IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-000736
[2022] NZHC 1280

UNDER	the Accident Compensation Act 2001
IN THE MATTER	of an application under section 162 of the Act to appeal to the High Court on a question of law
BETWEEN	TN Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 17 May 2022

Appearances: B H Woodhouse and B J Peck for the Appellant
S M Bisley and L W D Kibblewhite for the Respondent

Judgment: 1 June 2022

JUDGMENT OF COOKE J

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[1] TN appeals against the decision of the District Court upholding a decision of the Accident Compensation Corporation (the Corporation) that she is not entitled to

earnings related compensation as a potential earner under s 105 of the Accident Compensation Act 2001 (the Act).[1] It is accepted that TN has ACC cover because of the mental injuries inflicted on her arising from sexual abuse while she was a child. Potential earning compensation arises when a person suffers such mental injuries before turning 18 years of age which results in the person being unable to engage in work. The Corporation determined that TN's injuries were deemed to have arisen when she first received treatment for those injuries as an adult. That arises as a consequence of the suggested application of s 36. She was found not to be entitled to compensation as a potential earner as a consequence. Neither is she entitled to standard earnings related compensation under s 103 as she was not in work when she was deemed to be injured. The District Court has upheld that decision. The essential issue on this appeal is whether the legislation does have this effect.

Relevant facts

[2] TN was the victim of multiple sexual offences committed against her by family members and associates between the ages of 2 and 15.

[3] Although TN disclosed the abuse to her parents as early as age seven she was told by her family she was not allowed to discuss it with others, and her family did not allow her to visit medical professionals unaccompanied. When she turned 16 she ran away from home. She was brought back by a man who her father then invited to stay in her room for several months. On one occasion the man forced her to have sex with his younger brother. As a consequence of that rape she conceived a child.

[4] TN would have disclosed the abuse and the mental injuries resulting from the abuse when she consulted her GP in relation to her pregnancy when she was 17 years old had her mother not been present at that consultation. At that stage the abuse was causing her distress, she was feeling deeply depressed and sleeping all day, rarely leaving the house, and viewed her pregnancy as a reminder of the abuse that had occurred as it was a further product of that abuse.

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1 *TN v Accident Compensation Corporation* [2020] NZACC 132.

[5] When she was 35 she laid criminal charges against her grandfather and uncle who were both convicted and imprisoned for their offending against her.

[6] TN eventually sought treatment for her mental injuries in September 2008 when she was 37. She was granted cover for post-traumatic stress disorder and major depressive disorder. The Corporation takes the date of her mental injury to be 12 September 2008 by applying s 36 of the Act which I address below. TN also has cover for bulimia nervosa with a deemed date of injury of 17 April 1993.

[7] In December 2018 TN phoned the Corporation and asked about her eligibility for earnings related compensation as a potential earner. She was told that she was not eligible as she did not seek treatment before the age of 18. This was subsequently confirmed by the Corporation in a formal decision dated 18 December 2018. A review against that decision was dismissed on 16 May 2019.

[8] On appeal to the District Court the Corporation's decisions were upheld by Judge McGuire on the basis that s 36 deemed TN's mental injury to occur when she first sought treatment, and accordingly after she turned 18 years of age.

[9] The Corporation, Review Officer and the District Court did not go on to determine whether TN would have qualified for earning related compensation as a potential earner but for the application of s 36, but I note the District Court said that the sexual abuse was "grievous" and that "there is little doubt from the evidence that the effect of this sexual abuse was profound".[2] So it seems likely that the requirements for this form of entitlement would otherwise have been met.

[10] Leave to appeal was granted by Judge Harrison on 10 November 2021.[3] The specific question for which leave was granted was not as formulated by the appellant but I do not think anything turns on that as the ultimate question of law in issue is clear — it is whether the deemed date of injury in s 36 applies to the definition of "potential earner" in s 6.

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2 *TN v Accident Compensation Corporation*, above n 1, at [36].
3 *TN v Accident Compensation Corporation* [2021] NZACC 180.

The statutory provisions

[11] Section 21 of the Act provides that a person has cover for mental injury arising as a consequence of certain criminal acts. The qualifying offending is set out in Schedule 3 and includes the serious sexual offending in issue here.

[12] Section 36 provides:

> *Relevant dates of injury*
>
> **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.
>
> (2) The date on which a person suffers mental injury because of physical injuries suffered by the person is the date on which the physical injuries are suffered.
>
> (3) In subsection (1), **treatment** means treatment of a type that the person is entitled to under this Act or a former Act.
>
> (4) This section does not apply for the purposes of clause 55 of Schedule 1.

[13] After TN sought treatment in September 2008 she was granted ACC cover in accordance with s 36.

[14] But TN also seeks earning related compensation. She was not in employment when she sought treatment, and is accordingly not entitled to standard earnings related compensation in accordance with s 103. But she seeks such compensation on the basis that she has been unable to work as a consequence of the impact of the sexual abuse in her childhood. She does so on the basis that she was a "potential earner" — this contemplates a type of earnings related compensation that is less generous than standard earnings related compensation, and which applies when the injury is suffered by someone under 18 and it removes their capacity to work later in life. It arises under s 105(1)(b). Section 105 provides:

105 Corporation to determine incapacity of certain claimants who, at time of incapacity, had ceased to be in employment, were potential earners, or had purchased weekly compensation under section 223

(1) The Corporation must determine under this section the incapacity of a claimant who—

(a) is deemed under clause 43 of Schedule 1 to continue to be an employee, a self-employed person, or a shareholder-employee, as the case may be; or

(b) is a potential earner; or

(c) has purchased the right to receive weekly compensation under section 223.

(2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in work for which he or she is suited by reason of experience, education, or training, or any combination of those things.

(3) The references in subsection (2) to a personal injury are references to a personal injury for which the person has cover under this Act.

(4) Subsection (3) is for the avoidance of doubt.

[15] There is a definition of "potential earner" in s 6. It is:

potential earner means a claimant who either—

(a) suffered personal injury before turning 18 years; or

(b) suffered personal injury while engaged in full-time study or training that began before the claimant turned 18 years and continued uninterrupted until after the claimant turned 18 years

[16] There is also a definition of "suffers" in s 6 in the following terms:

suffers is affected in its interpretation by—

(a) section 36 and clause 55 of Schedule 1, when it is used in relation to mental injury:

(b) section 37 and clause 55 of Schedule 1, when it is used in relation to personal injury caused by a work-related gradual process, disease, or infection:

(c) section 38 and clause 55 of Schedule 1, when it is used in relation to treatment injury or personal injury caused by medical misadventure

[17] So the use of the defined term in s 105 ("potential earner") itself uses a defined term ("suffered", and accordingly "suffers") which in turn cross-references s 36 which deems the date of the injury to be when a person first seeks treatment for that injury, which here was when TN was an adult. This path through the provisions is complex, but the text of the provisions leads down that path.

Previous authorities

[18] A provision deeming the date of the mental injury to be the date of first treatment was first introduced by s 63 of the Accident Rehabilitation and Compensation Insurance Act 1992. It was then carried through into the subsequent legislation including s 36 of the current Act.

[19] In 2004 the District Court heard an appeal against a decision by the Corporation to decline earnings related compensation as a potential earner under the current Act.[4] Judge Ongley dismissed the appeal as he concluded that s 36 was clear and prevented the appellant in that case being able to contend that they had suffered mental injuries before they were aged 18. He identified the apparent anomaly within s 36 treated mental injuries differently from physical injuries. He held:[5]

> There is of course a spectre of unfairness where a person who can identify physical injury causing mental injury is placed in a potentially more favourable position that a person who cannot. The different treatment of the two different circumstances contemplated by s 36 is not difficult to understand as reflecting legislative policy. In many instances the time of making a claim determines the commencement of compensation. There is some logic in fixing a date for compensation as the time on which the effect of the mental injury is sufficiently serious or obvious that the person seeks treatment. The problem created by s 36 is that it does not prescribe a date for commencement of compensation, but an assumed or artificial date on which the injury is deemed to have occurred. The same approach is taken in s 37 concerning to work-related gradual process injury and s 38 concerning medical misadventure.
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> There are many instances in the compensation statutes of time requirements that must be met before money will be paid. Entitlement for loss of potential earnings depended from the beginning on definitions involving age and other conditions determined by legislative policy. I am unable to find a persuasive reason to adopt the meaning for which Ms Ross contends. I am satisfied that the words of s 36 have a clear meaning and must have been so intended by the legislature.

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4 *BRM v Accident Compensation Corporation* DC Wellington 224/2004, 6 August 2004.
5 At [21]–[22].

[20] Nearly 10 years later in *Murray v Accident Compensation Corporation* the position was considered again by the High Court in the context of an application to leave to appeal to that Court from a District Court decision reaching similar conclusions.[6] A series of questions in relation to earnings related compensation by those suffering mental injury as a consequence of historic sexual abuse were raised, but leave was declined. When addressing the question directed to earnings related compensation as a potential earner Kós J held:[7]

> I agree with Ms Hansen's submission (for the Corporation) that where sexual abuse occurs when a person is under 18, but treatment for mental injury caused by the abuse is only first received after 18, the words of s 36 are clear. If the mental injury is suffered because of *physical* injury, s 36(2) applies. The mental injury is suffered on the date of the physical injury. But otherwise s 36(1) makes it clear that the date of injury is the date on which the person first receives treatment for the mental injury (caused by the abuse) "as that mental injury".
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> I think Judge Ongley was correct to say, in *BRM v ACC* that s 36 establishes a purely notional or assumed date on which the mental injury is deemed to have occurred.[8] Frater J reached the same view in *A v Roman Catholic Archdiocese of Wellington*.[9]
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> I do not consider, therefore, that the question posed is capable of bona fide and serious argument. The statutory language is too clear to admit of such argument. The alternative interpretation advanced by Mr Miller cannot stand in the face of the statutory wording, the meaning of which is plain.

[21] Kós J ended his judgment declining leave in the following terms:[10]

> The outcomes under the present Act are unquestionably anomalous. It was not suggested otherwise before me. No Judge could frame common law duties in so inconsistent and erratic a fashion. Nor could insurers achieve such outcomes in an informed market. But cover under the Act is the product of careful and crystalline drafting by legislators. The meaning and effect of the statutory words in issue is quite clear.

[22] Likewise, in following these authorities in the decision currently under appeal, Judge McGuire described Parliament's choices in s 36 as "premeditated and specific".[11]

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6 *Murray v Accident Compensation Corporation* [2013] NZHC 2967.
7 At [44]–[46].
8 *BRM v Accident Compensation Corporation*, above n 4, at [21].
9 *A v Roman Catholic Archdiocese of Wellington* HC Wellington CIV-2001-485-961, 15 November 2006 at [537].
10 *Murray v Accident Compensation Corporation,* above n 6, at [69].
11 *TN v Accident Compensation Corporation*, above n 1, at [41].

Assessment

[23] I will not set out the arguments advanced by the parties in a separate part of this judgment as I believe I can capture them in the analysis engaged in below.

[24] The general approach to the interpretation of ACC legislation is clear. The normal principles mandated by s 10 of the Legislation Act 2019 apply. There is no special approach applicable to ACC legislation.[12] The Court should interpret the text in light of its purpose, and in its context. The requirement to consider purpose as well as text is a fundamental one. In *Commerce Commission v Fonterra Co-operative Group Ltd* Tipping J said that "… [e]ven if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5".[13] The only change to this requirement is that that s 10 of the Legislation Act now has three requirements. Context must also be addressed along with text and purpose. That is unlikely to be a material change, however, given that purpose and context are overlapping concepts.[14]

[25] Ms Woodhouse and Ms Peck argued that *BRM* and *Murray* failed to properly identify what the purpose of the deeming provision in s 36 was, and that consideration of that purpose demonstrates that the literal interpretation of the provisions is not the correct one.

The purpose of the provision: the legislative history

[26] As indicated, the legislative predecessor to s 36 was first introduced in the 1992 Act. Section 63 provided a limitation period. It materially provided:

> **63 Claims—**
>
> (1) Every claimant for cover under this Act shall lodge a claim in the prescribed form.

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12 *Accident Compensation Corporation v Algie* [2016] NZCA 120, [2016] 3 NZLR 59 at [14]–[15]; *McKeefry v Accident Compensation Corporation* [2019] NZHC 612 at [6]–[8]. See also *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 at [39],

13 *Commerce Commission v Fonterra Co-Operative Group Ltd*, [2007] NZSC 36, [2007] 3 NZLR 767, at [22].

14 See *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064 at [22]–[23].

> (2) No claimant shall be entitled to any payment in respect of personal injury unless that claimant has lodged a claim for cover within 12 months after the date on which the personal injury is suffered.
>
> (3) For the purposes of this section, where a claim involves conduct of a kind described in section 8(3) of this Act, the personal injury shall be deemed to have been suffered on the date on which the person first received treatment for that personal injury as that personal injury, being treatment of a kind for which the Corporation is required or permitted to make payments, irrespective of whether or not it makes any payment in the particular case.
>
> …

[27] The limitation periods in the earlier legislation contained a proviso that the Corporation could only rely on the limitation period if a failure to meet it had caused the Corporation prejudice.[15] The removal of that proviso in s 63(2) was part of the general tightening of entitlements in the 1992 Act.

[28] When first introduced to Parliament, what had become s 63 did not have the exception in s 63(3), which is the legislative predecessor of s 36 of the present Act. But the fact that a more exacting limitation period could cause significant prejudice to those who had suffered mental injury as a consequence of sexual abuse became the subject of scrutiny. The deputy leader of the opposition, the Rt Hon Helen Clark said at the first reading:[16]

> I want to deal with issues that are of particular importance to women. The issue that was of grave concern to many women's organisations was the Minister's initial announcement that the victims of rape and sexual abuse would not be covered by the legislation. However, under clause 3 compensation may be paid for any mental disorder suffered by a person, which is the outcome of any act of any other person performed on, with, or in relation to the first person, which is within the description of any offence listed in the first schedule.
>
> The first schedule to the Act lists such crimes as rape and other sexual crimes. I welcome the inclusion of that but I have to say that I am enormously disturbed by clause 65, which provides that no claimant for personal injury shall be entitled to any payment for that injury unless the claim is lodged within 12 months after the date on which the personal injury was suffered. Am I to read that provision as stating that unless a victim of sexual abuse lodges a claim for personal injury within 12 months of that abuse occurring then compensation or counselling expenses will not be paid? That is a question I should like the answer to, and if the answer is that the Bill intends

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15 Accident Compensation Act 1979, s 149(2); Accident Compensation Act 1982, s 98(2).

16 (19 November 1991) 520 NZPD 5397.

> that no compensation shall be paid unless the claim is lodged within 12 months I must say that I think that is atrocious.

[29] On the second reading on 19 March 1992 the Minister of Labour, the Rt Hon W F Birch explained to the House that the Government had indicated that "the requirement that a claim be made within one year of an accident would be reconsidered by the select committee to allow special consideration for those who have suffered sexual abuse",[17] and that as a consequence:[18]

> Sexual abuse has been dealt with as promised. Total cover is now provided for. The new clause 65(2A) meets the undertaking that I gave at the introduction of the Bill. It provides that the personal injury shall be deemed to have been suffered on the date on which the person first receives treatment for that personal injury.

[30] Ian Revell, a government member of the select committee further explained the process that had been followed:[19]

> Let me turn to an issue that the select committee spent a great deal of time on — to ensure that there is proper coverage for the victims of sexual abuse. Substantial submissions were made by sexual abuse support groups, and it was quite clear that the horror of sexual abuse often does not surface for many years after the event. The select committee decided that the 12-month period for a claim to be initiated will be taken from the time at which medical treatment is first received for the abuse and not from the date of the sexual abuse. That means that children who have been abused and who seek treatment years afterwards will be eligible for coverage.

[31] The purpose of the deeming provision was accordingly clear. It was introduced to remedy the injustice for sexual abuse victims that would have arisen from depriving them of cover because of the limitation period. Such a limitation period involved an unreasonable restriction given the difficulties with identifying and raising childhood sexual abuse injuries at the time of the abuse. The amendment ensured that those who suffered harm from childhood sexual abuse nevertheless received compensation. In the words of the Minister, the legislation was changed so that "total cover is now provided for".

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17 (19 March 1992) 522 NZPD 7075.
18 At 7076.
19 At 7095.

[32] Once that is understood it can be seen that interpreting the provisions so that this change *deprives* a claimant of earnings-related compensation as a potential earner because the person did not seek treatment before they were 18 years of age is not only not consistent with Parliament's purpose, but is directly contrary to it. This would be to re-introduce the very kind of time limitation that Parliament had regarded as unreasonable for those suffering mental injury from sexual abuse as a child.[20]

[33] Mr Bisley argued that although Hansard was a legitimate source to be considered for identifying the purpose of the provision, the Court should be cautious when doing so. I accept that — it is the words of the enactment rather than the speeches in Parliament that are to be given effect to. But in identifying the purpose of a particular provision, materials such as the Hansard debates and select committee reports can be valuable and are frequently referred to by the Courts.[21] Moreover here it is not just the debates, but also the legislative history and the changes made to the Bill that reveal the original purpose of the deeming provision.

[34] Mr Bisley further argued that whilst this may have been a purpose of the deeming provision when enacted, that it was not the only purpose. In particular, he relied on the analysis conducted by Judge Ongley that a further purpose of the provision was to create a clear date when cover was to arise, in order to avoid the complicated questions that would otherwise follow when determining a mental injury caused by periods of childhood sexual abuse over time.[22] In other words, the purpose was to provide certainty and to avoid administrative difficulty. Whilst I accept that this is a further benefit of the deeming provision, and that it can be seen as part of the purpose of it, I do not accept that this was its original purpose. There is no reference to this objective in the legislative history. Moreover, deeming the date of injury as the date upon which a person first seeks treatment for that injury itself raises a complex evidential question. There is also less complexity in the present context — all that needs to be established is that such injury occurred before the victim turned 18.

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20 Compensation for loss of potential earnings arose under the 1992 Act under s 46 which required the person to have "suffered personal injury before attaining the age of 18 years …".

21 See, for example, *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289 at [59]–[64].

22 *BRM v Accident Compensation Corporation*, above n 4, at [21]–[22].

How the purpose affects the text

[35] It is, of course, necessary to identify how an identified purpose influences the interpretation of the text of the enactment.

[36] As enacted in the 1992 Act there would have been a relatively straightforward interpretation of the text to give effect to the remedial purpose of the deeming provision. Section 63(3) provided that the deeming occurred "for the purposes of this section". That is for the purposes of the limitation period in s 63, and not more broadly. The Court of Appeal noted that limitation in *S v Attorney-General* where it said:[23]

> Thirdly, it is plain that s 63, both from its position in the statute – in Part 5 relating to claims for payment – and from its own content, deals not with cover but with the claims process for someone who already has cover under Part 2. Subsection (3) is said to apply only for the purposes of s 63, not more generally. For that limited purpose, the making of a claim, it gives extra time by deeming the injury to have been suffered on the date of the first treatment.

[37] This would mean that the deeming provision did not apply in relation to the requirement in s 46 that the person suffer injury before attaining 18 years in order to receive compensation for the loss of potential earnings. I understood counsel to say, however, that the Corporation's interpretation has been applied in practice since 1992. If that is the case it seems to me that the practice was wrong.

[38] But when the deeming provision was carried through into the later legislation the provisions were formulated differently. Section 36 of the current Act no longer has the words "for the purposes of this section". Moreover s 36 was separated out from the limitation provision. It was grouped with other provisions concerning more complex injuries in ss 36–38. The limitation period requirements were also relaxed — Parliament re-introduced the requirement that the Corporation demonstrate prejudice before the limitation period could be relied upon.[24] So the original purpose of the deeming provision might no longer be said to arise from a need to avoid the harsh effect of the strict limitation period.

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23 *S v Attorney-General* [2003] 3 NZLR 450 at [27].
24 Accident Compensation Act 2001, s 53.

[39] Mr Bisley argued that s 36, in the context of the present Act, could no longer be said to have been motivated by a need to avoid the harsh effects of a limitation period, even if that had been the case when its predecessor was first enacted in 1992. I see force in this point, but I do not think it eliminates the existence of the purpose as originally identified. Section 36 can still be seen as having the objective of avoiding the harsh effects of the limitation period, even if another provision (s 53) might also now do so. The legislative history of the deeming provision cannot be ignored.

[40] But I accept the different statutory scheme in the present Act means that the Corporation's argument is decidedly stronger. Section 36 now forms a part of related provisions in ss 36–38 which deal with gradual conditions and treatment related injuries. The definition of "suffers" then refers to those different categories of more complex injury. So the argument that the purpose of s 36 was to create clarity on when an injury arose for sexual abuse given the complex evidential questions is much stronger given the scheme of the 2001 Act.

[41] The re-enactments in 1998 and 2001 do not appear to have involved any intention to change let alone significantly limit the entitlements for those suffering mental injury arising from sexual abuse, however. The lack of such an intention is significant given the extent to which the issue was debated by Parliament in 1991–1992, and the decisions then made.

[42] The changes in the way the provisions are now formulated also give rise to the alternative interpretative avenue relied upon by the appellant. The requirement that the person suffer the injury before 18 years of age is now to be found in the definition of "potential earner" in s 6 of the Act. The issue now turns on the meaning of the words "suffered personal injury before turning 18 years" in the definition, and the prescribed definition of "suffers".

[43] In common with most statutes, the definitions apply "except where the context otherwise requires". This qualification "… indicates that, particularly in a long Act where the word in question appears several times, there may be occasions where it

does not bear its defined meaning".[25] Recourse to this qualification will only displace a statutory definition where there are strong indications to the contrary in the context, particularly when the definition is of a stipulative kind.[26] The approach was set out by the Supreme Court in *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* in the following terms:[27]

> Summarising what we consider to be the correct approach, where there is a defined meaning of a statutory term that is subject to a context qualification, strong contextual reasons will be required to justify departure from the defined meaning. The starting point for the court's consideration of context will be the immediate context provided by the language of the provision under consideration. We accept that surrounding provisions may also provide relevant context, and that it is legitimate to test the competing interpretations against the statute's purpose, against any other policy considerations reflected in the legislation and against the legislative history, where they are capable of providing assistance. While we accept Mr Jagose's point that the context must relate to the statute rather than something extraneous, we do not see the concept as otherwise constrained.

[44] This confirms the relevance of statutory purpose in considering whether the context requires an alternative definition of a defined term.

[45] Ms Woodhouse and Ms Peck argued that the context here required the word "suffered" in the definition of "potential earner" to be given its ordinary meaning rather than the deemed meaning arising from s 36. That is because the deemed meaning in s 36 was intended to address when cover arose, particularly for the purposes of limitation, whereas the use of the expression in relation to potential earners compensation involved a different context — the entitlements of a person so covered. The timing requirements for lodging a claim arise under Part 2 of the Act, and they determine whether a claimant has ACC cover at all. However the extent of the entitlements when such cover exists was a different question under Part 4 of the Act. Section 50 of the Act identifies the existence of cover and the entitlements arising from that cover as separate steps.

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25 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, Lexis Nexis, Wellington, 2021) at 571.

26 See *Police v Thompson* [1966] NZLR 813 (CA).

27 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212 at [65]; see also *McKeefry v Accident Compensation Corporation*, above n 12, at [33].

[46] There is also a second relevant statutory purpose of importance. The purpose of the provisions allowing somebody injured before they are 18 to recover as a potential earner is to provide compensation for persons such as those harmed by childhood injury, such as by sexual abuse. If the mental injury later prevented them working as an adult, compensation is to be made available, albeit at a discounted rate that reflects the uncertainties. So the suggestion that the deeming provision eliminated that entitlement unless treatment was sought before the age of 18 would not only re-introduce the very kind of limitation period that Parliament had originally intended to avoid, but would be inconsistent with the purpose of this particular category of compensation for those mentally injured as a child or young person.

[47] The definition of "potential earner" is itself a self-contained and stipulative definition directed to this statutory purpose — providing compensation for the earning potential of children and young persons harmed by injuries. Parliament's intention can be understood from the ordinary meaning of the words used in this definition. It is also noteworthy that the definition uses the word "suffered" rather than "suffers", which is the defined term. Such a departure from the precise defined term would ordinarily be immaterial, but if it really was Parliament's intention to apply the other deemed definition it might have been expected to use the defined term more exactly. That is particularly so given that it would be creating a significant exception, and an anomalous one, for childhood sexual abuse victims.

[48] Mr Bisley argued that the words identifying when a sexual abuse victim suffered mental injury could not be given different meanings within the Act, and relied on *McKeefry v Accident Compensation Corporation* where such an argument was rejected.[28] But the fact that Parliament has said that the defined terms apply except where the context otherwise requires inherently contemplates the potential for different meanings in different contexts. And the point being made in *McKeefry* was that the circumstances relied upon in that case were personal to Mr McKeefry rather than the circumstances of the use of the defined term in the Act.

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[28] *McKeefry v Accident Compensation Corporation*, above n 12, at [33]–[34].

[49] Mr Bisley also argued that s 36(4) expressly identified when s 36 did not apply. But again that can be said to be for the purposes of cover, and not what entitlements arose once cover is established, or for the purposes of implementing the legislative policy that those injured as a child or young person receive compensation as a potential earner if they were unable to work as a consequence.

Relevance of long-standing practice

[50] The Corporation's interpretation of the provisions has, however, been in place now for a very long time. Its approach has received judicial endorsement from the District Court in 2004 and then the High Court in 2013. It now reflects a well settled practice. Moreover Mr Bisley argued that the ACC legislation was frequently amended by Parliament, and Parliament has not at any point sought to amend the provisions as a result of the interpretation applied by the Corporation.

[51] Were I to adopt the meaning now contended for by the appellant the Court's decision would be inconsistent with the practice that has now been applied for many years, and subject not only to judicial endorsement but the lack of parliamentary change. I would be swimming against a strong tide.

[52] Mr Bisley argued that the Court was bound by the earlier decision in *Murray*, whilst accepting that the Court could reach an alternative view if *Murray* was regarded as per incuriam.[29] But *Murray* was only a decision declining leave, and Kós J recorded that full argument had not been advanced.[30] Moreover it is clear that the purpose of the deeming provision as revealed by the legislative history was not brought to the Court's attention, or to Judge Ongley's attention in *BRM*. For that reason both decisions are per incuriam. In my view, therefore, *Murray* is not binding. But it still has significant persuasive effect.

[53] There is another interpretation principle that arises however. In *Terminals (NZ) Ltd v Comptroller of Customs* the Supreme Court said:[31]

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29 *Singh v New Zealand Police* [2021] NZCA 91, (2021) 29 CRNZ 665 at [13]–[17].

30 *Murray v Accident Compensation Corporation*, above n 6, at [42]–[43]; I note that the Court of Appeal adopted a similar view in *Taylor v Roper* [2020] NZCA 268 at [143] and *Taylor v Roper* [2021] NZCA 691 at [13]–[14], but without the present issue in mind.

31 *Terminals (NZ) Ltd v Comptroller of Customs*, above n 12, at [46] (footnotes omitted).

> If words in a statute are enacted against the background of an established interpretation of those words, then this may be an indication that the parliamentary purpose was to use the words in that sense. Whether that is so or not will depend on a number of factors, including the context of the particular statute, how established the meaning is and the relevance of the previous caselaw to the situation covered by the statute in question. The meaning of the particular words in the particular statute must still be ascertained from the text considered in light of the purpose of the provision.

[54] Both *BRM* and *Murray* were decided after the present Act was enacted, so it cannot be said that Parliament has endorsed the interpretation adopted in those cases. But a relevant consideration nevertheless arises from the Corporation applying its interpretation for many years. There will have been many claimants who have been addressed on this basis. Many claimants will have been declined cover. There might also be an argument that some claimants will have been permitted cover for the more generous weekly compensation when they should have been treated as a "potential earner" under s 105 given their injury was sustained in childhood.[32] That would mean they should have received the less generous cover as a potential earner.

Conclusions

[55] The factors referred to by the Corporation in combination suggest there are powerful reasons not to accept the appellant's interpretation. The text alone appears clear. The Corporation has applied this interpretation for many years. It has been approved of by the Courts. And Parliament has not changed the approach in the later Acts, including the current Act. Indeed it has enacted provisions in the current Act which less clearly give effect to the original purpose of the deeming provision and which support the alternative view of the purpose for which Mr Bisley contends. The text of the provisions, and the scheme of the legislation now can be said to support the Corporation's approach.

[56] But there are also strong countervailing considerations. Compensation for the loss of the ability to work is a central aspect of ACC cover. Parliament's purpose in establishing potential earner compensation under s 105 contemplates the kind of adverse consequences that can arise for childhood sexual abuse victims, and its

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[32] This would depend on giving the word "suffered" in s 103(1)(a) other than the deemed meaning arising from s 36 — which does not necessarily follow from a conclusion that the word has that meaning for the purposes of the definition of "potential earner".

original purpose in deeming the date of injury to be when treatment is first sought was to ensure full cover was available for such victims.

[57] It is often said that ACC legislation involves line drawing exercises which create anomalies and unfairness. Such anomalies are often attributed to the intention of Parliament, as they have been here. But if it is apparent that Parliament did not intend such a result and in fact had the opposite purpose, and an interpretation consistent with its purpose is available, there would need to be some very powerful reasons not to adopt that interpretation.

[58] Here the outcome the Corporation contends for was described as "atrocious" by the opposition when first raised in Parliament, and the Government changed the proposed legislation so that "total cover" was provided for as a consequence. Without the benefit of the legislative background Kós J described the legislation as anomalous, inconsistent and erratic, and only gave effect to this interpretation as he concluded that the statutory words were "crystalline".[33] The District Court in the decision under appeal even described Parliament's choices in s 36 as "premeditated" — language more usually reserved for sentencing decisions. In its submissions the Corporation said it had the "greatest sympathy" for the appellant, but that any change was an issue for Parliament. There has been no shortage of outrage at the interpretation the Corporation contends for.

[59] Ms Peck made the point that very few victims of child sexual offending receive earnings related compensation, referring to evidence before the Royal Commission of Inquiry into Abuse in Care that only 1.25 per cent of those who had lodged sensitive claims since 2010 receive such compensation.[34] Given this evidence it can be said that the interpretation the Corporation contends for is inconsistent with the purposes of the Act more broadly. She also argued that there was a feminist dimension to the argument. I accept that it can be seen in those terms.

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33 *Murray v Accident Compensation Corporation*, above n 6, at [69].

34 Abuse in Care Royal Commission *He Purapura Ora, he Māra Tipu – From Redress to Puretumu Torowhānui* (Royal Commission Report, Vol 1, 1 December 2021) at 238.

[60] Ms Peck referred to other situations where the Court had departed from an earlier established interpretation of ACC legislation. In particular she referred to *Accident Compensation Corporation v D* where Mallon J had departed from the previous interpretation relating to cover for those harmed by an unwanted pregnancy.[35] Mallon J was then overturned in the Court of Appeal,[36] but her view was later approved of by the Supreme Court.[37] So the Courts have previously departed from settled interpretations of ACC legislation by giving the legislation a more purposive interpretation. Ms Peck also pointed out that in *Bryant v Attorney-General* the High Court had adopted such an approach in addressing a similar issue concerning the deeming provisions.[38]

[61] One way forward, perhaps the more cautious view, would be to find that the historically accepted interpretation endorsed by this Court in *Murray* should prevail with any reconsideration of it left to the Court of Appeal. But the reality is that this judgment is likely to proceed to the Court of Appeal whichever interpretation is preferred. The criteria for granting special leave to appeal under s 63 would be satisfied, and during argument I understood counsel for both parties saw an appeal as likely. In those circumstances the Court of Appeal may be most assisted by a judgment that reflects my view on what the better interpretation of the provisions actually is.

[62] In my view the appellant's interpretation is the correct one, and the Court should allow the appeal. Parliament's initial purpose in deeming sexual abuse mental injury to arise at a later date was clearly remedial, and intended to ensure that full cover was available to those who were victims of such abuse. That remains a purpose of the provision notwithstanding its re-enactment in 2001 was with different wording. Parliament also had a particular purpose when specifying those who could be entitled to compensation as "potential earners" when defining that term in the Act. To say that the deemed definition deprives those suffering from childhood sexual abuse from earnings related compensation as a potential earner unless they sought treatment for the injury caused before they turned 18 is in conflict with those purposes. The ordinary meaning of the words in the definition of "potential earners" includes victims such as

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35 *Accident Compensation Corporation v D* [2007] NZAR 679 (HC).
36 *Accident Compensation Corporation v D* [2008] NZCA 576.
37 *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425.
38 *Bryant v Attorney-General* HC Wellington CP 44/00, 7 August 2000.

the appellant, and it is only another defined term that is said to exclude that meaning. But a stipulated definition can be departed from if the particular context requires. Given the different context, and Parliament's purposes, I agree that the date of injury being referred to in the definition of "potential earner" is the actual date of injury, and not the deemed date prescribed by s 36. The context requires that approach if Parliament's purposes are to be given effect. This involves departing from a well-established interpretation endorsed by this Court. But a misinterpretation is no less in error simply because it is long-standing.

[63] I would be more inclined to accept the Corporation's interpretation if it could be shown that there had been an intention to limit the entitlements of victims of sexual abuse on the passage of the 1998 or 2001 Acts. Not only is that not suggested, but a proposal to that effect might be thought to have likely provoked a reaction similar to that arising in Parliament in 1991–92. The meaning of legislation is not established by the practices of officials. The Court's function is to give effect to the will of the elected representatives acting in Parliament. The interpretation I have accepted seeks to do so by giving meaning to the text of Parliament's enactment in light of the relevant purposes and in the context of the particular category of compensation in issue.

[64] The appeal is accordingly allowed and the appellant's claim is remitted to the Corporation for the purpose of assessing her entitlement to compensation under s 105 of the Act. If there is any issue as to costs memoranda may be filed.

Cooke J

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