

LXGA

GASKELL, A. E.

The scope of compensability under Section 121  
of the Accident Compensation Act 1972.

Gaskell



"The negligence action is a form of lottery. In case of industrial accidents it provides inconsistent solutions for less than one victim in every hundred. The Workers' Compensation Act provides meagre compensation for workers, but only if their injury occurred at work. The Social Security Act will assist those who remain, provided they can meet the means test. All other

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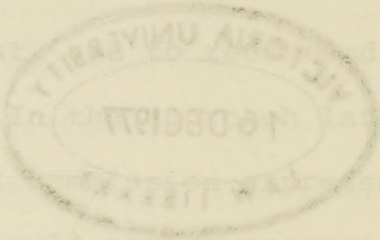
"Such a fragmented and capricious response to a social problem which cries out for co-ordinated and comprehensive treatment cannot be good enough. No economic reason justifies it. It is a situation which needs to be changed."<sup>1</sup>

Submitted for LLB(Hons)

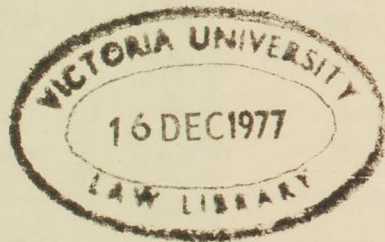
by Anne Gaskell. 1977

In these days the Royal Commission of Inquiry into Compensation for Personal Injury summed up the situation existing in its area of investigation at the time of the inquiry. The task of the Royal Commission was to study and report upon the law relating to compensation and claims for damages for personal injury by accident and such changes as it felt were desirable. In its report, the Royal Commission expressed the opinion that, "The community should accept responsibility for all victims of accidents and if that responsibility is to be fairly discharged every man should be provided with a fair measure of his actual losses. Real compensation is the aim, and in our view injustice by discrimination must be avoided."<sup>2</sup> To achieve this end the Accident Compensation Act<sup>3</sup> was passed in 1972 doing away with the common law claim for damages for personal injury by accident, and assuming the functions of

1. Report for the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand: at Page 13 Para. 1. Hereafter this Report will be referred to as the Woodhouse Report.
2. Woodhouse Report, P. 104 Para. 257
3. Hereafter referred to as the Act.



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"The negligence action is a form of lottery. In case of industrial accidents it provides inconsistent solutions for less than one victim in every hundred. The Workers' Compensation Act provides meagre compensation for workers, but only if their injury occurred at work. The Social Security Act will assist with the pressing needs of those who remain, provided they can meet the means test. All others are left to fend for themselves."

"Such a fragmented and capricious response to a social problem which cries out for co-ordinated and comprehensive treatment cannot be good enough. No economic reason justifies it. It is a situation which needs to be changed."<sup>1</sup>

In these words the Royal Commission of Inquiry into Compensation for Personal Injury summed up the situation existing in its area of investigation at the time of the inquiry. The task of the Royal Commission was to study and report upon the law relating to compensation and claims for damages for personal injury by accident, and to recommend such changes as it felt were desirable. In the approach later proposed in the Woodhouse report, the Royal Commission expressed the opinion that, "The community should accept responsibility for all victims of accident: and if that responsibility is to be fairly discharged every man should be provided with a fair measure of his actual losses ..... Real compensation is the aim, and in our view injustice by discrimination must be avoided."<sup>2</sup> To achieve this end the Accident Compensation Act<sup>3</sup> was passed in 1972 doing away with the common law claim for damages for personal injury by accident, and assuming the functions of

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the Workers' Compensation Board<sup>4</sup> in respect of personal injuries by accident occurring on or after 1 April 1974. The Act was to do away with the anomalies and injustices of the existing processes and replace them by a comprehensive scheme operating from a basis of consistent principle<sup>5</sup> as a form of social insurance, not a form of social assistance.<sup>6</sup>

Neither the Woodhouse Report nor the Gair Report<sup>7</sup> deemed it practical for the State to bear the whole of an injured person's losses, and it became a question of which losses should be included in the new scheme and how they could be shifted and fairly apportioned as between the individual and the State so as to make the proposal a viable one. It also had to be decided which of the remedies available at common law in this area should be adopted by the new scheme.

The White Paper<sup>8</sup> suggested that a preferable alternative to the Commission's proposals might be to compensate all accident victims on the basis of full indemnity. To effect this, the common law measure of damages could be retained although the common law action as such need not be so retained. It was recognised that adoption of this course of action would entail considerable administrative difficulty and extra expense, possibly making it impractical as an alternative to the Royal Commission's proposal that the personal injury claimant must bear part of his own losses.<sup>9</sup>

4. As empowered by the Workers' Compensation Act 1956
5. Woodhouse Report at page 107, paragraph 278(a)
6. Woodhouse Report at page 107, paragraph 279(b)
7. Report of the Parliamentary Select Committee on Compensation for Personal Injury in New Zealand. Hereafter referred to as the Gair Report.
8. "Personal Injury: A Commentary on the Report of the Inquiry into Compensation for Personal Injury in New Zealand." Hereafter referred to as the White Paper.
9. The White Paper at page 54, paragraph 120.

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The proposal of the White Paper in this regard was not adopted by the Act.

The Gair Report distinguished three classes of compensation: firstly, for income maintenance, secondly, for non-economic losses such as loss of enjoyment of life from physical impairment or disfigurement and finally, compensation for various special expenses; all being for expenditure which has been incurred as a result of disablement.

These classes of compensation are not alternatives and an injured person may be entitled to compensation under all three categories.<sup>10</sup> It is the last of these categories which is the concern of section 121 of the Act. That provision reads<sup>11</sup>

Compensation for pecuniary loss not related to earnings -

1 Where a person suffers personal injury by accident in respect of which he has cover under this Act, or where a person dies as a result of personal injury so suffered, the Commission, having regard to any other compensation payable and any rehabilitation assistance provided or to be provided, may, under this subsection, pay to him, or in the event of his death to his administrator, in addition to any other compensation and rehabilitation assistance to which he is entitled under this Act, compensation of such amount (if any) as it thinks fit for actual and reasonable expenses and proved losses necessarily and directly resulting from the injury or death, not being -

10. The Gair Report at page 37, paragraph 77.

11. s 121 2, 3 and 4 are included in Appendix A of this paper.

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- a Any expense or loss in respect of damage to property; or
- b Any expense or loss incurred after the death of that person in respect of the administration of his estate; or
- c Any expense or loss arising from damage in respect of which, or to the extent to which, no payment is to be made under subsection 1 or subsection 1A or section 110 or this Act, by reason, of subsection 2 of that section; or
- d The loss of an opportunity to make a profit; or
- e Any loss arising from inability to perform a business contract; or
- f Any loss that has not for the time being actually occurred, whether or not the amount thereof is ascertainable before it occurs; or
- g Any expense or loss in respect of or towards payment of which compensation is otherwise payable under this Act.

1A Notwithstanding anything in subsection 1 of this section, unless (in the opinion of the Commission) there are special circumstances that justify a payment being made under that subsection, no payment shall be so made in respect of any expense or loss if the Commission considers that the expense or loss is similar in nature to an expense or loss for which compensation is payable under any other provision of this Act.

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No exhaustive list of expenses compensatable under Section 121 can be made but such claims as the following have been held to satisfy the requirements of the section:

- the payment of the airfare to Australia of a doctor accompanying an accident patient to his home in that country,<sup>12</sup>
- the cost of a housekeeper or household help where the usual houseperson was incapacitated by injury from fulfilling that role, though the amount so paid is reviewable by the Commission,<sup>13</sup>
- The cost of hired labour to perform heavy work which the claimant was incapacitated by injury from performing himself,<sup>14</sup>
- The cost of clearing overgrown grass and hedges from a section,<sup>15</sup>
- payment of taxi fares for transport of an accident victim to and from the Rehabilitation Centre and Sheltered Workshops<sup>16</sup>
- the cost of furniture removal from one city to another in the case of a wife who wanted to live closer to her husband, hospitalized after an accident<sup>16</sup>
- also the cost of travelling expenses to attend a review hearing<sup>17</sup>

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12 Review decision 76/RD143:unreported.

13 Review decisions:A.C.C. Report May 1976:32 and 33.

14 A.C. Appeal Authority re MarinKovich, A.C.C. Report November 1976:60

15 A.C. Appeal Authority re Smart A.C.C. Report March 1977:37

16 Review decision 76/R0047:unreported

17 Review decision 76/R0513:unreported

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- to achieve a proper perspective of the scope of the present section 121,<sup>18</sup> the provision must be viewed in the context of the compensation provided by the Act as a whole and against the background of the various heads of damages available at common law

The damages formerly available at common law will be considered under two headings:

- those which are covered under the Act; and
- those which are not so covered.

It should be noted that it is not the writer's intention to deal with every possible head of damage available in the area of personal injury or death by accident.

Damages formerly available at common law which are now covered under Section 121 of the Act.

In addition to the obvious types of pecuniary damage such as loss of earnings or earning capacity medical, hospital and nursing expenses, it is submitted that the following types of claim formerly recoverable at common law, will also be met under the Act: where a doctor's injuries made it necessary for him to employ an assistant permanently in his practice;<sup>19</sup> loss to a household resulting from the inability of a "do-it-yourself" person to continue this money-saving activity because of incapacity from an injury;<sup>20</sup>

18 The present S121 1 & 1A of the Act were substituted for the original S121 1 by S22 1 of the Accident Compensation Amendment Act 1975. See Appendix B for the original provisions.

19 Owen V Sykes 1963 1 K.B. 192

20 Mellor V British Transport Commission 1956 1 All E.R. 578

loss of entitlement to free lodgings and food which the plaintiff received from her employer in addition to her wages, and which she was prevented from retaining by virtue of personal injuries;<sup>21</sup> the fares paid to visit an injured spouse in hospital<sup>22</sup> the loss incurred by taking unpaid leave in order to be with an injured spouse hospitalised at a distance from his work;<sup>23</sup> the expenses arising from the injured plaintiff's inability to complete his own house and having to hire labour for that purpose;<sup>24</sup> loss arising from inability through injury to continue making contributions to a superannuation fund thereby reducing the surrender value of the policy.<sup>25</sup> Section 121 4 provides for some cover in this last type of situation. This provision allows the Commission a discretion to pay to a dependent of a deceased superannuitant or pensioner compensation for any loss of support arising out of the termination or reduction in the superannuation payments.

No mention is made of injuries which do not result in death, so the injured person would have to rely on Section 121 1 to recover in such cases.

The common law action "per quod servitium amisit" is abolished by the Act,<sup>26</sup> along with the cause of action for loss of consortium. No provision is made under the Act for compensation under the latter head. However section 121 2 a provides compensation for the old per quod cause for any member of the

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21 Liffen V Watson 1940 1 K.B. 556  
22 Hare V British Transport Commission 1956 1 All E.R. 578  
23 McNeill V Johnstone 1958 3 All E.R. 16  
24 Turnstill V Electricity Commission W.A. 1965 W.A.R. 50  
25 Judd V Hammersmith, West London & St. Mark's Hospitals Board of Governors 1960 1 W.L.R. 328  
26 Section 5 2

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of the injured's or deceased's household who can show a quantifiable loss of service resulting from the injury or death. Recovery of damages for this relational tort was confined to "material loss" at common law. Recovery under the Act requires in addition that this material loss can be measured in pecuniary terms.

It must be noted that the test for recovery of damages at common law was that the loss occurred as a reasonably foreseeable consequence of the defendant's negligence. The test of reasonable foreseeability is not relevant under Section 121, nor is negligence relevant in the context of the Act.

Therefore, if the above listed common law cases are to receive cover under the Act, or more specifically under Section 121, they must satisfy the criteria established there. The essentials for the operation of this provision are threefold:

- a) the expense or loss must necessarily and directly result from the injury or death;
- b) the claimant must have cover under the Act for death or personal injury by accident; and
- c) the claim must cover actual and reasonable expenses and proved losses.

These prerequisites for the operation of Section 121 require further discussion.

Under the Act the loss must be a necessary and direct result of the injury to be recoverable.

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The notion of directness is not new to the law of damages and appears<sup>27</sup> prior to the *Wagon Mound*<sup>28</sup> cases along with words such as "necessary," "Natural," and "probable" to divide those damages which could be classed as resulting from an injury, and those which were too remote. If the damage flowed from an independent or extraneous factor the damage is regarded as a direct result. However where there is some intervention, the question must be whether it has broken the direct chain of causation between the injury and the damage.

"Necessary" is defined by the Concise Oxford Dictionary as "inevitably resulting from the nature of things ..... inevitably produced a previous state of things" "Necessary" then is to be construed within a given set of circumstances. It refers to those losses which of necessity arose from the injury. It is submitted that the word "necessarily" within Section 121 has an objective meaning, rather than the subjective or personal meaning as was attached to the words "necessary" and "necessarily" by Warrington L.J.<sup>29</sup>

This analysis has treated the words "directly" and "necessarily" as separate entities, however Blair J. has directed that they be read together as a combined concept.<sup>30</sup>

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27 In such cases as re *Polemis and Furness Withy & Co* 1921 3 K.B. 560; and *Bostock & Co. Ltd V Nicholson & Sons Ltd* 1904 1 KB 725  
28 1961 A.C. 388  
29 *Ricketts V Colquhoun* 1925 1 K.B. 725 On appeal 1926 A.C. 1 at 7, Lord Blanesburgh found this approach was not correct, and the terms were objectively used.  
30 A.C. Appeal Authority re *Smart* A.C.C. Report March 1977:37

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The second of the prerequisites to be satisfied under Section 121 is that the claimant must have cover under the Act for death or personal injury by accident.

Situations which are covered by the phrase 'personal injury by accident' are given in section 2 of the Act, but this is not an exclusive list. This is followed by a list of situations which are not included under that definition.

Payment under section 121 1 is personal to the person who has been so injured, or in the event of his death, to his administrator.

However under section 121 1 b any person can recover expenses incurred in helping the injured or deceased person. Such expenses include the cost of taking him to hospital by taxi or private car, the cost of insertion of funeral notices in the paper when the deceased's family was not in New Zealand; and an award to a man who deferred starting a new business to care for the needs of his injured wife and asthmatic children.

It is also required that the claim cover actual and reasonable expenses and proved losses. This requirement may cause some confusion since it is arguable that "losses" goes far wider than 'expenses', in not being limited to pecuniary losses as the latter word is. If this is so, the scope of section 121 1 is considerably enlarged to include any loss, pecuniary or otherwise, provided that the loss is proved, or the expense is actual and reasonable.

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On the other hand, it may be argued that the words 'proved losses' are to be read as ejusdem generis with "actual and reasonable expenses." The headings to section 121 certainly indicate that this is so, but such headings are not to affect the interpretation of the Act.<sup>31</sup>

The Commission, in meeting claims under this section, has applied the restricted approach toward the word 'losses' in only allowing compensation for those losses which are proved and of a pecuniary nature. An illustration of this approach is found in the judgment of Blair J.<sup>32</sup>

"the words "proved losses" ... must be given effect to ... and in order to succeed the claimant must show a specific, actual, identifiable amount."

The use of the word "amount" implies that Blair J. is talking in terms of pecuniary loss.

The major heads of non-pecuniary loss from common law are retained under the Act.

Section 120 provides lump sum compensation for pain and suffering, past and future, loss of enjoyment of life and loss from disfigurement. Loss and impairment of bodily function covered by lump sum awards under Section 119.

31 Acts Interpretation Act 1924 S5 f

32 A.C. Appeal Authority: re Marinkovich, A.C.C. report Nov.1976:60

This restrictive interpretation of "losses" as referring only to pecuniary losses has been adopted by the Commission as a matter of policy. It must be noted that most claims lodged under section 121 do fall into the category of pecuniary losses, but that aside, it is submitted that the Commission adopted this approach on considerations such as the greater ease of administering a provision which allows solely for the recovery of pecuniary losses, rather than one encompassing all losses and where value had to be assessed for less tangible or quantifiable objects. To remove the possibility of recovery for non-pecuniary losses also partly admits the susceptibility of the provision to abuse from false claims, since the non-pecuniary losses not already covered in the Act may be less open to proof. Also the concept of the Accident Compensation plan as one of social insurance has some bearing on the point, in that this community funded scheme aims at compensating all injuries, regardless of fault and cause, by assuming a fair proportion, but not all, of the individual's loss.

As to the word "reasonable," it is submitted that it has two meanings. Blair J. expressed the purpose of the Act in this way :<sup>33</sup>

"Though the Act is a remedial and liberal one, it does not purport to be fully compensatory. Its scheme is rather to be comprehensive in its cover and practical in its application. It aims at giving to all victims of accidents a significant part but not all of the loss suffered in an accident."

The Act itself is silent as to the extent of the Compensation which it provides :<sup>34</sup>

33 A.C. Appeal Authority: re Wall, A.C. Report, Jan 1976:10

34 Section 4 1 c

35 Review Decision 74/200011: A.C.C. Report, March 1976:32

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"The purposes of this Act shall be ..... to make provision for the compensation of ....."

Another difficulty which may arise in interpreting the third prerequisite of section 121 is whether the objectives in "actual and reasonable expenses and proved losses" refer to both losses and expenses. Do the expenses which satisfy the requirements of actual and reasonable, also need proof?

And do the losses which are proved, also have to be actual and reasonable?

To determine whether the expenses were actual is a question of fact: was the expense incurred? There is no difficulty in establishing that requirement.

As to the word reasonable," it is submitted that it has two meanings within the context of the provision:

1. was it reasonable to incur the expense? and,
2. is the amount of the expense reasonable.

Both of these requirements must be met before compensation will be awarded.

To determine the former question the whole circumstances of the claim must be taken into account. This approach was exercised in a review decision<sup>35</sup> concerning a claim under section 121 where the words "actual and reasonable expenses" also appear.

<sup>35</sup> Review decision 74/ROOD13:A.C.C. Report, March 1976:32

Review decision 74/ROD164:A.C.C. Report, May 1976:12  
Review decision 75/ROD117:A.C.C. Report, May 1976:13

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A husband who was about to begin a new business deferred that venture to stay home and care for his wife, who had suffered a serious accident, and to attend to the special needs of his asthmatic children. The review officer held that the husband's decision to stay at home himself, rather than hiring a housekeeper, was a reasonable one given the special requirements of the family.

The question whether the claim is for a reasonable amount must also be decided in the light of all the circumstances of the case. A comparison of two review applications illustrates the way this test operates.

In one case<sup>36</sup> a woman who broke her arm and was unable to keep house because of this and an existing stiff leg, paid a relative \$160 to housekeep for her for 8 weeks. This application was allowed. In the other case,<sup>37</sup> a daughter who injured her leg, paid her mother \$450 for a month to look after the house and a family of 4 children. The Commission refused to make full reimbursement of this amount, paying out \$243 of it.

On review, this refusal of full reimbursement was upheld on the grounds that there was no legal obligation to pay the mother, merely a moral obligation, and the Commission could not be bound by the value placed on it by the person under the obligation. In other words, given the circumstances of the case, and the fact that it was a relative who assisted in the house rather than a person who takes that type of work for wages, the Commission felt that the amount claimed was excessive and used its discretion to pay what it considered was a reasonable amount.

36 Review decision 74/RO0164:A.C.C. Report, May 1976:32

37 Review decision 75/RO117:A.C.C. Report, May 1976:33

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After these three prerequisites of section 121 have been satisfied by a claim, payment does not follow automatically. The Commission still has to exercise its discretion in two areas :

- a whether to pay the claimant at all, and
- b if so, the amount of that payment.

The section says "The Commission ... may pay to him or in the event of his death to his administrator ...." Prima facie the word "may" is permissive, although there are cases given in Maxwell<sup>38</sup> where the word has been held to be mandatory. However, in the light of the wording of the original subsection viz "... the Commission shall pay to him etc. ..." and the fact of its later amendment to "may" it is difficult to see how the word could be given any meaning other than the permissive one.

Having decided to make a payment the Commission then can pay what it considers a fit amount. The section itself contains two controls on the determination of the quantum:

- 1) the compensation must be
  - i) for actual and reasonable expenses and proved losses;
  - ii) necessarily and directly resulting from the injury or death.
  - iii) not being any of a list of express exclusions.
- 2) The Commission is directed to have "regard to any other compensation payable and any rehabilitation assistance provided or to be provided."

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38 12 ed. P234

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In practice, the Commission considers the claim as a whole in reaching a decision under section 121 1 . In one appeal decision<sup>39</sup> for example, Blair J. held that the Commission had treated the appellant liberally on at least one aspect of the total claim thereby substantially cushioning his loss "and that as a consequence of this it is not a case for the exercise of a discretionary power ..." This approach was also taken by the Commission in deferring a decision under section 121 1 pending the outcome of the claimant's negligence action against the aircraft manufacturers in the U.S.A.<sup>40</sup>

Damages formerly available at common law and now excluded from recovery under section 121.

Pecuniary losses

Specific provisions in the Act cover a variety of pecuniary losses including medical treatment,<sup>41</sup> earnings related compensation<sup>42</sup> loss of potential earning capacity<sup>43</sup> and funeral expenses.<sup>44</sup>

Where such a section cannot be read as providing for the recovery of a given expense falling within its sphere, section 121 is not able to fill the void by awarding compensation. Section 121 A supports this view. Consider the example of a claim for Chiropractor's fees. Section 111 provides for recovery of the costs of listed medical treatments but chiropractic treatment is not

39 A.C. Appeal Authority:re Marinkovich:A.C.C. Report Nov1976:60

40 A.C.C. Report Jan 1976:9

41 Section 111

42 Section 113

43 Section 118

44 Section 122

mentioned in the lists. On the other hand Section 121 allows for the recovery of "actual and reasonable expenses ... necessarily and directly resulting from the injury." The Commission however has directed<sup>45</sup> that chiropractor's fees cannot be seen as a reasonable expense under section 121 as the types of medical expense which are deemed reasonable and for which the Commission is directed to pay the cost are set out exclusively in Section 111. It therefore seems that section 121 is available only to cover expenses and losses in areas not specifically provided for, and in areas not similar to those covered elsewhere in the Act.

The section 121 lists a number of types of loss which are outside the scope of its cover even though they may be reasonable expenses and proved losses necessarily and directly resulting from the injury or death which it demands.

The first of these exclusions is of "any expense or loss in respect of damage to property."

Since there is no definition of property in section 2 of the Act, the word is to be taken on its general meaning as covering things owned and possessions, both real and personal. Section 110 allows for the reasonable cost of repair to or replacement of clothing or spectacles damaged while being worn at the time of an accident.

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45 Review decision 74/RO063:A.C.C. Report, March 1976:32

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The second exclusion is of "any expense or loss incurred after  
Clothing and spectacles are possessions. This makes section 110  
1 c inconsistent with section 121 1 a . It is submitted that  
the latter provision is to be read as excluding recovery for  
expenses or losses in regard to any damage to property except  
where express provision has been made elsewhere in the Act for  
their recovery. To extend compensation for damage to property  
beyond this point would be to exceed the aims of the Act as  
stated in section 4. The function of the Act is to provide for  
the compensation of personal injury or death by accident. Claims  
for property damage not covered by Section 110 will continue to  
be handled by the courts. This effectively means that the losses  
of some injured people will be dealt with under Section 121 and  
its criterion of necessary and direct consequence whereas the  
property damage of another injured claimant will be decided in the  
courts on the basis of the common law test of reasonable  
foreseeability.

Although it may arguably be desirable for all actions arising  
out of an injury or death by accident to be dealt with by the  
one agency so ensuring a consistent approach, a speedier and  
cheaper process than the Court system provides, and no administra-  
tive double handling, there are such weighty disadvantages to this  
course as to make it impracticable. The costs potentially  
involved in claims for property damage are very high and it would  
not provide a fair result for claimants if a ceiling were placed  
on the amount recoverable in any one claim. To allow for a  
reasonable percentage of the property claim to be covered might  
produce a result acceptable by comparison with the uncertainty  
of the common law action, but again the costs potentially  
required to fund this inclusion would make it infeasible, the more

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The second exclusion is of "any expense or loss incurred after the death of that person in respect of the administration of his estate." This exclusion was added by the Amendment Act of 1975, and has the effect of limiting the type of expense which can be claimed as "necessarily and directly resulting from the injury or death." In deciding a review application on this point<sup>46</sup> the Commission held that "the administration of a deceased's estate cannot be a necessary action consequential upon the death of the deceased person in the terms of the Act. The purposes and scope of the Accident Compensation Act are set out in section 4 of the Act and we think it is clear that the Act does not envisage the Commission paying towards the expenses of administering the estates of deceased persons."

In the facts of the review claim mentioned, a brother had claimed the cost of his travel to New Zealand from Britain under Section 121 2 b, arguing that his trip was necessary for the administration of his deceased sister's estate. There are two policy grounds for this refusal to meet the claim. Firstly, to allow the costs of estate administration would set a precedent and the Commission would subsequently be faced with claims for such items as legal fees, which would vary in price according to the complexity of the estate concerned, the amount of involvement of the legal firm in the execution of the estate and the length of time taken to wind up the affair. At this point the costs become inextricably bound up with the amount of property involved, and that item is outside the concern of the Act.

<sup>46</sup> Review decision 74/ROO444 A.C.C. Report, March 1976:26

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To compensate for estate administration costs would also delay the finalising of a claim under the Act and to that extent would create administrative difficulty.

Also the Commission as a general rule does not pay the costs of travelling expenses outside New Zealand. To do so would establish an expensive precedent difficult to justify in terms of a publicly funded scheme.

Next excluded from recovery under Section 121 1 is "any expense or loss arising from damage in respect of which, or to the extent to which, no payment is to be made" under Section 110 1 or 1A. In other words, section 121 cannot operate to override a refusal to pay compensation, or a limitation on its quantum which occurs in the provisions concerning damage to natural teeth, or artificial limbs and aids, clothing or spectacles being used or worn by the claimant at the time of the accident.

This exclusion was also added to the Act by the amendment of 1975. It serves to stress the principle that it is not the proper function of the Act to provide compensation for property damage and that what is listed in section 110 as compensatable is to be strictly followed and not extended.

The fourth exclusion concerns the loss of opportunity to make a profit. The position at common law was that a person injured or killed by the negligence of another could claim for loss of future profits in addition to loss of future income.

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However an action at common law for such damages is excluded by section 5, while exclusion d of section 121 1 precludes it from cover under the Act.

Common Law and the Act are based on different attitudes as to the quantum of compensation.

The principle of tort damages was that the plaintiff should be able to receive full compensation for his loss, although it should be noted that this ideal was rarely achieved. Under the Act, the aim of compensation is to cushion the loss, but not fully compensate for it.

The Act provides for compensation for loss of earning capacity in section 113 and loss of potential earning capacity in section 118 but not for dividends nor, generally speaking, for gratuitous income. In this regard the compensation provided by the Act falls short of the remedies available at common law, yet Section 5 precludes claimants from that more favourable remedy.

Several claims concerning farming partnerships' expenses have gone to review hearings on the question of the appropriate measure of compensation where one partner is injured and replacement labour must be hired.

Basic to such a claim, is the principle of Allen v. Dixon<sup>47</sup> where the Court of Appeal decided in a claim for general damages in common law that the cost of replacement labour is a partnership loss and that the plaintiff could not recover as general damages

47 1973 2 NZLR 496

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an allowance for these costs in excess of his share of the expenses.

Payment of replacement labour charges can be considered under 2 sections :

either section 121 1 as an "actual and reasonable expense and proved loss necessarily and directly resulting from an injury or death,"

or section 113 as a measure of the loss of earning capacity for the purpose of calculating earnings related compensation. In the case of a self-employed person, this calculation is made on the basis of average weekly earnings for the financial year last ended before the date of the accident. Loss of earning capacity cannot exceed relevant earnings for the purposes of the Act. Therefore the cost of replacement labour is not pertinent to the question of the claimant's earnings, and is not covered by Section 113.

The additional expense, i.e. the difference between E.R.C. and the cost of hired labour, could be covered by section 121 1 if it were construed merely as a non-earnings related expense arising from the injury. The Commission, however, has treated such an expense as a business expense which has the effect of reducing the applicant's profit. The loss of opportunity to make a profit is expressly excluded by section 121 1 d . Therefore as a general rule business expenses won't be paid under this section; and more specifically, payment of replacement labour costs will not be met by the section.

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Consider the hypothetical case of a share milker incapacitated by injury for 6 months. His last year's earnings were \$2,400. The costs of replacement labour for the 6 months amount to \$2,600. Not only has the milker lost the opportunity to make a profit, he has because of his injury made a real loss, even if his so called profit is taken over the whole year. What does the Act offer him? The Commission sees this partnership as a business concern and the cost of replacement labour as a business expense, and therefore any income from the business is seen as profit, or failure to get income is seen as a loss of opportunity to make a profit. Under this head it is excluded from cover under section 121.

It seems anomalous that in such a case where the income from the sharemilking is equivalent to the individual's earnings and it is his livelihood, that be the categorisation of his earnings as "profits" he is precluded from cover under the Act, and is left to live off a minus income. The inequity is more obvious if it is compared with the situation of a wage earner who is not only able to recover his E.R.C. but also the cost of hiring labour for any other necessary activity he is prevented from performing by his injury. Consider the case of a carpenter incapacitated from work for 5 months.<sup>48</sup> He was paid E.R.C. and recovered the expenses of hired labour to perform heavy work, including the pouring of concrete, on a house he was building for himself.

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48 A.C. Appeal Authority, re Marinkovich A.C.C. Report Nov1976:60

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Although on policy grounds the Commission cannot possibly entertain the idea of maintaining high profit levels for a thriving company, there should be room for a more accommodating approach to be adopted where "profits" are synonymous with wages or earnings. Such an approach is within the purpose and the words of the Act, and to perpetrate such an anomaly on a mere technicality of interpretation thereby ignoring a basic aim of the Act, viz to provide the incapacitated worker automatically with earnings related compensation, is difficult to justify.

Also excluded from recovery under section 121 are losses arising from an inability to perform a business contract where the inability arises from a personal injury by accident.

Section 2 of the Act defines "business" by reference to section 2 of the Land and Income Tax Act 1954. It covers "..... any profession, trade, manufacture or undertaking carried on for pecuniary profit."

A.A.P. Willy<sup>49</sup> argues that because carrying on a business for the purpose of the Land & Income Act necessitates a degree of continuity and comprehends more than an isolated act, a business contract must be taken as one which relates to a series of transactions, therefore section 121 1 e could not apply to a contract relating to an isolated transaction.

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49 "The Accident Compensation Act and Recovery for Losses arising from Personal Injury and Death by Accident." N.Z.U.L.R. Vol.6. 1975;250

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With respect, it is submitted that Willy is wrong. Where there is a business contract which relates to an isolated transaction and which cannot be performed because of a personal injury by accident, the Commission must apply the provisions of the Act as they stand and the relevant provision clearly states that any loss arising from the inability to perform a business contract cannot be recovered. There is no room for the exercise of a discretion as to payment.

Payment under section 121 1 is personal to the claimant who has suffered personal injury by accident, or, in the event of his death, to his administrator. It can therefore be seen that the "any loss" of this exception, clearly means any loss suffered by the injured or deceased person and not any loss that may be suffered by another party to the contract.

In the situation where a contract is breached because of an accidental injury, and the injured person has to pay damages to a third party for that breach, he could not recover that cost under the Act because of this exception. Likewise a third party could not get compensation under the Act because of this provision, even if payments under the subsection were not personal to the injured person. Nor could he seek a remedy for damages at common law as this is precluded by section 5.

Again financial considerations were, it is submitted, partly responsible for this head being excluded from cover under section 121.

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To accept responsibility for losses from non-performance of business contracts would be to lay the fund open to claims far above the extent of its resources. Also the Act is a social welfare scheme, operating at the level of people and compensating them for injuries and lost incomes. Business interests, like property interests, are not within its scope.

The next type of loss excluded by section 121 concerns "any loss that has not for the time being actually occurred, whether or not the amount thereof is ascertainable before it occurs."

This serves to reiterate the prerequisite for recovery under section 121 that the expenses must be actual. According to the Concise Oxford Dictionary 'actual' means something which exists in fact, or is real.

Potential losses cannot be recovered under this section, although elsewhere in the Act there is specific provision made for such losses.<sup>50</sup>

It is submitted that this loss must be to the injured or deceased person, and does not refer to loss to a third party.

The Act operates as a Social insurance scheme and consonant with that role, it does not undertake to meet potential and future losses apart from those expressly provided for elsewhere in the Act.

50 Section 118 provides for compensation for loss of potential earning capacity.

51 1964 A.C. 1129  
52 1963 A.C. 99

Unlike the common law action which made one assessment of the damages recoverable by a plaintiff, the Act provides on-going compensation and where a claimant incurs some loss after his original claim has been lodged or satisfied, he is able to apply for recovery of that expense. So this exclusion only bars recovery until such time as the loss has occurred.

The last exclusion is of "any expense or loss in respect of or towards payment of which compensation is otherwise payable under this Act." This exclusion is reinforced by section 121 1A which goes a step further and refuses payment for any expense or loss similar in nature to an expense or loss for which compensation is payable under any other provision of the Act.

These provisions merely reiterate that double recovery will not be made under the Act even though two or more sections may be interpreted as covering one aspect of a claim. Double recovery was also avoided in common law assessments of damages.

This exclusion relates equally to pecuniary and non-pecuniary losses, although the existence of some doubt as to whether the latter are included under section 121 has already been alluded to.

Two further heads of damages available at common law require mention; they are exemplary damages and aggravated damages. There is uncertainty in the area of exemplary damages after Rookes v Barnard and the Privy Council's decision in Australian Consolidated Press Ltd v. Uren.<sup>52</sup>

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51 1964 A.C. 1129  
52 1969 A.C. 590

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CONCLUSIONS

However using Fogg v McKnight<sup>53</sup> as authority, it can be said that exemplary damages have been awarded in New Zealand in a case involving personal injury. The basis of an award of exemplary damages is to punish the defendant, so these damages cannot fit into the requirement of section 121 as being compensation for "a proved loss necessarily and directly resulting from the injury." They are not recompense for a loss suffered by the injured person, so no compensation will be awarded under section 121. An action under this head at common law is precluded by section 5. The same is true of a claim to recover aggravated damages arising out of personal injury by accident. Aggravated damages were described in Fogg v McKnight by McGregor J. as truly compensatory. If this description is correct, as the writer submits it is, the way is clear to claim compensation on this head under section 121 1, since the claimant has lost something as a direct result of his injury. There is nothing in the section to support the view that proved losses must also be of a pecuniary nature, therefore on the basis of the provision as written the claim should succeed.

Section 121 does not aim to provide compensation for all losses and expenses which are consequent upon injury or death. It establishes definite criteria to be satisfied before compensation will be awarded, and lists classes of exceptions where no compensation will be paid. Should there exist some situation where a substantial claim is made which satisfies the prerequisites of section 121 1 and is not excluded by section 121 1 a - g, the Commission still has a double discretion ("may pay" and "such amount (if any) as it thinks fit") to exercise where to pay Compensation would produce a result not intended or foreseen by the legislation.

53 1968 NZLR 330

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CONCLUSIONS

1. Most of the major heads of losses recoverable at common law are now covered under the Act, but not all of them. The exclusions of section 121 place some parameters on the scope of compensation under the Act.
2. The reason for the inclusion of such a provision as section 121 in a social welfare scheme rests on the acceptance of the fact that the prime need in such a scheme is to ensure that these persons in need as a result of accidents should have their income maintained at a level not too far below that of their previous earnings. As part of this aim, expenses arising solely as a result of the injury should be met.  
  
The Act purports to supplant common law claims for personal injury by accident. To allow a contemporaneous action at common law for some aspect of the personal injury not covered under the Act would have made no sense, administratively, cost-wise, or logically. Not to allow such an action (by express legislative prohibition) for an aspect not covered by the Act but formerly remediable at common law would not have been equitable. The solution to this problem was to include in the Act provision for recovery of expenses "arising necessarily and directly from the injury."
3. In section 121 there are presently some difficulties with the wording and its interpretation. In some cases this means that the section is being applied in a way inconsistent either with the language of the statute or, in other cases, with the purposes of the Act. The situation call for legislative remedy.

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APPENDIX

A. The text of the remainder of section 121 of the Act is as follows :

2 Where a person suffers personal injury by accident in respect of which he has cover under this Act, or where a person dies as a result of personal injury so suffered, the Commission having regard to any other compensation payable, may -

a Pay to any member of the household of which the injured or deceased person was a member on the date of the accident such compensation as the Commission thinks fit for any quantifiable loss of service proved to have been suffered by the person to whom the payment is made as a result of the injury or death for such a period as the Commission thinks fit, not being longer than the period for which that member could reasonably be expected to receive the service:

b Pay to any person, or to the administrator of the person, such compensation as the Commission thinks fit for any identifiable actual and reasonable expenses or losses incurred by the person in giving help to the injured person while he is suffering from incapacity resulting from the injury or in taking any necessary action following and consequential upon the death of the injured person.

3 Where a person suffers personal injury by accident in respect of which he has cover under this Act and the injury is of such a nature that he must have constant personal attention,

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the Commission, having regard to any other compensation payable, may pay to that person, or if it thinks fit to the administrator of that person, in addition to all other compensation and rehabilitation assistance to which he may be entitled, such amounts as the Commission from time to time thinks fit in respect of the necessary care of the person in any place of abode or institution.

4 Where a person dies as a result of personal injury by accident in respect of which he has cover under this Act, and any superannuation, pension, or annuity terminates or is reduced upon his death, if in the opinion of the Commission any dependant of the person, being a dependant who was dependent through him on that superannuation, pension, or annuity immediately before the date of the death, suffers any loss of support by reason of the termination or reduction thereof, the Commission having regard to any other compensation payable and to the circumstances of the dependant and to any other relevant circumstances, may pay to that dependant such compensation as it thinks fit in respect of the loss which in the opinion of the Commission is so suffered for such period as it thinks fit, not being a period extending beyond the shortest of the following periods:

- a A period equal to the expectation of life of a normal person of the same age and sex as the deceased person; or
- b The period for which earnings related compensation would be payable to the dependant under subsection (2) of section 128 of this Act if that subsection applied to the dependant; or

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- c Any period other than the lifetime of the deceased person for which the superannuation, pension, or annuity would have continued if the deceased person had not died.

This section was brought into force on 1 April 1974; see S.R. 1973/290/2. Subss. 1 and 1a were substituted for the original subs. 1 by s. 22 1 of the Accident Compensation Amendment Act 1975.

In subs. 2 b the words "or losses" were inserted by s.22 2 of the Accident Compensation Amendment Act 1975.

- B. The original text of section 121 of the Act read:

Compensation for Pecuniary Loss not Related to Earnings

121, Compensation for pecuniary loss not related to earnings - 1 Where a person suffers personal injury by accident in respect of which he has cover under this Act, or where a person dies as a result of personal injury so suffered, the Commission shall pay to him, or in the event of his death to his administrator, in addition to all other compensation and rehabilitation assistance to which he is entitled under this Act, compensation of such amount as the Commission may fix for actual and reasonable expenses and proved losses necessarily and directly resulting from the injury or death, not being-

- a Damage to property; or
- b The loss of an opportunity to make a profit; or
- c Any loss arising from inability to perform a business contract; or

- d Any loss that has not for the time being actually occurred, whether or not the amount thereof is ascertainable before it occurs; or
- e Expenses in or towards payment of which compensation is otherwise payable under this Act.

2 Where a person suffers personal injury by accident in respect of which he has cover under this Act, or where a person dies as a result of personal injury so suffered, the Commission having regard to any other compensation payable, may-

- a Pay to any member of the household of which the injured deceased person was a member on the date of the accident such compensation as the Commission thinks fit for any quantifiable loss of service proved to have been suffered by the person to whom the payment is made as a result of the injury or death for such period as the Commission thinks fit, not being longer than the period for which that member could reasonably have expected to receive the service:
- b Pay to any person, or to the administrator of the person, such compensation as the Commission thinks fit for any identifiable actual and reasonable expenses incurred by the person in giving help to the injured person while he is suffering from incapacity resulting from the injury or in taking any necessary action following and consequential upon the death of the injured person.

3 Where a person suffers personal injury by accident in respect of which he has cover under this Act and the injury is of such a nature that he must have constant personal attention,

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the Commission, having regard to any other compensation payable, may pay to that person, or if it thinks fit to the administrator of that person, in addition to all other compensation and rehabilitation assistance to which he may be entitled, such amounts as the Commission from time to time thinks fit in respect of the necessary care of the person in any place of abode or institution.

4 Where a person dies as a result of personal injury by accident in respect of which he has cover under this Act, and any superannuation, pension or annuity terminates or is reduced upon his death, if in the opinion of the Commission any dependant of the person, being a dependant who was dependent through him on that superannuation, pension, or annuity immediately before the date of the death, suffers any loss of support by reason of the termination or reduction thereof, the Commission having regard to any other compensation payable and to the circumstances of the dependant and to any other relevant circumstances, may pay to that dependant such compensation as it thinks fit in respect of the loss which in the opinion of the Commission is so suffered for such period as it thinks fit, not being a period extending beyond the shortest of the following periods:

- a A period equal to the expectation of life of a normal person of the same age and sex as the deceased person;  
or
- b The period for which earnings related compensation would be payable to the dependant under subsection 2 of section 128 of this Act if that subsection applied to the dependant; or

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- c Any period other than the lifetime of the deceased person for which the superannuation, pension, or annuity would have continued if the deceased person had not died.

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Any period other than the lifetime of the deceased person for which the superannuation, pension, or annuity would have continued if the deceased person had not died.

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