by an appeal on a question of law to the High Court and eventually to the Court of Appeal. In 1997 there were 3,414 reviews and appeals heard and 34.6% were decided against the ACC: *1997 ACC Annual Report*, p. 55.

Thus if there is physical contact which is not a physical injury *e.g.* a contemptuous touch this also could be the subject of a damages claim. If there was no damage suffered there would certainly be a problem in suing for negligence but a claim in assault and battery could be an option particularly if there was a deliberate attempt to strike the victim<sup>27</sup>.

### 2.1.5 No Clear Decision On Mental Trauma

Despite the number of claims filed for damages for mental trauma we still await a decision from the Court of Appeal. Most of the claims have survived strike out applications and as yet only one mental trauma case *Kingi v. Partridge*<sup>28</sup> has proceeded to an adverse judgment by a High Court Judge.

In that case a claim for nervous shock by a family over the death of a relative in hospital was struck out on the basis of the tests for proximity laid down by the House of Lords in *Alcock v. Chief Constable of South Yorkshire*<sup>29</sup>.

However there are some doubts whether the English tests for nervous shock will be adopted in New Zealand by the Court of Appeal. Lord Cooke when he was President of the Court of Appeal noted<sup>30</sup> that the *Alcock*

27. In New Zealand it is still unclear whether an assault and battery can only be committed intentionally. In *Dehn v. AG*, [1988] 2 NZLR 564, 583, Tipping J. said that a battery required an intentional as opposed to an unintentional application of force. This point was not considered on appeal by the Court of Appeal, [1989] 1 NZLR 320. Although the Court of Appeal in *McKenzie v. AG*, [1992] 2 NZLR 14, said that claims for assault and battery were barred under the Accident Compensation legislation, this decision was under the old definition of « personal injury by accident » in the 1982 Act. The definition in the 1992 Act with its exclusion on mental trauma is significantly different and now allows these claims to be made.

28. High Court, Rotorua, CP16/93, Thorp J., 2 August 1993. However in a recent decision issued after this article was written, Pankhurst J. disagreed with the decision of Thorp J. in *Kingi*. See *Palmer v. Danes Shotover Rafts Ltd & Ors*, High Court, Invercargill, CP10/97, Pankhurst J., 18 March 1998.

29. [1992] 1 AC 410.

30. In *Mouat v. Clark Boyce*, [1992] 2 NZLR 559, 569. In two recent decisions which became available after this article was written a Master of the High Court has decided that the more liberal Australian approach to the requirement for proximity in nervous shock cases should be preferred to the more restrictive English approach. See *Van Soest & Ors v. The Residual Health Unit & Ors*, High Court, Christchurch, CP180/96, Master Venning, 22 December 1997 and *Legge & Ors v. The Attorney General*, High Court, Christchurch, M290/96, Master Venning, 19 December 1997. The more liberal Australian approach is shown in *Andrews v. Williams*, [1967] VR 831, *Coates v. Government Assurance Office of NSW*, (1995) 36 NSWLR 1 and *Pham v. Lawson*, (1997) 68 SASR 124. However Master Venning considered that a recognised mental or psychiatric illness was still required for a nervous shock claim at common law.

decision was really a policy decision thus indicating that different tests for nervous shock may be more appropriate for New Zealand.

### 2.1.6 Damages For Distress

New Zealand certainly has an indigenous approach to many areas of Tort law<sup>31</sup> and has shown a readiness to award damages for transient emotional trauma such as distress. In *Mouat v. Clark Boyce*<sup>32</sup> the plaintiff was awarded damages for the financial loss and distress she suffered through the defendant firm of solicitors failing to properly advise her when she guaranteed financial transactions for her son. The defendant solicitors challenged the award of \$25,000 to Mrs. Mouat for her distress. They argued that the worry, inconvenience and stress suffered by Mrs. Mouat were not causative of any physical consequences and did not amount to nervous shock or neurosis such as to be compensatable in tort.

The Court of Appeal rejected this argument and upheld the award. Lord Cooke said :

In my opinion, when the plaintiff has a cause of action for negligence, damages for distress, vexation, inconvenience and the like are recoverable in both tort and contract, at least if reasonably foreseeable consequences of the breach of duty. It has been said that mental distress is not by itself sufficient damage to ground an action : see McGregor on Damages (15th ed 1987) para 89. But that question does not arise here as the plaintiff has suffered other recoverable damage.

While the fact that there was other recoverable damage (*e.g.* financial loss) meant that Lord Cooke did not have to decide whether mental distress alone was sufficient, Richardson J. considered that it was. He said :

In the present case where there is a duty of care to the plaintiff, the scope of the damages recoverable is essentially a question of remoteness of damage which turns on whether the particular harm was a reasonably foreseeable consequence of the particular breaches of duty which have been established. And public policy concerns which emphasise the often temporary and relatively trivial nature of the harm and the risks of falsification cannot justify leaving the burden of the loss with the innocent victim where the claim is adequately proved.

Gault J. also considered that there was no reason to interfere with the award of damages for stress.

Thus it would appear that damages claims for mental trauma in negligence or assault and battery will not fail solely on the grounds that there is only transient mental trauma.

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31. *Brown v. Heathcote Council*, [1986] 1 NZLR 76, 80.

32. [1992] 2 NZLR 559.

### 2.1.7 Section 14 Bar On Damages

The only remaining argument against such claims succeeding is where the emotional trauma arises from witnessing or learning about another person being injured or killed.

It will be remembered that section 14 of the Act bars damages claims « arising directly or indirectly out of personal injury covered by this Act ». While it is clear that the person suffering from mental trauma has not suffered a personal injury covered by the Act the person whom he has seen injured or killed certainly has. The argument can then be made by a defendant that the damages claim for mental trauma arises directly or indirectly out of the other persons personal injury and is therefore barred by section 14. This argument succeeded recently before a Master of the High Court who struck out the plaintiff's claim. In that case *Palmer v. Danes Shotover Rafts Ltd. & Ors*<sup>33</sup>, the plaintiff's wife had been killed in a rafting accident. He had seen this and had suffered nervous shock. He had not suffered physical injuries so his mental trauma was not a personal injury and was not therefore covered by the Act. Nevertheless his claim for \$50,000 exemplary damages against each defendant was struck out by the Master as being barred by section 14 of the *Accident Rehabilitation and Compensation Insurance Act 1992*.

The Master considered that although the Plaintiff had not suffered any personal injury his wife clearly had and his claim arose indirectly out of her personal injury. This case is being appealed but if it is upheld it will mean that a person such as the plaintiff who does not come under the Act and therefore receives no compensation also has no right to sue for damages. However it is unlikely to be upheld as it is contrary to many other High Court interlocutory decisions.

For example, in *McGrory v. Ansett NZ Ltd.*<sup>34</sup>, leave was given for a claim to be added for compensatory damages for mental injury which was not the outcome of physical injury. This case involved a plane crash where clearly there were physical injuries to others. Indeed the claims for compensatory damages for physical injuries were struck out but the claim for

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33. High Court, Invercargill, CP 10/97, Master Venning, 3 December 1997. Since overruled on appeal in a decision issued after this article was written. See *Palmer v. Danes Shotover Rafts Ltd. & Ors*, High Court, Invercargill, CP10/97, Pankhurst J., 18 March 1998. Pankhurst J. said: « It is my view that the natural and ordinary meaning of s. 14 (1) does not extend to the secondary victim of an accident ». The case is now going on appeal to the Court of Appeal.

34. High Court, Auckland, CP 228/97, Smellie J., 11 December 1997.

exemplary damages was allowed to continue along with any mental injury damages.

It will eventually be a policy decision for the Court of Appeal but it is submitted that although a literal reading of the words in section 14 could bar such claims the Court of Appeal would be slow to deny access to the courts for those excluded from the Act. The court would probably reason as they did for exemplary damages claims that the mental trauma arises not from the other persons personal injury or death but from the defendant's conduct in bringing about such a horrific event. Any other decision would also lead to the anomalous situation of some mental trauma claims being barred where the trauma arises from an injury to another but allowed when there has been no such fear or there has been such a fear but no injury eventuates as in the old case of *Pugh v. London, Brighton and South Coast Railway Co.*<sup>35</sup>, where a signalman suffered nervous shock when he thought a train was about to crash. It did not crash and there were no injuries. *Pugh's* case was approved by the New Zealand Court of Appeal in *ACC v. E*<sup>36</sup>.

At common law, the essential requirement for a nervous shock claim, is that the defendant owed a duty of care to the plaintiff who suffered the nervous shock. That allegation depends on a number of features including proximity and relationship. The injuries suffered by the victim are only important in showing that the nervous shock claim is likely to be genuine. As in *Pugh's* case it is not essential for anyone to have been injured.

## 2.2 Exemplary/Punitive Damages Claims

The 1972 and the 1982 Accident Compensation Acts contained an equivalent section to section 14 of the 1992 Act and barred proceedings for damages which arose directly or indirectly out of personal injury by accident.

This statutory language was interpreted in some early cases as not only excluding proceedings for compensatory damages but also exemplary/punitive damages. However, although acknowledging that the literal wording of the Act could be read this way, the Court of Appeal in a policy decision in *Donselaar v. Donselaar*<sup>37</sup> decided otherwise. It held that exemplary/punitive damages did not arise out of the personal injury but arose from the conduct of the wrongdoer. They were not therefore barred by the Act. Thus from an early stage in the ACC scheme such damages claims could be made whether a person's physical or mental injuries came under the Act or not.

35. [1896] 2 QB 248.

36. [1992] 2 NZLR 426.

37. [1982] 1 NZLR 97.

### 2.2.1 Negligent Conduct

However until recently exemplary/punitive damages claims only arose in cases of intentional harm and were thus fairly limited as most defendants who intentionally caused harm were either in prison or impecunious — usually both. But following overseas developments<sup>38</sup>, counsel started to claim them in New Zealand in cases of negligence. The first New Zealand case to award exemplary damages for negligent conduct was *McLaren Transport Ltd. v. Somerville*<sup>39</sup>. That was a case where a garage employee so negligently over-inflated a tractor tyre that it exploded injuring the plaintiff. He suffered serious physical injuries and so came under the definition of personal injury in the Act. He also had cover as the personal injury was caused by an accident.

However he also sued for exemplary/punitive damages as well. In the High Court Tipping J. upheld the lower court award of \$15,000 exemplary damages for negligent conduct. The test used by Tipping J. was a simple one :

Exemplary damages for negligence causing personal injury may be awarded if, but only if, the level of negligence is so high that it amounts to an outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment.

The matter did not go on appeal to the Court of Appeal, no doubt because the amount awarded was so low.

However the Court of Appeal in another case which recently came before it, *Ellison v. L*<sup>40</sup>, would not commit itself to a decision that exemplary damages could be awarded for negligence. In that case Mrs. Ellison brought a claim for \$250,000 exemplary damages against her dentist. He had extracted a tooth but negligently left some packing in the wound. This caused her some problems with infections until it was removed some nine months later. The Court of Appeal said :

We are prepared to accept for the sake of argument, though leaving the matter to be decided on another occasion, that in some cases of negligence exemplary damages may be awarded. But because negligence is an unintentional tort those cases are likely to be rare indeed. Exemplary damages are awarded to punish a defendant for high handed disregard of the rights of a plaintiff or for acting in bad faith or for abusing a public position or behaving in some other outrageous manner which infringes the rights of the defendant. Negligence simpliciter will never suffice.

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38. *Coloca v. BP Australia Ltd.*, [1992] 2 VR 441; *Robitaille v. Vancouver Hockey Club Ltd.*, (1981) 125 DLR (3d) 228.

39. [1996] 3 NZLR 424, (1996) 1 BACR 262.

40. CA 287/96, 19 November 1997.

In New Zealand therefore it is now clear that there will be no exemplary damages for ordinary negligence and this may cause a reduction in the rising number of claims.

### 2.2.2 Level Of Awards

The negative attitude of the Court of Appeal to this upsurge in exemplary damages claims is no doubt a result of the high amounts (by New Zealand standards) being claimed and the perception that the amounts sought were really being sought as extra compensation.

The Court of Appeal had warned of this in *Donselaar v. Donselaar*<sup>41</sup> :

The Courts will have to keep a tight rein on actions, with a view to countering any temptation, conscious or unconscious, to give exemplary damages merely because the statutory benefits may be felt to be inadequate. Immoderate amounts will have to be discouraged.

Until recently even in cases of intentional torts the amounts awarded were quite low<sup>42</sup>. However in *G v. G*<sup>43</sup> Cartwright J. awarded the sum of \$85,000 in a case of serious domestic violence. The Judge contrasted the amounts awarded in personal injury claims with defamation awards of \$180,000 to \$400,000 and observed that there was little justification for such a contrast between large amounts ordered for harm to a reputation and the more modest amounts for the serious physical, emotional and sometimes psychiatric consequences of violence.

However the increasing levels in the amounts being claimed coupled with an actual award of \$85,000 in *G v. G* prompted the Court of Appeal in *Ellison v. L* to say :

We desire to make an observation about the level of damages claimed. Mrs Ellison has sought leave to bring a claim for \$250,000. Even if the conduct of the respondent had been outrageous and deserved to be marked by an award of exemplary damages, a claim of this size would be quite unrealistic. As far as we are aware, Judges in this country have restricted such awards to a mere fraction of the sum claimed here (for example, in *McLaren Transport* where apparently gross negligence in the inflating of a tyre cause serious injury \$15,000 was awarded). They have been right to do so. The marking out and punishment of outrageous behaviour can be adequately achieved by a relatively modest penalty. It is to be remembered that such awards are not intended as compensation.

41. [1982] 1 NZLR 97.

42. *A. v. M.*, [1991] 3 NZLR 228 : \$20,000 awarded for marital rape ; *AB. v. CD.* (High Court, Timaru, CP 53/89, Fraser J., 1 March 1992), \$20,000 awarded for sexual abuse by father ; *H. v. R.*, [1996] 1 NZLR 299, \$20,000 for sexual abuse ; *B. v. R.* (High Court, Auckland, M 1957/93, Morris J., 15 February 1996), \$225,000 claimed, \$35,000 awarded for sexual violation and abuse by uncle (now deceased). Value of estate worth \$110,000.

43. (1996) 1 BACR 286, [1997] NZFLR 49 : \$200,000 claimed.

Legal advisers should be careful not to be associated with claims for amounts of damages which on any objective view are unattainable and give the appearance of being brought in *terrorem*<sup>44</sup>.

Thus it appears clear that the amounts sought in exemplary damages claims particularly in negligence cases will be so limited from now on that it will probably not be worthwhile bringing the action.

### 2.2.3 Prior Criminal Conviction

Furthermore there has been another restriction on exemplary damages claims by the Court of Appeal in another recent decision *Daniels v. Thompson*<sup>45</sup>. In that case the Court of Appeal, on the grounds of public policy, barred exemplary damages in a number of sexual abuse claims where there has been a prior criminal conviction on the same matter.

This will have a major impact on exemplary damages claims for sexual abuse and employment injuries. It may lead to the situation where victims of crime refuse to cooperate with the authorities in a prosecution so that they preserve their right to bring an exemplary damages claim. In *G v. G* it is interesting to note that in a case of serious domestic violence the plaintiff decided to sue for damages rather than prosecute.

However in claims for injuries arising from motor accidents involving drunk drivers the offender is invariably prosecuted and punished without the need for any victim to appear. Thus there may be no choice of prosecution or litigation by such victims.

### 2.2.4 Fatal Claims

If the above restrictions were not enough, no exemplary damages are available where the injured person is killed by the tortfeasor. The Court of Appeal in *Re Chase*<sup>46</sup> confirmed that section 3 (2) *Law Reform Act 1936* excludes exemplary damages claims from the claims that survive the death of the victim.

### 2.2.5 Limitation Act 1950

Another restriction on damages claims for personal injury in New Zealand is the short limitation period of two years in which to sue. However the Court of Appeal has recently developed the law in *G D Searle &*

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44. CA 287/96, 19 November 1997.

45. CA 86/96, 12 February 1998.

46. [1989] 1 NZLR 325.



*Co. v. G*<sup>47</sup> so that time only runs from when bodily injury is discovered or reasonably ought to have been discovered.

### 2.3 Lump Sums For Pain and Suffering Abolished

The two previous ACC Acts (the Accident Compensation Acts of 1972 and 1982) had lump sums available for pain, suffering and loss of amenities (up to NZ \$10,000 under the 1982 Act) and for disability (up to NZ \$17,000 under the 1982 Act) based on a percentage disability figure. For non earners such as sexual abuse victims the lump sums were often the only significant compensation they received. The 1992 Act abolished these lump sums and replaced them with what is termed an independence allowance of NZ \$40 per week for a 100 % disability<sup>48</sup>. This sum was widely perceived as inadequate and also fuelled the rise in litigation.

### 2.4 Upsurge in Litigation

Thus the exclusion of mental trauma from the Act, the changing view of exemplary damages for negligence and the abolition of lump sums all contributed to the upsurge in litigation and brought lawyers back into the compensation process. While the Court of Appeal may have now curtailed the claims for exemplary damages for negligence the claims for mental trauma look set to escalate in an effort to obtain more compensation than that available under the Act.

This leads on to the compensation available under the Act. While the increase in litigation has been fuelled by the abolition of lump sums the compensation and assistance available under the Act particularly for seriously injured earners can still be significant.

## 3. Benefits

The benefits available under the present Act are :

- 1) 80 % of weekly earnings up to a maximum of NZ \$1,179 per week<sup>49</sup>;
- 2) An independence allowance up to NZ \$60 per week based on a percentage disability figure<sup>50</sup>;

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47. [1996] 2 NZLR 129.

48. Section 54 — since increased to \$60 per week for a 100 % disability.

49. Sections 38 and 39. This is calculated on the gross earnings lost by the employee and income tax is payable on the weekly compensation.

50. Sections 54 and 54A and Regulations.

- 3) Medical treatment<sup>51</sup> ;
- 4) Vocational and Social Rehabilitation assistance including the provision of attendant care up to 24 hours per day, home help, child care, aids and appliances, alterations to homes and motor vehicles, etc.<sup>52</sup> ;
- 5) In fatal claims there are :
  - 5.1) Funeral grant of NZ \$3,000<sup>53</sup> ;
  - 5.2) Survivors grant to spouse — NZ \$4,000<sup>54</sup> ;
  - 5.3) Survivors grant to child under 18 — NZ \$2,000<sup>55</sup> ;
  - 5.4) Weekly compensation to spouse at 60 % of deceased's compensation<sup>56</sup> ;
  - 5.5) Weekly compensation to child under 18 at 20 % of deceased's compensation<sup>57</sup> ;
- 6) Property Damage : Unlike the 1982 Act there is no compensation for property damage even for clothing or other personal items such as dentures or spectacles<sup>58</sup> damaged in the accident. This is left to normal voluntary insurance arrangements and civil actions for damages.

#### 4. Funding

##### 4.1 Income Sources

The ACC is financed from five income sources<sup>59</sup> :

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51. Section 27 and Regulations.
  52. Sections 18-26A and over 30 different sets of regulations govern the provision of these matters and medical treatment. See the Regulations Section in See J. MILLER and D. RENNIE, *op. cit.*, note 22. The Regulations are noted for their rigidity and the lack of discretion available to the ACC. In an effort to resolve this after many complaints from the public and the District Court who had to deal with the hard cases an amending section to the Act was passed (section 26A) in 1996. This gives a discretion to the ACC to exceed the regulations in the provision of assistance for social rehabilitation.
  53. Section 55.
  54. Section 56.
  55. *Ibid.*, \$2,000 is also payable to any other dependents of the deceased.
  56. Section 58. This is payable for up to 5 years or longer if the spouse has the care of a child under 18 or any other dependent of the deceased.
  57. Section 59. This extends to 21 years if the child is studying. Section 60 also provides a similar percentage of 20 % for other dependants of the deceased. No more than 100 % of the deceased's compensation is payable.
  58. Section 4. Definition of personal injury does not include these items and there is no other section in the Act or regulation to allow them in.
  59. Part VII of the Act, sections 100-134.

### 1. *Employers (including the self employed)*

They pay a premium based on total payroll. The amount paid depends on the type of work and the injury record. This brought in NZ \$1232.5 million dollars in the year ending 1997.

### 2. *Earners*

People in the workforce pay a premium of 70 cents for every \$100 earned. This is collected as *paye* tax. It covers them for non work injuries apart from motor vehicle injuries. It brought in NZ \$288 million dollars in the year ending 1997.

### 3. *Motor vehicle owners and drivers*

The premium is included in the annual registration fee (NZ \$90 for a private car) and an excise duty of 2 cents per litre on petrol sales. These two brought in NZ \$249.4 million dollars in the year ending 1997 (NZ \$192.2 million from premiums, NZ \$57.2 million from petrol sales).

### 4. *Government Payment*

An annual payment to cover non earners.

### 5. *Investment earnings*

From the respective account reserves.

## 4.2 **Accounts**

Injury costs are assigned to one of six accounts :

### 1. *The Employers' Account*

This meets the cost of all work related injuries (apart from motor vehicle injuries)<sup>60</sup>. It also meets the cost of non work injuries before 1992. It is funded from employers premiums.

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60. The shifting of the costs of motor vehicle injuries out of the Employers and Earners account is really the only reason for considering whether an injury has been caused by a vehicle. The definition of a motor vehicle injury in section 3 is :

a) Any injury occurring as a consequence of the movement of a motor vehicle or  
 b) Any injury occurring as a consequence of a motor vehicle that is stationary being struck by another motor vehicle or other means of conveyance — but excludes an injury suffered in the course of loading, unloading, servicing, repair, or off-road use of a motor vehicle and any use of a motor vehicle other than as a means of conveyance. « Off-road use » does not include use of a motor vehicle that is off road as a direct result of its being out of control or its having been involved in an accident.

Of the 6388 new motor vehicle claims in 1997, 379 were work related and cost \$1,872 million. There was also 1016 ongoing work claims at a cost of \$16,603,000: *ACC Injury Statistics, 1997*, p. 46.

## 2. *The Earners Account*

This meets the costs of people in the workforce who are injured outside of the workplace—*e.g.* at home or in sport. It does not include motor vehicle injuries<sup>61</sup>. It is funded from the earners premiums.

## 3. *The Non Earners Account*

This covers the cost of injuries to persons not in the workforce. It is funded by the Government from taxation.

## 4. *The Motor Vehicle Account*

This meets the cost of all injuries from motor vehicles<sup>62</sup>. It is funded from motor vehicle premiums and a petrol levy.

## 5. *The Subsequent Work Injury Account*

This meets the costs of work related claims that involve a recurrence of an injury received in a previous employment. It is funded from the above four accounts.

## 6. *The Medical Misadventure Account*

This meets the costs of injuries that result from medical misadventure by medical practitioners. It is funded from the earners and non earners accounts.

### 4.3 **Motor Vehicle Fund**

Reserves 1996	NZ \$286,842,000
Income 1997	NZ \$305,218,000 <sup>63</sup>
Expenditure 1997	NZ \$289,443,000
Surplus 1997	NZ \$15,775,000
Backdated care claims	NZ \$82,996,000
Deficit 1997	NZ \$67,221,000
Surplus carried forward	NZ \$219,621,000

At 1 July 1996 the fund held reserves of NZ \$286,842,000. Total income into the fund was NZ \$305,218,000. This included premium income from registration, the petrol levy and investment income. Total expenditure on claims was NZ \$289,443,000 leaving a surplus of NZ \$15,775,000.

61. *Ibid.*

62. *Ibid.*

63. The \$305,218 million includes \$192,198,000 from motor vehicle registration. There are approximately 2.4 million registered vehicles in NZ. A further \$57,160,000 came from the petrol premium levy. The remainder is sundry and investment income: *ACC Annual Report, 1997*, p. 63.

However from this amount the sum of NZ \$82,996,000 was set aside to pay for backdated attendant care claims<sup>64</sup>. This left a deficit of NZ \$67,221,000 which when taken away from the opening surplus reserves figure of NZ \$286,842,000 left a surplus of NZ \$219,621,000 at 30 June 1997.

The funding of the motor vehicle part of the scheme is not a problem as it is always in surplus. It is not controversial. The main problems with the funding of ACC scheme has come from the employers' concerns over the funding of the Employers Account. Despite the fact that their ACC premiums are often lower than the insurance premiums comparable employers pay overseas for workers compensation and employers liability insurance they have constantly lobbied for changes favourable to them in premium rates and ACC compensation. They have generally succeeded with their lobbying — hence the significant changes in the 1992 Act.

#### 4.4 Motor Vehicle Account Claims

For the year ending 1997 there were 6388 new claims and 14,685 ongoing claims made up as follows :

Type	New Claims Claims (\$000)	Cost New	Ongoing Claims Claims (\$000)	Cost Ongoing
Cycling	249	474	537	6,560
Bus	49	100	101	820
Car	3,392	11,693	9,045	101,165
Motorcycle	1,081	3,786	2,931	34,555
Other vehicle	62	326	111	1,557
Truck	202	982	534	7,375
Not defined	972	1,858	229	1,016
Other	39	109	48	744
Pedestrian	342	1,148	1,149	11,956
TOTAL	6,388	20,476	14,685	165,748

64. The backdated attendant care claims which amount to NZ \$216,355 million dollars over the various accounts arose from a *pro bono* case (*Campbell & Ors v. ACC*, High Court, Wellington, AP 200/95, Heron and Ellis JJ., 4 April 1996). The writer was counsel for 5 families whose children (4) or sibling (1) had been severely injured in traffic accidents. The injured claimants required 24 hour a day care but the ACC had only paid lesser amounts leaving the families (usually the female members) to cope with the shortfall. As a result of the decision the ACC have had to review and pay all such claims. Hence the sum set out in the accounts.

## 5. Compensating Criminals

The only controversial aspect about motor vehicle compensation is the periodic public concern about compensation for the injured criminal driver specifically the drunk driver. This is governed as part of the general scheme by sections 81 to 84 of the Act. Section 81 denies all benefits<sup>65</sup> even to dependants for any personal injury suffered as a result of wilfully self inflicted injuries or death by suicide. There does not appear to have been any cases on this section in relation to motor vehicle injuries or death presumably because it would be too difficult to prove in the absence of a suicide note that an injury or death in a motor vehicle crash was self inflicted.

Section 82 denies all benefits to a dependant who murders the deceased. This again does not appear to have arisen in the context of a motor vehicle death.

Section 83 is more relevant as that denies any benefits under the Act while a person is an inmate in a prison. Thus an injured drunk driver who is imprisoned does not receive any benefits for that period.

Before release from prison the provisions of section 84 will be invoked. That section provides as follows :

*S84 Denial of compensation where criminal act involved—*(1) Where any person suffers personal injury in the course of committing any offence for which the person is convicted and is sentenced to imprisonment and the Corporation is aware of that sentence, the Corporation shall make an application to the District Court for a determination as to whether any treatment, service, rehabilitation, related transport, compensation, grant or allowance should be payable on the person's release from such a penal institution within the meaning of the Penal Institutions Act 1954, or whether such payment shall not be made on the grounds that receipt of such payment would be repugnant to justice<sup>66</sup>.

The key phrase in section 84 is *repugnant to justice*. That phrase was also used in a similar section—section 92 of the 1982 Act and was considered by the Court of Appeal in two cases under that Act: *ACC v. Curtis* and *ACC v. McKee*<sup>67</sup>. In *Curtis* the seriously injured claimant had been sentenced to imprisonment for traffic offences involving the death of three passengers in a car she was driving after consuming alcohol and drugs. In *McKee* the injured claimant was imprisoned for dangerous driving causing

65. There is an exception where the injury or death is the result of mental injury or mental trauma from a sex crime : section 81 (2).

66. The Corporation has to continue payment in full on release until a determination is made by the Court : section 84 (2).

67. [1994] 2 NZLR 519 ; [1994] NZAR 289.

death when a motorcycle he was riding collided with a van at an intersection killing a passenger in a van.

### 5.1 Principles Under 1982 Act

The Court of Appeal decision in the two cases under the 1982 Act set out certain guideline principles for such cases. The question is whether they still apply to the 1992 Act. The principles to be considered under the 1982 Act were :

- 1) The dominant purpose of the Act is to provide comprehensive no fault cover for all, including those whose injuries were suffered in the course of criminal conduct attracting imprisonment.
- 2) Section 92 of the 1982 Act overrides that general purpose where statutory assistance would be repugnant to justice, *i.e.* where the demands of retribution, denunciation, deterrence, and reparation outweigh the general purposes of the statute.
- 3) Considerations relevant to the exercise of the section 92 discretion include : the gravity of the crime, the extent of other penalties suffered, the claimant's personal circumstances, the nature of the proposed statutory assistance, the strength of the need and the claimant's own resources to meet it.
- 4) Once the considerations relevant to the particular case have been identified their relative weight must be assessed. The nature and seriousness of the crime compared with the urgency of the need for statutory assistance will be of particular importance.
- 5) Once identified and evaluated the question will be whether the relevant considerations in their totality would make statutory assistance repugnant to justice, noting that the threshold required before refusing or reducing benefits is a high one.
- 6) A decision under section 92 may be to allow any given item of statutory assistance in full, to refuse it completely or to allow it in part only. The decision may be made globally with respect to a series of items or discreetly with respect to each.

In both cases the decision was for a 50 % reduction in the lump sums then available under the 1982 Act.

### 5.2 1992 Act

The question under section 84 of the 1992 Act is whether the same principles apply. What is different about the 1992 Act is that principle 1) no

longer applies as the Act no longer provides comprehensive no fault cover for all. Those suffering mental trauma are excluded as are many medical injuries<sup>68</sup>. Hence compensating the injured drunk driver is even more likely to be repugnant to justice than beforehand. If the family of someone killed by a drunk driver would not come within the Act for any mental trauma they suffer why should the drunken driver be compensated? There has also been a hardening of attitude in respect of drink driving and a call for tougher penalties in recent years.

On the other hand unlike the 1982 Act earners under the 1992 Act now pay their own premiums to the Earners Fund. Thus a drunken driver who is an earner and therefore a premium payer has more of a claim to compensation than hitherto when he paid nothing. Furthermore the words «repugnant to justice» mean more than «unjust or inequitable» — it is a very high standard to reach — analogous to «the existence of extraordinary circumstance» as the Court of Appeal defined similar words in a matrimonial property case<sup>69</sup>.

### 5.3 1992 Act Cases

There have been two cases in the District Court under section 84 of the 1992 Act. In *ARCI v. Findlay*<sup>70</sup> the 21 year old claimant was sentenced to three and a half years imprisonment for manslaughter and six months imprisonment on each of three charges of causing injury by an unlawful act. The charges arose from a driving incident which had also left the claimant a paraplegic. The Judge simply applied the 1982 Act principles in *Curtis* and *McKee* and declined payment of the independence allowance and reduced the weekly compensation to 60% rather than the entitled 80%.

In *ARCI v. Mitchel*<sup>71</sup> the claimant suffered head injuries in a fatal accident caused by his drunken reckless driving. He was sentenced to nine years imprisonment for manslaughter. As he was not an earner prior to the accident, there was no entitlement to weekly compensation. However the decision was made not to pay the independence allowance either or provide any form of social rehabilitation. Only medical treatment and medical services for his head injury was allowed.

It would thus appear that the *Curtis* and *McKee* principles under the 1982 Act are being applied but with a harsher result in that as there are no

68. The definition of medical misadventure in section 5 of the Act excludes an adverse consequence of treatment if it not rare (1% risk or less) and not severe.

69. *Martin v. Martin*, [1979] 1 NZLR 97.

70. District Court, Christchurch, MA 227/97 Doherty J., 28 October 1997.

71. District Court, Christchurch, NP 1536/97 Noble J., 9 December 1997.



lump sums anymore and the independence allowance is seen as a meagre replacement the weekly compensation is also being reduced.

### **Conclusion**

The motor vehicle scheme is an integral part of the overall Accident Compensation system. It has operated successfully with no real problems. The recent upsurge in exemplary damages and mental trauma claims and the re-entry of lawyers into the compensation process have also not involved motor vehicle claims as much as other areas.

However now that lawyers have returned they will probably remain and look for ways damages claims can still be brought. There are indications that the Government is considering opening up the ACC to competition and the motor vehicle scheme with its healthy surplus and lack of problems would be an attractive segment for insurance companies. It may be that we are in the process of returning to a « fragmented and capricious » system.