IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI **SC 16/2022**

SC 23/2022

BETWEEN	**ATTORNEY-GENERAL**
	Appellant
AND	**MARIYA ANN TAYLOR**
	First Respondent
AND	**ROBERT ROPER**
	Second Respondent

ATTORNEY-GENERAL'S SUBMISSIONS ON APPEAL

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INTRODUCTION AND SUMMARY

1. The central issue in this appeal is whether the respondent, Ms Taylor, has cover under the accident compensation legislation and is, therefore, barred from progressing her claim for tortious damages for false imprisonment.

2. Following an eight-day trial in the High Court in Auckland, Edwards J found Ms Taylor suffered mental injury, arising from a series of overtly sexualised acts committed against her by Mr Roper, including rubbing himself up against her, groping her breasts and putting his hands up her skirt. This occurred while she was driving him home, as well as in the tyre bay where he also prodded her bottom with an iron bar and locked her in a tyre cage. These acts formed the basis to establish claims in assaults and false imprisonment. Edwards J considered both claims were intertwined and were covered under the accident compensation regime.

3. On appeal, French J accepted the finding of Edwards J, and considered that it would be wrong to isolate two aspects of Mr Roper's conduct (namely, his detention of Ms Taylor in the car and in the tyre cage) and to hold that this conduct in and of itself was a substantial cause of Ms Taylor's mental injury such that a claim for damages for false imprisonment is not barred.

4. The majority of the Court of Appeal, however, took a different view. They held the false imprisonment cause of action is not a claim for personal injury and the statutory bar in the accident compensation legislation, therefore, does not apply.

5. The Attorney-General's position is that the approach adopted by Edwards and French JJ is correct as it properly addresses the overlapping nature of Ms Taylor's claims. It is not disputed on the evidence that the injury caused by the false imprisonment is all part of a predatory and sexualised course of conduct by Mr Roper against Ms Taylor. The aspect of detention as part of the incidents experienced by Ms Taylor cannot be divorced from the contemporaneous sexual assault.

6. Under the operation of the Accident Compensation Acts (past and present), Ms Taylor has cover and is barred from seeking to litigate a claim in tort. It

runs counter to the text, scheme and purpose of the accident compensation legislation to allow recovery of both statutory compensation and compensatory damages in respect of the same injury.

7. In the event this Court finds Ms Taylor is not barred from proceeding with her claim for compensatory damages, it must go on to decide whether Ms Taylor has separate cover for mental injury caused by exposure to a sudden traumatic event in the course of employment under s 21B of the Accident Compensation Act 2001 (**the Accident Compensation Act**). The Attorney-General submits she has cover and the Court of Appeal's interpretation of this section unduly restricts the scope of compensation for work-related mental injury.

8. The Attorney-General submits the Court of Appeal:

   8.1 erred in its interpretation of *Willis v Attorney-General* (***Willis***) and its interpretation of s 317 of the Accident Compensation Act 2001;

   8.2 erred in its interpretation of s 21B of the Accident Compensation Act; and

   8.3 adopted an approach inconsistent with the text, scheme and purpose of the Accident Compensation Act.

THE HISTORY, SCHEME AND PURPOSE OF THE ACCIDENT COMPENSATION LEGISLATION

9. The accident compensation legislation is a bespoke feature of New Zealand's legal landscape, and has been for the past 50 years. In other common law jurisdictions, a primary function of the law of torts is to compensate for damage caused by personal injury. New Zealand, on the other hand, legislated along a different path, adopting a no-fault system providing statutory compensation for personal injury caused by accident. Where the conditions for cover were met, a claim could be made following a simple process, removing the need to litigate as the recourse for compensation.

History of accident compensation in New Zealand

10. Accident compensation for workers in New Zealand emerged through the English common law and developed through a variety of statutes. While the

tort of negligence expanded significantly in the nineteenth century and presented the possibility for significant awards of damages through a civil trial, only a minority of cases were successful in proving fault.[1] Against this background, the following statutes were enacted in New Zealand:

10.1 The Workers Compensation Act 1900, developed due to the social burden of unsuccessful tort claims.[2] This introduced requirements such as the need for employers to insure against employee injuries and provide weekly compensation payments to injured workers.[3] This Act was one of the first of its kind in the world, but it had limitations including that there was no cover for non-work injuries or motor vehicle injuries.[4]

10.2 The Motor Vehicles Insurance (Third Parties Risk) Act 1928 followed, in recognition of motor vehicles being another major source of injury.[5] This, likewise, required vehicle owners to secure compulsory insurance to cover injuries caused to others.

10.3 The Social Security Act 1938 provided a comprehensive system of flat rate payments by the state for people incapacitated through a variety of causes, including sickness and invalidity.[6]

11. Despite these legislative changes, by the 1960s workers were frustrated with limitations of the existing framework. A Royal Commission was charged with investigating and reporting on the law relating to compensation and claims for damages for incapacity or death caused by accidents (including diseases) suffered by employees.

The Woodhouse Report and the accident compensation legislation

12. The product of the Royal Commission was its report into personal injury law in

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1 Geoffrey Palmer "A Retrospective on the Woodhouse Report: The Vision, The Performance and The Future" (2019) 50 VUWLR 401 at 402-403 (**Palmer**).

2 Palmer, above n 1, at 403.

3 Weekly compensation was tied to an employee's previous earnings. The Act also provided compensation for families of people who were fatally injured at work.

4 Brian Easton *The Historical Context of the Woodhouse Commission* (2003) 34 VUWLR 207 at 210 (**Easton**).

5 Easton, above n 4, at 210.

6 Palmer, above n 1, at 403.

New Zealand, known widely as the Woodhouse Report.[7] The Woodhouse Report recognised the limits of the legislation set out above, and tort law in addressing personal injury:[8]

> The negligence action is a form of lottery. In the case of industrial accidents it provides inconsistent solutions for less than one victim in every hundred. The Workers' Compensation Act provides meagre compensation for workers, but only if their injury occurred at their work. The Social Security Act will assist with the pressing needs of those who remain, provided they can meet the means test. All others are left to fend for themselves.
>
> Such a fragmented and capricious response to a social problem which cries out for co-ordinated and comprehensive treatment cannot be good enough. No economic reason justifies it. It is a situation which needs to be changed.

13. It concluded that the existing system failed to compensate large numbers of accident victims and wasted legal and administrative costs, which could instead go to the injured.[9] The economic consequences of a successful common law claim had a limited deterrent effect due to liability insurance.[10] The Woodhouse Report recommended that "assessments must give all reasonable doubts in favour of the applicant; that they must be based on the real merits and justice of the case; and that suitable discretion should be available to deal with unusual circumstances."[11] As outlined at the outset:[12]

> The toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole.

14. The Woodhouse Report proposed a comprehensive system of accident prevention, rehabilitation and compensation. This proposed system was designed to avoid the disadvantages of the existing processes, meet the requirements of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency, and satisfy the requirement of financial affordability.[13]

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7 *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, Wellington, December 1967) [Woodhouse Report].

8 Woodhouse Report at [1].

9 Woodhouse Report at [484], [485].

10 Woodhouse Report at [90].

11 Woodhouse Report at [492(3)].

12 Woodhouse Report at [1].

13 Woodhouse Report at [4], [484].

15. Following the Woodhouse Report, a White Paper,[14] and a Select Committee report,[15] the Accident Compensation Act 1972 was enacted. A change of government meant that the Act was amended in 1973 to extend the scheme to give universal coverage for personal injury as pledged.[16] From its inception, the Act barred the right to sue or to claim workers' compensation for those covered by the scheme, in accordance with the Woodhouse Report's view that these remedies became irrelevant.[17]

16. There have now been four re-enactments, in 1982, 1992, 1998 and 2001 and further significant amendments in 2005, 2008 and 2010. Throughout its life, fundamentally the scheme continues to operate on much the same basis as it did when it was introduced.[18]

The accident compensation scheme as a social contract

17. In return for the advantages of the statutory scheme under the Accident Compensation Act and its predecessors, the legislation prevents claimants seeking compensation through the courts.[19] This exchange has frequently been referred to as the social contract,[20] which underpins the operation of the scheme.

18. This exchange of rights is now embodied in s 317 of the Accident Compensation Act 2001, its broad purpose being to "bar actions for damages where the victim is in a position to claim compensation under the statutory scheme".[21] It has been described by this Court as "a pivotal provision in the social contract implemented through the accident compensation

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[14] Department of Labour *Personal Injury: A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (1969).

[15] *Report of the Select Committee on Compensation for Personal Injury in New Zealand* (1970).

[16] Palmer, above n 1, at 406, Stephen Todd and others *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) (**Todd**) at [2.2.02].

[17] Todd at [2.2.02].

[18] Todd at [2.1].

[19] Accident Compensation Act 2001, s 317. *McGougan v Depuy International Limited* [2018] NZCA 91, [2018] 2 NZLR 916 at [32].

[20] *Brightwell v Accident Compensation Corporation* [1985] 1 NZLR 132 (CA) at 139-140; *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA) at 555.

[21] Todd at [2.3.03](3).

legislation."[22] It is a simple "quid pro quo";[23] and "fundamental to that social contract that the statutory bar is coextensive with cover under the ACC Act".[24]

Purpose of the accident compensation scheme

19. This social contract captures the core purpose of the accident compensation legislation, which is "designed fundamentally to supplant the vagaries of actions for damages for negligence at common law".[25] At the highest level of generality, its aim "is to promote distributive rather than corrective justice by spreading the economic consequences of negligent conduct over the whole community and to provide compensation for injury (regardless of fault)".[26]

20. The certainty of compensation is afforded to those who suffer personal injury by accident, without the need to engage in lengthy and complicated litigation. It is likewise needless to point to the existence of fault on any party or identify and evaluate potential causes of action.[27]

21. The most recent iteration, the 2001 Act, seeks to "enhance the public good and reinforce the social contract represented by the first accident compensation scheme".[28] This Court has reiterated this and the importance of an effective bar in maintaining its integrity.[29] The Attorney General agrees, and submits the clear and predictable boundaries, including for cases at the margins, are needed to preserve the integrity of the scheme.

BACKGROUND FACTS

22. The facts are set out at paragraphs [4] to [31] of the Court of Appeal's judgment.[30] The key events that are the subject of Ms Taylor's claim occurred while Ms Taylor was enlisted in the Royal New Zealand Airforce (RNZAF) as an Aircraftsman in the Motor Transport section at Whenuapai Airbase between

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22 *Davies v Police* [2009] NZSC 47, [2009] 3 NZLR 189 at [27].

23 Todd at [2.3.03](1).

24 *McGougan v Depuy International Limited* [2018] NZCA 91, [2018] 2 NZLR 916 at [32].

25 *Willis v Attorney-General* [1989] NZLR 574 (CA) (***Willis***) at 576.

26 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 at [25].

27 Noting that the ability to bring claims for exemplary damages is preserved by s 319 of the Accident Compensation Act 2001, this Court having reiterated exemplary damages are not designed to compensate the plaintiff for the harm suffered, but to punish and denounce the conduct of the defendant; see *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149, McGrath J at [194]. See also Elias CJ's comments at [19], Blanchard J at [58], Tipping J at [92] to [99], and Wilson J at [254].

28 Accident Compensation Act 2001, s 3.

29 *Davies v Police* at [27].

30 *Taylor v Roper* [2020] NZCA 268 (**Court of Appeal decision**) [[101.0132]].

mid-1986 and October 1987.[31] There are no grounds to disturb the lower Courts' factual findings, but it is, as French J noted, the application of the law to the facts that divided the judges thus far.

23. Following the discovery of Mr Roper's trial and convictions for sexual offending in 2014, Ms Taylor commenced civil proceedings against Mr Roper and the Attorney-General on behalf of the RNZAF in May 2016. Her claim was formulated as three causes of action against Mr Roper: assault (and battery), intentional infliction of emotional harm and false imprisonment. She further claimed the Attorney-General was directly and vicariously liable for Mr Roper's conduct as well as in negligence.[32] In respect of each cause of action, she pleaded she suffered mental injury in the form of extreme distress, anxiety, depression and post-traumatic stress disorder (**PTSD**) as a result.[33]

24. Ms Taylor seeks compensation from Mr Roper and the Attorney-General including general damages, exemplary damages, vindicatory damages, aggravated damages and special damages for loss of earnings, medical and other expenses.[34]

Findings in the Courts below

25. In the High Court, Edwards J accepted that the facts established the causes of action for assault and false imprisonment, although not to the degree and extent alleged.[35] Her Honour accepted Ms Taylor was suffering from a mental injury and that what happened to her at Whenuapai was a material and substantial cause of her PTSD.[36]

26. Edwards J held the claims were barred under the Limitation Act 1950 and the

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[31] The time period over which the events occurred was significantly less than that claimed by Ms Taylor (1985 to 1988). In particular, Ms Taylor did not arrive to Whenuapai until 1986 and Edwards J found that there were only 34 days in the first half of 1986 when both Mr Roper and Ms Taylor were on duty at Whenuapai and he was transferred to Ohakea in November 1987, see *Taylor v Roper* [2018] NZHC 2330 (**High Court decision**) at [37] [[101.0076]] at [[101.0085]].

[32] Ms Taylor also claimed that she complained about this conduct to her superiors, and that the RNZAF failed to do anything about it. Edwards J did not accept that formal complaints were made about the conduct and these claims against the RNZAF are no longer in issue. High Court decision at [76] [[101.0076]] at [[101.0093]].

[33] Amended statement of claim at [72] [[101.0018]] at [[101.0030]].

[34] Amended statement of claim at [77] [[101.0018]] at [[101.0034]], High Court decision at [28] [[101.0076]] at [[101.0082]]. Specifically, she seeks $300,000 in general damages, $150,000 in exemplary damages, $50,000 in vindicatory damages and $100,000 in aggravated damages. The parties agreed that the claim for special damages should be deferred pending delivery of the judgment on liability. Prior to the High Court trial, counsel for Ms Taylor filed a memorandum quantifying Ms Taylor's claim for special damages at $956,136.00.

[35] High Court decision at [77] [[101.0076]] at [[101.0093]].

[36] High Court decision at [188(b)] [[101.0076]] at [[101.0121]]. Edwards J accepted Ms Taylor was also suffering from anxiety and depression, but that there appeared to be other causes for that condition and the evidence was insufficient to show a causal link between what happened at Whenuapai and her depression and anxiety.

accident compensation legislation as Ms Taylor was entitled to cover under the Accident Compensation Act 1982 (the **1982 Act**) at the time of the events.[37] This was an orthodox application of existing case law.[38]

27. On appeal by Ms Taylor, the Court of Appeal confirmed Ms Taylor had cover under the 1982 Act for the mental injury she suffered from assault and battery.[39] The Court went further to confirm that Ms Taylor also had cover under the 1992 Act, and has cover under the current Accident Compensation Act.[40] The Court was divided on the application of the legislation to Ms Taylor's claims for false imprisonment: Brown and Clifford JJ concluded it was not a claim for personal injury and was not captured by the statutory bar;[41] while French J acknowledged that the false imprisonment cause of action was intertwined with an assault.[42]

28. The respondents sought leave to appeal the decision to this Court, where this Court raised the issue of whether Ms Taylor had cover for experiencing a traumatic event at work under s 21B of the Accident Compensation Act.

29. The Court of Appeal subsequently recalled and reissued its decision with an addendum determining s 21B did not apply to Ms Taylor.[43] It concluded that although Ms Taylor was subject to a series of events and there was no doubt Mr Roper was the "cause" of each incident, she did not qualify for cover because she did not experience "sudden" events, and these events did not "together comprise a single incident or occasion".

THE COURT ERRED IN ITS INTERPRETATION OF WILLIS V ATTORNEY-GENERAL AND SECTION 317

30. The question for this Court on the first ground of appeal is whether the Court of Appeal erred in its interpretation of *Willis v Attorney-General* and the application of s 317 of the Accident Compensation Act. In essence, it is whether the events Ms Taylor experienced at Whenuapai which amount to

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37 See High Court decision at [171] [[101.0076]] at [[101.0116]].

38 *Accident Compensation Corporation v E* [1992] NZLR 426 (CA), *Green v Matheson* [1989] 3 NZLR 564 (CA) (***Green***).

39 Court of Appeal decision at [133] [[101.0132]] at [[101.0163]].

40 Court of Appeal decision at [149] [[101.0132]] at [[101.0166]].

41 Court of Appeal decision at [208] [[101.0132]] at [[101.0183]].

42 Court of Appeal decision at [164] and [165] [[101.0132]] at [[101.0169]].

43 *Taylor v Attorney-General* [2021] NZCA 691 (**Recall decision**) at [51] [[101.0185]] at [[101.0203]].

false imprisonment as a legal cause of action, are personal injury and precluded by the statutory bar in the accident compensation legislation.

31. The Attorney-General submits the majority's findings are in error because they do not confront the overlapping nature of Ms Taylor's claims as they are pleaded in the amended Statement of Claim and in her evidence. The aspect of detention as part of the incidents experienced by Ms Taylor cannot be sensibly divorced from the sexual assault that occurred contemporaneously. It was the succession of these distressing events which resulted in a fear of Mr Roper and his conduct, which in turn caused Ms Taylor's mental injury. It is artificial to sever parts of a legal claim and permit a claimant to avoid the accident compensation bar.

The statutory bar for damages arising out of personal injury by accident

32. The starting point is s 317 of the Accident Compensation Act, the 'statutory bar', which prevents any person from "bring[ing] proceedings independently of the Act in the courts for damages arising directly or indirectly out of personal injury covered by the Act or its predecessors."[44] Exemplary damages, designed to punish a defendant who is guilty of outrageous wrong doing, deter that person and others from similar misconduct in the future and register the court's condemnation of that behaviour, are preserved by s 319 and will be determined at a later stage.[45]

33. Although Ms Taylor has not availed herself of the remedy provided by Parliament,[46] s 317(7) is clear that the statutory bar cannot be defeated by the failure or refusal to lodge a claim for personal injury.

The bar applies to compensatory damages for mental injuries caused by assault and battery

34. The courts have long recognised "that physical and mental injuries caused by intentional assaults or batteries (including rape) are personal injuries by accident from the point of view of the victim, so actions for damages of that

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[44] Section 317(1). The 'statutory bar' has existed through all iterations of the accident compensation legislation, see: s 394 in the Accident Insurance Act 1998, Accident Rehabilitation and Compensation Insurance Act 1992, s 14, Accident Compensation Act 1982, s 27.

[45] In light of the findings in the High Court Edwards J said it was not necessary or appropriate to consider Ms Taylor's claim for intentional infliction of emotional distress, negligence against the RNZAF, and whether exemplary damages would have otherwise been awarded. The majority in the Court of Appeal decided to remit the matter to the High Court for determination.

[46] As indicated by counsel for Ms Taylor at the hearing on 1 October 2020.

kind are within the statutory bar".[47] As is discussed further below,[48] an accident or injury need not be unexpected and undesigned to qualify as personal injury covered by the accident compensation scheme.[49]

35. Both Courts agreed that Ms Taylor had cover under the 1982 Act, which was in force at the time of the relevant events.[50] The Court of Appeal further confirmed Ms Taylor currently has cover for that damage.[51] She is therefore precluded from seeking damages for that personal injury – the PTSD – covered by the accident compensation legislation, however the claim for compensation is labelled or expressed.

The false imprisonment claim is a claim for 'damages arising directly or indirectly out of personal injury'

36. The statutory wording of s 317 focuses not on the nature of the claim, but the consequences of it. It is plain "the bar operates where the claim is *for damages arising directly or indirectly out of personal injury*. It is inescapable that if [the plaintiff] is seeking damages quantified by reference to his personal injury covered by the Act, the claim, whatever its genesis, is a claim for damages so arising."[52] (emphasis added)

37. The Court of Appeal accepted that the damage Ms Taylor suffered from false imprisonment "is the same mental and psychological injury and consequential loss alleged in respect of all causes of action, including assault".[53]

38. On a proper application of s 317 of the Accident Compensation Act and the principles in *Green* and *Willis* (discussed further below), it is "inescapable" that the damages sought in this case arose from personal injury covered under the accident compensation legislation.

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47 *Willis* at 576.

48 See paras [81] – [84].

49 *Accident Compensation Corporation v E* at 432.

50 Court of Appeal decision at [133] [[101.0132]] at [[101.0163]], High Court decision at [171] [[101.0076]] at [[101.0116]].

51 Court of Appeal decision at [149] [[101.0132]] at [[101.0166]]. The High Court considered it was unnecessary to determine whether Ms Taylor was also entitled to cover under the current Act, High Court decision at [171].

52 *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA) at [11], discussing an earlier iteration of the Act, the Accident Insurance Act 1998.

53 Court of Appeal decision at [155] [[101.0132]] at [[101.0167]]. The High Court also noted at [18] that the plaintiff's claim is "that as a result of what happened at Whenuapai she has suffered from extreme distress, depression, anxiety, and has developed post-traumatic stress disorder (PTSD)." [[101.0076]] at [[101.0080]].

The rule in *Willis v Attorney-General*

39. The High Court accepted that Ms Taylor was subject to false imprisonment when she was locked in the tyre cage and when driving Mr Roper home.[54] French J observed Ms Taylor's pleading relied on all the allegations of Mr Roper's abusive behaviour including the sexual and physical assaults and harassment, and the factual findings were all part of the context in which the application of the accident compensation legislation must be determined.[55]

40. Both Courts turned to the application of *Willis,* where the full Court of Appeal considered the meaning of "personal injury by accident" under the 1982 Act in the context of a claim for false imprisonment, malicious prosecution and negligence, alleged to have caused inconvenience, distress and financial loss arising from the actions of the Custom officers in detaining the plaintiffs and the seizure of four imported Ford Mustangs.[56]

41. The Court in *Willis* found that claims for malicious prosecution, or breach of a duty of care to safeguard the plaintiff's proprietary or economic interests or reputation, did not fall within the natural and ordinary meaning of "personal injury by accident".[57]

42. It reached the same conclusion on the false imprisonment claim for the unlawful total restraint of the liberty of the person. Importantly, and in stark contrast to the facts of this case, there was no claim of assault or battery nor any suggestion or threat of force, or any assertion of mental injury.

43. The Court in *Willis* was careful not to extend the statutory bar to exclude actions in tort which had a tenuous link to the subject-matter of the accident compensation legislation. It made four pertinent points on the interface between the accident compensation scheme and false imprisonment:[58]

    43.1 It acknowledged that false imprisonment is not necessarily brought about by force or the threat of force, and a person could be detained unlawfully without their knowledge. False imprisonment *as such*, and as

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[54] High Court decision at [77], see also [183] [[101.0076]] at [[101.0093]] and [[101.0119]].

[55] Court of Appeal decision at [153]-[158] [[101.0132]] at [[101.0167]].

[56] The Court also contemporaneously decided *Green v Matheson* noting the two judgments should be read together, see *Willis* at 576 and *Green* at 572.

[57] *Willis* at 577.

[58] *Willis* at 579.

the plaintiffs claimed to have been, was outside the purview of the 1982 Act.

43.2 Then followed a critical proviso: "If a plaintiff were to claim damages (other than exemplary) for assault or battery, the position would be different." Such claims are barred, and if the detention of a plaintiff was accompanied by physical injuries, damages cannot be claimed for those or for the pain and suffering they caused.

43.3 If mental consequences such as distress, humiliation, and fear have been caused by both false imprisonment and assault or battery, a plaintiff may only claim damages if the false imprisonment has been a substantial cause of those mental consequences.

43.4 Trial Judges will adopt a common sense approach, guided by what is within the broad spirit of the accident compensation scheme and what is outside of it.

44. In *Green* (the complementary decision to *Willis*), the Court reiterated "once there is a personal injury by accident within the scope of the Act, all the emotional or psychological effects fall within the statutory words… Parliament cannot have intended fine distinctions in this area."[59] It considered it was "obvious that 'personal injury by accident' refers to a mishap causing harm to the person",[60] adopting a passage from *Dandoroff v Rogozinoff*, which "is just as applicable to unintentional torts as to intentional ones":[61]

> ... I find it difficult, as well as artificial, to attempt to isolate out from the effects of an intentional tort those elements of humiliation, embarrassment, wounded feelings, righteous anger on the one hand, and any other mental consequences of an injury or an unwanted or untoward event on the other hand. Precise classification of feelings and of mental consequences is not feasible and there must nearly always be the elements of overlap which do not allow of finite distinction, an exercise which in my mind would be quite unrealistic and one I very much doubt envisaged by the Legislature as being a residuary function of the Court in its common law jurisdiction.

45. The conclusion in *Green* was that all the plaintiff's claims under the various causes of action were proceedings for damages arising directly or indirectly

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[59] *Green* at 572.

[60] *Green* at 571.

[61] *Dandoroff v Rogozinoff* [1988] 2 NZLR 588 (HC), cited in *Green* at 572.

out of personal injury by accident. That is the same outcome here — the various causes of action arise from the same underlying facts and are inextricably linked. All the claims are proceedings for damages arising directly or indirectly out of personal injury by accident.

Ms Taylor's claim is for a serious mental disorder arising out of intertwined claims

46. The injury Ms Taylor suffered properly fits within the definition for personal injury by accident. Her claim for false imprisonment is in the context of instances of assault, sexualised behaviour and intimidation by Mr Roper.[62] It is a far cry from the facts in *Willis,* in which the plaintiffs claimed the inconvenience, distress and financial loss was caused by their detention and confiscation of vehicles by Customs officers.

47. The High Court recognised Ms Taylor's claim for depression, anxiety and PTSD "is closer to the serious mental disorder found to be covered in *ACC v E*, than the humiliation and distress the subject of the claim in *Willis*".[63] French J went further, saying "the facts are so far removed from *Willis v Attorney-General* so as to bring it within a different category".[64]

48. As French J set out, "the pulling of the bra straps, the touching of her bottom, the rubbing himself up against her, the ogling in the changing room, the groping in the car and the touching of her bottom with an iron bar in the tyre cage were all part of a predatory and sexualised course of conduct" that "cumulatively impacted on Ms Taylor."[65] The Attorney-General adopts her Honour's assessment that it would be "highly artificial to isolate two aspects of Mr Roper's conduct"[66] and Edwards J's conclusion the claims were intertwined.[67]

49. In particular, Ms Taylor's evidence demonstrated "the impact on her from

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[62] See for example the Medico-Legal report at [6] and [7] "systematic sexual harassment at the hands of Mr Roper, verbal and emotional abuse; regularly being prodded with an iron bar and forced into a wire mesh cage called the "tyre cage" and at times being exposed to false imprisonment in this wire mesh cage… [he] would approach her, pull at her bra strap and try to unclip it. He would use an iron bar to touch her bottom and sometimes gyrate against her… When she did drive him around as directed he would "swamp" her, touching her on the legs and making her uncomfortable. He then would proceed to threaten her and touch or attempt to touch her breasts or under her skirt." [[301.0001]] at [[301.0002]].

[63] High Court decision at [177]. In *Accident Compensation v E* [1992] 2 NZLR 426 (CA), the Court of Appeal found the claimant was covered by the 1982 Act when she suffered a psychiatric breakdown during a management course.

[64] Court of Appeal decision at [166] [[101.0132]] at [[101.0169]].

[65] Court of Appeal decision at [168] [[101.0132]] at [[101.0169]].

[66] Court of Appeal decision at [168] [[101.0132]] at [[101.0169]].

[67] High Court decision at [178] [[101.0076]] at [[101.0118]].

being locked in the tyre cage derived from her knowledge of Mr Roper as a sexual predator and what he was capable of doing and had done to her."[68] There is therefore no evidential basis to insulate the element of detention from the assault that occurred during those periods and the fear of personal injury transpiring from Ms Taylor's experiences:

49.1 She described how Mr Roper "would lock the vehicle doors, try and put his hand up my skirt whilst I was driving and he would be groping and trying to touch my breasts",[69] and how she "felt trapped and scared".[70] If she tried to resist or tell him to stop "he would be trying harder to get his hand up my skirt",[71] and at the end of the journey, "always when we arrived at his house he would grab my arm so firm, squeezing my upper arm so it hurt, then he would threaten me not to tell a soul or else my job would be on the line".[72]

49.2 She highlighted the fear that she harboured, "the thoughts and anxiety of going to work and being alone with him were terrifying",[73] and she lived with "fear of what he was capable of, how he made me feel when he was sexually touching me alone in a vehicle".[74] She says she "was always fearful of being assaulted worse than I already had been, being raped or beaten up or murdered on that country road between Whenuapai and Hobsonville."[75]

49.3 She also described the conduct she endured in the tyre bay, that Mr Roper would "rub himself up behind me when I was in the tyre bay, gyrate himself against me, grab my bottom, breasts, upper thighs and he would corner me when I was trying to work on machinery. He would try to undo my bra straps, and touch me."[76] It was when working in the tyre bay that Mr Roper would force her into the tyre cage, and lock her

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[68] Court of Appeal decision at [168] [[101.0132]] at [[101.0169]].

[69] BoE M Taylor at [15] [[201.0001]] at [[201.0004]].

[70] BoE M Taylor at [16] [[201.0001]] at [[201.0004]].

[71] BoE M Taylor at [16] [[201.0001]] at [[201.0004]].

[72] BoE M Taylor at [17] [[201.0001]] at [[201.0004]].

[73] BoE M Taylor at [17] [[201.0001]] at [[201.0004]].

[74] BoE M Taylor at [17] [[201.0001]] at [[201.0004]].

[75] BoE M Taylor at [18] [[201.0001]] at [[201.0005]].

[76] BoE M Taylor at [11] [[201.0001]] at [[201.0003]].

in.[77] She recalled the "terror and fear" she felt and that "the feeling of him prodding me with the iron bar was horrific".[78]

50. Ms Taylor's case is totally different to *Willis,* in which the claim was for detention simpliciter, unaccompanied by any physical violence or the threat of violence.[79]

51. There is no tenuous link to the subject matter of accident compensation in this case. Ms Taylor's evidence and that of the medical experts was clear and specific – the mental injury she suffered stemmed from the physical and sexual assaults by Mr Roper and her accompanying fear of him and the harm he could cause to her.[80]

A 'substantial cause' is not equivalent to a 'not insubstantial' cause

52. Under the accident compensation legislation, the 'substantial cause' of an injury cannot simply be taken to mean a 'not insubstantial' cause. The question is whether the acts materially contributed to causing the mental injury, in some genuine or meaningful way.[81] If so, the statutory bar applies to the damages arising directly or indirectly from that injury. The majority's interpretation imports a different test for causation than what has been accepted in the accident compensation context and runs counter to the ordinary meaning of 'substantial.'

53. The relevant test for causation under the accident compensation legislation differs from the common law tests as to the required level of contribution in tort.[82] Specifically, there is no basis to adopt the de minimis test for causation found in general tort law, which was developed as a device to "[attribute] fault in order to distribute the economic costs of injuries" where the plaintiff has suffered indivisible damage caused by a combination of tortious and non-tortious contributions.[83] Under the statutory scheme, attribution of fault is not relevant, and in fact the antithesis of its core objectives.

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77 The tyre cage is described in the High Court decision at [43] [[101.0076]] at [[101.0086]].

78 BoE M Taylor at [18], [24] [[201.0001]] at [[201.0005]], [[201.0007]].

79 Court of Appeal decision at [167] [[101.0132]] at [[101.0169]].

80 BoE M Taylor at [17] [[201.0001]] at [[201.0004]].

81 *W v Accident Compensation Corporation (**W**)* [2018] NZHC 937, [2018] 3 NZLR 859 at [65].

82 *W* at [66].

83 *W* at [67].

54. Having satisfied the Court that Ms Taylor's "mental injury [was] caused by an act performed by another person… within the description of an offence listed in sch 3"[84] and she had cover under the Accident Compensation Act, there is no room for alternative causes to be postulated to escape the statutory bar.

55. The decision in *Willis* does not, as the majority incorrectly held, permit additional claims for damages for false imprisonment if it was not an "insubstantial or minimal cause" of the claimed injury. By doing so, Brown and Clifford JJ essentially applied a de minimis approach in determining whether a claim falls outside s 317.

56. The Attorney-General submits the majority's approach sets the threshold too low for claims to survive the accident compensation bar and is contrary to the operation of the scheme. Put simply, the Courts must determine what the material cause of injury was, and whether that is covered by accident compensation scheme.[85] The Court in *Willis* cannot be taken to have intended for damage to both be covered by the accident compensation scheme and fall outside it in the same breath, especially in light of the corresponding decision in *Green*. This accords with the common sense approach discussed further below.

A 'common sense' approach requires looking at the claim in context

57. There may often be multiple contributing factors to a claimant's mental injury. What is not addressed by the majority, however, is how to apply the 'common sense' approach where multiple, intertwined contributing factors exist: some causes will give rise to an entitlement to statutory compensation, while others will not. It is therefore a reasonably binary assessment: "under a no-fault regime, either there is cover or there is not. There is no ability to discount compensation, and in a no-fault regime no conceptual need to do so."[86]

58. The majority's emphasis on Ms Taylor's evidence that "being locked in the tyre cage [was] a traumatic event" to conclude it "points to a substantial

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[84] Namely indecent assault, Court of Appeal decision at [141] and [142] [[101.0132]] at [[101.0164]].

[85] The interpretation of the legislation is also "not to be undermined by an ungenerous or niggardly approach to the scope of cover provided", *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) at [19].

[86] *Accident Compensation Commission v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 at [46], rejecting a loss of chance approach to treatment injury.

cause of her mental injury being the psychological impact of imprisonment"[87] is not representative of the reality of the case. On Ms Taylor's own evidence, overwhelmingly, it was the totality of Mr Roper's conduct on each occasion that caused her harm. The majority did not confront the indivisible nature of the events, simply concluding "the fact that whilst imprisoned she also harboured fears about what Mr Roper might do while she was driving him at night does not lessen the significance of the mental injury occasioned by the imprisonment."[88] Similarly, its comment "there was no evidence that she was subjected to sexual abuse while she was locked in the tyre cage" disregards the surrounding circumstances in which the sexual assaults occurred, including the "horrific" feeling of Mr Roper forcibly prodding her into the cage with the iron bar.[89]

59. The description of 'personal injury by accident' as applied naturally is entirely apt to encapsulate the heart of her claim. It follows, based on the coextensive nature of the statutory scheme, the ability to bring a claim has been relinquished in exchange for cover and Ms Taylor is not able to sue by the backdoor of false imprisonment. This is consistent with Professor Todd's view, as adopted by the High Court in *P v Attorney-General* and *AB v Attorney-General*, that "probably, if the damages arise out of both covered and uncovered injury and are quite indivisible, the action is barred".[90]

The majority's approach is inconsistent with the purpose of the accident compensation legislation

60. The approach to determining whether a person has suffered personal injury must be consistent with the purpose and the scheme of the legislation. As set out above, it is designed to avoid the vagaries of negligence (or personal injury) litigation.[91] The majority's approach is simply "not apt in the context of the scheme, under which there is no need to devise a means of attributing fault in order to distribute the economic costs of injuries."[92]

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87 Court of Appeal decision at [207] [[101.0132]] at [[101.0182]].

88 Court of Appeal decision at [207] [[101.0132]] at [[101.0182]].

89 High Court decision at [46], [50]-[51] [[101.0076]] at [[101.0086]], BoE M Taylor at [24] [[201.0001]] at [[201.0007]].

90 *P v Attorney-General* HC Wellington CIV-2006-485-874, 16 June 2010 at [55], *AB v Attorney-General* HC Wellington CIV-2006-485-2304, 22 February 2011 at [416]-[418].

91 *Willis* at 576.

92 *W* at [67].

61. It goes against the purpose of the scheme to allow a person to claim compensation by formulating an abstract cause of action divorced from the reality of the facts. The Court of Appeal embarked on an analysis concentrating exclusively on the elements of the tort of false imprisonment quite apart from the factual matrix within which it occurred, instead of adopting a common sense approach based on the nature of the damages sustained. The Court has created an anomaly whereby the plaintiff can opt to claim under the accident compensation legislation and/or sue in the common law courts in respect of the same damage in the hope of obtaining more generous damages than afforded under the scheme.

The accident compensation scheme must be taken as an effective remedy

62. Compensatory damages for false imprisonment can only be awarded where they do not conflict with the operation of the accident compensation scheme.[93] Through the entitlements under the scheme, Parliament has provided the remedy of compensation, which must be taken as an effective remedy, in place of the right to claim damages, and any award of compensation cannot supplement those entitlements.[94]

THE COURT ERRED IN ITS INTERPRETATION OF SECTION 21B

63. The Attorney-General's primary submission is that Ms Taylor's claim for compensatory damages overlaps entirely with damage arising from personal injury covered by the accident compensation legislation. In the event this Court finds any or all of Ms Taylor's claims for compensatory damages are not covered by s 21 of the Accident Compensation Act or the 1982 Act, it must go on to decide whether Ms Taylor is separately entitled to cover under s 21B of the Accident Compensation Act, which provides cover for mental injury caused by exposure to a sudden traumatic event in the course of

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[93] These awards are approximately $5,000 where a plaintiff has been detained for periods ranging from 1 hour to 5.5 hours. See for example *Neilson v Attorney-General* [2001] 3 NZLR 433 (CA) (for being unlawfully arrested and detained for 1.5 hours), *Slater v Attorney-General (No 2)* [2007] NZAR 47 (HC) (assaulted restrained, handcuffed and detained for 7.5 hours), *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC) (in custody for 7.5 hours), *Craig v Attorney-General* (1986) 2 CRNZ 551 (HC) (Wrongful arrest and false imprisonment for a period of two hours), *Attorney-General v Niania* [1994] 3 NZLR 106 (HC) (false imprisonment for 5.5 hours). Courts have considered inflation in raising awards to meet current settings *Wright v Bhosale* [2015] NZHC 3367, [2016] NZAR 335 (wrongly arrested and in police custody for two and a half hours, awarded $12,000 in general damages for false imprisonment, arrest, assault and battery).

[94] *Wilding v Attorney General* at [11].

employment.[95]

64. The Attorney-General submits that Ms Taylor has cover under s 21B of the Accident Compensation Act. This aligns with the policy and rationale for the section, as well as the philosophy underpinning the accident compensation legislation as canvassed in respect of the first ground of appeal.

Cover for work-related mental injury

65. Cover for work-related mental injury is set out in s 21B of the Accident Compensation Act, introduced by the Injury, Prevention, Rehabilitation and Compensation Amendment Bill (No 2) 2007. It aims at providing cover for clinically significant mental injuries, as recorded in the Explanatory Note:[96]

> The Bill introduces cover for mental injury caused by exposure to a sudden traumatic event in the course of employment. This provides cover for clinically significant mental injuries, rather than temporary distress that constitutes a normal reaction to trauma. The event must be seen, heard, or experienced by the person directly (and not, for example, seen on television), and be one which could reasonably be expected to cause mental injury. It does not introduce cover for mental injury caused by non-physical stress (gradual onset) in the workplace. Providing cover will help to ensure appropriate treatment, and will facilitate rehabilitation, including an early and sustainable return to work.

66. The Transport and Industrial Relations Committee accepted mental injury caused by a series of events ought also to be covered but extending the proposed cover to "gradual process work-related mental injuries" would likely "compromise the scheme's sustainability."[97] The resulting recommendations, subsequently incorporated into the legislation, struck a balance as to the extent of cover: A single event that could be construed as consisting of a number of interrelated events is not intended to be excluded, however injuries caused by minor events or by a gradual process are.[98]

67. Section 21B accordingly provides cover to a person for a personal injury that is a work-related mental injury if:

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[95] As identified by Williams J in his minute of 29 October 2020, SC 56/2020 and 57/2020 [[102.0393]].

[96] See Injury, Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) 2007 (170-1) (explanatory note) (**Explanatory note**) at 4.

[97] Injury, Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) 2007 (170-1) (Select Committee) (**Select Committee Report**) at 2.

[98] Select Committee Report at 2, 3.

67.1 he or she suffers the mental injury on or after 1 October 2008;[99] and

67.2 the mental injury is caused by a single "event"[100] that:

67.2.1 the person experiences, sees, or hears directly[101] in the circumstances described in section 28(1);[102] and

67.2.2 is an event that could reasonably be expected to cause mental injury to people generally.[103]

68. "Event" is defined as "an event that is sudden" or "a direct outcome of a sudden event" and can include "a series of events that arise from the same cause or circumstance" and "together comprise a single incident or occasion". It does not include a gradual process.[104]

69. Although the event must occur in New Zealand,[105] it is irrelevant whether the person is ordinarily resident in New Zealand on the date on which she suffers the injury.[106]

The spectrum of cases in which s 21B is intended to, and has, applied

70. Discussion of the paradigmatic examples during the introduction of s 21B is illustrative of the types of events it was designed to embrace. These included "a train driver whose train hits someone on the tracks or a bank worker who witnesses a colleague shot during a robbery and goes on to develop mental injury as a result".[107] The example of a coalminer buried alive for 20 hours in the cab of his mining vehicle after the mine he was working in collapsed, was also recounted before the Select Committee.[108]

71. The claimant's injury in *Davis v Portage Licensing Trust* is another scenario

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[99] Being the date on which s 21B was inserted and the Injury Prevention, Rehabilitation, and Compensation Amendment Act 2008 came into force. Note the date on which mental injury is suffered is determined by s 36 of the Accident Compensation Act 2001, that date being the date on which she first receives treatment for that mental injury as that mental injury.

[100] Accident Compensation Act 2001, s 21B(7).

[101] That is, he or she is involved in or witnesses the event himself or herself and is in close physical proximity to the event at the time it occurs, Accident Compensation Act 2001, s 21B(5).

[102] Accident Compensation Act 2001, s 21B(1) and (2)(a).

[103] Accident Compensation Act 2001, s 21B (2)(b).

[104] Accident Compensation Act 2001, ss 21B(7) and 21B(7)(c).

[105] Or if the event occurs overseas, to a person ordinarily resident in New Zealand; Accident Compensation Act 2001, s 21B(2)(c).

[106] Accident Compensation Act 2001, s 21B(3) and (4).

[107] (11 December 2007) 644 NZPD 13942, see also Explanatory note at 4.

[108] (17 June 2008) 647 NZPD 16636.

which commentary has since described as a "textbook example" that would qualify for cover under s 21B. Mr Davis, a barman/cook at a tavern, experienced three armed robberies in four months while working at the defendant company and suffered PTSD symptoms.[109] His case preceded the introduction of s 21B and he did not otherwise qualify for cover.

72. Since then, there have been several District Court decisions considering the application and scope of the provision. The two cases where cover has been found to exist under s 21B are:

72.1 *MC v Accident Compensation Corporation* where the appellant sought cover for PTSD and depression linked to a number of events in the course of his employment, in particular as a reserve force Soldier serving in Afghanistan on two tours of duty. Judge MacLean found the "seriously troubling events in Afghanistan" were a material cause of his PTSD.[110] His Honour was guided by overall statutory purpose in his interpretation of s 21B. In distinguishing a 'series of events' from a 'gradual process', he adopted Judge Ongley's discussion in *Waghorn v Accident Compensation Corporation:*[111]

> It is implicit in the text that a *series of events* may be a series of specific events or a gradual process. There is no guidance as to the dividing line. Continuous processes such as wear on a joint would not be called a series of events. **A logical approach to the problem at least in the case of a PARS defect is that if events are so gradually incremental that they cannot be distinguished one from the other they should be regarded as a gradual process. Whereas a series of forceful events each contributing in some significant way would attract cover.** That does not solve the evidential difficulty. A process … could involve a combination of both causes, that is to say a process of indistinguishable minor events as well as more significant stresses capable of causing a fracture. (emphasis added)

72.2 Most recently in *Phillips v Accident Compensation Corporation,* Judge McGuire found Ms Phillips suffered mental injuries caused by a series of

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[109] Fiona Thwaites "Mental Injury Claims under the Accident Compensation Act 2001" (2012) 18 Canta L R 244 at 252, and *Mazengarb's Employment Law* (looseleaf ed, LexisNexis) at [IPA21B.5]. *Davis v Portage Licensing Trust* [2006] 1 ERNZ 268. This case was heard by the Employment Court and concerned a claim for breach of contract, unjustified dismissal and unjustifiable disadvantage.

[110] *MC v Accident Compensation Corporation* [2016] NZACC 264 (DC) at [85]. These events included a number of rocket attacks, including one in which the claimant was in close proximity to, and witnessing a military helicopter explode mid-flight with 16 passengers on board).

[111] *Waghorn v Accident Compensation Corporation* [2013] NZACC 2 (DC) at [33]. Cited in *MC v Accident Compensation Corporation* at [72].

events, most notably a meeting with her manager and the human resources team and a further occasion in which she was humiliated and demeaned in front of her colleagues.[112]

73. On the other hand, there are several cases that have fallen outside the scope of s 21B for various reasons:

73.1 A cleaner was subject to bullying and harassment at work, against her background of a combination of life and family stressors, and mental health difficulties including manic episodes. Judge Joyce QC was not satisfied she had suffered a mental injury, or that any mental injury suffered was attributable to a single event. His Honour considered the incident in which her colleague grabbed and squashed her face was, at most, a "final straw" event and "far removed from the league of seriously traumatic events the mischief of which s 21B was intended to address."[113]

73.2 A psychiatric nurse in an acute psychiatric in-patient unit claimed she suffered mental injury following two different work-related events involving a suicide and an attempted suicide. Judge Walker was not convinced on the evidence that the mental injury had been proven in that case,[114] and found that there was no event that could reasonably be expected to cause mental injury to people generally.[115]

73.3 A claimant failed to meet the threshold in respect of mental injury suffered during her secondment to Greymouth. Judge Mathers grappled with the question of whether a series of events could be identified in this case. She also adopted the distinction drawn in *Waghorn*, asking whether the events were so gradually incremental that they cannot be distinguished one from the other, as against a series of forceful events each contributing in some gradual process.[116] The Judge had difficulty identifying any single event or series of events

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112 *Phillips v Accident Compensation Corporation* [2022] NZACC 100 (DC) at [116], [119], [123].

113 *OCS Ltd v TW* [2013] NZACC 177 (DC) at [79]-[82].

114 *MHF v MidCentral District Health Board* [2020] NZACC 18 (DC) at [390].

115 *MHF v MidCentral District Health Board* at [443].

116 *Jeffrey v Progressive Enterprises Ltd* [2015] NZACC 4 (DC) at [56].

to come within the Act; and rather, the mental injury was caused by incremental and gradual steps of mental stress caused by the pressure and isolation Ms Jeffrey felt,[117] compounded to a limited extent by the emotions of the Pike River Mine disaster (although she did not see or hear the explosion).[118]

73.4 An embalmer attending a police-call out to a suicide in September 2007 did not qualify for cover for mental injury suffered in May 2009. Judge Beattie considered the "single event of a nature which might cause mental injury to people generally must be one that is in effect a one-off event, and which results in the more or less immediate onset of the factors involved in the medical condition."[119] He did not consider only one event, namely the September 2007 event, could have caused the onset of her mental injury where that came about two years after the index event.[120] He noted there were a number of subsequent events which the appellant had indicated had caused her condition but did not discuss whether these multiple events could form a series of events.[121]

74. These cases provide a useful spectrum on which to compare the facts of Ms Taylor's case.

Ms Taylor has cover under s 21B for a sudden traumatic event in the workplace

75. The facts here meet the criteria for cover under s 21B as follows:

Ms Taylor directly experienced a series of events at her workplace

75.1 There is no challenge as to the events that occurred at Whenuapai.[122] Ms Taylor directly experienced the events and there can be no dispute they occurred while she was at a place for the purposes of her employment.[123]

75.2 As a matter of plain language, all the incidents of assault against

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117 *Jeffrey v Progressive Enterprises Ltd* at [60].

118 *Jeffrey v Progressive Enterprises Ltd* at [58].

119 *KB v Accident Compensation Corporation* [2013] NZACC 41 (DC) at [25]. The application for leave to appeal this judgment was dismissed by Judge Powell in *KB v Accident Compensation Corporation* [2014] NZACC 336 (DC).

120 *KB v Accident Compensation Corporation* at [26].

121 *KB v Accident Compensation Corporation* at [24] and [26], despite referring to the meaning of 'event' including a 'series of events' in [22].

122 High Court decision at [40], [51], [53] [[101.0076]] at [[101.0085]], [[101.0087]], [[101.0088]].

123 See ss 6, 21B(1)(b), (2)(a) and 28(1)(a).

Ms Taylor by Mr Roper while she was driving him home and working with him in the tyre bay could be described as a series of events. Nor is there any doubt Mr Roper was the sole author and cause of the traumatic and distressing events.

75.3 These events are easily articulated as comprising a single incident or occasion given the obvious connection between each event: each occurrence involved the same participants, same conduct and were of the same nature. Ms Taylor described in her evidence that it was these events "the terrifying times I had alone with him in the car, and the control he had over me in the tyre bay, the absolute terror I felt locked in the cage", that came flooding back to her when she learnt of Mr Roper's charges in 2014.[124]

Ms Taylor suffered mental injury in the form of PTSD

75.4 Both Courts confirmed Ms Taylor suffered mental injury, being a clinically significant behavioural, cognitive, or psychological dysfunction, in the form of PTSD in 1988. The date on which Ms Taylor first received treatment for that injury was 19 November 2015,[125] and her injury is therefore deemed to have been suffered on or after 1 October 2008.[126]

75.5 It can be inferred, and it is not disputed, that these were distressing events that could be reasonably expected to cause mental injury to people generally.[127]

These events were 'sudden' events from Ms Taylor's perspective

75.6 The event[s] experienced by Ms Taylor were 'sudden' within the context of the Accident Compensation Act, which is outcome-focused and relies on a common-sense approach guided by the spirit of the Act.

75.7 For the purposes of s 21B, no more is needed than for there to be a clear and identifiable point of commencement of an event, as opposed

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[124] BoE M Taylor at [42] [[201.0001]] at [[201.0011]].

[125] High Court decision at [90] [[101.0076]] at [[101.0096]]. The High Court noted that the first record of the events at Whenuapai being causative of stress was on this date.

[126] Recall decision at [15] [[101.0185]] at [[101.0191]], Court of Appeal decision at [143] [[101.0132]] at [[101.0165]], High Court decision at [142] [[101.0076]] at [[101.0109]] (finding that all M's causes of action had accrued by 1988).

[127] High Court decision at [78], [123] [[101.0076]] at [[101.0094]], [[101.0104]]. Medico-Legal Report – Mariya Taylor at [32] [[301.0001]] at [[301.0009]], BoE Dr Barry-Walsh at [60] [[201.0183]] at [[201.0194]].

to a gradual onset or incremental process where no such 'sudden' point in time can be found. The duration of an event however, does not need to be confined to only a single snapshot in time — an event includes both the direct outcome of a sudden event;[128] and series of related events that can be taken together to form a single event.[129]

75.8 It is not and never has been necessary to show some causative incident which is unexpected and undesigned in order to qualify for cover for personal injury by accident.[130] All that is required is that the event is untoward from the perspective of the victim.[131] There is no reason to suggest that Parliament intended to deviate from this long-standing principle when enacting s 21B.

76. It is against the background of the accident compensation scheme, and specifically, the mischief that Parliament intended s 21B to address, that the Court should interpret and apply the provision to the facts of this case. The Attorney-General submits that the Court of Appeal's approach fails to achieve what Parliament intended and does not accurately reflect the proper scope of the provision.

The definition of 'sudden' must be interpreted in context

77. It is submitted that the singular focus on the interpretation of 'sudden' is misguided and creates an unworkable hurdle for claimants. As the Court itself observed, the relevant phrase needs to be read as a whole and one must be careful not to approach its construction in a piecemeal fashion.[132]

78. It would therefore be erroneous to embark on a discussion of the conceptual meaning of 'sudden', without examining its use in context, both within the subsection, and against the purpose of s 21B and the wider scheme of the Accident Compensation Act. When viewed in context, the definition of 'event' in subs 21B(7) comprises three parts. It means:

78.1 an event that is sudden; or a direct outcome of a sudden event; and

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128 Accident Compensation Act 2001, s 21B(7)(a).

129 Accident Compensation Act 2001, s 21B(7)(b).

130 *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA) at 432 upholding the findings of Grieg J in the High Court.

131 *Childs v Hillock* [1994] 2 NZLR 65 (CA) at 70, citing *Green v Matheson* [1989] 3 NZLR 564 (CA).

132 Recall decision at [22] [[101.0185]] at [[101.0193]].

78.2 can include a series of events that arise from the same cause or circumstance;

78.3 provided it is not a gradual process.

79. These three components work in tandem to achieve Parliament's intended scope of cover for s 21B: to provide compensation for workers who suffer a traumatic event at work, but to exclude cover for the gradual onset of mental injury caused by incremental work stresses. This aim is reinforced by subs 21B(2)(b) which excludes 'final straw' events where an individual event taken on its own would be of insufficient gravity to "reasonably be expected to cause mental injury to people generally."

The Court's definition of 'sudden' does not provide meaningful cover

80. The Court of Appeal considered that the section was not intended to extend to apprehended, albeit unwanted, incidents of physical harassment in the nature of detention or confinement. The Attorney-General submits the Court was wrong to find the requirement of a 'sudden' event incorporated the requirements of both an absence of foreseeability or warning as well as in the temporal sense, namely rapid or instantaneous.[133]

It is contrary to the accident compensation scheme to exclude anticipated events

81. First, to exclude cover for an anticipated or forewarned event — as the Court of Appeal has done — disqualifies all those engaged in high-risk occupations, where traumatic events may be anticipated or feared. This interpretation would exclude events like those that occurred on the tours of duty in *MC v Accident Compensation Corporation*.

82. Likewise, Mr Davis, our 'textbook' example, would be denied cover given the high incidence and risk of recurrent robberies. Armed robbery was specifically identified as a risk to staff and there were two incidents of forced entry into the tavern before the first armed robbery experienced by Mr Davis.[134] Following the first instance, he may well have feared the possibility of repeated armed robberies.

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[133] Recall decision at [19] and [33] [[101.0185]] at [[101.0192]], [[101.0197]].

[134] *Davis v Portage Licensing Trust* [2006] 1 ERNZ 268 at [5] - [10].

83. Similarly, the Select Committee report expressly referred to the intention "to provide cover for a work-related mental injury caused by encountering a traumatic scene, such as a serious industrial accident, even though the person may have encountered the scene after the accident had occurred and did not witness it."[135] It would be entirely arbitrary for a supervisor, for example, to fail to obtain cover on the basis she received prior notice of the accident and/or its consequences before encountering the scene.

84. As noted above, it has never been a feature of the accident compensation legislation to exclude cover for an event or injury on the basis that it is "anticipated or foreseen".[136] Nor is there anything in the legislative history to indicate Parliament intended s 21B to apply only in such constrained circumstances. The Courts have repeatedly emphasised the need to interpret the accident compensation legislation in a generous and unniggardly manner, and cover should not be denied except where the language of the statute is clear and unambiguous.[137] The Court of Appeal's approach here fails to observe these principles.

There is no policy basis to deny a person compensation for a traumatic event merely because it was not fleeting and instantaneous

85. Additionally, although the Court accepted the individual incidents had a sudden component in the sense that each instance necessarily involved a point of commencement, it considered Ms Taylor was confined for a "notable length" in the tyre cage and driving Mr Roper home would "naturally take some time".[138] It referred to the High Court's finding it was improbable Ms Taylor was locked in the tyre cage for up to an hour, but did not refer to the evidence that the car journey from the base to Mr Roper's home was only a five to seven minute drive.[139]

86. The Attorney-General submits the Court's ultimate conclusion that it would be "unduly stretching the meaning of 'sudden' event in s 21B to embrace incidents of that duration" — five to seven minutes, and less than an hour —

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135 Select Committee Report at 2.

136 Recall decision at [29] [[101.0185]] at [[101.0196]].

137 *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) at [19], [40] and [130]-[131].

138 Recall decision at [33] [[101.0185]] at [[101.0197]].

139 M Taylor NoE p25, l35, p26 [[201.0028]] at [[201.0042]].

bears no relation to the discussion on what comprises an event for the purpose of s 21B.

87. On the Court's reasoning, anyone who experienced a traumatic event that occurred over a period of time, rather than momentarily, would be denied cover under s 21B. Excluding such events in this case from cover because "the substantial effect of the detention on a victim would lie not in the mere fact of its commencement but also its prolonged nature, combined with the fear of what else might occur during the period of confinement"[140] is at odds with the scheme of the accident compensation legislation. Remarkably, it is entirely incompatible with Parliament's express contemplation of traumatic events including a period of confinement — a coalminer stuck for 20 hours — while debating the introduction of the provision.

88. The overall statutory purpose of the accident compensation legislation should not be disregarded unless there is language of the clearest kind. There is no suggestion that Parliament intended to provide cover only for unforeseen events lasting less than five minutes. The Attorney-General submits the additional glosses added by the Court of Appeal markedly limits the application of s 21B such that it cannot provide any meaningful cover.

This is a case of a "series of events" together forming a "single incident or occasion"

89. The Court of Appeal accepted that as a matter of plain language, the incidents could be described as a series of events and there was no doubt Mr Roper was the sole author and cause of the traumatic and distressing events. Nonetheless the Court concluded it was unrealistic to view the events occurring between 1986 and 1987 as a 'single incident or occasion.'[141] It did not provide any guidance or reasoning for this conclusion, except to say this would cast "the net far too wide".[142]

90. This conclusion has effectively denied cover to Ms Taylor by virtue of the fact she suffered multiple traumatic events at the hands of Mr Roper. To find her entitlement is negated by each subsequent event that exacerbated her injury

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[140] Recall decision at [34] [[101.0185]] at [[101.0197]].

[141] Recall decision at [47] [[101.0185]] at [[101.0202]].

[142] Recall decision at [48] [[101.0185]] at [[101.0202]].

is contrary to the intent of the regime, and the harm which s 21B was designed to address.

91. The Attorney-General agrees Mr Roper's actions can be characterised as "all part of a predatory and sexualised course of conduct"[143] and a series of incidents that impacted both independently and cumulatively on Ms Taylor. It is difficult to envisage any other events which could be of any closer similarity than that at hand – involving the same participants, conduct and locality.

92. Given these events of striking similarity cannot be taken to meet the requisite definition of a 'series of events', the effect of the Court's decision is to limit the application of s 21B solely to complete 'one-off' events. Again, Mr Davis, who had the misfortune of being victim to three armed robberies, would be denied cover for the cumulative impact of those events.

93. This narrows the scope of the provision significantly and does not accord with its original intention, or the introduction of subs 21B(7)(b) to simply to clarify that incremental mental stress was excluded from cover.[144]

94. The evidence confirmed Ms Taylor experienced identifiable and traumatic events at Whenuapai that can be isolated out from other stressors.[145] There can be no argument that the nature and severity of those events can, or should be, categorised trivially as ordinary work-place stresses intended to be excluded from the ambit of s 21B.

Each incident could be characterised as a single traumatic event that could reasonably be expected to cause mental injury

95. Lastly, the Attorney-General submits Ms Taylor is entitled to cover under s 21B for each individual event. Although, the Court considered Ms Taylor's complaint had "never been about a single incident of false imprisonment, but the effect taken together which these incidents had on her",[146] It would not be "mischaracterising Ms Taylor's experience to single out a particular event for the purpose of saying there is cover under s 21B" for two reasons:

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143 Court of Appeal decision at [168] [[101.0132]] at [[101.0169]].

144 Select Committee Report at 2. See also *Jeffrey v Progressive Enterprises Ltd* [2015] NZACC 4 at [54].

145 BoE Dr Barry-Walsh at [60] [[201.0183]] at [[201.0194]], Medico-Legal Report – Mariya Taylor, at page 12-13 [[301.0001]] at [[301.0012]], [[301.0013]] High Court decision at [78], [125] [[101.0076]] at [[101.0094]], [[101.0104]], Court of Appeal decision at [179] [[101.0132]] at [[101.0172]].

146 Recall decision at [45] [[101.0185]] at [[101.0201]].

95.1 First, Ms Taylor's case was not focused solely on the cumulative impact of the separate incidents, but that each occasion was traumatic and distressing for her. This is not a case where there has been a 'final straw' event that, in of itself, could not be reasonably expected to cause mental injury to people generally. Rather, taken together, the correct inference from the evidence and the Courts' findings is any one of the incidents can be seen as causative of Ms Taylor's mental injury.

95.2 Secondly, the Court again appears to artificially focus only on the detention aspect of the events. This, like the majority's earlier conclusions, ignores the context in which the detention occurred; that is, the 'event' for the purpose of s 21B comprises all the acts within the incident itself. This approach conflicts with Parliament's intent to avoid a granular assessment of interrelated events.[147]

96. As noted above, the Court did not grapple with the outcome that it has produced which in effect, is to deny Ms Taylor cover on the basis that she suffered more than one traumatic event. As the Court in *MC* observed, Parliament could not have intended to exclude cover where a person was subject to a number of traumatic events, all of which individually would have met the requisite threshold.[148]

Conclusion

97. For the reasons stated above the appeal should be allowed.

27 July 2022

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Counsel for the Attorney-General, the appellant in SC16/2022

TO: The Registrar of the Supreme Court of New Zealand.
AND TO: The appellant in SC 23
AND TO: The respondent

[147] Select Committee Report at 2.

[148] *MC v Accident Compensation Corporation* at [86].

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13. *Dandoroff v Rogozinoff* [1988] 2 NZLR 588 (HC)
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