

NOTE: ORDER PROHIBITING PUBLICATION OF THE RESPONDENT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE RESPONDENT, PURSUANT TO S 160(1)(B) OF THE ACCIDENT COMPENSATION ACT 2001, REMAINS IN FORCE. SEE [2021] NZACC 125. SEE <http://www.legislation.govt.nz/act/public/2001/0049/latest/DLM101854.html>

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA261/2023
[2025] NZCA 373**

BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
AND	D Respondent

Hearing: 1 May 2025 (further material received 6 May 2025)

Court: Thomas, Collins and Woolford JJ

Counsel: S M Bisley and W H Ranaweera for Appellant
B H Woodhouse and M J McKillop for Respondent

Judgment: 31 July 2025 at 9.30 am

JUDGMENT OF THE COURT

- A The answer to the question of law set out at [2] of the judgment is “yes”.**
- B The appeal is allowed and the High Court decision is set aside.**
- C There is no order as to costs.**
-

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] D was born in Russia in August 2001 and was a Russian citizen when he was physically assaulted as a young child.¹ In August 2004, D was adopted by New Zealanders and emigrated to New Zealand. In November 2019, D was diagnosed with severe post-traumatic stress disorder (PTSD) attributed to the physical injuries he suffered in Russia. The issue in this appeal is whether D is entitled to cover for his mental injury under the Accident Compensation Act 2001 (the Act). Specifically, the question is whether, in order to receive cover, the physical injury causative of his mental injury must occur in New Zealand (as the Accident Compensation Corporation (ACC) says) or whether it is only the resultant mental injury that must occur in New Zealand (as D says).

[2] ACC declined to accept D's claim for cover, a decision that was confirmed on review in February 2020. Cover was refused because the personal injury had not been suffered in New Zealand and D was not ordinarily resident in New Zealand at the time it occurred. On appeal, the District Court concluded that D's mental injury was

¹ The Courts below anonymised the name and identifying particulars of the respondent and prohibited publication of them under s 160(1)(b)(i) of the Accident Compensation Act 2001 by consent. We adopt the same approach.

covered because the mental injury was suffered in New Zealand.² That decision was upheld on appeal to the High Court³ on a point of law and it is the same point of law which has now been referred to us.⁴ The question on appeal is:⁵

Did the High Court err in finding, at [10]–[13], that D had cover under s 26(1)(c) of the Accident Compensation Act 2001 for a mental injury suffered by D because of physical injury suffered by D because:

- (1) it held that s 36(2) of the Accident Compensation Act 2001 deems the personal injury to have been suffered on the date, but not at the location, of his physical injury; and
- (2) although D was not resident in New Zealand when his physical injury was suffered, he was resident in New Zealand when his mental injury was “suffered”?

[3] The question is one of statutory interpretation requiring us to ascertain the meaning of the Act from its text and in light of its purpose and context.⁶

Relevant statutory provisions

[4] We begin by setting out the relevant statutory provisions in order to provide context to the next section, which discusses the High Court judgment giving rise to this appeal.

[5] “Mental injury” and “personal injury” have the meanings set out in ss 27 and 26 of the Act respectively.⁷

[6] A mental injury is “a clinically significant behavioural, cognitive, or psychological dysfunction”.⁸

[7] Section 26(1) of the Act specifies that personal injury is:

- (a) the death of a person; or
- (b) physical injuries suffered by a person, including, for example, a strain or a sprain; or

² *D v Accident Compensation Corporation* [2021] NZACC 125.

³ *Accident Compensation Corporation v D* [2023] NZHC 266 [judgment under appeal].

⁴ *Accident Compensation Corporation v D* [2023] NZHC 931.

⁵ At [5].

⁶ Legislation Act 2019, s 10(1).

⁷ Accident Compensation Act, s 6(1) definitions of “mental injury” and “personal injury”.

⁸ Section 27.

- (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.

[8] Section 20 relevantly provides:⁹

- (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:
 - ...

[9] Section 22 addresses cover for personal injury suffered outside New Zealand:

22 Cover for personal injury suffered outside 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 outside 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 person is ordinarily resident in New Zealand when he or she suffers the personal injury; and
 - (d) the personal injury is one for which the person would have cover if he or she had suffered it in New Zealand.

⁹ The date of D's physical injuries is unknown. Both parties proceeded on the basis they occurred on or after 1 April 2002, meaning the Act applies. From the material provided to us, we accept there is justification for that approach and we do not need to inquire further.

...

- (6) 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.
- (7) A person who suffers personal injury that is work-related mental injury in circumstances described in section 21B has cover under section 21B, but not under this section.

[10] Leaving aside mental injury suffered as a consequence of qualifying criminal acts (sexual abuse) (s 21) and work-related mental injuries (s 21B), mental injury is only covered under the Act if suffered *because of* physical injuries suffered by the person. The personal injury must be suffered in New Zealand or, under s 22, if the person was ordinarily resident in New Zealand when the personal injury was suffered and the personal injury is one for which the person would have had cover if suffered in New Zealand.

[11] The interpretation section, s 6, relevantly provides:

- (1) In this Act, unless the context otherwise requires,—

...

suffers is affected in its interpretation by—

- (a) section 36 and clause 55 of Schedule 1, when it is used in relation to mental injury:

...

[12] It is the interpretation of s 36 which is the focus of the question on appeal. That section relevantly 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.

...

[13] Before leaving the statutory framework, we set out the purpose of the Act:

3 Purpose

The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by 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), through—

- (a) Establishing as a primary function of the Corporation the promotion of measures to reduce the incidence and severity of personal injury:
- (b) providing for a framework for the collection, co-ordination, and analysis of injury-related information:
- (ba) ensuring that the Corporation monitors access to the accident compensation scheme by Māori and identified population groups in order to deliver services under this Act in a manner that supports access to the scheme by injured Māori and injured persons in those population groups:
- (c) ensuring that, where injuries occur, the Corporation's primary focus should be on 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:
- (d) ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment:
- (e) ensuring positive claimant interactions with the Corporation through the development and operation of a Code of ACC Claimants' Rights:
- (f) ensuring that persons who suffered personal injuries before the commencement of this Act continue to receive entitlements where appropriate.

The judgment under appeal

[14] In the High Court, Palmer J found that, as a matter of fact, D's mental injury was suffered in New Zealand from 2019.¹⁰ That meant he had cover under s 20(1). The Judge conceded that, as a matter of law, s 36(2) deems the date on which D is to be regarded as suffering the mental injury to have been the date the physical injuries were suffered but agreed with Ms Woodhouse's submission for D that the language

¹⁰ Judgment under appeal, above n 3, at [11].

Parliament used in s 36(2) does not deem the mental injury to have been suffered in any particular location.¹¹

[15] The Judge considered that the location of those mental injuries was dealt with elsewhere in the Act. In the case of mental injuries caused by criminal acts, in s 21(2)(b) and (3), which provide as follows:

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.

...

[16] In respect of work-related mental injuries caused by a single event, the Judge noted that the location where those mental injuries were suffered was set out in s 21B(2)(c) and (3), which provide as follows:

¹¹ At [12].

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.

...

[17] In the Judge’s view, the location of mental injuries caused by physical injuries was fixed by ss 20(1)(a) and 22. He therefore concluded D’s mental injuries were suffered in New Zealand.¹² He regarded the conclusion as consistent with the decision in *Bryant v Attorney-General*, discussed below at [67]–[72].¹³

[18] The Judge discussed three other cases. The case of *TN v Accident Compensation Corporation* (at that stage a High Court decision),¹⁴ which the Judge considered, to the extent it was relevant to D’s case, supported his interpretation.¹⁵ That decision was subsequently unsuccessfully appealed to this Court and is discussed briefly below.¹⁶

¹² At [13].

¹³ At [13], citing *Bryant v Attorney-General* HC Wellington CP44/00, 7 August 2000.

¹⁴ *TN v Accident Compensation Corporation* [2022] NZHC 1280.

¹⁵ Judgment under appeal, above n 3, at [16].

¹⁶ *Accident Compensation Corporation v TN* [2023] NZCA 664, [2024] 2 NZLR 107.

[19] The Judge also referred to the 1991 decision of this Court in *Accident Compensation Corporation v E*, which held that “accident” included the unexpected consequences of an intended activity, including mental consequences, whether or not there was also physical injury.¹⁷ That decision resulted in legislative change clarifying that mental injury is limited to that suffered by a person because of physical injuries they suffered.

[20] The final case referred to by the Judge was *Monk v Accident Compensation Corporation*, where this Court held that a mental injury under s 26(1)(c) may be covered even if the separate physical injury from which it results is not.¹⁸ That case was particularly relevant to the way in which the argument was framed on behalf of ACC before the High Court, which was to the effect that a s 26(1)(c) personal injury was a *composite* injury consisting of two elements, the first, physical, and the second, mental. The Judge considered that *Monk v Accident Compensation Corporation* disposed of that argument and confirmed that the sort of mental injury at issue in the present case was not a composite injury.¹⁹

[21] The Judge considered his interpretation was consistent with the purpose of the Act because minimising the incidence of mental injury and the impact of mental injury on the New Zealand community was achieved through D having access to the services made available by cover under the Act. ACC’s primary focus should be on rehabilitation and that could be achieved through entitlements that restored to the maximum practicable extent D’s health, independence and participation.²⁰

[22] D also claimed before the High Court, and for the first time, that ACC’s contended interpretation infringed the New Zealand Bill of Rights Act 1990 (NZBORA). The Judge did not consider that argument made much difference, observing that a requirement that cover related to the location where an injury was suffered could have the tendency to impact more frequently on those of non-New Zealand ethnic or national origin. If that were the case, he regarded it as inherent in the overall statutory regime for cover. The justification for limitation of

¹⁷ *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA) at 433–434.

¹⁸ *Accident Compensation Corporation v Monk* [2012] NZCA 615, [2013] NZAR 1 at [30].

¹⁹ Judgment under appeal, above n 3, at [18]–[19].

²⁰ At [14].

rights was relevant to interpretation but he did not consider he had heard sufficient argument on that point.²¹ In any event, given his decision, there was no need for him to take the matter any further.

The scheme of the Act

[23] We briefly overview the history of accident compensation law in New Zealand before discussing the general scheme of the Act by reference to its provisions on causation, territorial restrictions and the social contract. That provides the necessary context for an analysis of s 36 and the question on appeal.

Legislative history

[24] The Accident Compensation Act 1972 (the 1972 Act) was the first formulation of a compensation scheme responding to the report of the Royal Commission to Inquire into and Report upon Workers' Compensation.²² The report recommended a system to provide compensation for all accidental injuries, irrespective of fault and regardless of cause.²³ The Royal Commission had been established to consider how personal injury arising out of accidents was then dealt with and to suggest possible alternatives. The Royal Commission noted there were three possible sources of relief for injury arising out of an accident:²⁴

- (a) a common law action in negligence;
- (b) assistance under the then Workers' Compensation Act 1956; and
- (c) social security payments.

[25] The Royal Commission considered that none of the then-current mechanisms addressed the impact of the loss arising out of injury. It noted in particular the social

²¹ At [15].

²² AO Woodhouse, HL Bockett and GA Parsons *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, December 1967).

²³ At [279(c)].

²⁴ See at pts 3, 4 and 5.

costs of injury by accident and that victims of personal injury were entitled to receive a coordinated response from the nation as a whole.²⁵

[26] The Royal Commission proposed the adoption of a unified and comprehensive scheme of accident prevention, rehabilitation and compensation to be applied consistently and equitably.²⁶ The report was followed by a white paper,²⁷ a Select Committee report and, finally, the enactment of the 1972 Act.²⁸

[27] The 1972 Act was initially a scaled-down version of the Royal Commission's recommendations, limiting cover to employees injured at work and victims of motor vehicle accidents.²⁹ However, before the full scheme came into force, a change of Government resulted in changes to the scheme so that it provided comprehensive coverage for all victims of personal injury by accident.³⁰ The scheme also barred the right to sue or to claim workers' compensation for those covered by it.³¹ As put by the learned author of *Accident Compensation Law*:³²

This became known as the "social contract", which refers to the fact that the scheme provides comprehensive and extensive cover to injuries arising out of an accident, in return for which people forgo the right to sue under common law.

An essential part of the social contract is that the focus is on the accident rather than fault. The scheme severs the connection between an injured person's right to compensation and any obligation on the part of the person responsible for the injury. The wider community, through the government's use of community funds, now assumes responsibility for the accident.

[28] Since the accident compensation scheme came into force in 1974, there have been four major rewrites and numerous amendments to the legislation. The major rewrites are the Accident Compensation Act 1982 (the 1982 Act), the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act), the Accident

²⁵ At [1].

²⁶ At [2].

²⁷ Department of Labour *Personal Injury: A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (Government Printer, October 1969).

²⁸ Select Committee on Compensation for Personal Injury in New Zealand *Report of the Select Committee on Compensation for Personal Injury in New Zealand* (12 November 1970).

²⁹ Stephen Todd and others *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 35.

³⁰ At 35.

³¹ At 35.

³² Doug Tennent *Accident Compensation Law* (LexisNexis, Wellington, 2013) at 6, citing *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA) at 555 (footnotes omitted).

Insurance Act 1998 (the 1998 Act) and the Injury Prevention, Rehabilitation, and Compensation Act 2001 (renamed in 2010 the Accident Compensation Act 2001).

[29] Both the 1972 Act (as enacted and as amended by the Accident Compensation Amendment Act 1974) and the 1982 Act contained very broad definitions of “personal injury by accident”.³³ A working report of the Minister of Labour in 1991 referred to the expansive interpretation of “accident” in judicial and administrative decisions.³⁴ For example, in *Accident Compensation Corporation v Mitchell*, this Court held that a baby who was left significantly disabled following an apnoeic attack, the cause of which was unknown, had suffered an injury by accident and was therefore covered.³⁵ Richardson J advocated for a “generous unniggardly interpretation of personal injury by accident”, saying it was in keeping with the policy underlying the 1982 Act of providing comprehensive cover for all those suffering personal injury by accident in New Zealand.³⁶

[30] And, in *Accident Compensation Corporation v E*, this Court held that the 1982 Act provided cover for mental injuries without any physical injury.³⁷ After four days on what was considered a vigorous management course, E suffered a breakdown. There was no particular incident or event that could be identified as the trigger. This Court considered there was no policy reason for exclusion of cover for purely mental consequences.³⁸

³³ Accident Compensation Act 1972, s 2 definition of “personal injury by accident”; and Accident Compensation Act 1982, s 2 definition of “personal injury by accident”. The 1972 Act originally defined “personal injury by accident” as including “incapacity resulting from an occupational disease to the extent that cover extends in respect of the disease under sections 65 to 68 of this Act”. “Incapacitated”, in turn, meant “suffering from total or partial incapacity; and ‘incapacity’ [had] a corresponding meaning”. The 1974 Amendment Act changed the definition to include the physical and mental consequences of any injury or accident, medical misadventure, incapacity resulting from an occupational disease and actual bodily harm resulting from specified offences under the Crimes Act 1961. This definition was carried over into the 1982 Act, with only superficial changes.

³⁴ W F Birch *Accident Compensation: A Fairer Scheme* (Department of Labour, 1991).

³⁵ *Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436 (CA) at 438–439 per Richardson J.

³⁶ At 438–439 per Richardson J.

³⁷ *Accident Compensation Corporation v E*, above n 17, at 434.

³⁸ At 433–434.

[31] The working report led to a much more restrictive definition of “personal injury” and a separate definition of “accident” in the 1992 Act.³⁹ It was necessary to show that a personal injury was caused by *an* accident — a particular event or series of events had to be identified.⁴⁰ The policy of defining accident and personal injury with more precision has continued into subsequent legislation.⁴¹

[32] There was no definition of “mental injury” before the 1992 Act. The 1972 Act (as amended by the Accident Compensation Amendment Act 1974) and the 1982 Act both included the physical and mental consequences of any personal injury or accident in the definition of “personal injury by accident”.⁴² The 1992 Act provided that mental injury was covered only if it were caused by a physical injury.⁴³ Under the Act, for mental injury to be covered, it must arise out of a physical injury or be caused by certain criminal acts or a workplace incident.⁴⁴

[33] With that background, we now address the general scheme of the current legislation.

Causation

[34] Section 20(1) of the Act establishes that cover depends on whether the person’s injury or disease constitutes a “personal injury” as defined in s 26. While a personal injury is a necessary prerequisite for cover, how the personal injury was caused is critical. There must be a nexus between a personal injury and a claimant’s condition before there is entitlement to cover. That has been described as the “elementary requirement” central to the scheme of the Act and its underlying policy.⁴⁵

³⁹ Accident Rehabilitation and Compensation Insurance Act 1992, s 2 definitions of “accident” and “personal injury”. “Accident” was exhaustively defined and included specific mechanisms, for instance, “[a] specific event or series of events that involves the application of a force or resistance external to the human body and that results in personal injury, but does not include any gradual process”. “Personal injury” meant death or physical injury and any mental injury resulting from that physical injury.

⁴⁰ Accident Rehabilitation and Compensation Insurance Act 1992, s 8(2)(a).

⁴¹ See Accident Insurance Act 1998, ss 28 and 29; and Accident Compensation Act 2001, ss 25 and 26.

⁴² Accident Compensation Act 1972, s 2 definition of “personal injury by accident”, para (a)(i) (following the enactment of the Accident Compensation Amendment Act 1974); and Accident Compensation Act 1982, s 2 definition of “personal injury by accident”, para (a)(i).

⁴³ Accident Rehabilitation and Compensation Insurance Act 1992, s 4(1).

⁴⁴ Accident Compensation Act 2001, ss 21, 21B and 26(1)(c).

⁴⁵ *Wakenshaw v Accident Compensation Corporation* [2003] NZAR 590 (HC) at [15].

[35] The language of the Act emphasises the importance of causation in respect of cover for mental injury. Section 26(1)(c) provides that mental injury is covered if suffered by a person *because of* physical injuries suffered by the person.⁴⁶ In respect of cover for mental injury caused by certain criminal acts, the mental injury must be *caused by* an act performed by another person.⁴⁷

[36] The focus on causation is also emphasised in s 30, which addresses personal injury caused by work-related gradual process, disease or infection. The essential question is whether the gradual process *caused* the injury and the focus of the section is causation.⁴⁸ Similarly, s 32 deals with treatment injury (replacing the previous provisions on medical misadventure, medical error and medical mishap).⁴⁹ A causal link between the treatment and injury remains one of the key requirements for cover.⁵⁰

[37] The phrase “mental injury suffered by a person because of physical injuries suffered by the person” has been addressed in a number of decisions which have reaffirmed the requirement to establish causation.

[38] In *Hornby v Accident Compensation Corporation*, the appellant suffered from a major depressive disorder (a mental injury) which preceded the date of her accident.⁵¹ While her accident may have brought on her depressive symptoms, it did not cause her depression.⁵² The High Court adopted the approach of this Court in *Harrild v Director of Proceedings* in holding that the words “because of” in s 26(1)(c) should be interpreted as “results from” as the appropriate mode of testing the connection.⁵³ That being the case, indirect causation is insufficient to satisfy the requirement for cover. On appeal, this Court upheld the High Court’s decision but

⁴⁶ Before us, Mr Bisley, for ACC, effectively eschewed the argument advanced in the High Court as to a s 26(1)(c) personal injury being a composite injury. We agree that argument is an unnecessary complication.

⁴⁷ Section 21(1)(b).

⁴⁸ See s 30(1), (2)(b)(i), (2)(c), (2A), (4), (5) and (7).

⁴⁹ See Accident Insurance Act 1998, ss 34–37.

⁵⁰ *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 at [13]–[14], [23], [32] and [46].

⁵¹ *Hornby v Accident Compensation Corporation* HC Wellington CIV-2008-485-763, 10 December 2008.

⁵² At [10].

⁵³ At [6], citing *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) at [19].

declined to make any further ruling on the issue of causation in mental injury cases generally.⁵⁴

[39] Whether a connection between the physical and mental injury needs to be established was considered in *Queenstown Lakes District Council v Palmer*.⁵⁵ In that case, the plaintiff had witnessed his wife being thrown from their raft into the water and drowning. He suffered serious mental injuries as a result of the experience and sought to sue the rafting company responsible. While his wife's death was clearly covered by accident compensation, this Court found that the common law damages sought by the plaintiff were not for his wife's death but rather for the mental injuries he suffered as a result of the alleged breach of a duty of care owed to him by the defendant rafting company. This Court observed that, had the plaintiff's wife survived the ordeal and not suffered any personal injury, the plaintiff would still have suffered nervous shock at the sight of his wife being thrown into the water and thus he would still have had a common law claim.⁵⁶

[40] In *Accident Compensation Corporation v Monk*, this Court confirmed that the physical injury causing the mental injury did not have to be of a kind covered by accident compensation.⁵⁷ Ms Monk had undergone a medical procedure known as a lumbar puncture, which involved inserting a large needle into her spine. During the procedure, she experienced the sensation of an electric shock down her legs. For some time after the procedure, Ms Monk experienced a lack of full control of her legs. A neurologist concluded that Ms Monk had not suffered a physical injury arising out of the lumbar puncture. Rather, her ongoing leg problems were caused by a "conversion disorder", the experience of physical symptoms with no physiological basis but which may have arisen from the psychological trauma of the lumbar puncture. ACC declined the claim on the basis that the mental injuries covered had to have been suffered because of physical injuries which were also covered by accident compensation, which they were not in this case. This Court held that the issue was whether the mental injury was brought about by a physical injury, where the physical injury was a necessary part or ordinary consequence of treatment received by the person. If that could be

⁵⁴ *Hornby v Accident Compensation Corporation* [2009] NZCA 576.

⁵⁵ *Queenstown Lakes District Council v Palmer*, above n 32.

⁵⁶ At 554.

⁵⁷ *Accident Compensation Corporation v Monk*, above n 18, at [30].

established, the resulting mental injury would be a qualifying “personal injury” for which the appellant would be entitled to cover.⁵⁸ The need to establish a causal link still remained.

Territorial restrictions

[41] Generally, cover under the Act and therefore the bar on the right to sue for damages in s 317 (discussed below) only applies if the qualifying personal injury is suffered in New Zealand.⁵⁹

[42] Cover is available for personal injury suffered outside New Zealand if the injured person is ordinarily resident in New Zealand when they suffer the personal injury and the personal injury would be covered by accident compensation if the injury occurred in New Zealand.⁶⁰ This covers, for example, injuries suffered by a New Zealand resident when holidaying abroad.

[43] A qualifying personal injury suffered by a person not ordinarily resident in New Zealand who is still onboard the aeroplane, ship or other means of conveyance bringing them to or taking them from New Zealand is not covered.⁶¹ This means that a tourist who is injured on an aeroplane would not be covered but, if the same injury occurs once they have disembarked and are in the airport, then they are covered.

[44] Leaving aside mental injury suffered because of physical injury, the Act requires that any coverable personal injury, whether physical or mental, be caused in New Zealand or,⁶² if caused overseas, to a person ordinarily resident in New Zealand.⁶³

[45] Mental injury suffered in New Zealand but which results from qualifying sexual abuse that occurred outside New Zealand is covered if the claimant was

⁵⁸ At [30]–[31].

⁵⁹ “New Zealand” is defined in s 16 of the Act.

⁶⁰ Section 22.

⁶¹ Section 23.

⁶² See ss 20(1)(a), 21(2)(b)(i), 21A(1)(c)(i) (referring to cover under the 1992 Act for mental injury caused by certain criminal acts), 21B(2)(c)(i), s 24(1)(b) (referring to work-related gradual process, disease or infection resulting from events occurring before 1 April 1974) and 30(4A)(a).

⁶³ See s 21(2)(b)(ii), 21A(1)(c)(ii) (referring to cover under the 1992 Act for mental injury caused by certain criminal acts), 21B(2)(c)(ii), 22(1)(c), 24(1)(c) (referring to work-related gradual process, disease or infection resulting from events occurring before 1 April 1974) and 30(4A)(b).

ordinarily resident in New Zealand at the time of the crime.⁶⁴ Section 21(3) specifically provides that it is irrelevant whether or not the person was ordinarily resident in New Zealand on the date they suffered the mental injury, which, pursuant to s 36(1), is the date they first received treatment for that mental injury (as that mental injury). Section 21B provides for the same approach to work-related mental injuries.

[46] Ms Woodhouse sought to make something of the fact ss 21 and 21B specifically provide that it is irrelevant whether or not the person was ordinarily resident in New Zealand on the date on which they suffer the mental injury. However, there is no corresponding provision for mental injury suffered because of physical injuries. And in any event, when the deeming provision in s 36(1) is considered, the reason for ss 21(3) and 21B(3) is clear. It is irrelevant whether or not the person was ordinarily resident in New Zealand when they first seek medical treatment for a s 21 or a s 21B mental injury. But the *cause* of that injury (the qualifying crime or the relevant event for a work-related mental injury⁶⁵) must have occurred in New Zealand or when the person was ordinarily resident in New Zealand. Consistency with that approach requires a physical injury which has caused mental injury to have occurred in New Zealand or when the person was ordinarily resident in New Zealand.

The social contract

[47] The purpose of the Act refers to the social contract represented by the first accident compensation scheme. Under that social contract, people who are injured by accident forego the right to sue in return for certainty of entitlements. As a result, s 317 of the Act imposes a bar on proceedings for damages arising out of personal injury covered by the Act or the former Acts. A person who suffers a personal injury which is not covered by the scheme still has the right to take legal action.⁶⁶

[48] This reinforces the territorial limits of the Act and the focus on causation. The Act could hardly preclude a person from suing someone resident overseas. The Act does not prevent D from bringing any legally available claim in Russia in respect of the physical injuries he suffered there and any consequences of those physical injuries.

⁶⁴ Section 21.

⁶⁵ Section 28(1).

⁶⁶ As was made clear by this Court in *Queenstown Lakes District Council v Palmer*, above n 32.

[49] That context brings us to an analysis of how s 36(2) should be interpreted.

Does s 36(2) of the Act deem the mental injury to have been suffered at the location as well as the date of the physical injury?

[50] For convenience, we set out s 36(1) and (2) again:

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.

...

The background to s 36 of the Act

[51] Section 2 of the Accident Compensation Amendment Act 1974 amended the definition of “personal injury by accident” in the 1972 Act to include “[a]ctual bodily harm arising in the circumstances specified in section 105B of this Act”.⁶⁷ Section 105B(2) provided:⁶⁸

Where any person suffers actual bodily harm, by any act or omission of any other person (being an act or omission that occurs in New Zealand after the commencement of this section), and it is proved to the satisfaction of the Commission that the act or omission is within the description of any of the offences specified in sections 128, 132, and 201 of the Crimes Act 1961, that bodily harm shall, for the purposes of this Act, *be deemed to be personal injury by accident occurring at the time of the act or omission*, and the provisions of this Act shall apply accordingly, irrespective of whether any person is charged with the offence.

[52] There was a 12-month limitation period (with certain exceptions) for making claims, running from the date of the accident causing the injury or (in the case of death) the date of death.⁶⁹

⁶⁷ Counsel helpfully provided a joint memorandum on the background to s 36.

⁶⁸ Emphasis added.

⁶⁹ Accident Compensation Act 1972, s 149(1).

[53] The predecessor to s 36(1) of the Act was first introduced in s 63(3) of the 1992 Act. Claims were still required to be made within 12 months after the date on which the personal injury was suffered.⁷⁰ Section 63(3) provided:⁷¹

For the purposes of this section, where a claim involves conduct of a kind described in section 8(3) of this Act, *the personal injury shall be deemed to have been suffered on the date on which the person first received treatment for that personal injury as that personal injury*, being treatment of a kind for which the Corporation is required or permitted to make payments, irrespective of whether or not it makes any payment in the particular case.

[54] The provision which eventually became s 63(3) (cl 65(2A)) was added after the first reading of the Accident Rehabilitation and Compensation Insurance Bill 1992 to deal with concerns that the strict time limit for making a claim could prevent claims by victims of sexual abuse.⁷² Section 8(3) applied to injury as a result of such abuse.⁷³

[55] The 1998 Act contained the equivalent of s 63(3) of the 1992 Act.⁷⁴

[56] What became s 36 of the Act began with cl 35 of the Injury Prevention and Rehabilitation Bill 2000, which provided:⁷⁵

35 Date on which person is to be regarded as suffering mental injury caused by certain criminal acts

- (1) The date on which a person suffers mental injury is the date on which the person first receives treatment for that mental injury as that mental injury.
- (2) In subsection (1), treatment means treatment of a type that the person is entitled to under this Act or a former Act.

...

[57] Clause 35 was amended by the Transport and Industrial Relations Committee to read:

⁷⁰ Accident Rehabilitation and Compensation Insurance Act 1992, s 63(2).

⁷¹ Emphasis added.

⁷² Accident Rehabilitation and Compensation Insurance Bill 1992 (103-2). The background, including parliamentary debates, is extensively canvassed in *Accident Compensation Corporation v TN*, above n 16, at [30]–[32]. That case is discussed below.

⁷³ See sch 1 to the Accident Rehabilitation and Compensation Insurance Act 1992.

⁷⁴ Accident Insurance Act 1998, s 44(1).

⁷⁵ Injury Prevention and Rehabilitation Bill 2000 (90-1).

35 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 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.

...

[58] The Select Committee report, repeating the wording of a Report of the Department of Labour,⁷⁶ explained that:⁷⁷

The bill does not specify a date of injury for mental consequences arising from physical injury. People could claim a lump sum for a permanent mental impairment that resulted from an injury they suffered before 1 April 2002. At present, only impairment resulting from injuries suffered after 1 April 2002 would be eligible for lump sums.

We recommend amending clause 35 to clarify that the date of mental injury resulting from physical injury is the same as the date of the original physical injury. The heading is to be amended by removing the words “certain criminal acts”, and subclause (1) needs to be divided into (a) criminal acts and (b) physical injury with mental consequences to clarify the relationship with clause 61 of Schedule 1.

[59] It seems there was no further relevant discussion during the parliamentary debates.

[60] We accept the submission by Ms Woodhouse that the purpose of s 36(2) appears to have been a pragmatic one. It enables the date a mental injury is suffered to be fixed. In the case of mental injury which has arisen because of a physical injury, the precise date of its manifestation may well be unclear. For example, in D’s case, the diagnosis of PTSD occurred in 2019 but, from the material provided to us, it is evident that D was suffering mental health issues for some time prior to that diagnosis.

⁷⁶ Department of Labour *Injury Prevention and Rehabilitation Bill: Department of Labour Report* (2001) at 49.

⁷⁷ *Injury Prevention and Rehabilitation Bill 2001 (90-2)* (select committee report) at 8–9.

[61] We see this as further support for the interpretation for which Mr Bisley, for ACC, contends. Causation is the primary consideration. A mental injury which has arisen because of a physical injury may well be latent — the date the mental injury is triggered or the symptoms manifest is no doubt dependent on a variety of circumstances. But it is the physical injury which is the root of the mental injury (as the Act requires). It is therefore the date and, in our view, the location, of that physical injury which is the key to whether cover is available under the Act. That is the logical conclusion from a plain reading of s 36(2).

Accident Compensation Corporation v TN

[62] We need to spend a little time discussing this Court's recent decision in *Accident Compensation Corporation v TN*, which, in Ms Woodhouse's submission, held that the s 36(1) deemed date of mental injury does not preclude a factual finding as to when the mental injury was in fact suffered.⁷⁸ Ms Woodhouse submitted that s 36(2) should be interpreted in the same way — that the provision contemplates a mental injury being suffered, as a matter of fact, on a different date from the date on which it is deemed to be suffered for the purposes of cover (the date on which the causative physical injuries are suffered). In the judgment under appeal, the Judge considered that the High Court decision in *TN v Accident Compensation Corporation*, which was upheld on appeal, supported his approach, albeit that the case concerned entitlements rather than cover.⁷⁹

[63] TN had been the victim of severe childhood sexual abuse and as an adult was diagnosed with mental injury resulting from that abuse. When TN first sought treatment for her mental injury, she was not employed and therefore not entitled to standard earnings-related compensation. She instead sought loss of potential earnings compensation, which is available to those over 18 years of age who are unable to work because of an injury suffered as a child. She was declined cover on the basis of s 36(1) — that the date on which a person suffers a mental injury caused by sexual abuse is the date on which the person first receives treatment for that mental injury. She was

⁷⁸ Citing *Accident Compensation Corporation v TN*, above n 16, at [144] and [146].

⁷⁹ Judgment under appeal, above n 3, at [16].

therefore deemed to have suffered the mental injury in adulthood despite the sexual abuse occurring when she was a child.

[64] Before this Court were the two options identified as the possible commencement date for payment of the compensation. TN contended for the actual date of incapacity whereas ACC contended for the deemed date of injury in reliance on s 36(1). This Court concluded that the actual date of incapacity was the only plausible interpretation, meaning that the incapacitated young person would be compensated.⁸⁰

[65] We agree with Mr Bisley that the reasoning in *Accident Compensation Corporation v TN* does not apply to s 36(2). Not only did that case address entitlements rather than cover but it was focused on the legislative history of a different provision. This Court undertook a careful analysis of the history of provisions relating to loss of potential earnings compensation, focusing in particular on the fact that, under the 1992 Act, TN would have been entitled to such compensation. The 1998 Act did not change that. This Court noted that Parliament clearly intended to provide full cover for victims of sexual abuse in the 1992 Act and there was nothing in the subsequent legislation which suggested Parliament would perform a volte-face and reject the clear purpose of the 1992 Act.⁸¹ Simply because the statutory provisions had been reordered did not of itself indicate an intention to change the substantive meaning of the reordered provisions.⁸²

[66] The position as regards s 36(2) is quite different. There is not the same purposive and contextual rationale for taking a different interpretation from the one which the wording on its face suggests. There is no clear statement of policy to the contrary of the plain meaning. The purpose and text are aligned.

Bryant v Attorney-General

[67] The other case relied on by Ms Woodhouse in her submission that the deemed date does not override a factual finding of when an injury was in fact suffered was the

⁸⁰ *Accident Compensation Corporation v TN*, above n 16, at [146].

⁸¹ At [59]–[120].

⁸² See [90]–[93].

High Court decision in *Bryant v Attorney-General*. Mr Bryant was a mechanical engineer residing in Australia but, between 1969 and 1981, had been employed as a marine engineering technician in New Zealand. He claimed to have been exposed to asbestos materials during the time of his employment in New Zealand. He contracted mesothelioma and claimed in tort against the Crown. The Crown contended that Mr Bryant's claim in tort was barred because he had cover for personal injury caused by a work-related gradual process.

[68] Section 45 of the 1998 Act, which then applied, provided that the date of the injury was the earlier of the date on which Mr Bryant first received treatment for the injury or the date on which the personal injury resulted in incapacity. Cover for personal injury caused by work-related gradual process, disease or infection was precluded under s 43 if the claimant suffered the injury because of a task performed or an environment worked in outside New Zealand or when they were not ordinarily resident in New Zealand.

[69] In the High Court, Heron J held that Mr Bryant was not ordinarily resident in New Zealand when he suffered the personal injury but, because s 43 contemplated a situation in which the claimant was living outside of New Zealand when the injury manifested, that was not a bar to cover. The cause of the injury was exposure to asbestos and that had occurred in New Zealand. That was the critical factor which determined that Mr Bryant was entitled to accident compensation cover.⁸³ The Judge concluded that the deemed date of the injury, as specified in s 45, did not render the cause of the injury as occurring other than in New Zealand. It was the location of the cause which governed whether cover was available.⁸⁴

[70] The High Court's approach was consistent with the provisions which are now set out in ss 21 and 21B. The issue is the location of the cause of the injury, not where the injury was suffered. We agree too with Heron J's explanation for the statutory policy:⁸⁵

⁸³ *Bryant v Attorney-General*, above n 13, at [34].

⁸⁴ At [37].

⁸⁵ At [38].

Section 43 only precludes persons from coverage if the incident giving rise to the injury happened while that person was not in New Zealand and not ordinarily resident in New Zealand. That makes sense because otherwise the state would be leaving itself open to compensate for circumstances over which it had no jurisdiction, and where there is most likely a law in the correct jurisdiction which would govern the availability of compensation.

[71] We therefore agree with Mr Bisley that the rationale in *Bryant v Attorney-General* is not consistent with the proposition advanced on behalf of D in this case — that an injury caused by an event overseas should nonetheless be covered if the consequences of the injury occur in New Zealand.

[72] We also note that s 43 of the 1998 Act is replicated in s 24 of the Act, excluding personal injuries caused by a task performed or an environment worked in outside New Zealand before 1 April 1974 unless the claimant was ordinarily resident in New Zealand at the time they performed the task or worked in the environment.

New Zealand Bill of Rights Act 1990

[73] Mr McKillop, who argued this aspect of the case on behalf of D, clarified that reference to NZBORA and the right to freedom from discrimination was referred to only as a “strut” in the exercise of statutory interpretation.⁸⁶ It was a further indication that a “niggardly” approach should not be taken. He submitted that the starting point of any interpretive exercise is the presumption that a rights-consistent interpretation should be favoured.⁸⁷

[74] This is not a case where Parliament’s intention is unclear such that regard must be had to NZBORA and the direction to prefer an approach consistent with the rights and freedoms of NZBORA. A requirement that cover relates to the location where the injury is suffered or that the injury is suffered by a New Zealand resident is inherent in the overall statutory regime. We need say no more.

⁸⁶ New Zealand Bill of Rights Act 1990, s 19(1).

⁸⁷ Section 6. See *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [48]–[49], [56] and [119] per Winkelmann CJ. We note, however, that under the approach endorsed by the majority of the Supreme Court in *R v Hansen* [2007] NZSC, [2007] 3 NZLR 1, the presumption of rights-consistency is engaged only if the derogation from protected rights is not demonstrably justified under s 5: at [92] per Tipping J.

Conclusion

[75] When D suffered the physical injuries which caused his mental injury, he was neither in New Zealand nor ordinarily resident in New Zealand. It follows that D does not have cover under the Act. This conclusion is consistent with the approach to territorial limitations on cover under the Act, which is to exclude injuries that are caused by events that occur outside New Zealand unless they are suffered by a person ordinarily resident in New Zealand at that time.

[76] We are satisfied this interpretation is consistent not only with the plain text of s 36(2) but also the purpose and context of the Act. The context includes that the Act is a scheme and should be interpreted in a coherent manner. Cover is determined by reference to specified causes and the Act has a territorial scope.

[77] The interpretation is consistent with the overarching purpose of the Act, focused as it is on enhancing the public good and reinforcing the personal injury social contract between New Zealanders. The Act cannot be interpreted as intending to provide cover for injuries caused overseas to people who are not ordinarily resident in New Zealand. Such an approach would mean the scheme was required to fund the consequences of events outside its jurisdiction and over which it could have no influence. While rehabilitation and access to services made available by cover under the Act is part of the purpose of the Act, that applies only once a claimant is entitled to cover.

[78] The legislative history of the scheme also supports that approach.

[79] Section 36(2), with its emphasis on the cause of the mental injury, is consistent with the statutory scheme. In our view, it is clear that Parliament intended to provide cover for mental injuries suffered because of physical injuries where the causative physical injuries occurred in New Zealand or, if suffered outside New Zealand, when the person was ordinarily resident in New Zealand when the cause occurred.

Costs

[80] ACC does not seek costs and accordingly we make no order as to costs.

Result

[81] We answer the question of law as follows:

Did the High Court err in finding, at [10]–[13], that D had cover under s 26(1)(c) of the Accident Compensation Act 2001 for a mental injury suffered by D because of physical injury suffered by D because:

- (1) it held that s 36(2) of the Accident Compensation Act 2001 deems the personal injury to have been suffered on the date, but not at the location, of his physical injury; and
- (2) although D was not resident in New Zealand when his physical injury was suffered, he was resident in New Zealand when his mental injury was “suffered”?

Yes, the High Court erred in finding that D had cover under s 26(1)(c) of the Accident Compensation Act 2001 for a mental injury suffered by D because the causative physical injury did not occur in New Zealand and D was not ordinarily resident in New Zealand at the time he was physically injured.

[82] The appeal is allowed and the High Court decision is set aside.

[83] There is no order as to costs.

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