IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-002191
[2018] NZHC 2434

UNDER	The Prisoners' and Victims' Claims Act 2005
IN THE MATTER OF	An appeal against the decisions in the matter of VSC 001/16 and 002/16
BETWEEN	NICHOLAS PAUL ALFRED REEKIE Appellant
AND	CLAIMANTS A and B Respondents

Hearing: 11 July 2018

Appearances: Appellant in Person
Victoria Casey QC as Amicus Curiae for the Respondents

Judgment: 14 September 2018

JUDGMENT OF MOORE J

This judgment was delivered by me on 14 September 2018 at 3:00 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Introduction

[1] Mr Reekie is a convicted rapist serving a sentence of preventive detention. He was ordered to pay an award of $50,000 in exemplary damages to two of the victims of his offending in the Victims' Special Claims Tribunal ("the Tribunal").[1] This appeal concerns the lawfulness of that award. Mr Reekie says the process the Tribunal followed breached his right to natural justice and that the Tribunal's assessment of damages was manifestly unreasonable.

Background

[2] Mr Reekie was sentenced on 3 August 2004 on 31 charges, including multiple charges of sexual violation against four complainants. Two of those complainants are Claimants A and B, who are the respondents in this appeal. The offending against Claimant A occurred in 1992. Mr Reekie was sentenced to a term of 14 years' imprisonment with a minimum period of nine and a half years.[2] Preventive detention was not an available sentencing option at that time. In respect of Claimant B, he was sentenced to preventive detention with a non-parole period of 20 years.[3]

[3] On 21 July 2012, Mr Reekie made a Privacy Act 1993 request to the Department of Corrections ("Corrections") seeking the provision of certain documents about him. Some of that information was provided on 6 November 2012. Mr Reekie complained that the disclosure was insufficient and sought compensation from Corrections for a breach of the Privacy Act.

[4] On 25 February 2016, a settlement was reached between Mr Reekie and Corrections. Corrections acknowledged its management of the request failed to meet expected standards. Corrections agreed to make a payment by way of compensation in the sum of $1,350 to be held as follows:

> "Mr Reekie acknowledges that in accordance with section 17(1) of the Prisoners' and Victims' Claims Act 2005, the payment of compensation in the sum of ONE THOUSAND AND THREE HUNDRED AND FIFTY DOLLARS ($1,350) will be paid to the Secretary for Justice to be dealt with in accordance with the provisions of that Act."

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1 *Claimant A v Reekie* Victims' Special Claims Tribunal VSC001/16, 25 August 2017.
2 *R v Reekie* HC Auckland T021833, 15 July 2003, at [17]-[18].
3 *R v Reekie* CA339/03, 3 August 2004.

The Prisoners' and Victims' Claims Act 2005

[5] In order to explain the events that followed, it is necessary to set out the framework of the Prisoners' and Victims' Claims Act 2005 ("the Act") in some detail.

[6] The Act represents a legislative response to the awards of compensation made in *Taunoa v Attorney-General* to prisoners unlawfully detained in a segregated behaviour management regime.[4] As the Minister of Justice told Parliament during the first reading of the Prisoners' and Victims' Claims Bill:[5]

> "Most people, including myself, have a deep sense that it is wrong that serious offenders can be awarded compensation for wrongful treatment without those offenders themselves being required to pay compensation to their victims for the serious wrongs inflicted upon them."

[7] As well as narrowing the class of cases in which prisoners can claim compensation, the Act establishes a scheme by which victims can make claims against payments of compensation made to prisoners as redress for the harm they have suffered. "Victim's claim" is defined in s 9 as a claim for damages or exemplary damages made by or on behalf of a victim against an offender, based on acts done or omitted to be done by the offender in committing the offence.

[8] The payment of $1,350 to Mr Reekie is an example of a compensation payment captured by the Act and claimable by the victims of his offending. There is also no dispute that Claimants A and B are victims under the scheme of the Act.

[9] Subpart 2 of Part 2 of the Act serves two purposes:[6]

(a) it establishes, requires payments into, and regulates the operation of a victims' claims trust account ("the account"); and

(b) it provides a procedure for the making and determination of victims' claims.

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4 *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC). The damages awarded were ultimately reduced in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

5 (14 December 2004) 622 NZPD 17986.

6 Prisoners' and Victims' Claims Act 2005, s 3(2).

[10] As is recorded in Mr Reekie's deed of settlement with Corrections, s 17 of the Act requires that payments of compensation made to prisoners must be paid to the Secretary for Justice to be held in the interest-bearing account, once the steps at s 18(1)(a)-(c) have been followed. The residue may be paid out of the account only in accordance with subpart 2, Part 2 of the Act (or any regulations made under s 57). The Secretary of Justice must give notice of payments made into the account.[7] The Act also sets out how victims' claims may be filed.[8]

[11] Once a claim has been filed, it is referred to the Tribunal. The Tribunal consists of a District Court Judge, and its function is to determine victims' claims for damages filed under the Act.[9] The Tribunal's procedure in determining claims is relatively unorthodox. This is to minimise the impact of the process on victims. To that end it possesses wide powers to regulate the procedure it chooses to follow.[10] Claims are determined on the papers without the need to hear oral evidence, although this may be appropriate in certain situations.[11] The Tribunal may receive as evidence any statement, document, information or matter that, in the Tribunal's opinion, may assist in determining the victim's claim, whether or not such material would be admissible in a court of law. It may also accept as proven, findings of fact that have been accepted or proved at the original trial.[12] Additionally, it may access relevant Court documents or records or request other information.[13]

[12] The Tribunal must not accept a victim's claim unless satisfied, on the balance of probabilities, that:[14]

> "(a) the claimant is a victim of the offender; and
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> (b) the victim has, through or by means of the offence, suffered injury, loss, or damage for which the victim has not received, and is not to receive, effective redress; and
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> (c) the claim discloses a cause of action that is, under the general law, one for which damages are, in the particular case, payable."

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7 See ss 20-25.
8 Section 28.
9 Section 58.
10 Section 45. This is subject to the statutory provisions in ss 28-44, 46, 59 and 60 of the Act.
11 Sections 34 and 38.
12 Section 37.
13 Sections 35 and 39.
14 Section 46(2).

[13] If it does accept a claim, the Tribunal may order that an amount of money be paid to the victim.[15] It may also order payment if a sum is agreed to by all victims and the offender, or if it considers a proposed payment is reasonable by way of final settlement of all victims' claims concerned.[16]

[14] In fixing the amount to be paid, the Tribunal must determine any amounts without regard to the amount of money actually held in the account for the offender.[17] Moreover, in determining whether the amount should be paid by way of damages or exemplary damages, and in fixing quantum, the Tribunal must apply the general law relating to awarding damages.[18]

The claims brought by Claimants A and B

[15] On 30 June 2016, just over a month after the amount of $1,350 was placed into the account, notice was given to interested Government departments. Notice was also given in daily newspapers in the five main centres on 2 July 2016, advising that any person who had been a victim of Mr Reekie was entitled to make a claim against the money held in the account. Any notice of claim had to be filed before Tuesday, 3 January 2017.

[16] Only claims by Claimants A and B were received within the specified time. No claims were lodged out of time. The claims filed sought general or exemplary damages, citing the emotional harm the victims had suffered as a result of Mr Reekie's sexual offending against them.

[17] Prior to the hearing Mr Reekie offered $1,000 to each Claimant by way of settlement. He submitted that if his offer was rejected, the claim should be dismissed.

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15 Section 46(3).
16 Section 46(4).
17 Section 47(1).
18 Section 47(2).

The Tribunal's decision

[18] Judge C S Blackie, sitting as the Tribunal, found exemplary damages were available. He was satisfied of the matters in s 46(2), namely that:

(a) each Claimant is a victim of Mr Reekie;

(b) each, through his offending, has suffered injury, loss or damage for which they have not received and are not likely to receive effective redress; and

(c) the claims disclose the torts of assault and battery which justify exemplary damages.

[19] He noted the "gross indecencies" suffered by each of the Claimants, and awarded exemplary damages in the sum of $25,000 to each Claimant for Mr Reekie's "outrageous conduct".[19]

Mr Reekie's appeal

[20] Mr Reekie has raised six questions of law:[20]

(a) Did the Judge err by hearing some matters in Mr Reekie's absence?

(b) Was Mr Reekie inadequately informed of the basis of the claims against him?

(c) Did the Judge err in proceeding to hearing after being informed Mr Reekie had not been served with either notice of claim?

(d) Did the Judge err when he allowed the hearing to proceed once made aware Mr Reekie was "statute-barred" from making submissions?

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19 *Claimant A v Reekie*, above n 1, at [20].

20 Pursuant to s 51 of the Prisoners' and Victims' Claims Act 2005, a party may only appeal a claim determined under s 46 on a question of law.

(e) Was there an undue delay in this matter, and if so, who caused it and what was its effect? and

(f) Was the award of exemplary damages available to the Judge and was the amount awarded manifestly unreasonable?

[21] Because Mr Reekie is self-represented, an order was made appointing Ms Casey QC as amicus curiae. She helpfully identified the key issue on appeal: whether Mr Reekie was provided with a copy of the claim as required by s 31 of the Act. However, at the hearing the Judge's approach to the assessment of damages also assumed significance. I shall deal with the latter issue separately, although for reasons which follow the appeal does not turn on it.

Was Mr Reekie provided with a copy of the claim?

[22] Section 31(1) requires that before determining a victim's claim, the Tribunal must serve a copy of the claim on the offender and provide a reasonable opportunity for the offender to make written submissions. The claim must be served on the offender as soon as practicable after it is filed.[21] Section 31(3) then balances the privacy interests of victims against the offender's right to natural justice. It provides that information identifying the victim's address must be removed from the copy of the claim served on the offender unless, in the Tribunal's opinion, that information is necessary to ensure the offender is fully and fairly informed of the nature of the claim. Section 31(4) and (5) then relate to the reasonable opportunity given to the offender to make submissions:

> "(4) The Tribunal gives the offender the reasonable opportunity required by subsection (1) by requiring his or her written submissions to be filed with the Secretary of the Tribunal—
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> (a) within 60 days after the expiry of the periods specified in section 33(a); or
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> (b) within a further period the Tribunal is satisfied, on an application for the purpose before the expiry of that 60-day period, is justified by exceptional circumstances.

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[21] Section 31(2).

(5) In determining under subsection (4)(b) whether it is satisfied a further period is justified by exceptional circumstances, the Tribunal must have regard to the number and complexity of the victims' claims filed against the offender."

[23] With respect to the s 31 requirements, the Judge stated in his decision:[22]

> "The respondent is fully aware of these proceedings, having been served with a notice of claim, the summary of the misconduct giving rise to the claim, the nature of the relief sought by way of compensatory damages. Further, I directed by a minute, issued on 12 April 2017, that if the claimant's representative, Ms Gardner, was able to meet with the respondent, he would be able to read the contents of their statements. He was not, however, to be given copies of those statements, except through instructing counsel. I imposed that restriction so as to reduce the possibility of the claimants being re-victimised. Despite attempts, no face-to-face meeting has been possible."

[24] Mr Reekie disagreed with this summary. He argued the Judge erroneously delegated the responsibility of serving the claims on him to the representative of the Claimants, Dr Gardner, who never completed the task. Relatedly, he argued the method of service directed by the Judge did not comply with the strict obligation in s 31 to "serve a copy of the claim" or his right to be fully informed of the nature of the claims. He further argued that a complete lack of specificity in the claims means the Tribunal's decision is a nullity.

Analysis – procedural failings

[25] As Ms Casey helpfully summarised, the documentary record corroborates Mr Reekie's account and reveals a serious procedural failure.

[26] Both claims were filed in December 2016. But almost six months later, in a letter of 4 May 2017, Mr Reekie wrote to the Tribunal advising he still had not been served with a copy of the claims. Earlier, in a Minute of 12 April 2017, the Judge had made the following directions as to service:[23]

> "Clearly, with the interests of victims in mind, this Tribunal has the ability under its creating Statute to set its own procedure. Therefore, in this case, I make the following directions as to mode of service:
>
> (1) A notice of claim is to be served on the defendant, such notice to contain the following particulars:

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22 *Claimant A v Reekie*, above n 1, at [16].

23 *[Claimant A] v Reekie* Victims' Special Claims Tribunal VSC001/16, 12 April 2016, at [4]-[5].

(a) The full name and date of birth of the claimant.

(b) A summary of the misconduct giving rise to the claim.

(c) The nature of the relief sought by way of compensational damages.

(2) Service of the notice of claim is to be effected personally upon the respondent by counsel for the claimant, Ms Gardner.

At the time of service, assuming she is able to meet personally with the respondent, Ms Gardner is to read to the respondent the contents of the victims' statements. He is not, however, to be provided with a copy of their statements."

[27] For reasons which are not apparent this Minute was not sent to Mr Reekie until 13 May 2017, just over a month later. It was accompanied by a covering letter from the Registrar, who advised Mr Reekie he would "not be permitted to keep copies of the claim[s] and associated documentation". This advice was wrong; in fact the Judge's direction was that Mr Reekie could not be provided copies of the *victims' statements* (they were simply to be read to him). The letter also advised the meeting between Mr Reekie and Dr Gardner would take place on 24 May 2017 at the Special Needs Block Interview Room at Auckland Prison.

[28] On 21 May 2017 Mr Reekie filed a "Notice of Opposition … to the Minute of Judge C S Blackie dated 12 April 2016", complaining the Judge's directions had not complied with s 31 and advising he had still not been served with the claims. He also expressed concern that the time for filing submissions, set out in s 31(4), had expired and he was time-barred from making submissions. In a letter sent the same day to Dr Gardner he advised that he would not be meeting with her, because he considered it would not be proper or lawful service of the claims.

[29] The Tribunal issued another Minute on 14 June 2017, asking counsel to clarify whether Mr Reekie had received the notices of claim. The Judge also asked counsel to advise whether Mr Reekie's settlement offer of $1,000 per Claimant was acceptable. This Minute was served on Mr Reekie on 19 June 2017. He responded the same day with a further memorandum informing he had refused to meet with Dr Gardner. He explained that when he arrived at the Special Needs Block Interview Room on 24 May 2017, prison staff advised him the meeting would take place elsewhere. He refused to go with the staff to the new location. In correspondence dated 26 June 2017

Dr Gardner confirmed this. She was informed by prison staff that Mr Reekie "insisted that we be brought to the cell block to meet with him". She submitted she had "done everything" she could "to ensure Mr Reekie is able to view the submissions as part of natural justice, but has refused to meet".

[30] As a result, Mr Reekie was never provided with a copy of the claim forms lodged by the Claimants. Ms Casey has obtained written confirmation of this from the Tribunal. Despite this, the Judge appears to have proceeded on the misunderstanding Mr Reekie had been served.

[31] Thus there has been a fundamental procedural failing. The mandatory requirement that the offender be served a copy of the claim and given a reasonable opportunity to make submissions was not met. While the Tribunal's procedure is designed to minimise the impact of the process on the victims, it was envisaged it would "still [be] consistent with natural justice requirements."[24] In this case, the breach of the rules of natural justice has tainted the Tribunal's substantive decision.[25]

[32] Before addressing what orders should be made, three further comments regarding the process followed are necessary. First, while aspects of the Tribunal's procedure are at its discretion, others are not. These include s 31.[26] The requirement that Mr Reekie be served with the claims and given a reasonable opportunity to make written submissions was not capable of being varied by the Tribunal. However, as Ms Casey pointed out, a person is sufficiently served if any of the methods set out in s 27(1) are followed.

[33] This leads to the second point. While s 31(3) calls for redaction of "information that identifies, or that may lead to the identification of, the address of the place where the victim lives", it does not allow for redaction of substantive aspects of the claim, particularly those necessary to fully and fairly inform the offender of the nature of the claim. The priority of natural justice over privacy is apparent in the final

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24 (14 December 2004) 622 NZPD 17986.
25 *Ancare New Zealand Ltd v Wyatt (NZ) Ltd* [2009] NZCA 211, [2009] 3 NZLR 501 at [46].
26 Prisoners' and Victims' Claims Act 2005, s 45.

part of s 31(3), which allows the Tribunal to not redact the victim's address if that information is necessary to ensure the offender is fully and fairly informed.

[34] Accordingly, in order to be fully and fairly informed and be able to make submissions, Mr Reekie must be given more. I agree with Ms Casey that the Tribunal should exercise caution in allowing any information beyond that referred to in s 31(3) to be redacted from the claim forms, given the dictates of natural justice.

[35] Moreover, while I understand the Tribunal's reasons for doing so, I accept Mr Reekie's submission that merely having the victims' statements read to him is insufficient to enable him to respond to the claims in submissions. Any orders made to protect the victims should not impinge on the offender's reasonable opportunity to make written submissions on the claims. As Ms Casey submitted, Mr Reekie's ability to sensibly respond should be read in light of s 27(1) of the New Zealand Bill of Rights Act 1990. It is a matter for the Tribunal to determine how this objective is best given effect to, but it seems to me it would be necessary for Mr Reekie to have some means for taking contemporaneous notes when the victims' statements are presented to him; that he has available some form of aide-mémoire when later preparing submissions. Alternatively, as Ms Casey suggested, he could be given limited access to the victims' statements while preparing his submissions, with the statements retrieved once his preparation is complete.

[36] As Ms Casey sensibly pointed out, to avoid the tension between the victims' interests and natural justice arising in future cases, the Tribunal could consider exercising its powers to obtain copies of relevant sentencing notes and Court transcripts rather than obtaining statements from the victims themselves. Such a course would have the benefit of focusing on the offender's conduct, which is the primary consideration in assessing any award of exemplary damages in any event. It may be that on any rehearing, this is the course the Tribunal will elect to adopt.

[37] Finally, despite Mr Reekie's claim, he was not time-barred from making submissions. The Judge, in his Minute of 12 April 2017, directed that "notice of defence to the applications and any evidence pertaining thereto should be filed within

28 days of the date of service".[27] Given the time for filing in accordance with s 31(4)(a) expired 60 days after the deadline for the filing of claims, on 5 March 2017, this constituted a "further period" for filing "justified by exceptional circumstances" in terms of s 31(4)(b). I agree that not being informed of service of the claim until some two months after this deadline constituted "exceptional circumstances". However, given the strict time limits in s 31, and the requirement to give the offender a reasonable opportunity to make written submissions, the situation was not ideal. Service needed to be effected earlier consistent with the principles of natural justice.

What order should be made?

[38] Mr Reekie submitted I should strike the claims out altogether, but in the event I did not I should substitute the Tribunal's decision with my own, implementing a settlement offer made by Mr Reekie of $5,000 per Claimant. While Claimant B is prepared to accept this offer, Claimant A is not. In the absence of agreement, and not having heard submissions on damages, I am not prepared to substitute my own decision.

[39] In any event it is clear to me the Tribunal's decision cannot stand. I agree with Ms Casey that the appropriate course is to refer the matter back to the Tribunal for rehearing. That course will have the additional benefit of the Tribunal receiving and considering submissions on both damages and quantum. It will also provide the Tribunal with the benefit of the guiding observations which follow.

The assessment of damages

[40] During the hearing, I discussed with counsel whether, in the event I was to remit the matter back to the Tribunal for rehearing, some guidance on the approach to assessing exemplary damages might be desirable. I did so because I was concerned the Judge's assessment may have been inadequate. I called for further submissions on the approach to assessing and fixing exemplary damages, as well as the effect of s 47(1) of the Act on any award of damages. I have now had the benefit of considering those very helpful submissions in preparing this judgment, and place on record my

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27 *[Claimant A] v Reekie*, above n 23, at [8].

gratitude to the parties for their assistance. What follows are observations intended to assist the Tribunal in its approach to determining exemplary damages.

[41] While the Tribunal's procedure is designed to minimise the risk of retraumatising victims, ss 46 and 47 are clear; the Tribunal is bound by the general law in determining liability and quantum. It will not be sufficient to make a determination of liability, particularly in a claim for exemplary damages (for which under the general law there exists a high threshold) without a robust analysis of the law and the facts. I disagree with the Judge's conclusion that:[28]

> "There are authorities limiting the amount of exemplary damages available if the perpetrator has otherwise been punished by the criminal law. However, it would defeat the purpose of this Act if such an approach were taken in respect of claims such as those currently presented."

[42] On the contrary, the Act plainly contemplates that the Tribunal will engage in such issues, adopting the applicable legal principles. Moreover, in my view the Tribunal's duty to rigorously analyse the merits of a claim for damages, including what quantum should be awarded, is particularly relevant in the context of s 47(1). As noted, that provision requires the Tribunal to determine any amounts payable to victims without taking into account the funds actually held in the offender's account. It exposes offenders who suffer wrongful treatment in prison to a summary procedure by which victims may claim substantial damages against them greater than the amount of money paid to an offender as compensation. To the extent an award of damages exceeds the amount held as compensation for the offender, the victims may enforce the order as if it was a judgment of the District Court.[29] The consequences of an excessive award will include adjudicating the offender bankrupt. The stern consequences of an award made under the Act therefore compel a robust determination.

[43] I agree with Ms Casey the Tribunal must address each of the three elements in s 46(2) (set out above at [12]) in its decision. Moreover, each element must have some evidential foundation, although s 59 provides that such a foundation need not derive from any information or matters which would be admissible in a court of law.

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28 *Claimant A v Reekie*, above n 1, at [18].
29 Prisoners' and Victims' Claims Act 2005, s 48(4)-(6).

[44] Section 46(2)(a) requires the Tribunal to be satisfied the claimant is a victim of the offender. As well as meeting the s 8 definition, they must not have obtained, or be seeking, judgment in respect of the conduct on which the claim is based in civil proceedings against the offender.[30] I agree with Ms Casey that the claim forms completed by the Claimants do not fully cover the requirements of s 28(1)(c), nor the comparable requirement at s 46(2)(b) that they have not received and are not likely to receive effective redress for the injury, loss or damage they have suffered. In terms of the remainder of s 46(2)(b), I accept that the victims' statements and the sentencing notes were sufficient evidence of injury, loss or damage.

[45] As for ss 46(2)(c) and 47(2), the Tribunal's conclusion that Mr Reekie's offending discloses the tort of battery is plainly correct. However, further considerations flow from the requirement that the general law of liability and quantum of damages be applied. The availability of a limitation defence is one factor that needs to be considered under the general law. While s 64 provides for the purposes of the Act standard limitation periods are suspended for the period the offender is serving a sentence of imprisonment, that does not affect limitation defences which have accrued prior to the commencement of imprisonment. It pertains only to the running of limitation periods during the term of imprisonment; it does not affect their existence.[31] Therefore in respect of Claimant A (who was the victim of offending in 1992), subject to important questions of the reasonable discoverability of the cause of action,[32] and whether Claimant A was operating under a disability for any period after the offending,[33] it appears the six-year period for bringing a claim in tort under s 4(1) of the Limitation Act 1950 expired before Mr Reekie was convicted and imprisoned. These are legal questions which need to be resolved before an award of exemplary damages may be made.

[46] A second factor is that, as the Judge noted, claims for compensatory damages arising out of personal injury covered by the Accident Compensation Act 2001 or its

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30 Section 28(1)(c).

31 Relatedly, s 63(2)(b) states s 64 applies whether or not the action was one in respect of which a limitation defence could, before the commencement on 4 June 2005 of the Act, have been pleaded.

32 *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 at [77], citing *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [49].

33 Limitation Act 1950, s 24. See generally *Jay v Jay*, above n 32, at [90], applying *T v H* [1995] 3 NZLR 37 (CA) at 61.

predecessors are barred under the general law.[34] Damages for mental injuries caused by intentional assaults or batteries were within the statutory bar of the Accident Compensation Act 1982,[35] and s 8(3) of the Accident Rehabilitation and Compensation Insurance Act 1992. Moreover, the current Accident Compensation Act provides cover for mental injury caused by criminal acts such as Mr Reekie's.[36] The claims therefore had to be for exemplary damages, which fall outside the statutory bar.[37]

[47] Exemplary damages are to be confined to torts which are committed intentionally or with subjective recklessness, which is the close moral equivalent of intention.[38] The purpose of an award of exemplary damages was discussed extensively by the Supreme Court in *Couch v Attorney-General (No 2)*, where McGrath J stated:[39]

> "Two linked considerations … are, in my opinion, of fundamental importance in deciding when exemplary damages are to be awarded. The first is that the primary purpose of exemplary damages is to punish a defendant for wrongful conduct. Deterrence of the offender is likely to be the effect of an award, as is vindication of the plaintiff who suffers harm and receives the damages. But these are both incidental consequences and should not divert the courts from the punitive purpose of the remedy.
>
> Secondly, because the focus of the courts is on punishment, it is the culpability of the defendant's conduct that justifies an award of exemplary damages. Assessment of the degree of culpability is straightforward where a defendant intentionally causes harm."

[48] Outrageousness of conduct is not the sole criterion: the focal point of the inquiry is not the committing of the tort per se, but the subjective appreciation of the risk of wrongful harm.[40] Because exemplary damages are punitive, the focus must be on the conduct of the tortfeasor rather than the extent of harm. In determining whether the threshold for exemplary damages is met, the Tribunal may thus take into account the mental elements of the offending. The sentencing Judge's comments about culpability will also likely be relevant. The Tribunal should also consider the gloss on

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34 Accident Compensation Act 2001, s 317. Section 6 defines "former Act".
35 *Willis v Attorney General* [1989] 3 NZLR 574 (CA) at 576; *M v Roper* [2018] NZHC 2330 at [164], [171].
36 Accident Compensation Act 2001, s 21.
37 Section 319.
38 *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [178] per Tipping J.
39 At [238]-[239].
40 At [178]-[179]. See also *Wright v Bhosale* [2016] NZCA 593, [2017] NZAR 203 at [52]-[53].

liability for exemplary damages provided by s 319(3) of the Accident Compensation Act:

> "(3) In determining whether to award exemplary damages and, if they are to be awarded, the amount of them, the court may have regard to—
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> (a) whether a penalty has been imposed on the defendant for an offence involving the conduct concerned in the claim for exemplary damages; and
>
> (b) if so, the nature of the penalty."

[49] If satisfied exemplary damages are available, the Tribunal must then turn to fix quantum. In doing so, the following principles outlined by Hammond J in *McDermott v Wallace* should guide the assessment:[41]

(a) the claimant must be the victim of punishable behaviour;

(b) there should be moderation in making awards;

(c) the means of the parties should be considered;

(d) other awards to the claimant are relevant;

(e) regard must be had to the imposition of any criminal penalty; and

(f) the conduct of the parties is relevant, including that of the claimant.

[50] Another cornerstone consideration, as Tipping J stated in *Couch*, is that exemplary damages "are not a surrogate way of awarding greater compensation".[42]

[51] Additionally, aggravating and mitigating factors are relevant.[43] While in comparison to other torts sexual battery cases tend to attract larger awards of exemplary damages due to the nature of the acts involved, "much depends on the individual circumstances of each case", including the lack of means of the parties.[44]

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41 *McDermott v Wallace* [2005] 3 NZLR 661 (CA) at [94]-[102], as summarised in *Hikurangi Forest Farms Ltd v Negara Developments* [2018] NZHC 607, [2018] NZAR 804 at [204].
42 *Couch v Attorney-General (No 2)*, above n 38, at [95].
43 *Jay v Jay*, above n 32, at [105].
44 At [106].

[52] I make no comment on the final award arrived at by the Tribunal. However, it is not apparent consideration was given to the multiple and competing factors relevant to assessing quantum. These principles should have been weighed alongside the Judge's finding of outrageous conduct; namely Mr Reekie's lack of means, his criminal penalty, the effect of two awards, and the principle of moderation. His conduct, including his settlement offers and/or the presence of remorse, if any, was also relevant.

[53] It is hoped that these observations will assist the Tribunal in its determination of liability and quantum at the rehearing. I also gratefully adopt Ms Casey's suggestion that reference may be had to the tables summarising awards of exemplary damages, and the relevant factors underpinning each award in the cases therein, in *J v J*[45] and *McDermott v Wallace*,[46] though such reference should not supervene the requirement for a robust assessment of the relevant principles.

Result

[54] The appeal is allowed.

[55] A rehearing in the Tribunal is ordered.

Moore J

Solicitors:
Ms Casey QC, Wellington

Copy to:
The Appellant

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45 *J v J* [2013] NZHC 1512 at [200], approved in *Jay v Jay*, above n 32, at [102]-[111].
46 *McDermott v Wallace*, above n 41, at [97].