MENTAL INJURY CLAIMS UNDER THE ACCIDENT COMPENSATION ACT 2001

Fiona Thwaites (née Henderson)*

Introduction

The treatment of mental injury claims under New Zealand's accident compensation scheme is an issue of real importance given the frequency of such claims, with more than 2,500 claims being made every year.[1] However since the inception of the accident compensation scheme in New Zealand,[2] controversy has surrounded the scheme's limited cover for mental injury and consequential difficulty in determining the availability of residual common law actions falling outside the statutory regime.[3] Today the Accident Compensation Act 2001 ("ACA 2001")[4] continues to limit coverage of mental injury, perpetuating the controversy associated with mental injury claims, and the difficulty in determining whether such claims should be entitled to accident compensation.

In this paper consideration is given to the ACA 2001's present coverage of mental injury: mental injury caused by physical injury (s 26(1)(c)), mental injury caused by a sexual offence as listed in Schedule 3 (s 21), and mental injury caused by a single traumatic event experienced during the course of employment (s 21B). It will illustrate that present mental injury coverage is illogical and arbitrary, neither in keeping with psychiatric research in this area, nor reflective of any legally principled approach. It may therefore be that change is required to mental injury coverage under the ACA 2001. But, of course, before any change can be recommended, the various policy considerations must be considered and their influence weighed. This includes considerations of cost and the anticipated pressure if coverage was to be extended, along with the potential for encouraging a flood of claims, including unmeritorious ones.

* Solicitor, Bell Gully, Wellington. Winner, Canterbury Law Review Prize, 2011

1 Latest ACC statistics in this area show for the year 2008-2009 a total of 2,647 claims being lodged. Of these, 1,353 claims were declined – giving a total of 1294 successful mental injury claims: Accident Compensation Corporation *Injury Statistics 2008/2009* <www.acc.co.nz>.

2 The New Zealand Parliament replaced the common law action for damages for personal injury with an accident compensation scheme on 1 April 1974, under the Accident Compensation Act 1972: S Todd (ed) *The law of torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 22.

3 Paul Heslin "Pushing the Boundaries of Cover for "Purely" Mental Injury" [2001] *Employment Law Bulletin* 115.

4 The title of this Act, previously the "Injury Prevention, Rehabilitation, and Compensation Act 2001", was 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).

To consider mental injury claims under the ACA 2001, and any proposal for change that should be made to present cover, this paper will be divided into four parts. Part I will consider how mental injury claims are presently covered by the ACA 2001. Part II will consider the difficulties associated with this coverage. Part III will consider how these difficulties might be alleviated. Finally, Part IV will outline a recommended solution to mental injury coverage under the ACA 2001 in New Zealand.

I. Mental Injury Coverage Under the Accident Compensation Scheme

A. Background to the Accident Compensation Scheme

In 1967 the Royal Commission was charged with investigating and reporting upon the law relating to compensation and claims for damages for incapacity or death arising out of accidents, including diseases, suffered by employees.[5] The Commission's Report, known as the Woodhouse Report,[6] highlighted the many disadvantages of the common law process in compensation claims for damage caused by personal injury. This included the overriding concern that the present common law system was a liability fault-based system, where to recover damages under tortious principles one would need to show that someone else was liable in tort.[7] In view of these difficulties, the Commission recommended replacing the common law system with a comprehensive system of accident "prevention, rehabilitation and compensation,"[8] where the object was compensation for all accidental injuries, irrespective of fault and regardless of cause.[9] It was hoped this would avoid the disadvantages of the existing common law processes. The response from Parliament was to introduce the accident compensation scheme, and its fundamental design, in its first formulation: the Accident Compensation Act 1972.

5 Todd, above n 2, at 23.

6 Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (the Woodhouse Report) (1967).

7 Other disadvantages of the common law process the Royal Commission identified were: the economic consequences of negligent conduct which were often spread via insurance over the whole community, the fact that the existence of compulsory insurance undermined the claim that the threat of damages provided a financial incentive to be careful, the risks of litigation (the difficulties of proof, the ability of advocates, the reactions of juries and mere chance itself), as well as the overall cumbersome nature of the tort system which was delayed and inefficient in operation: Todd, above n 2, at 23 and 24.

8 Todd, above n 2, at 25.

9 It hoped to do this by meeting the requirements of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency. For further discussion of these five guiding principles of the ACC Scheme and how they relate to mental injury claims under the ACA 2001 see below, Part III.

As advised by the Royal Commission, the introduction of the 1972 Act in New Zealand meant comprehensive coverage for all victims of personal injury by accident, and consequently, the denial of common law action for damages for personal injury.[10] In what has commonly been referred to as the social charter, or "social compact,"[11] this bar on damages was introduced to prevent the situation where the claimant may receive a windfall - both personal injury compensation under the scheme, as well as court proceedings for damages.[12]

B. Coverage for Mental Injury Under the Old Accident Compensation Acts

Under the 1974 and 1982 Acts "personal injury by accident" was not fully defined, but rather stated that it included the physical and mental consequences of the injury or accident, medical misadventure, incapacity resulting from occupational disease, and bodily harm caused by the commission of certain criminal offences. Thus, as noted by the Court of Appeal in *ACC v E*,[13] coverage for mental injury under these Acts generally operated on the basis of broader principles, including the general principle that physical injury to the claimant was not necessary before mental consequences could be claimed for.

This broad definition was, however, changed in 1992 where, following increasing ill-feeling over the associated costs of the accident compensation scheme,[14] Parliament sought to save costs by eliminating uncertainty about the boundaries of the scheme placing a fetter on judges' ability to give expansive interpretations to coverage provisions.[15] Thus the 1992 Act[16] defined areas of coverage in exhaustive terms, with cover for personal injury caused by an accident, by employment-related disease or infection, by medical misadventure and treatment for personal injury, and finally, for mental or nervous shock suffered by the victims of certain specified sexual offences.[17] This change had a lasting impact on mental injury coverage, removing any possibility of

10 AP Blair *Accident Compensation in New Zealand* (Butterworths, Wellington, 1978).

11 *Brightwell v ACC* [1985] 1 NZLR 132 (CA) at 139-140; *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA) at 555.

12 In this way Blanchard J in *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA) at 791 refers to the "substitute" nature of the accident compensation scheme. That the scheme's entitlement to claim compensation, capped as to the amount, on a no-fault basis, is substituted for a right to bring court proceedings for damages for the injury.

13 *ACC v E* [1992] 2 NZLR 426 (CA).

14 Todd, above n 2, at 28.

15 Previously the Courts had tended to give an expansive interpretation to the provisions governing the Act's ambit. Examples include *Re Chase* [1989] 1 NZLR 325 (CA); *Green v Matheson* [1989] 3 NZLR 564 (CA); *Willis v Attorney-General* [1989] 3 NZLR 574 (CA); *ACC v E* [1992] 2 NZLR 426 (CA); *ACC v Mitchell* [1992] 2 NZLR 436 (CA); and *Childs v Hillock* [1994] 2 NZLR 65 (CA).

16 Accident Rehabilitation and Compensation Insurance Act 1992.

17 Todd, above n 2, at 28.

mental injury being covered in stand alone situations, and thereby placing mental injuries in an inferior position to physical injuries. The result was, in the words of one commentator of the time, a "recipe for serious injustice."[18]

Following four re-enactments,[19] and two further amendments,[20] the present form of the accident compensation scheme is now found in the ACA 2001. While the 2001 Act still reflects the broad areas of coverage identified in the 1992 Act, coverage for mental injury is restricted to three areas. How mental injury coverage is determined for each of these areas will now be considered.

C. Coverage for Mental Injury under the Accident Compensation Act 2001

1. Claimants who suffer mental injury as a consequence of physical injury – s 26(1)(c)

As noted in s 20(1) ACA 2001, a person has cover where they suffer a "personal injury" in certain circumstances,[21] which includes "mental injury suffered by a person because of physical injuries suffered by the person" (s 26(1)(c) ACA 2001). The wording of s 26 refers to mental injury "because of" physical injury, rather than mental injury "caused by" physical injury. This means to determine whether a claimant's mental injury is due to the physical injury, in terms of s 26(1)(c), a court will undertake "a careful analysis of the accidental physical injury alleged, along with the materials that causally link any mental condition directly to that physical injury."[22] That is, "the mental injury must be directly parasitic to the physical injury."[23] As noted in *Ambros*,[24] this means to satisfy the requirements of s 26(1)(c), a court must be able to draw a "robust inference of causation, based on facts and supported by the evidence"[25] so that "risk of causation"[26] will not suffice. The application of this test is illustrated well in the case of *Hornby*.[27] The appellant broke her arm and the fracture did not heal well, requiring further surgery and

18 R Harrison *Matters of Life & Death: The ARCI Act 1992 & Common Law Claims for Personal Injury* (Legal Research Foundation, Auckland, 1993) at i, as cited in IB Campbell *Compensation for personal injury in New Zealand: its rise and fall* (Auckland University Press, Auckland, 1996).

19 Accident Compensation Act 1982; Accident Rehabilitation and Compensation Insurance Act 1992; Accident Insurance Act 1998 and Accident Compensation Act 2001.

20 Injury Prevention, Rehabilitation, and Compensation Amendment Act 2005 (2005 No 2); Injury Prevention, Rehabilitation, and Compensation Amendment Act 2008 (2008 No 46).

21 And where the personal injury is described in any of the paragraphs in s 20(2) ACA 2001, for example, where a personal injury is caused by an accident to the person: ACA 2001, s 20(2)(a). The person must also suffer the personal injury in New Zealand on or after 1 April 2002: ACA 2001, s 20(1)(a).

22 *Gallagher v ACC* DC, Wellington 184/2005, 20/06/05, Judge Cadenhead. Affirmed in *ACC v Griffith* DC, Wellington 84/2009, 19/05/09, Judge Ongley.

23 *Gallagher v ACC* DC, Wellington 184/2005, 20/06/05, Judge Cadenhead.

24 *ACC v Ambros* [2008] 1 NZLR 340 (CA).

25 Ibid, at [67], [70].

26 Ibid.

27 *Hornby v ACC* Court of Appeal, CA 131/09, 09/12/09, O'Regan, Arnold and Ellen France JJ.

resulting in pain from a pinched nerve. She received compensation for the physical injury but her claim for mental injury arising from the break was declined on the basis that it was not attributable to the physical injury but rather to pre-existing mental conditions of anxiety and depression.[28]

The appropriate test of causation to be employed for s 26(1)(c) has also been framed in *Geerders*,[29] in terms of the civil standard required. The Court noted that to show causation under this section the claimant will need to show, on the balance of probabilities, that the mental injury suffered was "directly caused by the physical injury suffered."[30] This means, in cases where there are a number of contributing factors or causes to the claimant's mental injury or condition, a claimant may be unlikely to satisfy causation requirements, and so will fall outside the section's ambit. In *Geerders*[31] itself, Geerders claimed accident compensation coverage pursuant to s 26(1)(c) on the grounds of clinical depressions as a result of a soft tissue injury in his back. ACC, however, suspended his entitlement, maintaining that Geerder's depression was caused by long-term unemployment and his wife and children leaving him, rather than by the original injury. The Court highlighted that there were significant stressors in Geerders' life that had contributed to his depression including indirection causation such as brooding or worry. From this, the Court concluded that Geerders had not sufficiently proved that his depression was directly caused by the physical injury that he had suffered, and so fell outside the coverage of s 26(1)(c).

Finally, as with most questions of causation under the ACA 2001, whether or not a claimant has coverage under s 26(1)(c) will often depend on the medical evidence[32] and whether medical evidence confirms causation, or suggests another plausible explanation for the claimant's mental problems.[33]

A common area where people have claimed coverage for mental injury parasitic on physical injury under s 26(1)(c), is for the mental consequences of assaults.[34] An example of this was *Greenland-Tangipo v ACC*[35] where post-traumatic stress disorder following an assault, resulting from surrounding circumstances immediately following the injury and manifesting itself in fear of future injury, was held to be suffered because of the initial physical injury.

28 The District Court had accepted that the broken arm may have aggravated the pre-existing mental disorder of depression but concluded that it was not the cause of post traumatic stress disorder claimed by the appellant. Dobson J, in the High Court, upheld the approach of the District Court, treating the accident as triggering a pre-existing mental injury: *Hornby v ACC* High Court, CIV-2008-495-763, 10/09/08, Dobson J.

29 *ACC v Geerders* 08/07/04, DC Wellington.

30 Ibid.

31 Ibid.

32 New Zealand Statutes, Acts: Accident Compensation Act 2001 *Key terms relating to cover* (online looseleaf ed, LexisNexis) at [IPA26.5.2].

33 *Foster v ACC,* DC, Wellington 142/2004, 20/05/04, Judge Hole.

34 New Zealand Statutes, Acts: Accident Compensation Act 2001 *Key terms relating to cover*, above n 32, at [IPA26.5.2].

35 *Greenland-Tangipo v ACC* DC, Wellington 28/2003, 06/03/03, Judge Middleton.

Similar to this, in *Woodd*[36], a severe level of post-traumatic stress disorder following an assault during a robbery that caused bruising to the claimant was held to satisfy the requirements of s 26(1)(c).

A further area where causation issues have come to the forefront in the courts' consideration of mental injury coverage under s 26(1)(c), is where the claim for mental injury has multiple causes. This includes both physical and mental causes, and where the cause may be associated with both the claimant and another secondary victim.[37] This will be discussed further below in Part II.

2. Claimants who suffer mental injury caused by certain criminal acts – s 21

In addition to the above, there are two special stand alone mental injury cases that are covered under the ACA 2001. The first of these is cover for mental injury caused by certain criminal acts. This exception was covered under the earlier 1982 Act by the term "personal injury by accident", which included "bodily harm caused by the commission of certain criminal offences".[38] Today in the ACA 2001, there is coverage under s 26 for mental injury caused by any of the sexual offences listed in Schedule 3 to the Act, by virtue of s 21 (subs (1)(d)), even if there are no physical injuries involved.[39] All that is required is that the act performed on the victim comes within the description of an offence listed in Schedule 3. Schedule 3 lists all the major sex crimes, such as sexual violation and indecent assault, and it also includes infecting with a disease (s 201 of the Crimes Act 1961) and female genital mutilation (ss 204A and 204B of the Crimes Act 1961).[40] In relation to these Schedule 3 criminal acts it is irrelevant whether, in the context of the ACA 2001, the alleged offender can be charged with or convicted of an offence, or is capable of forming criminal intent (s 21(5)). Therefore there need not even be a complaint to the police, although it is presumed that the Corporation would require some evidence of the sexual abuse.[41]

As noted in s 21(4) ACA 2001, s 36 gives the date of first seeking treatment for that mental injury as the date the mental injury is suffered. The reference to "as that mental injury" in the section is to deal with situations where treatment may have been sought for a mental trauma but no connection has been made at that time between that trauma and the prior sexual abuse.[42] The

36 *Woodd v ACC* DC Wellington 54/03, 2/4/03, Judge Cadenhead.

37 See, for example, the cases of *Robertson v Attorney-General* 12/8/02, Gendall J, HC Palmerston North CP16/01 and *Sivasubramaniam v Yarrall* [2005] 3 NZLR 268.

38 This s 2 definition of "personal injury by accident" in the 1982 Act was reflected in s 8(3) and (4) of the Accident Rehabilitation and Compensation Insurance Act 1992, and s 40 of the Accident Insurance Act 1998.

39 R Thornton (ed) *Accident Compensation Act Commentary - Personal Injury in New Zealand* (online looseleaf ed, Brookers, Thomson Reuters) at [AC21.03].

40 Ibid.

41 Accident Compensation *Workplace Safety and Accidents Handbook* (online looseleaf ed, Brookers, Thomson Reuters) at [3.4].

42 Thornton, above n 39, at [AC21.08].

connection between the trauma and the sexual abuse may only come about at a later stage and it is the stage that that treatment is sought that is taken as the date the mental injury is suffered.[43] This also means that the date mental injury is suffered often differs from the date the sex crime occurs.[44] The date of injury is important in many cases for the purposes of linking the injury to a time when the claimant was in employment or a potential earner under 18 years of age, so weekly compensation can be claimed.[45] The deemed date of suffering the injury under s 36 does not, however, apply for the award of a lump sum under cl 5 of Schedule 1.[46]

The courts have generally taken a generous approach to the ambit of coverage under s 21.[47] In *XYZ v ARCIC*,[48] the Court upheld a claim for sexual abuse, in relation to assaults, which it was accepted would have been regarded as indecent at the relevant time (1954 – 1959); and where "indecent assault" on a woman or a girl is an offence under s 135 of the Crimes Act 1961, and is one of those offences expressly referred to in what is now Schedule 3. Support has also been given for cases of sexual harassment at work by physical behaviour, as potentially being covered by the ACA 2001.[49] Thus in the extreme example of *P v Attorney-General*,[50] the High Court considered that a plaintiff may have cover for mental injury arising from work-related sexual assaults.

Of course there are some instances where the Courts have shown restraint in the generosity given to coverage under s 21. In *Woodd*,[51] Judge Cadenhead rejected an alternative argument that the claimant had cover under the Schedule because she feared that she was going to be raped. Even where the fear or apprehension was "genuinely held" it was not sufficient to amount to "indecent assault" and bring the incident within the scope of the Schedule. Given the s 21(2) requirement that the sexual crime be "performed on, with, or in relation to the person" who suffers the mental injury, it would also seem that cases where mental injury is suffered by another (that is, secondary victims cases, for example, mental injury suffered by a parent on learning of a sex crime on their child),[52] are unlikely to come within the Act. Thus in *BS*

43 Thus, for example, in *DMF v ACC* DC Wellington 74/09, 12/05/09 it was decided that the date of entitlement commenced on the date the appellant started counselling with a qualified counsellor.

44 *Clothier v ACC* DC Tauranga 6/08, 22/01/08.

45 *MJR v ACC* [2010] NZACC Dunedin 105.

46 To qualify for a lump sum the sexual crime must take place after 1 April 2002: Thornton, above n 39, at [ACSynopsis].

47 New Zealand Statutes, Acts: Accident Compensation Act 2001 *Key terms relating to cover*, above n 32, at [IPA26.5.4].

48 *XYZ v ARCIC* [1994] NZAR 407.

49 New Zealand Statutes, Acts: Accident Compensation Act 2001 *Key terms relating to cover*, above n 32, at [IPA26.5.4.]

50 *P v Attorney-General* CIV-20060485-874, 16 June 2010. For further discussion of this case, see Part II below.

51 *Woodd v Accident Compensation Corporation* DC Wellington 54/03, 2/4/03, Judge Cadenhead.

52 Thornton, above n 39, at [AC21.06].

v ARCIC,[53] a heart attack allegedly caused by a wrongful accusation of sexual abuse was held not to be covered by what was then s 8(3) (now s 21), since the claimant was not the primary victim as required by subsection (3) (now s 21(2)(c)).

Like mental injury that is parasitic on physical injury, there must be the requisite causal nexus between the sexual crime and the mental injury; that the mental injury is "caused by an act performed by another person."[54] So in *LMP*,[55] where the appellant was admitted to a private residential psychiatric clinic due to the break-up of her marriage and extramarital affair, and where during her stay at the clinic the appellant disclosed that she had been a victim of rape at the age of 18, the appellant's claim for cover for personal injury to fund her treatment at the clinic was declined. The Court held the claimant's psychiatric condition, which had arisen over the preceding two years, was not caused by the earlier sexual violation.

Finally, in establishing the requisite "causal nexus"[56] under s 21, again the Courts have emphasised the need for assessment and apportionment to be carried out by qualified psychiatric practitioners.[57]

3. Claimants who suffer mental injury in a work-related sudden event or incident – s 21B

The second special case of mental injury standing alone that is covered under the ACA 2001, is mental injury suffered in a work-related sudden event or incident. Provided for in s 21B, as described in s 26(1)(da), work-related mental injury is a relatively recent inclusion to the ACA 2001, with s 21B being inserted from 1 October 2008.[58] This section was added to deal with situations which had occurred such as a train driver who had suffered from post-traumatic stress disorder ("PTSD") after killing someone on the train track. The driver was unable to continue working because of his PTSD, but could not obtain cover for his mental injury from ACC as he had not suffered any physical injury himself.[59]

Section 21B places a number of restrictions on claims, which have been likened to the restrictions the courts have placed on 'nervous shock' damage cases.[60] Under s 21B, a work-related mental injury may be covered where it is caused by a single event that the person directly experiences, sees, or hears while at work[61] and is an event that could reasonably be expected to

53 *BS v ARCIC*, unreported, DC 72/95.
54 ACA 2001, s 21(1)(b).
55 *LMP v ACC* DC Christchurch 285/05, 28/09/05.
56 *ACC v Geerders* 08/07/04, DC Wellington.
57 *MT v ACC* DC Wellington 213/2009, 10/12/09.
58 Section 21B was inserted by s 6 Injury Prevention, Rehabilitation, and Compensation Amendment Act 2008 (2008 No 46).
59 Thornton, above n 39, at [AC21.B.02]. See also Hon Maryan Street, Minister for ACC, press release (17 June 2008).
60 See, for example, *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA).
61 ACA 2001, s 21B(1)(b).

cause mental injury to people generally.[62] A person is taken to have directly experienced the event where he or she is involved in or witnesses the event him or herself, and was in close physical proximity at the time of the event's occurrence.[63] Thus a person who sees on television, reads or hears about in the news media, will not "directly experience" the event and so will fall outside of the Act's coverage.[64] The textbook example of a mental injury claimant falling under the ambit of s 21B, was the bar attendant/cook in *Davis*[65] who suffered from PTSD after being subjected to three armed robberies in as many months.

The effect of the s 21B requirements is that while work-related mental injury caused by a single, sudden, traumatic event is covered, gradual onset mental injury caused by stress is not.[66] So in *WD/S*,[67] a community worker failed in an attempt to establish a claim based on stress arising from the often confrontational nature of his work. Further to this, s 21B is confined to work-related injuries, which are those defined in s 28(1) as occurring whilst the person is at any place for the purposes of his or her employment, having a break from work, or travelling to or from the place of employment.[68] Thus in *ACC v HIH*,[69] the Court held that the injury the employee suffered in the employer's car park after finishing his work was a work-related personal injury. It would also seem that a mental injury suffered during a break for a meal, rest or refreshment at the employee's place of employment will also qualify under s 21B.[70]

The s 21B requirement that the event could reasonably be expected to cause mental injury to people generally,[71] stems from the policy intent to ensure that cover for work-related mental injury does not extend to injuries caused by minor events or by gradual process.[72] It calls for an objective assessment of the magnitude of the qualifying event, rather than allowing

62 Ibid, s 21B(2)(b).
63 Ibid, s 21B(5).
64 Ibid, s 21B(6).
65 *Davis v Portage Licensing Trust* [2006] 1 ERNZ 268.
66 Accident Compensation *Workplace Safety and Accidents Handbook*, above n 41, at [3.4.07].
67 *WD/S v ARCIC,* unreported, DC, 1/98.
68 "Employment" is further defined in s 6 ACA 2001 and (a) means work engaged in or carried out for the purposes of pecuniary gain or profit; and (b) in the case of an employee, includes a period of paid leave, other than paid leave on the termination of employment.
69 *ACC v HIH Workable Ltd* 17/10/00, DC Wellington.
70 Accident Compensation *Workplace Safety and Accidents Handbook*, above n 41, at [3.4.06].
71 ACA 2001, above n 62.
72 *Injury Prevention, Rehabilitation and Compensation Amendment Bill (No 2)*, as reported from the Transport and Industrial Relations Committee, Commentary (2009) at 3, cited in Andrew Gray (ed) *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [IPA21B.8]. The inclusion of the requirement that the event could reasonably be expected to cause mental injury was no doubt prompted by cases such as *Accident Compensation v E* [1991] 2 NZLR 228 (HC); [1992] 2 NZLR 426 (CA). There the unique and acute stress experienced by an employee after working long hours at a high pressure management course was found to be an instrumental factor in her mental breakdown and to amount to "personal injury by accident" under the original scheme.

a subjective approach accommodating an individual response. Thus in *Urbani*,[73] where the claimant was a young mortuary assistant dealing with bodies in a clinical and sterile environment, which included observation of the embalming procedures and assistance with lifting, washing and dressing deceased persons, the claim was held not to qualify for coverage under s 21B.

Finally, like s 21, s 36 gives the date of first receiving treatment for the mental injury in question as the date the mental injury is "suffered" under s 21B.

4. Section 27 "mental injury" ACA 2001

In order to qualify under any of the above three heads of coverage, a claimant must show that he or she has a "mental injury," which is narrowly defined in s 27 as a "clinically significant behavioural, cognitive, or psychological dysfunction."[74] This definition appeared in both the 1998 and 1992 Acts, representing a change from the earlier 1982 Act.[75] Employing a definition based on the American Psychiatric Association's *Diagnostic and Statistical Manual IV* ("DSM-IV")[76] a narrower conception of s 27 was preferred on the basis that background policy papers had consistently emphasised the need to provide a threshold for mental injury sufficiently high "to ensure that temporary distress constituting a normal reaction to trauma was not covered."[77] It was hoped that the definition of "mental injury" under s 27 would achieve this objective.

In applying s 27, it is clear that mental illness or injury is to be distinguished from mental distress.[78] Thus the illness or injury needs to be one that is recognisable by the medical profession, rather than the Court's assessment of mental and emotional suffering that is "plainly outside the range of ordinary human experience."[79] This also reflects the policy intention behind s 27 that treatment and particularly the diagnosis be undertaken by a psychiatrist who is best suited to provide a reliable assessment of the mental injury and its cause.[80]

73 *Urbani v Gillions and Sons Ltd* 5/3/03, HC Dunedin, CP26/01, Hansen J; upheld on appeal in *Urbani v Gillions & Sons Ltd* (2004) 2 NZELR 267 (BC200460323) (CA).

74 This approximates the "medically identifiable psychiatric illness or injury" which is required for a mental injury claim to succeed at common law: *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA) at [70].

75 AP Blair *Accident Compensation in New Zealand* (2nd ed, Wellington, 1983) at ch 5.

76 TA Widiger (ed) *DSM-IV sourcebook* (American Psychiatric Association, Washington DC, 1994), cited in Department of Labour, *Injury Prevention and Rehabilitation Bill: Departmental Report* (June 2001) at 41.

77 Department of Labour, *Legislative Options for Expanding Cover for Work-Related Conditions,* Paper 1, "Mental Injury Caused by a Work-Related Traumatic Event" (07/67318, 18 May 2007) at 2, cited in J Hughes "New cover for work-related mental injury" [2008] ELB 114.

78 *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA) at [65], affirmed in *P v Attorney-General* CIV-20060485-874, 16 June 2010 at [251].

79 Department of Labour, *Legislative Options for Expanding Cover for Work-Related Conditions*, above n 77.

80 Ibid.

At present, the most common mental injuries claimed for under the ACA 2001, and for which standardised diagnostic criteria are available under the DSM-IV, are acute stress disorder, post-traumatic stress disorder,[81] adjustment disorder with anxiety and/or depression, pain disorders and specific phobia.[82]

D. Current Procedure and Assessment of Mental Injury Claims

To qualify for coverage under the ACA 2001, a person who claims accident compensation entitlement for mental injury caused by physical injury or work-related incident will require assessment by a psychiatrist or a psychologist, which will provide the Accident Compensation Corporation ("the Corporation") with the basis on which to make a cover decision.[83] The mental injury must be both diagnosable in terms of DSM-IV criteria, and also require treatment.[84] To determine this, typically the Corporation will gather at least two medical reports. The first will be from the claimant's treating practitioner. The second will be a comprehensive assessment by a registered psychiatrist or psychologist. The psychiatrist or psychologist will usually be one who works under the terms of one of the Corporation's standard contracts for services.[85] The treatment options recommended by a report are those which the Corporation is likely to cover to treat the particular claimant's mental injury. This will typically include any associated prescription costs as well as referral costs to a psychiatrist or psychologist for treatment or counselling.[86]

When a mental injury is caused by a Schedule 3 sexual offence, the person can lodge a claim through either a medical practitioner - doctor or GP - or an ACC-registered counsellor.[87] To claim, the mental injury must be both diagnosable and also require treatment. The Corporation calls such claims "Sensitive Claims" because of their deemed "confidential and personal nature."[88] Given that Sensitive Claims may result in a "longer time period being taken to reach a cover decision,"[89] the Corporation funds the

81 Post-traumatic stress disorder was first included in the 1980 third edition (DSM-III). For further discussion of this disorder see below, Part II.

82 Department of Labour, *Draft Legislative Options for Expanding Cover for Work-Related Conditions* (5 April 2007, 7/66181) at 8, citing anecdotal evidence from British Columbia. See also New Zealand Statutes, Acts: Accident Compensation Act 2001 *Mental Injury* (online looseleaf ed, LexisNexis) at [IPA 27.2].

83 Accident Compensation Corporation, *Treatment Provider Handbook Sections 6.0* <www.acc.co.nz> at 80.

84 Ibid.

85 Ibid.

86 Ibid, at 81.

87 Ibid, at 80.

88 Ibid, at 81.

89 Ibid, at 81.

provision of early medical intervention following sexual assault through DSAC (Doctors for Sexual Abuse Care), who are trained in the management of sexual assault.[90]

In addition to treatment costs, if a claimant receives coverage for mental injury, he or she will then be entitled to claim the benefits provided by the ACA 2001. This can include weekly compensation for loss of potential earnings,[91] as well as lump sum compensation for the mental injury, under Part 3 of Schedule 1, in which cases claimants may receive an independent allowance.[92]

These entitlements are not insubstantial, and in many cases may involve the payment of significant costs.[93] It therefore must be asked, is the present coverage for mental injury claimants appropriate? Is it fair that in addition to mental injury caused by physical injury, the line is drawn to include only two stand-alone cases - mental injury caused by sexual offences and mental injury caused by worked-related incidents - and where claimants falling outside these areas, however worthy of coverage, will be denied ACC entitlement? It is these issues Part II will now address.

II. The Difficulties of Present Mental Injury Coverage

A. The Difficulties Associated with Present Mental Injury Coverage Under the ACA 2001

1. Difficulties with mental injury consequential on physical injury – s 26(1)(c)

The s 26(1)(c) definition of mental injury as mental injury that is consequential on physical injury, is "markedly more narrow"[94] than the definition of "personal injury by accident" given under the 1974 and 1982 Acts (which as noted above includes the physical and mental consequences of the injury or accident). The result is the exclusion of two types of mental injury

90 Additionally, from August 16 2011, people with a new ACC sensitive claim (or a new claim already in the system but awaiting a decision) will be able to access up to 16 hours with a counsellor, to ensure their safety and well-being: Accident Compensation Corporation *About ACC* <www.acc.co.nz>.

91 This is up to 80 per cent of a client's normal weekly wage if they are off work for more than one week. However under s 103 ACA 2001, to receive weekly compensation the injured person must be an earner at the time of the injury: Accident Compensation Corporation *Frequently requested facts and stats* <www.acc.co.nz>.

92 New Zealand Statutes, Acts: Accident Compensation Act 2001 *Mental Injury*, above n 82, at [IPA 27.3].

93 Indeed the Accident Compensation Corporation's total expenditure for 2007/08 (including paying for rehabilitation, compensation, administration, injury prevention programmes, levy collection) was $3.181 billion: Accident Compensation Corporation *About ACC -statistics* <www.acc.co.nz>.

94 New Zealand Statutes, Acts: Accident Compensation Act 2001 *Key terms relating to cover*, above n 32, at [IPA26.5.3].

cases which would have been covered by the 1982 Act. The first excluded situation is where a purely mental consequence is suffered as the result of an accident to the claimant, and where no physical injury is suffered.[95] Now, claimants in cases such as *Re Firmstone*[96] (where the claimant suffered mental injury as the result of mistaken arrest), or *P v Attorney-General*[97] (where the claimant suffered a mental injury due to threats and intimidation), will not be entitled to coverage under the ACA 2001 unless the claims can be brought within either s 21 or s 21B.[98]

The second excluded situation occurs where a purely mental consequence is suffered by a person as the result of witnessing physical injury, or potential physical injury, to others.[99] This secondary victim situation is very difficult to claim at common law.[100] These sorts of consequences are often suffered by rescuers who may experience traumatic consequences or aftermath of a tragedy. Claimants may receive coverage under the ACA 2001 where the tragedy or aftermath is work-related under s 21B (in cases such as *Mt Isa*[101] where the claimant developed acute schizophrenia as a reaction to seeing a fellow working in flames and *Pugh*[102] where a railway worker suffered nervous shock after his actions averted a train crash), however this leaves outside the ambit of the ACA's coverage those rescuers who are volunteers or who are working outside of an employment capacity.

In addition to rescuers, a further example of a secondary victim who would now be excluded from coverage under s 26(1)(c), is a person who suffers nervous shock and other psychiatric consequences from unwillingly witnessing an injury to a close relative.[103] This form of mental injury was covered under the 1982 Act, and is compensable at common law.[104] Section 26 now, however, excludes injuries of this type, however meritorious, unless exceptionally the circumstances meet the requirements of s 21B. Possibly the

95 Ibid.

96 *Re Firmstone* (1983) 4 NZAR 62.

97 *P v Attorney-General* HC Wellington CIV-2006-4850874, 16 June 2010.

98 New Zealand Statutes, Acts: Accident Compensation Act 2001 *Key terms relating to cover*, above n 32, at [IPA26.5.3].

99 Ibid.

100 Seeking common law damages for mental injury is particularly burdensome for secondary victim claimants. As compared to primary victims, secondary victims must overcome a number of largely arbitrary legal hurdles, in particular, the need to prove that the psychiatric illness was induced by the "sudden shock" of a "horrifying event". See the leading House of Lords case on point *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 at 401. See also H Teff "No More Shock, Horror? The Declining Significance of 'Sudden Shock' and the 'Horrifying Event' in Psychiatric Injury Claims" in Sheila McLean (ed) *First do no harm: law, ethics and healthcare* (Ashgate, Aldershot, 2006) 303.

101 *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

102 *Pugh v London, Brighton & South Coast Railway* [1986] 2 QB 248.

103 New Zealand Statutes, Acts: Accident Compensation Act 2001 *Key terms relating to cover*, above n 32, at [IPA26.5.3].

104 See for example, *McLoughlin v O'Brien* [1983] 1 AC 410; *Alcock v Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057 and *Hevican v Ruane* [1991] 3 All ER 65, or the New Zealand example of *Queenstown Lakes District Council v Palmer*, unreported, CA, 2 November 1998, CA 83/98.

claimant might have coverage if he or she suffers a physical injury. However, it has to be clear that the mental injury comes from the physical injury and not from the horrific event.[105] Thus, in *Queenstown Lakes District Council*[106] where a husband saw his wife drown in a rafting accident, it did not come within the definition of personal injury because the husband's mental injury did not arise from physical injuries to him but instead arose from physical injuries to his wife.

Excluded cases – meritorious and worthy of coverage?

There are a number of misgivings with these two kinds of mental injury cases being excluded from coverage under the ACA 2001 which would have received coverage under the earlier Accident Compensation Acts. If one considers the advances that have been made in medicine and psychology which "now equate mental well-being with physical well-being,"[107] it seems illogical that mental injury claims have been given a more limited form of coverage under the ACA 2001. As noted by Gray,[108] in the last few decades mainstream medicine has come to recognise the vital importance of both human-beings' physical well-being and human-beings' mental well-being.[109] Underpinning this development, the field of psychology now has a comprehensive understanding of the complexities of the human brain, behaviour, emotional responses, including the biological and scientific processes involved with many of the common disorders. In many areas of psychological research, mental disorders are now recognised as "fundamentally physical diseases" or "diseases of the brain."[110] In many instances it has also been recognised by the medical profession that mental disorders exhibit physical or "biologically categorical"[111] symptoms. So, for example, in *ACC v E*[112] medical expertise was able to identify eyewitness evidence of physical symptoms that could be associated with a "serious mental disorder."

105 New Zealand Statutes, Acts: Accident Compensation Act 2001 *Key terms relating to cover*, above n 32, at [IPA 26.5.3].

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

107 P Gray *Psychology* (4th ed, Worth Publishers, New York, 2002).

108 Ibid, at 43.

109 The equal emphasis now given to a person's physical and mental well-being represents a marked change to the historical position, where health was defined solely in terms of a person's physical well-being: I Prilleltensky, "The Politics of Abnormal Psychology: Past, Present and Future" (1990) Vol 1 No 4 *Political Psychology* 767 at 768.

110 On the basis of measureable abnormalities in the brain that correlate with certain mental disorders, drug treatments have been developed to alter the brain and alleviate the symptoms of the disorder. For example, the mental disorder depression is known to be associated with low levels of serotonin at the synapses of the brain's neurotransmitters. Common drugs for the treatment of depression correct this imbalance by blocking the reuptake of serotonin at the synapse: P Gray, above n 107, at 616, 626.

111 Ibid, at 617.

112 *ACC v E* [1992] 2 NZLR 426 (CA) at 435.

Furthermore, like mainstream medicine, psychology now relies on empirical research and scientific evidence to minimise bias, and draw the most reliable and valid conclusions possible. It treats mental disorders as analogous to medical diseases and borrows from medicine the terms "symptom" and "syndrome"[113] to describe psychiatric conditions in an objective way.

Given these medical developments, one may ask why the law on accident compensation coverage is going in the opposite direction. A number of cases which would have been included under the former Acts are now excluded. An example is the claimant in *ACC v E*[114] who, without the presence of physical injury was covered under the 1982 Act, but who would now fall outside the Act's coverage. Should not the law be reflecting medical reality and thus supporting a more liberal form of mental injury coverage under the ACA 2001?

2. Difficulties with mental injury caused by certain sexual offences – s 21

There are also associated difficulties with the two stand-alone categories of coverage for mental injury. Dealing, firstly, with the associated difficulties of s 21; that is, mental injury caused by a sexual offence listed in Schedule 3. Of the Schedule 3 listed offences an anomaly exists for assault which is on a male child by another male, which is not covered by the qualifications to s 194 of the Crimes Act 1961,[115] as listed in Schedule 3. This was illustrated in *ACC v BH*,[116] where the claimant who suffered mental injury as a consequence of sexual abuse performed on him by his step-father was denied accident compensation coverage on the basis that s 194 in the ACA 2001 relates to female sexual assaults only.[117]

In addition to the *BH* case, a further example of a seemingly meritorious case, but one that was excluded under s 21 - as the offence in question is not listed in Schedule 3 - is *CLM v ACC.*[118] There the claimant's sexual partner did not disclose that he was HIV positive. Although she did not contract the disease, she did suffer a mental injury through the stress of waiting for the test results. However, even though the partner was convicted of criminal nuisance,

113 A "symptom" is any characteristic of a person's actions, thoughts, or feelings that could be a potential indicator of a mental disorder; and a "syndrome" is a constellation of interrelated symptoms manifested by a given individual. Under the DSM-IV, a syndrome or collection of symptoms may only be taken as evidence of a mental disorder if, and only if, it satisfies the criteria of being a clinically significant detriment, internal source and an involuntary manifestation. These three criteria are objective medical guidelines which ensure that psychological categorisation reflects an approach similar to physical disease categorisation: P Gray, above n 107, at 611.

114 *ACC v E* [1992] 2 NZLR 426 (CA).

115 Section 194 of the Crimes Act 1961 covers "assault on a child".

116 *ACC v BH* Unreported, DC, 93/2002.

117 Ibid. As Judge Beattie noted, the specified criminal act which results in mental injury must be one referred to by the wording of the Accident Insurance Act 1998, not the Crimes Act 1961 (and the reason and purpose for the words in s 194 is to restrict the category of assailants on a child to females only, whereas s 194 Crimes Act 1961 refers to males as well).

118 *CLM v ACC* [2006] 3 NZLR 127 (HC).

as the offence was not an offence listed in Schedule 3, the Corporation declined her mental injury claim. This was upheld by the District Court[119] and High Court,[120] where the Courts concluded that the law in New Zealand did not extend to the appellant's proposition that the non-disclosure of the HIV status of her partner vitiated consent to sexual intercourse or indecent assault. Remarking on the perceived inequity of this situation the Court considered that any change to the law was a matter for Parliament, not the Courts.[121] *CLM* certainly highlights a number of difficulties associated with s 21. The claimant in this case had clearly suffered from a mental injury, in immensely distressing circumstances, yet was not entitled to coverage under the ACA 2001. It therefore raises an important question - why have these particular sexual offences been singled out?

A further class of excluded case under s 21, which may also be seen as meritorious and therefore worthy of coverage under the ACA 2001, is secondary victims' cases.[122] Where a mental injury is suffered by another, say, where a mental injury is suffered by parents on learning of a sex crime on their child, and where common law damages in such situations are difficult to obtain,[123] should not the claim be entitled to compensation under the ACA 2001? Psychological evidence, including evidence that the maternal or paternal link between parent and child can expose the parent to a high risk of developing a mental disorder where their child suffers assault,[124] would certainly seem to support such coverage. This includes the DSM-IV criteria required for post-traumatic stress disorder which requires that "the person experienced … actual or threatened death or serious injury, or a threat to the physical integrity of self *or others.*"[125]

Suggested favouritism given to mental injury caused by sexual crimes

This concern associated with the cases excluded from s 21, including those cases which involve offences not listed in Schedule 3 as well as secondary victims' cases, forms part of a more general difficulty associated with s 21. This concerns the whole philosophy behind s 21 and reason for its inclusion in the ACA 2001, which points to favouritism towards mental injury cases

119 *CLM v ACC* DC Wellington 110/05, 07/04/05, Judge Ongley.

120 *CLM v ACC* [2006] 3 NZLR 127 (HC).

121 Ibid.

122 Thornton, above n 39, at [AC21.06.]

123 The bar on suing for damages in s 317 does not apply to the parent (although it does apply to the child) and a claim for damages for the mental injury may be available if there is a suitable cause of action. This could be against the wrongdoer, or the wrongdoer's employer or an organisation responsible for supervising the wrongdoer, for example, a mental hospital that has negligently released a dangerous paedophile. Such damages actions however are difficult and often founder on policy considerations against establishing a duty of care: Thornton, above n 39, at [AC21.06.]

124 P Gray above n 107, at 617.

125 And that "the person's response involved intense fear, helplessness, or horror:" *P v Attorney-General* CIV-20060485-874, 16 June 2010 at [260]. See also the *Diagnostic and Statistical Manual of Mental Disorders DSM-IV* (American Psychiatric Association, Washington, 2000).

caused by sexual offences, and therefore victims of sexual crimes. This special emphasis given to mental injuries associated with sexual misconduct has been seen from early times in the operation of the accident compensation scheme. When the 1992 Act was introduced to define exhaustively those areas which would be covered under the Act, the policy intention was clear: to provide cover for victims of crimes of a sexual nature.[126] So coverage specifically included "mental or nervous shock suffered by the victims of certain specified sexual offences."[127]

Yet if one considers the psychology and medical evidence associated with victims of sexual offences, and the mental disorders they may be likely to suffer, it would seem to be an arbitrary distinction to draw. As noted in ACC Treatment Paths,[128] as affirmed by psychological research generally,[129] where a person suffers a sexual offence (such as sexual abuse, violation or assault), the most likely mental disorder to develop will be post-traumatic stress disorder ("PTSD"). Yet psychological evidence also shows that a sexual offence is only one of the many traumatic incidents that may lead to a person developing PTSD. Indeed, initially PTSD was framed in terms of trauma such as torture, the Nazi holocaust, the atomic bombing of Hiroshima and Nagasaki, and natural and man-made disasters - with no mention made of sexual offences.[130] Today the DSM-IV commentary on PTSD refers to a cause as "an extreme traumatic stressor" that can include a "violent personal assault" of which "sexual assault" is given as just one of many examples.[131] Given then that the psychological basis for mental injury does not highlight sexual offences as a primary, or overriding cause of PTSD, why is it given special emphasis in the ACA 2001?

The answer to this anomaly must lie with New Zealand's social policy, and the popular pressure and public concern that exist in New Zealand towards sexual crimes. In the words of Judge Ongley in *AB v ARCIC*,[132] remarking on what is now s 21 of the Accident Compensation Act, section 8(3) deals with a "recognised situation of social concern because it is *notorious* that profound psychological consequences can follow sexual assault even though no physical injury occurs." Yet is social concern, however strong, a sufficient basis to determine which mental injury is worthy of coverage under ACC, and which is not? To the author's mind, basing mental injury coverage on social concern, not on psychological evidence, is likely to result in a lack of principle and resulting difficulty in the ACA's application, as well as unfairness to those claimants who fall just outside the Act's coverage.

126 New Zealand Statutes, Acts: Accident Compensation Act 2001 *Mental Injury*, above n 82, at [IPA 21.3].
127 Todd, above n 2, at 28.
128 Accident Compensation Corporation, *Treatment Provider Handbook Sections 6.0*, above n 83.
129 *P v Attorney-General* HC Wellington CIV-20060485-874, 16 June 2010 at [254].
130 Ibid, at [260].
131 Ibid, at [254].
132 *AB v ARCIC*, unreported, DC, 118/96.

3. Difficulties with mental injury that is work-related mental injury – s 21B

Under s 21B mental injury must result from a "single event."[133] As "event" under subsection (7)(c) does not include a "gradual process," it has been anticipated that boundary problems will be associated with this subsection.[134] In some employments, such as nursing or fire-fighting, or the police force, a person will regularly be exposed to multiple events that are potentially traumatic, but which may seem to have become "normalised" through regular experience until continued exposure results in mental injury.[135] An example is seen in *Brickell*[136] where the claimant had filmed and edited a large amount of horrifying video material over a period of 15 years, in the course of his work as a police video photographer, but did not present symptoms of post-traumatic stress disorder until nine or ten years after finishing this work. Is it reasonable that a person exposed to multiple events, which may be equally traumatic (and therefore equally likely as a single event to cause a mental injury) should fall outside of s 21B and coverage of the ACC scheme?[137]

A further difficulty found with s 21B is its requirement that the mental injury is confined to work-related injuries; that it occurs in the course of employment. Under s 6 "employment" means, primarily "work engaged in or carried out for the purposes of pecuniary gain or profit." Therefore, volunteers, persons on work experience, or those on job training are excluded from cover under s 21B.[138] The resulting distinction made between employees and volunteers poses a clear "policy dilemma,"[139] seen particularly in the emergency services where traumatic events are commonly witnessed. Volunteers are used extensively in these services, with both the New Zealand Fire Service and the Ambulance Service making considerable use of trained volunteers. The largest part of the Fire Service, for example, is made up

133 ACA 2001, Sections 21B(2).

134 Andrew Gray, above n 72, at [IPA21B.8].

135 Department of Labour, *The injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2), Report to the Transport and Industrial Relations Select Committee* (May 2008) (at 10,?? cited in Andrew Gray, above n 72, at [IPA21B.6].

136 *Brickell v Attorney-General* (2000) 5 NZELC 96,077.

137 As noted in Hughes, above n 77, a number of further problems can be seen with the boundaries of the "event" definition. For example, what of the employee who suffers from psychiatric illness, but no adverse physical consequences, after becoming aware that he or she has been exposed to the adverse effects of hazardous chemicals on a specific occasion or specific occasions - the position of one plaintiff in *Iversen v Zendel Industries Let* HC, Auckland, 08/06/93, Williams J, CP 2171/91. Or the employee who suffers from post-traumatic stress disorder after witnessing a "near miss" to others, from a position where he or she was at no risk of harm, such as the crane driver who saw the load-bearing cable on a crane snap over a ship's hold where fellow employees were working in *Dooley v Cammell Laird Ltd* [1951] 1 Lloyds Rep 271.

138 Department of Labour *The Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2), Report to the Transport and Industrial Relations Select Committee* (May 2008) at 17, cited in Andrew Gray, above n 72, at [IPA21.B.4].

139 Hughes, above n 77, at 114.

volunteers.[140] These volunteers work alongside paid employees who would be covered by s 21B of the ACA 2001, so is it fair that they fall outside the ambit of the Act?[141]

In addition to volunteers, other persons who suffer mental injury as a result of trauma experienced in the workplace environment, but who are not employees, will be excluded from coverage under s 21B. This illustrates a further arbitrary line that has been drawn within this section. To illustrate by way of two more common examples, a tourist who witnessed his wife drowning in a commercial white-water rafting accident would not be covered, but the rafting crew could be.[142] Similarly, passengers who survived an air crash physically unscathed would not be covered, but the air crew could be.[143] While those who are outside the work-related exception might be able to recover at common law, in present circumstances, this will only be possible in very limited circumstances.[144]

A further difficulty can be seen with regards to the primary/secondary boundary which s 21B employs. In order to be covered by s 21B, the person concerned has to experience, see, or hear the event directly (subsection (2)(a)). This requires that the person is involved in, or witnesses, the event himself or herself and is in close proximity to the event at the time it occurs (subsection (5)).[145] These boundaries reflect some elements of the difficult distinction between "primary" and "secondary" victims that have been established by the UK courts when limiting recovery of compensatory damages for mental injury at common law; although unlike some common law approaches, witnesses to the aftermath of an accident are covered.[146]

B. Difficulties associated with mental injury claims generally

Yet, difficulties associated with mental injury claims under the ACA 2001 are not just confined to difficulties associated with each of the three heads of coverage outlined above. Rather, the whole issue of mental injury claims

140 Hughes, above n 77.

141 While officials have recently recognised the need for more even coverage and cover for volunteers in the workplace under the accident compensation scheme (Department of Labour, *The Injury Prevention, Rehabilitation and Compensation Amendment Bill (No 2), Report to the Transport and Industrial Relations Select Committee* (May 2008), no action was taken to amend s 21B Accident Compensation Act 2001.

142 *Queenstown Lakes District Council v Palmer* [1991] 1 NZLR 549 (CA).

143 *McGrory v Ansett New Zealand Ltd* [1999] 2 NZLR 328 (CA).

144 New Zealand Statutes, Acts: Accident Compensation Act 2001 *Key terms relating to cover*, above n 32, at [IPA 26.5.3].

145 Awareness through secondary sources such as television, news media, radio, telephone and personal message are excluded as being "direct" for this purpose: ACA 2001, s 21B(6).

146 Andrew Gray, above n 72, at [IPA21B.6]. See also Todd, above n 2, at [5.7.03] and Campbell, above n 18, at ix 'preface'.

under the ACA 2001 - issues of where the appropriate line should be drawn, of which cases should and should not be covered - is made more difficult by the generally complicated nature of mental injuries.[147]

1. Complexity of mental disorders

A particular difficulty associated with mental injury claims is their complex nature, which includes their vast aetiology (potential number of causes). As noted above, psychological evidence shows that in many instances mental disorders are a biological condition or abnormality in the brain, which may result from genes, or from environmental assaults such as poisons, alcohol or drugs, birth difficulties (such as oxygen deprivation during birth), or from viruses or bacteria that attack the brain. In addition to these biological factors, psychological evidence also reveals that the likelihood of developing a mental disorder can also be influenced by behavioural,[148] socio-cultural factors,[149] or even general experience. So, for example, in the case of phobias (such as social phobia), it can have a number of causes. It can be brought on by genetic disposition, a destructive habit formed during childhood, or a traumatic one-off incident.[150] The multiple causes that may exist for a mental injury claim, then, contrasts with claims for physical injury where the cause is likely to be straight forward and where clear biological evidence will typically be available to illustrate the cause.

2. Divisibility issues – where a claim for mental injury has multiple causes

The difficulty involved with causation in mental injury claims is also seen where the injury may have a number of identifiable causes, and where it can be difficult to divide up these causes. During the 1990s, a number of cases came before the courts where the courts had to grapple with such difficulties. This included the need to disentangle mental harm from the physical harm, and mental injury attributable to both a person's own, and someone else's injury.[151]

While the first of these cases, *Queenstown Lakes*,[152] established that a particular claim for damages may exist where proceedings arise directly or indirectly out of personal injury that is not covered by the ACA 2001; subsequent cases presented more difficulty. In particular, the question still

147 D Dewees, D Duff and M Trebilcock *Exploring the domain of accident law: taking the facts seriously* (Oxford University Press, New York, Oxford, 1996) at 422.

148 In particular, cognitive and behavioural theories which are more concerned with a person's conscious thoughts and actions, maintain that mental disorders are learned, maladaptive habits of thinking that have been acquired through the person's interaction with the environment: P Gray, above n 107, at 617.

149 The socio-cultural perspective maintains that mental disorders are products not only of the person and the person's immediate environment, but also of the larger culture within which the person develops: P Gray, above n 107, at 617.

150 Ibid.

151 These difficulties had been identified early on in *ACC v E* [1992] 2 NZLR 426 (CA) where the Court predicted that it would be difficult to separate physical and mental injuries.

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

unresolved was: where a claimant has more than one kind of injury, one covered by the ACC scheme and one not, is the s 317 bar on damages still to apply? A case which illustrates this dilemma was *Robertson*.[153] There, a road accident victim who suffered physical injury claimed common law damages for trauma suffered on account of the death of another person in the same accident, and so claimed as a secondary victim. The claim however failed on the basis that the plaintiff was unable to show that the mental shock elements of his claim could be separated from his physical injuries.[154] On this point Gendall J noted that it "may well be impossible, to separate mental and physical consequences of an event or accident where both types of injury occur at the same time, or arise from the same event".[155]

Similarly, in *L v ACC*[156] cover had been accepted for sexual abuse during the appellant's marriage and a further claim was then made for compensation for mental injuries resulting from beatings over the same period. However, the physical injuries inflicted by assaults during a marriage were held to be so entwined with the sexual allegations that it was artificial to separate for purposes of assessment.[157]

A different approach to this divisibility issue, and the need to distinguish between allegedly different injuries[158] was taken in *Yarrall*.[159] There another road accident victim who suffered trauma from her own injuries, the death of her unborn child and the death of her mother, all in the same accident, was held to be entitled to continue with common law proceedings for mental injury arising distinctly out of the death of her mother. Health J was satisfied in the case that the fact-finder could be asked to assess what proportion of the mental injury could be attributed to those aetiologies that were covered under the Act and those that were not.

Given the differing approaches of the courts in the respective cases, what is the answer to this divisibility issue? Where a claimant has a mental injury which may have multiple causes, will they be covered by the ACA 2001 and the s 317 bar on common law damages apply, or can they seek damages at common law? As Todd[160] maintains, ultimately this is a factual question. If the damages sought can be shown to arise from uncovered injury then a common law action may lie. But probably, if the damages arise out of both covered and uncovered injury and are quite indivisible, then the action is barred. This approach has been accepted recently in *P v AG*[161] by Mallon J.

153 *Robertson v Attorney-General* 12/8/02, Gendall J, HC Palmerston North CP16/01.
154 Ibid.
155 Ibid, at [39].
156 *L v ACC* DC Wellington 354/2005, 09/12/05, Judge Cadenhead.
157 Ibid.
158 Todd, above n 2, at 37.
159 *Sivasubramaniam v Yarrall* [2005] 3 NZLR 268. Heath J considered that, at trial, the Court would need to determine what proportion of the plaintiff's mental injury could be attributed to a cause that was covered by the accident compensation legislation and what mental injury could be contributed to a cause that was not.
160 Todd, above n 2, at 38.
161 *P v Attorney-General* CIV-20060485-874, 16 June 2010 at 55.

While this point would now seem to be settled in favour of the view of Todd, nevertheless, it goes some way to illustrate the kinds of difficulties the courts face in dealing with mental injury claims.

3. The variation in peoples' resilience

A further difficulty of determining causation in mental injury claims is in light of the variation that exists in people's responses to difficult circumstances. The varying nature of people's responses and the likelihood of developing a mental disorder have been discussed in the context of people who experience traumatic events and who may suffer a mental injury in terms of s 21B.[162] Research seems to support the conclusion that most people exposed to extremely traumatic events will experience emotions such as fear and anger but then deal with the event in their own way and suffer no longer term consequences. Some, however, develop severe mental or psychological problems.[163]

In the context of mental injury claims, the varying level of claimants' mental resilience has commonly been termed as the "egg-shell personality factor."[164] Where members of the population may differ in their response to traumatic events or circumstances, the courts will assess the person's claim for mental injury on the basis that you find the person as he or she is,[165] ignoring suggestions of a claimant's potential eggshell personality. Thus in *ACC v McArthur*,[166] where a minor brain injury exacerbated already existing psychological tendencies and precipitated a major depressive disorder, it was still held to be mental injury caused by a physical injury in terms of s 26(1)(c). Likewise, Somatoform pain disorder following injury to fingers was held to be a mental injury which was the outcome of a physical injury in *van der Swaluw*.[167] The Court attached no significance to the fact that what was described as being the appellant's "defective makeup" undoubtedly extended the duration of his reaction. Nevertheless, this potential for egg-shell personalities is a further difficulty which must be addressed in ACA 2001 mental injury cases.

162 Hughes, above n 77.

163 Department of Labour, *Draft Legislative Options for Expanding Cover for Work-Related Conditions* (5 April 2007, 7/66181) at 7, cited in Hughes, above n 77.

164 *ACC v E* [1992] 2 NZLR 426 (CA). See also *ARCIC v Burke* DC Huntly 198/98, 7/9/98, Judge Beattie.

165 *Johnston v ACC* DC Wellington 46/09, 30/3/09, Judge Barber.

166 *ACC v McArthur* DC, Huntly 174/2003, 44/08/03, Judge Beattie.

167 *van der Swaluw v ACC* unreported, DC, 222/2001.

4. Causation issues and the difficulty of PTSD

The difficult causation issues which must be addressed when dealing with mental injury claims has been seen most acutely in cases dealing with post-traumatic stress disorder ("PTSD").[168] As noted above, for the three areas of mental injury presently covered by the ACA 2001, PTSD is the most common mental injury that arises. An example where this difficult condition arose, and a case that will also be drawn on in the next section below, is *P v Attorney-General*.[169] There the High Court considered a claim for damages where the plaintiff had suffered an alleged sexual assault in the Navy 20 years earlier, and which allegedly led the claimant to suffer from PTSD (and which the claimant had received accident compensation for).[170]

In outlining what must be established for mental injury under the ACA 2001, Mallon J highlighted the particular difficulties that can arise for the courts when dealing with claims for PTSD, and as identified by the expert psychiatric evidence given in the case.[171] In particular Mallon J, citing the evidence of Professor Mellsop, noted that while PTSD is a "recognised" psychiatric disorder and so would qualify as a "mental injury" for which compensation could be awarded, nevertheless as defined by criteria in the DSM-IV, it is a disorder which is a "cause in search of consequences;"[172] that is "here is a trauma experienced, what are the consequences". In that regard, it differed from other psychiatric disorders where the illness has a symptom profile and the cause is a separate matter.[173] Mallon J also noted how proving causation in a claim for PTSD was made more difficult by the DSM-IV criteria for the disorder. The criteria does not specify a time period for symptoms to manifest themselves, but instead states that "symptoms usually begin within the first three months after the trauma, although there may be a delay of months, or even years, before symptoms appear".[174] With

168 Not only in the context of accident compensation, but also for common law claims the difficulties associated with PTSD have been noted: see Todd, above n 2, at 183. Indeed in *Urbani v Gillions and Sons Ltd* 5/3/03, HC Dunedin, CP26/01, Hansen J, John Hansen regarded PTSD as "highly problematical".

169 *P v Attorney-General* HC Wellington CIV-20060485-874, 16 June 2010 at [254].

170 Although the claimant received compensation under the Accident Compensation Scheme for the mental injury he developed as a result of sexual assault, he claimed damages for alleged threats and intimidation for reporting the sexual assault and breach of fiduciary relationship, among others. See *P v Attorney-General* HC Wellington CIV-20060485-874, 16 June 2010 at [5] - [10].

171 Ibid, at [259] - [267].

172 Ibid, at [260], citing the evidence of Professor Mellsop.

173 Ibid.

174 Ibid, at [256].

such time delays it can be very difficult for psychiatrists, to draw the correct conclusion on the claimant's condition, and ensure that a claim for accident compensation is indeed a meritorious one.[175]

5. Difficulties with evidence, categorisation issues and applying the DSM-IV

Difficulties with assessing mental injury, in the context of accident compensation legislation, arise not only with issues of causation, but also evidential issues which a court may face when assessing a claim for mental injury. In particular, it is now clear that when assessing a mental injury claim for the purposes of the ACA 2001, only practitioner (psychologist or psychiatrist) or specialist evidence will be relied upon; extracts from medical and scientific journals will not be sufficient evidence to support a medical proposition.[176] In the words of Judge Ongley in *Dally*:[177]

> "The purpose of expert medical evidence is to provide the Corporation, the Review Officer or the Court with material which will enable a judgment of medical questions which are themselves outside the ordinary knowledge and competence of the tribunal [or court] in question to judge without such assistance. In order to meet ordinary tests of admissibility, the medical opinion needs to be provided by a practitioner or specialist who first qualifies himself or herself with sufficient skill and expertise in the process of diagnosis that is required in the case."

Notwithstanding the steps the courts have taken to accept only "expert medical evidence", issues of evidence may still arise when dealing with claims for mental injury, given that it will inevitably involve a court applying an analysis of science; and the difficulty that can be involved in reconciling these two fields. As noted in *P v Attorney-General*, when you take these DSM-IV diagnoses into the court setting there are difficulties because the "criteria can give an impression of science that simply is not present."[178] Further to this, when assessing a person for a mental disorder, there is danger in reducing analysis down to criteria, and diagnoses in terms of labels. A person's symptoms will often not fit into the 'criteria box' of a certain mental disorder

175 Reinforcing this view, in *P v Attorney-General* HC Wellington CIV-20060485-874, 16 June 2010 at [263], expert psychiatrist Dr Barry-Walsh noted that "post-traumatic stress disorder carries with it, in my opinion, so much baggage and so many problems that it's one diagnosis in particular that I'm very careful to avoid where possible or where I introduce it, introduce with significant qualification."

176 *Wilson v ACC* DC Wellington 189/09, 30/10/09 at [21].

177 *Dally v ARCIC* DC Hamilton 60/97, 21/4/97, per Judge Ongley at 4.

178 *P v Attorney-General* HC Wellington CIV-20060485-874, 16 June 2010 at [263], per Mallon J, citing expert evidence given by Dr Barry-Walsh.

laid out by the DMS-IV, and it is artificial to try and force this.[179] This poses difficulties in the Court setting where strict black and white criteria are more easily applied.

Furthermore, while the DSM-IV is readily used as a psychiatry sourcebook,[180] as noted by Mallon J in *P v Attorney-General*,[181] there can be a number of problems with using the DSM criteria to decide in a court setting when assessing whether a plaintiff has a mental injury. This may be unsurprising given that the DSM is not intended for "medico-legal"[182] use, and where the DSM-IV handbook specifically warns against its use in this setting. As Mallon J goes on to note, the DSM is a "political"[183] document put together by the American Psychiatric Association. It is subject to update and change",[184] which includes the criteria used to describe a certain disorder. The potential for criteria change was pointed out in *P v Attorney-General*,[185] in what Professor Mellsop noted as the "criterion creep" of mental disorders. This has been seen most obviously in the case of PTSD, where now "almost no behavioural or psychological symptom could not be claimed as being part of PTSD".

Similarly on this point, the English Law Commission has also highlighted the difficulty of using the DSM-IV to determine meritorious mental injury claims at common law.[186] When considering recent literature on PTSD and other psychiatric illnesses that may be compensable in negligent action (including depressive disorders, adjustment disorders and anxiety disorders), the Commission noted that the clinical and scientific considerations involved in the categorisation of certain conditions as mental disorders might not be relevant to legal judgments, which take into account such issues as individual responsibility, level of disability and competency; even though these considerations may be accepted by psychiatrists as an appropriate test for actionable damage.

179 Rather, psychiatrists will carry out what is known as "formulation" - the skill of integrating all the information that they have, and providing a description and understanding of what a person is and what their problems are to give a "richer and more complete account" of the person's problems. It is hoped that this approach will reduce the level of ambiguity and potential for distortion: *P v Attorney-General* HC Wellington CIV-20060485-874, 16 June 2010 at [263].

180 The DMS-IV is used in many countries by clinicians to assess whether a person has a mental disorder.

181 *P v Attorney-General* HC Wellington CIV-20060485-874, 16 June 2010 at [259] - [263].

182 Ibid, at [265], per Mallon J, citing evidence given by Dr Huthwaite.

183 Ibid, at [261].

184 The current DSV-IV is the fourth revised addition. The first addition appeared in 1952, with revised additions in 1968 and 1980. The current version, the DSM-IV first appeared in 1994 (being modified slightly in 2000).

185 *P v Attorney-General* HC Wellington CIV-20060485-874, 16 June 2010 at [261], per Mallon J, citing evidence given by Professor Mellsop.

186 Law Commission (Eng), *Liability for Psychiatric Illness* report no 249 (1998) at Part III, cited in Todd, above n 2, at 183.

III. How Far Mental Injury Coverage Ought to go - Potential Changes to Coverage Under the Accident Compensation Act 2001

A. Extending coverage – justified in legal principle

As noted above, present cover does not exist for mental shock outside the narrow parameters of three sections.[187] To extend mental injury coverage to include these excluded cases would certainly provide a more equitable approach to potential claimants. It would ensure that mental injuries are given equal weight with physical injuries under the ACA 2001. But is there sufficient support to make this extension?

Both medical evidence and legal principle would seem to support the notion of extending mental injury under the ACA 2001. As discussed above in Part II, there is now much medical and psychological material which highlights how a person's overall health or well-being is to be assessed in terms of both physical and mental well-being. This tends to suggest that coverage should give equal emphasis to both physical and mental injuries, thus correcting the disparity that is presently seen between physical and mental injuries under the ACA 2001.

"Established legal principle"[188] would also seem to endorse mental injury receiving equal weight, and therefore coverage, under the ACA 2001. At common law, in *Donoghue v Stevenson*[189] Lord MacMillan noted the need to perceive claims for mental injury on an equal footing to claims for physical injury. More recently, in the context of New Zealand's accident compensation scheme, there has been an increasing recognition of the need to acknowledge claims for psychiatric injury as a matter of principle:[190] Indeed, as noted by Sir Geoffrey Palmer:[191]

> "[T]he question you have to ask is: 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, but why wouldn't you treat that the same as the sort of incapacity that arises from physical injury?"

More recently the same question has been posited in *Brickell*,[192] where in the context of mental injury coverage for a work-related event, McGechan J asked:

187 Andrew Gray, above n 72, at [IPA20.4].
188 PR Handford (ed) *Mullany & Handford's Tort Liability for Psychiatric Damage* (2nd ed, Lawbook Co, Sydney, 2006) at preface.
189 *Donoghue v Stevenson* [1932] AC 562 (HL).
190 Heslin, above n 3, at 117.
191 Sir Geoffrey Palmer, "*Brickell* Decision" Transcript from *Nine to Noon* Public Radio, interview by Kim Hill, 20 June 2000, as cited in Heslin, above n 3, at 117.
192 *Brickell v Attorney-General* (2000) 5 NZELC 96,077, per McGechan J.

> "[I]f the plaintiff had fallen over and cracked his skull on a box of videos the outcome would have been governed by ACC. Should it be different because the contents of the box caused a psychiatric condition?"

The anomaly of providing comprehensive coverage to physical injury, yet only restricted coverage for mental injury under the ACA 2001 has also been recognised in *ACC v E*.[193] In the Court of Appeal Gault J noted that it would be a "strange situation if cover under the Act for a person suffering a serious mental consequence caused by an accident were to depend upon whether or not some physical injury however slight also is sustained."

Extending mental injury coverage under the ACA 2001 to cover a greater number of mental injury cases would not only reflect legal principle, but would also be in keeping with the whole ethos of the accident compensation scheme. This, as noted in the Woodhouse Report, was to introduce a comprehensive system of accident rehabilitation and compensation, and where the object was "compensation for all accidental injuries, irrespective of fault and regardless of cause."[194] Comprehensive and complete compensation, surely should allow coverage for all potentially meritorious cases, irrespective of whether the claim is for physical or mental injury. Reinforcing this view, the Law Commission has noted that: "wisdom, logic and justice all require that every citizen who is injured must be included, and equal losses must be given equal treatment."[195]

B. Policy Considerations – Cost and Floodgate Factors

Today, however, medical evidence and legal principle alone may not be sufficient to justify change. The accident compensation scheme, as a statutory entity, is dependent not only on funding levies but also tax-payer funds,[196] meaning any changes to the scheme which could increase costs will be closely guarded. In addition to cost arguments, there is also the floodgate factor leading to a likely "torrent of claims."[197] Further to this is the potential for an influx of non-meritorious claims, this being a common concern for psychiatric claims at common law.[198]

193 *ACC v E* [1992] 2 NZLR 426 (CA) at 435, per Gault J.

194 As reinforced by the five guiding principles of the ACC scheme: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency: D Tennent "Degenerative Conditions: one of the dilemmas of accident compensation cover. Is there a way of clarifying the confusion in order to achieve fairness?" (2009) 23 *NZULR* 315.

195 Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (the Woodhouse Report) (1967) at 253.

196 Latest ACC statistics show that for the year 2007/2008, in addition to the $3.652 billion ACC collected in levies to pay for rehabilitation, compensation and administration costs, the Government supplemented $863,343,000 into the Non-Earners account: Accident Compensation Corporation *About ACC – statistics* <www.acc.co.nz>.

197 Heslin, above n 3, at 115.

198 As noted by Teff, at common law there is no mystery about the pronounced divergence between law and science in regard to psychiatric harm, which is driven largely by a fear of proliferating claims if the special controls were avoided: Teff, above n 100, at 315.

In considering these policy issues, the analysis given by the Labour Market Policy Group to the Labour Government's 2000 proposals[199] to extend cover under the accident compensation legislation to include mental injury arising from witnessing a traumatic incident (amongst other things) is relevant.[200] In the course of its analysis the Policy Group identified a number of risks in extending cover to mental injury in each of the four options. This included the "significant increases in scheme expenditure"[201] that would be required; and that the availability of financial incentives such as weekly and lump sum compensation could provide "strong incentives to claim for mental injury"[202]. Although the proposals considered by the Labour Market Policy Group were subsequently abandoned, they generated a number of interesting policy discussions by officials at the time, highlighting the tension between the principle of having comprehensive accident coverage under the statutory scheme, and the relevant policy considerations of "anticipated pressure of costs and the potential for encouraging a flood of claims".[203]

When considering whether to extend cover for mental injury, as the Policy Group noted, cost was a key policy consideration.[204] Drawing on evidence from overseas, the Group highlighted how "[o]verseas experience confirms that mental injury claims are considerably more expensive than average claims, with longer than average injury durations."[205] The Policy Group did, however, point out that costs might be contained if, at the same time as extending cover to persons who witness traumatic events, the entitlements

199 Labour Party, *Labour on ACC* (Labour Party Policy document, July 1999), cited in Heslin, above n 3; discussed further in private communication with Todd Krieble (General Manager, Accident Compensation Policy & Monitoring).

200 Labour Market Policy Group, *Cover for Mental Injury Arising from Witnessing a Traumatic Incident* (00/001872, 24 March 2000). The Policy Group considered four options for extending cover to mental injury. Option 1: to extend cover (not restricted to family members) to mental injury arising from witnessing death, serious injury, and other traumatic events, such as bank hold-ups. Option 2, to extend cover (not restricted to family members) to mental injury arising from witnessing the death of or serious injury to a person covered by the scheme. Option 3, to extend cover (family members only) to mental injury arising from witnessing the death or serious injury to a person covered by the scheme. Option 4, to extend cover (family members only) to mental injury arising from witnessing the death of a person covered by the scheme.

201 Labour Market Policy Group, 00/001872, above n 200, at [3a].

202 Ibid, at [3d].

203 Heslin, above n 3, at 115. The difficulty of reconciling these two principles of "efficiency" with "comprehensive entitlement" in the context of mental injury claims has also been recognised by the Business Roundtable: C Thomson, et al *Accident Compensation: Options for Reform (prepared by Credit Suisse First Boston for the New Zealand Business Roundtable* (New Zealand Business Roundtable, Wellington, 1998) at ix.

204 Labour Market Policy Group, 00/001872, above n 200, at [45].

205 Heslin, above n 3, at 115.

available were correspondingly reduced,[206] although that would be wholly inconsistent with the entitlements available for physical injuries covered by the scheme.

Sharing these cost concerns were Treasury, who did not support the extension of mental injury coverage under the accident compensation scheme. They noted the significant risks of introducing this policy that would be very difficult for ACC to manage, "The options for this policy for full entitlements, including lump sums, are expensive and the ability of ACC to contain costs would be practically impossible."[207] While Treasury did concede that there may be benefits involved with extending coverage for mental injury, including reducing the likelihood of long-term mental health problems developing if people did not have access to appropriate treatment,[208] nevertheless, these benefits would be unlikely to be outweighed by the costs involved. To illustrate this point, Treasury cited information provided by Professor Beverley Raphael who contributed to a *Disaster Mental Health Response Handbook* for the New South Wales Health Department, who notes the difficulties that can be involved with treatment of psychological victims, and the potential for re-traumatisation.[209]

1 Rebuttal to cost and floodgate arguments

Yet against this, evidence has increasingly been cited that policy arguments such as cost and the floodgate factor, as reasons not to extend mental injury claims, have little weight.[210] Advocates such as John Millar,[211] maintain that cost arguments for increasing coverage for mental injury claims have often

206 For example, entitlements could be restricted to counselling rather than the full range of entitlements which normally includes weekly compensation and lump sum payments: Heslin, above n 3, at 116.

207 Labour Market Policy Group, 00/001872, above n 200, at [62].

208 Here Treasury referred to comments made by the Ministry of Health that without appropriate access to treatment, witnesses of a death or serious injury could develop longer-term mental health problems, resulting in increased costs to the health sector: Labour Market Policy Group, 00/001872, above n 200, at [59].

209 In the *Disaster Mental Health Response Handbook* for the New South Wales Health Department (July 2000), at 69, Professor Beverley Raphael notes how there is now literature which reveals little evidence to support the notion that psychological debriefing (the most popular early intervention technique used for trauma survivors) should be offered to everyone involved in a major traumatic event. Some studies of individual psychological debriefing have raised the possibility that the intense re-exposure involved in the debriefing can re-traumatise some people without allowing adequate time for healing resulting in a negative outcome, cited in Heslin, above n 3, at 115. An example of this seen in New Zealand was *GS v ACC* DC Wellington 145/05, 06/05/05, where the appellant had been sexually violated overseas, and was re-traumatised in 1995 in New Zealand through a form of "attack" therapy adopted by her therapist.

210 Heslin, above n 3, at 116.

211 John Millar "Returning Stress to the ACC Fold" *Safeguard* September/October, 2000 at 18, cited in Heslin, above n 3, at 116. Following decisions such as *Gilbert v Attorney-General* (2000) 5 NZELC 96,077, John Millar has urged employers to lobby the Government to incorporate stress/mental trauma claims within ACC.

been overstated. Rather, as ACC Injury Statistics reveal,[212] mental injury claims under the accident compensation scheme have been settled comparatively cheaply when compared against the equivalent amounts awarded at common law (see, for example, the *Gilbert* and *Brickell* cases).[213] Further to this, an increase in overall costs of the scheme to provide comprehensive coverage would be in keeping with the whole of the Woodhouse style of the accident compensation scheme, which seeks to reduce reliance on the common law.[214] On this point Sir Geoffrey Palmer, one of the architects of the accident compensation scheme, maintains, "[I]f the common law remained, the financial logic of the reform was destroyed - new sources of revenue would be needed rather than making better use of the existing money."[215]

In any case, extending coverage for mental injury is unlikely to result in a huge cost increase, given the small number of successful claims that would be likely. In the year 2008 to 2009, 2,647 claims for mental injury were lodged, with 1,353 claims being declined, leaving a total of 1,294 successful claims for that year.[216] These 1,294 successful mental injury claims are quite insignificant when compared to the total 1,799,243 accepted claims for accident compensation, made in the same time period.[217]

The relative insignificance of mental injury costs has been illustrated recently with regards to s 21B work-related mental injury, introduced by amendment in 2008.[218] As a part of the present government's series of cost containment measures for the present accident compensation legislation (eventually enacted as the Accident Compensation Amendment Act 2010),[219] s 21B was originally intended to be repealed. However the Cabinet decision to remove s 21B was rescinded when it became apparent that the provision had involved a relatively small financial impact. For example, in the year after it came into force, 75 claims had been made, of which 57 had been declined, 16 were under investigation, and only two had received cover.[220]

212 As Millar notes, in the year ended 1999 the ACC Injury Statistics Report recorded 4859 new mental injury claims covered at a cost of $2,291,000 (which is an average of $471.50 per claim); and 10,118 on-going mental injury claims which have cost $14,466,000 (which is an average of $1427.75 per claim): Millar, above n 211, at 18.

213 *Gilbert v Attorney-General* (2000) 5 NZELC 96,077; *Brickell* (2000) 5 NZELC 96,077.

214 Thomson et al, above n 203, at 11.

215 Sir Geoffrey Palmer *Compensation for Incapacity* (Oxford University Press, Oxford, 1979) at 25.

216 Accident Compensation Corporation *Injury Statistics 2008/2009* <www.acc.co.nz>.

217 Ibid.

218 Injury Prevention, Rehabilitation, and Compensation Amendment Act 2008 (2008 No 46).

219 Cabinet Minute "Injury Prevention, Rehabilitation, and Compensation Act 2001: Changes" (CAB Min (09) 29/8).

220 Andrew Gray, above n 72, at [IPA21B.4]. The decision will be made to reassess the place of s 21B, however, "if the provision proves to be problematic:" Offices of the Minister of Labour *Memorandum to the Cabinet Legislation Committee* "Injury Prevention, Rehabilitation, and Compensation Amendment Bill 2009" (23 September 2009).

It also seems that concern that extending mental injury claims may open up the gates to potential limitless liability, including a flood of unmeritorious claims - a further concern noted by the Policy Group[221] - is overstated. As noted by Millar,[222] if coverage for mental injury claims were extended under the ACA 2001, the "supposed spectre of thousands of fictitious claims" would be adequately held in check by the screening mechanism used by the Corporation, coupled with the new attitude towards "prompt, effective rehabilitation."[223] This argument was also noted by the Court in *ACC v E*[224] which held that taking an extended view to granting cover for mental injury would "not necessarily open floodgates as each case would require consideration in light of established principles." As noted above, these established principles include the use of "expert medical evidence"[225] where both assessment and apportionment of the claimant is to be carried out by a qualified psychiatric practitioner.[226] Furthermore, the present s 27 requirement, that the mental injury must be a "clinically significant behavioural, cognitive, or psychological dysfunction," also must be satisfied. Thus, certainly as long as this s 27 "recognisable psychiatric illness" threshold is retained "dire warnings of the courts being inundated with trivial claims have a somewhat hollow ring."[227]

C. The Most Principled Solution – A Solution with Set Parameters

In light of the above discussion, it follows that arguments of cost, or the potential floodgate of claims, are not of sufficient concern to outweigh the psychological and legal principles which favour an equitable treatment of mental and physical injury claims under the ACA 2001, and for these reasons there should be an extension of mental injury claims. It is therefore submitted that the accident compensation scheme - the "comprehensive system for injury"[228] - should be extended to provide an increased form of coverage to mental injury causes. Given this submission, the issue turns to what would be the most legally sound, principled, and therefore most appropriate, solution under the ACA 2001.

The complex nature of mental disorders can mean that the assessment of mental injury claims involves a number of difficulties. This includes causation issues, which, as identified by the Policy Group, can involve the difficulty of proving that the mental injury the claimant has suffered is caused by the trauma that he or she has been exposed too.[229] Yet these causation issues are not reason enough to prevent an extension of mental injury coverage under

221 Labour Market Policy Group, 00/001872, above n 200, at [3d].
222 Millar, above n 211, at 116.
223 Ibid.
224 *ACC v E* [1992] 2 NZLR 426 (CA) at 434.
225 *Dally v ARCIC* DC Hamilton 60/97, 21/4/97, Judge Ongley at 4.
226 *MT v ACC* DC Wellington 213/2009, 10/12/09.
227 Teff, above n 100, at 303.
228 Sir Geoffrey Palmer, above n 215, at 25.
229 Labour Market Policy Group, 00/001872, above n 200, at [3b].

the ACA 2001. If mental injury was not extended to an unlimited form of coverage such as stand-alone mental injury, or coverage similar to that seen under the 1982 Acts,[230] but instead constrained to *mental injury arising from witnessing a traumatic incident* (Option 1 analysed by the Policy Group above),[231] causation difficulties involved with mental injury claims would be kept to a minimum. This is because, to qualify for coverage, any claim for mental injury would need to show that the mental injury is causatively linked to the "traumatic incident"[232] and not the consequence of other factors.

Under the head "mental injury arising from witnessing a traumatic incident," causation issues could further be reduced by adding objective test criteria to prove mental injury. This objective test could be, for example, the requirement presently seen under section 21B subsection (2)(b), that the event must be one that "could reasonably be expected to cause mental injury to people generally". Including this requirement would ensure that the cause of the mental injury was "clearly identifiable,"[233] and reduce the likelihood of non-meritorious claims, or those caused by minor events.[234] This objective test would be included alongside the usual s 27 requirement that there be a medically recognisable DSM-IV mental injury. This would act to further reduce the likelihood of claims succeeding where they result from seemingly insignificant events and would ensure only those meritorious cases receive accident compensation. This would also reflect the approach taken in *Tame*,[235] where the Australian High Court recognised that many of the concerns underlying recovery for psychiatric injury tended to recede if full force is given to the distinction between emotional distress and a recognisable illness.

In addition to addressing causation issues, extending mental injury coverage to "mental injury arising from witnessing a traumatic incident" would also ameliorate some of the difficulties associated with applying the DSM-IV in the legal context (here, to mental injury claims for accident compensation).

230 As noted above, under the 1974 and 1982 Acts "personal injury by accident" was not fully defined, but rather stated that it included the "physical and mental consequences of the injury or accident".

231 See above n 200, Option 1: to extend cover (not restricted to family members) to mental injury arising from *witnessing death, serious injury, and other traumatic events such as bank hold-ups.* This Option takes the British Columbia model for work-related critical incident mental injury and extends it to cover non-work as well as work situations.

232 This is not unlike the present s 21B "single event" requirement - that for a claimant to receive coverage for a work-related mental injury the mental injury must be shown to result from the event: ACA 2001, s 21B(1)(b).

233 *Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2),* as reported from the Transport and Industrial Relations Committee (2009) at 3, cited in Hughes, above n 77.

234 The objective test was added in s 21B to ensure that cover for work-related mental injury does not extend to injuries caused by minor events or by gradual process: *Injury Prevention, Rehabilitation and Compensation Amendment Bill (No 2)*, above n 233.

235 *Tame v New South Wales: Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 (HCA). This view has also been accepted by the English Law Commission, which noted that the English courts should continue to require evidence of a "recognisable psychiatric illness", given that it is a practicable definition with clinical merit. Law Commission (Eng), *Liability for Psychiatric Illness* report no 249 (1998), cited in Todd, above n 2, at 198.

This is because fulfilling the DSM-IV diagnostic criteria for most common forms of mental injury that arise in this context (including post-traumatic stress disorder), commence with the requirement that the condition "has been triggered by threatened death or serious injury to the person concerned," or by that person "witnessing the death or serious injury of others."[236] Both of these criteria reflect witnessing a traumatic incident. Thus, in any assessment for mental injury arising from witnessing a traumatic incident, the Courts would be using the DSM-IV as a "valid diagnostic entity"[237] that does not go beyond its "empirical supporting evidence."[238]

Importantly, if mental injury coverage was not limited to the three areas of coverage it is presently restricted to, but instead extended to "mental injury arising from witnessing a traumatic incident," it would cover a number of worthy cases of mental injury presently excluded by the ACA 2001. It would therefore provide a less arbitrary line than is presently seen for the three heads of coverage. In particular, it would include cases outside the work environment, including motor vehicle injuries, domestic violence, robbery, and assault, as well as secondary victims' cases.[239] It would also address the sexual offences anomaly seen today under s 21 which illustrates a seemingly unjustified favouritism towards victims of sexual offences. If mental injury coverage was extended to "mental injury arising from witnessing a traumatic incident," victims of sexual offences would still have every chance to receive coverage for mental injury that is consequentially suffered, but importantly, they would not be afforded preferential treatment. Like other claimants they would be required to show that their mental injury arose from "witnessing" a traumatic incident.

It is also estimated that this extension could be made at a very reasonable cost. The Labour Policy Group suggested a cost of $44 million per annum,[240] which is a modest amount when compared to the $2.72 billion that is paid out every year for medical and surgical treatment, rehabilitation and compensation.[241]

Nevertheless, there may be some difficulties with the proposed head "mental injury arising from witnessing a traumatic incident". This includes contentious boundary and proximity issues that may arise.[242] As identified by the Labour Market Policy Group in its analysis, if the primary/secondary victim distinction was imported from the common law into the accident

236 Andrew Gray, above n 72, at [IPA21B.8].

237 *P v Attorney-General* CIV-20060485-874, 16 June 2010 at [261], per Mallon J citing Professor Mellsop.

238 Ibid.

239 Labour Market Policy Group, 00/001872, above n 200, at [26].

240 Costs outlined by the Policy group did not include the additional costs of lump sums if those were introduced. Labour Market Policy Group, 00/001872, above n 200, at [44].

241 In the year 2007/2008 for the 1.8 million injury claims received, ACC paid out $2.72 billion for medical and surgical treatment, rehabilitation and compensation: Accident Compensation Corporation *Cover and entitlements for ACC clients* <www.acc.co.nz>.

242 Labour Market Policy Group, 00/001872, above n 200, at [3e].

compensation scheme there may be resulting difficulties with establishing appropriate criteria relating to the proximity of relationship of the secondary victim to the primary victim, and with regard to temporal and spatial proximity.[243]

In deciding where the line should be drawn in determining the relationship of the secondary victim to the primary victim, the Policy Group noted that wherever the line was drawn there would be argument that other people, who did not meet the accepted criteria, should be eligible for cover. While the common law requirement of ties of "natural love and affection"[244] could be adopted, in some instances it would be "difficult to defend, and would inevitably invite legal challenge."[245] Further difficulty involved the appropriate degree of temporal and spatial proximity for successful mental injury claims.[246] If cover were extended to people who directly witness a traumatic event, it might be difficult to justify the exclusion of people who arrive at a scene soon after the event and witness the aftermath.[247] Because of this, the Policy Group maintained that the setting of any proximity parameter may result in only "another controversial boundary."[248]

Yet, as noted by Heslin, arguably the Policy Group's assertion that it would be difficult to develop robust criteria for traumatic incident mental injury claims "is not a particularly strong one."[249] This is because setting such criteria would not create new or greater difficulties in determining cover than ACC or the Courts already face in dealing with accidents which involve mental consequences.[250] Thus criteria could be set to overcome proximity issues. So for example, the present requirement seen under section 21B, subsection (2)(a) that "person experiences, sees, or hears directly", could be retained as a criteria that a claimant must fulfil to satisfy "mental injury arising from witnessing a traumatic incident". This would ensure both primary and secondary victims are eligible to receive coverage, but still maintain a requisite proximity[251] link to ensure only those victims directly affected by the incident receive coverage.

243 Ibid.
244 Ibid, at [20].
245 Ibid.
246 At common law, secondary victim criteria for successful claims for mental injury resulting from witnessing a traumatic event include that the victim must: have suffered a recognisable psychiatric illness, have suffered shock as a result of a discrete event, have ties of love and affection with the primary victim and be in close physical proximity with the primary victim at the time of the primary victim's injury: Labour Market Policy Group, 00/001872, above n 200, at [34].
247 Ibid, at [23].
248 Ibid, at [22].
249 Heslin, above n 3, at 116.
250 Ibid. Heslin then cites a number of examples of difficult cases where the courts have dealt with such controversial boundary issues: *AB v ARCIC* (1996) BACR 336; *JBDB v ARCIC* [2000] NZAR 385; *E v ARCIC* [2000] NZAR 446; *McMeekin v Boyce and Homelands Retirement Home* [1999] NZAR 426.
251 By analogy with the common law, "proximity" in this context connotes closeness of both space and time: *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310 (HL) at 398, 400 and 417.

IV. Conclusion

Mental injury under the ACA 2001 is a challenging area, where psychology, law and social welfare all must be reconciled. Nevertheless coverage for mental injury under the ACA 2001 is presently inadequate. Coverage for mental injury consequential to physical injury under s 26(1)(c) leaves a number of meritorious cases excluded, in particular, those who suffer mental injury with no quantifiable physical harm, along with secondary victims such as parents or caregivers. This needs to be addressed. The two stand-alone areas of mental injury: mental injury caused by certain sexual offences (s 21) and mental injury that is work-related (s 21B), also illustrate coverage based on arbitrary line-setting, which has resulted in the exclusion of further meritorious cases. This includes claimants who suffer immense trauma which is not due to one of the offences listed in Schedule 3, along with volunteers, rescuers and non-employees who may encounter the same traumatic incident as staff members.

Perhaps what is most concerning about present coverage for mental injury under the ACA 2001, and an area that needs immediate addressing, is its lack of incorporation of present-day medical and psychological understanding of mental disorders. If mental injury coverage is to reflect an up-to-date principled approach, and be afforded the same status as physical injury, change is required under the ACA 2001. Incorporating coverage under the head "mental injury arising from witnessing a traumatic incident" could provide this principled form of coverage.

In addition, having coverage for mental injury arising from witnessing a traumatic event would minimise causation issues which can be associated with mental injury claims, as claimants will still need to identify a "traumatic event" as a cause of their mental injury. This would also align itself well with psychology research and tools in the area, in particular, the DMS-IV which lists criteria for most mental disorders to include circumstances akin to witnessing a traumatic incident.

Coverage for mental injury arising from witnessing a traumatic event would reinforce a clear and equitable approach to mental injury under the ACA 2001. It recognises, in principle, that a person's mental well-being is as important as his or her physical well-being, but does not highlight any particular case of mental injury over another. Rather, reflecting the medical reality, every person who develops a "clinically significant behavioural, cognitive, or psychological dysfunction" from a traumatic event will have the opportunity to satisfy the section and receive accident compensation. This offers mental injury coverage to a number of meritorious cases presently excluded. This includes those outside the work environment, including motor vehicle injuries, domestic violence, robbery, and assault, as well as secondary victims.

Finally, having coverage for mental injury arising from witnessing a traumatic event is in keeping with the tenets of the scheme, which is, after all, an accident compensation scheme,[252] and which does not cover illness. It represents a legally sound solution, which guards against "longer-term mental health problems"[253] taking an affirmative step towards protecting the future well-being of New Zealanders.

252 Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (the Woodhouse Report) (1967).

253 Labour Market Policy Group, 00/001872, above n 200, at [59].