ORDER PROHIBITING PUBLICATION OF NAMES ADDRESSES OR IDENTIFYING PARTICULARS OF THE PLAINTIFF AND THE WITNESS IDENTIFIED IN [13], [64] AND [65] OF THIS JUDGMENT.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-001149
[2018] NZHC 2330

IN THE MATTER OF	a claim of historic sexual abuse
BETWEEN	M Plaintiff
AND	ROBERT ROPER First Defendant
	ATTORNEY-GENERAL Second Defendant

Hearing: 5–9, 12 and 14 March 2018

Counsel: G F Little and G E Whiteford for the Plaintiff
J F Mather and L M Herbke for the First Defendant
A C M Fisher QC, J K Gorman and
E Lay for the Second Defendant

Judgment: 5 September 2018

JUDGMENT OF EDWARDS J

This judgment was delivered by Justice Edwards on 5 September 2018 at 2.30 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

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Introduction

[1] M was enlisted as an Aircraftsman in the Royal New Zealand Air Force (RNZAF) in the 1980s. She was a driver in the Motor Transport section. Robert Roper, then a Sergeant, was also in that section and was M's superior at that time.

[2] M says that Mr Roper bullied, verbally abused, sexually harassed, inappropriately touched and falsely imprisoned her between 1985 and 1988. She says she complained about his conduct, but the RNZAF failed to do anything about it. She now claims damages for the mental harm she says these acts caused her, and for the failure of the RNZAF to act on her complaints.

[3] Mr Roper denies doing any of the things alleged by M. The second defendant (referred to as the RNZAF in this judgment) denies that M made complaints, and denies that there was a failure to take all reasonable steps to protect M from harm.

[4] There is a dispute about whether the alleged acts caused the mental harm for which M claims damages. In addition, both defendants say that M's claim is barred under the Limitation Act 1950 and under the Accident Compensation Act 2001. Even if M was able to overcome these hurdles, the RNZAF says it cannot be held liable, whether vicariously or directly, for any of the loss claimed by M.

Key events

[5] M joined the RNZAF on 23 July 1985. She was 18 years old and, in her own words "very shy, quiet and naïve". Having a career in the forces was something M had dreamed about since she was in the fifth form (year 11) at school.

[6] After completing her three-month recruit course in Blenheim, M was stationed at the RNZAF base at Whenuapai. She was a driver, and was posted to work in the Motor Transport section of the base.[1] Once M completed her driver's course she became an Aircraftsman (AC). This is the lowest of the non-commissioned ranks in

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1 This was also referred to as the Mechanical Transport Squadron in evidence.

the RNZAF. The non-commissioned ranks, from lowest to highest, are: Aircraftsman (AC), Leading Aircraftsman (LAC), Corporal, Sergeant, Flight Sergeant, and Warrant Officer.

[7] The non-commissioned officers are outranked by those in the commissioned ranks. Those ranks, from lowest to highest, are: Pilot Officer, Flying Officer, Flight Lieutenant, Squadron Leader, Wing Commander, Group Captain, Air Commodore, Air Vice-Marshal, and Air Marshal.[2]

[8] The events at the heart of M's claim occurred between 1985 and 1988. M was working in the same section as Mr Roper, who was a Sergeant at the time. In broad terms, M claims that Mr Roper would grope her as she was driving him home late at night, and regularly lock her and leave her in a tyre cage. She also claims that he would rub himself against her, try and undo her bra straps, and use an iron bar to prod her in the backside. There was other sexually intimidating conduct by Mr Roper too, such as bursting into the female changing rooms and the female night-shift bedrooms, and ogling at M during section parades.

[9] M says she complained about this conduct to her superiors and in particular Flight Sergeant Robert McKinney and to Flight Lieutenant Bryce Meredith. Both deny receiving a specific complaint from M about Mr Roper's behaviour.

[10] On 17 March 1988, M applied for release from the RNZAF, and she eventually left on 24 July 1988. She travelled to the United Kingdom and worked as a nanny and in a bar. By her own account, M was partying and drinking heavily at this time.

[11] M returned to New Zealand and re-enlisted in the RNZAF as a civilian in the same Motor Transport division on 22 January 1996. Mr Roper was no longer at the base by this time. However, M's time with the RNZAF was short-lived, and she eventually left, this time for good, on 27 June 1997.

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[2] There were a number of witnesses who were at the RNZAF during the period in question. I refer to these witnesses by their civilian titles, and will only refer to them by rank where it is relevant to do so.

[12] After leaving the RNZAF, M worked as a courier driver and undertook a basic accounting course. She subsequently began working for a small company answering phones and worked in that role for some years. Her son was born in 2001. She and her husband moved to Australia in 2008, and she found part-time work in the accounts department at the local hospital.

[13] In 2014, Mr Roper stood trial and was convicted of 20 counts of sexual offending against members of his family and three other women. The offending took place between 1976 and 1988 and included sexual offending against a young woman who was on work experience at the Whenuapai airbase in 1987.

[14] M says she found out about Mr Roper's charges in November 2014. She says she felt physically sick and all the emotions from her time with him in the 1980s came flooding back. She also felt for his children, and described her overwhelming guilt that no-one took her seriously or actioned her complaints at the time.

[15] Mr Roper was found guilty and convicted on 4 December 2014. Two days later, M rang the New Zealand Police and reported what Mr Roper had done to her. The New Zealand Police put her in contact with the Australian Police, and M formalised her statement on 13 June 2015.

[16] By this time, the RNZAF had commenced an independent inquiry into Mr Roper's conduct, which was led by Frances Joychild QC. M was interviewed as part of that inquiry on 16 November 2015.[3]

[17] M filed these proceedings on 27 May 2016. In July 2016, she advised the New Zealand Police that she did not want to pursue her complaint against Mr Roper.

[18] M claims that as a result of what happened at Whenuapai she has suffered from extreme distress, depression, anxiety, and has developed post-traumatic stress disorder (PTSD).

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[3] Ms Joychild's report did not form part of the evidence at trial and I was not subsequently provided with a copy. I have accordingly not read nor referred to that report in writing this judgment.

The scope of M's claim

[19] M's claim is a civil claim against both Mr Roper, and the RNZAF, for damages. Those damages are in relation to M's mental injury which M says she suffered as a result of what Mr Roper allegedly did to her in the mid-1980s, and for the alleged failure of the RNZAF to take steps to prevent Mr Roper from harming her. M also seeks damages on the grounds that the conduct of both defendants was so outrageous it should be "punished" by way of separate monetary award.

[20] Although M makes allegations against Mr Roper which are criminal in nature, this is not a criminal proceeding. M elected to abandon her police complaint about Mr Roper's conduct in favour of this civil proceeding. Nor is M's claim a general inquiry into the way the RNZAF handled complaints of inappropriate behaviour by those in its ranks in the 1980s and 1990s. The claim against the RNZAF which I must determine is limited to what occurred between M and Mr Roper, and the response of the RNZAF to that alleged conduct.

[21] That distinction is important because some of the evidence called on behalf of M was crafted from statements made for the purposes of Ms Joychild's independent inquiry. Those statements canvassed matters outside the scope of this proceeding. Consequently, at the outset of trial, and during its course, I made a number of rulings as to the admissibility of evidence. Other challenges were resolved by consent.[4] I gave brief reasons at the time of my rulings, and my full reasons are set out in Appendix A to this judgment.

[22] The issues to be determined in this proceeding arise out of M's amended statement of claim which was filed on 21 November 2016. That amended claim comprises four causes of action.

[23] The first cause of action is for assault. M alleges that on several occasions while driving Mr Roper home, he would forcefully prevent her from calling for help while locked in the car with him and would grab her arm to restrain her from

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[4] These challenges were to the evidence of Sonya Oppenhuis, Karen Matchitt, Joseph Taylor, Tui Davis-Ostler and Neven Daniel.

attempting to open a door. On other occasions he would prod her with an iron bar to move her into a tyre cage before locking her inside. In addition, he would attempt to put his hands inside her skirt and would surreptitiously watch her change in the female changing rooms.

[24] The second cause of action is for intentional infliction of emotional distress. M says that Mr Roper's actions against M including assaults, false imprisonment, sexual harassment, bullying and belittling, was intentionally and wilfully calculated to cause harm or severe distress.

[25] The third cause of action is for false imprisonment. M says that the occasions spent locked in the tyre cage, and locked in the car, were false imprisonments.

[26] The first three causes of action are against Mr Roper and the RNZAF jointly. M says that the RNZAF is liable either directly or vicariously for Mr Roper's conduct because Mr Roper was either acting as the RNZAF or was otherwise engaged by the RNZAF at the relevant time.

[27] The fourth cause of action is against the RNZAF alone. M claims that the RNZAF owed her a duty of care as an employer (or as a body analogous to an employer), and that it breached that duty of care. There are numerous and related breaches alleged. In essence those breaches relate to alleged failures by the RNZAF to take steps in relation to Mr Roper's conduct towards M.

[28] M claims damages in relation to each of the causes of action as follows:

(a) General damages in the sum of $300,000;

(b) Exemplary damages in the sum of $150,000;

(c) Vindicatory damages in the sum of $50,000;

(d) Aggravated damages in the sum of $100,000;

(e) Special damages for loss of earnings, medical and other expenses in sums to be quantified prior to trial; and

(f) Interest and costs.

[29] The parties agreed that the claim for special damages for loss of earnings, medical and other expenses should be deferred pending delivery of this judgment on liability.

[30] The final point in relation to the scope of M's claim relates to the approach I have taken to the evidence. M's claim relates to events which occurred over 30 years ago. That raises particular problems in making findings of fact. Although witnesses may give their evidence about what occurred at that time honestly, there are a number of factors which mean that their evidence may nevertheless be unreliable. In making findings of fact in this case I have placed particular emphasis on whether the account given by a witness is corroborated by the evidence of others, whether it is plausible, and whether it is supported by the documents and records produced at trial. Those findings of fact, adopting that approach, now follow.

Did the acts occur?

[31] Mr Roper denies all allegations made against him. Therefore, the first issue is to determine whether Mr Roper committed the acts alleged by M. If he did, the second issue is to determine whether M made a complaint about it as she alleges.

Driving Mr Roper home

[32] M says that when she was rostered on night-shift, she and others would get a call from Mr Roper demanding that the younger females pick him up and take him home after a night of drinking. Mr Roper would be extremely drunk on these occasions.

[33] Once M and Mr Roper had left the base, M says he would reach over and lock the car doors. He would then put his hand up her skirt whilst she was driving and would try to touch her breasts. She would try to use the radio in the car to inform the

base, but he would grab it off her and threaten her not to say anything. She would scream and swear at him but it made no difference. When they would arrive at his house, Mr Roper would grab M's arm firmly and squeeze it, threatening her not to tell a soul or else her job would be on the line.

[34] Mr Roper denies that subordinates would be asked to drive senior non-commissioned officers home at night after drinking at the Sergeants' mess, and denies acting in any of the ways alleged.

[35] M's evidence regarding this incident was compelling. She was able to recall some details vividly, and was clearly distressed in the re-telling of what had occurred. Crucially, aspects of M's account were corroborated by evidence given by other witnesses at trial. In particular:

(a) A number of witnesses at trial confirmed the practice of senior non-commissioned officers being driven home, and young female drivers complaining about Mr Roper's behaviour.[5]

(b) M's evidence that several men stepped in to drive Mr Roper home so that she and other young females did not have to do so was also confirmed by a number of witnesses.[6]

(c) M's account of what happened in the car was consistent with what happened to Ms Davis-Ostler. She recalled driving Mr Roper home on one occasion and him putting his hand on her knee or shoulder. She said she punched him, got stroppy with him, and did not have any further problems.

[36] On the basis of this evidence, I find that M did drive Mr Roper home from the Sergeants' mess, and that Mr Roper did lock the door and grope M. However, I am not persuaded that it happened on as many occasions as M alleges, for the reasons which now follow.

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5 Vicki Cunningham, Andrew Stewart, Grant Ingersoll, Tui Davis-Ostler, Sonia Oppenhuis, Joseph Taylor and Robert Service.

6 Vicki Cunningham, Andrew Stewart, Joseph Taylor, Robert Service and Sonia Oppenhuis.

[37] First, Mr Roper and M were not on the same base together for the entire time M was posted at Whenuapai. M accepted in cross-examination that she did not begin her work at Whenuapai until returning from leave on 6 January 1986. Mr Roper was on leave for much of the first three months of 1986 and M was away from April to July 1986. There were only 34 possible days (including weekends) on which M and Mr Roper were both on duty at Whenuapai in the first half of 1986. Mr Roper was subsequently transferred to Ohakea in November 1987.

[38] Second, given the evidence about the men stepping in to drive Mr Roper home so that M and other young females did not have to, I consider it highly unlikely that M drove Mr Roper home on a regular basis.

[39] Third, there is no evidence to corroborate M's allegation that a drunken Mr Roper would enter the female rooms in the Motor Transport sleeping quarters when they were on night-shifts to demand rides home. That scenario seems unlikely given the configuration of the sleeping quarters, the fact that an officer was stationed outside the door of the room, and the external doors were likely locked at night.

[40] In summary, I find on the balance of probabilities that M would drive Mr Roper home, during which Mr Roper would lock the car doors and try to grope M, touch her breasts and put his hands up her skirt. She would try to use the radio to call for help but Mr Roper would take it from her. He would also squeeze her arm firmly and threaten her with consequences should she tell anyone. I find that this happened on at least one occasion, but that it is unlikely to have occurred on a regular basis or on as many occasions as M asserts.

Being locked in the tyre cage

[41] M alleges that Mr Roper locked her in the tyre cage at least once a month between 1985 and 1988.

[42] The tyre bay (or flight store) was a building on base which Mr Roper described as the size of a double garage. It had two roller doors at the front of the building. Ms Oppenhuis describes one of those doors being closed most of the time due to tyres leaning up against it, but the other door generally remained open.

[43] In a back corner of the tyre bay was an open-air storage cupboard. Two of the walls were formed by the sides of the building. The other two sides were made of mesh. The door to this cupboard was also made of mesh. M described the door as being like a wire door to a tennis court. Mr Roper described this cupboard as being about two metres high, by 1.5 metres deep and 1.5 metres wide. It was big enough for someone to stand up in. M confirmed that it was this storage cupboard that she was referring to when she described being locked in the tyre cage. I will refer to this area as the tyre cage also.

[44] There was a dispute about whether the tyre cage was lockable. Mr Roper denies that it was, and denied locking anyone inside it. Further, he says that even if he had attempted to do so, the keys were accessible from the inside of the cage and anyone could have easily got themselves out.

[45] I prefer Ms Oppenhuis's evidence regarding the lock. She said that the lock mechanism was through a padlock, and the key to the padlock was normally kept on a set of keyrings held by the Sergeant that was in the area. That evidence was confirmed by a number of other witnesses who were in the Motor Transport section at the time. Accordingly, contrary to Mr Roper's evidence, I find that the tyre cage was lockable and that there was no access to the keys from the inside of the cage.

[46] In her evidence in chief, M described Mr Roper bashing a large iron tyre bar on the counters of the tyre bay. He would prod M with the iron bar to get her into the cage and would tap her on the bottom with it also. She says she would sometimes be locked in the cage for more than an hour. She recalls Andrew Stewart witnessing her being locked in the tyre cage on occasion and trying to get Mr Roper to open the cage and let her out.

[47] M's account of being locked in the tyre cage was corroborated by other witnesses.

(a) Ms Davis-Ostler recalled one occasion where she, Mr Roper and others were laughing at M being shut in the tyre cage. After five minutes she

realised it was "over the top", and that M was both upset and "pissed off" about being locked in the cage.

(b) Mr Stewart also recalled two occasions involving M being locked in the tyre cage. He says that on one of these occasions she got straight out after Mr Roper had used a screwdriver to lock the door because the padlock was missing. On the other occasion he says he found M locked in the cage and she was crying and very upset.

[48] Although there were some discrepancies between the accounts given by M on the one hand, and those given by Ms Davis-Ostler and Mr Stewart on the other, those discrepancies are explicable given the passage of time, and they are ultimately immaterial to my findings.

[49] Furthermore, Ms Oppenhuis gave evidence of seeing others being locked in the tyre cage, although she did not recall seeing M specifically locked in there. I found Ms Oppenhuis's evidence to be tempered, credible and generally reliable. Her evidence about this incident is broadly consistent with M's account.

[50] Although there was no specific corroboration of Mr Roper using an iron bar on these occasions, I consider it entirely plausible that he did so. An iron bar was used to break the bead on the truck tyres and would have been in the general vicinity of the tyre cage. Using the iron bar to prod M and get her into the cage is generally consistent with the conduct observed by others at this time.

[51] I am satisfied on the basis of this evidence that M was locked in the tyre cage on more than one occasion by Mr Roper. I also consider it more probable than not that he used an iron bar to prod her, tap her on the bottom, and generally intimidate her on these occasions.

[52] However, I do not consider that this occurred at least once a month as M asserts. In addition, given the open nature of the tyre bay, the mesh sides of the cage, and people coming and going, I consider it improbable that M was locked in the tyre cage for up to an hour. Estimating time is difficult at the best of times, let alone 30

years after the events in question. In hindsight, it may have felt like an hour or a very long time, but I consider it highly unlikely it was anywhere near this length of time.

[53] In summary, whilst I find that M was locked in the tyre cage on occasion, it was not as frequent, nor for as long, as she alleges.

Other sexualised conduct

[54] M makes a number of other allegations against Mr Roper. These include: daily groping whenever he was in proximity to her, pulling her bra strap, gyrating and rubbing himself against her, intruding on her and others in the female changing rooms, and standing close and staring at her body during uniform parades.

[55] Other witnesses corroborated M's account of Mr Roper's overtly sexualised behaviour. For example:

(a) Ms Cunningham gave evidence of Mr Roper "pinging" female recruits' bra straps, patting their bottoms when lining up for lunch at the mess, and rubbing up against them when they were at a bar buying drinks.

(b) Similarly, Mr Stewart gave evidence of Mr Roper pulling on female recruits' bra straps and rubbing their bottoms while working with him.

(c) Ms Oppenhuis described Mr Roper as having no respect for personal boundaries and said he would use any excuse to touch her and others. That was corroborated by Ms Davis-Ostler, who also described Mr Roper as putting his hand on her shoulder from behind and laughing at her.

(d) Many witnesses referred to Mr Roper's coarse language, rudeness, lack of respect and general "sleaziness".

(e) There was also evidence of pornography on base and Mr Roper was seen watching pornographic videos down in the fuel section.

(f) M's account of the way that Mr Roper would behave towards her during section parades was also corroborated by Ms Oppenhuis's evidence.

[56] Although there was no specific corroboration of Mr Roper pushing open the changing room doors and staring at M and the other females getting changed, that conduct is generally consistent with Mr Roper's behaviour. On the basis of this evidence, I consider it more likely than not that Mr Roper did act in the way M alleges.

Did M complain?

[57] The next issue is whether M made complaints to either Mr Roper, or her superiors, about Mr Roper's conduct. The focus of this section is deliberately narrow. It is solely concerned with whether *M* made complaints. It does not concern complaints made by others, relating to others, or the alleged failure of the RNZAF to respond to complaints generally.

[58] M says she challenged Mr Roper about his behaviour in an effort to get him to stop. However, she said he would simply respond by saying that she was "too lippy", and he would threaten to ruin her career if she ever told anyone. She also says that at times he would make her do certain tasks to punish her out of spite.

[59] I consider it likely that M challenged Mr Roper about his behaviour in an effort to get it to stop. Mr Roper may also have threatened to ruin her career if she ever told. But I do not find he took any steps consequent on that threat. There is no evidence that he was involved in any of M's appraisals or gave negative feedback in an attempt to ruin her career. Nor am I persuaded that M was made to do certain tasks as a form of punishment or out of spite. The evidence suggests that the tasks she was asked to do, such as polishing windows inside a bus, were part of normal duties for someone of her rank.

[60] Of more significance is M's claim that she made formal complaints about Mr Roper's behaviour to her superiors. M says she complained to Corporals Cunningham and Service, Flight Sergeant McKinney, and Flight Lieutenant Meredith. However, M's evidence regarding these complaints was not as detailed as her evidence

about the alleged acts. And, it is at odds with the evidence of those to whom she says she complained.

[61] Ms Cunningham was a Corporal at the relevant time. She left the RNZAF in August 1987. She did not recall M making a specific complaint about Mr Roper's behaviour. Although she gave evidence about making complaints about Mr Roper's conduct at the time, they were not on behalf of M.

[62] Mr Service was a Leading Aircraftsman in 1985, and was promoted to Corporal with effect from 20 October 1986. He was at Whenuapai for the duration of M's posting. Although he was generally aware that female staff did not like Mr Roper, he said he was not aware of any complaints of a sexual nature made about Mr Roper by either male or female service people at the time. He specifically denies that M told him about any sexual abuse or inappropriate sexual behaviour by Mr Roper. Mr Service was cross-examined on material which suggests he may have been aware of complaints of a sexual nature made about others in the RNZAF at the time. But there is no reason to doubt his evidence that M did not make complaints to him about Mr Roper.

[63] Mr McKinney held the rank of Flight Sergeant at the relevant time. He also denied that any complaint was made to him by M. He was posted to the Whenuapai airbase in November 1987. At that time, Mr Roper was posted to Ohakea and was not present at the Whenuapai airbase. I consider it unlikely that M would have complained about Mr Roper's conduct when he was not present. Furthermore, M's description of the office that Flight Sergeant McKinney had at the time she made her complaint was also, understandably after this length of time, confused. That confusion raises doubt about the accuracy of her testimony about complaining to Flight Sergeant McKinney at the time.

[64] Mr Meredith (then a Flight Lieutenant) also denies receiving a complaint from M about Mr Roper's conduct. Mr Meredith relied on evidence about the way he dealt with another complaint about Mr Roper's conduct towards a young woman who was on work experience in the Motor Transport section to substantiate that denial.

[65] That complaint was made by Denise Hiskemuller, who was an Aircraftsman in the Motor Transport division at Whenuapai from September 1985 to June 1987. Ms Hiskemuller gave evidence at trial about seeing a young woman on work experience in the tyre bay being inappropriately touched by Mr Roper. With the consent of the young woman concerned, she made a complaint about that incident to Flight Lieutenant Meredith. Ms Hiskemuller's evidence was that Flight Lieutenant Meredith took the complaint seriously, and said that he would speak to Sergeant Roper about it.

[66] Mr Meredith's evidence is that he called Mr Roper into his office and told him about the allegations that were made. He says he "told him in no uncertain terms that if there were any other complaints then the matter would go further (meaning that I would escalate the complaint)." After this meeting, he spoke with the young woman concerned and asked her if she wanted to make a formal complaint. She was happy with what had occurred and did not want it to be taken any further. Mr Meredith's account of this meeting was consistent with the recollections of the young woman concerned. Mr Meredith then said he advised Squadron Leader Jim Ellis what had happened and the steps that were taken, and he was advised that if all parties were satisfied, there was no need to escalate the complaint.

[67] I accept that this evidence tends to support Mr Meredith's assertion that he was particularly attuned to complaints about Mr Roper's conduct, and had he received a complaint from M, he would have acted upon it accordingly.

[68] Nevertheless, the credibility of Mr Meredith's evidence was called into question by the evidence of Andrew Stewart, an Aircraftsman in the Motor Transport section at the relevant time. Mr Stewart said that he complained at least four times, including twice in writing, to Flight Lieutenant Meredith about Mr Roper. He said that the first written complaint was in relation to Mr Roper's "bullying behaviour" towards him, and the second written complaint was in relation to the way Mr Roper treated women on the base. Mr Stewart alleges that Flight Lieutenant Meredith screwed up the second complaint and threw it in the bin.

[69] Mr Meredith categorically rejects Mr Stewart's evidence about receiving any complaints from him, either about bullying or about the way Mr Roper treated women. He denies having screwed up a written complaint as alleged. Mr Meredith describes Mr Stewart's history with him as "not good, which might explain why he considers he was unfairly looked over for a posting".

[70] As to the conflict in the evidence between Mr Meredith and Mr Stewart, I prefer the evidence of the former. Mr Stewart accepted in cross-examination that he was under significant personal stress at the time he said the complaints were made. It was also apparent from his evidence that he harboured a grievance for being overlooked for an overseas posting. I consider that grievance likely coloured his evidence against Mr Meredith. Furthermore, Mr Stewart's claim that the second complaint had been screwed up and put in the bin was not recorded in the statement made to Ms Joychild, upon which Mr Stewart's brief of evidence was apparently based. His allegation was made for the first time in Court. And, in light of the way Mr Meredith dealt with the other complaint about Mr Roper's conduct, I consider it more likely than not that he would have taken any complaints about Mr Roper's conduct towards women seriously.

[71] M's recollections about making a complaint are also undermined by the lack of any documentary record of a complaint being made. M points to comments made in her performance appraisal on 19 July 1987. Flight Lieutenant Meredith was the officer in charge of the division at the time. He wrote on M's appraisal:

> AC [M] is a well prepared and polite driver. Her quiet nature in no way detracts from her ability as an MT Driver. *AC* [*M*] *is not scared to speak her mind and put her point forward when needed*. AC [M] will in time become a better than average driver with definite NCO potential.
>
> (emphasis added)

[72] M relies on the italicised portion of these comments as relating back to the complaints that she made to Flight Lieutenant Meredith at the time. She says this is consistent with Mr Roper telling her that she was "too lippy" and that he was going to ruin her career if she spoke out against him. But there is no evidence at all that Mr Roper contributed to M's appraisals. And, I consider it too much of a stretch to

draw an inference of a complaint being made from the observations noted in the appraisal.

[73] Considered in totality, this evidence raises real questions about the accuracy and reliability of M's evidence that she made complaints about Mr Roper's conduct to her superiors. There is no independent evidence corroborating her account, and the evidence of those that she says she complained to is inconsistent with a complaint having been made. Overall, I consider there is insufficient evidence to conclude, on the balance of probabilities, that M did make a formal complaint about Mr Roper's conduct at the time.

Summary of factual findings

[74] In summary, I have found that it is more likely than not that M drove Mr Roper home and that he acted as M alleges during these occasions. I have also found it likely that Mr Roper locked M in the tyre cage as alleged, and prodded her with an iron bar. However, neither the car, nor the tyre cage incidents happened as frequently as M alleges. I have also found insufficient evidence to suggest that Mr Roper would burst into the female sleeping quarters at night demanding to be driven home.

[75] I have found it likely that Mr Roper engaged in other sexualised behaviour, such as pulling M's bra straps, touching her bottom, and rubbing himself up against her on occasion. Similarly, I have found it more likely than not that he pushed open the door to the female changing rooms and ogled at M and the other female recruits, as they were getting changed.

[76] I have not found evidence corroborating M's account that she made formal complaints about Mr Roper's conduct to her superiors, or that they failed to act on those complaints. The evidence fell short of the necessary threshold for me to be persuaded on the balance of probabilities that formal complaints were made.

[77] These findings of fact establish that Mr Roper assaulted and falsely imprisoned M as alleged. M's claim is for damages to compensate her for the mental injury that M says these acts caused. Issues arising out of the nature and extent of the mental

injury M says she suffered as a result of what Mr Roper did to her at Whenuapai are considered next.

What is the medical evidence of mental injury?

[78] There can be no real dispute that Mr Roper's acts would have been distressing for M at the time. Driving him home along dark country roads must have been particularly terrifying for M in the circumstances. But something more than emotional distress is required for M to establish her claim for damages. The mental injury caused by Mr Roper's acts must amount to a medically recognisable psychiatric illness or injury.[7] In this case, M claims that she is suffering from such an injury being depression, anxiety, and PTSD.

[79] Dr Eshuys was engaged by M, and Dr Barry-Walsh was engaged by the RNZAF, to address the nature of M's mental injury. Both experts agree that M currently exhibits symptoms consistent with a diagnosis of PTSD, which is a medically recognisable psychiatric illness or injury. They also agree that M is suffering from symptoms of depression and anxiety, and that she has appeared to suffer from depressive symptoms for some time. However, Dr Barry-Walsh was less certain that M's depression amounted to a medically identifiable psychiatric illness or injury.

[80] The fact that M is currently suffering from a mental injury is not determinative of M's claim. M must show, on the balance of probabilities, that the mental injury she is currently suffering was caused by what happened at Whenuapai. To determine that issue it is necessary to consider the medical evidence regarding the nature and extent of M's mental injury in some detail. A summary of that evidence now follows.

Medical records

[81] M underwent a medical examination upon leaving the RNZAF in 1988. The report of that examination dated 14 July 1988 was produced at trial. That report

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7 Stephen Todd *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [5.7.03]; citing, amongst others, *Tame v New South Wales* [2002] HCA 35 (2002) 211 CLR 317 at [7] and [192]–[194]; *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263 at [41]. See also *P v Attorney-General* HC Wellington CIV-2006-485-874, 16 June 2010 at [251]; *AB v Attorney-General* HC Wellington CIV-2006-485-2304, 22 February 2011 at [307].

records M as experiencing some physical difficulties (such as ear and eye troubles; a skin complaint; and knee, ankle, joint or other bone injuries). However, she is not recorded as having experienced any issues with depression or nervous trouble, and there is no record of a change of weight or loss of appetite. There is no other illness or disability specifically mentioned in the records. Her blood pressure is also recorded as normal, as is her mental capacity and emotional stability. She has signed the medical record declaring the answers to be true and having not withheld any relevant information.

[82] M told both medical experts that she had sought counselling in 1996 but she could not remember the name of the counsellor. But there is no record of an ACC claim made at that time, and no further documentary evidence confirming this consultation.

[83] The only other medical records available were those from 2002 to 2008, and then from 2012 to 2017. The first entry for a prescription of anti-depressants in those medical records occurred on 2 August 2006. Repeat prescriptions for another anti-depressant are recorded in the following year. The only stressor recorded in the medical notes is a legal case M was engaged in at the time regarding a subsidy for her son's medication.

[84] In 2008, the records note that M is moving to Australia and wanted to know about withdrawing from the anti-depressants. M appears to have been able to work at this time and there is no suggestion that she was disabled in her day-to-day functioning. Dr Barry-Walsh describes the period from 2008 onwards as the period of greatest stability in M's life.

[85] The next entry of relevance is in August 2013. The medical notes record that M was tearful and distressed and feeling overwhelmed due to an impending audit at work. There are other entries in the next seven to eight months recording M's mood as fluctuating due to work stresses.

[86] In March 2014 an entry records that M had broken down at work as a result of her boss becoming very aggressive, resulting in M feeling bullied. The entry

specifically records M wanting to have this documented in case it goes further, such as filing a work cover claim. Over the following months, M's mood was either noted as stabilised or as continuing due to her work stresses.

[87] The most telling medical records concern the period in which M found out about Mr Roper's conviction. Mr Roper was convicted on 4 December 2014. M spoke to police on 6 December 2014. On 10 December 2014, M is recorded as visiting her health practitioner for a repeat prescription of her antidepressant. Her mood is recorded as stable, and reference is made to her travelling back to New Zealand to sell her house and then return to Australia.

[88] Entries on 13 February 2015 record that M's mood is stable and that she wants to decrease her anti-depressant intake. On 12 March 2015, the notes record M wanting to discuss ongoing issues regarding her boss. There is a detailed discussion about this stressor recorded at the time. On 18 March 2015, the entries record a "few terrible days/distressed & upset". This was recorded as being due to difficulties in managing work stresses with her son's health needs. Her anti-depressant intake was increased at this time.

[89] On 13 June 2015, M formalised her statement with police. A repeat prescription for the anti-depressant is noted on 23 July 2015. There are no references in the notes to the causes of any stress. The notes record M feeling well in herself on 12 August 2015, but ongoing stress at work is outlined in some detail in the entry on 28 August 2015. M was given a medical certificate at this time and was then cleared to return to work on 17 September 2015.

[90] The first record of the events in Whenuapai being causative of stress are in the notes for 19 November 2015. M attends for a repeat script of anti-depressants at this time. She is recorded as saying that things have settled down at work, and that she thinks some of her stress has been triggered by an old army sergeant who has been jailed for abusing his family and air force girls. By this time, M had known about Mr Roper's arrest for about a year, had spoken to police, and had received sexual abuse counselling.

[91] From this time onwards, the medical records note that M is involved with the inquiry by Ms Joychild. They also record reported flashbacks triggered by associated bullying by her boss and being put in a closed office. There are reports of her anxiety flaring up, her problems with sleeping, and being under a lot of stress as a result of both the inquiry and what is occurring at work. On 27 May 2016, M filed her statement of claim.

Dr Eshuys

[92] Dr Eshuys is a clinical psychologist consulting in a private practice in Queensland. Her practice involves the assessment and treatment of a wide range of psychological disorders.

[93] Dr Eshuys's opinion was based on an interview with M and an assessment using the following psychometric assessment tools: Millon Clinical Multiaxial Inventory, 4th edition (MCMI–IV, 2015) , the Trauma Scale Inventory (TSI, 1995) and the Paulhus Deception Scale (PDS–2004). The only other document relied upon was M's amended statement of claim dated 21 November 2016. Accordingly, Dr Eshuys's opinion was heavily reliant on M's self-report.

[94] M's description of what occurred when she found out about Mr Roper's arrest in 2014 was described by Dr Eshuys as a "sudden decompensation: a sudden rush of all her emotional responses to the past". She considered that M suffered a mental health crisis at this time and has effectively been unable to function since.

[95] Based on the interview with M and her assessment using the psychiatric tools, Dr Eshuys's opinion was that M had a diagnosable mental health condition, namely major depressive disorder with anxious distress, and PTSD. Whilst not having a personality disorder per se, she did have characteristics of an avoidant personality type, a schizoid personality type and a dependent personality type.

[96] Dr Eshuys considered that the PTSD originated in M's exposure to emotional, physical and sexual abuse by Mr Roper, and that her depression with anxiety likely came about due to a combination of genetic, psychological and environmental factors.

[97] Finally, Dr Eshuys considered that M had not formed any connection between her experience of abuse and her mental distress and subsequent mental health deterioration until reading of the arrest and imprisonment of Mr Roper. In Dr Eshuys's opinion, it was only on reading of Mr Roper's arrest in 2014 that M was able to "face her internalised fears and approach the police".

Dr Barry-Walsh

[98] Dr Barry-Walsh was engaged on behalf of the RNZAF. He is a consultant forensic psychiatrist with extensive professional and academic qualifications and experience.

[99] Dr Barry-Walsh examined M on 9 November 2017. He explained in his evidence that he did not explore her account of events in any detail because of the level of distress it generated. He also spoke to her partner by telephone. His review included some of M's pleadings and initial disclosure; reports relating to M from 1985 to 1988; M's release forms from regular service; discovery provided by M; briefs of evidence for M including the report of Dr Eshuys; a chronology of events; and M's medical history from January 2002 to March 2008.

[100] Dr Barry-Walsh asked M directly how much she thought the problems that she was experiencing in London, immediately after leaving the RNZAF in 1988, were due to her experiences with Mr Roper. She told him, "quite a bit". He then asked whether she had made a connection between these difficulties and Mr Roper's behaviour and she answered, "definitely". On the basis of this evidence, Dr Barry-Walsh was firm in his view that M had always made the connection between her mental health problems and what had occurred at Whenuapai.

[101] Dr Barry-Walsh concluded that M had developed a significant psychiatric and psychological disorder secondary to her reported experiences with the RNZAF. He also considered a diagnosis of PTSD to be reasonable in the event that what occurred at Whenuapai did in fact occur. He considered M's symptoms of anxiety and depressed mood have probably been present long-term, but he was less clear that M had a major depressive illness. On balance, he considered that M was likely prevented

as a result of the mental injury from initiating legal proceedings until 2014 when she first learned of Mr Roper's conviction.

[102] Dr Barry-Walsh's initial opinion was subject to a number of caveats, which may be summarised as follows:

(a) That his opinion is based on an assumption that M's account was true.

(b) That M's account was not explored in detail given the distress it caused, but was instead based on the account in the materials which were cross-checked with M.

(c) There were difficulties in assessing causation in psychiatric conditions. Dr Barry-Walsh said that the assessment is limited by constrained understanding of the causes of psychiatric and psychological problems, and the difficulties in weighing contributions from competing factors.

(d) The fact that M had been through a significant period of engagement in the current legal process which complicated the assessment further because she would have rehearsed and repeated her narrative on several occasions.

(e) Substantial problems with the current classificatory systems used in a forensic context. Those limitations were particularly evident in areas such as PTSD.

(f) The fact that the legal test relating to disability for the purposes of the Limitation Act does not have a psychiatric equivalent.

[103] Subsequent to the preparation of his first brief of evidence, Dr Barry-Walsh was provided with M's later medical records. He also reviewed the evidence of Dr Eshuys, including her cross-examination. Dr Barry-Walsh considered that there was a significant inconsistency in what M had reported to him and what was evidenced by the later medical records. He said that this raised some questions about the extent and severity of the disorder that she developed as a result of her experiences at

Whenuapai. Specifically, Dr Barry-Walsh considered that these inconsistencies raised some doubt about his assessment that M was likely prevented as a result of a mental injury from initiating legal proceedings.

[104] Dr Barry-Walsh's unchallenged evidence that M always knew that events at Whenuapai caused her mental injury, and his revised opinion on whether this mental injury prevented M from commencing legal proceedings earlier, assumes real importance in determining questions of causation and limitation periods. Those questions now follow.

Did Mr Roper's actions cause M's mental injury?

[105] M has proved that the alleged acts occurred, and that she now suffers from a mental injury. But in order to establish her claim, M must prove a link between those two things. That is, M must prove that what she experienced at the hands of Mr Roper caused the mental injury she now suffers.

The legal test for causation

[106] In *P v Attorney-General* Mallon J considered issues of causation in claims of this nature and summarised the relevant principles as follows:[8]

> [275] … In New Zealand, for there to be causation in law the defendant's conduct must be an effective cause of the harm. Where there is more than one cause (tortious and non-tortious) which combine to produce the harm (which is indivisible) the tortious conduct will be an effective cause if it was a substantial cause also described as a "material and substantial" cause.
>
> (footnotes omitted)

[107] Therefore, the law in New Zealand requires M to show that what occurred at Whenuapai was a material and substantial cause of her mental injury.

[108] However, Mr Little submits that where a plaintiff proves that the mental injury is the result of a tort, it is up to a defendant who alleges that the harm may have been caused by something else for which they are not liable, to separate the tortious from the non-tortious causes. In essence, he contends that the onus to disprove causation

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8 *P v Attorney-General* HC Wellington CIV-2006-485-874, 16 June 2010.

rests on the defendants. He relies on two cases decided by the High Court of Australia, *Watts v Rake*[9] and *Purkess v Crittenden*,[10] in support of that proposition.

[109] The claims in both Australian cases were for personal injury where the defendant contended that there was a pre-existing condition, or post-accident events, that meant the injury would have been suffered anyway. In *Purkess v Crittenden*, a majority of the High Court of Australia confirmed that the principle for which *Watts v Rake* stands for is that where a plaintiff has made out a prima facie case that incapacity has resulted from the defendant's negligence, the onus then rests upon the defendant to adduce evidence that shows that the incapacity results from a pre-existing condition or would have resulted in any event.[11]

[110] It is apparent that the context in both cases relied on by Mr Little is accordingly quite different to the current case. But in any respect, the defendants rely on the medical records of M to discharge any evidential onus which might otherwise apply. On the basis of these records, both defendants submit that the mental injury suffered by M was not caused by events at Whenuapai.

[111] In brief, the legal onus remains on M to prove, on the balance of probabilities, that Mr Roper's acts at the Whenuapai airbase were a material and substantial cause of the mental injury M is now suffering.

The causation assessment in this case

[112] Both experts noted the difficulty in assessing causation in psychiatric conditions. That difficulty is amplified in this case where the alleged causative events occurred over 30 years ago.

[113] Nevertheless, Dr Eshuys's opinion was that M's PTSD originated in her experiences at the hands of Mr Roper whilst at the Whenuapai airbase. She considered M's depression and anxiety were likely due to a combination of genetic, psychological and environmental factors.

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9 *Watts v Rake* (1960) 108 CLR 158.
10 *Purkess v Crittenden* (1965) 114 CLR 164.
11 *Purkess v Crittenden* (1965) 114 CLR 164 at 168.

[114] Dr Barry-Walsh's initial opinion was that M had developed a significant psychiatric and psychological disorder secondary to her reported experiences with the RNZAF. However, that initial opinion was subject to a number of caveats. And, his subsequent review of the later medical records led to some doubt in his mind about the nature and severity of the disorder that M said she was suffering as a result of events in Whenuapai.

[115] There are several reasons to be cautious about a finding of causation in this case.

[116] First, M's own account of the impact of Mr Roper's offending must be treated carefully given it traverses a 30-year period. That is not to say that M is dishonest. To the contrary, I consider her to be a truthful witness. But truthful witnesses can be mistaken, and there are obvious problems in accurately recalling mental health difficulties from over 30 years ago.

[117] That inherent unreliability is compounded in this case because M has repeated her narrative on a number of occasions, not only for this case but for the inquiry into the RNZAF also. This was one of the caveats to Dr Barry-Walsh's opinion which he expressed in these terms:

> Assessment is further complicated because [M] 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 attributions for her difficulties and the weight she puts on various events.
>
> …
>
> The alleged index events occurred over thirty years ago, and it is difficult, without corroborative history (e.g. from the counsellor she saw) to obtain a detailed history about the time course, and nature of distress and impairment from that time.

[118] Dr Eshuys's opinion was heavily reliant on M's self-report. Her opinion that the events at Whenuapai were causative of a mental injury is accordingly vulnerable to the unreliability of that account.

[119] Second, there is little objective evidence to suggest that M was suffering from a mental injury in the years after she left the RNZAF:

(a) M's medical examination at the time of discharge in 1988 did not record any symptoms of depression, anxiety or emotional instability.

(b) As Dr Eshuys accepted, M's heavy drinking and other lifestyle choices whilst in London, did not necessarily indicate an underlying mental injury – there were other equally plausible explanations for that behaviour.

(c) There were no records to support M's contention that she had sought counselling in 1996.

(d) There are no entries in the medical records produced by M of any symptoms consistent with a mental injury until 2006 when she is first prescribed anti-depressants. This is some 20 years after what occurred at Whenuapai.

[120] Third, to the extent that there is evidence of mental injury in the period after she left Whenuapai, then there are other potential explanations for what caused it. For example, M told Dr Eshuys that she sought counselling in 1996 for the loss of her mother. Stress in relation to a subsidy for her son and difficulties at work are recorded in the medical records as being causative of M's depression and anxiety. The first mention of events at Whenuapai as being a possible cause of her mental injury was 2015. But that is despite M telling Dr Barry-Walsh that she had always made the connection between what happened at Whenuapai and the harm that she suffered. Dr Barry-Walsh's evidence on that issue was not challenged.

[121] Fourth, and perhaps most significantly, Dr Eshuys relied heavily on M's self-report about what had occurred when she found out about Mr Roper's arrest and subsequent conviction. But in fact, the medical records do not corroborate that account. To the contrary, they suggest that M was relatively stable in the year after she found out about Mr Roper's convictions, with any low points attributed to work

stress. I agree with Dr Barry-Walsh that this is a material inconsistency, and one which suggests that the events at Whenuapai may not have been causative of the injury that M is now suffering.

[122] In light of that evidence, I am unable to conclude that the events at Whenuapai were a material and substantive cause of M's depression and anxiety. The evidence suggests that there were other contributors, such as a possible genetic pre-disposition to that illness, and the loss of M's mother to suicide at a young age, that were material causes of that condition.

[123] But there is no other explanation for the PTSD. Neither expert identified any other event which may have triggered this disorder. Dr Eshuys referred to Australian figures which suggest that approximately 25 per cent of those exposed to a potentially traumatic event are diagnosed with PTSD. However, she did not suggest that M had suffered any other traumatic event which might have triggered it.

[124] Dr Barry-Walsh highlighted the difficulty in assessing causation in psychiatric conditions. In addition, he pointed out that there were substantial problems with current classificatory systems particularly in the area of PTSD, which was a diagnosis that initially emerged in the context of the social movement of the 1970s. But he did not resile from his initial agreement with Dr Eshuys that M was displaying symptoms consistent with PTSD. Furthermore, whilst he expressed some doubt about the extent and severity of M's mental disorder in his revised opinion, he stopped short of saying that he did not consider it was caused by events at Whenuapai at all.

[125] The question of causation is delicately balanced. But after careful review of the medical evidence, and faced with M'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 M's current mental injury, being her PTSD.

[126] That finding is sufficient to establish some key elements of M's claim. The next question is whether M's claim is in time, or whether it is barred by the operation of the Limitation Act 1950.

Is M's claim barred by the Limitation Act 1950?

[127] Legal proceedings must be brought within certain timeframes. There are good policy reasons why that is so, including the difficulties in pursuing and defending a historical claim. The relevant limitation periods for M's case are set out in the Limitation Act 1950. Under that Act claims in tort must be brought within six years from the date on which the cause of action accrued.[12] In addition, if they are claims for bodily injury (which includes mental injury), leave is required if they are brought more than two years after the cause of action accrued, but within the six-year period.[13]

[128] The law allows limitation periods to be extended in certain circumstances. One such circumstance is set out in s 24 of the Limitation Act. That section provides that a limitation period will be extended where a claimant was suffering from a "disability" at the time the cause of action accrued. Time does not start running until the disability ceases. Disability includes being of "unsound mind".[14]

[129] The defendants submit that M's claim is statute-barred. Whether that is so is to be determined by:

(a) first, considering when the causes of action accrued; and

(b) second, considering whether M was suffering from a "disability" at that time.

When did the causes of action accrue?

[130] The first cause of action for assault, and the third cause of action for false imprisonment, are torts which are actionable per se. Those causes of action therefore accrued when the relevant acts occurred. Similarly, M's claim against the RNZAF for vicarious liability for assault and false imprisonment are also actionable when the wrongful act occurred.[15]

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12 Limitation Act 1950, s 4(1).
13 Limitation Act 1950, s 4(7).
14 Limitation Act 1950, s 2(2).
15 *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [39]; *P v Attorney-General* HC Wellington CIV-2010-485-874, 16 June 2010 at [287].

[131] M's remaining claims (negligence and intentional infliction of emotional distress) depend on M's ability to prove damage. Those causes of action accordingly accrue when M knew or was reasonably able to discover that:[16]

(a) there had been an act or omission by another person; and

(b) she had suffered an injury; and

(c) the act or omission caused the injury.

[132] Claims involving mental injury can sometimes raise questions about when the mental injury was suffered. For example, the act may occur in one year, but the mental consequences of that act may not be suffered until many years later. Other claims may involve the acts and mental injury occurring at the same time, but the plaintiff not making the necessary connection between the two until many years later.

[133] Neither of those issues arise in this case. M's claim is based on the mental injury being suffered at the time she left the RNZAF in 1988. Furthermore, Dr Barry-Walsh's evidence that M had always made the connection between the mental injury and the events at Whenuapai was not challenged. Reasonable discoverability was not therefore an issue at trial, and the parties proceeded on that basis.

[134] Nevertheless, Dr Barry-Walsh's evidence was at odds with Dr Eshuys's evidence that M had only formed the necessary connection after being triggered in 2014 by the news of Mr Roper's conviction. The issue is of some importance, not only to when the causes of action accrued, but to the assessment of M's evidence generally. For those reasons, I indicate my view on the conflict in the expert evidence despite the issue not being contested at trial.

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[16] *GD Searle & Co v Gunn* [1996] 2 NZLR 129 (CA) at 132–133; *S v G* [1995] 3 NZLR 681 (CA) at 687; Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thompson Reuters, Wellington, 2016) at [26.5.06(4)].

[135] In *P v Attorney-General*, Mallon J reviewed relevant authorities on the nature of the "damage" in terms of mental injury of which the plaintiff must be aware. The Judge said:[17]

> [297] It seems to me that it is not enough that the plaintiff experienced emotional effects (shame, distress and upset etc). That is not sufficient "damage" on which a cause of action can be brought. At the other end of the scale it seems to me that the plaintiff needed to know that he had a particular identified psychiatric illness or that his symptoms amounted to a psychiatric illness of some kind (even if a particular diagnosis is not made). Were it necessary for me to decide this issue I would have concluded that, consistent with what is necessary to be actionable damage, it would be enough if the plaintiff knew he had clinically significant behavioural, cognitive or psychological dysfunction in that he required treatment.

[136] Dr Eshuys's expert opinion was that until M read about the arrest and imprisonment of Mr Roper, she did not form any connection between her experience of the abuse and her mental distress and subsequent mental health deterioration. That opinion was not based on specific questions to M about whether she made the connection between her mental illness and what had happened in Whenuapai. Rather, it was inferences drawn from M's account to her at the time.

[137] Dr Eshuys's expert opinion was at odds with the evidence of Dr Barry-Walsh. He specifically asked M questions about the connection between her alleged mental injury and the abuse she had suffered in Whenuapai. His evidence in chief was as follows:

> I asked how much she thought these problems at the time were due to experiences in Whenuapai with the defendant and she said "*quite a bit*". I asked whether she had made a connection between her difficulties with anxiety and depression and the defendant's behaviour and she said "*definitely*".

[138] Dr Barry-Walsh was asked some further questions about this at trial. In particular, he was asked to comment on passages of Dr Eshuys's evidence which suggested that M might not have been aware of the connection between what was happening in London immediately after she left the RNZAF and the abuse that she had suffered. Dr Barry-Walsh said this:[18]

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17 *P v Attorney-General* HC Wellington CIV-2010-485-874, 16 June 2010.

18 Notes of Evidence at 356–357.

A. I just want to make it clear that when I interviewed [M], she said that she recognised over that period, so that time while she was overseas, that the difficulties that she was experiencing were a result of her experiences in Whenuapai. That history that I gained from her was distinct in that matter.

Q. Just before you go on, just as a point of clarification, in her brief of evidence – in her written brief of evidence Dr Eshuys, you may recall, took the view that [M] had not formed – Your Honour, this is page 13 of the brief, had not formed any connection between her experience of abuse and her mental distress and subsequent mental health deterioration. Had you picked up that there was a discrepancy between what [M] appeared to have told Dr Eshuys and what she told you?

A. Yes.

Q. Is there any significance in that?

A. I'm really not sure. What I can say is that [M] in her interview with me was very clear about that. So there was no ambiguity, she was clearly and distinctly saying, "I understood the difficulties having at that time were related to my experiences at Whenuapai."

[139] This opinion was not challenged at all in cross-examination. Indeed, the questions appeared to confirm Dr Barry-Walsh's evidence on this point:[19]

Q. You've made it clear that, both from what she's said and other records, she has always blamed the conduct of Mr Roper at Whenuapai and the failure of the hierarchy to react to complaints about that, for her ongoing and continuous psychological and psychiatric problems, that's so, isn't it?

A. Yes.

Q. So that the question that sometimes arises under the Limitation Act of not making the connection, you're satisfied doesn't apply in this case?

A. Yes.

[140] Nevertheless, to the extent the conflict in the expert evidence remains, I prefer Dr Barry-Walsh's evidence on this issue. It relies on answers to direct questioning at a time when the legal significance of those answers may not have been apparent. Dr Barry-Walsh was clear and firm in his evidence on this point. In contrast, Dr Eshuys's opinion appears to have based on assumptions and inferences she made based on M's self-report rather than on direct questioning of M as to the connection.

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19 Notes of Evidence at 363.

[141] Accordingly, if the matter had been contested, I would have preferred Dr Barry-Walsh's evidence on this point.

[142] In summary, the Limitation Act issues are to be determined on the basis that M 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 M's causes of action had accrued by 1988. M's claim will be statute barred unless she can show that she was under a disability which extended the limitation period in her case.

Did M have a disability at the time the causes of action accrued?

[143] Under the Limitation Act, a person is deemed to be under a disability while he or she is of "unsound mind".[20] What is meant by "unsound mind" for the purposes of s 24 has been considered in a number of appellate authorities. In *Jay v Jay*, the Court of Appeal said that in order to establish unsoundness of mind, two factors must be proved, namely:[21]

> (a) the alleged unsoundness pertains to a part or facet of the mind relevant to and sufficiently inhibiting the capacity to sue; and
>
> (b) the alleged unsoundness results from a demonstrable and recognised mental illness or disability, rather than just the inability to face up to the process of suing.

[144] In that case, the Court of Appeal upheld the trial Judge's finding that there was a disability which extended the limitation period. There was evidence of a continuing depressive disorder, self-harming, overdoses, and expert evidence that the plaintiff had undertaken a journey to recover enough emotional equilibrium to file a suit.[22]

[145] In *T v H*, Tipping J emphasised that the focus is on the "particular rather than the general". That is, the unsoundness of mind need not relate to an inability to manage affairs generally, but must relate to a specific disability that means the person is unable to pursue their rights.[23]

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20 Limitation Act 1950, s 2(2).
21 *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 at [90]; citing *T v H* [1995] 3 NZLR 37 (CA) at 61.
22 At [97]–[99].
23 *T v H* [1995] 3 NZLR 37 (CA) at 61.

[146] The line between functioning in a general sense and a specific disability resulting in an incapacity to file proceedings was at issue in *S v Attorney-General*.[24] In that case, there was expert medical evidence that PTSD had served as a significant and major barrier to the plaintiff bringing proceedings. Once the plaintiff in that case had been "released" by the death of his caregiver, and had received medical and psychological support, he then pursued his legal claim. The fact that the plaintiff had been able to function well in other areas of his life which did not require him to face the abuse did not mean that he was not suffering from a specific disability which precluded him from commencing proceedings.[25]

[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 M suffering from any sort of mental injury in 1988 or shortly thereafter, let alone one which left her incapable of commencing these proceedings.

[148] There is no documentary evidence of M suffering from a recognisable mental illness in the period after she left the RNZAF the first time. The only documentary records available from this time indicate that M was otherwise in good health. The release form that M signed on leaving the RNZAF in 1988 indicated that her reasons for seeking release were to travel overseas and to visit family. Those reports must be seen in the context of M stating that she had made several complaints about Mr Roper's behaviour at the time, and that she always connected her mental health difficulties with what had happened at Whenuapai.

[149] M's experiences in London could be symptomatic of an underlying mental illness which prevented her from initiating proceedings. Dr Eshuys characterised M's behaviour as being consistent with M engaging in avoidance techniques in an effort to try and block out her experiences at Whenuapai. However, both experts accepted that there were other plausible explanations for M's behaviour at this time. Those included: a continuation of alcohol-related behaviours which had started during her time in the RNZAF, avoidance of other distressing features of her life (such as her mother's suicide), and the normal behaviour of a young woman on her "OE". In the

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24 *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [43]–[44].
25 *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [43]–[44].

absence of other corroborating evidence from this time, it is difficult to draw any conclusions regarding mental injury from M's behaviour when she left the RNZAF.

[150] Furthermore, M's return to work at the Whenuapai airbase in the same Motor Transport division in 1996 does not sit easily with M suffering from a "disability" leaving her unable to pursue her right to sue. Although Mr Roper had left Whenuapai by this stage, it was nevertheless the scene of trauma for M which, by her own account, had caused, and was still causing, her to suffer depression and anxiety.

[151] Dr Eshuys relied on M's self-report as to the reasons she left the RNZAF on the second occasion. M told Dr Eshuys that she was overwhelmed, unable to focus, suffering from poor concentration, and that her memories were vague. Dr Eshuys characterised this as a period of "mental decompensation". Yet the documentary records and the evidence of other witnesses at trial do not support M's recollections:

(a) The Squadron Leader at the time, Trevor Mulligan, wrote a report stating that M had served with diligence and distinction and had maintained the highest possible standards.

(b) M's co-worker at the time confirmed that M had a "sunny disposition" and got on with everyone. She did not recall M being unhappy or low-spirited.

[152] This evidence suggests that M was able to function whilst being located in the very heart of the environment that had caused her harm. To the extent that M was suffering from a mental injury, this evidence suggests that it was not of a nature that she was rendered incapable of commencing these proceedings in the late 1980s.

[153] Dr Eshuys's expert evidence is also heavily reliant on what M said occurred when she found out about Mr Roper's arrest and subsequent conviction in 2014. This was also described by Dr Eshuys as a period of mental decompensation which effectively freed M to pursue this claim.

[154] But the medical records do not corroborate that account. To the contrary, they reveal that M was relatively stable and even contemplating withdrawal from her anti-depressants in the days and months which followed her finding out about Mr Roper's conviction. I agree with Dr Barry-Walsh that these medical records suggest that the extent and severity of M's mental illness was not as pervasive and debilitating as he initially thought. That evidence undermines any suggestion that M was operating under a disability up until this point in time.

[155] On balance, I do not consider there to be sufficient evidence that M was operating under a disability as at 1988 or at any time subsequent which would allow the limitation period to be extended. M's claim is accordingly out of time.

[156] That finding is sufficient to dismiss M's claim. Nevertheless, I have considered the second affirmative defence advanced by the defendants in this case, that is, whether M's claim is barred by the Accident Compensation Act 2001.

Is M's claim barred by the Accident Compensation Act 2001?

[157] The accident compensation scheme provides cover for those who suffer personal injury by accident. If a person is entitled to cover under the accident compensation scheme, then a statutory bar precludes that person from suing for compensatory damages in relation to the injury. The exception to that bar is a claim for exemplary damages.[26]

[158] The starting point for assessing whether M's claim for damages is precluded in this case is s 317 of the Accident Compensation Act 2001. That section relevantly provides:

> **317 Proceedings for personal injury**
>
> (1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—
>
> (a) personal injury covered by this Act; or

[26] Accident Compensation Act 2001, s 319.

(b) personal injury covered by the former Acts.

…

(7) Nothing in this section is affected by—

(a) the failure or refusal of any person to lodge a claim for personal injury of the kinds described in subsection (1); or

(b) any purported denial or surrender by any person of any rights relating to personal injury of the kinds described in subsection (1); or

(c) the fact that a person who has suffered personal injury of the kinds described in subsection (1) is not entitled to any entitlement under this Act.

[159] Accordingly, the statutory bar operates to preclude proceedings for damages arising out of personal injury covered by the 2001 Act or by the former Acts.[27] That statutory bar applies whether or not a claim has been lodged and whether or not a person would be entitled to any entitlement under the 2001 Act.

[160] The parties took a different approach to the application of the statutory bar. M addressed cover under both the 2001 and the 1982 Acts. The defendants focused on cover under the 1982 Act. Because both parties addressed the 1982 Act, I start with that question first. Whether M's claim for damages for mental injury consequent on the false imprisonment is covered under the 1982 Act is addressed separately.

Is the mental injury arising from the assaults covered by the 1982 Act?

[161] The 1982 Act provided cover for all persons who suffered "personal injury by accident" in New Zealand.[28] The phrase "personal injury by accident" included "the physical and mental consequences of any such injury or of the accident".

[162] In *Willis v Attorney-General*, the Court of Appeal confirmed that physical and mental injuries caused by intentional assaults or batteries are personal injuries by

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27 Section 6 defines "former Act" to include the Accident Insurance Act 1998, the Accident Rehabilitation and Compensation Insurance Act 1992, the Accident Compensation Act 1982, and the Accident Compensation Act 1972.

28 Section 26(2).

accident from the point of view of the victim. Actions for damages of that kind are accordingly within the statutory bar.[29]

[163] The definition of personal injury by accident under the 1982 Act was considered again by the Court of Appeal in *Accident Compensation Corporation v E* (*ACC v E*).[30] The Court of Appeal confirmed in that case that mental consequences of an accident were included within the definition of personal injury by accident whether or not there was also physical injury.[31] The Court of Appeal commented that it would be strange if cover under the Act for a person suffering serious mental consequences caused by an accident were to depend upon whether some physical injury, however slight, was also sustained.[32]

[164] Accordingly, on the basis of these authorities, the mental injuries suffered by M are covered by the 1982 Act, and her claim for compensatory damages arising out of assault are therefore barred by operation of s 317(1)(b) of the 2001 Act.

[165] However, Mr Little submits that M did not have cover under the 1982 Act. He submits that up until the decision in *ACC v E*, the Accident Compensation Corporation had not been accepting cover for mental consequences which were not accompanied by physical injury. It was only when the decision in *ACC v E* was released that cover became available.

[166] Furthermore, he says that the Government acted to revoke the effect of that decision by passing the Accident Rehabilitation and Compensation Insurance Act 1992 (1992 Act). He says the proper interpretation of s 135(5) of that Act is that it effectively repealed that part of the 1982 Act which provided cover for mental consequences unaccompanied by physical injury. Section 135(5) of the 1992 Act provided as follows:

> 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

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29 *Willis v Attorney-General* [1989] 3 NZLR 574 (CA) at 576.
30 *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA) at 433.
31 *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA) at 433.
32 *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA) at 434.

> 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.

[167] I respectfully disagree with Mr Little's submissions. In assessing whether a claim for compensation is barred under an Act, the law that existed at the relevant time must apply. Although the Accident Compensation Corporation may not have accepted claims for mental consequences unaccompanied by physical injury under the 1982 Act, that was found to be an incorrect application of the law. The position did not change with the decision in *ACC v E*. Rather, the Court of Appeal simply clarified the scope of the law which applied.

[168] Section 135(5) of the 1992 Act does not alter that analysis. Section 135 governed the transition from the old legislation to the new. The effect of the section was that those who would have been covered under the previous Acts but had not lodged their claim by 1 October 1992, would only be covered if the personal injury by accident was covered under the 1992 Act.

[169] The effect of s 135(5) of the 1992 Act was considered by the Court of Appeal in *Childs v Hillock*.[33] In that case, the plaintiff sued for damages arising out of a physical injury caused to her by an IUD. The injury was suffered when the 1982 Act was in force and cover would have been available at that time. However, the appellant in that case did not lodge her claim under that Act, and cover for her injury was not available under the 1992 Act. The appellant argued that because she was no longer entitled to compensation under the accident compensation scheme, her claim for damages against her medical practitioner should not be barred. The Court of Appeal rejected that argument saying:[34]

> Ms Childs did not lodge a claim before 1 October 1992 and therefore is strictly entitled to compensation only if she sustained personal injury of the kind covered by the 1992 Act. Mr Chapman argued that she did not sustain such injury; and that the essential issue in this case is therefore whether she does have cover under this Act. As mentioned it was his case that if there is no cover there is a right to sue for damages; and it is that right that Ms Childs wishes to assert. If the argument is correct, it would mean that a cunningly advised injured person could have obtained the right to sue merely by not lodging a

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33 *Childs v Hillock* [1994] 2 NZLR 65 (CA).
34 At 68–69.

> claim before 1 October 1992. It is most unlikely that that result was contemplated by what is plainly a transitional section. It is not a section creating rights, but rather one that ameliorates the consequences of the change from a more generous to a less generous compensation scheme. Under the new Act certain eventualities occurring after 1 July 1992, that were covered under the earlier Acts, are no longer covered. The earlier Acts having been repealed as at 1 July 1992, unclaimed cover under those Acts in respect of those eventualities would come to an end unless preserved. Subsection (5) preserves them for three months. If opportunity is not taken to lodge a claim, then cover is lost. This is not a plainly unintended result. There may be hard cases; but no doubt the line had to be drawn somewhere.

[170] That decision was followed in *White v Attorney-General*, in which the appellant sought to make a similar argument based on s 360 of the 2001 Act which is in similar terms to s 135(5) of the 1992 Act.[35] The combination of ss 317(1)(b) and s 360 of the 2001 Act in that case meant that one of the appellants was unable to claim compensation under the 2001 Act, and also unable to bring proceedings for compensatory damages. The appellant argued that this was an unjust result and compelled a different interpretation of s 317(1)(b). The Court of Appeal dismissed that argument in unequivocal terms:

> [161] In the present case, cover was available for Earl's injury at the time it was suffered. Because a claim was not lodged, cover has since lapsed. Section 317, like s 14 of the 1992 Act, is in clear and unambiguous terms. Parliament has used explicit statutory language: a claimant who at one point had cover for a personal injury loses the right to sue for damages, even where cover may have ceased to be available under later statutes and a claim was not made at the appropriate time. We do not see *Childs v Hillock* as distinguishable. Whatever the merits of Ms Cooper's policy arguments, this Court cannot refuse to apply the statutory bar. Nor can we read words into the statute that are not there, in order to make the section fairer, as Ms Cooper asked us to do. There is no gap in the section which needs to be filled: the section is clear and, whatever view we take of its fairness, we are obliged to apply it.

[171] Accordingly, I consider M's claim for compensatory damages for assault is covered by the 1982 Act and is therefore statute-barred. It is not necessary for me to consider whether M's claim would have been covered under the 2001 Act in light of that finding.

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35 *White v Attorney-General* [2010] NZCA 139.

Is mental injury from the false imprisonment claim covered?

[172] M says that even if her claim in assault is statute-barred, then her claim for false imprisonment nevertheless survives. She relies on *Willis v Attorney-General* for that proposition.[36] That case arose out of the importation of four Mustang cars which were seized by customs officials, with the plaintiffs temporarily detained. The Court of Appeal held that the plaintiffs' claim for distress, humiliation and fear caused by the false imprisonment was not covered by the 1982 Act and was not therefore barred. After considering the scope and meaning of the phrase "personal injury by accident", and reviewing the elements of the false imprisonment cause of action, the Court said:[37]

> False imprisonment is the unlawful total restraint of the liberty of a person. It may be but is not necessarily brought about by force or the threat of force; … Force or the threat of force is not the gist of the cause of action … Applying again the tests of the purposes of the Accident Compensation legislation and the natural and ordinary use of language, we have come to the conclusion that false imprisonment as such is outside the purview of the Act. In ordinary speech we do not think that it would 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.
>
> Accordingly we hold that claims for damages for false imprisonment or abuse of rights amounting to false imprisonment (which appears to add nothing) are not barred by the Act. If a plaintiff were to claim damages (other than exemplary) for assault or battery, the position would be different. Such claims are barred, but they are not made by the plaintiffs here. If the detention of a plaintiff has been accompanied by physical injuries, damages cannot be claimed for those or for the pain and suffering they have caused.
>
> 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.

[173] The defendants submit that M's damages claim is closer to the decision in *ACC v E* than it is to *Willis*. In that case, E had attended a management course, and after four days on the course she suffered a psychiatric breakdown and was admitted to

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36 *Willis v Attorney-General* [1989] 3 NZLR 574 (CA).
37 At 579.

hospital. There was no incident or event which could be identified as having triggered the psychotic episode. The Court of Appeal held that mental consequences of an accident were included within the definition of personal injury by accident and it was not necessary for such an injury to be accompanied by a physical act.[38] The Court of Appeal rejected the submission that this interpretation was inconsistent with the decision in *Willis*.[39]

[174] The Court of Appeal in *Willis* endorsed a "common sense approach" under which trial Judges will be guided by what is within the broad spirit of the accident compensation system and what is outside it.[40] In determining whether M's claim falls inside or outside the 1982 Act, regard must be had to whether the mental distress said by M to have resulted from the false imprisonment is a "personal injury by accident".

[175] In *Willis*, the Court of Appeal held that "personal injury by accident" must bear its ordinary and natural meaning, and 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 that the bar extended to other tort actions "where a suggested link with the subject-matter of the Act is more tenuous".[41]

[176] Accordingly, whether M can claim for her false imprisonment depends on whether that can appropriately be described as an "accident" in accordance with the policy of the 1982 Act.

[177] M's claim is for mental injury, that is the depression, anxiety and PTSD which she says arose out of the events at Whenuapai. That claim is closer to the serious mental disorder found to be covered in *ACC v E*, than the humiliation and distress the subject of the claim in *Willis*.

[178] Furthermore, the nature of the claim itself fits within the ordinary and natural meaning of personal injury by accident. The false imprisonment is intertwined with an assault and the consequences are more closely aligned with what would be regarded

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38 *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA) at 433.
39 At 434.
40 *Willis v Attorney-General* [1989] 3 NZLR 574 (CA) at 579.
41 At 576.

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 M's claim for false imprisonment, I consider the mental injury which M says resulted from that claim would have been covered under the 1982 Act. Accordingly, proceedings for damages in respect of that harm would have been caught by the statutory bar, and are caught by the statutory bar which now applies under s 317 of the 2001 Act.

[180] Overall, I consider that M's claim for compensatory damages for mental injury for the assaults and for her false imprisonment is barred by s 317 of the Accident Compensation Act 2001 as it falls within the meaning of personal injury by accident in the 1982 Act.

Other legal issues

[181] In light of my findings as to the effect of the Limitation Act and the Accident Compensation Act, it is not necessary to determine the other legal issues raised in this case. But, as the parties made submissions on each of these issues, I address them briefly below.

[182] First, Mr Mather submitted that the car incident, if proved, constituted an assault, but it did not constitute false imprisonment as alleged. That is because M was driving the car at the time, and she could have unlocked the door and escaped if she had wished.

[183] I respectfully disagree. M 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.

[184] Second, I do not consider this to be an appropriate case to consider the scope of the intentional infliction of emotional distress tort pleaded in the second cause of action. There are relatively few cases concerning this tort in New Zealand, and it does not appear to have developed since the last case of *Bradley v Wingnut Films Ltd.*[42] However, there have been some observations made about the utility of the tort in this modern era.[43] The United Kingdom Supreme Court revitalised and reformulated the tort in *Rhodes v OPO*,[44] but those principles have not been judicially considered in this country.[45]

[185] M's claims for assault and false imprisonment have already been established. The intentional infliction of emotional distress cause of action does not add anything further to those claims. It would be preferable for the scope of the 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.

[186] Third, and for essentially the same reasons, this is not an appropriate case to consider whether the RNZAF has vicarious liability for the acts of those in its service. That issue requires careful consideration of the relationship between the RNZAF and those in its service, which is governed by military law and the oath of service. Nor is this the right case to consider whether the RNZAF owes a duty of care and is accordingly directly liable to M. That is a novel claim and the boundaries of such a claim are better considered in a case where the issues are live.

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42 *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC).

43 See, for example, the observations made by Lord Hoffmann in *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 at [41], in which *Wilkinson v Downton* is described as having "no leading role in the modern law".

44 *Rhodes v OPO* [2015] UKSC 32, [2015] 2 WLR 1373.

45 For the origins of the tort and its development in this country in light of these United Kingdom cases see Pita Roycroft "*Wilkinson v Downton* After *Rhodes* and its Future Viability in New Zealand" (2017) 48 VUWLR 107 at 112–114.

[187] Fourth, and finally, my findings of fact make it inappropriate to engage in a conversation about whether a case for exemplary damages could otherwise have been made out.

Summary of findings

[188] In summary, I have found the following:

(a) It is more likely than not that Mr Roper did most, but not all, of the acts alleged by M, but he did not do them as frequently as she suggested. There is no evidence to corroborate her claim that she complained to her superiors about these acts at the time.

(b) M is suffering from a mental injury, being depression, anxiety and PTSD. The evidence is insufficient to show a causal link between what happened at Whenuapai and M's depression and anxiety. There appear to be other causes for that condition. But the medical evidence suggests that what happened to M at Whenuapai was a material and substantial cause of her PTSD.

(c) M's claim is out of time and is accordingly barred by the Limitation Act 1950. Limitation periods were calculated on the basis that M suffered her mental injury when she first left the RNZAF, and that she had made the necessary connection between her mental injury and what had occurred at Whenuapai, at that time. There is insufficient evidence of a mental injury at this time, let alone one which constituted a "disability" within the meaning of the Limitation Act which would permit the extension of the limitation period.

(d) M's claim for compensatory damages is otherwise barred by s 317(1)(b) of the Accident Compensation Act 2001. That is because the claim would have been covered under the 1982 Act.

(e) Because the claim is barred by the Limitation Act, and the Accident Compensation Act, it is not necessary, nor appropriate, to

consider M's claim for intentional infliction of emotional distress, negligence against the RNZAF, and whether exemplary damages would have otherwise been awarded.

Result

[189] The plaintiff's claims are dismissed.

[190] The parties shall confer and endeavour to agree costs. If costs cannot be agreed, memoranda in support of a claim of costs shall be filed within 20 working days of this judgment, with memoranda in reply 10 working days thereafter.

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Edwards J

Counsel: A C M Fisher QC, Auckland
G F Little, Auckland
J F Mather, Auckland

Solicitors: Davenports City Law, Auckland
Barter Law, Auckland
Crown Law, Wellington

Appendix A

[191] During the trial, I ruled certain evidence inadmissible. I gave brief reasons at the time for those ruling. My full reasons now follow.

Plaintiff's brief

[192] The RNZAF challenged the admissibility of paragraph 31 of the plaintiff's brief of evidence. That paragraph concerned "lots of talk" around an incident overseas. The plaintiff says that she assumed that these matters were investigated, and that she, and others, were not to speak of it as it was idle gossip.

[193] The RNZAF challenged this evidence on the grounds that it was hearsay and the preconditions for the admissibility of hearsay under s 18 of the Evidence Act 2006 could not be met. I did not consider it to be hearsay as the purpose of calling the evidence was not to prove the truth of its contents, but to show that at the relevant time the RNZAF was aware of Mr Roper's reputation.

[194] However, I considered that the evidence did not carry probative value on the question of what was known about Mr Roper's conduct towards the plaintiff at the time. It was simply evidence of "talk" at the time, and did not amount to evidence of a complaint made by either the plaintiff or somebody else. Nor did it reveal that the plaintiff's superiors knew of the alleged incident or about Mr Roper's reputation. It did not show that the RNZAF was consciously aware of the risks posed by Mr Roper.

[195] I also considered that admitting the evidence would be unfairly prejudicial. The evidence related to alleged discussions between unnamed people which took place between 1983 and 1989. The length of time since those alleged discussions were made would draw into question the reliability of the evidence. The relevant paragraph in the plaintiff's evidence did not detail who said what to whom and when. That also meant that the evidence could not be meaningfully tested which made it difficult for the defendants to defend the claims against them.

[196] On balance, I considered that the unfairly prejudicial nature of the evidence outweighed its probative value and the evidence should be excluded under s 8 of the Evidence Act.

Vicki Cunningham's evidence

[197] Ms Cunningham was called as a witness for the plaintiff. Paragraphs 9, 21, 28 and 32 to 38 of her brief of evidence referred to incidents during her time with the RNZAF. Those incidences involved a Warrant Officer and a Sergeant. Ms Cunningham described one of those officers as sleazy, a bully, and socially inept. She referred to making complaints to this officer, and as a result of those complaints she alleged that a number of rumours began to be spread about her. She also described a serious incident in her evidence involving the other named officer. The officers mentioned in Ms Cunningham's brief were not officers mentioned at all by the plaintiff, and were not the same officers that the plaintiff says she complained to about Mr Roper's conduct.

[198] Mr Little submitted that the evidence was relevant to the question of exemplary damages as it showed systemic failures within the RNZAF. He referred and relied upon the case of *W v Attorney-General*.[46] That case concerned a claim for compensatory and exemplary damages from the Department of Social Welfare for the mental consequences of physical and emotional abuse by foster parents. Counsel for the appellant had argued that the evidence revealed a systemic failure by the department to act upon complaints of sexual offending against children in its care. The Court of Appeal noted that the case was not pleaded in that way, and it would not therefore be proper to consider the evidence relating to abuse of children other than the appellant and her sister "except where that evidence may shed light upon the attitude of [the social worker] towards the complaints of abuse made to her by EW".[47]

[199] Mr Little submitted that, unlike *W v Attorney-General*, there was a pleading of systemic failure in this case. He relied on paragraph 65 of the amended statement of claim which specifically refers to the officers mentioned in the evidence of

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46 *W v Attorney-General* CA227/02, 15 July 2003.
47 *W v Attorney-General* CA227/02, 15 July 2003 at [56].

Ms Cunningham. That paragraph refers to the reasons why the plaintiff did not complain further, her belief that the senior officers in the section supported each other, and an assertion that she was too scared to speak up because nothing had been done in relation to past allegations.

[200] I do not consider that this paragraph amounts to a pleading of systemic failure for the purposes of proving an exemplary damages claim against the RNZAF. Paragraph 65 of the amended statement of claim does not form part of the four pleaded causes of action, but rather merely part of the narrative in the statement of claim regarding the alleged complaints made about Mr Roper's behaviour. The paragraph does not, in and of itself, allege a claim of systemic failure, but provides an explanation as to why the plaintiff did not progress her complaint further. In that respect, it is in the nature of evidence rather than pleading, yet none of M's evidence was directed towards that paragraph.

[201] The four causes of action are not pleaded in a way that relies on systemic failure. Rather they are limited to alleged acts by Mr Roper as against M. The RNZAF is said to be either directly or vicariously liable for Mr Roper's conduct.

[202] As the challenged evidence of Ms Cunningham does not relate to conduct by Mr Roper towards M, it is not relevant to the question of attribution of Mr Roper's conduct to the RNZAF.

[203] Nor could it be said to be relevant to the action or lack of action taken by officers to which M allegedly complained about Mr Roper's conduct. The evidence regarding the most serious incident does not extend to complaining about the incident at all.

[204] I considered that the evidence had an unfairly prejudicial effect on the proceedings. The paragraphs in the brief of evidence contained very serious allegations against two named officers who were not joined to the proceedings and who had not, to date, responded. I considered that admitting the evidence in those circumstances would allow a mini-trial of issues which verged on the criminal to be played out in the context of a civil proceeding relating to a wholly different set of

allegations between different parties. Admission of the evidence would needlessly prolong the trial in those circumstances.

[205] Accordingly, I ruled the evidence was inadmissible. However, I made it clear that such a ruling was provisional given that I had not yet heard the evidence in the trial, and further legal submissions could address the point of direct liability and exemplary damages if necessary. I indicated that if it transpired that such evidence was relevant then it may be necessary to re-call Ms Cunningham and allow time for further rebuttal evidence to be adduced. However, there was no evidence called at trial, and no additional legal submissions made, and the evidence was excluded accordingly.

Grant Ingersoll

[206] The RNZAF challenged the admissibility of paragraphs 9 to 13 of Grant Ingersoll's brief of evidence. In paragraph 9, Mr Ingersoll made allegations about another officer with the RNZAF at the time. As M's evidence did not concern the acts of that officer and there was nothing in the paragraph which related to M's claim, I ruled that such evidence was irrelevant and accordingly inadmissible.

[207] Paragraphs 10 to 13 of Mr Ingersoll's evidence related to an incident involving Sergeant Rob Service. In his evidence, Mr Ingersoll said that he was asked to report to the office of Trevor Mulligan and was accused of mutiny at the time.

[208] The RNZAF challenged the relevancy of this evidence on the grounds that the allegation related to a time at least 17 months after M had left the RNZAF. However, I considered that the evidence met the relatively low threshold for relevance under s 7 of the Evidence Act. Although the evidence post-dated the time that M was present at the base, it may nevertheless have reflected on the attitude of Flight Sergeant McKinney at the time when confronted with allegations of inappropriate conduct. Flight Sergeant McKinney is one of the officers that M says she complained to about Mr Roper's conduct. Furthermore, Mr Service, Mr McKinney and one of the girls alleged to be involved in the incident which Mr Ingersoll describes, were to give evidence in the trial. They would therefore have an opportunity to respond to the evidence.

[209] I considered that admitting the evidence would not be unfairly prejudicial and did not outweigh the probative value of the evidence in those circumstances. I ruled the evidence was admissible for those reasons.