

**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**

Appellant/Cross Respondent

**AND** **SAM TE HEI**

Respondent /Cross Appellant

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**SUBMISSIONS OF CROSS RESPONDENT IN CROSS APPEAL**

**10 FEBRUARY 2026**

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

### 1. SUMMARY

These submissions respond to the cross appellant's arguments filed on 3 February 2026. The cross respondent says -

1.1 Mrs Hawkins' estate is not barred from recovering exemplary damages:

(a) The decision of the Court of Appeal in *re Chase*<sup>1</sup> was wrongly decided. The exclusion in s 3(2)(a) of the Law Reform Act 1936 was directed at aggravated compensatory damages, not punitive awards. Contemporary tort doctrine, the legislative history, and subsequent judicial developments all support an interpretation which would allow an estate to recover exemplary damages.

(b) Even if *Chase* remains good law, s. 3(2)(a) would not apply due to the timing of Mrs Hawkins' death. If the matter is remitted to the Tribunal, it could be subject to a condition Mrs Hawkins' death will not affect any claim for exemplary damages.

1.2 There is nothing to prevent this Court from reconsidering the criteria which apply to actions for mental harm. The facts in this case are simple and do not require determination at first instance.

1.3 Mrs Hawkins was not required to raise a specific claim for mental harm with the Tribunal. If any cause of action exists which would allow her to claim damages from Mr Te Hei, her claim should be accepted by the Tribunal.

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<sup>1</sup> *re Chase* [1989] 1 NZLR 325.

## 2. EXEMPLARY DAMAGES AND MRS HAWKINS' ESTATE

### Revisiting *re Chase*<sup>2</sup>

- 2.1 Mrs Hawkins died in July 2024, shortly after her appeal was heard but before the Court of Appeal released its judgment. The cross appellant relies on the Court of Appeal's decision in *Chase* to argue that any claim for exemplary damages Mrs Hawkins may have had against Mr Te Hei is now barred by s 3(2)(a) of the Law Reform Act 1936 which provides that where a cause of action survives for the benefit of an estate, "*the damages recoverable ... shall not include any exemplary damages*".
- 2.2 New Zealand courts have consistently affirmed exemplary damages as an available and important remedy in tort law.<sup>3</sup> In the personal injury context, they have been described as a "*useful weapon in the legal armoury*".<sup>4</sup>
- 2.3 Exemplary damages are not compensatory. Their availability is justified not by reference to the plaintiff's loss but by the civil law's need to punish and deter egregious misconduct by tortfeasors, particularly "*conscious wrongdoing in contumelious disregard of another's rights*".<sup>5</sup>
- 2.4 Against that background, there is no principled basis for preventing an award of exemplary damages from passing to a deceased victim's estate. The only barrier is the interpretation given to the anomalous language of s 3(2)(a) in *Chase*.

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<sup>2</sup> *Re Chase* [1989] 1 NZLR 325.

<sup>3</sup> *Donselaar v Donselaar* [1982] 1 NZLR 97; *Couch v Attorney-General* (no 2) [2010] 3 NZLR 149.

<sup>4</sup> *Donselaar* at 107 per Cooke J.

<sup>5</sup> *Couch no 2* (note 3) at [15] per Elias CJ, citing Kirby J in *Gray v Motor Accident Commission* [1998] HCA 70, (1998) 196 CLR 1.

- 2.5 Although exemplary damages may be categorised as a “windfall” this does not detract from their legitimacy or punitive and deterrent function. They are the mechanism by which the civil law condemns serious, intentional, or reckless misconduct. Because only the plaintiff can bring the proceeding through which that condemnation is expressed, the award is justified even though it is directed at the offender’s wrongdoing rather than the victim’s loss. Since exemplary damages are not linked to personal loss, the policy justification used in *Chase’s* justification – that such damages would be an improper “windfall” for an estate – is inconsistent with contemporary tort doctrine.
- 2.6 The historical context reinforces this position. The drafters of the UK Law Reform Act 1934, on which the Law Reform Act 1936 was based, did not conceive of exemplary damages in their modern form. Recent academic commentary provides strong support for the argument, advanced unsuccessfully by the appellant in *Chase*, that the exclusion of “exemplary damages” in s 3(2) was intended to capture aggravated compensatory damages, not punitive awards.<sup>6</sup>
- 2.7 Subsequent developments in New Zealand law since *Chase* further undermine its correctness. Parliament’s reversal of *Daniels v Thompson* demonstrated an intention to preserve exemplary damages within the civil justice system.<sup>7</sup> Likewise, this Court’s analysis in *Couch* confirmed exemplary damages as a recognised and coherent part of New Zealand’s tort law framework.<sup>8</sup>

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<sup>6</sup> Madeleine Hay “*Should Claims for Exemplary Damages Survive Death?*” (2022) 28 Auck ULR 165; Geoff Mclay “*The Chase case : in search of a future for tort?*” (1990) 20 VUWLR 255, 260.

<sup>7</sup> *Daniels v Thompson* [1998] 3 NZLR 22, which was reversed short afterwards by s.396 of the Accident Insurance Act 1998, now s. 319 of the Accident Compensation Act 2001.

<sup>8</sup> *Couch no 2* (refer note 3).

- 2.8 Given these developments, the restrictive approach in *Chase*, which precludes an estate from recovering exemplary damages if the victim dies before the conclusion of proceedings, is inconsistent with contemporary doctrine. It produces the perverse result whereby exemplary damages may be awarded when a victim survives serious misconduct, but not when the same conduct causes death.<sup>9</sup>
- 2.9 While Parliament could, in theory, have amended s 3(2)(a), no significance should be attached to its silence. Legislative inaction is not endorsement. It remains open to this Court to reconsider the meaning of s 3(2)(a) and to restore an interpretation consistent with the well-established distinction between aggravated damages (compensatory) and exemplary damages (punitive and deterrent). In doing so, the Court can ensure the anomalous wording of s 3(2)(a) does not continue to impede coherent development of exemplary damages in New Zealand law.

### **Merger of Judgment**

- 2.10 Mrs Hawkins sought exemplary damages from the Tribunal, but it declined to award them, finding instead that damages for emotional harm were more appropriate. She cross appealed that finding to the High Court and continued to pursue exemplary damages in the Court of Appeal. The Court considered the potential implication of s.3(2)(a) on such a claim but considered there was a strong argument the subsection applies only if a party dies before

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<sup>9</sup> This dynamic can be observed in the *Hobson/Couch* litigation. Mrs Couch survived the attack by William Bell at the RSA Panmure and was able to pursue a claim for exemplary damages against the Department of Corrections: *Couch* (refer note 5). Other victims, however – including the wife of Mr Tai Hobson – were killed. Mrs Hobson’s estate was barred from bringing a similar claim for exemplary damages because of the interpretation of s 3(2) applied in *Chase*. Mr Hobson attempted to sue personally, but he was unable to identify a viable cause of action which would allow him to recover exemplary damages in his own right: *Hobson v Attorney General* [2007] 2 NZLR 220 (CA). The contrast – between the potential availability of a claim to a surviving victim, but not to the estate of a deceased victim arising from the same conduct – starkly illustrates the arbitrary and unjust consequences of the *Chase* interpretation.

commencing an action or before judgment is given. Where a party dies while a case is on appeal, the underlying action merges with the judgment of the lower court; s.3(2)(a) therefore ceases to operate.

- 2.11 The cross appellant relies on *Hagaman v Little*<sup>10</sup> to argue the Court of Appeal's reasoning would not apply to any reconsideration of Mrs Hawkins' claim, and s.3(2) would still bar her estate from recovering exemplary damages. The cross respondent has already addressed, in her primary submissions on appeal, why a remittal to the Tribunal is unnecessary. However, even if any aspect of her claim were to be reconsidered, the Court of Appeal's reasoning remains correct and s.3(2) should not bar exemplary damages in this case.
- 2.12 *Hagaman* was a defamation action to which s.3(1) of the Law Reform Act applies. The plaintiff's estate was unsuccessful because at the time of his death, the case was only part heard and the cause of action had not yet merged into a judgment. Mrs Hawkins' circumstances are materially different. The Tribunal had already determined the criteria under s 46(2) were satisfied, accepted her claim, and ordered payment of \$15,000. That order has been the subject of subsequent appeals and cross appeals. Accordingly, Mrs Hawkins' claim – and any underlying cause of action – had therefore already merged into the Tribunal's order before she died.
- 2.13 A reconsideration would not materially alter this position. An order of the Tribunal is suspended while an appeal is pending,<sup>11</sup> but the central question on appeal remains whether the precondition in s.46(2)(c) is met – namely, whether there is a recognised cause of action entitling Mrs Hawkins to damages. If that requirement is

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<sup>10</sup> *Hagaman v Little* [2017] NZCA 447; [2018] 2 NZLR 140.

<sup>11</sup> Section 51(5) of the PVC Act.

satisfied, the Tribunal's acceptance of her claim was correct, notwithstanding any errors in its reasoning. In that event, the Tribunal's order award of \$15,000 can be reinstated and recovered by her estate.

2.14 Alternatively, if this Court were to remit the claim to the Tribunal for rehearing, it would be just for it to impose conditions ensuring that Mrs Hawkins' death does not prejudice her estate's ability to pursue the claim. In *Lee v Lew*,<sup>12</sup> the plaintiff had obtained a judgment which was overturned on appeal and a new trial ordered. He died before his further appeal was heard. The Supreme Court of Canada directed that the retrial proceed on the condition the defendant not rely on the plaintiff's death. The Privy Council upheld the power to impose conditions on new trials to prevent injustice where circumstances change between initial judgment and appeal, including where a party dies.

### **3. WHETHER TO REVISIT VAN SOEST AND HOBSON**

3.1 The cross appellant contends this is not an appropriate case for the Court to revisit the established criteria governing claims for mental harm.

3.2 This appeal represents the first point in the litigation at which the legal criteria for a mental-injury claim could properly be considered. The leading authority remains *van Soest v Residual Health Management Unit*,<sup>13</sup> a decision of a five-judge panel of the Court of Appeal which was binding on all lower courts. Therefore, until now, the appellant/cross respondent's arguments on appeal were

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<sup>12</sup> *Lee v Lew* [1925] AC 819.

<sup>13</sup> *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA); also the obiter comments of Justice William Young in *Hobson v Attorney General* at [140]-[141] which raise the possible requirement for physical and temporal proximity. The cross respondent/appellant addresses these issues in her primary submissions.

confined to seeking a referral back to the Tribunal to determine whether the evidence relied on for emotional-harm damages was also capable of establishing a recognised psychiatric disorder and thereby support a claim for mental injury.

3.3 The cross respondent rejects the cross appellant's submission that the issues would be too complex to address without a first instance decision. This case provides an ideal vehicle for the Court to clarify and refine the principles which apply to mental-harm claims. The factual matrix is significantly simpler than that in *van Soest* and there is already some evidential foundation to support a claim of mental harm.

3.4 In addressing the legal framework, this Court has the benefit of the Court of Appeal's decisions in *van Soest* and *Hobson*, together with more recent, and diverse, authority from senior courts in the United Kingdom and Canada.<sup>14</sup>

#### **4. CAN MRS HAWKINS NOW CLAIM FOR MENTAL HARM?**

4.1 The cross appellant contends the Court of Appeal erred in liberally interpreting the PVC Act and permitting Mrs Hawkins to raise a new cause of action with the Tribunal.

4.2 The Court of Appeal, having the same powers on appeal as the High Court,<sup>15</sup> had jurisdiction to direct the Tribunal to consider evidence of mental harm. Under s 51(4) of the PVC Act the High Court on appeal may:

(a) make any determination or determinations it thinks should have been made:

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<sup>14</sup> *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1, [2024] 2 WLR 417; *Saadati v Moorhead*, 2017 SCC 28, [2017] 1 SCR 543.

<sup>15</sup> Sections 56, 57 and 148 of the Senior Courts Act 2016 and rule 48(4) of the Court of Appeal (Civil) Rules 2005. This Court has similar powers under s 79 of the Senior Courts Act.

(b) direct the Tribunal to—allows the High Court to:

(i) consider or determine (whether for the first time or again) any matters the High Court directs; or

(ii) rehear the proceeding;

(c) make any order or further order it thinks fit.

4.3 The Court of Appeal was satisfied the scheme of the PVC Act does not require formal pleadings and there is correspondingly greater latitude for claimants to raise causes of action on appeal which were not expressly addressed by the Tribunal at first instance.<sup>16</sup> The Court considered this informality to be “*consistent with what is intended to be a simple and accessible procedure*”.<sup>17</sup>

4.4 The statutory scheme does not impose a legal burden on victims to prove their claim against an offender. Under s 46(2)(c), it is for Tribunal to satisfy itself that a recognised cause of action exists and that the claimant is entitled to damages.<sup>18</sup> In doing so, the Tribunal may draw on information from the parties as well as its own inquisitorial powers, which extend to seeking material from the courts and other sources.<sup>19</sup>

4.5 The Act requires a notice of claim be submitted in a form approved by the Secretary and Ministry of Justice.<sup>20</sup> Section 28(2) obliges a claimant to complete the prescribed form and file it with the Tribunal by the statutory deadline.

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<sup>16</sup> CA Decision at [73].

<sup>17</sup> CA Decision at [72]; the High Court has made similar remarks about the relative informality of the claims process: *Reekie v Claimants A and B* [2018] NZAR 1685 at [11]; *Preston v Victims’ Special Claims Tribunal* [2021] NZHC 3043 at [74].

<sup>18</sup> Section 46(2)(c) reads: “*The Tribunal must not accept a victim’s claim unless satisfied on the balance of probability that ... the claim discloses a cause of action that is, under the general law, one for which damages are, in the particular case, payable*”.

<sup>19</sup> Sections 35, 36 and 39.

<sup>20</sup> Section 28.

- 4.6 The approved form seeks essential information from a claimant, including personal details, information about the offender and the offence, and the compensation sought. Claimants are advised the Tribunal will determine the claim according to “*the general law relating to the awarding of damages*”. The form does not require a claimant to identify a specific cause of action or provide legal submissions.<sup>21</sup>
- 4.7 The Tribunal provides a redacted copy of the claim to the offender, who may then file submissions in response.<sup>22</sup> The Tribunal is responsible for service and the parties do not otherwise communicate directly.<sup>23</sup>
- 4.8 In this case, Mrs Hawkins completed the approved claim form with the assistance of a victim advocate on 16 November 2020.<sup>24</sup> She sought legal advice only after counsel for Mr Te Hei required formal proof of the claim.<sup>25</sup> Mrs Hawkins subsequently filed an affidavit<sup>26</sup> and a submission in reply which tied her claim for emotional harm to a recent Tribunal decision<sup>27</sup> and included an additional claim for exemplary damages.<sup>28</sup>

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<sup>21</sup> Victim Claim Form (redacted) dated 16 November 2020 **COA 101.0002**.

<sup>22</sup> Section 38.

<sup>23</sup> Section 31.

<sup>24</sup> Victim Claim Form (refer note 21).

<sup>25</sup> Respondent’s submissions dated 10 May 2020 **COA 101.0010**.

<sup>26</sup> Affidavit of Ida Hawkins dated 17 June 2020 **COA 101.0026**.

<sup>27</sup> *Payne v Tuhero* [2021] NZVSC 21 **COA 101.0019**. This decision was provided to the parties by the Tribunal.

<sup>28</sup> Claimant’s submissions in reply dated 23 June 2021 **COA 101.0030**; the respondent filed further submissions on 26 July 2020 **COA 101.0080**.

4.9 Mrs Hawkins was not required to plead any cause of action. Even had a claim for mental harm been expressly raised, it is unlikely the Tribunal would have accepted it on that basis. The Tribunal was satisfied Mrs Hawkins had a valid claim under the general law for emotional harm and was prepared to determine the matter on that basis. Additional psychiatric evidence would likely have been regarded as unnecessary given the Tribunal's satisfaction the statutory criteria were already met.

Date: 10 February 2026

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NM Pender/GP McLay/GJ Haszard  
Counsel for the cross respondent

These submissions are certified for publication