THE MEANING OF "ACCIDENT"

by
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As Mr Hillyer has explained, there is no definition of the expression "accident" in the Accident Compensation Act 1972. However, clearly the Commission itself has views on this point, and in fact has issued guide-lines to the Medical and Legal Professions. In fact it may be that to define "accident" is to define the indefinable. Difficulty is, however, likely to arise in a number of situations in which an interpretation of "accident" is needed.

One area which immediately comes to mind is in respect of statements made negligently, which are relied on, so that personal injury is suffered. Can that personal injury really be said to be by accident, if in fact it is directly consequent on the negligent statement. A particular example of the sort of situation I have in mind arose out of the well-known case ***Smith*** v ***Auckland Hospital Board*** [1965] NZLR 191 in which the plaintiff relied on a statement (which was proved to have been given negligently) to the effect that there was no risk involved in a certain type of examination. In fact the risk was very high; it materialised and resulted in the victim having to have his leg amputated.

I find it very hard to see when the known risk was so high that such a situation was an accident, even from the victim's viewpoint.

My personal interpretation of the word "accident" would not include intentional torts, such as ***assault*** and ***battery,*** which can result in personal injury, since in my view the term "accident" carries a connotation of something not foreseeable. (Even though liability in negligence is measured by the yardstick of "what ought to be forseeable to the reasonable defendant".) Nevertheless in my view any intended result cannot be an accident, even though in some circumstances it will be from the victim's point of view. The Commission appears to look at the whole question from the victim's point of view. This may give fair results, but is it really fair in relation to notions such as "voluntary assumption of risk"? Can a volunteer ever really be the victim of an accident?

The scheme of the Act does require a fundamental change in one's view of the legal system, and it is central to the argument which I am about to put forward that one will be required to look at issues relating to liability in ways different from those in which they have been looked at in the past.

One aspect of this which does worry me is that to a large degree the Commission itself will be a judge in its own cause, and it may be that the Courts will not feel free to consider legal questions of the sort which I envisage until after the Commission has first ruled on the matter and then only through the Appeal procedures available under the Act itself (see s. 5(5)). My arguments are based on legal theories which ought to be tested by the usual procedures for trial of civil actions before judges and magistrates, who have the appropriate training to test such questions.

In deciding whether there are any claims for damages arising out of personal injuries, it is crucial to examine the impact of s.5 ofthe Accident Compensation Act 1972, as amended by the Amendment Act (No 2) 1973, which substitutes a new s.5 stating that:

"5. (1) Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of a personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

"(2) Without limiting the generality of subsection (1) of this section, the action for loss of services (known as the action ***per quod servitium amisit)*** and the cause of action for loss of consortium (known as the action ***per quod consortium amisit)*** are hereby abolished.

"(3) Nothing in this section shall affect-

"(a) Any action which lies in accordance with section 131 of this Act; or

"(b) Any action for damages by the injured person or his administrator or any other person for breach of a contract of insurance; or

"(c) Any proceedings for damages arising out of personal injury by accident or death resulting therefrom, if the accident occurred before the 1st day of April 1974.

"(4) No person shall have cover under this Act in respect of personal injury by accident if the accident occurred before the 1st day of April 1974.

"(5) Where in any proceedings before a Court a question arises as to whether any person has cover under this Act, the Court shall refer the question to the Accident Compensation Commission for decision, and the Commission shall have exclusive jurisdiction to determine the question.

"(6) The Commission may, on the application of any person who is a party to any proceedings or contemplated proceedings before a Court, determine any such question.

"(7) Subject to Part VII of this Act, a subsisting decision of the Commission under subsections (5) and (6) of this section shall be conclusive evidence as to whether or not the person to whom the decision relates had cover under this Act."

It is worth noting in passing that the claim for damages in respect of personal injuries still exists in respect of causes of action arising prior to 1st April 1974 in respect of which all claims in tort and contract are still available (and under the Workers' Compensation Act 1956). Gradually these claims (after the expiration of limitation periods) will be phased out.

Apart from this small class of claims, what claims are still available?

S.5 (1) declares (inter alia) . . . "no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule or any enactment."

The use of the words "directly or indirectly" and "whether [brought] by that person or any other person, and whether under any rule of law or any enactment" are important.

In my opinion, this means, in effect, that in respect of ***personal injuries*** (and I stress the use of that term for reasons which will become obvious) there can be no claim under what is known as the tort of negligence,no claim arising from an intentional tort (such as Battery and Assault), no claim under the Deaths by Accident Compensation Act 1952, and no claim in Contract (in particular those arising out of the master/servant relationship, or claims in which negligence cannot be established but a breach of an implied warranty can be).

None of these types of claims will be permissible. It is a questionable point whether the Woodhouse Report had it in mind that so many claims would go. The overall impression that one gets from a fairly close reading of the Woodhouse Report is that no more was really intended than that the claim under the tort of negligence should be abolished, rather than that it was intended to remove the claim grounded on the commission of an intentional tort, or a breach of contract.

Be that as it may be, if one holds the view that the law of torts and the law of contract (at least in some respects) can act as a deterrent, in a way that the criminal and quasi-criminal law cannot, then the enactment of the Act in its present form leaves one with a sense of regret.

This may only be because the concept of the availability of the claim for damages, the concept of the adversary process and so on, which lawyers have inculcated into their systems from first days in law school are hard to shake off. The new Act clearly does require a new focus altogether; a focus on the ideal of compensation for all regardless of fault.

Nevertheless, rightly or wrongly it is my contention that there are still some claims for damages available. I will not, however, answer for the success or failure of my theory. I also contend that in spite of the ideals behind the Act, the scheme will prevent some from obtaining fair compensation, and itself will create anomalies. It is central to the theory which I wish to put forward that one must take full cognisance of what the terms: damage and injury mean. In the sense in which I wish to use these terms, ***damage*** is of course the loss which flows from the damaging event, and this damage is the injury, whereas the damaging event is the event which gives rise in some circumstances to the right to claim that loss. ***Damages,*** on the other hand, can be said to be the measure of damages assessed by a court – in other words, "the Remedy".

A ***cause of action*** is the recognition that a certain type or category of fact situation which, if an event from which damage has flowed has occurred, will give rise to the right to bring a legal action to recover damages. Therefore sincee s.5 (1) of the Act came into force, no cause of action can give rise to a claim for damages attributable to a personal injury. But the head of damage is removed, not the cause of action.

What is not often fully appreciated, however, is that in some circumstances a damaging event may itself create more than one type of damage or injury from which damages will flow.

The rule in ***Fetter*** v ***Beal*** (1699) I Ld Raym. 399 precludes a person from bringing a second claim based on the same cause of action, and the same head of damages. In other words, where a cause of action gives rise to a right to claim damages, the damages are said to be "once and for all".

One can, however, look at the Accident Compensation Act as though it

has created a new cause of action solely restricted to personal injury, and giving as a ***remedy,*** the right to claim compensation. Where this cause of action is present (i.e. where the damaging event has resulted in personal injury), then clearly no claim for damages for personal injury as such will lie.

But where the damaging event has given rise to another cause of action (even though under the pre-existing law that same cause of action could have given rise to a claim for damages flowing from personal injury) then the cause of action still exists, in my view.

An example may illustrate my point more clearly than pure theory.

The torts of Assault and Battery – the old Trespass to the Person – were the cause of action whereby the victims of a variety of injuries could obtain redress. ***Battery*** is any act of the defendant which directly and either intentionally or negligently causes some physical contact with the person of the plaintiff without the plaintiff's consent. ***Assault*** is any act of the defendant which directly and either intentionally or negligently causes the plaintiff immediately to apprehend a contact with his person.

From the point of view of the present discussion an important aspect of both assault and battery is that they are both actionable per se – no "damage" may flow from the damaging event at all, so too, personal injury will not necessarily occur with the commission of the tort. If no personal injury has occurred then presumably, and s.5 would not seem to preclude it, the tort action of assault and battery must still lie. These actions also recognise that damages may flow from humiliation or loss of reputation, and are certainly comparable to this extent with the tort of false imprisonment (where personal injury is an unlikely result).

Conversely there will be situations where assault and battery have been committed and personal injury suffered. Then there can be no action for damages flowing from the personal injury. But clearly if the actions lie whether or not there is personal injury, then personal injury cannot be the gist of the tort. This would suggest that personal injury is clearly not the damaging event, in the legal sense, but is in fact merely the damage or loss which flows from the damaging event, so that if some other quite different type of injury flows from the damaging event, (such as injury to reputation – see ***Foggs*** v ***McKnight*** [1968] NZLR 330) then a claim in tort will lie even though the damaging event happens also to have resulted in personal injury. Such damages would not be related to the personal injury but would include general damages, aggravated damages, and even exemplary damages. (This would seem to accord with the decision in ***Darley Main Colliery Company*** v ***Mitchell*** (1886) II App.Cas. 127.)

The tort actions in assault and battery by their very nature perhaps illustrate the point quite clearly that the damaging event is quite separate from the damage (or injury) and that more than one injury may flow from the damaging event and that the Accident Compensation Act only abolishes a common law claim in so far as the assessment of damages flowing from damage or injury which in turn was caused by a damaging event (covered by the generic term "accident"). The cause of action giving rise to a claim in damages remains intact (so long as a particular kind of damage is not included in the claim).

In respect of other areas of tort liability (such as negligence) and in actions for breach of contract resulting in personal injury it may be more difficult to

separate the damaging event from the damage, in order to show that more than one kind of damage has occurred, or it may be that in the majority of cases (at least in negligence, but the same may not be true of actions alleging breach of an implied warranty in contract) only one kind of damage, namely personal injuries, in fact occurs. There will be cases, however, from time to time when more than one injury will flow although these will probably be rare.

It can be argued that the claim for exemplary damages (tied as it must be to the damaging event and the cause of action) does not flow from the damage or injury, but rather from the conduct of the defendant. If this is so, then, bearing in mind that the law in relation to exemplary damages may be different in New Zealand from England after ***Australian Consolidated Press*** v ***Uren,*** [1969] I A.C. 590 and ***Uren*** v ***John Fairfax & Sons Ltd*** (1967) 117 CLR 118, there could be many circumstances where it might be desirable and possible for a claim for exemplary damages to be brought.

The kind of situation which I envisage is that in which a factory owner has in his factory some sort of machine which he has a statutory duty to fence in a particular way. But the necessary fence will mean that the machine is slow to operate and can only put through ten articles an hour, whereas with a less adequate fence it can produce thirty articles in the same hour. The employer is of course aware of the provisions of the Accident Compensation Act, he is also aware that a factory inspector is likely to discover what is going on; but the employer decides that he will "give it a go" without adequate fencing for as long as possible. After his employee is injured, in spite of his successful claim for compensation from the Accident Compensation Commission, and in spite of the penalty available under the appropriate safety legislation, it might not be unreasonable, undesirable or legally impossible for the employee to bring a claim alleging breach of statutory duty not in respect of damages arising from his personal injury, but for damages arising from his employer's conduct.

A similar argument can be used to show that when there is a breach of an implied warranty, although there may be damage in the form of personal injury (for which a claim is not precluded by the Act), damage by way of humiliation has also been suffered. Although ***Addis*** v ***Gramaphone Co.*** [1909] A.C. 488 suggested that a claim for exemplary damages cannot arise out of actions in contract, there is strong argument in recent cases to suggest that this strict rule may no longer be adhered to. In particular see the judgments in ***Jarvis*** v ***Swan Tours Ltd*** [1973] I All E.R. 71 and ***Jackson*** v ***Horizon Holidays Ltd*** (C.A.) ***The Times,*** Feb 5, 1974, where damages for injury included non-pecuniary damages being part of the expectation interest, were awarded. In fact, the law of contract recognises that damages will be for the loss of a variety of non-pecuniary benefits, but it is argued that these are quite distinct from damages flowing from personal injury.

It may be that there will be actions in which damages which smack of an exemplary or punitive character can only be regarded as parasitic so that if the damages claim for personal injuries no longer lies, then neither would an action for the exemplary damages be available. But I suggest that at least in respect of claims in tort based on causes of action which are actionable per se that an action for damages different in kind from that flowing from the personal injury claim will still be available. The same would apply to an action in contract since

damages in contract flow from the breach of the contractual duty rather than from the damage or injury, and can also be described as being actionable per se.

In addition there are causes of action which whilst they may give rise to an action for damages also give the right to ask the court to exercise its equitable jurisdiction and grant an injunction (usually if there is a strong likelihood of damage), but at that point of time damage will not have occurred at all. (This most frequently arises in respect of the tort nuisance). The damages which could occur might be damage flowing from personal injuries, but presumably s.5 of the Act will not affect the right to ask for an injunction. Once an injunction is granted the Court can, under its powers, make an award of damages in lieu of granting an injunction, under the provisions of Lord Cairn's Act (21 & 22 Vict. C.27) which is in force in New Zealand. Whether a Court will still consider it has power to follow this procedure, since the passing of the Act, and in view of s.5 (5) remains to be seen, but it seems that there could be circumstances in which either the granting of an injunction, or damages in lieu thereof, would be the equitable course for the courts to follow.

It has also been suggested to me that the appropriate dependants will still retain their right to claim under the provisions of the Deaths by Accident Compensation Act, 1952. Certainly that Act is not repeated by the Accident Compensation Act, but it is my opinion that the words in s.5 (1):

> "no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment"

would preclude a claim under that Act, since the proceedings for damages are such as arise indirectly out of death.

It may be that my arguments are based on a logical fallacy of reasoning, but it is my opinion that whilst one cannot deny that the scheme of the Accident Compensation Act will benefit the community there will be some victims of accidents, particularly those (but there will be others) who are the victims of intentional torts, or breach of contract, who, unless they retain their right to claim at common law, will be inequably treated in relation to some other members of the community. It is my hope that there is a way round their problem within the existing framework of the law. One must, however, not lose sight of the fact that the intoduction of this Act does require one to look, not only at the theory of "fault", but at the whole theory of damage and the assessment of damages in an entirely new way from that in which common lawyers have looked at these concepts in the past.