NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE WITNESS IDENTIFIED IN [13], [64] AND [65] OF THE JUDGMENT IN [2018] NZHC 2330 AND [93(c)] OF THIS JUDGMENT. SEE PARAGRAPH [107].

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-001149
[2025] NZHC 30

IN THE MATTER OF	a claim of historic sexual abuse
BETWEEN	MARIYA ANN TAYLOR Plaintiff
AND	ROBERT ROPER First Defendant
	ATTORNEY-GENERAL Second Defendant

Hearing: 31 October 2024

Appearances: G F Little SC and D B Beard for Plaintiff
J F Mather and L M Herbke for First Defendant
A C M Fisher KC and E N C Lay for Second Defendant

Judgment: 28 January 2025

JUDGMENT OF EDWARDS J

This judgment was delivered by me on 28 January 2025 at 11.00 am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Counsel/Solicitors:
G F Little SC, Auckland
Legal Street, Auckland
J F Mather, Auckland
Corban Revell, Auckland
A C M Fisher KC, Auckland
Crown Law Office, Wellington

[1] Ms Taylor seeks an award of exemplary damages against the second defendant (sued in respect of the Royal New Zealand Air Force, referred to as the RNZAF in this judgment). Her claim arises out of the sexual abuse and false imprisonment she suffered at the hands of Mr Roper when they were both in the RNZAF in the 1980s.

[2] Exemplary damages are in a different category to those routinely sought in a civil claim. Rather than compensating for harm suffered, they are aimed at punishing a wrongdoer for outrageous conduct and deterring the wrongdoer and others from acting in the same way. Words like "contumelious", "high-handed", "oppressive" and "wilful" are used to describe the sort of conduct which attracts an award of exemplary damages.[1]

[3] The claim for exemplary damages against the RNZAF is the only part of Ms Taylor's claim which remains. Proceedings were commenced in 2016. The trial took place in 2018 and the first High Court judgment was issued that year.[2] Appeals from the judgment then followed, culminating in a Supreme Court decision which confirmed that Ms Taylor's claim for compensation was barred by the Accident Compensation Act 2001 (ACC Act).[3] The claim for exemplary damages was remitted to this Court for determination. Subsequently, Ms Taylor discontinued her claim for exemplary damages against Mr Roper. She proceeds only against the RNZAF.

[4] The claim for an award of exemplary damages is opposed by the RNZAF. The RNZAF says the claim cannot be established at law as exemplary damages are not awarded in cases of vicarious liability, and the Crown cannot be sued directly in tort. More importantly, it says that its conduct falls far short of that which would attract an award of exemplary damages, and an award would not act as a deterrent given the changes that have occurred in the last 30 years in the way abuse complaints are handled in the RNZAF.

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1 *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [26] and [138] citing *Taylor v Beere* [1982] 1 NZLR 81 at 90 per Richardson J; *Donselaar v Donselaar* [1982] 1 NZLR 97 at 115 per Somers J; and *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) at 1229.

2 *M v Roper* [2018] NZHC 2330 [High Court judgment].

3 *Roper v Taylor* [2023] NZSC 49, [2023] 1 NZLR 1 [Supreme Court judgment].

[5] Ms Taylor also makes an application for leave to adduce a report prepared by Ms Frances Joychild KC in 2018 (the Joychild report) as evidence in the proceeding. This report followed an independent inquiry established by the Chief of the RNZAF into the way the RNZAF handled complaints relating to Mr Roper's conduct in the 1980s.

[6] The RNZAF opposes the application to adduce the Joychild report on the basis that it comprises hearsay and opinion statements and is not cogent of the issues in dispute. Moreover, it was available to Ms Taylor's lawyers prior to trial, as were the statements of some of those interviewed by Ms Joychild for the inquiry. Many of these interviewees were called as witnesses at the trial.

Relevant background

[7] The background to the claim is set out in my judgment dated 5 September 2018.[4] Only the key events are referred to below.

[8] Ms Taylor was an aircraftsman with the RNZAF in the 1980s and was stationed at Whenuapai. Mr Roper was a sergeant with the RNZAF at this time.

[9] Between 1985 and 1988, Ms Taylor was working in the same section as Mr Roper. In the first trial, I found that Ms Taylor was subjected to sexual abuse and intimidation by Mr Roper during her time there. This included: being locked in a car and groped by Mr Roper as she drove him home at night;[5] being locked in a tyre cage and prodded with an iron bar;[6] and touched and ogled in an overly sexualised way (touching her bottom, pulling on her bra strap, rubbing himself against her, and peering at her and others in the changing rooms and on parade).[7] I found that Mr Roper's abuse of Ms Taylor was a material and substantial cause of her post-traumatic stress disorder.[8]

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4 High Court judgment, above n 2, at [5]–[18].
5 At [36].
6 At [51].
7 At [75].
8 At [122]–[123].

[10] Ms Taylor said she complained about this conduct to her superiors. However, 30 years on, I found there was insufficient evidence to establish that Ms Taylor had complained.[9] This factual finding was upheld on appeal.[10]

[11] Following Mr Roper's convictions for sexual offending in 2014, Ms Taylor made a complaint to the police. In 2015, the RNZAF commenced the independent inquiry into the way complaints about Mr Roper had been dealt with at this time. This inquiry was led by Ms Joychild. Ms Taylor was interviewed by Ms Joychild as part of that inquiry.

[12] Ms Taylor subsequently filed this proceeding on 27 May 2016 and withdrew her criminal complaint against Mr Roper.

[13] As is discussed later, a draft of the Joychild report was prepared in 2017 and finalised in early 2018. It was provided to Ms Taylor's lawyer in February 2018, shortly before the High Court trial.

High Court, Court of Appeal and Supreme Court judgments

[14] The trial in this Court commenced on 5 March 2018. Judgment was delivered on 5 September 2018.[11]

[15] I found that Mr Roper did most, but not all, of the acts alleged by Ms Taylor, but he did not do them as frequently as she had alleged.[12] As already noted, I found the allegation that Ms Taylor had complained to her superiors was not proved on the evidence. I held that Ms Taylor's claim was barred by the Limitation Act 1950 and the ACC Act.[13]

[16] Ms Taylor appealed. A majority in the Court of Appeal found that the claim was not barred by the Limitation Act 1950, and the claim for false imprisonment was

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9 At [76].
10 *Taylor v Roper* [2020] NZCA 268, [2021] 3 NZLR 37 [First Court of Appeal judgment] at [62].
11 High Court judgment, above n 2.
12 At [188(a)].
13 At [188(c)–(d)].

not barred by the ACC Act.[14] The appeal was allowed on those two grounds only. Factual findings, including that there was insufficient evidence that Ms Taylor had complained, were upheld.[15]

[17] There were applications for leave to appeal to the Supreme Court by all parties. The Supreme Court granted leave to appeal on issues concerned with the application of the ACC Act, and its application to the claim for false imprisonment.[16] The appeal was allowed on the latter ground and the finding that the false imprisonment claim was barred by the ACC Act was reinstated.[17]

[18] Ms Taylor's claim for exemplary damages was remitted to this Court for determination.[18]

The scope of Ms Taylor's claim

[19] The outstanding issues in this case are to be determined by reference to Ms Taylor's pleaded claim against the RNZAF and the evidence adduced at trial.

[20] Ms Taylor's claim is pleaded in her amended statement of claim dated 21 November 2016. Four causes of action in tort are pleaded.

[21] The first three are pleaded against Mr Roper and the RNZAF for: assault; intentional infliction of emotional harm; and false imprisonment.

[22] The RNZAF's liability in relation to these three causes of action is said to arise both vicariously and directly. The direct liability claim is on the basis that Mr Roper was acting as the RNZAF in relation to Ms Taylor. That is, Mr Roper's actions are directly attributable to the RNZAF.

[23] The fourth cause of action is against the RNZAF alone. It is pleaded that the RNZAF owed Ms Taylor a duty of care as an employer or being in a position

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14 First Court of Appeal judgment, above n 10, at [172]–[175] per Brown and Clifford JJ.
15 At [210] per Brown and Clifford JJ.
16 The precise issues upon which leave was granted are set out in the leave judgment: *Roper v Taylor* [2022] NZSC 62 at [4].
17 Supreme Court judgment, above n 3, at [104].
18 At [25]; and First Court of Appeal judgment, above n 10, at [211].

analogous to an employer. In essence, the alleged breaches relate to an alleged failure by the RNZAF to keep Ms Taylor safe from Mr Roper, to act on complaints, and to prevent him from continuing to assault, sexually harass, falsely imprison, and bully her.

[24] The scope of that duty is restricted to failures by the RNZAF in relation to Mr Roper's conduct towards Ms Taylor. It does not relate to the way the RNZAF handled claims of sexual abuse and misconduct more generally. That is, it is not a claim for systemic failure in the broad sense. This was confirmed by the Court of Appeal.[19]

[25] Finally, for completeness, I record that the statement of claim includes a claim for exemplary damages in the sum of $150,000 (in addition to other heads of damages). However, in his oral submissions, Mr Little SC sought the sum of $400,000. For the reasons set out more fully below, I have not found it necessary to consider the quantum of any exemplary award in this case.

Should leave be granted to adduce evidence of the Joychild report?

The Joychild report

[26] Counsel for Ms Taylor applies for leave to adduce the Joychild report. As already noted, this followed an independent investigation established by the Chief of the RNZAF following Mr Roper's convictions in 2014.[20]

[27] The inquiry was into the RNZAF's handling of sexual abuse, harassment, and bullying by Mr Roper in the 1980s. The inquiry also extended to contemporary systems and processes for handling complaints of this nature.

[28] Ms Joychild was appointed to investigate and report on specific questions and to make recommendations to the RNZAF for improvements in its policies, processes, and systems. The questions posed included whether there had been any complaints of

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19 At [65]–[66].

20 This was not an inquiry under the Inquiries Act 2013.

abuse, harassment or bullying against Mr Roper during the years 1984 to 1988, and the investigation processes which were followed.

[29] The inquiry was conducted over approximately two years. Ms Joychild interviewed around 50 people. None were examined on oath. They were interviewed on the basis that they would not be identified by name in the published report and pseudonyms were used instead.

[30] A final report was submitted to the RNZAF in draft form in 2017. A final report was delivered to the RNZAF on 21 January 2018. It appears that the delay in finalising the report, and in making it public, was to allow the Chief of the RNZAF to comply with an undertaking he made to four victims of Mr Roper that they could read the report in draft form.

[31] The Joychild report comprises a report of some 243 pages, and Executive Summary and Recommendations of a further 49 pages. Extensive recommendations (97 by the RNZAF's count) were made as to processes and systems for dealing with complaints of abuse.

The present application

[32] The grounds advanced in support of the application are set out in some length in the written application. The key grounds may be distilled as follow:

(a) Ms Taylor was prevented from identifying and contacting witnesses who would have been able to corroborate her complaint about the failures of the RNZAF in relation to complaints about Mr Roper.

(b) The report received prior to trial was redacted to such an extent that it was not possible to identify potential witnesses and was of little use. Ms Taylor's legal team proceeded with what they had.

(c) The Crown's offer to agree to an adjournment of the trial if sought by Ms Taylor was declined by her counsel.

(d) The Joychild report could have been provided much earlier and there was non-compliance with the orders of the Court in relation to discovery of the report and identification of interviewees who had given statements.

[33] Despite the application referring to potential witnesses and their statements made to Ms Joychild as part of the inquiry, the application does not extend to these statements. In any event, as explained below, Ms Taylor's legal team received statements from those witnesses who consented to their release.

[34] As already noted, the RNZAF opposes the application on the grounds that the evidence is inadmissible as it is not cogent, nor fresh. The specific grounds of opposition are discussed further below.

Relevant legal principles

[35] Under s 98 of the Evidence Act 2006, a party may not offer further evidence after closing that party's case, except with the permission of the Judge. Permission may be granted at any time until judgment is delivered.[21] Permission may not be granted if any unfairness caused to the other party cannot be remedied by an adjournment or an award of costs, or both.[22]

[36] The principles relevant to an application to adduce evidence after trial were summarised in *Equiticorp Industries Group Ltd (in stat man) v Hawkins* as follows:[23]

(a) The discretion should be exercised sparingly once the cases on both sides have closed, and leave should only be given in exceptional circumstances.

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21 In the context of this claim, the relevant judgment to be delivered is the judgment on the claim for exemplary damages.

22 Evidence Act 2006, s 98(2).

23 Jessica Gorman and others *McGechan on Procedure* (online ed, Thomas Reuters) at [HR487.07] and [HHR10.10.07] citing *Equiticorp Industries Group Ltd (in stat man) v Hawkins* [1996] 2 NZLR 82 (HC) at 85.

(b) Only if the failure to call evidence at the proper time is adequately explained should the discretion be exercised.

(c) The justice of the case must require the admission of the additional evidence.

(d) Leave will be refused if the evidence would have been available had due diligence been exercised.

(e) If the party is taken by surprise, leave will be more readily granted.

(f) The distinction between a failure to tender evidence, and an election not to call evidence, can be important.

[37] As the authors of *McGechan on Procedure* observe, these principles are similar to those which apply to an application to adduce fresh evidence on appeal.[24] The test for admission of the evidence in those circumstances is whether the evidence is fresh, credible and cogent.[25] These principles are designed to balance the interests of the parties and reflect the public interest in ensuring, so far as is possible, that parties put forward their best case at trial.[26]

Is the Joychild report cogent?

[38] The Joychild report is a comprehensive document following an independent inquiry conducted over several years. There is no challenge to the quality of that report, nor recommendations made. The cogency analysis focuses on the relevance and value of the report in relation to the issues in this proceeding.

[39] Contrary to the RNZAF's submissions, I consider the Joychild report is relevant to Ms Taylor's claim. That is because it has some bearing on what the

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24 At [HHR10.10.07(2)].

25 *Lawyers for Climate Change Action NZ Inc v Climate Change Commission* [2023] NZCA 443 at [12] citing *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192–193; and *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6].

26 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192.

RNZAF knew about Mr Roper's conduct at the relevant time, and the steps taken (or not taken) to protect Ms Taylor from the risk of harm. The recommendations made in the report (many of which were subsequently implemented) are also relevant to whether an award of exemplary damages would serve the principle of deterrence.

[40] The cogency of the report does not, however, lie in the conclusions of Ms Joychild, but in the accounts of those who were interviewed by her as part of the inquiry.[27] Indeed, the section concerning complaints made against Mr Roper between 1984 and 1988 (the most relevant section of the Joychild report) comprises, in large part, a summary of those accounts.

[41] Many of those who were interviewed by Ms Joychild gave evidence at trial. These witnesses consented to the release of their information to Ms Taylor prior to trial. Evidence before the Court show that 15 records of interviews for 13 people were sent to Mr Little in July and August 2017 from Ms Joychild's office.[28] Some interviewees did not consent to their interview records being provided to Ms Taylor, as was their right.

[42] All but two of the 13 people who had consented to release of their information gave evidence at the first trial in 2018. Seven of them gave evidence for Ms Taylor, with the remainder giving evidence for the RNZAF. This evidence contradicts the suggestion that Ms Taylor was prevented from identifying and contacting witnesses who would have been able to corroborate her evidence.

[43] This suggests that the real value of the Joychild report, being the accounts of those interviewed for the purposes of the inquiry, has already been realised in the evidence given at trial. The Joychild report adds very little to that evidential picture, and in that sense, it is not cogent.

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27 As a matter of law, Ms Joychild's conclusions are hearsay and opinion statements which are likely to be inadmissible under the Evidence Act 2006. However, even if admissible, the nature of these conclusions significantly reduces the cogency of the report on the issues to be determined in this case. This appears to have been recognised by Mr Little when, in 2017, he refined the scope of a discovery application relating to the Joychild report to focus on the statements of the interviewees, rather than the report itself.

28 This evidence is consistent with Mr Little's memorandum of counsel filed on 7 February 2018 which acknowledged receipt of these statements.

Is the Joychild report fresh?

[44] The Joychild report is not fresh in the sense that it has only become available after trial. Indeed, as explained below, Ms Taylor's legal team had the report prior to the first trial in 2018. Therefore, the focus of the freshness inquiry is on the diligence exercised to adduce that evidence and the reason it was not adduced at the first trial.

[45] Ms Taylor's legal team is unable to provide an adequate explanation for the failure to adduce this report before now. The report was initially sought by Ms Taylor's legal team in a discovery application filed on 24 May 2017. That application was subsequently refined by Mr Little so that it related to records of interviews created by Ms Joychild.[29] The application was ultimately resolved by Associate Judge Bell directing that the RNZAF and Ms Joychild should contact interviewees to advise them of Ms Taylor's request and to enquire whether they consent to the information given to Ms Joychild being disclosed.[30] Leave was reserved to seek a telephone conference if further directions were required.[31]

[46] As already noted, 15 records of interviews for 13 people were sent to Mr Little in July and August 2017 from Ms Joychild's office, and all but two of the 13 people who had consented to release of their information gave evidence at trial.

[47] On 20 February 2018, this Court ordered that the Joychild report be provided on 22 February 2018 with redactions to protect the interviewees' identities. A copy of the redacted report was provided to Ms Taylor's lawyers on 22 February 2018. This was approximately one and a half weeks before trial commenced on 5 March 2018.

[48] Mr Little submits that the redacted report was received at a time when he and the other members of Ms Taylor's legal team were busy preparing for trial. He says the report was of little use as it did not identify the persons who had provided information to the inquiry, and Ms Taylor's legal team "had to proceed with what they had".

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29 *M v Roper* HC Auckland CIV-2016-404-1149, 20 June 2017 at [3].
30 At [7].
31 At [9].

[49] This explanation falls well short of what is required to adduce fresh evidence at this very late stage. Trial lawyers will always be busy in the lead-up to trial—it is the nature of the trial process.

[50] If Mr Little felt Ms Taylor's case was prejudiced by either the late disclosure of the report, or the extent of the redactions, then he could have sought an adjournment of the trial to give him some more time. The RNZAF had offered to agree to an adjournment of the case if that was required. Mr Little says it was decided not to take that course because further delays to the hearing were not in Ms Taylor's best interests.

[51] This suggests a deliberate and strategic decision was made to proceed with the trial on the basis of the evidence as it then stood. While there may have been good reasons to make that decision at the time, it is far too late to revisit that decision six years and several Court decisions after the trial.

[52] In sum, there is no satisfactory explanation for the failure of Ms Taylor's legal team to seek to adduce the Joychild report at the first trial. This weighs heavily against admission of the evidence at this late stage.

Other factors

[53] Finally, admitting the report at this late stage, risks reopening the entire trial. If Ms Joychild and others were called to give evidence, some of the witnesses who gave evidence at the first trial would need to be recalled. This gives rise to the prospect of a rehearing of the evidence heard some six years ago and after appeal rights have been exhausted. This would not be in the interests of any of the witnesses who gave evidence at the first trial. The time and cost of repeating that process would not be in the public interest either.

[54] It follows from the above that there are no exceptional circumstances, and it is not in the interests of justice, to allow the Joychild report to be adduced in evidence. The application is declined. This means that whether an award of exemplary damages against the RNZAF should be made must be decided on the evidence adduced at trial.

Are exemplary damages available for vicarious liability?

[55] As already noted, the first three causes of action against the RNZAF are pleaded on the basis that the RNZAF is vicariously liable for the actions of Mr Roper.

[56] Counsel for the RNZAF submits that exemplary damages are not awarded on a vicarious basis. This means that even if vicarious liability is established, then an award of exemplary damages will not be made. This is because an award would be at odds with the purpose of exemplary damages.

[57] The RNZAF relies on the Court of Appeal's decision in *S v Attorney-General* in reaching that conclusion.[32] That was a claim by S arising out of abuse and sexual molestation committed by foster parents. The Court of Appeal held that the Crown was vicariously liable for the acts of the foster parents and the Crown was accordingly found liable to compensate the plaintiff for the abuse. However, the Court declined to award exemplary damages on a vicarious basis stating that it would not be consistent with the purpose of such an award. Blanchard J explained that conclusion as follows:

> [88] We have earlier determined that the Crown is liable to compensate the plaintiff for abuse by his foster parents. But it does not follow that it would be proper also to impose liability for exemplary damages on a vicarious basis. In fact, when it is appreciated that the primary purpose of such damages is to punish a flagrant wrongdoer, not to provide additional compensation (in contrast to compensatory damages awarded on an aggravated basis), it might seem to be quite unfair to inflict a punishment upon someone who has been found not to have been complicit in the wrongdoing. Exemplary or punitive damages would not then be a reflection of the culpability of the defendant. Any "message of disapproval" would be delivered to the wrong person.

[58] The Court of Appeal left open the possibility that exemplary damages may be available if a state official had acted deliberately, recklessly or in a grossly negligent manner by directing personal injury on the plaintiff, and that official had not been able to be identified and so the wrongdoer had not been punished or disciplined.[33]

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32 *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [88]–[93].

33 At [93]. See also *P v Attorney-General* HC Wellington CIV-2006-485-874, 16 June 2010 at [84] in which Mallon J observed that the rationale for exemplary damages of subjective recklessness which found favour with the majority in *Couch v Attorney-General (No 2)* (above n 1) does not support exemplary damages on a vicarious liability basis.

[59] Applying the reasoning in *S v Attorney General* to this case, there is no basis upon which to make an award of exemplary damages against the RNZAF on a vicarious basis. It is Mr Roper who is the flagrant wrongdoer, not the RNZAF; and it is Mr Roper's conduct, not the RNZAF's conduct, which calls for punishment, denunciation, and deterrence. As Blanchard J said in *S v Attorney-General*:[34]

> It is one thing to require a principal who has without neglect created a situation leading to injury to compensate the injured person; it is quite another to punish the principal for the sins of the agent.

[60] The fact that Ms Taylor's claim for compensation is barred by the ACC Act does not provide justification for an award of exemplary damages in this case. Such awards are not substitutes for compensatory damages and should not be used as a way of circumventing the accident compensation scheme.

[61] The narrow exception identified by the Court of Appeal in *S v Attorney-General* does not apply here either because Mr Roper has been identified as the wrongdoer. When the Court reconvened to hear Ms Taylor's claim for exemplary damages, Ms Taylor discontinued her claim for exemplary damages against Mr Roper. Prior to that, the possibility of an award of exemplary damages for his wrongdoing was open to the Court.

[62] In reliance on the Court of Appeal's decision in *S v Attorney-General*, Ms Taylor's claim for exemplary damages on a vicarious basis in respect of the first three causes of action cannot succeed.

Can the RNZAF be held directly liable in tort?

[63] As already noted, Ms Taylor claims that the RNZAF is directly liable for the first three causes of action on the basis that Mr Roper was acting as the RNZAF.

[64] For the purposes of analysis, I have assumed, without deciding, that Mr Roper's actions can be attributed to the RNZAF, and that he was acting as the RNZAF at the relevant time.

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[34] At [88].

[65] The RNZAF submits that claims against the Crown for direct liability in tort cannot succeed. Counsel relies on the Court of Appeal's decision in *Attorney-General v Strathboss Kiwifruit Ltd* in making that submission.[35]

[66] The decision in *Strathboss* concerned Crown liability for the introduction of the Psa3 kiwifruit virus. One of the issues was the interpretation of s 6 of the Crown Proceedings Act 1950 which provides:

> **6 Liability of the Crown in tort**
>
> (1) Subject to the provisions of this Act and any other Act, and except as provided in subsection (4A) or (4B), the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—
>
> (a) in respect of torts committed by its servants or agents;
>
> (b) in respect of any breach of those duties which a person owes to his or her servants or agents at common law by reason of being their employer; and
>
> (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession, or control of property:
>
> provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his or her estate.

[67] After canvassing the history of Crown immunity and the background to s 6(1)(a) of the Crown Proceedings Act 1950 in some detail, the Court of Appeal concluded that the effect of s 6(1)(a) was that, subject to some exceptions, the Crown could only be sued vicariously in tort.[36]

[68] In reaching this conclusion, the Court of Appeal referred to scathing criticism of the enactment of s 6(1)(a) of the Crown Proceeding Act 1950 which effected this change to the common law:[37]

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35 *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247.

36 At [109] and [111].

37 At [98] citing Stuart Anderson "'Grave injustice', 'despotic privilege': the insecure foundations of crown liability for torts in New Zealand" (2009) 12 Otago LR 1 at 21.

> The statutory limitation of torts liability to vicarious liability is an embarrassment to our law, and a distortion of it. It has no principled justification, and never has had. It is the result of accidents of English history. It was brought into New Zealand law as a substitute for an indigenous rule that by then had its limitations, but was a rule based upon principle.

[69] After citing this passage, the Court of Appeal said:[38]

> Whatever the rights or wrongs of the matter may be as a matter of policy, we venture to suggest that the law in this respect is entirely clear.

[70] The Court went on to cite three other references that supported the conclusion that Crown liability for tort must be vicarious and could not be direct, namely:[39] the judgment of Cooke P in *Crispin v Registrar of District Court*;[40] *Todd on Torts*;[41] and the Law Commission report on Crown liability.[42] The Court said:[43]

> If the position is to change, that too must be the product of careful, incremental statutory (rather than common law) reform, as the Law Commission recognised in 2015.

[71] The effect of s 6(1)(a) of the Crown Proceedings Act and the Court of Appeal's decision in *Strathboss* means the claims against the RNZAF for direct liability in relation to the first three causes of action cannot succeed. That may seem very unfair in these circumstances, but, as the Court of Appeal said, the law in this area is a matter for Parliament to change if it sees fit.

[72] This means there is no legal basis upon which to make an award of exemplary damages against the RNZAF for direct liability in tort. The claim for exemplary damages for the first three causes of action must be dismissed.

Should exemplary damages be awarded in relation to the fourth cause of action?

[73] As noted above, the fourth cause of action is pleaded on the basis that the RNZAF owed Ms Taylor a duty of care as an employer or being in a position analogous to an employer.

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38 At [99].
39 At [100]–[104].
40 *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 (CA) at 254.
41 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019).
42 Law Commission *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* (NZLC R135, 2015).
43 *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 at [109].

[74] The RNZAF did not rely on s 6(1)(a) and *Strathboss* in relation to the fourth cause of action. That is despite the claim being framed as a claim for direct liability in tort.[44] In the absence of submissions directed towards the application of s 6, I proceed on the assumption that the claim is not barred by this section.

[75] However, that is not the only legal hurdle to establishing Ms Taylor's claim. Before getting to the stage of exemplary damages, Ms Taylor's lawyers would need to show that the RNZAF owed the pleaded duty of care. That is not straightforward. The pleaded claim is novel and the implications of recognising such a duty would need to be carefully considered.

[76] Mr Little did not address me on this issue at the most recent hearing, nor seek to persuade me that the law should recognise such a duty. Counsel for the RNZAF made brief submissions on the relevant policy factors but suggested that the claim for exemplary damages could be decided without finally deciding whether a duty of care exists. In the absence of assistance from the parties on this difficult issue, I proceed on the assumption that the RNZAF did owe Ms Taylor the duty of care pleaded in the fourth cause of action.

[77] To prove her claim, Ms Taylor would need to show that the RNZAF breached its duty of care. However, proof of breach would not, on its own, be enough to justify an award of exemplary damages for negligence. As I explain below, on the current state of the law, even "gross negligence" is not enough. Something more is required to meet the threshold for exemplary damages in cases of negligence.

The threshold for exemplary damages in negligence

[78] The threshold for exemplary damages in cases of negligence was fixed by the Supreme Court in *Couch v Attorney-General (No 2*).[45] The Supreme Court held that an award of exemplary damages for negligence will only be made for intentional and

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[44] The Law Commission suggests that the Crown may not be sued for institutional or systemic failure: see Law Commission *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* (NZLC R135, 2015) at [3.8].

[45] *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.

outrageous conduct or subjective and outrageous recklessness.[46] This is a very high threshold, and awards are likely to be rare.[47]

[79] Subjective recklessness requires a defendant to have had a conscious appreciation of the risk of causing harm and to have made a deliberate decision to run that risk.[48] The greater the risk and the greater the harm that is likely to ensue, the more likely it is that the conduct will be described as outrageous.[49]

[80] This form of negligence is to be contrasted with objective recklessness. This is where a person does not appreciate an obvious risk of causing harm and proceeds to cause the harm without appreciation of the risk. In *Couch*, Tipping J described the differences between the two forms of recklessness as follows:

> [100] The English language encompasses two distinct states of mind within the single concept of recklessness. The law also recognises the distinction. A person may be described as reckless who does not appreciate an obvious risk of causing harm and proceeds to cause the harm without appreciation of the risk. This is what in law is known as objective recklessness. It is the practical equivalent of a high level of negligence. On the other hand, a person may appreciate the risk of causing harm and proceed nevertheless deliberately to run that risk and end up causing the harm. That is subjective recklessness. Subjective recklessness is generally seen as more culpable and deserving of punishment than objective recklessness. In the case of subjective recklessness there is a conscious appreciation of the risk that one's conduct may cause harm and a deliberate decision to run that risk. The greater the risk and the greater the harm which is likely to ensue, the more culpable the person's conduct will be and the more appropriate it may be to describe it as outrageous.

[81] As described by Tipping J, the rationale of only allowing an award of exemplary damages for subjective recklessness is that a person who consciously chooses to run the risk of causing harm is more blameworthy than a person who causes harm without choosing to do so.[50]

[82] Moreover, the subjective recklessness must also be outrageous to attract an award of exemplary damages.[51] Whether running such a risk is to be regarded as outrageous depends on the degree of risk that was appreciated and the seriousness of

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46 At [102] at [178].
47 At [100].
48 At [100].
49 At [100].
50 At [113].
51 At [100] and [178]–[179].

the personal injury that was foreseen as likely to ensue if the risk materialised.[52] The type of conduct which might otherwise attract an award of exemplary damages has been described as "malicious", "high-handed", "arbitrary", "oppressive", "contumelious", "wilful", "wanton", "cruel", "contemptuous", "reprehensible", and deserving of society's condemnation and punishment.[53]

[83] In *S v Attorney-General*, the Court of Appeal sounded a note of caution about ensuring that the distinction between compensatory and exemplary damages was maintained.[54] Exemplary damages are not a surrogate for compensatory damages. This is important in New Zealand because the accident compensation scheme means that claims for compensatory damages in cases of negligence involving personal injury are likely to be statute barred, just as Ms Taylor's case is here. Exemplary damages awards should not be allowed to subvert the accident compensation scheme, as Blanchard J explained:

> [89] Exemplary damages are not intended, and should not be used, to provide an additional monetary remedy. Where compensatory damages are able to be awarded vicariously against a principal they will provide the full and effective remedy, even in circumstances in which the actual wrongdoer cannot be found or is impecunious. In this country, of course, the accident compensation scheme will ordinarily prevent an award of compensatory damages, but that does not mean that exemplary damages should be allowed to change their character and become a way of providing lump sum compensation if and to the extent that the scheme does not allow for it. There is no warrant for the Courts to attempt to make up for any perceived inadequacy in the accident compensation scheme. That would, as counsel for the respondent said, merely undermine the scheme. It would require employers to self-insure against that risk or pay for insurance cover, if available, as well as meeting levies under the scheme.

[84] The high threshold for an award of exemplary damages in cases of negligence is exemplified in several cases in both this Court and the Court of Appeal.

[85] The case of *W v Attorney-General* involved a child victim of sexual assault committed by foster parents.[55] The child had made complaints of "rudeness" to the

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52 At [179].

53 At [26], [44] and [138] citing *Taylor v Beere* [1982] 1 NZLR 81 at 90 per Richardson J; *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 at [63] per Lord Nicholls; and *Donselaar v Donselaar* [1982] 1 NZLR 97 at 115 per Somers J; and *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) at 1229.

54 *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [89].

55 *W v Attorney-General* CA227/02, 15 July 2003.

social worker at the time, but not of sexual abuse.[56] The Court of Appeal upheld the trial Judge's finding that the social worker had been negligent in "not picking up the message" and taking it seriously and acting to protect the plaintiff.[57] However, judged by the standards of the time, the Court of Appeal said that the conduct was not such that it ought to be marked by an award of exemplary damages.[58]

[86] *P v Attorney-General* involved a claim for damages for a sexual assault that occurred while the plaintiff, who was 17 years old, was serving in the Navy in 1984.[59] The plaintiff alleged that another naval officer, who was of a higher rank, had sexually assaulted him one evening in his bunk. He also claimed damages for alleged threats and intimidation from other Navy personnel for reporting the sexual assault.

[87] The claim against the Navy was alleged on a vicarious and direct basis. Exemplary damages were claimed on several grounds. These included that the Navy was aware that bullying and a form of discipline called "mess justice" were part of the Navy culture but chose not to intervene or take steps to prevent the sexual assault and the threats and intimidation even though it would have been possible to do so.[60]

[88] The Judge found that the claim was barred by the ACC Act and also declined to make an award of exemplary damages.[61] Her Honour found that the Navy's conduct did not meet the threshold of intentional or subjective recklessness which was outrageous.[62] The Judge considered that an award of exemplary damages for the Navy's vicarious liability would be "pointless".[63] That was because the Navy operated very differently from the time of the alleged assault; the legal landscape was different; and the Navy had comprehensive policies and practices relating to physical, sexual, and other abuses.[64]

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56 At [55].
57 At [55] and [61].
58 At [61].
59 *P v Attorney-General* HC Wellington CIV-2006-485-874, 16 June 2010.
60 At [75(c)].
61 At [13]–[14].
62 At [178].
63 At [90].
64 At [90].

[89] In *AB v Attorney-General*, the plaintiff claimed damages for physical assaults he suffered during his time at Cadet School in the 1970s, when he was 15 years old.[65] The claim was advanced on the basis that the defendant was directly and vicariously liable for breaches of fiduciary duty and a breach of a duty of care (negligence).[66] The Judge was satisfied that exemplary damages for vicarious liability were not justified.[67] That is because no purpose would be served by a deterrent award.[68] While the Cadet School was aware of some risk of bullying among cadets, the Judge could not be satisfied that the risk was so great that the conduct could be described as outrageous, or that the punitive or deterrent purpose of exemplary damages was appropriate for the case.[69]

[90] For completeness, I record that counsel for Ms Taylor relied on *G v G*, in which an award of exemplary damages was made in favour of the plaintiff against her former husband for assault and battery in the course of a violent domestic relationship.[70] That case would have supported an exemplary damages award against Mr Roper, but it provides little assistance in determining whether an exemplary damages award should be made against the RNZAF.

Is there evidence of outrageous subjective recklessness in this case?

[91] Applying these principles to this case, the key question is whether there is evidence of outrageous subjective recklessness to justify an award of exemplary damages in this case. Ms Taylor's lawyers would need to point to evidence that the RNZAF consciously appreciated a risk of harm caused by Mr Roper to Ms Taylor and deliberately and outrageously ran that risk.

[92] Factual findings made in the first trial make it very difficult for Ms Taylor to reach this high threshold. As explained in the first judgment, there was insufficient evidence to prove that Ms Taylor had complained to her superiors about Mr Roper's

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65 *AB v Attorney-General* HC Wellington CIV 2006-485-2304, 22 February 2011.
66 At [423].
67 At [433].
68 At [433].
69 At [439]–[440].
70 *G v G* [1997] NZFLR 49 (HC).

conduct.[71] Those factual findings were upheld on appeal.[72] Proving that the RNZAF was aware of the risks posed by Mr Roper to Ms Taylor, and deliberately ran those risks anyway (let alone in a way that was outrageous) is an enormous task in the absence of proof of complaints.

[93] There was some evidence called at the first trial which suggests that the RNZAF may have been aware of Mr Roper's inappropriate conduct towards women generally:

(a) Mr Roper's nicknames included "Groper Roper".[73]

(b) Ms Cunningham said she made complaints about Mr Roper's conduct (although these complaints were not on behalf of Ms Taylor). Ms Cunningham was a corporal at the relevant time.

(c) Mr Meredith (then a flight lieutenant) dealt with a complaint about Mr Roper's conduct towards another young woman on work experience during the relevant period. The complaint related to inappropriate touching of this young woman by Mr Roper.

[94] This evidence may be enough to show that the RNZAF was aware of the risks posed by Mr Roper to young women more generally. It may even be enough to show that the RNZAF ought to have known that Mr Roper posed risks to Ms Taylor and other women in the unit and ought to have taken steps to protect them.

[95] However, as I have already explained, that is not enough to justify an award of exemplary damages. Ms Taylor would still need to show that the RNZAF *deliberately* ran the risks Mr Roper posed, and acted so *outrageously* that it deserves to be punished. Mr Little has not pointed me to any evidence that establishes these requirements. Indeed, evidence of the way in which the RNZAF handled the complaint relating to another young woman (referred to in [93(c)] above) tends to

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71 High Court judgment, above n 2, at [73].

72 First Court of Appeal judgment, above n 10, at [62] and [210].

73 Mr Roper had other nicknames too, such as "Rocky Roper" and "the backscratcher". These appear to have been well known amongst the junior and non-commissioned officers. However, there was limited evidence that the senior officers knew of these nicknames.

counter the suggestion that the RNZAF deliberately ran the risk in relation to Ms Taylor, or acted in a high-handed, contumelious, or malicious way, in failing to protect her from Mr Roper. The evidence called at trial falls short of that high threshold.

Would an award of exemplary damages meet the object of deterrence?

[96] There is also no reason to suggest that an award of exemplary damages would meet the objective of deterrence in this case. Much has changed in the 30 years since Mr Roper's heinous conduct towards Ms Taylor. Counsel for the RNZAF referred to numerous reviews relating to the progress of gender integration, sexual harassment in the armed forces, sexual assault prevention and management, the quality of recruit training and most significantly "Operation Respect", an action plan for ensuring an inclusive and safe environment for all personnel. Many of the recommendations made by Ms Joychild were also implemented by the RNZAF.

[97] An award of exemplary damages for events that occurred in the 1980s when systems and operations were quite different would be at odds with the deterrent purpose of exemplary damages awards. This factor weighed against an award of exemplary damages in analogous cases, such as *S v Attorney-General*, *P v Attorney-General* and *AB v Attorney-General*.[74] It is a factor which weighs against an award in this case too.

Are there any other grounds to award exemplary damages?

[98] Finally, contrary to Mr Little's submissions, there is nothing before the Court to substantiate the claim that exemplary damages should be awarded for the way Crown counsel conducted the case. There is nothing to indicate that counsel's conduct was inappropriate, let alone coming anywhere near the high threshold for exemplary damages awards to be made. Crown counsel have conducted themselves fairly and with integrity throughout the proceeding.

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[74] *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [123]; *P v Attorney-General* HC Wellington CIV-2006-485-874, 16 June 2010 at [92]; and *AB v Attorney-General* HC Wellington CIV-206-485-2304, 22 February 2011 at [433] and [439].

[99] There are no other grounds upon which to make an award of exemplary damages.

Conclusion

[100] This Court has every sympathy for Ms Taylor and what she endured at the hands of Mr Roper in the 1980s. The desire to hold the RNZAF accountable for what occurred is understandable in those circumstances.

[101] However, like any other claim in this Court, Ms Taylor's claim for exemplary damages must be determined in accordance with the law. And, as I have explained, the law poses significant hurdles for Ms Taylor in this case. The law does not generally allow exemplary damages awards to be made in cases of vicarious liability, and the Court of Appeal has said that the effect of s 6 of the Crown Proceedings Act 1950 means that that RNZAF cannot be sued directly in tort. I am bound by the decisions of the Court of Appeal.

[102] The claim that the RNZAF owed a duty of care raises some difficult legal issues too. But even if these could be overcome, the evidence falls short of reaching the high threshold fixed by the Supreme Court for exemplary damages awards in cases of negligence. There is no evidence that the RNZAF deliberately ran the risk that Ms Taylor would be harmed, let alone acted outrageously or wilfully in doing so. Moreover, the deterrent purpose of an award of exemplary damages would not be met given the changes made in the RNZAF in the last 30 years. There is no other reason to award exemplary damages against the RNZAF in this case.

[103] For these reasons, the claim for exemplary damages against the RNZAF must be dismissed.

Result

[104] The application to adduce the Joychild report as evidence is declined.

[105] The claim for exemplary damages is dismissed.

[106] The RNZAF does not seek costs against Ms Taylor and so I make no order as to costs in the proceeding.

[107] The order prohibiting publication of the name, address, or identifying particulars of the witness identified in [13], [64] and [65] of the first High Court judgment ([2018] NZHC 2330) remains in force. To protect the efficacy and integrity of that order, it is extended to [93(c)] of this judgment.

Edwards J