IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA597/2018
[2021] NZCA 691

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

Court: French, Brown and Clifford JJ

Counsel: G F Little SC and G E Whiteford for Appellant
J F Mather and L M Herbke for First Respondent
A C M Fisher QC and E N C Lay for Second Respondent

Judgment: 16 December 2021 at 10.30 am
(On the papers)

JUDGMENT OF THE COURT

A The application for recall is granted.

B [2020] NZCA 268 is recalled and reissued.

C The second respondent must pay the appellant costs for a standard application on a band A basis with usual disbursements

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REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] In May 2016 Ms Taylor commenced a civil action against Mr Roper claiming that he sexually assaulted and falsely imprisoned her in the late 1980s at Whenuapai Airbase and, as a result, she suffered mental injury in the form of depression, anxiety and post-traumatic stress disorder (PTSD). Her proceeding was dismissed in the High Court as being time-barred under the Limitation Act 1950 and also barred by the Accident Compensation legislation.[1] Allowing in part an appeal from the High Court judgment, a majority of this Court[2] held that Ms Taylor's claim was not barred by the Limitation Act. Moreover, the cause of action for false imprisonment in respect of her detention by Mr Roper in a tyre cage and while driving Mr Roper to his home was not a claim for personal injury. Hence it was not captured by the statutory bar in the Accident Compensation legislation.

[2] The Attorney-General and Mr Roper filed applications to the Supreme Court for leave to appeal. The leave panel raised the issue of whether cover might have been available for Ms Taylor via the application of s 21B of the Accident Compensation Act 2001 (the Act). The leave panel did not consider it appropriate to hear an appeal on the false imprisonment issue until the parties had had an opportunity to argue the s 21B issue in this Court. Hence on 21 December 2020 the applications for leave were dismissed in order that the applicants could seek a recall of this Court's judgment to enable the s 21B issue to be ventilated.[3]

The recall application

[3] On 5 February 2021 the Attorney-General filed an application for recall of this Court's judgment on the following grounds:

> 2.1 Section 21B … is relevant to the question of whether the claims for compensatory damages made by appellant, Ms Taylor, are barred by s 317 of the Act;
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> 2.2 Cover under s 21B arises independently of cover under s 21 of the Act; and

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1 *M v Roper* [2018] NZHC 2330.
2 *Taylor v Roper* [2020] NZCA 268 [Court of Appeal judgment] per Brown and Clifford JJ, French J dissenting.
3 *Attorney-General v Taylor* [2020] NZSC 152.

2.3 The relevance of s 21B of the Act was not drawn to the Court's attention by any party.

[4] We accept that these circumstances satisfy the second category for recall in *Horowhenua County v Nash (No 2)*, namely where counsel have failed to direct the Court's attention to a legislative provision of plain relevance.[4] Consequently we grant the application for recall in order to consider the issue of the application of s 21B. Due to the length and complexity of the original judgment, our reasons in relation to this issue are contained in this current decision. Accordingly we order [2020] NZCA 268 to be recalled and the judgment amended and reissued in order that it clearly acknowledges the addendum contained herein.

Section 21B

[5] The cover for personal injury provided by s 20 of the Act is subject to exceptions in respect of both mental injury caused by certain criminal acts (addressed in s 21) and work-related mental injury. "Work-related personal injury" is defined in s 28(1) as personal injury suffered while, inter alia, a person is at a place for the purpose of employment or taking a break at his or her place of employment. Section 28(4A) then states that work-related personal injury includes work-related mental injury that is suffered in the circumstances described in s 21B which provides:

> **21B Cover for work-related mental injury**
>
> (1) A person has cover for a personal injury that is a work-related mental injury if—
>
> (a) he or she suffers the mental injury inside or outside New Zealand on or after 1 October 2008; and
>
> (b) the mental injury is caused by a single event of a kind described in subsection (2).
>
> (2) Subsection (1)(b) applies to an event that—
>
> (a) the person experiences, sees, or hears directly in the circumstances described in section 28(1); and
>
> (b) is an event that could reasonably be expected to cause mental injury to people generally; and
>
> (c) occurs—

[4] *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

(i) in New Zealand; or

(ii) outside New Zealand to a person who is ordinarily resident in New Zealand when the event occurs.

(3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.

(4) Section 36(1) describes how the date referred to in subsection (3) is determined.

(5) In subsection (2)(a), a person experiences, sees, or hears an event directly if that person—

(a) is involved in or witnesses the event himself or herself; and

(b) is in close physical proximity to the event at the time it occurs.

(6) To avoid doubt, a person does not experience, see, or hear an event directly if that person experiences, sees, or hears it through a secondary source, for example, by—

(a) seeing it on television (including closed circuit television):

(b) seeing pictures of, or reading about, it in news media:

(c) hearing it on radio or by telephone:

(d) hearing about it from radio, telephone, or another person.

(7) In this section, **event**—

(a) means—

(i) an event that is sudden; or

(ii) a direct outcome of a sudden event; and

(b) includes a series of events that—

(i) arise from the same cause or circumstance; and

(ii) together comprise a single incident or occasion; but

(c) does not include a gradual process.

Submissions

[6] Both Mr Roper and the Attorney-General contended that s 21B provides cover in respect of Ms Taylor's mental injury because it was suffered on or after 1 October

2008 and it was caused by a series of sudden events,[5] the incidents of false imprisonment, which she directly experienced at a place for the purposes of her employment.

[7] Ms Taylor did not take issue with the proposition that both the driving and tyre cage incidents occurred while she was present for the purposes of her employment in terms of s 28(1)(a). However on her behalf Mr Little SC contended that s 21B does not apply to her claim for two reasons. First, the provision is not retrospective: not only the mental injury but also the causative event must occur after 1 October 2008. However he submits Ms Taylor experienced the relevant conduct between 1985 and 1988. Secondly, Mr Little submits that the relevant incidents were not sudden but comprised a continuous course of conduct throughout that period and hence they did not qualify as a single event.

[8] Subsequent to the filing of the parties' initial submissions on the recall issue, we invited further submissions on two matters. The first matter concerned the implications of s 28(6) which states.[6]

> (6) **Work-related personal injury** does not include a personal injury suffered by a person when all the following conditions exist:
>
> (a) the personal injury is suffered in any of the circumstances described in subsection (1); and
>
> (b) the personal injury is suffered in the circumstances described in section 21; and
>
> (c) the person elects to have the personal injury regarded as a non-work injury, in which case that personal injury is a non-work injury.

[9] The parties were unanimous in their view that s 28(6) is of no relevance to the present issue. Even if their collective view was erroneous, it would still be necessary for Ms Taylor to make the election in s 28(6)(c) for the provision to assume relevance. That has not occurred. Consequently we have not explored that matter further.

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5 The Attorney-General also makes an argument that each instance of detention could be considered a single event. This submission is discussed later.

6 *Taylor v Roper* CA597/2018, 21 April 2021 (Minute No 2).

[10] Our second question was whether a single sudden event and a gradual process are exhaustive alternatives or does s 21B(7) envisage a third scenario, namely an event or events which do not satisfy either of those criteria.[7] That is, could a series of events fail to constitute a single event or occasion but also not amount to a gradual process.

[11] From our review of all the submissions filed in response, we consider that the following issues fall to be addressed:

(a) Is s 21B inapplicable because it is prospective only?

(b) Were the incidents of false imprisonment "sudden" events (s 21B(7)(a)(i))?

(c) Were the incidents of false imprisonment a gradual process (s 21B(7)(c))?

(d) Did the incidents of false imprisonment arise from the same cause or circumstance and together comprise a single incident or occasion (s 21B(7)(b)(i) and (ii))?

While there is a degree of overlap in the latter issues, it is nevertheless useful for the purposes of analysis to consider them separately.

Is s 21B inapplicable because it is prospective only?

[12] The answer to Mr Little's retrospectivity contention is to be found in s 21B(4). It provides that the date upon which mental injury is suffered is that described in s 36(1) which states:

> **36 Date on which person is to be regarded as suffering mental injury**
>
> (1) The date on which a person suffers mental injury in the circumstances described in section 21 or 21B is the date on which the person first receives treatment for that mental injury as that mental injury.

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7 *Taylor v Roper* CA597/2018, 21 September 2021 (Minute No 3).

[13] Cover for mental injuries caused by certain criminal acts has an equivalent provision, s 21(4), linking to s 36. This was discussed by French J in this Court's original judgment. Her Honour observed that according to Ms Taylor's medical records the first date on which she received treatment for her PTSD was well after 1 April 2002, that being the material date in s 21(1)(a).[8]

[14] In our view the effect of the reference in s 21B(4) to s 36(1) must defeat Mr Little's argument that the conjunction of (a) and (b) in s 21B(1) requires that both the causative event and the mental injury must occur after 1 October 2008. We consider the effect of s 36(1) to be that cover will be available for a work-related mental injury occasioned by an event experienced prior to 1 October 2008 where the person suffering that mental injury first receives treatment for the injury on or after 1 October 2008.

[15] We accept the submission for the Attorney-General that the date on which Ms Taylor first received treatment for PTSD was subsequent to 1 October 2008 and most likely not before November 2015. The evidence demonstrated that:

(a) the first mention of Mr Roper in Ms Taylor's medical notes was in 19 November 2015;[9]

(b) the first reference to PTSD was on 4 July 2016;

(c) there is no evidence of Ms Taylor ever seeing a psychologist or psychiatrist prior to December 2016;[10] and

(d) the first diagnosis of PTSD was in Dr Eshuys' report, completed on 5 January 2017 following the interview on 5 December 2016.

[16] This conclusion is fortified by the fact that Ms Taylor herself claimed that, although she appreciated that Mr Roper's actions had caused her mental health

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8 Court of Appeal judgment, above n 2, at [143].
9 At [23] and [116].
10 At [30].

problems,[11] she only discovered that she was suffering PTSD because of his conduct subsequent to the publication of his trial and conviction in late 2014.

[17] The cover provided by s 21B would, therefore, not be rendered unavailable to Ms Taylor just because she was falsely imprisoned in the late 1980s.

Were the incidents of false imprisonment "sudden" events?

[18] Two reasons were advanced by Mr Little in support of the proposition that the incidents of false imprisonment were not sudden events and hence were not events which give rise to cover under s 21B. Observing that Ms Taylor's mental injury was the result of events that occurred between 1985 and 1988, it was his original submission that the events were "not sudden but were a continuous course of conduct over those years". However in his most recent submissions, the focus of which was the single event issue, Mr Little submitted:

> Neither were the events that occurred sudden because she was forewarned about the conduct of her tormentor so what occurred was not unexpected although it was untoward.

[19] In his response to the latter submission, the Attorney-General observed that the word "sudden" has two different meanings: the primary one being an absence of foreseeability or warning, and the secondary having a temporal connotation, namely rapid or instantaneous.[12] Attention was drawn to *Lumbercorp (BOP) Ltd v GIO Insurance Ltd*,[13] an insurance case where the insurer declined liability on the basis that an alleged progressive subsidence of a property was not within the cover provided for a "sudden and unforeseen" subsidence. The insured argued for the absence of foreseeability meaning[14] while the insurer contended for the temporal meaning of "instantaneous".[15]

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11 At [39].

12 Reference was made to the definition in *The Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989) vol XVII at 115: "Happening or coming without warning or premonition; taking place or appearing all at once."

13 *Lumbercorp (BOP) Ltd v GIO Insurance Ltd* (2000) 11 ANZ Insurance Cases 61-475.

14 Citing *New Zealand Municipalities Co-operative Insurance Co Ltd v Mayor, Councillors and Citizens of the City of Tauranga* CA171/86, 21 September 1988.

15 Citing *Vee H Aviation Pty Ltd v Australian Underwriting Pool Pty Ltd* SC61/1993, 20 December 1996 (ACTSC).

[20] The Attorney-General noted that a similar question was considered in *Accident Compensation Corporation v E* where this Court concluded that an incident alleged to have caused a personal injury was not required to "be unexpected and undesigned for such injury to come within the description of 'personal injury by accident'".[16] This Court approved the following observations of Greig J at first instance:[17]

> It is not and never has been necessary to show some causative incident which is unexpected and undesigned. That is often the situation with accident and the injury which results from it. But it is still personal injury by accident when the event or activity, or the incident is designed and intended and may have usually unremarkable results. The accident in that case is the unexpected and unintended consequence and is equally an accident as that in which the result or injury is the inevitable and expected consequence of an unforeseen event.

[21] Although since that case Parliament has now prescribed the circumstances in which a person has cover (such that the question is no longer simply whether a person has suffered a "personal injury by accident"), the Attorney-General submitted that in the Accident Compensation context there is no policy basis to interpret "sudden" as limited to what counsel described as "the narrow sense only" provided the other elements of s 21B have been met. Accordingly, notwithstanding Ms Taylor could have foreseen or expected the incidents of false imprisonment, they nevertheless constituted "sudden" events, attracting cover accordingly.

[22] In our view the significance of *Lumbercorp* lies in illustrating that the meaning of the word "sudden" is necessarily contextual. The reason why Wild J preferred the insurer's suggested meaning (abrupt, all at once, instantaneous) was because an interpretation of "sudden" as meaning unforeseen or unexpected would create a tautology whereby the phrase would effectively become "unforeseen and unforeseen".[18] By contrast in *Sun Alliance & London Insurance Group v North West Iron Co Ltd*, the word sudden, when used in qualifying the word "stoppage of the functions thereof", was construed to mean unforeseen and unexpected.[19] Sheppard J

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16 *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA) at 428 and 432.

17 *Accident Compensation Corporation v E* [1991] 2 NZLR 228 (HC) at 231.

18 *Lumbercorp (BOP) Ltd v GIO Insurance Ltd*, above n 13, at [29].

19 *Sun Alliance & London Insurance Group v North West Iron Co Ltd* [1974] 2 NSWLR 625 at 631–633 (NSWSC), following a similar interpretation adopted in *Anderson & Middleton Lumber Co v Lumbermen's Mutual Casualty Co* 333 P 2d 938 (Wash 1959) at 940–941. This was also the interpretation adopted in the more recent case of *Visy Packaging Pty Ltd v Siegwerk Australia Pty Ltd* [2013] FCA 231, (2013) 301 ALR 560 at [93].

made the point that the relevant phrase needed to be read as a whole and one had to be careful not to approach its construction in a "piecemeal fashion".[20]

[23] Section 21B has been considered in several cases four of which warrant mention. First, seemingly the first District Court case on s 21B, is *KB v Accident Compensation Corporation* which involved an embalmer who claimed she had suffered mental injury from attending a police-call out to a suicide. However the appellant had experienced a number of significant traumatic incidents in her employment and a single incident could not be identified as the cause of her mental injures. Accordingly Judge Beattie held s 21B did not apply.[21] Similarly in *OCS Ltd v TW* the appellant, who experienced mental health difficulties including manic episodes, could not show a link to a single event at her work. A face-squashing incident was held to be no more than an event forming an integral element of long-running bullying and harassment, being the last or "final straw" event at most. The Judge also noted it was far removed from the "seriously traumatic events" s 21B was intended to address.[22]

[24] *MC v Accident Compensation Corporation* concerned a soldier suffering from PTSD. It was uncontested that his PTSD was linked to a number of traumatic events the appellant experienced while serving two tours of duty in 2005 and 2009 as a reserve force soldier overseas (particularly in Afghanistan) in an active combat environment. [23] The Judge distinguished *OCS Ltd v TW*, finding that the cumulative total of all the relevant stressors over nearly a decade was not an example of a "final straw" event described in that case.[24] The criteria in s 21B were held to have been established for the reason that the most serious events of the appellant's tour of duty in 2009 were a material cause of his PTSD and could be isolated out, rather than a more general accumulation or constellation of stressors as a whole being causative.[25]

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20 At 632.

21 *KB v Accident Compensation Corporation* [2013] NZACC 41 at [26]–[27]. Leave to appeal to the High Court was declined: *KB v Accident Compensation Corporation* [2014] NZACC 336.

22 *OCS Ltd v TW* [2013] NZACC 177 at [79]–[82].

23 *MC v Accident Compensation Corporation* [2016] NZACC 264, [2017] DCR 59 at [5]. The PTSD was also said to be linked to his work during a similar period as a police officer.

24 At [77].

25 At [83]–[85].

[25] However in *MHF v MidCentral District Health Board* Judge Walker considered *MC* was specific to its facts and did not provide a precedent for applying s 21B to "multiple events" such as those in the facts before him.[26] The appellant was a psychiatric nurse in an acute psychiatric in-patient unit who suffered PTSD. Her claim for work-related mental injury cited two different occasions: a patient committing suicide in April 2014, and then an attempted suicide by a patient the following month. Citing *KB* the Judge ruled that s 21B did not allow the totality of all events to be taken into account.[27] Ultimately in this case the Judge held there was no event that could reasonably be expected to cause mental injury to people generally.[28]

[26] While these decisions are of interest in relation to the single event versus a series of events consideration in s 21B(7)(b), they do not assist on the issue of whether or not "sudden" should be construed as unexpected, in addition to (or alternatively to) instantaneous.

[27] The only other instance of the use of "sudden" in the Act appears in the first definition of accident in s 25(1)(a):

> **25 Accident**
>
> (1) **Accident** means any of the following kinds of occurrences:
>
> (a) a specific event or a series of events, other than a gradual process, that—
>
> …
>
> (ii) involves the sudden movement of the body to avoid a force (including gravity), or resistance, external to the body; or
>
> …

[28] The sudden movement event in s 25(1)(a)(ii) did not feature in the definition of accident in the Accident Insurance Act 1998.[29] According to *Personal Injury in New Zealand*,[30] this provision was added in response to the District Court decision in

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26 *MHF v MidCentral District Health Board* [2020] NZACC 18 at [397].
27 At [403].
28 At [443].
29 Found in s 28 of that act.
30 Samuel Hack and others (ed) *Personal Injury in New Zealand* (online looseleaf ed, Thomson Reuters) at [AC25.09].

O'Regan v Accident Rehabilitation and Compensation Insurance Corporation.[31] In that case the injury was sustained by the appellant twisting her body in a sudden movement in order to evade the flying hoof of a cow. The Court held this was not an accident because it could not be said that there was any application of a force or resistance external to the body.

[29] We consider that the description of the particular type of bodily movement in s 25(1)(a)(ii) as sudden conveys a temporal meaning. It is a movement for the purpose of avoiding an external force or resistance. In addition it must be sudden. Read in its entirety this does not convey to us the notion of an anticipated or apprehended event.

[30] Irrespective of the meaning of s 25(1)(a)(ii), in our view the context of s 21B points away from a sudden event as including one that is anticipated or foreseen. The explanatory note to the Bill introducing s 21B stated:[32]

> The Act covers mental injury in 2 situations: mental injury suffered because of the claimant's physical injuries, and mental injuries suffered as a result of certain types of sexual abuse or assault. No cover is currently available for mental injury caused by exposure to a sudden traumatic event in the course of employment (for example, witnessing a colleague shot in a bank robbery, or a train driver hitting someone on the tracks).
>
> …
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> 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. …

[31] The immediacy of the event for the person who sustains a mental injury is reflected in the requirement that the claimant experience, see or hear the event directly.[33] That requirement is given greater specificity in s 21B(5) and (6), including by precluding delayed exposure to the event by means of various forms of media or

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31 *O'Regan v Accident Rehabilitation and Compensation Insurance Corp* DC Huntly No 5/99, 21 January 1999.

32 Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) 2007 (170-1) (explanatory note) at 4.

33 Section 21B(2)(a).

telecommunications. However, in addition, having regard to the cumulative requirements for cover under s 21B, including that the event be one which could reasonably be expected to cause mental injury to people generally,[34] we have difficulty with the proposition that the section is intended to extend to apprehended, albeit unwanted, incidents of physical harassment in the nature of detention or confinement. Given a contextual interpretation, we view s 21B as incorporating elements of both the primary and secondary meanings of the word highlighted at [19] above.

[32] As Mr Little pointed out, Mr Roper had earned an unpleasant reputation for sexual harassment of the Airbase staff. On the night shift roster a call for transportation home for the then Sergeant Roper in an intoxicated state could be expected and, at least in Ms Taylor's case, feared. In the course of the journey the anticipated sexual overture would commence while Ms Taylor was locked in the vehicle. In our view such anticipated and feared episodes are not fairly characterised as "sudden".

[33] Furthermore it is implicit in the concept of detention or confinement that it will be for a period of time rather than momentary. As the Attorney-General's submissions noted, the Judge in the High Court recognised that for Ms Taylor her confinement in the tyre cage may have felt like an hour or a very long time.[35] Even if ultimately the Judge found it improbable Ms Taylor was locked in there for up to an hour, the confinement was clearly of a notable length. Similarly, in relation to the incidents of being locked in the car, it would naturally take some time to drive Mr Roper home. We consider that it would be unduly stretching the meaning of sudden event in s 21B in order for it to embrace incidents of that duration.

[34] We accept that individual incidents of false imprisonment would have a sudden component in the sense that each instance, while anticipated, would necessarily involve a point of commencement. However 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. For these reasons we consider it unrealistic to characterise the incidents

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34 Section 21B(2)(b).
35 *M v Roper*, above n 1, at [52].

of false imprisonment to which Ms Taylor was subjected as being sudden events in the sense that expression is employed in s 21B.

[35] While this would be sufficient to conclude that s 21B is not applicable to Ms Taylor, for completeness we address the remaining issues.

Were the incidents of false imprisonment a gradual process?

Submissions following this Court's minute

[36] In order to comprehend the parties' positions on both this issue and the final issue discussed below, it is necessary first to note their responses to the question posed in our third minute, which relevantly stated:[36]

> [3] The parties' submissions proceeded on the binary footing that the operative cause of a work-related mental injury was either an event as particularised in s 21B(7)(a) and (b) or the result of a gradual process. See for example paragraph 21 of the second respondent's submissions explaining what distinguishes a "series of events" from a "gradual process".
>
> [4] The parties' submissions do not explicitly address the possibility that s 21B(7) should be interpreted so as to accommodate three permutations namely:
>
> (a) an event satisfying the criteria in s 21B(7)(a) and (b); or
>
> (b) a sequence of events that do not fulfil the criteria in s 21B(7)(b), for example because they comprise a number of events which occur over a substantial period of time and which cannot sensibly be viewed as arising from the same cause or circumstances; or
>
> (c) a gradual process.

[37] Ms Taylor's response to our question was in the negative. As her submission stated, the intention of the legislature had been clearly expressed as:

> … excluding the combining of a number of events on different occasions to have a cumulative effect in causing the mental injury as qualifying for cover. This is perhaps loosely described in s 21B(7)(c) as not including a gradual process i.e. not a continuum of a specific causative event but an accumulation of separate and distinct events separate in place and time. The latter cannot be converted into being "caused by a single event."

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36 Minute No 3, above n 7.

Her submission in response to our question further stated:

> Subsection 7(c) merely refers to the exclusion of a disease of gradual process to make it abundantly clear that incidents could not be accumulated over time to produce the mental injury when the entitlement was strictly controlled to a single event which could be a sole occurrence or a chain of occurrences still being part of the one event.

[38] Mr Roper's response was to the contrary of Ms Taylor's position, albeit the basis for his position appeared to be that he viewed subparas (a) and (b) of s 21B(7) disjunctively:

> [Section] 21B(7) does not preclude cover for a sequence of events that do not fulfil the criteria in s 21B(7)(b). Any sequence of events that factually formed one event would come within s 21B(7)(b), and any series of events, each one of which arose from a separate cause or circumstance, would fall within s 21B(7)(a).

[39] The Attorney-General appeared to also answer the question in the affirmative. His response, which we record verbatim, was that there were five possible scenarios, three of which give rise to cover.

> 3.1 In some instances (such as seeing someone hit by a train or shot in a robbery), there is a singular distinct experience which would make it unnecessary to take a detailed assessment of the various components of the 'event'.
>
> 3.2 Subsection 21B(7)(b) clarifies the definition of 'event', so that a person may also qualify for cover where they have experienced a series of events that arise from the same cause or circumstance and together comprise a single incident or occasion.
>
> 3.3 As this Court observed, there may be a sequence of events that do not fulfil the criteria in s 21B(7)(a) and (b). An example of this is where a person has the misfortune of falling victim to a number of unrelated events, say a mixture of work-related and personal stressors. Where the individual events alone are not of sufficient gravity to cause mental injury and are not linked to one another as required, a person would not have cover under s 21B.
>
> 3.4 The definition is also tempered by subs 21B(7)(c) which clarifies that an 'event' (including a series of events) does not include a gradual process. This is where the events are "so gradually incremental that they cannot be distinguished one from the other" such that a single causative event or series of events cannot be identified. A case with a background of minor events concluding with a "final straw" event may also fall into the category of a gradual process.
>
> 3.5 Finally, the Courts have recognised that there may be a combination of both a process of indistinguishable minor events as well as more

> significant stressor events. The question in these cases is whether the serious events can be isolated out from the other stressors — so that it is not an accumulation or constellation of stressors as a whole that can be said to be causative — but a small number of events (arising from the same cause or circumstance and comprising an event) that are a material cause of the mental injury.

It was the Attorney-General's contention in this set of submissions that each instance of false imprisonment could qualify for cover under the first scenario, or in the alternative Ms Taylor's circumstances satisfied the second of the scenarios and hence she qualified for cover.

"Gradual process"

[40] "Gradual process" is not a defined term. It appears in several provisions as part of the composite phrase "gradual process, disease or infection". Cover is available under s 20(2)(e) for personal injury caused by a work-related gradual process, disease or infection, that being one of the exceptions to the general exclusion in s 26(2) of personal injuries caused wholly or substantially by a gradual process, disease or infection. Its relevance here is that s 21B, which gives cover for work-related mental injuries caused by a "single event", expressly excludes a gradual process from the definition of event. This definition of "event" in s 21B(7) finds a parallel in the first definition of "accident" in s 25(1)(a) which refers to "a specific event or a series of events, other than a gradual process".

[41] This limitation in respect of cover for work-related mental injury reflects a policy decision that can be gleaned from the legislative history. The explanatory note to the Bill, quoted at [30] above, stated that the Bill introduced cover for mental injury caused by exposure to a sudden traumatic events at work but not for mental injury caused by "non-physical stress (gradual onset) in the workplace".[37]

[42] As the submissions for the Attorney-General noted, the Transport and Industrial Relations Committee accepted that mental injury caused by a series of events ought also to be covered. But it considered that extending the proposed cover to "include mental injuries arising from gradual or cumulative exposure to work tasks

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

or the characteristics of a particular job would have significant policy and financial implications".[38] The Committee confirmed the intention of the requirement that the event be one that could be reasonably be expected to cause mental injury is "to ensure that cover for work-related mental injury does not extend to injuries caused by minor events or by gradual process.[39]

[43] Mr Little's submission for Ms Taylor appears to assume that, although there were a number of individual instances of conduct amounting to false imprisonment over a significant period of time, because those incidents constituted a continuous course of conduct they qualified as a gradual process for the purposes of s 21B(7). We do not agree. The concept is not merely about something happening repeatedly. There is the requirement of some type of process taking place. Moreover, the legislative history highlights injuries that may occur from "gradual or cumulative exposure", which suggests progressive development over days, weeks or months. Putting this together, in our view the reference to a "gradual process" is a reference to a transformative process occurring progressively over time.

[44] We agree with the Attorney-General's submission that in the case of a gradual process, a single causative event or series of events cannot be identified. In our view the course of conduct to which Ms Taylor was subjected was not a gradual process within the terms of s 21B(7)(c).

Did the incidents of false imprisonment arise from the same cause or circumstance and together comprise a single incident or occasion?

[45] The Attorney-General contended that each instance of false imprisonment of Ms Taylor was a single and sudden event as defined in s 21B(7)(a) and hence she has cover under s 21B for each individual incident. We are unable to accept this submission. Ms Taylor's complaint has never been about a single incident of false imprisonment, but the effect taken together which these incidents had on her. It would be mischaracterising her experience, and Mr Roper's conduct, to single out a particular event for the purpose of saying there is cover under s 21B.

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38 Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) 2007 (170-2) (select committee report) at 2.

39 At 3.

[46] The alternative submission of the Attorney-General, echoed by Mr Roper, is that there was a series of events that can be linked as required in s 21B(7)(b). His position was that a conclusion that the events did not arise from the same cause or circumstance was not available on the evidence, and that together they comprised a "single incident or occasion".

[47] We agree with the Attorney-General's submission that Mr Roper was the sole author and cause of the traumatic and distressing events experienced by Ms Taylor at Whenuapai and that, taken together, the incidents comprise a predatory and sexualised course of conduct by him.[40] However we consider it is quite unrealistic to view the incidents of false imprisonment during 1986 and 1987 as comprising a single incident or occasion. The tyre cage incidents and the driving incidents occurred at different places and in different circumstances. They involved different conduct, albeit all comprising detention or confinement of some kind. The nature of Ms Taylor's case is in our view similar to that in *KB* where the appellant had experienced multiple significant traumatic incidents.[41] Like Judge Walker in *MHF*,[42] we do not view *MC* as a relevant precedent for this matter.

[48] We do not consider that this objection is answered by the Attorney-General's still further alternative submission that the tyre cage incidents together amount to one series of events comprising a single incident and similarly that the driving incidents taken together amount to another series of events comprising a discrete single incident. In our view the Attorney-General's argument in its diverse forms endeavouring to characterise Mr Roper's prolonged course of conduct towards Ms Taylor as one, or alternatively two, single incidents involves casting the net far too wide.

Conclusion

[49] Mr Roper's sexual predation of Ms Taylor in the course of her employment involved a number of incidents of false imprisonment either in the tyre cage or in the motor vehicle when she was summoned to drive him home from the sergeants' mess.

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40 Quoting Court of Appeal judgment, above n 2, at [168] per French J.
41 *KB v Accident Compensation Corporation*, above n 21.
42 *MHF v MidCentral District Health Board*, above n 26, at [397].

As a matter of plain language they can be described as a series of events and there is no doubt that Mr Roper was the "cause" of each incident.

[50] However we do not consider that s 21B applies to those incidents for two reasons:

(a) they were not "sudden" incidents; and

(b) they did not together comprise a single incident or occasion.

[51] Consequently we conclude that s 21B does not provide cover for the PTSD suffered by Ms Taylor as a consequence of these incidents. Hence her claim for compensatory damages for false imprisonment is not statute barred.

Result

[52] The application for recall is granted.

[53] [2020] NZCA 268 is recalled and reissued.

[54] While the application has been granted, ultimately the respondents have been unsuccessful in their arguments. In light of this, and the continuing protracted nature of her claim, we are of the view Ms Taylor is entitled to costs. As Mr Roper is legally aided, the Attorney-General must pay Ms Taylor costs for a standard application on a band A basis with usual disbursements.

Solicitors:
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