**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 30/2025**
**[2026] NZSC 121**

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| BETWEEN | TRACEY IDA PEKA AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA HAWKINS<br>Appellant |
| AND | SAM TE HEI<br>Respondent |

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| Hearing: | 10 March 2026 |
| Court: | Winkelmann CJ, Ellen France, Miller, Cooke and Katz JJ |
| Counsel: | N M Pender, G P McLay and G J Haszard for Appellant<br>B J R Keith and A C Singleton for Respondent |
| Judgment: | 4 September 2026 |

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B The cross-appeal is allowed, and the order for reconsideration is set aside.**

**C There is no order as to costs.**

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**REASONS**
(Given by Cooke J)

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[1] The appellant is the personal representative of the estate of Mrs Ida Hawkins. In November 2021, the Victims' Special Claims Tribunal (the Tribunal) upheld a claim by Mrs Hawkins for compensation for emotional harm arising from the respondent, Mr Sam Te Hei's, rape and murder of her 16-year-old daughter, Ms Colleen Burrows. The Tribunal awarded Mrs Hawkins $15,000 against Mr Te Hei.[1] In November 2022, the High Court allowed Mr Te Hei's appeal and quashed the Tribunal's award.[2] In February 2025, the Court of Appeal then allowed the appellant's appeal and referred the claim back to the Tribunal on the basis that Mrs Hawkins may have had a claim against Mr Te Hei on a ground not previously considered by the High Court or the Tribunal; namely, a common law claim for psychiatric harm.[3]

[2] The appellant appeals to this Court against the Court of Appeal decision—which in substance upholds the High Court decision—and also challenges the limited basis on which the claim was referred back to the Tribunal. For his part, Mr Te Hei cross-appeals the further decision of the Court of Appeal recognising that the appellant might have a claim against Mr Te Hei she could pursue, and referring that claim back to the Tribunal for determination. Leave has been granted, the approved questions being whether the Court of Appeal was correct in allowing the appeal and dismissing the cross-appeal, and in referring the claim back to the Tribunal.[4]

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1 *Hawkins v Te Hei* [2021] NZVSC 31 (Judge Blackie) [Tribunal decision].
2 *Te Hei v Hawkins* [2022] NZHC 3170 (Palmer J) [HC judgment].
3 *Peka (as personal representative of the Estate of Hawkins) v Te Hei* [2025] NZCA 32, [2025] 2 NZLR 353 (Cooper P, Mallon and Ellis JJ) [CA judgment].
4 *Peka as personal representative of the Estate of Hawkins v Te Hei* [2025] NZSC 108 (Glazebrook, Ellen France and Miller JJ).

**Background**

[3] In June 1987, Ms Burrows was raped and murdered by two men associated with the Mongrel Mob. Mr Te Hei was one of the men. He was convicted following a jury trial and sentenced to life imprisonment. He served over 30 years in prison[5] before being released on parole in 2018.

[4] Mr Te Hei was one of a group of prisoners who was mistreated in prison in the manner addressed by this Court in *Taunoa v Attorney-General*.[6] In 2020, the Crown agreed to pay Mr Te Hei $17,664 as compensation for breaches of his rights under the New Zealand Bill of Rights Act 1990 (Bill of Rights) resulting from his mistreatment.

[5] Parliament had earlier enacted the Prisoners' and Victims' Claims Act 2005 (PVC Act). The PVC Act established a special procedure under which the victims of the offences for which the prisoners had been imprisoned could bring claims before a Victims' Special Claims Tribunal and, if successful, have recourse to compensation paid to the prisoners,[7] including as part of any out-of-court settlement.[8] Section 46(2) of the PVC Act provides that the Tribunal must not accept a victim's claim unless it is satisfied, on the balance of probabilities, that:

> (a) the claimant is a victim of the offender; and
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> (b) the victim has, through or by means of the offence, suffered injury, loss, or damage for which the victim has not received, and is not to receive, effective redress; and
>
> (c) the claim discloses a cause of action that is, under the general law, one for which damages are, in the particular case, payable.

[6] In November 2020, Mrs Hawkins made a claim under the PVC Act for damages for emotional harm and exemplary damages in relation to the effects upon her of Mr Te Hei's offending.[9] The Tribunal upheld her claim for emotional harm, but rejected her claim for exemplary damages.[10] As to the former, Judge Blackie said that Mrs Hawkins' claim disclosed a cause of action for which damages were payable

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5 For both the murder of Ms Burrows and a later attempted murder committed whilst in prison.
6 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
7 Section 3(2)(b).
8 Section 4 definition of "compensation", para (b).
9 Tribunal decision, above n 1, at [19].
10 At [22]–[26].

under the general law. It appears the Judge was of the view that, as a victim of Mr Te Hei's offending, Mrs Hawkins was entitled to damages for emotional harm as the victim of an "offence", as defined in s 4 of the PVC Act, as well as under other enactments, including the Deaths by Accidents Compensation Act 1952, and the common law actions of assault and battery.[11] Judge Blackie concluded:[12]

> Emotional harm comes about as a result of a number of factors, including grief, stress, mental anguish, psychological injury, and other factors that may affect a person's emotional wellbeing. There is no need to prove any sort of mental breakdown or any form of mental illness that may be categorised under the [Mental Health (Compulsory Assessment and Treatment) Act 1992]. In the case of this Claimant, grief will probably have been the strongest initial factor but it goes without saying that there would be inevitable long-lasting aftereffects. The Claimant's daughter was taken from her on account of a brutal killing by the Respondent and his associate. In any right-thinking person's mind, this would have been a traumatic and significant personal tragedy. I do not consider that any further proof is required beyond that stated by the Claimant. Her suffering, emotional harm is self-evident.

## Courts below

### *High Court*

[7] Mr Te Hei appealed against the Tribunal's decision to the High Court. His appeal was allowed and the award of $15,000 set aside. Palmer J accepted that Mrs Hawkins was a victim entitled to make a claim under the PVC Act, and he rejected the procedural challenges advanced by Mr Te Hei.[13] But Palmer J pointed out that s 46(2) required Mrs Hawkins to have a cause of action under the general law for which damages were payable. He considered that the Tribunal had not analysed the merits of Mrs Hawkins' claim with sufficient rigour—in particular, it had not identified a cause of action upon which Mrs Hawkins could sue under the general law.[14]

[8] Palmer J explained that none of the enactments referred to by the Tribunal, including the PVC Act, disclosed a cause of action upon which Mrs Hawkins could sue for damages.[15] Further, assault and battery could only be advanced by the person assaulted or battered, not a third party. A family member of someone who had been

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11 At [20]–[22].
12 At [22].
13 HC judgment, above n 2, at [2], [26]–[27] and [38]–[58].
14 At [2] and [28]–[32].
15 At [28]–[30].

killed because of such conduct could advance a claim under the Deaths by Accidents Compensation Act, but only loss of pecuniary benefits could be claimed under that Act, as confirmed by a Full Court of the Court of Appeal in *Pou v British American Tobacco (New Zealand) Ltd*.[16] Mrs Hawkins was accordingly not entitled to damages for emotional harm on the basis found by the Tribunal. Mr Te Hei's appeal was therefore allowed.

[9] Palmer J also dismissed a cross-appeal by Mrs Hawkins in relation to the Tribunal's refusal to grant her exemplary damages. He found that a claim for exemplary damages was preserved by s 319 of the Accident Compensation Act 2001 (2001 AC Act). However, such a claim could not be advanced after Ms Burrows' death other than under the Deaths by Accidents Compensation Act, which excluded exemplary damages for the reasons explained in *Pou*.

*Court of Appeal*

[10] On appeal, the Court of Appeal agreed with the conclusion of Palmer J that any claim by Mrs Hawkins under the Deaths by Accidents Compensation Act was limited to claims for loss of a pecuniary benefit. In reaching that conclusion, the Court considered whether it should overrule its prior decision in *Pou*. The Court decided it was not appropriate to do so given that *Pou* was decided by a panel of five Judges and societal views of emotional harm as a form of personal injury at that time were probably similar to current views.[17] The Court also rejected the submission that it should develop the law to recognise a new common law cause of action for wrongful death. If the Court were to recognise such a common law claim, it would sit parallel with, but undercut, the legislative policy of the Deaths by Accidents Compensation Act. It was not open to the Court to recognise a claim in such circumstances. Instead, it was for Parliament to consider whether to amend the Deaths by Accidents Compensation Act to allow relatives to claim bereavement damages for wrongful death.[18] It also rejected the submission that a wrongful death claim should be recognised directly under the PVC Act.[19]

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16 At [31] citing *Pou v British American Tobacco (New Zealand) Ltd* [2006] 1 NZLR 661 (CA).
17 CA judgment, above n 3, at [41]–[52].
18 At [62]–[63].
19 At [65]–[69].

[11] The Court saw greater merit in Mrs Hawkins' common law claim for mental injury arising out of Mr Te Hei's wrongdoing. The Court noted that neither the Tribunal nor the High Court had properly considered this claim,[20] and then proceeded to make its own preliminary assessment as to its availability. It noted that the submissions for Mrs Hawkins assumed she would have had cover under the Accident Compensation Act 1982 (1982 AC Act),[21] and accepted that any claim for compensatory damages would have been barred by s 27 of that Act. While exemplary damages would not have been recoverable had Mrs Hawkins brought her claim at the time of Colleen's death,[22] the Court pointed out that by the time that Mrs Hawkins made her claim in 2020, the 2001 AC Act applied. Under s 319 of that Act, a claim for exemplary damages could be pursued.[23] Accordingly, any common law cause of action Mrs Hawkins had for compensatory or exemplary damages survived the repeal of the 1982 AC Act.[24] The Court concluded that a claim in negligence of the kind recognised by the Court of Appeal in *van Soest v Residual Health Management Unit* could possibly be maintained by Mrs Hawkins.[25] That would be so if Mrs Hawkins suffered from a recognisable psychiatric disorder or illness as a result of the primary victim's injury or death. The success of a claim would also depend on whether there is a requirement to witness the event or its aftermath. The claim would also need to meet the threshold for an exemplary damages award.[26] The Court concluded that such a claim for exemplary damages should be referred back to the Tribunal for consideration.[27]

[12] The Court finally addressed a further complication that had arisen because Mrs Hawkins had herself died following the hearing before the Court of Appeal, but prior to it issuing judgment. This potentially engaged s 3 of the Law Reform Act 1936,

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20 At [70]–[74].

21 Under the Accident Compensation Act 1982 [1982 AC Act], unlike later Acts, a person could receive cover for mental injury not connected to physical injury. The Court did not express a view on whether Mrs Hawkins would have had cover, as the submissions for Mrs Hawkins assumed she would: see at [77]–[79]. See also *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA) at 433–434.

22 CA judgment, above n 3, at [78], and see at [35] citing *Daniels v Thompson* [1998] 3 NZLR 22 (CA).

23 CA judgment, above n 3, at [80]–[82].

24 At [79].

25 *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA).

26 CA judgment, above n 3, at [85]–[87].

27 At [92].

which provides that a cause of action survives the death of a person for the benefit of that person's estate, but exemplary damages are not recoverable in respect of such a claim. This proposition was confirmed by the Court of Appeal in *Re Chase*.[28] The Court of Appeal in the present case, whilst noting that it had not heard argument on the matter, concluded that s 3 did not apply. This was because once Mrs Hawkins' claim was upheld by the Tribunal, the cause of action on which it was based became "merged in the [Tribunal's] judgment", which survived even if the original cause of action did not.[29]

**Issues on appeal**

[13] A number of issues were addressed by Ms Pender and Mr McLay in support of the appeal, and in response by Mr Keith and Ms Singleton. Broadly speaking, the appellant identified two potential pathways by which the claim could be upheld:

(a) through a common law claim in negligence by Mrs Hawkins against Mr Te Hei for the emotional harm caused to her by Mr Te Hei's actions, or the development of a novel tort based on wrongful death allowing such a claim; or

(b) through a claim by Mrs Hawkins against Mr Te Hei under the Deaths by Accidents Compensation Act for damages arising from the wrongful death.

[14] Subject to one argument advanced by the appellant,[30] it is accepted that any claim in tort can only be for an award of exemplary damages as a result of the statutory bar in s 27 of the 1982 AC Act. That limitation would not apply to the claim under the Deaths by Accidents Compensation Act, however.

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28 *Re Chase* [1989] 1 NZLR 325 (CA).

29 CA judgment, above n 3, at [90].

30 The appellant invited the Court to find that Mrs Hawkins' claim would not be limited to exemplary damages, but could cover compensatory damages for mental suffering not covered by the 1982 AC Act. We accept that, on the approach adopted to the exclusion of tortious liability expressed in *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA), this is arguable. But, given our conclusions reached below, we do not address the matter further.

[15] The claim in negligence faces two main hurdles. The first arises from the decision of a Full Court of the Court of Appeal in *van Soest*, which held that a claim for mental injury by a secondary victim such as Mrs Hawkins only arises if the wrongdoing causes a recognisable psychiatric illness or disorder.[31] The second hurdle is the possible requirement referred to in *van Soest*,[32] and recently upheld by the United Kingdom Supreme Court in *Paul v Royal Wolverhampton NHS Trust*, that the secondary victim witness the event that causes the mental injury or its immediate aftermath.[33] The appellant argues that the law should be developed so that both of these requirements do not apply, or that a novel tort should be recognised without such requirements.

[16] Even if these two hurdles are overcome, a further issue arises because of Mrs Hawkins' death—namely, whether her estate is prevented from pursuing a claim for exemplary damages as a consequence of s 3(2)(a) of the Law Reform Act. This issue is the subject of the respondent's cross-appeal. In response, the appellant argues that the decision of the Court of Appeal in *Re Chase*, which held that the Law Reform Act barred the estate of a deceased person from pursuing exemplary damages, should be overruled.[34] She also argues that the principle of merger saves the claim, as the Court of Appeal held.[35]

[17] The alternative basis for the claim, under the Deaths by Accidents Compensation Act, faces a single hurdle. In *Pou*, a Full Court of the Court of Appeal upheld the earlier decision of that Court in *McCarthy v Palmer* that the damages recoverable under this legislation are confined to compensation for pecuniary losses.[36] It is not suggested that Mrs Hawkins suffered such pecuniary loss. The appellant therefore argues that *Pou* and *McCarthy* should be overruled, and the claim for compensatory damages under that Act allowed.

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31 *van Soest*, above n 25, at [65]–[69] per Gault, Henry, Keith and Blanchard JJ.

32 The Court in *van Soest* reserved its position as to whether the restrictions based on physical and temporal proximity should be removed or relaxed: at [74] per Gault, Henry, Keith and Blanchard JJ.

33 *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1, [2025] AC 459 at [90]–[92] and [104]–[115] per Lord Leggatt and Lady Rose SCJJ (with whom Lord Briggs, Lord Sales and Lord Richards SCJJ agreed) and [179(iv)] per Lord Burrows SCJ dissenting.

34 *Re Chase*, above n 28.

35 CA judgment, above n 3, at [90].

36 *Pou*, above n 16, at [34]–[38]; and *McCarthy v Palmer* [1957] NZLR 620 (CA).

[18] There are additional technical issues arising from the parties' submissions, but these hurdles reflect the key issues addressed on appeal.

**Prisoners' and Victims' Claims Act 2005**

[19] Before we address these issues, it is appropriate to explain the context in which we do so.

[20] The PVC Act was enacted as a response to the decisions of the Courts in *Taunoa*, which recognised that prisoners could maintain claims against the Crown under the Bill of Rights arising from their mistreatment within prison.[37] The parliamentary materials reveal a concern that people who had committed very serious offences would be awarded significant amounts of money. While it was recognised that depriving the prisoners of such a remedy would be inconsistent with New Zealand's international obligations,[38] there remained a concern for the victims of the original offending.

[21] The way in which these issues were ultimately addressed in the PVC Act was as follows. Subpart 1 of pt 2 was enacted to restrict and guide the awarding of compensation to prisoners to ensure the remedy was reserved for exceptional cases and only where necessary to provide effective redress.[39] Subpart 2 of pt 2 then established procedures by which the victims of the offending could advance claims against the prisoners before the Tribunal, and have access to the awards made in the prisoners' favour. But whilst procedural mechanisms were implemented to better allow for victims' claims to be advanced, the substantive law applying to such claims was unchanged—under s 46(2)(c), a claim must disclose "a cause of action that is, under the general law, one for which damages are, in the particular case, payable", and under s 47(2), the Tribunal "must apply the general law relating to the awarding of damages". We agree with the line of High Court authority confirming that it is

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37 See *van Silfhout v Pathirannehelage* [2023] NZSC 148, [2023] 1 NZLR 560 at [13] per Winkelmann CJ, O'Regan and Ellen France JJ citing *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC). See also *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (HC).

38 Prisoners' and Victims' Claims Bill 2005 (241-2) (select committee report) at 1–3; and (16 December 2004) 622 NZPD 17986–17988.

39 Section 3(1).

necessary for the Tribunal to identify and apply the elements of a cause of action available at general law to victims' claims under the PVC Act.[40]

[22] Three features of the procedural facilitation of such claims under the PVC Act were:

(a) The establishment of Victims' Special Claims Tribunal.[41] The PVC Act enables the Tribunal to operate with informal procedures to allow victims to make claims relatively easily, and to exercise inquisitorial powers rather than relying solely on adversarial processes.[42]

(b) The holding by the Secretary of Justice of any amounts paid by the Crown to prisoners as compensation. Those funds are then available to meet claims successfully advanced by victims before the Tribunal.[43]

(c) The suspension of the running of the limitation period applying for such claims for the period of time in which the prisoner was in prison.[44]

[23] Each of these procedural elements can have significant practical implications. In the present case, the suspension of the limitation period has particular significance. Mr Te Hei served over 30 years in prison for his offending. Under normal limitation principles, any cause of action against him would likely have been time-barred six years after the cause of action had accrued following his offending in June 1987.[45] Any claim would normally have been time-barred by June 1993. The effect of the PVC Act when it was enacted in 2005 was to resurrect victims' abilities to bring such claims. Mrs Hawkins' claim was therefore addressed by the Tribunal, and subsequently on appeal, more than 34 years after the events which gave rise to it.

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40 HC judgment, above n 2, at [28]–[32]; *Reekie v Claimants A and B* [2018] NZHC 2434, [2018] NZAR 1685 at [42]–[43]; and *Preston v Victims' Special Claims Tribunal* [2021] NZHC 3043 at [53], [55]–[56] and [58].

41 Each Tribunal consists of a District Court Judge designated for this purpose by the Chief District Court Judge: s 58.

42 See ss 58–62.

43 See ss 17–27 and 54–57.

44 See ss 63–64.

45 Limitation Act 1950, s 4(1); Limitation Act 2010, s 59; and Deaths by Accidents Compensation Act 1952, s 10(1)–(2).

[24] This Court is being invited to make significant changes to the law in a way that will allow this claim to be upheld. The appellant submits that longstanding decisions of the Court of Appeal should be overturned, including *van Soest*, *Pou*, *McCarthy* and *Re Chase*. There is an inherent awkwardness arising from these arguments. The Court is being asked to overrule well-established precedents, and then retrospectively apply the reformed law to a claim that arose many years ago. The invitation to so reform the law must be considered in this very particular context.

**First pathway: claim in tort**

[25] The appellant first argues that the Court should change the common law by removing the two requirements summarised above at [15] for secondary victims to advance successful claims in negligence.

[26] Given that s 46 of the PVC Act requires a victim's claim to disclose a cause of action available under the general law, it is relevant to consider the state of the general law at the time the Act was passed in 2005. By that time, various changes had been made to the law to address the position of victims of criminal offending. Amendments had been made to accident compensation legislation to allow victims to pursue civil claims for exemplary damages against offenders. This effectively overruled the decision of the Court of Appeal in *Daniels*, which had held that such awards were not available because exemplary damages are punitive by nature and in such circumstances punishment had already been exacted.[46] Legislation had also been passed allowing the court to make reparation orders in favour of victims as part of a sentence,[47] and this had been extended to cover reparations for psychological harm from August 1987.[48] This was continued in s 32(3) of the Sentencing Act 2002, which also required the sentencing court to take into account the rights of the victim to recover at common law.[49] From July 1992, accident compensation cover was only available for mental injury if physical injury was also sustained, thereby restricting the

46 *Daniels*, above n 22, at 47 per Richardson P, Gault, Henry and Keith JJ. See Accident Insurance Act 1998 [1998 AI Act], s 396; and Accident Compensation Act 2001 [2001 AC Act], s 319.

47 Criminal Justice Act 1985, s 22.

48 Criminal Justice Amendment Act (No 3) 1987, s 4.

49 Section 32(3). Under s 32(2) the right to bring such a claim was preserved.

statutory bar so that it allowed civil claims for mental injury alone.[50] Other legislation had addressed the rights of victims more generally, including the Victims' Rights Act 2002.

[27] At the time the PVC Act was passed, secondary victims—persons such as Mrs Hawkins who were not directly impacted by the tortious conduct, but who suffered emotional harm as a consequence of it—could bring claims in tort in respect of such harm. But tort claims by secondary victims would only succeed if they met the requirements identified by the Court of Appeal in 1999 in *van Soest*. Certain secondary victims were expressly covered by the definition of "victim" in the PVC Act so that they were eligible to advance a claim for compensation,[51] but the general law was not changed.

[28] In advancing submissions for the appellant, Mr McLay referred us to these statutory developments. He argued that they showed a trend in favour of developing the law to better recognise the rights of victims, and he invited us to finish the job that Parliament had started.[52]

[29] The arguments in favour of allowing claims in tort for emotional harm not amounting to a recognisable psychiatric disorder or illness were identified in the dissenting judgment of Thomas J in *van Soest*, and the decision of the Supreme Court of Canada in *Saadati v Moorhead*.[53] They include the potentially arbitrary nature of the distinction, and the appropriateness of liability turning on criteria developed for medical diagnosis. The arguments as to why it should not be necessary for a plaintiff to have witnessed the event which harmed the primary victim, or its immediate

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50 *Queenstown Lakes District Council v Palmer*, above n 30, at 555. See also Accident Rehabilitation and Compensation Insurance Act 1992, s 4(1) definition of "personal injury". This was carried into subsequent accident compensation enactments: 1998 AI Act, s 29(1)(c) definition of "personal injury"; and 2001 AC Act, s 26(1) definition of "personal injury", para (c). There are two exceptions in the 2001 AC Act: first, where the mental injury was caused by certain criminal acts performed on, with, or in relation to the person seeking cover; and, second, where the claimant suffers a work-related mental injury: ss 21–21B.

51 Section 8(1)(c)–(d).

52 Referring to TT Arvind and Jenny Steele *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (2013, Hart Publishing, Oxford) at 469–470.

53 *van Soest*, above n 25, at [97]–[107]; and *Saadati v Moorhead* 2017 SCC 28, [2017] 1 SCR 543 at [25]–[38]. The respondent submits that claims for mental distress by bereaved family members appear to have been infrequently upheld in Canada, referring to *EB v British Columbia (Child, Family and Community Services)* 2021 BCCA 47 at [66]–[67]; *Snowball v Ornge* 2017 ONSC 4601; and *Sigurdson v Norbord Inc* 2021 ONSC 5193 at [48].

aftermath, were also identified by Thomas J in *van Soest*.[54] He proposed that reasonable foreseeability provides an adequate and more principled basis to identify the scope of liability.

[30] But there are countervailing considerations, as outlined by the majority of the Court of Appeal in *van Soest* and the United Kingdom Supreme Court in *Paul*.[55] They include the potential difficulties with indeterminate liability if the requirements are relaxed, and whether an alternative formulation based on reasonable foreseeability provides a workable test for determining when recovery will be allowed. There is a further issue in this case arising from the fact that the wrongdoer, Mr Te Hei, would have been liable to the primary victim, Ms Burrows, for an intentional tort rather than because a duty of care was owed to her. In circumstances such as these, it is perhaps doubtful whether it can be said that a duty of care is owed to secondary victims.[56]

[31] The concern about potentially indeterminate liability may also have particular relevance if the alleged tortious act involves criminal offending for which a person has been sentenced. As noted above, the Court of Appeal had held in *Daniels* that awarding exemplary damages in respect of criminal conduct for which the offender has already been convicted and sentenced is inappropriate as punishment has already been exacted.[57] Parliament responded to this issue by amending the accident compensation legislation to allow such claims.[58] In deciding whether to extend the scope of potential plaintiffs, it may become necessary for the court to consider whether the extension of the common law to allow awards of exemplary damages to be made for secondary victims would amount to double jeopardy in contravention of s 26(2) of the Bill of Rights. In doing so, it may be necessary to decide whether a "punishment"

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54 *van Soest*, above n 25, at [108]–[116].

55 *Paul*, above n, 33, at [107]–[110] per Lord Leggatt and Lady Rose SCJJ (with whom Lord Briggs, Lord Sales and Lord Richards SCJJ agreed), and see at [179(iv)] per Lord Burrows SCJ dissenting. As noted above at [15], the majority in *van Soest* accepted the existence of the recognisable psychiatric disorder requirement but reserved the position as to the proximity requirement: *van Soest*, above n 25, at [65]–[70] and [74] per Gault, Henry, Keith and Blanchard JJ. See also at [76].

56 But see *Young v Downey* [2025] EWCA Civ 177, [2025] 4 WLR 32.

57 *Daniels*, above n 22, at 47 per Richardson P, Gault, Henry and Keith JJ.

58 See above at [26].

for the purpose of s 26(2) can include a civil penalty and, if so, whether imposing such a second penalty is demonstrably justified.[59]

[32] Against that background, we consider there are two interrelated considerations which mean that we should not change the law as the appellant seeks.

[33] First, such a change would involve recognising liability for a broader category of case than the present one. It would also, for example, change the law for the kind of parties involved in the *van Soest* and *Paul* cases, where claims for exemplary damages were advanced by the families of those who had died as the result of medical negligence. These claims may not be limited to negligence involving death or medical negligence. The changes we are being asked to make would affect the relevant defendants, their employers, insurers and other parties. Significant developments in tort law of this kind normally reflect changing societal needs and expectations. We have not been provided with any evidence or information that demonstrates whether such developments are necessary or appropriate. For example, we have no expert evidence addressing the distinction between recognisable psychiatric illnesses and disorders and other kinds of psychological harm. Neither do we have other information that would assist us in determining the scope of liability should claims be opened up to secondary victims to whom a duty of care may not have been previously recognised. The implications of recognising such liability, and the policy justifications for doing so, are difficult to assess. As explained above, the issues involved are complex and raise questions of indeterminate liability. *Van Soest* was decided by a Full Court of the Court of Appeal over 26 years ago. We consider that we should take a cautious approach to the request to overrule it and to change the law, given these implications.

[34] The second and closely related point is that we would be making such changes in the very particular context of victims' claims under the PVC Act. The Act creates a specific and exceptional procedure to facilitate a limited category of claims by the victims of prisoners who have received compensation. Victims' claims are determined

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59 See *Daniels*, above n 22, at 33–34 per Richardson P, Gault, Henry and Keith JJ; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [24.3.22].

by way of streamlined, inquisitorial processes, and are enforceable against a specific fund. Normal limitation periods are suspended in respect of such claims, enabling the retrospective revival of claims which would otherwise be time-barred—here, a claim arising more than 34 years ago, when the general legal context was different.[60] The number of potential claimants falling within the same category as Mrs Hawkins is likely small, and the streamlined processes under the PVC Act are ill-suited to deal with the complex evidential issues involved should the law be changed, especially given that the awards involved are likely to be comparatively modest (such as the $15,000 awarded here).

[35] We recognise the sense of justice that forms the basis of Mrs Hawkins' case. But we do not consider that we should make the changes we are being invited to make to tort law to address the limited number of claims contemplated by the bespoke procedures established by the PVC Act. Rather than completing a job that Parliament has started, we consider we would be altering tort law in significant ways to deal with a very limited number of cases, with little information on the implications of such changes. As noted, the changes relate to complex issues the subject of case law that Parliament has chosen not to amend or overrule via legislation.

[36] For similar reasons, we do not accept that we should recognise a novel tort based on wrongful death without the requirements that the appellant challenges. That would be to avoid the difficult issues that have been identified in the case law, and which we consider need to be readdressed if tortious liability is to be so recognised.

*Is the claim in tort barred by the Law Reform Act 1936?*

[37] As noted above, there is a further complication with the claim in tort. After the case was argued in the Court of Appeal, but before the Court had delivered judgment, Mrs Hawkins died. The appeal before this Court is now pursued by the executor of her estate. These events engage s 3 of the Law Reform Act, which relevantly provides:

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60 See above at [22].

**3 Effect of death on certain causes of action**

(1) Subject to the provisions of this Part, on the death of any person after the passing of this Act all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of his estate …

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—

(a) shall not include any exemplary damages:

…

[38] The Court of Appeal held that there was a strong argument that this provision did not prevent the claim for exemplary damages from being upheld. That was because the cause of action upon which the judgment was based was "merged in the judgment".[61] The Court noted that it had not heard submissions on this but said, "at this point we would not dismiss Mrs Hawkins' appeal on this basis".[62] The Tribunal had made an award in Mrs Hawkins' favour and, in referring the claim back to the Tribunal, the Court was allowing that award to be reconsidered on a different basis.[63] This finding is challenged on the respondent's cross-appeal. Two issues arise.

Should we overrule *Re Chase*?

[39] First, we do not accept the appellant's submission that we should reconsider, and overrule, the decision of the Court of Appeal in *Re Chase*.[64] The appellant argues that s 3(2)(a) of the Law Reform Act did not bar a claim for exemplary damages, and the Court of Appeal in that case had erred in concluding that it did, relying on commentary suggesting that section was intended to capture only aggravated damages.[65]

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61 CA judgment, above n 3, at [90].
62 At [90].
63 See at [92].
64 *Re Chase*, above n 28.
65 Madeleine Hay "Should Claims for Exemplary Damages Survive Death?" (2022) 28 AULR 165; and Geoff McLay "The *Chase* case: in search of a future for tort?" (1990) 20 VUWLR 255 at 260.

[40] *Re Chase* was decided in 1988. The argument that the legislation did not mean what it appeared to say was well traversed in that case.[66] Whilst there may have been greater uncertainty as to the boundaries between compensatory, aggravated and exemplary damages at the time of enactment of the legislation, we do not consider it possible to interpret the plain words of the statute in an alternative way. Neither are we satisfied that a purposive approach suggests a different result—the rationale for excluding an estate from recovering aggravated damages would apply equally to exemplary damages. Both categories of damages can be seen to be awards going beyond what was needed to compensate beneficiaries of the estate for what they have lost, which was the rationale for the legislation identified by the Court of Appeal in *Re Chase*.[67] We do not accept the alternative rationale identified by the appellant—that aggravated damages are personal in nature and die with the aggrieved party, whereas exemplary damages are intended to have punitive effect—provides a persuasive reason to interpret the text in light of its purpose in a way that allows exemplary damages to be awarded. It would be decidedly odd to interpret the legislation so that the estate could recover compensatory and exemplary damages, but not aggravated damages. We consider that *Re Chase* correctly identified the purpose of the provision, and that it was rightly decided.

Does merger apply?

[41] The second issue concerns the scope of the merger principle relied on by the Court of Appeal. Here we accept Mr Keith's argument for the respondent. The rationale behind the merger principle in this context is that, once the person dies, their estate is no longer pursuing the relevant cause of action—rather, it is pursuing a judgment. The question arises whether that principle applies when the judgment is subject to appeal, particularly when the judgment is altered on appeal. That question was addressed in *Hagaman v Little*, where the Court of Appeal explained that it depended on the stage that the proceeding had reached.[68] We accept the submission that the appropriate stage has not been reached if the order of the appeal court requires

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66 *Re Chase*, above n 28, at 329–332 per Cooke P, 335–337 per Somers J and 338–339 per Henry J.
67 See at 331 per Cooke P and 339 per Henry J.
68 *Hagaman v Little* [2017] NZCA 447, [2018] 2 NZLR 140 at [10]–[13].

a retrial. When that is the case there is not yet a judgment with which the claim has merged.[69]

[42] Here, the remission of the claim to the Tribunal would require an assessment of new evidential matters and new factual findings. In particular, and given our conclusions reached above, it would require the Tribunal to assess whether Mrs Hawkins has suffered from a recognisable psychiatric illness or disorder caused by Mr Te Hei's wrongdoing. This is a new line of inquiry into whether a cause of action in tort is established at all. The events occurred many years ago. The principal witness, Mrs Hawkins, has died. Some form of evidence establishing such a psychiatric illness or disorder caused by the events would likely be required. The Tribunal has also previously declined to award Mrs Hawkins exemplary damages.[70] It does not matter that these inquiries would be undertaken through the more streamlined procedures under the PVC Act. The reality is that the Tribunal would be undertaking a procedure that is analogous to a retrial. For that reason, the merger principle does not save the claim in tort from the effect of the Law Reform Act.

[43] Given this conclusion, we do not need to address the respondent's further submission that the Court of Appeal went too far in directing a rehearing in the circumstances of the case.

**Second pathway: claim under the Deaths by Accidents Compensation Act 1952**

[44] We now address the second potential pathway for upholding the appellant's claim. Under s 4(1) of the Deaths by Accidents Compensation Act, when the death of a person is caused by a wrongful act, and the person who died would have had a claim for damages but for their death, the wrongdoer remains liable. Under s 5, an action against the wrongdoer may be brought by the parents of a person whose death has been so caused. The respondent does not dispute that Mrs Hawkins was eligible to advance such a claim.

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69 See *Calwell v Ipec Australia Ltd* (1975) 135 CLR 321 at 335 per Jacobs J.

70 Tribunal decision, above n 1, at [23]–[24].

[45] The Act then relevantly specifies what damages may be recovered under such claims:

> **7 Amount of damages**
>
> (1) In every such action the court may award—
>
> (a) such damages as it may think proportioned to the injury resulting from the death to the person or persons for whose benefit the action is brought; and
>
> (b) damages in respect of the amount of actual pecuniary benefit which the person or persons for whose benefit the action is brought might reasonably have expected to enjoy if the death had not occurred, whether or not the person or persons have been either wholly or partially dependent upon the deceased person before his death; and
>
> (c) damages in respect of the medical and funeral expenses of the deceased person if the expenses have been incurred by the person or any of the persons by whom or for whose benefit the action is brought.
>
> (2) In awarding damages in any such action the court shall not take into account any gain, whether to the estate of the deceased person or to any dependant, that is consequent on the death of the deceased person.
>
> (3) Where any such action is tried with a jury, the amount of the damages which may be awarded as aforesaid shall be determined by the jury.

[46] This provision was initially enacted in England by the Fatal Accidents Act 1846.[71] From a very early stage the English courts took the view that the Act provided for compensation for pecuniary losses only.[72] Damages for mental injury were accordingly not recoverable. The provision was carried over into New Zealand law, and the correct interpretation of the New Zealand legislation was first considered by the Court of Appeal in 1957 in *McCarthy*.[73] The Court confirmed that, as had been uniformly observed in both England and New Zealand for more than a century, the provision was limited to "compensation in respect of pecuniary benefits which the claimants might reasonably have expected to enjoy".[74]

71 Fatal Accidents Act 1846 (Imp) 9 & 10 Vict c 93, incorporated into New Zealand law by the English Acts Act 1854, s 1 and sch.

72 *Gillard v The Lancashire and Yorkshire Railway Co* (1849) 12 LT Jour 356 (Exch); and *Blake v Midland Railway Co* (1852) 18 QB 93.

73 *McCarthy*, above n 36.

74 At 620.

[47] The approach adopted in *McCarthy* was reconsidered by the Court of Appeal some 50 years later in *Pou*.[75] A Full Court of the Court of Appeal again confirmed this interpretation. William Young J said for the Court:

> [36] It may be that 155 years ago the English Courts took too narrow an approach to the Fatal Accidents Act and the losses for which compensation might be awarded under it. This approach, however, was already well-settled when the Fatal Accidents Act was first incorporated into our law in 1854. When Parliament enacted the 1952 Act (and indeed its 1880 and 1908 precursors) using language which was largely borrowed from the Fatal Accidents Act 1846, it must have intended that that language would continue to receive the same interpretation as previously. In his judgment Harrison J cited the speech of the Attorney-General on 18 September 1952 on the introduction of the Bill which became the 1952 Act. The Attorney-General was plainly of the view that the new legislation would continue to provide compensation only for pecuniary losses. In light of all of this, we have no doubt that *McCarthy v Palmer* was correctly decided.

[48] Ms Pender nevertheless argued for the appellant that we should overrule *McCarthy* and *Pou* and conclude that "injury" in s 7(1) of the Deaths by Accidents Compensation Act should be construed as including mental injury for which damages can be awarded.

[49] We accept that on the wording of the legislation, and s 7(1)(a) in particular, a claim for damages for mental injury is not necessarily excluded. As the Court of Appeal said in *Pou*, it may be that the English cases took too narrow an approach in deciding that such claims were excluded. But the Court of Appeal decided otherwise in 1957, and that conclusion was reiterated by that same Court in 2005. The view that has prevailed is that if there is to be a change to the law it must be one effected by the legislature. It is appropriate for this Court to proceed on the basis that Parliament would have anticipated that the courts would apply the established interpretation when it used the same statutory wording when enacting the Deaths by Accidents Compensation Act.

[50] Further, for the reasons we have already outlined in relation to the claims in tort, we do not consider we should take this step to address the limited class of claims that arise under the PVC Act. We also agree with the view expressed in *Pou* that any change would now need to be implemented by legislation.

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[75] *Pou*, above n 16.

## Conclusions

[51] Given the above conclusions, the appeal is dismissed and the cross-appeal allowed.

[52] We do not consider that we should reconsider the law to uphold the claims in tort in this context. Doing so would also change the law for a broader category of cases, and we have little information and evidence to address the implications of making the proposed changes. We consider that any such reconsideration should be undertaken in the context of current social needs, and that the present claim is not an appropriate vehicle to make such assessments. We recognise that the position could be reviewed at some point in an appropriate case.

[53] In particular, we decline to change the law of tort to allow claims by secondary victims for mental injury arising from tortious acts beyond those giving rise to a recognisable psychiatric illness or disorder as recognised in *van Soest*. We also decline to decide whether such claims should be allowed even when the plaintiff did not witness the event or its immediate aftermath.

[54] In the present case it is not suggested that Mrs Hawkins witnessed the event or its immediate aftermath. And, even if there is no such requirement, neither is there any evidence that she suffered from a psychiatric illness or condition as a consequence of it. For these reasons we do not accept that a claim in tort has presently been identified. For similar reasons we also do not accept that we should recognise a novel tort based on wrongful death.

[55] In any event, any claim in tort for exemplary damages was brought to an end by Mrs Hawkins' death. We decline to overrule the Court of Appeal's decision in *Re Chase* and confirm that the Law Reform Act prevented a claim of exemplary damages being pursued by the estate. We disagree with the conclusion of the Court of Appeal that Mrs Hawkins' claim had merged with the judgment that the Tribunal had issued, essentially because recognising such a claim would have required the Tribunal to undertake a new inquiry to determine whether any claim existed.

[56] We also do not accept that the appellant had a claim under the Deaths by Accidents Compensation Act. We decline to overturn the decisions of the Court of Appeal in *McCarthy* and *Pou* so that the claim for damages for mental injury could be pursued under that Act. Those authorities find that only pecuniary losses may be recovered under that legislation, and we do not consider we should change the law to allow such claims to be advanced. Any change would need to be made by legislation.

**Result**

[57] The appeal is dismissed.

[58] The cross-appeal is allowed, and the order for reconsideration is set aside.

[59] There is no order as to costs.

Solicitors:
Ord Legal, Wellington for Respondent