

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

RESPONDENT SUBMISSIONS

27 February 2026

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Under paragraph 6(2) of the Supreme Court Submissions Practice Note 2023 and having made appropriate inquiries to ascertain whether the submission contains any suppressed information, counsel certify that, to the best of their knowledge, the submission is suitable for publication (that is, it does not contain any suppressed information.

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MAY IT PLEASE THE COURT

1. This appeal arises from the decision of the Court of Appeal that:
 - 1.1. Declined the appellant's argument that the Court's decision in *Pou*, and precursor and comparative decisions, that non-pecuniary loss for bereavement is not compensable under the Deaths by Accident Compensation Act 1952 (**DBACA**) should be overturned;
 - 1.2. Declined further arguments that a cause of action in damages arose under the Prisoners' and Victims' Claims Act 2005 (**PVCA**) or at common law; but
 - 1.3. Identified a potential alternative cause of action in exemplary damages for mental injury, whether under the criteria set by that Court in *van Soest* and *Hobson* or following variation of those criteria,¹ and also subject to expert evidence and also argument concerning the exemplary damages bar in the Law Reform Act 1936, and referred that matter back to the Tribunal.
2. On appeal to this Court, the appellant advances three specific points:
 - 2.1. First, that the interpretation of the DBACA in *Pou* and elsewhere to exclude claims for non-pecuniary loss should be reversed;
 - 2.2. Second, that if that position is not altered, there should instead be a cause of action at common law, reversing the position reflected by the DBACA and its precursors and most recently confirmed, for example, in the decision of the United Kingdom Supreme Court in *Paul*;² and
 - 2.3. The threshold for a mental injury claim should, on the basis of the appellant's reading of the dissent of Thomas J in *van Soest*, above, and the 2017 decision of the Supreme Court of Canada in *Saadati*,³ be revisited such that the appellant's claim in damages can simply be

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

² *Paul & Anor v Royal Wolverhampton NHS Trust* [2024] UKSC 1; [2024] 2 WLR 417, [2]-[3].

³ *Saadati v Moorehad* [2017] 1 SCR 543.

upheld in this Court absent the expert evidence anticipated by the Court below.

3. A fourth, and broader, point raised for the appellant is that one or other of these outcomes is required to meet what is said to be the object of the PVCA.
4. The question of referral back, including the interpretation of the Law Reform Act and the cross-respondent's claim to revisit *Re Chase*, is addressed in the cross-respondent submissions.
5. In short, the respondent's case is that there are three basic objections to the points sought on appeal:
 - 5.1. The first is that, as was noted by the Court below, the appellant has not put forward a substantive basis for change to common law and to the longstanding interpretation of the DBACA. While it said, for example, that these principles should no longer be followed in a New Zealand context, a concrete and substantial reason for that departure is not stated. Nor do the *Saadati* decision and the dissent of Thomas J have the effect sought for the appellant of allowing the appellant simply to recover, without more.
 - 5.2. The second is that, as for example observed by the High Court of Australia in respect of the DBACA in *Barclay*,⁴ change to such longstanding principle should occur by legislation, not common law reform. That is for two reasons:
 - 5.2.1 From the enactment of the first precursor to the DBACA in 1846 onwards and, particularly, with the advent of the Accident Compensation scheme; the reparation scheme now provided in the Sentencing Act 2002; and a number of other statutory mechanisms, the appellant's claims to a cause of action are not made in a vacuum. Even if a basis for common law or interpretative change were put forward, it must account for those regimes, including deliberative legislative choices to include or exclude particular redress.

⁴ *Barclay v Penberthy* [2012] HCA 40; 246 CLR 258; 291 ALR 608, [26]-[27].

5.2.2 Further, the effect of those measures – and of extensive law reform review, in New Zealand and in other jurisdictions – is to underline the need for a robustly informed and legislatively determined response. It is not an area, unlike that canvassed by this Court in *Smith v Fonterra*, in which scope is left for common law development.⁵ The instant case, particularly, underlines the inappropriateness of common law method here.

5.3. The third objection concerns the PVCA. Whatever the wider merits or demerits of that Act, its express terms – as found by the Court below – are that while it “facilitates” claims against human rights compensation received by prisoners in striking ways – notably, here, suspending limitation periods by thirty years – it does not create new causes of action or require modification to such causes.

Whether the Court ought revisit the interpretation of the Deaths by Accident Compensation Act 1952 in *McCarthy / Pou* and others

6. The first proposition raised for the appellant is that the Court should depart from the interpretation of the DBAC Act as followed in, for example, *McCarthy* and *Pou*.⁶

7. However, and put by the Court below:⁷

“*Pou*” was given at a time when the 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.

and went on to record that there had been nothing put to the Court to suggest that underlying social views had changed and that the claimed basis put forward for such change “was likely present when *Pou* was decided.”

8. The appellant’s case in this Court remains that “[i]t is open for this Court to take a different approach” and that such an approach:⁸

“... would ensure that the DAC Act remained relevant; reflected a contemporary approach to the compensation of emotional harm; and met

⁵ *Smith v Fonterra Cooperative Group & ors* [2024] NZSC 5; [2024] 1 NZLR 134.

⁶ AS [5.26]; *Pou v British American Tobacco (New Zealand) Ltd* [2006] 1 NZLR 661 (CA) and *McCarthy v Palmer* [1957] NZLR 442 (SC); [1957] NZLR 620 (CA).

⁷ CA [52], **Case 05.0032**.

⁸ AS [5.26]

Parliament's expectation that damages would be available in cases like the present one."

9. The question of "Parliament's expectation" is understood to be a reference to the PVCA, and that is dealt with separately below. On the broad claim for change, however, two points follow:

9.1. The first, and simplest, is that any change to the interpretation of the DBACA must, as put by the Court below, be based upon some substantive claim to social change and none has been put forward.

9.2. The second is that the claim for such change must be reconciled with the statutory context, including ; the innate difficulty of seeking change through the narrow prism of individual, and rare, cases such as the present rather than through statutory reform. As put by the High Court of Australia in *Barclay*:^{8A}

"The pattern of Australian legislation is a pointer towards the continued existence of the rule in *Baker v Bolton* as a matter of common law ...

Any further contraction in the scope of the rule in *Baker v Bolton* is a matter for Australian legislatures."

Relevance of statutory reforms

10. More specifically, and as in parts cited by the appellant, New Zealand has – as with other jurisdictions – adopted detailed statutory schemes for compensation and other support for the family members of victims of offences, including through reparation orders in the sentencing process but also through the Accident Compensation scheme and victim support.

11. The starting point, as noted in *Pou*, is that this jurisdiction is itself the product of a statutory modification of the common law. The critical point, as put in *Pou*, is therefore not whether the position put in and since the 19th century decisions – both as to the non-existence of a common law right and as to the correct interpretation of the successive remedial statutes – was or is correct,⁹ but rather that that question is properly left to legislative reform.

^{8A} Above n 4, [26]-[27].

⁹ See, for example, the very detailed survey of both in Donal Nolan "The Fatal Accidents Act 1846" in T.T. Arvind & Jenny Steele (eds) *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart, 2012) 131.

12. As put in *Pou*:

12.1. Prior to the DBACA and its precursors, the common law did not permit an action for damages by the estate or family of a person wrongfully killed.¹⁰ That had been varied by statute, first by the Fatal Accidents Act 1846 (UK), in force in New Zealand under the English Acts Act 1854, and several subsequent New Zealand statutes.¹¹

12.2. Such statutory claims had “from a very early stage”, and consistently since, been limited to pecuniary loss, the Court observing that “there are no decided cases in which lost companionship and society have been the subject of compensation.”¹²

12.3. The Court acknowledged submissions critical of the 19th century cases:¹³

“It may be that 155 years ago the English Courts took too narrow an approach to the Fatal Accidents Act and the losses for which compensation might be awarded under it.”

but went on to observe that the *Baker* rule had been well-known at the re-enactment of the DBACA.

13. The result is that, in that respect, the question was long removed from the general body of common law tort and, as put by Nolan in respect of the passage of the original Fatal Accidents Act in 1846:¹⁴

“One final point can be made by way of a conclusion, which is that there were clear advantages to a legislative solution to the wrongful death question. Statutory intervention resulted in a comprehensive scheme for the recovery by dependants of their losses, which would have been difficult to achieve through common law development.”

¹⁰ *Pou* at [7].

¹¹ Prior to the DBACA, the Deaths by Accidents Compensation Acts 1880 and 1908 made provision “to the same effect”: *Pou* at [10] & [13]. The Statutes Amendment Act 1937 also clarified that pecuniary loss could be claimed by non-dependent family members.

¹² *Pou* at [9]-[11]; [14] & [36], citing *Gillard v Lancashire and Yorkshire Railway* (1849) 12 LT 356; *Blake v Midland Railway Co* (1852) 18 QB 93 and recent English commentary and, in New Zealand, *Shaw v Hill* [1935] NZLR 914, 920 and, particularly, *McCarthy v Palmer* [1957] NZLR 442 (SC) and [1957] NZLR 620 (CA). approved at [36].

¹³ *Pou* at [35]-[36] & [38].

¹⁴ Above n 9, 157.

Effect and relevance of statutory reforms / innovations

14. As this Court observed in *Smith v Fonterra*:¹⁵

“Statute law has been active in New Zealand in displacing or modifying the application of the common law of torts. To state the obvious, statutory reform alters context, and may thereby necessitate reform of existing and related common law principles.¹²⁷In that instance, statute’s impact is indirect. Some statutory reforms may however displace tort directly.”

and, of particular relevance here, the Court went on:

“The best-known (and most dramatic) example is the Accident Compensation Act 2001 (and its predecessor Acts) proscribing claims for damages for personal injuries covered by the legislative compensation scheme. Exemplary damages were retained to perform tort law’s deterrent function, and in the workplace context, the Health and Safety at Work Act 2015 supplies the missing deterrent function in the absence of workplace personal injury liability.”

15. In *Smith*, the Court referred to the preservation of common law under the Resource Management Act 1991 and the absence of any exclusion of common law in the Climate Change Response Act 2002 to find that the law of torts and the potential for a common law response to emissions could emerge apply amid that “statutory landscape”.¹⁶

16. However, the landscape in *Smith*, described as comprising “permits, immunities, policies, rules and resource consents” and so distinct from a common law cause of action,¹⁷ can be contrasted with the overlap between statutory compensation mechanisms and any common law development:

16.1. It is unclear whether the appellant ought to have received any form of accident compensation support in 1987,¹⁸ but she could not recall having received anything. However, it is not in issue that the accident compensation bar precludes compensatory damages;¹⁹ and

¹⁵ *Smith*, above n 5, [92]-[94].

¹⁶ Above n 5, [100]-[101].

¹⁷ Above n 5, [101].

¹⁸ The Court of Appeal had confirmed in December 1991 that the ACC scheme extended to mental harm whether or not physical injury had occurred: *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA). However, in mid-1992, the Accident Rehabilitation and Compensation Insurance Act 1992 reversed that position, albeit with an exception for mental harm caused by sexual offences under the Crimes Act (see s 8(3) and sch 1), but not for – for example – family members of murder victims.

¹⁹ AS [6.1]-[6.2].

16.2. It is, however, clear that the criminal reparation procedure then in place did not extend to non-pecuniary loss;²⁰ but

16.3. Under current law:

16.3.1 The accident compensation scheme provides for earnings-related compensation; a one-off survivors' grant; and support for childcare;²¹

16.3.2 The families of murder victims fall within victim assistance schemes;²² and

16.3.3 The Sentencing Act 2002 provides a detailed scheme and procedure that includes:²³

(a) Reparation for emotional harm and loss or damage consequential upon emotional harm or loss of, or damage to, property; and

(b) The interaction between reparation and civil causes of action and the Accident Compensation Act.

17. That provision has two consequences for significant common law change or change to the longstanding interpretation of the DBACA, as sought here.

²⁰ The Criminal Justice Act 1985, as in force at the time of the respondent's offence in June 1987, made provision for reparation only in respect of property damage: see s 22. Emotional harm was later added as a factor for reparation by s 4 Criminal Justice Amendment Act 1987, which came into effect on 1 August 1987.

²¹ See Law Commission *Compensating victims of crime* (NZLCR 121, 2012) 19 (Accident Compensation Act entitlements) and, for a current summary, ACC "Financial support if someone has died from an injury", accessible <https://www.acc.co.nz/im-injured/financial-support/financial-support-after-death>.

²² See, Law Commission above n 21 5 (victims' support initiatives) and, for current victim assistance scheme entitlements *Victim Assistance Scheme (VAS) Guide* (undated; accessible <https://www.victimsupport.org.nz/financial-assistance>).

²³ Section 32, (1)(a)-(c) and:

- Subs (2): sentencing 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 deciding whether to order consequential damage reparation and amount;
- Subs (4): subs (3) applies whether or not right to claim exercised or expired); and
- Subs (5): reparation may not be ordered for consequential damage if compensation paid or to be paid under the Accident Compensation Act:

and see, for example, *Davies v Police* [2009] NZSC 47; [2009] 3 NZLR 189, [10]: "The sentence of reparation ... provides summary remedy for victims of crime, without limiting their ability to seek compensation outside the criminal justice process."

18. The first is that, if the premise of change is an unmet societal need:
- 18.1. The adoption and operation of such schemes, even if not comprehensive or in terms that a party may wish, tells against such need; and
- 18.2. More practically, the capacity of a court to weigh the consequences of such change is complicated by the operation of such schemes, both because those schemes complicate assessments of what could or should be done and because, as with the rarity of cases under the DBACA noted in *Pou*, the paucity of cases impairs incremental or considered development.
19. The second and stronger point is that put by the leading scholar Peter Cane, well-known for his work both in tort and in administrative law, in respect of common law and statutory reform:²⁴

“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.”

20. The point was also put by Sir Ivor Richardson, who, though also imploring counsel to put forward social and economic evidence, acknowledged:²⁵

“the need for particular care in reaching conclusions as to social policy and the public interest on the information and arguments furnished by the parties to the litigation where there are social and economic value judgments involved.”

and that:

“Litigation under the adversary process is not an ideal vehicle for conducting an extensive social inquiry. And there are obvious dangers in assuming from our own reading and research, however wide, that we fully appreciate the economic and social implications of alternative approaches.”

²⁴ Peter Cane “Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law” (2005) 25 OJLS 393, 405 and see also TT Arvind & Jenny Steele “Introduction: Legislation and the Shape of Tort Law” in Arvind & Steele, above n 9, 1, 3: “What is missing, rather, is a sense of the ways in which common law and statute come together in the law of tort, and the full implications of incorporating their interaction ... Statute is superior to common law as a means of achieving change in the balance of rights and liabilities because of its democratic credentials (expressing the will of an elected legislature), so that it can create or limit liability in a way that courts should not.”

²⁵ I L M Richardson “The role of judges as policy makers” (1985) 15 VUWLR 46, 49.

21. Reference to such statutory reform, and to the legislative determination of appropriate responses to particular social or economic conditions, is not an abstract or illusory point.
22. In addition to the several New Zealand schemes that, at least now, apply to a case such as the present:
 - 22.1. As set out in the appellant's submissions, a broad range of approaches to such recovery and/or recovery for emotional harm – varying in broad or subtle degrees – have been adopted, or rejected, in other jurisdictions and, also, including as to emotional harm more generally, in certain New Zealand schemes;²⁶
 - 22.2. Law reform bodies in other jurisdictions have directly addressed the specific question of recovery for wrongful death;²⁷ and
 - 22.3. In New Zealand, the particular question of compensation for victims of crimes was extensively canvassed by the Law Commission in 2012, the Commission finding – for a number of reasons, including the victims' support noted above – that no reform was required.²⁸

²⁶ See

- AS [5.3] (various statutory provision for compensation for emotional harm in particular contexts); [5.4] (reparation under the Sentencing Act); [5.12] (fixed damages for bereavement under English and Welsh law); [5.15] (statutory compensation codes in some other Canadian provinces); [5.16] (statutory codes in the Northern Territory and South Australia); [5.18]-[5.19] (reparation under the Sentencing Act); and
- also AS [4.10] (statutory reversal of *Tame v New South Wales* [2002] HCA 35, 211 CLR 317).
- See also common law [4.17] (English Law Commission recommendation not followed by United Kingdom Supreme Court)

²⁷ See, for example:

- The 1997-1999 review by the English Law Commission *Claims for Wrongful Death* (No 263, 1999), discussed in Nolan above n 9, 156-157;
- The 2010-2011 New South Wales Law Reform Commission *Review of compensation to relatives* (NSWLRC, Report 131, 2011), addressing – both in the specific context of asbestos and similar claims and more generally – introduction of bereavement damages (not recommended: see [4.20]) and estate claims for non-economic loss (not recommended: [4.35]); and
- The 2018-2020 review by the 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), noting an earlier review and reform to allow for “assistance and guidance” awards (as also canvassed in *Pou*, above) but setting out reasons for recommendation against any further reform to allow non-economic loss claims under the Fatal Accidents Act 1959 (WA).

²⁸ Above n 21.

Whether a common law cause of action should now be found

23. The second proposition for the appellant is that the Court ought instead recognise an:²⁹

“... action in the common law which would allow emotional harm damages for wrongful death”

24. As acknowledged for the appellant:³⁰

24.1. The common law position was recently, and usefully, restated by the United Kingdom Supreme Court in *Paul*:

“... the common law does not recognise one person as having any legally compensable interest in the physical well-being of another. The law accords compensation to the victim but not to others who suffer harm in consequence of the victim’s injuries or death, however severely affected they may be.”

24.2. The material of that position is altered by the United Kingdom parallel to the DBACA and other statutory and common law rights.

but it is then said that New Zealand court can and must depart from that common law position by reference to “conditions in New Zealand”, the “unique statutory environment”, and in cognisance of tikanga.

25. The submissions for appellant do not, however, identify the particular conditions or statutory environment, beyond a reference to the accident compensation and reparation schemes above, and it is not explained why those warrant any alteration of the common law position. The simple point, as above, is that such change should follow an identified change in societal context and that is not present.

26. In respect of tikanga, the position is developed as follows:³¹

“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.”

²⁹ AS [5.27].

³⁰ AS [5.30].

³¹ AS [5.31], n 116.

27. As put in *Ellis*, it is, of course, apt that any law reform in respect of *Pou* and the DBACA be guided by tikanga, particularly if and so far as reform were to occur through change in the common law.³² This said, however:

27.1. The further concern put in *Ellis* and since, including in *He Poutama*, is to ensure that tikanga is addressed in a manner that upholds its integrity and the fairness of proceedings in which it is raised.³³ That can be achieved by careful and appropriate means, as with the wānanga convened by the parties in *Ellis*.³⁴

27.2. The particular consequence in this proceeding is that it is not possible simply to extrapolate from, for instance, the particular position reached in *Ellis* to prescribe a particular outcome. It may be thought that the principles listed for the appellant would have some bearing on the direction of reform: but, and for example, the cited principles of utu and muru function with the framework of take and ea.³⁵ The point, again, is that a substantive case must be put and is not present here.

Whether *van Soest* should be revisited

28. The further and more specific point put for the appellant is that this Court should set aside the constraints – a requirement of diagnosed psychiatric illness and proximity – upheld by the Court of Appeal in *van Soest*.

29. It is said that the 2017 decision of the Supreme Court of Canada in *Saadati* and the dissenting judgment of Thomas J in *van Soest*, if followed by the Court, would mean that:³⁶

“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*,

³² *Ellis v R* [2022] NZSC 114; [2022] 1 NZLR 239, [10]-[11] and see also, in the context of legislative reform, Te Aka Mātua o te Ture | New Zealand Law Commission *He Poutama* (Pūrongo Rangahau | Study Paper 24, 2023) [9.2]ff.

³³ See, for example, *Ellis* above n 32 [120] per Glazebrook J (integrity) and [166] per Winkelmann CJ (procedural and substantive fairness) and *He Poutama* above n 32, [8.106]ff (promotion of manaakitanga in proceedings to ensure integrity and correct development).

³⁴ See, for example, *Ellis* above n 32, [35]-[38].

³⁵ Take-utu-ea is a principle of cause, reciprocation and balance, directed toward ultimate peaceful resolution of disputed and complex issues: see, for example, Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Rev ed 2016) 35 and, particularly, the detailed discussion of utu and ea in *He Poutama* [3.60]-[3.69].

³⁶ AS [4.18].

further evidence would not be necessary as Mrs Hawkins has already provided sufficient proof.”

because, it is said, *Saadati* held that:³⁷

“... 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.’”

in the form of a statement by Mrs Hawkins that she had become reclusive and had been harassed by members of the Mongrel Mob, whom she believed to be acting in support of the respondent, though it is not said that he directed that harassment.

30. However, *Saadati* did not propose a lower or less stringent standard of evidence. Instead, both it and, as below, the dissent of Thomas J addressed the specific – and long-debated – question of whether a clinical diagnosis of recognisable psychiatric illness is a precondition for a mental injury claim. The Court in *Saadati* rejected that precondition, holding that that Court had never required it.³⁸

31. The Court framed the resulting reformed evidential standard as follows:³⁹

“... the claimant’s task in establishing a mental injury is to show the requisite degree of disturbance (although not, as the respondents say, to show its classification as a recognized psychiatric illness).

Nor should any of this be taken as suggesting that expert evidence cannot assist in determining whether or not a mental injury has been shown. In assessing whether the claimant has succeeded, it will often be important to consider, for example, how seriously the claimant’s cognitive functions and participation in daily activities were impaired, the length of such impairment and the nature and effect of any treatment To the extent that claimants do not adduce relevant expert evidence to assist triers of fact in applying these and any other relevant considerations, they run a risk of being found to have fallen short. As Thomas J. observed in *van Soest* (at para. 103), ‘[c]ourts can be informed by the expert opinion of modern medical knowledge’, ‘without needing to address the question whether the mental suffering is a recognisable psychiatric illness or not’. To be clear, however: while relevant expert evidence will often be helpful in determining whether the claimant has proven a mental injury, it is not required as a matter of law. Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. And, of course, it also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused any mental injury, or at least any mental injury known to psychiatry. ...”

³⁷ AS [4.11], citing *Saadati* at [37].

³⁸ Above n 3, [11] and see further grounds for rejection at [33]-[36].

³⁹ *Saadati* above n 3, [37]-[38].

32. Similarly, in *van Soest*, Thomas J referred to the judicial and scholarly debates over the requirement of a recognised psychiatric illness and instead proposed the following:⁴⁰

“For my part, I would: ...

- Modify the rule that for damages to be recoverable for mental suffering the plaintiff must have a recognisable psychiatric illness to make it a general rule that, while damages are not generally available in the absence of a recognisable psychiatric illness, the plaintiff will not be prevented from recovering if he or she can nevertheless demonstrate that, although not identified as a recognisable psychiatric illness, their mental suffering is of the order, or approaching the order, of a psychiatric illness and therefore plainly outside the range of ordinary human experience.”

and, further and in terms similar to *Saadati*:⁴¹

“... No doubt, the question whether the plaintiff’s mental suffering amounts to a recognisable psychiatric illness or not is easier to cope with than the task of ascertaining the true extent of the plaintiff’s mental suffering. But it is not the fair and proper question. For that reason, while not advocating the abandonment of the requirement for a recognisable psychiatric illness altogether, I do not consider that it should be applied in absolute terms. For the present it is enough that it can be the general rule.

Obviously, in practice a plaintiff would still seek to prove that he or she suffered a recognisable psychiatric illness as a result of the accident or tragedy. If and when that condition has been established there will be no argument about his or her ability to seek damages for an actionable injury. In this sense it would be the general rule or principle. But it need not be absolute. ... The question whether the plaintiff’s mental illness, although not commanding a psychiatric label, is plainly outside the range of ordinary human experience in the sense that I have described would still be subject to expert medical evidence ...”

33. The appellant also refers to the rejection of proximity put by Thomas J and in *Saadati*,⁴² stating that it should not apply in a case such as the present.⁴³ The point, however, is again that there is not a substantive basis put forward to warrant such a departure.
34. The appellant also cites two Ontario first instance decisions, *Snowball* and *Sigurdson*, for the extension of *Saadati* to claims for mental distress by bereaved family members.⁴⁴

⁴⁰ Above n 1, [78]-[79]; [83]; [97]-[100].

⁴¹ Above n 1, [105]-[106]. Thomas J did, however, go on to propose that (at [107]):

“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.”

⁴² AS [4.9] & [4.13]; also noting the proximity standards applied in *Paul*, above n 2, [4.16].

⁴³ AS [4.20]-[4.24].

⁴⁴ AS [4.14].

35. However, the two decisions are concerned with the identification, in response to strike out applications, of potential alternative claims driven by particular and distinct facts:

35.1. In *Snowball*, the Court declined an application to strike out such a claim. It noted precedents from *Baker* onwards and also statutory reforms and observed:⁴⁵

“... none of the cases provided by the plaintiffs involve a situation where damages for mental injury have been awarded to a person who has not suffered bodily injury or who has not witnessed the injury or death of another person or its immediate aftermath.”

but cited the availability of claims for witnessing a death and, further, the removal of absolute preconditions in *Saadati*, and held that the claims “might succeed” and should be determined on the basis of “robust” factual assessments.⁴⁶ The case did not proceed further and the strike out decision was described in 2021 by the British Columbia Court of Appeal as follows:⁴⁷

“... *Snowball* likely stands on its own in Ontario. Furthermore, the claim in that case relied—at least in part—on what was said to be an already recognized duty of care ‘owed to family members of persons who die in aviation crashes by Transport Canada, its inspectors, and the operators of such flights’ ...”

35.2. Similarly and as properly acknowledged for the appellant, *Sigurdson* struck out a bereavement claim but that it had not been established that a claim by the father of the deceased, who had searched for him and found his body, had no prospect of success. The Court suggested that such a claim may arise by extension of precedent involving rescuers.⁴⁸

Relevance of the Prisoners’ and Victims’ Claims Act 2005

36. The wider proposition advanced for the appellant is that the PVCA either:

36.1. Requires a cause of action in damages;⁴⁹ or

⁴⁵ *Snowball v Ornge* 2017 ONSC 4601, [16].

⁴⁶ Above n 45, [21].

⁴⁷ *EB v British Columbia (Child, Family and Community Services)*, 2021 BCCA 47, 67.

⁴⁸ *Sigurdson et al v Norbord Inc et al* 2021 ONSC 5193, [12]; [42]; [46]-[48].

⁴⁹ AS [1.4] the present claim “exemplifies the purpose” of the PVCA, such that a “clear pathway” for damages should follow.

36.2. Requires modification of an extant cause of action to allow recovery in the instant case, either:

36.2.1 By removing the requirement for “expert evidence and submissions to establish mental harm”, as envisaged by the Court below following *van Soest*;⁵⁰ or

36.2.2 By reinterpretation of the DBAC Act to allow recovery, despite *Pou* and the other precedents;⁵¹

and there is reference to that fulfilling parliamentary intent,⁵² although without addressing the parliamentary record as below.⁵³

37. The Court below, following the High Court, declined such interpretation of the PVCA. As observed by the Court:

37.1. Section 46(3)(c) provides that a claim by a victim must not be accepted unless the Tribunal is 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.”

s 47(2) in turn requires the Tribunal to “apply the general law relating to the awarding of damages” in its decision as to damages.

37.2. The result, as put by the Court, the PVCA is:⁵⁴

“... is intended to facilitate a victim who has a ‘cause of action’ for ‘damages’ against a prisoner under the ‘general law’”.

and does not create a new cause of action; and

⁵⁰ AS [4.4] (evidential requirement “could undermine the statutory scheme”).

⁵¹ AS [5.26] (change in interpretation of the DBAC Act to meet “Parliament’s expectation such damages would be available in cases like the present”).

⁵² See AS [1.4] (claim “exemplifies the purpose” of the PVCA) such that damages should be recoverable and [5.26] (“Parliament’s expectation such damages would be available in cases like the present one”).

⁵³ The submissions do record (at n 7) that the late appellant Mrs Hawkins made a submission on the Bill and there was reference to her in the third reading debate. However, it is not correct that that submission was cited “in support of the Bill”. Instead, as recorded (see the speeches of two opposition Members at NZPD vol 626, 20563 & 21304, 1 June 2005), the late appellant was cited in opposition the Bill on the basis of her submission the Bill should have barred compensation outright, rather than creating a claims mechanism.

⁵⁴ CA [66], **Case 05.0037**; also [68] “the PVC Act requires a ‘cause of action’ for ‘damages’ under the ‘general law’” and [91] “the PVC Act does not provide a standalone basis”.

37.3. There is nothing in the PVCA to amend or alter the interpretation of the DBAC Act or otherwise give rise to a cause of action:⁵⁵ such provision would require express words.⁵⁶

38. The two further points are that:

38.1. The approach of the Court below is, contrary to several references to such parliamentary intent for the appellant,⁵⁷ supported by the legislative history:

38.1.1 The Explanatory Note to the Bill as introduced records:⁵⁸

"A [victim's] claim can succeed if the Tribunal is satisfied that the facts establish a recognised cause of action for which compensatory or exemplary damages are payable under the general law."

38.1.2 The responsible Minister stated at the second reading of the Bill that:⁵⁹

"The tribunal will determine claims and make any orders based on the general law of damages."

39. Further and as acknowledged by the Court below, Parliament could have enacted the PVCA in different and potentially more straightforward terms, but did not do so.⁶⁰ As that Act stands, the different provision sought for the appellant does not meet the standard for a necessary inference.⁶¹

40. It follows that appeal should be dismissed. The parties are legally aided and no issue arises as to costs.

B Keith / A Singleton
Counsel for cross-appellant

⁵⁵ CA [66], **Case 05.0037-38**.

⁵⁶ CA [66] and [68], **Case 05.0038**.

⁵⁷ Above n 52 and also AS [8.1] (common law must "better align ... with parliamentary expectations in this area").

⁵⁸ Prisoners' and Victims' Claims Bill (241-1), p 3 and see also p 13 (repeating the terms of what is now s 46(2)(c) & 47(2)).

⁵⁹ (12 May 2005) 625 NZPD 20556 (Prisoners' and Victims' Claims Bill - Second Reading, Hon Phil Goff, Minister of Justice).

⁶⁰ CA [65] & [68], **Case 05.0037-38** (PVCA could have been enacted to parallel reparation entitlements); note, however, that that would not have assisted in the present case.

⁶¹ *Poynter v Commerce Commission* [2010] NZSC 38; [2010] 3 NZLR 300, [46].