

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

**CIV-2018-085-000507
[2019] NZDC 5980**

IN THE MATTER OF	THE BILL OF RIGHTS ACT 1990
BETWEEN	PERRY NGAWAKA BRISTOW Plaintiff
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: 28 March 2019

Appearances: Mr DA Ewen for the Plaintiff
Ms RMA Kos for the Defendant

Judgment: 11 April 2019

**RESERVED JUDGMENT OF JUDGE S M HARROP
[As to Plaintiff's Application for Interim Payment on Account of Damages]**

Introduction

[1] Perry Bristow was in 2016 detained by the Department of Corrections for 228 days longer than he ought to have been pursuant to sentences of imprisonment imposed on him in mid-2011. He has issued this proceeding claiming compensation of \$80,000 together with interest and costs for his unlawful and arbitrary detention. The Chief Executive of the Department of Corrections admits liability and in a letter dated 13 August 2018 made an open offer in full and final settlement of \$80,000 in damages, plus \$4,718.26 interest and a contribution to actual and reasonable legal costs up to a maximum of \$2,500.

[2] While Mr Bristow has not yet formerly accepted the offer Mr Ewen has indicated on his behalf that he will very likely do so.

[3] The Chief Executive's offer is subject to the application of the provisions of the Prisoners' and Victims' Claims Act 2005 ("the PVCA").

[4] Ms Bristow has made an application under r 7.61 of the District Court Rules 2014 for an interim payment of damages on account. By consent an initial interim payment of \$40,000 was on 31 January 2019 ordered to be made by the defendant to the Secretary of Justice for the purposes of s 17 of the PVCA.

[5] Mr Bristow now seeks a further interim payment, to himself directly, of up to \$30,000 to cover his legal costs and, though he is a recently sentenced prisoner (again), to cover incidental expenses he may incur during his time in custody. At the hearing before me Mr Ewen accepted that in addition to Mr Bristow's liability for \$17,500 (this takes the \$2,500 contribution into account) for legal costs, a further \$3,500 ought to be sufficient to cover those incidentals for the period for which Mr Bristow is likely to be in custody. He therefore said that Mr Bristow would realistically have to accept that an interim payment of \$21,000 would be sufficient and appropriate at this stage.

Jurisdiction

[6] The defendant does not dispute that there is jurisdiction to grant the application made. Following the judgment of Judge Hastings in *McCrostie*¹, which was not appealed, the defendant accepts that an interim payment of the kind sought may properly be made despite the provisions of the PVCA. That said, both counsel accept that the discretion must be exercised in a way which avoids any potential adverse impact on any successful claims which victims of Mr Bristow's offending may make.

¹ [2018] NZDC 21761

[7] Rule 7.62 provides:

7.62 Order for interim payment in respect of damages

- (1) A Judge may make an order under subclause (2) if, on hearing the application, the Judge is satisfied that—
 - (a) the defendant against whom the order is sought has admitted liability for the plaintiff's damages; or
 - (b) the plaintiff has a judgment against the defendant for damages to be assessed; or
 - (c) on a trial of the proceeding, the plaintiff would obtain judgment for substantial damages against the defendant or, if there are several defendants, against 1 or more of them.
- (2) A Judge may, within the limits in subclause (3), order the defendant to make an interim payment of an amount that the Judge thinks just.
- (3) The amount must not exceed a reasonable proportion of the damages the plaintiff is, in the opinion of the Judge, likely to recover after taking into account—
 - (a) any relevant contributory negligence; and
 - (b) any set-off, cross-claim, or counterclaim on which the defendant may be entitled to rely.

[8] In *McCrostie* Judge Hastings said²:

A two-stage approach is required in order to determine whether or not I should exercise my discretion under r 7.62. I must first be satisfied as to any of the matters in r 7.62(1). In this case, there is little doubt that the defendant is liable to pay, and that the plaintiff is entitled to, damages in the region of \$13,000 plus interest. Having been satisfied as to a r 7.62(1) matter, I may then proceed to order the defendant to make an interim payment “of an amount that the Judge thinks just” under r 7.62(2). Having decided that the PVCA does not preclude an application under r 7.62, I disagree with the defendant that it is not for me to assess (or “venture a guess” as he put it) who the victims might be or the amounts they might claim. This is an assessment that must be made if I am to determine whether or not I should exercise my discretion to make an interim payment order under r 7.62(2). I agree with the defendant, however, that I should not exercise my discretion in a manner which could frustrate Parliament's intention in enacting the PVCA, which is to give offenders' victims an opportunity to claim redress. It would not be just to order an interim payment that leaves an insufficient amount against which victims may claim. This requires an assessment of what claims might be made, and to this end the plaintiff has provided his criminal conviction history and summaries of facts identifying possible victims of his offending.

² At [12]

[9] Both counsel agree, as do I, that I should proceed on that basis to consider what claims might be made by the victims of Mr Bristow's offending.

The PVCA process

[10] Under Subpart 2 of Part 2 of the PVCA, victims may make claims against money paid to an offender. As s 3(2) says:

- (2) The purpose of subpart 2 of Part 2 is to:
 - (a) establish, require payments into, and regulate the operation of, a victims' claims trust bank account; and
 - (b) provide a procedure for the making and determination of victims' claims.

[11] Section 17 of the PVCA provides:

17 Compensation of prisoners, etc, must be paid to Secretary

- (1) A person must pay to the Secretary, immediately, all money that, after the commencement of this Act, the person becomes liable to pay as compensation and—
 - (a) in satisfaction of a court's or tribunal's final judgment—
 - (i) on a specified claim; and
 - (ii) given after the commencement, on 4 June 2005, of this Act; or
 - (b) as, or as part of, an out-of-court final settlement—
 - (i) of a specified claim; and
 - (ii) concluded after the commencement, on 4 June 2005, of this Act.
- (2) For the purposes of subsection (1)(a), a judgment of a court or tribunal (whether at first instance or on appeal) is final—
 - (a) when the time for filing appeals against the judgment expires and no appeals of that kind have been filed; or
 - (b) if appeals against the judgment may be brought or heard only by leave, when—
 - (i) the time for applying for leave expires and no application for leave has been made; or

- (ii) all applications for leave have been withdrawn or finally determined and declined; or
 - (iii) no party granted leave to appeal has, within the time for commencing an appeal, commenced an appeal; or
- (c) when all appeals against the judgment have been withdrawn or finally determined.
- (3) Nothing in subsection (1)(b) applies to an out-of-court final settlement of a specified claim containing a provision to the effect that it is a settlement that is not subject to this subpart.
- (4) Subsection (1) applies even if that money is also—
 - (a) required to be paid to a creditor of the accused or the offender; or
 - (b) liable to be attached or taken in execution at the instance of a creditor of the accused or the offender.
- (5) In subsection (4), a *creditor* includes the Commissioner of Inland Revenue or any other person or body to whom any taxes, duties, fines, levies, or other charges, deductions, or amounts (for example, under the Child Support Act 1991 or the Student Loan Scheme Act 2011) are payable.
- (6) No person has a right of action against the Crown, an agent of the Crown, or any other person, in respect of any investment or payment of money permitted or required by this subpart or by regulations made under section 57.

[12] “*Compensation*” is defined for the purposes of that subpart of the Act as including³:

... any form of monetary compensation or damages (however described), required to be paid, or as part of, and out-of-Court final settlement of a claim (including, without limitation), an amount paid in final settlement of a claim for an amount of, or in the nature of, exemplary damages. ...

[13] Section 18 of the PVCA requires the Secretary for Justice to use the monies to satisfy:

- 18.1 The offender’s legal aid debts arising from the specified claims;
- 18.2 Any outstanding reparation owed by the offender; and
- 18.2 Any outstanding awards made by the Tribunal in connection with other specified claims.

³ PVCA s 4

[14] After that process, any surplus must be paid into the victim's claims trust bank account to be held on trust for the offender. The Secretary of Justice must then give written notice of the receipt of the money into the bank account to victims whose contact details are available and Government departments that may have an interest in the matter. The Secretary's practice is also to give notice in the Gazette, on the internet and in newspapers circulating in major centres. The Secretary is required to take reasonable steps to identify and ascertain the contact details of actual or potential victims⁴.

[15] Victims may file claims with the Victims' Special Claims Tribunal (the Tribunal), within six months of receiving notice. If no claims are filed within that period, the Secretary must promptly pay the money to the offender.

[16] If a claim is filed, it is determined by the Tribunal.

[17] Section 46(2) of the PVCA provides:

46 Tribunal to determine group of claims received

...

- (2) The Tribunal must not accept a victim's claim unless satisfied, on the balance of probabilities, that—
- (a) the claimant is a victim of the offender; and
 - (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
 - (c) the claim discloses a cause of action that is, under the general law, one for which damages are, in the particular case, payable.

[18] In what, as far as I am aware, is the only High Court consideration of the Tribunal process, Moore J in *Reekie v Claimants A & B*⁵ said at [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'

⁴ See PVCA s 24

⁵ [2018] NZHC 2434

claims for damages filed under the Act.⁶ 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.⁷ Claims are determined on the papers without the need to hear oral evidence, although this may be appropriate in certain situations.⁸ 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.⁹ Additionally, it may access relevant Court documents or records or request other information.¹⁰

[19] In *Reekie*, the Tribunal (Judge Blackie) awarded \$25,000 in exemplary damages to two of the victims of Mr Reekie's appalling sexual offending.

[20] In allowing the appeal and directing a rehearing in the Tribunal, Moore J made observations about the assessment of exemplary damages in this context. Since they are critical to the task I must undertake I quote them in full. His Honour said¹¹:

[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:¹²

“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

⁶ Section 58.

⁷ Section 45. This is subject to the statutory provisions in ss 28-44, 46, 59 and 60 of the Act.

⁸ Sections 34 and 38.

⁹ Section 37.

¹⁰ Sections 35 and 39.

¹¹ At [41] – [51]

¹² At [18] of the Tribunal decision.

order as if it was a judgment of the District Court.¹³ 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.

[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.¹⁴ 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 ss46(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.¹⁵ 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,¹⁶ and whether Claimant A was operating under a disability for any period after the offending,¹⁷ 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 predecessors are barred under the general law.¹⁸ Damages for mental injuries caused by intentional assaults or batteries were within the statutory bar of the Accident Compensation Act 1982,¹⁹ and s 8(3) of the

¹³ Prisoners' and Victims' Claims Act 2005, s 48(4)-(6).

¹⁴ Section 28(1)(c).

¹⁵ 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.

¹⁶ *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].

¹⁷ 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.

¹⁸ Accident Compensation Act 2001, s 317. Section 6 defines "former Act".

¹⁹ *Willis v Attorney General* [1989] 3 NZLR 574 (CA) at 576; *M v Roper* [2018] NZHC 2330 at

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.²⁰ The claims therefore had to be for exemplary damages, which fall outside the statutory bar.²¹

[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.²² 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:²³

“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.²⁴ 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 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—
- (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:²⁵

[164], [171].

²⁰ Accident Compensation Act 2001, s 21.

²¹ Section 319.

²² *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [178] per Tipping J.

²³ At [238]-[239].

²⁴ At [178]-[179]. See also *Wright v Bhosale* [2016] NZCA 593, [2017] NZAR 203 at [52]-[53].

²⁵ *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].

- (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”.²⁶

[51] Additionally, aggravating and mitigating factors are relevant.²⁷ 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 of the parties.²⁸

The Known Victims of Mr Bristow’s Offending

[21] Mr Bristow acknowledges that there may be several victims of his offending who may wish to make a claim to the Tribunal.

Aggravated Robbery of [Club name deleted], Henderson on 21 March 2010

[22] Mr Bristow, along with two other offenders, robbed the [Club] in Henderson on the evening of 21 March 2010. The bar manager [Leah] was working in the office behind the bar area. The offenders went into that office and she had nowhere to go when a screwdriver was presented at her by a co-offender and she was told to open the safe. She was also threatened by Mr Bristow. She complied and the contents of the safe were removed. Another offender approached a bar tender [James]. He thought that the offender had a nail gun with him and that he was going to be shot with it. He was told to open the till at the bar and the money was then removed. In total \$21,155 was taken.

²⁶ *Couch v Attorney-General (No 2)*, above n 38, at [95].

²⁷ *Jay v Jay*, above n 32, at [105].

²⁸ At [106].

[23] The victim impact statements were described by the sentencing judge, Judge McCauslan, as making distressing reading. Mr Bristow had also pleaded guilty to a burglary committed earlier on 21 March 2010 and received an overall sentence of six years and six months imprisonment at the Papakura District Court on 20 April 2011.

[24] The potential claimants arising from this offending are the [Club], or its insurer, as to the cash taken (and interest on it) and potentially [Leah] and [James] who may have claims for exemplary damages. No reparation orders were made at the time of sentencing, no doubt because of Mr Bristow's inability to pay so none of these victims he's previously received "effective redress" in terms of s 46(2)(b) of the PVCA.

[25] As to the financial loss suffered by the [Club] from the theft of the money, Mr Ewen accepts that \$21,155 would if claimed need to be awarded by the Tribunal, together with interest of \$8,063.10, as calculated as at 7 March 2019, so a total of \$29,218.10.

[26] As to potential claims by [Leah] and [James], they are each the victims of assault without battery by Mr Bristow as tortfeasor, or a secondary tortfeasor, being part of the robbery group. On the face of it, there is the potential for a successful claim for exemplary damages by each of them to denounce and punish Mr Bristow for his wrongful conduct.

[27] There is, however, a real question whether any award could properly to be made by the Tribunal given the substantial prison sentence which has already been served by Mr Bristow. Judge Blackie observed in the passage at [41] in Moore J's judgment in *Reekie*, that it would defeat the purpose of the PVCA if exemplary damages were limited by the fact that the offender has been punished by the criminal law. However, Moore J expressly disagreed with that and I am of course bound by the High Court's decision on that issue. There is also an argument that Mr Bristow would, were exemplary damages awarded against him, be twice punished for his conduct in contravention of s 26(2) of the New Zealand Bill of Rights Act 1990 which provides:

No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried *or punished for it* again. (emphasis added)

[28] With due respect to the observations of Moore J, I think there is considerable force in Judge Blackie's concern that the purpose of the PVCA would be defeated if there were no, or merely nominal, awards of exemplary damages because of the prison sentence imposed on the offender. As Judge Blackie observed in another case²⁹:

It may be considered ironic by the claimants that Ms Abdille is successful in obtaining damages (compensation) for her treatment, including personal injury, at the hands of the Department of Corrections, unaffected by the constraints of the Accident Compensation Act, whereas the victims of her offending when suffering physical or emotional injury are so constrained. They may be forgiven for thinking that sometimes the law gets in the way of justice.

[29] *Leahy & Ors v Abdille* was the case arising from the well-known incident where Ms Abdille attempted to hijack an Air New Zealand flight from Blenheim to Christchurch on 8 February 2008. About 10 minutes into the flight, Ms Abdille approached the cockpit brandishing a knife and demanded that the captain ([Captain's name deleted]) fly the aircraft to Australia. She was told this was not possible as the aircraft did not carry sufficient fuel. She told the captain she had a bomb in her bag. The captain endeavoured to engage her in conversation while the First Officer flew the aircraft, but she became increasingly agitated and began hitting the First Officer on the side of the head with the knife handle, demanding that he crash the plane. One of the female passengers tried to reason with Ms Abdille, who ordered her back to her seat at the same time lunging at her and causing a small cut to her left hand. Later in the flight, Ms Abdille interfered with the aircraft control switches, which included two fuel cut-off switches; fortunately they were mechanically guarded. While doing so, she stated she was going to crash the plane and kill everybody.

[30] Fortunately, the First Officer was able to land the plane safely in Christchurch and the passengers and First Officer disembarked. The captain remained on board and was threatened by Ms Abdille, still armed with her knife. There was a struggle and he tried to wrest the knife from her grip. In doing so he sustained a serious injury to his left hand, severing tendons and an artery, later necessitating the arterial amputation of his thumb.

²⁹ *Leahy & Ors v Abdille* (Victims' Special Claims Tribunal, 14 December 2018 at [70])

[31] Ms Abdille was sentenced to nine years imprisonment on 27 August 2010. The sentence was upheld on appeal.

[32] In 2016, Ms Abdille raised a number of concerns about her management within the prison and brought a claim for damages/compensation against the Department of Corrections. This was settled in July 2017 by the making of a compensation order to her in the sum of \$25,000.

[33] [The Captain] sought damages from the Tribunal for emotional harm in the sum of \$105,410 and exemplary damages for his physical injury of \$37,686, a total of \$146,341. Three of the passengers sought respectively \$10,000, \$5,000 and \$8,000 for emotional harm.

[34] In his decision dated 14 December 2018, Judge Blackie applied the observations of Moore J in *Reekie*. His Honour had no difficulty being satisfied that Ms Abdille's behaviour was so outrageous as to satisfy the requirements for an award of exemplary damages for assault and battery as far as the captain was concerned and assault in respect of the passengers. Applying the appropriate principles, Judge Blackie awarded \$5,000 to [the Captain] for physical and emotional trauma and \$1,500 each to the passengers.

[35] Informed by that decision, as I must be in attempting to predict what claims may successfully be made by [Leah] and [James] were they to make claims to the Tribunal, I conclude that any award to them is unlikely to exceed \$2,000 each given that the passenger received only \$1,500 for what was a traumatic event of greater duration. That is in no way to under estimate the harm that was suffered by [Leah] and [James], which I have no doubt was significant and long lasting. However, as Tipping J stated in *Couch v Attorney-General (No 2)*³⁰, exemplary damages “*are not a surrogate way of awarding greater compensation*”. There is indeed a real possibility that the Tribunal might decide not to award [Leah] and [James] any exemplary damages having regard to the substantial prison sentence already served by Mr Bristow.

³⁰ [2010] 3 NZLR 149 at [95]

[36] In summary, it would appear that the maximum likely award by the Tribunal to the victims of the [Club] aggravated robbery would be around \$33,200. I note there would not be interest on any exemplary damages awarded, because that is a retrospective assessment made by the Tribunal at the time of its decision, rather than one designed to compensate the victims for what happened as at the date that they become victims.

Theft at Porirua on 9 March 2010

[37] At about 8am on Tuesday 9 March 2010 (so 12 days before the [Club] aggravated robbery) Mr Bristow and two associates parked their car near another car which had a Security Express logo on it. The courier driver victim, [Alice], left the vehicle and entered the [community centre deleted]. When she returned to her car holding a large white plastic bag containing \$2,501.90 in cash and \$42 in cheques, Mr Bristow snatched the bag from her and a tussle ensued. He overpowered her and left in his car.

[38] Judge Butler was asked to give a sentence indication on 16 May 2011 in part because of Judge McAuslan's sentencing of Mr Bristow on 20 April 2011. Originally Mr Bristow was charged with robbery but was given a sentence indication on an alternative charge of theft. Judge Butler indicated the end sentence on a totality basis cumulative on the sentence imposed by Judge McAuslan should be four months' imprisonment. His Honour noted that \$1,000 of the sum stolen had been recovered and that a claim for \$1,500 for reparation had been made but in view of Mr Bristow's circumstances as a sentenced prisoner with no hope of meeting reparation in the foreseeable future Judge Butler declined to make a reparation order. Mr Bristow accepted the sentence indication and waived his right to a pre-sentence report. He was immediately sentenced to four months' imprisonment cumulative on the six and a half years prison sentence imposed by Judge McAuslan.

[39] Were a claim made to the Tribunal, Mr Ewen accepts an award would properly be made for reparation of the \$1,501.90 (ignoring the theft of the cheques) together with interest of \$632.14 to the owner or insurer of the cash taken, so a total of \$2,134.04.

[40] The question then is whether [Alice] might have a basis for a claim to the Tribunal for exemplary damages for the mental trauma she suffered and if so in what sum. I have read her victim impact statement. She says she did not seek any medical treatment. Emotionally she felt shocked and remembered feeling shaken while providing the police with a statement, but had not suffered any long term emotional harm as a result of the incident. That statement was given on 12 May 2011 some 14 months after the theft. She said that she had learnt from the experience and while on occasions it had caused her to be extra cautious it had not affected how she usually performed her duties. She remained comfortable in her role and it was now a matter that had little concern for her.

[41] On that basis it appears unlikely that [Alice] would make a claim for exemplary damages and that, if she did, there would be any award, having regard to the principles outlined earlier and having regard to the four months' prison sentence which was imposed on Mr Bristow as punishment for his conduct.

The Aggravated Robbery of the [Restaurant] at [location deleted] on [date deleted] 2017

[42] In the early hours of the morning on [date deleted] 2017 an aggravated robbery occurred at the [restaurant] in [location deleted], Auckland. The offence was committed by an armed group of males seeking cash. Mr Bristow was one of the four involved. To facilitate the offence they used a stolen car. Mr Bristow was charged with aggravated robbery and unlawfully getting into the stolen car but not with unlawfully taking it.

[43] On approaching the [restaurant] at about 6am the group were heavily disguised and three of them had handguns. The victim [Jessie] was the manager of the restaurant. The defendants confronted staff and demanded that they get on the floor. They complied and three of the group stood over them while a fourth entered the manager's office and located a safe box. One of the offenders approached [Jessie] and demanded that she open the safe box. As she did this two of the other offenders pointed their weapons at her. \$1300 in cash was taken from the safe and her handbag was stolen.

[44] [Jessie] ultimately suffered no loss in respect of the items in her handbag because her employer had reimbursed her for that. As to emotional harm she said she did not receive any professional counselling but sought comfort from family and friends. The incident affected her comfort about working on early shift and she had also woken up at night feeling scared. She was now very cautious about going out and ensured she checked her environment before even leaving her car. She described the incident as really scary.

[45] Judge McNaughton sentenced Mr Bristow to five years imprisonment on 27 February 2019. Mr Ewen appeared for Mr Bristow at sentencing along with trial counsel Mr Edgar. At the time of sentencing Mr Bristow was of course aware of his current claim and of the defendant's settlement offer. Accordingly he offered lump sum reparation of \$1,300 payable to [the restaurant] and \$700 payable to [Jessie] for emotional harm. If those sums have not already been paid they will obviously need to be deducted by the Secretary of Justice before considering any claims which may be made and before any distribution to Mr Bristow of any surplus. Judge McNaughton discounted the sentence "by a full 12 months" to recognise that reparation payment.

[46] Based on the prison sentence and the reparation already ordered there is a strong argument that no further exemplary damages would, even if sought, be awarded to [Jessie]. Taking a conservative approach and with reference to the passengers' award in *Abdille*. I consider that at most a further \$800 might be awarded on top of the \$700 emotional harm reparation already ordered.

Summary of likely claims for financial loss or exemplary damages for emotional harm

[47] In summary, in relation to these three serious offences the possible claims by victims appear to be respectively \$33,200, \$2,134.04 and \$800, making a total of \$36,134.04.

Other possible claims

[48] Ms Kos pointed out that there are other offences in Mr Bristow's criminal history which might give rise to claims by victims. She referred to a burglary on 12 March 2010, a robbery by assault on 22 January 2009, theft of 4 October 2004 and two convictions for burglary on 12 April 2004. In addition, Mr Bristow has a further 46 convictions between 1998 and 2010, 28 of which would appear to involve victims.

[49] Despite the time which has passed since many these offences occurred, they may not be statute-barred because of the effect of the suspension of limitation period provisions in the PVCA. Sections 63, 64, 64A and 64B of the PVCA provide:

63 Limitation periods to which section 64 applies

- (1) Section 64 applies to every applicable limitation period for an action that is based on a claim—
 - (a) made by or on behalf of a victim; and
 - (b) made against an offender; and
 - (c) based on acts done or omitted to be done (whether before or after the commencement, on 4 June 2005, of this Act) by the offender in committing the offence.
- (2) Section 64 applies whether or not the action was—
 - (a) commenced before the commencement, on 4 June 2005, of this Act; or
 - (b) one in respect of which a limitation defence (under the Limitation Act 2010 or any other law of New Zealand) could, before the commencement, on 4 June 2005, of this Act, have been pleaded successfully.
- (3) However, nothing in section 64 affects—
 - (a) an action or arbitration determined before the commencement, on 4 June 2005, of this Act; or
 - (b) the title to any property which is the subject of an action or arbitration of that kind.

64 Limitation periods suspended while offender serving sentence of imprisonment

- (1) The limitation periods to which this section applies cease to run while the offender is serving a sentence of imprisonment in a penal institution, prison, or service prison.

- (2) In this section, *servicing a sentence of imprisonment in a penal institution, prison, or service prison*—
- (a) means serving in a penal institution, prison, or service prison—
 - (i) the sentence of imprisonment for the offence (as defined in section 5(1)(a)(ii)); and
 - (ii) any earlier sentence of imprisonment on which the sentence of imprisonment for the offence is directed to be served cumulatively; and
 - (iii) any later sentence that is directed to be served cumulatively on the sentence of imprisonment for the offence; and
 - (b) includes spending time in a penal institution or a prison following a related recall application (as defined in section 59 of the Parole Act 2002), but only if a final recall order (as defined in section 4(1) of that Act) is made following the recall application.

64A Limitation periods to which section 64B applies

Section 64B applies to every applicable limitation period for an action based on a claim—

- (a) made by or on behalf of a victim after the commencement, on 1 July 2013, of section 64B; and
- (b) made against an offender and against money received under section 17 that is compensation in respect of a specified claim of the offender made after 30 June 2013; and
- (c) based on acts done or omitted to be done (whether before or after the commencement, on 1 July 2013, of section 64B) by the offender in committing the offence.

64B Limitation periods suspended until standard deadline for filing of victims' claims under this Act

The limitation periods to which this section applies cease to run for the action against the offender and the money received under section 17 until the standard deadline (specified in section 28(3)) for the filing of a victim's claim in the victims' claims process under subpart 2.

[50] Mr Ewen submitted, and Ms Kos was inclined to agree without formerly conceding the point, that the effect of these provisions is that the limitation period for a claim to be made by a victim of an offence is suspended while a sentence of imprisonment is being served by the offender *for that offence*. Ms Kos had earlier submitted that all limitation periods were suspended whenever the offender was in

prison regardless of whether the limitation periods related to a potential claim arising from the offence for which he was imprisoned.

[51] A good deal more information would be required for me, or for the Tribunal in the event of a claim by any such victim, to assess the question of whether any claim might be made by anyone of those “older” victims and if so the extent to which any claim they might have was affected by the limitation suspension.

[52] However, given that the most substantial sentence of imprisonment received by Mr Bristow prior to his sentencing by Judge McAuslan on 28 April 2011 was two years, apart from four years for aggravated robbery received on 8 September 2005, it seems unlikely that the six-year limitation periods, which would apply in this context starting from the date of the offence, would now still permit a claim, notwithstanding the limitation suspension provisions. Adding weight to that is the point that the limitation period is only suspended while the offender is serving a sentencing of imprisonment *in a prison*. Where the sentences have been two years or less, as all but one of the sentences were, there would have been automatic parole after 12 months (at most) so the suspension of limitation would have been for a maximum of 12 months.

[53] Of course limitation periods may end up being considerably longer than six years, especially in the case of a minor being a victim or of disability. However, Mr Ewen noted that the relevant statute for much of the earlier offending would be the Limitation Act 1950 rather than the Limitation Act 2010 which came into force on 1 January 2011. Generally it is “less claimant-friendly” than the 2010 Act. When this is added to the various restrictions on awards for exemplary damages, it seems unlikely that there will be any more potential claims, aside from those I have discussed in some detail. However, as I have noted there is a paucity of information and a conservative approach must be adopted.

[54] On the basis that there is approximately \$86,000 currently available including interest, and that it appears the maximum that should be deducted from that is just over \$36,000 for the offences I have discussed in detail, there remains approximately \$50,000 to cover any other possible claims, leaving aside deductions which the Secretary for Justice would need to make (for example, aside from the reparation

orders already made, Mr Bristow has some \$1,240 owing for fines and offender levies; since the hearing counsel have provided confirmation that Mr Bristow has no legal aid debt.)

[55] If an interim payment of \$21,000 is now made, some \$29,000 would be left to cover all other possible claims.

[56] Standing back and reflecting on all of this I am satisfied that granting the application for an interim payment in the sum of \$21,000 is very unlikely to have any impact on the awarding by the Tribunal of appropriate compensation to any victim of Mr Bristow's offending who might make a claim to the Tribunal.

[57] For these reasons I grant Mr Bristow's application.

[58] There is no order for costs against the defendant. Although the application was initially opposed the defendant has taken a responsible and indeed helpful approach and has abided the decision of the court as to both payment and quantum.

Judge S M Harrop
District Court Judge

Date of authentication: 11/04/2019

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.