**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA** **SC 30/2025**

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| **UNDER** | the Prisoners' and Victims Claims Act 2005 |
| **BETWEEN** | **TRACEY IDA PEKA AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA HAWKINS**<br><br>Appellant |
| **AND** | **SAM TE HEI**<br><br>Respondent |

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# SUBMISSIONS OF APPELLANT

**23 DECEMBER 2025**

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— CHAMBERS —

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## E TE KŌTI, MAY IT PLEASE THE COURT –

## 1. SUMMARY

1.1 Sam Te Hei, the respondent, was convicted of killing the 16-year old daughter of the late Ida Hawkins, Colleen Burrows.[1] He was sentenced to life imprisonment. The Crown agreed to pay Mr Te Hei $17,664 for breaches of his rights while in prison. Mrs Hawkins is entitled to claim against this compensation under the PVC Act,[2] provided she has a cause of action which would allow recovery of damages.[3] The Tribunal accepted her claim and awarded her $15,000 for emotional harm;[4] this decision was overturned on appeal, after the High Court found there to be no qualifying cause of action which would allow a claim for damages.[5]

1.2 The Court of Appeal allowed Mrs Hawkins' appeal in part and referred the claim back for the Tribunal to consider whether she has a personal claim for mental injury against the respondent.[6] Under the Court's formulation of the law, however, her estate would have to prove events from nearly 40 years ago caused Mrs Hawkins to suffer from a recognisable psychiatric condition; and the effect of Mrs Hawkins, mercifully, not being present at the horrific crime is unclear.

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[1] Mrs Hawkins died after the Court of Appeal hearing and before its decision was released. Her appeal is now being pursued by the personal representative of her estate, Tracey Peka, who is Mrs Hawkins' daughter and Colleen Burrows' sister.

[2] The *PVC Act* means the Prisoners' and Victims' Claims Act 2005.

[3] Section 46(2) of the PVC Act sets three criteria which must be satisfied before a victim's claim may be accepted. Only criterion (c) is in dispute. It reads:

> *The Tribunal must not accept a victim's claim unless satisfied, on the balance of probabilities, that … the claim discloses a cause of action that is, under the general law, one for which damages are, in the particular case, payable.*

[4] *Tribunal* means the Victims' Special Claims Tribunal, established under s 58 of the PVC Act; Judge CS Blackie sat as the Tribunal in this case: *Hawkins v Te Hei* [2021] NZVSC 31 (*Tribunal Decision*).

[5] *Te Hei v Hawkins* [2022] NZHC 3170 (*HC Decision*).

[6] *Peka v Te Hei* [2025] NZCA 32; [2025] 2 NZLR 353 (*CA Decision*).

1.3 The death of her daughter changed Mrs Hawkins' life forever. Intimidated by Mongrel Mob members, she became a recluse and hypervigilant about the safety of her other children. Although the men responsible for Colleen's death served sentences of imprisonment, no compensation has ever been paid to Mrs Hawkins or her whānau.

1.4 This case presents a significant conundrum. Mrs Hawkins'claim exemplifies the purpose of the PVC Act, [7] and damages for emotional harm are recognised in both criminal and civil contexts. Despite this, the High Court and Court of Appeal were unable to find a clear pathway which would allow her to recover damages from the person responsible for raping and murdering her daughter.

1.5 The appellant asks this Court to confirm a claim for mental harm does not depend on proof of a psychiatric condition – an advance advocated by Thomas J in *van Soest v Residual Health Management Unit*[8] and now recognised in Canada – nor require a claimant to have witnessed the incident, as was contemplated by the court in *van Soest* [9] She also asks the Court to confirm the right to claim emotional harm damages for wrongful death forms part of the general law. If the Court were to find either pathway was available to Mrs Hawkins, the original award of $15,000 could be restored and her claim need not be referred back to the Tribunal.

[7] Mrs Hawkins appeared before the Select Committee during submissions on the PVC Bill and her case was expressly cited in support of the Bill by some MPs during its third reading.

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

[9] *Saadati v Moorhead* [2017] RCS 543.

## 2. CONTEXT

### Colleen Burrows' death

2.1 The circumstances of Colleen Burrows' death are not in dispute.[10] On 18 June 1987, the teenager was on her way to get takeaways when she was picked up on the street by Mr Te Hei and another man, both Mongrel Mob members. After Colleen refused them sex, the men raped her, kicked her to death with steel-capped boots and drove over her repeatedly with their car. Colleen's body was too badly mutilated for her mother to see her and say goodbye. In the words of the Parole Board, it was "*an appalling and vicious crime*".[11]

2.2 Sam Te Hei was convicted in November 1987 and remained in prison for more than 30 years. He was released on parole in April 2018.

### Mrs Hawkins' Claim

2.3 The PVC Act was passed after public disquiet about prisoners being awarded significant monetary amounts for wrongful treatment in prison, while their victims remained uncompensated for the offending against them.[12] The Act provides a scheme which controls the ability for prisoners to claim monetary relief and a means by which victims can claim against awards of compensation.[13]

2.4 On 16 November 2020, after the Crown agreed to pay Mr Te Hei $17,664 for breaches of his rights while in prison, Mrs Hawkins filed a claim with the Tribunal under the PVC Act. Judge Blackie accepted Mrs Hawkins' claim. He awarded her $15,000 in compensation for

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[10] CA Decision at [1].

[11] Parole Board decision dated 5 March 2008 at p 2 **COA 101.0052.**

[12] CA Decision at [8]. Also: Hon P Goff, first reading (14 Dec 2004) 622 NZPD 17987; *van Sifhout* v *Pathirannehegage* [2023] NZSC 148, [2023] 1 NZLR 560 (SC).

[13] The CA Decision sets out this statutory framework more fully at [8] to [17].

emotional harm, but declined to award exemplary damages.[14] In the High Court, Palmer J overturned this decision on appeal, finding there to be no cause of action in the general law which would allow Mrs Hawkins to claim damages for emotional harm or exemplary damages; this being a precondition for claims under the PVC Act.[15]

2.5 Mrs Hawkins appealed to the Court of Appeal, which determined:[16]

(a) she did not have a claim for emotional harm, because the statutory wrongful death action under the DAC Act[17] only allowed recovery of economic loss and there was no action for wrongful death available under the common law;[18] but

(b) it was possible she may have a claim for mental injury arising from the circumstances of Colleen's rape and murder; and

(c) the case should be referred back to the Tribunal for it to consider whether -

(i) Mrs Hawkins suffered a recognisable psychiatric condition as a consequence of her daughter's death;

(ii) the action required her to have witnessed the murder or its aftermath; and

(iii) assuming compensatory damages for psychiatric injury would have been barred by the ACA 1982, her claim met the threshold for an award of exemplary damages.[19]

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[14] *Hawkins v Te Hei* [2021] NZVSC 31.

[15] Section 46(2)(c) of the PVC Act.

[16] CA Decision at [91] – [93].

[17] *DAC Act* means the Death by Accidents Compensation Act 1952.

[18] CA Decision at [69].

[19] CA Decision at [87].

## 3. ISSUES ON APPEAL

3.1 This Court has approved leave to appeal and cross appeal on two questions:[20]

(a) whether the Court of Appeal was correct to allow the appeal and dismiss the cross-appeal; and

(b) whether the Court of Appeal was correct to refer Mrs Hawkins' claim back to the Tribunal for reconsideration in light of its judgment.

3.2 These submissions address the second question and raise the following subsidiary issues:

(a) Under a common law action for mental injury -

(i) What constitutes mental harm and how may it be proved?

(ii) Is it necessary for a plaintiff to have witnessed the negligent event or its aftermath?

(b) Was the Court of Appeal correct to find Mrs Hawkins had no right under the DAC Act or at common law to claim damages for emotional harm resulting from the wrongful death of her daughter?

(c) Would the ACA 1982[21] have barred Mrs Hawkins from recovering damages for mental injury and/or emotional harm? And, if "yes", does the claim meet the threshold for an award of exemplary damages?

[20] *Peka v Te Hei* [2025] NZSC 208.

[21] *ACA 1982* refers to the Accident Compensation Act 1982.

(d) Can this Court finally determine all outstanding issues or should the claim be sent back to the Tribunal for reconsideration?[22]

3.3 There is no issue as to quantum as neither party appealed the Tribunal's award of $15,000.

3.4 Mrs Hawkins died shortly after the hearing in the Court of Appeal, while its judgment was still reserved.[23] In its decision, the Court addressed the possibility s 3(2) of the Law Reform Act 1936 would preclude her estate from recovering exemplary damages, but considered there to be a strong argument s 3(2) did not apply in cases where a party dies after a judgment has been delivered but before its validity has been fully tested on appeal.[24] Ms Peka, as personal representative of her mother's estate, respectfully concurs with this argument and also reserves her right to make further submissions if the respondent takes a contrary position.

## 4. COMMON LAW CLAIM FOR MENTAL HARM

4.1 The Court of Appeal allowed Mrs Hawkins' appeal because it considered she may have a claim for mental injury. As the Tribunal had not considered this cause of action when it determined Mrs Hawkins' claim, the Court of Appeal considered the case should be sent back to the Tribunal for reconsideration.

4.2 The Court acknowledged the law in this area was undeveloped, including as to the nature of harm and what, if any, physical or temporal proximity requirements may apply to a claim for mental injury resulting from a shocking event.[25] It said any claim would

[22] The jurisdiction of the High Court on appeal is set out in s 51 of the PVC Act.

[23] CA Decision at [6].

[24] CA Decision at [88]-[90].

[25] CA decision at [87].

depend on evidence Mrs Hawkins had suffered a recognisable psychiatric illness; whether the law required her to have witnessed the event or its aftermath; and (assuming psychiatric injury was covered by accident compensation at that time) whether it met the threshold for exemplary damages.[26] It said, while it was a matter for the Tribunal to determine its own procedure, the situation may require further evidence, written submissions and an oral hearing.[27]

4.3 Unless the law in this area is revisited, the Tribunal would be bound by the Court of Appeal decision of *van Soest*,[28] which stipulated the need for proof of a recognisable psychiatric injury. As the courts in this country have not definitively determined whether to adopt a requirement for temporal and physical proximity, Mrs Hawkins' claim would not appear to depend on her having witnessed the murder or its aftermath (as is the case in the United Kingdom); but the uncertainty of this position could render her claim – or similar claims determined by the Tribunal – vulnerable to appeal.

4.4 The Court of Appeal also suggested expert evidence and oral submissions would be required to establish mental harm. It is understood the Tribunal has several similar claims waiting for the outcome of this decision. If this were the only way to recognise victims' claims involving wrongful deaths under the PVC Act, the scale, complexity and cost of proving harm could undermine the statutory scheme, which was intended to be "*as simple as possible while still being consistent with natural justice requirements*".[29] It was also Parliament's expectation the Tribunal would be able to rely on findings in the criminal proceeding and information provided

[26] CA Decision at [87].

[27] CA Decision at [93].

[28] *van Soest* (refer note 8).

[29] Hon P Goff (14 Dec 2004) 622 NZPD 17987.

in victim impact statements – much like the approach of sentencing courts when imposing reparation for emotional harm. [30]

**van Soest[31]**

4.5 In this 1999 decision, a panel of five judges considered whether families of patients who had died due to medical misadventure could claim damages for mental suffering consequent upon their death. None of the appellants had witnessed the deaths nor suffered a psychiatric injury as a consequence of the negligence. Importantly, no plaintiff claimed to have suffered more than grief and shock.

4.6 The Court of Appeal was unanimous in dismissing the appeals but divided as to the proper approach to actions claiming mental injury consequent upon a death.

*Measure of harm*

4.7 In determining the requisite degree of mental injury, the majority of the court chose to follow the approach of the English courts:[32]

> [That] a claim by a secondary victim for mental suffering caused by awareness of death or injury to a primary victim through the negligence of the defendant will not lie unless the effect on the mind of the secondary victim has manifested itself in a recognisable psychiatric disorder or illness.

It noted this was also the approach in Australia and Canada at that time, albeit the position was not universally supported.[33]

4.8 In a minority decision, Thomas J would have relaxed the requirement for a recognisable psychiatric condition and replaced

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[30] In *Sargeant v Police* (1997) 15 CRNZ 454, 458, Hammond J acknowledged victim impact statements and reparation reports were "*routinely deficient in terms of their information*" but said "*the Court cannot and should not have to run a civil trial in a criminal setting [and] criminal Courts should not be delayed by the necessity of inquiring into complicated loss of damage assessments*."

[31] *van Soest* (above n 8).

[32] At [65].

[33] At [51]-[55] and [57].

it with proof of a degree of mental suffering "*which is plainly outside the range of ordinary human experience"*.[34] He said:

> In this way the law will be less arbitrary, more fair, and open to develop in accordance with the fundamental principles of the law of negligence. Eventually, it may be enough for a mentally injured plaintiff to show that his or her grief and sorrow is more than the grief and sorrow which is part of the ordinary vicissitudes of life.

*Proximity*

4.9 In *van Soest*, the Court acknowledged the English approach would also require there to be physical and temporal proximity in cases of this kind; this meant plaintiffs (even those with close familial ties, like Mrs Hawkins) had to have witnessed the negligently-caused event which caused the death, or its immediate aftermath.[35] The majority reserved its position on the need for a plaintiff to have witnessed an event, noting it was not striking out the claims in that case "*for want of physical proximity to the relevant operation and its aftermath*".[36] For his part, Thomas J would have rejected outright any relational, geographical or temporal proximity restrictions, which he attributed to courts being overly concerned with "*the desire to avoid liability in an indeterminate amount for an indeterminate time and for an indeterminate class*".[37] In his view, the reasonable foreseeability of harm test which ordinarily applied in negligence claims was a sufficient safeguard against the risk of unlimited liability.[38]

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[34] At [107].

[35] *Alcock* v *Chief Constable of South Yorkshire Police* [1992] 1 AC 310; [1991] 4 All ER 907, HL; *McLoughlin* v *O'Brian* [1983] 1 AC 410; [1982] 2 All ER 298; [1982] RTR 209, HL.

[36] *van Soest* (above n 8) at [74].

[37] At [79].

[38] At [93].

## Developments in comparable jurisdictions since *van Soest*

*Changes to approach of Australian courts*

4.10 In 2002, the High Court of Australia abandoned requirements for proximity in favour of a foreseeability of harm test. [39] However, subsequent statutory reforms in Australia have reinforced stringent requirements, including proof of a recognisable psychiatric condition in claims for mental harm.

*Changes to approach of Canadian courts*

4.11 In *Saadati v Moorhead*, a 2017 negligence case involving mental harm, [40] the Supreme Court of Canada expressly endorsed the threshold proposed by Thomas J in *van Soest* for determining whether mental harm has occurred and what was required to prove it. [41] Brown J, writing for a unanimous court, held a medically-recognised psychiatric diagnosis was not required to prove compensable mental injury provided "*the disturbance suffered by the claimant is 'serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears' that come with living in civil society*." [42] This revised threshold removed the mandatory requirement for expert evidence.[43]

4.12 The Court also rejected an approach to mental harm claims which distinguished between "primary" and "secondary" victims and required a claimant to demonstrate relational, geographical and temporal proximity. [44] Brown J considered the strict proximity conditions to have been influenced by the common law courts' historic suspicion and mistrust of claims involving mental harm;

[39] *Tame v New South Wales* [2002] HCA 35, 211 CLR 317.

[40] *Saadati v Moorhead* (above n 9).

[41] At [29], [34] and [38].

[42] At [37].

[43] At [38].

[44] At [16].

this prejudice had led to distortions in the law whereby more onerous conditions were imposed on claims involving mental injury than on those involving physical injury.[45]

4.13 The Supreme Court was satisfied the usual criteria for negligence actions (duty of care, breach, causation and foreseeable harm) provided sufficient limits to guard against unmeritorious claims without the need to impose additional proximity requirements.[46] Brown J went on to say:[47]

> Each of these elements can pose a significant hurdle: not all claimants alleging mental injury will be in a relationship of proximity with defendants necessary to ground a duty of care; not all conduct resulting in mental harm will breach the standard of care; not all mental disturbances will amount to true "damage" qualifying as mental injury, which is "serious and prolonged" and rises above the ordinary emotional disturbances that will occasionally afflict any member of civil society without violating his or her right to be free of negligently caused mental injury [and] not all mental injury is caused, in fact or in law, by the defendant's negligent conduct.

4.14 The approach in *Saadati* has since been applied by the Superior Court of Justice in Ontario to claims involving mental harm consequent upon a death:

(a) In *Snowball v Ornge*[48] the Court declined to strike out a claim in negligence for mental distress brought by the family of a paramedic killed in an air ambulance helicopter crash.

(b) *Siguardson v Norbord*[49] involved a workplace accident which resulted in the death of a worker. The Court struck out claims from the deceased's mother and sister on the grounds there was no duty of care owed to them by the employer. However,

[45] At [14] – [15], [21].

[46] At [21].

[47] At [19].

[48] *Snowball v Ornge*, 2017 ONSC 4601.

[49] *Siguardson v Norbord* 2021 ONSC 5193.

it left open the possibility of a duty of care owed to the deceased's father because the inaction of the defendant had caused him to assume a rescuer role, whereupon he had discovered his son's body.

*No changes to approach of English courts*

4.15 In a recent decision, *Paul v Royal Wolverhampton NHS Trust*[50], the United Kingdom Supreme Court reviewed the English approach to common law actions for mental harm resulting from a death. Like *van Soest*, *Paul* was concerned with liability owed to next of kin relatives in cases of medical negligence causing death. In three separate cases, claimants had suffered psychiatric harm after witnessing the sudden deaths of close relatives from medical conditions which, it was claimed, ought to have been diagnosed and treated by their doctors. The Court did not have to review the threshold for establishing mental harm as it was accepted all prospective claimants were suffering from recognisable psychiatric illnesses or disorders.[51]

4.16 Lord Leggatt and Lady Rose, writing for the majority, found the doctors who treated the patients had not assumed responsibility for "*protecting members of the patient's close family from exposure to the traumatic experience of witnessing the death or manifestation of disease or injury in their relative*".[52] They also reconfirmed the traditional English approach of requiring physical and temporal proximity and went further, holding a claimant needed to have witnessed an external event which causes, or has the potential to cause, the injury; it was not enough simply to witness the death.[53]

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[50] *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1, [2024] 2 WLR 417.

[51] At [32].

[52] At [138]

[53] At [142].

4.17 The majority did not adopt recommendations previously made by the Law Commission, which would have replaced the strict proximity requirements for claims involving psychiatric injury with a reasonable foreseeability of harm test and retained the need for relational proximity in cases of this kind.[54]

## Mrs Hawkins' claim for mental harm

*What constitutes mental injury?*

4.18 It is conceivable an expert psychiatrist would conclude Mrs Hawkins more than likely suffered from post-traumatic stress disorder in the aftermath of Colleen's shocking death (albeit a diagnosis will be more difficult now she has died). However, if the Court were to follow the Canadian Supreme Court in *Saadati* and adopt the threshold for mental harm proposed by Thomas J in *van Soest*, further evidence would not be necessary as Mrs Hawkins has already provided sufficient proof. In an affidavit to the Tribunal, she said:[55]

> The horror of Colleen's death stays with me to this day…
>
> My whānau tried to keep all the details about Colleen's murder from me at first and they protected me at her funeral. Later, I learned the truth and I also found out that members of the Mongrel Mob had turned up to the funeral to intimidate my family…
>
> After Colleen died, I became reclusive. I was a widow at the time and still had two young children to look after. I locked myself in my house. I didn't barely ever go down to the shops. I also tried to keep my other children at home and wouldn't even let them go to school. I regret that now but at the time, it was the only way that I felt I could keep us all safe.
>
> Sam Te Hei was a member of the Mongrel Mob when he and the other member murdered Colleen. I know from the Parole Board hearings that he kept his gang affiliation and remained a high ranking member of the Mongrel mob while he was inside. I have no doubt whatsoever that the harassment I experienced from other Mongrel Mob members was to do with Sam Te Hei as

[54] Law Commission of England and Wales, *Liability for Psychiatric Illness* (1998) (Law Com no 249).

[55] Affidavit of Ida Hawkins at [2], [4], [6], [10]-[11].

> there was no other reason why they would be interested in me.
>
> Living in Napier, I knew and recognised people who were members of the Mongrel Mob. What people may not realise is that when a Mob member is convicted of a crime, the whole gang comes to their defence. In the gang's eyes, somehow my daughter was responsible for her own death and my family were to blame for two of their members being in prison.

4.19 This evidence is enough to establish the mental suffering and distress Mrs Hawkins experienced following Colleen's death was prolonged, serious and far beyond the realm of ordinary human experience. Judge Blackie was undoubtedly correct when he said *"[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 [Mrs Hawkins]. Her suffering, emotional harm is self-evident."*[56]

*Need to bear witness?*

4.20 The appellant submits the requirement for physical and temporal proximity ought not to apply in New Zealand.[57]

4.21 In *van Soest,* the majority of the court was sufficiently sceptical of the traditional House of Lords approach to proximity so as to leave this question open; while Thomas J would have expressly rejected it. [58] With respect, this is the correct approach; there are no principled or policy reasons for denying Mrs Hawkins' claim simply because she did not witness her daughter's murder or its immediate aftermath.

4.22 The United Kingdom Supreme Court in *Paul* had to reconcile claims of mental injury involving medical negligence with long-standing House of Lords authority requiring claimants to have witnessed an

[56] Tribunal Decision at [22].

[57] The appellant expresses no view on the question of relational proximity, as the issue does not arise here.

[58] Refer above at [4.9].

accident or its immediate aftermath.[59] As those authorities are not hardwired into New Zealand law, this Court does not need to proceed as cautiously. That the majority in *Paul* would have reached the same outcome had it settled instead on a more flexible foreseeability of harm test also provides an instructive reality check.[60]

4.23 Lord Atkin's "neighbour test" in *Donoghue v Stevenson* is more apposite: "*Who, then, in law, is my neighbour? The answer seems to be–persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*"

4.24 Sam Te Hei must have foreseen, by killing Colleen Burrows, he would likely cause mental suffering to those who loved her. It is not unreasonable to hold a person accountable for the wrongful death of another, particularly when the death is the result of intentional torts. It is also reasonable they provide solace to the deceased's whānau for their loss. Sam Te Hei caused Mrs Hawkins significant harm beyond what is expected of the human condition.

## 5. EMOTIONAL DAMAGES FOR WRONGFUL DEATH

### Damages for emotional harm (civil)

5.1 The general law in New Zealand recognises damages for mental distress and emotional harm in other contexts.

5.2 In *Mouat v Clark Boyce*,[61] the Court of Appeal held damages for mental distress were recoverable for a breach of duty arising from tort, contract or equity, provided the emotional harm was

[59] Refer above n 35.

[60] Refer above at [4.16] and n 52.

[61] *Mouat v Clark Boyce* [1992] 2 NZLR 559 (*Mouat*).

reasonably foreseeable at the time of the breach.[62] Richardson J referred by way of example, to "numerous" building cases where "moderate" damages had been awarded for emotional and mental stress. He said:[63]

> Where there is a duty of care to the plaintiff, the scope of the damages recoverable is essentially a question of remoteness of damage which turns on whether the particular harm was a reasonably foreseeable consequence of the particular breaches of duty which have been established …
>
> I can see no objection in principle or in terms of public policy to the award of such damages so long as the kinds of harm suffered were reasonably foreseeable consequences of the particular breaches of duty and were caused by those breaches of duty.

5.3 Damages for emotional distress, humiliation, loss of dignity, and injury to feelings are also recognised in employment cases;[64] and for breaches of human rights and privacy.[65]

**Reparation for emotional harm (criminal)**

5.4 Similar to victims' claims under the PVC Act, reparation provides "*a simple and speedy means of compensating those who suffer loss from criminal activities*".[66] Although imposed as part of sentencing, reparation is compensatory and not punitive in nature.[67] An order for reparation may not be made at all if an offender lacks the means to pay it.[68] Reparation is intended to circumvent the need for a separate civil proceeding; it is, effectively, a civil remedy attached to a criminal proceeding.[69] Reparation coexists with, and does not

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[62] In *Mouat*, mental stress damages of $25,000 were awarded to a vulnerable woman who had mortgaged her home to secure a loan for her son without receiving adequate legal advice.

[63] At 573.

[64] Section 123(1)(c)(i) Employment Relations Act 2000.

[65] Section 92M(1)(c) Human Rights Act 1991; s 103(1)(d) Privacy Act 2020.

[66] *R v O'Rourke* [1990] 1 NZLR 155 (CA) at p 158.

[67] *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 at [33]

[68] Section 35 of the Sentencing Act.

[69] NZLC *Compensating Crime Victims* R121 (2010) at [2.10]: "*the rationale for the sentence of reparation is that it would be both unfair to the victim, and costly for the victim and the State, to*

supplant, any right to bring civil action in respect of the same harm.[70]

5.5 In *Clarke v Police*, Holland J said:[71]

> A sentence of reparation is no more than applying the criminal sanctions to a liability which an offender already has. It does not add a new financial liability upon him. It relieves the victims of commencing proceedings in the civil courts.

5.6 The ability for sentencing courts to order reparation for emotional harm was first introduced by the Criminal Justice Amendment Act 1987 (no 3). The Act took effect on 1 August 1987, a few weeks after Colleen Burrows was murdered.[72]

5.7 In *Sargeant v Police*,[73] Hammond J interpreted "emotional harm" as covering a broad spectrum: from "*mental anguish occasioned to a victim by a crime*" to "*identifiable, long term, clinical conditions such as traumatic stress disorders, or even psychotic conditions*".[74]

5.8 The power to order reparation, including for emotional harm, is now provided for in s 32 of the Sentencing Act 2002. Section 32(3) reads:

> In determining whether a sentence of reparation is appropriate or the amount of reparation to be made for any consequential loss or damage described in subsection (1)(c), the court must take into account whether there is or may be, under the provisions of any enactment or rule of law, a right available to the person who suffered the loss or damage to bring proceedings or to make any application in relation to that loss

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*require the victim to prove wrongdoing by the offender and establish the quantum of loss in separate civil proceedings when this can be done as part of the criminal proceedings*."

[70] Section 38(2) of the Sentencing Act 2002.

[71] *Clarke v Police* [1993] NZHC 1259; also NZLC *Compensating Crime Victims* R121 (2010) at [2.10]: "*the rationale for the sentence of reparation is that it would be both unfair to the victim, and costly for the victim and the State, to require the victim to prove wrongdoing by the offender and establish the quantum of loss in separate civil proceedings when this can be done as part of the criminal proceedings*."

[72] The sentencing Judge would not have been able to order reparation for emotional harm retrospectively, but a claim for compensation, if available, could still be pursued in the civil courts.

[73] *Sargeant v Police* (above n 30).

[74] At p 458.

or damage.

5.9 In *Davies v Police,*[75] this Court considered the meaning of s 32(3) and said, when determining whether a reparation order was "appropriate", a sentencing court was required to identify whether there was *"a 'right available' under any enactment or rule of law 'to bring proceedings' or 'to make any application' in relation to 'that loss or damage"*.[76] The Court also observed an order may not be "appropriate" if there was a significant dispute over essential elements like causation or measurement of loss, which were required to be proved in a civil case.[77]

## Emotional harm from wrongful death (other jurisdictions)

*Scotland*

5.10 The law in Scotland has, since ancient times, allowed the close relatives of a person who dies as a consequence of a tort (or delict) to claim for solatium, loss of society or loss of support arising from the death.[78] The actions which entitle these claims derive from customary law and under the *action injuriarum;* they are now codified.[79] Solatium in this context means:

(a) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death;

(b) grief and sorrow of the relative caused by the deceased's death;

[75] *Davies (Peter) v Police* [2009] NZSC 47, [2009] 3 NZLR 189.

[76] At [23].

[77] At [10].

[78] *Paul* (above n 50) at [252]-[253]; Scottish Law Commission, *Damages for Injuries Causing Death*, 10 April 1972, (CM no 17).

[79] Damages (Scotland) Act 2011, s 4.

(c) the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died."

5.11 In Scotland, solatium for grief and sorrow excludes damages for mental injury as the latter may be claimed separately if a plaintiff (or pursuer) can establish the defendant (or defender) owed them a duty of care.[80]

*United Kingdom*

5.12 In the United Kingdom, bereavement damages have been available under s 1A of the Fatal Accidents Act since 1982.[81] The purposes of bereavement damages include compensating relatives for their grief and sorrow, both immediate upon the deceased's death and afterwards; compensating relatives for non-pecuniary benefits such as the loss of the deceased's care, guidance and society; providing practical help to relatives; symbolising public acknowledgement of the wrongful death; and punishing the tortfeasor who caused the wrongful death.[82]

5.13 Bereavement damages attach to a wrongful death action and subsist independently of a common law claim for psychiatric harm. The amount of damages is fixed.[83] This means, while the Supreme Court decision in *Paul* was concerned with claims for compensation for psychiatric injury, the decision would not have

[80] Scotland Law Commission – *Report on Wrongful Death* (Sept 2008) at [38].

[81] Section 1A the Fatal Accidents Act 1976, inserted by s.3 of the Administration of Justice Act 1982, originally applied to dependents but was in amended in 1991 to include parents and other non-dependent relatives.

[82] Law Commission (UK) *Claims for Wrongful Death* (Consultation Paper) [1997] EWLC C148 (15 January 1997) at 3.127.

[83] Section 1A sets a fixed amount of recoverable damages for bereavement; the current rate is £15,120 (approx. NZ $35,000).

precluded next of kin claimants from being awarded bereavement damages had wrongful death been established.[84]

*Canada*

5.14 In 1996, the Supreme Court of Canada upheld the right of a mother under the Quebec and French civil law to claim *solatium doloris* (moral damages) arising from the wrongful death of her child, noting that:[85] "*unlike the common law, the civil law tradition has never denied that an indirect victim can obtain compensation for the moral prejudice resulting from a person's death… According to the general civil law rule, any prejudice, whether moral or material, even if it is difficult to assess, is compensable, if proven*."[86]

5.15 Most other Canadian provinces allow the recovery of bereavement damages for loss of guidance, care and companionship (society). The right has been enabled primarily through amendment to fatal accidents legislation but also through the courts treating claims for loss of guidance, care and companionship as pecuniary loss.[87] The average amount of bereavement damages payable to a parent of a deceased person is significantly more than the $15,000 Mrs Hawkins would receive if her claim were to be upheld.[88]

*Australia*

5.16 In Australia, only the Northern Territory and South Australia permit claims for solatium or bereavement damages in wrongful death claims.[89] A recent law reform project undertaken in Western

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[84] Also in *Alcock* (above, n 35) at 917 and 924-925, the House of Lords acknowledged some relatives of people killed during the Hillsborough Stadium tragedy may have been entitled to bereavement damages under the Fatal Accidents Act 1976.

[85] *Augustus v Gosset* [1996] 3 SCR 268.

[86] At 285.

[87] Alberta Justice and Solicitor General, Government of Alberta, *Review of the levels of damages under Section 8 of the Fatal Accidents Act, Fall 2021*, at pp 9-10.

[88] At pp 10-11. In Alberta, for instance, the current statutory fixed rate for a parent is $82,000 CAD which equates to approximately $100,000 NZD.

[89] Compensation (Fatal Injuries) Act 1974 (NT); Civil Liability Act 1936 (SA).

Australia recommended against allowing claims for non-economic loss under its Fatal Accidents Act.[90]

**Emotional harm from wrongful death (New Zealand)**

5.17 Judge Blackie, drawing on his experience of reparation orders under the Sentencing Act and health and safety legislation, assumed damages for emotional harm were available for wrongful death.[91]

5.18 The High Court and Court of Appeal acknowledged the right of victims to be compensated for emotional harm was recognised by the criminal courts when imposing reparation orders but did not proceed to consider where the source of that right could be found.[92]

5.19 Evidently sentencing courts do, in fact, periodically order reparation for emotional harm where criminal offending has resulted in a death: more commonly for health and safety offences;[93] but also for offences under the Crimes Act.[94] These decisions have not been disturbed by Parliament. The right to claim must therefore exist somewhere in the law, otherwise sentencing courts would not have jurisdiction to make such orders.

*Wrongful death under the DAC Act*

5.20 Where a person dies because of a wrongful act or omission, the DAC Act gives the deceased's family a limited right to bring an action against the tortfeasor.[95] These actions are hybrid: they are derivative, in that they are based on any action the deceased could

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[90] Western Australia Law Reform Commission *Final Report: Claims for Non-Economic Loss for Wrongful Death under the Fatal Accidents Act 1959 (WA)* (WALRC, Project 109, 2020).

[91] Tribunal Decision at [20].

[92] CA Decision at [60] and [67]-[68]; HC Decision at [30].

[93] See for instance, *Ocean Fisheries Ltd v Maritime New Zealand* [2021] NZHC 2083; [2021] 3 NZLR 443 where a total of $505,000 was awarded for emotional harm to 19 family victims.

[94] See for instance, *R v Meads* [2011] NZHC 1238 and [2011] NZHC 1403 (recall) where $15,000 was awarded to each of the parents of the murder victim, $15,000 to each of the deceased's three children and $5,000 to the deceased's sister.

[95] Section 4 of the DAC Act; CA Decision at [36]-[38].

have brought had they survived;[96] but also personal, in that compensation is targeted at harm suffered by family members rather than the deceased.[97]

5.21 Section 7 determines the damages which are recoverable under the statutory action. It reads:

> (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.

5.22 The genesis of the DAC Act is the English Fatal Accidents Act 1846, also known as Lord Campbell's Act.[98] Even though "injury" was not defined under the Fatal Accidents Act 1846, early English decisions limited it to quantifiable pecuniary loss by interpreting

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[96] Sections 4 and 6 of the DAC Act.

[97] Section 7 of the DAC Act.

[98] Death by accident compensation legislation was first introduced into New Zealand law through the Deaths by Accidents Compensation Act 1880. This Act was modelled on the English Fatal Accidents Act and was incorporated into New Zealand law by the English Acts Act 1854. The 1880 Act was succeeded by the DAC Act 1908 which, in turn, was replaced by the DAC Act 1952. The 1908 Act was amended by the Statutes Amendment Act 1937, which expressly confined damages to pecuniary loss. Unlike the current s 7, the former provision read: "*the amount of actual pecuniary benefit which the person … for whose the action is brought might reasonably expect to enjoy if the deceased had not been killed*."

"*compensation*" for the members of the family to exclude "*solace of their wounded feelings*".[99] This approach was subsequently followed by New Zealand courts after the first DAC Act was introduced.[100]

5.23 The DAC Act was rendered effectively redundant after the advent of accident compensation.[101] But for this scheme, it is likely New Zealand would have followed England and amended the DAC Act to include bereavement damages. At the very least, there would have been discussion about the role of emotional harm in cases of wrongful death, as has happened in Australia and Canada.

5.24 The only noteworthy case since accident compensation has been the Court of Appeal's 2005 decision in *Pou v British American Tobacco (New Zealand) Ltd,*[102] where the court also declined to extend the scope of the DAC to non-pecuniary loss. In taking this approach, the court in *Pou* deferred to views of Parliament and the courts from the 1950s, even though the reluctance to recognise non-economic loss likely reflected prevailing societal attitudes.[103]

5.25 The Court of Appeal in the present case said:[104]

> Unencumbered by the history to the DAC Act and the cases of this Court that have considered it, we agree that a straightforward reading of "injury" in s 7(1)(a) would encompass mental injury. It may also be that *Pou* was a missed opportunity to take the approach advocated on behalf of Mrs Hawkins' estate. However, *Pou* was decided by a panel of five judges of this court. And it was given at a time when the

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[99] *McCarthy v Palmer* [1957] NZLR 442 (HC) at 444/40-41.

[100] As above.

[101] The accident compensation scheme has consistently provided cover for the pecuniary loss of dependent family members occasioned by a death.

[102] *Pou v British American Tobacco (New Zealand) Ltd* [2006] 1 NZLR 661 (CA).

[103] A prevalent bias in favour of quantifiable loss was perhaps also a feature of the "*hypnotic influence of money*" perspective, which Woodhouse J believed, in 1979, was causing courts "*to give an entirely disproportionate weight to monetary contributions*" in matrimonial property cases: *Reid* v *Reid* [1979] 1 NZLR 572 at 581.

[104] CA Decision at [52].

> DAC Act had been rendered largely redundant by the accident compensation scheme and at a time when societal views of emotional harm as a form of personal injury were probably similar to current views. It is not appropriate in these circumstances for this Court of three to overrule *Pou* by taking an ambulatory interpretative approach when the claimed basis for that approach was likely present when *Pou* was decided.

5.26 It is open for this Court to take a different course. It would not be a strain of the language under s 7 if "injury" encompassed non-pecuniary harm, included grief and mental suffering. An ambulatory approach to statutory interpretation[105] would ensure the DAC Act remained relevant; reflected a contemporary approach to the compensation of emotional harm; and met Parliament's expectation such damages would be available in cases like the present one.

*Wrongful death under the common law*

5.27 If a claim under the DAC Act is unavailable, the appellant says the Court of Appeal was wrong not to recognise a complementary action in the common law which would allow emotional harm damages for wrongful death.

5.28 In 1952, during the second reading of what became the DAC Act, the then Attorney General said:[106]

> The common law rule was that it was not a Civil wrong to cause the death of another, and these Acts derogated from that common law rule. If you ran over a man and killed him, neither his estate nor his dependants had any claim at common law against you, although if the man had lived he might have recovered substantial damages; and so it used to be said that it was cheaper to kill than to maim. These Acts, as I have said, derogated from the common law rule that it was not a Civil wrong death of another. The Deaths by Accidents Compensation Act did not do away with that common law rule, but granted exceptions to it for the benefit of the dependants of the person killed, The action is quite different from one which the deceased himself would have been entitled to maintain if he had lived. What the Act did was to give to certain near relatives of the deceased a right to compensation for the

[105] As codified under s 10 of the Legislation Act 2019.

[106] Hon C Webb, second reading (18 Sept 1952) 298 NZPD 1501.

> pecuniary loss they had suffered as a result of the death of the deceased. This is still the principle of the present legislation and of the Bill now before the House

5.29 It is acknowledged the speech of the Attorney General supports the view of the courts in *McCarthy v Palmer* and in *Pou*, that, in enacting the DAC Act in 1952, Parliament expected damages for wrongful death would continue to be limited to pecuniary loss. However, as is also evident from this speech, the DAC Act was not intended to be the final word on the law relating to wrongful deaths; the Attorney General expected the common law would continue to operate in this sphere albeit it did not, at that time, recognise a right to bring such action.

5.30 The Court of Appeal in this case accepted the common law rule which disallowed the death of another to be claimed as an injury, first articulated in the decision of *Baker v Bolton* in 1808,[107] was based on a dubious premise.[108] While it is acknowledged the United Kingdom Supreme Court recently confirmed that rule remained part of the general law there,[109] limitations in English statute and general law also significantly curtail its impact; these include:

(a) fatal accidents legislation, which creates a statutory action for wrongful death for the benefit of the deceased's dependents;[110]

(b) in addition to damages for pecuniary loss, the right of relatives to claim bereavement damages for wrongful death;[111]

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[107] *Baker v Bolton* (1808) 1 Camp 493, (1808) 170 ER 1033 (KB).

[108] CA Decision at [54] and [55]. See too discussion in *Snowball v Ornge* (note 48) at [12] – [15].

[109] *Paul* v *Wolverhampton NHS Trust* (fn 78).

[110] Refer to [5.22] above.

[111] Refer above at [5.12]-5.13].

(c) abolition of the rule that prevented a deceased's estate from suing;[112]

(d) the recognition of claims for psychiatric injury incurred by close family members consequential on a wrongful death;[113]

(e) a government-funded criminal injuries compensation scheme which provides (as a last resort) compensation to victims of crime.

5.31 New Zealand courts have the right and the responsibility to depart from an English common law principle if it does not suit the conditions in New Zealand.[114] The common law here develops in tandem with our unique statutory environment, [115] which includes the accident compensation and reparation schemes; it is also required to be cognisant of tikanga.[116]

5.32 If damages under the DAC Act cannot provide an appropriate remedy, it should not prevent this Court developing one. The legislation could be seen as simply a historical response to a specific injustice: ie the plight of dependent family members, financially harmed by a wrongful death, at a time when there was no other right to sue. There would then be room for a common law

[112] The maxim *actio personalis moritur cum persona* (a personal right of action dies with the person) prevented a deceased's estate from suing or being sued. This rule was substantially abolished in England by the Law Reform (miscellaneous reforms) Act 1934 and in New Zealand by the Law Reform Act 1936.

[113] *Paul* v *Wolverhampton NHS Trust* (above n 78)

[114] *Invercargill City Council v Hamlin* [1996] AC at [25]; *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741 (CA) at 757/14 (Cooke J) and at 771/44 (Woodhouse J).

[115] *Bognuda v Upton & Shearer Ltd* (fn 114) in which the unique statutory environment was the land transfer system.

[116] *Ellis v R* [2022] NZSC 114; [2022] 1 NZLR 239, [108]-[110] per Glazebrook J, [171]-[174] per Winkelmann CJ, [257]-[259] per Williams J, and [279] per O'Regan and Arnold JJ. Relevant tikanga would appear to include the interconnected principles of hara, mana, whakapapa, whanaungatanga and ea, which helped inform the Supreme Court's decision to allow the posthumous appeal of Mr Ellis in Ellis v R [2022] NZSC 114; [2022] 1 NZLR 239; and /or the principles and practices of utu and muru.

action for wrongful death to co-exist with the DAC Act provided it did not include economic redress for dependent family members.

## 6. THE EFFECT OF ACCIDENT COMPENSATION

### Concession only for psychiatric injury

6.1 In the High Court and Court of Appeal, it was assumed the five member panel decision of *van Soest* would prevail and require Mrs Hawkins to have suffered from a recognisable psychiatric condition. The ACA 1982 defined personal injury as including "*the physical and mental consequences of any such injury or accident*". In *Accident Compensation Corporation v E,* [117] a 1992 case involving a workplace mental injury, the court found "*mental consequences*" included mental harm irrespective of whether there was also physical injury. Mrs Hawkins conceded this definition would likely have covered a verified psychiatric injury,[118] even though she herself did not receive accident compensation. [119] The Court of Appeal therefore proceeded on the assumption compensatory damages would have been barred but a claim for exemplary damages may still have been available.[120]

6.2 In July 1992, the ACA 1982 was replaced by new legislation which removed cover for pure mental injury decoupled from physical harm. As there was insufficient time for the broader implications of *ACC v E* to be tested, it is only possible to speculate now whether the courts would have extended "*mental consequences*" to include

[117] *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA).

[118] This also accords with the view of the court in *van Soest* (below at [6.4]).

[119] In her evidence to the Tribunal, Mrs Hawkins said, while she could remember WINZ giving her a contribution towards a headstone for Colleen, she could not recall receiving any accident compensation: affidavit of Ida Hawkins dated 21 June 2021 at [5] **COA 101.0027**.

[120] CA Decision at [82].

mental harm which was not a recognisable psychiatric disorder and which did not arise in the context of a workplace.

**No cover for emotional harm**

6.3 The ACA 1982 was still in force when the Criminal Justice Amendment Act 1987 was passed. The latter introduced the ability for sentencing courts to order reparation for emotional harm but expressly excluded reparation for personal injury to preserve the integrity of the accident scheme.[121] It can be assumed, therefore, Parliament did not expect emotional harm would be covered by accident compensation, at least in this context.

6.4 This interpretation is consistent with the view expressed by the majority in *van Soest":*[122] *"where, as in the present case, an accident has been suffered by a primary victim it cannot be said that the experiencing of grief and distress by the secondary victim which falls short of a psychiatric disorder or illness can be said to be the suffering of an injury*."

6.5 Mrs Hawkins should not therefore be precluded by the accident compensation scheme from recovering compensatory damages for emotional harm or for mental suffering other than for a recognised psychiatric illness.

[121] B Dillon, *Violent Offences Bill* (no 2) (9 July 1087) 482 NZPD 10324

[122] *van Soest* at [24]

## 7. REFERRAL BACK TO TRIBUNAL?

7.1 This Court would not have to refer this case back to the Tribunal if it was itself satisfied there was sufficient evidence to establish a claim for mental harm; or held there was an action in the general law which entitled Mrs Hawkins to claim damages for emotional harm.

7.2 The Court of Appeal found, even if compensatory damages were barred, an action for mental injury may still entitle Mrs Hawkins to claim exemplary damages.[123] It referred this issue back to the Tribunal, because Judge Blackie had declined to award exemplary damages. However, as Mrs Hawkins appealed Judge Blackie's decision not to award her exemplary damages, this Court is able to substitute its own determination. The circumstances of this case were horrific and deserving of an award of exemplary damages.

## 8. CONCLUSION

8.1 This case highlights a need for recalibration of the common law to remove distortions in the courts' approach to mental and emotional harm; and to better align it with parliamentary expectations in this area.

8.2 The Court can finally resolve this case, without referring it back to the Tribunal, by recognising at least one pathway in the general law which would entitle Mrs Hawkins to claim damages against the respondent. An award of $15,000 would not be excessive under any available head of damages, be it compensation for mental injury, damages for emotional harm or exemplary damages.

[123] Section 319 of the ACA 2001, which also applies to personal injury covered by former Acts, allows a court to award exemplary damages even when a defendant has been charged with an offence arising from the same conduct.

8.3 Ms Peka, on behalf of Mrs Hawkins' estate, therefore asks the Court to:

(a) reinstate the Tribunal's award of damages to Ida Hawkins in the amount of $15,000; or

(b) alternatively, refer the case back for the Tribunal for reconsideration in light of this Court's judgment.

Date: 23 December 2025

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NM Pender/GP McLay/GJ Haszard
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These submissions are certified for publication