

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 16/2022

BETWEEN

ROBERT ROPER

Appellant

AND

MARIYA TAYLOR

First Respondent

AND

ATTORNEY-GENERAL

Second Respondent

**SUBMISSION OF COUNSEL FOR THE APPELLANT (MR ROPER) IN
SUPPORT OF CIVIL APPEAL**

Dated 27th day of July 2022

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MAY IT PLEASE THE COURT

Grounds of appeal

1. The grounds of appeal are that;
 - a. the majority of the Court of Appeal:¹
 - i. has interpreted section 317 Accident Compensation Act 2001, the effect of which allows Ms Taylor to have coverage under the ACC scheme and compensatory damages for the same mental consequences of the personal injury.
 - b. In the recalled and reissued judgment:²
 - i. The Court was in error in finding Ms Taylor does not have cover under s 21B of the Accident Compensation Act for false imprisonment; and
 - ii. while sudden has the two elements noted at [31], and the Court of Appeal at [34] accepted the individual acts of imprisonment would have a sudden component in the sense that each instance, while anticipated, would necessarily involve a starting point, Ms Taylor did not have cover under s 21B.

Counsel's approach – adoption of leave submissions

2. Counsel have reviewed the leave submission and adopts that as the substantive submission for determination of the appeal.

Facts

3. In 2016 Ms Taylor sued the appellant (Mr Roper) for damages based on Mr Roper's conduct when Ms Taylor was Mr Roper's subordinate in the Royal New Zealand Airforce between 1985 and 1986.

The causes of action against the appellant (Mr Roper)

4. The causes of action as pleaded by the first respondent in the amended statement of claim 21 November 2016 (the statement of claim) were:
 - a. First - Assault

¹ *Taylor v Roper & Anor* [2020] NZCA 268 reissued on 16 December 2021 (“**Court of Appeal decision**”) [\[\[101.0132\]\]](#)

² *Taylor v Roper and Anor* [2021] NZCA 691 (CA597/2018) (“**Recall Judgment**”) [\[\[101.0184\]\]](#)

- b. Second - Intentional infliction of emotional harm
- a. Third - False imprisonment.³

Result in the High Court

- 5. In the High Court, Edwards J. held all claims were time barred under the Limitation Act 1950⁴ and barred under the accident compensation legislation.⁵
- 6. Ms Taylor appealed to the Court of Appeal.

Result in the Court of Appeal

The divergence in the Court of Appeal

- 7. In the Court of Appeal, all members agreed on all but two issues.⁶
- 8. French J would have dismissed the appeal and upheld the High Court judgment in its entirety.⁷ That is, French J would have held all causes of action time barred and barred by operation of the accident compensation legislation.
- 9. Brown and Clifford JJ agreed with French J save in two respects⁸ and found:
 - a. there was sufficient evidence to warrant the application of s 24 the Limitation Act 1950⁹ to extend the limitation period for the four causes of action;¹⁰ and
 - b. Ms Taylor's claim for compensatory damages for false imprisonment was not within the scope of the accident compensation legislation.¹¹

³ A fourth cause of action, breach of duty of care, was pleaded against the Attorney-General (the second respondent).

⁴ In the Court of Appeal decision (at [69] [\[\[101.0145\]\]](#)) it is noted that references to "the Limitation Act" should be read as references to the Limitation Act 1950 and that reference is adopted in this synopsis from here on.

⁵ In the Court of Appeal decision, at [129] [\[\[101.0161\]\]](#) French J noted there had been three relevant iterations of the accident compensation legislation. They were the 1982 Act: [131] [\[\[101.0162\]\]](#), The Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act) [134] [\[\[101.0162\]\]](#) and the 2001 Act: [140] [\[\[101.0164\]\]](#).

⁶ Court of Appeal decision at [3] [\[\[101.0134\]\]](#).

⁷ Court of Appeal decision at [171] [\[\[101.0170\]\]](#).

⁸ Court of Appeal decision at [172] [\[\[101.0170\]\]](#).

⁹ Court of Appeal decision at [173] [\[\[101.0171\]\]](#).

¹⁰ Court of Appeal decision at [173] [\[\[101.0171\]\]](#).

¹¹ Court of Appeal decision at [173] [\[\[101.0171\]\]](#).

Consequences of divergence

10. Ms Taylor has a remedy against Mr Roper confined to exemplary damages for assault and intentional infliction of emotional harm and a remedy in compensatory and exemplary damages for false imprisonment.

The accident compensation legislation

11. French J's conclusion is the same reached by Edwards J.¹² Brown and Clifford JJ disagreed with the trial Judge on the issue – this is striking in the context where the same Court has implicitly encouraged trial Judges to determine cases in the “grey area.”¹³
12. French J embarks on an orthodox analysis of the issue by assessing what damages were pleaded by Ms Taylor under the false imprisonment tort. In her statement of claim, Ms Taylor pleads, at paragraph 87, relief for the third cause of action (false imprisonment) by way of damages as set out at paragraph 77 of the statement of claim.
13. French J concludes: *The damage said to have been suffered is the same mental and psychological injury and consequential economic loss alleged in respect of all the causes of action, including assault.*¹⁴
14. Brown and Clifford JJ at para [206] held that they do not consider that:
- “...this court in Willis intended substantial to be synonymous with primary or dominant. It is sufficient that the cause is not insubstantial or minimal. Consequently, as the court stated, if the mental consequences have been caused by both false imprisonment and assault and battery, a plaintiff can still claim damages for those consequences.”*
15. The factual findings of the trial Judge, which were not disturbed by the Court of Appeal panel, were that:
- a. *Mr Roper had locked the car doors while Ms Taylor was driving him home and that he would then try to grope her, touch her breasts and*

¹² Court of Appeal decision at [164] and [165] [\[\[101.0168\]\]](#), when citing *M v Roper* [2018] NZHC 2330 (“**High Court decision**”) (at [178] – [179] [\[\[101.0118\]\]](#)).

¹³ *Willis v Attorney-General* [1989] 3 NZLR 574 (CA) at [page 579, lines 39 to 41](#): “Trial Judges will adopt a common sense approach, guided by what is within the broad spirit of the Accident Compensation System and what is outside it. Any difficulties are likely to be more theoretical than practical.”

¹⁴ Court of Appeal decision at [155] [\[\[101.0166\]\]](#)

*put his hands up her skirt as well as squeeze her arm firmly and threaten her with consequences should she tell anyone.*¹⁵

- b. *Ms Taylor was locked in the tyre cage on more than one occasion by Mr Roper although not as often as Ms Taylor claimed and not for as long as she claimed. Mr Roper used an iron bar to prod her, tap her on the bottom and generally intimidate her on these occasions.*¹⁶

16. Brown and Clifford JJ held at para [207] that *there was no evidence that she was subjected to sexual abuse while she was locked in the tyre cage.*

17. The undisturbed factual findings noted above were in fact that the false imprisonment acts were accompanied by indecent assaults.

18. Brown and Clifford JJ held *that whilst imprisoned she also harboured fears about what Mr Roper might do while she was driving him at night.*¹⁷ The undisturbed factual findings of Edwards J were not only that Ms Taylor harboured fears, but that *Mr Roper did grope M.*¹⁸ who was being subject to assaults while in the car.¹⁹

19. Thus, the majority embarked on their analysis of the issue misdirecting themselves as to what the factual findings were of the trial Judge. Edwards J held that Mr Roper indecently assaulted Ms Taylor contemporaneously to the false imprisonment acts.

20. Brown and Clifford JJ interpret the decision of *Willis* to hold that it is enough that if the mental consequences have been caused by both false imprisonment and assault and battery, a plaintiff can still claim damages for those consequences *unless the false imprisonment is not one substantial cause of the mental injury.*²⁰

21. This analysis is simplistic when considering the decision of *Willis* in its entirety, in particular the guidance Cooke P gives trial Judges when determining the issue. French J is cognisant of the complexities of the *grey area* that trial Judges must navigate and agrees with Edwards J that the circumstances of this false imprisonment claim are so far removed from *Willis* as to bring it within a different category.²¹

¹⁵ Court of Appeal decision at [156] [\[\[101.0167\]\]](#), citing the High Court decision at [36] to [40] [\[\[101.0084\]\]](#)

¹⁶ Court of Appeal decision at [157] [\[\[101.0167\]\]](#), citing *M v Roper* [2018] NZHC 2330 at [51] to [53] [\[\[101.0087\]\]](#)

¹⁷ Court of Appeal decision at [207] [\[\[101.0182\]\]](#)

¹⁸ High Court decision at [36] [\[\[101.0084\]\]](#)

¹⁹ Court of Appeal decision at [183] [\[\[101.0119\]\]](#)

²⁰ Court of Appeal decision at [206] [\[\[101.0181\]\]](#)

²¹ Court of Appeal decision at [166] [\[\[101.0169\]\]](#)

22. Brown and Clifford JJ's interpretation of *Willis* permits claimants to sue for damages for mental consequences that have been caused by both false imprisonment and some other cause, which is covered by the accident compensation scheme. The practical issue of the mental consequences intertwining has been overlooked.
23. How does a trial Judge determine what compensation ought to be awarded for mental consequences that have also been caused by a personal injury by accident? The majority do not deal with this issue and instead remit the matter to the High Court as they *do not consider it appropriate for this Court to engage with the issues in the abstract and without the benefit of a finding by the trial judge.*²²
24. This approach is remiss as Edwards J has already found that the *false imprisonment is intertwined with an assault and the consequences are more closely aligned with what would be regarded as a personal injury from the perspective of a plaintiff.*²³
25. This is the mischief that Cooke P identified in *Willis*. Cooke P urged trial Judge's to take a common sense approach. French J recognised this issue when she held, *the substance of the claim is undoubtedly a claim in the nature of personal injury by accident. To hold otherwise is in my view to interpret Willis as imposing a universal rule that all claims for false imprisonment are outside the accident compensation scheme and that is not what the Court held.*²⁴
26. To remit the matter to the High Court to make an assessment of which damages flow from the false imprisonment tort is asking the impossible of a trial Judge who has determined, as she ought to have following *Willis*, that the consequences are too intermingled to separate. She too would be dealing in the abstract.
27. The corollary effect of the majority's decision is to shift the burden and standard of proof to defendants in claims where the mental consequences suffered are intermingled with claims of personal injury by accident. It is submitted that the practical reality of Brown and Clifford JJ's decision amounts to an unjustified shift in both the burden and standard of proof for these types of claims.
28. Practically, a defendant will then have the task of proving on the balance of probabilities, what share of the plaintiff's injuries are covered by the ACC

²² Court of Appeal decision at [213] [\[\[101.0183\]\]](#)

²³ High Court decision at [178] [\[\[101.0118\]\]](#)

²⁴ Court of Appeal decision at [169] [\[\[101.0169\]\]](#)

scheme, i.e. what percentage of a plaintiff's claim for compensation ought not to be awarded. This is especially so in the context of the current pleadings, as Ms Taylor has not pleaded what mental consequences were suffered from the false imprisonment claim alone. The explanation for that failure may be in the observation of French J when commenting on the reality of the case:

On the contrary, it emerges very clearly from Ms Taylor's own evidence that the impact on her from being locked in the car and the tyre cage derived from her knowledge of Mr Roper as a sexual predator and what he was capable of doing and had done to her.

29. The Court of Appeal panel concluded that Ms Taylor had cover for all personal injuries suffered (other than false imprisonment which the panel disagreed on) under the 1982 Act, 1992 Act and still has cover under the 2001 Act.²⁵ The panel were divided on the claim for false imprisonment.²⁶

30. It is submitted that French J's analysis at paragraphs [152] to [169] is correct. The conclusion she reaches is that in substance the false imprisonment claim is undoubtedly a claim in the nature of personal injury by accident.²⁷

The section 21B issue in the recall judgment

31. The Court of Appeal recalled the 2020 judgment, found in favour of Ms Taylor on the section 21B issue – she did not have cover – and reissued the 2020 judgment on 16 December 2021.²⁸

Sudden – s 21B(7)(a)(i)

32. The Court of Appeal found an insurance case²⁹ showing that the meaning of “sudden” was contextual. The Court further found that four cases where s 21B

²⁵ Court of Appeal decision at [149] [\[\[101.0166\]\]](#)

²⁶ French J (dissenting in part) held that the false imprisonment claim is in the nature of personal injury, while the majority of Brown and Clifford JJ held that the false imprisonment claim is not a claim for personal injury and hence not captured by the statutory bar in the accident compensation legislation.

²⁷ Court of Appeal decision at [169] [\[\[101.0169\]\]](#)

²⁸ Recall Judgment [\[\[101.0184\]\]](#)

²⁹ *Lumbercorp (BOP) Ltd v GIO Insurance Ltd* (2000) 11 ANZ Insurance Cases 61-475 (referred to in the Recall Judgment at [19] and [22] [\[\[101.0191\]\]](#))

had been considered,³⁰ while of interest in relation to the single event versus a series of events in consideration in s 21B(7)(b), did not assist on the issue whether “sudden” should be construed as *unexpected, in addition to (or alternatively to) instantaneous*.³¹

33. The Court of Appeal accepted individual incidents of false imprisonment would, while anticipated, involve a point of commencement.³² The Court found that the substantial effect of the detention on a victim would lie not in the mere fact of commencement but its prolonged nature and fear of what else might occur during the confinement. The Court of Appeal found, *for these reasons we consider it unrealistic to characterise the incidents of false imprisonment to which Ms Taylor was subjected to as being sudden events in the sense that expression is employed in s 21B*.³³

34. The submission is that the Court of Appeals description of false imprisonment falls within the disjunctive s 21B(7)(a)(ii), a direct outcome of a sudden event. Hence, the Court of Appeal’s restrictive view of “sudden” was misapplied to the issue in consideration.

The Court of Appeal’s consideration of remaining issues³⁴

35. The Court of Appeal said the analysis up to paragraph [34] was sufficient to conclude that s 21B was not applicable to Mrs Taylor, but it would address the remaining issues.³⁵

Were the incidents of false imprisonment a gradual process? – [36] to [44]

36. Mrs Taylor was not excluded from cover by operation of s 21B(7)(c).³⁶ That finding is accepted.

Did the incidents of false imprisonment arise from the same cause or circumstance and together comprise a single incident or occasion? – [45] to [48]

37. Mr Roper’s submission to the Court of Appeal was that s 21B(7) did not preclude cover for a sequence of events that do not fulfil the criteria in s 21B(7)(b). Any sequence of events that factually formed one event would come with s 21B(7)(b), and any series of events, each one of which arose from a separate cause or circumstance, would fall within s 21B(7)(a). That submission

³⁰ Recall Judgment at [23] to [25] [\[\[101.0193\]\]](#)

³¹ Recall Judgment at [26] [\[\[101.0194\]\]](#)

³² Recall Judgment at [34] [\[\[101.0196\]\]](#)

³³ Recall Judgment at [34] [\[\[101.0196\]\]](#)

³⁴ Recall Judgment at [36] to [48] [\[\[101.0197\]\]](#) to [\[\[101.0201\]\]](#)

³⁵ Recall Judgment at [35] [\[\[101.0197\]\]](#)

³⁶ Recall Judgment at [44] [\[\[101.0200\]\]](#)

appears to have been dismissed as based on believing it was an error to view subparas (a) and (b) of s 21B(7) were disjunctive. Subpara (a) can, but need not, include (b) but cannot include (c).

38. The submission is that subpara (b) does not need to be satisfied for subparagraph (a) to be met. Subpara (b) operates to expand subpara (a), not to restrict it. If a correct interpretation, as set out herein at paragraph 34 above, is given to “sudden”, then subparagraph (b) falls away and Mr Taylor has cover under the Accident Compensation legislation.

39. The Court of Appeal considered s21B did not apply for two reasons. First, *they were not “sudden” incidents*. Second, *they did not together comprise a single incident or occasion*.³⁷

40. The “they” are described by the Court of Appeal at [49]: *Mr Roper’s sexual predation of Mrs Taylor in the course of her employment involved a number of incidents of false imprisonment either in the tyre cage or in the motor vehicle when she was summoned to drive him home from the sergeants’ mess. As a matter of plain language they can be described as a series of events and there is no doubt that Mr Roper was the “cause” of each incident*.³⁸

41. The submission is that the interpretation of s 21B(7)(a) as set out at paragraph 37 above is correct, and Ms Taylor has cover under the Accident Compensation legislation.

Reasons why the appeal should be allowed

Accident compensation legislation

Willis

42. The majority has misunderstood the findings of the trial judge, has made incorrect findings of fact and, as a result, come to a clearly wrong result as to the application *Willis* to the facts.

43. How trial Judges are to practically approach the analysis of intertwined mental consequences for personal injuries by accident and other acts outside the ACC scheme is a matter of general or public importance.

44. The majority decision allows potential plaintiffs to claim consequences for mental injury if a court determines that the cause is not insubstantial or

³⁷ Recall Judgment at [50] [\[\[101.0202\]\]](#)

³⁸ Recall Judgment at [49] [\[\[101.0201\]\]](#)

minimal. However, this analysis ignores how a court is to assess the level of compensatory damages. If the mental consequences are covered by the ACC scheme, then compensation to potential plaintiffs may have already been provided under this scheme. In this potentially widespread situation, the court is left with the unenviable task of attempting to quantify mental consequences of a tort committed while preventing the claimant from “double dipping”.

S 21B

45. An Official Information Act request to Accident Compensation Corporation for all written material held in respect of s 21B with particular reference to s 21B(7), brought a 10 November 2021 response that, *We were not able to find any papers specifically on s 21B(7) and to our knowledge no work has been done on s 21B(7).*

46. If the Corporation had considered section 21(B), it may have come to the view that the public interest required cover where the injury happened at work and is caused by “a specific event or a series of events, other than a gradual process”.

Dated 27th of July 2022

.....
John Mather / Laurence Herbke
as Counsel for the Appellant

TO: The Registrar, Supreme Court

AND TO: The First respondent

AND TO: The Second respondent

CERTIFICATE OF COUNSEL

Counsel certifies that this submission does not contain suppressed information and is suitable for publication.