

ROPER *V* TAYLOR AND THE MISNOMER OF A COMPREHENSIVE ACC SOCIAL CONTRACT

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This article seeks to show that understanding the accident compensation scheme as a social contract does not inherently justify universal cover as the Supreme Court claims in Roper v Taylor. This article uses the facts of Roper v Taylor to explore two approaches to understanding the accident compensation scheme. The first relies on community responsibility to achieve comprehensive entitlement. The second relies on the social contract to establish entitlement in exchange for the right to sue. This article argues that the social contract does not inherently justify universal cover because coverage depends on which injuries Parliament has included within the scheme, rather than an overarching principle of community responsibility. Consequently, the Court's assertion of a principle of universal cover does not establish which injuries Parliament has in fact included within the social contract. To conclude, this article suggests that a principle of community responsibility could operate in a limited capacity to overrule textual interpretations where Parliament clearly intended a particular type of injury to fall within the social contract.

I INTRODUCTION

It seems very strange, as there must be right somewhere, that an honest judge in real earnest has not been able to find out through all these years where it is.¹

Esther's assessment of the Chancery courts in Charles Dickens' 1853 novel *Bleak House* could just as well apply to the current law of personal injury compensation in New Zealand. In the case of *Roper v Taylor*, Ms Taylor spent seven years attempting to recover damages for mental injury and emotional harm from Mr Roper, who abused her in the late 1980s.² The Supreme Court found that

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1 Charles Dickens *Bleak House* (Oxford University Press, Oxford, 1948) at 58.

2 *Roper v Taylor* [2023] NZSC 49, [2023] 1 NZLR 1 [*Roper SC*].

Ms Taylor was unable to do so because her injury was covered by s 21 of the Accident Compensation Act 2001 (the Act).³ Section 21 provides cover for mental injury caused by certain criminal acts, including indecent assault.

At first glance, the case is an orthodox operation of the famous ACC social contract. Since Ms Taylor received cover under the scheme, she could not receive civil damages because that would amount to double recovery.⁴ The Court used a plethora of adjectives to describe the coverage which the ACC social contract provides. The words "generous", "intuitive", "broad", "wide-reaching", "unified", "comprehensive" and "non-niggardly" all appear in the judgment. Yet these adjectives conflict with the reality of Ms Taylor's case. If cover under the scheme is broad and generous, why did Ms Taylor try to avoid the scheme's ambit?⁵ If cover is intuitive, why was the Supreme Court needed, at the cost of thousands of dollars to the parties, to show where the boundaries of that cover lie? This article will use Ms Taylor's case as a lens to investigate how the courts' interpretation of the Act could better reflect the reality of the current scheme's boundaries.

The goal of New Zealand's unique personal injury compensation scheme originally derives from its foundational text, the 1967 Royal Commission of Inquiry report (the Report).⁶ In the 57 years since the Report's publication, the goals of personal injury compensation have changed. The fact that change has occurred is not problematic. The Report itself considered that the validity of any social measure depends on its current and future utility.⁷ However, the comprehensive vision of the original Report is not reflected in the current Act. Consequently, the Court's use of adjectives like "comprehensive" and "unified" conflicts with the express boundaries of the current scheme. This conflict causes confusion and extensive litigation, exemplified by Ms Taylor's case.

First, this article will distinguish the Report's goals from the reality of the social contract prescribed by the current Act. The Report had an ambitious vision for all personal injuries to receive compensation under a social insurance scheme. The Report relied on principles of community responsibility and comprehensive entitlement to explain why all injuries should be covered, no matter what their cause was.⁸ This new system would replace the right to sue.⁹ However, legislators in 1992 found that the scope of coverage under the scheme placed too great a demand on the New Zealand

3 At [48].

4 Accident Compensation Act 2001, s 317.

5 At [31].

6 HL Brockett, GA Parsons and AO Woodhouse *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, December 1967) [Royal Commission report].

7 At 33.

8 At 56 and 57.

9 At 170 and 171.

taxpayer.¹⁰ The 1992 reforms exhaustively defined the scheme's scope to limit coverage to injuries which the ordinary person would perceive as an accident. In contrast to the Report's comprehensive vision, the new Act justified coverage as an exchange of rights. Coverage would be provided for particular injuries in exchange for the right to sue.¹¹

Having shown the distinction between the Report and the Act, this article will analyse the judgments of the Court of Appeal and Supreme Court in the *Roper* case. This analysis will show that the Courts struggle to construct a consistent method to define the scheme's scope. In particular, this article will argue that the Supreme Court conflated the comprehensive vision of the original Report with the reality of limited coverage that the current Act provides. Only the Report's principle of community responsibility can provide comprehensive entitlement. Under the current Act, Parliament has deliberately decided that the excessive cost of covering some injuries justifies their exclusion from the social contract's exchange of rights. The Supreme Court's prioritisation of comprehensive entitlement in *Roper* contradicts the exhaustive boundaries of the social contract which Parliament has devised. The Court's proposed interpretation is unhelpful because it does not provide truly comprehensive coverage due to the clear boundaries of the Act, but it nevertheless provokes questionable interpretations of the Act's prescriptive text.

To conclude, this article will suggest how the courts might use the Report's original principle of community responsibility to "tip the balance" in cases where Parliament's intention of coverage is clear despite alternative textual interpretations. This may resolve cases like Ms Taylor's, but such a principle should be used sparingly. To be clear, the current Act unjustly excludes coverage for many types of personal injury, particularly mental injury.¹² However, the courts are constitutionally unable to establish comprehensive coverage for injuries that Parliament has deliberately excluded from the social contract embodied by the Act.

II ROPER V TAYLOR—THE FACTS

This article will first set out the facts of the *Roper* case, which will be used to contrast the social contract and community responsibility approaches to personal injury compensation.

The plaintiff in *Roper* was Ms Taylor, who enlisted into the Air Force in 1985 at the age of 18.¹³ From 1985 to 1988, she worked at Whenuapai Air Force Base as a driver in the motor transport

10 WF Birch *Accident Compensation: A Fairer Scheme* (Office of the Minister of Labour, 30 July 1991).

11 Accident Compensation Act, s 317.

12 See Cara Crawford "New Zealand's Accident Compensation Scheme – Mental Injury Cover at the Margins" (LLB (Hons) Dissertation, University of Otago, 2017); Jack Christopher Whittam, "Mind Over Matter: A Case for Reforming New Zealand's Accident Compensation Law Concerning Work-Related Injury" (2021) 28 *Canta LR* 109; and Fiona Thwaites "Mental Injury Claims under the Accident Compensation Act 2001" (2012) 18 *Canta LR* 244.

13 *Taylor v Roper* [2021] NZCA 268, [2021] 3 NZLR 37 [*Roper CA*] at [4].

section.¹⁴ Mr Roper was her senior at the Air Force base, and Ms Taylor's job was to drive him home late at night.¹⁵ During 1986 and 1987, Mr Roper abused Ms Taylor. Three aspects of the abuse are material.¹⁶ First, on multiple occasions, Mr Roper locked the car doors and groped Ms Taylor as she drove him home. Secondly, on multiple occasions, Mr Roper locked Ms Taylor in a tyre cage and prodded her with an iron bar. Thirdly, Mr Roper behaved in an overtly sexualised way towards Ms Taylor and other female staff.

Ms Taylor first sought counselling for anxiety and depression in 1996, due to a variety of reasons including the suicide of her mother and the abuse at Whenuapai.¹⁷ The earliest records of treatment were from 2002 and Ms Taylor's first prescription of anti-depressants was in 2006.¹⁸ Ms Taylor stopped taking anti-depressants between 2008 and August 2013.¹⁹

In November 2014, Ms Taylor first heard that Mr Roper had been charged with serious sexual offending against other women between 1977 and 1988.²⁰ He was found guilty on 3 December.²¹ On 6 December, Ms Taylor contacted the police to tell them about what happened to her in 1986 and 1987. Four days later, she contacted her doctor and was re-prescribed anti-depressant medication.²² Mr Roper's name appears in medical notes from an appointment on 19 November 2015.²³ Ms Taylor's mental condition worsened in 2016, which she attributed to both her work and an inquiry led by the Air Force into Mr Roper's conduct.²⁴ Possibly frustrated by the police's delay, Ms Taylor filed a civil claim against Mr Roper in May 2016 for assault, intentional infliction of emotional harm and false imprisonment, seeking a total of \$550,000 in damages.²⁵ In July 2016, Ms Taylor notified the police she did not want to proceed with a criminal prosecution.²⁶ In December 2016, Ms Taylor saw a

14 At [4]–[8].

15 At [6].

16 At [6].

17 At [11].

18 At [12].

19 At [15].

20 At [17].

21 At [18].

22 At [19].

23 At [23].

24 At [24].

25 At [25]–[27].

26 At [28].

psychiatrist for the first time.²⁷ The psychiatrist found that Ms Taylor suffered from PTSD which originated from the events at Whenuapai.²⁸

This factual narrative shows that Ms Taylor's entire adult life has been interrupted by anxiety, depression and PTSD. Although Ms Taylor chose not to pursue prosecution, most of us would agree that Ms Taylor deserves some sort of justice for the wrongs done to her and the injuries she has suffered. How might New Zealand's system of personal injury compensation give justice to Ms Taylor? This question will be explored in light of community responsibility and the social contract, having first provided a brief overview of ACC's founding document.

III THE PHILOSOPHY OF THE SCHEME

A The Founding Document

The founding document of New Zealand's personal injury compensation system is the *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand*.²⁹ The Report identified that the social problem of personal injury in New Zealand had become intolerable and it proposed a new system for personal injury compensation.³⁰ The suggestion that our response to social problems should be improved is hardly a controversial point. But as with any argument which advocates for change, people either expand or qualify new proposals to conform with their current perception of reality. The Report itself recognised this, stating that the validity of any social measure will depend upon its current and future utility.

With this utility in mind, the Report identified two foundational principles necessary to create a rational system of personal injury compensation in the modern era of the 1970s.³¹ The Report named the first foundational principle Community Responsibility, and characterised it as a double argument.³² First, given that we all benefit from the productive work of citizens, we should all accept responsibility for those who are willing to work but are prevented from doing so by personal injury. Secondly, given that we all persist in following community activities, we all share a responsibility to compensate those who are the statistically necessary victims of personal injury.

27 At [29] and [30].

28 At [179].

29 Royal Commission report, above n 6.

30 At [1].

31 At [55].

32 At [56].

Having established community responsibility, the Report proposed its second foundational principle, called Comprehensive Entitlement:³³

... there can be no justification for providing from community funds for the same class of worker entirely inconsistent awards for precisely similar incapacities merely because fortuitously the causes which gave rise to them have at different stages of our social development been the subject of conflicting responses.

Turning to Ms Taylor's case, despite the Report's support for comprehensive entitlement, it may be ambiguous how Ms Taylor's injury should be approached. On the one hand, the Report is adamant that all personal injuries should be covered by the scheme, including those suffered due to criminal violence.³⁴ Ms Taylor's clear suffering might mean she should receive cover to reduce the loss which her injury causes to society. On the other hand, the Report's justification for comprehensive entitlement is community responsibility, which itself assumes that people participate in socially beneficial activities. While Ms Taylor's contribution to the Air Force satisfies this criterion, Mr Roper's criminal activities are the antithesis to socially beneficial. This perhaps means that Mr Roper should bear the responsibility of his actions, rather than receiving the protection of righteous members of society.

Using Ms Taylor's injury as a lens, this article will contrast a broad interpretation of the Report's principle of community responsibility with the more modern social contract interpretation which underpins current legislation.

B Community Responsibility—A Focus on Loss

This article first considers a form of community responsibility which focuses on Ms Taylor's loss alone. This approach argues Ms Taylor should be covered because regardless of cause, she has suffered a personal injury. Having suffered this loss, the attribution of fault becomes an irrelevant exercise because once Ms Taylor is injured, society suffers from Ms Taylor's incapacity.

This approach is supported by Richard Gaskins, as shown in an article where he set out to interpret the principle of community responsibility in the present day.³⁵ He asked: "But just what kind of society did he [Owen Woodhouse, the Report's chairman] imagine, and how was it connected to his key ethical principle of community responsibility?"³⁶

33 At [57].

34 At [288].

35 Richard Gaskins "The Enigma of Community Responsibility: Ethical Reflections on Accident Compensation" (2015) 46 VUWLR 789.

36 At 791.

For Gaskins, the key to community responsibility is that Woodhouse saw a complex society full of multiple causal factors.³⁷ In his opinion, the Report found that the common law's ability to provide compensation by establishing fault is restricted to linear and transparent patterns of causation. Although Ms Taylor's injury may be sufficiently linked to Mr Roper's conduct to show that he is at fault, this can only be known for sure after a trial.

The causal analysis of mental injury involved in a trial requires expert witnesses to make linear connections between actions and outcomes. It would be absurd to try to define the proportional connection between particular events and Ms Taylor's mental injury, or if a particular event was a cause of Ms Taylor's mental injury at all.³⁸ The causal matrix of mental injury is simply too complex to justify any forensic delineation of cause. A principle of community responsibility provides compensation for injuries like Ms Taylor's because the alternative, a forensic analysis of fault, is itself no satisfactory remedy to Ms Taylor's injury.

This argument addresses the pragmatic difficulties of proving fault. However, an argument based on principle also exists. Community responsibility for all loss is valid because any other principle creates arbitrary distinctions between injuries which are and are not covered by the scheme. If the cost of compensating Ms Taylor's injury was not borne by the community, the severity of Ms Taylor's injury would be unrecognised.³⁹ Ms Taylor has been plagued by mental injury her whole adult life. It would make no sense if she received no cover, but someone who suffered a transient physical injury, say in a minor car crash, would be covered. Richard Gaskins defines this argument as social cost theory.⁴⁰ Any personal injury will be suffered by the community from the moment after it occurs. As community responsibility is the only principle which ensures that all losses are covered, the principles of community responsibility and comprehensive entitlement are mutually dependent.

Richard Gaskins and Geoffrey Palmer rue that the current Act does not prioritise this ambitious vision of community responsibility. A different interpretation underlies the current Act, that of a social contract. Gaskins finds the social contract "simple",⁴¹ Palmer, "legalistic".⁴² Yet the reformers who

37 At 792.

38 Although this approach has been adopted in the past. See *Sivasubramaniam v Yarrall* [2005] 3 NZLR 268 (HC).

39 Royal Commission report, above n 6, at [279(d)].

40 Richard Gaskins "Woodhouse Heresies" (2023) 54 VUWLR 833 at 837.

41 Gaskins, above n 35, at 800.

42 Geoffrey Palmer "A Retrospective on the Woodhouse Report: The Vision, the Performance and the Future" (2019) 50 VUWLR 401.

drafted the scheme in light of this approach considered it fair and equitable.⁴³ What lies behind this divide in opinion?

C The Social Contract

The concept of a social contract is often used to justify arguments which advocate for a generous scheme, as the Court did in *Roper*.⁴⁴ Although the social contract approach is currently endorsed by the Accident Compensation Act's purpose section,⁴⁵ this article seeks to show that the social contract does not inevitably create a generous scheme, in contrast to a principle of community responsibility.

The social contract approach is centred around s 317 of the Act which forbids New Zealanders from suing for compensatory damages if their injury is covered by the scheme. The argument goes that s 317 establishes a metaphorical bargain between New Zealanders and the state. In exchange for the right to sue, the state will guarantee comprehensive entitlement.

This interpretation of the scheme has been favoured by those who consider that the Report was addressing a specific societal problem of industrial accidents, rather than fundamentally redefining our approach to personal injury compensation. The legislators of the scheme's 1992 reforms saw the scheme in this way. The words "community responsibility" are absent from the policy document *Accident Compensation: A Fairer Scheme*.⁴⁶ Instead, the document acknowledges the sacrifice made to individual responsibility by broad judicial interpretations of the scheme.⁴⁷ These decisions forced citizens, or insurers, to cover people who had not actually suffered what an ordinary person would consider an accident.⁴⁸ For this reason, in the reformers' opinion, the scheme had become too expensive and therefore unfair on New Zealand tax and levy payers.

This is a valid interpretation if one believes the Report was meant to solely address industrial accidents. However, the concept of a social contract has received criticism from some authors. Simon Connell questions the social contract because in his opinion the Report does not speak of foregoing the right to sue *in exchange* for comprehensive entitlement.⁴⁹ While on its surface accurate, supporters of community responsibility would find that the right to sue was not exchanged for comprehensive coverage but was instead outright replaced by a different set of principles.

43 Birch, above n 10.

44 *Roper* SC, above n 2, at [50] and [69].

45 Accident Compensation Act, s 3.

46 Birch, above n 10.

47 At 8.

48 At 8.

49 Simon Connell "Justice for Victims of Injury: The Influence of New Zealand's Accident Compensation Scheme on the Civil and Criminal Law" (2012) 25 NZULR 181 at 187.

Failing to mention community responsibility means that the social contract approach defines comprehensive entitlement with respect to whether we should or should not forego the right to sue. One might think that for the Report's authors, the issue was not whether we should forego the right to sue, but that we must. Yet for those who interpret accident compensation as a social contract, this question is the centre of the debate: does the contract make a fair exchange of common law rights for insurance from the New Zealand public?⁵⁰ In Ms Taylor's case, the question becomes: is it just that Ms Taylor forewent her common law right to sue Mr Roper in exchange for the security of entitlement under the scheme, at the cost of the New Zealand taxpayer? Hence, the interpretation of a social contract replaces community responsibility with a threshold assessment of the value of individual responsibility.

Under the social contract approach, there are multiple arguments which suggest that Ms Taylor's injury might or might not fall fairly within the scheme's ambit. The question ultimately depends on whether New Zealanders, as represented in Parliament, have decided it is fair to ask the insurer to provide compulsory coverage, in exchange for which Ms Taylor forewent her right to sue.

It could be argued that holding Ms Taylor to the contract is unfair because, first, the legislation shields Mr Roper from taking personal responsibility for his heinous actions.⁵¹ Ms Taylor should have the ability to vindicate her infringed rights by recovering from Mr Roper personally. Secondly, the right to sue is arguably more valuable to Ms Taylor than the compensation provided by the scheme.⁵² So long as Ms Taylor's injury does not prevent her from working, the compensation for her injury's treatment pales in comparison to the compensatory damages she might receive under common law for emotional harm. This larger sum might justly reflect the grievance which Mr Roper has caused Ms Taylor.

In contrast, Ms Taylor's injury might fall fairly within the contract because mental injury suffered from sexual abuse is a social concern which causes particularly profound psychological harm, justifying cover regardless of fault.⁵³ Sexual abuse is a particularly heinous act and often victims want to avoid any sort of re-engagement with their abuser in legal proceedings. If they can show evidence of abuse, any mental injury so caused can be appropriately addressed. This avoids an investigation of fault, which can often worsen mental injury, as it did in Ms Taylor's case.

50 Birch, above n 10.

51 Ailsa Duffy "The Common-Law Response to the Accident Compensation Scheme" (2003) 34 VUWLR 367 at 384.

52 At 370.

53 Whittam, above n 12, at 119.

Ultimately, Parliament decided in 1992 that mental injury caused by sexual abuse should continue to be included in the social contract,⁵⁴ even though all other types of mental injury should be excluded unless they are "because of" a physical injury.⁵⁵ Evidently, the social concern for mental injuries caused by sexual abuse, or by physical injury, was of greater concern than any other type of mental injury. The reformers themselves recognised that this restriction had "an appearance of arbitrariness".⁵⁶

Despite the conclusion that mental injury caused by sexual abuse should be included in the contract, Parliament has since modified the contract in favour of greater personal accountability. Simon Connell investigated this by questioning Geoffrey Palmer's 1994 assertion that "the fact that the wrongdoer does not pay excites few".⁵⁷ Parliament's decisions indicate otherwise. A middle ground has been found between compensatory and retributive justice by allowing a sentence of reparation to top up the 80 per cent of earnings compensation received under the scheme.⁵⁸ The courts considered this proposition would amount to double recovery, contravening the social contract philosophy of the scheme. However, Parliament decided otherwise, overriding the courts and finding that injuries caused by criminal acts deserve greater recognition of individual rights.

This "constant legislative fiddling", in the words of Palmer, proves that the social contract requires every kind of injury to be considered in light of whether individual responsibility should operate, or whether the generosity of the New Zealand taxpayer justifies an exchange of individual rights for the guaranteed entitlement the scheme provides.⁵⁹ This question is a political choice and should therefore perhaps not be considered a grave violation of the Report's grand principles.⁶⁰ This is especially so for mental injuries like those suffered by Ms Taylor because in all likelihood, the Report's authors simply did not consider the effect of this kind of mental injury.⁶¹ The Report was primarily concerned with industrial accidents and if injury caused by criminal acts was considered at all, it was merely an afterthought. A brief five-line paragraph buried in the Report defines victims of criminal injury as a

54 Accident Rehabilitation and Compensation Insurance Act 1992, s 8(3); and Accident Compensation Act, s 21.

55 Birch, above n 10, at 32.

56 At 32.

57 Connell, above n 49, at 189.

58 Simon Connell "Overturning the Social Contract?" [2014] NZLJ 314.

59 Palmer, above n 42, at 413.

60 Connell, above n 49, at 200.

61 Geoff McLay "Nervous Shock, Tort and Accident Compensation: Tort Regained?" (1999) 30 VUWLR 197 at 218.

"special group".⁶² The Report concludes without elaboration that these people would automatically be included because the scheme is all-embracing and specific groups in the community need not be mentioned.

In the end, when applying the social contract which Parliament has devised, the courts attempt to arrive at some conception of justice by relying on the kinds of arguments above. The point of exploring the philosophy of the scheme is to show that the Report's text has evolved into considerably different visions for New Zealand's unique system of personal injury compensation. This article now turns to the decision in *Roper* to show how the courts use different arguments to justify coverage under the scheme.

IV THE COURT'S DECISION IN ROPER V TAYLOR

The purpose section of the Act explicitly refers to the scheme as a social contract.⁶³ Therefore, the Act includes different "compensable conditions" which define categories of injury which the legislature has deemed a fair part of the social contract.⁶⁴ Two of these compensable conditions were relevant to Ms Taylor's case. First, s 21 of the Act provides cover in cases of mental injury caused by certain criminal acts, including indecent assault. Secondly, s 21B of the Act is a specific compensable condition added to the scheme in 2008.⁶⁵ It covers those who have suffered mental injury by directly perceiving a single, sudden traumatic event at the workplace which would cause mental injury to the ordinary person.

Ms Taylor's case falls into a particular class of "abuser shield" cases, as explained by Ailsa Duffy.⁶⁶ Ms Taylor sought to avoid the scheme's coverage due to the higher compensation she would receive by way of civil damages. Therefore, the issue for the courts was whether Ms Taylor's civil action in assault and false imprisonment was statute-barred because she had cover under the Act. This article will analyse the judgments of the Court of Appeal and Supreme Court in turn.

A The Court of Appeal Judgment—s 21

The Court of Appeal found that Ms Taylor was covered by s 21 of the Act because she had suffered mental injury caused by indecent assault.⁶⁷ By a majority, the Court found that while Ms Taylor was statute-barred from an assault action, she could sue Mr Roper in false imprisonment. The Court found that Ms Taylor's false imprisonment caused a loss separate to the loss caused by the assault. Ms Taylor

⁶² Royal Commission report, above n 6, at [288].

⁶³ Accident Compensation Act, s 3.

⁶⁴ Birch, above n 10, at 31.

⁶⁵ Injury Prevention, Rehabilitation and Compensation Amendment Act 2008, s 6.

⁶⁶ Duffy, above n 51.

⁶⁷ *Roper* CA, above n 13, at [142] and [149].

did not receive cover under the Act for this loss and therefore she was not bound by the social contract.⁶⁸

The Court had to interpret the legal principle laid down in the case of *Willis v Attorney-General* which considered when a false imprisonment action is barred by the Act.⁶⁹ The Court in *Willis* held that a plaintiff could claim damages for false imprisonment if the false imprisonment had been a "substantial cause" of the injury. The decision advocated for "a common sense approach, guided by what is within the broad spirit of the accident compensation system and what is outside it".⁷⁰

Although the strictest followers of community responsibility would hold that no personal affliction should lie outside the Report's proposed scheme, the "broad spirit of the accident compensation system" still seems to be more analogous to a system which focuses on harm as a social cost than individual responsibility.⁷¹ The minority, French J, interpreted *Willis* consistently with this approach. The judge found that "standing back and looking at the nature of the harm", the harm was a series of incidents which had a cumulative impact on Ms Taylor.⁷² It would be artificial to keep loss caused by false imprisonment outside the scheme in this case because the injury as a whole is "undoubtedly a claim in the nature of personal injury by accident".⁷³ This approach focuses on Ms Taylor's loss and still acknowledges that cover depends on how Parliament has defined coverage under the scheme. French J used these arguments to conclude that Ms Taylor's entire loss was a personal injury which fitted within s 21 of the Act.

In contrast, Ms Taylor successfully persuaded the two other members of the Court that she could sue Mr Roper for false imprisonment alone because the loss suffered from being locked in a tyre cage was separate to the loss she suffered by assault and battery. In the majority's opinion, there was no evidence she was subjected to sexual abuse while she was locked in the tyre cage (despite the physical prodding with an iron bar while in the cage).⁷⁴ Therefore, the loss suffered by Ms Taylor in the tyre cage alone was a substantial cause of her injury, as stated in *Willis*. This meant that the loss was not a personal injury covered by the Act and therefore Ms Taylor could recoup damages for that loss.

The difference between the judges' reasoning shows the importance of how judges interpret the philosophy and purpose of the scheme. French J considered that Ms Taylor's injury undoubtedly fell

68 At [208].

69 *Willis v Attorney-General* [1989] 3 NZLR 574 (CA).

70 At 579.

71 See at 579.

72 *Roper CA*, above n 13, at [169].

73 At [169].

74 At [207].

within the kind of loss Parliament intended for the scheme to cover. This approach removes any necessity to connect loss to cause in a linear way. However, such a connecting-the-dots exercise lay at the heart of the majority's reasoning. The majority's decision implied that connecting losses with their causes is an essential part of identifying a boundary between coverage under the scheme and where the right to sue returns as an equally valid tool for compensating loss.

The majority's approach has been criticised as inconsistent with a generous interpretation of the Act.⁷⁵ However, the key problem shown by the Court of Appeal's decision is the inconsistency between the judges' philosophical approaches to the scheme. Broad notions of community responsibility which derive from the original Report continue to encourage some judges to interpret the scheme with a focus on loss as a social cost. However, the purpose of the social contract according to the 1992 reformers was to restrict judicial interpretations of the scheme and to clarify the boundaries of cover.⁷⁶ In contrast to French J, the majority's simple application of the *Willis* substantial cause test implied a prioritisation of that objective.

Decisions like that of the Court of Appeal create an ambiguity in the Act's scope which has unfortunate consequences. The ambiguity encourages those in Ms Taylor's position to define their injury with respect to a cause not included in the social contract. The attraction of substantial damages as highlighted by Duffy is sufficient to ignore the capricious and costly nature of the tort system, let alone the difficulty of proving that a type of injury lies outside the social contract.⁷⁷ Furthermore, this attraction potentially obfuscates the proper tool to achieve vindictive justice—conviction of the abuser under criminal law.

As Palmer notes, this is the reality of keeping some injuries in and leaving some out of the current scheme. The common law action has not been eliminated as the Report foresaw; it has instead had a fence built around it.⁷⁸ Deciding whether claimants have successfully vaulted the fence is difficult and costly because Parliament provides judges with no principles for deciding cases where claimants have partly, substantially or materially suffered from injuries covered under the scheme. To fill in this statutory void, judges use various and at times inconsistent philosophies to justify why a particular injury falls within the linear and binary categories of the Act's social contract.

75 Ben Clark "*Taylor v Roper: A Step Backwards from the Generous Approach to Accident Compensation?*" (LLB (Hons) Dissertation, Victoria University of Wellington, 2021).

76 Birch, above n 10, at 8.

77 Duffy, above n 51.

78 Interview with Sir Geoffrey Palmer, Professor of Law (Kim Hill, Nine to Noon, 20 June 2000) as cited in Paul Heslin "Pushing the Boundaries of Cover for "Purely" Mental Injury" [2001] ELB 115.

B The Court of Appeal Judgment—s 21B

After the Court of Appeal's decision, both parties appealed to the Supreme Court. While the Supreme Court found that the false imprisonment issue deserved consideration, the Court considered that s 21B might provide cover for Ms Taylor's false imprisonment independently of s 21.⁷⁹ The Supreme Court implied that Ms Taylor's false imprisonment could be a single, sudden traumatic event. The Court refused to hear the case until the Court of Appeal had a chance to "ventilate" the issue.⁸⁰ That this course of action was "unavoidable" shows the costs of filling in the statutory voids in the current scheme.⁸¹ Both litigants and judges must rely on statutory purpose, philosophy and history to justify whether particular types of injury fairly lie in or out of the social contract.

Once given the opportunity, the Court of Appeal unanimously found that Ms Taylor was not covered by s 21B, for essentially the same reason that French J found cover *was* established under s 21. Ms Taylor's injury was the result of a cumulative series of events and was not attributable to any one cause.⁸² Parliament deliberately restricted s 21B's ambit to single, sudden, directly perceived traumatic events. The Court of Appeal referred to the explanatory note accompanying s 21B, which stated that Parliament intended to restrict coverage to those who suffer events like vehicle collisions and hold-ups.⁸³ The Court of Appeal concluded the section's application to Ms Taylor's injury would be quite unrealistic: "we have difficulty with the proposition that the section is intended to extend to apprehended, albeit unwanted, incidents of physical harassment in the nature of detention or confinement".⁸⁴

Although this approach is draconian, it accurately reflects Parliament's deliberate choice to restrict s 21B's ambit to collision or hold-up situations. An extended series of abuse or false imprisonments cannot be considered a single sudden traumatic event. The required conclusion under the current Act is that Ms Taylor's injury is not one which Parliament, and therefore New Zealanders, expect the levy and taxpayer to shoulder, at least with respect to s 21B.

C The Supreme Court Judgment—s 21

Thus far, the Court of Appeal had found that Ms Taylor received cover under s 21. However, that Court found she could pursue an action in false imprisonment because the loss caused by her false imprisonment was separate to the injury covered by the Act. The Court also concluded that Ms Taylor

⁷⁹ *Attorney-General v Taylor* [2020] NZSC 152 at [8].

⁸⁰ At [9]–[11].

⁸¹ See at [9].

⁸² *Taylor v Roper* [2021] NZCA 69, [2022] 2 NZLR 671 [*Roper* CA recall decision] at [45] and [49].

⁸³ At [30].

⁸⁴ At [31].

was not covered by s 21B because she had not suffered injury due to a single, sudden traumatic event. Having filed her statement of claim in 2016, Ms Taylor's case was heard by the Supreme Court in 2023.

Like the Court of Appeal, the Supreme Court found that Ms Taylor was covered by s 21.⁸⁵ However, in contrast to the Court of Appeal, the Supreme Court found Ms Taylor had no right to sue for any damages.⁸⁶ Before addressing the issues in the case, the Court seized the opportunity to provide an overview of the legislative history of ACC.⁸⁷ It covered the Report at some length. A key plank of the Report, according to the Court, was the abolition of civil actions because the Report found them to be "illogical, uncertain, costly, slow-moving and an impediment to rehabilitation".⁸⁸ The Court continued to explain that in exchange for broad coverage under a "unified and comprehensive" system, New Zealanders are held to a social contract where they forego their right to sue under the common law.⁸⁹

The Supreme Court noted the scheme's broad coverage, but this is not an equivalent to the "unified and comprehensive" system envisaged by the Report.⁹⁰ According to the interpretation of the Report's vision which extends beyond mere accidents, comprehensive coverage is mutually dependent on the principle of community responsibility.⁹¹ The right to sue is not exchanged for cover which appears under the new scheme.⁹² Rather, the right to sue is replaced because it fails to live up to the Report's two mutually dependent principles of community responsibility and comprehensive entitlement.⁹³

This distinction matters because only the principle of community responsibility, as described in the Report, provides a logical basis for the unified and comprehensive coverage to which the Supreme Court referred. The social contract theory embodied by the Act does not reflect this universality because cover depends on whether Parliament decides a particular type of injury justifies that New Zealanders be fairly held to the social contract. The Supreme Court in *Roper* was forced to ask by the current statute whether New Zealanders, via Parliament, have decided that Ms Taylor has given up

85 *Roper* SC, above n 2, at [48].

86 At [50].

87 The Supreme Court rarely hears ACC matters because the Court of Appeal's decision on appeals from the Corporation's decision to grant cover are final. See Accident Compensation Act, s 163(4). See Palmer, above n 42, at 418 for criticism.

88 *Roper* SC, above n 2, at [33].

89 At [50].

90 See Gaskins, above n 35.

91 Gaskins, above n 35.

92 Connell, above n 49, at 205.

93 Gaskins, above n 35.

the right to sue in exchange for coverage. If the Court found coverage was not established, the right to sue returns as a matter of course. This logic was foreign to the Report's vision of a unified and comprehensive system.

In light of this distinction between the Report and the social contract, the Court had difficulty in justifying how the current Act provides universal coverage. The Court first found that the scheme covered Ms Taylor's injury entirely, relying on similar reasoning to that used by French J in the Court of Appeal.⁹⁴ Section 21 of the Act uses broad language, reflecting Parliament's concern for sexual abuse victims. Ms Taylor would have cover under s 21 if she suffered "mental injury caused by an act 'of a kind' that is 'within the description of' an offence listed in sch 3". While Ms Taylor suffered different kinds of abuse, all of Mr Roper's actions were "of a kind" that were "within the description of" indecent assault. Hence, the Court found that permitting Ms Taylor to sue for false imprisonment would be wrong because that would allow her to recover damages, and receive coverage under the scheme, for the same injury.⁹⁵

However, the Court went on to say that even if the acts of assault and false imprisonment could be separated, granting compensatory damages for false imprisonment would be inconsistent with the social contract because the assault was a "material cause" of Ms Taylor's injury.⁹⁶ The Court justified this approach in part by saying that the social contract establishes a system where "the need for compensatory damages is replaced with *universal* compensation".⁹⁷ But yet, under the current scheme, coverage is patently not universal because it is still possible to sue for personal injury if that injury is not covered by the Act.⁹⁸ The Court's argument conflates the social contract with an interpretation of community responsibility that focuses on loss alone. That is, Ms Taylor and all other New Zealanders should receive universal coverage under the scheme because there is a community duty to compensate each other for all kinds of personal injury, regardless of cause.

The Supreme Court's adoption of French J's approach would cover Ms Taylor's entire injury. However, the Court decided to bolster s 21's application with an argument of universal coverage. This fails to recognise the boundaries of the social contract. Universal coverage is impossible without legislative change and, consequently, a principle of universal coverage as used by the Court does not provide a useful tool to understand the current boundaries of the Act.

94 *Roper* SC, above n 2, at [48].

95 At [50].

96 At [62].

97 At [69] (emphasis added).

98 Accident Compensation Act, s 317.

D The Supreme Court Judgment—s 21B

Having established cover for Ms Taylor's entire injury under s 21, the Supreme Court did not need to analyse s 21B. However, the Court did so, and gave s 21B as much space in its judgment as the arguments on the issues necessary to decide the appeal. The lengthy analysis of s 21B provides further evidence that the Court preferred an interpretation which prioritises comprehensive entitlement, despite the contradiction between comprehensive entitlement and the Act's boundaries of cover.

To receive cover under s 21B, Ms Taylor must have suffered mental injury caused by a single, sudden, traumatic event directly perceived in the workplace, which would cause mental injury to people generally. It is ironic that the requirements of s 21B are very similar to the factors needed to establish a duty of care under the capricious tort system the Report's proposal sought to replace.⁹⁹ Despite this, the Supreme Court's interpretation of s 21B remains consistent with the desire for a scheme that provides comprehensive coverage.

To address s 21B, the Court criticised two aspects of the Court of Appeal's s 21B judgment. First, the Court addressed the Court of Appeal's definition of whether mental injury had been caused by a "sudden" event. The Court found the Court of Appeal defined sudden as "not foreseeable in the ordinary course of employment".¹⁰⁰ The primary reason why the Supreme Court questioned this definition was that it might withhold coverage from those with dangerous jobs, where traumatic injuries might be more foreseeable.¹⁰¹

The Court stated this would be counter to the scheme's objective of comprehensive coverage.¹⁰² Yet s 21B does not provide comprehensive coverage and such an approach is not justified by the social contract that the Act currently endorses.¹⁰³ That the Supreme Court uses comprehensive entitlement as its primary justification, instead of judicial authority on s 21B or the purpose section of the Act, is further evidence that the Court's interpretation may contradict the Act's exhaustive boundaries of cover. The Court further criticised the Court of Appeal's interpretation of s 21B because it might contradict Parliament's intent to create a generous and intuitive compensation scheme. There is some irony in labelling the scheme as intuitive as parties need to spend thousands of dollars and take up valuable court time to figure out just where the scheme's boundaries lie.

Having addressed the Court of Appeal's interpretation of "sudden", the Supreme Court moved on to address whether Ms Taylor's injury was caused by a single event of false imprisonment as s 21B

99 Thwaites, above n 12, at 251.

100 *Roper* SC, above n 2, at [92].

101 At [94].

102 At [94].

103 At [30] and [31].

requires. The Court concluded "it may well be" that each separate event of abuse could be a single sudden event because each event could be seen as a material cause of Ms Taylor's injury.¹⁰⁴ The Court found this to be consistent with the scheme's objective of wide-reaching cover. This reasoning effectively prioritises the scheme's perceived objective of wide-reaching cover over everything else. Furthermore, the Court's sources to back up the claim that s 21B is generous were selectively chosen.

First, the Court cited a paragraph of the Select Committee report on s 21B which referred to an intention to expand the scope of s 21B to cover a series of events which make up a "single incident or occasion".¹⁰⁵ This was to ensure that a single event would not be excluded if it comprised a series of multiple events. On its own, this might suggest that Ms Taylor's injury is covered by s 21B. However, the following paragraphs not cited in the judgment provide important context. The Committee's intention was to ensure that the single event of something like a truck crash was not to be broken down into minutiae: a truck driver seeing a person, hitting the person, stopping to ascertain injuries and seeing the person's injuries.¹⁰⁶ With this information, it is questionable whether the provision was meant to cover Ms Taylor's situation.

Secondly, the Court cited parliamentary debates over s 21B which showed that a miner suffering from PTSD caused by a collapse was intended to receive compensation.¹⁰⁷ The Court used this to challenge the Court of Appeal's restrictive interpretation of "sudden". A miner might be trapped by the sudden collapse of a rockface, and the lengthy duration of the entrapment should not mean the event is not sudden as the Court of Appeal suggested.¹⁰⁸

While the Court's point may be a valid critique of the Court of Appeal's interpretation of "sudden", the overall tenor of opposition to the Bill enacting s 21B reveals that cover under the section is delineated arbitrarily and is not comprehensive. The opposition highlighted the arbitrary requirement that an injury must be suffered while at work, with the example of customers at a bank during a hold-up. The customers would not receive cover under s 21B, while the workers at the bank would. The only justification is that "the Government chooses to cover a situation simply because the funding tends to come from employers. We want to know why other situations are not being covered".¹⁰⁹

104 At [102].

105 At [86] and [87].

106 Injury Prevention, Rehabilitation and Compensation Amendment Bill (No 2) 2007 (170-2) (select committee report) at 2.

107 At [96].

108 *Roper* CA recall decision, above n 82, at [33].

109 (11 December 2007) 644 NZPD 13944.

Even Members of Parliament who supported the Bill attacked the arbitrary exclusion of those who are injured by perceiving multiple events.¹¹⁰ This critique is particularly relevant to Ms Taylor's case. Why should Ms Taylor be covered if she had suffered only one traumatic event but not if she has suffered multiple events? Why should an emergency worker receive cover if they see a single traumatic scene but not if they have seen multiple traumatic scenes?¹¹¹ Perhaps the best summary of the Bill across its readings in the House came from Peter Brown MP, who supported the Bill: "We fought hard to get this sort of coverage. It is only very lukewarm coverage, but at least it is a move in the right direction."¹¹²

The Supreme Court's conclusion that s 21B covers multiple events because each separate event is a material cause of the injury expands s 21B's ambit. But the Court's reliance on comprehensive entitlement does not assist s 21B's interpretation because it simply ignores the boundaries which Parliament intended to draw. For example, one important unresolved question under the Court's approach is whether "feather that broke the camel's back" events are covered. Perhaps they are not, because considered proportionately, the event would not be a material cause of the accident over time. But considered absolutely, the event would be a material cause because, but for the event, the mental injury would not have occurred. Such issues remain unclear in light of the *Roper* decision and the Supreme Court acknowledged that the question remains up "for debate".¹¹³

The Supreme Court, having found that Ms Taylor's entire injury received cover under s 21, prevented Ms Taylor from receiving civil damages. Seven years after filing her statement of claim, Ms Taylor failed to get the result she wanted. Normally, the loser of a civil suit is required to pay costs. The Prime Minister spared Ms Taylor this injustice after her loss in the trial decision.¹¹⁴ The Supreme Court followed suit.¹¹⁵

V THE FUTURE

Ms Taylor's story proves that the courts struggle to construct a helpful method to define the boundaries of the current scheme. Rather than defining the scheme's boundaries, the Supreme Court considered that broad, if not universal, coverage should instead be the cornerstone of our compensation system. Yet this goal can only be achieved with legislative change. By relying on a perceived universal coverage anyway, which cannot be found in the current Act, the Supreme Court

110 (17 June 2008) 647 NZPD 16645.

111 (17 June 2008) 647 NZPD 16645.

112 (11 December 2007) 644 NZPD 13950.

113 At [62].

114 Sam Hurley "Prime Minister tells NZDF to halt court costs claim against 'groper Roper' victim" *The New Zealand Herald* (online ed, Auckland, 23 November 2018).

115 *Roper v Taylor* [2023] NZSC 79.

has left the law in a state of limbo. The Court's definition of coverage is insufficiently broad to prevent future disputes over the scheme's boundaries, yet it is broad enough to incite disputes over the faithful application of the Act.

To conclude, this article briefly suggests how the courts could use an overarching narrative of community responsibility to merely "tip the balance" in cases which seem to fall within the social contract even if the text of the Act might indicate other possible interpretations. This approach is most consistent with French J's judgment in the Court of Appeal. It seeks to avoid endorsing a generic principle of comprehensive coverage because that would ignore the types of injury Parliament deliberately excluded from the social contract. This approach minimises judicial legislating while also minimising the number of arbitrary boundaries of cover. The final part of this article will use the facts of *Roper* to illustrate this approach.

The essential question is: which types of injury have New Zealanders decided to include within the social contract? Section 21 of the Act reflects New Zealanders' concern for those who have suffered mental injury caused by sexual abuse. The 1992 policy document claimed that "the Government is very aware of [sexual crime victims'] needs and of the need to achieve equitable compensation for them".¹¹⁶ Consequently, the provision for cover of mental injury caused by sexual abuse includes broad language. It provides cover for injuries caused by an act "of a kind" that is "within the description of" a listed offence.¹¹⁷

The problem in Ms Taylor's case was not whether she had suffered abuse. Instead, the issue was that her false imprisonment could technically have caused a loss separate to the abuse. Viewing her injury in this way, in the words of French J, "does not reflect the reality of the case".¹¹⁸ Ms Taylor's injury stems from indecent assault and false imprisonment, and both actions were involved in a series of one man's reprehensible conduct. Given that Parliament has expressed a concern for the needs of people like Ms Taylor, community responsibility could step in to justify why her coverage should be complete. The community has expressed concern for Ms Taylor by including her type of injury within the social contract in broad terms. In Ms Taylor's case, complete coverage eliminates a forensic delineation of cause without straying beyond the ambit of the social contract.

That said, the courts cannot ignore the social contract Parliament prescribed in favour of comprehensive entitlement. This occurred when the Supreme Court applied s 21B to Ms Taylor's case. Section 21B responds to a narrow class of injury with restrictive language. There is real doubt that Parliament intended Ms Taylor's injury to be covered by s 21B. The Court of Appeal seemed right to note that Ms Taylor's complaint was never about any particular event as targeted by s 21B, but rather

¹¹⁶ Birch, above n 10, at 33.

¹¹⁷ Accident Compensation Act, s 21.

¹¹⁸ *Roper CA*, above n 13, at [168].

an extended course of predatory conduct.¹¹⁹ In this situation, community responsibility should not be used to ignore the social contract's boundaries. Such an approach encourages arguments over the boundaries of the scheme, which directs attention away from compensating for the injury itself. The 1992 reformers hoped that an exhaustive definition of the word "accident" would clarify the scheme's ambit.¹²⁰ The use of community responsibility to circumvent this desire would only increase the administrative burden on claimants.

The restrictive nature of s 21B might mean cases of "tipping the balance" are rare. However, the case of *Davis v Portage Licensing Trust* could be an example.¹²¹ This case was cited by the Supreme Court as a "textbook example" of coverage under s 21B.¹²² However, in that case, a bar attendant suffered three hold-ups in as many months. A strict interpretation of s 21B would exclude this case because s 21B only covers mental injury caused by a single event, not three events. As a result, rather than a paradigmatic example, this case seems to lie on the boundary of s 21B's ambit. However, a principle of community responsibility might tip the balance in favour of cover because a hold-up is the exact situation Parliament envisaged when drafting the section. Since New Zealanders have shown particular concern for the mental injury suffered by victims of hold-ups, this might justify why this type of injury should fall within the social contract, notwithstanding s 21B's requirement that a single event caused the mental injury.

VI CONCLUSION

The author is aware that the proposed use of community responsibility still requires an arbitrary line to be drawn somewhere along a continuum of inclusion within the social contract. However, this approach intends to avoid the problems caused by pushing an approach of universal coverage at all costs. Comparing the social contract philosophy with community responsibility has shown that only community responsibility can truly justify comprehensive coverage. To achieve this, legislative change would be needed to reduce the arbitrary exclusion of some injuries, particularly mental injury. However, until that time, the courts' relentless broadening of the scheme's coverage provokes arguments over the abstract boundaries of coverage, like in *Roper*, rather than putting resources into compensating for the injury itself, by whatever means. Ms Taylor's story shows that the philosophy of personal injury in judicial decisions will continue to play an essential role in defining the, at times, arbitrary and uncertain cover under the accident compensation scheme.

¹¹⁹ *Roper* CA recall decision, above n 82, at [45].

¹²⁰ Birch, above n 10, at 31.

¹²¹ *Davis v Portage Licensing Trust* [2006] 1 ERNZ 268 (EmpC). This case was decided before s 21B's enactment.

¹²² *Roper* SC, above n 2, at [93].

