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

SC 30/2025

BETWEEN

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

AND

SAM TE HEI
Respondent

Hearing: 10 March 2026

Court: Winkelmann CJ
Ellen France J
Miller J
Cooke J
Katz J

Counsel: N M Pender, G P McLay and G J Haszard for the
Appellant
B J R Keith and A C Singleton for the Respondent

CIVIL APPEAL

MS PENDER:

Tēnā koutou e ngā Kaiwhakawā. Ko Ms Pender tōku ingoa. Ko au te rōia mō te kaitono, mātou ko ōku hoa, Mr McLay, ko Ms Haszard. May it please the Court, counsel's name is Ms Pender, and I appear with Mr McLay and
5 Ms Haszard on behalf of the appellant.

WINKELMANN CJ:

Tēnā koutou.

MR KEITH:

E ngā Kaiwhakawā, tēnā koutou. E te Kōti, ko Keith ahau. Kei konei māua ko
10 Singleton, mō te kaiwhakahē. May it please the Court. Keith and Singleton for the respondent and cross-appellant.

WINKELMANN CJ:

Tēnā kōrua. Now have counsel discussed time allocation because of the complicated – Ms Pender?

15 **MS PENDER:**

Yes, your Honour.

WINKELMANN CJ:

Because you have, it's a propping up and toppling down type thing, isn't it?

MS PENDER:

20 That's right. There was a memorandum filed by my learned friend.

WINKELMANN CJ:

Yes, but not time allocation in it?

MR KEITH:

No, we haven't addressed that Ma'am. Perhaps Ms Pender could just outline
25 how long she expects to be. We hadn't discussed it. We're certainly confident of getting through fairly quickly today.

MS PENDER:

We are set down for the day, but I would anticipate that we will be unlikely to need the full day. I had anticipated going at least until the morning break, or possibly just slightly over with Mr McLay.

5 **WINKELMANN CJ:**

So midday.

MS PENDER:

So yes, perhaps allowing the morning if we need to. It depends on how detailed the issues in terms of the questions, but we will certainly not go past lunchtime.

10 **WINKELMANN CJ:**

Well Mr Singleton and Mr Keith at midday then.

MS PENDER:

Yes.

WINKELMANN CJ:

15 Because if you go up to lunchtime I think it may leave them short for the rest of it.

MS PENDER:

Yes, we won't go past lunchtime.

WINKELMANN CJ:

20 Okay. Ms Pender.

MS PENDER:

Thank you. Tēnā koutou. This case arises because the respondent, Mr Te Hei, received compensation of just over \$17,500 for breaches of his rights while he was in prison. The reason he was in prison was because he was convicted of
25 murdering the late Mrs Hawkins' daughter Colleen and, under the Prisoners' and Victims' Claims Act 2005, a mother has the right to claim against compensation because she's a victim of crime recognised under the statute and

in this case she's not received redress and the only issue that has arisen in this Court and in the lower courts, is whether or not the general law recognises a right for her to claim general damages against a person in the situation of Mr Te Hei.

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The Prisoners' and Victims' Claims Act was passed just three years after significant criminal justice legislative reform which resulted in the Sentencing Act 2002, the Parole Act 2002 and the Victims' Rights Act 2002. Key aims of these reforms were to improve the rights of victims in the criminal justice system and to significantly prioritise the payment of reparations, including compensation for emotional harm.

10

Judge Blackie, who was the appointed Victims' Special Claims Tribunal under the, I'll start calling it the PVC Act from now on, under the PVC Act he accepted Mrs Hawkins' claim. He found that: "In any right-thinking person's mind, this would have been a traumatic and significant personal tragedy...", that her suffering and emotional harm was self-evident and he ordered her \$15,000." That \$15,000 is not an issue, that quantum is fixed.

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We say Judge Blackie was right to do so. His decision gave proper effect to the purpose of the PVC Act and it was consistent with the broader philosophy underpinning the criminal justice reforms of that era.

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Justice Palmer in the High Court disagreed with Judge Blackie and found there to be no cause of action in the general law which would allow damages to be paid to Mrs Hawkins. The Court of Appeal acknowledged reparations for emotional harm were available as part of sentencing, but likewise could find no corresponding cause of action in the civil law. The Court did, however, consider Mrs Hawkins may have a claim for mental injury against Mr Te Hei and referred the matter back to the Tribunal.

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However, the present formulation of this cause of action would require proof of a recognisable psychiatric disorder. This threshold would impose an onerous and expensive burden on both claimants and the Tribunal and this is a burden

which is diametrically opposed to the simple, cost-effective process set up under the Act.

5 It is the appellant/cross-respondent's case that Mrs Hawkins, in Colleen's case, is the paradigm case. It encapsulates the very circumstances, the reason why the PVC Act was passed in the first place. There's no need for further legislative reform to recognise Mrs Hawkins' right to claim damages against Mr Te Hei. What is missing are clear, common law rules to navigate the pathway. This case presents a rare opportunity for this Court to articulate the principles which
10 apply to common law claims for mental harm and to confirm the ability of victims to claim emotional harm damages arising from wrongful death.

And if I may at just this point, before I start going into the issues and the arguments, if I could just acknowledge Ms Peka, Mrs Hawkins' daughter and
15 her son Christopher will be watching this on the livestream and I just want to acknowledge that we're going to get into legal arguments but these circumstances do arise out of a very real family tragedy that has been their life story for nearly 40 years and just to acknowledge that they are watching at that moment.

20

A road map was filed and should be available. Just in terms of how we're going to address these submissions, it should be laid out there. I'm going to hand over to my learned friend, Mr McLay, at some stage after I've dealt with the matters that are addressed before that. He's going to talk more generally about
25 issues around the statute law and common law. He may also be able to answer some questions arising with some of the more substantive matters but we'll wait and see if that's the case.

Because we do not want to be jumping up and down as much then because
30 there is a cross-appeal, we'll try as best we can to also refer to the cross-respondent's submissions in our primary appeal submissions.

1010

The only real exception there is an issue which we've called the merger of judgment issue, which we will wait to respond to, but otherwise Mr McLay will be dealing with the issue of exemplary damages and the impact of Mrs Hawkins' death which was between the hearing in the Court of Appeal and the decision in the Court of Appeal, and he will be dealing specifically with the purpose of exemplary damages and also the interpretation of it under section 3 of the Law Reform Act 1936, and the Court of Appeal's decision in *Re Chase* [1989] 1 NZLR 325 (CA). I will then come back to just finish off the remaining parts of our submissions and anything else as well before handing over and as I anticipate that should be well before midday.

If I could just turn now to the issues that we are looking at on appeal. This Court obviously approved leave to appeal on two grounds. We're mainly concerned with the second of those, whether the Court of Appeal was correct to refer Mrs Hawkins' claim back to the Tribunal for reconsideration in light of its judgment, and this involves the consideration of the common law claim for mental injury and we are asking this Court to consider the issues and reconsider the decision in *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA) and the test that was set down in that case for the common law action for mental injury. In particular what constitutes mental harm and how it may be proved and is it necessary for a plaintiff to have witnessed the negligent event or its aftermath?

And then the second point is, was the Court of Appeal correct to find Mrs Hawkins had no right under the Act or at common law to claim damages for emotional harm resulting from wrongful death of her daughter? There's another issue there about whether or not the Accident Compensation scheme as it applied in 1987, which was the 1982 Act, whether it would have barred Mrs Hawkins from recovering damages either for mental injury or emotional harm, and if yes, does the claim meet the threshold for the order of exemplary damages? That last question Mr McLay will be dealing with. And then finally, can this Court finally determine all outstanding issues or should the claim be sent back to the tribunal for reconsideration? And as I've indicated there's no issue as to quantum.

Turning now just to the context, I'm not going spend time on the facts, the facts are simple and they are well addressed in the circumstances which lead to this claim. I just note that there is a chronology in the bundle now which also sets
5 out not just so much the circumstances that gave rise to the claim itself but really the circumstances that give rise to the real issue, which is in the Tribunal, how Mr Te Hei came to have compensation and how it was addressed by the Tribunal.

10 What I do want to deal with, spend some time on though, is the Prisoners' and Victims' Claims Act of 2005. So the Prisoners' and Victims' Claims Act, this is well-known that this arose out of the High Court's decision in *R v Taunoa*, which was a representative action if I understand it, involving a number of prisoners who had been detained in prison under the behavioural management
15 programme and it was a claim against breaches of rights which was upheld by the High Court. In the High Court there were significant amounts of compensation awarded. This led to a fair bit of public discussion and it was in fact what led to the Prisoners' and Victims' Claims Act 2005. The Act itself though is worth spending just some time on what it intended to achieve despite
20 a lot of opposition to the fact that compensation was paid in the first place. The Act itself strikes a very fine balance. It was passed, as I said in opening, it was passed three years after the very important criminal law reforms of 2002. It was a different Parliamentary term but it was the same government, the fifth Labour government.

25

The same ministry was responsible, the Ministry of Justice and in fact the same Minister of Justice, the Honourable Phil Goff introduced both the Sentencing and Parole Reform Bill and also this particular, the Bill that led to being the Prisoner and Victims Claims Act 2005. And in our submission, when we look
30 at this Act and then we actually look at the Sentencing Act and the language, the reflection, and start seeing those, given that time and given that reform period, it becomes evident that this Act was just another of the suite of Acts that were enacted during that time, during that period, important period of reform in criminal justice, and it was seen as being complementary. It arises out of the

criminal justice system. It only applies to prisoners who are serving time and their victims of criminal offences, but it is very much – can be seen in that history and that context, as –

WINKELMANN CJ:

5 Yes, but what does that mean?

MS PENDER:

What it means is that it can actually be read alongside the Sentencing Act and those reforms to be seen as where it was intended to fit.

WINKELMANN CJ:

10 But what does that mean?

MS PENDER:

It does in terms of the purpose of, for instance, the very important purpose of ensuring that victims have the right to reparation from offenders. We would say that it can be seen here in terms of, we'll come to – in terms of the fact that any
15 compensation from offenders, even before claims are met, is used to satisfy outstanding reparation and then victims' claims, but it is seen as another opportunity for victims who have not had redress from offenders to make a claim and to have that similar to reparation, similar to the concept of reparation.

WINKELMANN CJ:

20 So, it's a focus on victims?

MS PENDER:

Focus on victims.

WINKELMANN CJ:

Reparation?

25 **MS PENDER:**

And reparation.

WINKELMANN CJ:

And punitive?

MS PENDER:

5 It's compensatory because reparation is a compensatory award, even though it's one that's attached to a sentence.

COOKE J:

Is it one of your best arguments that the legislation defined victim to include the family member of someone who'd been killed?

MS PENDER:

10 That's right, and that definition is consistent across the whole suite of those Acts, all four if you include this Act as well.

COOKE J:

But none of this legislation decided to amend civil law in relation to the ability to claim damages.

15 **MS PENDER:**

Our claim will be that the civil law just needs to adapt to recognise the fact that this is a right that is recognised and is awarded in the criminal context. It's also awarded in other contexts in civil, and that what was intended, and it may have been at the expectation that that right did already exist in the general law.

20 **MILLER J:**

So, you can say it's a legislative policy that offenders ought to be liable to pay compensation to their victims?

MS PENDER:

25 There's two points here. One is the right to compensation, which might exist anyway in the civil law, so there is that right, so we have to address that, but the second thing is that this is another means, similar to the ability to award reparation on sentence, another means, a speedy, inexpensive means by

which victims can have access to that relief without having to go through the civil law.

WINKELMANN CJ:

And it suspends operation of the Limitation Act 2010 in certain situations?

5 **MS PENDER:**

It does, and it does in this case, so Mr Te Hei was in prison for 30 years' life imprisonment.

WINKELMANN CJ:

10 And it also says explicitly that the compensation that can be awarded is not limited to any compensation the prisoner has received.

MS PENDER:

It does say that. That issue doesn't arise in this case because quantum has been fixed.

WINKELMANN CJ:

15 But it arises –

MS PENDER:

It does.

WINKELMANN CJ:

20 We're interpreting the Act and thinking about the common law for all purposes because what we say applies outside of this case.

MS PENDER:

Yes.

WINKELMANN CJ:

So, it has, it's an extremely impactful piece of legislation where it operates.

MS PENDER:

It is, although if the right to compensation exists in the civil law, then that's always open to a victim to do, to take as a plaintiff in a civil action.

WINKELMANN CJ:

5 But the Limitation Act isn't varied in that circumstance.

MS PENDER:

But the Limitation Act, yes, but in this particular case it has been capped at \$15,000 so that issue of the fact that it might be this large amount that can't be met by the compensation and therefore puts Mr Te Hei at risk of being
10 bankrupted, that simply doesn't arise on the facts of this case.

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WINKELMANN CJ:

I point those matters out because if you're suggesting we have to develop the common law, we have to think about the extent, the impact of that development.

15 **MS PENDER:**

Yes, that's right.

COOKE J:

And then there's the underlying question that it is, it would be consistent with the general theme of this legislation to recognise a right of compensation, but
20 nevertheless Parliament has not decided to amend the civil law itself and why didn't it amend the civil law if that's what it wanted?

MS PENDER:

This is an argument we will develop and my friend Mr McLay will also develop this. The argument there is that we have a system, we have a legislative
25 common law system, bit like this Court said in *Smith v Fonterra Cooperative Group & ors* [2024] NZSC 5; [2024] 1 NZLR 134, that Parliament has put this in place and there is an expectation that there is a right here that can be read, that is irresistible from the reading of this Act and the Sentencing Act, which I

will take the Court to, and that it is a situation where the common law, where we're now seeing emotional harm damage being rewarded routinely, in the criminal context at least, to the families of people who have died as a consequence of an offence, that we've got cases we can come to where
5 defendants are not disputing that. That it's well-settled, it's well-established, Parliament has not resisted it, and that that's simply reflecting the fact that there is a right to claim, other than just through reparation. That that right should exist independently, just like all the other heads of reparation exist independently of the Sentencing Act. The right to claim compensation for property loss that has
10 been caused. The stipulation in subsection (3), which I will come to shortly, of section 32(3) which requires it to be a lot more grounded in a recognisable right in civil law.

So it's just getting the civil and the criminal law working in tandem, as well as
15 giving effect to the scheme that is supposed to operate here as well.

WINKELMANN CJ:

Right, so where are you at in your outline?

MS PENDER:

So I'm just at under the Prisoners' and Victims' Claims Act 2005. So just looking
20 at that, could we have, is it section 3(2)(b)? I've just got subsection (2)(a) up here, sorry – oh, subsection 2(b) sorry, I beg your pardon. So the purpose of the subpart, so it's in two Parts. The Act in the first Part regulates the compensation, that is from the *R v Taunoa*, so that's compensation is payable for breach of rights once it's as a last resort, if there is no other appropriate
25 redress and that's called a specified claim. There are other claims. It's New Zealand Bill of Rights Act 1990 mainly but human rights and privacy breaches. And the second part is to provide procedure for the making and determination of victim's claims.

30 So if we come down to the definition of offence. So, offence here, it means, in relation to a victim, means an offence against an enactment, so it's (a), (b) or (c). We would say in this case: "(b) through which, or by means of which, the

victim ... suffered ... emotional harm...”, so that applies in this particular case or: “(c) [and also] that related in the death of a member of the victim’s immediate family, or in a member of the immediate family being incapable.” And that, in that respect, too, is a direct – that formulates the relationship between Mrs Hawkins and Mr Te Hei in a civil context as well. That immediately means that Mr Te Hei is linked directly to, not just Colleen, the person he was convicted of murdering, but also to her immediate family. And I won't take you to immediate family but just to note that it is also a consistent definition across these Acts and it does include a mother, like Mrs Hawkins.

10

And this is to the point by his Honour Justice Cooke that the definition of victim includes: “(d) a member of the immediate family of a person ...”. There is no hierarchy, this is everyone is a victim who falls under (a), (b), (c) or (d). It was expansively defined and it is consistent across all the suite of Acts and in other Acts as well. Coroners Act, Legal Services Act. It has become a very entrenched definition of what a “victim” is in this context.

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MILLER J:

Some of these provisions appear to mimic the policy constraints that have been long, the common law has long set around claims for psychiatric injury, which has been the subject of criticism in the Canadian cases. Attempts to control the reach of the remedy. Is there anything in the legislative history that tells us the drafter had in mind the common law constraints such as there needing to be a relationship of proximity between the two in a familial sense.

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MS PENDER:

There’s nothing in the history that suggests that they had in mind that the common law action for mental harm, as it’s currently formulated, and in fact it might even be the reverse, the simple and speedy process that’s used under this Act, and also in the criminal courts for reparation, is not consistent with the type of evidence that would normally be required to prove a recognised psychiatric disorder, for instance, under a common law claim for mental harm. That’s what we would say there, but the main point really with that victims is

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that a victim of an offender includes (1) people that are – it's a degree of separation that is recognised under the legislation.

5 So section 9: "... victim's claim means a claim for damages or exemplary damages (a) made by or on behalf of a victim; and (b) made against an offender; and (c) based on acts done or omitted to be done by the offender in committing the offence."

10 I don't know if we, section 15 probably, maybe section 18. Yes, section 18 is just there to note that when the money is paid, even before the right to claim is advertised by Gazette notice to victims, the Secretary of Justice is required to deduct out of that any outstanding reparation. So this ties in with the idea that it is part, it is consistent, it is read in light of the Sentencing Act and the Sentencing Act for instance enables reparations to be paid by instalments, and 15 this is a requirement that, first of all, these get paid and then there's a right of claims to be made.

20 Section 28(2), this is where we're sort of stepping into our cross-respondent submissions a little bit. This supports the Court of Appeal's finding when it determined that it would refer the matter back to the Tribunal to consider whether this other – whether the common law claim could be established. It said that it looked at the process, and the process is not formal in the same way as civil would be. There's no requirement to plead, there's no requirement, even burden on the complainant to prove a case. So this is the first one that 25 they relied on. So: "The claim must be (a) in a form approved for the purpose by the chief executive of the Ministry of Justice after consulting the the Chief District Court Judge."

30 Now this in the next provision, we'll come to it, which we might not even need to, this is important because what the Act did is it very much involved the District Court as opposed to just, for instance saying, here's our Tribunal, these are the minimum requirements to be a member. It has actually specifically said, actually, we'll go to section 28(2) please if we can. Sorry, which one is it.

WINKELMANN CJ:

It's section 28(2).

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MS PENDER:

5 It is section 28(2). We'll just find the exact provision, but the Act specifically requires the Tribunal to be appointed by the Chief District Court Judge and to be a member – and to be a District Court Judge which is, in our submission , consistent with the intention that this is supposed to operate consistently with the way that reparation awards are made in sentencing. The District Court
10 would have primary responsibility for sentencing award, certainly at the lower level, they would be used to, they would have the experience and the day-to-day knowledge and experience.

WINKELMANN CJ:

So, this is your reply to the cross-appeal?

15 **MS PENDER:**

No, I'm mixing things up. This is actually –

WINKELMANN CJ:

I was going to note the time limit in the next subsection. The time limit suggests that there is a requirement for some formality because the claim has to be
20 presented within a certain period of time.

MS PENDER:

Yes it does. There is some formality but we'll come to the claim form shortly.

KATZ J:

I think section 58 is the section you're looking for I think.

25 **MS PENDER:**

It was section 58. Thank you.

KATZ J:

It has to be a District Court Judge.

MS PENDER:

5 Yes. So section 58. So, I'm sorry, I'm back to my appeal. I'm back to the submission that this is very much to be read alongside the way that reparations are awarded mainly in the District Court, that there is a requirement that the Tribunal be an experienced District Court Judge and be appointed by the Chief District Court Judge. This expectation that there will be some sort of consistency there is reflected in that requirement.

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We'll go back to the form, because I do want to just deal with that quite quickly. So, section 35. So, the claimant has to fill out a form, a pre-approved form and we'll come to what that form looks like in a minute. But the claimant's responsibility, within a certain time, they have to fill out this pre-approved form that's been devised in consultation with the Chief District Court Judge. The Tribunal has inquisitorial powers. The Tribunal can go and then get access to the Court records and anything else that the Tribunal needs in order to satisfy, in this case Judge Blackie himself, of certain things that he needs to be satisfied of to ensure that there is a proper claim and that the evidence stacks up. So, section 35.

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Section 39 is another inquisitorial power given to the Tribunal, so it's very much the Tribunal being proactive about getting the evidence and not the responsibility of the claimant to prove a case.

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Section 46. Actually we'll come back to section 46 in a minute.

So, this is the claims form. This is the one that was filled out on behalf of Mrs Hawkins by a victim's advocate, but this is the pre-approved claims form. And this is the cross-respondent's, this is the response and this is in support of the Court of Appeal's finding that there was no requirement for Mrs Hawkins, herself, to identify a cause of action or to plead it, simply this claims form gives some information, it requires certain things. If we scroll down it gives some

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definitions there of what they mean and if we keep just going down there, actually what it's mainly concerned about is enough information to establish that the claimant is a victim. Contact details, if you keep scrolling down. So, details of the offence and the offender, so that's Part 3 and what the offence was about.

5 And then Part 4 is very much about giving evidence to support different compensations, so it's offering: "Damages for loss of, or damage to property." "Damages for consequential economic loss as a result of..."

As we'll see when we go to the Sentencing Act, section 32, this has echoes of reparation as well, so if we could scroll down again to: "Damages for emotional harm and ...

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1035 SD

...this is very – this has echoes of reparation as well, so if we could scroll down again to "damages for emotional harm" and "exemplary damages for physical injury" which is mainly because of the accident compensation requirement, but what it's doing there is not requiring the complainant so much to particularise but to actually provide details that the Tribunal can then assess. If we could go, then, back to section 46.

20

So, section 46 is the power of the Tribunal to determine the claims. Section 46(2), and it's 46(2)(c) which is the main issue in this case, but just in terms of looking at where it says: "The Tribunal must not accept a victim's claim unless satisfied, on the balance of probabilities..."

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So what's actually going on there is the Tribunal is making a decision whether to accept a claim and it's on the Tribunal to satisfy themselves, Judge Blackie needed to satisfy himself on the balance of probabilities that these three limbs were met; (a) and (b), no question in this case, Mrs Hawkins is a victim who has not received redress, and (c), he needs to satisfy himself, so the onus is not that the claimant doesn't have to satisfy the Tribunal, the Tribunal just needs to be satisfied on the basis of the evidence received from the complainant, and also using those inquisitorial powers, to be satisfied the claim discloses a cause

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of action that is, under the general law, one for which damages are, in the particular case, payable.

WINKELMANN CJ:

Ms Pender, do we have the actual claim form here? It's the redacted one, isn't
5 it?

MS PENDER:

It was only ever redacted, so we can go back to that. It was supplemented, so that was the claim form that was submitted. I think that was redacted for when it was released to Mr Te Hei.

10 **KATZ J:**

It's really just identifying details that have been redacted, isn't it?

MS PENDER:

Yes, that's right.

KATZ J:

15 The original claim is there.

MS PENDER:

There's an extra form at the end with the reasons that was filled in by Mrs Hawkins' victim's advocate, and then in terms of the chronology, it was challenged by Mr Te Hei to his then counsel and so then a further affidavit was
20 provided by, well, an affidavit was provided by Mrs Hawkins and a further submission, but in terms of the argument, in terms of supporting the Court of Appeal was right, that if – it's for the Tribunal to be satisfied as to whether or not that limb (c) is satisfied.

25 If it turns out that the Tribunal was satisfied but for the wrong reason, but a subsequent Court on appeal says, but there is still a claim in the general law, just not the one that was identified by the Tribunal, we would say that the Tribunal's decision was still the correct one even if it was for the wrong reason,

that there was objectively a claim in the law that entitled the claim for damages and that therefore the Tribunal, even though – the Tribunal's decision to accept the claim was correct, even though it may have been, the reasons might have been wrong. Although as, we go on to say, is that in our submission, the
5 Tribunal was correct to find that emotional harm damages were something that was available for Mrs Hawkins.

If we go to section 47, just to finish off that claim. So 47 is where, and remembering there may be multiple victims' claims for one set of compensation,
10 it hasn't arisen on the facts of this case, but that is, the Act envisages there may be more than one victim who claims. So: "The Tribunal must determine any amounts to be paid to victims without taking account in any way of the amount of money actually held...". That's to your point, Ma'am. The fact is that this is a point that his Honour Justice Moore found in the *Reekie v Claimants A and B*
15 [2018] NZAR 1685 (HC) decision, which is that they have to determine what the actual extent of the claim would be, and it's not an issue that, as I say, that arises here because quantum is fixed, but it is probably an area of the Act that is a little uncomfortable in terms of when you compare it to the reparation scheme, which is very much determined and is governed by the amount, the
20 ability of the offender to pay. That's just something that's missing in this Act here, we would acknowledge that.

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So "the Tribunal must apply," this is in subsection (2), " the Tribunal must apply
25 the general law relating to the awarding of damages", when "determining whether to order under section 46(3) or (4) that an amount be paid ... by way of damages or exemplary damages". And the rest is around interest which doesn't apply here.

30 If we could go please to the Tribunal decision. So this is Judge Blackie's decision in this case. We go down the – his Honour looked at the provisions if we scroll down.

WINKELMANN CJ:

So you've got limited time and we are quite familiar with it so you can go straight to the bit you really want to take us to.

MS PENDER:

5 If we could go please to the bit talking about the actual claim, that is satisfied. So this is paragraph 22, so the conclusion. This is the bit: "The evidence before me establishes conclusively that the Respondent was responsible for the death...". "Further, I am satisfied of the brutality and degree of violence (described by the Parole Board as 'appalling and vicious')...".

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Then: "Emotional harm comes about as a result of a number of factors, including grief, stress, mental anguish, psychological injury, and other factors that may affect a person's emotional wellbeing. There is no need to prove any sort of mental breakdown or any form of mental illness that may be
15 categorised ... In the case of this Claimant, grief will have probably been the strongest initial factor but it goes without saying that there would be inevitable long-lasting aftereffects."

And it goes on to describe the trauma and the significant personal tragedy. "Her
20 suffering emotional harm is self-evident." Now my learned friend Mr McLay will look at what the Tribunal said about exemplary damages.

Drawing this to the Court's attention because just on those findings alone was enough for the Court of Appeal to be satisfied that if the Tribunal had turned its
25 mind to the fact that the only possible cause of action may be the common law action for mental harm, but there's already struck notes. The Tribunal said we didn't need that evidence because he was satisfied that emotional harm was clearly met, that threshold was clearly met and he believed that that threshold was available, but it is clear there that it's touching on elements that the
30 evidence there was getting pretty close to the higher threshold, although he did not have evidence before him of a recognised psychiatric disorder or evidence of a mental breakdown which he didn't think he needed for the purposes of determining this claim.

ELLEN FRANCE J:

So how is it getting close to that higher threshold?

MS PENDER:

5 If we just come to just the language that he was using. That a number of factors,
“grief, stress, mental anguish, psychological injury and other factors ... There
is no need to prove any sort of mental breakdown or any form of mental illness.”
Now if at that stage it may well have been that if the Tribunal thought that was
required that there was expert evidence required it was an opportunity to go out
10 there and perhaps seek it. We say here that if we reconsider that the test in
van Soest, so that’s applying the test in *van Soest* that requires there to be a
“recognisable psychiatric disorder”. There’s no evidence before there – expert
evidence of a recognisable psychiatric disorder but there’s enough possibly on
the face of the evidence there that suggests that that’s possible and that it
15 could – further enquiry may well have revealed that but the Tribunal didn’t think
he needed to enquire further. It goes without saying “there would be inevitable
long-lasting aftereffects”, and we make the submission out in our written
submissions that it may well be that from what Mrs Hawkins has described of
the impact on her, her reclusiveness.

20 **WINKELMANN CJ:**

So what is he actually finding there?

MS PENDER:

He’s finding that on the evidence –

WINKELMANN CJ:

25 He’s finding emotional harm?

MS PENDER:

Yes.

WINKELMANN CJ:

Emotional harm, but not a psychiatric, not a mental break breakdown or any form of mental illness, and that grief was the strongest factor.

MS PENDER:

5 He said there's no need to prove any sort of mental breakdown. So he's, that there is where he's very much applying the threshold of emotional harm. So the lower threshold, because he believes that's available to him.

KATZ J:

So he actually finds, doesn't he, grief, inevitable long-lasting after-effects and then over the page suffering emotional harm, actually.

10 **MS PENDER:**

Yes.

WINKELMANN CJ:

Yes, so it's grief and suffering.

MS PENDER:

15 Yes.

WINKELMANN CJ:

Emotional harm. But he's not finding a psychiatric disorder.

MS PENDER:

He doesn't think he needs to.

20 **WINKELMANN CJ:**

Yes, so mixed up, isn't it.

MILLER J:

And you would say this meets the Canadian test.

MS PENDER:

Yes, it does. And even the test that was suggested by his Honour Justice Thomas in the minority decision in *van Soest*.

ELLEN FRANCE J:

5 Sorry, how do you say it meets that test, Justice Thomas' test?

MS PENDER:

His test was it was something, it would be something close to, but he did say that he considered the law might develop so that it was a mental injury of some kind that was beyond the normal vicissitudes of normal grief and suffering.

10 **ELLEN FRANCE J:**

"The ordinary".

MS PENDER:

It would be something in the form of a mental injury, something that would actually require treatment, something that would actually affect, it would be something comprehensible, because it is the Canadian case very much was saying we treat the mental injury differently from physical injury, but it should be the same, we should be looking at it the same. So it is, it is something that is measurable, it may not necessarily be a recognisable psychiatric disorder, but it's something –

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20 **WINKELMANN CJ:**

But is language something like not the ordinary –

COOKE J:

"Vicissitudes of life."

WINKELMANN CJ:

25 "Vicissitudes of life." So, would grief be an "ordinary vicissitude of life"? Would this test sit at the level of every person whose family is the victim of a very bad crime?

MS PENDER:

It could possibly. It could actually put these class of cases into a separate section, because, fortunately, you know, it happens to a minority of people that this is, there is this shock, there is the trauma, there is the circumstances, the living with that, the extra – there is a lot more to it than just losing a loved one when somebody dies as a result of a crime. There is the fact that it becomes – you lose even the intimacy of mourning that person, it becomes public property. There is a lot more to it. It is a very aggravated form of circumstances that you have to deal with, as well as just dealing with the ordinary loss of a person.

So grief and suffering, the normal rules against putting it too low is that this is a consequence of life, that this, that we all go through it, that this is a natural occurrence. But it is a natural occurrence, you know, when people get old, get ill, and grief and suffering, but there are elements of it where the suddenness, the shock of a sudden death, for instance, adds another layer. But the shock and circumstances where somebody has been killed by a violent crime or been killed in the context of offending where it was avoidable and preventable, and particularly in circumstances where the victim obviously suffered, and it's a mother, it really does put it into a completely different class.

MILLER J:

Well, do you need to say that this entire class has a claim for compensation? Don't you just adopt the Canadian test which requires something more than the ordinary losses of life and really treats it as a question of fact, says the ordinary rules about foreseeability and so on are capable of dealing with it?

MS PENDER:

Yes, certainly, and I wouldn't want to be seen to be saying, putting it as a firm test, it's just using that as a way of saying that those are, there are categories where you could actually suggest that may well be open to meet that test.

WINKELMANN CJ:

So I'm just looking at your time, there's a lot – you have got to cover a lot before Mr McLay gets on his feet.

MS PENDER:

All right. If we could please then, if we could go to section 8 of the Sentencing Act 2002 please.

WINKELMANN CJ:

So perhaps if you could just tell us what your submission in relation to all of these Sentencing Act references would be, we'll go from –

MS PENDER:

10 All the Sentencing Act references, the references are – actually, I will. Section 8 simply reinforces the fact, which the Court already knows, that reparation is now one of the principles of sentencing, so perhaps if we go, section 32 is the key one which I will take you to.

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So, section 32 is about the sentence of reparation. So this is where: “(1) A court may impose a sentence ... [where] the offender is convicted, caused a person to suffer— (a) loss of or damage to property.”

20 Now, (a) is a form of compensation, that is an existing right. This picks up on the point that Justice Holland made, this is in the written submissions, in *Clarke v Police* [1993] NZHC 1259, that reparation is often simply giving effect to an existing right, but it's enabling a victim of crime to get a speedy and inexpensive way of getting that redress. So this is at – so loss of or damage to
25 property. That's an existing right. That could be claimed in a civil context.

WINKELMANN CJ:

So emotional harm.

MS PENDER:

But emotional harm sits, quite clearly emotional harm, if you read (2), it's limited to victims but we know that Mrs Hawkins is a victim as an immediate family member, so it clearly applies to victims in Mrs Hawkins' situation. There's no doubt about that. But there's nothing in that language that would suggest, notwithstanding the fact that you wouldn't get this in civil law, notwithstanding anything like that, you are going to get this entitlement. There's almost an expectation that it is an existing right. And then when you look at (c), which is informed by subsection (3) –

WINKELMANN CJ:

10 So are you saying anything more than this is a statutory right, or are you saying, what are you saying?

MS PENDER:

I'm saying the expectation of reparation is that it's actually more a mechanism a bit like the victims' claims process under the PVC, that it's more a mechanism that enables, it gives the power to sentencing judges to give a compensatory form of remedy. All the authorities say this is compensatory, it's not penal.

WINKELMANN CJ:

But it's not dependent on existing civil, common law cause of action for it.

MS PENDER:

20 Well it's normally been to give effect to an existing right. That you could go to the civil courts but, so that they victims don't have to do that, they get to have this order.

WINKELMANN CJ:

25 Are you saying that there is a court decision which says that an award under section 32(1)(b) for a family member victim is dependent on a common law cause of action? Or some other right. Are you saying that this is not a statutory right to compensation. That you need some other cause of action before you can avail yourself of section 32(1)(b)?

MS PENDER:

Probably what I'm saying is that section 32, that the reparation itself is not meant to be the source of the right. It's meant to give effect to an existing right that exists elsewhere.

5 **WINKELMANN CJ:**

And do you have authority that says that?

MS PENDER:

10 In *Clarke v Police*, which is 5.5 of the written submissions, this was Justice Holland back in 1993 saying: "A sentence of reparation is no more than applying the criminal –"

WINKELMANN CJ:

That's before this Act, though, isn't it?

MS PENDER:

It is before the Court, but it's still the idea of reparation.

15 **COOKE J:**

Section 32(3) says with respect to category (1)(c): "... the court must take into account whether there is [a right of common law]."

MS PENDER:

Yes.

20 **COOKE J:**

But even that's just taking it into account. So it actually contemplates the Court giving that compensation, notwithstanding it's not, there's no entitlement in civil law, but you do have to take that into account.

MS PENDER:

25 Well, this Court in *Davies (Peter) v Police* [2009] NZSC 47, [2009] 3 NZLR 189 talked about what was appropriate and did talk about the fact that you can actually have reference or defendants, it is a defence to that.

WINKELMANN CJ:

It doesn't look like you're right on this, I have to say. Is your argument dependent on it? It doesn't seem to be, so are we...

MS PENDER:

- 5 Well my argument is it doesn't stop it from having been supported in the civil – an existing right. If it's recognised here that it also can be pursued in the civil law, but this is actually, that there – that that is support for the fact that the common law can develop to recognise that.

WINKELMANN CJ:

- 10 I suppose it's actually is a problem for your argument, because if there's already this capacity to aware compensation, why does the common law need to develop?

MS PENDER:

- 15 Because section 30, is it 30, it's the next one, 35, actually reserves the right to pursue any rights outside the civil law.

WINKELMANN CJ:

But that's a different point. Your point is that the common law needs to develop to address a gap in the law, but there's a statutory basis for the reparations.

MS PENDER:

- 20 Well there's a statutory basis for the reparation for loss for physical – for property loss, but that exists elsewhere.

WINKELMANN CJ:

And emotional harm.

MS PENDER:

- 25 Yes. Well emotional harm in some other contexts as well. It's a situation which we will come to which is the fact is that the criminal law and tort often moved in tandem so that there was, if there was a criminal offence there was often a

private right, so assault and battery in civil as well, conversion theft, and the only reason that there isn't one for emotional harm here for Mrs Hawkins is a sort of almost conspiracy of – well starting with the decision in *Baker v Bolton* (1808) 1 Camp 493, (1808) 170 ER 1033 (KB) which is in 1808, which I think
5 universally is accepted as having no proper basis for it. This was the a decision where Lord Ellenborough said that there was no cause of action that could be derived from the death of another. And the authorities, and there's many of them and footnoted, they're referred to in the Court of Appeal judgment and my learned friend takes you to an article by Mr Nolan which refers to them as well
10 which it looked like Lord Ellenborough was confusing another maxim which was the maxim which said that personal right of action ends on the death, which has a sort of a Latin name which, maxim, which doesn't necessarily roll off the tongue very easily. But that existed. So, that was that estates could not, your right to claim died with you. The estate couldn't bring an action. Now, that was
15 part of the Law Reform Act of 1936 which my friend Mr McLay is going to be dealing with.

What Lord Ellenborough has said though, he went further and said and anyone who's living can't bring a cause of action on the death, and that was considered
20 to be wrong in principle and it's been challenged, but in the meantime it became very heavily baked into the law. But that was the reason why the Fatal Accidents Act in 1846 was enacted in the UK. It was Lord Campbell's Act, he was actually in court the day of *Baker v Bolton* and he sought to remedy it.

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The Fatal Accidents Act, which is the genesis of the Deaths by Accidents Compensation Act 1952 addressed two things. So, it was a novel piece. It addressed both the *Baker v Bolton* law and also the problem with estates not being able to sue and it was very much to address a particular harm which was
30 the financial needs of dependants of people who had died. At that stage the estate couldn't sue and then they couldn't sue because of *Baker v Bolton* and also the long ancient concept of deodand which sort of filled the vacuum to ensure that financial redress was given to people in this situation. That system was breaking down and wasn't being very efficient.

So, the Deaths by Accidents Compensation Act. If we come to section 4. It's a hybrid action, so it enables the family to step into the shoes of the deceased, so it's a derivative action. It's not their own action. They take the action that would've been available. So, that got round the maxim that stopped the personal claim once somebody died. But the actual injury itself, which is section 7, the actual damages that can be awarded were personal to the immediate family, so it was very much focused on them and not the damages that the deceased would've necessarily been able to claim.

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So, section 7(1)(a) is the key provision here. That language is exactly the same language, pretty much the same language as the original Fatal Accidents Act of 1846, the UK one: "Such damages as it may think proportioned to the injury resulting from the death to the person or persons for whose benefit the action is brought ...". And no question we cannot dispute the fact that over the years, immediately after the Act in 1846, the courts read "injury" down to mean only pecuniary loss and that was carried through. The 1952 Act, this is dealt with extensively in the Court of Appeal decision but immediately after the 1952 Act – sorry, just before the 1952 Act the language had changed and it had become a lot more specific. So, this was an amendment to the 1837 Act. Sorry, the Statutes Amendment Act 1937, had actually made it a lot more prescriptive and required the injury was pecuniary injury only.

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And then when the 1952 Act came in it reverted back to the language of the original Act so it just talks about injury. And in the first case that came for consideration it was argued that this now opened it up to something like a solatium, or bereavement, those sorts of damages, and the courts did not accept that. They said Parliament never intended this to change, and then fast track to the Court of Appeal's decision in *Pou v British American Tobacco (New Zealand) Ltd* [2006] 1 NZLR 661 (CA) in 2005 where a similar argument was run that societal – things have changed and society has adapted and we now would accept as part of injury as including mental injury or emotional harm or solatium, which the Court of Appeal did not accept then.

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COOKE J:

But do you accept it doesn't really encompass exemplary damages? It's all about injury.

MS PENDER:

5 It certainly doesn't accompany that. The thing about exemplary damages is whether exemplary damages can attach to any cause of action, irrespective of whether it's statute and whether it sort of sits there as an available – just gives really a claimant a right to claim them, standing, if you like. That's probably a separate issue but I would accept that injury doesn't incorporate exemplary
10 damages.

But, and my friend Mr McLay will talk more generally about the statutory interpretation principles that apply here, and certainly in the Court of Appeal, they consider themselves bound by the decision in *Pou*, and this is at 5.25 of
15 the appellant's written submissions, is the quote there that: "Unencumbered by the history to the [Death by Accidents Compensation] Act and the cases of this Court that have considered it, we agree that a straightforward reading of 'injury' ... would encompass mental injury." So, in our submission, this Court is not so encumbered and it is open to this Court to interpret that more generally,
20 to give life to an action that exists, or certainly is, where awards are made in the criminal court and awards are also made in the civil court.

And the submissions refer to the Court of Appeal's decision in *Mouat v Clark Boyce* [1992] 2 NZLR 559. Now, that did go on appeal to the Privy Council but
25 not on this point, and this was the consideration of damages for mental distress which attach in the civil jurisdiction, and that was in a situation where an elderly woman had guaranteed her son's home and risked losing her house, her home. The liability had been found against the lawyers for not giving her proper advice and there were damages and they included damages for mental distress, and
30 in that decision, both the President Cooke and Justice Richardson went through a lot of authorities to show that that was a valid claim, albeit not, at that stage, a stand-alone head of damage, damages for mental distress. It was more like an aggravated head of damages that could be added on in tort and in equity,

et cetera. And we would say that since *Mouat v Clark*, that probably isn't the case, that it is now a stand-alone recognised emotional harm or mental distress type of damages are recognised as stand-alone heads of damage, as seen as damages for emotional distress, humiliation, loss of dignity, injury to feelings and employment, and those are similar types of heads of damage available under breaches of human rights and privacy.

So, we're getting to a point where these are very standard types of injury and types of damages that can be awarded to compensate people in different contexts, in both the civil and as reparation under the Sentencing Act, and that this is actually a glitch, that this doesn't really make any sense that a person in the situation of Mrs Hawkins, who has clearly suffered mental anguish and emotional harm, where there's clearly a proper relationship between her and the respondent, enough proximity, certainly foreseeability of harm – if somebody does these sorts of actions, they should be deemed to have foreseen the harm and the anguish that they're going to cause to the loved ones left behind – that all of the normal markers and the normal levers that we'd apply to make sure that this is a proper scope, this is a proper claim, this is a proper cause of action, that the defence that there's a relationship, that the harm was foreseeable, and that we've got a head of damages that is now very recognised in 2026 in a way that it wasn't recognised, certainly, in the mid-19th century and even probably the 1950s, that this is not an outrageous development.

WINKELMANN CJ:

Are you at – I'm just trying to work out where you are in your submissions?

MS PENDER:

I am all over the place, I do apologise. I've gone to the Deaths by Accident Compensation Act, so I leapt forward there down to, this is on the road map, down to the bottom of page 2.

WINKELMANN CJ:

But you're back up now, are you, at common law claim for mental injury?

MS PENDER:

I'm about to go that now, so that's separate. So this is the alternative. This is, well –

WINKELMANN CJ:

- 5 I mean, what have you been dealing with? Have you been dealing with your Deaths by Accidents legislation argument or have you been dealing –

MS PENDER:

- Well, before I finish that, I'm going to actually go to the – if it's not available, if that interpretation is not available on section 7 of the Deaths by Accidents
10 Compensation Act, then we also say that the Court of Appeal went on to say that they could not see any gap in the common law which would enable a claim for emotional harm damages when you take into account the scope of the Deaths by Accidents Compensation Act and also the common law claim for mental harm. They were concerned that there was no room to develop a
15 common law cause of action that would enable emotional harm.

WINKELMANN CJ:

Well, who is taking questions about this? Because I'm not sure if I should ask you a question about it or Mr McLay?

MS PENDER:

- 20 You can, and if need to defer I will.

WINKELMANN CJ:

- Well, you've taken us to the Sentencing Act which is kind of a carefully worked out scheme that allows reparations to be awarded for the very thing we should develop the common law to allow to be awarded, and the Sentencing Act gives
25 you a framework which it does its best to reconcile, well, it avoids a double punishment issue that might arise under section 26 of the Bill of Rights Act. It addresses abilities such as ability to pay, it has a framework which is intended to be as rights-compliant as it can be, so why should we therefore develop the

common law given that there is already that capacity to award these damages and we might think it's a more secure framework to do it with?

MS PENDER:

5 The argument probably is that reparation is a compensatory remedy and most other reparations there is already a right in the civil law, so it's not a double punishment, it's just a right that a plaintiff has, a private right that exists in tort against a tortfeasor who also happens to be a criminal offender.

10 So, that's ordinarily, so a compensatory award would normally be a private right to claim it.

WINKELMANN CJ:

15 Yes but I'm asking you why we need to develop the common law or the interpretation of that Act when the Sentencing Act already gives us the capacity to deal with it? It doesn't for your client, I know that, but it does in the general run of things.

MS PENDER:

20 It's, perhaps taking a step back and looking at the PVC Act, the reason we're here is because the PVC Act requires us to look outside of the Act for a right. We would say to a large extent you could almost read the Sentencing Act as also bringing in, as working in tandem with the civil law, that they work together, that this is a compensatory award, but it gives a power to a judge and it certainly is the case for some of the other compensation and it doesn't take away a person's right to exercise their civil claims, you know, it expressly doesn't do that.

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30 So this is the right is outside of the Sentencing Act and it's actually looking outside that, it's looking out the PVC Act and going what's wrong with the law that doesn't actually recognise a private right by a person in the situation of Mrs Hawkins as against somebody who is an offender but also arguably we'd say a tortfeasor? It has create – that has caused, that has committed an action that has caused her emotional harm.

WINKELMANN CJ:

Well, your best argument might be section, is it section 32(4) or (3) which contemplates common law continuing to co-exist, but I still don't know how that doesn't actually give you a problem, because there's no need. The need, there's not an overwhelming need, because there's the Sentencing Act, in a go forward sort of a way.

MS PENDER:

Well, the Sentencing Act enables, but it is still compensatory, it's not a penal, it's a sort of an add on, it's a power given to a sentencing judge to have resort to a compensatory award that might otherwise have been available in the civil law and still is there if it doesn't, if people, if it doesn't cover the entire amount of the claim, the claimant's right to pursue that elsewhere is still there.

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But it can create a situation where it can create distortions, because you can have situations where one judge may decide, well, I haven't got enough evidence to say that somebody can afford to pay, I'm not going to make a reparation award here but someone over there, they have, but they've put it on instalments. Exactly the same thing, it comes along to the PVC Act and one has a right to recovery from the compensation and the other doesn't.

In terms of the PVC Act being, yes it is taking it out of the compensation, but the issue we're dealing with is, where in the general law is this right? And the real question is why isn't there a right to emotional harm damages for someone like Mrs Hawkins when there's a right in all these other contexts, civil? There's a right to reparation generally that the law now recognises that offenders should pay reparation for emotional harm to victims in the situation of Mrs Hawkins.

COOKE J:

I think the allied problem is that Parliament has looked quite closely at the rights of victims in 2002 with the Sentencing Act and the Victims' Rights Act, and then in 2005 in relation to this piece of legislation and on both occasions it's enacted

that quite elaborate schemes, but in neither situation did Parliament decide to change the ordinary civil law about tortious recovery. So why would courts do what Parliament decided deliberately not to do?

MS PENDER:

- 5 Well that's probably, that last point is where I perhaps have – there's nothing in any of the materials to suggest that Parliament turned their mind to this and said we know that this in actual fact this would, a victim like – effectively an immediate family member of somebody who has died would have no right, we've looked at that and we've decided we're not going to change that. That's, probably the expectation is that this emotional harm damages are available, in the common law are available generally, and that it's just waiting for a case for it to be awarded in this particular instance.

WINKELMANN CJ:

Who's dealing with exemplary damages in the argument?

- 15 **MS PENDER:**

That's Mr McLay.

WINKELMANN CJ:

Right.

COOKE J:

- 20 I think the *Pou* decision was being made at the time this Act was passed, wasn't it, being decided in the High Court.

MS PENDER:

I'm not sure what the dates were. They probably, yes we probably could, although –

- 25 **COOKE J:**

I think it was the claim had been struck out in the High Court and was on its way to the Court of Appeal when the legislation was passed.

MS PENDER:

That's right. But it doesn't engage with the issues here because that was very much a civil case. It was a claim by the smoker against the tobacco company, it was not in the criminal context here.

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The real point to be made though, around the PVC Act and its timing and its context is, and the appointment of a tribunal as a District Court judge is that it was intended, in our submission, to be very similar to reparation and to be seen as a way of giving some sort of compensation to victims and that it would be applied consistently. And that's not just in the way that it's awarded but also in the informality of the process and the evidence. And it was anticipated of course that the compensation awards would not be large so that it was very much the process was – it was properly put in place to take into account the nature of this types of claims to be speedy and inexpensive.

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15 **KATZ J:**

Well it's very directed to procedural matters, isn't it? I mean it's making things easier procedurally.

MS PENDER:

Yes.

20 **KATZ J:**

But they didn't change the substantive law at all on when you might actually have a cause of action. They just have that section that says, that cross-references to the general law unlike perhaps some of the criminal provisions and things you've taken to us where they actually deal in the statute with, make clear that there's an entitlement to damages for emotional harm but here they put in place an easier process but elected not to do anything alter the substantive law.

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WINKELMANN CJ:

What Act are we speaking about?

COOKE J:

The Prisoners –

WINKELMANN CJ:

PVCA.

5 **KATZ J:**

PVCA and yes, I meant the PVC.

MS PENDER:

And the Sentencing Act 2002

WINKELMANN CJ:

10 The PVCA, not the Sentencing Act.

MS PENDER:

Where it's similar though is that under reparation there is a process where there's a reparation report. Victims don't have any right of course, it's something that's pursued by the prosecutor so there is a reparation report.

15 The evidence is a much lower standard than might otherwise apply in civil cases, so there is similarity there, that the process has been set up to be a simple, inexpensive way for victims to get redress other than, perhaps, the more formal, expensive route of the civil courts, so they're both seen as a means of achieving an end rather than necessarily being the source.

20 **WINKELMANN CJ:**

Are you saying that about the Sentencing Act?

MS PENDER:

Even about the Sentencing Act, that there is a civil right that sits alongside that could be a means of recovery. We're trying to, this is the Law Commission said,
25 what we're trying to do is avoid victims having to go down that route, they probably never will, and we want to be able to allow the sentencing judges to

be able to have the power to award compensation so that we effectively, you know, address all the victim's needs.

WINKELMANN CJ:

5 So, it's a statutory right, you accept it's a statutory right? We wouldn't want to read the Sentencing Act down to take away people's rights to compensation.

MS PENDER:

No, but it's the right as the power given to the sentencing judge to award compensation. It's effectively civil compensation, so it's compensation, it's not punitive, but it's part of the sentencing process to enable victims to recover.

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The other – so just to finish off the claim about the common law, that if the Death by Accidents Compensation Act doesn't apply, we would say that there is still room in the common law for there to recognise a claim for emotional harm damages, and this is just looking at the way that emotional harm is defined under the Sentencing Act, the way that the sentencing Courts approach that. It's seen as bereavement damages.

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There's a case there, which I know I'm running out of time so I won't take you to, but the *Ocean Fisheries Ltd v Maritime New Zealand* [2021] NZHC 2083; [2021] 3 NZLR 443 case, it's useful to see how it's applied in this context in the case of wrongful deaths. It's seen as a type of bereavement damages. It sends a qualitative acknowledgement of a wrong. It's there to address – the sums aren't large, the quantum isn't large, and this is very much reflected overseas, so these are ways – in the UK in their Fatal Accidents Act 1976 now, of course, they still have a very vibrant personal injury jurisdiction but around about the same time as we were getting rid of ours through, well, or certainly changing it with the accident compensation scheme, they introduced a right to bereavement damages as a separate section of their Act.

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That's capped in the UK, it's capped at a certain amount, it's about \$35,000 New Zealand, but if we then contrast that to the Scots law, which the Scots law never – the *Baker v Bolton* law never applied there. They have always

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traditionally had a right for families to have a solatium or some sort of acknowledgement of the grief and suffering and the loss of society, and that's referred to in the decision of *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1, [2024] 2 WLR 41. This is a real contrast between Scots law.

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Now, as they say there, that was always a personal right that family members had. It wasn't a derivative right like under the Death by Accidents Compensation Act. It was a personal right, and this sits alongside, this is different from a mental health claim, so they still have that as a separate claim, so mental injury is a separate claim that's personal, but that is much more quantifiable, much more compensable. It would sit alongside, we would say, based on the Canadian Supreme Court, would sit along like a physical, quantifying the loss and the damage there, so mental health is in its own class, whereas emotional harm damages actually is an acknowledgement, it's almost a symbolic acknowledgement of the wrong, and the consequential emotional harm that follows from that.

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So, those are other opportunities, so it's – again, it's not outlandish to come up with a claim that emotional harm damages, even though they're referred to in the Sentencing Act, they actually do have roots in the civil law, maybe overseas, and also in wrongful death actions that may or may not be criminal, that they are actually already recognised in other jurisdictions and that they could be recognised here either by a more liberal interpretation of section 7 of the Death by Accidents Compensation Act or by simply recognising that that Act and its history was to meet a very specific need which was the financial impecuniosity of dependence on the deceased and so it codifies the law in that regard.

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But otherwise in terms of *Baker v Bolton*, which has been confirmed again in the UK recently and it has been confirmed in Australia, but for good reason, it's a long-standing law, it's universally accepted that it was unprincipled, that there really wasn't any reason for it, that it was – the Judge at the time got that wrong. But it hasn't been rewound because it's hard-baked into the personal injury.

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It's like, we know there's a body buried in the foundations but a small city's been built on top of it and we can't now demolish that in order to exhume it.

5 So, we have to accept that that's still the general law, for that principle that came out of *Baker v Bolton* but New Zealand's in a different position. Our personal injury jurisprudence is completely unique. We are already outliers. We already demolished the buildings back in, over 50 years ago now. There's actually no reason why we need to follow a rule that all academics over the years, over
10 hundreds of years, have accepted was unprincipled and where we've got a situation where the Scots law never recognised it we can go back to first principles and say, well why wouldn't you allow a claim for a wrongful death.

KATZ J:

Isn't the problem with that argument, the one I think was pointed out by the Court of Appeal in this case, that the fundamental problem here is not
15 *Baker v Bolton* which has been very widely criticised, but the subsequent legislative response. So that established a very narrow rule which commentators have said was unprincipled, but then the legislative response was to carve out an exception to that very narrow, restrictive rule in the Deaths by Accidents Compensation Act and say, well, we're going to soften the
20 effect of that rule by passing this legislation, and so there's been a legislative response and that the legislature has turned their minds to, what is the appropriate carve out from that very harsh starting point, and it's put this up as the appropriate carve out so, therefore, if the legislature has decided that should the Court say, oh well, we should do something alongside the Deaths by
25 Accidents Compensation Act and take it further or – apart from interpreting it more widely, which is obviously one of your arguments, but in terms of doing something different the legislature has responded to the harshness of the common law of that rule already.

MS PENDER:

30 But the argument to that would be that they haven't actually completely codified it. They haven't said, we endorse this rule and we're going to create an exception. They've actually, in fact there's an authority and it's referred to in

the main submissions, where in the reading of the 1952 Act they actually refer to it still being the common law, so there's the common law, quite critical of it. It's this rule that means it's better to kill than to maim, but this exception was carved out to meet a specific social need of the time and it wasn't the only
5 reason. As I've said, there was that reason there was also the fact that estates couldn't sue and there was also the fact that the deodand system wasn't working so you were left with a class of people that were destitute. It was a social justice reform with a specific mischief in mind and we would say, yes, that has certainly been codified. But Parliament can't be read as saying, but
10 we're actually now taking up the mantle here, *Baker v Bolton* is, we're cementing it.

KATZ J:

Well have they not? They've subsequently done a number of further carveouts from that sort of common law principle as we see in modern ACC legislation
15 which is more generous, perhaps in theory in the 1982 Act where people can get grants and bereavement and things so they've continued to have statutory carveouts from the harshness of that rule in *Baker v Bolton* so it hasn't sort of just been fixed for all time. The legislature has made provisions in certain circumstances that run contrary to the principle in *Baker v Bolton*. Not just in
20 the Deaths by Accidents Compensation Act but in subsequent, post-1992 Accident Compensation legislation.

MS PENDER:

In our submission there's probably no real danger here in saying *Baker v Bolton* was bad law, it's not. The common law, we resile from it but then noting to the
25 extent that there are statutes and codes the common law has to work with those, effectively. The submission really is the overseas jurisdictions it becomes very difficult to do that because it's just so hard-baked into, you pull a thread here and you don't know where it's going to go. It is something that you would expect would be major reform. Here though, not so much. So that even
30 if there ACC is giving different entitlements, well, that would obviously have to be factored in, in terms of how the common law would address things. If ACC has cover, well, there will be a bar, for instance, but common law actions and

rights still exist, even if there is a bar, it's just that you can't claim the damages, the compensation for it.

WINKELMANN CJ:

So quite apart from the kind of the technical content of the existing law obstacles
5 you face, you also face the obstacle, two obstacles, which is: they have, Parliament has expressly addressed the need to compensate for emotional harm but they didn't make it retrospective when they passed the Sentencing Act; and the second point – oh, it's just gone from my mind, but the first point is –

10 **COOKE J:**

It wasn't: or revised when they passed this legislation?

WINKELMANN CJ:

Yes, and the second – now you've distracted me from it again – the second
15 point is the interplay between what you are proposing and this Prisoners', PVCA legislation. Because if we take your invitation, expand the common law, then it's creating a kind of an expressway through against prisoners, not other people, prisoners subject to sentence, I think, I'm not quite – I can't quite recollect the timeframes that are imposed – but it's creating an expressway
20 against them which extends all of the limitation Acts and has no limit on the amount that can be awarded against them. So, it's the interplay of what you're proposing with the PVCA which is I'm very concerned about, because it's quite extraordinary legislation.

MS PENDER:

On the facts of this case it would apply in a criminal context because that's the
25 relationship between the appellant and the respondent and that's the circumstances of this case. If we took a step back, though, and looked at emotional harm as a bereavement in terms of wrongful deaths, which would be if you interpreted section 7, how that would play out would depend on other cases, it's not on the facts of this case, but it's actually just looking outside of
30 that, irrespective of the PVC Act. The reason we're here, we're back looking at

this, is because the PVC Act says you need to look outside the Act for this. So it's just in terms of first principles about why there wouldn't be –

WINKELMANN CJ:

5 Yes, well, that's what I'm asking you about, the first principle is like, what is the ripple effect through the law? Because I'm – Mr McLay achieved his accident compensation law, but where will it flow through all the gaps that are left there? Where will it flow outside the PVCA, quite apart from the issues of the PVCA? Because it's a principle that would have wider application, isn't it, than people who are convicted of a crime?

10 **MS PENDER:**

Yes, it will. Well, it would be just recognising that emotional harm damages were happening. In my submission, it's not, the ripple effect is unlikely to be major, it's just simply filling a lacuna that is there because of the dubious principle dating back, but there's actually no principle reason why you wouldn't
15 award emotional harm damages in circumstances like this when you see where emotional harm or mental distress damages are awarded in other contexts. If we recognise them in employment, in human rights breaches, if we recognise that those are comprehensible harm, it is comprehensible harm, it is a genuine head of damages and the question is –

20 **WINKELMANN CJ:**

I think these are probably things for Mr McLay in terms of how it works in with the philosophy of the Accident Compensation Act 1982.

MS PENDER:

25 Sure, we can do that. So if I move away from the emotional harm and just go to the mental, to the *van Soest* decision, so this is the –

WINKELMANN CJ:

Well, you have two minutes until the morning break.

MS PENDER:

Shall I start after, immediately after the morning break, would that be easier, or it depends how –

WINKELMANN CJ:

5 Probably and if it's a major topic. Because how much longer are you going to be? Because we thought you – everyone should be finished by midday, but Mr McLay hasn't started yet?

MS PENDER:

10 Okay. Well, I do, it is an important part of our submission, it's just really how much more the Court needs, whether to expand on that in terms of the *van Soest* principles and –

WINKELMANN CJ:

Is that how you pronounce it? We were debating this.

MS PENDER:

15 I'm not sure.

WINKELMANN CJ:

Yes, all right, well, we won't waste time on that.

MS PENDER:

20 I think it's probably worth it, I won't take too much longer after the break and I'll just also just review, just to make sure that I have covered where I needed to get to, but it is an important point of our submission and I –

WINKELMANN CJ:

We have read the submissions, so yes.

MILLER J:

25 It's in the submissions. For my part, I'd quite like to understand the ACC context.

WINKELMANN CJ:

Yes, I mean, I think Mr McLay has got quite a lot of heavy lifting to do, our concern.

MS PENDER:

5 All right. We'll move to Mr McLay.

WINKELMANN CJ:

Yes and so we have read the submissions and I believe understood them, yes.

MS PENDER:

All right, thank you, that's the direction, thank you very much for that.

10 **WINKELMANN CJ:**

We'll take the adjournment.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.46 AM

MS PENDER:

15 I am going to hand over to my learned friend Mr McLay. I just wanted to, if it's possible, just to clarify one point before I do, and I will finish after him as well, just if there's any last thing, but the main point is just on the section 46(2)(c). Just looking –

WINKELMANN CJ:

20 Of what Act?

MS PENDER:

Sorry, this is the PVC Act. This is the provision: "...the claim discloses a cause of action that is" – is, present – "under the general law, one for which damages are, in the particular case, payable." So, the point is that there is obviously
25 emotional harm compensation available in reparations. If we took a situation where somebody has, you know, in more recent times since 2002 been

convicted and an award for reparation was not made because of an ability to pay, we would say that that would be very unfair if a victim was unable to then, under the PVC Act, have the right to redress under the circumstances where the prisoner now has compensation.

5

That's the purpose of this legislation, that they've now got some means that would enable redress to be made, and that it's in the here and now. The PVC is the here and now, the compensation is here and now, which is why the limitations period was suspended, but that is actually now that there is a right to compensation for emotional harm in the here and now, in the Sentencing Act now. And that's in the present, whether it's available now that's the important point in that regard.

10**COOKE J:**

But it doesn't say, where it would have had a claim for reparations under the Sentencing Act, it says you've got a cause of action.

15**MS PENDER:**

That is a cause of action and maybe it is a looseness of whether a cause of action is specific to the civil or whether it can include a claim for reparation under the Sentencing Act, if that's the only source. It's just that most of the reparation awards, you've got a source outside of the Sentencing Act as well to draw on, and our point here is just simply making sure there is a source outside of the Sentencing Act to give life to that, if that's the only route. Otherwise, it could be the Sentencing Act itself, recognising that Parliament fully intended that victims have this sort of redress. That was just the pointed I wanted to raise, just a point of clarification, but I will hand over to Mr McLay.

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25**WINKELMANN CJ:**

Thank you.

MR McLAY:

May it please the Court. I think there are two paragraphs in the submissions, that those two paragraphs have been covered a lot in questions, so what I

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propose to do is to go directly to one quotation from a text, just to see it, where I think we're approaching this matter from, and then perhaps I might go through some of the questions that your Honours have raised to my leading counsel.

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So the chapter we're bringing up at the moment is with a hope that academics can be of some use, is that this is the conclusion of the Arvind and Steele book and the passage we just want to highlight is this last paragraph which is up and is a continuation on the next page.

10 **WINKELMANN CJ:**

What paragraph of your submissions is it in Mr McLay?

MR McLAY:

It's not in the submissions sorry. This is just –

15 **MILLER J:**

Supplementary authority wasn't it?

MR McLAY:

Supplementary authority yes.

20 **WINKELMANN CJ:**

And what textbook is it?

MR McLAY:

This is the Arvind and Steele tort law statutes book –

25 **WINKELMANN CJ:**

Arvind and Steele, thank you.

MR McLAY:

Which our friends have also referred to. They had the introduction and the
30 chapter on the Fatal Accidents Act.

COOKE J:

What page are you on because I'm following my own version?

MR McLAY:

5 Page 469 your Honour. And so the conclusion just to summarise where we sort of – I think it's useful to reframe after this morning's session what we're actually doing here, which is a very difficult combination of statutes and common law, that we are asking the Court to interpret statutes in a particular way. But also we are at the same time asking the Court to develop common law in particular
10 ways and I think that that's one of the difficulties when I'm thinking about this case, are you asking the Court to overall statutory intention? Clearly not. Are we asking the Court to make unprecedented changes to the common law? Absolutely not.

15 What we are really asking the Court to do in the Arvind and Steele language is to finish the job that Parliament has started in relation to the Prisoners' and Victims' Claims statute. My friend has just talked about the Deaths by Accidents statutes in New Zealand. One of the points I think of that Arvind and Steele book is to show that this relationship between legislation and the common law
20 at least in relation to these tort reform statutes is very complex, that sometimes some of the things we think of as being common law are in fact statutory and vice versa.

And I think that the principle submission I'd like to leave you with on this point
25 is that it is a complex matter of interaction, that the passage we've quoted from Lord Burrow's extrajudicially when he talks about – we're not going to bring it up, we don't have time to run through it, but that the role of judges and interpreting statutes has to be, as the Chief Justice was suggesting, to seek integrity of all of this sort of diverse material that you're being asked to consider
30 today. And that's what we hope to help you reach that blessed state of integrity, interpretation in what we are doing today.

So first of all is this is not an unusual problem. This is a difficult problem created by statutes and Justice Cooke has asked why didn't they do X, Y and Z in the

statute? Well the reality is if you look at these tort reform statutes they don't often do that at all, that they leave the job to the courts to finish. Justice Miller referred to as their statutory history in relation to the PVCA Act. One relevant piece of statutory history, Justice Miller, is that it is four years before the PVCA, the Australians had passed a whole series of civil liability statutes which did restrict the liability of its so-called nervous shock to people who were present at the scene and basically codified the *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; [1991] 4 All ER 907 criteria. So I would say perhaps another piece of relevant piece of statutory interpretation will be not what Parliament didn't do in a negative sense but also positively they didn't adopt the Australian criteria and require victims like Mrs Hawkins to be present at the crime that was committed because I think that would have been inappropriate.

If we can just bring up, we – one of things is, we were wanting to emphasise we're not asking this Court to do things that New Zealand courts have not done before because I think that sometimes we can get lost in worries about, and we – appropriate worries about as Parliamentary sovereignty and legislative intention, but just some examples.

So our friends referred to in the decisions of good advocacy, using the passages of judgments that our friends have suggested that clearly that was one of the arguments, was made in *Smith v Fonterra*. Justice Cooke, my understanding of that hearing was that one of the defendant's cases was exactly a similar version of what you put to my friend which was, in the very elaborate climate change statutes that New Zealand has adopted, we did not put a private right of action into that statute, and yet this Court, very appropriately, although to the surprise of some academic commentators, agreed that you should recognise a common law right, and in doing so, I don't think it's necessarily true to say that we just resurrected the common law right in these what I call Satanic mill cases from the 19th century.

We recognise them as something fundamental to the common law and the passages we've given you are Justice Kós and Justice Williams' joint judgment

where they emphasise that the common law still needs to be able to develop, even given a statutory overlay where you've done some things. We agree with the Chief Justice, obviously, there's a strong statutory overlay in relation to the Sentencing Act 2002, but here there is a circumstance where our client or the
5 deceased client was unable to get the reparations at the time of the sentencing, because the Sentencing Act wasn't in force, but also this money was not available at the time, so we think that there is plenty of evidence, sorry, there's some suggestions from *Fonterra* that that might be okay.

10 I was trying in the last couple of days to think of more prosaic examples, because *Smith v Fonterra* is obviously a very extraordinary case in some respects, involving extraordinary facts, but this Court and the Court of Appeal have not often, but quite reasonably frequently, done what we are asking you to do in relation to the tort reform statutes, various tort reform statutes, and I
15 apologise, I'm a bit inexperienced so I haven't put all these things in the submissions, but for example, section 17 of the Law Reform Act 1936 has been interpreted by this Court as enabling apportionment between parties who are not joint tortfeasors.

20 The Contributory Negligence Act 1947 has been interpreted as allowing people who are in contracts to be subject to contributory negligence against what I would say is the express words of the statute, the very clear words of that statute. It's not unusual what we're asking here for the statutes to be interpreted in ways that, in the Arvind and Steele phraseology, finish the job.

25 **WINKELMANN CJ:**

So can I just ask you, you've framed your argument sort of in terms of apophasis, you know, that rhetorical device when you say: "I will not speak of." You are not asking us to do this, you're not asking us to do that, but what are you asking us to do? Because you've put it in terms of Arvind and Steele,
30 Where you're asking us to finish the job that Parliament started. Is that Parliament started in the Death by Accidents legislation, Parliament started in the Prisoners' –

MR McLAY:

Parliament has had – if one is to take the Imperial Parliament, there's been a lot of Parliaments saying a lot of things about this particular area, and I think we'd all agree saying things quite poorly, as Parliament sometimes might do,
5 so you're asking me what we say you ought to do as the Court. What we say you ought to do as the Court is to recognise Mrs Hawkins' rights as the rights of any New Zealander to take a civil claim against somebody who has committed a tort against her.

10 Your Honour the Chief Justice was very concerned about the retrospectivity of the PVCA. I put to one side the merits of the PVCA. What the statute really does is it says Mrs Hawkins is entitled to the same rights as anybody else under the general law. What we're asking you to do in this Court is to recognise the general law of New Zealand as including the kinds of cases, claims that
15 Mrs Hawkins brought in front of Judge Blackie in the Tribunal, so is that plain? And what we would say perhaps is that there are two routes to doing this which are interlocked –

WINKELMANN CJ:

Well, I'm just – you said we're asking – you're asking us to finish Parliament's
20 job and you're asking us to interpret statutes. So it's not really the PVCA that you're asking us to interpret, it's the Death by Accidents statute.

MR McLAY:

It's all of these stat – so we have the PVCA Act where the Parliament didn't conclude, finish as Justice Cooke might have asked them to do, to define what
25 those claims could have been, left that blank. The Fatal Accidents Act or the Death by Accidents Act, Parliament hasn't come back to that issue. We raise – Justice Katz quite correctly identified Parliament's inaction in relation to going back to doing what has been done in other common law jurisdictions to ameliorate the harshness.

30 1200

Now, there's a number of things you might say about that parliamentary inaction, but probably one of the things that I don't really think we can talk of deliberate intention in terms of not going back and fixing this problem for the limited class of people that it applies to, it's a very limited class of people the reason Parliament doesn't go back is because the vast majority of New Zealanders in this circumstance are covered by accident compensation. But for a very limited class of people, the plaintiff in *Pou* or our claimant Mrs Hawkins, it does really matter but they're a very small group of people. Parliament has not seized itself of this issue appropriately, in our submissions, in the last few years. It's up to the Court to use the interpretive techniques that the Court has.

And so if I could just take you back, your Honour, to, which I haven't put up Lord Burrows' judicial article, where he deals with his idea of always think, always speaking that we get a statute and we need to apply it to new circumstances and those new circumstances include not just changes in social or technological areas but also they might, I would submit, include matters of legal integrity and that's what I would say your Honours, if I could be so bold, that's what we would submit the Court ought to do in this case, to approach this matter, to give intent, to give final working out to Parliament's intention in the PVC Act to give Mrs Hawkins and the small group of people like her who need to rely on that as opposed to the sentencing regime, the ability to be able to bring her claims as just anybody else could have.

WINKELMANN CJ:

25 So, you say you put your attitude to the PVCA to one side?

MR McLAY:

Yes.

WINKELMANN CJ:

30 But the PVCA has been characterised by judges at first instance, I think, as quite exceptional legislation. It enables causes of action to be brought outside statutory time limitations, and it gives a very summary and informal process.

Any of the pathways you are urging upon us would actually give it a more expansive application, so that is a factor we need to take into account?

MR McLAY:

I think the, sorry I submit – wrong job.

5 **WINKELMANN CJ:**

It's alright you can think Mr McLay. You can think.

MR McLAY:

What I would submit is that the PVC Act was enacted by Parliament to deal with a particular problem. The rights are not – the changes we can argue about
10 what retrospectivity is not. All that Parliament was enabling people to do was take claims against people who probably were impecunious or unlikely to satisfy judgement probably at the time of their convictions and because of various other events, I think can honestly say, breach of their civil rights which I think is the result of this windfall that Mr Te Hei has in his, sorry not windfall, the
15 compensation that he has. All that enables us is to get access to that ..., the money that wasn't previously there.

There were other changes that could have been done. One of the reasons why I suspect they didn't do what Justice Cooke suggests is they didn't want to go
20 down that route. They wanted the claim simply to be as ordinary New Zealander claim against another ordinary New Zealander. They didn't want to invent a special right for exactly the fears that your Honour was eluding to.

25 I acknowledge that some of my colleagues, some of the criminal lawyers I think are very concerned about the PVCA and its effect, but that's what Parliament did. It didn't go back and create a special free-standing right, we're not arguing for a special free-standing right.

COOKE J:

I suppose the problem about seeing it as finishing the job that Parliament started is it's a very elaborately designed scheme. To say that we should finish off what they did doesn't really do justice to what they did which is create a very
5 elaborate scheme that balanced rights of prisoners and against claimants and reached a final resting point on how that balance should be struck. And you're asking us to move that balance point.

MR McLAY:

I don't think, if I can think now. What I would submit is I think that
10 mischaracterisation is my understanding of the PVC. In the end there is an elaborate procedural regime, we agree. But at the very heart the operative provision is the claims that are available at the general law. That's not an elaborate parliamentary invention. That is telling the Courts, in my submission, you tell us what the general law is, because you are the proper people to tell us
15 what the general law is. We as parliamentarians don't want to be in the business of inventing special claims against long-term prisoners in Paremoremo for example.

MILLER J:

So we should focus on what's available at the general law and this is simply a
20 consequence.

MR McLAY:

Exactly your Honour, and one of the things we would like to say, and I think Ms Pender's submissions in relation to the nervous shock thing are very important because what I think that both Justice Blackie and Justice Palmer in
25 the High Court missed, was that this was something that was done to Mrs Hawkins at general law. it wasn't just something done to her daughter. It was something that was done to her as somebody that Mr Te Hei must have realised would have been deeply affected. Their life would have been turned up and down by what Mr Te Hei did all those years ago.

30

So that's the real question for your Honour. We're not trying to do anything fancy here. There's lots of statutes and there's lots of provisions. I think what I understood my friend Ms Pender to be alluding to in the Sentencing Act was the Sentencing Act at its heart has this basic understanding of what the general law is too. That there is these emotional harm damages out there. That emotional harm is real, and one of the things that I think we could perhaps emphasise is that over the course of the statutes there has been a growing understanding of the effect of emotional harm/recognised psychiatric injury, whatever you want to call it, I know there are slightly different tests, but that's a real thing, and the Courts in other jurisdictions have recognised that real thing, and that's all we're – that's essentially the critical thing we're asking you to recognise.

The principal fault of Justice Palmer's High Court decision was his failure to recognise that it was a right to Mrs Hawkins that was at issue. Similarly in relation to the exemplary damages issue I might get onto in a bit, that was the fault that Justice Blackie made in his original determination. Failure to recognise that Mrs Hawkins was just asking for her rights as a New Zealander to be confirmed subject to the fact, as the Chief Justice alluded to, the limitation period had been expanded by Parliament to quite deliberately. Like I haven't looked at Hansard for a very long time but I think that if you went there you would find an acknowledgement by the government that it was doing something very serious, that it was deliberately doing this, and that it understood that this is exactly the kind of thing it was asking the Courts, to use the phrase, "finish the job on".

WINKELMANN CJ:

Are you going to help us with how either course of action, sometimes needs to create a flow chart, I'm not quite sure how many moves on the chessboard you're requiring of the Court, but whichever course of action we take, what flow through it has in terms of broader implications for law. So I raised it's interaction, say, expanding the death by accident legislation right, or creating a common law cause of action. How that would fit in with the ACC regime.

MR McLAY:

So one of the things that I'd just like to start with in that regard is there are different meanings to the words accident compensation. There's the scheme that we would like to exist, and there is the scheme that actually does exist in the statute. So one of the things that I would just draw your Honours attention to is that since 1992 mental harm has not been covered by accident compensation except in very rare circumstances. Mental harm is covered in relation to someone who themselves has suffered injury or someone subject to the, later on in the 2000, in the modification – suffered mental harm as a result of very serious criminal offending. The victim. So Ms Burrows, had she survived, would have been able to get compensation, although not Mrs Hawkins, because it's very clear it's –

WINKELMANN CJ:

The direct victim.

MR McLAY:

Yes, a direct victim to use – a primary victim is covered, and subsequently in I think 2008, and forgive me I might get the year wrong, we extended mental harm to employees who were involved in rescue activities, and they were subject to the *Alcock* criteria, but essentially the general law of New Zealand is that unfortunately, and I might say “unfortunately” does not cover people for mental injury in the circumstances of Mrs Hawkins at the moment. It's a very strange, there's a very difficult argument about what the law was before 1992, which we're happy to reverse, we might not have time to go through that in the hearing today, but that was –

WINKELMANN CJ:

It's in your submissions anyway.

MR MCLAY:

So that was, and if I can just finish the point, because I think it's important. Those arguments were run, your Honour, in the integrity arguments, this would destroy the integrity of the scheme by allowing nervous shock were run in a

case I call *Danes Shotover Rafts, Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 which again, sorry I didn't realise I'd be talking about this so I haven't put it in the bundle, but again that case is a situation where a secondary victim, so a man who saw his new wife die in a rafting accident,
5 brought a civil claim.

The Court of Appeal, a very strong Court of Appeal, held that because of the way Parliament had changed the law it was clear that the man who had seen his wife die was not compensatable under Accident Compensation scheme.
10 And Justice Thomas, and forgive me I have talked to students about this hundreds of times, the quotation's almost in my head but not quite. There is a very fundamental view that if Parliament does not take away common law rights, those common law rights are maintained and again I apologise not having – I am sure you can find.

15 **WINKELMANN CJ:**

Yes, but of course the taking away of common law rights was not dependent upon compensation being available at any stage was it?

MR McLAY:

No. Your Honour, sorry. It's not compensation itself, it's cover. So, again the
20 Accident Compensation Act is obviously a hard thing to navigate without it in front of me and I apologise. But the essential provision is that you are prevented from common law action for things that are covered by accident compensation. In 1992 the legislative technique was to remove cover from people who had only suffered mental trauma as a result of seeing other bad things happen.

25

And so, in that case it has a dual effect. The retraction of cover basically had a reverse effect on the right to sue and so the right to sue expanded as the cover was retracted.

30 Your Honour's right, in some cases you don't have compensation and you can't sue, which is another whole thing. But here the clear message of *Palmer v Danes Shotover Rafts Ltd* (3 December 1997) unreported,

Invercargill Registry, Master Venning, CP 10/97, *Queenstown Lakes v Palmer* was that the Court of Appeal held that the lack of a common law right, the lack of compensation, the common law right had to be taken away by clear words and Parliament had done the reverse of clear words, actually. It expressly
5 removed things.

So, to get back to your point about coherence and integrity of the Accident Compensation system, I agree, Justice Elias was very concerned about that in the *Davies (Peter) v Police* [2009] NZSC 47, 3 NZLR 189 case which has been
10 cited to your Honour in relation of the Sentencing Act but unfortunately there are gaps in our Accident Compensation scheme and, again to use my analogy, that's not a job you can finish. It is a job for Parliament to get back to and finish.

So, I don't know whether that answers your concerns about the
15 Accident Compensation scheme.

WINKELMANN CJ:

So you say that this in no way offends against the prohibition on bringing personal injury by accident claims?

MR McLAY:

20 No. No, because that's contemplated by what Parliament did in 1992.

KATZ J:

So what's the relevance of the '82 Act if any? Because this was, the '82 was in force at the time of the death and it would've been barred, presumably, by section 27 because that covered the mental injury, independently of physical
25 injury up until '92.

MR McLAY:

If I could just say, this is a very complicated issue which we have spent a great deal of time trying to puzzle out, as did the Court of Appeal clearly, because the judges kind of decided not to decide this in some ways.

The difficulty we had, the pre-1992 statute was much more general in its phraseology, again I don't have the actual provisions in front of me but it was really about personal injury by accident. What was clear over a period of time was that judges, finishing the job for Parliament, were expanding that definition –

KATZ J:

And the definition of "injury", it covered the mental consequences of an accident independent, in the definition itself.

MR McLAY:

10 So, the definition is my recollection, and forgive me if I get this a little bit wrong off the top of my head, my understanding is that that was not by way of definition. That was by way of judicial analogy, so one case happens after another, there were a series of cases. There was a case *Accident Compensation Corporation v E* [1992] 2 NZLR 426 involving someone who
15 went to a training course and suffered mental consequences of, sort of, over-rigorous personal training at whatever it was, some sort of teambuilding exercise, and she suffered personal harm as a result. She was able to cover.

MILLER J:

But she was a direct victim. I've read that case and it's, yes.

20 **MR McLAY:**

So that's – and there are other cases. Another case which is often cited, a case called *Mitchell*, which involved a mother who was sitting, I think, at the bedside, or the death of – a medical case involving a mother and her son.

KATZ J:

25 But that's why it was tightened up in '92, wasn't it?

MR McLAY:

Yes, exactly. So the fear was – and there was another case, an infamous case, if I can forgive the Courts for the facts, where a man took an action after the

Accident Compensation Corporation for no longer being able to have intercourse with his wife as a result of a procedure that had gone wrong in a medical context, and that caused alarm amongst politicians, and so politicians ratcheted that back. So the short answer, Justice Katz, is that it's really difficult to actually predict what the law would have been which would have applied for Mrs Hawkins, which is why we have relied on exemplary damages, and which is why the Court of Appeal relies on exemplary damages.

WINKELMANN CJ:

So the 1982 legislation provided that: "Personal injury by accident (a) includes (i) the physical and mental consequences of any such injury or of the accident." And then the prohibition on claims is contained in which section in the 1982 legislation?

MR McLAY:

Sorry 27 wasn't it. Sorry, just all –

WINKELMANN CJ:

Coming back to you in a horrible rush.

MR McLAY:

But I think the problem, the interpretive problem, just while your Honours are looking, is of the accident, and how we might begin to expand the definition of "accident". So I think that that was one of the things that Parliament was – the Ministers at the time, that there was a, you might recall, in the early 1990s there was a budget crisis, and one of the government's responses to that was to essentially limit under the so-called fairer scheme the recovery, and this is one of the ways they did this. So we were unable, Justice Katz, to find cases analogous to Mrs Hawkins' case, which were reported in the mid-80s, which could definitively answer your question.

WINKELMANN CJ:

But it looks like, on the face of it, without going into the kind of bizarre interpretive feats that one inevitably ends up going into when taking on the

Accident Compensation Act. It looks like the right of action was taken away under this legislation, and there was such compensation as there was.

MR McLAY:

It was, I think where we got to was taken away, but also the potential to go much
5 further was taken away.

WINKELMANN CJ:

That's under the 1982 legislation.

MR McLAY:

Yes.

10 **WINKELMANN CJ:**

And then there's the question of what the effect of the 1990 – 1982, what's the effect of the subsequent major reform.

MR McLAY:

If it helps, this is quite complicated, and we haven't made – there was an earlier
15 concession which we made. So one of the other issues that is peculiar – so we made – so a concession was made in the Court of Appeal that had she suffered psychiatric, recognisable psychiatric in the definition of the Act –

KATZ J:

It would be barred but you've left open what about something lesser like
20 emotional harm or whatever.

WINKELMANN CJ:

But that's because it's not –

KATZ J:

Because that is something we are going to have to grapple with.

WINKELMANN CJ:

It's not a mental injury for the purposes, on the basis of the argument, it's not a mental injury for the purpose of the ACC?

MR McLAY:

5 Yes.

KATZ J:

But a mental consequence is a phrase that could encompass emotional harm as well as a recognised – so you only make a concession as far as the fairly high bar of recognised psychiatric –

10 **MR McLAY:**

That's my – we unfortunately had COVID during the Court of Appeal hearing but –

KATZ J:

15 Right, psychiatric harm. But you say other mental consequences that are lower might not be –

MR McLAY:

And I think we refer to this, sorry, I didn't mean to talk over you, I think, sorry I was just looking down, we refer to this in the submissions I think Justice Katz.

WINKELMANN CJ:

20 What paragraph, or your junior can find it for you.

MR McLAY:

25 My senior can find it for me. So this is all in section 6, and there's just a discussion of the *E* case and what we understood the case. So my understanding is what proceeded in the Court of Appeal was because we believed that we can claim exemplary damages. At the time of the hearing our case was based on exemplary damages, which is obviously not caught by the bar, and that was the cleaner way of proceeding. We don't have to require the

judges to go through this sort of extrapolatory exercise of what judges would have decided in the 1980s. But that's actually, that leads on to the submissions we need to make very quickly I suspect now on exemplary damages.

KATZ J:

5 But you now soon that you can claim compensatory damages so we do need to engage in-depth with this issue. Is that right?

MR McLAY:

We say that there's a case – we say in relation to Mrs Hawkins' case that she had a complete cause of action based on the duty of care, it was breached by
10 Mr Te Hei, and she suffered harm. As a result of that she is entitled, she would have been entitled to compensatory damages but for whatever the bar was in the 1992 Act. But that she is certainly able under the *Couch v Attorney-General (No 2)* [2010] 3 NZLR 149 (SC) decision in this Court to seek exemplary damages for things that are – for what would be negligence. Very strange to
15 call what happened in this case, negligence, but essentially that's the legal characterisation...

1220

KATZ J:

But in assessing compensatory damages, is it the bar in the '82 Act or the
20 '92 Act that you say applies?

MR McLAY:

We would say for her it's the bar in the '82 Act sorry, your Honour. I was just, in response to the judges, the Chief Justice worried about integrity of the
25 scheme, and more or less the 1992 Act that the vast majority of people that might want to take one of these claims now will in fact be taking it after 1992, and as a result will not be compensated by accident, were not covered by Accident Compensation.

KATZ J:

But they wouldn't have a problem claiming it after '92. So we're really looking at it at a 10-year period where there might be a bar for this kind of claim for exemplary damages.

5

MR McLAY:

But I think I was really trying to respond to the Chief Justice's concern when she was questioning my friend about why would this Court do this? Well the answer to why the Court should do this is because there are a large number of ordinary New Zealanders, I just say ordinary New Zealanders, whose common law rights need to defined by this Court and part of the point of this – one of the things you might consider in this case is that's what this case is really about, it's partly about.

10

WINKELMANN CJ:

But which New Zealanders? Because it's hard to work out. You say there's a large number of New Zealanders but if we're going to amend the law to meet their needs we need to know how it's going to play through the ACC legislation, the PVCA, the Sentencing Act.

15

MR McLAY:

Yes.

20

WINKELMANN CJ:

Because I note here that you say that the Criminal Justice Amendment Act 1987 was passed to enable courts to order reparation for emotional harm on their – and you suggest it can be assumed that Parliament did not expect emotional harm would be covered by the Accident Compensation Act, at least in this context after 1982?

25

MR McLAY:

I think Ms Pender has suggested she can respond to, that's more her field of expertise. I haven't spent that much time in the bowels of the Criminal Justice Act 1987 and I don't think I'll be able to help you on that. But I think that was,

30

just really by way of response to Chief Justice, again, why should this Court develop the law? Well the Court should develop the law because Parliament removed the prohibition on common law actions in 1992 for the vast majority of people who might seek recompense under this Act.

5 **WINKELMANN CJ:**

So who are these people? I mean you made, you gave a kind of a policy-type argument about why we should respond to this category of people. Well who is this category of people? Is it just the people between 1982 and 1992?

10 **MR McLAY:**

No so this judgment – I think the submissions that Ms Pender made in relation to the change, not the change, the way in which the common law of New Zealand should develop would apply to a large, to potentially a number of different plaintiffs in different contexts. It would apply to the, it might apply to
15 the situation in *Queenstown Lakes*, that you might develop the law for someone who was in the bar rather than on the raft itself.

WINKELMANN CJ:

Can we just put it in more kind of generalised terms? It would apply across the Accident Compensation regimes. It wouldn't be barred by the 1992 reforms or
20 any subsequent reforms. This kind of claim would go through all of them because it's emotional harm it's not covered.

MR McLAY:

Covered.

25 **WINKELMANN CJ:**

By any regime.

MR McLAY:

And we would say for Mrs Hawkins that that was a decision made by Parliament
30 that one of the things that's happened in New Zealand is New Zealanders don't enjoy compensation under the scheme for these sorts of nervous shock events.

I think if we're going to call them nervous shocks. They would in the United Kingdom. They would in Australia if they satisfy the criteria in the various civil liability reforms of the early 2000s. This is not an unusual feature of common law systems. What we would say is it's Parliament who has bought back the
5 common law here who's telling you that this is now your jurisdiction to figure out. Sorry "to figure out" is a bit...

MILLER J:

You're asking us to embrace Lord Burrow's dissent in the *Paul v Wolverhampton* case where he said Parliament has effectively left this
10 to the Court, but we will and they will decide how to respond to it?

MR McLAY:

You've put it much better than I have been able to.

WINKELMANN CJ:

15 But Mr McLay, can we still go back to nuts and bolts. So, ACC regime for those falling short of just psychiatric order across the range, those were the psychiatric order because they're captured by the Bar.

MR McLAY

That's true.

20 **WINKELMANN CJ:**

So it's a –

MR MCLAY:

But not in any – so to go back to Justice Katz's point, sorry, it's quite
25 complicated.

WINKELMANN CJ:

In 1992 it's –

MR McLAY:

5 So, the pre-1992 victims, if we call them that, they potentially are covered for psychiatric illness which has occurred by accident. We weren't quite sure what the accident was, whether they needed to be in the accident or whether they needed to see the accident or how we were going to define accident which was expanding at the same time. So, that would be – the people, they are covered, people that have just suffered like Mrs Hawkins did, we would argue, who've just suffered grief. Not just grief we don't say, the extreme grief –

WINKELMANN CJ:

10 So, let's just call that emotional harm.

MR McLAY

Emotional harm. So, on a fair reading of the '82 Act, they would not be covered.

WINKELMANN CJ:

But they would be under the 1992 Act.

15 **MR McLAY:**

They would not. No, neither group –

WINKELMANN CJ:

Sorry, psychiatric disorder would be under the 1992 Act, no. It wouldn't in the –

MR McLAY:

20 No, no. So my –

WINKELMANN CJ:

Mr McLay, can we just keep it simple. Can you tell me who is this giving a right to and when does the ACC legislation of any time take it away?

MR McLAY:

25 So, perhaps I can try again and I apologise for the confusion. I think there are simpler ways we could organise the law.

What I would say is that between '82, for the diminishing number of people who are going to come to court in relation to claims before 1992, my understanding is that they are covered if they have suffered – we've conceded they are covered if they have a recognisable psychiatric condition and that comes from
5 an accident.

COOKE J:

If you can't answer it, just say you can't answer it, Ms Pender might have to deal with it.

WINKELMANN CJ:

10 I think Mr McLay probably can answer it. It's his life's work.

MR McLAY:

So, I think I'll just go back to what I was trying... So, before –

WINKELMANN CJ:

We could just approach it this way. What periods of time did the ACC legislation
15 exclude claims for psychiatric disorders?

MR McLAY:

It depends on what the cause of the psychiatric disorder is. Before 1992 psychiatric disorders, as far as I understand and can recall –

WINKELMANN CJ:

20 Were covered.

MR McLAY:

Were covered so long as they were the result of an accident, is the wording you read out before your Honour.

25 After 1992 serious psychiatric condition needs to be the result of a physical injury. That's the key change that's made. So you're only covered for psychiatric illness if that's a result of a physical injury or you fall within one of

the exceptions in the Act, the most important of which is serious criminal offending, mostly sexual offending or you fall within the exception relating to employees. So, at the moment they're not covered. Most of us are not covered for serious psychiatric –

5 **WINKELMANN CJ:**

As a primary or a secondary victim.

MR McLAY:

As a secondary victim.

WINKELMANN CJ:

10 Yes.

MR McLAY:

If we're in a car accident and we ourselves are injured in the car accident and as a result of that injury we suffered serious psychiatric illness, then we clearly are covered. But if we just see a car accident, even if that car accident involves
15 a loved one, then we are not covered by the current statute. That's probably as clear as I can possibly be with a statute which is not particularly clear and we...

COOKE J:

Can I ask another question. *Van Soest*, I don't know how you pronounce it,
20 was dealing with a situation where there was a recognised duty of care, medical negligence in that case. Your argument is that an offender, when they're committing an offence, has a duty of care, is that right?

MR McLAY

Well, I think it sounds peculiar to put it like that doesn't it, but effectively that's
25 the legal effect of what we're arguing. So the oddity here would be, and I don't want to go over the facts of this case more than they need to be gone over, but the oddity of this case would be, if someone who's negligent is subject to a duty

in relation to nervous shock, or psychiatric illness, whatever you want to term it, emotional harm.

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5 It seems very strange in law or in policy or in any good sense, to be honest, that someone who has done what Mr Te Hei has done in this case is not going to have such a duty recognised, and I think there's a difficulty. We've made the analogy to negligence, whether – I can see your Honour's a little bit discomfited by that, and it doesn't fit. It's a kind of square peg, round hole problem.

10 **COOKE J:**

Well, he commits an intentional tort, right? Has any court in the common law world recognised that offenders owe duty of care to third parties?

MR McLAY:

15 But this is getting – sorry, this gets back to some other very old stuff in *Letang*, like your Honour might recall *Letang v Cooper* from when he was...

WINKELMANN CJ:

Never mind what he recalls.

MR McLAY:

20 When Lord Denning said exactly, the old causes of action, that we shouldn't let the old causes of action clank their chains and prevent us doing justice, essentially, which is exactly – that's the case, I think, in that case where the people drove – there's some limitation issue. They drove their car onto somebody's foot and they didn't take it off, I think, and so the question there was can we say they've got a duty of care as well as committing an assault?

25

And Lord Denning made the very practical suggestion that actually, we shouldn't be worried, as Maitland was, about cause of action, and we should be worried about the reality of what's gone on. As I said, I think that our basic case is that it would be absurd if we were to recognise common law duties like
30 *Danes Shotover Rafts* and not recognise the raft operators owe a duty of care,

to say that people like Mr Te Hei, when they do what has been done in this case, do not owe a duty of care to victims. In fact, we would say that's implicit in what Parliament is doing in the Prisoners' and Victims' Claims Act, by recognising victims, relatives of victims just as the actual victims.

5 **MILLER J:**

And in the Accident Compensation Act too, post '92? Would that be true also of the Accident Compensation legislation post-'92, where you include cover extends to victims?

MR McLAY:

10 After 80 – sorry, after '82?

MILLER J:

After '92.

MR McLAY:

15 After '92 doesn't, it extends to victims but it does not, it would not extend – if this had happened in 1993 –

MILLER J:

20 Yes, I understand it wouldn't in her case, but I'm looking at the policy that you're trying to extract from what Parliament has done in the PVCA, and I'm asking whether the same policy is at work now in the Accident Compensation legislation.

MR McLAY:

25 Well, I think I would just get back to whatever – again, I put aside my personal views about the 1992 Act. What I would say is that's what Parliament did and that's what, in *Danes Shotover Rafts*, Justice Thomas for, I think, a court of five held that if you want to exclude common law rights, you can do that. I think there's some observations of Justice Kós and Justice Williams in *Fonterra* to this effect too. If you want to exclude common law rights, Parliament clearly

can do that. We all agree with that, but Parliament needs to do that clearly and hasn't done that in this particular circumstance.

WINKELMANN CJ:

5 So, we get back to my granularity. After 1992, then, under the ACC, the hypothetical plaintiff you're now thinking about in your new legal paradigm would be able to bring a claim for emotional harm or serious psychiatric disorder because – unless they're in one of the carve-outs, so sexual violence.

MR McLAY:

10 Yes, but in point of fact what would probably happen in the criminal sphere, which your Honour is worried about, is one would hope these people are prosecuted before they are sued and that they will be subject to the Sentencing Act, and that I imagine the Courts would take account of what happens in the reparations judgments that are issued against them.

15 So, I think that some of the – I don't want to use the word floodgates, because it's always a terrible word, but some of the worry about what might actually happen may not be borne out by what will actually happen in terms of the procedure which would actually go on, that someone would be prosecuted. What we would say is it's important to keep on developing the common law in
20 the circumstances for situations where there are no prosecutions.

So, the Sentencing Act only works when someone is prosecuted, obviously, and the example which we were talking about at the break is the health and safety legislation. You can, as in the *Whakaari* case, get quite considerable
25 reparations under the Health and Safety at Work Act 2015 if there's a prosecution, but if there had been no prosecution in the *Whakaari* case, which is quite possible, you know, one can imagine circumstances in which there isn't a prosecution, and the relatives feel aggrieved, it should be their common law right, we would say, for them to be able to take that case.

WINKELMANN CJ:

Yes, so Mr McLay, I think you're really thoroughly out of time, really, so what else do you have to say that you must say?

MR McLAY:

5 What I need to do is to just very quickly talk about the exemplary damages, your Honour. So, as I said, in the Court of Appeal there was an assumption that Mrs Hawkins would be able to receive exemplary damages which got us out of the interpretive conundrums we've just been discussing. The reality is, unfortunately, Mrs Hawkins died after the Court of Appeal judgment which is
10 now – sorry after the Court of Appeal hearing –

WINKELMANN CJ:

Yes, before the judgment.

MR McLAY

And that raises issues in relation to the Law Reform Act 1936, unfortunately.
15 We had avoided these issues so we did not take a case for her estate, for Colleen Burrows' estate. This was always based on Mrs Hawkins' rights, partly because of the *Chase* case.

The *Chase* case says you cannot recover exemplary damages in New Zealand
20 if you have – sorry, you cannot recover if you've died. I think, I won't belabour the absurdity of that, the facts of the case is one Donselaar brother hits the other over the head with a hammer, which they did. If they hit him to an inch of his life he can be sued. If he goes a bit further he can't be. I don't think anybody has a good policy answer for why that is a great legal policy result.

25

Part of the reason for this is the *Chase* case from 1989. I don't want to belabour the technical, legal arguments too much other than you will see that, I think: "Mr Hodder, who argued this part of the case for the appellant, candidly described his argument as difficult, but hoped by him to be interesting and
30 persuasive." The argument still remains quite difficult in one respect. I would say there are two possible ways in which you can resolve this in favour of the

plaintiff. The first is to say that in 1936, or 1934 actually, the law reformers did not mean what we mean – they meant aggravated damages. Mr Hodder's argument which was rejected by Justice Cooke, or President Cooke to make distinctions –

5 **WINKELMANN CJ:**

So, they didn't mean exemplary damages.

MR McLAY:

So, there's a matter of legal – I was going to take you through the article but I will just refer to Ms Hay's article which I think is excellent in the
10 Auckland University Law Review about why that conclusion was probably wrong with all respect to that Justice Cooke.

There are arguments, in particular if you were to go through his reasoning, that Justice Cooke's reasoning, in *Chase*. There's a line in the judgment where it
15 says it doesn't make sense to allow the recovery because the victim's family should not be able to profit from his death. And that seems to be the policy behind his understanding of what was done in 1934 and 1936. We would say that that's –

WINKELMANN CJ:

20 So, Ms Hay's article explains why it is that we should proceed on the basis that Parliament didn't mean exemplary damages.

MR McLAY:

Yes. It explains what they really meant was aggravated damages. Again, what I would really like to rely on though is what's happened since *Chase*. So, what
25 we would say is the better argument, I suspect, is that since 1989, we have come to understand the implications of the *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA) decision in a way better than perhaps its author did.

That this Court in the *Couch* decision has recognised that the purpose of
30 exemplary damages is deterrence and punishment, that it is not vindictive or it

is not about compensating rights. It is about singling out behaviour worthy of labelling as contumacious to use –

WINKELMANN CJ:

Don't you have a problem with that argument though which is the second
5 penalty argument, if it's really deterrence and punishment then why don't you fall into the difficulty of section 26(2)?

MR McLAY:

Of the Bill of –

WINKELMANN CJ:

10 It's second punishment. And it might not bite directly if it's a private action but the Court's bound by the Bill of Rights Act and there's a Sentencing Act and we might say, well why would we develop a jurisprudence which seems to punish someone who is being punished for their crime a second time when in fact there's a jurisdiction under the Sentencing Act.

15 1240

MR McLAY:

So, there's a couple of answers that and I just get back, I think the most important argument is that that's the argument that the Court of Appeal accepted in the *Daniels v Thompson* [1998] 3 NZLR 22 case. So, in *Daniels*
20 the Court of Appeal accepted, the very strong Court of Appeal accepted four to one that the double punishment in the Bill of Rights Act overrode the ability to grant exemplary damages. That was subsequently appealed to the Privy Council, but what really happened then was the legislative change which led to what is now section 319 of the Accident Compensation Act, which
25 expressly says – and just forgive me, I don't have it in front – it might be useful just to refer to that when you get there, but essentially –

WINKELMANN CJ:

So, what case was it?

MR McLAY:

So, *Daniels v Thompson*, which is referred to in the submissions. *Daniels v Thompson* held that the double jeopardy provisions were engaged, and there was a dissent by Justice Thomas, quite a strong and, one might say, extremely long dissent to that holding. But what happened next was that the 1992 Act was then going through Parliament. At a very late stage, and the committee of the whole, an amendment was made which is now section 319, which says notwithstanding any rule of law, exemplary damages may be awarded and, just to paraphrase, despite the fact that there has been a conviction or there has been a sentence or that sentence has been carried out.

WINKELMANN CJ:

Well, that's under that Act, though, so this tends to argue against you because that's a parliamentary incursion on the Bill of Rights and Parliament is free to do that, but we're charged with compliance with the Bill of Rights and we must develop the common law in a way which is consistent with the Bill of Rights, so why does that give us any comfort?

MR McLAY:

So, my senior was just – again, referring, if we look through the PVCA which we probably don't have time, it actually expressly contemplates the recovery of exemplary damages and again, the whole point of the PVCA would have been, if there was exemplary damage to be awarded, the people had by definition been convicted. That's a necessary implication of what Parliament has done, that they're enabling exemplary damages claims against people who have been convicted and sent to jail.

WINKELMANN CJ:

Okay, so that's your answer on that?

MR McLAY:

I do just have one last point about the relationship to exemplary damages generally. This Court has recognised the existence of exemplary damages in other contexts, most notably in *Couch*. What we are really asking for is

exemplary damages to be recognised for Mrs Hawkins because of the developments that – again, I don't want to belabour the facts but if we are to have exemplary damages in New Zealand, it seems that this is the kind of case you would want to be able to bring them in, with the rider that your Honour
5 probably is about to ask me about – in relation to the double punishment point.

WINKELMANN CJ:

No.

WINKELMANN CJ:

What I was going to say is, aren't we dealing with the cross-appeal here?
10 Are we dealing with the cross-appeal on this point? Because I'm just wondering.

MR McLAY:

So yes, the agreement between the parties was that we would deal with the main exemplary damages point.

15 **WINKELMANN CJ:**

Okay, the exemplary damages, all right.

MR McLAY:

And then we would deal with the –

WINKELMANN CJ:

20 Okay, because I'm just concerned about the time, but I have a procedural concern about the exemplary, quite apart from the issue of merger, about how the matter was dealt with and whether it's fair procedurally to remit it back for another go, given that there is a time limit in the legislation itself, PVCA, and itself kind of rides over, extends the time limit.

25 **MR McLAY:**

I think, if it pleases the Court, my learned colleague would like to answer that question, if that's all right.

WINKELMANN CJ:

In her reply?

MR McLAY:

In her reply.

5 **WINKELMANN CJ:**

All right, well, then we probably need to – Mr Keith’s got a lot to cover and it’s 12.45.

MR McLAY:

May it please the Court.

10 **WINKELMANN CJ:**

Thank you, Mr McLay.

MR KEITH:

Tēnā koutou and may it please the Court. Before I say anything about the far-reaching and dry, I have to say, legal issues raised in this case, I do want to
15 take one moment to acknowledge, and I have instructions from my client, Mr Te Hei, to acknowledge his very grave crime and the horrific loss that underpins his case. I will not say anything more about that.

On the case itself the Court has a short outline from the respondent and
20 cross-appellant. I think given time limits and also rather wide-ranging discussion this morning I’ll look to cover the, what I call, the three common threads, the first part of that overview before the adjournment. But I don’t wish in any way to stifle questions from the Court. We will then work, I think, quickly through the cross-appeal and respondent submissions and touch on such
25 matters as have arisen this morning.

The one practical point I’ll just note is that my learned friend Ms Singleton will address what under this listing is ground (B)(3) in the cross-appeal, whether the Prisoners’ and Victims’ Claims Act has any bearing on the decision of the

Court of Appeal to refer back, that Court having said the Act gave greater latitude for such a step in this case. And I'm conscious of what her Honour, the Chief Justice has just said about possibly going the other way given the already significant procedural modifications on civil claims under that Act.

5 I should also say I'm happy to be interrupted at any point if the Court wishes.

So the three common threads, and this was, I think may still be helpful in light of the discussion this morning and particularly in light of the discussion this morning, the objection for the respondent is, as a number of the Court have raised, this is an expansion of tort sought in a dense statutory context. I'll come to why we say this is not *Smith* but it's just with touching on those six, or if you count the Bill of Rights Act, seven, statutory schemes that are at play here. The Prisoners' and Victims' Claims Act with its procedural modifications and as members of the Court have observed it is only engaged, it is only triggered, it's not then limited in terms of recovery, but it is only triggered by an award of damages under the Bill of Rights Act, Privacy Act or the Human Rights Act. So it is a rather brutal and limited tool. It creates very strange cases as this Court said in *van Silfhout v Pathirannehelage* [2023] NZSC 148, [2023] 1 NZLR 560, which Ms Singleton has taken the trouble of asking a Dutch person about the pronunciation so I'm very grateful to her. Oh also, it's *van Soest* apparently.

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WINKELMANN CJ:

The same Dutch person assisted on that too?

MR KEITH:

Yes. Useful chap I think. Second, the Accident Compensation scheme and we can, I'd hope we can avoid going into the minutiae of what scheme was in place in 1987, but the broader point is that we have a statute bar, we have a remedial scheme. We have, in terms of Justice Katz' comment about amelioration of the harsh common law position, it's true as far as I'm aware that recovery for mental injury is not, was not available or is not available now, but there are provisions under that scheme for compensation and other support in the event of death, including death by violent crime.

25
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Third statutory scheme, Deaths by Accident Compensation Act, and we'll talk more about that, but that it did introduce, or it is rather the, I think, fifth iteration of in New Zealand, the statutory scheme that introduced a remedy but remedy that was limited to pecuniary loss and interpreted as such in decisions most recently in *Pou* and in the Court below.

Fourth, the Victims' Right Act and I think we've given a guide in the authorities to the various forms of support that that Act currently provides for, and there's a footnote under the submissions I'll come to.

10 1250

Next, the reparation regime, so Criminal Justice Act as in force at the time of the murder provided for reparation for loss of property but not for emotional harm. It was amended in 1987 and now we have it in the Sentencing Act.

15

And last, because of the further tragedy in this case, the loss of Mrs Hawkins, the effect of the Law Reform Act on exemplary damages, but also the wider point about that Act, that it continued causes of action that would otherwise have lapsed upon death.

20

So, when I say a dense statutory context, I mean that in two senses or possibly three. First, anything the Court is being asked to do, it is being asked to act in a scheme, in a field, that is already highly complex and highly statutory. It is not like the gaps, not like the preservation of common law position in the Climate Change Response Act and the RMA as before this Court in *Smith*. This very question of what happens to the family, the bereaved, of a person when they die has been directly addressed under each of these schemes, except, we would say, under the Prisoners' and Victims' Claims Act. It doesn't, and I don't think there's any real suggestion that it changes any of that law.

25

30 It makes this kind of case possible. Procedurally, it doesn't change the substantive, so that's one way in which that statutory scheme matters.

A second is, and it was always interesting to hear Professor McLay, it does put front and centre a question of when, if ever, the Court, faced with dense statutory intervention in terms of liability –

WINKELMANN CJ:

5 So, what is that word you're saying? Is it "deft"?

MR KEITH:

Dense.

WINKELMANN CJ:

Dense, dense statutory...

10 **MR KEITH:**

Sorry, Ma'am, I hope I'm keeping the volume up. I'm conscious you told me off once for that.

WINKELMANN CJ:

No, you are very clear.

15 **MR KEITH:**

But I'll also try to enunciate better.

WINKELMANN CJ:

No, it was my fault, sorry. Thanks.

MR KEITH:

20 But a dense statutory context, if I were here for the Crown I might be saying "deft" too, about legislation, but I'm not so I'm not. The question of whether the statutory responses are adequate, whether they are right, whether they provide the things that people should provide; my submission, in a case like this, we're really left with a very difficult position that all of us probably have views about
25 whether ACC, for example, should or shouldn't do more. Acutely conscious both of the minute decisions of the appellate courts in New Zealand about the parameters of that scheme and the interpretation of its wording, but also

including in the legislative reversal of some of those decisions, the fraught and financially far-reaching consequences of any change in the scope of that scheme and any change in the scope of cover. That's why Parliament has and often exercises the last word. So, that is a second way in which it is relevant.

5

The other point, though, and this is point (a) under (1) on the handout, much of what you've heard this morning has been to say, well, there are these other statutory regimes that provide for recovery for emotional harm, and so it's no great leap to create a common law analogue, but that turns it on its head.

10

It says, well, the common law should, as was being said, maybe fill the gap, that where Parliament has chosen to go this far but not further, I don't think that follows. It's not possible to say, and I think the questions from the Court indicated the members of the Court's understanding of this point, if I have a statutory right under the Sentencing Act, well, that has two consequences.

15

One is, why would we need a common law act, why would we need a common law cause of action rather? But the other is, Parliament having gone where it's gone, one can't simply pick that up and extrapolate out. It goes beyond common law method to something like legislation. So, that is why I say those six or seven statutory regimes really are significant.

20

As to the Prisoners' and Victims' Claims Act in particular, I think it was accepted this morning that there's no intention to amend the common law. There's nothing in there that amends the common law, but there is a theme in the appellant's submissions that what Parliament envisaged was a claim like this and the common law should follow suit, but there's nothing to support that. There's no flagging of any changes.

25

30

Justice Cooke pointed out this morning the *Pou* decision was on foot, or *Pou* proceeding, rather, was on foot, not yet – I think it had been determined in the High Court, and I could check the date, but not even heard in the Court of Appeal. The appeal had been filed – but no reference at all, no intent, nothing in terms of the Deaths by Accident Compensation Act, and certainly, also, no language that the Court, when one looks at the parliamentary debate, when one looks at the legislative history, it is about applying the general law.

It is not, we will go so far and the Courts will then determine the scope of these claims. It is to apply the extant law.

5 And last, just to touch on, and I will come back to this in the written submissions after the adjournment, quite distinct from the common law scope left in *Smith*, we have Parliament hard at work, whether deftly or not, since the Fatal Accidents Act which, as Dr Nolan, I think it is, points out, was quite a humane piece of legislation compared to the general ambit of early 19th century provisions for people killed by accident. Lord Allendale, I think, but anyway, 10 parliaments, multiple and including across the common law world, have been hard at work on this, whether well or ill, for something like 185 years, so it's a little different from *Smith*.

15 Two last points and then I think, subject to any questions, we could take the adjournment.

20 Second common thread, when we look at significant tort decisions, particularly when we look at cases like *Paul*, like *Saadati v Moorhead* [2017] 1 RCS 543, 2017 SCC 28, they are occurring against the context of recurrent questions being raised. I've called it groundswell cases in the submission. That is some general perception that this area of tort, this area of common law, does not work, requires reform. The Court below in this case, in response to the attempt to reopen *Pou*, said, well, where is the societal or economic change? We don't have that put to us. We assume or we are obliged to conclude that nothing 25 much has changed since 2005, and we don't have anything like that here.

30 And that's important in the sense both of, in order to make a common law change – many people have views. Like, I say, we might all think what should happen in a case like this, or what should happen under ACC, but to effect common law change there must be some driver. It can't simply be that the Court is free to look at it afresh, but the more important one, and I think this is coming up to her Honour the Chief Justice's question about the ripples, this Court is in no position to assess how far-reaching any of this change sought

might be, and I think it is about five changes in all in order to get to the result sought for the appellant.

5 We simply don't have that, and that was a point made in the Court below, that we just don't have the factual matrix, we don't have the context, either to this individual case because of the procedural oddities of the Prisoners' and Victims' Claims Act, but also in any broader sense.

10 The second point under 2, and almost to time, we've referred to in the submissions extensive law reform reviews, so the New Zealand Law Commission looked at compensation for victims of crime 14, I think it was, years ago. The other jurisdictions have looked at the Deaths by Accident Compensation Act. There is active, informed, evidence-based consideration of these steps, whether there are changes or not, those are matters – My point is
15 only that these can be done in a thorough, careful, cross-statutory way and that's what should happen if there were to be changes of the kind, and I don't know enough about common law case law but for the High Court of Australia to say on a tort issue, on the deaths by accident issue, for that Court to say this is not for common law development but for the legislation, I think is striking given
20 how enthusiastically that Court does engage with common law issues.

And then there is just the final point, and this is more going to the commentary that Arvind and Steele here says that, my learned friend Mr McLay has referred to, also Sir Ivor Richardson, also Professor Cane. This really exemplifies what
25 common law shouldn't be trying to do. Parliamentary processes – I was struck actually and I'll finish on this point, it's like personal reflection. I've spent my life working with statutes and to me they're what law looks like. I was slightly surprised when I read the Arvind and Steele book about how much disdain there was for parliamentary processes. But we have people like Professor Cane, like
30 Sir Ivor, saying no, there is actually an advantage to an informed debated, publicly accountable decision-making process when dealing with these really hard and far-reaching and interlinked social problems. I think that's the adjournment Ma'am.

WINKELMANN CJ:

It's certainly time for lunch.

MR KEITH:

Beyond that just as an indication I should hope to be pretty fast. I know that
5 there was some ground where the Court wanted to come back to my
learned friends, but as I say I'm in no way wishing to stifle the Court's questions,
I appreciate these are hard issues.

WINKELMANN CJ:

No. So, we're up to your 3, so you're half way through your submissions really?

10 **MR KEITH:**

Well, no, I've done my three general points and then we're just speaking to the
submissions. You've read them. We really will be speaking to points arising
from them and not going through them in detail but as I say, very keen to
understand the Court's questions.

15 **WINKELMANN CJ:**

Thank you Mr Keith.

MR KEITH:

Grateful, Ma'am.

COURT ADJOURNS: 1.02 PM

20 **COURT RESUMES: 2.15 PM**

MR KEITH:

May it please the Court. I am not subject to any questions the Court may have
about our three overriding themes, we'll just work quickly first through the cross-
appeals submissions concerned with the referral back, then hand to
25 Ms Singleton for the last of those points, but they're at cross, in the referral back
in the Prisoners' and Victims' Claims Act, and then work quickly through the
respondent's submissions too.

The cross-appeal submissions concerned with three objections to the referral back, first, and I'm at paragraph 4 of the cross-appeal submissions and I will just speak to them briefly, is the Law Reform Act 1936 and the bar on exemplary damages and this is what the court below referred to as a merger of judgment or judgment merger point. And my learned friends are going, for the appellant and cross-respondent, are going to address after us, but the straightforward point as we set out there is that the clear words of the 1936 Act, I'll come to Ms Hay's Auckland University Law Review article in a moment, but the clear words of that Act preclude an exemplary damages claim by an estate. And while a claim may, once upheld, survive for the purpose of an appeal, what we have in *Hagaman* and other precedent, other jurisdictions, it's a clear point that we can't have a new trial. And so when the Court of Appeal says, and its excerpted at the start of the cross-appeal submissions, there could be a claim by Mrs Hawkins' estate, there could be a claim in mental injury. What we take from that, and certainly what the record would indicate, is it would have to be a new hearing, it would be a new matter or a new course of action and as such on that authority it can't be brought for exemplary damages after Mrs Hawkins' passing.

20

The court below suggested a way through that, that the merger of judgment, but those cases that, the four or five that the Court of Appeal relied upon are all concerned with someone whose obtained substantive judgment or some other order at first instance, and can that itself be pursued on appeal or further pursued? Not that there is a clear carve out, in particular the High Court of Australia in *Calwell v Ipec Australia Ltd*, (1975) 135 CLR 321; (1975) 7 ALR 553 for a new claim, a new trial and that's what would be required here. We say that is just barred by the 1936 Act.

25

COOKE J:

30 If it was referred back without the need for new evidence would you say that's still the same?

MR KEITH:

I think even then the, what I take from those, from in particular the *Calwell* case, is if one's got an intact verdict and it's a question of reinstating that or not then that can be referred back. If it was a question of law or something like that
5 about bar to damages or something like that, that can be referred back. I don't read it as limited to new evidence and I do say that a mental injury claim here would be a whole new set of arguments, including because the Court of Appeal envisaged that the elements of that claim *van Soest* requirements might well be varied or might well be sought to be varied in that case.

10 **COOKE J:**

We'd have to take into account the way in which the Act takes away from technicalities in terms of bringing a claim and it is more a substantive vehicle.
1420

MR KEITH:

15 That's something that Ms Singleton's going to address but I will do my best just now. One point and I think this is picking up on your Honour's judgment in *Preston v Victims' Special Claims Tribunal* [2021] NZHC 3043, which Ms Singleton knows better than I do, she will say nice things about it, I think, is the Act makes some accommodations and some of those are extraordinary.
20 The fact we are here at all is a product of the extraordinary suspension of limitation periods.

And as you heard from my learned friends as well, the role of the Tribunal is set out to be quite demanding but I don't think that goes as far as saying that the
25 rule that one can carve a hole through the '36 Act, say, well, one has to look at the finding of the Tribunal in some amorphous sense, it's more that there are a series of quite specific procedural modifications applicable to the Tribunal.

It has a real evidence clause and I think it's section 51, we can check, but it
30 doesn't have a sort of do justice according to some broad principle rule, for example. Instead, it applies the requirements of the general law and I don't think there is any leeway. Whether or not one accepts the proposition and I

think we have to, that it's not on a claimant to make all of that running, the Tribunal certainly has that job and it has the power to do that.

I will just touch very briefly on one of the five, I think, decisions that the Court of Appeal relied upon, *Lee v Lew* [1925] AC 819 (PC), and I am only going to it because I noticed it was mentioned in my learned friend's hand up. I think we can bring that up for you.

The point that you'll see in that judgment, it predates the statutory reforms and the point that it has is the Supreme Court of Canada had made a condition and had imposed a condition that no exception should be based – or the defendant to the claim, rather, must accept that no exception would be based on the fact that the plaintiff was dead. So the Privy Council is actual upholding a relaxation of the common law principle that claims shouldn't survive death. That's all it stands for; it doesn't help us other than that, I think. It certainly doesn't get us back to the point of allowing a new trial.

I don't – the other part I was going to deal with here was the article by Ms Hay and I will just make one very quick point about that. My learned friends may make more of it, but the particular point at page 190 is that the emphasis very much in Ms Hay's reasoning is that the modern conception of exemplary damages is punitive and there is a point partway down page 190, I will just find the line reference, under the heading: "*Punishment not compensation*," and Ms Hay makes the statement, third sentence under the heading: "*1 Punishment not compensation ... In fact, the combined effect of the exclusion*" – this is the 1936 Act – "and ACC is that wrongdoers who kill their victims go *unpunished*."

I do not think there is a – that's not a convincing rationale for changing the interpretation of section 3(2)(a), in my submission. We have here a wrongdoer who killed and he has been decidedly punished. I do not think there is a, you know, it's not as though there is some purpose going unserved in a case brought under the Prisoners' and Victims' Claims Act which, of course, is dependent upon a conviction in the first place.

The further points about the referral back. I will just pick up on a point, Ms Singleton is going to talk about the Prisoners' and Victims' Claims Act but I think her Honour the Chief Justice did raise a couple of times that there is a wider question about fairness in the context of the statutory scheme.

5 I've already touched on that the Prisoners' and Victims' Claims Act has this extraordinary consequence in a case such as the present through suspending limitation periods for the duration of the sentence, and in a case like this the sentence is potentially extremely long and was in the event extremely long, and there are then the time limits of bringing claims.

10

The point that I infer the Chief Justice is approaching, and I'm happy to adopt it, is that the operation of the Prisoners' and Victims' Claims Act is to sequester compensation either ordered or agreed under one of the three statutes. So in the instant case the respondent was one, another of the about 200 I think

15 prisoners who were at the behaviour management regime in Auckland Prison between 1988 and 2004, and eventually received compensation on a Crown settlement in about 2019. He has not had the benefit of that because of this scheme. There is a tension there in having this sort of referral back, particularly, and this is already put in the submissions, when the referral back appears to

20 envisage that Court of Appeal authority, from, sourced, will be revisited or varied or might need to be. So we are talking years and years and years. It's just not a just step. If that is the point that the Chief Justice was approaching, I'm very happy, as I say, to adopt it.

25 Last, and it is suggested by the appellant that the Court could simply decide this claim itself, and I set out with reference to this Court's decision in *R v Chief Executive, Department of Corrections* [2024] NZSC 47; [2024] 1 NZLR 11 at 12.2.2(c), (b) rather, why that would be thoroughly inappropriate. The Court is in no position to make that nuanced assessment. It shouldn't try and do so, at

30 least without the Court below.

The second point on the cross-appeal is just that this is not apt for – that referral back is not an apt mechanism for reconsideration *van Soest*, and as I say at 14.3 with reference to the High Court's decision, footnote 22, it would be an

altogether new claim, and I think I've already made the point at 15 that the requirements of what the Tribunal, what the Court below appeared to envisage was a highly complex process, and it's not fair or efficient. As I say, I adopt the point the Chief Justice was approaching.

5 **COOKE J:**

Do you put in issue whether the defendant would have owed a duty of care?

MR KEITH:

I was, and I have noticed your Honour's question to Mr McLay about whether there was a case involving an intentional tort, and I did look for one. It is an odd
10 thing to talk about. Negligence in this context, which is what we have. I took it from his answer that he couldn't find one either. So my answer is I think this goes to the novelty of the cause of action that would need to be found. If one looks at *van Soest*, I don't think I could resist the contention that there was foreseeable harm, there was foreseeability of harm, but we would have the
15 questions of the evidential threshold, which I'll come to in the respondent's submissions, but also whether there's a proximity requirement or not.

But I think, sorry, that's a long way of saying in answer to your Honour's question, I don't really know the answer but I don't think so. I don't think there'd
20 be a – I don't think I could resist a duty of care in that context. But we have no precedent for it that we could find.

1430

Unless the Court has any questions on those parts, I'll hand over to
25 Ms Singleton just to round out the cross-appeal submissions, and then you'll have me back for the remainder.

WINKELMANN CJ:

Thank you, Mr Keith.

MS SINGLETON:

May it please the Court, I will be dealing with a fairly discrete aspect of the cross-appeal at paragraphs 16 through to 20, beginning at page 8 of the written submissions, so I don't propose to take up much of your Honours' time.

5 The issue arises out of the Court of Appeal's decision at paragraphs 73 and 74 to refer back to the Tribunal a cause of action that was not considered by the Tribunal or the High Court.

10 This present objection is not an objection to the general ability to refer matters back to lower courts, and I note for completeness that that power is set up in the Prisoners' and Victims' Claims Act at section 51.

WINKELMANN CJ:

Can I just ask what submissions are we talking about? The principal submissions?

15 **MS SINGLETON:**

The cross-appeal submissions, Ma'am.

WINKELMANN CJ:

And at what paragraphs?

MS SINGLETON:

20 Sixteen onwards to 20. The crux of the objection is in paragraph 18 of the cross-appeal submissions, and the objection is to the reasoning of the Court of Appeal that, due to the fact that the prisoners' and victims' claims jurisdiction does not require the formalities of pleadings, it is open to the Court on appeal to identify an unargued cause of action and send that back for
25 consideration to the Tribunal.

In other words, our objection is not to the power to refer matters back but to the premise on which it was referred back in this case, and that is the perception that the Prisoners' and Victims' Claims Act, as some wider authority for a

flexible and informal approach, empowers the Court to take steps that it would not otherwise ordinarily take.

Perhaps to orientate myself and yourselves, we could begin with the
5 Prisoners' and Victims' Claims Act itself, and specifically where the legislation
does do away with some of the, or adapt some of the ordinary civil procedural
requirements, I think the obvious one is in Subpart 3 of Part 2 of the legislation,
and principally sections 63 and 64. These are the sections that suspend the
normal limitation provisions and these expressly suspend limitation on periods
10 for victims' claims where an offender is serving a sentence of imprisonment.

Following on from that, section 59 of the Act, a different section, different part,
even, relates to evidence and I've heard this referred to as the open evidence
rule: "A Tribunal may receive as evidence any statement, document,
15 information, or matter that, in the Tribunal's opinion, may help the Tribunal to
determine a victim's claim, whether or not it would be admissible..." so it
effectively does away with ordinary evidence law.

And finally, sections 17, 18, and 19 of the Act deal with sequestering of funds.
20 It's notable that the money at issue in the claim is held on trust and that process
is triggered by the receipt of compensation by an offender on a breach of rights.
The PVCA does not depart from ordinary civil – well, sorry, let me start again,
please. It does depart from formalities in those matters and it does so
expressly. What it doesn't do is stand for a wider principle of flexibility that
25 would empower courts to take steps so that they would not ordinarily take.

COOKE J:

Doesn't it also alter what you need to advance to make a claim? You don't
need to plead a cause of action.

MS SINGLETON:

30 It does, but again, it does do that expressly.

COOKE J:

Yes, so if a claimant makes a claim and the Tribunal messes up that claim, why can't you just send it back to the Tribunal to get it right?

MS SINGLETON:

5 Sir, my answer to that would be, you could send it back to correct findings already made but in this case the referral back dealt with findings that weren't made on a matter that wasn't considered by the Tribunal. And in fact, and I might be encroaching on Mr Keith's submissions here, deals with matters that on the evidence before the Tribunal would not disclose a cause of action under
10 the current law.

WINKELMANN CJ:

Do we know if the arguments were made?

MS SINGLETON:

I can't address your Honour on that point, I'm sorry, I don't know.

15 **WINKELMANN CJ:**

Because we have no record of the arguments.

MS SINGLETON:

Perhaps my friends would have an answer to that question but I don't.

COOKE J:

20 The problem might be if the Tribunal doesn't address something because it's made an error, misunderstood what the position of the law was, so the fact that the Tribunal hasn't addressed it that's not the test is it. So, an error by the Tribunal in not addressing something is something you could refer back.

MS SINGLETON:

25 My instinct is to say that that would be dealt with in section 51 of the Act which allows the High Court to refer back any matter for the first time.

WINKELMANN CJ:

So, at paragraph 14 it says: "That she'd engage counsel who reformulated a claim to include damages for emotional harm and exemplary damages." Right.

MS SINGLETON:

5 Ma'am, I'm being referred by Mr Keith to footnote 22: "If Mrs Hawkins believes a claim for bereavement damages on the basis of PTSD would succeed, she could pursue that. That claim was not before the Tribunal and is not part of this appeal."

WINKELMANN CJ:

10 Footnote 22 in your submissions?

MS SINGLETON:

Yes, cross-appellant submissions.

COOKE J:

15 It's a bit hard to say that it's not part of her claim that's originally lodged though, is it, she was claiming emotional damages and exemplary damages wasn't she?

MS SINGLETON:

Yes.

COOKE J:

20 It's just if we say there is a claim of that kind it's very hard to see that it's not within it.

MS SINGLETON:

Sorry, Sir, could you please repeat that?

COOKE J:

25 Her original claim was for both emotional damages and exemplary damages as filed.

MS SINGLETON:

Yes Sir.

COOKE J:

5 So, if the Tribunal messes that claim up and gets the law wrong why can't it be referred back to get it right?

MS SINGLETON:

10 Well, I'm not saying that it can't be referred back but the premise on which this Court of Appeal decision to refer back was not on the basis, as far as I can see on the judgment of section 51, but on the basis of a broader view of the Acts in formality and flexibility which to refer back to my earlier submissions, where that Act does depart from the ordinary procedures for civil claims, it does so expressly.

15 Perhaps I could point out where that is intended with some of the observations referred to in our authorities. In the Court's decision in *Reekie v Claimants A and B* it observed that: "While the Tribunal's procedure is designed to minimise the risk of the traumatising victims," and that goes to the manner in which a claim is brought. "... ss 46 and 47 are clear; the Tribunal is bound by the general law in determining liability and quantum."

20

And then in your Honour Justice Cooke's decision in *Preston*, your Honour was not willing to accept Ms Watt's submissions that the Act relaxes some of the requirements, including the requirement to prove a claim to the civil standard and was not intended to alter the substantive law.

25 1440

MILLER J:

30 This is in part a question of policy behind these limitation provisions in this Act which are quite distinctive, because they're not defined by reference to a period of time following the injury during which the plaintiff should get their act together and bring their case, which is the normal position. Time ceases to run while the

offender is in prison. That is quite distinctive and in a way capable of a more exacting standard, I would have thought.

MS SINGLETON:

I will gladly adopt that point, Sir.

5 **MILLER J:**

Well, I'm not – yes, it seems to me that authorities from the approach taking the limitation in another context might assist, yes.

MS SINGLETON:

Yes, Sir, and I will be coming to the decision of *van Silfhout* later.

10 **WINKELMANN CJ:**

I mean, you could argue that the Tribunal's – the claim as articulated by the Tribunal is not on all fours with what is referred back, is that, are you arguing that? Because what is referred back is a common law claim for mental injury arising from the circumstances of the death of her daughter and the claim will
15 be confined to exemplary damages. So it's a mental injury claim.

MS SINGLETON:

Yes and it does face some obstacles, Ma'am, including the particular obstacles in *van Soest*, including the issue of a recognisable psychiatric disorder and proximity, in addition to the potential obstacle raised by the law from that.

20 **COOKE J:**

It just seems that if we got to the position where there was a proper claim for mental injury allowing exemplary damages, it would seem a bit odd that it couldn't be sent back to the Tribunal to determine it. I mean, there are a lot of hurdles to get over to get to that point and it seems to be those hurdles are the
25 main point, rather than the suggestion, even if they got over them all, you're gazumped at the last moment because you're not allowed to refer it back.

MS SINGLETON:

Yes, Sir, I have two responses to that. The first is that if you are prohibited from referring matters back, which I don't think is the case in any reclaim, given the presence of section 51, that is a feature of the way this Act is designed to allow victims to bring claims, and I suppose I could leave the point there. And I've
5 lost my second point, I'm sorry.

WINKELMANN CJ:

That's all right, I have been affected by that today. You can come back to it, once it pops into your head, if you like.

10 **MS SINGLETON:**

I will, thank you, Ma'am.

WINKELMANN CJ:

That's the effect that Justice Cooke has on people.

MS SINGLETON:

15 Perhaps coming onto the second point in paragraph 18.2 of the cross-appellant's submissions. For a prescriptive code that makes express modifications to the ordinary way of bringing civil claims, as I already pointed out to your Honours, the Prisoners' and Victims' Claims Act does not expressly modify the effect of the law from that and the authorities suggest that it would
20 be inappropriate to do so.

I would refer your Honour's to the case *T v H* [1995] 3 NZLR 37 (CA) and that appears at footnote 30 of the cross-appellant's written submissions and we can go to the paragraphs if you wish, but the simple point is that in this case there
25 are two different statutory schemes that were in conflict here and the Court held that it was inappropriate to read one as modifying the other.

Additionally, in *van Silfhout*, which is a decision of this Court, where the Prisoners' and Victims' Claims Act does not prescribe for a situation, the Court
30 held that it is not this Court's job to fill the gaps and their Honours Justices Kós

and Williams took the time to emphasise in their judgment that this particular statute results in some “peculiar” results. Despite those peculiar results, the Court declined to embellish the express provisions of the Prisoners’ and Victims’ Claims Act and those observations are at paragraphs 54 and 61 of that decision. In our submission it cannot be a matter of necessary implication that the Prisoners’ and Victims’ Claims Act displaces the Law Reform Act, well specifically section 3(2)(a) of the Law Reform Act. The Prisoners’ and Victims’ Claims Act is a code and where it displaces the standard procedure it expressly does so. It is not a broader licence to amend civil procedure as the Court of Appeal seemed to base its referral back on.

I should note in this Court’s decision in *Poynter v Commerce Commission* [2010] NZSC 38; [2010] 3 NZLR 300 it was observed that it’s not appropriate to put a common law gloss on prescriptive statutes such as the Prisoners’ and Victims’ Claims Act and: “It is far better, both in principle and pragmatically, for Parliament to [take that step and] to address issues arising in a comprehensive manner.” That’s at page 321 of the *Poynter* judgment.

I conclude with a reference to the Committee against Torture which has noted, and this is at footnote 34 of the cross-appellant’s written submissions, that the Prisoners’ and Victims’ Claims Act does engage rights to remedy for human rights violations and in the footnote you’ll see reference to the Committee’s continuing concern under the Convention Against Torture: “to ensure consistency with prisoners’ rights to remedy”. In our submission that is a particular reason to tread carefully here, to read the Prisoners’ and Victims’ Claims Act on its terms and not further. This is, as your Honour noted, exceptional legislation so the terms must be read carefully to ensure that these proceedings, which are still adversarial, are consistent with human rights and are rigorous. I fear that that earlier point has truly escaped me.

30 WINKELMANN CJ:

That’s all right.

MS SINGLETON:

But perhaps if it does come back to me I will alert Mr Keith to it.
Do your Honours have any questions?

WINKELMANN CJ:

5 No that's fine. Thank you, Ms Singleton.

MS SINGLETON:

Thank you.

MR KEITH:

10 May it please the Court. If Ms Singleton tells me of her second point I'll bring it
up but one answer that, or the further answer that did occur to me in terms of
Justice Cooke's question –

WINKELMANN CJ:

Can you remind me what Justice Cooke's question was?

MR KEITH:

15 Justice Cooke's question was if the Tribunal gets it wrong, if they fail to address
a point, I'm paraphrasing Judge of the Supreme Court so I'm being very careful
here and open to correction, but if the Tribunal has simply not addressed a point
surely it's open to an appellate court to refer that back. I think the only point
we're making, as Ms Singleton I think put it, is it's not referral back generally or
20 even referral back on that sort of ground. It's the fact of if one looks at the
intricacy of what was referred back was a claim that was expressed in quite
different terms as Justice Palmer recorded in the High Court, hadn't been run
in the way envisaged in the Tribunal and then also the Court identifying and
expressing a view about possible claim in that direction but also a possible
25 re-reading of the 1936 Act. It's just going several steps beyond merely saying
you the Tribunal with the facts and findings before you could have apprised this
case in this way. And I think, again Ms Singleton's more familiar with *Preston*
than me, but I think your Honour Justice Cooke did a similar exercise of, even
if you parsed it this way you don't get there. You could equally say to the

Tribunal well if you parse it in a differently constituted case I'm referring it back so it can make orders in light of this. But what the Court of Appeal did here, apparently on the basis that the PVCA empowers some more flexible approach, was several steps beyond that conventional identification of a possible different
5 way of approaching the facts as found.

WINKELMANN CJ:

Is a way of testing it this way?

MR KEITH:

Yes.

10 **WINKELMANN CJ:**

If it was open on how it had been run in the Tribunal, the Court of Appeal could have decided it itself.

MR KEITH:

15 It would have actually been really good if it had because then at least it could have dealt with any doubt about *van Soest* which the Tribunal obviously couldn't – can't, rather. Yes, Ma'am, that's a good way of putting it. And maybe that's a neat answer, neater answer, even, to Justice Cooke's point. If it's a question of saying: "Here you are, I've given you all the nuts and bolts, go to it," but they didn't, this was a couple of steps beyond that.

20

I'm conscious of time, but I'm also conscious that we, the Court had –

WINKELMANN CJ:

Well, you haven't had much time.

MR KEITH:

25 Well, but I will try to be fast through the respondent's submissions but I was just wanting to encourage the Court to raise any questions because these are far-reaching issues the Court has been asked to engage with. Just taking those in turn, and starting at paragraph 6 of the respondent's submissions, the

argument for the appellant on the Death by Accidents Compensation Act is set out at paragraph 8 in the excerpt there, that the Court can simply take a different approach to *Pou* and the Court of Appeal had said, well, we have, we've been given nothing to suggest that *Pou* is now not right, that there have been social changes.

There is also the point, and I think it echoes some of what the Court was asking, was putting this morning. We're dealing with a cause of action and in a statute that, as the Court below said, the 1952 Act is largely redundant, so it's an extremely narrow mechanism in the first place, but then I think I'd said in my three general threads, three common threads, paragraph 9.2 on page 4 of the respondent's submissions, the statement of the High Court of Australia in *Barclay v Penberthy* [2012] HCA 40; 246 CLR 258; 291 ALR 608, and that was decided 2012, that: "Any further contraction ... in *Baker v Bolton* [should be for legislation]", as I say, and then that carries particular weight coming from that Court.

I already touched on, and members of the Court have also put to my learned friends at paragraphs 10 and onwards, and I think I did make this point about my three threads, there are, this is very much at the intersection of a whole lot of statutory schemes, some extremely old. The New Zealand position was adopted under the English Acts Act 1854, and then there's a series of Acts since then, but, and I'll come onto that, there have also been other statutory schemes, and the point made by the full court of the Court of Appeal in *Pou* was not whether or not *Baker v Bolton* was bad law, and I think I heard Mr McLay agree with this proposition, but rather now any change is for legislation.

My learned friend Ms Pender did talk about things that were baked into the common law. I think the point is less that and more that we are dealing with the aftermath of an awful lot of statutory law reform over more than a century and some of it, compared to the original common law position, extremely benign but careful, and that's a point I'd already mentioned from Dr Nolan, that even the 1846 Act was quite humane by 19th century standards.

I've already touched on *Smith*, I'm at paragraph 14 of the submissions, and the distinction I draw here is that this Court described the landscape in *Smith* as permits, immunities, policies, rules, and resource consents, and as leaving
5 open common law, and there was in fact some statutory preservation of common law positions under the Resource Management Act 1991, but here the statute is at the core of what's being asked, the recovery of compensation, the terms of liability, are in the statutes. It's unlike *Smith*. The legislature has spoken, kept speaking, said a number of things which we may or may not agree
10 with, but it's worlds apart.

COOKE J:

Well, the other thing is that *Smith* is actually just a strike out decision, isn't it?

MR KEITH:

As to whether – yes, yes, I think that's right. Well, it is right, Sir, yes.

15

Now, the further point and this is at paragraph 16.1, following this into the – just some questions in discussion this morning about the ACC scheme, I had understood the position to be that we just don't know whether there was eligibility for ACC in 1987, but that compensatory damages were precluded.
20 I think the suggestion this morning was that perhaps what was not in issue was that a claim for a recognisable mental health condition, a psychiatric condition, might have been barred but the mental injury wasn't. I don't think that's right, in light of what was said in *E* in 1992. We can go to it but I don't think anything much turns on it, but that they were dealing with, well, the premise of *E* was that
25 the material consequences – actually, we can go to it, thank you, Ms Singleton, if we can scroll down and I'll just try and find my copy of it.

WINKELMANN CJ:

So what do you think is not right, Mr Keith?

MR KEITH:

I don't think it's right that the 1982 Act as in force at the time of Mrs Hawkins' murder – sorry, Ms Burrow's murder, precluded a claim based on a recognised psychiatric injury but not other mental trauma. *E*, as I understand it, as I read it, says that under the scheme then the mental consequences of an accident and that accident did not have to have caused physical injury were within the scope of the Act, were within the scope of the ACC scheme.

MILLER J:

But *E* wasn't dealing with an indirect victim, was it?

10 **MR KEITH:**

No, it wasn't, Sir.

MILLER J:

And that, reading it, it's a difficult decision to read, but that does seem to be the striking feature of it. The way in which Todd seems to approach this is that such claims were potentially available for an indirect victim who suffered some kind of mental harm under that Act.

MR KEITH:

Yes.

MILLER J:

20 Now, I'm not sure whether that's right at all, but...

MR KEITH:

No, but I think if the premise was, well, as I understood it, the Court rely on any case without climbing into the minutiae, the premise of the Court of Appeal's reasoning was that we were dealing with an exemplary damages claim and if that was preserved the compensatory claim could not have been brought. But if they're wrong about that, I'm not sure we can nail it down.

KATZ J:

I thought the, although most of the case law in this area seemed to go your way, I thought the comments in *van Soest*, I think, and the majority, at paragraph 24, tended to favour the appellants, whereas I think Justice Blanchard said: “We
5 are inclined to the view that where, as in the present case, an accident has been suffered by a primary victim it cannot be said that the experiencing of grief and distress by the secondary victim which falls short of a psychiatric disorder or illness can be said to be the suffering of an injury, the words ‘personal injury by accident’ have been given a generous interpretation ... especially before
10 1992, but we do not think they can properly be applied to a situation such as that alleged by the next of kin plaintiffs in this case. Without expressing a final view, we proceed on the basis that the first and second plaintiffs did not have coverage under the 1982 Act and that their claims are accordingly not barred by it.”

15

So that would seem to support the appellant’s point of view that the claims wouldn’t have fallen within the statutory bar in the 1982 Act and therefore compensatory damages would be available.

MR KEITH:

20 This is the point that we simply aren’t clear about in light of the court below, so the court below has proceeded on the basis that such a claim would have been barred.

KATZ J:

That’s right, but aren’t we going to have to form a view on that?

25 1500

MR KEITH:

I say that you don’t, because of the way that we’re addressing the case. But that is if one takes the – if the premise is that – sorry, I’ll back up. The wider point that the Court has pointed to this morning is that, as matters stand now,
30 this kind of direct claim what Mr McLay described as a claim for the harm inflicted on Mrs Hawkins would be barred for compensatory relief, but eligible

for the various benefits provided under the ACC scheme. So, as matters stand now, I'd say that to extend this –

KATZ J:

Right so this issue then falls away?

5 **MR KEITH:**

It does fall away in terms of the kind of tort change that the appellants are seeking. If we were arguing about whether or not the ACC bar applied that would be a different point I think. If I have any further thought on that I will come back to it though, Justice Katz, because it's an important question I think.

10

The further point beyond that though, and I will here turn to page 18, sorry paragraph 18, a point that arises partly from my learned friend Mr McLay's comments about the ACC scheme we wish we had. We do have statutory schemes here that provide various forms of support or care, that's at paragraph 16.3, and then at paragraph 18 and following make the point that: "The adoption and operation of such schemes ... tells against [an unmet societal need]. And then we have the points made by Cane and Richardson.

15

And I'll also just briefly go to the Lord Burrows lecture which my learned friends have given you and given your Honour. So, this is again on the intersection of statute and tort. And at page 9 of that... Sorry, I have somewhere lost the reference. I will just, rather than waste your time now, I'll just come back to that if I can find it. The point that I was hoping to make by reference to Burrows, and I'll just make sure I'm not actually referring to Arvind TT and Steele Jenny instead, was a comment about circumstances in which a statutory scheme should preclude the Court taking a creative approach or looking to innovate. I'll just ask if Ms Singleton can find that passage and I'll get on with the submission.

20

25

I've already touched on in my three common threads points, I'm in now paragraphs 21 and 22 of the submissions. There have been a large number of

30

substantive law reforms. There have been a very large number of law reform body reviews and we do not need to revisit, to go back to that.

WINKELMANN CJ:

In your submission does that show that Parliament has turned the earth over
5 thoroughly in this area?

MR KEITH:

It shows two things, yes, and it also shows that it's not a question of statutory neglect or it's not really hypothetical that Parliament could here act. Parliament does review, scrutinise, law reform bodies are directed or take it upon
10 themselves to scrutinise, whether there should be statutory reform, and so it's simply – I think there was a comment earlier that, oh the people who'd be affected here is only a small group, or something like that. But what we have here are, over and over again, is attention to what sort of measures there should be in place. Paragraphs 23 –

15 **WINKELMANN CJ:**

Well, what do you say about that submission, that it's just a small group?

MR KEITH:

I say two things. One, we don't know how big the group is, I think one of the Court, it may have been your Honour, made the observation that we simply
20 don't know how many would then be in a claimant group or how that claimant group would be defined; but the other is that we do have specific, very detailed provision, and scrutiny, and then statutory provision for, for example, victims of crime, we have a whole Act around that.

MILLER J:

25 You cannot really suggest that Parliament has squarely turned its mind to this, surely? Isn't this just an example of dialogue? We do what think is appropriate, if Parliament thinks that it created a liability that is too extensive then Parliament can change it. That's what the pattern tells us, doesn't it?

MR KEITH:

There are two different forms of law reform at work here, Sir. So, one, and my learned friends have given the example of, I think, it's the *Tame v New South Wales* [2002] HCA 35, 211 CLR 317 decision of the High Court of Australia.

5 Of course, if there is common law development and Parliament thinks it's gone too far, or it should be codified, or whatever, yes, by all means. But in terms to here, where we have statutory schemes that cover compensation for bereavement, that cover support for the survivors of crime including the surviving, the survivors of people who have been killed, when we have that
10 denser statutory scheme, trying to make a common law contribution to that, certainly without a very full appreciation, which the Court does not have, of what is already there and what impact what the Court might do will have, I think goes beyond dialogue and this is the point made by, for example, *Burrows* and I think certainly by *Cane* and in decisions like *Barclay*, that –

15 MILLER J:

A little hard to reconcile with the reference in the PVCA to a cause of action recognised at law, or indeed with the language of the Deaths by Accidents Act, is it not? Is leaving it to the courts to ascertain what is the scope of liability.

MR KEITH:

20 Well, Sir, leaving it to the Court – leaving it to the body of law that is in place, including under the 1952 Act, including under the common law. What I think we are saying is you can't take the Prisoners' and Victims' Claims Act as a fill-up to create a cause of action that wasn't there, because that just was not envisaged. It was a statutory scheme pointed at the extant law.

25

I suppose another way of putting it, Sir, is to say that if a Court found, and this was the ground swell point or the social change point that I was making about *Pou*, if a Court, or equally this Court's decision in *Smith*, if a Court points to an unmet social need or points to deficient common law rule of itself, well, that is
30 the Court doing what it continues to do. But if it is doing that in the context of half a dozen detailed, highly prescriptive statutory schemes that is where comment about the limits of common law development becomes relevant.

MILLER J:

Well, *Pou* itself, the Court of Appeal recognised that the law had moved on in other jurisdictions, hadn't in New Zealand because the Accident Compensation regime has really covered – really stopped the development of the law in this
5 area.

MR KEITH:

That's true, but most of that movement and certainly what my learned friends have pointed to, has been statute law reform. So we have things like the UK bereavement damages regime, which you can see is very much similar to the
10 Victims' support and the other measures. It's true, the good example of what your Honour is pointing to, I think, is *Saadati* and I will come to that.

MILLER J:

Yes.

MR KEITH:

15 But these reforms around damages or death, if I can put it that way, have almost all been statute.

WINKELMANN CJ:

So, Mr Keith, Mr McLay said that he invited us to perfect Parliament's work.

1510

MR KEITH:

20 Yes. I think the authorities we're pointing to tell against that. This isn't in *Poynter* terms, as Ms Singleton said, supplying the necessary missing part and I don't think one can take the Prisoners' and Victims' Claims Act as setting the stage for judicial innovation for the reasons I've just suggested to his Honour
25 Justice Miller.

So, I did notice that discussion but I think *Smith* is probably a very, and in one way almost by absence or omission, we don't have in the Climate Change Response Act 2002, for example a compensation or claims scheme.

If Parliament had enacted one I think *Smith* might've been a rather different decision. And I think it's not so much finishing off Parliament's work as bolting on something that Parliament could easily have included but didn't. Quite different thing to introduce causes of action into that 2005 Act.

5 **MILLER J:**

The common law has moved on reasonably significantly in other jurisdictions, both as to the proximity requirements in the claim for mental injury or psychiatric injury, and in the requirements for pecuniary loss under the comparable legislation. They still recognise that it's more than just a claim for mental harm,
10 there needs to be some loss associated with the death of the person.

MR KEITH:

Yes Sir. Well, certainly in Canada that has been done, in the UK it has not.

MILLER J:

What precludes us from taking that into account in our interpretation of that
15 legislation?

MR KEITH:

Well, those are two different propositions, Sir, I think I'd say.

MILLER J:

Yes, they are.

20 **MR KEITH:**

First yes, the Supreme Court of Canada has gone in the direction that it has gone on mental injury claims, still very stringent and I don't think they assist in the way that my learned friend suggest they do but dispensing with the requirement of a recognised psychiatric illness, which the Supreme Court of
25 Canada actually said had never been the law in that Court. But that is an example of common law development of the tort itself. So, not in a statutory context that I can see in that decision but rather simply saying, we reject this common law tort requirement as it had evolved in *Alcock*, for example I think,

as otiose as inappropriate, there's a lot of language about treating mental injury more restrictively than physical injury and about relying too much upon the *DSM* or that sort of thing. That is common law development.

- 5 The interpretation of taking a statutory scheme and looking to bolt additional things onto it to bring in new causes of action by light of it, I think is a different order of development. One is sort of an organic or incremental, I think Lord Burrows calls it, extension of existing common law. This is traipsing into, well traipsing is slightly disrespectful, but it's looking to trench into something
10 that Parliament has dealt with in detail.

MILLER J:

I understood you to be unable to resist the proposition that when an intentional wrong is done a duty of care might be owed.

MR KEITH:

- 15 Yes Sir.

MILLER J:

It seems perfectly orthodox.

MR KEITH:

Yes.

- 20 **MILLER J:**

Yes. So, where's the great extension in recognising that as a cause of action which is available at law and, therefore, accessible under the Prisoners' and Victims' Compensation Act?

MR KEITH:

- 25 Again I think your Honour's question is about the extension or variation of van Soest. Just in isolation that's a straightforward question, and I say about that that yes, New Zealand could follow *Saadati*, remove the requirement for a psychiatric diagnosis but, I'm sorry, recognise psychiatric illness. It could do

that, this is not the case to do it because we have nothing. We don't have a reasoning in the court below, we don't have a case put, we don't have, as in *Saadati*, a groundswell of cases pushing against that or holding that requirement in *van Soest* to be unjust. There's none of the scene-setting for a final appellate court that the Supreme Court of Canada had in *Saadati*.
5 So there's nothing wrong with it in principle, it's doing exactly, the Supreme Court of Canada is doing what a common law court does.

WINKELMANN CJ:

So that's an important point you're making that this is not saying that the law,
10 were we to reject the invitation to evolve the law in this context, is not a rejection of that evolution, any particular aspect of the requests and others, particularly the removing the requirement for a diagnosed psychiatric disorder, it could occur in other contexts.

MR KEITH:

15 Yes and likewise with proximity the Court could have before it one day a decision in which it weighs up the competing merits of *Paul* in the UK Supreme Court and *Saadati* might come up with its own even better third path but I say, so no objection in principle but we are just not in the position to do it here.

20 **COOKE J:**

Well I have to say for myself that the question of the duty of care sort of is quite pivotal to this, and you've accepted I think, that one would be owed. But if there's no common law that's ever said this it does seem to be quite an important point.

25 **MR KEITH:**

Well we haven't been able to find one anyway Sir. I found it odd but then I'm, and Mr McLay didn't have one either.

COOKE J:

It's just very difficult to understand how a prospective offender owes a duty of care when committing offences.

MR KEITH:

5 To understand why they do or why they don't?

COOKE J:

Why would – the law would say that that is the correct analysis for seeing liability to arise? They obviously commit an intentional tort.

MR KEITH:

10 Yes.

COOKE J:

But it's hard to see them having a duty of care, duty of reasonable care.

MR KEITH:

It's an awkward framing Sir.

15 **WINKELMANN CJ:**

There would probably be an answer in civil law jurisdictions. They would probably recognise such, I expect they would have recognised such a duty.

MR KEITH:

20 Well, quite possibly I mean my learned friends with the appellant have pointed to the, I think it's Quebec position and to the Scottish position, which I think do carry over civil law rules. But I do think the other answer may be, and I'm coming to the statutory schemes, that New Zealand's not alone in criminal reparation statutes. It may well be that the reason we can't find case law is that
25 whatever, they're being sorted out in reparation schemes. Because it's, I mean the straightforward point that we are making is telling against an unmet need here, is we have that scheme in full force and have done since 1987. It's just

that this case by virtue of those extraordinary limitation periods, of limitation period provisions to take Justice Miller's point, preceded any of or preceded the emotional harm part of that.

WINKELMANN CJ:

5 So, Mr Keith we are running out of time for the other part of this.

MR KEITH:

What I'd say from all of that, and I'm still thinking about Justice Katz' question too, but from, in terms of the common law it's simply quite valid questions as Justice Miller has said but not, I say, in the context of reading things into or
10 looking to respond to perceived gaps in the statutory scheme, and certainly not in this case without the kind of groundbreaking or ground preparation that one has in cases like *Paul* and *Saadati*.

WINKELMANN CJ:

I mean I suppose one thing you might say is that the gap is for people, it's a
15 retrospective gap. It's not an ongoing gap because the Sentencing Act can provide the reparation for people and has been able to since 2000, but we would be prospectively changing the common law.

1520

MR KEITH:

20 And the Criminal Justice Amendment Act (no 3) 1987 as well Ma'am , yes. So we would be making a change in the common law now for some, or as I think your Honour pointed out, a very narrow set of extremely elderly cases and the only way those cases could, as far as I am aware, arise is at the very – at the exceptional end of the Prisoners' and Victims' Claims Act. Nothing else
25 would be within limitation periods. And I do say that trying to respond to that by common law is not needed and extremely fraught.

I hadn't made and the court below has suggested that the reparation provisions might be able to be applied retrospectively and we did make the point about
30 section 26 of the Bill of Rights Act, double-punishment and retrospective

changes in penal law, but I think those same principles do tell against trying to bring in a cause of action now for events so long ago in the context of criminal offending.

5 I will just touch through the remainder of our submissions, but I am very grateful for the Court's questions. Common law cause of action now be found, again, we simply say there isn't the social case made, social economic case made, but particularly in respect of tikanga. Paragraph 26, page 10 of the respondent's submissions, one can point to tikanga principles but as this Court
10 emphasised in *Ellis*, as emphasised in *He Poutama*, one can't simply say, well, there is a tikanga principle in that direction. It is much more complicated and a substantive case would need to have been put and hasn't been.

Again, to pick up on my point about *van Soest* and *Saadati* and *Pou*, it might
15 well be that this Court, properly seized of that question of common law reform, would have tikanga evidence but it does not.

I think that the Court has got what I have taken from, or what we have taken from *Saadati* and there is one further point in written submissions which is just
20 that the premise of the argument for the appellant, and this is quoted at paragraph 29, is that *Saadati* and the dissenting judgment of Justice Thomas in *van Soest* have made it possible simply to make a finding of mental health, mental injury without more, but that's not what either of those decisions made.

25 Justice Thomas does say and this is at my footnote 41, he did envisage that one day perhaps the common law might go so far as to say: "...more than ... the ordinary vicissitudes of life." But what he said as at *van Soest*, even in that dissent, this is at paragraph 32, the first excerpt: "... mental suffering is of the order, or approaching the order, of a psychiatric illness ..." so, and likewise
30 *Saadati* on the previous page, it's not saying by removing that as an absolute requirement, not saying that the evidential threshold is thereby lessened.

Paragraphs 36 and following, I have addressed further that the particular machinery of the Prisoners' and Victims' Claims Act, I think I heard Mr McLay

particularly say that Prisoners' and Victims' Claims Act is a mechanism, it's a machinery Act, it doesn't introduce new causes of action, and I think there was a comment that it shouldn't, that there were good reasons not to. If that is the appellant's position now, I agree with it. There is just nothing in the Act and
5 nothing in the legislative history to found a new cause of action or a modified cause of action or reinterpretation of the 1952 Act. Now, I think...

WINKELMANN CJ:

Is that about it?

MR KEITH:

10 I think that is about it. I'll just check with Ms Singleton and I have –

WINKELMANN CJ:

She's found the passage that you were hoping for?

MR KEITH:

I'll just have one possibly doomed effort to find my...

15 **WINKELMANN CJ:**

I think we can find it.

MR KEITH:

If it's not in Burrows.

WINKELMANN CJ:

20 Well if it's not in Burrows it'll be in Arvind and...

MR KEITH:

I will find it and I will either make sure that the Court's got it already. It maybe in something we've already handed up. I have a large flag saying "this is page 9 of Burrows" and it's not.

25

I think the best answer I can give to Justice Katz' question, and it is an important question, is we would be back to then saying that the case referred back, or the

case that Mrs Hawkins might have been able to bring, was contrary to the Court below, contrary to what's been done, a compensatory damages claim not allowed by the 1982 Act. I think the best answer I can give to that is that's again the whole new claim.

5 **KATZ J:**

I mean your proposition that it's barred by the 1982 Act is dependent, is it not, on us rejecting the argument that, or possibly rejecting the argument about the recognised, the bar about the recognised psychiatric injury should be required because you say, well the psychiatric is required. That was clearly covered by
10 the 1982 Act, and therefore the bar would kick in. But if we accepted the submission that's been advanced that that threshold should be dropped significantly, then isn't there room for argument about whether the 1982 Act, and that's the argument the appellants are advancing, covered lesser forms of emotional harm?

15 **MR KEITH:**

Well I have one thing, and I'm never sure whether you're allowed to ask judges this question. I hadn't seen in the 1982 Act the basis for saying that a recognised psychiatric injury could not be the subject of a claim.

KATZ J:

20 I'm just saying that I understand that's your proposition. Something of that level of seriousness would fall within the mental consequences of an injury.

MR KEITH:

Well there are two things there. So first up I'm saying that this Court would have to decide, or someone would have to decide that the *van Soest* threshold could
25 be lowered, or could be met in this case. That hasn't been done, so that's something to which we say can't now be done.

The second question of whether having made that out, that sounds an exemplary damages, so engages the 1936 Act, or compensatory damages as
30 permitted under the 1982 Act, that would be the alternative question. I had

understood my learned friends to be saying, but I just couldn't find the basis for it, that the 1982 Act did not allow claims for a recognised psychiatric injury, but I couldn't find where that was. They may be able to point the Court to it. But I think the upstream question anyway, we say, is first up to make that claim one
5 would have to find somehow *van Soest* either met here or wrongly decided such that that standard should, and then that it was properly an issue referred back, notwithstanding the sequence of this case.

KATZ J:

I mean I certainly think, as I understand it, the appellants accept that if the *van*
10 *Soest* test is right, then the compensatory claim for damage – claim for compensatory damages would be barred, but they appear to be saying, well, if that, if the *van Soest* test is wrong, and we're entitled to claim for some lesser form of emotional harm, then that makes it a live issue as to whether that lesser claim would have been barred by the 1982 Act.

15 **MR KEITH:**

Yes, and I also don't know, and I suspect your Honour may do, whether the alteration in the statute bar by the 1992 amendment that followed the *E* decision, whether that had the effect of precluding older claims. I don't know whether it does or not.

20 **KATZ J:**

No, from looking at it, it preserved the statute bar for injuries that were covered by the former Acts. So there was a statute bar under one of the former Acts prior to 1992. That statutory bar carried on is my understanding.

MR KEITH:

25 Yes, but the flip side of that, I honestly don't know, we could find out if the Court needed us to.

KATZ J:

No, no, I'm just trying to figure out where...

MR KEITH:

But whether if I had, in light of *E*, a claim for mental consequences short of psychiatric injury under the pre-1992 ACC scheme, whether the 1992 amendment took that away from me. I don't know the answer to that.

5 **WINKELMANN CJ:**

So what Mr McLay said was that under the 1982 legislation you were covered for psychiatric disorder as a secondary victim but not for something falling short of it.

MR KEITH:

10 Something short of it, right.

WINKELMANN CJ:

And under the 1992, you were covered as a secondary victim for psychiatric disorder only if you were a primary victim or if you fell within one of the exceptions as a result of physical injury or if you fall within one of the exceptions including sexual violence.

MR KEITH:

Yes and I think they were all sexual violence in that Act, yes.

WINKELMANN CJ:

Could I ask you this question, is the other answer to this point, though, merger?
20 Because there was no judgment on this basis prior to the death of the claimant?

MR KEITH:

I think that's right, Ma'am, yes.

KATZ J:

So that would knock out the exemplary damages claim, on your analysis?

25 **MR KEITH:**

It would knock out the exemplary damages claim and it would also – this case had not been run as a compensatory claim for that injury, so the merger point,

as we view it, as we read *Hagaman v Little* [2017] NZCA 447; [2018] 2 NZLR 140 and *Calwell* and the others, would require a whole new case. So, I don't think it would be saved by the merger principle.

WINKELMANN CJ:

5 In either formation, compensatory or exemplary, is what you're saying?

MR KEITH:

Not exemplary, anyway. What occurs to me and again this is a new point developed today, but if one had a compensatory claim now, how would that occur? How would that – how could that be considered this far down the track?

10 I have already pointed to the time limit issue that your Honour has raised, your Honour the Chief Justice has raised, but also as well as the 1936 Act bar on exemplary damages, one would have a question about how a claim for compensatory damages could now be fairly determined.

WINKELMANN CJ:

15 Right, okay, well, thank you Mr Keith.

MR KEITH:

Most grateful to your Honours.

WINKELMANN CJ:

So I think we can hopefully be very short on the next bit, Ms Pender.

20 **MS PENDER:**

Thank you, Ma'am. I have just got the points that I understood you might want to hear from me, but I will be – I will take my cue.

25 The first point is really addressing the Chief Justice around who would this decision affect, what is the class of people? We would say, in a very simple and a very narrow way, they are people who are victims under the PVC Act, like Mrs Hawkins, who has suffered, in this case emotional harm, has suffered

harm as a consequence of the respondent's offending and who has not had effective redress.

WINKELMANN CJ:

They would be secondary victims. I mean, I know victims in terms of the
5 PVC Act, but if we just – they'd be secondary victims.

MS PENDER:

They would be the immediate family victims who are a special category.
Which probably then brings me to another, to just to go there, I think this might
have been in answer to a question of you, your Honour Justice Miller, earlier
10 which is around the legislative policy of the PVC Act.

The legislative policy is quite clear that a victim in the position of Mrs Hawkins,
or an offender, perhaps put the other way, offender in the position of Mr Te Hei
is required to compensate a person who's a victim in the position of
15 Mrs Hawkins for harm he has caused her as a consequence of his offence.
And that's the legislative policy, it's the legislative policy of the PVC on the
strength of what I have just said, it's also can be reflected in just the general
policy of reparation generally.

WINKELMANN CJ:

20 Isn't it more limited than that? Isn't it they should compensate them if they have
a claim against them and the offender receives compensation themselves?

MS PENDER:

Well, that triggers the ability to get redress, really.

WINKELMANN CJ:

25 I know. But it's not a broad statutory policy that offenders should compensate
their victims. It's a more refined statutory policy than that.

MS PENDER:

Well, perhaps if I can put it another way, who else would fall into this class? So we could have a situation where you've got somebody where the offending was within the last six years, so we've got no limitation issue, it fell within the Sentencing Act, exactly the same circumstances. The sentencing judge is satisfied the harm has been suffered, emotional harm, but declines to reward reparation on the basis that the offender has no means of paying it. That person too would fall under the PVC Act as somebody who's a victim, who suffered harm, who has not had effective redress, because suddenly the offender has compensation and suddenly does have the means to pay, which is really the underlying – this is the purpose of the PVC. Suddenly, there's a means to pay and there's a victim who has never received redress. So, it is a small class.

COOKE J:

Would it not affect people like the plaintiff in the *Pou* case?

15 **MS PENDER:**

It could. It depends how it's defined. I mean, that's a further class and that may be a situation that needs to be determined on its own facts. In terms of this case though we're actually looking at the facts of this case which would be Mrs Hawkins and her relationship to Mr Te Hei –

20 **WINKELMANN CJ:**

How would you define that?

MS PENDER:

Well, it's the legislative policy that there is an intention that there is, I'm not sure whether you'd call it a duty of care or whether it's more about foreseeability of harm –

WINKELMANN CJ:

So, is your answer to the question that you'd define it by reference to whether they have a claim under the PVC Act?

MS PENDER:

The claim, obviously we have to get over the hurdle of 46(2)(c), but there is, already in the general law, already compensation under the Sentencing Act. Somebody who has had reparation paid for emotional harm under the
5 Sentencing Act has already received that and they wouldn't need it under the PVC Act because they've already had the effective redress. So there –

WINKELMANN CJ:

So, we would make this new common law cause of action for someone who hasn't already had compensation under the Sentencing Act and who has a
10 claim under the PVC Act because the prisoner has received compensation.

MS PENDER:

The fact that the prisoner's received compensation it does trigger the Act, it enables the Act to work. In terms of, though, what it is that just in its purest sense of what it is, it's just recognising that there is already a legislative
15 imperative that says that there's something about this particular relationship that means that this offender would, in the ordinary sense, if they could pay –

WINKELMANN CJ:

Aren't you undermining your own arguments really? Wouldn't you just be better to formulate it as a cause of action that is a cause of action for anyone who's in
20 a secondary victim situation?

MS PENDER:

Yes. Well, I'm happy to go with that if that's where the Court goes and obviously we would fall within it.

25 In terms of how this decision would apply, people that it would effect, would clearly apply to that smaller class but it would also potentially apply to other people for wrongful death actions which may have their own variables that may need to be considered.

WINKELMANN CJ:

I mean I suppose you could limit it to wrongful death actions caused by crime but...

MS PENDER:

- 5 Well, it is a policy decision and so we're certainly not saying, do not confine it that narrowly, but you could confine it to just the facts of this case. But, yes, going out another layer there could be integrity around that around wrongful deaths. It would bring it in line with the way, perhaps, bereavement damages work overseas if it was emotional harm, or if we were looking at it in terms of
- 10 the common law claim for mental harm having been caused, again but that could be then defined by the circumstances of this case. But the mental harm that was caused to Mrs Hawkins by the actions of Mr Te Hei would be the ratio and then in terms of other cases, but leaving that open, it could possibly also mean in other cases a wrongful death, but they would fall to be determined on
- 15 their own facts and they may have their own permutations depending on other levers that need to be considered and that might be, sort of, more duty of care where you've got the *van Soest* sort of type scenarios that the courts have grappled with.
- 20 They're always difficult cases. *van Soest*, *Paul v Royal Wolverhampton* they're very difficult cases and so they end up with perhaps these thresholds and these requirements that are too restrictive than they really need to be. This is a much more simple case.

WINKELMANN CJ:

- 25 So, we're dealing with your reply at the moment.
1540

MS PENDER:

- So that was just in reply to that particular point. The second point was, this is more the cross-respondent referring to the referral back and it really comes
- 30 back, the submissions were made earlier on, very much rely on what the Court of Appeal found in terms of their interpretation of the Act.

This is the Act, the Act does not require a claimant to prove a case. All it requires a claimant to do is to fill out a pre-approved form within the requisite time which is what Mrs Hawkins did. The claim itself invites information around emotional harm and exemplary damages. In this particular case, that's what Mrs Hawkins did at first instance. It was challenged. She got legal advice and more evidence was put in, in the form for an affidavit and a submission.

Just by way of background, in terms of this, there was an earlier issue about the fact that the Tribunal's decisions are not readily available and the Tribunal released a decision that it considered was on point, the *Payne v Tuhoro* [2021] NZVSC 21 and that's in that, in a case on appeal, which showed that they effectively would grant emotional harm.

So the evidence, there was no additional evidence provided that would look to prove a recognisable psychiatric disorder and in terms of perhaps injecting a little bit of realism here, too, we look at the context of what the amounts at stake and this is a legal aid matter, to engage a psychiatric expert evidence in a case like this, when your Tribunal said I don't need it, it's just not going to happen. So, the situation where the Tribunal perhaps has got, perhaps got the erred on the law but maybe hasn't got the outcome wrong, maybe there is a case, there is a cause of action, section 46(2)(c), all it requires the Tribunal to do is be satisfied that there is this right before accepting the claim. It's not a determination, it's not a judgment, it's just that that's one of the hurdles they have to be satisfied of.

If they were satisfied but for the wrong reasons, you refer it back and they go, well, I'm still satisfied, just for a different reason, then it's not the same as a complete re-trial and it would be very unfair to a claimant who is not – has any obligation to prove a case to be disadvantaged by that, because time will have expired for any claimant in that respect.

So that's that and in terms of the merger of judgment argument, *Hagaman* was a defamation case, so the Law Reform Act, it did away with that maxim about

rights to claim expiring on somebody's death, for everything except for defamation. In that case, the key point there was not so much the re-trial, it was the fact that the cause of action was never perfected in the first place. It went to the jury. The jury said, yes, potentially defamation, but they didn't
5 determine whether there were damages and they didn't determine whether there was malice, so no judgment was ever able to be entered in that case because those elements had not been determined. It had to go back to the jury because they had missed that but it was never actually perfected. So, in that case, that cause of action did not merge into the judgment but the cause of
10 action didn't survive death. So, it was defamation, it wasn't exemplary damages.

In this particular case, well, we have had a decision and it's not – it has got, we have gone onto appeal, it would be not in the interests of justice at all for a
15 claimant who has turned into a test case, so it has taken its time to go through the system, to be deprived at the last hurdle of an ability to get a claim recognised simply because she has died in those circumstances.

And the *Lee v Lew* case that Mr Keith referred to, that was, as he said, before
20 the Law Reform Act, the *Lee v Lew* case, that was, so obviously the courts were grappling with this all the time, where plaintiffs, you know, the parties' untimely deaths sort of brought things to an end.

In this case, it was very much a pragmatic way of saying, well, look, you had
25 judgment in your favour, it looks like we're going to have to overturn it and send it back in favour of the defendant, but you, defendant, can't have it both ways, you can't then take the point that the plaintiff doesn't get to run it again. So it was them working with this, probably this maxim, it was very inflexible and of its time, but that was a Privy Council case, affirming a Supreme Court case of
30 Canada and that was what applied before the Law Reform Act came in. So to take a more restrictive approach than that, in my submission, would be grossly unjust in these circumstances.

COOKE J:

It may be different if you persuade us to depart from the *van Soest* requirements, but if there is a requirement to establish a recognisable psychiatric illness, the problem is that's going to need new evidence and the principal evidence would become from the person who's died, so it would be very difficult to really satisfy that claim, wouldn't it?

MS PENDER:

Well, it depends. The evidential standards, as we say, for the Tribunal, it's not the same rigour. They can perhaps accept something that's not cross-examined, for instance, an opinion on the face of it based on what's been described. They may be able to say: I'm satisfied on the balance of probabilities, that looks to me like it was post-traumatic stress, you know, classic symptoms of PTSD, and that may – but that's really for the Tribunal to determine within its evidential – it's got a lot of power there around that. The evidential rules aren't the same. Certainly, it would be a problem in the civil courts, I would venture, but that would be required and there would be an expectation of cross-examination, et cetera, but in this situation, we may get there, but certainly made more difficult by the fact that Mrs Hawkins is no longer alive.

COOKE J:

And one of the rationales for the rule that the cause of action died with the – on the death of the plaintiff was the principal witness was no longer available.

MS PENDER:

Well, except here we have got evidence from the principal witness already in the form of an affidavit, and all these are done on the papers – well, no, I take that back. The Court of Appeal anticipated that this might have to be one of those rare cases where there's an oral hearing, but they are – they adapt to the nature of the quantum and what we're dealing with, just like reparations do. Reparation's the same. Often the information comes from the victim's impact statement, and I'll just refer the Court to the discussion of that by

Justice Hammond in the *Sargeant v Police* (1997) 15 CRNZ 454 case, early on in the '90s, about how this really works in practice.

5 I was, I think, expected to come back around the effect of accident compensation. I'm not sure whether we've – I have a feeling from the questions of your Honour Justice Katz that maybe what I was going to respond to has been already addressed. The *van Soest* case was dealing with a number of different claims and some of them fell under the '82 Accident Compensation Act and some after, and they did find on that privilege, and without being able to
10 take a final view, they were satisfied that something less than psychiatric disorder would not have fallen under the '82 Act and it is correct that we only made that concession just because that was the standard we were faced with, because we weren't able to argue that the Court of Appeal – it was a five-panel Court of Appeal and it's really only before this Court that we can really –

15 **KATZ J:**

But in this Court the position is that you can claim compensatory damages on the – if it's accepted that you don't have to prove a recognised psychiatric condition, that something less than that is satisfactory, and something less than that, you say, would not be barred by the '82 Act because it wouldn't have been
20 covered.

MS PENDER:

There's certainly no authority that would say that there was cover for that. *E* is the high-water mark and that was a woman who'd suffered a mental breakdown, so a recognisable psychiatric condition, and that's really the only main case.
25 There are a couple of other cases that my learned friend referred to but they're very on the peripheral and the Act was changed so soon afterwards, that may be a response in and of itself, that if somebody had tried to actually – if, say, somebody in the position of Mrs Hawkins had come along in 1988 and tried to claim that – we just don't know, and it's very unlikely. What we do know is we
30 have her evidence that says that she received nothing.

I just want to respond to my learned friend's position on *Pou* and the argument that the Court of Appeal found that societal changes between 2005 and now, we'd say that that's not the relevant period. The Court of Appeal was unable to depart from *Pou* as a three-judge panel versus a five-judge panel without any
5 real evidence that there'd been significant change since 2005, and they had to assume that the Court of Appeal was looking at society then in 2005.

We say that *Pou* was wrongly decided, and we can do that in front of this Court in a far more direct way than we were able to in the Court of Appeal. In our
10 view, the relevant period is the societal changes between 1952, or whenever – was it '55? – when those key cases were decided on the interpretation of that new 1952 Act, the changes between 1950s and, well, 2005, but even 2026, such massive changes of how we view injuries, how we view mental health, how we equate it more, drawing on the *Saadati* opinion
15 where we say we should stop treating it like a poor cousin to physical injury, we just – we do incorporate that and the examples of where emotional harm or mental distress damages are stand-alone heads of damage quite commonly throughout the civil law and, going back to the last position, a lot of that growth is because they do fall outside the ACC. They don't have cover for them, so
20 that's why they are there too.

And actually, I've got to the end. I thought there were six, but I think there's only five, so those were the points that I had to respond to, unless there's something that you still wish to hear from us on.

25 **WINKELMANN CJ:**

No, thank you.

MS PENDER:

As the Court pleases.

WINKELMANN CJ:

30 Do you have anything by way of reply, Mr Keith? You don't have to make – don't feel obliged to.

MR KEITH:

I don't believe so, Ma'am. I did have a reference – oh, I have an answer to my quandary about Lord Burrows. I was reading Lord Sales, who gave another lecture in the same year on the same thing. It simply says, it's quite a useful
5 discussion of judicial forbearance in the context of statute law reform, forbearance from the common law. If the Court would like, we can provide a copy.

WINKELMANN CJ:

Yes, thank you.

10 **MR KEITH:**

I'll do that, and the other was that the Court of Appeal decision in this instance does envisage that there would be new evidence in the referred-back case, so they weren't proceeding on the premise that's been put, but those were the only points that occurred to me, unless the Court has any questions.

15 **WINKELMANN CJ:**

No, thank you.

MR KEITH:

Most grateful, Ma'am.

WINKELMANN CJ:

20 Thank you, counsel, for your submissions. We will reserve our decision, and we will now retire.

COURT ADJOURNS: 3.52 PM