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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 16/2022
[2022] NZSC Trans 22
Republished: 12 October 2022

BETWEEN **ROBERT ROPER**
Appellant

AND **MARIYA ANN TAYLOR**
First Respondent

ATTORNEY-GENERAL
Second Respondent

SC 23/2022

BETWEEN **ATTORNEY-GENERAL**
Appellant

AND **MARIYA ANN TAYLOR**
First Respondent

ROBERT ROPER

Second Respondent

Hearing:	05 October 2022
Court:	Winkelmann CJ Glazebrook J O'Regan J Williams J William Young J
Counsel:	J F Mather and L M Herbke for the Appellant G F Little SC and G E Whiteford for the First Respondent A C M Fisher KC and E N C Lay for the Second Respondent

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CIVIL APPEAL

MS FISHER KC:

E ngā Kaiwhakawā, tēnā koutou. Ko Ms Fisher ahau, kei kōnei (Māori 10:03:21) ko Ms Lay (Māori 10:03:24) mō te Karauna.

WINKELMANN CJ:

Tēnā koutou.

MR LITTLE SC:

May it please your Honours. I appear with my learned friend Mr Timothy Little and Ms Geraldine Whiteford for the cross-appellant/first respondent.

WINKELMANN CJ:

Tēnā koutou.

MR MATHER:

May it please the Court. Counsel's name is Mather and I appear with my learned friend Mr Herbke for the appellant Mr Roper.

WINKELMANN CJ:

Tēnā korua Mr Mather. So just reminding myself about who's going first. That would be the Attorney-General I suppose, I think, yes. Can I just clarify there are no name suppression issues in this case?

MR MATHER:

No, your Honour, not from our point of view.

WINKELMANN CJ:

Thank you.

MR MATHER:

If I may I think there are in respect of two or maybe three of the witnesses, but not by the parties.

WINKELMANN CJ:

Thank you. Ms Fisher?

MS FISHER KC:

Thank you your Honour, and your Honours. You should have before you the synopsis of the appellant's submissions, together with the Attorney-General's submissions, and the cross-appeal submissions, and there should also be the bundle in front of you, which we can refer to. It's been recently supplemented in terms of the legislation, but you should have all that now in front of you on the computer.

WINKELMANN CJ:

Yes.

MS FISHER KC:

So the central issue in this case is whether Ms Taylor's for false imprisonment falls inside or outside of the accident compensation regime. If Ms Taylor has cover under the section 21 of the Accident Compensation Act 2001, and I thought it would be useful just to take you to that section so we can just work

through to see exactly what that means. So it's on page 45 of the bundle, and at section 21, which relates to: "Cover for mental injury caused by certain criminal acts." Under (1)(a) "he or she suffers the mental injury inside or outside New Zealand…"

So that clearly applies. (b) "the mental injury is caused by an act performed by another person." And subsection (2)(c) "that' it's within the description of an offence listed in Schedule 3." And section 3 is at the back of that bundle of documents under tab 2, and you'll see that "Cover for mental injury caused by certain acts…" it's covered under the "indecent act" under section 135.

So there's no question that those all apply to Ms Taylor. Then we move on to subsection *[sic]* 21(4): "Section 36 describes how the date referred to in subsection (3) is determined." And your Honours will be familiar with this section of course. Section 36 makes it plain that the date "on which a person suffers mental injury in the circumstances described in section 21 or 21B is the date on which the person first receives treatment for that mental injury."

We know from the evidence that Ms Taylor first received treatment in 2015. So she meets all the criteria that's set out there under section 21. So there's no question that she is able to make a claim for cover under section 21.

So with that background in mind we then need to turn to the two competing positions that we're dealing with, and I would like to take your Honours firstly to the judgment, and if we can look at what Justice French said, which starts at paragraph 166. Starting off at paragraph 166 you will see that Justice France says, and she's talking about the facts of this case. "In my view, the facts of this case are so far removed from *Willis v Attorney-General* as to bring it within a different category. First, the claim in this case is for a clinically recognised mental illness and not… 'mere humiliation or distress'. Secondly, in *Willis* the detention was unaccompanied by… physical violence or the threat.. It was detention simpliciter."

Then she goes on to say this: "In stark contrast in this case, we are essentially concerned with a series of incidents that cumulatively impacted on Ms Taylor. The pulling of the bra straps, the touching of her bottom, the rubbing… up against her, the ogling in the changing room, the groping in the car… touching of her bottom with an iron bar in the tyre cage were all part of a predatory and sexualised course of conduct." She says: "In those circumstances it is… highly artificial to isolate two aspects of that conduct – the detention in the car and the tyre cage – both of which were limited as found by the Judge – and say they, in isolation, were a substantial cause of the mental illness."

She says: "This does not reflect the reality of the case. On the contrary, it emerges very clearly from Ms Taylor's own evidence that the impact on her from being locked in the car and the tyre cage derived from her knowledge of Mr Roper as a sexual predator and what he was capable of doing and had done to her."

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She goes on to say in paragraph 169: "In deciding whether the false imprisonment was a substantial cause of the damage, the Court in *Willis* enjoined judges to adopt a common sense approach and to be guided by what is within the broad spirit of the accident compensation legislation. Standing back and looking at the nature of the harm claimed and the tortious conduct that caused that harm, I consider in substance this claim is undoubtedly a claim in the nature of personal injury by accident. To hold otherwise is in my view to interpret *Willis* as imposing a universal rule that all claims for false imprisonment are outside the scheme and this is not what the Court held."

Now the opposing view of the majority is set out at paragraphs 205 and 206 and it's useful just to go to those. In paragraph 205 it starts with the majority saying: "Justice French does not expressly endorse the Judge's 'intertwined' analysis. Having recited the discussion in *Willis* of the 'grey area' of overlap of false imprisonment … Justice French states that it all depends on whether the false imprisonment is 'a substantial cause' of the mental injury. She concludes that it was Ms Taylor's fear of being sexually violated and subjected to other

forms of violence while being detained that was the 'substantial cause' of her injury."

The majority then go on to say: "There may be of course multiple causes of mental injury. There may also be more than one substantial cause. We do not consider this Court in *Willis* intended substantial to be synonymous with primary or dominant. It is sufficient that the cause is not insubstantial or minimal. Consequently, as the Court stated, if the mental consequences have been caused by both false imprisonment and the assault and battery, a plaintiff can still claim damages for those consequences." They say: "The 'clear rule' in *Willis* will apply unless the false imprisonment is not one substantial cause of the mental injury," and they also go on at paragraph 207 to talk about what happened in the tyre cage.

Now it's the Attorney-General's submission that the isolation of two aspects of that conduct, the detention in the car and the cage, is artificial and does not reflect the reality of the case. So when we're looking at the *Willis v Attorney-General* [1989] 3 NZLR 574 (CA) case, it's useful to have a look at actually what President Cooke was saying, and if I can get you to turn to tab 23 of the bundle of authorities you'll have there, the *Willis v Attorney-General* case, and I'm taking you through to page 579 which is the last page of the judgment, and it starts there with in that case, of course, the statement of claim alleged humiliation and distress. There was no suggestion of assault or battery. There is no mention, technically or otherwise, of force or a threat of force, and then the President says this: "False imprisonment is the unlawful total restraint of the liberty of a person. It may be but is not necessarily brought about by force… Force or the threat of force is not the gist of the cause of action…," and going down to line 14: "Applying again the tests of the purposes of the Accident Compensation legislation and the natural and ordinary use of language, we have come to the conclusion that false imprisonment is outside the purview of the Act. In ordinary speech we do not think it could be said of anyone who had been detained as the plaintiffs claim to have been that he or she had suffered personal injury by accident."

He goes on to say: “No doubt there is a grey area in which it can be argued that distress or humiliation or fear for which a plaintiff alleging false imprisonment seeks damages amounts to or overlaps…”. But then he goes on to say: “…we think the clear rule must be adopted that any claims for any kind of damages for false imprisonment alone and for any distress, humiliation or fear caused thereby are outside the scope” of the scheme. But then he says: “If such mental consequences have been caused by both…, a plaintiff can still claim damages for them. It is enough if the false imprisonment has been a substantial cause.”

He then goes on to say: “Trial Judges will adopt a common sense approach, guided by what is within the broad spirit” of the scheme “and what is outside it.”

So that’s where it was left in *Willis*.

WINKELMANN CJ:

So doesn’t that just mean it’s a factual question as to whether it’s a substantial cause?

MS FISHER KC:

That’s exactly what it is, your Honour.

WINKELMANN CJ:

And the Court of Appeal says that it’s open to a trial judge to find that it was a substantial cause.

MS FISHER KC:

Yes.

WINKELMANN CJ:

And you say they were wrong?

MS FISHER KC:

We say they were wrong because the evidence, and when you look at the facts in particular, clearly show that these incidents were all intertwined. So on that note let's look at what the evidence actually said.

WINKELMANN CJ:

But that's a different test, isn't it, because that's applying a different test? The Court of Appeal is not suggesting that it's necessary in *Willis* to decide whether they're intertwined. They're simply saying if the false imprisonment is a substantial cause it can proceed.

MS FISHER KC:

Yes, but if you're looking at whether it's a substantial cause or not, you have to analyse the facts of the case and determine what the facts are actually saying. Are the facts showing it's a substantial cause or can you look at the facts differently?

WILLIAMS J:

Justice Edwards didn't actually say it wasn't a substantial cause. He said effectively that there's the overlap: "I consider the mental injury which Ms Taylor says resulted from that claim would have been covered under the 1982 Act." It's not quite the test that the Court of Appeal in *Willis* adopted.

MS FISHER KC:

She doesn't refer to the substantial cause because she thinks *Willis* doesn't apply because the facts are so far removed from *Willis* you don't need to look at that.

GLAZEBROOK J:

And the Court of Appeal says that's wrong as a matter of law.

MS FISHER KC:

Yes, well, the Court of Appeal have said as long as it's not an insubstantial cause, but they're not doing what I – what the *Willis* test is asking you to do is to stand back and look at what this case is all about.

GLAZEBROOK J:

Can we have a hypothetical where somebody is – and obviously something that is possible and false imprisonment is recognised by – in *Willis*. Somebody has a gun pointed at their head and said: "Get in this cage." They're then detained in the cage for 24 hours. What do you say about that? It's not false imprisonment simpliciter because there's the threat of violence and obviously that's what they're worried about as they're being detained.

MS FISHER KC:

Well, you look at what the cause of the personal injury was or what the cause of the damage was. If they're suing for the psychiatric harm or emotional distress, if that was primarily caused from the pointing of the gun and the fear, if that's, that's the personal injury that they're suffering.

GLAZEBROOK J:

But that's the point, isn't it, that if it was substantially caused by the false imprisonment and not the pointing of the gun, then isn't it related to the false imprisonment? Isn't that all *Willis* is saying?

MS FISHER KC:

Well, yes, because it's false imprisonment simpliciter. You're not relying on any personal injury.

GLAZEBROOK J:

Well, it's not simpliciter because it was a combination of the two. Well, this isn't saying if there's a combination of force and personal injury and false imprisonment you can't get damages, does it, or do you say it does?

MS FISHER KC:

No, no, it says you can get both but you have to look at what the substantial cause of the injury was and if the plaintiff –

WILLIAM YOUNG J:

A substantial cause.

GLAZEBROOK J:

Yes.

MS FISHER KC:

Not an insubstantial cause. Thank you.

WILLIAM YOUNG J:

No, just "a substantial cause" was the language.

MS FISHER KC:

It is.

WILLIAM YOUNG J:

It's been twisted around into either "the substantial cause" or "a not insubstantial cause".

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MS FISHER KC:

Yes, it's an unusual way of putting it. But don't you have to stand back and look at what's the injury that the plaintiff is suffering in that case? If she's suing for the mental injury that she suffered, if she's got post-traumatic stress, you've got to look at what's caused that. Was it caused by the gun being pointed at her head, and her fear of personal harm, or was it caused by –

GLAZEBROOK J:

Well does it have to be or the other, can it be both?

WINKELMANN CJ:

Can I ask you a question. So is your submission then not that the Court of Appeal majority was in error in the legal test they applied, but in their factual finding?

MS FISHER KC:

Correct.

WINKELMANN CJ:

And do you say their factual finding was inconsistent with the trial Judge's?

MS FISHER KC:

It was.

WILLIAM YOUNG J:

Where in her judgment did she say it wasn't a substantial cause?

MS FISHER KC:

She didn't use those words, but she said "standing back it's a personal injury by accident". That's what she suffered.

WILLIAM YOUNG J:

Paragraph 179?

MS FISHER KC:

Yes.

WINKELMANN CJ:

So there's no finding inconsistent with the Court of Appeal's finding then? Factual finding.

MS FISHER KC:

In Justice Edward's decision –

WINKELMANN CJ:

Factual finding.

MS FISHER KC:

No, no, but it is useful at this stage to have a look at what the evidence actually was.

WINKELMANN CJ:

Yes, it sounds like it would be.

MS FISHER KC:

And if I can take you to tab 58 of the case on appeal. Now this is the evidence of Ms Taylor, and there's a number of paragraphs I want to take you to. The first one is her evidence at paragraph 11 and she says here: "Sergeant Roper was continually touchy feely, he would rub himself up behind me when I was in the tyre bay, gyrate – "

WINKELMANN CJ:

We can read it if you like. Yes.

MS FISHER KC:

Then at paragraph 15, over the page, it's just the last sentence. He'd locked the vehicle doors, put his hand up my skirt while I was driving, and grope and touch me. Then over the page the second half of paragraph 17 she talks about "having to live with the fear of what he was capable of, how he made me feel when he was sexually touching me". Again at paragraph 18, just the last sentence: "I was always fearful of being assault worse than I already had been, being raped or beaten up or murdered on that country road between Whenuapai and Hobsonville."

Then again at paragraph 24, now she's talking about the tyre cage. "This behaviour continued and worsened…". Half way through: "I… remember the terror and fear I felt when he would lock me in the… cage."

Over at 25 she talks about the humiliation and distress. In the last sentence: "The 'what ifs' thinking if he can do this when others are around, then what was he capable of on those nights when I was alone…".

Finally at 42 she talks about “the terrifying times I had alone with him in the car”.

WINKELMANN CJ:

Yes, well isn't it open, influenced on those facts, that the fact that she is confined by him, and subject to him doing whatever he wants is a substantial part of what’s going on for her?

MS FISHER KC:

Yes.

WINKELMANN CJ:

I mean that evidence tends to suggest that.

MS FISHER KC:

It does but then we need to look at what the medical evidence was, about what the cause of her injury was, and that’s set out at tab 77, and this is the report of Dr Eshuys, and I want to take you down on the first page at 301.0002 down the bottom. She talks about: “Ms Taylor alleges many insidious and distressing incidents that occurred over the three year period…”. He was, over the page: “regularly watching pornography… her systematic sexual harassment… verbal and emotional abuse… being prodded with an iron bar and forced into a wire mesh cage..”.

Then at paragraph 7 she talks about “using the iron bar” and then at the bottom of paragraph 7 she talks about “he would proceed to threaten her” and touch her. “She was threatened by him that should – ”

WINKELMANN CJ:

Well this is just a doctor recounting, effectively, the evidence.

MS FISHER KC:

It is.

WINKELMANN CJ:

So that's not adding anything other than a narrative of the evidence.

MS FISHER KC:

No. I'll take you to her conclusions then at page 301.0009. She talks half way down that, this is paragraph 32, midway she says, just after the brackets: "it is evident from her responses that Ms Taylor has experienced traumatic events that may have involved a threatening situation or serious injury during which she suffered intense fear."

But perhaps the most compelling thing that she say sis set out over the page at 301.0010 when she talks about the criteria for post-traumatic stress disorder, which is what she says the injury in, in this case, and this is on 301.0010, and she says that the criteria for post-traumatic stress is: "Exposure to actual or threatened death, serious injury, or sexual violence in one or more of the following ways." So the important point is there that to be diagnosed with post-traumatic stress disorder you have to have been exposed to a serious event, actual or threatened death, injury or sexual violence.

If you turn now to page 301.0012 down the bottom the doctor summarises this as saying: "It is my opinion – "

GLAZEBROOK J:

Sorry, what page?

MS FISHER KC:

Page 301.0012, paragraph (c) right there at the bottom: "It is my opinion that a post-traumatic stress disorder originated in her exposure to emotional, physical and sexual abuse whilst in the employ of the RNZAF and under the direct command…".

Then the next paragraph is "his use of force, threats, intimidation" and fear, and she talks about her "voicing complaints" but then she says it's "not surprising given the literature indicates that sexual assaults are a major contributing cause

to the development of PTSD in female service members." This is the point of this analysis, that it was her fear of him that arose because she had been sexually assaulted by him. She'd been sexually violated by him. So when she's in the cage she's very fearful of harm to her person because of what he has done. She' snot suffering post-traumatic stress disorder because she's int eh tyre care. She's suffering post-traumatic stress disorder because of what he has physically done to her. The criminal act, the sexual assault, that is what has caused her distress and her fear of being in the tyre care. Being in the tyre cage simpliciter is not generating post-traumatic stress disorder.

WINKELMANN CJ:

Although being in a tyre cage and being in a car, on this narrative, arguably is the thing that makes her so vulnerable to all the other terrible things. So you could say that the fact of the imprisonment – sorry, for the Court of Appeal to say the fact of the imprisonment is a substantial cause.

MS FISHER KC:

Except the literature that Dr Eshuys refers to says you really need that fear of injury or sexual violence to give you post-traumatic stress disorder. If she wasn't suffering from post-traumatic stress disorder, if she was suffering some other mental injury, maybe it's open to suggest that, but she's got post-traumatic stress disorder, which derived form her fear of him, from personal harm to herself, from the, you know, the sexual assaults, the groping, the touching, that's what caused her fear. That's what her mental injury is and we say that is the substantial cause of her harm. So you need exposure to actual or threatened death or serious injury to qualify for this disorder.

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WINKELMANN CJ:

Is that a mainstream view of post-traumatic stress disorder?

MS FISHER KC:

Yes, there's nothing to suggest that's not the case.

GLAZEBROOK J:

Well you don't have to be assaulted, do you, or do you say you have to have been assaulted or – because you could be very fearful of something that's going to happen if you find yourself locked in a cage, just absolutely simplistic, couldn't you. It would be rational to think "why am I being locked in a cage" if it's not for some nefarious purpose.

MS FISHER KC:

It could be intense fear. It could be intense fear. Intense fear of suffering physical harm.

WINKELMANN CJ:

Yes, well, but that's her evidence, and the intense fear is located in the fact that she is completely vulnerable to him because she's locked in a car or locked in a cage.

MS FISHER KC:

Well no the, well –

WINKELMANN CJ:

On that lonely country road I was vulnerable to him doing anything.

MS FISHER KC:

Yes but we've just got to be a bit realistic. The evidence also said that that long country road drive, in fact, was five to seven minutes.

WILLIAMS J:

It's quite a long time.

MS FISHER KC:

Five to seven minutes well…

WILLIAMS J:

Shall we time it? It's quite a long time if you're stuck in a car.

GLAZEBROOK J:

If you stood through the moments of silence for the Queen, even one minute seems an awfully long time.

MS FISHER KC:

True, that's fair enough.

GLAZEBROOK J:

It's obviously a mark of respect but it still is a long period.

MS FISHER KC:

Yes, I'm not going to disagree with that, but I think it's important to look at what her real fear was, and it was fear of personal harm to herself. He had sexually assaulted her, that's what she was worried about. She was worried about being raped and murdered by – that's what was worrying her, because he'd sexually assaulted her.

GLAZEBROOK J:

So the fear of an injury is enough to give you cover under the Act, is that the submission?

MS FISHER KC:

Well, it's got to be, for mental injury it's got to come in one of the sections in Schedule 3.

GLAZEBROOK J:

Well that's what I was just going to –

MS FISHER KC:

So fear on its own, unless it – fear on its own like that, you'd need to link it in to Schedule 3.

GLAZEBROOK J:

All right, do we want to have a look in Schedule 3. I'm just postulating something where somebody is locked in a cage and thinks the only reason I can be locked in here is because they want to do me home.

MS FISHER KC:

Right.

GLAZEBROOK J:

And maybe threatened in order to get into that cage. I'm just trying to work out the bounds of this particular argument, that's all.

MS FISHER KC:

Yes, well the Schedule 3 is primarily dealing with sexual assault, and it's primarily attempted sexual violation, attempted –

GLAZEBROOK J:

I'm really saying is there a threat of that there?

MS FISHER KC:

No, no, there's no threat.

GLAZEBROOK J:

So it has to be linked to an actual incident?

MS FISHER KC:

Or attempted, yes.

GLAZEBROOK J:

Well, no, or attempted.

MS FISHER KC:

Yes, it has to – to get under Schedule 3, yes, it has to be that. So fear on its own wouldn't qualify for –

GLAZEBROOK J:

So it can't be, I'm going to lock you in the cage and I'm going to rape you at the end of the day. That doesn't give you cover?

MS FISHER KC:

No, it wouldn't give you cover because it doesn't come within Schedule 3. So you wouldn't come in under section 21 –

GLAZEBROOK J:

So your argument, as I understand it then, is that her fear was linked to the sexual assaults –

MS FISHER KC:

It was.

GLAZEBROOK J:

– rather than the false imprisonment as a matter of fact.

MS FISHER KC:

As a matter of fact, yes.

GLAZEBROOK J:

I understand.

WINKELMANN CJ:

Which seems inconsistent with her evidence really, which is that her fear arises from her vulnerability. That's her narrative. It's her expression of vulnerability which you could see is located in the false imprisonment.

MS FISHER KC:

Well, her evidence does emphasise the sexual touching is what it was that she was fearful of. She talks about that happening, that first incident happening quite quickly when she was at the base, and it was all about what he would do with her, touching her, grabbing her bottom, her breasts, her upper thighs, cornering her, that's what distressed her.

WINKELMANN CJ:

She also talks about her vulnerability.

MS FISHER KC:

Yes she does.

WILLIAM YOUNG J:

But Justice Edward's findings on causation were perhaps by a narrow margin she rejected the claims in relation to – as to causation – in relation to depression and anxiety but accepted in relation to PTSD.

MS FISHER KC:

Well, yes, she said there didn't seem to be any other explanation for her PTSD.

WILLIAM YOUNG J:

So that's 122 and 123.

MS FISHER KC:

Yes.

WILLIAM YOUNG J:

And then at 125: "I conclude, on the balance of probabilities, that Mr Roper's actions at Whenuapai were a material and substantial cause of M's current mental injury, being her PTSD."

MS FISHER KC:

Yes.

WILLIAM YOUNG J:

And do you tie that into the evidence given by the psychiatrist called for Ms Taylor to say that that's substantially associated with the sexual assaults?

MS FISHER KC:

Yes.

WILLIAMS J:

Can there be only – you're not suggesting that one substantial connection – only one substantial connection is available?

MS FISHER KC:

Well, it –

WILLIAMS J:

Do you accept there can be multiple substantial causes?

MS FISHER KC:

There can be multiple causes. In my submission there cannot be multiple substantial causes.

WILLIAMS J:

So in your view "substantial" means dominant?

MS FISHER KC:

"Substantial" means the material cause, the real reason why she's got her injury is due to… There can be lots of multiple causes for the injury.

WINKELMANN CJ:

Don't you have an issue with the indefinite article "a" as opposed to "the" in *Willis*?

WILLIAM YOUNG J:

At 125 in the High Court judgment the Judge refers to "a material and substantial cause of M's current mental injury, being her PTSD." By saying that she didn't exclude that there were perhaps other causes for her, or other reasons why she developed PTSD.

MS FISHER KC:

No, it was all to do with his conduct.

WILLIAM YOUNG J:

But –

WINKELMANN CJ:

Can I just ask Ms Fisher to answer the point about *Willis* though, which is that there's an issue with your submission that you just made because *Willis* says "a substantial cause", as Justice Young had pointed out earlier, not "the substantial cause".

MS FISHER KC:

I'll just go to *Willis*. Let's have a look. Yes, it does say "a substantial cause".

GLAZEBROOK J:

You can imagine a situation, can't you, where you have – I'm just thinking in a war-time situation, you could possibly have multiple causes in that without – if it was only one incident you might have actually managed but with the double incidents you can't. They could be different incidents that have actually caused that, because just looking at this, if you had been sexually assaulted in a relatively minor manner and then found yourself contained with a fear of a much more serious assault, and vulnerability and not being able to do anything about it, can you split out the causes in a case of that nature?

MS FISHER KC:

Well, I think you could. It's kind of like what Justice Heath had to do in that *Yarrall* case. It's that case where there was the car accident where the woman lost her unborn child, was physically injured, and then her mother also died in the same car accident, and Justice Heath said that he thought you could separate out the claim for the loss of the mother because that was a secondary victim, sort of nervous shock type of scenario, and that could be separated out from the mental trauma suffered from the physical injuries. I think you discussed this, your Honour, actually, in the *AB v Attorney-General* HC Wellington CIV-2006-485-2304, 11 February 2011 case. You refer to Justice Heath's decision in – might be useful –

GLAZEBROOK J:

But this has all happened to the same person though?

MS FISHER KC:

Yes, and it did in the *Yarrall* case as well but –

GLAZEBROOK J:

But in my scenario the false imprisonment is the worry about the threat of very much more serious harm than has already been suffered.

WINKELMANN CJ:

Which she says.

GLAZEBROOK J:

She says.

WINKELMANN CJ:

No, she actually gives evidence about that, doesn't she, what he was capable of?

MS FISHER KC:

Yes, she says she was fearful. But in –

GLAZEBROOK J:

So in fact possibly the actual cause could be – in fact, on the facts, the substantial cause could be the imprisonment because of the threat of much more serious harm.

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MS FISHER KC:

But that's not what the evidence was in this case. The –

WILLIAM YOUNG J:

Was there any – I mean at any –

WINKELMANN CJ:

Well, it was her evidence actually, that she was worried about what he was capable of, when he could do that with people around, what was he capable of on the Hobsonville to Whenuapai road:

MS FISHER KC:

Yes, but it's clear from the way she pleaded her case and it's clear from what the expert evidence was that it was primarily due to the sexual assault. Sorry Justice Young?

WILLIAM YOUNG J:

Was there any evidence from the psychiatrist called for Ms Taylor that the false imprisonment was a material and substantial cause of her PTSD?

MS FISHER KC:

No, no, to the contrary.

WILLIAM YOUNG J:

So we're really speculating as to what is and what – was there any evidence that it wasn't, to put it another –

MS FISHER KC:

No, it was primarily the –

WILLIAM YOUNG J:

No, sorry, but was there any – I mean the overlap between the false imprisonment and the sexual assault claims was clear. *Willis* was on the table. Was there any evidence from either the plaintiff or the defendants bearing on the causative effect, or likely causative effect, of false imprisonment?

MS FISHER KC:

Well, they lump it all together. It's all about the emotional, physical and sexual abuse. You know, it's all lumped together. That's what she says, that paragraph I took you to.

WILLIAM YOUNG J:

So just so I'm – I think the answer to my question is probably there wasn't the evidence, but I take it first of all the plaintiff's psychiatrist didn't say false imprisonment was itself a standalone material and substantial cause of her PTSD.

MS FISHER KC:

No.

WILLIAM YOUNG J:

And likewise your psychiatrist didn't say, well, this is just silly because the false imprisonment was wrapped up so closely with the assaults that it can't sensibly be regarded as a substantial or material cause of her PTSD, or –

MS FISHER KC:

No. He linked it all into the disturbing traumatic events. That's what gave rise to her post-traumatic stress.

WINKELMANN CJ:

So would I be correct in my assessment that when this goes to trial it's as in a lot of Accident Compensation claims, it's a morass of technical legal difficulty about which statutory regime applies and about how that fits with the facts and things start to become clearer by the time you get to submissions and clearer still in the judgment, so that in the High Court the Judge didn't make a finding in terms of *Willis* but the Court of Appeal did on the evidence, given that they effectively found that she'd taken a wrong legal approach, and so your argument has to be that the facts weren't available for them, that they were plainly wrong in that factual finding?

MS FISHER KC:

Well –

WILLIAM YOUNG J:

Only that they're wrong, I think.

WINKELMANN CJ:

Well, yes, wrong. Wrong, although – yes, only that they're wrong.

GLAZEBROOK J:

Or it wasn't – well –

WILLIAM YOUNG J:

It's not a trial.

WINKELMANN CJ:

Yes, quite. We'd have to be at the error of law level. It's just they're wrong.

MS FISHER KC:

Well, no, Justice Edwards, she's the one that heard all the evidence and she –

WINKELMANN CJ:

But she didn't find that it wasn't a substantial cause.

MS FISHER KC:

No, she felt it was all intertwined.

WINKELMANN CJ:

Which is not to say –

GLAZEBROOK J:

But you've accepted that's not the answer. "All intertwined" isn't the answer, because you've accepted that a threat of violence isn't enough.

MS FISHER KC:

No, well, her findings were the actions were a material cause.

GLAZEBROOK J:

No, and understandably because it was pleaded probably as a lump sum –

MS FISHER KC:

That way, yes.

GLAZEBROOK J:

– and argued as a lump sum and she found as a lump sum.

MS FISHER KC:

Yes. So your question is?

WINKELMANN CJ:

My question was is there any reason it wasn't open to the Court of Appeal to make this factual finding, or is your submission simply – I mean because they weren't overturning her factual finding. Even if they were, they could do. you accept that they weren't overturning her factual finding because she does not seem to have made a finding that it was not a substantial cause. She hasn't directed her mind to that, the trial Judge.

MS FISHER KC:

No, she didn't think the *Willis* test applied at all, it's just so far removed. So no, she didn't make – she didn't deal with the issue of whether it's substantive or not. She just felt you couldn't separate them out. You couldn't separate out the false imprisonment from what happened, from the sexual assault. It was all – the reason for her injury was all wrapped up in one.

WILLIAMS J:

So let's assume that that meant inferentially that the imprisonment and the fear of sexual assault were jointly substantial causes. Where does that get you? Let's just assume that for present purposes.

MS FISHER KC:

Yes. Well, I think you have to look at what the cause of the fear was, and the fear –

WILLIAMS J:

No, but I'm asking you to – if it's available, let's assume it's available, and because they were not, the plaited facts weren't unplaited, let's assume the Judge considered that the incarceration and the fear of sexual assault were each substantial causes. What's your answer to such a scenario?

MS FISHER KC:

If the Judge made that factual finding.

WILLIAMS J:

If that factual finding is available, let's assume that's what was the finding, what does the Act say?

MS FISHER KC:

Well if the substantial cause of it, of her injury was her fear, and the imprisonment, then that is the substantial cause, then –

MS FISHER KC:

No, there are two causes –

GLAZEBROOK J:

Just finish the sentence, sorry? If that was a substantial cause.

MS FISHER KC:

If the substantial cause was the imprisonment, the detention and the fear alone, and that was a factual finding that that was a substantial cause of her injury, then that would have to be available.

WILLIAMS J:

Even if it was also –

GLAZEBROOK J:

Are you saying that wouldn't be covered, because I think you're right if you're saying that.

MS FISHER KC:

Yes, it wouldn't be covered.

WILLIAMS J:

Even if another substantial cause is the ongoing fear of sexual assault?

MS FISHER KC:

Well you see I don't, in my submission you can't have two substantial causes.

WILLIAMS J:

Yes, so that's –

WINKELMANN CJ:

But that's a different, so you're saying, you're departing, you're asking us to depart from *Willis*.

MS FISHER KC:

I don't think –

WILLIAM YOUNG J:

I think you are actually.

WILLIAMS J:

You are, that's what *Willis* says, you can have more than one.

MS FISHER KC:

Well, no, you can have, well –

GLAZEBROOK J:

And logically you must be able to because in warfare you couldn't say, well I saw my friend being shot – well you possibly couldn't a friend – but I saw three men being shot and the third one tipped me over so that's the substantial cause, rather than the other two. I mean you'd have to have, wouldn't you?

MS FISHER KC:

Two substantial causes?

GLAZEBROOK J:

Well I saw my friend shot, plus then I saw an explosion that actually meant that a whole lot of civilians were caught in the explosion and I had something else, and I got PTSD. I mean nobody is going to say – nobody is going to go and say, oh well it was your friend being shot that was the only cause of that i.e. the substantial one.

MS FISHER KC:

Look, if that's what the evidence was, and you're satisfied that that was the evidence, yes you could say there were two –

WILLIAMS J:

There are two points here it seems to me. One is, must there be only one substantial cause. The other is, the Judge's conclusion on this was not available on the facts. Right, they're very different questions. One is a question of law, the other is a question of reasonable inference form facts. On the first question, don't you run into the problem that that's hardly ever the case? It's just way too simplistic in life to say there's always one cause that is the gotcha.

MS FISHER KC:

Yes, yes.

WINKELMANN CJ:

Can I just ask you –

WILLIAMS J:

So, can I just finish, so why are you arguing that now? As a matter of law, not as a matter of fact?

MS FISHER KC:

Well, I was just about to say that if you do have a substantial cause that relates to the mental injury, then you're covered by the Act if you've got that mental injury. For example, we're talking about the 2001 Act, but under the

1982 Act that fear alone causing her injury would have given her cover under the Act, because what you needed to establish was personal injury by accident, and that didn't limit your claim. You didn't need – there was no schedule under the 1982 Act, so you would just say, you would have suffered personal injury by accident.

WILLIAMS J:

Well, we're dealing with the effects of section 36 anyway, but it seems to me that the debate here is about the effect of substantial. First, that's the first part. What does substantial mean, what can it mean, and you're not really saying that substantial can be a single cause.

MS FISHER KC:

No.

WILLIAMS J:

You're not?

WINKELMANN CJ:

Well you are actually.

WILLIAMS J:

Well that's what I –

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WINKELMANN CJ:

Can I go back to the question I asked some time ago but I didn't get an answer to? You say that you're not departing from *Willis* but you are. So can you tell me – well, on the words of it you are because it says "a substantial cause" there. So that's the first point. Do you have any argument as to why *Willis* doesn't stand as authority for the fact there can be more than one substantial cause?

WILLIAM YOUNG J:

Well, isn't the better argument really the one that Justice French adopted? That is that this isn't really the sort of case that *Willis* contemplated. This is a case that is in truth and substance one of sexual assault, false imprisonment is incidental to that, and that that takes it out of the *Willis* approach. I mean she wasn't saying –

WINKELMANN CJ:

Well, that's a factual finding.

WILLIAMS J:

Exactly.

WILLIAM YOUNG J:

Sorry?

WINKELMANN CJ:

That's a factual finding.

WILLIAM YOUNG J:

Well, no, I think it may be – she says at 169: "In deciding whether the false imprisonment was a substantial cause of the damage, the Court … enjoined judges to adopt a common sense approach and to be guided by what is within the broad spirit of the ACC legislation. Standing back" – and then she departs a bit from, well – "Standing back and looking at the nature of the harm claimed and the tortious conduct that caused that harm, I consider in substance this claim is undoubtedly a claim –

WINKELMANN CJ:

Okay, I mean I know what she said, so can I –

WILLIAM YOUNG J:

Sorry?

WINKELMANN CJ:

Well, do you adopt Justice Young's answer to my question, Ms Fisher, because –

MS FISHER KC:

Well, it sounded quite good to me.

WINKELMANN CJ:

– because if you do, I make clear I have a follow-up question. So you adopt Justice Young's approach which is that the *Willis* test does not apply.

GLAZEBROOK J:

No, I think you have – I think you've said you don't adopt that argument. Or do you?

WINKELMANN CJ:

Because that's what Justice Young just said.

WILLIAM YOUNG J:

Well, I'm really just paraphrasing what Justice French –

WINKELMANN CJ:

And for my part I find it very hard to see how –

WILLIAM YOUNG J:

It was what Justice French said.

WINKELMANN CJ:

I just don't see how it's not a factual –

GLAZEBROOK J:

No, it's a – well, it's a –

WINKELMANN CJ:

Well, that's a factual finding.

WILLIAM YOUNG J:

She said: "In my view," 166, "In my view, the facts of this case are so far removed from *Willis* as to bring it within a different category."

MS FISHER KC:

Yes, that's what – she didn't apply the *Willis* test to this case because she didn't think she needed to because the primary, the cause of her injury was what – his conduct all wrapped up in one. So she just didn't need to apply it. She didn't think it was both.

WILLIAM YOUNG J:

It's also, I think she's saying –

WINKELMANN CJ:

Well, that is a factual finding in my – it's a confused thing then.

WILLIAM YOUNG J:

– that the injury that's being claimed for is actually fully covered by ACC as opposed to, say, humiliation and distress in relation to *Willis*.

WINKELMANN CJ:

So that's my follow-up question which is you were saying in answer to Justice Williams, I think, he was asking you why are you making this argument now, and you said, well, look she's covered. So is your argument that the Courts should take the view that her cause of action arising from false imprisonment should be taken away from her as a matter of policy because you can get compensation for the issues that she – for the personal injury for which she's covered?

MS FISHER KC:

Correct, yes.

WINKELMANN CJ:

Well, why as a matter of policy should she be deprived of her cause of action for false imprisonment in those circumstances?

MS FISHER KC:

Well, because of the Accident Compensation scheme and the bar. That's the social contract. If you're able to get cover for your personal injury then you lose your claim to sue. You lose your right to sue.

WINKELMANN CJ:

It's not a social contract.

WILLIAMS J:

So that gets you back to the point, it seems to me, that if you have cover under the Act on some aspect, end of game, which means one substantial cause covered under the Act is going to be enough.

MS FISHER KC:

Well, it will be enough, yes.

WILLIAMS J:

Which is so, so…

GLAZEBROOK J:

It's a different argument again though. So it would be useful to understand the different arguments.

WILLIAMS J:

But that – yes, that's different from saying there is one cause, because you started off saying there's one predominant cause and that's what the Act requires. But you're not really saying that. You're saying as long as one substantial cause is covered under the Act, disregard everything else.

MS FISHER KC:

Yes. I was concentrating on Justice Glazebrook's "fear alone" point when I was addressing that, if it was fear alone. But the correct answer is yes, if she's covered under the Act, which she is, then everything else must fall away.

WILLIAMS J:

So that suggests, doesn't it, that *Willis* was wrong because it contemplated the possibility of multiple causes and invited judges to take a sensible approach to that because this is real life and they're judges. You're much more black and white.

MS FISHER KC:

Well it's a bit more nuanced because of course *Willis* was decided in 1989, which was under the 1982 Act, where it was a bit all encompassing, it was personal injury by accident, it would have covered everything that happened, whereas under the 2001 Act we're only looking at mental injury that's within the schedule. So it's much more refined, it's –

WILLIAMS J:

But isn't that an argument against you? That the reach of the Act has shrunk?

WINKELMANN CJ:

It is rather.

WILLIAM YOUNG J:

Well is it –

GLAZEBROOK J:

I'm just looking at what's said: "If such mental consequences have been caused by both false imprisonment and assault or battery, a plaintiff can still claim damages for them. It is enough if the false imprisonment has been a substantial cause." So they're definitely not saying if you're covered under the Act you can't sue.

MS FISHER KC:

Well the only thing is if you just go back up a little bit to what he also says at – he says at line 20, or line 23, if we can just go up, and this is the gist of it. He says: "If a plaintiff were to claim damages for assault or battery the position would be different. Such claims are barred but they're not made here. If the detention of the plaintiff has been accompanied by physical injuries, damages cannot be claimed for those or for the pain or suffering they've caused." So he's much clearer there.

GLAZEBROOK J:

No, he's saying you can't claim it – it doesn't say you can't claim it for the false imprisonment either. Just saying that if it is damages for assault and battery other than exemplary, you can't claim. I don't think it's inconsistent with what's said below.

WINKELMANN CJ:

Well anyway, it says what it says I suppose. So Ms Fisher, we've given you a bit of an interrogation on this side of your argument, and very useful engagement on the issue of policy thanks.

WILLIAM YOUNG J:

Sorry, can I just ask one question on this, sorry.

WINKELMANN CJ:

Just before you do, just in terms of timing, because in the timetable you're finished by 11.30 I think, and I'm just anxious that you have enough time because you've got other arguments to make, haven't you?

MS FISHER KC:

Yes, well I was planning on speaking only for an hour, and Ms Lay is going to address you on 21B. But I can wrap up.

WINKELMANN CJ:

Okay, we'll just let Justice Young ask his question.

WILLIAM YOUNG J:

Okay, sorry, I understood from section 317 that if she had cover under the 1982 Act, then that's end of story.

MS FISHER KC:

Yes.

WILLIAM YOUNG J:

So we don't have to look at the narrowing of cover later, because we really just look at it at the time when the incidents happened.

MS FISHER KC:

Yes, it's personal do by covered by former Acts.

GLAZEBROOK J:

Do you want to just take us to why she had cover under the former Act?

MS FISHER KC:

Under the 1982 Act? Yes. So –

WILLIAMS J:

Don't the dates –

MS FISHER KC:

No she would have had –

WILLIAMS J:

Yes, but that doesn't apply here because the injury was in 2014/2015.

MS FISHER KC:

No but 317 says or, 317 says if she's covered by this Act *or* covered by the former Act. Obviously she wouldn't be putting a claim in now –

GLAZEBROOK J:

But surely she's only covered by the former Act if she had an accident at that time.

WILLIAM YOUNG J:

Which she did.

WILLIAMS J:

Well, no, she didn't have, not according to section 36.

WILLIAM YOUNG J:

No but –

MS FISHER KC:

No but she would've –

WINKELMANN CJ:

Because Mr Little's main argument, he doesn't seem to engage with any of the basis on which the Court of Appeal has decided this case. His main argument is that she doesn't have cover anywhere.

MS FISHER KC:

No, well I mean of course she had cover under the 1982 Act. Because of *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA) she's covered for her mental trauma.

WINKELMANN CJ:

Which she didn't suffer until 2015.

MS FISHER KC:

Well that's under the 2001 Act, but if she was under the 1982 Act she definitely would have had cover, if she'd put her claim in.

WILLIAM YOUNG J:

If she'd put her claim in.

MS FISHER KC:

If she'd put her claim in.

WINKELMANN CJ:

Well she hadn't been diagnosed at that point, so she couldn't put a claim in.

MS FISHER KC:

Yes, but you didn't need to be diagnosed under the 1982 Act.

WINKELMANN CJ:

Okay, right, that's the point.

WILLIAM YOUNG J:

Yes. The diagnosis requirement is linked to the narrowing of cover.

MS FISHER KC:

That's right. Now I just wanted to refer to the – when you're looking at causation it's helpful to look at *W v Accident Compensation* Corporation [2018] NZHC 937, [2018] 3 NZLR 859 case, a decision of Justice Collins, which is in your bundle under tab 20.

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Because he just, he says you don't need to get caught up in issues of causation and he says this. He says – he's talking about "the de minimis principle is not apt in the context of the scheme, under which there is no need to devise a means of attributing fault" and he talks about the words "because of" fit more comfortably with a test that focuses on the physical injuries, as long as you are able to establish a genuine and meaningful connection. Now here he's talking between the physical injury and the mental injury but then you've got cover under the Act. "In cases involving multiple contributions to a claimant's mental injuries, the decision-maker should ask if the claimant's physical injuries materially contributed… The inquiry involves an assessment of the evidence and the drawing of reasonable inferences." If the injuries materially contribute to his mental injuries, then the claimant will have cover. So that's what you need to do. So…

WILLIAM YOUNG J:

So this is the other side of the coin though, isn't it?

WINKELMANN CJ:

Yes. Yes, it is the other side of the coin. I'm interested in the notion of "social contract" because it's not really a social contract unless you think that the obligations imposed and rights imposed by Parliament is the social contract.

MS FISHER KC:

Well, those are the words that are used, aren't they?

WILLIAMS J:

Yes, that's what Parliament thought.

MS FISHER KC:

It's what Parliament thought.

WILLIAM YOUNG J:

It's a pretty commonly used expression.

O'REGAN J:

Yes.

WINKELMANN CJ:

I mean it was obviously a person with a – I think it was a –

GLAZEBROOK J:

Well, a social contract was not suing in return for getting cover.

WINKELMANN CJ:

It's a very libertarian kind of analysis. Obviously the person who wrote that material was – anyway.

MS FISHER KC:

No, well –

WILLIAMS J:

Justice Woodhouse.

MS FISHER KC:

What I wanted to get to was the description of personal injury by accident is really the heart of the plaintiff's claim in this case. So that's how you need to look at it. It's the heart of her claim and it falls within the Act. So we don't need to get caught up in the technical arguments of whether it might or might not apply if we just look at the fear. The essence of her claim is a mental injury caused by this conduct.

WILLIAMS J:

So this is really factual conclusion unreasonable argument, isn't it?

MS FISHER KC:

Yes.

WILLIAMS J:

You're not really arguing about the test at all.

MS FISHER KC:

No.

WILLIAM YOUNG J:

I think she is.

WILLIAMS J:

You just say the conclusion wasn't available.

GLAZEBROOK J:

Well, no, I think you are because you're saying if –

WINKELMANN CJ:

Yes, she is.

WILLIAMS J:

Well, not in the end.

GLAZEBROOK J:

Well, no, you're saying now if there's cover under the Act for the mental injury you don't, you can't sue for damages.

MS FISHER KC:

Yes.

WINKELMANN CJ:

Yes, you're saying the *Willis* test should be amended, although you say *Willis* doesn't say what we read it as saying, but apart from that your second approach – and I think you adopt Justice Young's sub – argument that Justice French –

WILLIAM YOUNG J:

Yes, not a submission.

WINKELMANN CJ:

Yes, it was a submission. He was making a helpful suggestion about your submission – the formulation of what Justice French had said which I had read as a factual finding myself but rather as an alternative factual finding in a series of events kind of a scenario which must be, it seems to me, I have to say, hard to fit with *Willis* because there we are. So it's –

GLAZEBROOK J:

No, but you're saying, well, this only – I think what I'm hearing is you say, well, this only applies to what is a detention simpliciter.

MS FISHER KC:

Yes.

GLAZEBROOK J:

It doesn't apply to, well, at least the Whenuapai, the country road detention, because that was actually specifically associated with actual sexual assaults.

MS FISHER KC:

Yes.

WILLIAM YOUNG J:

So too was – also associated with assaults was the tyre cage incident.

GLAZEBROOK J:

Well, I know they were poking with the bar, et cetera, yes.

WILLIAM YOUNG J:

Yes.

MS FISHER KC:

Poking with a bar on her bottom and her fear arose because of what had happened in the car.

GLAZEBROOK J:

No, you – so you say that *Willis* only applies when you can split out the two and here you can't because of the actual physical assaults that were occurring during those incidents.

MS FISHER KC:

That's right. They're really in –

GLAZEBROOK J:

Is that the…

MS FISHER KC:

Yes, that's it and it's what – they're indivisible. So when you potentially have cover under – and under cover and non-covered aspects you – it's – if the injury is indivisible then the claim covers both. That's really what we're saying and –

WILLIAMS J:

I think that's probably consistent with what *Willis* says because if, on those facts, they were indivisible, you can expect that the learned President would have come to the same conclusion you want us to come to.

MS FISHER KC:

Yes.

WILLIAMS J:

But whether they're indivisible or not is a pure question of fact.

MS FISHER KC:

Yes, and the evidence in this case was that they're not.

WILLIAMS J:

Exactly. So in the end your argument comes down to this conclusion was not available to the majority in the Court of Appeal or to the High Court Judge.

WILLIAM YOUNG J:

Or they were wrong.

O'REGAN J:

Just that they were wrong.

GLAZEBROOK J:

Or that we should overturn it.

WINKELMANN CJ:

Yes.

O'REGAN J:

We don't agree with it.

WILLIAM YOUNG J:

Just that it's wrong.

GLAZEBROOK J:

We can overturn it.

WINKELMANN CJ:

Yes, it doesn't – it's not an error of law argument.

MS FISHER KC:

Well, that's probably an appropriate place for me to end my submissions unless there's anything else.

WINKELMANN CJ:

Can I just ask one question about the indivisible thing? If this is being charged as crimes they'd all be – the Crown would have no difficulty in charging them as separate things.

MS FISHER KC:

I'll take your word for that, your Honour.

WINKELMANN CJ:

Okay.

MS FISHER KC:

Ms Lay is just wanting me to draw your attention to what's set out in the *Green* case, *Green v Matheson* [1989] 3 NZLR 564 (CA), which was decided at the same time as *Willis* and I had intended to take you to that before I got distracted because we need to look at – so *Green* is in tab 11 and if I can get you to turn to page 572 which is actually noted in that road map that I've given you. I've given you the reference, and just reading from the top there: "In *Willis v Attorney-General*, which is being decided…, we say more," they've got to be read together, and then he says: "Once there is personal injury by accident within the scope of the Act, all the emotional or psychological effects fall within the statutory words 'The physical and mental consequences of any such injury or of the accident'." And then he goes on to say –

WILLIAMS J:

Sorry, I've just caught up with you. Can you just give me the page reference?

MS FISHER KC:

Sorry, 572. It should be on the screen in front of you.

WILLIAMS J:

I'm all analogue today. That's all right. I've got it.

MS FISHER KC:

Okay. I usually am too but I have got Ms Piaggi who's brilliantly conducting the computer.

Then he goes on, as I've just said, in the second paragraph, once there is a personal injury by accident, all the emotional physiological effects fall within the statutory words, and then they go on to talk about – and the *Green* case, that was the one arising out of the cervical cancer injuries, this is at line 32: "If there was a personal injury by accident or a number of personal injuries by accident within the meaning of the Act, we think that any of those pleaded consequences must be within the words 'The physical and mental consequences of any such injury or of the accident'… The words are all-embracing…" and it's also useful just to go up to that quote from Justice Henry, and this is apt in this case, he says: "I find it difficult as well as well as artificial to attempt to isolate out from the effects of an intentional tort those elements of humiliation, embarrassment, wounded feelings, anger, on the one hand, and any other mental consequences of an injury. Precise classification of feelings and of mental consequences is not feasible, and there must always be the elements of overlap which do not allow for finite distinction…"

WINKELMANN CJ:

Well, that seems a rather different point, but what do you draw from that?

MS FISHER KC:

Well, once you're talking about the mental consequences then you're all in. You can't separate them out. You can't have one claim for mental injury for something else that falls for cover under the Act.

WILLIAMS J:

I don't think they're quite saying that.

WINKELMANN CJ:

But that's a different situation, yes.

GLAZEBROOK J:

Well, I think what you're really saying though I think is it is a legal point as I understand it because the legal point is that if you have cover because the actual physical assault was a substantial – well, some kind of cause of your mental injury which would have been the test under the 1982 Act, then you can't sue –

MS FISHER KC:

That's right.

GLAZEBROOK J:

– because you already have cover for that injury, ie, the mental injury you've suffered, and you can't claim twice for the same thing.

MS FISHER KC:

That's it, yes.

GLAZEBROOK J:

And that's what the bar says in relation to 1982. Slightly different for the later Act.

MS FISHER KC:

It is.

GLAZEBROOK J:

Because you just have a cover for the certain things in there you might have to split out the causes. Is that the…

MS FISHER KC:

Yes, it is, but – and that's timely to lead to what 21B of the Act says.

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GLAZEBROOK J:

Yes, okay.

MS FISHER KC:

So I'll let Ms Lay address you on that.

MS LAY:

Sorry, your Honours, I'm a bit analogue as well so I'll just set myself up. Tēnā\ koutou e ngā Kaiwhakawā.

So as Ms Fisher has outlined, the Attorney-General's primary position is that she has cover for all of the damages. Her claims are all for damages arising under personal injury for accident covered both by section 21 (timestamp 11:11:07) of the current Act and also she's traversed the 1982 Act. But as was raised by this Court, there is the further possibility that she has cover under section 21B of the current Act and that arises independently of the analysis under section 21 or under the 1982 Act.

The Attorney-General submits that she does meet the criteria in section 21B which provides cover for mental injury caused by exposure to a sudden traumatic event in the workplace.

So before I turn to that section, we have noted some of the examples discussed during the introduction of that Bill and I'd like to take your Honours to that material. That's at tab 33 of the joint bundle of authorities, and this is the Minister for ACC's speech at the second reading of the bill. At the bottom of

the second page she refers to the stories of those who came before the select committee. So in particular there, in that second to last paragraph, she refers to the train driver Terry Bristow, whose train ran over people on railway tracks and who tearfully detailed how these experiences changed his life. He notes that, it says "this" but I assume it was "his" grandfather, was faced with these tragedies twice in a three-year period, and unable eventually to cope, he retired.

The second example there is the case of coalminer, John Stone. He was buried alive for 20 hours in the cab of his mining vehicle, after the mine he was working in collapsed, and, unsurprisingly, he was then unable to face work underground. At that point he was ineligible for ACC compensation or counselling.

The third there was the experience of staff who have been traumatised by armed robberies.

So bearing that in mind, I first note that there's no dispute that Mr Roper's conduct occurred during the course of Ms Taylor's employment, nor that the experiences that she had could reasonably be expected to cause mental injury to people generally. So the key issue is whether or not these events that she experienced met the relevant definition in section 21B. The section is set out in full in tab 2 of our bundle of authorities and it's also reproduced in the recall judgment.

So at subsection (7) you can see the definition of "event" which comprises three components: that the event is sudden, or the direct outcome of a sudden event; it can include a series of events provided they arise from the same cause or circumstance, and together comprise a single incident or occasion; but it excludes a gradual process.

In my submission, your Honours, these three components, in tandem with the requirement that the event be reasonably expected to cause mental injury, work to provide cover for serious traumatic events but exclude cover for the gradual onset of workplace stresses. So we have no issue with the Court of Appeal's

finding that we're not dealing with a gradual process here. So the issue is the definitions for "sudden" and what comprises a series of events.

As we've already discussed, she has described each of these incidents as a "traumatic event". We're not looking at the type of "final straw" event here where there was a gradual accumulation of minor events, and as such it can be distinguished from some of those cases such as *OCS Limited v TW* [2013] NZACC 177, *MHF v MidCentral District Health Board* [2020] NZACC 18 or *Jeffrey v Progressive Enterprises Ltd* [2015] NZACC 4, and while I will address each of these two aspects in turn, my submission is that these parts of the definition need to be read as a whole and not fragmented, focused on, in a piecemeal fashion.

So first on the requirement of "sudden" the Court of Appeal introduced two requirements here: first, the absence of foreseeability and then, secondly, that the event must essentially commence and conclude in a very short period of time. On the first point, it's never been a feature of the accident compensation legislation to exclude anticipated or foreseen events, and it cannot have been Parliament's intent to exclude cover where a person has warning of or may foresee an event, particularly where they are powerless to prevent it from occurring.

So in this respect I'd like to take your Honours to an article by Fiona Thwaites. It's at tab 25 of our bundle. She discusses mental injury available under the 2001 Act which is in these three particular circumstances: because of physical injury suffered or mental injury under section 21 or mental injury under section 21B.

Under point 3 she discusses 21B, and at the top of 252, so she deals with the train driver and then at the top of 252, after discussing the limitations built into the section, she notes at the end of that paragraph, the first paragraph there: "The textbook example of a mental injury claimant falling under the ambit of section 21B, was the bar attendant/cook in *Davis* who suffered from PTSD after being subjected to three armed robberies in as many months."

I would like to take the Court through the facts of *Davis v Portage Licensing Trust* [2006] 1 ERNZ 268 (EmpC) but before I'll do that I'll just address the second part of the Court of Appeal's definition of "sudden" because that's relevant to the facts of *Davis* as well.

WINKELMANN CJ:

Davis is not a foreseeability case though, is it?

MS LAY:

There is the issue of foreseeability in *Davis* as well. Would you like me to go to *Davis* now?

WINKELMANN CJ:

Why is there – no, you can just tell us why there was foreseeability in it.

MS LAY:

So with *Davis* he was subject to three armed robberies, which I'll go through in more detail shortly, but in that case the Court did find that the employer knew or ought to have known that there was a high risk of repeated robberies.

WINKELMANN CJ:

That's a different kind of foreseeability though, isn't it, really?

MS LAY:

Yes, well, there was a – with *Davis* there was a high incidence of criminal incidents involving that pub, so it was already at high risk of burglaries of robberies, and, particularly after the first incident, there was a risk of a second and third and potentially more robberies. Now the problem with the Court of Appeal's judgment we say is that introducing the requirement that there's an absence of foreseeability imports the sort of standard that we find in common law cases for tort. That's not really what the accident compensation scheme is designed for. We're not looking at attributing fault, we're not looking at control.

There is no reason to say that accidents should exclude anticipated, apprehended or feared episodes.

GLAZEBROOK J:

Well, some of the accidents are – I mean that, you can almost say, is a function of the employment to a degree.

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MS LAY:

I'm sorry your Honour, I'm not quite sure I…

WILLIAMS J:

She's agreeing with you.

MS LAY:

Thank you your Honour.

WILLIAMS J:

Smile and nod.

GLAZEBROOK J:

Well it seems relatively – I mean I'm sure there are things that can be done to stop robberies, but not – I mean I imagine the particular area not terribly easily unless you're going to actually have armed guards around the outside though.

MS LAY:

Yes so if –

GLAZEBROOK J:

I mean it's not a case of you just fix up the ceiling tile that could really fall on someone and injure them.

MS LAY:

Yes. I'll take Justice Williams' advice to smile and nod there your Honour.

WILLIAMS J:
So what does “sudden” mean?

MS LAY:
So –

WINKELMANN CJ:
Yes, let’s move onto that.

MS LAY:
So there’s the second part of the definition which we take issue as well, but in answer to your question, your Honour, sudden here stands in direct contrast to a gradual process. So sudden requires that there is some event that requires abruptly or instantaneously, such that you can identify a clear commencement point, so it’s not just an accumulation of indistinguishable events. But there’s no requirement that it exclude an anticipated or feared episode, or foreseeable incident –

WILLIAMS J:
Why didn’t they just say a distinct event then, because sudden carries a lot more meaning generally than what you’re attributing it to.

MS LAY:
Yes, “sudden” does carry a lot more meaning, I accept that. So I'm taking a plain reading of “sudden” here, in the context it’s used.

WINKELMANN CJ:
You’re saying the word was selected because – in contra distinction to “gradual”, so in fact if they had just been concerned to clearly convey meaning, they may not have used it, but they were focused on contrasting it with “gradual”.

MS LAY:
Yes, that’s my point exactly your Honour. Perhaps the other point too –

GLAZEBROOK J:

Well you say it can still be sudden if its anticipated.

MS LAY:

Yes.

GLAZEBROOK J:

Because the timing will be not anticipated not necessarily, and therefore still sudden.

MS LAY:

Or the injury, and perhaps I'll just take your Honours to some of the reasoning that the Court provided to illustrate that point. That's at I think tab 13 of the case on appeal. Tab 14 sorry, on the case on appeal. The Court looked to the other instance of "sudden" used in the Accident Compensation Act, beginning at paragraph 27. I'll just go to it while it's coming up on the screen, but that is the definition of "accident". So there's a little bit of gymnastics here now in the current Act, when you're looking at personal injury by accident. Personal injury is defined, accident is also defined. So accident has a number of occurrences, which include there the sudden movement – sorry. "A specific event or a series of events, other than a gradual process, that… involves the sudden movement of the body."

Now at paragraph 29 of that judgment, the Court considered that the description conveyed a temporal meaning. "It is a movement for the purpose of avoiding an external force or resistance. In addition is must be sudden. Read in its entirety this does not convey to us the notion of an anticipated or apprehended event."

Now if that were the position, any sudden movement in the course of a contact sport, for example, boxing or rugby where you have a number of anticipated or apprehended events that involve sudden movements, would not be caught aby an accident, and that simply can't be the case. So the Court has, in my view,

imposed an additional gloss on the meaning of "sudden" which leads us to very unintended outcomes, both within section 21B, but also in section 25.

WINKELMANN CJ:

It could be that their reasoning is actually linked to the second point, which is that the foreseeability, that part of the case is that the stress is caused by the fear that she's carrying all the time, and so this is not an isolated incident. Isolated or distinct, distinct incident. It's actually something which is ongoing and therefore outside the plain words of the section.

MS LAY:

Well that would then take us to the series of events section.

WINKELMANN CJ:

It's probably even more than the series of events, isn't it, because it's not, her case is not that it's a series of events. Her case is that a series of events has caused her to be in this perpetual state of stress and fear. I read her evidence. But anyway. Let's go on the series of events issue.

MS LAY:

Sorry, before I was going to the series of events issue, I was just going to deal with the Court's point on the other aspect of what "sudden" required, which was focused on the duration of the events. So that's at paragraphs 33 and 34 there. So as Ms Fisher noted the drive, which was canvassed in cross-examination by Mr Mather, was only a five to seven minute drive, and the tyre cage incidents were unlikely to be anywhere close to an hour. So that there is quite a stark contrast to the example given before the select committee of the coal miner buried in his cab of his mining vehicle for up to 20 hours. Now surely a five to seven minute drive, or actually where I'll go to next is the facts of *Davis*. If we're limiting the traumatic event to be less than five minutes, that really is going to exclude the vast majority, I would say, of traumatic events experienced, and designed to be captured by section 21B.

WINKELMANN CJ:

We're really interested in your next point I think.

MS LAY:

Series of events or the facts in *Davis*?

WINKELMANN CJ:

Series of events, because that seems to be a difficulty for your argument, in terms of plain section – the wording of the section.

MS LAY:

So with series of –

GLAZEBROOK J:

I'm just thinking in the coal miner, I'm not sure that it really does necessarily, because the sudden event is being buried, which is clearly the sudden event that comes about.

WILLIAM YOUNG J:

Or it could be being marooned because of a slip that leaves you effectively locked into the drive.

WINKELMANN CJ:

Buried.

GLAZEBROOK J:

No same thing, same thing, but the slip is the sudden event is what I'm saying.

MS LAY:

So that's the issue with what the Court of Appeal has said at paragraph 30 –

WILLIAM YOUNG J:

Sorry, or the detention, the resulting fact that you can't take out, which may take days.

GLAZEBROOK J:

All I'm saying is I don't, I'm not… I think the sudden comes about by the fact that it's – I mean if it was gradually coming down then it may not be sudden.

MS LAY:

Well that's where we say there's sort of this, degrees there are there of how sudden something occurs, and we say it shouldn't –

GLAZEBROOK J:

It's not an easy section in other words.

MS LAY:

No.

GLAZEBROOK J:

As the cases you indicated make it clear that it's not a very easy section.

MS LAY:

No, but your Honour's point, I think, is the issue with what the Court of Appeal have said at 34. So they have accepted that there is a "sudden" component, such as in the coal miner example, that while it, in this case, anticipated, or perhaps in the coal miner situation he had some warning, or there was foreseeability issues that there was, you know, the possibility of him being buried in the mine. So they have accepted that there is a sudden component because there is a point of commencement. The next point, though, is the problematic part.

GLAZEBROOK J:

Yes, I understand.

MS LAY:

Where they say the substantial effect of detention "would not lie in the mere fact of its commencement but also its prolonged nature, combined with the fear of what else might occur". Now I would have to say that in the coal miner example it would not just be the fact of the slip –

WINKELMANN CJ:

Well I mean you might be trapped in a towering inferno for five hours, in fear of the burning, and that would still be a sudden event probably.

GLAZEBROOK J:

Yes, exactly.

WINKELMANN CJ:

So I'm just looking at the time, I think we need to move on to your critical point I think.

MS LAY:

Yes, sorry your Honours. So the series of events argument I accept is a little bit clumsily worded, I think, in the section. So the Court of Appeal included –

WINKELMANN CJ:

Well it seems quite plainly worded actually.

MS LAY:

So it's the same cause or circumstance that together comprises a single incident. The Court of Appeal simply said it would cast the net too wide to characterise Mr Roper's conduct as a single incident, but did not provide any reasoning for that. So –

WILLIAM YOUNG J:

All we know is that each incident happened more than once.

MS LAY:

Or at least once.

WILLIAM YOUNG J:

Yes, at least once.

MS LAY:

At least once, but not – there's no factual finding of how many or over what period. What we say is that the Court of Appeal has done the opposite of casting the net too wide, but focused too granularly on the cause of conduct and said because they occurred at different places, and different locations, they cannot be said to be a single incident. Our submission is that we have here Mr Roper who the Court has accepted, both Courts have accepted, was the sole cause of Ms Taylor's injury. He was the sole perpetrator of these traumatic and distressing events, and his conduct together was a course of predatory and sexualised conduct.

WILLIAMS J:

How do you get yourself through (7)(b)(ii)?

MS LAY:

So this is where we say they were all of the same nature, comprising all of the – all occurred –

WINKELMANN CJ:

Which they weren't, on the facts, of the same nature. They're different.

WILLIAM YOUNG J:

There were two locales. One is the car and one is the tyre cage.

MS LAY:

Yes, but to focus on that being the distinguishing factor I think is too granular. They all occurred while she was on base at Whenuapai.

WILLIAMS J:

What do you make of "single", shall we do that.

MS LAY:

Single, so I would say that they need – that is tied with the first part, "same cause or circumstance", so there needs to be a – they need to be able to be linked together, and as Ms Fisher was detailing, in our submission, you can't

separate out these events. They're so intrinsically linked to one another. There's –

WINKELMANN CJ:

Can we just look at the section?

MS LAY:

Section 21B. Well we're in the judgment here, so we could go back to paragraph 5.

GLAZEBROOK J:

Is the, your best argument possibly is that sudden just means not gradual and here it's not gradual and therefore its sudden and the single event is not intended to be splitting up – well even if it is, it will split up the events to say there's one event, another event, another event, like in the three robberies, because you can't split up the causation because it might be the third robbery tipped you over, but the other two were a cause as well, and each was sudden.

MS LAY:

Yes, and so I would like to take your Honours to *Davis* to illustrate that point.

WINKELMANN CJ:

Can we just look at the –

O'REGAN J:

It's morning tea.

WINKELMANN CJ:

Yes, it's morning tea time, and we can perhaps, you can just conclude on this submission after the morning tea break. I'll just give you an indication that I'm really interested in how your argument, if you can just, when you come back, take us to the words of the section and tell us how you say that works.

MS LAY:

Yes.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.49 AM

MS LAY:

Apologies for going over time, your Honour, but just before we broke I think, Justice Winkelmann, you wanted to go to the section now, in particular, section 21B.

WINKELMANN CJ:

Yes, I wanted you to link your argument to the section, 21B.

MS LAY:

So we're looking at section 21B(7)(b)(i) and (ii), so a series of events that arise from the same cause or circumstance and together comprise a single incident or occasion.

So the couple of points that I'd like to bear in mind when we're looking at this, obviously we're looking at this as a matter of statutory interpretation, so what does this section mean in terms of the purpose of the section in the Act, and bearing in mind the comments of the Court in *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) to apply a generous and unniggardly approach in the context of ACC, and unless there is clear and unequivocal language we should be adopting a claimant-friendly approach here in terms of providing cover.

So in our situation we are saying that there is the same cause or circumstance here and they are so – as we would broke (please check 11:50:41) – the events are so intrinsically linked that taken together they comprise a single incident or occasion, and I wanted to take your Honours to the case in *Davis* to illustrate this point and that *Davis* should not fall through the gaps because of the

interpretation adopted by the Court of Appeal because this is the type of case which section 21B should clearly apply.

So just quickly before I read this section in *Davis*, the facts were as I mentioned earlier –

WINKELMANN CJ:
I think we've got them, yes.

MS LAY:
He was subject to three armed robberies and the evidence here at 123, was that it could not be said with certainty that if he had only experienced that first event he would have developed full blown – well, this is the Court's word – "full blown PTSD", but it was sufficiently traumatic to have produced characteristics that might have led him to develop PTSD. Over the page at 124: "It is clear that after the second robbery he did exhibit PTSD symptoms, but again it might be concluded that the symptoms did not show full blown PTSD in the short time before the third robbery." So it was only by the third robbery that the Court could say there was no doubt the causal connection between the second and third robberies and the PTSD suffered by Mr Davis, and that was properly conceded by the parties.

So we have a similar case here where we unfortunately don't have any evidence that could say one single occasion caused her mental injury, but taken together there's no doubt that she suffered PTSD because of the conduct of Mr Roper, and applying the Court of Appeal's analysis Mr Davis would not qualify for cover under section 21B despite being subject to three armed robberies in the period of four months, and that in our submission can't be what Parliament intended and not the proper way to interpret section 21B.

The other case that I will just take your Honours to is *MC v Accident Compensation* [2016] NZACC 264 –

WILLIAMS J:

Can you just tell me then what's the point in Roman (ii)?

MS LAY:

Sorry, what's the point…

WILLIAMS J:

What is the point in Roman (ii)? Why does it need to be there at all? You'd have got where you want to get to just with Roman (i).

MS LAY:

With the same cause or circumstance. Let me just reflect on that a little, your Honour.

WINKELMANN CJ:

Are you saying that Roman (ii) effectively – well, you just have to deal with Roman (ii) but we should read it. If we can put the section, the thing, back up, we just have to read the – because (b)(ii) is simply clarificatory, isn't it, of (a)?

MS LAY:

Yes, I say that you read it –

WINKELMANN CJ:

And you're saying we should – really what the point is is that "event" can encompass an intrinsically connected series of events really, so – and we should therefore not read "single incident or occasion" as excluding that.

MS LAY:

Yes, your Honour, I think that's the answer to your question, Justice Williams, that I'm adopting a purposive approach here that that wording shouldn't then limit down to just one event. There's got to be – I think Roman (i) is probably the operative part of that section, that there needs to be the same cause or circumstance, and the second part is really that it's got to be linked or able to be considered as one, taking –

GLAZEBROOK J:

Unless you just say that if you have three sudden events, even if it's not a series of events, it still has cover.

MS LAY:

Yes, that's one way of looking at that. If each single event could – well, I think the difficulty –

GLAZEBROOK J:

If each event can be sudden in itself, and is sudden in the case of the robberies, then you have cover, and you don't have to link them, except to the work, and so you – and then by analogy from that you'd say you have sudden events in respect of this and their link to the work and that's enough.

MS LAY:

The difficulty I think if we have to break it up to say, looking at each individual event, is that you may then run into the problem with what the case was in Mr Davis, where you can't say that that first event alone was causative –

GLAZEBROOK J:

Well that's splitting hairs as well, isn't it, and you'd say you shouldn't do that.

MS LAY:

Yes, exactly your Honour.

GLAZEBROOK J:

That that sort of, the idea that you have to split hairs like that, rather than looking at them…

MS LAY:

Holistically, in a sense.

GLAZEBROOK J:

Holistically is just not in accordance with the legislation.

MS LAY:

Yes, and again probably the point of – well both Roman (i) and (ii) in subsection (b) is like sudden, the contradistinction to gradual process where I think Judge Ongley's points, where he was dealing with series of events versus gradual process. The Roman (i) and (ii) perhaps add an extra flavour or assistance in deciding what falls into a series of events and what would fall into a gradual process, such that you can identify particular events, and not where you've got a gradual incremental process, or I think the Court said transformative process, where you cannot isolate those to say that any particular event or series of events were themselves the causative significant stressors.

So the other case I just mentioned was *MC*, which your Honours will probably be familiar with. That is the soldier on a tour of duty in Afghanistan.

WINKELMANN CJ:

We should probably, can we, do you have to read that, or you can just tell us the particular point?

MS LAY:

I'll take you to the paragraph.

WINKELMANN CJ:

Okay, I'm just conscious of other people's time.

MS LAY:

Sorry your Honour, this is where I'm going to wrap up so I won't be long. Just at paragraph 86 there. So I'd like to adopt Judge Maclean's comments reflecting on extracts from Hansard about the train driver situation and the focus on a single event misses the point. "The question really… 'would the fact that such a train driver have witnessed more than on such event and/or that happened against a background of other… stressors preclude an entitlement to cover." And his answer is that clearly that it must be no, taking into account the purpose of the scheme of the Act. He then refers to the comments in

Harrild, and from Justice Kós "that the overall statutory purpose of the Act should not be disregarded unless there is language of the clearest kind and that the 'generous unniggardly interpretation'' should be adopted.

So our submission, your Honours, is that the Court of Appeal's interpretation, both on "sudden" and on "series of events" has created a lacuna which people like the soldier in *MC*, the barmen in the *Davis* case, and clearly here Ms Taylor, would fall through, which clearly can't be the case because they've – because instead of just experiencing one traumatic event, they've had the misfortune of experiencing several, and using that to disqualify cover seems to be the complete antithesis of what's engendered here.

Now as your Honour said, I'm conscious of time, so unless there are any other questions that I could assist the Court.

WINKELMANN CJ:
Thank you.

MS LAY:
Thank you your Honour, those are our submissions.

WINKELMANN CJ:
Mr Mather?

MR MATHER:
May it please the Court. Before I go to the lectern may I say that counsel had thought that the appropriate way to deal with this was for my learned friend, junior, to deal with what we term "the *Willis* issue".

WINKELMANN CJ:
Yes.

MR MATHER:

And for me to address the Court in respect of 21B, and on that basis, if it pleases the Court, Mr Herbke would now approach the lectern to address the Court on the *Willis* issue and then I will follow.

In terms of timing, I think Mr Herbke can take more than half of the time that was allocated, because I don't anticipate 21B taking long. I think it was always anticipated that we were sort of a follow-up rather than taking the lead on these matters, so we'll just try and address some issues that have arisen, rather than go through everything ab initio.

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WINKELMANN CJ:

Thank you. Thank you, Mr Mather.

MR MATHER:

Thank you.

WINKELMANN CJ:

I should say that Justice Young has got a question for Mr Herbke too about the previous legislation, the 1982 Act, which he'll also ask Mr Little to deal with. But we'll just let Mr Herbke come to the lectern because I think it's…

O'REGAN J:

It's probably better directly to Mr Mather, I think, isn't it?

WILLIAM YOUNG J:

Yes, I wonder if we could put up –

WINKELMANN CJ:

No, I think it is Mr – because Mr Herbke is dealing with section – with *Willis*.

WILLIAM YOUNG J:

I wonder if we could put up section 27(1) of the 1982 Act? I don't know who's in charge of the machine.

WINKELMANN CJ:

Mr Herbke, by all means come forward.

MR HERBKE:

I'm not sure if I'm the person to answer this specific question but…

WINKELMANN CJ:

We can work that out once it's been addressed, and it may be both of you will want to take some time and come to it at the end of the submissions or, I don't know, because this just arose out of the tail-end of Ms Fisher's submissions and seems to have come incidentally out of it.

WILLIAM YOUNG J:

All right, that's fine, thanks. Can you see that, Mr Herbke?

MR HERBKE:

Yes.

WILLIAM YOUNG J:

All right. "Where any person suffers personal injury by accident in New Zealand," and then further down, "no proceedings for damages arising directly or indirectly out of the injury shall be brought in any Court in New Zealand," so as I understand the section the prohibition is in relation to bringing any action associated with the injury which is caused by the accident. In this case, on the face of it, the injury is Ms Taylor's PTSD. A substantial contributing cause to that injury were the sexual assaults to which she was subjected, and, construed literally, section 27(1) excludes any claim in relation to that post-traumatic stress disorder. Now I think that's the point that Justice French was making and it's a point that's occurred to me, obviously, and it's one which counsel may wish to consider in their submissions.

MR HERBKE:

Thank you, Sir. Yes, I do have a point on that and I'll get to that when we discuss *Willis*, but just to begin, the ACC bar has time and time again been robustly applied to seemingly sympathetic causes.

In *AB v A-G* Justice Williams applied it to the collective impact of bullying at cadet school which included a particularly reprehensible nuggeting incident.

In *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA) the Court of Appeal applied it to damages sought by Mr Wilding against police for an alleged dog bite occurring at the time of arrest when he was already handcuffed on the ground. Now there are arguments in that case that *Baigent's* damages fit outside of the scheme of the ACC and the Court of Appeal held that if the monetary compensation sought is for personal injury directly or indirectly occasioned by breach of a right then the bar would apply. It left open the question of whether or not there's a possibility of *Baigent's* damages being awarded if they were not to be quantified as to provide compensation for the injury, and I'll get to that later.

So there's many other examples, obviously, of the ACC bar applying, which then takes us to the majority reasoning at paragraph 206 of the judgment under appeal, and why the majority seemed fit to essentially carve out a special sphere outside the ACC bar for false imprisonment, and I submit that it was a misinterpretation of *Willis* that created this situation. The starting point in *Willis* is that the claims for damages for false imprisonment are not barred by the Act. However, the Court of Appeal go on to say that if the plaintiff were to claim damages, other than exemplary, for assault or battery, the position would be different. Such claims are barred but they weren't made by the plaintiffs in that case. So the starting point for any decision in this area is at line 24 to 25 of that decision at page 576 of the decision.

WILLIAM YOUNG J:

It's just coming up, I think.

MR HERBKE:

Brilliant, thank you. The starting point there is – mine's all highlighted – page 579. Which is further down. Line 24. "If the detention of a plaintiff has been accompanied by physical injuries, damages cannot be claimed for those or for the pain and suffering they have caused." That's a starting point and that, I think, is the most important sentence of that case.

WILLIAM YOUNG J:

Yes, it's sort of slightly made fuzzy by what follows a few lines later.

MR HERBKE:

I think the fuzziness comes about by a misunderstanding of what's been discussed in that paragraph, and that paragraph, and I'll go straight to it. They're talking there about a grey area in which it can argued that distress or humiliation or fear, not mental injury, not personal injury by accident.

GLAZEBROOK J:

Can you just make sure you talk into the microphone otherwise it's not picked up on the transcript.

WINKELMANN CJ:

You're addressing the whole court and you need to use the microphone.

MR HERBKE:

My mistake.

GLAZEBROOK J:

We can often hear you but it's often not picked up on the…

MR HERBKE:

Yes, understood. So the grey area that's been described as the grey area in relation to "distress or humiliation or fear for which a plaintiff alleging false imprisonment seeks damages", and when that overlaps when personal injury by accident.

GLAZEBROOK J:

Sorry, can you just repeat that?

GLAZEBROOK J:

The grey area is described as being the area where "distress, humiliation or fear… overlaps with personal injury by accident".

WINKELMANN CJ:

Is that a full sentence? Do you mean the distress, humiliation or fear arising from false imprisonment overlaps?

MR HERBKE:

Yes, "… seeks damages amounts to or overlaps with personal injury by accident." So there's two separate natural consequences, or harm suffered, that they're describing. On the one hand, distress or humiliation or fear, not covered by the Act. On the other, personal injury by accident, covered by the Act.

GLAZEBROOK J:

I'm just not quite getting your point because I thought that was the point, that there could be two causes.

MR HERBKE:

Well this is where I differ from my learned friend your Honour.

GLAZEBROOK J:

I see.

MR HERBKE:

So that's why this grey area issue, I think, has become so muddled, because I think as a starting point the paragraph needs to be read by recognising that they're describing two types of harm suffered by the person. One, being distress or humiliation or fear for someone who is alleging false imprisonment. The other, a personal injury by accident, which could be caused by any type of

cause. In that's case it's an assault. In fact an indecent assault which provides cover. So we've got two –

GLAZEBROOK J:

What say you have distress, humiliation and fear caused by both false imprisonment and the personal injury by accident.

MR HERBKE:

Then you have cover. Then the bar exists.

GLAZEBROOK J:

So you say that they're not saying the distress, humiliation or fear you say under *Willis* have to be only related to the false imprisonment for you to be able to sue, is that – which is actually the same argument as the Attorney-General as I understand it.

MR HERBKE:

So if you carry on to the next part of that paragraph, it's where they make the clear rule, which is that "… any claims for any kind of damages for false imprisonment alone and for any distress, humiliation or fear caused thereby are outside the scope of the accident compensation system and unaffected by the Act." So that's the clear rule that is accepting that false imprisonment may cause this type of damage, and if its false imprisonment alone causing this kind of damage, then the bar would not apply.

WINKELMANN CJ:

But what about the sentence…

MR HERBKE:

The next sentence, yes. So this is where it becomes important, in my view, to read the whole paragraph as one because the next sentence: "If such mental consequences…" and I believe there they're referring to the distress, humiliation or fear, "… have been caused by both false imprisonment and assault or battery, a plaintiff can still claim damages for them."

The situation that I believe that that is describing is if we took the example of *Wilding v Attorney-General*. You have a person that has been bitten on the ground by a police dog, which has caused a personal injury. It may have also caused a mental injury, being some fear of dogs or some other ongoing mental injury caused by that incident.

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Let's say after that incident occurred the person was then detained and as a result of the unlawful force applied to him during the arrest procedure the detention thereafter for a period of days and nights was unlawful, therefore being a false imprisonment. They might then receive, or suffer, I should say, distress, humiliation or fear from that false imprisonment which is separate from the personal injury by accident suffered at the time of the arrest.

WINKELMANN CJ:

Well, you're arguing that that sentence covers, is talking about two quite divisible incidents, so the false imprisonment comes after the assault and battery, on your analysis.

MR HERBKE:

That could be a situation where a claimant in that case would not be barred for seeking damages for the false imprisonment as the personal injury by accident covered by the Act has come about from a separate cause.

WINKELMANN CJ:

So the problem, when you look at that section that Justice Young has referred us to, which I don't think I have a copy of…

WILLIAM YOUNG J:

Section 27(1).

WINKELMANN CJ:

Section 27(1). That doesn't really work, does it, because it's the same injury?

WILLIAM YOUNG J:

Well, is it? Was distress humiliation a personal injury in itself?

MR HERBKE:

No. So it's different damage, different harm suffered. In my example I just described, the distress, humiliation and fear from the false imprisonment, it might result in a fear of tiny spaces, it might cause all sorts of harm which is not covered by the Act, quite a divisible type of harm from the personal injury by accident.

WINKELMANN CJ:

Yes, but what happens if they're distressed and humiliated by the assault and battery which is what's being postulated here and they're distressed and humiliated by the false imprisonment? That's being postulated in that sentence, isn't it?

MR HERBKE:

No, I do not believe it is. I believe it's contemplating two separate types of harm.

WINKELMANN CJ:

No, it's not. What it says: "…have been caused by both false imprisonment", "If such mental consequences have been caused…"

MR HERBKE:

Yes, so the question there for a court is whether or not it is a personal injury by accident, whether or not the harm suffered reaches the threshold to obtain ACC or not. If it does then the bar covers all of the damage suffered. If it doesn't then they are free to claim damages.

WILLIAM YOUNG J:

Is there anything explicit in relation to the 1982 Act about whether injury had to be a recognisable psychiatric disorder? I mean is it is clear as you're suggesting that the distress, humiliation and fear were outside the definition of

personal injury by accident? I don't think we've got that definition in our copy of the Act, have we? I think in the authorities – it's in section 2 of the 1982 Act.

MR HERBKE:

Yes.

WILLIAM YOUNG J:

But all we've got I think is section 27.

O'REGAN J:

No, we have got section 2.

WILLIAM YOUNG J:

Where have we got it?

O'REGAN J:

Just if you scroll up from – yes, "Personal injury by accident."

WILLIAM YOUNG J:

I don't think I have actually.

O'REGAN J:

Tab 1 of the authorities. If you just scroll up on that screen, yes, that's…

WILLIAM YOUNG J:

Okay. "The physical and mental consequences of such injury or of the accident." So could you claim that fear, humiliation, distress, are mental consequences of an accident? Probably could, couldn't you?

WINKELMANN CJ:

Was this around the time that they were extending it to that? What was the time? I can't remember. That was the *Shotover* case, wasn't it, where they extended it to trauma –

WILLIAM YOUNG J:

That's in the '90s though, I think.

WINKELMANN CJ:

Yes, so I don't know that it was covering…

MR HERBKE:

I don't know – well, *Willis* in 1989 was dealing with the 1982 Act.

WILLIAM YOUNG J:

And that's the Act that is primarily applicable here.

MR HERBKE:

Yes, other than the issue of section 36 in the current Act.

WILLIAM YOUNG J:

Yes.

MR HERBKE:

But yes, I agree, and my understanding is is that the definition of "personal injury by accident" was broader in the 1982 Act which meant that, generally speaking, people were more likely to obtain cover, thus the bar applying to more people. Now they've, in *Green v Matheson* and *Willis*, specifically stated that false imprisonment would lie outside of that bar if either there was humiliation, distress or hurt suffered, which don't reach the threshold of an injury. Or if that humiliation, distress or fear, the grey area, is divisible from that injury in some way.

WILLIAM YOUNG J:

Well the alternative is that perhaps we've got to interpret the statute and not what Sir Robin Cooke was saying.

WINKELMANN CJ:

Well they actually say in the case that at that time personal injury by accident was not defined in the Act, and is left to bear its ordinary and natural meaning.

WILLIAM YOUNG J:

I think it is defined.

WINKELMANN CJ:

Well it may have been a late amendment because that's what they say in the case at page 576.

WILLIAM YOUNG J:

Okay.

WILLIAMS J:

The last amendment to the definition is in 1973 according to the footnote to that section.

WINKELMANN CJ:

It seems pretty strange that they seem to have proceeded on that basis.

MR HERBKE:

Green v Matheson includes a section 2 interpretation and the definition, which was to be read together, and it's the same definition as what we're seeing on the screen as well.

WINKELMANN CJ:

Okay.

GLAZEBROOK J:

Maybe we need more discussion because it hasn't really been properly dealt with, has it.

WINKELMANN CJ:

Yes, I think that's right. But if you look at the Act the point he's making there – sorry, it's section, at the Act – the case, page 576: "… 'The physical and mental consequences of any such injury or of the accident', but the particular wording of (i) is such that these consequences are not brought in unless there has been 'personal injury by accident' in the first place." So there is – your point is that

you need to read the section – well I think the point that we all should be taking is that you need to read the particular legislative framework to understand page 579 properly.

MR HERBKE:

Yes Ma'am.

WINKELMANN CJ:

But I don't know that you can really help us further than that, or can you, because it seems to me that this is kind of a critical part of the whole case. But really the significance of section 27(1) for me certainly didn't emerge until very much at the end of the Attorney-General's submissions. Well really only tangentially.

MR HERBKE:

Yes. If I can just go back one step and just clarify what I'm actually submitting, and what I'm submitting is that when Justice French looks at this issue, at paragraphs 152 to 170, she gives – sorry, she ends her analysis once she decides that the harm suffered is covered by ACC.

WINKELMANN CJ:

Mmm.

MR HERBKE:

And I think that's the important point. Once you go on from that and try and divorce certain parts of the harm as to different causes, I don't think it matters whether or not they're substantial causes, or insubstantial, or not substantial, it doesn't matter. As long as there's cover for that harm suffered for that injury then analysis ends there, and that's exactly what Justice French does, and she gives the reason for this by saying that the claim that is made by Ms Taylor is for a clinically recognised mental illness and not mere humiliation and distress.

WILLIAM YOUNG J:

That's the – the claim is for PTSD.

MR HERBKE:

It's not for humiliation and distress. If it were, we'd be in a completely different situation.

WILLIAMS J:

Does that mean the penultimate sentence int eh paragraph we've been looking at, at page 579 of Justice Cooke's judgment, is wrong?

MR HERBKE:

I don't think it's wrong. I think it's misinterpreted. I think the mental consequences that he's discussing there are the ones that he refers to at the top of the paragraph, which is "distress, humiliation or fear".

WILLIAMS J:

Yes but he's clearly posing the proposition that the mental consequences are the same with two drivers.

MR HERBKE:

Correct.

WILLIAMS J:

Your hypothesis is that if the mental consequences are the same, and one side of them has cover, that's the end of the game.

MR HERBKE:

Correct Sir, and –

WILLIAMS J:

So doesn't that meant that that sentence is incorrect?

MR HERBKE:

No.

WILLIAMS J:

On your analysis?

MR HERBKE:

Because when he refers to “mental consequences” at that second to last sentence, he specifically doesn’t say “personal injury”. He says “mental consequences”.

GLAZEBROOK J:

Well shall we say it doesn’t cover mental injury, is that the better way of putting it?

MR HERBKE:

Perhaps that’s a better way, yes.

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GLAZEBROOK J:

That covers mental consequences and you have to read that back after you say to humiliation and distress.

MR HERBKE:

Correct.

WINKELMANN CJ:

So your point is that it is significant in *Willis* that they were dealing with humiliation and distress, which was not an injury covered by the Act, which is a very direct and straightforward way of saying something that we seem to have taken a long time for anybody to say to us.

MR HERBKE:

And that’s why this discussion about causation, substantial, de minimis, none of that is important. As soon as you have a harm that is covered by the Act it ends there.

WILLIAMS J:

So the definition at (a)(i) refers to the mental consequences of an injury which clearly don't apply, or of the accident. Hurt, humiliation and so forth is a mental consequence of the accident to the extent that it's an assault or battery, correct?

MR HERBKE:

Sorry, I just need to see that section again

WILLIAMS J:

The definition in 82.

GLAZEBROOK J:

No, I think what you're saying is if the mental consequences, but not a mental injury, are a consequence of the false imprisonment, then you can sue.

MR HERBKE:

Correct.

WILLIAMS J:

But personal injury by accident is not just the consequence of the injury, it's also a consequence of the accident. Not just the injury. So if it's a consequence of the accident, and the accident is the assault, then it's covered.

MR HERBKE:

Yes.

WILLIAMS J:

Doesn't the President here say even if its covered, as long as I'll infer it's severable, you can still sue?

MR HERBKE:

No. I believe what he's saying is that if the mental consequences do not amount to cover, and the causes of those mental consequences are from assault or battery, and false imprisonment, then you may still be able to sue.

WILLIAMS J:

That doesn't make sense to me.

GLAZEBROOK J:

Well really – I mean I think to debate what *Willis* say is probably – your submission is that we should find that anyway. So if *Willis* wasn't saying that, your submission is we should find that to be the case.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

Because that is the statutory framework.

WINKELMANN CJ:

For my part I haven't been particularly assisted by the submissions we've received to date on this point about the effect of section 27(1) and I think we might be calling for additional submissions on it, because it seems a reasonably critical issue.

MR HERBKE:

Yes. Thank you your Honours. I have nothing further to add and if Mr Mather can now address you.

WINKELMANN CJ:

Excellent. Very good.

MR MATHER:

May it please the Court. I simply have some brief submissions in respect of section 21B, and the submission really is that – and I refer now to the submissions of counsel, 27th day of July 2022, and the submission broadly is that because of the definition or the description, and I'm referring now to paragraph 40 of the submission that I have identified, 39 and 40: "The Court of Appeal considered 21B did not apply for two reasons. First, *they were not*

'sudden' incidents. Second, *they did not together comprise a single incident or occasion*."

Then at 40: "The 'they'," that the Court was referring to are described by the Court, and perhaps I should read it in full: " *Mr Roper's sexual predation of Mrs Taylor in the course of her employment involved a number of incidents of false imprisonment either in the tyre cage or in the motor vehicle when she was summoned to drive him home from the sergeants' mess. As a matter of plain language they can be described as a series of events and there in no doubt that Mr Roper was the 'cause' of each incident*."

Now that perhaps causes some confusion, but really the primary submission here is that if we look at (7)(a), I'll look at (7) first in the introductory phrase.

WINKELMANN CJ:

If we could just have that section up.

MR MATHER:

Sorry, this is section 21B. I see it's on the screen now. "In this section, 'event'…" So that relates back to 21(2) which is subsection (1)(b) applies to an event. So "an event", and that's then the introduction to subsection (7), "means an event that is sudden". Now the submission on behalf of Mr Roper is that "sudden" is at the start of the incident, not the continuation, but sudden in the sense that that is the start, and the Court of Appeal did accept it, and this is paragraph 33 of the submission. The Court accepted individual incidents of false imprisonment would, while anticipated, involve a point of commencement. So there was a point of commencement and it's the point of commencement – the submission is it's the point of commencement that's sudden and this relates back to section (7)(a)(i) "…sudden; or a direct outcome of a sudden event". So there's a start and that is sudden, and so the submission is really that that is the end of the inquiry, but if we go on to (7)(b) which really does simply, in my submission, add a bit of confusion rather than clarification in this present incidence, "includes a series of events…arise from the same cause", so let's not go on to "or circumstances", but "the same cause", in this case, of course,

the submission that it's Mr Roper, and "together comprise a single incident or occasion". Now that creates some difficulties, that second phrase, I accept, but really the primary submission is we don't need to go there. (a)(i) and (ii) cover the situation. We have an event, and that's each particular event, so the false imprisonment in the cage, false imprisonment in car. So it's a sudden event, and that really is as far as the inquiry needs to go.

So those were just the points that I wished to address in oral argument in terms of the submission that was filed.

WINKELMANN CJ:
Thank you.

MR MATHER:
Have I simply caused confusion or clarification?

WINKELMANN CJ:
No, no.

GLAZEBROOK J:
In the three robbery case you just say you just go to (a).

MR MATHER:
Yes.

GLAZEBROOK J:
And the fact that you needed (1), (2) or (3) to get your mental injury is actually irrelevant because it arises out of a sudden event, ie, the three different sudden events is that –

MR MATHER:
Yes, the three, each sudden event.

GLAZEBROOK J:
So you don't have to make it a series. You just make it the three different ones.

MR MATHER:

You mean amalgamate the three different ones into one event or – sorry, I don't quite…

WINKELMANN CJ:

I'm not sure. I think we've got the answer anyway, thank you.

MR MATHER:

Thank you. So those were just the oral submissions that I wished to make on that point, which brings us, I think, well within time.

WINKELMANN CJ:

Approximately. Certainly, if there's any overrun of time it's not due to you. Now, Mr Little?

MR LITTLE SC:

Yes, Ma'am. I know it might sound a bit Irish but I'd like to start with 21B and then go back to the beginning after we've got rid of that if we may, your Honours.

WINKELMANN CJ:

It doesn't sound that bad to me, Mr Little. Not that there's anything bad about being Irish.

MR LITTLE SC:

Well, I can say it because I'm part-Irish, obviously, Ma'am.

WINKELMANN CJ:

You'll be in good company in this Court then.

MR LITTLE SC:

With an O'Regan? That sounds a most unIrish name.

WINKELMANN CJ:

No, there are many people in this Court who are part-Irish. Carry on.

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MR LITTLE SC:

Thank you your Honour. Now the early progress of psychiatry in the last century was looked at by the Courts will a great deal of suspicion, and it was quite a long time before the term “nervous shock” was coined, and we still find nervous shock in the accident compensation statutes on the present day and shock, of course, is an expression in normal parlance, and it’s something that we all understand. It’s an unexpected thing that causes fright, or concernedness, and the earliest examples that I recall that were given of this by the medical profession were somebody standing on some slightly elevated area by roadway. They hear a squeal of brakes and then the crunch as a car hits another car, or hits a power pole. The person goes down, because it doesn’t look to be a very serious act, but somebody is still inside the car. Goes down to assess and it suddenly explodes in a ball of flame, and he sees somebody incinerated inside the car.

WINKELMANN CJ:

I think you’ll find the first example of this was actually shell shock, Mr Little, in World War I.

MR LITTLE SC:

Yes, certainly.

WINKELMANN CJ:

And it was a well-established thing. It was PTSD but it was shell shock, they called it shell shock.

MR LITTLE SC:

Yes, certainly your Honour, but the reason I'm alluding to this is that that, of course, is a series of occurrences, but they all arise from the single event, the car crash, and that’s exactly what the legislature is trying to deal with here. It’s trying to deal with a number of things that may occur, that run on from the one event. So it’s got to be sudden and it’s got to be a single event. So that in

our submission 21B does not fulfil those categories by trying to accumulate a number of events and saying because they're all concerned with the same predator they all arise out of a single event.

WINKELMANN CJ:

What about the point that Justice Glazebrook put to Mr Mather, which is that although you might have needed the three robberies, the PTSD arose out of that first robbery. It arose out of the second as well, but it still arose out of that first robbery. So it applies, section 21B applies.

MR LITTLE SC:

Well it maybe –

GLAZEBROOK J:

Well no A/(a) (12:33:09) applies, so you don't need it – so the robberies don't need to be a series of events, they just need to be sudden.

MR LITTLE SC:

Yes.

GLAZEBROOK J:

So that you have accumulation under A/(a), you don't have to have a series of events. Because your description of a series of events makes much more sense to me because you're looking at one particular thing, although what do you say about cause, arise from the same cause?

MR LITTLE SC:

Well the cause is the car accident in the example that I've just given.

GLAZEBROOK J:

Well here I think the argument is the case is Mr Roper. That's as I understand the argument against you.

MR LITTLE SC:

Well the Court of Appeal observed that so far as Ms Taylor was concerned, the conduct of Mr Roper was neither unexpected, but it was untoward, and she was in fear of having to drive him –

GLAZEBROOK J:

But that's different, that's saying it's not sudden.

WINKELMANN CJ:

Yes, I don't need if we need to bother you with that argument anyway. It's not – yes, move on Mr Little.

MR LITTLE SC:

Thank you. Well we say, in any event, that the section in 21B is to deal with a nervous shock type sudden event, and the debates in Parliament about it also, in our submission, indicate that it operates only prospectively, section 21B. There are in the parliamentary debates, debates about the fact that there's no retrospectivity for it but, in fact, there's nothing to say it's retrospective, therefore it's assumed by the Legislation Act 2019 to be prospective only.

WINKELMANN CJ:

Is there any reason why the section has disappeared off the screen?

UNIDENTIFIED SPEAKER:

I can bring that back, your Honour.

WINKELMANN CJ:

Thank you. So you say that – and it came into force on 1 October 2008, so why is it important to you that it operates prospectively when the diagnosis was in 2014 or '15?

MR LITTLE SC:

Because we say that *S v Attorney-General* [2003] NZCA 149; [2003] 3 NZLR 450 (15 July 2003) said that before 1992 sexual abuse cases they – the relevant time is the time of the occurrence of the event, not the suffering in due course,

and Parliament followed that in, if I can draw your Honours' attention to it, to the Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 3) which at pages 5 – if we can have pages 5 – at the foot of that page, starting: "ACC cover", if your Honours would be good enough to look at pages 5 and then the top of page 6.

So the next section that I'll take your Honours to is –

WINKELMANN CJ:
So what's your point?

MR LITTLE SC:
My point is that it's dealing with what the previous law was. It's a 2001 Act and it's dealing with the previous law, and it says that the – what the Court of Appeal had said in *S v Attorney-General* – that the Accident Rehabilitation and Compensation Insurance Act 1992 did not provide cover for mental injury arising from certain sexual crimes that occurred solely before 1 April '74 and any affected claimants had the right to pursue civil action, and then, importantly, your Honour: "The Bill provides cover and entitlements for people who were first treated for mental injury as a result of sexual abuse during the period in which the Accident Rehabilitation and Compensation Insurance Act 1992 was in force, from 1 July 1992 to 30 June 1999, as long as the other cover and entitlement criteria are met."

WILLIAM YOUNG J:
But what's that got to do with this case where the events occurred in the '80s?

MR LITTLE SC:
Well, because it's dealing with cases from 1974 on, your Honour, historical cases which it says, and –

O'REGAN J:
But it talks about cases.

MR LITTLE SC:

I'm sorry, your Honour?

O'REGAN J:

The extract you've taken us to talks about suffering sexual abuse before 1974, not after it.

MR LITTLE SC:

Yes, but the point that I'm coming to, your Honour, is that the focus is on the events giving rise to the injury.

WINKELMANN CJ:

Well, this is not on the events. This is now to say that you've got cover because of – this focuses on the consequence now, as a consequence of this amendment, doesn't it?

MR LITTLE SC:

Well, no, with respect, your Honour, if we can go on to the…

WINKELMANN CJ:

Okay. Well, where's the operative bit?

MR LITTLE SC:

Well, the subsequent page is page 13.

WINKELMANN CJ:

Well, do we have the provision that extended the cover?

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MR LITTLE SC:

No, well, it does, but only in a limited extent. Clause 8, your Honours will see at page 13, it "applies to persons who suffered mental and nervous shock arising from sexual abuse that occurred before 1 July 1992 (including before 1 April 1974)."

So that's how the 1982 Act comes to be looked at by the statute. Then it goes on: "The Court of Appeal in *S v Attorney-General* [2003] 3 NZLR 450 (CA43/02) and *W v Attorney-General* (CA227/02) held that section 8(3)…" which is the section that prescribed three sexual crimes under the 1982 Act and then prescribed a couple more under the 1992 Act, "… applied only if the event that gave rise to the mental and nervous shock on or after 1 July 1992."

Well as your Honour observed, the event gave rise to in this case occurred between 1986 and 1988, and then secondly: "The 1992 Act did not bar common law claims for mental or nervous shock resulting from sexual abuse that occurred before 1 July 1992."

WINKELMANN CJ:

I don't know how any of this is relevant though because it's an extension of cover to people who were injured, who were the victim of sexual offending before the regime came in, and that's its intent, so how does it have any significance to how we apply section 21B? If you could maybe just cut to the point and then maybe put your reasoning behind it because it's hard to follow your argument.

MR LITTLE SC:

Well the point is, there, your Honour, that the next two sections in this say: "New section 21A deems cover to have existed.." and then says: "Persons who have civil proceedings pending at the introduction of this Bill… can elect to continue with those proceedings" and receive covers. Well, that's what happens under 21A. So that under section 21A, the Parliament has seen fit to give people cover for pre-1992 events that have resulted –

WILLIAM YOUNG J:

Can you just pause there? Pause there. I know that it says that in the explanatory note in the Bill, but it refers to *S* which was a pre-1974 case, wasn't it?

MR LITTLE SC:

It was.

WILLIAM YOUNG J:

Yes, so wasn't *S* talking about whether that Act gave cover for events that occurred before 1974?

MR LITTLE SC:

True.

WILLIAM YOUNG J:

So hasn't it – I don't – I mean I've only had a quick a look at *S*. I didn't see anything to suggest in *S* that the 1982 Act didn't bar claims for mental or nervous shock resulting from sexual abuse that occurred while it was in play.

MR LITTLE SC:

Up until beginning of 1992, it was in play.

WILLIAM YOUNG J:

Okay, all right.

MR LITTLE SC:

And if somebody had been – suffered their injury before 1st July 1992, they would've had cover under the Act.

WILLIAM YOUNG J:

Yes, so is this linked to your argument that she didn't suffer injury until it was diagnosed?

MR LITTLE SC:

That's true, we say that –

WINKELMANN CJ:

But where's your argument?

WILLIAM YOUNG J:

Is it part and parcel of the same argument or is it a separate argument?

MR LITTLE SC:

No, the argument is that – well…

WINKELMANN CJ:

Can you just make clear how you say these legislative changes, which we're dealing very specifically with people whose rights – who were victims of offending before this regime came into effect, these provisions extended cover to them, but because it would be unfair to take away causes of action they had before the regime was in effect, they were allowed to continue with their causes of action, how is that at all relevant to the situation of Ms Taylor who, everything has occurred to her, or diagnoses et cetera, all occurred in a time when the Accident Compensation regime was in effect?

MR LITTLE SC:

Because, your Honour, she didn't suffer injury until 2015 when this statue was in effect, and this statute dealt with the prior statutes that had been repealed and it gave rights under this Act in certain cases for persons who'd suffered sexual abuse before July 1992 and said they're entitled to cover in certain circumstances, but the circumstances were restricted to those who had been first treated for their injury as the injury between 1992 and 1999.

WINKELMANN CJ:

Can you show us where it says in the provisions that you're relying on? So what section are you taking us to?

MR LITTLE SC:

Yes, your Honour. It's section 21A in the 2001 Act, and if one looks at that section it draws attention to the period where the actions causing the injury occurred.

WILLIAM YOUNG J:

Can you just make this point clear for me? Before the 1992 Act it is perfectly clear that Ms Taylor could have made an ACC claim in relation to what had happened.

MR LITTLE SC:

Had she been diagnosed as having –

WILLIAM YOUNG J:

No, but she didn't need to be diagnosed before 1992. There was no requirement under the 1982 Act for a diagnosis, was there?

MR LITTLE SC:

Well, she hadn't suffered injury under the Act.

WILLIAM YOUNG J:

Well, all right, I think we might be going around in a circle.

MR LITTLE SC:

The Acts fixed a few –

WILLIAM YOUNG J:

Sorry, did she not suffer mental consequences as a result of the assaults, even if they were not diagnosed prior to 1992?

MR LITTLE SC:

In all probability she did, your Honour.

WILLIAM YOUNG J:

Yes, okay.

MR LITTLE SC:

But under the legislation she was deemed to have suffered her injury for the purposes of the legislation when she was first treated for it, so that that takes us a long way away from 1982 –

WILLIAM YOUNG J:

I understand that argument.

MR LITTLE SC:

– to the present time and in the meantime the Parliament following *S v A-G*, a pre-1974 case, certainly, but Parliament's followed it by enacting section 21A and said that although cover had wrongly been given by the ACC on a wrong basis up until 1999, they were prepared to say that the payments had been all right and those who had been treated and diagnosed for their injury had suffered their injury and if it was between 1992 and 1999 they had cover but also they could elect to bring common law proceedings, and the documents say, the Parliamentary debates say, that the 1992 Act did not bar common law proceedings and the proceedings were considered based on the date when the acts took place, not when the injury was suffered.

WILLIAM YOUNG J:

Could we have a look, please, at section 317 of the current ACC Act?

MR LITTLE SC:

I think from recollection that says any cover under this Act or the previous Acts, I think it says, doesn't it?

WILLIAM YOUNG J:

Yes. So it excludes a claim – sorry, it excludes claims in relation to damages arising directly or indirectly out of personal injury covered by former Acts. So as at 1986, or 1987, Ms Taylor had suffered personal injury covered by the 1982 Act.

MR LITTLE SC:

Well, the Act, so far as I'm aware, and the subsequent Act, say that's the date of suffering. The injury that gives right to cover is the date when she first receives treatment. That's why she's outside 21A. She can't get cover under 21A because she wasn't treated between 1992 and 1999 for her injury caused in 1982.

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WILLIAM YOUNG J:

So how should section 317(1)(b) be read?

MR LITTLE SC:

It's just coming up apparently, your Honour. It's coming and going on my screen, I'm sorry, your Honour.

WILLIAM YOUNG J:

It is on mine too so you're not alone.

MR LITTLE SC:

Here we are. 317. Yes, your Honour.

WILLIAM YOUNG J:

So if you look at section (1)(b): "No person may bring proceedings independently of this Act… for damages arising directly or indirectly out of personal injury covered by the former Acts." So as at 1986, any mental consequences associated with, it's 1986 and 1987, associated with the assaults, would have been personal injury covered by the former Acts?

MR LITTLE SC:

Had she been treated then.

WILLIAM YOUNG J:

No, no. There's no requirement for treatment under the 1982 Act.

MR LITTLE SC:

Well there's no cover until the injury suffered, your Honour –

WILLIAM YOUNG J:

All right.

MR LITTLE SC:

– and the injury is not suffered until you are treated for the –

GLAZEBROOK J:

So where do you get the treatment for injury from?

WINKELMANN CJ:

Because it wasn't a personal injury so therefore it hasn't been suffered until there's treatment.

GLAZEBROOK J:

No, I understand that, but –

WINKELMANN CJ:

That's all he's saying, I think.

GLAZEBROOK J:

Well, I understand that, but I just want to know where that comes out of the Act.

WILLIAM YOUNG J:

Where the treatment requirement comes out of the Act. Where does that come out of the Act?

MR LITTLE SC:

Well, the date of suffering the injury, your Honour.

WILLIAM YOUNG J:

Yes, where's that?

MR LITTLE SC:

Sorry?

WILLIAM YOUNG J:

Where's the treatment date – where is that dealt with on –

WILLIAMS J:

Section 36.

MR LITTLE SC:

It's… in the 1992 Act, it is…

WINKELMANN CJ:

I think it's the 1982 Act we're talking about.

O'REGAN J:

But it needs to be in the 1982 Act.

WINKELMANN CJ:

Are you saying that as a matter of fact, she didn't have PTSD at a time she could've had cover under the 1982 Act? The PTSD was – what was the evidence about that?

MR LITTLE SC:

Well, the evidence was that she had probably had PTSD the whole time.

WINKELMANN CJ:

If there's no requirement of treatment, then she would've had cover under the Act. The fact that she didn't claim it doesn't mean she didn't have cover.

MR LITTLE SC:

No, because cover is only for people who've suffered the injury, so they've got to have treatment. Otherwise, they don't have cover, as I understand it.

WILLIAM YOUNG J:

So where does this requirement come from?

O'REGAN J:

Yes, but that treatment – that provision that says the date of treatment is in the 1992 Act, but the question we're asking you is, why wasn't she covered under the 1982 Act for what happened to her in 1986, if it caused her to have PTSD in 1986?

MR LITTLE SC:

Well, we would say that she didn't have cover under the Act because the Act prescribed for cover for specified criminal injuries. There were three crimes specified. One was rape. One was infecting with disease.

GLAZEBROOK J:

Are you talking about the 1982 Act?

MR LITTLE SC:

The 1982 Act, yes.

WILLIAM YOUNG J:

But you could get cover for an assault. If someone who was punched in the face and lost some teeth would have cover under the 1982 Act –

MR LITTLE SC:

They would, for an assault, your Honour.

WILLIAM YOUNG J:

She was the subject of an assault. Of a series of assaults.

MR LITTLE SC:

Well, not physical, basically, your Honour.

WILLIAM YOUNG J:

Well, there was non-consensual touching.

MR LITTLE SC:

No, there was, there was –

WILLIAM YOUNG J:

Well that's an assault, isn't it?

MR LITTLE SC:

– and in the next Act, the 1992 Act, indecent assault was included.

WILLIAM YOUNG J:

Yes, yes, I know, but in 1982, she had – the offending that took place against her involved non-consensual touching.

MR LITTLE SC:

It did.

WILLIAM YOUNG J:

An assault.

MR LITTLE SC:

Yes.

WILLIAM YOUNG J:

It was well-established, wasn't it, under the 1982 Act, and indeed I think under the 1972 Act, that cover was available in relation to injuries caused by assaults, injuries caused deliberately?

MR LITTLE SC:

Yes.

WILLIAM YOUNG J:

So why wouldn't there be cover in relation to indecent assaults? Under the general provisions of the Act, irrespective of whether indecent assault was a specified offence?

MR LITTLE SC:

Well, why, one would say, why were these other crimes scheduled if you could get cover for something far less?

WILLIAM YOUNG J:

Well, some of them might not have necessarily involved assaults, for instance, unlawful – some of the other offences, for instance, indecent assault might be – sorry, I haven't got these provisions in front of me.

GLAZEBROOK J:

Well, it is attempts, there's attempts anyway which – included. But I think they were cutting it down rather than expanding it, weren't they?

MR LITTLE SC:

Our point is that under the early statutes she has not suffered any injury in accordance with the statute and once she suffers injury she then has cover, but she hasn't suffered her injury, even under the current Act now, she hasn't suffered it till 2015 or 2016.

GLAZEBROOK J:

Can you show us where in the 1982 Act she hasn't suffered injury? So why in the 1982 Act do you say she hasn't suffered injury? So where in the 1982 Act does it say you have to have had treatment to suffer injury?

MR LITTLE SC:

Well, the "personal injury by accident" includes physical and mental consequences of any such injury, actual bodily harm (including pregnancy and mental or nervous shock) arising by any act or omission of any other person which is within the description of any of the offences specified in sections 128, 132, and 201 of the Crimes Act. That is an extension to the "personal injury by accident" that provides for cover for breach of any of those three sections. Now it doesn't say assaults without injury give rise to cover. It says "mental or nervous shock" coming from the three prescribed sections gives rise to cover.

WINKELMANN CJ:

So if we look at section 21B, which is what we're dealing with, you say it does not apply to Ms Taylor because on the face of it, when we look at the words of the section, and I'd like you to deal with the words of the section, it seems to apply to her.

MR LITTLE SC:

Well, we say it doesn't apply to her because the events that gave cause to this occurred at a time when the statutory cover to – statute was not in effect.

WINKELMANN CJ:

So: "A person has cover for a personal injury that is a work related mental injury if he or she suffers mental injury inside or outside New Zealand on or after 1 October 2008," and on your analysis that must mean…

MR LITTLE SC:

Prospective only.

WILLIAM YOUNG J:

Can we get down to 21B, sorry?

WINKELMANN CJ:

But she has suffered it after, on your analysis, on or after 1 October 2008.

MR LITTLE SC:

Yes, but the legislation is presumed to be prospective only which applies only to events occurring after that time.

WINKELMANN CJ:

Yes, it's saying that it's applying to the event that occurred after that which was, on your analysis, her diagnosis, her treatment for PTSD which was after 2008.

MR LITTLE SC:

True, but that's only – according to *S v A-G* there are two aspects to these cases. There are the events and then there is the outcome of the event which is the injury.

WINKELMANN CJ:

Yes, and this section is directing itself purely to the mental injury.

MR LITTLE SC:

It's not taking account of the events giving rise to the injury which occurred 20 years beforehand.

WINKELMANN CJ:

So you're saying that section 21B does not apply if the events in question occurred before…

MR LITTLE SC:

The enactment of this Act.

WINKELMANN CJ:

The offending?

MR LITTLE SC:

Mmm, the 21B Act, and this is –

WINKELMANN CJ:

Although it –

WILLIAM YOUNG J:

Sorry, but when was the Act enacted? When was this enacted?

WINKELMANN CJ:

2008 this section.

MR LITTLE SC:

2008. It was an amendment in 2008, your Honour.

1300

WILLIAM YOUNG J:

So did it come into effect on 1 October?

MR LITTLE SC:

I think that's correct, your Honour.

WINKELMANN CJ:

So that requires a restrictive reading of section 21B?

MR LITTLE SC:

No, your Honour.

WINKELMANN CJ:

A non-purposive reading?

MR LITTLE SC:

No, it just requires applying it as prospective and not having the retrospective effect that 21A has. If your Honours look at 21A, it is a detailed retrospective section dealing with mental injury prior to that Act, and it deals with it in a compendious way and it gives cover where it says cover was not available in the past, it gives cover but it only gives cover for those lucky people who were treated between 1992 and 1999, and if Parliament in 2001 had wanted to say cover continued for others whose treatment was after that date they could have said so, but they didn't say so.

GLAZEBROOK J:

Perhaps after the adjournment can you just walk me through again why there wasn't cover under the 1982 Act, and why you say that it's treatment date under the 1982 Act and also….

WINKELMANN CJ:

I think he does say that, yes, think he does. I think he does. I think he says that.

GLAZEBROOK J:

Well, because I've understood that was the argument. So under the 1982 Act why it's treatment.

WINKELMANN CJ:

You're saying she doesn't have cover for anything, correct, for any mental injury, whether it's arising from the –

MR LITTLE SC:

Yes, we say there were no standalone mental injury available until much later and then since the repeal of the 1982 Act the qualifications for mental injury by and large have got tighter and tighter although there are now more criminal acts prescribed in the current schedule.

WINKELMANN CJ:

All right, we'll take the luncheon adjournment.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.18 PM

WINKELMANN CJ:

Mr Little.

MR LITTLE SC:

Yes, thank you, your Honour. The short answer to Justice Young's question, I think your Honour's, the Chief Justice, is that it may be that she had cover under the 1982 Act but she didn't know that she had cover at that time and the fact that section 21A is now in the most recent Act giving retrospective cover to people who have suffered, who go back a long time, is merely to identify the fact that psychiatric injury is a rather amorphous and difficult thing and it's not like somebody who drops a weight on his foot and crushes it who knows he's suffered an injury and he knows it's going to put him off work, he'll go and get cover, but with Ms Taylor, she didn't know until 2015 that she'd suffered a psychiatric injury and so she made no claim under the 1982 Act which, ultimately, was repealed. She was entitled, had she been alerted to it after the enactment of the 1992 Act because it operated to provide cover in circumstances where injury had occurred prior to the enactment of the 1992 Act, and I'm sorry but I don't think any of us here have put the matter in our documents, your Honour, but I'd ask to seek leave to direct your Honours to section 135 of the Accident Rehabilitation and Compensation Insurance Act headed "Transitional provisions", "Relationship of this Act and former Acts".

WINKELMANN CJ:

Which year Act? Which Act?

MR LITTLE SC:

It's the Accident Rehabilitation and Compensation Insurance Act. It should have come up on your Honours' –

WILLIAMS J:

It's the 1992 Act, correct?

MR LITTLE SC:

The 1992 Act, the easy way of saying it, yes. The 1992 Act, your Honour, and we take your Honour to 135 which deals with, at an early stage, with cases such as Ms Taylor's who may have been the sufferer of something that entitled her to cover without knowing she had that entitlement. Rather than me read it out, your Honour, it may be if your Honours would look at subparagraphs (1)-(5) and your Honour will see that cover has been kept alive in this way subject to some restrictions.

GLAZEBROOK J:

Can we scroll down? Subsection (5) seems to be the…

WINKELMANN CJ:

It does, yes.

MR LITTLE SC:

We say that Ms Taylor was within subsection (5). She didn't know she had a claim, she hadn't lodged one, so the difficulty that that caused for her was that she had to be covered both by the 1982 Act and by the 1992 Act before she could gain cover.

WILLIAM YOUNG J:

Was her claim, as at – what restrictive provisions were there in 1992 that limited her claim?

MR LITTLE SC:

The fact that there was a very much stricter approach to take into injury by accident, which she was outside, and there was –

WINKELMANN CJ:

How so outside and what was that? Because we need…

GLAZEBROOK J:

Sorry who was outside at what point?

WINKELMANN CJ:

She was. He's –

MR LITTLE SC:

The 1992 –

GLAZEBROOK J:

No, the 1982 –

WINKELMANN CJ:

No, the 1992.

GLAZEBROOK J:

Well, no, but it says if she –

WINKELMANN CJ:

It's outside – you're only covered –

GLAZEBROOK J:

She had to be within 1982, but didn't make a claim, and so has to also have a cover under 1992. Is that what we're dealing with?

WINKELMANN CJ:

Yes, and Mr Little is saying why didn't have cover under 1992.

MR LITTLE SC:

She didn't have – and 1992 took a big hammer to the previous 1982 Act, and your Honours may not have it but I can read –

WINKELMANN CJ:

You can tell us. We can look it up.

MR LITTLE SC:

It's the section 3 interpretation and your Honours will see what "accident" means.

WILLIAM YOUNG J:

But is that – have we got section 3?

MR LITTLE SC:

Your Honours will see that goes down to half way on page 68.

WILLIAM YOUNG J:

4 and 8, yes.

MR LITTLE SC:

Then, relevantly, page 71, half way down: "'Mental injury' means, in relation to any person, a clinically significant behavioural, psychological, or cognitive dysfunction." Then 4 defines "personal injury", and with respect to mental injury there to the outcome of physical injuries. Then – a bit like the Hampton Court Maze, I'm sorry your Honours, but then goes to section 8(3) of the Act and that's cover for personal injury occurring in New Zealand.

WILLIAM YOUNG J:

So what are the offences listed in the first schedule to the Act?

MR LITTLE SC:

Sorry, your Honour?

WILLIAM YOUNG J:

What are the offences listed in the first schedule to the 1992 –

MR LITTLE SC:

The first schedule now including attempted… What's the –

WILLIAM YOUNG J:

Does it include indecent assault?

MR LITTLE SC:

Another – indecent assault, your Honour, I'm sorry.

WILLIAM YOUNG J:

All right, so she had cover under the 1992 Act then?

MR LITTLE SC:

Yes, but she also had to have cover under the 1982 Act.

WILLIAM YOUNG J:

Okay, let's assume she's got cover under the 1982 Act and she's got cover under the 1992 Act.

MR LITTLE SC:

Oh no, you have to have cover under both, your Honour.

WILLIAM YOUNG J:

Yes, well, let's make –

MR LITTLE SC:

If your Honour looks at 8(3): "Cover under this Act shall… extend to personal injury… mental or nervous shock suffered by a person as an outcome of any act of any other person performed on, with, or in relation to the first person… which is within the description of any offence."

WINKELMANN CJ:

You started out by saying – when we came back from lunch, you said whilst she may have had cover under the 1982 Act, she hadn't lodged a claim, and under the 1992 Act, she could only then get cover if she also had cover under the 1992 Act and she didn't have cover. But now you've just accepted from Justice Young that she does have cover under the 1992 Act.

MR LITTLE SC:

No, your Honour. We're saying that indecent assault was not within the schedule in the 1982 Act.

WILLIAM YOUNG J:

We know that, but providing she had cover under the 1982 Act and it was a result, the mental injury was a result of an indecent assault, she has cover under the 1992 Act, doesn't she?

MR LITTLE SC:

No, there's more to it than that, your Honour. She didn't suffer a scheduled crime under the 1982 Act. She was in that –

WINKELMANN CJ:

Under the 1992 Act? 1982? Okay.

MR LITTLE SC:

No, she certainly didn't suffer under the 1992 Act, but if we can take your Honours to section 135 again.

GLAZEBROOK J:

Sorry, which Act?

WINKELMANN CJ:

It's the 1982 Act. I don't know anymore.

MR LITTLE SC:

No, that's the 1992 Act. My juniors keep telling me that her injury was still latent at that time.

WINKELMANN CJ:

Yes, but the question is why is that relevant to cover? Under which Act is that relevant to cover?

MR LITTLE SC:

Well because she may not have suffered personal injury if it was still latent, your Honour.

WILLIAM YOUNG J:

But I thought you accepted that the probabilities were that she did have PTSD from the late '80s?

MR LITTLE SC:

Well, it's a notoriously insidious condition, your Honour, which is why there's so much complexity in these statutes because –

WILLIAM YOUNG J:

Yes, but the 1982 Act imposed a diagnosis trigger for liability or for cover.

MR LITTLE SC:

Yes.

WINKELMANN CJ:

So if we could go back to section 135(5), and then you started out by saying yes, she had cover under the 1982 Act but she hadn't lodged a claim, so section 135(5) applied.

MR LITTLE SC:

Yes, your Honour.

WINKELMANN CJ:

Therefore, in order to get cover under the 1992 Act by virtue of the incidents under the 1982 Act, she also had to have cover only if that personal injury by accident is also personal injury that is covered by this Act?

MR LITTLE SC:

Yes.

WINKELMANN CJ:

Were you telling us that it's not personal injury by accident that is covered by the 1992 Act?

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MR LITTLE SC:

Well, the 1992 Act took away the broad description that had been given to personal injury by accident in the 1982 Act, so that even though she was now within a schedule that gave rights, she lost her right under the 1982 Act because of the enactment of this part of the 1992 Act, because the decisions of *E* and the ACC had been completely overwritten by this statute, and *E v ACC* was the case that gave rise to a broad interpretation of what injury was and this statute significantly restricted that broad section and so she no longer had cover or an entitlement to cover under the 1982 Act.

GLAZEBROOK J:

Well, she did, didn't she? Subsection (5) says that, but only if you have cover under the 1992 Act and if you accept she had cover under the 1992 Act she had cover under both.

MR LITTLE SC:

Well, we say we didn't have cover under both and we didn't understand that we were suffering the injury at that time either.

WILLIAM YOUNG J:

But that comes in later, doesn't it?

MR LITTLE SC:

Sorry, your Honour?

WILLIAM YOUNG J:

The requirement for a diagnosis comes later, doesn't it?

MR LITTLE SC:

Well, if people don't know they're sick they don't go to the doctor, I suppose, your Honour. That's –

WILLIAM YOUNG J:

Yes, look, you're not actually answering. I'm talking about as a matter of law. The requirement for a diagnosis as a triggering event in itself comes later, doesn't it? It's not a 1992 requirement.

MR LITTLE SC:

Well, it's premised on any person who has suffered personal injury by accident.

WINKELMANN CJ:

Mr Little, can you tell me which of these steps is wrong? You accept that if she'd made a claim under the 1982 Act she would have had cover.

MR LITTLE SC:

Probably, your Honour.

WINKELMANN CJ:

But she didn't.

MR LITTLE SC:

No.

WINKELMANN CJ:

So section 135(5) applied.

MR LITTLE SC:

Yes.

WINKELMANN CJ:

And under section 135(5) she would have had cover if she made a claim but only if the 1992 Act applied.

MR LITTLE SC:

Yes, your Honour.

WINKELMANN CJ:

And you say that it's the 1992 Act that stops her having cover?

MR LITTLE SC:

Well, we say the 1992 Act takes away the qualification she got for cover under the 1982 Act.

WINKELMANN CJ:

And how did it take away the qualification she had for cover?

MR LITTLE SC:

Because now the 1992 Act was the relevant Act for cover it had a different –

WILLIAM YOUNG J:

But she met those criteria.

MR LITTLE SC:

Sorry, your Honour?

WILLIAM YOUNG J:

She met the 1992 Act criteria for cover. She suffered a mental injury –

MR LITTLE SC:

She did, your Honour.

WILLIAM YOUNG J:

– as a result of indecent assault.

MR LITTLE SC:

Yes, she did.

WILLIAM YOUNG J:

So if she'd claimed in 1993 or 1994 the ACC would have said: "Okay, your cover under the 1982 Act has expired because it's been replaced by the 1992 Act but the good news is that you've got cover under the 1992 Act."

MR LITTLE SC:

Well, that, with respect, your Honour, that'd probably be correct. However, this is where we then go to section 21A of the 2001 Act, which we've looked at before, where –

GLAZEBROOK J:

Could we have that back up, please?

UNIDENTIFIED SPEAKER:

Which one, your Honour?

GLAZEBROOK J:

21A.

WINKELMANN CJ:

Section 21A of the 2001 Act.

MR LITTLE SC:

The general policy statement on the Government Bill.

GLAZEBROOK J:

Well, I'd rather look at the statute personally. So section 21A?

MR LITTLE SC:

21A, yes.

GLAZEBROOK J:

So how does that help?

MR LITTLE SC:

So she's within section 1 as being within a description of an offence listed in Schedule 1, which his Honour Justice Young has drawn our attention to, and it was before the acts were performed before 1 July 1992, and they were performed in New Zealand, and for the purposes of subsection (1) and that is covered, I assume, although we've gone past that, for the purposes, et cetera, deemed to be suffered.

That's where I struggled a bit with the 1982 Act because I thought this had retrospective effect on the 1982 Act and this is where the deemed suffering comes in, and she must be somebody who's received her first treatment on or after 1 July 1992, well that's certainly the case, but before 1 July 1999. So the loss of cover has been the lapse of time and the changes in the fundamental approach to cover under the Act.

WINKELMANN CJ:

So you're saying this is an exclusive code for coverage for people who fall within – who are –

MR LITTLE SC:

Criminal acts causing mental injury. That's what we have in 21A.

WINKELMANN CJ:

So you're saying in fact it provides exclusive cover for the timeframe before 1 July 1992 and who is suffering personal injury that is mental or nervous shock and that they only have cover if the first treatment –

GLAZEBROOK J:

Can you scroll down a bit on that section, please?

WINKELMANN CJ:

– the first treatment is between July 1992 and 1 July 1999?

MR LITTLE SC:

Yes, your Honour, and that seems to be the result of *S v Attorney-General* which led, apparently, or it appears to be what led to this amendment, and if we can go back, your Honour, to the government bill again, at page 13, if your Honours will have a look at what the Court of Appeal said to have said in *S v Attorney-General*, your Honours will find that the 1992 Act did not bar common law claims for mental or nervous shock resulting from sexual abuse that occurred before 1 July 1992.

WILLIAM YOUNG J:

Yes. I think I misinterpreted *S*. I think *S* said before 1 April 1974?

WINKELMANN CJ:

Yes, you did.

WILLIAM YOUNG J:

I said that to you before lunch.

MR LITTLE SC:

Well, it did say the other part. It did say before 1974, with respect, your Honour, but it's the later Bill that became the Act that talks about including before July 1992.

If we can go to page 5 of the government Bill, your Honours will see page 5 – This is the Bill at page 6, sorry, on the Bill. It's number 3. 165.1 it's got at the foot, opening page of it. Doesn't have a date. There it is, 1651, and we need page 6.

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We can't seem to get that one up, your Honour. It is – I thought it was in our list of authorities but doesn't appear to be. But the only point I intended to make from it, apart from what I've said already, is that subparagraph (5) of the draft

says: "However, the following provisions apply to civil proceedings brought before or after the commencement of this section…" Now that's pretty open-ended. It doesn't shut the right to general damages down even though compensation is being provided for those within the 1992 and 1999 period.

So it's our submissions, your Honours, that this is clearly a very detailed, carefully thought out rehash of the system and providing historic cases with an entitlement that get shut down presumably with a change in insurance arrangements in 1998.

WINKELMANN CJ:

So you ran this argument in front of the Court of Appeal and they rejected it. They said that section 21A is intended to operate as a deeming provision to give cover to people who would otherwise not, and so therefore it's not a code which displaces cover but rather effectively extends cover, and so they said it –

MR LITTLE SC:

Well, it does extend cover, your Honour, true, but it's limited cover and it also provides, as *S v A-G* said, the 1992 Act did not bar common law claims for –

WINKELMANN CJ:

Well, if you just pause for a moment. And then the Court says it doesn't override section 21 – if we can go to section 21 – and that if a claimant meets the requirements of section 21, which Ms Taylor does, then that is what gives her cover. The cover is not under the 1992 Act which would be the case if she were within section 21A. The cover is under the 2001 Act.

MR LITTLE SC:

Well, we say those two sections can't sit together, your Honour. We say it's only prospective for events, that the 2001 Act, section 21, is only prospective. The 21A deals with all the circumstances of Ms Taylor. She is within the entitlement to receive the money but she loses her entitlement, and she loses that –

WINKELMANN CJ:

Okay, well, I think we've got your submission on that.

MR LITTLE SC:

Yes – in an area where common law is still available for those cases before or after coming into effect of this Act.

WINKELMANN CJ:

So you say section 21B does not apply?

MR LITTLE SC:

It's for the day after the Act came into – for the events that occurred the day after the Act was enact – became into effect.

GLAZEBROOK J:

So 21 operates on when something happens rather than when treatment is sought, is that the submission?

MR LITTLE SC:

There is a section fixing the time. I think it's 36, your Honour, where 21B and 21 I think are both said to be the date of the mental injury, first treatment for the mental injury, but it doesn't include 21A which is a little code of its own with persons who were –

GLAZEBROOK J:

But under 21 if the date is the date you suffer mental injury why doesn't she have cover?

MR LITTLE SC:

Well, because we say 21A is not subject to section 36. It's established its own little retrospective…

WILLIAM YOUNG J:

Okay, I understand the argument. It's pretty odd that up until, for 15 years or so, there was no common law claim but in 2001 because of the sort of transitional provisions of common law, a right to sue at common law just arose.

MR LITTLE SC:

Well, that's what we say, your Honour. We say the –

WILLIAM YOUNG J:

And how does that sit with section 317?

MR LITTLE SC:

Well, the Act – well, that section 21A giving the right to sue is outside section 317.

WILLIAM YOUNG J:

Well, 317 says you've no right to sue for personal injury covered by former Acts. If it was covered by the 1982 and the 1992 Act, it was covered by a former Act.

MR LITTLE SC:

Well, it's no longer covered by a former Act at the time they enact the 2001 Act.

WILLIAM YOUNG J:

Well, of course it can't be.

GLAZEBROOK J:

But is that – that's because of 21A for some reason?

WILLIAM YOUNG J:

Yes, but – so what's happened is it's narrowed perhaps entitlements but it hasn't necessarily expanded common law claims.

MR LITTLE SC:

Well, we say the specific use of "before and after the commencement of this Act" for common law is consistent with what was said in *S v Attorney-General* that the 1992 Act didn't bar common law claims.

WINKELMANN CJ:

Your junior can handle the submission if he wishes, Mr Little.

MR T LITTLE:

Thank you, your Honours.

WINKELMANN CJ:

Do you want to just swap places with Mr Little?

MR T LITTLE:

Certainly. Ms Whiteford and I, your Honours, we say, and we have agreed prior, that Ms Taylor did not have cover under the 1982 Act as she did not suffer one of the only three scheduled crimes at the time.

WILLIAM YOUNG J:

Yes, we've got that. We understand that that's a submission.

MR T LITTLE:

So therefore she does not have cover under the 1982 Act.

MR LITTLE SC:

I don't know whether to be grateful for that assistance or not, your Honour, but…

WINKELMANN CJ:

Well, that's what juniors are for.

MR LITTLE SC:

At least it gave me a bit of a rest.

GLAZEBROOK J:

No, that might be true but isn't the argument that she just had general cover under the general mental injury under the first – subsection (1)?

WINKELMANN CJ:

Subsection of what?

MR LITTLE SC:

What section is this?

UNIDENTIFIED SPEAKER:

Mental consequences.

GLAZEBROOK J:

Whatever the section was in the 1982 Act. There were specific crimes mentioned but…

WINKELMANN CJ:

What is the section?

O'REGAN J:

I think we're just going over the same ground here.

MR LITTLE SC:

I don't know how that sits with 11(1)(a), I'm afraid, your Honour – 21A rather. On one hand you've got a bar, on another you've got a specific section authorising proceedings, and it's been traditionally regarded by the Court of Appeal at least that one shouldn't too readily accept that the right to compensatory damages for wrong, as redress for wrongs, should be lightly given away and in a case like this where we have fixed on a certain time for matters to occur that is said to give rise to common law damages, then that should not be overruled by the general prohibition that there is in the Act.

WINKELMANN CJ:

Right, so what is your next argument, Mr Little?

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MR LITTLE SC:

I think probably the only thing was to say something about 21B but I'm not convinced, having gone through this other maze, whether I've got it right, what your Honour sought from me. I just say –

WILLIAM YOUNG J:

Can I just take you to one other section, 360 of the 2001 Act? So basically Ms Taylor would have had cover, has cover under section 360 if she had cover under the earlier Acts and she is within the criteria of the 2001 Act. You say that providing she didn't get an official diagnosis she can sue at common law?

MR LITTLE SC:

Yes, your Honour.

WILLIAM YOUNG J:

It's a pretty weird proposition, isn't it?

MR LITTLE SC:

Well, it's a pretty weird Act, your Honour.

WILLIAM YOUNG J:

Yeah, but say she'd just gone ahead and said, gone to trial without psychiatric evidence, without a diagnosis, you say that that would have been fine.

MR LITTLE SC:

We would have lost, I suspect.

WILLIAM YOUNG J:

Yes, but on your theory, because she – the last point, that the obtaining of a diagnosis hadn't happened, she had a common law claim?

MR LITTLE SC:

Well, if she was able to prove her common law claim she would have had it, yes. That's the effect.

WILLIAM YOUNG J:

Isn't it possible to read section 360(2) on the basis that she had cover, the assumption that she had cover, there would be an assumption that she had cover if she was able to obtain a diagnosis?

MR LITTLE SC:

Yes, of a serious mental injury that amounted to psychiatric injury.

But, your Honour, the point I was making was that Parliament has gone to a great deal of effort to produce section 21A and it must be that when that happens in 2005, going right back to injuries starting 1992, that there must be a long tail of psychiatric cases.

WILLIAM YOUNG J:

But pausing there, as soon as she got the diagnosis she had cover under the 2002 Act, 2001 Act.

WINKELMANN CJ:

Which is what the Court of Appeal says.

WILLIAM YOUNG J:

So she has, by the time of trial, she had cover under the 2001 Act.

MR LITTLE SC:

May I ask, your Honour, what injury would she have cover for under the 2002 Act? We've got to go back to the Act to see what the injury is –

WILLIAM YOUNG J:

The injury that she suffered in 1986 and which were diagnosed in whatever year it was.

MR LITTLE SC:

But the effluxion of time has removed her rights and entitlement. Had government not –

WINKELMANN CJ:

Well, that all turns on what section 20 means, isn't it?

MR LITTLE SC:

Section 20 is fine for the future after –

WINKELMANN CJ:

21, sorry. Is it 21?

WILLIAM YOUNG J:

Well, I think it might also be 360.

WINKELMANN CJ:

Well, that's assuming cover under previous Act.

WILLIAM YOUNG J:

Yes, assuming she's 1982 in 1992.

WINKELMANN CJ:

But section 20 – is it 21 which says it just applied –

WILLIAM YOUNG J:

And then she has to fit within 21(2), or 21A.

WINKELMANN CJ:

Have we got the section?

UNIDENTIFIED SPEAKER:

Sorry, I'm just having a technical problem but we have it now. Is it 21A, your Honour?

O'REGAN J:

21A.

MR LITTLE SC:

21.

WINKELMANN CJ:

No, it's 21. "A person has cover for a personal injury that is a mental injury if he or she suffers the mental injury inside or outside New Zealand on or after 1 :April 2002;" and it's caused by an act performed by another person, and the act is the kind described in subsection (2), and the Court of Appeal just said, look, that just applies on its face. It doesn't matter that the action occurred a long time ago, because the injury's occurred –

WILLIAM YOUNG J:

The pattern is that you have to have cover under the Act as it was at the time the incident occurred and, secondly, that if that incident had occurred under the new regime you would have to have cover under the new regime as well. That's the pattern of the transitional provisions.

MR LITTLE SC:

1992 Act.

WILLIAM YOUNG J:

Now here she has cover under – she had cover under the earlier Acts and she also had cover under section 21 in the sense that if the events had occurred after 2002 she would have had cover, and that's what section 360 says.

MR LITTLE SC:

But section 36 only talks about section 21 and 21B. It does not talk about 21A which is its own code, your Honour.

WINKELMANN CJ:

This is an origami or it's a very complex and niggardly kind of an approach to legislation and I can't imagine, because you've got to remember, Mr Little, that this legislation is usually being applied to enable people to access cover. It's not being applied in every way possible to cut them out. So…

MR LITTLE SC:

I understand that, your Honour, but *S v A-G* have cut a pretty deep swathe through it, says there was no cover for sexual, these sexual crimes, committed between 1992 and 1999. People were paid, some were paid, but people were at liberty to sue.

WINKELMANN CJ:

But that turned on when the injury had occurred, didn't it?

MR LITTLE SC:

Before – no, the events occurred before –

O'REGAN J:

1974.

MR LITTLE SC:

– July 1992, I think, your Honour.

WINKELMANN CJ:

So it didn't turn on when the injury had occurred, the personal injury by accident had occurred? I thought it occurred, it depended on when the personal injury by accident had occurred and this – and section 36 for the purposes of section 21 deems it to have occurred, the injury to have occurred on the day of treatment.

MR LITTLE SC:

Well, that's when – we've said that that's when the injury is incurred but nevertheless section 21A deals with both the events and the injury.

WINKELMANN CJ:

Well, that's because it's addressing *R v S* but this is making clear, for other purposes outside the *R v S* catchment, this is making clear that the injury is the date, critical date, and it's the date on which you get treatment.

MR LITTLE SC:

Well, that would have the effect, of course, that the ACC may be paying out very large amounts of money on historical cases. Whether they're budgeted for that or not I don't know. I assumed that what's happened with 21A and the like had been budgetary constraints or…

WINKELMANN CJ:

I don't imagine it's a big issue any more because the big issue is pre-1974 and that's now a long, long time ago, 50 years.

MR LITTLE SC:

I remember it well, your Honour. Drove me out of the country.

O'REGAN J:

I think we've probably…

WINKELMANN CJ:

We've probably covered that. So I think we've covered section 21B, or did you want to say anything about sudden –

MR LITTLE SC:

Well, I can't say any more than Parliament's very, very strongly tried to reinforce that a single event means a single event even though in the circumstances adverted to before about the various sequelae of a car accident that would be a series of event – a series of things occurring, all part of a single event, namely, the car crash. So that's what we would say, your Honour.

No questions? Thank you, your Honour.

WINKELMANN CJ:

Is Mr Little, Mr Timothy Little, making submissions or…

MR T LITTLE:

Your Honour, I don't propose to make submissions.

WINKELMANN CJ:

So those conclude your submissions?

MR LITTLE SC:

Those are my submissions, your Honour.

WINKELMANN CJ:

Thank you. So, submissions in reply?

MS FISHER KC:

I just wanted to address the issue about section 27 of the 1982 Act. I'm not sure if I need to do that now but, your Honour, you didn't think that that had been covered in the submissions.

WINKELMANN CJ:

No, I didn't think it'd been the focus of oral submissions particularly.

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MS FISHER KC:

No, but just if you could have a look at paragraph 32 of the Attorney's submissions. We just set out there that the starting point is, of course, a statutory bar under the 2001 Act that's section 317. In the footnote we just reference there, footnote 44, all the provisions that relate to the Bar. So you've got section 394 in the 1998 Act, you've got section 14 in the 1992 Act and of course you've got 27, and the footnote makes it clear that the bar existed throughout all these iterations of the Act, and while –

WINKELMANN CJ:

Sorry, what paragraph was it in your submissions?

MS FISHER KC:

Paragraph 32.

WINKELMANN CJ:

32, thank you.

MS FISHER KC:

Paragraph 32, footnote 44, so while the scope of cover has been limited, the statutory bar has remained throughout all those iterations of the legislation. Were there any other questions arising from the statutory bar?

WINKELMANN CJ:

No, I don't think so. Well, yes, what do you say it means – we heard from Mr Herbke about the relationship between that and *Willis*. Did you have anything you wanted to say about that?

MS FISHER KC:

Just that he's referring to the humiliation and distress being covered.

WINKELMANN CJ:

Yes.

MS FISHER KC:

Yes, well, the point there of course is that *Willis* only applies when you're talking about an overlap, and there was no overlap in that case. It was in 1989 before we had the *ACC v E* case, and *ACC v E* was the one that said mental consequences qualify under the 1982 Act. So Ms Taylor would have had cover not just because of the assaults, but also because of any mental consequences on their own. That's what *ACC v E* said. So the difference is that the nature of the false imprisonment talked about in *Willis* is, of course, very different from the nature of false imprisonment that we've got in this case.

WINKELMANN CJ:

Mr Herbke's submission, I think, was, I'm just trying to capture it, was that it was really – the point was that there was no cover for humiliation, pain and distress so it wasn't talking there about overlapping cover, I think.

MS FISHER KC:

No, well that's when we took you to the *Green* case because it said there was no cover for humiliation, distress, you had to have a serious mental disorder.

WINKELMANN CJ:

Mmm.

MS FISHER KC:

So that's the position.

WINKELMANN CJ:

So is the submission really that *Willis* is confused, or confusing?

MS FISHER KC:

Well *Willis* is confusing because it was dealing with the 1982 Act before we had *ACC v E*, which clarified that mental consequences on their own were covered by the 1982 Act. But it also needs to be read with *Green v Matheson*, and that makes it plain that once you're in with mental consequences, then you are covered completely and the bar applies. So you need to read *Willis* with *Green*.

WILLIAM YOUNG J:

And with the recognition they precede *E*.

MS FISHER KC:

Yes, they do, and that's probably where the confusion arises, looking at *Willis* now. Is there anything else that I can address you on?

WINKELMANN CJ:

No, I think we're suitably confused. Can I ask, however, before you sit down Ms Fisher, about costs in the proceeding.

MS FISHER KC:

I think the Attorney's position is they will not be seeking costs.

WINKELMANN CJ:

Right. Mr Little, costs?

MR LITTLE SC:

We seek costs, your Honour, this has been a long dragged out thing for six years now. We would seek costs if we're successful.

WINKELMANN CJ:

I've overlooked Mr Roper's right of reply Mr Mather. You might not have much to say anyway.

MR MATHER:

There's not a lot but I would ask if Mr Herbke could address the Court briefly.

WINKELMANN CJ:

Yes, and he can address costs as well when he's up.

MR MATHER:

He can address costs as well.

MR HERBKE:

I'll just be brief. Firstly, in summary, our position is that whether Ms Taylor had cover under the 1982 Act or not is largely irrelevant as she did have cover under the 2001 Act because of the indecent assault being in Schedule 3, and also because of 21B applying.

With respect to *Willis*, and just to clarify the position, the wording in the passage that we've gone over a number of times may not be perfect, in view of the 1982 Act, and in particular the definition of "personal injury by accident" in that Act, which includes the physical and mental consequences, the same words used, of any such injury or of the accident. However, our position remains that the

mental consequences that his Honour, President Cooke is referring to in that passage, is the distress, humiliation or fear that is referred to in the same passage. Unfortunately, it also could refer to the mental consequences under personal injury by accident in section 2 of the Act. However, the passage, in our view, has been perhaps elevated above the real meaning of it, or the need for it to be elevated in the way it has, because in that case we were not dealing with a situation with intertwined damages. We were dealing with a tort of false imprisonment alone.

WINKELMANN CJ:

So a conventional way of putting that is that the comments are obiter?

MR HERBKE:

Thank you Ma'am. And I just wish to emphasise that although the comments, the obiter comments may have been elevated, the precedent of the case is contained at lines 24 to 27 of that same page, which is simply that if the detention of a plaintiff has been accompanied by physical injuries, damages cannot be claimed for those, or for the pain and suffering they have caused. That would be the precedent of the case.

With respect to costs Ma'am, Mr Roper is legally aided. If successful on appeal he would be seeking costs, but it would only be to any prescribed repayment amount that he may have to pay back to the legal services agency, the Ministry of Justice, which are normally lower than scale costs. So we'd need to –

WILLIAM YOUNG J:

Is that right? Sorry, doesn't the legal aid fund very occasionally make a profit out of costs awards?

MR HERBKE:

We cannot claim for –

WILLIAM YOUNG J:

Can't you claim…

MR HERBKE:

– costs that have not been incurred.

WILLIAM YOUNG J:

I see, sorry, you can only claim, of course, you can only claim for the costs that you get from the legal – okay, no, I understand, sorry. I misunderstood what you were saying.

MR HERBKE:

Not that's fine Sir, and if Mr Roper is unsuccessful, then we've advised all parties that under section 24 of the Legal Services Act 011 that he is legally aided and we would be of the view that there's not exceptional circumstances that would warrant an award of costs against him.

Those are our submissions.

WINKELMANN CJ:

Thank you Mr Herbke. Thank you, counsel, for your submissions. We'll take some time to try and work out the scheme of the Acts, and we'll let you have our decision in due course. We will now retire.