

- Concept of injury is a crucial one - definition only exists in our compensation scheme for that purpose. Different from medical worlds and types of loss or harm.

Victims of Accidents:

- Primary vs. secondary victims
 - Example: someone who witnesses an accident: the family suffers a loss or a death where the family get compensation.

Accidents and the Law:

- Torts:
 - Negligence
 - Defamation
 - Intentional: assault or battery
 - Breach of statutory duty
 - Misfeasance of public office - (public role and intentionally do it badly)
 - Tort of Wilkinson and Downton (intentional infliction of emotional distress)
- ACC: tort provides a background for ACC - sitting there as another source of compensation
- Criminal:
 - Offences acts or omissions
 - Sentencing process (a way that our society responds to accidents)
- Workplace health and safety law: duties (offences connect back to sentencing)
- Health and welfare system: HPC
- Product liability & Consumer law
- BORA potentially
- Contract law: breaches of contract
- Insurance law

The Social Contract:

Community driven focus of the Woodhouse Report. Rather than being one set of fixed ideas, but a way of approaching various sorts of questions. ACC social contract: back in the old days you could sue and the people in NZ gave up their right to sue a wrongdoer for real compensation for compensation on a no-fault basis.

Simon: fairy tale to tell tort student, rather need to take care in taking it more seriously. One reason for that is there is still a lingering sentiment that where you have been injured, you should be able to sue them even with the ACC scheme. The social contract also doesn't explain the complete ACC scheme. To run a successful ACC scheme, you need a whole lot of money, any explanation of how it works without saying where the money comes from.

Different conceptions of justice:

- That might drive how you find a just outcome in terms of accidents
 - *Supplemented by readings by Simon and Jesse Wall*
 - Law is there to provide for these outcomes to serve justice
1. **Corrective Justice** the institution of liability is providing justice - rectifying injustice to the way it was previous or pay money damages to reflect the value of the loss. Corrective justice is concerned with wrongful losses (liability rectified) inflicted by one person on another.
 - Corrective justice operates on moral wrongdoing, not wrongdoing in a technical legal sense. The moral character of the wrongdoing provides the principled justification for imposing liability on the wrongdoer. So, the "wrongful losses" corrective justice is concerned with are wrongful in the sense that they are inconsistent with the plaintiff's moral obligations towards the defendant.
 - A just outcome in terms of corrective justice is when the wrongdoer puts right the loss caused by the injury;
 2. **Retributive Justice** deserves punishment - impose punishment on the basis that these actions demand a retributive response. The moral wrongdoing of retributive justice is wrongdoing that ought to receive a response from society in terms of punishment, deterrence and denunciation.

- Like corrective justice, retributive justice is concerned with moral wrongdoing. However, while corrective justice is concerned with rectifying the consequences of wrongdoing between individuals, retributive justice is concerned with providing society's response to wrongdoing.
 - A just outcome in terms of distributive justice is when the victim is alleviated of some of the burden of their injury, based on the consistent application of the same criterion for alleviation of burden applied to all victims of injury;
3. **Distributive Justice** bigger picture - looking at rules in society. How can we distribute certain social goods in a way that's fair and just - if there are losses should they stay as they are or be spread around. Distributive justice is concerned with the distribution of a benefit or burden across society and is typically pursued by machinery that achieves the particular desired distribution across society.
- Approaching injury as a matter of distributive justice therefore means taking the view that justice for victims of injury is measured with reference to how the burden of injury is shared across society. There are two interconnected elements to this. The first concerns the extent to which an individual injury sufferer is alleviated of the burden of the injury, and the second concerning how that burden is then distributed across society.
 - Retributive justice is achieved by providing a response appropriate for the seriousness of the wrongdoing, for which the victim's loss may be relevant but is not determinative.

It is not generally possible to satisfy all three conceptions of justice in a single legal response.

We achieve corrective justice If there is a wrongdoer, by making them put the right harm they caused. If there is no wrongdoer, then corrective justice is not engaged. Similarly, with retributive justice, someone needs to do something wrong. Distributive justice is distribution of particular benefit or burden across society.

Corrective Justice v Distributive Justice:

- Some situations where these different conceptions of justice pull us in different directions. Corrective justice is only focusing on injury if they have suffered a wrong. Distributive justice high level - spending lots of money is determining fault.

Corrective Justice v Retributive Justice:

- Imposing liability on the defendant to achieve CJ may also serve purpose of punishment. From the point of view of the defendant, award of damages is punitive. Possible that you may have a scenario.
- You might have a nasty calculated decision that is morally blameworthy that produces a rather insignificant loss - company deliberately cuts costs knowing it increases risk of serious risk to employees.

Applying to New Zealand:

- Used to have a Workers Compensation Scheme - now set up a Royal Commissioner to enquire into Workers Compensation. They widened their scope. Agreed on personal injury problem.
- Woodhouse report - taking a very distributive justice approach. Negligence is a bad way to deal with injury.

Two different types of criticism of negligence in the Woodhouse Report:

1. Criticism of the distribution of the cost of accidents in the compensation system - lottery. If you are looking at whether it does a good job of provision compensation, answer is no because you have to identify a wrongdoer who committed negligence against you. Is it even worth trying to sue them - do they even have money? Then need to take them to court and win - negligent cases long. Maybe rather tort law focusing on other types of justice.
2. Criticism of philosophically unsound - if you come up with some other explanation for negligence - making people responsible for their wrongful harms - this doesn't work either.
 - i. [85] the penalty to the defendant is not proportional to their wrongdoing;
 - ii. ~~[86] The negligent system does nothing for an innocent injured person; (another way of saying distributive justice should be)~~
 - iii. [87] Negligence does not equal moral blameworthiness - the objective standard against which we are judged by negligence, it is not an assessment of moral blameworthiness (subjective);
 - iv. [88] insurance undermines fault - the negligence action was being used as a clumsy way attempt to achieve distributive justice;
 - v. ~~[89] man in the street (political popularity objection)~~

Fault principle is not a satisfying way to distributive costs of accidents

Responses to the Woodhouse Principles - (Jesse Wall reading):

- Seemed to have approached negligence on the basis that it is about retributive justice.
- Pg. 130 - report a bit misguided. The fault that negligence is concerned with is not moral blameworthiness per se, rather conduct that generates a duty of reparation.
- The royal commission gets off on the wrong foot - negligence not about punishment but giving reparation.
- Our law responds to all sorts of conduct - held responsible even if its beyond their control.
- In our legal system we allow people to benefit of positive consequences (e.g. if you take a risk to set up a business), if we allow people to benefit from positive outcomes of their actions, then we need to hold them accountable negative consequences out of their control.
- Jesse concludes that woodhouse report criticisms of negligence fall well-short of the mark. Pre-ACC we have a philosophically justified tort system.
- He concludes woodhouse report is wrong - we have lost some sense of holding people to an objective standard of behaviour with respect to causing injury.

Sir Geoffrey Palmer wrote in 1994 that the ACC scheme represented a decision to sacrifice corrective justice for distributive justice and declared:

- Forget about corrective justice, retributive is for criminal law, rather focus on distributive for people.

Compensation is the primary function of the civil law and can serve both distributive justice (in terms of achieving the desired distribution of the burden of accidents) and corrective justice (in terms of a defendant correcting a wrongful loss). The ACC scheme serves distributive justice for all injury victims. However, the bar on proceedings for personal injury means that the civil law cannot serve corrective justice for injury victims.

Simons view:

- People in NZ are not interested in the idea that wrongdoers ought to put right injuries that they cause, hence not enough public interest for a corrective justice approach.
- Abandonment view - NZ are highly communitarian view, naturally go for distributive justice and corrective focusing on individual autonomy, is a sense of political right.
 - Many other jurisdictions more socialists than NZ who have not adopted an ACC scheme.
 - Political history:
 - In the mid 1970s global recession, neo-liberal approach to governing in NZ (4th Labour Government) focused on economy. The 4th National Government turned their eyes to the welfare state but similar approach as Labour. Most dramatic period of change. Subsequent governments have been seen as softening and entrenching this approach.

Workers Compensation Scheme:

- No fault scheme - benefits for both employers and employees. Compensation whether anyone is at fault or not.

Year	Government	Accident Compensation
1960	2nd National	1967 - Woodhouse Report published
1970	3rd Labour/National	Muldoon/post war/into depression 1972 - ACC Act (into force 1974) (ACC 1.0)
1980	4th Labour	Transformation of NZ into the world's first post-welfare state
1990	4th National	1992 - Insurance Era of ACC (ACC 2.0) 1998 - Act Privatisation Enacted significant decreases to the welfare payments
2000	5th Labour	2001 - Modern Era of ACC (ACC 2.75)
2010	5th National	
2017	6th Labour	

It's not the case that after the Woodhouse Report came out that everyone just agreed on a community solution, rather a more complicated solution (no fault compensation instead of able to sue). Throughout this time there was argument between two concepts of an ACC scheme.

Community Insurance	Compulsory Insurance
<ul style="list-style-type: none"> • Vision for an ACC scheme that can be found in the Woodhouse Report. • Left Wing politics; <ul style="list-style-type: none"> ◦ Government community solutions to problems, unions, workers, market solutions • Reason it's a good idea to have no fault accident compensation scheme - community has a responsibility to look after its members. • Principle of community responsibility from the Woodhouse Report • Consequences: as soon as you make a statement like the community ought to look after its members that have been injured - raises questions about where you draw the line. Royal Commission expanded its scope to look at all injuries. • Community responsibility is not tied to the notion of accidents, more beyond that. • RC argued more sense to make one considered step of injury then expanded into illness into the future <ul style="list-style-type: none"> ◦ This has not happened - because not everyone accepts that we are collectively responsible of people who suffer from illness as well as injury. 	<ul style="list-style-type: none"> • What the ACC scheme is a kind of compulsory insurance scheme. Source of this in the Woodhouse Report - principle of administrative efficiency. <ul style="list-style-type: none"> ◦ Practical observation rather than a moral observation that is seen in the community principle • Spending money that does not help (judges, courts etc), just give it to people injured instead. • Accepting administrative efficiency; more efficient to accept this scheme. • Political right concerned with having successful economy, then this option appeals. • 1972 Act did not provide for the ACC scheme we have nowadays. It provided an earner scheme (cover for injuries to earners whether inside or outside work) and road accident scheme <ul style="list-style-type: none"> ◦ If you are thinking about ACC not as fundamentally about community taking responsibility but economic insurance scheme - you would expect funding to be good. Driven by two factors: insuring against specific losses and what's the risk of this eventuating. Risk on employers is not entirely consistent with that approach. • Can give a clear articulation of why scheme does not extend to illness - more economically viable to claim under a scheme; does not mean a similar scheme for illness is economically efficient.

1972 Act did not provide for the ACC scheme we have nowadays. It provided an:

1. Earner scheme (cover for injuries to earners whether inside or outside work) and;
2. Road accident scheme

1972 Act also included everyone who suffers an injury by accident - Labour.

- Broad general approach to statutory drafting

1980s - Proposal to reduce weekly compensation for lost earnings - enough objections to this proposal before it was passed before Labour lost to National.

- Two objections:
 - Social welfare department - what about people being unable to work
 - Unions - suspicious because we fought hard for workers compensation scheme and we had to give up for ACC scheme, gave up right to sue so not willing to drop further.

National comes into power:

- Leaps in favour of compulsory insurance ACC scheme - recognise the administrative efficiency philosophy.
- 1992 Act - change in drafting style, exhaustive of accident, definition of personal injury, much more prescriptive philosophy.

2001 Act - bones of 1992 Act so may not be ACC 3.0 but rather 2.75

- Restrictive approach to cover retained
- 5th National Government decided to rename to the Act but no other substantial changes

Real challenges today - community insurance mindset; compelling case that this group should be included in the ACC scheme - ad hoc implementable changes to the scheme or no dumb it.

ACC and the Criminal Law:

- Corrective Justice: private civil law action
- Retributive Justice: criminal sanctions regarding punishment
- Distributive Justice: administrative statute, social welfare and just distribution

Tension between action to achieve justice due to losses and benefits from distributive justice point of view.

Part of what has been going on in Tort Law:

- *As courts discovered tort of negligence, courts saw the big problems of injuries caused by industrialisation, trying to achieve a more just distribution of the losses through the only means they had at hand (civil justice system). Thus, a debate in tort law to what extent courts should be focusing on this or rather a bigger picture for fairer distribution of losses.*

Growing compensation in the Criminal Law:

- The Criminal Injuries Compensation Scheme (1964)
 - Removed in the subsequent Acts.
 - Mini no-fault scheme for victims of injury or property damage caused by criminal acts.
 - Similar to the then Workers Compensation Scheme as well as the Tort system. However, quite a low cap on awards that can be paid
- Fine diversion awards (1975)
 - Where the court would fine an offender, the statute allowed the court to divert up to 1/2 the fine to the victim.
- Reparation (1985)
 - Connection between language of reparation in the sentence and reparation in terms of corrective justice.
 - A sentence imposed as part of the sentencing process in the criminal justice system - requires the offender to pay victim a specified sum
 - Introduced in the Criminal Justice Act 1985
 - Presumed in favour of reparation unless inappropriate, ability to pay a relevant factor
 - Statute provides machinery to assess harm & encourage co-operation
 - First only available only for loss of, or damage to, property
 - In 1987 extended for emotional harm - Criminal Justice Amendment Act
 - Sargeant v Police (1997) - reparation of emotional harm
 - 1992 Act - Mental injury - clinically significant condition- removed lump sums and replace them with an independent allowance as a periodic payment. Also massively decreases the amount of money you can actually get.
- 2001 Injury Prevention and Rehabilitation Act - renamed later.
 - Increase what is payable but retain perception of payment of impairment.
- Citizens Initiated Referendum Act: enough signatures then can get a referendum
 - 1999 there was a justice referendum - "should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?"
- Sentencing Act 2002:
 - Replaces the Criminal Justice Act as primary sentencing legislation
 - Greater emphasis on the victim - s3 Purpose
 - Removes the fine diversion awards
 - Strengthens presumption in favour of reparation
 - If lawfully entitled, a Court must impose a sentence of reparation unless "under hardship" or "any other special circumstances" (s12)
 - Extends the scope of reparation to "loss or damage consequential on any emotional or physical harm or loss of, or damage to, property".

The relationship between reparation and fines:

- *Police v Ferrier HC Auckland CRI 2003-404-000195*
 - Careless driving causing death
 - Crown seeks almost \$20k reparation for the family of the deceased
 - DC: that is out of proportion to the moral wrongdoing of the offender - awards reparation of \$5k, slightly more than the maximum fine. If trying to achieve punishment that reflect moral wrongdoing or compensation that the Crown wanted.
 - HC: Parliament intended to compensate victims in cases like this. The change in legislation supports this notion that compensation should be awarded.
- *Department of Labour v Street Smart (2008) 5 NZELR 603 (HC)*
 - DC: developed a practice of deducting reparation dollar-for-dollar from that fine that would otherwise be payable.
 - HC: no, a dollar paid in reparation is not equivalent to a dollar paid as a fine, because of insurance. "penalties must bite" and not operate as a "license fee" [59].
 - When you pay reparation through insurance is not the same as paying a fine (punitive).
 - See further *Department of Labour v Areva T & D New Zealand Ltd*

The relationship between reparation and ACC Scheme:

- Sentencing Act 2002, which began as the Sentencing and Parole Reform Bill, had originally allowed for reparation for "physical harm".
 - Once the potential overlap with ACC scheme was identified, the Select Committee recommended that the Bill be amended to:
 - Remove reparation for "physical harm"; and
 - Add a clause preventing reparation for consequential losses "for which the victim has cover" under the ACC scheme
 - A supplementary Order Paper later change this to preventing reparation "for which the court believes that a person has entitlements" under the ACC scheme. The idea of "court believes" sentencing can happen when full entitlement from ACC not clear; "Entitlement" cover/entitlement reflect in ACC scheme.
- There is an ambiguity that leads to the "top-up" issue:
 - ACC pays weekly compensation for 80% for lost earnings
 - Can reparation be awarded to make an offender "top-up" the victim's compensation to 100%?
 - Two competing interpretations:
 - The victim has entitlement to compensation for lost earnings, so reparation cannot be awarded; or
 - The victim has entitlement to compensation for 80% of their lost earnings and not remaining 20%, so reparation can be awarded.
 - Davies v Police:
 - The lower courts went for the latter interpretation;
 - A majority of the SC went for the former.
 - Davies overturned by the Victims of Crime Reform Bill
 - Explanatory note specifically refers to the "overturn" of Davies
 - Now - how to calculate lost earnings consequential on physical harm
 - ***Oceana Gold v Worksafe New Zealand [2019] NZHC 365 distinguishes:***
 - "Statutory shortfall" approach - pay the 20% not paid by ACC, based on ACC's earnings calculation;
 - "Open-ended" approach - difference between ACC compensation and anticipated actual lifetime earnings
 - Clear you can have a top up (since Parliament overturned Davies), however what method is the Court supposed to use to work out the top up?

Recap:

- Look at growing compensatory function in criminal justice system. Main concern is reparation, as a sentence or as a compensatory award. Over time the scope for reparation and the degree to which courts have allowed this has increased (depends on the financial capacity of the victim).
- Sentencing Act = key legislation.
 - In hindsight, this raises questions about the connection between reparation and the ACC Scheme

- ***Davies v Police*** - questions s 32(5) ambiguity in the Sentencing Act - the "top up". Davies was originally required to pay the remaining 20% as reparation however this also shows that the ACC Scheme was being used as a defence, not protective of victims. Davies argues that the social contract ideology behind the ACC Scheme means that the right to sue was given up.
 - The SC were happy with this idea, reinforcing the original social contract (note this is partially in practice a political dig from Labour to National RE: returning to the good old days of ACC, the original scheme implemented by Labour). Giving up ability to sue should also apply to criminal law in which cannot get top up.
 - Minority (like HC and CA): said that if there is a clash of policy, purpose of sentencing is to promote interests of crime - wrong to promote purpose of ACC Scheme over criminal sentencing.
- After this decision, Parliament "overturned" this case. The position appeared settled to say that yes, you can now get top ups.
- Another complexity arises in ***Oceana Gold v Worksafe New Zealand*** -
 - Statutory ambiguity on how to calculate lost earnings consequential on physical harm.
 - Section 32(5), Sentencing Act 2002: When say "consequential losses" are we talking about class of loss or the specific quantum. Clear that top up are allowed, but how do you calculate this quantum?
 - Loss or damage consequential on physical harm?