

IN THE MATTER of a Criminal Appeal

BETWEEN **PETER MILES DAVIES**

Appellant

AND **NEW ZEALAND POLICE**

Respondent

Hearing 5 August 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel G S M McDonald and C R Gates for Appellant
Solicitor-General, A M Powell and C Brown for Crown

CRIMINAL APPEAL

10.05 am

McDonald May it please the Court, McDonald with Gates for the Appellant.

Collins Together with Mr Powell and Miss Brown, I appear for the Respondent Your Honours

Elias CJ Thank you Mr Solicitor.
Now there was a minute put out by the Court, are you going to address that? I am not sure what has been decided about that.

McDonald Subject to the leave of the Court, I have a memorandum that can be filed by consent, on the basis that it's contents are factually accurate and secondly, on the basis that the respondent reserves it's position concerning its relevance.

Elias CJ Yes, the relevance, really the Court minute was put out because both counsel in their written submissions referred to the insurance issue, but perhaps you can develop that later. Mr Solicitor, you have seen this memorandum, we will receive it, and then we will make of it whatever counsel suggest we might.

Collins I am happy with that course of action, your honour.

Elias CJ Thank you.

Tipping J Is your microphone on Mr McDonald, I was not hearing you very well?

McDonald I am a bit of a technophobe, your honour.

Tipping J Madam Registrar? Yes it is on.

McGrath J You can pull it closer to you.

McDonald I will file a memorandum now.

Elias CJ Madam Registrar, if you could pass that round. Was no enquiry made of the insurance industry?

McDonald There was Ma'am.

Elias CJ There was

McDonald The secretary of the Insurance Council was approached, who approached the member of the Council.

Elias CJ Oh, I see paragraph 2. So this is the information obtained from that source. Sorry, I jumped over that. Yes, thank you.

McDonald May it please your honours, the appellant's position in this case, is that s.32(5), precludes reparation for the loss of 20% of weekly earnings, because that loss or damage is part of a loss to which an entitlement, the weekly compensation entitlement responds. It is

the appellant's case, that this position is consistent with the legislative history of s.32(5), the structure and purpose of the Compensation Act and it is reasonable, when the entitlement is seen as part of the package of a guaranteed scheme. Therefore, in the absence of clear language that compels the court to reach a different view, the legislature should be presumed to have so intended. I intend to deal with seven points briefly. First the consequences of the respondent's position. Secondly, a comment on the history of reparation since the introduction of ACC, the legislative history of s.32(5), the substitution of entitlement for cover under s.32(5) on the third reading, and 33 (1) (c) (ii). Sixth, the use of the word payable under s.6 of the Compensation Act and finally a brief comment on paragraphs 47 – 60, of the respondent's submissions. If the respondent is right then it is not just the weekly compensation entitlement that can be topped up, in principle there is no reason why any of the other entitlements could also be topped up. That would include in addition to the 20% of weekly earnings, weekly compensation for loss of earnings above the maximum, loss of potential earnings above those provided for, loss resulting from permanent impairment above the \$100,000 maximum, as adjusted for inflation. Loss above that allowed for the victims actual level of impairment by regulations made under the act.

Tipping J Does that proposition involve quite an extended meaning of the word consequential on? Was that too cryptic? You are seeming to me to suggest that reparation could cover every single aspect of the old personal injury regime that's not compensated under ACC – in other words loss of a leg. You'd say oh well the Schedule says so much, but let's top it up under reparation. Is that what you're arguing?

McDonald Well Sir, that situation if you had for example a violinist who lost an arm and the level of impairment that was awarded under the regulation would be whatever it was under the regulation, if the respondent's position is right, the consequences

Tipping J The word consequential in this context I think has a specialised meaning. It doesn't mean everything that flows is a matter of cause and effect.

Anderson J It had a specific meaning in the days of personal injuries didn't it?

Tipping J Yes, yes.

- Elias CJ However it doesn't detract from your point which is that other consequential loss which is covered by the well I keep calling it the ACC legislation, would have to also fit within the argument of the respondent.
- McDonald Yes.
- Tipping J Yes I agree entirely but it's just that I thought you were gilding the lily a bit Mr McDonald.
- McDonald Unintentionally Sir.
- Anderson J I think the short answer to my brother Tipping's question is yes.
- McDonald Yes. In my submission the position taken by the respondent would result in disparities between victims of crime and victims of other types of accident. It would also result in disparities among victims of crime who fall outside the maxima provided by the Compensation Act and those who don't. So the position for which the respondent contends creates an ancillary system outside the Compensation Act for consequences of physical harm. It's a system that's governed by the discretionary elements in the provision of reparation under the Sentencing Act. My submission is ancillary system is inconsistent with the purpose and structure of the Compensation Act which treats victims in the same way irrespective of how they come to suffer the accident. Secondly, entitlements respond to the loss or damage in a way that is considered fair and appropriate, given they come as part of a package under a guaranteed scheme. I accept that since 1975 down to the passing of the present s. 32 compensation up to half a fine could be awarded to a victim for physical harm notwithstanding ACC. The two points I make about that are first there is a difference between that and the ancillary compensation system for which the respondent contends, and secondly under that legislation, the legislature clearly authorised the payment in addition to ACC. The legislative history underpins.
- McGrath J Sorry, you're moving on now are you from that point you just made. Could you just repeat the first point again, I didn't quite catch it?

McDonald The first point was there was difference between compensation being awarded up to half of a maximum fine and the ancillary system of compensation for which the respondent now contends.

McGrath J But would it be fair to say of the old system that it was all within the rubric of the punishment represented by the fine? The punishment could never be greater than the fine, which would be assessed according to the culpability for the offending.

McDonald Yes.

McGrath J Yes, that is what I had understood the position during that period to be and I'll be interested to see how you characterise the position on the judgments of the Courts below in that regard.

McDonald As Your Honour pleases.

Elias CJ Mr McDonald, I meant to look up – what's the maximum penalty for careless use causing injury?

McDonald Ah I'm afraid

Elias CJ Don't worry somebody else can answer it later.

McDonald Yes.

Elias CJ It's just that it does occur to me that the result contended for, well the result reached by the Court of Appeal does have the rather startling consequence that maximum penalties may be greatly exceeded if imposed as reparation, and I just wonder about fundamental principle and how that aligns with it.

McDonald My submission would be that that would be undermining of the principal structure and purpose of the Compensation Act.

Blanchard J But wouldn't the same be true if it was reparation for property damage?

McDonald No Sir because property damage is outside the ACC.

Blanchard J Yes I know that, but my point is there could be an award for reparation in relation to property damage which was a great deal more than the maximum fine.

Elias CJ Justice Blanchard's answering my point rather than yours thanks.

McDonald Yes.

Tipping J You're still on your first point consequences are you? Your highlighting the disparity as against different victims and different situations and all that sort of thing?

McDonald Yes.

Tipping J Yes.

McDonald And I was now going to move on to the legislative history of s.32(5). At para.32.1.1, the respondent relies on the Ministry of Justice report of 4 September 2001 which states that reparation would include payment for loss of income and medical expenses arising out of an assault, and I accept it, that's what the report says, but that report did not consider the impact of the relevant Compensation Act. That's made clear in the subsequent report by the Ministry of Justice dated the 18th December, which at the foot of page 5

Elias CJ Sorry, what are we looking at here?

McDonald Document 35 in the respondent's bundle at the foot of page 5.

Elias CJ Sorry, tab 5?

McDonald Tab 35 of the respondent's bundle.

Blanchard J Now what is this document?

McDonald This is the Ministry of Justice report 18 December.

Blanchard J Are we entitled to look at that?

McDonald In my submission it's relevant background for which the Court

Blanchard J Well there's a lot of things that might be background, it's a question of whether it's admissible. It doesn't have the same sort of standing as a Parliamentary document produced within the legislature during the process. This is the Ministry making its comments to the Select Committee

McDonald Yes.

Blanchard J And I've always been rather doubtful that even under the somewhat looser regime that has applied in recent decades, the Courts are entitled to look at this.

McDonald My submission is relevant because the recommendation that was made was accepted by the sub-committee.

Blanchard J Well if you can point us to the Select Committee saying that, that's a different matter.

Tipping J Are you saying that if the earlier one is referred to, this one also should also be referred to? The one you referred to

McDonald Most certainly Sir.

Elias CJ That was the UN report wasn't it?

McDonald No, that was the earlier report by the Ministry of Justice for September which is at tab 34 - the previous tab.

Tipping J So it's sort of all or nothing?

McDonald Yes.

Tipping J You shouldn't have just cherry picked them?

McDonald Yes.

Tipping J Well I understand the force of that point. I'm a bit with my brother Blanchard – I'm not sure that it should be in here at all, any of that, but fully take your point that you can't just look at one and ignore another document of a similar status if you like.

McDonald Yes.

Blanchard J What did the Select Committee itself say?

McDonald The Select Committee itself accepted the recommendation set out in the Ministry of Justice report, 18 December by implication

Blanchard J Well can you point us to where the Select Committee did accept that?

McDonald Yes, well if I can refer Your Honours to document 7 in the appellant's bundle.

McGrath J They don't have numbers so you're going to have to help us get there.

McDonald I'm sorry Your Honour. It's document number 7

Blanchard J Yes but they're not numbered.

McGrath J Its the commentary to the second reading anyway.

McDonald Perhaps the easy way and I'm grateful to my learned friend is tab

Blanchard J This is the Select Committee report isn't it?

McGrath J Yes.

Blanchard J Yes, well that we can look at. Which page?

McDonald It's page 17.

Elias CJ Page 17 of the report.

Blanchard J And this doesn't refer to the Ministry of Justice report.

McDonald No Sir, but it is perfectly consistent with, and the recommendation is found in the Ministry of Justice report of 18 December at page 7

McGrath J Could you just tell us what it is we can draw from the Select Committee report on its own, just putting aside this less formal input?

McDonald Well Sir the recommendation that is set out at page 17 of the report

McGrath J The recommendation did you say?

McDonald Yes the recommendation, is to then be compared with the actual provision that was drafted adopting that recommendation, and that can be found at document 31 of the respondent's bundle at pages 32 to 33 - document 31, at pages

McGrath J So is the Bill that's attached.

McDonald Yes Sir this is

McGrath J The Bill as reported back?

McDonald Yes, yes it is.

Elias CJ And what page are you taking us to?

McDonald At page 32 of the Sentencing and Parole Reform Bill.

Elias CJ I see, we've just got extracts, yes.

McDonald And you'll see that the recommendation has been picked up by the draftsman by the striking out of physical harm in para.1(a), and there's the edition

McGrath J There've been reversed as well?

McDonald Yes.

McGrath J Yes.

McDonald And there's the new edition of para.1(c), which is the consequential provision, and then for our purposes over the page at clause 2(b), the prohibition is added.

Tipping J Using the word 'cover' at this stage.

McDonald Using the word 'cover' at this stage Your Honour, yes. Now my submission when you look at the recommendation and the drafting, is that it's reasonable to assume the Committee thought the new formula would achieve for forms of loss or damage consequential on physical harm, what was achieved by removing the power to order reparation for physical harm itself. In other words it would preclude reparation for those forms of such loss as were covered by the current Accident Compensation Legislation.

Tipping J Your violinist's missing arm?

McDonald Yes. The broad aim in my submission was that the only forms of loss consequential and physical harm that should remain within the reparation system were those that fell entirely outside the

compensation scheme as contrasted with those that might be partially but not fully compensated under that scheme.

Blanchard J It says most of us recommend an amendment to clause 29. Do we know what the remainder of the Committee were saying?

McDonald No Sir, I'm not aware of that.

McGrath J Well there is a minority report isn't there, but does it not address that?

McDonald I wasn't aware of the minority report.

McGrath J Oh sorry, I thought I saw something. Just if you look at page 48 of the report in your bundle of authorities, it's not a very extensive minority report, I haven't read, but it's not a minority report as such I suppose - it's included in the main report

Tipping J Is there an implication in 2(b) – oh I'm sorry I'm interrupting the

McGrath J No, all we know is that they split on party lines.

Tipping J Is there an implication in 2(b) at least when it uses the word 'cover' that it means in respect of any consequential loss or damage of a type for which the victim has cover rather than a more precise examination of quantum if you like? In other words it's generic as opposed to specific dollars and cents.

McDonald I think a good understanding is obtained when you look at the change from cover to entitlement.

Tipping J Well I'm just saying at the moment with using the word 'cover' I would read that as naturally signalling a type, a generic. In other words if it's loss of earnings, it's of a type for which you have cover without prejudice to whether that cover is full. That would be my, at least provisionally, my first impression of what they're trying to get at.

McDonald That may be what they were trying to get at and I think they probably, by making the change to entitlement, tried to perfect that position.

Tipping J Tried to?

McDonald Perfect that position.

Tipping J Oh, to reinforce that.

McDonald Yes.

Tipping J Rather than depart from it?

McDonald Yes.

Tipping J Well that's where you're going to have to be fairly persuasive.

Elias CJ Shouldn't we start with the text we have to construe?

McDonald Yes.

Blanchard J Well as we're in the middle of the Parliamentary process, can I be permitted to ask when was the change from cover to entitlements made and was anything said when it was made? I assume it was in the Committee of the Full House?

Elias CJ Yes.

McDonald It was in the third reading yes Sir.

Blanchard J The third reading?

McDonald Yes as I understand it.

Blanchard J That's very unlikely.

Anderson J The second reading would have followed this report back wouldn't it?

McDonald Yes, this was the second

Blanchard J Yes, but the change would be made in the Committee of the Full House wouldn't it?

McDonald As I understand it was made on the third reading Sir, and it's also as I understand it the respondent's understanding of the position.

Blanchard J That's very unusual because that's just a yes or no vote.

McDonald Yes, and there is no reason for the subsequent change.

McGrath J When you say no reason, there's nothing in the Parliamentary debates that's indicated why the change was made?

McDonald Yes Sir.

Blanchard J There would have to be something though. There would have to have been some mention of a supplementary order paper. You can't just change legislation on the way through without going through a formal process.

McDonald At tab 32, and I'm grateful to my learned friend, there is the supplementary order paper

Tipping J I missed the tab number. Tab?

McDonald Tab 32.

Tipping J Thank you.

Blanchard J Yes, in Committee to move the following amendments. It's not the third reading at all. So have you looked at the debates in Committee?

McDonald No Sir.

Blanchard J Well shouldn't you?

McDonald Yes.

Tipping J Well anyway at the moment we have no direct assistance on why they changed cover to entitlements.

McDonald No Sir. The respondent contends that the only reason for the change was to enable topping up of weekly compensation. In my submission the change from cover to entitlements, and the change is conveniently captured in para.45 of my written submissions, is the change from cover to entitlements. In my submission the change may have been made so as not to preclude reparation where a person has suffered personal injury – has cover – has suffered loss consequent upon the injury, but has no entitlement at all, or (b) no entitlement responds to that form or type of loss. If you take both those situations separately I accept para.17 of the

respondent's submissions that in principle there can be situations where there is no entitlement at all, but there is cover. I also agree that such instances would be very rare. Dealing with the second point, no entitlements that respond to that form of loss, these will also be limited, but there will be cases where forms of loss or damage that have no natural relationship with any of the particular entitlements may occur, and I give an example in my written submissions in this case where if the victim had been unable to carry on, had to sell the business, a loss of goodwill could crystallise, and that's a form of loss or type of loss to which each of the specific entitlements seems to have no natural relation.

Tipping J It's not just the switch from cover to entitlements is it, it's a switch from a victim

McDonald For which the victim has cover.

Tipping J For which the victim has cover to a person has entitlements? They've taken it away from the victim. It must mean the victim though mustn't it.

McDonald Yes, yes.

Tipping J It's a very odd piece of redrafting in that context. I couldn't understand why they changed victim to a person.

McDonald Well it could only

Blanchard J It may be for consistency with the ACC legislation which probably doesn't speak in terms of victim.

Elias CJ Yes.

Anderson J Subsection 2 refers to a person who was a victim.

Tipping J Well it's even more odd because s.33 – that's the one talking about extent – says the extent to which the person who suffered the loss of damage is likely to be covered by entitlements. I mean this is not a stellar performance.

McDonald Which is why we're here.

Blanchard J We don't get many stellar performances here.

(laughter)

Tipping J Alright, I'll shut up and let you develop Mr McDonald.

McGrath J Anyway Mr McDonald your point is that is an explanation and in your submission the logical explanation for the change the movement the movement from the word 'cover' to the word 'entitlement', and you say it's got nothing to do with the notion that the entitlement is meant to be to full compensation, that that was not part of it at all?

McDonald Yes, that's my point. And the reason for the change that I've just articulated is in my submission perfectly consistent with the Justice and Electoral Law Committee recommendation at the second reading stage.

Tipping J But let's assume for the moment that we're entitled to look at that. Is there anything in it that directly focuses on this generic quantum dichotomy?

McDonald No Sir.

Tipping J No, right, thank you.

McDonald Dealing then with s.33(1)(c)(ii), at para.12.3 of the respondent's submissions, the respondent submits that the appellant's argument causes a collision between s.32(5) and s.33(1)(c)(ii). In my submission s.33(1)(c)(ii) is a machinery provision. It's a provision which is discretionary in the sense that the Court may order a report. Thirdly it's subordinate to s.32(5) in the sense that the report it allows must preclude losses or damages that are within s.32(5). Section 32(5) precludes reparation for loss or damages for which the Court believes a person has entitlements under the Compensation Act, therefore there has to be a consideration of which losses or damages are the subject of entitlement of the Compensation Act, and it's for that reason it's necessary to understand the Act and in my submission anyway, to understand such entitlements consistently with the purpose and structure of the Act is to see them as the entitlement for the loss or damage to which they naturally respond.

McGrath J Do you have an argument based on the meaning of the words in s.33(1)(c), or are you really saying they're against you but they cannot possibly override what you say is clear in s.32(5)?

- McDonald I don't think I'd go so far as to say they were against me. I accept that the extent to, which is in isolation more logically referable to quantum.
- McGrath J Yes.
- McDonald But I say that in context they can be read so as to not be against me.
- Tipping J I think a point in your favour is, and again this may be just rather unpersuasive drafting, but it doesn't say 'is likely to be covered for that loss' or damage.
- McDonald Yes.
- Tipping J You can only make reparation for loss or damage. That's the first concept. You identify what is the loss or the damage for which you're going to give reparation. It's the missing 20%, but (c)(i), sorry (c)(ii) doesn't say 'is likely to be covered for that loss or damage by entitlements. It's a much more generic approach to the issue, despite the word 'extent'.
- Blanchard J I wondered whether possibly the word 'extent' was in there because the subsection is worded in terms of entitlements in the plural, and the drafter may have been thinking that there was a possibility of coverage for one entitlement but not another. If there's any merit in that suggestion that would help you.
- McDonald Or Sir where there is a loss or damage to which one of the entitlement responds and none of the other entitlements respond – my loss of good will example – that would be
- Blanchard J Yes.
- McDonald That goodwill would be able to be something that was subject of this report.
- Elias CJ The quantification interpretation, or a meaning to the extent that would be much more powerful if there was only one form of entitlement.
- McDonald Yes, and of course there are a series of entitlements that constitute a package.

- Elias CJ Yes.
- McGrath J I suppose another possible way of looking at it is simply to say that although the phrase the extent to which came in, in the context just simply means whether?
- McDonald Yes.
- Tipping J Yes well with respect to that proposition you would have thought that even this draftsman would have used one word instead of four or five if that's really what they'd been up to. I think it does have some sort of proportionate, or some sort of distinguishing notion somewhere, but the difficulty is where?
- McDonald Well I think the 'where' is the in the form of the loss or damage in as much as that form of loss or damage naturally responds – that form is naturally related to one of the form entitlements, so if someone has suffered a loss of weekly earnings, that is a type of loss to which a particular entitlement naturally responds, but if you had a loss to which there is no specific entitlement responding, then that is a loss that would fall outside the Accident Compensation system. It could be the subject of this report.
- Tipping J There's another way of putting your point that the drafter was not anticipating you would sub-divide within individual entitlements.
- McDonald Yes, yes. As I said in my opening in terms of the position that the appellant takes is that if there is a type of loss, and it is part of a type of loss which a specific entitlement naturally responds then that loss is precluded from reparation. In other words you don't slice or dice the loss of damage below the level to which the specific entitlements slice or dice the loss.
- Anderson J In the same way really the degree of abstraction that you posit it at.
- McDonald Yes.
- Anderson J If you say a person has an entitlement to compensation for loss of weekly income, that's the entitlement.
- McDonald Just before leaving that point, it's my submission in any event that the use of the words 'to the extent to which' they do not compel

the Court to reach a contrary view to that for which the appellant contends.

Tipping J I'm sorry to keep asking you this, but it's really quite a vexing problem this, is anything to be derived from the 'is likely to'? Because everyone knows for a certainty that you're limited to 80%. There's no possible question of likelihood.

Anderson J I just wonder whether that relates back to the reference to the Court believing in the previous one, leaving it fairly

Elias CJ Suitable for summary determination is I think Mr Solicitor puts in his argument.

Tipping J Believes is covered - I mean likely to my mind denotes some uncertainty.

Elias CJ Well there are powers.

Blanchard J There is uncertainty.

Tipping J But there isn't uncertainty over this internal sub-division. It's an absolute certainty that you can't get any more than 80%.

Blanchard J Yes, but the Court may, and I think this may have occurred in this particular case. The Court may be absolutely persuaded that there is an entitlement to weekly compensation, but be uncertain about the level of it.

Tipping J Yes, well I suppose it's got to cover all sorts of different situations

Elias CJ Well it may cover the corporation – is it still a corporation – declining on some basis open to it to pay on the entitlements.

McDonald It could be those rare situations where

Blanchard J Self-employment situation where there's doubt about the level of income that was being earned.

Tipping J Well it doesn't seem this is getting any traction for you Mr McDonald, so

McDonald No Sir.

Elias CJ Well just on that point the sentencing Judge does refer to some inadequacies in the information in filing the Inland Revenue returns or something, and then deals with it in a rather odd way. It wasn't clear to me that her entitlement, using it in terms of the money she had available to her, and the top-up capacity, wasn't affected by her own conduct in not supplying that information, but I can't see that it's picked up in the appeal cases at all.

McDonald I'm afraid I can't help Your Honour with that.

Elias CJ Well, it just looks extremely odd - I mean as to whether this is an accurate assessment of the top-up differential in any event.

McDonald Yes there was certainly some vagueness from the way in which the District Court Judge

Blanchard J But you're not on this appeal challenging the quantum, you're just saying there shouldn't have been any at all?

McDonald Correct.

Elias CJ No, but I'm concerned about summary processes which may be quite astray, and this case may illustrate that. However if you're not able to answer that. The other point is on the charge sheet, it looks as though the matter was determined at hearing, but there's a reference somewhere else to your client having pleaded guilty. What's the position – did he plead guilty?

McDonald No it was a defended trial Your Honour.

Elias CJ It was a defended trial. That isn't what I picked up from the other material. I just wondered whether it was that he went to the Court and entered the plea, rather than

Blanchard J No.

Elias CJ Oh no, he has to anyway. No, that's what I'm talking about – convicted following a hearing. That's what I picked it up from, but there is subsequent reference to a

McGrath J There's also an indication in the victim impact report of concern of failure to acknowledge responsibility, which I thought was consistent with the

Elias CJ Yes.

Tipping J Does this actually matter?

Elias CJ No it doesn't, but I have loose threads.

Tipping J No, I just thought I'd missed some significant

McGrath J Mr Gates was counsel I think in the District Court.

Gates No I wasn't Your Honour

McGrath J Oh sorry, no

Gates No, but I did know the background in the District Court.

McDonald The next topic I wanted to briefly address was the use of payable in s.6 of the definition section. At para.12.2, 22 and 28 the respondent places reliance on the fact that s.6 defines weekly compensation as payable by ACC, and because 20% of weekly earnings not payable, that 20% is not an entitlement. The appellant's position is obviously that he doesn't dispute that only 80% of weekly earnings up to the maximum and calculated in detail is what the Compensation Act stipulates, and that it is this amount that is paid by the Commission, but the issue is what is that compensation for. Should it be seen in isolation as partial compensation for loss of earnings or should it be seen in combination with the other parts of the scheme as the fair compensation provided for in s.3(d). The appellant's position is that it's the latter and there is some reinforcement of that position. Clause 32 of Schedule 1 makes it clear that the 80% is **the** weekly compensation for loss of earnings. Clause 32(3) states the weekly compensation payable – that is the weekly compensation for loss of earnings referred to above is 80% of the payment of weekly earnings is calculated under clauses 33 to 45 and 48. And my final point is addressing paras.47 to 60 of the respondent's submission. They appear to be on the basis of an assumption that the Compensation Act provides an adequate compensation, but that's not the view of Parliament when it enacted the Compensation Act 2001 as it's made clear in s.3. For those reasons I would ask that the appeal be allowed.

Tipping J Just before you sit down Mr McDonald, I just want to build on something my brother Blanchard raised with you, and it's the use of the word 'entitlements' in the plural in the critical subsection.

McDonald In my written submissions I took some support from that in that it reinforced the notion that I'm putting forward that the entitlement should be seen as a package.

Tipping J Is it putting it to the same effect, but in a slightly different way, does it reinforce the generic nature of the concept of entitlement?

McDonald Yes.

Tipping J In that it's just the fact of having entitlements that is the bar, not the quantum of those entitlements?

McDonald Yes.

Tipping J Is that the essence of the point?

McDonald That's the essence of the point Sir.

Tipping J Yes, thank you.

Elias CJ Thank you Mr McDonald. Yes Mr Solicitor.

Collins Thank you very much Your Honours. I have a two-page document to make available to the Court. The first page merely sets out the five topics which I wish to cover in oral submissions, and the second page contains two charts which I may refer to during the course of my oral submissions. Now if it's of assistance to the Court, I will inform the Court each time I come to the end of one of my principal points which I wish to make, and by way of introduction, when Parliament enacted s.32, subsection 5 of the Sentencing Act, it drew a distinction between two types of losses which a victim of crime might suffer. The distinction which Parliament drew was between loss which was compensable by ACC on the one hand and loss which was not compensable by ACC on the other. And it will be very clear to the Court that it's the respondent's case that loss suffered by a victim of crime which is not compensable by ACC can be the subject of a reparation award, and what I endeavour to set out in my oral submissions is to convince the Court that this conclusion is correct regardless of what approach to statutory interpretation is taken. If one aims to

understand Parliament's intention either through a textual approach, or through a contextual analysis, or any sub-variety of those principal methods of statutory interpretation, then one invariably reaches the same conclusion as the Courts below. It is interesting to note that when Parliament enacted the Sentencing Act in 2002, it took a different approach to the approach which Parliament had taken when it enacted the Criminal Justice Act in 1975, and amended that Act in 1985, and if I can just take you to the respondent's volume of authorities. First at tab.4 for the 1975 Act

Elias CJ Are you going to take us to the context before you take us to the text? I mean you are going to come back to the text?

Collins I'm absolutely coming back to the text Your Honour, I'm still entering my introduction.

Elias CJ Alright.

Tipping J Still warming up.

Collins Just have a look at what Parliament did in 1975 and we go to tab 4 of the respondent's volume, page 501 of the statute and look at s.16, or 45A(1) as it was because it was an amendment. Parliament clearly contemplated the awarding of up to half of a fine by way of compensation to a victim of physical harm. And we flick over the page to ss.4(a) and (b), and in particular (a) we see that that award could be made regardless of a person's entitlement to ACC. And that same point was reiterated in 1985 under tab 5, s.28 at page 947 of the statute. And the Court may think it interesting to note that when ACC was commenced and the Criminal Justice Act was amended in close proximity to the commencement of ACC, Parliament thought it quite appropriate for a victim of crime to in effect get a double form of compensation, ACC, and then half, or up to half of a fine that might be imposed specifically by way of compensation.

Elias CJ Well up to

Collins Half.

Elias CJ Yes, and up to a maximum.

Collins Up to a maximum.

Elias CJ \$4,500 dollars?

Collins Yes. But it purports to be compensation to the victim and it's specified as compensation. Now

Elias CJ But it's not compensation in respect of any particular type of loss.

Collins I accept that without hesitation Your Honour, but the point that I'm trying to make is that from 1975 to 2002 the opportunity existed for a victim of crime to get a double compensation – ACC, plus whatever the Courts might award under these two provisions of the Criminal Justice Act. Since 2002 the opportunity for any form of double compensation has been removed and that is an integral part of the respondent's case, and it will be submitted to this Court that the approach since 2002 is far more principled because what the victim ends up with is just one compensation for one type of loss.

Elias CJ Well under the old system the most obvious gap under ACC was emotional harm, so the relatively modest award that could have been awarded under the 1985 Act might well have been not double-dipping at all, but for a type of loss that actually wouldn't be covered by ACC in any event.

Collins In relation to emotional harm, yes Your Honour is entirely correct, but not in relation to any other form of losses which the victim may have suffered.

Elias CJ No, but what I'm really just pointing out to you is that because it doesn't have to be sheeted home to any particular form of loss, I wonder whether you're putting it rather too highly when you say that pre-2002 you could have double-dipping, post you can't, because it's entirely consistent that the compensation paid under the 1985 legislation really was a sort of solatium.

Collins I accept that it was a token form of compensation but nevertheless if we remove emotional harm from the equation for the purposes of my present submission, the victim suffers a physical injury as a result of a crime and the perpetrator is prosecuted, then the victim could get cover from ACC, might end up with lost earnings compensation, treatment compensation, lump sum compensation, and the perpetrator of the crime may be required to pay a lump sum by way of compensation to the victim to compensate them for example their physical injury.

Tipping J But the quantum of the fine could not be increased beyond what was an appropriate fine

Collins Correct.

Tipping J In order to as it were, create, that's a fundamental point that needs to be borne in mind though.

Collins Oh I accept that without hesitation Sir.

Tipping J Now you can have both. You can have a fine and reparation.

Collins Definitely, but the reparation award does not compensate you for anything for which you have entitlements from ACC.

Tipping J I understand that

Elias CJ Mr Solicitor I think the schemes are just entirely different so I just don't accept that it's useful to compare them. The compensation – it's labelled compensation – but it's not referable to any particular loss that has to be quantified. It is much more in the nature of solatium for the fact of the crime and it doesn't have to be justified by the Judge, so I think it's a different regime.

Collins Right. Well regardless of that difference between Your Honour and I, the reality is there can be no doubt that since 2002 there is simply no opportunity whatsoever for a victim of crime to get compensation from ACC and by way of a reparation award, a compensation that repeats or in any way overlaps with what the victim has received from ACC. I'm still on my introduction Your Honours and I just wanted to make the obvious point that the victim in the case before the Court suffered four types of injury. Plainly loss of income which we'll be focusing upon; medical expenses – I think it was some \$350 dollars; emotional harm; and some property damage to her bicycle. Now it appears from the case on appeal that in the District Court the appellant did not oppose the making of any reparation awards, questioned the quantum, but didn't question the making of any reparation awards.

Elias CJ Where do you get that from that he questioned the quantum?

Tipping J Yes.

Anderson J It's in the sentencing notes of Judge Green.

Collins The sentencing notes of Judge Green Your Honour, and I think it's page 9 of the case on appeal at p.13 – para.3 I'm sorry Your Honours. So in the first sentence there is the reference to as I interpret it the appellant not opposing an order for reparation in regard to the losses that are identified in the victim impact report, and then quite rightly raised the point well the victim might be able to get some more money from ACC through weekly compensation by getting her tax return in and then getting a refund in from ACC. That's the way I interpret para.3.

Elias CJ Well no, it's establishing her earnings entitlement isn't it?

Collins Yes.

Anderson J ACC reduced the weekly payments because she didn't put a tax return in is it?

Elias CJ Yes, yes.

Anderson J This covers the possible issue of an adjustment for that.

Collins Yes, and if she puts her tax return in then ACC might be able to do the recalculation and refund her the balance.

Elias CJ Yes, but Mr Collins this looks awfully casual to me for a judgment of \$20,000 dollars. If this had been a civil claim it wouldn't have been a sort of one sentence and well we don't know what the position is but we're going to make the order and round it up a bit.

Collins Yes.

Anderson J Something persuaded the Judge not to go ahead with his first intention to get a reparation report which you can see from the Court file. We don't know what it was. Maybe that counsel indicated that he was in a position to make reasonable reparation. It often happens.

Collins I just can't shed any light at all on that, and I agree reading paras.3 and 4 as I have done a number of times to try and work out what happened, all I can suggest is that it appears that what

the Judge was doing was trying to reach some global equitable result.

Elias CJ It's very odd language altogether. 'I fixed that figure' – this is emotional 'empirically at \$7,000 dollars'.

Collins Yes.

Tipping J I think this Judge has his own unique style and not a great deal is likely to be derived from a close analysis.

Anderson J What it does indicate really is that as you can see from the 1893 Act, that it was originally intended to be a short sharp summary disposal of issues where small amounts were involved.

Collins Yes.

Anderson J Clothing damaged in a brawl or something like that and it's got far more complicated now for some reason.

McGrath J Mr Collins can I just ask you, the impression I had was that the focus of counsel for Dr Davies didn't mind what the size of the reparation order was, didn't want the fine to be too much – is that a fair inference?

Collins Well I wouldn't want to comment on any submissions that I didn't hear made Your Honour, but what I think is fair to say from para.3 of the sentencing notes is that it is abundantly clear that there was no opposition to reparation being awarded, and after that Your Honour may be right, but I just wouldn't want to safely conclude that.

Tipping J It wouldn't be safe for us to speculate either, no.

Collins Now after the District Court, the respondent obviously has changed tact, but it is I suggest, interesting to note that all that the respondent has done is challenged the jurisdiction of the Court to make the reparation awards only in relation to the balance between the victim's pre-injury earnings and her weekly compensation entitlements from ACC. So the appellant has not taken any issue with the jurisdiction of the Court to order to pay by way of reparation the balance between the treatment entitlements, which the victim was entitled to and the extra costs that she incurred when she went to a – obviously it had to be a private medical

provider – for there to be those extra costs. And admittedly it's only \$350 dollars but in principle on the analysis of s.32(5) which I will be advancing, there is in fact no difference in principle between

Elias CJ Between, sorry, between the approach taken in both, but how can we know whether this miscellaneous medical expenses what it related to and whether it was a – because you're really suggesting that this too is a top up

Collins Yes it is.

Elias CJ Variety, but were these expenses that were not covered by ACC?

Collins Yes, that's the only conclusion that I think a Court can

Elias CJ But can we really speculate on it. It might have been, I mean I don't know, something ACC was not prepared to wear, so not a discount from full earnings which is required by the Schedule, but something different, so

Collins The explanation Your Honour is at page 6 of the case on appeal, which is the victim impact report – sorry victim impact statement – and you'll see there are four numbered paragraphs, and it's the fourth one that I'm referring you to, and yes, which refers to.

Elias CJ Well that's the getting of the medical certificate in order to qualify for ACC. That's not a top-up. That's not covered by the ACC payments isn't it?

Collins It's the use of the word 'top-ups' which I think might have confused me Your Honour.

Elias CJ Well sorry, I'm trying to see whether you were right in saying that this head of damage is the same as the earnings related one. The earning related one as I understand it is because there is a gap between what ACC pays and what was actually lost.

Collins Correct.

Elias CJ But this is a head of medical expense that ACC does not cover isn't it?

Collins Precisely, and the two are identical Your Honour. This is a loss which the victim has incurred. The victim goes to the Doctor and

the victim incurs charges which she goes to the Doctor. ACC pay by far the majority of the cost but there is a balance, and the balance is in this case \$240 dollars for the medical certificates and \$72 dollars for x-rays.

Elias CJ Well my point is that aren't these the medical certificates which she requires in order to get earnings related compensation, and aren't those excluded from the cover available under ACC?

Collins Yes.

Elias CJ So it's not that there's just a discount on her total medical bill, this is a heading of loss that is not covered.

Collins Precisely in exactly the same way as the gap between her pre-injury earnings and her weekly compensation is a gap that is simply not covered by ACC.

Blanchard J No, isn't the point that there's no entitlement for these charges made by the GP because they're not for treatment?

Elias CJ Yes, well done.

Collins Well surcharges on x-rays?

Blanchard J No, no, I'm talking about the \$240 dollars for getting the certificates.

Collins Well

Blanchard J It's the same as if you have some sort of medical claim for which you're trying to get an insurer to accept and the insurer says oh I want a certificate, so you have to get hold of your GP and get a certificate and you get charged for that, but it's not for your treatment. It's *ex po facto* very often.

Collins Well

Tipping J Even if there is some inconsistency in the way they've approached this, does this effect the point of principle?

Collins It does ultimately Your Honour, yes, and the point of principle is – and I'll be really emphasising this when I get into the textual analysis – is that entitlements are specifically defined. The gap

between a victim's pre-injury earnings and her weekly compensation entitlements are not entitlements under ACC and are clearly excluded from the prohibition set out in s.32(5) of the Sentencing Act. But before I just leave that point that Your Honour Justice Blanchard and Her Honour the Chief Justice has raised, even if Your Honour Justice Blanchard is right in relation to medical certificates, the x-rays clearly are a surcharge that ACC doesn't pay for as part of treatment, and although we're dealing with a microscopic sum in overall comparison with what we're dealing with in this case, that \$72 dollars is exactly the same in principle as the gap that exists between a victim's pre-injury earnings and weekly compensation entitlements paid by ACC.

Tipping J Maybe they should have objected to that too. That's really my point Mr Solicitor, I mean despite whether they have chosen not to or whatever, surely doesn't effect

Elias CJ It's not an estoppel.

Tipping J No.

Collins I'm not trying to raise it as an estoppel at all.

Tipping J No.

Collins I'm just really trying to point out what the principles are in this instance.

Tipping J I fully understand that.

Collins Yes.

Tipping J That you can't have any surplusage.

Collins Yes, and of course the appellant recognises that under the Sentencing Act awards can be made in relation to emotional harm, and emotional harm is clearly something by itself, which is not the subject of cover from ACC. Now that's all I wanted to say by way of introduction. I now want to move on to ascertaining Parliament's intention through a textual analysis of s.32, ss.5 of the Sentencing Act, unless there was anything else by way of introduction that the Court wanted to raise with me, and in doing so there were seven points that I wanted to make in the textual analysis. Section 32, ss.5 only prohibits the making of a reparation

order in respect of loss or damage for which the victim has entitlements under ACC. That's the first point. The second point is that entitlements under ACC are specifically defined in s.69 of that Act. This morning we made a reprint available to the Court

Elias CJ Yes, thank you.

Collins To assist and can I invite the Court to go to s.69, which is at page 82 of this reprint and we'll see that there are five types of entitlements provided, and clearly what we're focusing upon are weekly compensation referred to in ss.69(1)(c) of the Act. The next point is that weekly compensation does not purport to compensate a victim for all of their pre-injury lost earnings. In percentage terms the most a victim can receive is 80%, and that is calculated by reference to various formula which is set out in clauses 30 to 46 of Schedule 1 of the Act, at page 310 through to page 330. So there are various formula depending on whether or not somebody is self-employed; an employee; what period of time they have been working – none of which we need to delve into. What is important is to note that under clause 46 there is a maximum weekly compensation for lost earnings. That was set in 2001 at \$1,341.31 and as you will see from the chart on the back of the one-page synopsis that I handed up this morning, that has been increased each year pursuant to a formula set out in s.115 of that Act to have a CPI adjustment so that as at today the maximum weekly compensation is \$1,638.04. Now I'll come back to that point a little later so that the Court has a full appreciation of what the impact of that cap is on people who are high income earners. What that cap means is that those who are high income earners actually receive less and in some instances significantly less than 80% of their pre-injury income by way of weekly compensation entitlements.

Anderson J I missed the reference to where that cap is set Mr Solicitor.

Collins The two pages that I handed up right at the beginning Your Honour has on the second page a chart

Anderson J Yes I've got that, but where is the statutory reference to it?

Collins The statutory reference to the cap is clause 46, Schedule 1, which sets the cap at \$1,365 as at 2001, and Your Honour will see that there is then a reference back to s.115 which provides the formula for annual increases for CPI adjustments. Now weekly

compensation is quite different in my respectful submission from lump sum compensation. Lump sum payments are designed to fully compensate a victim for any permanent physical impairment they have suffered. To this extent lump sum payments are a remnant of general damages that might have been able to be awarded at common law. Weekly compensation however will never compensate a victim for more than 80% of their lost income. That's a loss that is easily quantifiable in monetary terms and is a remnant of the special damages which a victim may have been able to sue for at common law.

Elias CJ The purpose of that was set right from the word go in the *Woodhouse Report* as an incentive to people to get back on their own feet.

Collins There are many aspects to that 80%. Incentivisation was one; affordability of the scheme at the time - it was very much in debate as to how affordable it was and what would be the best compromise figure for what is now called weekly comp. There were a variety of factors, but certainly incentivisation was one Your Honour.

Elias CJ Why is that not a general over-arching policy that Parliament has taken the view that those who have been injured should have an incentive to get back to work?

Collins Well that does remain a policy.

Elias CJ Right, I see, okay.

Collins And for most, well I won't go any further, but it certainly does clearly remain a policy factor Your Honour.

Elias CJ But those

Collins I think what Your Honour might be about to ask me is if victims of crime are entitled to the 20% difference, does that in anyway negate the incentive to return to work.

Elias CJ Well I'm just wondering about consistency of treatment throughout the whole system.

Collins Right, and I'll be elaborating on that point in quite some detail when I get on to the contextual analysis, because we have to bear

in mind of course that we're dealing with a Sentencing Act which has as a prime centre of focus, restoration of victims.

Elias CJ And you're dealing with an Accident Compensation regime.

Collins Yes.

Elias CJ Both?

Collins Yes. And I think that the two do merge and actually a very principled and balanced result does emerge Your Honour. Now the next point I wanted to make in the textual analysis is that the balance between a victim's pre-injury income and their weekly compensation entitlements are clearly not encompassed within the definition of an entitlement under the ACC Act, because the entitlement is capped at a maximum of 80%. It's a liquidated sum; a remnant of the special damages, entitlements can never exceed 80%. The balance is therefore by definition not an entitlement under the ACC Legislation, and as s.32, ss.5 of the Sentencing Act uses the concept entitlement in exactly the same way as that concept is used in the ACC Legislation, it follows that a Court when making a reparation order can require a victim to be compensated for the balance between their entitlement under ACC and what their true loss of income was. I'm sorry I think Your Honour Justice McGrath is about to – I'm sorry Your Honour.

McGrath J I think the key point is at the earlier stage of what you're saying isn't it. You're saying that an entitlement does not cover the top 20%, and you then said therefore that top 20% is not an entitlement is it. I think you're saying it falls outside the statutory definition and I think you're going to have to elaborate a bit more on why you say that an entitlement by definition does not cover full compensation.

Collins If we just focus upon

McGrath J The impression I have at the moment is an entitlement is not concerned with the quantum of compensation.

Collins When it comes to – well it is with respect, it is. Entitlements are actually very very carefully defined in ACC.

McGrath J Well perhaps you could take us to the particular provisions you are referring to then.

Collins I will indeed Your Honour but can I just perhaps introduce it by saying this. ACC has a two-step process. The first step is to ascertain whether or not somebody has cover.

McGrath J Yes.

Collins And once somebody has cover, the next step is to ascertain what if any entitlements they can receive.

McGrath J Yes.

Collins The entitlements are defined, and how entitlements are defined requires an analysis in relation to each type of entitlement of what the entitlement involves, and when we come to lost income, the entitlement is very carefully defined in the various formula which I've taken you to, set out in clauses 32 through to 45 of the first Schedule, which ensure that the entitlement means absolutely no more in any case than 80% of a person's pre-injury earnings.

Tipping J Your best point in that context is presumably the definition of weekly compensation

Collins Yes.

Tipping J In the Act, and the focus is Mr McDonald's forecast on the word 'payable'.

Collins Yes, that's what's payable by ACC in s.6.

Tipping J And by definition the argument runs. The concept of weekly compensation is directly linked with what is payable by the Corporation thereby necessarily involving one in quantum as well as generics.

Collins Only in quantum.

Tipping J Well, I mean it must go through generic to quantum.

Collins It only goes through generic in terms of whether or not there's cover. That's the only generic, and then once you've got cover you have to ascertain whether or not you've got an entitlement.

Tipping J Well the first half of the definition of weekly compensation is generic, and then it's limited by the concept of what is payable by the Corporation - that's all I meant.

Collins Yes, I understand and I accept entirely what Your Honour is saying. The definition of an entitlement – I come back to the common law concepts of a liquidated sum, special damage – it's easily identifiable notwithstanding the mathematical formula that's set out in the Schedule to the ACC Legislation. Every single person who is injured and who prior to injury is working, can go to ACC and they can instantly be told through ACC exactly what their weekly compensation entitlement is.

Tipping J If you didn't have the words 'that is payable by the Corporation' in the definition, then you'd be in a much worse position than you are.

Collins I wouldn't be in a stronger position as perhaps I am at the moment Your Honour.

Tipping J Well it's a matter of emphasis Mr Solicitor.

Elias CJ We'll take the adjournment now but you do slide of course in your submissions to us between entitlements and entitlement, and the more comfortable word that you have used in those last submissions to us is 'entitlement', and there may be a difference.

Tipping J That's the plural problem in 32(5).

Elias CJ Yes.

Collins Yes, I don't ..(inaudible)

Elias CJ Yes. Alright we'll take the adjournment now thank you.

11.32am Court Adjourned

11.47am Court Resumed

Collins Can I just recap the textual approach and deal with that question of entitlement as opposed to entitlements? In summary the respondent's position in relation to the textual analysis is that s.32, ss.5 refers to entitlements. It's a reference to entitlements under the Accident Compensation Act. Entitlements are defined in s.69 to

include weekly compensation. Weekly compensation is the amount which is payable by ACC to a victim of crime pursuant to the formula that is set out in Schedule 1, clauses 32 through to 45 of the Act. Entitlements do not include the difference between a victim's pre-injury income – their weekly income – and weekly compensation entitlements as calculated pursuant to those formula. For most that means there is a 20% gap between pre-injury weekly income and weekly compensation payable by ACC. For many it's more than a 20% gap, but for most it's a 20% gap. That 20% gap is not an entitlement. It does not come within the definition of entitlements and is therefore not precluded from being the subject of a reparation award by virtue of the bar set out in s.32, ss.5 of the Sentencing Act. Now I accept that I have in my oral submissions drifted between the words 'entitlement' and 'entitlements' and I don't with the greatest of respect think that it makes a great deal of difference. I accept

Tipping J I wonder Mr Solicitor that the crunch point for me is that it doesn't say 'has an entitlement'. Now it seems to me that the word 'entitlements' in the plural is as similarly generic as was the word 'cover'. Now I know the difference between 'cover' and 'entitlement' of course, but why is that word there in the plural?

Collins I think Your Honour the only explanation is that it must be a reference to a person having more than one of the entitlements.

Tipping J Yes, well it has a generic connotation to my mind in that context.

Collins Well if one goes to the definition of 'entitlement'

Elias CJ Well I've just been looking at that and I'm not sure that that helps you at all. In fact it all seems to complete the circle without reference to what's payable doesn't it? If entitlement is defined as 'the entitlements' described or referred to in s.69.

Tipping J Yes.

Elias CJ So 69 is read in its own terms with that definition without any need to refer to what the ACC ends up paying.

Collins Well except that would involve not understanding what weekly compensation was, and that would be disregarding a very important part of the formula.

Blanchard J Well weekly compensation under clause 32(1) is 'weekly compensation for loss of earnings'. At that point there's no cap.

Collins No you have to go to

Blanchard J It's only when you get down to the mechanism in the subsequent part of that clause that you have the 80%.

Collins Yes, but there can be no doubt Your Honour that weekly compensation can never be any more than 80% of a victim's pre-injury weekly earnings.

Elias CJ But weekly compensation is defined as compensation for loss of earnings.

Collins Yes.

Anderson J That is payable.

Collins That is payable – precisely, and you have to understand what is payable.

Elias CJ But is payable under those provisions?

Collins Yes.

Elias CJ But the definition really is loss of earnings. Compensation for loss of earnings.

Collins It is compensation for loss of earnings but you have to understand how weekly compensation

Elias CJ Well you do in order to know what is payable but I'm not so sure about the

Collins You see the difficulty with respect to the approach which Your Honour is tentatively drawn to is that you would be accepting that you can work out what weekly compensation means without having any regard at all to what the actual entitlement is that a victim has if they are the victim of an accident or injury for which they have entitlements under ACC.

Elias CJ Well, see you're sliding around with these words again - using 'entitlement', which is used in one sense in terms of the definition,

and you are then using it in the sense of meaning what one will receive at the end of the day. I'm not sure that it fits as well as that.

McGrath J You've got to bear in mind also that the definitions are all subject to context in this Act aren't they?

Collins Indeed, and not only that Act but also the Sentencing Act as well, and I haven't started on the contextual analysis yet. I was really focusing on the textual analysis of s.32(5). Perhaps if it's convenient to the Court an opportune time to move on to the contextual analysis. The Sentencing Act set out a number of purposes behind sentencing and dealing with offenders, and that is set out in s.7 under tab 11 of the respondent's bundle, and the Court might think it's instructive that we've got to this point in the hearing and for the first time the Court has been asked to look at what the purpose of the Sentencing Act is and what the purpose of sentencing is, and I draw particular attention to the first four purposes of sentence and otherwise dealing with an offender, namely, holding an offender accountable; promoting a sense of responsibility in the offender; providing for the interests of the victim; and providing for reparation.

Elias CJ Well you're just doing what ss.2 says we must do in isolating the first four?

Collins Yes. These first four re-emphasise the point which I'm about to make.

Elias CJ Yes, yes.

Collins I'm not ignoring the others. And those first four purposes reflect the fundamental principles that underpin restorative justice, namely restoring victims so far as can be done, to their previous position, and secondly making the offender contribute to the victim's restoration by requiring the offender to contribute if the State does not fully compensate the victim.

Tipping J I think in this question of the sort of hierarchy that s.12 of the Sentencing Act is probably the most significant for our immediate purposes is because it requires a sentence unless the Court is satisfied that such a sentence of reparation.

Collins Yes.

- Tipping J So really that's saying to every Judge in every case, you must consider the question of reparation and if you lawfully may impose it you must do so unless, and then come the exceptions.
- Collins Yes.
- Tipping J This is a very wide-ranging focus if you like on reparation - every case under the Act.
- Collins Yes, and a very high emphasis on the victim and trying to restore the victim so far as is possible to the position they were in before injury, or before the crime.
- Tipping J And it's reinforced, and I remember the debates about this when it was being mooted this legislation, that Court must actually give reasons for not imposing reparation if it's legally able to.
- Collins Yes.
- Tipping J So there's something. I don't know whether it's in your favour or not, but there's something to be drawn out of this heavy emphasis on reparation.
- Elias CJ Well it's all though prefaced on if a Court is lawfully entitled, so it takes you back in the end to
- Collins What is meant by reparation.
- Tipping J Yes.
- Elias CJ Yes.
- Tipping J Quite.
- Collins Yes, I accept that, but I still think that the contextual analysis is extremely important.
- Tipping J That's the most significant from the point of view of what Parliament was trying to get at isn't it, is the fact that if it's on you must do it?
- Collins Yes. And the underpinning of those two basic principles of restorative justice putting right and making the offender

accountable is a reflection of those same fundamental principles articulated by the United Nations in the 1985 Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power.

Tipping J It's a very capricious outcome Mr Solicitor that if you happen to suffer your injury through a crime or an offence and the person is prosecuted, your prima facie going to get the top up, and if you don't, you're not.

Collins Yes.

Tipping J It's a very capricious outcome.

Collins It's a very deliberate policy outcome to treat victims of crime in a way which ensures that they get restored so far as is possible to the position they were in prior to their losses being inflicted upon them by a criminal.

Tipping J It's not just victims of crime, it's victims of all sorts of offending. Low level offending; high level offending; middle. I don't deny that that is obviously the purpose of reparation, but

Collins Yes.

Elias CJ And if it was a deliberate outcome, the capricious one to which Justice Tipping has referred, one would have expect to have seen some reference to its having been arrived at advertantly.

Collins I'll come onto that point in a few moments Your Honour and I assume you don't want to let it slide, but I did want to finish the point that I was making with His Honour Justice Tipping. The capriciousness as you put it Your Honour, needs to be tempered by reference to the fact that a reparation of order can only be made in circumstances where the offender is able to make reparation, so there has to be an ability to actually make the reparation and

Tipping J I think that in fairness makes it worse.

Elias CJ It makes it worse. It makes it capricious vis a vis the victim, and it makes it capricious vis a vis penalties, because penalties will apply differently to different types of offenders.

Blanchard J And how do you factor in insurance?

Collins Well being able to put it right may be a reason for having insurance.

Elias CJ Well that's if you have the means or foresight to have insurance. Really, this scheme quite honestly doesn't seem to have been terrifically well thought through because one would have thought that securing evenness of treatment of offenders for like culpability was a very important part of the criminal justice system.

Collins And the emphasis in this particular occasion, when Parliament passes legislation, was trying to find a way of ensuring that victims of crime were put back in the position that they were in prior to them being the subject of the criminal offending.

Elias CJ But what's been just put to you is that it doesn't ensure that because of the means of the offender.

Collins Indeed, and there's no guarantee of course that somebody if they happen to be involved in a motor vehicle accident is going to be involved in an accident with an insured person, a wealthy person or a very impecunious person. There is no

Elias CJ Don't you have to take into account reparation in setting sentence?

Collins Yes.

Elias CJ So a wealthy person who has the means to pay reparation will probably have their sentence reduced.

Collins Yes, yes indeed, and that's again a deliberate policy, placing the emphasis on the interests of the victim

Elias CJ Well I wonder, I wonder about rule of law issues here and equality of treatment, but maybe that is what the legislation says.

Tipping J It's a little oblique to talk about accountability and sense of responsibility when you're insured. You have in a sense exercised some responsibility and you're accountable through your premium, but it's a somewhat indirect way of holding offenders accountable and promoting sense of responsibility for an acknowledgement of the harm. I would be much more comfortable if they'd done this more directly so that we could be quite clear that this is what they had in mind.

Collins Well I'll come on to the legislative change, and in particular the change from cover to entitlements, which in my submission reinforces the point that the emphasis was on entitlements and the point that I have been trying to emphasis - mainly that things which are not entitlements are able to be the subject of reparation orders, but I hadn't finished anywhere the contextual analysis which I had been setting out to do. The two basic points of restorative justice are articulated in the 1985 Convention and they are re-emphasised by authors on sentencing, such as *Hall* and *Professor Freckelton*. I can take Your Honours to the relevant paragraphs of those texts if it was of assistance. They are set out in the respondent's written submissions, but the *Hall* references are under tab.28 and the *Freckelton's* one are under tab 29.

Tipping J But these are general observations, they're nothing specifically on this point?

Collins No.

Tipping J No.

Collins No, the only reference in any text specifically on this point is a reference in *Adams* on sentencing, there is a paragraph which simply foreshadows the arguments of the respondent in this particular case without reference to any authority, and says that the 20% balance between pre-injury, weekly income and weekly compensation, can be the subject of a reparation award. The reference to that Your Honour is made in Justice Panckhurst's judgment in the High Court.

McGrath J Am I right, and I think I may have taken this from your submissions that Professor Hall classifies reparation really as a civil process, not as a criminal process?

Collins Yes there is very much a civil element to it. Of course it occurs in the context of a criminal proceeding.

McGrath J And it is a penalty in terms of the collection of sections it's dealt with is it not?

Collins It is, but of course it is a payment by an offender to a victim, and so to that extent, although the order is made by the State, the State doesn't play a role in the accountability or the transference of the money if it's money that's been required to be paid.

- McGrath J I just have a difficulty I suppose when it is an element included in the Sentencing Act as part of the penalty spectre of sections with the characterisation that it was a civil process.
- Collins Yes.
- McGrath J I mean I know that you've put this in your submissions and you've told us where to go to read around the context what Professor Hall is saying, but I just have some difficulty with that.
- Collins Well I think that the only civil element is as I say is a face-off between two citizens albeit in the context of a criminal procedure, and it's the Court of course that makes the order, but it's between A and B, two citizens as opposed to the State as a party to those proceedings, so the reparation is made.
- McGrath J But am I right in saying that the rather dramatic extent of the award in this case in relation to the particular offence, is relatively unusual what's coming out of the District Court in regulatory offences involving individuals driving?
- Collins Certainly involving individuals driving. It was not unusual in relation to health and occupational safety awards that were made under the Health and Safety Occupation Act, where very sums were able to be awarded to individuals who had been injured, particularly in workplaces.
- McGrath J Punitive considerations would generally call for very substantial awards in that context in any event wouldn't they? I mean no-one's really suggesting they think that \$20,000 was appropriate in punitive terms for Mr Davies' offending.
- Collins No, no I'm not making that suggestion at all, it's purely compensatory in this particular instance. Whether or not it's fair to say that the Health and Occupational Safety awards where punitive is another matter I think Your Honour
- Elias CJ Are they similarly open-ended? It is very odd to see a penalty without a maximum prescription. In fact I can't think of any other
- Tipping J Was it part of the fine in the Health and Safety – I think it used to be?

- Collins Yes, and the maximum fine I think was \$200,000 but I just
- Tipping J Yes, there were maxima, but has that been changed now to reflect the same?
- Collins Yes, indeed, indeed, and that was part of the driver behind this change.
- Blanchard J Are reparation awards in relation to Health and Safety matters made under the Sentencing Act or under the Health and Safety Act?
- Collins As I understand it, under the Sentencing Act Sir but can I just check on that point. Yes indeed.
- Tipping J Because my then brother Justice Fraser and I sitting as a full Court had an issue under the Health and Safety and we actually drew attention to what we perceived as somewhat anomalous, the same sort of anomalies that Mr McDonald has. The case was called *The Spa and the Labour Department or Inspector of Labour*, or something like that, but I'm not suggesting that's going to help us with our present problem, but this feeling of anomaly has been around for a while.
- Collins Yes, and I think I can fairly say that it was a concern about some of the magnitudes of the awards that were being made under the Health & Safety Legislation that was a driver, and you could pick up senses of that in some of the departmental reports if you need to go to that. That was a catalyst behind the changes that occurred in 2002.
- Tipping J Are you going as part of your contextual review to draw our attention to 32(3) Mr Solicitor, because if you are please come to it in your own time, but if you're not I would like some assistance on what weight and in what direction is the fact as to whether you have a right available to you to sue, bring proceedings, in relation to the loss or damage. The subsection tells the Court to take that into account, but it doesn't give much guidance as to which way it should go and in what circumstances, because you see here there was no right to sue for this 20%.
- Collins Yes, correct.
- Tipping J Now what should one make of ss.3 in that context? Is that a warning off reparation or is it an encouragement of reparation?

- Elias CJ It might have been a right to sue in respect of the bicycle
- Tipping J Oh sorry, I meant the 20%.
- Elias CJ No, but it's a good illustration because providing the Court took that into account it might well decide it was such a small amount that it was much better to deal with it in a summary way, whereas if it had been some extremely expensive item of property, it may be that the Court should on a principled basis say no, this should be the subject of a civil claim in which defences of contributory negligence and so on may arise. It's very unsatisfactory to have it left as vague as this, but there must be some proportionality one would have thought in the sentence of reparation that can be ordered and maybe the best indicator of that proportionality is the maximum fine, so that if for example you had damaged property which was worth \$200,000, perhaps it wouldn't be reasonable for the Judge to say well I'm just awarding that by way of reparation.
- Collins I think I can answer both Your Honours Justice Tipping and Your Honour the Chief Justice by saying this. Section 32(3) is an artefact of the Criminal Justice Act. The same provisions were in the 1975 and 1985 Criminal Justice Act. When I first read that I thought the only reference to civil proceedings that could realistically exist in relation to personal injury claims might be an exemplary damages claim, and I thought it was rather strange that somebody would be able to make it a judgment about whether or not an exemplary damages claim could or should be brought at a summary proceeding as occurred in this case. And the final point is I think that there is considerable merit in what Your Honour the Chief Justice is saying if I may say so, because you would expect a Judge to exercise discretion and judgment, and say now yes, what has been lost here may be several hundred thousand dollars proportionately, as Your Honour has put it, that is best dealt with in a completely different forum so that issues of liability; contribution, and all those other issues can be resolved in an appropriate forum.
- Elias CJ But that is a point directly against you in relation to personal injuries, and why if you have entitlements under the Accident Compensation regime it may be better that it's off the table because those could well be huge damages which if property damages, the Judge would be able to say should be dealt with in civil proceedings, but here he would have to deal with them on a

summary basis and against the context of a maximum fine of \$4,500.

Collins Apart from one important point I think Your Honour. If we just focus upon personal injury

Elias CJ Yes.

Collins Of course the Judge will know that if the victim has been injured then they're going to have their treatment expenses paid for very substantially. They're going to have an entitlement to lump sum payment, and they're going to have weekly compensation if they were in employment. All of those matters are off the table. They are completely off the table. They're not matters that the Court is going to be able to take into account in making a reparation award. The submission that I'm urging upon the Court is that the only matters which the Court can take into account in a personal injury case when coming to reparation, are those matters for which there is no entitlement to payment from ACC.

Tipping J But it's an odd system which says you can't sue for it, but you can get it through the criminal law.

Elias CJ In a List Court under these sort of circumstances.

Collins And my response to that is this was Parliament's intention to try and focus upon the imbalance that had been perceivably occurred where victims of crime were not being given the recognition and the acknowledgement that Parliament believes they deserved, i.e., being put back as best as possible to the position they were in prior to becoming the victim of the crime.

Elias CJ But not prior to the application of the Accident Compensation system, because the real beef is with the 80% cover it seems.

Collins I'm sorry Your Honour

Elias CJ Well I mean without that regime they would have had a cause of action

Collins Correct, yes.

Elias CJ So the limitation arises through the nature of that regime?

- Collins Indeed, yes.
- Elias CJ Yes.
- Collins And what your entitlements are under that regime, and what you'd get paid by ACC, which gets excluded from the equation, only since 2002.
- Anderson J Suppose the victim had a consequential loss of income of many many millions, and a careless driver causing injury was an extremely wealthy person, a List Court Judge could say, I order reparation of \$50 million dollars or \$20 million dollars.
- Collins Theoretically. One would hope the proportionality arguments that Her Honour the Chief Justice has urged would be brought to bear.
- Anderson J What I was really asking in a rather obtuse way is is there theoretically any limit on what can be done?
- Collins Theoretically no, and that was the purpose of the second chart. So as to ensure that the Court fully understood what the consequences are I asked ACC to do four calculations for me for four possible claimants – one on an annual gross salary of \$50,000; one on \$100,00; one on \$200,000, and one on \$350,000.
- Tipping J It encourages one to walk carefully across the road this chart Mr Solicitor.
- Collins What it really does Your Honour is encourages one to go to my friend's clients and ensure that you have loss of income insurance.
- Anderson J I'm still a bit perplexed about ss.3 of s.32 because it might be arguable that it envisages a situation where if you can't sue for it you shouldn't be able to get it by way of reparation, whereas if you can sue for it, then it's a question of balancing what is the most appropriate way of dealing with it, is it by a civil process or by a criminal process.
- Collins And what Parliament has decided Your Honour is that in relation to those liquidated sums – loss of income, additional medical expenses, the things that you don't get paid for by ACC, are able to be the subject of a reparation award in a summary jurisdiction or in a District Court, in a short sharp summary way.

Anderson J Originally only small amounts were envisaged weren't they?

Collins Yes.

Anderson J And until fairly recent times relating to 1975 or something like that there were caps of 2 pounds maximum out of a 4 pound fine and that sort of thing. Is there any inference one can take from the removal of the limit?

Collins The only inference that I think you can draw, whether it was ever thought of and I articulate it in this way, is another matter, but the only inference you can draw is that when we introduced the ACC scheme from 1 July 1975, it was thought that here is a scheme that is going to cover most people for most of their losses most of the time, and therefore the need for the Criminal Courts to give notional awards disappeared. But since then there has been a recognition that the interests of victims of crime have not received the status and recognition from Parliament that Parliament in 2002 believed they deserved.

Anderson J So there is a social shift from saying causation is irrelevant, it's the injury that counts and to certain circumstances where the causation counts.

Collins Yes indeed.

Anderson J Yes thank you.

Collins I was going to, and we've already touched on this, so I can make this point very very quickly that the history of restitution in New Zealand, as the Court will now fully understand, recognises that since 1894 there has been some limited form of ability for the Criminal Courts in certain circumstances to order offenders to pay to their victims sums of money usually as part of the fine, and that resulted as I said earlier in 1975, in 1985, in the opportunity albeit to a very very small degree, victims of crime getting both ACC plus a sum by way of compensation which could theoretically at least cover the same loss, and notwithstanding the concerns that have been raised, it is hoped that this Court would recognise that by eliminating even the theoretical possibility of a double compensation, the 2002 Act is more principled and that it only ensures that victims of crime receive one amount of compensation for their loss. Most is going to be by way of ACC, and to the extent that they do not get payment from ACC, then the offender can be

required to meet that balance. Now I was going to deal very briefly with the history of the Sentencing Act. The word 'cover' as we know was deleted and substituted with the word 'entitlements' in s.32(5), after the second reading, before the third reading. The supplementary order paper is before the Court – I think it's tab 31.

Blanchard J 32.

Collins 32. I asked Miss Brown to retrieve an explanatory note which accompanied this supplementary order paper. Could I just pause for a second and find which clause it was? I'm happy to make it available to the Court. I don't think it's of any assistance whatsoever because it doesn't provide explanation but if you wish to have it I will make it available.

Blanchard J Thank you very much.

Collins It's clause 29(2).

Elias CJ Well we can just take it from you that there's no help in it.

Blanchard J We might as well have it.

Collins Well having said Miss Brown to the office to grab it

Tipping J Miss Brown would wish to see it referred to I'm sure.

Elias CJ And it's no help at all.

Collins It probably came from Parliamentary council and for the reasons of consistency of the legislation.

Collins I think the real explanation Your Honour is that when the word 'cover' was in there people had assumed that the word 'cover' had the same meaning as it did when the ACC legislation was first enacted in 1974, and as it was re-enacted in 1981, 82 I'm sorry, where cover and entitlements were synonymous, and it was only in 1991 that that split actually occurred and we had people with cover but no entitlements and not able to sue if they had cover.

Elias CJ Yes.

Collins And so there was that lacuna which to some extent has been addressed, well very substantially addressed, with the introduction

of lump sum payments in 2001. Well actually they first came in I think in the 2001 legislation substantially anyway. So there was I suspect, a belief that the word 'cover' meant what you got from ACC when this legislation was first drafted, and that really does reinforce the point that what people were thinking of was what do you get from ACC and reparation awards can extend to events or matters for which you don't have cover or don't get payments from ACC. So it's that conflation of the concepts of cover and entitlements in the early phases of the drafting of this legislation which was twigged to I'm sure very late in the piece when somebody said no, the word 'cover' actually has a specific meaning in the ACC legislation, as does the word 'entitlement', and hence the change to 'entitlements'. Parliament at the same time also enacted what is now s.33(c)(ii) which Your Honours have focused upon, and clearly such a power to seek reparation reports would be unnecessary if as the appellant contends s.32, ss.5 excluded reparation awards for types or categories of loss for which entitlements are available under the ACC legislation. It's a very succinct and I hope acceptable point.

Tipping J Well I think you just need for my benefit just to expand on that a bit. Are you putting it as high as 33(1)(c)(ii) particularly cannot logically be present unless the whole purpose is to sub-divide within individual entitlements if I can borrow the expression I used with Mr McDonald.

Collins I understand what you say by sub-divide with entitlements and of course I don't accept that.

Tipping J No, no.

Collins But if it means a reference only to types and categories of entitlement, then what's the point of getting a reparation award to find out what you're cover is for ACC – what you are going to get from ACC?

Tipping J What about the 'is likely to be'. I mean either way there's no uncertainty is there? You're either going to have weekly compensation per se or not, or if you do have it you're going to have only 80%.

Collins The point I'm making Your Honour is what's the point of even making that inquiry? If you've got an injured victim they're going

to have ACC. What do you need to inquire into I rhetorically and respectfully ask?

Tipping J Yes, no I understand the force of the point. It weighed very heavily with Justice Panckhurst and I can understand the force of the point, but is it not equally consistent with a generic approach? You would say not because at this point the Judge wants to know about dollars and cents.

Collins Exactly. What are you getting from ACC? I need to know that before deciding what, if anything, I'm going to make the offender pay.

Tipping J Because it's a quantum focus rather than a generic focus here.

Collins Exactly.

Tipping J This has to be your best point if one's assessing individual points.

Collins Thank you Sir. I'm not too sure if I should thank you or not. I thought that the definition of 'entitlements' was far more persuasive

Tipping J Well I see this as being a stronger point on its own. I mean obviously one looks at it altogether but if this couldn't logically be here unless you're right, well that is a very strong point. We'll need to hear from Mr McDonald – I will at least from Mr McDonald in reply as to how he answers that.

Collins And his suggestion for example that there must somehow be a reference to, and the example he used was goodwill to business. Well that's not covered by ACC so why would you need to find out that, and why would you need to know your ACC entitlements if the damage was goodwill to a business. ACC doesn't cover that.

Elias CJ But is perhaps the answer that loss or damage consequential on physical harm is potentially a very broad category and not all such consequential loss, economic loss for example, may be the subject of cover. I'm just trying to think of some examples.

Collins It won't be any economic loss that's going to be the subject of cover Your Honour.

Elias CJ Sorry, what?

Collins There won't be any economic loss

Elias CJ Well I don't know, you were about to, I'm just trying to think of some tort claims that might arise if you're prevented from fulfilling a contractual engagement or something by reason of your accident.

Collins ACC isn't going to be covering

Elias CJ ACC is not going to be covering it, so you might need to have some inquiry into whether the type of consequential damage is damage of a type that ACC is likely to cover by entitlements.

Collins By entitlements.

Elias CJ Yes. In other words I don't see that the s.33(c) inquiry is in all circumstances going to be redundant unless it refers to the dollars and cents.

Collins Well with the greatest of respect Your Honour, I just can't envisage a situation in which there would be a loss consequential upon a physical injury for which the victim does not have entitlements from ACC which would necessitate some form unless you were inquiring into what the extent of those entitlements were and ordered to be able to insure when you're sentencing this person you weren't providing some form of double compensation.

Tipping J I think you have a point that perhaps hasn't been completely unveiled Mr Solicitor if I may be so bold. c(ii) must be read in conjunction with (c)(i) and that expressly includes the concept of value of the loss or damage which naturally leads one to think although it is conjoined with nature, it naturally leaves one to think that little 2 is also concerned with value, hence the dollars and cents. I'm not saying that's an overwhelming point, but you have to read all this together.

Collins As a package, yes.

Tipping J And the first purpose of (c) is nature and value, and then the second purpose is whether nature and value is covered by ACC. Well nature may be but not value.

Collins Exactly.

Elias CJ Or nature may not be.

Tipping J Or nature may not be.

Elias CJ And therefore it's not necessary to get into that.

Tipping J May be not. So I think perhaps that might really make your point

Collins A little more palatable perhaps.

Tipping J Well I don't know about palatable, but it's a necessary

Elias CJ There's a hook.

Tipping J It's a necessary dimension to bear in mind that little 2 can't be read in isolation of its immediate context.

Collins Yes.

Tipping J So the writer of the report is directed to two things, one of which can only be consistent with your thesis.

Collins Yes.

Anderson J When one sees the broad reference to the Act which takes one back to s.69, but that in itself is a condensation of a number of different concepts, one of which is weekly compensation and that in itself is a condensation of a number of concepts, and it's weekly compensation that is payable and s.32 of the Compensation Act defines what is payable in terms of 80%.

Collins Section 32, yes. S.32 Your Honour?

Anderson J Is it s.32

Elias CJ The Schedule is it?

Collins Clause 32 is it Your Honour?

Tipping J Well it's the payable point.

Collins Yes.

Anderson J It's the Schedule yes. The definition goes back to clause 32 of the Schedule.

Collins Yes indeed.

Anderson J Yes, that's what I meant.

Collins Yes.

Anderson J It can only be justified on the basis that there is a specific policy choice in the Sentencing Act which cuts across the idea of the Compensation Act, but it's a deliberate choice.

Collins Yes.

Blanchard J Mr Solicitor, there may be some support in the argument you've been putting up. I mean you can trust (b) and (c)

Tipping J Yes, I agree.

Collins Of 33?

Blanchard J Of 32(2), because (b) deals with nature and consequential loss

Collins I'm sorry Your Honour, I'll just make sure I've got the right one.

Tipping J It's the sub-division.

Collins Yes.

Blanchard J Yes, which perhaps suggests that in (c)(i) deals with nature and (ii) deals with consequential loss. It's of course complicated by the introduction, but that might be consistent with the thesis you're putting forward.

Tipping J Well clearly the whole of 33, up to the point where you get to financial capacity of offender, is at least in part to determine the value of the loss.

Collins Yes.

Tipping J As it's rather strangely put. The amount of the loss, and it would be odd if (c)(ii) didn't have at least as part of it that connotation, and if it is there for that purpose, it can't be there for any other reason than to distinguish in amount terms between what is covered and what isn't, using the word 'cover' loosely.

Collins Yes.

Tipping J And I think Mr McDonald will have to give us some further help on this, at least from my point of view.

Collins Now the final contextual point I wanted to make was that reference to the Select Committee's report, which is under tab 29 I think from memory, no, 31, and this was a provision which my friend Mr McDonald took Your Honours to this morning, and in particular to page 17, and the paragraph commencing 'most of us recommend', and it won't surprise the Court to know that my interpretation of that is completely different from my friend's.

Elias CJ Sorry, what have you taking us to, I was just making a note?

Collins I'm sorry. If you go to tab 31 Your Honour

Elias CJ Thank you.

Collins Page, and this is the report of the Select Committee, the commentary from the Select Committee, and page 17 of the report which is one page over, and there are two paragraphs which Mr McDonald took Your Honours to this morning – the first one commencing 'most of us recommend an amendment to clause 29. Now ultimately it's going to be a matter for Your Honours, but when I read that I read that to mean that what the Select Committee was trying to achieve was to ensure that no reparation award could be made to compensate somebody for physical harm, i.e., the matters that are covered by lump sum payments; the remnants of the general damages that might have been awarded at common law, but deliberately kept in place the ability to be able to make reparation awards for matters that were not the subject of compensation under ACC. In other words those quantifiable special damages such as the balance between weekly income and weekly compensation entitlements payable by ACC, and that what Parliament was trying to do was to strike that balance, and to get back to the point which I made right at the beginning, to get away from any possibility of double recovery and to ensure that victims receive by way of compensation sums that put them in the best place possible following them becoming the victims of crime. Now in the few moments that I would like to remain on my feet Your Honours, can I just deal with some of the key issues that I take with my friend's' approach? The first is that my friend really doesn't

focus upon the whole purpose of the Sentencing Act, and he doesn't engage with the fact that that Act was passed in the context of Parliament wanting to give effect to the principles of restorative justice and an environment where Parliament wanted to make the offender take responsibility for remedying a victim's loss. It also is noticeable that his submissions don't really recognise that what Parliament was trying to do in the Sentencing Act, and this part of the Sentencing Act was to ensure that victims of crime received compensation for their losses but not any form of double recovery. And it is also important to recognise that the Sentencing Act was passed in the context of a long tradition of this country's Criminal Courts having in limited instances the ability to order an offender to make good some of the consequences of their conduct to a victim of crime. And whilst the amounts awarded in this case of course were large by anyone's standards, the fundamental principle remains much the same. The fundamental philosophy of the ACC legislation is not compromised by Courts having the ability to be able to require offenders to make good the losses suffered by a victim of crime which ACC does not provide for. Those are the fundamental points which I wanted to make. I'm very very happy to address any other questions or concerns that Your Honours may have.

Tipping J So is the point on the philosophy this that the whole idea of no fault cover doesn't preclude topping up where there is fault, putting it in a rather cryptic way. In other words it doesn't necessarily follow because you have a no-fault system that in carefully defined circumstances you can put people into a better compensated position if there is fault. The no-fault just gives you a sort of underpinning on which you can build.

Collins Yes, it sets the foundation. And I don't know if Your Honours would have had much chance to absorb what happens overseas but I would have thought that when you look at what happens in Victoria for example, Canada and the United Kingdom, the result in New Zealand is in my respectful submission extremely principled. The State takes primary responsibility for looking after the victim and to the extent that an offender can be required to fully compensate, it does so. In Victoria you can end up with the double compensation. In the United Kingdom the reverse occurs. The emphasis is placed upon the offender and then the victims

Elias CJ Top up from the State

Elias CJ Compensation system.

Collins From the State. And that's also the case in most of the Canadian Provinces as well.

Elias CJ But our solution really follows from the philosophy of the Accident Compensation regime

Collins Entirely, entirely, yes

Elias CJ Yes, I'm sure it's not solicitousness for offenders.

Collins Yes. But the end result as advocated for by the respondent in this case produces by international standards, a very safe, sensible and principled outcome.

Anderson J Essentially on your view the Sentencing Act provision serves a sentencing purpose. It has a sentencing rationale involving concepts of I suppose restorative justice really.

Collins Exactly, which is why I took Your Honours to the United Nations Convention and the fundamental philosophy behind reparation.

Anderson J Yes, at the start.

Elias CJ Mr Solicitor I wonder if you can just help me, I've just gone back to thinking about the linkage between s.32 and s.33. If the interpretation of entitlements is not what's payable, just on that basis, then there's no awkwardness between sections 32 and 33 because the Court won't be ordering a reparation order in terms of s.33(1) because the sentence of reparation in respect of consequential loss won't be appropriate, because that's off the table under s.32(5).

Collins Yes I agree with that analysis, Your Honour. Of course I don't agree with the

Elias CJ No, no, but the point that I'm putting to you is that s.33 is not really a different argument from the principal argument based on interpretation of s.32.

Collins Well I have always tried to argue that they are consistent

Elias CJ Well they're equally consistent depending on the interpretation that is given to s.32.

Collins Well apart from the point which I made earlier Your Honour, I really struggle to understand what sort of an inquiry would be made under 33(1)(c)

Elias CJ Well you may well be right that it's a quantification inquiry, but it's for consequential loss which is not excluded by s.32(5). So it's the consequential loss in terms of medical payments not recoverable - those sort of things - but it's not consequential loss which is barred by s.32(5).

Collins Well it's perhaps because I'm really struggling to see how it could actually work that I'm hesitating to

Elias CJ That's how s.33(5) would work?

Collins Yes

Elias CJ 33

Collins 33(c)(ii)

Elias CJ Yes.

Collins I just don't understand how it could ever work.

Tipping J Well it could work but it would have extremely limited field of operation if you like if it was going along the lines the Chief Justice was putting to you.

Collins I can't actually envisage any situation

Elias CJ Well it would have to be a consequential loss such as not within the entitlements.

Collins Yes.

Elias CJ Yes.

Collins But I just can't envisage any situation in a case of physical injury where that could occur.

Elias CJ I'm not sure that that's right, but anyway I'll puzzle about that.

Blanchard J If ACC rejected your claim for some reason and you had to employ a lawyer – got John Miller involved – maybe it would cover that cost.

Collins And you're worried about proportionality.

Tipping J I'd apply on his behalf for a suppression order.

Collins Thank you very much Your Honours.

Elias CJ Thank you. Yes thank you Mr McDonald.

McDonald Just dealing with that s.33(1) point, let me say at the outset that I agree that it has a very limited application but on my argument it still does have an application. If we take the present case the victim suffered injury, had medical expenses which is an entitlement, suffered loss of earnings which is an entitlement. If when she went back to work as she said in the victim's report, her business had fallen off because her customers – she was a physiotherapist – her customers had gone elsewhere, and if she was incapable of going on and running that business then there would be a loss of goodwill, i.e., reduction of the purchase price which would have been crystallised on sale. Now if we categorise, slice or dice how we want, to look at it and say which specific entitlement as a part of that package naturally responds to that reduction in sale price?

Tipping J You'd have a real remoteness of damages in that example if you were at common law, so surely it's not intended that the reparation system is going to go into those sort of esoteric foreseeability and remoteness issues.

Elias CJ Well it may be that they don't arise because reparation is a direct response to victim needs.

McDonald There may be other examples. There may be other losses of business opportunity that are less remote. I mean that's just an example that occurred to me because

Tipping J Well I would be helped by a more immediate example because if all one can think of is very rarefied territory, it may not be very

persuasive to say that the section is directed at those rarefied events.

McDonald Well I have to concede that the events are going to be limited. That is an example that this case came close to.

Tipping J Yes quite.

McDonald But if you accept that proposition – I mean s.33(1)(c) does work, because the report has to identify the nature of the damage. Here to take that example, the loss of goodwill. It then has to say is that a loss or damage that is within s.32(5). If it is you don't value it. If it's not, if it's outside the ACC system, outside the package of entitlements, there's no specific entitlement to which it has a natural relation, then you do value it.

Tipping J A type of damage outside the package of entitlements?

McDonald Yes, there's no specific entitlement within the package to which it's naturally related.

Tipping J Well I have to say to you that I think it's pretty strange to suggest that that's the sort of thing that this reparation report's all about. That's a very sophisticated exercise. Even Judge Green in the List Court might find that a challenge.

McDonald The only alternative submission I can put it is it simply be treated as a side-wind.

Tipping J As a?

McDonald As a side-wind.

McGrath J But that was your main argument anyway.

McDonald Yes. One other point I could make about it is whatever the difficulty, and I accept it as a difficulty, I think the Court can afford to be quite hard on s.33(1)(c) for the reasons I've said. I mean it is a machinery provision. It is subordinate to s.32(5) in the sense the report it allows must preclude the loss of damages within s.32(5).

Tipping J You would resist the proposition I take it that it gives some clue to what they were trying to say in 32(5)?

McDonald It obviously has no value in terms of a guide to interpreting it, but it comes close to that in my submission. Unless there's anything else.

Elias CJ Sorry I'm thinking about examples which is a very bad thing to do on the bench, but suppose somebody broke their leg and couldn't go on a trip, would that be consequential loss or damage which would be covered by entitlements under ACC?

McDonald When Your Honour was talking there was another point that just did occur to me which may be a little less remote.

Elias CJ Well I don't think of breaking a leg, I was just thinking of a holiday.

McDonald No, no, not Your Honour's, I'm sorry. Justice Tipping's concerned

Tipping J Unkind observation.

McDonald Yes. The Accident Compensation Act is a large and complicated Act, and this case is focused on the weekly compensation, but in this case the victim was self-employed. Now under the entitlement for first week compensation, if you are salaried the employer pays it; if you are self-employed you don't, so it may be possible to argue that the loss of income of a self-employed person in the first week falls outside the package of entitlements because

Elias CJ Is this a own goal Mr McDonald?

McDonald Well I say it may be arguable because

Elias CJ Well it just sounds very like that's been put to us.

McDonald Well it's a question of how you see 'naturally related'. Is it the subject of an entitlement or not? And it may be arguable that a loss of that type is not sufficiently naturally related to the first week entitlement and that that might be something that could be part of the report.

Tipping J Well if that's not covered if you like, surely it's in like case to the missing 20%.

McDonald Well I would say no Sir to that because in my argument the weekly compensation of 80% is the weekly compensation that applies to that category or loss.

Tipping J It depends on how specific you are going to get. For a self-employed person it's 80% minus the first week.

McDonald Well except Sir in s.69 first week compensation is listed as a separate entitlement to weekly compensation.

Tipping J Yes, that's a good point, that is a good point,

Elias CJ So it's not a own goal, yes

Tipping J It's not a own goal, no, it's a different head of entitlement?

McDonald Yes, and there may be other arguments like that which are for another day, but it's a long and complicated Act and you have to try and think of examples. I mean with respect it's difficult and obviously it's been given a lot of thought, but that is another possibility. Those are my submissions.

Elias CJ Yes thank you. Thank you counsel. It's a short point but a very difficult point and we've been assisted very much by your submissions. We'll take time to consider our decision on the matter, thank you.

1.02pm Court Adjourned