IN THE SUPREME COURT OF NEW ZEALAND

SC 83/2007
[2009] NZSC 47

BETWEEN	PETER MILES DAVIES Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 5 August 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: G S M McDonald and C R Gates for Appellant
D B Collins QC Solicitor-General, A M Powell and C Brown for Respondent

Judgment: 25 May 2009

JUDGMENT OF THE COURT

A The appeal against the sentence of reparation is allowed.

B The sentence of reparation imposed in the District Court is set aside and in substitution a sentence of reparation of $8,945 is imposed.

C Any question of costs is reserved. If costs are sought, the appellant has 10 days to file a memorandum seeking them. The respondent will have a further 10 days to reply.

REASONS

ELIAS CJ, BLANCHARD AND ANDERSON JJ

(Given by Elias CJ)

[1] The appellant was convicted in the District Court at Christchurch of operating a vehicle carelessly and causing injury when towing a trailer with an insecure load. A mattress on the trailer fell off, causing a collision in which a cyclist was injured. The charge of careless driving causing injury carries maximum penalties of imprisonment for a term not exceeding three months or a fine not exceeding $4,500, together with mandatory disqualification for six months or more.[1] In addition to these penalties, it was open to the Judge to impose a sentence of reparation under s 32(1) of the Sentencing Act 2002. Such reparation is paid to victims of the offending in respect of their loss or damage to property, emotional harm, and any loss or damage consequential on emotional or physical harm or loss of or damage to property. In the present case, the cyclist fell within the definition of "victim" contained in s 4 of the Sentencing Act because she suffered physical injury and damage to property "through, or by means of, an offence committed by another person".[2] She was therefore someone in respect of whom the sentencing Judge was able to order reparation under s 32.

[2] Judge M J Green sentenced the appellant to make reparation totalling $20,500 and disqualified him for the minimum mandatory period of six months. The Judge imposed no additional fine, on the basis that, given the size of the reparation order, "it would be wrong to impose anything else by way of fine or any penalty other than the disqualification which must follow".[3] Of the total reparation order of $20,500 imposed in the District Court, $7,000 was ordered in respect of emotional harm.[4] The balance covered loss identified in the victim impact statement as including: $1,633 in respect of uninsured damage to the bicycle, clothing and equipment; $312 in respect of medical expenses associated with the injured cyclist's application for cover under the Injury Prevention, Rehabilitation, and Compensation

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1 Sections 8 and 38 of the Land Transport Act 1998.

2 It is unnecessary to determine whether she also fell within the definition of "a person against whom an offence is committed by another person" or whether that definition is confined to victims of advertent crimes.

3 *Police v Davies* (District Court, Christchurch, CRN 05009025688, 26 September 2006, Judge M J Green).

4 "Emotional harm" is not defined by the Sentencing Act 2002.

Act 2001; and $15,895 on account of lost earnings consequential on the physical injury not recovered from the Accident Compensation Corporation. The Judge, in reducing the amount claimed for losses other than emotional harm to a total of $13,500, did not distinctly attribute any part of that sum to each of the three heads of loss. Since, however, the property damage and medical expenses do not appear to have been controversial, it seems that **$**11,555 was awarded to reflect the victim's loss of earnings claim.[5] The reduction is consistent with the Judge's acknowledgement that he had applied a discount to the claim because it appeared that the victim might obtain further compensation for lost earnings from the Corporation, if she provided better substantiation of her loss. The sum of $11,555 represents the shortfall between the earnings lost by the victim as a result of her injuries and the weekly compensation she received in respect of such loss of earnings under the Injury Prevention, Rehabilitation, and Compensation Act. The shortfall arose because, under the Injury Prevention, Rehabilitation, and Compensation Act, weekly compensation for loss of earnings is limited to 80 per cent of earnings lost.[6]

[3] The reparation orders in respect of the victim's property loss and the emotional harm consequential upon her physical injuries are not challenged on appeal. The sole issue for determination is whether the District Court Judge was prevented by s 32(5) of the Sentencing Act from ordering reparation for the shortfall between the payments made to the victim in respect of her lost earnings under the Injury Prevention, Rehabilitation, and Compensation Act, and the full loss of earnings she had suffered through her injuries. As loss consequential upon physical harm, such loss falls within the scope of s 32(1)(c) of the Sentencing Act unless excluded by the terms of s 32(5), which provides:

> the court must not order the making of reparation in respect of any consequential loss or damage … for which the court believes that a person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001.

[4] Key to the determination of the appeal is the interpretation of the words "in respect of any consequential loss or damage … for which the court believes that a person has entitlements". If they refer to the type of consequential loss or damage

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5 This figure is derived by subtracting the uncontested amounts from $13,500.

6 Schedule 1, cl 32, referred to at para [17] below.

(loss of earnings) for which there are entitlements under the Injury Prevention, Rehabilitation, and Compensation Act, the earnings-based reparation of $11,555 is barred by s 32(5) because the victim had "entitlements" in respect of such loss under the Injury Prevention, Rehabilitation, and Compensation Act. If s 32(5) excludes reparation in respect only of the amount of compensation actually payable under the Injury, Prevention, Rehabilitation and Compensation Act, then the reparation order for the amount by which the income lost exceeds what is payable is not excluded.

[5] In the High Court[7] and in the Court of Appeal[8] it has been held that the sentence of reparation made in the District Court in relation to the shortfall in compensation for earnings was not precluded by s 32(5) and was one available to the sentencing Judge. Leave was given for further appeal to this Court because the question of interpretation raises a matter of general importance. Differing from the High Court and Court of Appeal, we consider that s 32(5) prevents the sentence of reparation in respect of loss of earnings. We would allow the appeal. Our reasons turn on the language of s 32(5) assessed, as the internal reference to the Injury Prevention, Rehabilitation, and Compensation Act requires, by reference to the meaning and purpose of that Act also.

The sentence of reparation

[6] The sentence of reparation is a key provision in the Sentencing Act 2002. Stand-alone reparation orders to compensate for property loss have been available under statutory provisions since 1894. Such orders of reparation for property loss were provided by s 22 of the Criminal Justice Act 1985 in terms which are similar to those adopted in s 32 of the Sentencing Act 2002. Sentencing legislation for many years also enabled the courts to order part or the whole of any fine imposed to be paid to a victim of crime. As provided for in s 16 of the Criminal Justice Amendment Act 1975, such award could be made to a victim who had suffered

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7 *Davies v Police* (2007) 8 NZELC 98,691.

8 *Davies (Peter) v Police* [2008] 2 NZLR 645 (William Young P, Hammond and Wilson JJ).

physical harm without affecting the right of the victim either to receive compensation under the Accident Compensation Act 1972, or to recovery by civil proceedings of damages in excess of the amount of the award.[9] The amount of the payment was, however, limited to the fine imposed.

[7] The Sentencing and Parole Reform Bill as introduced in August 2001 contained in cl 29 a sentence of reparation, able to be imposed when an offender caused another person to suffer either emotional or physical harm, or loss of or damage to property. The Bill proposed that any loss consequential on such harm could be taken into account in determining the amount of reparation to be made. Clause 29 made no reference to the interface between the sentence of reparation and any compensation available under the accident compensation legislation. Following recommendation by the Select Committee[10] that the clause should be amended to prevent a clash with the accident compensation legislation, which was noted to cover physical harm, the power to award reparation in respect of physical harm was removed. At the same time, cl 29(2B) was added, providing that in respect of consequential loss the court could not make an order for loss "for which the victim has cover under the Injury Prevention, Rehabilitation, and Compensation Act". A further additional subclause allowed a sentencing judge to take into account other remedies and rights available in relation to consequential loss or damage when deciding whether to order reparation. Subsequently, in the Committee of the whole House, the Minister of Justice proposed a number of changes to the Bill in a Supplementary Order Paper.[11] The changes included an amendment to cl 29(2B) to prevent reparation being ordered in respect of "consequential loss … for which the court believes that a person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001". This amendment was enacted in the Sentencing Act 2002.

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9 Section 16 of the Criminal Justice Amendment Act 1975, a provision re-enacted in s 28 of the Criminal Justice Act 1985 and in force until enactment of the Sentencing Act 2002.

10 Justice and Electoral Committee, "Sentencing and Parole Reform Bill" [2002] AJHR I.22C, p 583.

11 "Sentencing and Parole Reform Bill" (16 April 2002), No 262.

[8] The Sentencing Act 2002 makes reparation for victims an object of sentencing in itself. It is not confined to property loss or damage. And it is not limited by the fine prescribed as penalty. Reparation under the Sentencing Act addresses the Act's purpose in providing for "the interests of victims of crime".[12] It is given priority in the scheme of the Act.[13] If a court is lawfully entitled to impose a sentence of reparation it must do so unless satisfied that it would result in undue hardship for the offender or because there are special circumstances that would make the sentence inappropriate.[14] The court must give reasons for not imposing a sentence of reparation.[15] While the means of the offender may affect whether reparation is available for the full amount of loss,[16] in many cases the sentence of reparation will make it unnecessary for the victim to bring civil proceedings or make application for statutory remedy. The court investigates the means of the offender and other matters relevant to the amount of reparation and promotes agreement between offender and victim.

[9] The sentence of reparation is contained in s 32. As is relevant to the present appeal, it provides:

> (1) A court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer—
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> (a) loss of or damage to property; or
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> (b) emotional harm; or
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> (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.
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> (2) Despite subsection (1), a court must not impose a sentence of reparation in respect of emotional harm, or loss or damage consequential on emotional harm, unless the person who suffered the emotional harm is a person described in paragraph (a) of the definition of victim in section 4.

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12 Section 3(d).

13 Where a sentence of reparation and a sentence of fine are imposed, any payments received from the offender must be applied first in satisfaction of the sentence of reparation: s 35(2). Sums paid under a sentence of reparation may be paid, with the victim's consent, to his insurer: s 38(1).

14 Section 12(1).

15 Section 12(3).

16 Section 35(1).

> (3) In determining whether a sentence of reparation is appropriate or the amount of reparation to be made for any consequential loss or damage described in subsection (1)(c), the court must take into account whether there is or may be, under the provisions of any enactment or rule of law, a right available to the person who suffered the loss or damage to bring proceedings or to make any application in relation to that loss or damage.
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> (4) Subsection (3) applies whether or not the right to bring proceedings or make the application has been exercised in the particular case, and whether or not any time prescribed for the exercise of that right has expired.
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> (5) Despite subsections (1) and (3), the court must not order the making of reparation in respect of any consequential loss or damage described in subsection (1)(c) for which the court believes that a person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001.
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> …
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> (8) Nothing in section 320 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 applies to sentencing proceedings.

The effect of s 32 is that those who suffer physical or emotional harm or property damage through an offence may receive reparations at sentencing of the offender in respect of both emotional harm and property damage, and any loss consequential upon physical or emotional harm or damage to property.

[10] Sections 32(3) and 38(2) explain the relationship between the sentence of reparation and civil or other statutory remedies available to the victim. Section 32(3), like s 32(1), is expressly made subject to s 32(5), which provides an overriding prohibition on the making of a reparation order in respect of consequential loss or damage where the court believes a person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001. Section 32(3) makes it relevant to the determination whether a sentence of reparation is "appropriate" at all, as well as in relation to the amount of reparation to be ordered, whether other proceedings or statutory applications can be brought in relation to the loss. Under s 32(3), the court "must" take into account other such remedies available to the victim. Where there is substantial dispute as to causation or as to measure of loss, the court may take the view that compensation is not appropriately dealt with through the summary criminal procedure for ordering reparation. Nor is the appropriateness of the sentence of reparation determined by

whether the alternative procedure is in reality available. Section 32(4) provides that the court must consider whether it is appropriate to order reparation, given alternative remedies, whether or not the victim has exercised the alternative claim and whether or not he is barred by any time limit. On the other hand, in a case which is suitable for the sentence of reparation, but where the amount awarded only partially covers the loss, s 38(2) makes it clear that the victim is not precluded from obtaining additional relief through other proceedings available to him:

> A sentence of reparation does not affect any right that the person who suffered the harm, loss, or damage has to recover by civil proceedings any damages in excess of the amount recovered under the sentence.

These provisions recognise that not all losses suffered by victims will be suitable for a sentence of reparation. And even where a sentence of reparation is suitable, it may not be appropriate to award reparation which amounts to full compensation for loss. The sentence of reparation therefore provides summary remedy for victims of crime, without limiting their ability to seek compensation outside the criminal justice process.

[11] Reparation may not amount to full compensation and may not always be appropriate. But it enables speedy and inexpensive relief, additional to other remedies. Speedy and inexpensive determination is facilitated by the ability of the court to obtain reparation reports from a probation officer or some other person designated to provide information under s 33 of the Sentencing Act.[17] As is relevant, s 33 provides:

> (1) If the court considers that a sentence of reparation may be appropriate, the court may order a probation officer, or any other person designated by the court for the purpose, to prepare a reparation report for the court in accordance with section 34 on all or any of the following matters:
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> …
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> (c) in the case of any loss or damage consequential on physical harm,—
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> (i) the nature and value of the loss or damage; and

[17] Under s 34, report writers are encouraged to obtain the agreement of victim and offender about reparation, but where such resolution is not achieved may indicate their own view or report that matters are unresolved, to be resolved by the Court if appropriate.

(ii) the extent to which the person who suffered the loss or damage is likely to be covered by entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001.

[12] Section 33(1)(c) was introduced into the Sentencing and Parole Reform Bill through the same Supplementary Order Paper[18] that changed the reference from "cover" to "entitlements" (a term which more accurately reflects the language in the Injury Prevention, Rehabilitation, and Compensation Act) in what became s 32(5). The power of inquiry through report under s 33(1)(c) does not mean that the sentencing judge determines whether or not a victim is covered for personal injury under the Injury Prevention, Rehabilitation, and Compensation Act 2001 and has entitlements under that Act. Indeed, such determination would be inconsistent with the exclusion, for the purposes of the sentence of reparation, of the Corporation's general right to be heard in court proceedings where cover is in issue.[19] In cases of doubt or dispute as to entitlements, it would also be inconsistent with the system for determining such questions under the Injury Prevention, Rehabilitation, and Compensation Act. For the purpose of the sentence of reparation, the Court is simply required to assess the extent to which the victim is *likely* to be covered by entitlements under that Act. The language suggests a general inquiry as to the scope of the Injury Prevention, Rehabilitation, and Compensation Act 2001, rather than determination of what is payable by the Corporation.

[13] In some cases, perhaps in many cases, assessing the "likelihood" of cover by entitlements under the Injury Prevention, Rehabilitation, and Compensation Act may not require a reparation report, because entitlements will have been demonstrated through payment and are not in contention. In cases where the Corporation has not yet accepted cover, specific inquiry of it as to cover may be necessary because acceptance of cover for personal injury is a precondition for any entitlement under the Act.

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18 "Sentencing and Parole Reform Bill" (16 April 2002), No 262.

19 Section 32(8) of the Sentencing Act excludes s 320 of the Injury, Rehabilitation, and Compensation Act which prevents any court making a determination as to whether a person has cover under that Act, without giving the Corporation an opportunity to be heard.

Entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001

[14] The reference to the Injury Prevention, Rehabilitation, and Compensation Act in s 32(5) of the Sentencing Act makes the meaning and policies of that legislation relevant to the interpretation of s 32(5). The purpose of the Act is "to enhance the public good" by:[20]

> providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs).

[15] The Act provides cover for all who suffer personal injury in New Zealand.[21] Section 3 refers to the "social contract" represented by the first accident compensation scheme, which the current legislation is to "reinforce". As part of the social contract, s 317 provides that no person may bring "proceedings" independently of the Act for damages arising directly or indirectly out of personal injury covered by the Act, except for property damage. Where injuries occur, the Accident Compensation Corporation, which has the functions of determining cover and providing entitlements "in accordance with the provisions of this Act",[22] must have as its "primary focus":[23]

> rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation.

During their rehabilitation, claimants receive "fair compensation for loss from injury, including fair determination of weekly compensation",[24] as prescribed by the Act.

[16] Those who have suffered personal injury in respect of which the Accident Compensation Corporation has accepted cover can obtain the entitlements to which

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20 As the introductory words of s 3 provide.

21 Section 20. "Personal injury" is defined under s 26 to include mental injury suffered because of physical injuries. Mental injury is defined under s 27 to mean a "clinically significant behavioural, cognitive, or psychological dysfunction".

22 Section 165.

23 Section 3(c).

24 Section 3(d).

they are eligible under the Act.[25] "Entitlements" are defined by s 6 as those "described or referred to in s 69". Excluding transitional entitlements referred to in Parts 10 and 11 of the Act, s 69 identifies entitlements as: rehabilitation ("comprising treatment, social rehabilitation, and vocational rehabilitation"); first week compensation; weekly compensation; lump sum compensation for permanent impairment; and specific grants and compensation for dependants following death through personal injury. After the first week, loss of earnings are the subject of "weekly compensation", in issue in the present case.

[17] So far as is relevant, "weekly compensation" is defined by s 6 as:

> compensation for loss of earnings, or loss of potential earning capacity, … that is payable by the Corporation— … under [clause] 32 … of Schedule 1.

Weekly compensation under cl 32 of Sch 1 is payable to "an earner" in respect of any period of incapacity subsequent to the first week. Clause 32(3) caps the amount of weekly compensation:

> The weekly compensation payable is 80% of the claimant's weekly earnings, as calculated under clauses 33 to 45 and 48.

It is because of this cap in cl 32(3) in terms of weekly compensation that the victim sought reparation in respect of the 20 per cent of her pre-accident earnings she is unable to recover from the Corporation.

[18] The 80 per cent cap in cl 32 of Sch 1 is to be considered in the light of the legislative aims described in s 3. Consistently with the origins of the accident compensation system,[26] the benefits provided under the system, for reasons of affordability and the public interest in providing incentives to rehabilitation, were not set to be a complete indemnity. Claimants are to receive "during their rehabilitation", compensation for loss which is "fair" rather than full. That is a central plank in the "social contract" implemented through the legislation and its predecessors.

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25 Section 67.

26 See Royal Commission to Inquire into and Report upon Workers' Compensation, *Compensation for personal injury in New Zealand: Report of the Royal Commission of Inquiry* (1967).

[19] Section 317 prevents any person from bringing proceedings outside the Injury Prevention, Rehabilitation, and Compensation Act 2001 for damages arising out of personal injury, covered by the Act. The only exception to the general prohibition relates to "damage to property".[27] Under s 317(7) the prohibition on bringing proceedings for personal injury is unaffected by "the fact that a person who has suffered personal injury … is not entitled to any entitlement under this Act". Disentitlement under the provisions of the Act does not therefore revive any common law or statutory remedy for damages arising directly or indirectly out of personal injury for which there is cover under the Act. The person injured has no redress outside the statutory regime of the Injury Prevention, Rehabilitation, and Compensation Act.

The judgments in the High Court and Court of Appeal

[20] Panckhurst J considered that there were two ways to interpret "entitlements": in a "generic" sense, "so that as long as there is some entitlement, the statutory bar in s 32(5) applies"; and "as restricted to the actual provision under the accident compensation scheme".[28] If "generic", any entitlement would raise the statutory bar in s 32(5). If specific to what was actually provided under the Injury Prevention, Rehabilitation, and Compensation Act, s 32(5) would not prevent reparation in respect of the 20 per cent of weekly earnings not actually payable. Panckhurst J thought both interpretations tenable as a matter of textual analysis. He was persuaded that the correct meaning barred only what is actually payable for two principal reasons. He considered that the ability to obtain a report under s 33(1)(c) into "the extent" to which the victim was likely to be covered by entitlements, suggested an inquiry into what was payable. He was also influenced by the "primacy" given to reparations by the Sentencing Act, which he thought required a more generous approach to the availability of reparation than would apply if the "generic" interpretation were accepted.[29]

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27 Section 317(2).
28 At para [26].
29 At paras [27] – [30].

[21] The Court of Appeal agreed. Its conclusion was based on application of the definitions of "entitlements" and "weekly compensation" contained in the Injury Prevention, Rehabilitation, and Compensation Act[30] and on wider contextual and policy considerations. Since, applying the definitions, only 80 per cent of lost income is payable by the Corporation, the Court considered that the remaining 20 per cent was not "an entitlement" under the Act.[31] The Court of Appeal was also influenced by the fact that the power to direct part of a fine to be paid to a victim under earlier legislation had not been thought by Parliament to be inconsistent with the accident compensation regime.[32] It thought that the legislative history made it clear that s 32(5) was concerned only to exclude losses not compensated under the Injury Prevention, Rehabilitation, and Compensation Act, and there was no basis for excluding reparation for losses not able to be compensated. The Court considered there would be an inconsistency if emotional harm and loss consequential on it could be the subject of reparation, but losses consequential on physical harm could not be. The Court of Appeal agreed with Panckhurst J that the power to inquire into "the extent" to which a victim was likely to be covered by entitlements, suggested an inquiry into the amount payable. It also considered the interpretation adopted by Panckhurst J to be consistent with the purposes of reparation[33] and with offers of amends under s 10 of the Sentencing Act (which can be taken into account in sentencing and made the subject of an order to pay but which are not subject to the s 32(5) exclusion).[34]

The interpretation of s 32(5)

[22] In interpreting s 32(5), the High Court and Court of Appeal focussed on the meaning of the word "entitlements", which they interpreted by reference to the definitions contained in the Injury Prevention, Rehabilitation, and Compensation Act set out in paras [16] and [17] above. The emphasis on the word and its

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30 Set out at paras [14] – [18] above.
31 At para [21].
32 At para [12].
33 At para [24].
34 At para [25].

definition in another statute may mislead. The word in s 32(5) of the Sentencing Act appears in a phrase. The court must not order reparation "in respect of any consequential loss or damage described in subsection (1)(c) for which the court believes that a person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001". "Entitlements" as used in this phrase relates to the type of loss, as the use of the relative "for which" makes clear. The consequential loss in issue here is loss of earnings as a result of physical injury. In respect of that loss, the victim has entitlements to weekly compensation. The fact that the victim has such entitlements can be identified without calculation of what is "payable" under the Injury Prevention, Rehabilitation, and Compensation Act. Indeed, the language of "belief" by the sentencing court in s 32(5) does not suggest an inquiry into what is actually payable. The phrase read as a whole carries the meaning that if consequential loss or damage is believed to give rise to entitlements under the Injury Prevention, Rehabilitation, and Compensation Act, no reparation order may be made in respect of that loss. We think this to be the natural meaning of s 32(5) because of its language and structure which, as already indicated, links entitlements to "consequential loss or damage" and which is inconsistent with inquiry into what is "payable." But this textual reading is supported by the wider context to be found in the Sentencing Act. It is also indicated by the evident legislative purpose (shown in the legislative history of s 32(5) referred to at para [7] above) not to undermine the integrity of the system of compensation provided by the Injury Prevention, Rehabilitation, and Compensation Act. It would be anomalous if victims of crime were able to obtain "top-up" compensation by way of reparation, above that available under the Act. Finally, the practical problems of inquiry into what is payable by the Corporation in sentencing proceedings, make it highly improbable that such result was intended and inquiry is unnecessary if s 32(5) is interpreted to exclude reparation where the type of loss is the subject of entitlements. We deal with these points in what follows.

[23] What we suggest in para [22] to be the natural meaning of s 32(5) is consistent with s 32 read as a whole. The court, in determining whether a sentence of reparation is "appropriate" under s 32(3), "must" take into account "whether there is or may be" any right to bring proceedings or make any application "in relation to

that loss or damage". Section 32(3) is concerned to identify whether there is a "right available" under any enactment or rule of law "to bring proceedings" or "to make any application" in relation to "that loss or damage". The subsection is not concerned with net outcome, but the right to claim in relation to the type of loss or damage. The concern with claim rather than with outcome is made explicit by s 32(4), which provides that it is irrelevant whether or not the right to claim has been exercised or indeed whether the right has expired and any claim is statute-barred. This is inconsistent with the question of overlap in s 32(5) being determined on quantification of what is obtained. It deals, rather, with the right to claim "in relation to that loss or damage". It is concerned with heads of damage. Here, the head of damage in issue is loss of earnings consequential on physical injury.

[24] Despite the contrary view taken in the courts below, we are of the view that the language of s 33(1)(c) is quite consistent with an inquiry whether there are entitlements for the type of loss. An inquiry into "the extent to which the person who suffered the loss or damage is likely to be covered by entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001" is equally apposite to scope of the cover by entitlements (what losses are the subject of entitlement) as to quantification. The context of s 32 points to scope, for the reasons already given. So does the standard of "likelihood" invoked by s 33(1)(c). Like "belief" in s 32, it points to entitlement for type of loss (here, compensation for lost income) rather than inquiry into the amount payable. If shortfall in payments under the accident compensation regime is able to be covered by reparation, s 33(1)(c) would more appropriately require, not inquiry into the extent to which loss is "likely to be covered by entitlements", but simply inquiry into the extent of actual payment. Neither s 32(5), in referring to the court's "belief" that a victim has entitlements, nor s 33(1)(c), in referring to inquiry into whether a victim is "likely" to be covered by entitlements suggests precision in the assessment.

[25] Reparation for consequential loss is properly seen, as the preservation of other claims confirms, as additional or auxiliary to remedies available outside the criminal justice system. In the case of losses compensated under the Injury Prevention, Rehabilitation, and Compensation Act, such remedies have been replaced by an exclusive statutory regime, as is discussed further below. Reinstating

them in a partial way through the criminal justice system would be inconsistent with that regime. Section 32(5) prevents such inconsistency. On this basis, s 33(1)(c) provides for inquiry into *whether* there is likely to be cover by entitlements for the type of loss, not inquiry into the amount the claimant will receive. Some heads of loss may be likely to be covered by the Commission. Others may not. Here the head of loss is loss of earnings. In respect of it there was clearly likely to be cover.

The integrity of the scheme of compensation under the Injury Prevention, Rehabilitation, and Compensation Act

[26] Section 32(5) is not in our view properly seen simply as a measure to prevent "doubling-up" of compensation, as both the Court of Appeal and High Court treated it. Rather, the purpose of the exclusion is to ensure that, where compensation is available for any head of loss under the Injury Prevention, Rehabilitation, and Compensation Act, reparation is addressed exclusively under that legislation. That is consistent with the legislative history referred to in para [7]. There is nothing explicit in the Sentencing Act to suggest that reparation under s 32 was designed to provide more generous compensation, through "top-up", than is payable under the Injury Prevention, Rehabilitation, and Compensation Act. There is no provision equivalent, for example, to the explicit exemption contained in s 16 of the Criminal Justice Amendment Act 1975, referred to above at para [6]. The need under s 32(3) for the court to assess in a particular case whether a sentence of reparation is appropriate and the inevitably partial and uneven distribution of compensation obtained under the criminal justice system, do not suggest any general policy in providing such "top-up" for the victims of crime.

[27] In its terms, s 317 of the Injury Prevention, Rehabilitation, and Compensation Act does not apply to a sentence of reparation, since the sentence of reparation is not proceedings for damages. But s 317 is part of the context in which s 32 of the Sentencing Act falls to be interpreted. Section 317 is a pivotal provision in the social contract implemented through the accident compensation legislation. It prohibits any proceedings independent of the Act, "whether under any rule of law or any enactment", for damages arising "directly or indirectly out of ... personal injury

covered by this Act." The prohibition does not extend to damage to property.[35] Section 317(7) makes it clear that it is the scope of the Injury Prevention, Rehabilitation, and Compensation Act that prevents recovery, rather than whether a claimant actually receives any entitlement under the Act. It provides that the prohibition on proceedings under s 317(1) is unaffected by the failure of a person to lodge a claim for personal injury, or by any surrender of rights relating to personal injury, or by the fact that the person who has suffered personal injury "is not entitled to any entitlement under this Act".

[28] If reparation can be ordered under the Sentencing Act to make up for perceived inadequacies in entitlement under the Injury Prevention, Rehabilitation, and Compensation Act, victims of crime stand outside the general prohibition. If "entitlements" for the purposes of reparation eligibility depend on what is actually paid, ineligibility under the Injury Prevention, Rehabilitation, and Compensation Act would revive the ability to obtain redress through reparation for victims of crime, but not victims of civil wrongs.[36] It is not at all clear why "top-up" claims for victims should be available in sentencing proceedings but not in civil suit. In our view, s 32(5) of the Sentencing Act, properly understood, gives effect to the policy of the Injury Prevention, Rehabilitation, and Compensation Act by ensuring that the sentence of reparation supplements the right to recover by civil proceedings. Section 317 removes such right in relation to loss arising out of personal injury covered by the Act.

[29] If a shortfall between actual loss and payments under the Injury Prevention, Rehabilitation, and Compensation Act is outside the "entitlements" for consequential loss which occasion the prohibition in s 32(5), as the argument of the Solicitor-General and the decisions in the Courts below would have it, it is difficult to account for the very different treatment of compensation for physical injury. In respect of such injury, too, the Injury Prevention, Rehabilitation, and Compensation

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35 Section 317(2).

36 If an offender is unable to make reparation or can make only partial reparation, s 317 would prevent further proceedings outside the sentencing process for the balance.

Act sets a cap on recovery of lump sums for permanent impairment.[37] And yet it is clear from the terms of s 32(1) that no "top up" can be sought by way of reparation.[38]

[30] In addition to the anomaly in permitting "top up" payments only for victims of crime, such payments are inconsistent with the further policy of the Injury Prevention, Rehabilitation, and Compensation Act in setting compensation at a level which encourages rehabilitation. The cap in cl 32 of Sch 1 serves that purpose.

[31] These anomalies are not confined to, but are particularly stark in, the case of an offence based on negligence. They are not explained by the legislative history which shows, in the deletion of the suggested reparation for physical harm, an intention to maintain the comprehensiveness of compensation for personal injury under the Injury Prevention, Rehabilitation, and Compensation Act. We do not agree with the view expressed by the Courts below that the former sentencing legislation, permitting payment of fines to victims indicates legislative preparedness to make exceptions for victims of crime. Payments under the former legislation were limited to the fine imposed. The legislation did not purport to provide compensation matched to loss. Nor is interpreting s 32(5) in a way which creates such anomalies explicable by the prominence given to the sentence of reparation in the Sentencing Act. It is not to diminish the importance of the sentence to give effect to s 32(5). We are also of the view that the Court of Appeal's suggested analogy with offers of amends under s 10 of the Sentencing Act is not apt. Section 10 offers of amends are concerned with contrition and promotion of reconciliation by agreement, rather than with the imposition through sentence of orders to compensate for loss. Offers of amends may not include financial recompense at all. Although offers of amends may be encouraged by delaying sentence until they are fulfilled, the principal function of such offers is to assist the court in determining whether to impose a sentence at all and, if it does so, what the appropriate sentence should be. If an offer results in consideration of reparation as a sentence, the sentence of reparation must still be subject to s 32(5).

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37 Schedule 1, cl 56.

38 By contrast, emotional harm, for which there is no lump sum entitlement under the Injury Prevention, Rehabilitation, and Compensation Act, can be the subject of an order for reparation under s 32(1)(b).

[32] Nor does the difference in treatment of emotional harm and physical harm in s 32 prompt a different view. The distinction is consistent with the scheme of the Injury Prevention, Rehabilitation, and Compensation Act. Personal injury, in respect of which there will be cover and entitlements under the Injury Prevention, Rehabilitation, and Compensation Act, is defined under that Act to include physical injury and mental injury suffered by a person because of physical injury.[39] A victim who has suffered personal injury covered under the Injury Prevention, Rehabilitation and Compensation Act can receive reparation in relation to distress not amounting to mental injury consequential on physical harm because there are no entitlements under the Act in respect of such harm.[40] There is no anomaly in this, such as suggested by the Court of Appeal.

[33] Nor can it be right, as the Court of Appeal suggests, that the interpretation it prefers is necessary to avoid the consequences of physical harm "fall[ing] outside both Acts".[41] Consequential loss of income falls within the Injury Prevention, Rehabilitation, and Compensation Act entitlements. But other loss consequential on physical or emotional harm, but which is not the subject of entitlements under the Act and is able to be recovered through civil proceedings, may be the subject of reparation.

The unsuitability of inquiry into what is payable by the Corporation at sentencing

[34] We reach the conclusion that s 32(5) is a bar to reparation for loss of earnings consequential on physical harm largely as a matter of interpretation of the provisions of the Sentencing Act. Such interpretation is consistent, for the reasons given, with the policy of preserving the integrity of the Injury Prevention, Rehabilitation, and Compensation Act which is behind s 32(5). It prevents serious anomalies in result. But it is also relevant to the interpretation of s 32(5) that the sentence of reparation is

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39 Section 26.

40 Where it is not clear whether harm amounts to consequential mental injury for which there is cover, inquiry as to whether the victim is covered by entitlements may well be necessary under s 33(1)(c).

41 At para [23].

not suitable for the sort of quantification exercise that would be entailed in calculating shortfall in entitlements.

[35] In addition to problems with disentitlement, assessment of what is payable under the Injury Prevention, Rehabilitation, and Compensation Act may be complicated and contestable. This case indicates as much. The sentencing Judge made some allowance to reflect the fact that the Corporation had declined to meet some of the claimed loss on the basis that it was insufficiently substantiated. That approach seems to have been done without objection by the defendant. But in cases of disputed quantification, the extent to which the claimed shortfall is attributable to the victim may be difficult to resolve and is not likely to be suitable for determination in sentencing.

[36] What is "payable" is clearly a key concept for the purposes of the Corporation under the Injury Prevention, Rehabilitation, and Compensation Act. But it is not self-evidently useful in the line-drawing between the two Acts**,** which is the purpose of s 32(5). Weekly compensation, with the 80 per cent cap which is the catalyst for the reparation order made in respect of lost income, is itself subject to a maximum limit, to abatement calculations, to adjustment and generally to loss at the age of eligibility for New Zealand superannuation. In particular**,** it is subject to adjustment for the purposes of indexation under s 115 of the Act. The calculation of "shortfall" against these adjustments, seemingly internal to the administration of the Injury Prevention, Rehabilitation, and Compensation Act, would be necessary to establish the amount of lost earnings not within what is "payable". It is not a calculation appropriately attempted at a sentencing hearing on a summary basis. It seems highly unlikely that s 32(5) was intended to require determination of what the Corporation must pay under its legislation. Such result is unnecessary if s 32(5) is interpreted to exclude reparation in respect of any type of loss for which entitlements are available under the Injury Prevention, Rehabilitation, and Compensation Act. For the reasons already given, that seems to us to be not only the more convenient interpretation, but also the more natural one.

Result

[37] We are of the view that loss of earnings consequential on physical harm is not able to be the subject of reparation under s 32(1) of the Sentencing Act. It is loss in respect of which the victim has entitlements within the meaning of s 32(5) and is therefore excluded from the sentence by that provision, even if the amount payable by the Corporation does not meet the full extent of the loss. That is the effect of the social contract which s 32(5) protects. We would allow the appeal and quash the sentence of reparation. We would substitute for it a sentence of reparation of $8,945, made up of $7,000 for emotional harm (as ordered in the District Court and as is not in issue) and $1,945 for uncontested loss (replacing the award of $13,500 made in the District Court). Since the substituted order of reparation of $8,945 exceeds the maximum fine able to be imposed, the case is not one where the reduction in the sentence requires reconsideration of the sentencing Judge's conclusion that a fine should not be imposed.

TIPPING J

[38] I agree with the Courts below that the key word in s 32(5) of the Sentencing Act 2002 is the word "entitlements". No reparation order may be made in respect of any loss or damage which is consequential on personal injury and for which the Court believes the victim has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001. But I also agree with the conclusion of the Chief Justice that the Courts below misinterpreted the word "entitlements" in coming to the view that a reparation order could be made in respect of any lost earnings not reimbursed by the Accident Compensation Corporation. My reasons are these.

[39] When the Bill[42] which led to the passing of the Sentencing Act was introduced into Parliament it contained a clash between the proposed reparation regime and the accident compensation regime. The Bill envisaged reparation being made for physical harm and its consequences. The Select Committee which

[42] The Sentencing and Parole Reform Bill.

considered the Bill recommended the insertion of what became s 32(5) to avoid that clash.[43] There was no suggestion that a lesser clash was to remain by allowing reparation orders to "top up" what was available under the accident compensation scheme. The Select Committee simply said it was recommending the removal of the power to award reparation for physical harm because it was covered by the accident compensation legislation. It seems most unlikely that the Committee envisaged a distinction between direct harm and consequential harm whereby some aspects of the accident compensation regime could not be topped up by reparation orders, but others such as weekly compensation could be.

[40] At the Committee of the whole House stage a Supplementary Order Paper[44] proposed, and it was agreed, that the word "entitlements" should replace the word "cover" which had been used by the Select Committee in its proposed s 32(5).[45] Had that change not been made, it would have been clear enough that a reparation order could not have been made in respect of the 20 per cent of lost earnings not reimbursed by the Corporation. Lost earnings would have been consequential loss for which the victim had cover. The Court could not therefore have made any reparation order in respect of that kind of consequential loss. Cover was not, in context, a quantitative concept.

[41] The change from cover to entitlements was made, so I would assume, because it was not entirely correct to say that a person had cover in respect of any particular consequential loss or damage. One either had cover generally or one did not. Cover does not in and of itself result in any particular entitlements. They depend on the nature and consequences of the injury. Hence the substituted word "entitlements" better described the relationship between a particular kind of consequential loss or damage and the kind of compensation the person suffering the injury is entitled to receive from the Corporation.

[42] But, in adopting this change, I do not consider it at all likely that Parliament intended to make what would have been a fundamental alteration to the scope of

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43 Justice and Electoral Committee, "Sentencing and Parole Reform Bill" [2002] AJHR I.22C, p 583.

44 "Sentencing and Parole Reform Bill" (16 April 2002), No 262.

45 Page 6.

s 32(5). That would have been a very oblique and unheralded way to do so. I consider the purpose of the provision remained the same. No one could obtain through a reparation order more than they were entitled to receive under the accident compensation scheme. Those entitlements were to be delivered exclusively under that scheme. Only if and to the extent there was no entitlement under the accident compensation scheme for the kind of loss or damage in question could a reparation order be made.

[43] I should also mention that at the same time as the word "cover" was changed to "entitlements", an addition was made to s 33, the section dealing with reparation reports.[46] Paragraph (c) of s 33(1), as previously worded, provided, as is now provided in subpara (i), that in the case of any loss or damage consequential on physical harm the report should describe "the nature of the loss or damage". A new subpara (ii) was added directing the report to deal also with "the extent to which" the victim was likely to be "covered by entitlements" under the IPRC Act.

[44] The "nature" of loss or damage is a qualitative rather than a quantitative concept. So too, in context, is the "extent" of likely cover by entitlements. The use here of the concept of cover, eschewed in s 32(5), is rather strange but there is nothing to suggest a quantitative focus. That view is underlined by an amendment which occurred in 2004 whereby the words "and value" were added to subpara (i) so that it read "the nature and value of the loss or damage".[47] The same change was not, however, made to subpara (ii) so as to direct the inquiry to the value of the entitlements for which the victim was "covered".

[45] If ss 32(5) and s 33(1)(c) had been designed to depart from the exclusivity of the accident compensation legislation, much clearer language to that effect could have been expected. Indeed the provisions themselves and their purpose and the legislative history demonstrate a qualitative or generic meaning rather than a quantitative one.

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46 "Sentencing and Parole Reform Bill" (16 April 2002), No 262.

47 By s 4(2)(b) of the Sentencing Amendment Act of that year.

[46] Against that background the plural word "entitlements", in its context, naturally includes the singular concept of an or any entitlement.[48] So the inability to obtain reparation applies in respect of consequential loss or damage for which the victim has any entitlement under the IPRC Act. If the victim has an entitlement or, more accurately, if the Court believes[49] the victim has an entitlement to weekly compensation, no reparation order can be made in respect of lost earnings. They are a kind of consequential loss for which the victim has an entitlement under the Act in the form of weekly compensation. That expression is defined as compensation for loss of earnings or loss of potential earning capacity.[50] In short, any entitlement under the Act in respect of consequential loss or damage of a particular kind precludes the making of a reparation order in relation to that kind of loss or damage.

[47] The victim in the present case had an entitlement to weekly compensation. No reparation order could therefore be made in respect of lost earnings. There is no definitional difficulty with the word "entitlements". If anything has been paid or is payable by way of weekly compensation, no reparation order can be made in respect of lost earnings. Section 32(5) was designed to maintain the integrity and exclusivity of the accident compensation scheme which, from its inception, was set up to be administered for the most part outside the processes of the Court.

[48] There would be no logic, and indeed substantial illogic, in prohibiting civil proceedings seeking compensation for personal injury yet allowing the same result to occur through criminal proceedings. It would go against the whole philosophy and purpose of the accident compensation scheme to allow those suffering injury as a result of an offence to have the potential to gain greater compensation than those suffering the same injury when no offence is involved or no one is prosecuted. I am not persuaded that Parliament meant to do this.

[49] For these various reasons I agree the appeal should be allowed with the consequences proposed by the Chief Justice.

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48 See s 33 of the Interpretation Act 1999. The context here supports the plural including the singular.

49 The word "believes" is much more apt to signal a generic rather than a dollars and cents inquiry.

50 Section 6 of the IPRC Act.

McGRATH J

Background

[50] This appeal raises a question concerning the extent to which a sentence of reparation may order a convicted person to make reparation in respect of loss of income consequential on physical harm caused to a person by the offending conduct.

[51] The appellant was convicted of a charge of careless use of a motor vehicle causing injury and was ordered to pay reparation of $20,500 by the District Court. Of this sum $11,555 reflected loss of earnings – the shortfall between the injured person's actual loss and weekly compensation payable to her under the Injury Prevention, Rehabilitation, and Compensation Act 2001 (the Compensation Act). At issue in the appeal is whether the sentencing Judge had the authority to include the sum of $11,555 in the amount of reparation ordered to be paid.

Reparation under the Sentencing Act

[52] Section 32 of the Sentencing Act provides:

> **32 Sentence of reparation**
>
> (1) A court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer—
>
> (a) loss of or damage to property; or
>
> (b) emotional harm; or
>
> (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.
>
> (2) Despite subsection (1), a court must not impose a sentence of reparation in respect of emotional harm, or loss or damage consequential on emotional harm, unless the person who suffered the emotional harm is a person described in paragraph (a) of the definition of victim in section 4.
>
> (3) In determining whether a sentence of reparation is appropriate or the amount of reparation to be made for any consequential loss or damage described in subsection (1)(c), the court must take into

account whether there is or may be, under the provisions of any enactment or rule of law, a right available to the person who suffered the loss or damage to bring proceedings or to make any application in relation to that loss or damage.

(4) Subsection (3) applies whether or not the right to bring proceedings or make the application has been exercised in the particular case, and whether or not any time prescribed for the exercise of that right has expired.

(5) Despite subsections (1) and (3), the court must not order the making of reparation in respect of any consequential loss or damage described in subsection (1)(c) for which the court believes that a person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001.

(6) When determining the amount of reparation to be made, the court must take into account any offer, agreement, response, measure, or action as described in section 10.

(7) The court must not impose as part of a sentence of reparation an obligation on the offender to perform any form of work or service for the person who suffered the harm, loss, or damage.

(8) Nothing in section 320 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 applies to sentencing proceedings.

[53] Section 32(1)(c) empowers a court to sentence an offender to pay reparation where the offence has caused physical harm to a person who has suffered loss or damage consequential on that harm.[51] On its face the court's reparation power extends to imposing a reparation penalty that reimburses the injured person for loss of income caused by the physical harm.

[54] Section 32(5), however, qualifies the scope of s 32(1) by prohibiting the sentencing court from ordering the making of reparation for any loss or damage consequential on physical harm "for which the court believes that a person has entitlements under the [Compensation] Act". The bar on reparation accordingly covers loss of income consequent on physical harm where the injured person has the "entitlements" referred to in s 32(5).

[55] The issue in this appeal comes down to what "entitlements under the [Compensation] Act" in s 32(5) means. The conclusion reached in the Court of

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[51] Section 32(1)(c) applies to "emotional or physical harm" but, as emotional harm is not relevant to the issues in this appeal, no further reference to it is made in these reasons.

Appeal[52] and the High Court[53] is based on a definitional analysis of the word. "Entitlement" is a defined term in the Compensation Act meaning the entitlements described or referred to in s 69.[54] That section provides for "entitlements" to different forms of compensation including "first week compensation" and "weekly compensation". The relevant entitlement, in the present case, is that to "weekly compensation", which was received by the victim of the offending. "Weekly compensation" is defined as meaning "compensation for loss of earnings … payable by the Corporation". Under the Compensation Act, weekly compensation payable to an injured person cannot exceed 80 per cent of earnings lost by that person as a result of the accident.[55] The injured person has no right to the shortfall of 20 per cent (or more) under the Compensation Act. On the basis of this definitional analysis the lower courts have held that the entitlements under the Compensation Act for which reparation is based are those to compensation payable, excluding the 20 per cent shortfall.

[56] This meaning of s 32(5) of the Sentencing Act is supported in this Court by the Crown, which is the respondent to the appeal. In effect, the Crown says that the bar in s 32(5) on ordering reparation for consequential loss arising from physical harm applies to entitlements to the sums of money payable as compensation which are received by the injured person. The shortfall of at least 20 per cent is not part of the entitlements and not subject to the s 32(5) bar on reparation.

[57] An alternative meaning of "entitlements", supported by the appellant, is a generic one. On this meaning the reference to "entitlements under the [Compensation] Act" for which reparation is based is to any type of entitlement or entitlements that arise under the Compensation Act. The appellant's argument in this Court is that the bar on reparation for consequential loss applies if the injured person has any entitlements in that sense to statutory compensation.

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52 [2008] 2 NZLR 645.

53 (2007) 8 NZELC 98,691.

54 Section 6 of the Compensation Act.

55 The origin of this ceiling on weekly compensation appears to be the Woodhouse Report which recommended against full indemnity because some margin of effort should be left to injured workers as an incentive to get well and back to productive work: Royal Commission to Inquire into and Report upon Workers' Compensation, *Compensation for personal injury in New Zealand: Report of the Royal Commission of Inquiry* (1967), paras [218] and [292].

[58] The natural meaning of the phrase "entitlements under the [Compensation] Act" is, to my mind, entitlements *in terms of* the Compensation Act, that is the definitional meaning. I accept, however, that the phrase is capable of meaning entitlements of the type provided for in the Compensation Act. The issue of which is correct must be resolved by ascertaining the meaning of s 32(5) from its text in light of its context and the purpose of the statute.

[59] Turning to the context within the statute, s 33 is of assistance in ascertaining the meaning of "entitlements" in s 32(5). Section 33(1) relevantly provides:

> **33 Court may order reparation report**
>
> (1) If the court considers that a sentence of reparation may be appropriate, the court may order a probation officer, or any other person designated by the court for the purpose, to prepare a reparation report for the court in accordance with section 34 on all or any of the following matters:
>
> …
>
> (c) in the case of any loss or damage consequential on physical harm,—
>
> (i) the nature and value of the loss or damage; and
>
> (ii) the extent to which the person who suffered the loss or damage is likely to be covered by entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001:
>
> …

[60] Section 33 provides a procedure for the sentencing court to be informed of matters relevant to a sentence of reparation. The court may order the preparation of a reparation report on matters stipulated in the section. In respect of loss or damage consequential on physical harm, the matters which may be reported on are, under s 33(1)(c)(i), the nature, and since 2004,[56] the value, of the loss or damage and, under s 33(1)(c)(ii), the extent to which the injured person "is likely to be covered by

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[56] The words "and value" were added to subpara (i) by s 4(2) of the Sentencing Amendment Act 2004.

entitlements under the Compensation Act". Parliament has clearly envisaged that a report on the latter matter would assist the sentencing judge in ascertaining whether the bar on a reparation order, in respect of consequential loss for physical harm for which a person had entitlements under the Compensation Act, applied. It is clear that the link between ss 32(5) and 33(1)(c) in this respect is such that, even though the latter is a procedural provision only, it provides important contextual assistance in understanding the meaning of s 32(5).

[61] Section 33(1)(c) is also to be read, of course, in its present form and as a whole. The report on the first matter concerning consequential loss or damage, is to be into the value, as well as nature, of the loss. This suggests that the report on the second matter, which is into the extent to which the person suffering the loss is covered by entitlements, is also an inquiry into value. On this basis, the word "extent" in s 32(1)(c) refers to the monetary value of the "entitlements under the [Compensation] Act". So read, s 33(1)(c) requires an inquiry into and report on the value of the loss in monetary terms. The two matters are reported on in order that the sentencing judge is informed of the value of the loss, the value of the statutory compensation to be received for it, and of any difference between them. That would be of particular relevance to the amount of a reparation order.

[62] This meaning of s 33(1)(c) contextually fits well with the definitional meaning of s 32(5). It is consistent with its purpose, which is clearly to prevent a person suffering consequential loss from receiving a double recovery through a reparation order in addition to statutory compensation. If "entitlements" in s 32(5) means what is payable by the Compensation Corporation, the link between the matters reported on and the application of the bar on reparation for consequential loss will be relevant to the sentencing judge who will be informed of the amount of any consequential loss of income and how much of that has been received through weekly compensation. The judge can consider the net loss in considering a sentence of reparation.

[63] On the other hand the generic meaning of "entitlements" means that s 33(1)(c) does not fit with s 32(5). As the Solicitor-General pointed out, if

"entitlements" has the generic meaning, it is difficult to identify any reason why Parliament has provided for a report on the nature and value of the loss and the extent to which a person is covered by "entitlements" to compensation. On the generic meaning, s 32(5) excludes any awards for this type of loss for which there were any entitlements to compensation. Mr McDonald for the appellant sought to answer this argument by suggesting that there are some situations in which a loss could be suffered which was of a type which fell outside statutory entitlements. Loss or damage to the goodwill of a business would be an instance. The problem with the argument, however, is that it focuses on a type of loss which, on the argument, falls outside the accident compensation system, and is not addressed by s 32(5).

[64] I am satisfied that the Solicitor-General's contextual argument carries force and that s 33(1)(c) provides strong contextual support for a definitional meaning of "entitlements" rather than a general meaning.

Parliamentary history of ss 32 and 33

[65] Another context of assistance in determining between the two meanings is the Parliamentary history of ss 32 and 33 insofar as it concerns changes made to the form of the provisions originally appearing in the Sentencing and Parole Reform Bill during the passage of that Bill through Parliament.

[66] When the Bill was introduced to the House of Representatives, cl 29 simply authorised the imposition of a sentence of reparation where the convicted person's offending caused another person to suffer emotional or physical harm. The amount of reparation was to be determined taking into account consequential loss or damage, as well as damage directly suffered through the offence. At the same time, cl 30(1)(a) empowered the court, in the case of physical harm, to order the preparation of a report "on the nature of that harm and any consequential loss or damage".

[67] These provisions in the Bill were amended by the Justice and Electoral Committee. Clause 29(1) of the Bill as reported back stipulated the particular types of loss, damage or harm for which a reparation sentence could be imposed. One of

these was "loss or damage consequential on any … physical harm". This was the initial form of what became s 32(1)(c) of the Sentencing Act. In clause 29(2) of the amended Bill, the court was required to take into account any right to bring proceedings or make an application in relation to the loss.[57] Clause 29(2B), however, said that the court must not order reparation for "any consequential loss or damage … for which the victim had cover under the [Compensation] Act". Clause 29(2B) was the original form of what became s 32(5) of the Sentencing Act. Clause 29(2C) required the court, when determining the amount of reparation to be made, to take into account offers of amends and agreements on how the offender may remedy the loss. It is now s 32(6).

[68] The provision made by the Select Committee in cl 29(2), which was new, accordingly placed limits on reparation for consequential loss or damage. The Select Committee said of the changes:[58]

> Most of us recommend an amendment to clause 29, to remove the power to award reparation for physical harm. This is because physical harm is covered by current accident compensation legislation. The ability to award reparation for loss or damage consequential on any emotional or physical harm to the victim or loss of or damage to property of the victim will be provided for under proposed new clause 29(1)(c).
>
> We are satisfied the proposed new clause 29(2) places appropriate limits upon consequential loss or damage. We also recommend a change that will allow a judge to take into account other remedies and rights available to victims in relation to consequential loss or damage (clause 29(2C) refers).

[69] The "limits" on reparation for consequential loss provided for in s 32(3), (4), (5) and (6) require that the court take into account other remedial avenues available for the victim, when determining the amount of reparation. The purpose is to avoid a double recovery but, subject to that, it is implicit that reparation for consequential loss for physical injury could compensate a victim in full. Section 32(5) has a purpose of preventing double recovery in relation to accident compensation entitlements. The context of the other "appropriate limit" provisions suggests that s 32(5) also is not concerned with otherwise preventing reparation from fully

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57 Now s 32(3) and (4).

58 Justice and Electoral Committee, "Sentencing and Parole Reform Bill" [2002] AJHR I.22C, p 583.

compensating a victim. The general policy was that reparation could compensate in full subject only to there being no double recovery.

[70] The Select Committee also amended cl 30 to provide that the sentencing court would receive a report on "the nature of any loss or damage consequential on physical harm suffered by the victim". Previously the report was also to be on the nature of the physical harm itself. That was dropped. The change narrowed the focus of inquiry to the nature of the consequential loss or damage, that is to such matters as loss of earnings and medical expenses, rather than what injuries were suffered. This would enable determination of the extent to which statutory compensation met the victim's loss and suggests that the Select Committee had in mind that the application of s 32(5) would be to bar reparation only to the extent compensation was received.

[71] The Bill as reported back was then further changed during the Committee stages of the House through a Supplementary Order Paper.[59] It was at this point that "entitlements" was substituted for "cover" in cl 29(2B) which became s 32(5) of the Act. Clause 30, which became s 33, was also amended so that the reparation report could address both the nature of the consequential loss or damage (as previously); and "the extent to which the person who suffered the loss or damage is likely to be covered by entitlements under the [Compensation] Act." This new provision became s 33(1)(c)(ii) of the Act. The Explanatory Note to the Supplementary Order Paper said that the purpose of this amendment was to require that reports include the extent to which a person who has suffered loss or damage consequential on physical harm is likely to have entitlements. This supports the conclusion that the purpose of s 33(1)(c) was to reinforce the policy of enabling reparation to be full compensation for consequential loss due to physical injury but not to allow double recovery.

[72] It was in this form and following these changes that the Sentencing Act provisions concerning reparation for consequential loss, and its relationship to accident compensation, was passed.

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[59] "Sentencing and Parole Reform Bill" (16 April 2002), No 262.

[73] In 2004 the Sentencing Act was amended to require that under s 33(1)(c)(i) the reparation report addressed the nature "and value" of the loss or damage consequential on physical harm.[60] The inclusion of value brought s 33(1)(c)(ii) into line with other provisions.

Purpose of Sentencing Act

[74] Next I consider the light thrown on the meaning of "entitlements" by the statutory purpose. Section 32 is, of course, a provision in the Sentencing Act and it is the relevant purposes of that Act, rather than the Compensation Act, that guide the statutory meaning. This is to be ascertained from reading the Sentencing Act as a whole. Of particular importance is s 3(d) which provides that one of the purposes of the Act is: "to provide for the interests of victims of crime".

[75] Section 7 of the Sentencing Act is of relevance to its purpose. It provides:

> **7 Purposes of sentencing or otherwise dealing with offenders**
>
> (1) The purposes for which a court may sentence or otherwise deal with an offender are:
>
> (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
>
> (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
>
> (c) to provide for the interests of the victim of the offence; or
>
> (d) to provide reparation for harm done by the offending; or
>
> (e) to denounce the conduct in which the offender was involved; or
>
> (f) to deter the offender or other persons from committing the same or a similar offence; or
>
> (g) to protect the community from the offender; or
>
> (h) to assist in the offender's rehabilitation and reintegration; or
>
> (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).

[60] Section 4(2) of the Sentencing Amendment Act 2004.

> (2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

[76] A reparation sentence serves the wider purposes set out above in addition to providing "reparation for harm done by the offending" under s 7(1)(d). These are given effect in the Act's sentencing principles which include obligations to take into account information provided to the court concerning the effect of the offending on the victim.[61] The Sentencing Act also creates a presumption in favour of a reparation sentence where a court is lawfully entitled to impose it. The presumption is rebutted only if reparation would create undue hardship or if special circumstances make it inappropriate.[62] Overall, the Sentencing Act reflects a purpose of removal and replacement of limitations in the criminal justice legislation on the ability of the sentencing process to make good the consequences of harm done to victims. The replacement approach permits, and indeed encourages, the inclusion of reparation in sentences as a compensatory element where that is appropriate.

The meaning of "entitlements"

[77] At the time that the Select Committee reported back on the Sentencing and Parole Reform Bill, the policy in respect of reparation for consequential loss arising from physical harm was largely provided for in the Bill. The Select Committee majority favoured the eligibility of that category of loss for reparation. But reparation for consequential loss for which the victim had accident compensation cover was to be barred. The Select Committee was satisfied that there were "appropriate limits" upon consequential loss or damage in the Bill as reported back. Those limits were expressed in the provision containing the bar.

[78] The Supplementary Order Paper was not intended substantially to alter that position but was intended to refine it. It is significant that it did so by changing the terms in which the bar had been expressed and, at the same time, by adding to what was to be covered in the report to be provided to the sentencing judge in terms expressed in s 33(1)(c)(ii).

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61 Section 8(f) of the Sentencing Act 2002.
62 Section 12 of the Sentencing Act 2002.

[79] The first question here is why was "cover" changed to "entitlements under the [Compensation] Act" in the provision that became s 32(5). The obvious reason is that "entitlement" was chosen as it is a defined term. On its own, however, that change is arguably explicable as simply the choice of a more appropriate general term than "cover". But at the same time the information to be reported on under s 33(1)(c) was expanded, with the addition of subparagraph (c)(ii), introducing the concept of a report to the court on the *extent* of entitlements. This means that the judge is to be informed of the amount of the statutory compensation the person suffering physical harm is entitled to receive. Accordingly the judge will be made aware of the amount of the consequential loss, under s 33(1)(c)(i), and the amount of compensation that the victim is likely to receive, under s 33(1)(c)(ii). The purpose of that must be to inform the judge of the net amount necessary to compensate in full for consequential loss. That strongly favours the definitional interpretation of s 32(5), which would enable reparation to meet the shortfall in statutory compensation for loss of income, as part of the sentence.

[80] The considerations of context and purpose which I have discussed in these reasons point to a legislative policy which promotes reparation for victims of crime as an element of sentencing. Reparation can provide in full for losses consequential on physical harm subject to there being no element of double recovery. Together these considerations give strong support to the definitional meaning of "entitlements". I have already indicated that I regard that meaning as the natural meaning of the text of s 32(5).

[81] I accept that this meaning is in tension with certain policies of the Compensation Act. Reparation sentences are inconsistent with the principle that those with entitlements to statutory compensation cannot bring claims based on fault. That inconsistency, of course, is plainly reflected in the Sentencing Act. The effect of giving "entitlements" a definitional meaning in s 32(5) is that reparation for a shortfall in consequential loss of income due to the 80 per cent ceiling can be the subject of reparation. This is inconsistent with the policy that compensation should be limited so there is an incentive for injured persons to return to work. The extent of these tensions should not, however, be over-stated. In the special circumstances of punishment for criminal offending and providing for the interests of victims of

crime, the departures can hardly be seen as undermining the Compensation Act scheme; they are merely inconsistent with aspects of it. Accordingly, I am not persuaded that the Compensation Act context gives much support to the generic meaning of "entitlements".

Conclusion

[82] Overall I conclude that the text of s 32(5) of the Sentencing Act, read in its various contexts and in light of that statute's purpose, makes it plain that the provision bars reparation only to the extent of amounts of consequential loss of income that the sentencing court expects will be payable to a person suffering consequential loss or damage as a result of the offending. It does not bar reparation in respect of the 20 per cent in shortfall.

[83] I would accordingly dismiss the appeal.

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