

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 30 /2025

BETWEEN

TRACEY IDA PEKA AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF IDA HAWKINS

Appellant/ cross-respondent

AND

SAM TE HEI

Respondent / cross-appellant

CROSS-APPELLANT'S SUBMISSIONS

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MAY IT PLEASE THE COURT

1. The cross-appeal in this appeal is concerned with a narrow part of the decision of the Court below:¹

“... whether the Court of Appeal was correct to refer Mrs Hawkins’ claim back to the Victims’ Special Claims Tribunal for reconsideration in light of its judgment.”

2. The purpose of that referral back was that, the Court having declined to overturn its decision in *Pou* and so permit the appellant’s claim for bereavement damages, it was possible that the appellant’s estate might instead pursue a claim for exemplary damages for a recognised psychiatric disorder or illness. The Court acknowledged that such a claim would involve meeting or modifying the criteria set by that Court in *van Soest* and *Hobson* and would also need to address the bar against posthumous claims for exemplary damages under s 3(2)(a) of the Law Reform Act 1936.² It also noted that it had limited or no argument and had not decided any point:³

“All that can be said is that it is possible that Mrs Hawkins could establish a claim of this kind, depending on whether she is able to show that she suffered a recognisable psychiatric illness, or the law on this requirement is revisited, and depending on whether there is a requirement to witness the event or its aftermath. Such a claim would also need to meet the threshold for an exemplary damages award as compensatory damages are not available if Mrs Hawkins’ mental injury was covered by the 1982 AC Act.”

though did identify what appeared to be a strong argument under s 3(2)(a).

3. For the cross-appellant, there are three objections to the referral back:
 - 3.1. The first, and simplest, is that s 3(2)(a) does operate to bar the proposed claim for exemplary damages. While the Court below had identified and suggested reliance upon precedent concerning posthumous appeals, that precedent makes plain that new first instance determinations cannot be pursued posthumously.
 - 3.2. The second is that a referral back is not an apt or workable occasion to apply or revisit the *van Soest* and *Hobson* criteria. As the case had to date been pursued as a claim for bereavement damages, the Tribunal

¹ Leave decision 25 August 2025, B(b), **Case 05.0080**.

² *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA) and *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA).

³ Judgment under appeal (CA) [87], **Case 05.0044**, citing *van Soest* and *Hobson*, above n 2.

case would be wholly new; face exceptional difficulties in according fairness and rigour; and, further, would fall decided under those criteria. Further:

3.2.1 Any revisiting of the *van Soest* and *Hobson* criteria would be unavoidably complex and would have to follow still further appeals and any material change may be better a matter for a reformed statutory regime, rather than the vagaries of tort; and

3.2.2 These are also not matters that this Court can hear and determine itself, absent a record or lower Court determinations.

3.3. The third and related objection concerns the correct application of the Prisoners' and Victims' Claims Act 2005 (PVCA), which allowed this proceeding to be pursued. The Court below held that the PVCA was a basis for a more open approach to the proposed new claim. But the PVCA is an express and detailed claims mechanism, in particular through the exceptional suspension of limitation periods reflected in the present claim. It is already a complex, and fraught, balance of interests and does not warrant any broader inference of openness.

Bar to posthumous exemplary damages claims under the Law Reform Act 1936

4. The Law Reform Act provides in s 3(1) that, in general, causes of action vested in a plaintiff survive his or her death for the benefit of his or her estate. The Act, and its counterparts in other jurisdictions – notably, the precursor Law Reform (Miscellaneous Provisions) Act 1934 (UK) – reversed the common law prohibition against the prosecution of a claim in tort for personal injuries where the person who would otherwise be plaintiff or defendant in an action has died.⁴

5. However, s 3 also provides specific exclusions, including for defamation as recently canvassed by the Court of Appeal and, in declining leave, by this

⁴ *Rose v Ford* [1937] AC 826, 841:

“The purpose ... was to abolish in a special and particular way the rule preventing the prosecution of a claim in tort for personal injuries where the person who would otherwise be plaintiff or defendant in an action has died. The rule was expressed in the maxim ‘*actio personalis moritur cum persona*’”.

Court in *Hagaman*.⁵ In respect of claims for exemplary damages, s 3(2)(a) provides:

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

(a) shall not include any exemplary damages: ...”

6. The “practical” rather than “philosophical or discursive” policy basis of the statutory exclusions was usefully canvassed by the Court of Appeal in *Chase*:⁶

“Such damages do not represent a loss to the estate, but a punishment of the defendant, and they have never been recoverable by the estate from the wrongdoer at common law or by statute.”

7. As *Chase* went on to hold, the combined effect of s 3(2)(a) and the accident compensation bar upon compensatory damages is that absent any other relief – in *Chase*, the parallel application for a declaration, though that was then declined as a matter of discretion – a claim cannot be pursued.⁷
8. The Court below did not seek to revisit *Chase* but instead, and while cautioning that it had not heard argument on s 3(2)(a), observed:⁸

“There appears to be a strong an argument that s 3 does not apply at all because that section is directed to death of a person entitled to sue but who has not commenced an action, or who has died after commencing an action but before a judgment is delivered. At common law, where judgment is obtained, the cause of action upon which the judgment is based is merged in the judgment and the issue on appeal is not the original cause of action but rather the legality and validity of the judgment, and this survives even if the original cause of action does not. We have not had submissions about this but at this point we would not dismiss Mrs Hawkins’ appeal on this basis.”

and referred to *Hagaman* and other decisions.⁹

9. The difficulty, however, is that – as canvassed in *Hagaman* – the principle of merger applies if judgment has been obtained on the cause of action and can

⁵ *Hagaman v Little* [2017] NZCA 447; [2018] 2 NZLR 140 and *Hagaman v Little (Leave)* [2018] NZSC 13.

⁶ *Re Chase* [1989] 1 NZLR 325 (CA), 331.

⁷ Above n 6, 332.

⁸ CA [90], **Case 05.0046**.

⁹ See below at [10].

be reinstated. As put by the High Court of Australia in *Calwell*, cited in *Hagaman*:¹⁰

“As the right of action came to an end with the death of the plaintiff, Mr Calwell, the appellant could only succeed on this appeal if the proper order were one restoring the jury's verdict. There cannot be a new trial of the action.”

and that Court went on to differentiate between appeal outcomes that are not dependent upon any additional determination, which can succeed through a posthumous appeal, and those that require additional determinations and so cannot not be pursued posthumously.

10. Similarly, in *Hagaman*:

10.1. The Court below declined to allow an appeal to proceed on a cause of action that had not been determined;¹¹ and

10.2. This Court declined leave, citing insufficient prospects of success, in respect of a reformulated argument that:¹²

“... the proviso to s 3(1) of the Law Reform Act 1936 should be interpreted to allow appeals in defamation cases because the appeal becomes a cause of action vested in the deceased that survives for the benefit of his or her estate.”

11. The other decisions cited by the Court below are also illustrative of the distinction:

11.1. *Ryan v Davies Brothers Ltd* concerned an appeal brought by an estate against a costs order made at first instance, the High Court of Australia holding that the costs order survived the death of the party and so could be appealed;¹³

¹⁰ *Calwell v Ipec Australia Ltd*, (1975) 135 CLR 321; (1975) 7 ALR 553, 562 per Jacobs J, cited *Hagaman (CA)* above n 5, [13] n 13.

¹¹ *Hagaman (CA)* above n 5, [19]:

“... no verdict was given on the second cause of action. It therefore abates with the death of Mr Hagaman. No appeal may now be advanced upon it. As the whole of the appeal is confined to that cause of action, it also follows that the appeal itself must be dismissed.”

¹² *Hagaman (Leave)* above n 5, [6].

¹³ (1921) 29 CLR 527.

11.2. *Lee v Lew* concerned the survival of an appeal notwithstanding the death of the appellant himself;¹⁴

11.3. *Pickett* and *Gammell* concerned the intersection of damages obtained by a later deceased plaintiff and a pecuniary loss claim arising from the same incident and brought by surviving family members under the Fatal Accidents Act 1976 (UK), the deceased claim surviving under the merger principle;¹⁵ and

11.4. *Hislop* concerned the effect of the death of a group of claimants upon a claim under the Canadian Charter, the Court accepting that the estates of those claimants who died prior to obtaining judgment could not participate in an appeal but that the merger principle allowed an appeal by one claimant, who had obtained judgment prior to his death.¹⁶

12. The effect is that:

12.1. Contrary to the observation of the Court below, the cited cases and also *Calwell* specifically exclude a new trial. That precedent interpretation of s 3(2)(a) prevents, and cautions against, the posthumous pursuit of a different cause of action dependent upon evidential issues yet to be determined. The soundness of that distinction is readily apparent in the instant case: the referral back would require the parties to address, and the Tribunal to determine a new and complex claim concerning the late Mrs Hawkins, not only almost forty years after Ms Burrows' murder but now, in Mrs Hawkins' absence.

12.2. More widely and while the exclusion of exemplary damages under s 3(2)(a) and its comparative counterparts has been the subject of critical commentary and proposals for reform almost from its outset:¹⁷

¹⁴ [1925] AC 819.

¹⁵ *Pickett (Administratrix of the Estate of Ralph Henry Pickett) v British Rail Engineering Ltd* [1980] AC 136 and *Gammell v Wilson* [1982] AC 27.

¹⁶ *Canada (Attorney General) v Hislop* [2007] 1 SCR 429, [76].

¹⁷ See, as a recent example, Madeleine Hay "Should Claims for Exemplary Damages Survive Death?" (2022) 28 Auck ULR 165 and also the useful history in Geoff Mclay "The Chase case : in search of a future for tort?" (1990) 20 VUWLR 255, 260.

12.2.1 The means to consider and, if appropriate, address those arguments is through statutory reform. As will be more broadly canvassed in opposition to the appeal, such reform may well better be directed at a more coherent approach for victims, rather than engaging with the vagaries of exemplary damages.¹⁸

12.2.2 Even if it were proposed to reconsider the interpretation of s 3(2)(a) and/or the merger principle described, the point is again that, the Court of Appeal not having heard and determined these points:

- (a) The Tribunal, on referral back, is bound by *Hagaman*;
- (b) This Court ought not itself engage with those questions without the benefit of argument and decision in, at least, the Court below.¹⁹
- (c) If the issue requires additional evidence, that should be adduced and heard before any determination in this Court. In particular and in some contrast to the primary appeal point, on which the Court below had the benefit of intervention by the New Zealand Law Society, there has been no wider argument on the implications of any change in approach to the Law Reform Act.

Inapt to claim under, or revisit, *van Soest* before the Tribunal

13. The second and narrower objection to the referral back concerns the proposed new claim. The Court below explained that it had not engaged with the criteria for a claim for psychiatric harm, as most recently addressed in

¹⁸ See, for example, Peter Cane “Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law” (2005) 25 OJLS 393, 405:

“By contrast with judicial processes of adjudicative legalization, ‘political’ processes of legislative legalization are pluralistic and multi-polar rather than triadic and bipolar. The relevant models of ‘political’ process are investigation, consultation, deliberation, debate, negotiation, compromise, bargaining and majority voting.”

¹⁹ See, for example, in respect of new issues, *R v Chief Executive, Department of Corrections* [2024] NZSC 47; [2024] 1 NZLR 114, [5], [58], [61] & [62] (Court declining to determine new issue arising from change in position of respondent and respondent’s “new and untested” evidence one of two grounds for remittal).

the decisions of that Court in *van Soest* and *Hobson*, or made any determination.²⁰

14. Two related objections arise. The first is that, put short, the appellant's claim as pursued before the Tribunal and the courts below has sought bereavement damages under the Deaths by Accident Compensation Act 1952 or otherwise:

14.1. Although the Court below noted reference to counselling assessments of disorder and to reclusiveness in Mrs Hawkins' original claim form,²¹ the claim as then pursued at first instance had not sought to make out such a cause of action.²²

14.2. Instead, the appellant's primary case and, further, on appeal to the High Court and the Court below was that, following *Field*, above,²³ a requirement of psychiatric injury was incompatible with the object and procedures of the Tribunal under the PVCA: that is, damages ought follow without meeting that requirement.²⁴

14.3. The effect is that the factual and legal case before the Tribunal would be wholly new. There are, as canvassed above in respect of the Law Reform Act and below under the PVCA, legal and practical barriers to the robust and fair determination of that new case.

²⁰ CA [87], **Case 05.0044**, citing *van Soest* and *Hobson*, above n 2.

²¹ CA [87] n 114, **Case 05.0044**.

²² See, for example, the decision of the High Court at [32], **Case 05.0072**:

"If Mrs Hawkins believes a claim for bereavement damages on the basis of PTSD would succeed, she could pursue that. That claim was not before the Tribunal and is not part of this appeal. But the normative Australian academic authority inventively cited by counsel suggests that such a claim would have no better prospects of success than the above analysis suggests."

referring to reliance upon Iain Field "In mourning of bereavement damages" 201 22 TLJ 95, 112, advocating for a wider view of bereavement damages as a solution to the ongoing controversies over actionable psychiatric injury.

²³ Above n 22.

²⁴ See, for example, appellant's submissions in the Court below at [5.20]:

"If immediate family victims like Mrs Hawkins were precluded from claiming emotional harm or exemplary damages, the only damages available to them would be for psychiatric injury, proof of which requires expert medical evidence. But this would be incompatible with the nature of the victims' claims process, which was intended to be simple and informal, and also the expectation that evidence of suffering would be provided by way of victim impact statement."

15. The second objection is that, while the Court below referred to the possibility that the requirements of *van Soest* and *Hobson* might be revisited, that is again a highly complex and fraught question and not apt for progression here:²⁵

15.1. The Tribunal would, of course, be bound by *van Soest* and *Hobson* on the referral back;

15.2. Any review of the criteria given in those decisions would entail either:

15.2.1 Determination of the claim in the Tribunal or some form of removal or referral, so as to allow reconsideration by the Court of Appeal; or

15.2.2 Determination by this Court in the present appeal: but that, as with the point already made in respect of the Law Reform Act, would occur without the benefit of lower court consideration or fact-finding:²⁶

and neither step is apt for the reasoned development of the applicable law or, as below, for the fair and efficient operation of the PVCA.

Relevance of the Prisoners' and Victims' Claims Act 2005

16. The final point against the referral back relates to the implications of the PVCA. The Court of Appeal drew on that Act as a part of its reasoning:²⁷

“We consider that greater latitude should be given for raising grounds for an award not considered by the Tribunal than if this were a jurisdiction requiring the formalities of pleadings.”

17. However, there are two related objections to that reliance upon the PVCA.

18. The first is that the while the PVCA does make detailed and – as occurred in this case – potentially very far-reaching provision for the suspension of

²⁵ See, among others and also with reference to law reform reviews and proposals, Donal Nolan “Reforming Liability for Psychiatric Injury in Scotland: A Recipe for Uncertainty” (2005) 68 Mod LR 983; Rachael Mulheron “Rewriting the Requirement for a ‘Recognized Psychiatric Injury’ in Negligence Claims” (2012) 32 Ox JLS 77; and the significant decision of the Supreme Court of Canada in *Saadati v Moorhead*, 2017 SCC 28, [2017] 1 SCR 543.

²⁶ Above n 19.

²⁷ CA [73], **Case 05.0040**.

limitation periods and funding for the practical benefit of claimants,²⁸ it does not ground a more permissive approach overall:

18.1. The PVCA contains two specific provisions concerning deceased persons, neither to the point. These tend against any necessary implication of any broader principle of flexibility or openness;²⁹ and

18.2. In particular, it does not expressly modify the effect of the Law Reform Act and should not be read to do so: the position is analogously reached by the Court of Appeal in *T v H*, in which that Court declined to read exceptions provided by the then Limitation Act 1950 into s 3 of the Law Reform Act, citing the specific and distinct terms and purpose of the latter.³⁰

19. The second objection is broader. As this Court observed in *van Silfhout*, the scheme of the PVCA reflects underlying tensions and, as observed by two members of the Court in their concurring, can have peculiar consequences.³¹ More narrowly, successive decisions of the High Court have stressed the need for rigour given the scheme and its consequences:

19.1. In *Reekie*, Moore J observed:³²

“In my view the Tribunal’s duty to rigorously analyse the merits of a claim for damages, including what quantum should be awarded, is particularly relevant in the context of s 47(1). ... It exposes offenders who suffer wrongful treatment in prison to a summary procedure by which victims may claim substantial damages against them greater than the amount of money paid to an offender as compensation. ... The stern consequences of an award made under the Act therefore compel a robust determination.”

19.2. Following and having noted Moore J, Cooke J observed in *Preston*:³³

²⁸ The definition of "offence" in s 4, which has the effect that the victims of an offences causing the death of a person include, for the purposes of a claim, the immediate family of the deceased and the provision in s 27(3) for service of a notice under the PVCA upon the representatives of a deceased person.

²⁹ *Poynter v Commerce Commission* [2010] NZSC 38; [2010] 3 NZLR 300, [40] (specific express provision in the Commerce Act 1986 a factor against inference) and [46].

³⁰ *T v H* [1995] 3 NZLR 37 (CA), 47 & 54 per Hardie Boys J & 57 & 59 per Tipping J; Gault & Casey JJ concurring and Cooke P dissenting at 42-43 (primacy of 1936 Act and inappropriateness of reading in Limitation Act exceptions).

³¹ *van Silfhout v Pathirannehelage* [2023] 1 NZLR 560; [2023] NZSC 148, [54] and [61]ff per Williams & Kós &.

³² *Reekie v Claimants A and B* [2018] NZAR 1685, [42].

³³ *Preston v Victims' Special Claims Tribunal* [2021] NZHC 3043, [53], [56] & [60].

“... the Act was not intended to alter the substantive law determining when damages could be awarded. To do so would cut across the fundamental rights of the prisoners. The Act established a streamlined set of procedures to allow victims of offending to advance their claims for damages in a way that is less difficult than it would be before the ordinary courts. But the substantive rights of the victims as claimants, and that of the prisoners as respondents were largely unaffected. I say largely as there are some alterations to procedural matters that could be thought of as substantive, such as those relating to limitation.

... There is no licence for shortcuts, or to apply an approach that the victim should be given the modest amounts of money that may be involved because that is fair.”

20. The simple point is that, given what is necessarily complex and fraught balance of interests,³⁴ the PVCA is to be applied on its terms and consistent with the general law governing liability, except so far as – as with limitation – that law is expressly modified. It is not apt to supplement the express facilitative scheme by inference of any wider principle.

Judgment sought on cross-appeal

21. The order of the Court below for referral back should be set aside.

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³⁴ Notably, the Committee against Torture has continued to express concern over the effect of the Act and find that it should be reviewed to ensure consistency with prisoners’ rights to a remedy: see, most recently, *Concluding observations on the seventh periodic report of New Zealand* CAT/C/NZL/CO/7 (August 2023), [49]-[50].