IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA597/2018
[2020] NZCA 268

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

Hearing:	1 and 2 October 2019 (further material received 16 October 2019)
Court:	French, Brown and Clifford JJ
Counsel:	G F Little SC and G 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:	1 July 2020 at 9 am
Reissued:	16 December 2021
Effective date of Judgment:	1 July 2020

JUDGMENT OF THE COURT

A The appellant's application for leave to amend the grounds of appeal is declined in relation to the ground of appeal identified at [38] but otherwise granted.

B The appeal is allowed in part. The High Court findings that all the causes of action pleaded in the amended statement of claim are time-barred under the Limitation Act 1950 and that the claim for false imprisonment is barred

by the accident compensation legislation are over-ruled. In all other respects, the decision of the High Court is upheld.

C The proceeding is remitted to the High Court for determination of the appellant's claim to compensatory damages in respect of the false imprisonment cause of action and the claim for exemplary damages in respect of all four causes of action.

D The second respondent must pay the appellant costs for a standard appeal on a band A basis together with usual disbursements.

E The award of costs against the appellant made in the High Court is quashed and the High Court is directed to reconsider costs in light of this judgment.

F An addendum to this judgment addressing s 21B of the Accident Compensation Act 2001 is to be found in [2021] NZCA 691.

REASONS

FRENCH J

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Introduction

[1] In May 2016, Ms Taylor issued proceedings in the High Court relating to events that took place at Whenuapai Airbase in the late 1980s. Ms Taylor alleged she had been sexually abused and falsely imprisoned during those years and as a result suffered mental injury in the form of depression and post-traumatic stress disorder. The case was heard by Edwards J who held the claims were time-barred under the Limitation Act 1950.[1] The Judge also held the claims were barred by the accident compensation legislation.

[2] Ms Taylor now appeals those rulings and also challenges some of the Judge's findings of fact.

[3] The panel has reached agreement on all bar two issues. The two issues are the application of s 24 of the Limitation Act and whether Ms Taylor's claim for false imprisonment is outside the auspices of the accident compensation legislation. The view of the majority (Brown and Clifford JJ) on those two issues is the subject of a separate judgment.

Background

[4] In September 1985, Ms Taylor enlisted in the Royal New Zealand Air Force. At all relevant times, she held the rank of aircraftsman and worked as a driver in the Motor Transport section at Whenuapai. She was 18 years of age.

[5] The first respondent Mr Roper also worked in the Motor Transport section. He was a sergeant and Ms Taylor's superior.

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1 *M v Roper* [2018] NZHC 2330. The suppression of Ms Taylor's name has been lifted.

[6] During 1986 and 1987, Ms Taylor was subjected to sexual abuse and intimidation by Mr Roper. This took the form of groping her as she was driving him home late at night, locking her and leaving her in a tyre cage, rubbing himself against her, trying to undo her bra straps, and using an iron bar to prod her in the backside. He would also on occasion ogle Ms Taylor and others as they changed in the female changing rooms.

[7] There was a dispute in the evidence as to whether Ms Taylor ever made a complaint to anyone about Mr Roper's conduct. I return to that issue later in the judgment.

[8] On 24 July 1988, Ms Taylor left the Air Force. The reason she had given in her application for release was that she wanted to travel overseas. The application also stated that she intended to seek re-enlistment on her return in a year's time.

[9] Ms Taylor travelled to the United Kingdom where she worked as a nanny and in a bar. By her own account, during this period she led a lifestyle of excessive drinking and partying.

[10] Ms Taylor eventually returned to New Zealand and in January 1996 she re-enlisted in the Air Force as a civilian in the same Motor Transport section. Mr Roper was no longer at the base. Ms Taylor did not stay with the Air Force for long. She resigned in June 1997.

[11] At trial, evidence was given by a clinical psychologist Dr Eshuys and a consultant forensic psychiatrist Dr Barry-Walsh. According to what Ms Taylor told them, she sought counselling in 1996 but gave conflicting reasons for this. She told Dr Eshuys that it was grief counselling over the death of her mother who had tragically committed suicide when Ms Taylor was only seven. However, Ms Taylor told Dr Barry-Walsh that the counselling was for a variety of reasons including the abuse at Whenuapai.

[12] The earliest date of Ms Taylor's medical records made available for the trial was 2002. The first entry of a prescription for an anti-depressant is August 2006,

the trigger being recorded as stress over a dispute with Pharmac concerning medication for her young son. Ms Taylor told Dr Barry-Walsh that up until 2006 she had been treating her depression with natural remedies.

[13] Returning to the narrative, after leaving the Air Force for the second time in 1997, Ms Taylor worked first as a courier driver and then as a telephonist. She also undertook some accounting studies.

[14] She continued on anti-depressants during the rest of 2006 and 2007 but reported in September 2007 that although the Pharmac dispute was still unresolved, she was feeling better.

[15] In 2008, she and her husband and their son moved to Australia where Ms Taylor found part time work in the accounts department at a local hospital. The medical records suggest that by 2008 when the family moved to Australia, Ms Taylor was in the process of tapering off the anti-depressant medication and at some point between 2008 and August 2013 stopped altogether.

[16] However, between August 2013 and 29 October 2014, Ms Taylor consulted her doctor on several occasions about work related stress arising from workload pressures and bullying by her boss. She was diagnosed as suffering from anxiety and depression and prescribed medication. Initially, she was keen to attend counselling but later told the doctor counselling was no longer necessary. On one visit, she told her GP she wanted matters documented because she was considering filing a claim against her boss.

[17] In November 2014, Ms Taylor learnt for the first time that Mr Roper had been charged with serious sexual offending alleged to have taken place against other females between 1977 and 1988.

[18] On 3 December 2014 Mr Roper was found guilty of twenty sexual offences. On 6 December 2014, Ms Taylor contacted the New Zealand police to tell them what had happened to her at Whenuapai.

[19] Four days after talking to the police, Ms Taylor visited her doctor. According to the medical records, she was given a repeat prescription for anti-depressant medication. She is recorded as having told the doctor her mood was stable.

[20] On 13 February 2015, Ms Taylor consulted the doctor again. She is recorded as stating that she wanted to reduce her anti-depressant medication and that her mood was stable.

[21] Between March 2015 and September 2015, Ms Taylor had occasion to consult her GP several times about ongoing work-related stress and anxiety over her son's health issues.

[22] In September 2015, the Air Force announced that it had appointed a Queen's Counsel to undertake an independent inquiry into Mr Roper's conduct during his time with the Air Force. The Queen's Counsel in question, Ms Joychild, made contact with Ms Taylor and they arranged to meet in New Zealand over Christmas.

[23] On 19 November 2015, Ms Taylor visited her doctor to obtain a repeat prescription. The notes record Ms Taylor as reporting that she thinks some of her stress may have been triggered by an old army sergeant who has been jailed for abusing [details suppressed] and Air force girls. This is the first reference in any medical notes to Mr Roper. At some stage in 2015 after she had given a formal statement to police in June, Ms Taylor commenced weekly counselling funded through the police department.

[24] During 2016, the medical records show several visits to the doctor on account of stress, anxiety, self-esteem issues, lack of sleep, low mood and feelings of being overwhelmed. Ms Taylor is recorded as having attributed these to both her current work situation and the Roper inquiry.

[25] On 27 May 2016, Ms Taylor filed the current proceedings against Mr Roper as first defendant and the Attorney-General, on behalf of the Air Force, as second defendant. The statement of claim pleads three causes of action against both

defendants, namely (a) assault, (b) intentional infliction of emotional harm and (c) false imprisonment. In relation to those causes of action, the Air Force is alleged to be liable for Mr Roper's conduct on the basis of vicarious liability or attribution.

[26] The statement of claim also pleads a claim in negligence against the Air Force on the basis of its alleged failure to take steps to prevent Mr Roper from harming Ms Taylor.

[27] The statement of claim further claims that Ms Taylor has suffered anxiety and depression and post-traumatic stress disorder as a result of the defendants' wrongdoing and in relation to each cause of action seeks general damages of $300,000, exemplary damages $150,000, vindicatory damages $50,000, aggravated damages $100,000 as well as special damages for loss of earnings and expenses.

[28] Ms Taylor advised the police in July 2016 that as a result of legal advice she had "been having for some time", she had decided to take civil proceedings and did not want to proceed with a criminal prosecution.

[29] In October 2016 Ms Taylor asked her GP to provide a health summary and letter for her lawyer regarding her anxiety and depression. The following month, she told the doctor, her lawyer had advised she needed to see a psychologist for assessment. In December 2016, Ms Taylor saw Dr Eshuys for the first time.

[30] There is no evidence of Ms Taylor ever seeing a psychologist or psychiatrist prior to December 2016.

[31] At the hearing in the High Court, evidence was given by several witnesses including Mr Roper who denied any abusive conduct towards Ms Taylor.

The High Court decision

[32] Edwards J made the following key findings:

(a) The acts complained of did occur. Mr Roper assaulted and falsely imprisoned Ms Taylor. In particular:

(i) Mr Roper did on more than one occasion lock the car door and grope Ms Taylor as she drove him home but not as frequently as she claimed;[2]

(ii) Mr Roper did on more than one occasion lock Ms Taylor in a tyre cage and prod her with an iron bar but not once a month as claimed and not for as long as claimed;[3] and

(iii) Mr Roper behaved in an overtly sexualised way towards Ms Taylor and other female staff: he touched her bottom, pulled her bra strap, rubbed himself against her, intruded on her and female staff in the change rooms and ogled at her on parade.[4]

(b) Ms Taylor did not make any formal complaints about Mr Roper to her superiors.[5]

(c) Ms Taylor suffers from two medically recognisable psychiatric illnesses, namely post-traumatic stress disorder, and anxiety/depression.[6]

(d) Mr Roper's abusive conduct was a material and substantial cause of Ms Taylor's post-traumatic stress disorder. However, there was an insufficient causal link between the abuse and her anxiety/depression.[7]

(e) The claim was based on the mental injury she suffered at the time she left the Air Force in 1988.[8]

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2 *M v Roper*, above n 1, at [40] and [74].
3 At [51]–[53] and [74].
4 At [55]–[56] and [74]–[75].
5 At [73] and [76].
6 At [188(b)].
7 At [122]–[125] and [188(b)].
8 At [142] and [188(c)].

(f) Ms Taylor had always made the causal connection between her mental injury and the abuse.[9]

(g) All causes of action had accrued by July 1988 under the Limitation Act.[10]

(h) There was insufficient evidence she was operating under a disability as at 1988 or any time thereafter which would allow the six year limitation period to be extended.[11]

(i) The claim for compensatory damages for assault and false imprisonment was covered by the Accident Compensation Act 1982 (the 1982 Act) and was therefore caught by the statutory bar on personal injury claims.[12]

[33] In light of these findings, the Judge found it unnecessary to determine other legal issues raised by the pleadings, namely the scope of the tort of intentional infliction of emotional harm, the scope of vicarious liability for intentional torts, the duty of care in a military context and the availability of exemplary damages.[13]

[34] Dissatisfied with the outcome of the High Court hearing, Ms Taylor filed an appeal in this Court. There has been no cross-appeal by either Mr Roper or the Attorney-General.

Application for leave to add new grounds of appeal

[35] The parties were notified of the fixture date in this Court some five months in advance. Five working days before the hearing of the appeal, Ms Taylor's counsel Mr Little SC applied for leave to amend the grounds of appeal. The respondents collectively objected to two of the proposed amendments but did not take issue with the others.

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9 At [142] and [188(c)].
10 At [142].
11 At [155].
12 At [180] and [188(d)].
13 At [181]–[187].

[36] The panel therefore granted leave in respect of all the unopposed amendments and reserved its position in respect of the contested amendments. During the hearing, Mr Little withdrew one of the disputed amendments, leaving only one in contention.

[37] For reasons which I now explain, the panel declines to grant leave in respect of the disputed amendment.

[38] The disputed amendment was that in her consideration of the accident compensation legislation the Judge had erred:

> In not finding that, prior to her knowledge of Mr Roper's convictions, the appellant had no knowledge that she had clinically significant behaviour, cognitive or psychological dysfunction that entitled her to cover under the Accident Compensation aft [sic] 1982 or subsequent Acts.

[39] This proposed new ground is not only late but highly problematic. The uncontested evidence was that Ms Taylor said she always knew the abuse was the reason for her mental health problems. If the argument sought to be advanced is that Ms Taylor needed to know she had cover under the relevant accident compensation legislation before she could be held to have cover, then that is plainly wrong.

[40] Finally, I record that although the appellant's list of issues included the correctness of the Judge's finding that the abuse was not an operative cause of the depression and anxiety, it was not a ground of appeal and not mentioned in Mr Little's written submissions. The panel does not therefore address it. In any event, as will become apparent it makes no difference to the outcome

[41] I now turn to address each of the grounds of appeal properly before the panel.

Did the Judge impose an unfair evidentiary burden on Ms Taylor?

[42] Mr Little submitted that the Judge imposed an unfair evidentiary burden on Ms Taylor to corroborate her claims, including requiring her to provide documentary corroboration. This, he argued, was wrong in law and particularly unfair given that the Air Force's own record keeping of complaints was poor.

[43] The panel does not accept this is a valid criticism of the Judge. She did not impose a corroboration requirement, by which we mean she never approached the matter on the basis that she would only accept Ms Taylor's evidence if it was corroborated.

[44] As the Judge carefully explained, her general approach was that given the 30 year time gap and the obvious problems that created, she placed weight on whether evidence was supported by other witnesses, whether it was inherently plausible, and whether it was supported by contemporaneous records. That approach was entirely proper. In fact, the Judge accepted much of Ms Taylor's account but not all of it.

[45] Having reviewed the evidence ourselves, we consider there was reason to be cautious about the accuracy of Ms Taylor's recall. The respective leave records of her and Mr Roper for example showed there could not have been the level of contact between them that she claimed. She said that her start date with the Air Force was July 1985 and that there was abuse in 1985. The correct position was that her start date was September 1985 and more importantly that she had nothing at all to do with Mr Roper in 1985.

[46] In evidence Ms Taylor said she could not recall that Mr Roper had been permanently posted to a different base in November 1987. That was something Dr Barry-Walsh said he found surprising because if she had been as fearful as she claimed, he would have expected her to be highly vigilant as to Mr Roper's whereabouts.

[47] As mentioned before, Ms Taylor gave inconsistent accounts to the experts about the reason for going to counselling in 1996. Some crucial aspects of her evidence were also inconsistent with her medical records including what she was reported as having told her general practitioners.

[48] There were also internal inconsistencies in her evidence. Her evidence was that she "finally felt safe to disclose" what Mr Roper had done to her knowing that he was locked up in prison. It was her dark secret. This sits uneasily with her claims that

she made disclosures of sexual abuse to several people including a Flight Lieutenant at a time when she was still under Mr Roper's direct control.

[49] Apart from the passage of time and its effect on memory, there is a further issue arising out of the length of Ms Taylor's involvement in the legal process including the Air force inquiry. As Dr Barry-Walsh explained in evidence, that will have required her to rehearse and repeat her narrative, with the potential introduction of bias and the weight she puts on various events.

Was the finding that Ms Taylor had not made complaints against the weight of evidence?

[50] In evidence, Ms Taylor conceded she had not complained to senior commissioned officers. However, she said she had complained to two corporals, a flight sergeant and a flight lieutenant. Ms Taylor also testified that each time she reported Mr Roper, he would just say she was too lippy and outspoken.

[51] All of those named as having received a complaint from her gave evidence and all denied ever receiving a specific complaint of a sexual nature from Ms Taylor about Mr Roper.

[52] The Flight Sergeant was not at Whenuapai at the same time as Ms Taylor until after Mr Roper had left and Ms Taylor's account of her conversation with him had it taking place in an office he only occupied during her second period of employment in the late 1990s.

[53] The Flight Lieutenant's evidence was that the only complaint he received about Mr Roper was a complaint made to him by another servicewoman. She had observed Mr Roper inappropriately touch a woman — not Ms Taylor — in the tyre bay. The observer made the complaint with the consent of the victim. The Flight Lieutenant's claim that he took this complaint seriously and took immediate action was confirmed by both the observer and the victim. Although Mr Roper denied the allegation, he was reprimanded. The Flight Lieutenant would have taken the matter further had it not been for the wishes of the victim. These events took place at the same time as Ms Taylor was in the Motor Transport section and the Judge

considered it unlikely that the Flight Lieutenant would have reacted differently to a complaint from Ms Taylor if one had been made.

[54] The highest point of the supporting evidence for Ms Taylor regarding the making of complaints was:

(a) Evidence of a corporal and two leading aircraftsmen that they knew the women including Ms Taylor disliked driving Mr Roper home.

(b) Evidence of another corporal that she knew some female drivers had complained about Mr Roper touching them but she had no recollection of Ms Taylor being one of them. She had seen Ms Taylor crying and saying something about Mr Roper.

(c) Evidence from Mr Stewart, an aircraftsman and later leading aircraftsman, which the Judge did not accept as reliable.

[55] On appeal, Mr Little argued the Judge was wrong to reject Mr Stewart's evidence and we therefore address that in more detail.

[56] The evidence of Mr Stewart was potentially significant. In his written brief of evidence, he said he complained four times to the Flight Lieutenant, two of his complaints being in writing. All the complaints were about Mr Roper's bullying behaviour and included his treatment of the women on the base. In cross-examination, he said one of the written complaints was about bullying of him and the other, which the Flight Lieutenant screwed up, concerned Mr Roper's treatment of women.

[57] The allegation about the destruction of one of the complaints was new. It was not in his brief of evidence and Mr Stewart had never mentioned it in his statement to the Joychild inquiry. He had also not mentioned the allegation about the two written complaints in his statement to the Joychild inquiry. When questioned by Edwards J about the details of his written complaints, Mr Stewart was very vague, saying only that it was about Mr Roper's general "creepiness" towards women, and being "touchy, touchy".

[58] The reasons the Judge did not accept Mr Stewart's evidence was because he had a grievance against the Flight Lieutenant, he was suffering from severe depression at the time and his account kept changing. The panel agrees with that assessment.

[59] A further argument raised by Mr Little on appeal was that the Judge overlooked the evidence of another leading aircraftsman regarding a complaint he made to the Squadron Leader. The judgment does not mention the evidence but that is hardly surprising as it was of little or no relevance. The complaint in question did not relate to either Mr Roper or Ms Taylor and indeed post-dated her departure from the Air Force.

[60] Mr Little also submitted the Judge had failed to take into account that part of one of the corporal's jobs was to type up complaints, but having regard to the fact that none of the complaints he typed were about Mr Roper, the panel does not accept that was an error on the part of the Judge.

[61] Nor, contrary to another submission, does the panel accept the Judge should have placed weight on a statement made by the Flight Lieutenant in Ms Taylor's performance appraisal to the effect that Ms Taylor was not scared to speak her mind. Mr Little suggested the Judge should have drawn the inference from the statement that Ms Taylor had made a complaint about Mr Roper. We consider that a stretch. The Flight Lieutenant's explanation for the comment was cogent.

[62] Having reviewed the evidence, the panel agrees with the Judge that there was insufficient evidence to support a finding that Ms Taylor had made complaints.

Was the finding that Ms Taylor was not frequently locked in the tyre cage against the weight of evidence?

[63] This argument rests on the premise that the Judge and this Court on appeal are obliged to accept all of Ms Taylor's evidence. For the reasons identified in our discussion of the Judge's general approach, the panel agrees with the Judge's assessment of Ms Taylor's evidence regarding the tyre cage.

Did the Judge wrongly exclude evidence of misconduct by others?

[64] Edwards J ruled that the evidence must be limited to what occurred between Ms Taylor and Mr Roper and the response of the Air Force to that conduct. She therefore excluded evidence from another servicewoman making what the Judge said were very serious allegations against a warrant officer and another sergeant.[14] The men in question were not the officers alleged to have been the recipients of complaints by Ms Taylor.

[65] On appeal, Mr Little says the exclusion of this evidence was prejudicial and wrong because it prevented Ms Taylor from leading evidence of (a) systemic failure by the Air Force to take all or any steps to prevent serious sexual offending in the Motor Transport section and (b) evidence to show and identify those who were "agents to know" for the purpose of attributing Mr Roper's misconduct to the Air Force.

[66] In the view of the panel, this ground of appeal is not tenable. The statement of claim did not plead systemic failure. The causes of action were limited to alleged acts by Mr Roper against Ms Taylor, with the Air Force being said to be either directly or vicariously liable for those specific acts.

[67] The evidence was not therefore relevant to attribution and it was not relevant to the lack of action taken by those to whom Ms Taylor said she complained. The witness whose evidence was excluded did not say she had complained.

[68] As Ms Fisher QC for the Air Force submitted, the evidence involved wholly different allegations between different parties. It was not relevant and if admitted would have needlessly prolonged the trial by creating a trial within a trial.

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[14] *M v Roper*, above n 1, at [20] and [197]–[205].

Was the Judge wrong to find the claims were time barred?

General principles

[69] It was common ground that the relevant limitation legislation applying to Ms Taylor's claims was the Limitation Act 1950. Although that Act has been repealed and replaced by the Limitation Act 2010, its provisions continue to apply to claims based on acts or omissions prior to 1 January 2011.[15] References that appear in this judgment to "the Limitation Act" should be read as references to the Limitation Act 1950.

[70] Subject to some exceptions, the Limitation Act requires that claims in tort for bodily injury (which includes mental injury) must be brought within six years from the date on which the cause of action accrued.[16] It further requires a claimant to obtain the leave of the Court if such a claim is filed more than two years and less than six years after the cause of action accrued.[17]

[71] Identifying the point in time when the cause of action accrues is thus crucial. In personal injury cases like this one, the test for determining the date of accrual is known as the reasonable discoverability test.[18] Under that test, the cause of action accrues and time starts to run when all the material facts comprising each element of the cause of action are known to the claimant or ought reasonably to have been discovered by them.[19]

[72] As mentioned, there are exceptions to the general rule that time starts to run on accrual. One of those exceptions is contained in s 24 of the Limitation Act. Section 24 makes special provision for claimants who lack capacity to bring proceedings because they are under a disability at the time their cause of action accrues. Under s 24, the cause of action is deemed to accrue only on the date the claimant ceases to lack

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15 Limitation Act 2010, s 59.
16 Limitation Act 1950, s 4(1)(a).
17 Section 4(7).
18 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 1885.
19 *G D Searle & Co v Gunn* [1996] 2 NZLR 129 (CA) at 132–133 discussed by the Supreme Court in *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721. See also J C Corry *Laws of New Zealand* Limitation of Civil Proceedings: Limitation Act 1950 (online ed) at [22].

capacity or dies whichever event occurs first. In effect the date of accrual is postponed. Section 24 was at issue in this case.

[73] On appeal, Mr Little argued that the Judge erred both in her analysis of accrual and disability. I therefore address each separately.

[74] Before doing so, I note that the documents filed on behalf of Ms Taylor vary in what they say are the correct dates of accrual and release of disability. The reply that was filed to the respondents' pleading of limitation for example states "that at all material times from 1986 until becoming aware of a news broadcast concerning the first defendant in 2016 she was under a disability". Although the reply refers to 2016 as the time of release of disability that is clearly a mistake. The date that must have been intended — the date of the news broadcast — is November 2014. The list of issues for Ms Taylor stated that the correct date for accrual and release of disability was when Ms Taylor learnt of Mr Roper's conviction and prison sentence. Mr Roper was not sentenced until 5 February 2015. In oral submissions, Mr Little however consistently identified the correct date as December 2014, which was when Ms Taylor learnt of the guilty verdicts and contacted the police. All of the different nominated dates of release would result in the claims filed on 27 May 2016 being within time, that is within two years.

[75] I turn now to the issue of accrual.

Accrual of the causes of action

[76] Two of Ms Taylor's causes of action, namely false imprisonment and assault, are torts that are actionable without proof of damage. The elements of these torts are therefore the act that constitutes the assault or false imprisonment and the claimant's lack of consent to it.

[77] The Judge held that when Ms Taylor was at Whenuapai, she knew what had happened to her without her consent at the time it happened. Therefore, subject to the

disability exception, those causes of action had at the very latest accrued on 24 July 1988 when she left Whenuapai and were time-barred two years later.[20]

[78] The other two causes of action were negligence and intentional infliction of harm. Unlike assault and false imprisonment, those torts are actionable only on proof of harm caused by the wrongdoer. There are therefore additional elements. The elements of negligence are the existence of a duty of care, an act or omission amounting to a breach of that duty, the suffering of damage and a causal link between the breach and the harm suffered by the claimant. The elements of the tort of intentional infliction of harm are less well settled but have been identified by the United Kingdom Supreme Court as relevantly comprising conduct directed at the claimant for which there is no justification, and an intention to cause illness or at least distress which has resulted in recognised psychiatric harm.[21]

[79] Noting that Ms Taylor's claims were based on the mental injury suffered at the time she left the Air Force in July 1988 and that Ms Taylor had always made the connection between her mental injury and Mr Roper's wrongdoing, the Judge held these other two causes of action had also accrued by 24 July 1988 and were also accordingly time-barred.[22]

[80] In support of the contention that correctly analysed the causes of action had not accrued before December 2014, Mr Little advanced a number of arguments. In the unanimous view of the panel, none of them is tenable.

[81] The first was that Ms Taylor did not know and could not reasonably have known that she had the right to sue for damages for personal injury. Like all New Zealanders, she would have had an ACC mindset. Mr Little told us this point about the ACC mindset of New Zealanders was the "cornerstone" of his argument on limitation. In the same vein, he also contended that Ms Taylor did not know and could not reasonably have known that the Air Force owed her a duty of care. That was

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20 *M v Roper*, above n 1, at [130] and [142].
21 *O v Rhodes* [2015] UKSC 32, [2016] AC 219 at [88].
22 *M v Roper*, above n 1, at [142].

a complex issue. She may have thought for example that the Air Force would have immunity from being sued.

[82] This argument is contrary to well established authority and common sense. The authorities are clear. What must be discovered or discoverable are the material *facts*, not the law. Otherwise, it would render the Limitation Act pointless. For example, the duty of care element in negligence. What must be reasonably discoverable are the facts of the relationship between claimant and defendant that a court holds in law amount to a sufficiently proximate relationship to found a duty of care. Ms Taylor knew the facts of her relationship with the Air Force.

[83] Another argument advanced by Mr Little was that until learning about the convictions, it never occurred to Ms Taylor she might be believed and had an action worth bringing. However, the reasonable discoverability test does not require the claimant to know their prospects of success.

[84] Mr Little also submitted the Judge did not make any express finding as to the date on which Ms Taylor first began to suffer from post-traumatic stress disorder. In his submission, there was in fact insufficient evidence on which to make any finding. It followed the respondents had not discharged the onus of proving that the post-traumatic stress disorder had occurred before the first mention of it in the medical records which was 4 July 2016.

[85] This submission which of course only relates to the negligence and infliction of emotional distress claims was made for the first time by Mr Little orally during the appeal hearing. In the view of the panel, it is a thinly disguised and impermissible attempt to recast the claim and the appeal.

[86] Late onset post-traumatic stress disorder was never a feature of the case. It was never suggested that the news of Mr Roper's convictions had triggered a mental condition that had not existed before. 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 Court and even the notice of appeal are all based on

the premise that the post-traumatic stress disorder occurred in the late 1980s and that there was decompensation when Ms Taylor went to the United Kingdom.

[87] The panel accepts that some passages in Dr Eshuys' report dated 5 January 2017 might suggest when read in isolation that the doctor was suggesting the post-traumatic stress disorder was of recent origin. However, the report as a whole makes it clear that the post-traumatic stress disorder was suffered in 1988.

[88] The final argument advanced by Mr Little was that the causal link between Mr Roper's conduct and the post-traumatic stress disorder was not reasonably discoverable.

[89] The difficulty with that submission is that Ms Taylor told Dr Barry-Walsh the exact opposite and his evidence on that point was not challenged.[23]

[90] Mr Little attempted to overcome that formidable obstacle by contending that what Ms Taylor needed to know before the cause of action in negligence and intentional infliction of emotional distress accrued was that the symptoms she was experiencing amounted to post-traumatic stress disorder. However, the reasonable discoverability test does not require a claimant to know the technical medical diagnosis before time starts to run. Just as Ms Taylor is not required to have expert legal knowledge, she need not have expert medical knowledge.

[91] In the unanimous view of the panel, the Judge's conclusion that, subject to s 24, all causes of action had accrued by 1988 and were therefore time-barred is unassailable.

[92] I now turn to address s 24 and the disability exception. As already indicated, the panel was unable to reach agreement on this issue. There is agreement on the relevant legal principles but not their application on the evidence.

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[23] In so far as Dr Eshuys' report might suggest Ms Taylor told her something different, Edwards J found Dr Eshuys had made an assumption without directly asking Ms Taylor about causation, at [140].

Section 24 — the legal principles

[93] Section 24 states:

> **24 Extension of limitation period in case of disability**
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> If, on the date when any right of action accrued for which a period of limitation is prescribed by or may be prescribed under this Act the person to whom it accrued was under a disability,—
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> (a) in the case of any action in respect of the death of or bodily injury to any person, or of any action to recover a penalty or forfeiture or sum by way thereof by virtue of any enactment where the action is brought by an aggrieved party, the right of action shall be deemed to have accrued on the date when the person ceased to be under a disability or died, whichever event first occurred; or
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> (b) in any other case the action may be brought before the expiration of 6 years from the date when the person ceased to be under a disability or died, whichever event first occurred,—
>
> notwithstanding that, in any case to which either of the foregoing paragraphs of this section applies, the period of limitation has expired:
>
> Provided that—
>
> (c) this section shall not affect any case where the right of action first accrued to some person (not under a disability) through whom the person under a disability claims;
>
> (d) when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person;
>
> (e) no action to recover land or money charged on land shall be brought by virtue of this section by any person after the expiration of 30 years from the date on which the right of action accrued to that person or some person through whom he claims; and
>
> (f) *[Repealed]*
>
> (g) this section shall not apply to any action to recover a penalty or forfeiture, or sum by way thereof, by virtue of any enactment, except where the action is brought by an aggrieved party.

[94] The effect of s 24 is that if a claimant lacks capacity to bring proceedings because they are under a disability as at the date of accrual, then the cause of action is

deemed not to have accrued at that date. It will only accrue and time start to run once the incapacity ceases. In effect the accrual date is postponed.

[95] Two things follow from this.

(a) The incapacity must exist at the time the cause of action would otherwise have accrued. Incapacity that arises after the date of accrual does not count.[24]

(b) Even if the incapacity does exist at what otherwise would have been the date of accrual but is thereafter intermittent, the first occasion on which the disability ceases or ceases to have an incapacitating effect, the cause of action accrues and time runs as normal. In other words, the incapacity must persist and be continuous. Any cessation, no matter how brief, will cause time to start running.[25]

[96] As to what is meant by disability, s 2(2) of the Limitation Act says that for the purpose of the Act a person is deemed to be under a disability while they are an infant or of unsound mind. For limitation purposes, an infant is a person who has not attained 20 years of age.[26] Ms Taylor turned 20 on 14 March 1987.

[97] The following principles emerge from the case law:[27]

(a) "Disability" is limited to the two deemed circumstances specified in s 2(2), that is infancy and unsound mind. It does not extend to physical or mental incapacity short of unsoundness of mind.

(b) The onus of proof rests on the claimant.

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24 *C v J* [2001] NZAR 375 (HC) at [27]; *Borrows v Ellison* (1871) LR 6 Exch 128 at 131; and P A Landon *Pollock's law of torts* (15th ed, Stevens & Sons Ltd, London, 1951) at 155.

25 *C v J,* above n 24, at [27]; *Borrows v Ellison,* above n 24, at 131; and *Seaton v Seddon* [2012] EWHC 735 (Ch), [2012] 1 WLR 3636 at [88] citing *Purnell v Roche* [1927] 2 Ch 142; and *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102 (HL) at 140.

26 Stephen Todd, above n 18, at 1389–1390; and Age of Majority Act 1970, s 4(1).

27 *T v H* [1995] 3 NZLR 37 (CA) at 48–49 per Hardie Boys J and 61 per Tipping J (Casey and Gault JJ concurring); *P v T* [1998] 1 NZLR 257 (CA) at 260; and see further Andrew McGee *Limitation Periods* (8th ed, Sweet & Maxwell, London, 2018) at 354–355.

(c) The claimant must prove the alleged unsoundness of mind resulted from a demonstrable and recognised mental illness, and that as a result of that illness, they did not have the capacity to bring proceedings.

(d) The claimant is not required to show general unsoundness of mind. That is, they are not required to show they are unable to manage their affairs generally.

(e) On the other hand, the inability to face up to issuing proceedings is not enough to trigger s 24.

[98] In the High Court, Edwards J held (Mr Little says wrongly) that on balance there was not sufficient evidence to establish that Ms Taylor was operating under a disability as at 1988 or any time subsequent which would allow the limitation period to be extended.[28] I pause here to interpolate that the reference to "any time subsequent" is an error because it is well established that if time has started to run on accrual, *subsequent* mental incapacity would not stop it from continuing to run.[29]

[99] The reasons the Judge gave for finding that s 24 was not engaged were:[30]

(a) The paucity of objective contemporaneous evidence of Ms Taylor suffering from mental incapacity at the relevant times.

(b) What documentary evidence there was in existence in 1988 indicated that she was in good health.

(c) Ms Taylor's return to work in 1996 at the same airbase and in the same division did not sit easily with her suffering from a disability leaving her incapable of issuing proceedings.

(d) The fact she was able to function in 1996 while being located in the very heart of the environment that caused her harm suggests that to

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28 *M v Roper*, above n 1, at [155].
29 Stephen Todd, above n 18, at 1391.
30 *M v Roper*, above n 1, at [147]–[155].

the extent she was suffering from a mental injury, it was not of a nature to render her incapable of issuing proceedings.

(e) The fact of there being various periods of time which, on Ms Taylor's own evidence, were stable and happy.

(f) The absence of any significant mental health issues in the medical notes apart from some stress related to other matters.

[100] A review of the cases on s 24 shows that, as one might expect, they very much turn on their individual facts. Mr Little suggested that one distinguishing factor in cases where claimants have succeeded in having time extended as opposed to where they have not succeeded is the existence of a trigger which releases the claimant from their mental disability. There was, he argued, such a trigger in this case, namely the news of the convictions. However, the existence of a trigger in the sense of a release from mental disability is not determinative. In *Jay v Jay* for example where s 24 was held to apply there was no single trigger in that sense.[31] In any event, in every case where there has been very long delay, there will always be some catalyst or reason(s) for a complainant taking action.

[101] For completeness I record a further submission made by Mr Little that the Court should interpret s 24 in the light of subsequent amendments to the Limitation Act. However, the provisions he seeks in aid which only came into force in 2010 were intended to significantly change the law.[32] The submission is not tenable.

Application of s 24 to the facts of this case

[102] The view of the majority is that contrary to the Judge's findings the evidence does establish that Ms Taylor was under a qualifying disability as at 24 July 1988 and she remained under that disability throughout the whole of the 26 year period before learning of Mr Roper's convictions in late 2014. The majority consider that until late 2014 Ms Taylor's mental illness prevented her from initiating proceedings, she being psychologically unable to engage with what had happened at Whenuapai and

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31 *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 at [83] and [100].
32 Limitation Bill 2009 (33-2) (Select Committee Report) at 8–9 and 10–11.

subconsciously suppressing her anxiety. News of the convictions released her. It caused mental decompensation which effectively freed her to pursue this claim.

[103] I disagree with that assessment of the evidence. As stated by this Court in *T v H*, judges must take a robust view of s 24 and require clear and convincing evidence.[33] Our understanding of the effects of sexual abuse has developed since the date of that decision but the general principle remains true. In my view, although I have much sympathy for Ms Taylor, there are just too many question marks and uncertainty in the evidence in this case to be able to be satisfied on the balance of probabilities that s 24 is available to her.

[104] The basis of the argument advanced on appeal was that until Ms Taylor "had all the information including that [Mr Roper's] conduct had caused her mental injury, she had been disabled from bringing a legal claim". It was further submitted that the medical notes painted "a picture of consistent psychiatric problems" and that they confirmed a significant demand for medication "within days" of learning of the conviction, thus supporting the claim of a trigger.

[105] However, the evidence and the undisputed finding was that Ms Taylor had been aware from the outset that Mr Roper's conduct had caused her ill-health. That being the case, I do not accept it can be argued she had subconsciously suppressed either the fact of her anxiety or the cause of it.

[106] Further, the picture painted by the medical notes is far from being one of consistent psychiatric problems. The notes which begin in 2002 show no significant mental health issues between 2002 and December 2014 apart from anxiety arising at various intervals from work-related stress for which Ms Taylor was prescribed medication for anxiety/depression. She did not feel she needed to see a counsellor. The first prescription is in August 2006 and in the years between 2006 and 2014 there was a long period of stability without medication. In short, at best for Ms Taylor, what the notes show is intermittent concerns. And of course in the period before the notes begin (that is, the earlier period from 1988–2002) there is no contemporaneous

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[33] *T v H*, above n 27, at 43 and 50.

independent evidence of any continuous mental illness of sufficient severity to cause incapacity.

[107] It is also not correct that the notes show "a significant demand for medication within days" of learning of Mr Roper's conviction and sentence. There was a consultation on 10 December 2014 but it was for a repeat prescription for depression arising from work-related stress and Ms Taylor is recorded as telling the doctor her mood was stable. On 13 February 2015 which is eight days after Mr Roper was sentenced, Ms Taylor told the doctor she wanted to reduce the medication and her mood was stable.

[108] There is no doubt that Ms Taylor's mental health deteriorated in 2015 and 2016 but in terms of timing that happened after she had engaged in the legal process not immediately before it nor immediately after news of the convictions. Moreover, even when the medical notes show the symptoms at their worst ("all time high" to use Ms Taylor's own expression in her evidence in chief), Ms Taylor was still capable of continuing to engage in the legal process.

[109] At trial various reasons were advanced by or on behalf of Ms Taylor as to why she had not filed proceedings before 2014 and why she went to the police when she did:

(a) She did not know it was legally possible to bring a civil claim.

(b) Even if she had known she could bring a claim, she would not have done so because she did not think she would be believed.

(c) The jury verdicts validated the fears for her safety that she had experienced at the time of the abuse. The fears were real and not a figment of her imagination. He was a rapist. "I knew what my truth was. I knew that he was as evil as I thought."

(d) She had been too frightened of him before. She finally felt safe to disclose what he had done knowing he was in prison.

(e) She felt guilty in relation to his other victims, and angry and upset the Air Force had done nothing.

[110] My overall impression of the evidence viewed in its entirety is that it was not Ms Taylor's depression or post-traumatic stress disorder that was preventing her from suing earlier. Rather the evidence suggests the much more likely explanation is that she did not know she had the right to sue for damages or if she did know of her right to sue what stopped her was that she did not think she would be believed, a thought process that was not due to mental illness. News of the guilty verdicts did not release her from a continuous mental disability but rather (and quite understandably) emboldened her to make the claim. She knew she now had a better chance of being believed and so a better chance of winning her case and being vindicated.

[111] In coming to that conclusion, I am of course conscious of the fact that both Dr Eshuys and Dr Barry-Walsh considered Ms Taylor was likely prevented by her mental illness from initiating legal proceedings. Judges are not of course bound by expert evidence and like the High Court Judge in this case are entitled to reach their own view. But, more importantly, the weight that might usually be given to expert evidence on such an issue is significantly reduced in this case because of several factors.

[112] The first is that Dr Eshuys' report was based entirely on Ms Taylor's self-report. Dr Eshuys acknowledged this but said it was all she had to go on. She did not interview Ms Taylor until 5 December 2016 by which time Ms Taylor was familiar with the legal issues and as detailed at [45] to [49] above, there are several problems with some aspects of Ms Taylor's account. Another concern I have regarding Dr Eshuys' report is that despite the historic nature of the issues that she had been briefed to consider, Dr Eshuys never asked for Ms Taylor's medical notes and indeed had still not read them by the time of the hearing. Finally, her opinion on disability under s 24 was inextricably tied up with a wrong assumption she made that Ms Taylor did not appreciate the causal link between the abuse and her mental illness. That Dr Eshuys would just make that assumption without inquiry in itself further detracts, in my view, from the cogency of her report.

[113] As for the evidence of Dr Barry-Walsh, he said in oral evidence that he now had some doubts about his initial opinion regarding s 24 capacity after reviewing the medical notes. These had only been made available to him after he had provided his report. The records, he said, pulled his opinion "a little back towards an area of uncertainty" on incapacity.

[114] In his assessment, the medical notes raised questions about the extent and severity of the disorder that Ms Taylor developed as a result of her experiences at Whenuapai. The notes also revealed what he described as "a significant inconsistency" between them and Ms Taylor's narrative to him that after she learnt of Mr Roper's convictions she immediately deteriorated. As already mentioned, the medical records recorded her reporting her mood as stable in late 2014 and early 2015. Dr Barry-Walsh also considered it important that the records showed other issues such as her son's health and her work-related issues were significantly impacting on her at the relevant time, something she did not mention to him.

[115] It is correct as pointed out by the majority that Dr Barry-Walsh did not completely resile from his earlier opinion. But his oral evidence is permeated by the use of the word "plausible" by which it appears from his answers to the Judge he meant "possible." Indeed, even Dr Eshuys at the conclusion of cross-examination used the tentative expression "may not have been capable".

[116] The majority consider the fact the medical records are silent about Mr Roper is not significant and indeed regard it as consistent with someone suppressing references to the abuser. The first mention of Mr Roper is 19 November 2015, almost a year after news of his convictions. However, when this was put to Ms Taylor she did not say she had felt inhibited talking to any of her doctors about Mr Roper before then. On the contrary, she suggested her doctor "knew what was going on" and that because a lot of talking had gone on during her various doctor's visits it would be difficult to write everything down. This was suggested by her in relation to both the notes taken by her New Zealand doctor in 2006 regarding her stressors as well as the notes taken by the Australian doctors. In my view, it is most unlikely a doctor would omit recording something as significant as that if he or she had been told about it.

[117] There is also no mention in the notes about Ms Taylor having longstanding issues with mental illness that she had been treating naturally as she claimed. This was advanced as an explanation for the absence of any reference to a prescription for anti-depressant medication from 1988 to 2006. I consider it likely that if the claim about long standing and persistent issues and natural treatment were correct that she would have told the doctor about it especially when first being prescribed anti-depressants. The absence of any note to that effect is telling.

[118] The notes are in my view critical evidence because they are objective and contemporaneous, made before any appreciation of legal consequences, and made by an independent professional trained to be accurate and observant, someone who cared about Ms Taylor's well-being and someone in whom Ms Taylor confided. The fact that some of the treating doctors live in Australia would not have prevented Ms Taylor from calling them as witnesses as well as her New Zealand doctors. None of them was called despite the burden of proof being on Ms Taylor.

[119] In making these comments, I have not overlooked the evidence of Ms Taylor's husband. However, I would not place the weight on his brief of evidence that the majority do. Indeed, I consider his evidence is more telling in what it does not say.

[120] Ms Taylor's husband, Mr Daniel, was in the Air Force at the same time as Ms Taylor. He knew her. They were friends. His evidence says nothing about her mental state at the time of accrual. He says she told him about the abuse although does not say exactly when that was. It must however have been prior to 1996 because he also says it was due to the fact he knew what had happened to her previously that he was unhappy about her returning to the Air Force in 1996. He says nothing about her going to see a counsellor in 1996 as Ms Taylor claimed to Drs Eshuys and Barry-Walsh.

[121] In fact, all Mr Daniel says about her mental state in the years prior to 2014 is that she was "a little anxious" when she returned to the Air Force for the second time and was disappointed that others had got promotions when she had been denied that opportunity.

[122] And yet the claim before the Court is that on returning to the Air Force in 1996, Ms Taylor suffered "a total mental collapse". If that were correct, it would surely have been something Mr Daniel would have known about.

[123] As for what Mr Daniel says about the effect on her of news of the convictions in December 2014, he does not say anything in my view that would support this being a trigger releasing her from a 26 year period of continuous incapacity. Rather he suggests the primary reason she made the choice to go the police was because she felt guilt for Mr Roper's victims. She was "abusive and angry" towards the Armed Forces for not listening to her.

[124] I acknowledge that Mr Daniel does go on to talk about the matter beginning to consume Ms Taylor and impact on her day to day functioning. However, his evidence is imprecise as to when that occurred and is actually more consistent with this occurring after engagement in the legal process, than immediately after news of the convictions which is the basis of her limitation argument.

[125] In summary, I consider Mr Daniel's evidence does not support a continuing disability as required by s 24 and it does not support the theory of a release from disability in December 2014.

[126] For all these reasons and the reasons given by the Judge, I agree with her finding that there was insufficient evidence to warrant the application of s 24 and that accordingly all causes of action are time-barred. I would therefore have dismissed the appeal on that basis.

[127] I turn now to consider whether Ms Taylor has cover under the Accident Compensation scheme and therefore independently of limitation issues is prevented from being able to sue the respondents.

[128] Before doing so I record counsel's advice that for the purposes of s 320 of the Accident Compensation Act 2001 (the 2001 Act), the Accident Compensation Corporation was given an opportunity to be heard in this proceeding but declined.

Did the Judge err in her application of the accident compensation legislation?

[129] If Ms Taylor has cover for the mental injury she suffered under the accident compensation scheme, then even if her claim is in time (as Brown and Clifford JJ hold) she would not have the right to sue for compensatory damages, only exemplary damages. Conversely, if there is no cover, there is a right to sue for compensatory damages as well. There have been three relevant iterations of the accident compensation legislation and Ms Taylor says she does not have cover under any of them.

[130] Whether she does have cover turns on whether she suffered personal injury by accident within the meaning of the accident compensation legislation. Although in everyday language an assault (unlike negligence) would not be considered an accident, it is well established that physical and mental injuries caused by intentional assaults or batteries are personal injuries by accident from the point of view of the victim.[34] False imprisonment on the other hand is a special category and I put that to one side, returning to it at [151].

[131] At the time the abuse at Whenuapai occurred and Ms Taylor suffered her injuries, the 1982 Act was in force. It was widely thought including by those administering the 1982 Act that it only provided compensation for mental injury if the mental injury was a consequence of physical injury. To put it another way, cover was not considered to be available for mental consequences unaccompanied by physical injury. If that were a correct interpretation of the 1982 Act, it would mean Ms Taylor did not have cover under that Act. However, in *Accident Compensation Corp v E* this Court held the interpretation was wrong.[35] It said the correct interpretation was that mental consequences of an accident were included within the statutory definition of personal injury by accident under the 1982 Act whether or not there was also physical injury.[36]

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34 *Willis v Attorney General* [1989] 3 NZLR 574 (CA) at 576–577; and *Green v Matheson* [1989] 3 NZLR 564 (CA) at 571–572.

35 *Accident Compensation Corp v E* [1992] 2 NZLR 426 (CA) at 433–434.

36 At 433–434.

[132] Mr Little submitted that because prior to *Accident Compensation Corp v E* the Accident Compensation Corporation had been interpreting and applying the 1982 Act differently, the decision in *Accident Compensation Corp v E* only applied from the date it was decided which was 1992. Accordingly, it was the old interpretation that applied to Ms Taylor's case and she therefore did not have cover under the 1982 Act. However, that submission is contrary to the declaratory theory of law and is untenable. The effect of *Accident Compensation Corp v E* was both retrospective and prospective.

[133] The panel concludes that Ms Taylor did have cover under the 1982 Act.

[134] The 1982 Act was repealed and replaced by the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act). The 1992 Act generally reduced the scope of cover for mental injury by limiting it to mental injury that was the outcome of physical injury.[37] At the same time — and this is not mentioned in the High Court decision — it also introduced a new category of cover for mental injury caused by a criminal act including indecent assault.[38] The nature of the abuse inflicted by Mr Roper on Ms Taylor amounted to indecent assault. In so far as Edwards J may have assumed there was no cover under the 1992 Act, we disagree.

[135] Mr Little however argued that the 1992 Act meant Ms Taylor was free to sue for damages and in support of that submission relied on s 135(5) of the 1992 Act.

[136] Section 135(5) of the 1992 Act provided:[39]

> Any person who has suffered personal injury by accident within the meaning of the Accident Compensation Act 1972 or the Accident Compensation Act 1982 that is covered by either of those Acts, and who has not lodged a claim with the Corporation in respect of that personal injury by accident before the 1st day of October 1992, shall have cover under this Act only if that personal injury by accident is also personal injury that would be covered by this Act had it occurred on or after the 1st day of July 1992.

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37 Accident Rehabilitation and Compensation Insurance Act 1992, s 4(1).

38 Section 8(3) and sch 1.

39 This is the wording of the provision at the time the courses of action accrued, not as enacted. The provision was amended slightly by the Accident Rehabilitation and Compensation Insurance Amendment Act (No 2) 1993, s 41.

[137] Mr Little submitted that as a result of this section even if Ms Taylor was covered under the 1982 Act, the fact she never lodged a claim with the Corporation prior to 1 October 1992 meant she was free to sue.

[138] The panel does not accept that is a correct interpretation of s 135(5). As explained in *Childs v Hillock* it was a transitional provision designed to address the situation of unclaimed cover relating to personal injury covered under the previous legislation.[40] The effect of the sub-section is that a person in that situation would lose cover (but still not be free to sue) unless either (a) they had lodged a claim prior to 1 October 1992 or (b) the personal injury they had suffered was personal injury covered by the new 1992 Act.

[139] As already noted, the personal injury suffered by Ms Taylor was "personal injury covered by this Act". The fact she suffered it prior to the 1992 Act coming into force does not alter that conclusion.

[140] In the High Court, the Judge did not consider it necessary for her to consider whether Ms Taylor's claims would be covered in the 2001 Act. However, before us the respondents argued that Ms Taylor does have cover under the 2001 Act as well and could in fact still bring a claim under that Act, giving her a remedy for the wrong she has suffered. Mr Little strongly disputed this.

[141] The definition of "personal injury" in the 2001 Act is contained in s 26 of that Act. The definition includes "mental injury suffered by a person in the circumstances described in section 21".[41] Mental injury is defined as "a clinically significant behavioural, cognitive or psychological dysfunction".[42] As for the circumstances described by s 21, they relate to cover for mental injury caused by certain criminal acts. Section 21 provides that a person has cover for a personal injury that is a mental injury if certain criteria are satisfied. The criteria are relevantly:[43]

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40 *Childs v Hillock* [1994] 2 NZLR 65 (CA) at 68–69, reasoning endorsed in *White v Attorney General* [2010] NZCA 139 at [161] in relation to a similarly worded provision of the Accident Compensation Act 2001, s 360.

41 Accident Compensation Act 2001, s 26(1)(d).

42 Section 27.

43 Section 21(1) and (2).

(a) The person suffers the mental injury on or after 1 April 2002.

(b) The mental injury is caused by an act performed by another person in New Zealand.[44]

(c) The act is within the description of an offence listed in sch 3.

[142] One of the qualifying offences listed in sch 3 is indecent assault. Mr Roper indecently assaulted Ms Taylor in New Zealand and caused her mental injury as defined.

[143] But what of the requirement that the person must suffer the mental injury on or after 1 April 2002? On the face of it, that would not seem to be satisfied on the facts here. Ms Taylor suffered her mental injury in 1988. However, s 36(1) of the 2001 Act provides that the date on which a person suffers mental injury in the circumstances of s 21 is "the date on which that person first receives treatment for that mental injury as that mental injury". According to her medical records, the date on which Ms Taylor first received treatment for post-traumatic stress disorder was well after 2002.[45]

[144] When the panel put this analysis to Mr Little, he was not persuaded and contended it was completely answered by s 21A of the 2001 Act. In his submission s 21A means the 2001 Act cannot apply to Ms Taylor's case.

[145] Section 21A is a lengthy provision and we do not propose to set it out in full. It is a deeming provision. Persons to whom it applies are deemed to have had cover under the 1992 Act. The section goes on to detail how payments that have already been made by the Corporation to such persons now deemed to have cover under the 1992 Act are to be treated. It also details how civil proceedings brought by such persons before or after the commencement of s 21A in 2005 are to be treated.

[146] The persons to whom the deeming provision in s 21A applies are relevantly persons who suffer mental injury as a result of a criminal act performed prior to 1 July

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44 Or on a person who is ordinarily resident in New Zealand when the act is performed.

45 As mentioned there is evidence she received counselling in 1996 for the abuse but it is more likely than not that this related to anxiety rather than post-traumatic stress disorder.

1992 and who received their first treatment between 1 July 1992 and before 1 July 1999.

[147] Ms Taylor did not receive her first treatment until after 1 July 1999 and that Mr Little submitted disposed of the argument she had cover under the 2001 Act.

[148] The panel disagrees. The fact Ms Taylor did not receive her first treatment until after 1 July 1999 certainly takes her out of the deeming provision of s 21A. But it does not logically follow that she has no cover at all. Section 21A does not purport to override s 21. Its aim is to deal with a category outside the scope of s 21. If a claimant meets the requirements of s 21 — which Ms Taylor does — then that is what gives her cover. The cover is not under the 1992 Act which would be the case if she were within s 21A. The cover is under the 2001 Act.

[149] The panel concludes that Ms Taylor had cover under the 1982 Act and the 1992 Act and has cover under the 2001 Act.

[150] That conclusion, even combined with the majority view that none of the causes of action are time barred under the Limitation Act, means Ms Taylor cannot sue for compensatory damages in respect of the causes of action in negligence, assault and battery and infliction of emotional harm but she can sue for exemplary damages.

[151] Up until now, the analysis has excluded the claim for false imprisonment. That is because it raises a discrete issue on which as indicated the panel is divided. The views I express below differ from the views of the majority.

False imprisonment

[152] The tort of false imprisonment is the unlawful total restraint of the liberty of a person. There is no question that Ms Taylor was falsely imprisoned by Mr Roper in the car while she was driving him and also when he locked her in the tyre cage. The issue is whether the bar on bringing personal injury claims applies to this claim as it does to Ms Taylor's other tort claims.

[153] Ms Taylor's claim for false imprisonment is pleaded in the operative statement of claim in the following terms.

[154] First, it relies on all the allegations of Mr Roper's abusive behaviour including the sexual and physical assaults and harassment and then states:

> [Mr Roper] arbitrarily detained [Ms Taylor] for an extended period of time and severely limited [her] freedom of movement in that he locked her in the tyre cage for periods of time up to an hour at times and minutes on other occasions and inside a car conveying him to his home so preventing her escape from him.

[155] The pleading then states that as a result of Mr Roper's breach of Ms Taylor's right to freedom of movement and/or protection from arbitrary detention, she suffered damage. The damage said to have been suffered is the same mental and psychological injury and consequential economic loss alleged in respect of all the causes of action, including assault.

[156] Edwards J found that Mr Roper had locked the car doors while Ms Taylor was driving him home and that he would then try to grope her, touch her breasts and put his hands up her skirt as well as squeeze her arm firmly and threaten her with consequences should she tell anyone.[46] The Judge further found that this happened on at least one occasion but was unlikely to have occurred on a regular basis or on as many occasions as Ms Taylor asserted.[47]

[157] The Judge also found that Ms Taylor was locked in the tyre cage on more than one occasion by Mr Roper although not as often as Ms Taylor claimed and not for as long as she claimed. The Judge considered it highly improbable that Ms Taylor was locked in the cage for up to an hour as alleged. She did accept that Mr Roper used an iron bar to prod her, tap her on the bottom and generally intimidate her on these occasions.[48]

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46 *M v Roper*, above n 1, at [36] and [40]
47 At [31]–[39].
48 At [51]–[53].

[158] These findings of fact stand and are part of the context in which the issue regarding the application of the accident compensation legislation must be determined in this Court.

[159] The leading authority on the principles to be applied in determining whether a claim of false imprisonment is inside or outside the accident compensation legislation is the decision of this Court in *Willis v Attorney-General.*[49] It is the application of the legal principles articulated in *Willis* to the facts of this case that has divided the panel.

[160] The *Willis* decision concerned the importation of four Ford Mustang cars which were seized by the New Zealand Customs Agency. After the cars arrived, the importers claimed they were unlawfully detained by customs officers for questioning for several hours. They sought inter alia general damages. There was no claim of assault or battery and no suggestion of force or threat of force.

[161] As noted by Edwards J, the Court in *Willis* held that the phrase "personal injury by accident" must bear its ordinary and natural meaning and that whilst physical and mental injuries caused by intentional assaults or batteries were personal injuries by accident from the point of view of the victim, that did not mean the bar on damages claims extended to other tort actions "where a suggested link with the subject matter of the Act is more tenuous".[50]

[162] In holding that the importers' claim in tort for false imprisonment was not barred by the accident compensation legislation, the Court pointed out that force or the threat of force was not the gist of the cause of action of false imprisonment — it was the fact of detention — and that it could not be said of "anyone who had been detained as the plaintiffs claim to have been that he or she had suffered personal injury by accident".[51]

[163] Contrary to a submission made by Mr Little, the Court went on however to make it clear that it was not purporting to lay down an absolute rule that all claims of

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49 *Willis v Attorney-General*, above n 33.
50 At 576; and *M v Roper*, above n 1, at [175].
51 At 579.

false imprisonment were automatically outside the accident compensation legislation. There was as the Court put it a "grey area":[52]

> No doubt there is a grey area in which it can be argued that distress or humiliation or fear for which a plaintiff alleging false imprisonment seeks damages amounts to or overlaps with personal injury by accident. But to make the Act work as Parliament must have intended … we think that the clear rule must be adopted that any claims for any kind of damages for false imprisonment alone and for any distress, humiliation or fear caused thereby are outside the scope of the accident compensation system and unaffected by the Act. If such mental consequences have been caused by both false imprisonment and assault or battery, a plaintiff can still claim damages for them. It is enough if the false imprisonment has been a substantial cause.
>
> Trial Judges will adopt a common sense approach guided by what is within the broad spirit of the accident compensation system and what is outside it. Any difficulties are likely to be more theoretical than practical.

[164] The Judge directed herself in terms of those principles. She held having regard to the fact the false imprisonment was intertwined with an assault and the nature of the consequences, that it was in the nature of personal injury by accident and therefore within the scope of the accident compensation legislation.[53]

[165] I agree with that conclusion.

[166] In my view, the facts of this case are so far removed from *Willis v Attorney General* so as to bring it within a different category. First, the claim in this case is for a clinically recognised mental illness and not (to quote this Court in *Accident Compensation Corp v E* when discussing *Willis*) "mere humiliation or distress".[54]

[167] Secondly, in *Willis* the detention was unaccompanied by any physical violence or the threat of violence. It was detention simpliciter.

[168] In stark contrast in this case, we are essentially concerned with a series of incidents that cumulatively impacted on Ms Taylor. The pulling of the bra straps, the touching of her bottom, the rubbing himself up against her, the ogling in

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52 At 579.
53 *M v Roper*, above n 1, at [178]–[179].
54 *Accident Compensation Corp v E*, above n 35, at 434.

the changing room, the groping in the car and the touching of her bottom with an iron bar in the tyre cage were all part of a predatory and sexualised course of conduct.[55] In those circumstance it is in my assessment highly artificial to isolate two aspects of that conduct — the detention in the car and the tyre cage — both of which were limited as found by the Judge — and say they, in isolation, were a substantial cause of the mental illness. That does not reflect the reality of the case. On the contrary, it emerges very clearly from Ms Taylor's own evidence that the impact on her from being locked in the car and the tyre cage derived from her knowledge of Mr Roper as a sexual predator and what he was capable of doing and had done to her.

[169] In deciding whether the false imprisonment was a substantial cause of the damage, the Court in *Willis* enjoined judges to adopt a common sense approach and to be guided by what is within the broad spirit of the accident compensation legislation. Standing back and looking at the nature of the harm claimed and the tortious conduct that caused that harm, I consider in substance this claim is undoubtedly a claim in the nature of personal injury by accident. To hold otherwise is in my view to interpret *Willis* as imposing a universal rule that all claims for false imprisonment are outside the accident compensation scheme and that is not what the Court held.

[170] The majority of the panel however take a different view and for the reasons they explain in their separate judgment they conclude the claim for compensatory damages for false imprisonment is outside the scope of the accident compensation legislation, leaving Ms Taylor free to pursue that claim.

[171] Because of the view the majority takes on that issue and on s 24 of the Limitation Act, they therefore allow the appeal in part. I however would have dismissed it and upheld the High Court judgment in its entirety.

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[55] I disagree with the majority that there was no evidence of sexual abuse in the tyre cage. There was touching of her bottom both with his hand and an iron bar.

BROWN AND CLIFFORD JJ

(Given by Brown and Clifford JJ)

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Introduction

[172] We agree with the judgment of French J save in two respects:

(a) the conclusion that there was insufficient evidence to warrant the application of s 24 of the Limitation Act;[56] and

(b) the conclusion that Ms Taylor's claim for compensatory damages for false imprisonment is within the scope of the accident compensation legislation.[57]

[173] On the basis of the evidence in the High Court we consider that there was justification for the conclusion that, until she learned of Mr Roper's convictions, Ms Taylor was suffering from a disability which had the effect of providing an extension of the limitation period in respect of her four causes of action.

[174] However, because we agree with French J that the first, second and third causes of action were in respect of personal injury and hence covered by the accident compensation legislation,[58] Ms Taylor's remedy in respect of those three causes of action is confined to exemplary damages.

[175] The position is different in respect of the cause of action for false imprisonment. We do not agree that Ms Taylor's imprisonment in the tyre cage or her

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56 Above at [102]–[103].
57 At [164]–[169].
58 At [149]–[150].

being locked in the car while driving were not a substantial cause of her mental injury such that her claim is only for personal injury to which the accident compensation legislation applied. Consequently, we consider that it would be open to Ms Taylor to pursue both compensatory and exemplary damages in respect of her claim for false imprisonment.

The application of s 24 to the facts of this case

Relevant principles

[176] We gratefully adopt (and hence need not repeat) the summary of the relevant principles in the judgment of French J at [93] to [97].

The High Court judgment: approach to disability

[177] The conclusion of Edwards J was expressed in this manner:

> [155] On balance, I do not consider there to be sufficient evidence that [Ms Taylor] was operating under a disability as at 1988 or at any time subsequent which would allow the limitation period to be extended. …

We agree with French J that the reference to "any time subsequent" was an error.[59]

[178] However we also have misgivings about the consistency of the reasoning leading to the Judge's conclusion. Of particular concern is the earlier statement in the context of the disability analysis:

> [147] The difficulties which plagued the causation assessment in this case plague this aspect of the claim also. There is little in the way of objective evidence of [Ms Taylor] suffering from any sort of mental injury in 1988 or shortly thereafter, let alone one which left her incapable of commencing these proceedings.

[179] However both the experts had concluded that Ms Taylor suffered from PTSD which had originated in the events at Whenuapai. In particular we note the following:

> [105] [Ms Taylor] has proved that the alleged acts occurred, and that she now suffers from a mental injury. …
>
> …

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[59] At [98].

> [125] The question of causation is delicately balanced. But after careful review of the medical evidence, and faced with [Ms Taylor's] clear presentation of a current mental injury, I conclude, on the balance of probabilities, that Mr Roper's actions at Whenuapai were a material and substantial cause of [Ms Taylor's] current mental injury, being her PTSD.
>
> …
>
> [142] In summary, the Limitation Act issues are to be determined on the basis that [Ms Taylor] suffered a mental injury at the time she left the RNZAF, and that she had always made the connection between what had happened to her at the hands of Mr Roper and her mental health injury at that time. That means that all of [Ms Taylor's] causes of action had accrued by 1988. …

[180] Against that backdrop the statement at [147] of the High Court judgment, reiterated in the summary of findings at [188(c)], is surprising and raises a question whether the Judge in fact approached the issue of disability on the footing of the existence of a recognised mental injury, namely PTSD.

Did Ms Taylor suffer from a qualifying disability?

[181] French J concludes that it was not PTSD which prevented Ms Taylor from commencing proceedings earlier. Rather the evidence suggests that either Ms Taylor did not know she had the right to sue for damages or, if she did know of her right to sue, what stopped her doing so was that she did not think she would be believed, a thought process that was not due to mental illness. French J therefore concludes that news of Mr Roper's guilty verdicts did not release her from her mental disability but emboldened her to make a claim.[60]

[182] While recognising that there was a history of Ms Taylor perceiving that complaints by her (and other female Air Force staff) were not acknowledged,[61] we do not agree that perception provides the explanation for the delay in the commencement of her claim.

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60 Above at [110].

61 In the course of cross-examination she remarked: "but I know that I wasn't heard and nobody listened and a lot of us girls just gave up telling our story and we just wanted to get out".

[183] We consider the evidence of both Ms Taylor and her partner demonstrate that for Ms Taylor learning of Mr Roper's convictions was a watershed moment. As she stated in the course of cross-examination by counsel for the second respondent:

> Q. And your evidence is that you had a sudden emotional response, is that right?
>
> A. Correct.
>
> Q. What do you mean you had a sudden emotional response?
>
> A. I burst into tears. Everything came flooding back. I read about what he had been doing to [other victims]. I felt what he did to me in the cars and that tyre bay.
>
> Q. And is that when you say you decided you wanted to talk to the police?
>
> A. Yes.

It was Ms Taylor's case that the news of Mr Roper's convictions served as a trigger which released her from a mental state which prevented her from addressing in a practical way the treatment that she had suffered at Mr Roper's hands.

[184] Significantly that was also the preliminary view of a forensic psychiatrist, Dr Barry-Walsh, who was requested by the second respondent to provide an opinion on whether it was likely that Ms Taylor was suffering from a mental injury as a result of the alleged actions of Mr Roper which would have prevented her from initiating legal proceedings between 1987 and 2014. Dr Barry-Walsh examined Ms Taylor. He also spoke to her partner by telephone.

[185] Dr Barry-Walsh's brief of evidence stated:

> 68. The test is one of a specific unsoundness and not unsoundness in a general sense. As I have noted at [8.6], these tests are legal tests, for the court to determine. For instance, the terms mental injury and unsoundness of mind are not usually part of the psychiatric lexicon.
>
> 69. Having said that, Ms Taylor's explanation that until she knew that the defendant had been convicted and was incarcerated she was too fearful to initiate proceedings against him is psychologically plausible and an understandable reaction in someone suffering from her psychiatric problems.
>
> 70. For this reason, acknowledging my caveats at [8], it would be my view that on balance Ms Taylor was likely prevented as a result of the mental injury from initiating legal proceedings until 2014, when

> she learnt of Mr Roper's conviction. As I have noted earlier, the assessment of causation is limited by our constrained understanding or the causes of psychiatric and psychological problems, and the difficulty of weighing the contribution from competing factors, when present. Assessment is further complicated because Ms Taylor has been through a significant period of engagement in the current legal process. This means she will have rehearsed and repeated her narrative, with the potential introduction of bias including in attributions for her difficulties and the weight she puts on various events.

[186] However, after preparing his brief, Dr Barry-Walsh was provided with some of Ms Taylor's medical records. This led him to qualify his views in the course of his evidence-in-chief:

> Now, Your Honour, I'd like to just pause there and say that I have had cause to review, in particular, that aspect of my opinion and perhaps, to some extent, my opinion more generally. The difficulty that I have is that there is some evidence of contradiction between Ms Taylor's narrative and her contact with her general practitioner. Her narrative to me, and this was corroborated by her partner, was that after she learnt of Mr Roper's convictions, she immediately deteriorated, which is inconsistent with her contact with a general practitioner, particularly in late 2014 and early 2015 when she was reporting her mood as stable. The other issues there are that it would appear that her problems at work were a major stressor for her and may have been contributing significantly to her symptoms at the time, as well as the possibility that her son's health, which she didn't talk to me about, was having significant impact. I am aware that from the second half of 2015 she was having counselling at Laurel House and the letter from them does describe post-traumatic symptoms related to her experiences at Whenuapai. The problem though that I'm left with is that I think that is a significant inconsistency and one which I would very much like to have explored with Ms Taylor at the time that I interviewed her. And for me that does raise a little more, some more, I have to be careful about my words here, but does raise some doubt about my assessment that it was like, she was likely prevented as a result of a mental injury from initiating legal proceedings. I think that if you think of it on a continuum, it pulls my opinion a little back towards an area of uncertainty around that. I know the test is a balance of probabilities. And it also just raises some questions about the extent and severity of the disorder that she developed as a result of her experiences at Whenuapai. None of that is to diminish the very clear evidence of distress and suffering over the last several years as this legal process has continued but nevertheless it has raised some doubt in my mind.

[187] The earlier cross-examination of Ms Taylor by counsel for the second respondent revealed that, in response to a request to provide a copy of all her medical records, Ms Taylor had been able to locate such records in the periods between 2002 to 2008 and from 2012 to 2017. She was cross-examined about aspects of those medical records although unfortunately the treating doctors, some of whom were in Australia, were not called to give evidence.

[188] The cross-examination elicited that in August 2013 Ms Taylor had been prescribed for a trial period an antidepressant named Lexapro. She continued to be prescribed with that medicine throughout 2014 and in 2015. The references to "mood stable" in the succinct doctors' file notes of 10 December 2014 and 13 February 2015 were both made with reference to her responsiveness to that medicine. We note that on both her subsequent visits on 12 March 2015 and 18 March 2015 the file notes record her as having been in a distressed state.

[189] Counsel for the second respondent questioned Ms Taylor about the fact that a medical consultation on 19 November 2015 was the first occasion on which there was reference in the file notes to her experiences with Mr Roper. The somewhat cryptic notes include:

> …thinks some of her stress has been triggered by an old army sargent [sic] who has been jailed for abuse of [details suppressed] & airforce girls.

The lengthy exploration of the medical records in cross-examination concluded with counsel contrasting Ms Taylor's description of her symptoms in her brief of evidence with the medical notes in this way:

> Q. … And I suggest to you there's nothing in the notes between the 6th of December 2014 until the 19th of November 2015 that bear any relation to the symptoms you're saying you had.
>
> A. Well all my workplace issues were a trigger that took me back to my past. It just brought everything back, it flashed everything back — where my present boss was yelling at me, it just brought everything back to what was happening to me in the Air Force.
>
> Q. Well I suggest to you, Ms Taylor, that you're looking back on events and rewriting your history which bears little relation to what actually happened.
>
> A. You weren't there at the time, you didn't know what happened within that section.

[190] We do not consider that the evidence of the medical notes, such as it is, is necessarily inconsistent with Ms Taylor's evidence as to her reaction upon learning of Mr Roper's convictions. However, if, as the cross-examination implied, the respondents' contention was that Ms Taylor did not actually experience the trigger

event, we consider that such suggestion cannot sit comfortably with the evidence of Ms Taylor's partner.

[191] Mr Barry-Walsh had formed his initial opinion on the basis of speaking with not only Ms Taylor but also her partner. Her partner also provided a brief of evidence which relevantly stated:

> 14. After Mariya learnt of Robert Roper's conviction in 2014, she went downhill pretty quickly. She became quite upset by it and was very abusive and angry towards the Armed forces for not listening to her. It was after his conviction she made the choice to inform the NZ Police of her time in the Air Force. She felt terrible guilt for Roper's [other victims]. Not long after she heard of this Mariya began sleeping in a separate bedroom and we ceased sexual relations.
>
> 15. I noticed from her day-to-day functioning that it started to consume her. She took up smoking again having stopped in 2001. She became quite emotional; she would break down and start crying. Her relations at work took a downhill spiral on her mental health and she had to stop work earlier this year, due to her boss being very much like Roper. She tried to work through this with her counsellor at Laurel House but it was suggested that her current work situation was triggering her too much and not helping her healing process. She was able to put into context that it was ok to have a voice and speak up in the workplace but that proved hard at times and often led to big anxiety attacks at work.
>
> 16. Then in 2015 she went and gave a statement to Frances Joychild thinking that her enquiry might give her some closure. But it hasn't come to anything yet and this is really hard on Mariya. She again feels very let down by the Air Force. She has detached from doing things as a family and has become very on edge. This has had a devasting impact on our family life.

[192] Surprisingly in the circumstances, Ms Taylor's partner was not challenged on this evidence. Indeed his brief was admitted by consent. His evidence strongly supports Ms Taylor's contention about the effect on her of learning of Mr Roper's convictions. It is consistent with her having managed over the previous years to subconsciously suppress her anxiety. As Dr Barry-Walsh commented in his brief:

> 61. It is difficult extrapolating back, but it would seem her symptoms of anxiety and depressed mood have been present long-term but she had learnt to manage these probably, primarily through avoidance.

[193] Furthermore in the course of Dr Barry-Walsh's cross-examination, and notwithstanding his evidence-in-chief set out at [186] above:

(a) With reference to Ms Taylor's narrative of her experience of fear and terror, Mr Barry-Walsh opined that it was psychologically plausible that experience had "inhibited her from acting until she knew that Mr Roper was in custody and had learnt of his case".

(b) He was "not surprised" Ms Taylor had not mentioned her difficulties when she left the Air Force the first time. Rather that would be consistent with the kind of experiences that she reported.

(c) He said that it was a common experience for those suffering from PTSD to internalise their problems and not make an obvious or overt complaint about them all the time.

[194] The subsequent exchange is of particular note:

> Q. … Have you had patients before that you have examined where there has been a sudden realisation that the offending was — had actually been demonstrated and it was way more than they — or it was proved that their fears had subsequently been proved and the effect on them?
>
> A. Yes.
>
> Q. And is it — is that the case that … of itself, the fact they realised it wasn't a figment of their imagination and the degree of danger they were in at the time has a deleterious effect on their psyche?
>
> A. Yes.
>
> Q. And would it be consistent with that for somebody to immediately go to the police and make a complaint?
>
> A. Yes it would be.

[195] To complete the picture, we note the following exchange between the Judge and Dr Barry-Walsh on the issue of the "disability" evidence:

> Q. I understand, in terms of your opinion on the unstable mind point of view, and I understand that you've shifted your opinion somewhat today.
>
> A. Yes.
>
> Q. I just want to go back really and stick with, just to put that to one side, just to stick with the initial opinion which you based on the plaintiff's self-reporting to you, and as I understand your evidence-in-chief on

that basis, or your initial opinion was that she was suffering from a disability that would have prevented her from bringing the proceedings —

A. Likely.

Q. Likely?

A. Always — I qualify every opinion, Your Honour, but yes.

Q. Yes, so just sticking with that opinion, and putting aside the fact that it's been somewhat revised more recently, even on his self-report she had periods of relative stability where she wasn't suffering from depression or anxiety or any other symptoms of what may have occurred, so your initial opinion would even cover those periods when she seemed to be in a relatively good space?

A. Yes. Perhaps the neatest way to think about it is that at times she managed to get on with her life and all of this didn't bother her too much. And because I was mindful that it's a specific, not a general impairment, I was satisfied that those two things were not inconsistent.

Q. So even though she was able to get on with her life and was relatively happy and content, she was nevertheless still suffering from a specific impairment that would have prevent her from bringing the proceedings?

A. Yes, that would be quite plausible. I've got to stop using that word. That certainly would be possible and consistent with what it looked like her mental problems were.

Q. And is that part and parcel of the sort of avoidance technique that I think you mentioned in her initial brief of evidence?

A. That's right.

[196] French J makes the point at [106] that the medical records clearly demonstrate intermittent concerns, not of continual suffering such as said to be required by s 24. However, we do not consider that it is necessary in order to establish a s 24 disability that there be a "picture of consistent psychiatric problems". On the contrary, the scenario where a person is psychologically unable to engage with traumatic events (until some trigger event) would be more likely to manifest itself in a state of affairs where the anxiety was suppressed, and the trauma swept under the carpet.

[197] On the balance of probabilities we are satisfied that, until learning of Mr Roper's convictions, Ms Taylor was under a qualifying disability. Hence s 24 applies in this case to extend the commencement of the limitation period until

November 2014. Consequently, her claim filed in May 2016 was commenced within time.

The false imprisonment claim

[198] We agree with the description by French J at [153]–[157] of the incidents of the tort of false imprisonment. However, we have formed a different view from French J on the issue whether Mr Roper's false imprisonment of Ms Taylor in the tyre cage was a substantial cause of the distress, humiliation and fear which Ms Taylor suffered.

[199] Ms Taylor's brief of evidence suggested that the experience of being locked in the tyre cage was traumatic. She stated:

> He often locked me in the tyre case, a small padlocked holding compartment made of wire mesh in the tyre bay used to hold chemicals and other expensive or dangerous goods used by MT. He did this to me at least monthly between 1985–1988. I vividly remember the terror and fear I felt when he would lock me in the tyre cage, the outcome if I didn't do as he said, the loud banging as he bashed the large iron tyre bar on the counters of the tyre bay. The feeling of him prodding me with the iron bar was horrific. It was the iron bar you would use to break the bead on the truck tyres; he would prod me with it to get me into the cage. He would also tap me on the bottom with it when I was changing tyres.
>
> The fear I felt within the cage when there was no one around to let me out as staff were on lunch breaks. Sometime he'd lock me in there for more than an hour. The humiliation and persistent emotional distress [of] being locked in a cage and not being able to get free. …
>
> …
>
> Having read about Sergeant Roper's allegations online in late November 2014 and his offending, I felt physically sick. All the emotions came flooding back, the terrifying times I had alone with him in the car, and the control he had over me in the tyre bay, the absolute terror I felt locked in the cage.

[200] Ms Taylor was challenged in cross-examination by counsel for Mr Roper on the issue whether the tyre cage incidents had ever occurred. She was not cross-examined on the tyre cage issue by counsel for the Attorney-General.

[201] The trial Judge concluded that Ms Taylor was locked in the tyre case on occasion but not as frequently, nor for as long, as Ms Taylor alleged.[62] On appeal there was no challenge by the respondents to that finding.

[202] The Judge also concluded that Mr Roper's conduct towards Ms Taylor while she was driving him home happened on at least one occasion but was unlikely to have occurred on a regular basis.[63] Nevertheless the Judge described Ms Taylor's evidence as compelling, noting that she was able to recall some details vividly and was clearly distressed in the re-telling.[64]

[203] Rejecting Mr Roper's submission that the car incident did not constitute false imprisonment because Ms Taylor was driving the car at the time and could have unlocked the door and escaped, the Judge said:

> [183] I respectfully disagree. [Ms Taylor] had no choice but to drive Mr Roper home. She was physically confined in the car (by Mr Roper locking the doors and preventing her from calling from help), and further restrained by his threats about what he would do if she complained. She was driving a drunk superior home on dark country roads where she reasonably feared that to get out of the car would make her more vulnerable to even worse assaults than she was being subject to at the time. A means of escape which leaves a person more vulnerable to harm at the hands of the very person who has confined you, is not a reasonable means of egress in my view. This was a separate incident of false imprisonment.

[204] However, the Judge ruled that both incidents of false imprisonment came within the ordinary natural meaning of personal injury by accident, reasoning as follows:

> [178] … The false imprisonment is intertwined with an assault and the consequences are more closely aligned with what would be regarded as a personal injury from the perspective of the plaintiff. The nature of the claim is at the other end of the scale from the malicious prosecution, and breach of a duty to safeguard economic interests claims, which clearly fell outside the scope of the 1982 Act in *Willis*. It is also closer to the nature of a personal injury by accident than the false imprisonment at issue in *Willis*.
>
> [179] Standing back and considering the nature and scope of [Ms Taylor's] claim for false imprisonment, I consider the mental injury which [Ms Taylor] says resulted from that claim would have been covered under the 1982 Act. Accordingly, proceedings for damages in respect of that harm would have

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62 *M v Roper*, above n 1, at [51]–[53].
63 At [40].
64 At [35].

> bene caught by the statutory bar, and are caught by the statutory bar which now applies under s 317 of the 2001 Act.

[205] French J does not expressly endorse the Judge's "intertwined" analysis. Having recited the discussion in *Willis* of the "grey area" of overlap of false imprisonment and personal injury, French J states that it all depends on whether the false imprisonment is "a substantial cause" of the mental injury.[65] She concludes that it was Ms Taylor's fear of being sexually violated and subjected to other forms of violence while being detained that was the "substantial cause" of her mental injury.

[206] There may of course be multiple causes of mental injury. There may also be more than one substantial cause. We do not consider that this Court in *Willis* intended substantial to be synonymous with primary or dominant. It is sufficient that the cause is not insubstantial or minimal. Consequently, as the Court stated, if the mental consequences have been caused by both false imprisonment and assault and battery, a plaintiff can still claim damages for those consequences. The "clear rule" in *Willis* will apply unless the false imprisonment is not one substantial cause of the mental injury.

[207] It is apparent from her evidence that Ms Taylor found being locked in the tyre cage a traumatic event.[66] There was no evidence that she was subjected to sexual abuse while she was locked in the tyre cage. In our view Ms Taylor's evidence points to a substantial cause of her mental injury being the psychological impact of imprisonment. The fact that whilst imprisoned she also harboured fears about what Mr Roper might do while she was driving him at night does not lessen the significance of the mental injury occasioned by the imprisonment. Consequently, we are unable to agree that the false imprisonment of Ms Taylor in the tyre cage was not one substantial cause of her mental injury. While the grey area of overlap is more apparent in relation to the driving incident, similarly we do not accept that the act of confinement was not also a substantial cause.[67]

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65 Above at [168]–[169].

66 It is specifically referred to in a file note of a medical consultation on 18 January 2016: "sargent [sic] used to lock her in a cage etc".

67 See above at [203]–[204].

[208] Following the original release of this judgment, a question arose whether Ms Taylor's claim was barred by s 21B of the 2001 Act. This led to a recall application by the Attorney-General, which was granted on the basis the provision had not been brought to the Court's attention in the original argument.[68] The panel is unanimously of the view that s 21B does not apply and accordingly the outcome of this judgment is not affected. Our reasons are contained in [2021] NZCA 691 which is intended to be read as an addendum to the present judgment.

[209] We therefore conclude that the false imprisonment cause of action is not a claim for personal injury. Hence it is not captured by the statutory bar in the accident compensation legislation. It follows that Ms Taylor should be permitted to proceed with a claim for both compensatory and exemplary damages in respect of the false imprisonment cause of action.

Result

[210] The appellant's application for leave to amend the grounds of appeal is declined in relation to the ground of appeal identified at [38] but otherwise granted.

[211] The appeal is allowed in part as explained at [173]–[175]. The High Court findings that all the causes of action pleaded in the amended statement of claim are time-barred under the Limitation Act and that the claim for false imprisonment is barred by the accident compensation legislation are over-ruled. In all other respects, the decision of the High Court is upheld.

[212] The Judge did not adopt the course of undertaking an assessment of damages in the event that her rulings on disability and the application of the accident compensation legislation were overturned. In those circumstances we consider that the appropriate course is, as the notice of appeal requests, for the matter to be remitted to the High Court for determination of Ms Taylor's claim for compensatory damages in respect of the false imprisonment cause of action and for exemplary damages in respect of all four causes of action.

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[68] The second category in *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

[213] Furthermore as explained at [184]–[185] of her judgment the Judge did not consider the second cause of action, namely the intentional infliction of emotional distress, being of the view that it would be preferable for the scope of that tort to be addressed "in a case where the issues are live and any claim is not barred by the Limitation Act or Accident Compensation Act as I have found". For the same reason, the absence of a live issue, at [186] the Judge did not view the case as one appropriate to consider whether the Air Force has vicarious liability for the acts of those in its service or has direct liability to Ms Taylor.

[214] In the view of the majority, it is necessary for those issues to be determined in conjunction with the assessment of damages. We do not consider it appropriate for this Court to engage with the issues in the abstract and without the benefit of a finding by the trial Judge.

[215] The appellant having been successful in a significant part, we consider that costs should follow the event. The first respondent being legally aided, the second respondent must pay the appellant costs for a standard appeal on a band A basis together with usual disbursements.

[216] The award of costs against the appellant in the High Court is quashed and the High Court is directed to reconsider costs in light of this judgment.

[217] An addendum to this judgment addressing s 21B of the 2001 Act is to be found in [2021] NZCA 691.

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