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2330 REMAINS IN FORCE.**

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 16/2022
[2023] NZSC 49**

BETWEEN ROBERT ROPER
Appellant

AND MARIYA ANN TAYLOR
First Respondent

ATTORNEY-GENERAL
Second Respondent

SC 23/2022

BETWEEN ATTORNEY-GENERAL
Appellant

AND MARIYA ANN TAYLOR
First Respondent

ROBERT ROPER
Second Respondent

Hearing: 5 October 2022

Court: Winkelmann CJ, Glazebrook, O'Regan, Williams and
William Young JJ

Counsel: J F Mather and L M Herbke for Appellant (SC 16/2022) and
Second Respondent (SC 23/2022)
G F Little, G E Whiteford and T G Little for First Respondent
A C M Fisher KC and E N C Lay for Second Respondent
(SC 16/2022) and Appellant (SC 23/2022)

Judgment: 12 May 2023

JUDGMENT OF THE COURT

- A** **The appeal is allowed. We uphold the conclusion of the High Court Judge dismissing the claim by Ms Taylor for compensatory damages in relation to false imprisonment.**
- B** **The cross appeal is dismissed.**
- C** **Costs are reserved.**
-

REASONS

(Given by Glazebrook and William Young JJ)

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Overview

[1] Ms Taylor seeks compensation for post-traumatic stress disorder (PTSD) caused by Mr Roper sexually assaulting and falsely imprisoning her in the late 1980s while both were employed by the Royal New Zealand Air Force (RNZAF). On the evidence, her PTSD developed shortly afterwards, albeit that it was not diagnosed until much later and not linked to the assaults until 2015.

[2] The issues in the appeal¹ and cross appeal to this Court relate to the effect of the accident compensation scheme on Ms Taylor’s claim. The relevant legislative provisions are set out in the Appendix to this judgment.

Factual background

[3] Ms Taylor joined the RNZAF in 1985 at the age of 18. She was stationed at the base in Whenuapai as a driver in the Motor Transport section. Her rank was aircraftman, the lowest of the six non-commissioned ranks. Mr Roper was her superior. At the relevant time he was a sergeant (three ranks higher than Ms Taylor).

[4] Ms Taylor says that Mr Roper bullied, verbally abused, sexually harassed, inappropriately touched and falsely imprisoned her between 1985 and 1988. This included indecently assaulting her while she was driving him home late at night and regularly locking her and leaving her in a tyre cage. She says she complained about his conduct but the RNZAF failed to do anything about it.

[5] In 2014, Mr Roper was found guilty of sexual offending against members of his family and three other women. Ms Taylor contacted the police and, in 2015, she was interviewed as part of an independent inquiry into Mr Roper’s conduct. She

¹ “The appeal” should be read as referring to both SC 16/2022 and SC 23/2022.

filed civil proceedings in the High Court in 2016 and discontinued her police complaint.

Procedural history

High Court judgment

[6] In the High Court, Ms Taylor pleaded four causes of action: assault, intentional infliction of emotional distress, false imprisonment (against both Mr Roper and the RNZAF) and breach of duty of care as an employer (against the RNZAF only).

[7] Ms Taylor claimed that, as a result of Mr Roper's actions, she suffered from extreme distress, depression, anxiety and PTSD. She sought general damages, exemplary damages, vindictory damages, aggravated damages, special damages for loss of earnings and medical expenses, as well as interest and costs.

[8] Mr Roper denied the alleged behaviour. The RNZAF denied Ms Taylor had made complaints. It also denied that it had breached any duties owed to Ms Taylor.

[9] The High Court found on the balance of probabilities that Mr Roper had assaulted and falsely imprisoned Ms Taylor.² It also found that those actions had caused Ms Taylor's PTSD but that there was insufficient evidence that it had caused her anxiety or depression.³

[10] The Judge was not persuaded that Ms Taylor made formal complaints about Mr Roper to her superiors or that they failed to act on those complaints.⁴

[11] The High Court held that, in any event, Ms Taylor's claims were time-barred by the Limitation Act 1950, holding that the exception under s 24 of that Act did not apply.⁵

² *M v Roper* [2018] NZHC 2330 (Edwards J) [HC judgment] at [74]–[75] and [77].

³ At [122] and [125].

⁴ At [76].

⁵ At [142] and [155]. While the Limitation Act 1950 was repealed and replaced by the Limitation Act 2010, its provisions still apply to claims based on acts or omissions before 1 January 2011: Limitation Act 2010, s 59. References in this judgment to “the Limitation Act” refer to the

[12] While it did not need to decide the point, the High Court considered that Ms Taylor had cover for her mental injury arising from the assaults under the Accident Compensation Act 1982 (the 1982 ACC Act).⁶ It did not matter that the Accident Compensation Corporation historically had rejected claims for mental injury alone until the Court of Appeal’s ruling in *Accident Compensation Corp v E* in 1991.⁷ Nor was the position altered by s 135(5) of the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 ACC Act) as Ms Taylor submitted.⁸ The Judge held, therefore, that the claim was barred by s 317(1)(b) of the Accident Compensation Act 2001 (the 2001 ACC Act) as Ms Taylor had cover under the 1982 ACC Act.⁹

[13] In terms of the false imprisonment claim, Ms Taylor relied on the decision of *Willis v Attorney-General (Willis)*.¹⁰ In that case, the Court of Appeal held that false imprisonment was outside the scope of the 1982 ACC Act and that claims for damages for false imprisonment were therefore not barred by that Act. Where injury has been caused by both false imprisonment and assault, the Court of Appeal held that a claimant can still claim damages if the false imprisonment was “a substantial cause” of the loss or damage suffered.¹¹

[14] The High Court considered that, in Ms Taylor’s case, the false imprisonment claim was “closer to the serious mental disorder found to be covered in [*Accident Compensation Corp v E*], than the humiliation and distress” which was “the subject of the claim in *Willis*”.¹² Also, the Court held that the false imprisonment was “intertwined with an assault” and the consequences of the false imprisonment were “more closely aligned with what would be regarded as a personal injury from the

Limitation Act 1950.

⁶ At [171] and [180].

⁷ At [165] and [167] citing *Accident Compensation Corp v E* [1992] 2 NZLR 426 (CA).

⁸ HC judgment, above n 2, at [166] and [168]–[170], relying on *Childs v Hillock* [1994] 2 NZLR 65 (CA) and *White v Attorney-General* [2010] NZCA 139.

⁹ The Judge therefore did not need to consider whether there was also cover under the 2001 ACC Act itself.

¹⁰ *Willis v Attorney-General* [1989] 3 NZLR 574 (CA) [*Willis*].

¹¹ At 579.

¹² HC judgment, above n 2, at [177].

perspective of the plaintiff”.¹³ Ms Taylor’s claim for false imprisonment was therefore also barred by s 317(1)(b) of the 2001 ACC Act.¹⁴

[15] Given that her claims were barred by both the Limitation Act and the 2001 ACC Act, the Court considered it inappropriate to consider whether the RZNAF was vicariously liable for Mr Roper’s acts or whether it was directly liable to Ms Taylor in negligence.¹⁵

Court of Appeal (first decision)

[16] Relevantly for this appeal and cross appeal, the Court of Appeal accepted that cover had been widely thought not to have been available under the 1982 ACC Act for mental injury not accompanied by physical injury until the decision of the Court of Appeal in *Accident Compensation Corp v E*.¹⁶ The Court said that the submission of counsel for Ms Taylor that this case only applied from the date it was decided “is contrary to the declaratory theory of law and is untenable”.¹⁷ The Court held that Ms Taylor had cover under the 1982 ACC Act.¹⁸

[17] The Court of Appeal also rejected counsel’s argument based on s 135(5) of the 1992 ACC Act. It said that this was a transitional provision: a person who had not claimed cover under the previous legislation would lose cover (but still not be free to sue) unless they had either lodged a claim prior to 1 October 1992 or the personal injury they had suffered was personal injury covered by the 1992 ACC Act.¹⁹

[18] The Court also held that Ms Taylor had cover under the 2001 ACC Act itself. It noted that the definition of “personal injury” under s 26 of the 2001 ACC Act included mental injury suffered by a person in circumstances defined in s 21. These circumstances include mental injury caused by an act (including indecent assault)

¹³ At [178].

¹⁴ At [180].

¹⁵ At [186].

¹⁶ *Taylor v Roper* [2020] NZCA 268, [2021] 3 NZLR 37 (French, Brown and Clifford JJ) [First CA judgment] at [131].

¹⁷ At [132].

¹⁸ At [133].

¹⁹ At [138].

performed by another person in New Zealand.²⁰ There is a requirement that the person suffer the mental injury on or after 1 April 2002 but s 36(1) of the 2001 ACC Act provides that the date on which a person suffers mental injury is the date of first treatment, which in this case was well after 2002.²¹

[19] The Court rejected counsel's argument that s 21A of the 2001 ACC Act meant that, because Ms Taylor did not receive her first treatment between 1 July 1992 and 1 July 1999 (the relevant dates for s 21A to apply), she had no cover under the 2001 ACC Act. The Court said that s 21A does not purport to override s 21 but to deal with a category of cases outside the scope of s 21. It did not logically follow that, because Ms Taylor was not covered by s 21A, she had no cover at all.²²

[20] These findings meant that Ms Taylor was not able to sue for compensatory damages in respect of the causes of action in negligence, assault and battery and infliction of emotional harm, but she could sue for exemplary damages.²³

[21] By majority, the Court held that Ms Taylor was operating under a disability from 1988 until 2014 when she learned of Mr Roper's convictions. This meant that, pursuant to s 24 of the Limitation Act, her claims were not time-barred.²⁴

[22] The majority, relying on *Willis*, also held that Ms Taylor's false imprisonment claim was not a claim for personal injury.²⁵ The majority said that the Court in *Willis* did not intend 'substantial cause' to mean the primary or dominant cause. It is sufficient if the cause is "not insubstantial or minimal".²⁶ This means that, if the mental consequences have been caused by both false imprisonment and assault and battery, a plaintiff can still claim damages for the consequences of false imprisonment unless false imprisonment is not one of the substantial causes of the mental injury.²⁷

²⁰ See Accident Compensation Act 2001 [2001 ACC Act], sch 3.

²¹ First CA judgment, above n 16, at [141]–[143].

²² At [148].

²³ At [150].

²⁴ At [197] per Brown and Clifford JJ.

²⁵ At 209; *Willis*, above n 10, at 579.

²⁶ At [206].

²⁷ At [206].

[23] The majority considered it apparent from the evidence that Ms Taylor found being locked in the tyre cage traumatic and that her evidence points to a substantial cause of her mental injury being the psychological impact of false imprisonment. The same reasoning was also applied to the driving incident, although noting this to be more of a “grey area”.²⁸

[24] French J, dissenting on this issue, considered the facts of this case to be far removed from those in *Willis*. The detention in that case was unaccompanied by any threat of violence.²⁹ In this case, the detention took place in the context of a series of predatory behaviours.³⁰ The Judge considered that Ms Taylor’s claim was in substance one in the nature of personal injury by accident. Further, *Willis* did not, in her view, impose a universal rule that all claims for false imprisonment are outside the accident compensation scheme.³¹

[25] In line with the view of the majority, the matter was remitted to the High Court for determination of Ms Taylor’s claims for compensatory damages in respect of the false imprisonment cause of action and for exemplary damages in respect of all four causes of action.³²

First leave decision of this Court

[26] The Attorney-General and Mr Roper sought leave to appeal against the Court of Appeal decision to this Court.³³ Mr Roper wished to challenge both the limitation and the false imprisonment aspects of the Court of Appeal decision.³⁴ The Attorney-General only sought to challenge the decision on false imprisonment.³⁵

[27] This Court did not consider that the limitation issue met the criteria for leave and dismissed the leave application in that regard.³⁶

²⁸ At [207].

²⁹ At [167] per French J.

³⁰ At [168].

³¹ At [169].

³² At [210]–[213] per Brown and Clifford JJ.

³³ *Attorney-General v Taylor* [2020] NZSC 152 (O’Regan, Ellen France and Williams JJ) [SC first leave judgment].

³⁴ At [7].

³⁵ At [7].

³⁶ At [10].

[28] With regard to false imprisonment, this Court raised the potential relevance of s 21B of the 2001 ACC Act (not argued in the Courts below).³⁷ It directed the applicants to seek a recall of the Court of Appeal judgment because it did not consider it appropriate to hear an appeal on the false imprisonment issue until the matter had first been ventilated in the Court of Appeal.³⁸

[29] This Court noted that:³⁹

In the event the Court of Appeal recalls its judgment, the Attorney-General may file a fresh application for leave if the Court rules in favour of Ms Taylor on s 21B; and if the Court rules against Ms Taylor on s 21B, its comments in respect of the false imprisonment issue will become obiter and not capable of being appealed directly unless in very exceptional circumstances.⁴⁰

Court of Appeal recall and reissue decision

[30] The Attorney-General applied for a recall and the Court of Appeal accepted that the criteria for recall of its earlier judgment were met. It therefore recalled and reissued its decision.⁴¹ In this decision the Court of Appeal held that s 21B of the 2001 ACC Act did not apply.

Second leave decision of this Court

[31] On 17 May 2022, this Court granted the applications of Mr Roper and the Attorney-General for leave to appeal against the reissued Court of Appeal judgment, both in relation to the false imprisonment findings and in relation to s 21B of the 2001 ACC Act.⁴² Ms Taylor's application to cross appeal against the holding that she was entitled to accident compensation cover was also granted.

³⁷ At [8].

³⁸ At [9] and [11].

³⁹ At [11].

⁴⁰ *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55; [2008] 1 NZLR 13 at [25].

⁴¹ *Taylor v Roper* [2021] NZCA 691, [2022] 2 NZLR 671 (French, Brown and Clifford JJ) [CA recall judgment] at [4]. The decision was reissued on 21 December 2021 with the effective date of judgment as the date it was originally issued, 1 July 2020. An addendum to the First CA judgment addressing s 21B of the 2001 ACC Act was contained in the CA recall judgment.

⁴² *Roper v Taylor* [2022] NZSC 62 (Glazebrook, O'Regan and Ellen France JJ) [SC second leave judgment].

[32] We will address the cross appeal first and then the appeal but, before we do this, it is worth setting out some aspects of the legislative history relating to accident compensation cover for mental injury.

Legislative history

[33] The objectives underpinning New Zealand’s accident compensation scheme were set out in the Royal Commission of Inquiry report *Compensation for Personal Injury in New Zealand* (the Woodhouse Report).⁴³ At the time of the Woodhouse Report’s publication, New Zealand’s accident compensation regime consisted of a trifecta of the Workers’ Compensation Act 1956, the Social Security Act 1938 and actions in tort.⁴⁴ The Woodhouse Report recommended that this “fragmented and capricious”⁴⁵ system be replaced with one which was “unified and comprehensive”.⁴⁶ A key plank of this new system would be the abolition of common law actions for personal injury, which the authors found to be illogical, uncertain, costly, slow-moving and an impediment to rehabilitation.⁴⁷ Overall, the authors of the report sought the creation of a scheme which favoured granting wide-ranging cover on a no-fault basis, unrestricted by earlier legal tests.⁴⁸

[34] Thus, the accident compensation scheme was set up to grant wide-ranging cover on a basis which was efficient, comprehensible and not beleaguered by ‘capricious’ legal tests. In exchange for this broad coverage under the accident compensation scheme, New Zealanders are held to a “social contract” where they forgo their right to sue under the common law.⁴⁹ The accident compensation scheme was not implemented merely to be another option alongside damages, it was intended to be a ‘unified’ scheme which would replace the previous regime.

⁴³ A O Woodhouse, H L Bockett and G A Parsons *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, December 1967) [Woodhouse Report].

⁴⁴ At [1].

⁴⁵ At [1].

⁴⁶ At [278(a)].

⁴⁷ At [78].

⁴⁸ At [55]–[63].

⁴⁹ *Brightwell v Accident Compensation Corporation* [1985] 1 NZLR 132 (CA) at 139-140; *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA) at 555; and 2001 ACC Act, s 3.

[35] Subsequent to the Woodhouse Report, a White Paper⁵⁰ and a Select Committee report were also published.⁵¹ The accident compensation regime came into force on 1 April 1974 with the passage of the Accident Compensation Amendment Act 1974 (the 1974 ACC Act), providing entitlements for those who suffer “personal injury by accident”.⁵² It provided cover for personal injured suffered after 1 April 1974. The 1974 ACC Act was preceded by the Accident Compensation Act 1972 (the 1972 ACC Act). This was a “scaled-down” version of the Woodhouse Report’s recommendations, only providing cover for victims of motor vehicle accidents and employees.⁵³

[36] The 1982 ACC Act consolidated and amended the 1972 ACC Act and its amendments. Under s 2 of the 1982 ACC Act, “personal injury by accident” was defined as including the physical and mental consequences of any such injury or of the accident, as well as actual bodily harm (including mental or nervous shock) arising by any act of omission of any other person which is within the description of rape, sexual intercourse with a girl under 12 and wilfully infecting someone with a disease.⁵⁴ As noted above, the December 1991 judgment of the Court of Appeal in *Accident Compensation Corp v E* established that adverse mental consequences of an accident could amount to personal injury by accident, despite there having been no physical injury.⁵⁵

[37] The 1992 ACC Act reduced the scope of cover for mental injury generally by limiting the definition of “personal injury” to “the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries”.⁵⁶ At the same time, that Act introduced a new and separate

⁵⁰ Department of Labour “Personal Injury: A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand” [1969] IV AJHR H50..

⁵¹ Personal Injury Compensation Committee “Report of the Select Committee on Compensation for Personal Injury in New Zealand” [1970] IV AJHR I15.

⁵² Accident Compensation Amendment Act 1974 [1974 ACC Act], s 2.

⁵³ Before the 1972 ACC Act came into force, the government changed, introducing the 1974 ACC Act which substantially expanded the accident compensation scheme’s scope of coverage. Section 1 of the 1974 ACC Act states that it is to be “deemed part” of the Accident Compensation Act 1972: see Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 25.

⁵⁴ Crimes Act 1961, ss 128, 132 and 201 as at 1982.

⁵⁵ *Accident Compensation Corporation v E*, above n 7, at 433–434.

⁵⁶ Accident Rehabilitation and Compensation Insurance Act 1992 [1992 ACC Act], s 4.

category for cover for mental injury caused by certain criminal acts.⁵⁷ These acts included indecent assault, among other sexual offences.⁵⁸ This category of cover was analysed by the Court of Appeal in *S v Attorney-General* and in *W v Attorney-General*.⁵⁹ The Court held that cover for mental or nervous shock was not intended to apply unless the event giving rise to the injury occurred after the 1992 ACC Act came into force.⁶⁰

[38] The Accident Insurance Act 1998 (the 1998 ACC Act) extended cover for mental injury caused by certain criminal acts suffered before 1 April 1974 provided that treatment was first received after 1 July 1999. This was achieved through ss 40 and 44, which are both largely in the same form as what is now found in ss 21 and 36 of the 2001 ACC Act.

[39] The 2001 ACC Act replaced the 1998 ACC Act. Under s 21 of the 2001 ACC Act, in order to have cover, a person must suffer the mental injury on or after 1 April 2002, whether “inside or outside New Zealand”.⁶¹ The mental injury must have been caused by an act performed by another person against the claimant in New Zealand.⁶² The act must be within the description of one of the specified offences listed in Schedule 3 of the 2001 ACC Act.⁶³ Schedule 3 includes indecent assault.⁶⁴ Section 36(1) of the 2001 ACC Act provides that, for the purposes of ss 21 or 21B, the date on which the person suffers mental injury is the date on which the person first receives treatment for the mental injury.

[40] Section 21A of the 2001 ACC Act was introduced by the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005, in response to the

⁵⁷ Section 8(3) and sch 1.

⁵⁸ Note, the Accident Compensation Act 1982 [1982 ACC Act] included cover for bodily injuries caused by criminal acts.

⁵⁹ *S v Attorney-General* [2003] 3 NZLR 450 (CA); *W v Attorney-General* [2003] BCL 759 (CA).

⁶⁰ *S v Attorney-General*, above n 59, at [25], although the Court of Appeal acknowledged that the position changed in the 1998 Act, at [29].

⁶¹ Section 21(1)(a).

⁶² Subsections 21(1)(b), 21(2)(a) and 21(2)(b)(i). Or, if the claimant is ordinarily resident in New Zealand, it may have been performed on the claimant outside New Zealand s 21(2)(b)(ii).

⁶³ Section 21(2)(c).

⁶⁴ The Court of Appeal confirmed that Mr Roper indecently assaulted Ms Taylor: First CA judgment, above n 16, at [142]. Section 21(3) says that, for the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.

Court of Appeal's decision in *S v Attorney-General*. The explanatory note to this Bill said:⁶⁵

The Court of Appeal has held that the [1992 ACC Act] did not provide cover for mental injury arising from certain sexual crimes that occurred before 1 April 1974 and that any affected claimants have the right to pursue civil action. The Bill provides cover and entitlements for people who were first treated for mental injury as a result of sexual abuse during the period in which the [1992 ACC Act] was in force, from 1 July 1992 to 30 June 1999, as long as the other cover and entitlement criteria are met. The Bill also precludes affected claimants from obtaining cover and also taking civil action...

[41] Section 21A deems persons to have had cover under the 1992 ACC Act for mental injury caused by criminal acts performed before 1 July 1992 if they first received treatment between 1 July 1992 and 1 July 1999 and various other criteria are met. Under subs 5 those who had commenced civil proceedings pending at the introduction of the Bill could continue with those proceedings and those who had already received a judgment did not have cover.

The cross appeal

[42] We turn first to the cross appeal.

Ms Taylor's submissions

[43] First, she says she does not have cover under the 1982 ACC Act because that Act did not provide cover for indecent assault and, even if there had been cover, it did not survive the repeal of the 1982 ACC Act. Second, she did not have cover under the 1992 ACC Act because it only applied to personal injury occurring on or after 1 July 1992. She submits that the 1992 ACC Act did not bar common law claims for mental injury arising from criminal acts occurring before 1 July 1992. Third, both the 1992 and the 1998 Acts had been repealed before Ms Taylor was treated for her mental injury. She first received treatment for mental injury during the currency of the 2001 ACC Act but it is submitted that she does not have cover under that Act.

⁶⁵ Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 3) 2004 (165-1) (explanatory note) [2004 explanatory note] at 6. At 13 the 2004 explanatory note refers to *S v Attorney-General* and *W v Attorney-General*, above n 59.

[44] She submits that she does not have cover under s 21 of that Act because it does not have retrospective effect and therefore does not apply to acts that occurred between 1986 and 1998. Ms Taylor's primary argument on the 2001 ACC Act, however, is that s 21A of that Act is intended to be a code dealing with all cases of sexual abuse occurring before 1 April 1992. It is submitted that, because Ms Taylor did not receive treatment for her injury between 1 July 1992 and 1 July 1999, she had no cover under s 21A. In her submission, the legislature has made it clear in s 21A that in these circumstances common law proceedings for pre-1992 caused mental injuries are allowed.

Position of the Attorney-General and Mr Roper

[45] The Attorney-General and Mr Roper essentially support the conclusions reached in the Courts below.

Our assessment

[46] We deal first with Ms Taylor's argument that she did not have cover under the 1982 ACC Act because indecent assault was not covered by the Act. We do not accept that submission. Both the High Court and Court of Appeal held that Ms Taylor did have cover under that Act, even though the Accident Compensation Corporation would likely not have accepted her claim until the decision in *Accident Compensation Corp v E* clarified the position in 1991.⁶⁶ We agree.

[47] The High Court found that Mr Roper's assaults on Ms Taylor caused her PTSD.⁶⁷ The effect of *Accident Compensation Corp v E* was that Ms Taylor suffered personal injury by accident when she developed that disorder.⁶⁸ This was in the late 1980s. It is not material that the linkage between her mental state and the assaults was not made until later when she first sought treatment. The 1982 ACC Act did not include a provision stating that mental injury is deemed to have occurred at the time of treatment.⁶⁹ The fact that the 2001 ACC Act introduced this requirement does not change the interpretation of the 1982 ACC Act.

⁶⁶ HC judgment, above n 2, at [167]; and First CA judgment, above n 16, at [131]–[133].

⁶⁷ HC judgment, above n 2, at [125].

⁶⁸ *Accident Compensation Corporation v E*, above n 7, at 433–434.

⁶⁹ Unlike the 2001 ACC Act, s 36(1).

[48] We also agree with the Court of Appeal that Ms Taylor had cover under the 2001 ACC Act. In terms of the 2001 ACC Act, as the Court of Appeal noted,⁷⁰ s 21 provides that there is cover for mental injury caused by an act “of a kind” that is “within the description of” an offence listed in sch 3. Schedule 3 includes indecent assault. The injury must have been suffered on or after 1 April 2002. Section 36(1) provides that the date on which a person suffers mental injury under s 21 is the date on which the person first receives treatment for that mental injury. In terms of her submissions, Ms Taylor first received treatment in 2015 that linked her PTSD to the events at Whenuapai.⁷¹ Her injury was therefore deemed by s 36(1) to have been suffered within the requirements of s 21.

[49] Ms Taylor focusses in her submissions on s 21A, arguing that this is a code. She submits that, if she is not covered under s 21A, she is not covered at all. We do not accept that submission. As the Court of Appeal points out, s 21A does not purport to override s 21.⁷² It is a provision deeming certain people to have had cover under the 1992 ACC Act for mental injury caused by criminal acts performed before 1 July 1992, if they first received treatment between July 1992 and 1999. It does not purport to be the only section providing for cover for mental injury caused by criminal acts. Indeed, there is generally no overlap between ss 21 and 21A due to the time requirements. They provide for cover for mutually exclusive categories of people. Further, the fact that subs 5 keeps actions alive only in limited circumstances militates against the conclusion that a general right of action was otherwise preserved by s 21A.⁷³

[50] By virtue of s 317(1)(a) of the 2001 ACC Act, no person may bring proceedings for damages arising directly or indirectly out of personal injury covered by the 2001 ACC Act or, by virtue of s 317(1)(b), if there is cover under former ACC

⁷⁰ First CA judgment, above n 16, at [141]–[143].

⁷¹ In its first judgment, the Court of Appeal found that Ms Taylor first received treatment for PTSD long after 2002, although it did not specify a precise year: First CA judgment, above n 16, at [143]. In its recall judgment, the Court of Appeal found that the date on which Ms Taylor first received treatment for PTSD was “subsequent to 1 October 2008 and most likely not before November 2015”: CA recall judgment, above n 41 at [15].

⁷² First CA judgment, above n 16, at [148].

⁷³ As Frater J remarked in *A v Roman Catholic Archdiocese of Wellington*, s 21A “does not... create some new general rule preserving an overarching right to compensatory damages for mental injury”: *A v Roman Catholic Archdiocese of Wellington* [2007] 1 NZLR 536 (HC) at [525].

Acts. As noted above, this is the result of the “social contract” which underlies the entire accident compensation scheme — citizens forgo their common law rights in exchange for comprehensive coverage. From the beginning, the accident compensation scheme has sought to be a “unified and comprehensive” system, requiring the closing off of the tortious avenues for recovery to which plaintiffs had access prior to the scheme’s introduction.⁷⁴

[51] In this case, Ms Taylor had cover under the 1982 ACC Act. This means that the ban in s 317(1)(b) applies.⁷⁵ As Ms Taylor also had cover under the 2001 ACC Act, the ban in s 317(1)(a) applies. This means that the cross appeal must be dismissed.

The appeal

[52] This Court in its second leave judgment noted the issues raised in the appeal to be:⁷⁶

- (a) whether the Court of Appeal erred in its interpretation of *Willis v Attorney-General*⁷⁷ and in its interpretation of s 317 of the 2001 ACC Act;
- (b) whether the Court of Appeal erred in its interpretation of s 21B of the 2001 ACC Act; and
- (c) whether the Court of Appeal approach is inconsistent with the text, scheme and purpose of the 2001 ACC Act.⁷⁸

⁷⁴ The Woodhouse Report, above n 43, at [278(a)].

⁷⁵ As she is covered by the 1982 ACC Act it is irrelevant whether she may have had cover also under the 1992 and 1998 ACC Acts. It suffices if she had cover under one of the former Acts. The Attorney-General accepted that *S v Attorney-General* had the effect of precluding cover under the 1992 ACC Act where the event giving rise to the injury occurred after the 1992 ACC Act came into force. But we think it is likely that she had cover under the 1998 ACC Act. We agree that it is likely that, given the effect of *S v Attorney-General*, above n 59, Ms Taylor did not have cover under the 1992 ACC Act.

⁷⁶ SC second leave judgment, above n 42, at [4].

⁷⁷ *Willis*, above n 10.

⁷⁸ See earlier discussion of purpose of the scheme and history of the ACC Acts at [33]–[41].

[53] We will deal with issues (a) and (c) together (under the heading damages for false imprisonment) and then issue (b). But first we will briefly set out the submissions of the parties.

Submissions of the parties

Submissions of Mr Roper and the Attorney-General

[54] Mr Roper and the Attorney-General submit that the majority in the Court of Appeal erred in its interpretation of *Willis*. The Attorney-General argues that, given that the damage suffered from false imprisonment is the same damage arising out of all the causes of action, the conclusion is inescapable that the bar in s 317 of the 2001 ACC Act applies.

[55] Both Mr Roper and the Attorney-General argue that false imprisonment falls within the scope of s 21B(7). The Attorney-General submits that the Court of Appeal's interpretation of that provision is strained and that it would unjustly deprive people of cover. This would be contrary to the underlying philosophy of the accident compensation scheme and the purpose of s 21B.

Submissions of Ms Taylor

[56] Ms Taylor supports the conclusion of the majority of the Court of Appeal on the false imprisonment issue. On s 21B, she supports the reasoning of the Court of Appeal and also says that the section is not retrospective.

Damages for false imprisonment

[57] As we have noted in our discussion of the cross appeal, we are satisfied that Ms Taylor has cover under the accident compensation scheme for her PTSD. As we will now explain, we are also satisfied that her cover in relation to PTSD excludes any common law claim in relation to it based on false imprisonment.

Effect of s 317

[58] The effect of s 317 of the 2001 ACC Act is that Ms Taylor may not bring a claim for damages arising directly or indirectly from personal injury that is covered

under the 2001 ACC Act or the former Acts (relevantly the 1982, 1992 and 1998 Acts).

[59] The focus of s 317 is on the personal injury rather than its cause. If Ms Taylor had cover in relation to her PTSD, s 317 excludes any claim based on other tortious conduct for compensatory damages in relation to that PTSD.

[60] Also relevant for these purposes is that s 14 of the 1992 ACC Act and s 394 of the 1998 Act provided, and s 317 of the 2001 ACC Act provides, that their operation is not affected by failure of a person to make a claim. We note our conclusion on the cross appeal that Ms Taylor had cover under the 1982 and the 2001 ACC Acts.⁷⁹

[61] We have distinct reservations about whether it is realistic to separate out the false imprisonment components of Ms Taylor's claim for compensatory damages from the assault components. For the sake of the argument, however, we are prepared to accept that both were material causes of her PTSD.

[62] On the approach taken to personal injuries that have more than one cause, Ms Taylor is entitled to cover in relation to her PTSD if the assaults were a material cause of it. In *W v Accident Compensation Corporation* Collins J reviewed the authorities as to the level of contribution required, and the test he proposed was one of material contribution, an approach we are inclined to accept.⁸⁰ It is not necessary to establish that the assaults were the *only* material cause (to the exclusion of false imprisonment). It is sufficient that they were *a* material cause. While there may be some scope for debate about the level of materiality required and how this is best expressed (in terms of substantiality), we cannot conceive of a plausible formulation of the causation test under which Ms Taylor would not have such cover.⁸¹

[63] This means that, subject to the argument based on *Willis*, s 317 applies to bar a claim for compensatory damages for both assault and false imprisonment.

⁷⁹ See conclusion on cross appeal at [51]; also for 1992 and 1998 ACC Acts see above n 75.

⁸⁰ *W v Accident Compensation Corporation* [2018] NZHC 937, [2018] 3 NZLR 859 at [44]–[68].

⁸¹ The High Court found that Mr Roper's actions were a "material and substantial cause" of Ms Taylor's mental injury: HC judgment, above n 2, at [125].

Willis

[64] The majority in the Court of Appeal relied on *Willis* in coming to the view that Ms Taylor could seek compensatory damages for false imprisonment. That case arose from the importation by the plaintiffs of two motor vehicles that were alleged by a customs officer to have been smuggled. The plaintiffs maintained that they had been unlawfully detained during their interactions with that customs officer. Charges of smuggling that were subsequently laid against them were dismissed and they issued proceedings claiming damages for malicious prosecution, negligence and, relevantly, false imprisonment. In relation to the claim for false imprisonment, they sought damages for “inconvenience, humiliation and distress”.⁸²

[65] In issue in the Court of Appeal in *Willis* was whether that claim was precluded by the 1982 ACC Act. This point was addressed by the Court in this way:⁸³

False imprisonment is the unlawful total restraint of the liberty of a person. It may be but is not necessarily brought about by force or the threat of force...⁸⁴ Force or the threat of force is not the gist of the cause of action and Atkin LJ even held that a person may be imprisoned without being aware of it at the time...⁸⁵ Applying again the tests of the purposes of the Accident Compensation legislation and the natural and ordinary use of [language], we have come to the conclusion that false imprisonment as such is outside the purview of the Act. In ordinary speech we do not think that it would be said of anyone who had been detained as the plaintiffs claim to have been that he or she had suffered personal injury by accident.

Accordingly we hold that claims for damages for false imprisonment or abuse of rights amounting to false imprisonment (which appears to add nothing) are not barred by the Act. If a plaintiff were to claim damages (other than exemplary) for assault or battery, the position would be different. Such claims are barred, but they are not made by the plaintiffs here. *If the detention of a plaintiff has been accompanied by physical injuries, damages cannot be claimed for those or for the pain and suffering they have caused.*

No doubt there is a grey area in which it can be argued that distress or humiliation or fear for which a plaintiff alleging false imprisonment seeks damages amounts to or overlaps with personal injury by accident. But to make the Act work as Parliament must have intended...⁸⁶ we think that the

⁸² *Willis*, above n 10, at 576.

⁸³ At 579 (emphasis added).

⁸⁴ Referring to *Halsbury's Laws of England* (4th ed, 1985) vol 45 Tort at [1325].

⁸⁵ Referring to *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44 at 53–54.

⁸⁶ Comparing to *New Zealand Labourers' Union v Fletcher Challenge Ltd* [1988] 1 NZLR 520 (CA); and *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA).

clear rule must be adopted that any claims for any kind of damages for false imprisonment alone and for any distress, humiliation or fear caused thereby are outside the scope of the accident compensation system and unaffected by the Act. *If such mental consequences have been caused by both false imprisonment and assault or battery, a plaintiff can still claim damages for them. It is enough if the false imprisonment has been a substantial cause.*

Trial Judges will adopt a common sense approach, guided by what is within the broad spirit of the accident compensation system and what is outside it. Any difficulties are likely to be more theoretical than practical.

[66] The second of the passages that we have emphasised was at the heart of the reasoning of the Court of Appeal majority in the judgment under appeal.⁸⁷ On the approach of the majority, it meant that, if the false imprisonment suffered by Ms Taylor were a substantial cause of her PTSD, she is entitled to compensatory damages.⁸⁸

[67] But the bar on claims for damages applies if the injured person has cover for the personal injury for which damages are sought.⁸⁹ Where a personal injury is the result of more than one factor, only one of which engages the entitlement to compensation, cover is available if that factor was a material cause of the personal injury. As long as this requirement is met, cover will not be negated by the fact that the event has one or more other causes which do not engage the entitlement. The way in which the bar of common law claims has been expressed means that where there is cover, there is no parallel right to seek damages in relation to the same injury.

[68] A possible explanation for the second passage that we have emphasised is that the Court of Appeal in *Willis* may have assumed that physical injury was a prerequisite to cover under the 1982 ACC Act. It was only established definitively two years later that this was not the case: in *Accident Compensation Corp v E*. This explanation is consistent with the first of the passages that we have emphasised. We think it most unlikely that the Court of Appeal in *Willis* was of the view that a claim for false imprisonment could be brought for mental injury in respect of which the plaintiff had cover. This would essentially amount to double recovery for the same injury.

⁸⁷ First CA judgment, above n 16, at [206]–[208].

⁸⁸ At [206].

⁸⁹ 2001 ACC Act, s 317.

[69] An important purpose of damages in tort is to place the plaintiff in the position they would have been in if the injury had not occurred. When the accident compensation scheme provides compensation, this justification for imposing tortious compensatory damages no longer exists. To allow double recovery would run counter to the logic of the scheme's underlying social contract, where the need for compensatory damages is replaced with universal compensation.⁹⁰

[70] If, however, the Court of Appeal in *Willis* was of the view that there could be a claim for false imprisonment in such circumstances, then we consider that it was mistaken.

Conclusion

[71] For the above reasons, we conclude that Ms Taylor cannot sue for compensatory damages for false imprisonment.

Section 21B

[72] We now turn to s 21B of the 2001 ACC Act which provides cover for work-related mental injuries that are caused by sudden events. We first set out the relevant requirements of s 21B and summarise the reasons given by the Court of Appeal for its view that s 21B did not apply. We then discuss the legislative history of the section before considering whether each of the elements of the section were met in this case. Because of our conclusion on the cross appeal and on the effect of *Willis*, we do not need to come to a definitive view on the application of s 21B.

Relevant requirements of s 21B

[73] In order for s 21B to be satisfied in this case the following requirements must be met:

⁹⁰ See earlier discussion of purpose of the scheme and history of the ACC Acts at [33]–[41].

- (a) a person must have suffered a mental injury inside or outside New Zealand on or after 1 October 2008;⁹¹
- (b) the mental injury must be caused by a single event experienced by a person in the course of employment which could reasonably be expected to cause mental injury to people generally;⁹² and
- (c) the event must have occurred in New Zealand, or outside New Zealand to a person who is ordinarily resident in New Zealand.⁹³

[74] “Event” is defined in the following way at s 21B(7)(a): “event” means an event that: is sudden; or is a direct outcome of a sudden event.

[75] There is an extended definition of event in s 21B(7)(b) to include a series of events that arise from the same cause or circumstance and together comprise a single incident or occasion. It does not, however, include a gradual process.⁹⁴

Court of Appeal decision

[76] The Court found that Ms Taylor first received treatment for PTSD subsequent to 1 October 2008.⁹⁵ The Court, however, rejected Ms Taylor’s argument that s 21B(1) requires both the causative event and the mental injury to occur after 1 October 2008.⁹⁶

[77] In terms of whether s 21B applied, the Court held that the word “sudden” included two elements, being “an absence of foreseeability or warning” and “a temporal connotation, namely rapid or instantaneous”.⁹⁷ The Court of Appeal held that, in context, the word “sudden” does not include an event which was expected or foreseen.⁹⁸ It said that “apprehended, albeit unwanted, incidents of physical

⁹¹ 2001 ACC Act, s 21B(1)(a).

⁹² Section 21B(2)(a)–(b).

⁹³ Section 21B(2)(c).

⁹⁴ Section 21B(7)(c).

⁹⁵ CA recall judgment, above n 41, at [15].

⁹⁶ At [14].

⁹⁷ At [19] and [31].

⁹⁸ At [30].

harassment in the nature of detention or confinement” are excluded.⁹⁹ In its view, Ms Taylor driving Mr Roper home were “anticipated and feared episodes” which could not be characterised as “sudden”.¹⁰⁰ While it does not explicitly discuss the point, the Court’s reasoning regarding forewarning being provided by Mr Roper’s “unpleasant reputation for sexual harassment” is likely also intended to apply to the tyre cage episodes.¹⁰¹

[78] Further, the Court of Appeal held that the concept of detention implies that the episode would be “for a period of time rather than momentary”.¹⁰² The Court of Appeal maintained that to describe incidents of a substantial duration as “sudden” would be to unduly stretch the meaning of the word. In addition, while the Court accepted that the individual instances of false imprisonment would have a sudden component (the point of commencement), it held that:¹⁰³

... the substantial effect of the detention on a victim would lie not in the mere fact of its commencement but also its prolonged nature, combined with the fear of what else might occur during the period of confinement.

[79] This meant that the false imprisonment episodes were not sudden events and s 21B was not applicable.¹⁰⁴

[80] The Court went on to consider the remaining issues raised in terms of s 21B. The Court accepted that the injury occurred after 1 October 2008 and Ms Taylor did not contest that the causative events occurred in the course of her employment.¹⁰⁵ The Court of Appeal also considered the question of whether s 21B(7) was disjunctive (i.e., whether it envisioned only a complete, binary distinction between an “event” and a “gradual process”) or whether it was possible that a series of incidents might fail to satisfy the extended definition but still fail to constitute a gradual process.¹⁰⁶

⁹⁹ At [31].

¹⁰⁰ At [32].

¹⁰¹ At [32].

¹⁰² At [33].

¹⁰³ At [34].

¹⁰⁴ At [34].

¹⁰⁵ At [7] and [15].

¹⁰⁶ At [36].

[81] The Court of Appeal concluded that Mr Roper was the sole author and cause of the events experienced by Ms Taylor but held that they did not comprise a single incident or occasion.¹⁰⁷ In coming to this conclusion, they rejected a binary understanding of s 21B(7): holding that it is possible that a series of incidents is not a gradual process but still falls outside of the section's scope. The Court rejected the Attorney-General's argument that the tyre cage incidents could together amount to one series of events, while the driving incidents together amounted to another series of events.¹⁰⁸

[82] The Court concluded s 21B of the 2001 ACC Act did not provide cover for the PTSD suffered by Ms Taylor as a consequence of the incidents and therefore that this did not disturb the majority's earlier conclusion that her claim for compensatory damages for false imprisonment is not statute barred.¹⁰⁹

Legislative history of s 21B

[83] Section 21B was introduced by the Injury Prevention, Rehabilitation and Compensation Amendment Bill (No 2) 2007.

[84] The explanatory note to the Bill describes the gap in cover that s 21B was designed to address:¹¹⁰

No cover is currently available for mental injury caused by exposure to a sudden traumatic event in the course of employment (for example, witnessing a colleague shot in a bank robbery, or a train driver hitting someone on the tracks).

[85] The explanatory note describes the operation of s 21B in the following way:¹¹¹

The Bill provides cover for mental injury (a clinically significant behavioural, cognitive, or psychological dysfunction) caused by exposure to a sudden traumatic event during the course of employment.

¹⁰⁷ At [47].

¹⁰⁸ At [48].

¹⁰⁹ At [51].

¹¹⁰ Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) 2007 (170-1) (explanatory note) [2007 explanatory note] at 22.

¹¹¹ At 22.

[86] Prior to the passage of the Bill, the Select Committee recommended that it be amended due to concerns that the Bill might exclude certain claims that should be covered.¹¹² The Committee noted that the Bill:¹¹³

...was intended to provide cover for work-related mental injury caused by a single event, such as a road accident, even where that single event might be interpreted as consisting of a number of interrelated events.

[87] As such, the Bill was amended to include s 21B(7).¹¹⁴ Previously, the Bill had simply provided that an event had to be “sudden”, reasonably expected to cause mental injury, and experienced, seen or heard directly.¹¹⁵ The amended section includes an extended definition of event, expressly extending the term’s scope to preclude situations where a single event would be excluded due to being treated as a series of interrelated events.¹¹⁶

Section 21B – general comments

[88] We will begin by considering the elements of s 21B which are uncontroversial in this case.¹¹⁷ On element (a), we agree with the Court of Appeal that Ms Taylor first received treatment for PTSD subsequent to 1 October 2008, and we also agree with the Court of Appeal that only the mental injury needs to occur after 1 October 2008.¹¹⁸ On element (b), it is uncontroversial that the episodes occurred in the course of Ms Taylor’s employment.¹¹⁹ It is also relatively clear that these episodes would reasonably expected to cause mental injury to people generally. On element (c), the events occurred in New Zealand.

[89] The real issue in this case is whether the requirement of causation by a “single event” (from element (b)) is satisfied. This in turn requires that the section’s

¹¹² Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) 2007 (170-2) (select committee report) at 2.

¹¹³ At 2.

¹¹⁴ Compare Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) 2007 (170-1), pt 1 cl 6 with Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) 2007 (170-2), pt 1 cl 6.

¹¹⁵ Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) 2007 (170-1), pt 1 cl 6.

¹¹⁶ Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) 2007 (170-2), pt 1 cl 6.

¹¹⁷ We set out the elements of s 21B at [73].

¹¹⁸ See [76].

¹¹⁹ See [80].

definition of event¹²⁰ or the extended definition,¹²¹ be satisfied. In considering this definition, we reject the disjunctive understanding of s 21B(7): it is possible for a series of events not to be a gradual process but still fail to be an event for the purposes of s 21B(7).¹²²

[90] An added difficulty is that some of Mr Roper's actions may meet the definition while others do not.¹²³ This difficulty raises an additional causation question: it must be established that whichever of Mr Roper's actions constituted a "single event" was also a material cause of Ms Taylor's injury (when separated from his actions as a whole).

Meaning of "sudden"

[91] To meet this part of the definition, the event must be either a "sudden event" or a "direct outcome of a sudden event".¹²⁴

[92] The Court of Appeal interprets "sudden" in s 21B(7)(a), as referring to events that are not foreseeable in the ordinary course of employment. We question this for two reasons.

[93] First, the Court of Appeal's definition might exclude cases which are otherwise paradigmatic for the application of s 21B. The explanatory note discusses the two scenarios of "witnessing a colleague shot in a bank robbery" and "a train driver hitting someone on the tracks".¹²⁵ Depending on the circumstance, both of these events could be said to be foreseeable. For example, consider a situation where an employee works in a dangerous area and their place of work is robbed after having been threatened by a local group of robbers.¹²⁶

¹²⁰ See [74].

¹²¹ See [75].

¹²² See [80]–[81].

¹²³ This may be the case whether individual instances of offending by Mr Roper are taken as singular events, or whether the car episodes and tyre-cage episodes are each taken together.

¹²⁴ See [75].

¹²⁵ 2007 explanatory note, above n 110, at 4.

¹²⁶ As in *Davis v Portage Licensing Trust* [2006] 1 ERNZ 268 at [5]–[10]; which commentary has described as a "textbook example" of cover under 21B:see Fiona Thwaites "Mental Injury Claims under the Accident Compensation Act 2001" (2012) 18 *Canta L R* 244 at 252; and *Mazengarb's Employment Law* (looseleaf ed, LexisNexis) at [IPA21B.5].

[94] Secondly, and most importantly, irrespective of this discussion of the meaning of “sudden”, there are strong policy reasons which persuade against the Court of Appeal’s interpretation. Counter to the accident compensation scheme’s objective of comprehensive coverage, the Court of Appeal’s interpretation would counterintuitively place workers who are highly vulnerable at a disadvantage compared to workers for whom dangerous events occur more infrequently. Further, this interpretation seems to violate the requirement that interpretation of the statute be “non-niggardly”.¹²⁷

[95] We also have distinct reservations about the Court of Appeal’s exclusion of false imprisonment as coming within the section because of its prolonged character and despite the Court of Appeal accepting the sudden component at its commencement. The Court of Appeal’s distinction between the point of commencement and the event as a whole potentially contradicts Parliament’s intent to create a generous, intuitive compensation scheme by splitting instances of false imprisonment into two events: the ‘event’ of sudden commencement and the ‘event’ of protracted confinement. This interpretation appears strained, and would again exclude otherwise paradigmatic cases where s 21B would apply.

[96] For example, one of the scenarios raised in the Parliamentary debate prior to the introduction of the Bill was the case of a coalminer who had been buried alive for 20 hours following a mine collapse.¹²⁸ The Court of Appeal’s reasoning might imply splitting this scenario into two events: the ‘point of commencement when the mine collapsed’ (which was sudden) and ‘being trapped in the mine’ (which was not sudden due to its long duration). But this interpretation would clearly be strained.

[97] Therefore, in our view, any of the individual episodes of false imprisonment can be regarded as events under s 21B(7)(a). Each episode of false imprisonment could be taken as a singular sudden event under s 21B(7)(a)(i). Alternatively, the “point of commencement” of each episode could be taken as a sudden event, with

¹²⁷ *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) at [19], [40] and [130]–[131]. Throughout these cited paragraphs, the Court of Appeal uses the words “unniggardly” and “non-niggardly” interchangeably.

¹²⁸ (17 June 2008) 647 NZPD 16636.

the period of confinement being a “direct outcome” of the sudden event, under s 21B(7)(a)(ii).

Were the episodes of false imprisonment a gradual process?

[98] The Court of Appeal held that, for the purposes of s 21B, “gradual process” did not merely refer to “something happening repeatedly”, it signified a “transformative process occurring progressively over time”.¹²⁹ Within such a process “a single causative event or series of events” could not be identified.¹³⁰ Mr Roper’s course of conduct was not a “gradual process” by this definition. We agree with the Court of Appeal.

Were the instances of false imprisonment events under the extended definition of s 21B(7)(b)?

[99] In terms of whether the requirements of s 21B(7)(b) are met, it could be fairly said that the employment environment in which Ms Taylor was required to work with Mr Roper, and at his direction, and his associated pattern of predatory behaviour, meant that the assaults arose from the “the same cause or circumstance”.

[100] We do, however, have rather more difficulty with the view that various assaults could be said to “comprise a single incident or occasion”. Our tentative view is that the assaults on Ms Taylor were not “a single incident or occasion” in the sense set out in the extended definition of event. But given our finding that the definition in s 21B(7)(a) is met, this does not have an impact on the overall outcome.

Were the episodes of false imprisonment a single event which caused the mental injury?

[101] It is significant that this test specifies that a *single event* needs to have been a cause of the mental injury. Read in conjunction with s 21B(7), this requirement entails that a single sudden event, as defined in s 21B(7)(a), or a single unified series of occurrences which together are an event, as defined in s 21B(7)(b), must be a cause of the mental injury.

¹²⁹ CA recall judgment, above n 41 at [43].

¹³⁰ At [44].

[102] Where there have been a number of separate events which would each meet the definition in s 21B(7)(a) and they have cumulatively caused mental injury, it may well be that *each* separate event can be seen as a material cause of the mental injury, even if together they do not meet the extended definition of event. Understanding causation in this way would seem to accord with the accident compensation scheme's objective of wide-reaching cover and the need to adopt a "non-niggardly" interpretation of the Act.

Conclusion

[103] Therefore, while we do not need to decide the point, we tentatively conclude that the definition at s 21B(1)(a) is met in this case and that, therefore s 21B would be engaged, provided that each (or any) of the episodes of false imprisonment could, taking a non-niggardly approach, in themselves be seen as material causes of Ms Taylor's mental injury.

Result

[104] The appeal is allowed. We uphold the conclusion of the High Court Judge dismissing the claim by Ms Taylor for compensatory damages in relation to false imprisonment.

[105] The cross appeal is dismissed.

[106] Costs are reserved. If costs, both in this Court and the Courts below, cannot be agreed, memoranda should be filed and served in accordance with the following timetable:

- a) The RNZAF and Mr Roper on or before 26 May 2023.
- b) Ms Taylor on or before 9 June 2023.

Solicitors:

Albany Legal Ltd, Auckland for Appellant (SC 16/2022) and Second Respondent (SC 23/2022)

Chambers Craig Jarvis, Auckland for First Respondent

Crown Law Office, Wellington for Second Respondent (SC 16/2022) and Appellant (SC 23/2022)

Appendix: relevant legislation

1982 ACC Act

[107] Section 2 of the 1982 ACC Act provides in relevant part:

“Personal injury by accident”—

(a) Includes—

(i) The physical and mental consequences of any such injury or of the accident:

...

(iv) Actual bodily harm (including pregnancy and mental or nervous shock) arising by any act or omission of any other person which is within the description of any of the offences specified in sections 128, 132, and 201 of the Crimes Act 1961, irrespective of whether or not any person is charged with the offence and notwithstanding that the offender was legally incapable of forming a criminal intent:

...

1992 ACC Act

[108] Section 4 of the 1992 ACC Act provides in relevant part:

4. Definition of “personal injury”—

- (1) For the purposes of this Act, “personal injury” means the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person, and has the extended meaning assigned to it by section 8 (3) of this Act.

[109] Section 8(3)–(4) provides:

8. Cover for personal injury occurring in New Zealand—

...

- (3) Cover under this Act shall also extend to personal injury which is mental or nervous shock suffered by a person as an outcome of any act of any other person performed on, with, or in relation to the first person (but not on, with, or in relation to any other person) which is within the description of any offence listed in the First Schedule to this Act.
- (4) For the purposes of subsection (3) of this section, it is irrelevant that—
 - (a) No person can be or has been charged with or convicted of the offence; or
 - (b) The alleged offender is incapable of forming criminal intent.

[110] Section 135(5) provides:

Relationship of this Act and former Acts—

...

- (5) Any person who has suffered personal injury by accident within the meaning of the Accident Compensation Act 1972 or the Accident Compensation Act 1982 that is covered by either of those Acts, and who has not lodged a claim with the Corporation in respect of that personal injury by accident before the 1st day of October 1992, shall have cover under this Act only if that personal injury by accident is also personal injury that is covered by this Act.

2001 ACC Act

[111] Section 20 of the 2001 ACC Act provides in relevant part:

- 20 Cover for personal injury suffered in New Zealand (except mental injury caused by certain criminal acts or work-related mental injury)**
- (1) A person has cover for a personal injury if—

- (a) he or she suffers the personal injury in New Zealand on or after 1 April 2002; and
 - (b) the personal injury is any of the kinds of injuries described in section 26(1)(a) or (b) or (c) or (e); and
 - (c) the personal injury is described in any of the paragraphs in subsection (2).
- (2) Subsection (1)(c) applies to—
- (a) personal injury caused by an accident to the person:
- ...
- (4) A person who suffers personal injury that is mental injury in circumstances described in section 21 has cover under section 21, but not under this section.

[112] Section 21 provides:

21 Cover for mental injury caused by certain criminal acts

- (1) A person has cover for a personal injury that is a mental injury if—
- (a) he or she suffers the mental injury inside or outside New Zealand on or after 1 April 2002; and
 - (b) the mental injury is caused by an act performed by another person; and
 - (c) the act is of a kind described in subsection (2).
- (2) Subsection (1)(c) applies to an act that—
- (a) is performed on, with, or in relation to the person; and
 - (b) is performed—
 - (i) in New Zealand; or
 - (ii) outside New Zealand on, with, or in relation to a person who is ordinarily resident in New Zealand when the act is performed; and
 - (c) is within the description of an offence listed in Schedule 3.
- (3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.
- (4) Section 36 describes how the date referred to in subsection (3) is determined.

- (5) For the purposes of this section, it is irrelevant that—
- (a) no person can be, or has been, charged with or convicted of the offence; or
 - (b) the alleged offender is incapable of forming criminal intent.

[113] Section 21A provides:

21A Cover under Accident Rehabilitation and Compensation Insurance Act 1992 for mental injury caused by certain criminal acts

- (1) This section applies to persons who suffered personal injury that is mental or nervous shock suffered as an outcome of any act of any other person, which act—
- (a) was performed on, with, or in relation to the claimant (but not on, with, or in relation to any other person); and
 - (b) was within the description of any offence listed in Schedule 1 of the Accident Rehabilitation and Compensation Insurance Act 1992 (the **1992 Act**); and
 - (c) was performed before 1 July 1992 (including before 1 April 1974) and was performed—
 - (i) in New Zealand; or
 - (ii) outside New Zealand, and the claimant was ordinarily resident in New Zealand within the meaning of the 1992 Act when the act was actually performed.
- (2) For the purpose of subsection (1),—
- (a) the personal injury is deemed to have been suffered on the date of the first treatment that the claimant received for that personal injury as that personal injury; and
 - (b) that first treatment must have been received on or after 1 July 1992 and before 1 July 1999; and
 - (c) the treatment must have been of a kind for which the Corporation was required or permitted to make payments either directly under regulations made under the 1992 Act or under an agreement or contract or arrangement under section 29A of the 1992 Act, irrespective of whether or not it made any payment in the particular case.
- (3) For the purposes of subsection (1), it is irrelevant—
- (a) that no person can be, or has been, charged with or convicted of the offence; or

- (b) that the alleged offender is incapable of forming criminal intent; or
 - (c) whether or not the person who suffered the personal injury was ordinarily resident in New Zealand within the meaning of the 1992 Act when the personal injury is deemed to have been suffered.
- (4) Persons to whom this section applies are deemed to have had cover under the 1992 Act for the personal injury described in subsection (1), and the following provisions apply:
- (a) payments made by or through the Corporation (or a subsidiary of the Corporation) or the Department of Labour to those persons for a personal injury described in subsection (1), whether made before or after the commencement of this section, are deemed to be entitlements paid under the 1992 Act to the extent that the correct amounts were paid:
 - (b) for the purpose of paragraph (a), it does not matter whether or not the payment is a payment made in the belief that section 8(3) of the 1992 Act provided cover:
 - (c) entitlements available as a result of cover deemed by this section are subject to Part 13 of the Accident Insurance Act 1998 and Part 11 of this Act:
 - (d) Part 5 applies to decisions made by or on behalf of the Corporation between 15 July 2003 and the commencement of this section on claims made under section 8(3) of the 1992 Act for which cover is deemed by this section, and Part 5 applies as if those decisions had been made on the date of the commencement of this section.
- (5) However, the following provisions apply to civil proceedings brought before or after the commencement of this section seeking general damages for mental or nervous shock suffered by a person as an outcome of any act described in subsection (1) (the **proceedings**):
- (a) if the plaintiff received judgment in the proceedings, in his or her favour, before the commencement of this section, the plaintiff does not have cover under this section for the injury or injuries to which the proceedings relate:
 - (b) if the proceedings were filed, but not heard, before the date of introduction of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005, nothing in this section prevents the proceedings from being heard or prevents a court from awarding the plaintiff general damages for the mental or nervous shock:
 - (c) if the plaintiff continues the proceedings, the plaintiff must declare to the court any payments and entitlements received from the Corporation for the personal injury for which damages are sought, and the court must take those payments

and entitlements into account in awarding the plaintiff any damages:

- (d) on the date judgment is given in the proceedings, the plaintiff—
 - (i) does not have cover under this section for the injury or injuries to which the proceedings relate; and
 - (ii) must advise the Corporation of the judgment:
- (e) if the plaintiff loses cover by virtue of paragraph (a) or paragraph (d), the Corporation may not recover any part of an amount that is deemed by subsection (4)(a) to be an entitlement paid to the plaintiff under the 1992 Act.

[114] Section 21B provides:

21B Cover for work-related mental injury

- (1) A person has cover for a personal injury that is a work-related mental injury if—
 - (a) he or she suffers the mental injury inside or outside New Zealand on or after 1 October 2008; and
 - (b) the mental injury is caused by a single event of a kind described in subsection (2).
- (2) Subsection (1)(b) applies to an event that—
 - (a) the person experiences, sees, or hears directly in the circumstances described in section 28(1); and
 - (b) is an event that could reasonably be expected to cause mental injury to people generally; and
 - (c) occurs—
 - (i) in New Zealand; or
 - (ii) outside New Zealand to a person who is ordinarily resident in New Zealand when the event occurs.
- (3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.
- (4) Section 36(1) describes how the date referred to in subsection (3) is determined.
- (5) In subsection (2)(a), a person experiences, sees, or hears an event directly if that person—
 - (a) is involved in or witnesses the event himself or herself; and

- (b) is in close physical proximity to the event at the time it occurs.
- (6) To avoid doubt, a person does not experience, see, or hear an event directly if that person experiences, sees, or hears it through a secondary source, for example, by—
 - (a) seeing it on television (including closed circuit television):
 - (b) seeing pictures of, or reading about, it in news media:
 - (c) hearing it on radio or by telephone:
 - (d) hearing about it from radio, telephone, or another person.
- (7) In this section, **event**—
 - (a) means—
 - (i) an event that is sudden; or
 - (ii) a direct outcome of a sudden event; and
 - (b) includes a series of events that—
 - (i) arise from the same cause or circumstance; and
 - (ii) together comprise a single incident or occasion; but
 - (c) does not include a gradual process.

[115] Section 26 provides in relevant part:

26 Personal injury

- (1) **Personal injury** means—
 - (a) the death of a person; or
 - (b) physical injuries suffered by a person, including, for example, a strain or a sprain; or
 - (c) mental injury suffered by a person because of physical injuries suffered by the person; or
 - (d) mental injury suffered by a person in the circumstances described in section 21; or
 - (da) work-related mental injury that is suffered by a person in the circumstances described in section 21B; or
 - (e) damage (other than wear and tear) to dentures or prostheses that replace a part of the human body.

...

- (2) **Personal injury** does not include personal injury caused wholly or substantially by a gradual process, disease, or infection unless it is personal injury of a kind described in section 20(2)(e) to (h).

[116] Section 28(1) provides:

28 Work-related personal injury

- (1) A **work-related personal injury** is a personal injury that a person suffers—
- (a) while he or she is at any place for the purposes of his or her employment, including, for example, a place that itself moves or a place to or through which the claimant moves; or
 - (b) while he or she is having a break from work for a meal or rest or refreshment at his or her place of employment; or
 - (c) while he or she is travelling to or from his or her place of employment at the start or finish of his or her day's work, if he or she is an employee and if the transport—
 - (i) is provided by the employer; and
 - (ii) is provided for the purpose of transporting employees; and
 - (iii) is driven by the employer or, at the direction of the employer, by another employee of the employer or of a related or associated employer; or
 - (d) while he or she is travelling, by the most direct practicable route, between his or her place of employment and another place for the purposes of getting treatment for a work-related personal injury, if the treatment—
 - (i) is necessary for the injury; and
 - (ii) is treatment of a type that the claimant is entitled to under Part 1 of Schedule 1.

[117] Section 36 provides:

36 Date on which person is to be regarded as suffering mental injury

- (1) The date on which a person suffers mental injury in the circumstances described in section 21 or 21B is the date on which the person first receives treatment for that mental injury as that mental injury.

- (2) The date on which a person suffers mental injury because of physical injuries suffered by the person is the date on which the physical injuries are suffered.
- (3) In subsection (1), **treatment** means treatment of a type that the person is entitled to under this Act or a former Act.
- (4) This section does not apply for the purposes of clause 55 of Schedule 1.

[118] Section 317(1) provides:

317 Proceedings for personal injury

- (1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—
 - (a) personal injury covered by this Act; or
 - (b) personal injury covered by the former Acts.