IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA | SC 21/2023

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|---|---|
| BETWEEN | JOSHUA PERA VAN SILFHOUT |
| | Appellant |
| AND | UDAYA LAKSHMAN AGAS PATHIRANNEHELAGE |
| | Respondent |
| AND | SECRETARY FOR JUSTICE |
| | Counsel to assist |

# SECRETARY FOR JUSTICE'S SUBMISSIONS ON APPEAL

13 July 2023

Te Tari Ture o te Karauna
Crown Law

PO Box 2858
Wellington 6140
Tel: 04 472 1719

Contact Person:
D J Perkins / Z R Hamill / I M C McGlone
chr@crownlaw.govt.nz

COUNSEL FOR THE SECREATRY FOR JUSTICE CERTIFIES THAT THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

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## ISSUE

1. The Prisoners' and Victims' Claims Act 2005 (**PVCA**) suspends time running on the limitation period for victims' claims against offenders, whilst they are serving a sentence of imprisonment in a prison.[1]

2. This appeal raises a narrow question. If an offender is sentenced to imprisonment, did time run on the limitation period during any period of pre-sentence detention? Or did the PVCA suspend time running?

## SUMMARY OF ARGUMENT

3. Counsel for the Secretary for Justice appear to present argument as counsel assisting.[2]

4. Limitation provisions interfere with a plaintiff's strict legal right to bring an otherwise deserving claim. They reflect the legislature's policy judgement as to the appropriate balance between the competing interests of intending plaintiffs and intended defendants. Exceptions to general limitation provisions reflect a determination that, when certain circumstances are present, it is appropriate to strike the balance in a different place.

5. Section 64 of the PVCA is such an exception. The policy intent was to strengthen victims' rights, including by extending the period within which they could bring claims. This recognised the difficulties in pursuing money claims against prisoners whilst they were in prison—but also that other aspects of the PVCA[3] contemplated prisoners coming into funds, making recovery by victims more realistic.

6. The parliamentary materials indicate evolution in the Prisoners' and Victims' Claims Bill's treatment of remand prisoners. It is, however, clear the Government intended an expansive approach to the extension of the

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[1] Section 64(1) **[JBOA Tab 4].**

[2] Minute of the Court dated 4 May 2023 at [2] **[05.0009]**. The respondent abided the High Court's decision (**[201.0022]**); and did not play an active role in that Court (**[101.0017]** at [2]) or the Court of Appeal (**[101.0040]** at [6]).

[3] And the then-recent decision in *Taunoa v Attorney-General (Compensation)* (2004) 8 HRNZ 53 (HC).

period within which victims could claim. Stopping time running on limitation periods during pre-sentence detention would be consistent with this purpose.

7. The PVCA cannot be read in isolation from the Parole Act 2002. When an offender is sentenced to imprisonment, the period of that sentence to be served *in prison* is determined by the Parole Act. It is calculated by deeming any time the offender spent in pre-sentence detention as serving the sentence. Their parole eligibility, statutory release and sentence expiry dates are reckoned from there.

8. The period of time during which an offender is "serving a sentence of imprisonment … in prison" (for the purposes of s 64 of the PVCA) must also be determined by reference to these dates. To the extent the Parole Act applies pre-sentence detention to sentence calculation, it must apply equally to s 64. The Parole Act therefore provides necessary context for answering the question posed by s 64, namely for how long the limitation period is suspended.

9. This calculation may require a degree of retrospectivity, but is not contrary to the scheme and purpose of the PVCA or the general law of limitation. To the extent there are anomalies in how s 64 applies to cumulative sentences as against concurrent ones, this is a product of the PVCA itself.

10. If an offender is subject to a non-custodial sentence, they will not be subject to s 64 of the PVCA, regardless of any time spent in pre-sentence detention. It is the type of sentence imposed on the offender, not the mere fact they have spent time in pre-sentence detention, that determines whether time stops running on the limitation period while they were in pre-sentence detention.

**FACTS**

11. The appellant has filed a chronology.[4]

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[4] The only difference of any substance between the appellant and Secretary is that it is unclear whether the robbery took place on 8 or 9 July 2010. The appellant's conviction history lists two aggravated robbery offences, one on each day: **[201.0008]**. The respondent's claim to the Victims' Special Claims Tribunal (**Tribunal**) refers to 8 July: **[201.0003]**. But the Tribunal, High Court and Court of Appeal

**The appellant's periods in custody**

12. On 8 or 9 July 2010, the appellant robbed a service station with a knife. The respondent was the sole worker present, and a victim of the offence of aggravated robbery.[5]

13. On 30 January 2013, the appellant was arrested and remanded in custody.[6] His pre-sentence detention commenced.

14. On 13 May 2014, the appellant was sentenced to four years' and three months' imprisonment.[7] His pre-sentence detention ended.

15. On 21 November 2016, the appellant was released on parole.[8] He ceased serving his sentence in prison. For the next three months he served it in the community.

16. On 1 March 2017, the appellant was recalled to prison. He re-entered custody the following day.[9] He thereby re-commenced serving his sentence in prison.

17. On 2 May 2017, the appellant's sentence expired. He was released from prison.

**Compensation is paid, and a victim claims**

18. The appellant alleged the Department of Corrections (**Corrections**) breached his privacy whilst in prison. Corrections agreed to pay him $12,000 compensation.[10] The PVCA applied to this payment.

19. On 31 January 2020, $9,993.05 was paid into the Victims' Claims Trust Account, on trust for the appellant.[11]

20. This compensation payment compensation was notified to the appellant's

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decisions refer to 9 July: **[101.0002]** at [7]; **[101.0017]** at [5]; **[101.0039]** at [3]. Nothing turns on this discrepancy.

5 This is the time at which the respondent's cause of action accrued. Because it predated 1 January 2011, it is governed by the Limitation Act 1950, s 4: see Limitation Act 2010, s 59 **[JBOA Tab 3]**.

6 Letter from Shanell Christian to Douglas Ewen, 3 June 2021 **[201.0021]**.

7 Appellant's criminal and traffic history **[201.0008],** Letter from Shanell Christian to Douglas Ewen, 3 June 2021 **[201.0021]**.

8 Letter from Shanell Christian to Douglas Ewen, 3 June 2021 **[201.0021]**.

9 Letter from Shanell Christian to Douglas Ewen, 3 June 2021 **[201.0021]**. Initially this was pursuant to an interim recall, but the recall appears to have been ultimately made final.

10 *Pathirannehelage v van Silfhout* [2021] NZVSC 3 at [5] **[101.0002]**.

11 PVCA, s 18(1)(d) **[JBOA Tab 5].**

victims.[12] The Secretary wrote to the respondent,[13] and published a *Gazette* notice.[14]

**The history of this litigation**

21. By claim dated 24 March 2020 (filed on 2 April), the respondent sought $10,000 damages for emotional harm inflicted by the appellant in the course of the aggravated robbery.[15]

22. The Victims' Special Claims Tribunal held the claim was not time-barred.[16] It further held the respondent was a "victim" within the meaning of the PVCA,[17] had a cause of action in the tort of assault,[18] and damages were recoverable for the emotional harm he suffered.[19] The Tribunal awarded $5,000 damages.[20]

23. Tribunal decisions may be appealed on questions of law.[21] The questions on appeal related to the limitation defence—in particular, whether the PVCA suspended time running on the limitation period during the appellant's pre-sentence detention. The High Court[22] and Court of Appeal[23] both held it did.

24. This Court has granted leave to appeal.[24] The approved question is:[25]

> whether the Court of Appeal was correct in its interpretation of s 64(1) of the Prisoners' and Victims' Claims Act 2005 which suspends

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12 PVCA, ss 20 and 21 **[JBOA Tab 5].**

13 Letter from Jacquelyn Shannon to the respondent **[201.0023]**. Unfortunately, this notice is undated. However, it was likely given between 31 January 2020 (the date on which funds were paid into the Trust Account) and 24 March 2020 (the date of the respondent's Tribunal claim).

14 "Notice of Payment into Victims' Claims Trust Account" (7 February 2020) *New Zealand Gazette* No 2020-go456.

15 Respondent's claim form, Victims' Special Claims Tribunal, pt 3 **[201.0004]**.

16 *Pathirannehelage v van Silfhout* [2021] NZVSC 3 at [8] **[101.0003]**.

17 At [11]–[15] **[101.0003–4]**.

18 At [18] **[101.0004]**.

19 At [19]–[21] **[101.0005]**.

20 At [26]–[27] **[101.0006]**.

21 PVCA, s 51(1).

22 *van Silfhout v Pathirannehelage* [2021] NZHC 2268 [**HC judgment**] at [74]–[75] **[101.0035]**. The appellant, then-counsel to assist (Ms V Casey KC) and the High Court all agreed the Tribunal approached the matter incorrectly: High Court judgment, above n 22, at [25]–[27] **[101.0022–23]**. However, the Court held the Tribunal's decision on this point was still correct—just for a different reason.

23 *van Silfhout v Pathirannehelage* [2023] NZCA 5 [**CA judgment**] **[101.0038]**.

24 *van Silfhout v Pathirannehelage* [2023] NZSC 47 **[05.0008]**.

25 At [B] **[05.0008]**.

the limitation period for a victim of an offence making a claim under that Act while the offender is "serving a sentence of imprisonment" and, in particular, in concluding that time spent in pre-sentence detention counts to extend the period of suspension.

**SUBSTANTIVE SUBMISSIONS**

**Limitation of actions generally**

25. Claims to vindicate legal rights could theoretically exist in a contingent state indefinitely. However almost all legal systems have rules limiting a plaintiff's ability to bring a "stale" claim.[26]

26. Limitation of actions in New Zealand is largely a statutory construct.[27] Statutory limitation provisions allow a defendant to raise a bar to defeat an action, if a specified period of time elapses before the action is commenced. They interfere with a plaintiff's strict legal right to bring an otherwise deserving claim.

27. Statutory limitation provisions bar late claims on the basis that truth must eventually give way to other considerations in the public interest.[28] They are said to be justified on various grounds, including:

    27.1 A societal interest in settling disputes promptly, rather than letting them drag on. Limitation periods incentivise plaintiffs to pursue their rights, rather than "sleeping" on them.[29]

    27.2 Protecting defendants from the injustice of having to defend claims brought long after the event, when the quality of evidence they can call to defend themselves may have deteriorated.[30]

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26 *Birmingham City Council v Abdulla* [2012] UKSC 47, [2013] 1 All ER 649 at [41] per Lord Sumption SCJ.

27 For present purposes, equitable doctrines (such as laches) are not relevant.

28 See, eg, David Oughton et al *Limitation of Actions* (LLP Reference Publishing, London, 1998) at 4.

29 See, eg, *Board of Trade v Cayzer Irvine & Co* [1927] AC 610 (HL) at 628 per Lord Atkinson:

> The whole purpose of this Limitation Act, is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use.

This purpose is given particular prominence in the Limitation Act 2010; see s 3: "The purpose of this Act is to encourage claimants to make claims for monetary or other relief without undue delay by providing defendants with defences to stale claims."

30 This consideration cuts both ways; it applies to evidence both the plaintiff and defendant may have wished to call. But the plaintiff's interests are given less weight, given (at least in theory) the plaintiff has greater choice as to when they commence their claim.

27.3 Protecting defendants from having potential claims hanging over them. At some point defendants should be able to "move on".[31]

28. Statutory limitation provisions reflect the legislature's policy judgement as to the appropriate balance between the competing interests of intending plaintiffs and intended defendants.[32] They are a "practical compromise intended to encourage and secure reasonable diligence in litigation and to protect defendants from stale claims".[33]

29. Limitation statutes typically state general rules as to the commencement and duration of the period within which claims must be brought. Different types of legal actions are subject to limitation periods of different durations. For example, in New Zealand:

29.1 Personal grievances in employment relationships must generally be raised within 90 days.[34]

29.2 Defamation proceedings must generally be brought within two years.[35]

29.3 Contract and tort claims must generally be brought within six years.[36]

29.4 Some proceedings in respect of building work may be brought within 10 years.[37]

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31 This rationale is often connected to the need of businesses and insurers to have certainty as to their liabilities: see, eg, Peter McKenzie and Paul Radich *Limitation—The New Regime* (New Zealand Law Society CLE Ltd Seminar, October 2010) at 3. At a more abstract level, it means parties no longer need to reserve funds to meet potential liabilities and can apply them to more productive uses: see, eg, New South Wales Law Reform Commission *Limitation of Actions for Personal Injury Claims* (Report 50, 1986) at [1.10]. See also New Zealand Law Commission *Tidying the Limitation Act* (NZLC R61, 2000) at [1].

32 "Limitations statutes are driven by specific policy choices of the legislatures": *Manitoba Metis Federation Inc v Canada (Attorney-General)* [2013] SCC 14, [2013] 1 SCR 623 at [230] per Rothstein J. See also New Zealand Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) at [3]; *Tidying the Limitation Act*, above n 31, at [1].

33 *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL) at 782 per Lord Pearce.

34 Employment Relations Act 2000, s 114. The exception is sexual harassment personal grievances, which must be raised within 12 months.

35 Limitation Act 2010, s 15 **[JBOA Tab 3].**

36 Limitation Act 2010, s 11 **[JBOA Tab 3]**.

37 Building Act 2004, s 393(2).

30. Limitation statutes also typically prescribe special rules for certain circumstances. These reflect the legislature's determination that, when those circumstances are present, it is appropriate to strike the balance in a different place.[38] For example, such rules may:

30.1 delay a limitation period's commencement—eg where an intending plaintiff is a minor.[39]

30.2 extend a limitation period—eg where an intending plaintiff is incapacitated.[40]

30.3 restart a limitation period—eg where the defendant has acknowledged the claim or made part payment on it.[41]

30.4 provide for a second limitation period, commencing sometime after the first has expired—eg where a claimant obtains late knowledge.[42]

30.5 confer a power to grant relief, notwithstanding the relevant limitation period expired before the claim was brought—eg children abused by caregivers; or plaintiffs who suffer a gradual process, disease or infection.[43]

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

31. A different method by which the "usual" balance between the interests of plaintiffs and defendants can been displaced is by suspending time running on a limitation period. This is what s 64 of the PVCA does.

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38 "The exceptions in [limitations] statutes are also grounded in policy choices made by legislatures": *Manitoba Metis Federation Inc v Canada (Attorney-General)*, above n 32, at [230] per Rothstein J.

39 Limitation Act 2010, s 44 **[JBOA Tab 3]**.

40 Limitation Act 2010, s 45 **[JBOA Tab 3]**.

41 Limitation Act 2010, s 47 **[JBOA Tab 3]**.

42 Limitation Act 2010, s 14 **[JBOA Tab 3]**. Note, in this example the second limitation period is shorter than the original.

43 Limitation Act 2010, s 17 **[JBOA Tab 3]**.

32. The PVCA does not have a single, overarching purpose.[44] Indeed it has been said to have several purposes.[45] These seem to be:

    32.1 To restrict and guide awards of compensation to persons under control or supervision, in respect of breaches of their rights.

    32.2 To provide for prisoners' liabilities to the State and victims to be satisfied, before prisoners receive the benefit of any such awards.

    32.3 To enact procedural reforms making it easier for victims to claim against prisoners. These include a simplified claims process, and an extended period within which to bring claims.

33. The PVCA provisions suspending time running on a limitation period are in sub-pt 3 of pt 2.[46] Section 3(3) of the PVCA provides that subpart's purpose is "to suspend the running of limitation periods for certain claims by victims."

34. Section 64 itself reads:

> **64 Limitation periods suspended while offender serving sentence of imprisonment**
>
> (1) The limitation periods to which this section applies cease to run while the offender is serving a sentence of imprisonment in a penal institution, prison, or service prison.
>
> (2) In this section, serving a sentence of imprisonment in a penal institution, prison, or service prison—
>
> (a) means serving in a penal institution, prison, or service prison—

[44] CA judgment, above n 23, at [18] **[101.0046]**.

[45] That the Prisoners' and Victims' Claims Bill was perceived to be conflating distinct issues in a single piece of legislation was remarked upon by the Select Committee: Prisoners' and Victims' Claims Bill 2004 (241-2) (select committee report) **[JBOA Tab 7]** at 3.

[46] Section 4(1)(a) of the Limitation Act 1950 correspondingly provides **[JBOA Tab 3]**:

> **4 Limitation of actions of contract and tort, and certain other actions**
>
> Except as otherwise provided in this Act *or in subpart 3 of Part 2 of the Prisoners' and Victims' Claims Act 2005* [emphasis added] … the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say,—
>
> (a) actions founded on simple contract or on tort …

(i) the sentence of imprisonment for the offence (as defined in section 5(1)(a)(ii));[[47]] and

(ii) any earlier sentence of imprisonment on which the sentence of imprisonment for the offence is directed to be served cumulatively; and

(iii) any later sentence that is directed to be served cumulatively on the sentence of imprisonment for the offence; and

(b) includes spending time in a penal institution or a prison following a related recall application (as defined in section 59 of the Parole Act 2002), but only if a final recall order (as defined in section 4(1) of that Act) is made following the recall application.

***The Bill as introduced***

35. The Prisoners' and Victims' Claims Bill (**Bill**) was introduced into Parliament in 2004. It responded to the High Court's award (three months' prior) of Bill of Rights Act damages to prisoner plaintiffs in *Taunoa v Attorney-General*.[48]

36. Two aspects of the Bill as introduced may be noted at the outset. Firstly, it did not, in terms, apply to prisoners in the military justice system. This was rectified by the time the Select Committee reported.[49] For example, cl 60 (which became s 64) was amended to include reference to "service prisons" as places where sentences of imprisonment could be served.[50]

37. Moreover, the Bill was inaptly drafted to capture the nuances of remand prisoners. Part 1, and sub-pt 1 of pt 2, identified the subjects of the Bill as "person[s] under control or supervision". That term is broad enough to

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[47] Section 5(1)(a)(ii) provides **[JBOA Tab 5]**:

**5 Offender**

(1) In this Act, **offender**, in relation to a victim, means—

(a) for the purposes only of subpart 3 of Part 2, a person—

(i) convicted (alone or with others) by a court or the Court Martial of the offence that affected the victim; and

(ii) on whom a court or the Court Martial has, because of the person's conviction for that offence, imposed a sentence of imprisonment (the **sentence of imprisonment for the offence**) …

[48] *Taunoa v Attorney-General (Compensation)*, above n 3.

[49] Bill (241-2) (select committee report) at 6 **[JBOA Tab 7]**.

[50] This term was introduced into cl 60 of the Bill (which became s 64 of the PVCA) as well as elsewhere.

include remand prisoners. However, references in sub-pt 2 of pt 2 were originally to "offender".[51] The Select Committee noted:[52]

> **"Accused"**
>
> All of us, except the Green member, recommend an amendment to insert a new definition of "accused" into the bill to cover a person charged with an offence who is not subsequently convicted.[[53]] The term "offender" is used throughout the bill, but is defined in a way that is not appropriate in some cases, including the case where the prisoner receiving compensation was on remand, was not subsequently convicted, and has no previous convictions.
>
> The bill applies to all persons under control or supervision, including persons on remand who may or may not subsequently be convicted of the alleged offence for which they are held in custody. Even if a person on remand is not convicted of the charge for which he or she was on remand at the time the breach occurred, he or she may have previous victims who can use the claims procedure provided for in the bill. …

***The Government's intent as to limitation***

38. The overall tenor of parliamentary debate on the Bill was that while prisoners were entitled to effective remedies for breaches of their rights, and equal protection under the law,[54] victims' interests should also be protected. Indeed, in several specific ways, they could be advanced.

39. The Bill's general policy statement identified that one of its main objectives was "to strengthen the rights of victims to make civil claims against offenders".[55] To do this, "[c]hanges to the limitation rules will extend the period within which victims can pursue claims against prisoners either before a Victims' Special Claims Tribunal or in the ordinary courts."[56] The extension was said to be needed because:[57]

> It is often futile to contemplate proceedings while the offender is in prison; by the time he or she is released, the normal limitation period of 6 years may have expired. For victims of offenders sentenced to

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51 This subpart deals with the treatment of awards of compensation to prisoners, and the simplified process for victims to claim against prisoners.

52 Bill (241-2) (select committee report) at 5–6 **[JBOA Tab 7]**.

53 The Select Committee did not just recommend the insertion of a new definition of "accused"; the terminology of "accused or offender" was inserted throughout pt 2, sub-pt 2 of the Bill.

54 See, eg, Bill (241-2) (select committee report) at 1–4 **[JBOA Tab 7]**.

55 Bill (241-1) (explanatory note, general policy statement) at 1 **[JBOA Tab 6]**.

56 At 2 **[JBOA Tab 6]**.

57 At 4 (emphasis added) **[JBOA Tab 6]**.

> prison, the Bill overcomes this difficulty by providing that *the period ceases to run while the offender is in prison.*

40. As to how long the period for bringing claims should be extended, the parliamentary materials indicate the Government proposed an expansive approach. During the first reading debate, the Minister of Justice (Hon Phil Goff) relevantly said:[58]

> The third main feature of the bill is that it makes changes to the limitation rules that apply to victims' claims. Although victims have always had the right to take civil claims against offenders for the loss or harm they have suffered, they generally do not do so. One of the main reasons for this is that such claims are usually futile if the offender has no assets and is in prison. By the time the offender is released, the normal limitation period of 6 years may have expired and the victim may be disadvantaged. Clearly, this puts victims at a particular disadvantage in enforcing their rights. The bill will address this by providing that, for victims' claims against offenders, the 6-year limitation period will be suspended *during all periods that the offender is in prison.*

41. The Minister was perhaps even clearer during the second reading debate.[59]

> Victims have always had the right to take civil claims against offenders for the harm or loss they have suffered. However, they rarely do. In part, that is because they are at a particular disadvantage: by the time the offender is released from prison, the 6-year limitation period has often expired. The bill will address that by providing that for civil claims by victims against offenders, the 6-year limitation period will be suspended *whenever the offender is in prison.*

42. The Associate Minister of Justice (Hon Rick Barker) had carriage of the Bill in the Committee of the whole House. He noted it "alters the statute of limitations and suspends it *so there is a much longer period in which people can make a civil claim.*"[60]

43. And during the third reading debate, the Associate Minister summed up:[61]

> … it greatly enhances victims' rights to pursue civil damages claims against an offender. It does this in two ways. Firstly, it suspends the limitation period that applies to all civil claims *while an offender is in prison*. Offenders in prison cannot earn money, which means that making civil claims for damages against them is a waste of time.

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[58] (14 December 2004) 622 NZPD 17988 (emphasis added) **[JBOA Tab 18].**

[59] (12 May 2005) 625 NZPD 20556 (emphasis added) **[JBOA Tab 19].**

[60] (1 June 2005) 626 NZPD 21000 (emphasis added) **[JBOA Tab 21].**

[61] (1 June 2005) 626 NZPD 21016–7 (emphasis added) **[JBOA Tab 21].**

> Suspending the limitation period means that the victim will have more time after the prisoner is released in which to pursue a claim …

44. The generally expansive approach may also be seen in the text of cls 60(2)(a)(ii) and (iii).[62] These extended the reach of the sentence of imprisonment during which time on the limitation period stops running, beyond the offence pertaining to the present victim. They did so by stopping time running during any cumulative sentences that pre- or post-dated that sentence, but which were temporally connected to it.

45. None of the parliamentary materials suggest an intention to differentiate between periods an offender spent in prison prior to, or following, the imposition of their sentence, for the purpose of extending the period within which victims could bring claims. The question this Court must answer is whether Parliament carried forward the Government's intent into the text used in the ensuing enactment, or frustrated it.

**The law of sentences**

46. Like limitation periods, criminal sentences are creatures of statute. For offences against the general law,[63] the sentence imposed, and where that sentence is served (that is, in the case of imprisonment, the proportion of it served in prison), is governed by the Sentencing and Parole Acts 2002. These were enacted concurrently and "were intended to provide for a coherent approach to sentencing and parole."[64]

47. In determining the length of any sentence of imprisonment to be imposed, sentencing courts must not take into account any part of the period during which the offender was on pre-sentence detention.[65] Parliament has made the calculation and crediting of pre-sentence detention towards a sentence an administrative task, rather than a judicial one.[66]

48. Once a sentence of imprisonment is imposed, ss 90(1) and 91 of the Parole Act come into play. The former provides:

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62 Which became ss 64(2)(a)(ii) and (iii) **[JBOA Tab 5]**.

63 The military justice system is explored in greater detail at paragraphs [80]–[82] below.

64 *Booth v R* [2016] NZSC 127, [2017] 1 NZLR 223 at [43] **[JBOA Tab 11]**.

65 Sentencing Act 2002, s 82 **[JBOA Tab 8]**.

66 Parole Act 2002, s 88 **[JBOA Tab 4]**.

> For the purpose of calculating the key dates and non-parole period of a sentence of imprisonment (including a notional single sentence) and an offender's statutory release date and parole eligibility date, an offender is deemed to have been serving the sentence during any period that the offender has spent in pre-sentence detention.

49. "Key dates" include a sentence's start and expiry dates.[67] The start date is usually the date upon which it is imposed.[68] As a matter of logic, and coherent application of the Parole Act, parole eligibility, statutory release and sentence expiry dates cannot predate the start date.[69] At least in that sense, the Parole Act is forward-looking.[70]

50. But s 90(1) is also backward-looking.[71] Corrections must calculate any period an offender has spent in pre-sentence detention, and apply it to answer the legal question of when their parole eligibility, statutory release and sentence expiry dates occur.

51. Pre-sentence detention is defined by s 91 of the Parole Act. That definition is expansive in two ways.

    51.1 It applies to detention at any stage during the proceedings leading to the conviction or pending sentence—whether or not that period of detention relates to the charge on which the person was eventually convicted.[72]

    51.2 It includes other forms of detention apart from prison, including (for example) detention in a hospital or secure facility.[73]

52. So although a sentence of imprisonment has the duration a court specifies, ss 90(1) and 91 of the Parole Act deem a range of forms of pre-sentence

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67 Parole Act, s 4(1) **[JBOA Tab 4]**.

68 Parole Act, s 76 **[JBOA Tab 4]**. Exceptions to this rule are contained in ss 77–81. They include cumulative sentences "The start date of a notional single sentence is the start date of the first sentence in the series of sentences that forms the notional single sentence" (s 77), and sentences deferred under the Sentencing Act (s 78).

69 *Prince v Chief Executive, Department of Corrections* [2019] NZHC 3381, [2020] 2 NZLR 260 at [33]–[37] **[JBOA Tab 13]**.

70 *Prince,* above n 69, at [33] **[JBOA Tab 13]**.

71 *Prince,* above n 69, at [37] **[JBOA Tab 13]**.

72 Parole Act, s 91(1)(a) **[JBOA Tab 4]**.

73 Parole Act, s 91(2) **[JBOA Tab 4]**.

detention to have been part of the sentence. This benefits the offender, by avoiding them spending more time in custody than the sentence actually imposed.[74]

53. Section 90(1) does not "shorten" a sentence of imprisonment. Rather, it determines what counts towards serving the sentence. If an offender has spent time in custodial remand, this counts as part of the sentence, and is taken into account for the purposes of calculating parole eligibility, statutory release and sentence expiry dates. If an offender has spent as much—or more[75]—time in pre-sentence detention than the sentence of imprisonment actually imposed, their sentence expires (and they will be released) on the day it is imposed. But this does not mean they have not actually served a sentence of imprisonment at all.

**Applying s 90(1) of Parole Act to s 64 of the PVCA**

54. The relevance of this to s 64 of the PVCA is that it demonstrates what s 90(1) of the Parole Act actually does. It determines what counts as time spent serving a sentence of imprisonment, and therefore what remains of the sentence to serve. It does not alter the length of the sentence itself.

55. The appellant argues s 64 of the PVCA must be read in isolation from the Sentencing and Parole Acts. He says the suspension of time running on a limitation period commences when the court imposes sentence (ie the sentence start date), and ends upon release from prison (whether on parole, or at the statutory release date). However, those dates have no fixed, independent meaning. They may only be reckoned by reference to any time spent in pre-sentence detention.

56. The appellant's approach is liable to produce arbitrary outcomes. This is demonstrated by a scenario involving offenders of equal culpability, sentenced to identical terms of imprisonment (say, three years), neither of whom is released on parole. Their respective victims experienced equal harm. But Offender A was remanded on bail prior to sentencing, while Offender B was remanded in custody. The effect of s 90(1) of the Parole Act

74 *Booth v R,* above n 64, at [34] **[JBOA Tab 11]**.

75 *Prince,* above n 69 **[JBOA Tab 13]**.

is that both spend the same overall period in custody, but Offender A spends two years in prison following sentence, while Offender B spends three. On the appellant's proposed interpretation, the limitation period for tort claims against Offender A stops running for three years, whereas against Offender B it stops running only for two. Offender B's victim is in a worse position to bring a claim than Offender A's victim, because of factors beyond their control and irrelevant to the harm they experienced.

57. The text of s 64 does not require such an approach. Its reference to serving a sentence of imprisonment in a prison cannot be understood in isolation from the Sentencing and Parole Acts.

57.1 The PVCA defines a sentence of imprisonment as "imposed … under any 1 or more enactments or other rules of law (for example, … the Sentencing Act 2002)."[76]

57.2 Whether, and how much of, a sentence of imprisonment is served in prison, or in the community on parole, depends on the operation of the Parole Act.

58. The concept of pre-sentence detention—and the deeming effect it has on a sentence of imprisonment—is integral to answering questions that are relevant for the purposes of s 64. These include:

58.1 When an offender serving a long-term sentence becomes eligible for parole[77] (which, if granted, would restart time running on a limitation period).

58.2 When an offender serving a short-term sentence reaches their statutory release date (such that time running on a limitation period restarts).[78]

58.3 When a sentence of imprisonment expires (such that an offender must be released, if not already paroled—and time running on a limitation period restarts).

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[76] PVCA, s 4(1) **[JBOA Tab 5]**.

[77] Generally, after serving one-third of their sentence, unless a minimum term of imprisonment has been imposed: Parole Act, s 84(1) **[JBOA Tab 4]**.

[78] Generally, after serving half their sentence: Parole Act, s 86(1) **[JBOA Tab 4]**.

59. Put another way—and even on the appellant's proposed interpretation—s 64 of the PVCA *must* apply s 90(1) of the Parole Act, insofar as the latter determines dates on which an offender may or will cease to serve their sentence in prison. The underlying basis for those dates—and the deeming of pre-sentence detention as time served—must also apply to s 64.

***Serving a sentence of imprisonment "in a penal institution [or] prison"***

60. The appellant observes that s 64 applies to a sentence of imprisonment "serv[ed] in a penal institution [or] prison", in respect of the offence related to the victim bringing a claim. He contends these conditions cannot be reconciled with s 91 of the Parole Act. This is because it contemplates pre-sentence detention in non-penal environments, which may have accrued because of unrelated offending, also counting as credit against a sentence.

61. Section 64's reference to a sentence of imprisonment "serv[ed] in a penal institution [or] prison" must be seen in its historical context. When the PVCA was enacted, the Sentencing Act provided that a sentence of imprisonment could either be served in prison, or (with leave of the Parole Board) by way of home detention.[79] (Home detention became a standalone sentence in 2007.[80]) Parliament intended to limit the suspensory effect of s 64 to sentences of imprisonment served in prisons, rather than alternative means of serving such sentences, such as by home detention. The same point may be made in relation to sentences of imprisonment served in the community on parole (during which time runs on a limitation period), as opposed to sentences of imprisonment served in prison as a result of a final recall (during which time the limitation period is again suspended).

62. The phrase "serving a sentence of imprisonment in a penal institution [or] prison" should be read in this light. Time stops running on a limitation

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[79] Sentencing Act, ss 97–99 (now-repealed) **[JBOA Tab 9]**; and per Simon France (ed) *Adams on Criminal Law* (online ed, Thomson Reuters) at [SA80A.01]: "As initially enacted in the Sentencing Act 2002, home detention was a way of serving a sentence of imprisonment, rather than a sentence in its own right. Under the Sentencing Amendment Act 2007, the sentence of home detention is a stand-alone sentence. Sections 97 to 99 providing for what became known as 'front-end' home detention are now repealed."

[80] Sentencing Amendment Act 2007, s 10 (inserting ss 15A and 15B into the Sentencing Act), and s 44 (inserting ss 80A–80ZM into the Sentencing Act).

period during:

62.1 A sentence of imprisonment *that is to be served in prison* (as opposed to on home detention); and

62.2 Periods of time during which a sentence *is actually served in prison* (as opposed to in the community on parole).

***Retrospective application***

63. A limitation period could, on the Secretary's analysis, expire during pre-sentence detention, only to be retrospectively revived if that period is later deemed part of a sentence of imprisonment. The appellant argues this gives rise to untenable uncertainty.

64. As the Court of Appeal observed, the PVCA expressly contemplates that an expired limitation period may, in some circumstances, be revived. "[T]he calculation of the period of any suspension will inevitably involve a hindsight or retrospective analysis" where cumulative sentences are engaged, or a final recall order is made.[81] Further, the revival of a right to bring an action after a limitation period has expired is not unknown to the general law.[82]

65. Retrospectivity is also contemplated by s 63 of the PVCA: it applies to acts done before the PVCA commenced,[83] an action started before the PVCA commenced,[84] and "one in respect of which a limitation defence … could, before the commencement … of this Act, have been pleaded successfully".[85]

66. The need to avoid retrospectivity (and the uncertainty it is said to create) is not a strong theme underlying either the PVCA or the general law of limitation.

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81 CA judgment, above n 23, at [43].

82 See, for example, [30.4] above.

83 PVCA, s 63(1)(c) **[JBOA Tab 5]**.

84 PVCA, s 63(2)(a) **[JBOA Tab 5]**.

85 PVCA, s 63(2)(b) **[JBOA Tab 5]**.

**"Anomalies"**

*Concurrent sentences*

67. Section 64 is capable of producing anomalies in its application to different types of sentences. One identified by the appellant is the provision's application to concurrent sentences. Unlike cumulative sentences, s 64 is silent regarding them. This is liable to have anomalous consequences for a victim of an offence that is not the lead offence in a concurrently-structured sentence.

68. In a concurrent sentencing exercise, the court will adopt a starting point for the lead offence, and uplift the sentence for other (lesser) offending. The end result will be that the longest sentence is imposed on the lead offence only, with shorter, concurrent sentences attributed to the other offending. The offender will continue to serve their lead sentence of imprisonment after the shorter sentence has expired. But time will restart running on the limitation period in respect of the non-lead offending, sooner than had it been the lead offence, or one of several cumulative sentences.

69. This anomaly arises from s 64 itself—not the application of pre-sentence detention. It arises because s 64 makes no specific provision for concurrent sentences. Thus despite extending the suspension of time running on a limitation period to include periods spent serving cumulative sentences—even where those sentences arise from unrelated offending—it does not do so where the offending is a connected series of events.[86]

70. The appellant contends this disparity suggests the Sentencing and Parole Acts cannot provide interpretative context for s 64.[87] But it is not those Acts that create the problem. It is the PVCA that makes no provision for concurrent sentences. The fact the suspension is limited to the sentence related to the victim's claim creates the anomaly in question.

*Non-custodial sentences*

71. The appellant observes that an offender may spend time in pre-sentence detention but ultimately receive a non-custodial sentence. This is said to

86 Sentencing Act, s 84(2) and (3) **[JBOA Tab 8]**.

87 Appellant's submissions at [7.14].

create arbitrary results, because pre-sentence detention will not always be counted under s 64.

72. This anomaly is no greater than the ordinary course of events under the Sentencing and Parole Acts, when an offender spends time in pre-sentence detention, but then receives a non-custodial sentence. Sections 90(1) and 91 of the Parole Act—and s 82 of the Sentencing Act—only apply to sentences of imprisonment. Outside of that framework, time spent in pre-sentence detention *may* be taken into account in reducing the non-custodial sentence.[88]

73. The Secretary does not suggest that *all* pre-sentence detention is captured by s 64, irrespective of the actual sentence imposed. Parliament has determined that the imposition of a sentence of imprisonment is the threshold to suspend time running on a limitation period. Once that threshold is crossed, pre-sentence detention is deemed part of that sentence for limitation purposes. But pre-sentence detention is never deemed to be part of any non-custodial sentence—rather, it may be taken into account as a mitigating factor. The different approaches to pre-sentence detention in ordinary sentencing practice have no implications for s 64.

74. The issue is not that pre-sentence detention will not always be counted under s 64: it is that the *sentence imposed* will not always be counted. Any sentence lower than imprisonment in the hierarchy of sentences is not subject to s 64. This reflects Parliament's policy choices when enacting the PVCA.

*No reference to pre-sentence detention in the PVCA*

75. The appellant points to the absence of reference to pre-sentence detention in the PVCA, and the fact that s 64 refers to an "offender" rather than "prisoner" as factors suggesting pre-sentence detention was not meant to apply. The answer to this lies in the same point explored above, namely that s 64 does not apply to pre-sentence detention as a matter of course.

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88 *Wilson v Police* [2013] NZHC 3455 at [14]; *Kidman v R* [2011] NZCA 62, (2011) 25 CRNZ 268 at [15]–[18].

It does not apply to accused persons remanded in custody but who were subsequently acquitted, or received a non-custodial sentence.[89]

76. There are good reasons for there being limited reference to the Parole Act in the PVCA itself (and more particularly, in s 64). The administration of (civilian) sentences is exclusively a matter for the Sentencing and Parole Acts. There is no need for express reference to those enactments every time they might be engaged. They are inherently engaged because they form wider legal context in which the sentence itself exists. The fact s 64(2)(b) includes explicit references to the Parole Act does not suggest that Act should otherwise be excluded by necessary implication, or that Parliament intended only to apply the rules of sentencing and sentence administration that are specifically referred to in the PVCA.

***Other statutory contexts do not assist***

77. Similar legislative provisions across the statute book do not assist to answer the question presently before the Court.[90] Each must be interpreted in its own context. Some are temporally specific, ie limited expressly or by necessary implication to the period *after* sentence has been imposed.

78. A useful example is the Electoral Act 1993. Section 80(1)(d)(iii) disqualifies persons "detained in prison under … a sentence of imprisonment for a term of 3 years or more".[91] It is axiomatic that almost all prisoners in pre-sentence detention are entitled to the presumption of innocence,[92] and there would be no justifiable basis upon which such prisoners could be excluded from political participation.[93] Nor would it be practicable to retrospectively disqualify electors during a period of pre-sentence detention, once a sentence of imprisonment is imposed. This could call into question the validity of votes they cast during pre-sentence detention,

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89 Indeed the term "prisoner" is used sparingly throughout the PVCA: only in the title, s 4 **[JBOA Tab 5]**.

90 Further to the Minute of the Court dated 4 May 2023 at [3] **[05.0009]**, on 12 July 2023 the Secretary filed a table of statutory references to the term "serving a sentence of imprisonment", and several analogous terms.

91 Electoral Act 1993, s 80(1)(a)(d).

92 The narrow exception would be persons who have been found guilty, but remanded awaiting sentence.

93 Apart from the fundamental question of their guilt or otherwise, it will not always be apparent prior to sentencing whether a prisoner will be sentenced to a term of three years' or more imprisonment, or a

which may in turn have been determinative of electoral outcomes.

79. More fundamentally, it is not obvious that whatever interpretation this Court adopts of s 64 of the PVCA will have flow-on implications for other statutes containing analogous provisions.

***The military justice context***

80. Section 64 of the PVCA refers to "serving a sentence of imprisonment in a … service prison". It is therefore necessary to say something about sentence calculation and detention in the military justice context.

81. The Armed Forces Discipline Act 1971 (**AFDA**) mirrors s 82 of the Sentencing Act (the prohibition on courts taking pre-sentence detention into account, when determining the length of a sentence of imprisonment) and s 90(1) of the Parole Act (pre-sentence detention is deemed to be time served).[94] The same underlying principle—time spent in detention prior to sentence is deemed to have been time serving a sentence of imprisonment—applies in both civilian and military justice regimes.

82. However, "pre-sentence detention" *per se* is not known to the military justice system. The closest analogue is "custody".[95] It would have been cumbersome to include the different permutations of detention prior to sentence in the drafting of s 64. This reinforces the view that s 64 was intended to be applied against the backdrop of the relevant general provisions of sentence calculation and administration applying in the respective civilian and military justice contexts.

**Doctrine of legality**

83. The appellant contends he has a property interest in the chose in action crystallised by his settlement with Corrections.[96] He says the PVCA interferes with his ability to enjoy his property,[97] and the doctrine of

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lesser period.

94 AFDA, ss 81A and 177A.

95 Defined to mean detention in "civil custody" or under "close arrest", but exclude "open arrest": AFDA, ss 81A(3).

96 Appellant's submissions at [10.2]. Counsel for the Secretary would characterise the appellant's property interest differently. It has moved on from being a mere chose in action; his interest is now in the funds held by the Crown in trust for him: PVCA, s 19(4) **[JBOA Tab 5]**.

97 Appellant's submissions at [10.3].

legality means such interferences must be authorised by express words or necessary implication.[98] He says the doctrine's requirements have not been met with respect to suspending time running on the limitation period during his pre-sentence detention.[99]

84. The respondent also has a relevant property interest. Putting to one side for the moment the operation of the PVCA:

84.1 For the first six years following the offence, he had his own chose in action—a tort claim for the assault the appellant committed against him.[100]

84.2 Ordinarily the Limitation Act would interfere with the respondent's property right after six years, by preventing him from bringing an action to recover on it.

85. On the appellant's argument, legislation interfering with the respondent's property right should also be construed strictly.[101] The corollary would be that any exception to that legislation that would lessen the interference with his property right (including by suspending time running on the limitation period) should be construed beneficially.

86. This analysis demonstrates the double-edged nature of limitations statutes. General limitation provisions benefit intended defendants, at the expense of intending plaintiffs. Exceptions to general limitation provisions benefit intending plaintiffs, at the expense of intended defendants. But read together, general limitation provisions and the exceptions to them reflect a legislative policy judgement as to the appropriate balance between these competing interests, in a given situation.

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98 At [10.2], [10.5].

99 At [10.5].

100 Assuming that property right had not been extinguished by the time of the Tribunal's award, at that point it too moved on from being a mere chose in action, and became a $5,000 debt owed to him by the appellant.

101 *Méthot v Montreal Transportation Commission* [1972] SCR 387 at 397–8 per Hall J; *Australian National Airlines Commission v Newman (*1987) 162 CLR 466 at 471 per Mason CJ, Deane, Toohey and Gaudron JJ.

87. Professor Gino Dal Pont highlights the difficulty in relying upon interpretive maxims in this context.[102]

> [1.35] … Relatively recently Lord Millett opined that statutes of limitation "are regarded as beneficial enactments and are construed liberally", but did not elaborate the point. It remains to be asked: beneficial to whom? And in speaking of a liberal construction, again it may be queried: in whose favour? …
>
> [1.36] When, however, speaking instead of provisions directed to extending time—which benefit the plaintiff, not the defendant—there are judicial remarks branding them "protective and beneficial", to be thus construed in a "beneficial and reformatory fashion". This, opined Kirby J, means that such provisions "should not be narrowly construed or applied", so that when alternative interpretations are available, "it is more consistent with the reformatory purposes of [the provisions] to adopt the 'beneficial' or 'liberal' approach, to the full extent doing so is consistent with the statutory language."
>
> While some other judges share this view, it by no means enjoys judicial unanimity. At least two other [Australian] High Court judges have refused to countenance a liberal construction of these provisions, informed in part by an object of limitations statutes to stave off uncertainty. …

**COSTS**

88. The Secretary is not a party to this appeal.[103] He has appeared by counsel in response to this Court's invitation "to appear and to present argument as counsel assisting."

89. Section 178(2) of the Senior Courts Act 2016 enables this Court to order any party to pay the Secretary's costs, or the Secretary pay any party's costs. However, absent unusual circumstances, it is not the courts' ordinary practice to order a party to pay counsel assisting's costs, or counsel assisting to pay a party's costs.

90. The Secretary does not seek costs. He also resists any order to pay the appellant's costs.

91. If the Secretary believes on reasonable grounds that a limitation defence could defeat a victim's claim, the Secretary is not required to give the victim

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[102] G E Dal Pont *Law of Limitation* (LexisNexis Butterworths, Sydney, 2016) at 21–22 (internal footnotes omitted) **[JBOA Tab 17]**.

[103] Cf Appellant's submissions at [12.5].

notice that funds have been paid into the Victims' Claims Trust Account.[104] On the present facts, it was reasonable for the Secretary to advise the respondent of his right to claim, and leave any limitation issue to be resolved by the Tribunal (and courts on appeal).[105] It would not have been reasonable for the Secretary to pre-emptively deprive the respondent of the opportunity to argue his claim was not limitation-barred—an argument the Tribunal and two courts below have subsequently accepted.

13 July 2023

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D J Perkins / Z R Hamill / I M C McGlone
Counsel for the Secretary for Justice

**TO**: The Registrar of the Supreme Court of New Zealand.

**AND TO**: The appellant.

104 PVCA, s 21(5) **[JBOA Tab 5]**.

105 Cf Appellant's submissions at [12.6].

**List of authorities to be cited by respondent**
**Statutes**
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Electoral Act 1993, s 80

Employment Relations Act 2000, s 114

Limitation Act 1950, ss 4

Limitation Act 2010, ss 11, 14, 15, 17, 44, 45, 47, 59

Parole Act 2002, ss 4, 9, 76, 82, 88, 90, 91

Prisoners' and Victims' Claims Act 2005, ss 3, 5, 18, 19, 20, 21, 51, 63, 64

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**Cases**
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*Kidman v R* [2011] NZCA 62, (2011) 25 CRNZ 268

*Prince v Chief Executive, Department of Corrections* [2019] NZHC 3381, [2020] 2 NZLR 260

*Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC)

*Wilson v Police* [2013] NZHC 3455

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*Birmingham City Council v Abdulla* [2012] UKSC 47, [2013] 1 All ER 649

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New Zealand Law Commission *Tidying the Limitation Act* (NZLC R61, 2000)