
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 CROSS APPEAL

26 August 2022



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o te Karauna**
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Introduction and summary

1. These submissions are filed in reply to Ms Taylor’s cross-appeal, challenging the finding that she has cover under the accident compensation regime for her personal injury suffered as a result of assault and battery.¹ Both Courts concluded Ms Taylor had cover under the Accident Compensation Act 1982 (**1982 Act**) and the Court of Appeal found she also had cover under the Accident Rehabilitation and Compensation Insurance Act 1992 (**1992 Act**), and currently has cover under the Accident Compensation Act 2001 (**2001 Act**).
2. The Attorney-General submits there is no basis to deviate from longstanding principles that underpin the foundations of our accident compensation regime and legal theory.
3. All of Ms Taylor’s current arguments have already been dealt with and rejected by the Courts:
 - 3.1 Both Courts found Ms Taylor’s argument the Accident Compensation Corporation may not have accepted her claim until the decision in *ACC v E* clarified the position in 1991,² “is contrary to the declaratory theory of law and is untenable”.³
 - 3.2 Both Courts found that the 1992 Act did not permit Ms Taylor to sue for damages.⁴
 - 3.3 The Court of Appeal dismissed Ms Taylor’s arguments as to the interpretation and operation of sections 21, 21A, 21B and 36 of the 2001 Act.⁵ It is abundantly clear that Parliament intended to make cover available for mental injuries occasioned by events

¹ Ms Taylor’s submissions in opposition to the submissions of the Attorney-General filed on 5 August 2022 (**Ms Taylor’s submissions**). Leave granted in *Roper v Taylor* [2022] NZSC 62 at [8] (**Supreme Court leave decision**) [[05.0013]].

² *M v Roper* [2018] NZHC 2330 (**High Court decision**) at [165]-[167] [[101.0076]] at [[101.0114]]-[[101.0115]], *Taylor v Roper* [2020] NZCA 268 (**Court of Appeal decision**) at [131]-[133] [[101.0132]] at [[101.0162]].

³ Court of Appeal decision at [132] [[101.0132]] at [[101.0163]].

⁴ High Court decision at [168]-[170] [[101.0076]] at [[101.0115]]-[[101.0116]], Court of Appeal decision at [135]-[139] [[101.0132]] at [[101.0163]]-[[101.0164]]. Both Courts also found Ms Taylor’s interpretation of s 135(5) of the 1992 Act was incorrect.

⁵ Court of Appeal decision at [143] to [148] [[101.0132]] at [[101.0165]]-[[101.0166]]. *Taylor v Attorney-General* [2021] NZCA 691 (**Recall decision**) at [12] to [17] [[101.0185]] at [[101.0190]]-[[101.0192]]. The High Court found it unnecessary to deal with arguments in relation to the 2001 Act given its conclusions in relation to the 1982 Act, High Court decision at [171] [[101.0076]] at [[101.0116]].

experienced prior to 1 April 2002, provided the person first receives treatment for the injury on or after 1 April 2002.⁶

4. The Court of Appeal was correct to conclude that Ms Taylor has cover under the 2001 Act, and that cover cannot be rendered unavailable to Ms Taylor just because the events occurred in the late 1980s.⁷
5. She has attempted to argue she does not have cover by reference to a number of provisions in the 1992 Act and 2001 Act.⁸ However, her submissions appear to misunderstand the intent and effect of those legislative changes. To assist the Court, an overview of the relevant provisions is set out below, noting the 1992 and 1998 Act were not canvassed in detail by counsel before the lower courts.

Accident Compensation Act 1982

6. New Zealand's unique no-fault accident compensation regime came into force on 1 April 1974, providing comprehensive entitlements for persons who suffer "personal injury by accident".⁹ The 1982 Act consolidated and amended the 1972 Act and its amendments. The 1972 and 1982 Act provided cover for personal injuries suffered after 1 April 1974, but not those suffered before 1 April 1974.¹⁰
7. Under the 1982 Act, a person qualifies for cover when they suffer personal injury by accident,¹¹ defined as including;¹² "the physical and mental consequences of any such injury or of the accident". By 1988, the time Ms Taylor's mental injury occurred,¹³ the law on cover for mental

⁶ Or, in the case of s 21B, 1 October 2008.

⁷ Court of Appeal decision at [148], [[101.0132]] at [[101.0166]] Recall decision at [17] [[101.0185]] at [[101.0192]].

⁸ She also simply asserts, in a broadbrush manner, that she "did not have cover under the 1982 Act, the 1992 Act or the 1998 Act" see Ms Taylor's submissions at [26].

⁹ Accident Compensation Act 1972. Personal injury by accident was originally defined in s 2(1) to include: "...incapacity resulting from an occupational disease to the extent that cover extends in respect of the disease under sections 65 to 68 of this Act". In 1974 the definition was expanded to include "the physical and mental consequences of any such injury or of the accident". See Attorney-General's Submissions on Appeal, [9] to [16].

¹⁰ *S v Attorney-General* [2003] NZCA 149, [2003] 3 NZLR 450 at [21] [[Cross appellants bundle of authorities (CABOA) Tab 1]].

¹¹ 1982 Act at s 27.

¹² 1982 Act at s 2.

¹³ Court of Appeal decision at [143] [[101.0132]] at [[101.0165]].

injury under the 1982 Act was well settled.¹⁴ As Edwards J stated:¹⁵

In assessing whether a claim for compensation is barred under an Act, the law that existed at the relevant time must apply. Although the Accident Compensation Corporation may not have accepted claims for mental consequences unaccompanied by physical injury under the 1982 Act, that was found to be an incorrect application of the law. The position did not change with the decision in *ACC v E*. Rather, the Court of Appeal simply clarified the scope of the law which applied.

Accident Rehabilitation and Compensation Act 1992

8. In 1990, a committee was established to review the scheme, resulting in the 1992 Act repealing and replacing the 1982 Act.¹⁶ It reduced the scope of cover for mental injury generally by limiting the definition of ‘personal injury’ to “the death of, or physical injuries to, a person, and any mental injury suffered by that person which is the outcome of those physical injuries”.¹⁷

9. At the same time, it introduced a new and separate category for cover for mental injury caused by certain criminal acts.¹⁸ These acts included indecent assault, among other sexual offences.¹⁹ This category of cover was subsequently analysed by the Court of Appeal in *S v Attorney-General*. This ultimately resulted in the introduction of s 21A in the 2001 Act,²⁰ as the Court found cover for mental or nervous shock was not intended to apply unless the event giving rise to the injury occurred after the 1992 Act came into force.²¹

¹⁴ See *Willis v Attorney-General* [1989] 3 NZLR 574 (CA) at 576 and 579 [[Appellant’s joint bundle of authorities (ABOA) at Tab 23]], *Green v Matheson* [1989] 3 NZLR 564 (CA) [[ABOA Tab 11]], and later *Accident Compensation Corporation v E* [1992] 2 NZLR 426 at 433-434 [[ABOA Tab 7]].

¹⁵ High Court decision at [167] [[101.0076]] at [[101.0115]].

¹⁶ The 1992 Act brought in changes to separate the scheme into different accounts, cover employees’ non-work related injuries and introduced discounts and loadings for employers based on their claims history.

¹⁷ 1992 Act at s 4. See Court of Appeal decision at [134] [[101.0132]] at [[101.0163]].

¹⁸ 1992 Act at ss 4, 8, and sch 1.

¹⁹ Note, the 1982 Act included cover for bodily injuries caused by criminal acts.

²⁰ See paragraphs [15]-[17] below.

²¹ *S v Attorney-General* at [25] [[CABOA Tab 1]], although the Court of Appeal acknowledged that the position changed in the 1998 Act, at [29].

Accident Insurance Act 1998

10. The Accident Insurance Act 1998 was enacted to “introduce competition to the delivery of the accident compensation scheme to employers and the self-employed in order to improve incentives to minimise the costs of injuries to society”.²² It extended cover for mental injury caused by certain criminal acts suffered before 1 April 1974 provided the treatment is first received after 1 July 1999.²³ This was achieved through ss 40 and 44, which are both largely in the same form as what is now found in s 21 and s 36 of the 2001 Act.

Accident Compensation Act 2001

11. The Accident Compensation Act 2001 (initially entitled the Injury Prevention, Rehabilitation, and Compensation Act 2001) was enacted to “maintain and enhance the entitlements available to claimants”.²⁴
12. The definition of ‘personal injury’ is now found in s 26 and includes, by reference to s 21, personal injury that is a mental injury if caused by certain criminal acts.²⁵ Mental injury is defined as a clinically significant behavioural, cognitive, or psychological dysfunction.²⁶
13. In order to qualify for cover under s 21:
- 13.1 a person must suffer the mental injury on or after 1 April 2002, whether “inside or outside New Zealand”.²⁷ The date a person “suffers the mental injury” is determined by reference to s 36, being “the date on which the person first received treatment for that mental injury as that mental injury”²⁸, often referred to as ‘the date of treatment’;²⁹

²² Accident Insurance Bill 1999 (203-1) (explanatory note) at i.

²³ *S v Attorney-General*, at [29][[CABOA Tab 1]].

²⁴ Injury Prevention and Rehabilitation Bill 2001 (90-2) (select committee report) at 1.

²⁵ 2001 Act, s 21 [[ABOA Tab 2]].

²⁶ 2001 Act, s 27.

²⁷ 2001 Act, subs 21(1)(a) [[ABOA Tab 2]].

²⁸ The date of injury for “personal injury by accident caused by certain criminal acts” was introduced in the 1998 Act to “reflect the existing law”. See Accident Insurance Bill 1999 (203-1) (explanatory note) at page iv. In previous Acts, only the section relating to personal injuries suffered by gradual process, disease or infection set out what was meant by date of injury.

²⁹ See for example *RN v Accident Compensation Corporation* [2012] NZACC 273.

- 13.2 the mental injury must have been caused by an act performed: by another person against the claimant,³⁰ and in New Zealand;³¹ and
- 13.3 The act must be within the description of one of the specified offences listed in Schedule 3 of the 2001 Act.³²
14. The 2001 Act, like the 1998 Act, recognises that the criminal act, injury, and treatment will not necessarily occur at the same time or place. Like its predecessor, the requirement is only that the date of treatment occurs after the act came into force, which is deemed to be the date of injury. The actual date of the criminal act giving rise to the mental injury is irrelevant.

Introduction of s 21A

15. Ms Taylor relies on s 21A to support the argument that she does not have cover under the 1992, 1998 or 2001 Acts. She submits that this endorses the right for a person to bring and maintain a common law action for compensatory damages.³³
16. Section 21A was introduced by the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005, in response to the Court of Appeal's decision in *S v Attorney-General* mentioned above.³⁴ It is not, as submitted by Ms Taylor, "a code within the Act to deal with all cases of sexual abuse occurring before 1 April 1992."³⁵ Nor does it preserve the ability to bring civil proceedings for compensatory damages. It only permits those persons with civil proceedings pending at the introduction of the Bill, to elect to continue with those proceedings.³⁶

³⁰ Subsections 21(1)(b) and (2)(a) [[ABOA Tab 2]].

³¹ Section 21(2)(b)(i). Or, if the claimant is ordinarily resident in New Zealand, it may have been performed on the claimant outside New Zealand, section 21(2)(b)(ii) [[ABOA Tab 2]].

³² Section 21(2)(c). Schedule 3 includes indecent assault [[ABOA Tab 2]]. The Court of Appeal confirmed Mr Roper indecently assaulted Ms Taylor at [142] [[101.0132]] at [[101.0165]].

³³ Ms Taylor's submissions at [17].

³⁴ Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 3) (165-1) (explanatory note) at p 6, noting "The Bill provides cover and entitlements for people who were first treated for mental injury as a result of sexual abuse during the period in which the Accident Rehabilitation and Compensation Insurance Act 1992 was in force, from 1 July 1992 to 30 June 1999, as long as the other cover and entitlement criteria are met. The Bill also precludes affected claimants from obtaining cover and also taking civil action." [[CABOA Tab 11]].

³⁵ Ms Taylor's submissions at [15].

³⁶ 2001 Act, s 21A [[ABOA Tab 2]].

17. Section 21A serves a very narrow purpose. It is limited to those who suffered injury as result of a criminal act performed prior to 1 July 1992 and received their first treatment between 1 July 1992 and before 1 July 1999.³⁷ It fills a specific gap arising during the operation of the 1992 Act and prior to the 1998 Act. The simple answer is that s 21A does not apply to Ms Taylor as she never fell into this gap.³⁸

No reasons put forward as to why the High Court and Court of Appeal were wrong to find Ms Taylor had cover under the 1982 Act

18. Ms Taylor has not advanced any argument as to why the High Court and the Court of Appeal were wrong to find she was entitled to cover under the 1982 Act.
19. In the High Court, Edwards J concluded that Ms Taylor was entitled to cover under the 1982 Act.³⁹ Her Honour rejected the argument that the 1992 Act revoked the effect of the *ACC v E* decision in respect of entitlement to cover under the 1982 Act.
20. The Court of Appeal reached the same conclusions; namely, Ms Taylor did have cover under the 1982 Act,⁴⁰ the effect of *ACC v E* was both retrospective and prospective, and Ms Taylor’s submissions were untenable.⁴¹
21. In direct contrast to her evidence,⁴² Ms Taylor now says that cover could not have existed “as she had not suffered mental injury as required” under the 1982 Act.⁴³ As the Court of Appeal observed, “the statement of claim, the quantification of damages, Ms Taylor’s own evidence, Mr Little’s cross-examination and his closing submissions in the High

³⁷ Court of Appeal decision at [145] and [146] [[101.0132]] at [[101.0165]]. See s 21 of the 2001 Act, and s 40 of the 1998 Act.

³⁸ Court of Appeal decision at [148] [[101.0132]] at [[101.0166]].

³⁹ High Court decision at [161]-[164] [[101.0076]] at [[101.0113]]-[[101.0114]], *Willis v Attorney-General* [1989] 3 NZLR 574 (CA) at 576 [[ABOA Tab 23]] and *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA) at 433 [[ABOA Tab 7]].

⁴⁰ Court of Appeal decision at [133] [[101.0132]] at [[101.0163]].

⁴¹ Court of Appeal decision at [132] [[101.0132]] at [[101.0163]].

⁴² Court of Appeal decision at [139], [143], [179] [[101.0132]] at [[101.0164]]-[[101.0165]], [[101.0172]], High Court decision at [142] and [188(c)] [[101.0076]] at [[101.0109]] and [[101.0121]].

⁴³ Ms Taylor’s submissions at [26]. She also says she did not suffer mental injury as required under the 1992 Act and the 1998 Act.

Court and even the notice of appeal are all based on the premise that the post-traumatic stress disorder occurred in the late 1980s”.⁴⁴

22. While there was no diagnosis of mental injury until Ms Taylor sought and received treatment in late 2015 to 2016, there was no such requirement for a formal diagnosis or treatment of mental injury for the purposes of the 1982 Act. There can be no dispute against the Courts’ findings that the mental injury was suffered in 1988,⁴⁵ and Ms Taylor’s argument that “she did not suffer injury for the purposes of the Accident Compensation Act 1982”⁴⁶ is unsustainable.
23. The Attorney-General submits there is no reason to depart from the lower Courts’ conclusion that Ms Taylor had cover under the 1982 Act.⁴⁷

Ms Taylor is not left ‘without compensation’ as she still has cover under 2001 Act

24. Ms Taylor repeats her previous submission that s 21 “does not apply to circumstances that arose between 1986 and 1988”.⁴⁸
25. The Attorney-General submits the Court of Appeal was correct in its finding Ms Taylor meets each of the requirements of s 21.⁴⁹
26. Ms Taylor is not excluded from the application of this section simply because she received treatment for her mental injury while living in Australia.⁵⁰
27. Ms Taylor’s arguments that s 21 cannot apply because the section is “prospective applying to circumstances as they arise and does not have retrospective effect” for “circumstances that arose between 1986 and 1988”⁵¹ are plainly incorrect.

⁴⁴ Court of Appeal decision at [86] [[101.0132]] at [[101.0150]].

⁴⁵ Court of Appeal decision at [87], see also at [143] [[101.0132]] at [[101.0151]] and [[101.0165]].

⁴⁶ Ms Taylor’s submissions at [9](iv).

⁴⁷ Ms Taylor’s submissions as to the interpretation of s 135 of the 1992 Act were also rejected by both Courts; citing *Childs v Hillock* [1991] 2 NZLR 65 (CA) at 68-69 [[ABOA Tab 8]] and *White v Attorney-General* [2010] NZCA 139, see Court of Appeal decision at [138] [[101.0132]] at [[101.0164]] and High Court decision at [168]-[170] [[101.0076]] at [[101.0115]]-[[101.0116]].

⁴⁸ Ms Taylor’s submissions at [12], dealt with by the Court of Appeal at [143] [[101.0132]] at [[101.0165]].

⁴⁹ Court of Appeal decision at [141] – [143] [[101.0132]] at [[101.0164]].

⁵⁰ Ms Taylor’s submissions at [9 ii.]

⁵¹ Ms Taylor’s submissions at [12].

Conclusion

28. For the reasons stated above the cross appeal should not be allowed.

26 August 2022

A C M Fisher QC / E N C Lay / A M Piaggi
Counsel for the Attorney-General, the
appellant in SC23/2022

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant in SC 16/2022.

AND TO: The respondent.

LIST OF AUTHORITIES

Statutes

1. Accident Compensation Act 1972
2. Accident Compensation Act 1982
3. Accident Compensation Act 2001
4. Accident Insurance Act 1998
5. Accident Rehabilitation and Compensation Insurance Act 1992

Cases

6. *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA)
7. *Childs v Hillock* [1991] 2 NZLR 65 (CA)
8. *Green v Matheson* [1989] 3 NZLR 564 (CA)
9. *S v Attorney-General* [2003] NZCA 149, [2003] 3 NZLR 450
10. *White v Attorney-General* [2010] NZCA 139
11. *Willis v Attorney-General* [1989] 3 NZLR 574 (CA)
12. *RN v Accident Compensation Corporation* [2012] NZACC 273 (DC)

Other

13. Accident Insurance Bill 1999 (203-1) (explanatory note)
14. Injury Prevention and Rehabilitation Bill 2001 (90-2) (select committee report)
15. Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 3) (165-1) (explanatory note)