

# PAYMENTS FOR MENTAL HARM

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*The law recognises mental harm as a basis for compensation and reparations orders. Payments can be obtained in tort, contract, equity, and under statute, including the Sentencing Act.*

*The principles that apply in each context vary in a number of ways, starting with the way mental harm is defined. Some of the principles that apply in a civil context are difficult to reconcile with reparations orders under the Sentencing Act.*

*Further difficulties arise in identifying how the quantum of compensation payments and reparations orders is calculated.*

*This paper summarises these issues and offers some suggestions about how lawyers can approach them when drafting pleadings or making submissions to a Court.*

## WHAT IS MENTAL HARM?

I have used the term 'mental harm' in this paper. However, there are a number of expressions that appear in statutes and common law which describe different types of mental harm.

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*'Nervous Shock'*

The expression 'nervous shock' is used in tort. In this context, it refers to mental harm which amounts to a medically identifiable illness. Distress, grief and anxiety do not necessarily satisfy this definition.

Although mental harm in tort is described as 'nervous shock,' the description is imprecise. As *The Law of Torts in New Zealand* notes, a claim is made for mental harm caused by shock.<sup>2</sup>

The phrase 'nervous shock' also appears in the Injury Prevention, Rehabilitation and Compensation Act 2001.<sup>3</sup>

*'Neurosis'*

In *Clark Boyce v Mouat*,<sup>4</sup> the Court of Appeal said that Mrs Mouat's mental condition did not amount to '*nervous shock or neurosis*.'

Neurosis is '*a relatively mild mental illness that is not caused by organic disease, involving symptoms of stress (depression, anxiety, obsessive behaviour, hypochondria) but not a radical loss of touch with reality*.'<sup>5</sup>

*'Mental Injury'*

The Injury Prevention, Rehabilitation and Compensation Act 2001 defines mental injury as, '*a clinically significant behavioural, psychological or cognitive dysfunction*.'<sup>6</sup>

*'Mental Harm'*

The Health and Safety in Employment Act 1992 defines harm as including '*physical or mental harm caused by workplace stress*.'<sup>7</sup>

Neither 'mental harm' nor 'workplace stress' are defined in the act. The Department of Labour has published a booklet entitled 'Healthy work: Managing Stress in the Workplace.' The booklet defines 'workplace stress' as '*the result of the interaction between a person and their work environment*.'<sup>8</sup>

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<sup>2</sup> Todd (ed), *The Law of Torts in New Zealand*, 5<sup>th</sup> edition, Brookers, 2009, para 5.7.03.

<sup>3</sup> Section 21A(1)

<sup>4</sup> [1992] 2 NZLR 559

<sup>5</sup> *Oxford Dictionary of English*, 2<sup>nd</sup> edition revised, 2005

<sup>6</sup> Section 27.

<sup>7</sup> Section 2.

<sup>8</sup> Page 4

The booklet notes that a claim that an employee has suffered harm must be supported by '*a reputable medical diagnosis*,' that there must be '*clear evidence of harm that resulted from a defined medical condition*,' and that '*stress is not a medical diagnosis*.'<sup>9</sup>

The phrase 'mental harm' also appears in the International War Crimes Tribunals Act 1995<sup>10</sup> and the International Crimes and International Criminal Court Act 2000,<sup>11</sup> in which the definition of genocide includes causing mental harm to members of a national, ethnic, religious or racial group with intent to destroy the group in whole or in part.

*'Inconvenience, Worry and Stress.'*

In *Clark Boyce v Mouat*,<sup>12</sup> damages were awarded for '*inconvenience, worry and stress*' in a claim for breach of contract and negligence. The Court of Appeal recognised that general damages are available in contract and tort for '*discomfort and inconvenience and associated anxiety and stress*.' Damages were said to be available as long as this type of harm was foreseeable, even though '*the worry, inconvenience and stress suffered by Mrs Mouat were not demonstrated to be causative of any physical consequences and did not amount to nervous shock or neurosis*.'<sup>13</sup>

*Pain and Suffering*

Awards of general damages for pain and suffering were made in personal injuries claims (pre-ACC) for the mental consequences of physical injuries. However, the expression 'pain and suffering' is still used to cover distress, anxiety and inconvenience.

*'Humiliation, Loss of Dignity and Injury to Feelings'*

Compensation is available under the Employment Relations Act 2000 where an employee who successfully brings a personal grievance claim has suffered '*humiliation, loss of dignity and injury to feelings*.'<sup>14</sup>

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<sup>9</sup> Page 18.

<sup>10</sup> Article 4 (2)

<sup>11</sup> Article 6(b)

<sup>12</sup> *Clark Boyce v Mouat* [1992] 2 NZLR 559

<sup>13</sup> at 573.

<sup>14</sup> Section 123(1)(c)(i).

*'Emotional Harm'*

When sentencing an offender under the Sentencing Act 2002, the Court can order a reparations payment for 'emotional harm.' The term is not defined in the Act.

There is a similar power available where a person is convicted in a Court Martial under the Armed Forces Discipline Act 1971.<sup>15</sup>

The expression also appears in the Victims' Rights Act 2002, the Care of Children Act 2004 and the Prisoners' and Victims' Claims Act 2005.

*'Mental Disorder'*

The phrase 'mental disorder' appears in the Mental Health (Compulsory Treatment and Assessment) Act 1992 under which a compulsory treatment order can be made:<sup>16</sup>

**Mental disorder**, in relation to any person, means an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it—  
(a) Poses a serious danger to the health or safety of that person or of others; or  
(b) Seriously diminishes the capacity of that person to take care of himself or herself...

**Summary**

The various expressions used to describe what I have called 'mental harm' fall into two distinct categories:

1. A medically diagnosable mental condition.
2. A mental state that, while not being a medically diagnosable condition, still has a negative impact on a person.

This distinction was confirmed in New Zealand by the Court of Appeal in *van Soest v Residual Health Management Unit*,<sup>17</sup> in which secondary victims who claimed damages for mental harm in a negligence claim failed because the harm did not amount to a medically diagnosable condition.

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<sup>15</sup> Section 86(1)

<sup>16</sup> Section 2

<sup>17</sup> [2000] 1 NZLR 179

### *Medically Diagnosable Condition*

The following expressions fall into this category:

- Nervous shock.
- Neurosis.
- Mental Injury (as defined in the Injury Prevention, Rehabilitation and Compensation Insurance Act).
- Mental disorder.

*The International Classification of Diseases and Related Health Problems*,<sup>18</sup> which is published by the World Health Organisation, is one source of identifying mental conditions that the medical profession recognises as diagnosable.

### *A Mental State*

This category is made up of all of the other types of 'mental harm' that a person suffers as a result of an unlawful act, but which do not constitute a medically diagnosable condition.

This category includes (to adopt the words used by lawyers) pain and suffering, inconvenience, stress, distress, humiliation, loss of enjoyment, hurt feelings, loss of dignity and emotional harm.

## **COMPENSATION FOR MENTAL HARM**

### **Compensation versus Punishment**

The payments for mental harm addressed in this paper are compensatory, that is, awards of money to compensate a person who suffers mental harm as a result of unlawful conduct.

Aggravated and exemplary damages can be awarded in some contexts. Exemplary damages, which are designed to punish a wrongdoer, and not compensate a victim, are not addressed in this paper.

### **Attitudes to Claims for Compensation for Mental Harm**

Courts have been slow to recognise an entitlement to claim damages for mental harm, even where the harm amounts to a medically diagnosable condition. Even now, there are circumstances where compensation may not be awarded for distress and anxiety, unless

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<sup>18</sup> <http://apps.who.int/classifications/apps/icd/icd10online/>

they are accompanied by other types of loss, for example, financial loss or damage to property.

#### *Recognition of the Genuineness of Mental Harm*

Lawyers have taken some time to recognise mental harm as a genuine form of loss. While physical harm was usually readily identifiable, mental harm may not be obvious at all. It is only with the development of the discipline of psychiatry in the twentieth century that mental conditions can be diagnosed and treated.

Even today, there is still some scepticism about mental conditions. However, the presence of a diagnosable medical condition can be proved by adducing evidence from a psychiatrist.

#### *Floodgates*

In the case of physical injury, it is usually easy to identify the victim and the wrongdoer, but in the case of mental harm, there may be no direct link. For example, in the cases arising from the Hillsborough football stadium deaths,<sup>19</sup> the courts faced claims for mental harm from those who saw the events on television or heard about them from others.

There is always a concern in such cases that if those who are too far removed from the wrongdoing are allowed to bring claims for mental harm, the courts will be inundated with claims, and defendants will be required to bear disproportionate financial responsibility for their wrongdoing.

At one stage, there was a question about whether mental harm was sufficient to sustain a claim at all. However, this issue was clarified in New Zealand by section 2 of the Law Reform Act 1944:

**Damages may be recovered for injury suffered as a result of shock**

(1) In any action for injury to the person, whether founded on contract or in tort or otherwise, a party shall not be debarred from recovering damages merely because the injury complained of arose wholly or in part from mental or nervous shock.

While this does not give any guidance about the principles applicable to claims for mental harm, it at least confirms that claims can be brought for mental harm (although 'mental or nervous shock' would mean a medically diagnosable condition).

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<sup>19</sup> Eg *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310 House of Lords

## WHEN CAN A COURT ORDER PAYMENTS FOR MENTAL HARM?

### Tort

Claims for damages for mental harm in tort usually require proof of a medically recognisable mental injury. It is not sufficient that the plaintiff suffers any mental harm short of this.<sup>20</sup>

This view was, however, subject to challenge by Justice Thomas, who delivered the minority judgment in *van Soest*.

Justice Thomas said that, *'the law relating to compensation for mental injury is arbitrary and illogical. It is also inexplicably restrictive... I consider that the Courts can certainly make the law more coherent and just... the notion that mental injury is essentially different from physical injury seems to persevere between the lines'*<sup>21</sup>

He suggested that reasonable foreseeability of mental and emotional harm should be the test for recoverability, and that a plaintiff should be able to recover for harm which, while not amounting to a psychiatric illness, is *'plainly outside the range of human experience.'*<sup>22</sup>

The majority in that case were *'not persuaded that [Justice Thomas] has been able to articulate a workable test for recovery of mental and emotional suffering falling short of a recognisable psychiatric illness.'*<sup>23</sup>

The comments of the majority about the non-availability of compensation where the mental harm falls short of a diagnosable condition were confirmed by Young P in *Hobson v Attorney-General*.<sup>24</sup>

### *The Rule in Wilkinson v Downton*

In *Wilkinson v Downton*,<sup>25</sup> a practical joker told a woman that her husband had been seriously injured in an accident. She believed this and suffered nervous shock (which amounted to a diagnosable psychiatric condition). She succeeded in a claim based on what became known as the tort of intentional infliction of nervous shock.

The 'nervous shock' must be a diagnosable condition.

The authors of *Law of Torts in New Zealand* express the view that this tort has little relevance in New Zealand because the tort of

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<sup>20</sup> *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179

<sup>21</sup> Paragraphs [80]-[82].

<sup>22</sup> Paragraph [120]

<sup>23</sup> Paragraph [76].

<sup>24</sup> [2007] 1 NZLR 374 at [140].

<sup>25</sup> [1897] 2 QB 57

negligence may provide the basis for a claim.<sup>26</sup> The developing tort of breach of privacy may also provide a basis for such a claim.

There is a tort of intentionally inflicting emotional harm in the United States.

### *Assault and Battery*

Although the word 'assault' is often used to describe a physical attack, in tort, assault and battery are distinct. An assault involves the threatened infliction of force, whereas battery is the actual infliction of force. Either could occasion mental harm.

Unlike negligence, loss or damage is not an element of the torts of assault and battery. They are actionable 'per se.' This means that a claim for damages for emotional harm is available.<sup>27</sup>

An action for damages may overlap with claims under the rule in *Wilkinson v Downton*, breach of privacy and negligence.

An action for damages for mental harm would also be available in battery, except to the extent that it is precluded by the Injury Prevention, Compensation and Insurance Act 2001.<sup>28</sup>

The torts of assault and battery may amount to criminal offences. When sentencing an offender for such offences, the Court has the power to order the payment of reparations for emotional harm. This is dealt with later in the paper.

### *False Imprisonment*

The tort of false imprisonment is committed when a person is unlawfully detained.<sup>29</sup>

Damages are available for '*distress, humiliation or fear*,' although they may be barred if they are accompanied by a physical injury.<sup>30</sup>

### *Negligence*

A claim in negligence for mental harm will not succeed unless the harm amounts to a diagnosable mental condition.<sup>31</sup>

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<sup>26</sup> Todd, *supra*, para 4.7

<sup>27</sup> Todd, *supra*, para 25.2.09; *Fogg v McKnight* [1968] 3 NZLR 574

<sup>28</sup> See below.

<sup>29</sup> See *The Law of Torts in New Zealand*, 4<sup>th</sup> edition, para 4.5

<sup>30</sup> *Willis v Attorney General* [1989] 3 NZLR 574.

<sup>31</sup> *van Soest* *ibid*

A claim for damages will be precluded if cover is available under the Injury Prevention, Rehabilitation and Compensation Insurance Act 2001. Primary victims who suffer personal injury are therefore likely to be precluded from pursuing a common law claim for damages.

A 'secondary victim' is a 'person who experienced mental suffering but was not physically injured or placed in physical danger by the defendant's negligence.'<sup>32</sup>

The majority in *van Soest* said that a claim for mental suffering will not lie unless there is a recognisable psychiatric disorder or illness.<sup>33</sup> A claim can be made by a secondary victim for this type of mental harm, as long as there is a close and loving relationship between the primary and secondary victim, as well as a sufficient relational proximity.

The majority reserved the position on whether the test for relational proximity in the UK cases was too strict. (However, in *Hobson v Attorney-General*,<sup>34</sup> Young P<sup>35</sup> seemed to endorse the restrictive position set out in by the House of Lords in *White v Chief Constable of Police*.<sup>36</sup>)

In *Clark Boyce*, the Court of Appeal awarded damages for distress in a claim for negligence and breach of contract. However, this can be distinguished from the negligence claims dealt with in *van Soest*, *Hobson* and *Frost*, because the plaintiff also suffered financial loss. The sum awarded for distress was an adjunct to this claim.

In summary, the position in relation to claims for mental harm based on negligence is:

1. Recovery is available at common law for medically diagnosable mental harm suffered by a primary victim of negligence where it was reasonably foreseeable that the harm would be suffered.
2. However, ACC legislation precludes claims for compensation for medically diagnosable mental harm in certain cases (see below).
3. Secondary victims can claim damages for medically diagnosable mental harm.<sup>37</sup>
4. No claim is available for secondary victims where the mental harm is not medically diagnosable.<sup>38</sup>

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<sup>32</sup> *van Soest*, *ibid* paragraph [21].

<sup>33</sup> *Ibid*, paragraph [65].

<sup>34</sup> [2007] 1 NZLR 374 at [140].

<sup>35</sup> At [141]

<sup>36</sup> [1999] 1 ALL ER 1

<sup>37</sup> *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549

5. Damages for mental harm which is not medically diagnosable (eg distress and anxiety) may be available for primary victims where other loss has been suffered and the mental harm claim is an adjunct to the claim for the other losses.<sup>39</sup>

### *Harassment*

There is no tort of harassment, however, a claim may be available where the harassment constitutes assault or battery.

The Harassment Act 1997 provides a statutory basis for an application to the Court where a person is being harassed (as defined in section 3 of the Act). However, the remedy available upon proof of harassment is a restraining order. There is no provision for a claim for damages in the act.<sup>40</sup>

### *Privacy*

A tort of invasion of privacy has been recognised in New Zealand.<sup>41</sup> Gault P and Blanchard J expressed the criteria as:

1. The existence of facts in respect of which there is a reasonable expectation of privacy.
2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.<sup>42</sup>

Where these criteria are met, damages are available for humiliation, hurt feelings and loss of dignity.

Damages can also be awarded by the Human Rights Review Tribunal under the Privacy Act for humiliation, loss of dignity and injury to feelings.<sup>43</sup>

### **ACC**

Cover is available for personal injury caused to a person by accident.<sup>44</sup>

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<sup>38</sup> *van Soest*

<sup>39</sup> *Clark Boyce v Mouat*

<sup>40</sup> See also the Domestic Violence Act 1995, section 7

<sup>41</sup> *Hosking v Runting* [2005] 1 NZLR 1

<sup>42</sup> At page 32; Tipping J referred to a 'substantial level of offence.'

<sup>43</sup> Privacy Act, section 88(1)(c)

<sup>44</sup> *Ibid*, section 20(2)(a)

An 'accident' includes an event or series of events involving the application of force.<sup>45</sup>

Personal injury includes:

1. Mental injury suffered because of physical injuries.<sup>46</sup>
2. Mental injury suffered as a result of the commission of certain crimes.<sup>47</sup>
3. Work-related mental injury.<sup>48</sup>

'Mental injury' means a clinically significant behavioural, cognitive or psychological dysfunction.<sup>49</sup>

Where cover is available under the act, a common law claim for damages cannot be brought.<sup>50</sup>

### Contract

No damages for stress are available in a commercial contract, unless mental satisfaction is an object of the contract.<sup>51</sup> This is based upon policy.

Stress damages are available in a contract between a professional person and a non-commercial client.<sup>52</sup>

Stress damages are likely to be available where a contract involves 'personal, social and family interests,' and where the likelihood of mental suffering may be foreseen.

Damages for stress are available where they are an adjunct to a claim for property damage.<sup>53</sup>

Stress damages are available for breach of an employment contract.<sup>54</sup>

There is scope for arguing that stress damages should be available even for breach of a commercial contract, based upon the dissenting opinion of Thomas J in *Bloxham v Robinson*, and the inroads that

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<sup>45</sup> Ibid, section 25(1)(a)

<sup>46</sup> Ibid, section 26(1)(c)

<sup>47</sup> Ibid, section 26(1)(d), schedule 3

<sup>48</sup> Ibid, sections 21B, 26(1)(da), 28

<sup>49</sup> Ibid, section 27

<sup>50</sup> Ibid, section 317

<sup>51</sup> *Bloxham v Robinson* CA 18 June 1996

<sup>52</sup> *Clark Boyce v Mouat*

<sup>53</sup> For example, *Snodgrass v Hammington*, CA

<sup>54</sup> *Attorney-General v Gilbert* [2002] 2 NZLR 342

statutes are making to the exclusion of damages in this context (see below).

## Employment Contracts

### *Common Law*

Claims based on employment contracts are dealt with differently to claims for breaches of commercial contracts.

In *Attorney-General v Gilbert*,<sup>55</sup> the Court of Appeal said<sup>56</sup> that employers owed employees a duty to protect them from mental harm, even where this harm did not amount to a '*recognised psychiatric injury*.'

However, the Court said that there would be '*formidable obstacles*'<sup>57</sup> for those seeking to prove such claims, in particular, the difficulty of establishing a breach of the duty, and the link between the breach and the harm.

### *Employment Relations Act*

Compensation is available under the Employment Relations Act where an employee who successfully brings a personal grievance claim has suffered '*humiliation, loss of dignity and injury to feelings*.'<sup>58</sup>

## Fair Trading Act

Damages for stress are available under the Fair Trading Act.<sup>59</sup>

In *AMP Finance v Heaven*, the Court of Appeal specifically refrained from commenting on the unavailability of stress damages for breach of a commercial contract, saying that the present context was different, because damages were being awarded for misleading conduct under the Fair Trading Act.

The Court said, '*we can see no reason why stress damages should not be available in appropriate cases of this kind...Clearly not all cases will qualify for such an award, but it would be wrong to foreclose altogether on the possibility of such awards on the basis that the setting is commercial*.'<sup>60</sup>

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<sup>55</sup> [2002] 2 NZLR 342

<sup>56</sup> At [76]

<sup>57</sup> At [83]

<sup>58</sup> Section 123(1)(c)(i).

<sup>59</sup> *AMP Finance v Heaven* (1998) 6 NZBLC 102,414

<sup>60</sup> At pp 22-23

## New Zealand Bill of Rights Act

Compensation is available for a breach of the New Zealand Bill of Rights Act 1990.<sup>61</sup> The Court's power to award damages is discretionary, and the primary focus of an award is the affirmation of the right that has been breached. However, compensation can be awarded for mental harm arising from a breach of the act.<sup>62</sup>

Awards have also been made in cases where the plaintiff was wrongfully detained in breach of the act. It is likely that the level of the award in such cases incorporated a consideration of the mental harm caused by the detention.

## Human Rights Act

The Human Rights Act prohibits certain types of discrimination.<sup>63</sup> The Human Rights Review Tribunal has the power to award damages for breaches of Parts 1A or 2 of the act where a person suffers '*humiliation, loss of dignity and injury to feelings.*'<sup>64</sup>

## Equity

Although it is controversial in some jurisdictions, in New Zealand, common law and equitable remedies are considered concurrently, and the two areas of law have been described as '*mingled or merged.*'<sup>65</sup>

Technical issues about whether common law damages compensate and equitable damages restore losses have been dismissed as a '*difference without a distinction.*'<sup>66</sup>

Damages are available for mental harm not amounting to a diagnosable condition where a claim in equity is established, a common instance being a breach of fiduciary duty. In *Clark Boyce v Mouat*,<sup>67</sup> Cooke P said that damages could be awarded in equity to compensate the plaintiff for stress. Damages were also said to be available in *X v Attorney-General*.<sup>68</sup>

Consistent with common law principles, such damages could be reduced for contributory negligence or a failure to mitigate.

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<sup>61</sup> *Simpson v Attorney-General* [1994] 3 NZLR 667

<sup>62</sup> *Ibid*

<sup>63</sup> Section 21

<sup>64</sup> Section 92M(1)(c)

<sup>65</sup> *Day v Mead* [1990] 3 NZLR 299 per Cooke P

<sup>66</sup> *Ibid.*

<sup>67</sup> [1992] 2 NZLR 559

<sup>68</sup> [1997] 2 NZLR 623

There is scope for debate about whether the exclusion applying to damages for mental harm for breach of a commercial contract would apply in an equity claim.

### Reparations under the Sentencing Act

When sentencing an offender, the Court has the power to order the payment of reparations where a person has suffered emotional harm, or loss or damage consequential on emotional harm.<sup>69</sup>

An order can be made in favour of a victim and their immediate family, which includes any member of the family who is in a close relationship with the victim. This includes the spouse or partner, child, sibling, parent and grand-parents.<sup>70</sup>

In *Pierson v NZFSA*,<sup>71</sup> the High Court said that, '*the threshold for what constitutes emotional harm is, in fact, relatively low.*'<sup>72</sup>

In *Big Tuff Pallets Ltd v Department of Labour*,<sup>73</sup> the High Court said that, '*fixing an award for emotional harm is an intuitive exercise; its quantification defies finite calculation.*'<sup>74</sup>

Section 38(2) of the Sentencing Act states:

A sentence of reparation does not affect any right that the person who suffered the harm, loss, or damage has to recover by civil proceedings any damages in excess of the amount recovered under the sentence.

### A SUMMARY OF THE PRINCIPLES

Table A summarises the availability of claims. The term 'nervous shock' is used to describe medically diagnosable conditions, and 'emotional harm' for harm that is not medically diagnosable.

In summary:

1. There is a distinction between mental harm that is diagnosable as a medical condition and that which is not.
2. ACC cover is available for diagnosable mental harm resulting from injury by accident, certain crimes, and work-related injury.

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<sup>69</sup> Sentencing Act, section 32(1)(b) and (c)

<sup>70</sup> Section 4

<sup>71</sup> High Court, Gisborne, 1 May 2009

<sup>72</sup> At para [84].

<sup>73</sup> High Court, Auckland, 5 February 2009

<sup>74</sup> At para [19]

3. Compensation is available in tort when the condition is medically diagnosable and not precluded by ACC.
4. Stress damages are not available for breach of a commercial contract. However, there are exceptions for:
  - a. Contracts in which pleasure is the object.
  - b. Contracts between professional and laypeople
  - c. Employment contracts.
  - d. Contracts affecting personal, social and family interests.
  - e. Contracts in which the breach results in property damage.
5. Stress damages are available in equity.
6. Stress damages are available for breach of the Fair Trading Act.
7. Stress damages are available under statute for breaches of privacy and human rights.
8. Emotional harm reparations can be ordered under the Sentencing Act.

## QUANTUM OF PAYMENT

### Principles

Table B sets out examples of cases in which awards have been made.

The courts are generally conservative with awards of damages for mental harm.

In *Bloxham v Robinson*, Thomas J said, 'Awards [for mental distress] have been modest, and the Courts keep reiterating the need for such moderation.'

In *Andrews v Parceline Express*<sup>75</sup> Tipping J said:

Firm restraint must be kept on the quantum of awards in this area. While the type of damage for which the compensation is awarded is real, a sense of proportion must be maintained. That is so both in relation to common law damages of the present kind and in relation to damages awarded under the

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<sup>75</sup> [1994] 2 ERNZ 385

Employment Contracts Act for such things as humiliation, loss of dignity and injury to feelings.<sup>76</sup>

There are no damages available for stress relating to the litigation, except in a defamation claim where aggravated damages may be awarded if the defendant has defended the claim in a way that exacerbates the original defamatory conduct.

### **Damages in Tort**

As table B shows, distress damages in tort range between \$10,000 and \$25,000.

In *Clark Boyce*, the Court of Appeal described an award of \$25,000 for the plaintiff who was distressed about the possibility of losing her house as being 'on the high side.'

The award of \$50,000 for each plaintiff in *Heslop v Cousins*<sup>77</sup> may be exceptional. The Court noted there was a 'prolonged impact' on the plaintiffs' health, which was corroborated by medical evidence. The Court said that this, '*distinguishes this case from most other cases.*'<sup>78</sup>

### **Contract**

A similar range applies for awards in contract. The comment made by the Court of Appeal in *Clark Boyce* is also applicable, because that claim was made in contract and tort.

### **Breach of Fair Trading Act**

The few awards under the Fair Trading Act have been somewhat higher, with awards of up to \$45,000.

### **Compensation under Employment Relations Act**

The Department of Labour publishes bi-annual reports summarising awards for distress and humiliation under section 123(1)(c)(i) of the Employment Relations Act.<sup>79</sup>

These reports demonstrate that most awards are less than \$10,000. A few awards exceed \$10,000, and some are over \$15,000.

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<sup>76</sup> At 397.

<sup>77</sup> [2007] 3 NZLR 679

<sup>78</sup> At 716

<sup>79</sup> Available at [www.ers.dol.govt.nz](http://www.ers.dol.govt.nz)

## Reparations under the Sentencing Act

There are a number of High Court cases in which reparations awards for emotional harm have been addressed. Some of these are listed in Table B.

The area of most potential for larger awards is workplace and motor vehicle accidents where the victim can suffer serious physical injury. Also, reparations orders in cases of intentional crimes may be less likely where the offender has no capacity to pay.

The most authoritative decision on the quantum of emotional harm reparations awards in prosecutions under the Health and Safety in Employment Act is the decision of a full bench of the High Court in *Department of Labour v Hanham & Philp & others*.<sup>80</sup> In one of the three cases under appeal, Black Reef Mine Limited, the District Court judge had ordered reparations for 'severe' emotional harm to the wife and four children of the deceased in the total sum of \$50,000. This was increased by the High Court to a total for all five family members of \$75,000. The reparations order was apportioned between defendants.

The cases in Table B show that the High Court is conservative in awards for reparations for emotional harm. However, there are some District Court cases in which the judge has awarded sums for emotional harm reparations that are not conservative. For example, in *Department of Labour v LCG Limited*,<sup>81</sup> the District court awarded emotional harm reparations of \$70,000 where a victim who fell into a recycling baler had both legs amputated.

In *Big Tuff Pallets v Department of Labour*,<sup>82</sup> the victim's injuries consisted of the amputation of three fingers. Harrison J noted that, '*awards for emotional harm in excess of \$40,000 are rare in the District Court, and are normally reserved for cases of death or severe physical injury.*'<sup>83</sup>

## SOME DIFFICULTIES

In *van Soest*, Thomas J said that, '*the law relating to compensation for mental injury is arbitrary and illogical. It is also inexplicably restrictive.*'

In that case, Justice Thomas, who was speaking in the minority, was dealing with a case in tort. Similar inconsistencies arise in contract in relation to the rule against awarding distress damages in commercial

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<sup>80</sup> (2008) 6 ELRNZ 79

<sup>81</sup> District Court, New Plymouth, 11 March 2009

<sup>82</sup> High Court, Auckland, 5 February 2009

<sup>83</sup> At para [12].

contracts which is being eroded by the common law exceptions to the rule, and by statute.

However, perhaps the most obvious are of potential inconsistency and unfairness relates to the Court's ability to make awards for reparations under the Sentencing Act.

### Reparations under the Sentencing Act

In *Davies v Police*,<sup>84</sup> the Supreme Court said that, '*reparation may not amount to full compensation and may not always be appropriate. But it enables speedy and inexpensive relief, additional to other remedies.*'<sup>85</sup> The Court also said, '*in many cases the sentence of reparation will make it unnecessary for the victim to bring civil proceedings or make application for statutory remedy.*'<sup>86</sup>

It seems that the Court's power to award reparations is therefore designed to cut across and even circumvent the civil processes that would usually be available for the recovery of compensation for mental harm.

The risk with any relief that is '*speedy and inexpensive*' is that it is more prone to unfairness than more measured (and therefore costly) processes. There are a number of areas of potential unfairness in relation to reparations payments for emotional harm.

These difficulties emerge in a number of ways.

#### *Victim Focus*

As the Supreme Court noted in *Davies*,<sup>87</sup> the Sentencing Act makes reparation for victims an object of sentencing in itself. Reparation addresses one of the acts purposes in 'providing for the victims of crime. Although the Court can take into account the financial circumstances of the offender,<sup>88</sup> there is no provision in the Act that consideration should be given to principles applicable to civil damages claims. Rather, the fixing of reparations is, as the High Court said in *Big Tuff Pallets*, '*intuitive.*'

#### *What is Emotional Harm?*

It is clear that the type of mental harm contemplated in the Sentencing Act is harm that does not amount to a medically

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<sup>84</sup> [2009] 3 NZLR 189

<sup>85</sup> At [11]

<sup>86</sup> At [8]

<sup>87</sup> At [8]

<sup>88</sup> Sentencing Act, section 35

diagnosable illness. It is even possible that it is harm which would not otherwise be available in a civil context, because the threshold is low.

*Proof*

If a claim for mental harm was being made in a civil context, the Court would require some proof of the harm. This might come from the plaintiff and other witnesses, all of whom would be subject to cross-examination.

In a sentencing context, the only evidence comes in the Victim Impact Statement and any report commissioned by the Court. Often these consist of bare assertions, unsupported by any corroborating evidence.

Defence counsel will usually be reluctant to require the victim for cross-examination on this issue, as to do so would negate any advantage derived from pleading guilty and sparing the victim the unpleasantness of attending court.

In a victim-focused sentencing context, the Court's sympathies may well be with the victim and, even though a plaintiff in a civil claim is not entitled to aggravated damages just because a defendant defended a claim, the cross-examination of a victim to test assertions of emotional harm may result in a punitive increase in the level of emotional harm reparations.

It is also noteworthy that in many of the cases where reparations orders have been made, there is no real explanation of the nature and extent of the harm that a victim suffers. It appears that Courts will almost take judicial notice that a person will suffer emotional harm as a result of certain injures.

The absence of the cross-examination and discovery processes that are available in a civil claim also mean that defence counsel is unlikely to explore causation of the harm, or the possibility of any pre-existing mental conditions that might be contributing to the victim's emotional harm.

In *Davies*, the Supreme Court said, '*where there is a substantial dispute as to causation, or as to measure of loss, the court may take the view that compensation is not appropriately dealt with through the summary criminal procedure for ordering reparation.*'<sup>89</sup> In practice, however, the District Court is willing to make reparations orders, even where such uncertainty exists.

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<sup>89</sup> At para [10]

### *Quantum Uncertain*

As table B shows, it is very difficult to advise a client about the potential quantum of an order for emotional harm. It seems that District Court judges are willing to make reparations orders that exceed the conservative figures awarded in the High Court.

### *Contribution by Victim*

In a civil claim, a defendant would be entitled to seek a reduction in the level of damages payable if the plaintiff has contributed to their loss. There is no equivalent principle in a sentencing context.

### *Contribution by Others*

In a civil claim, a defendant is entitled to seek contribution or indemnity from others. Under the Sentencing Act, the Court is entitled to apportion reparations between defendants. However, if one defendant who would be liable in a civil context is not charged, or is found not guilty, a liable defendant would not receive the benefit of this apportionment.

### *Mitigation*

In a civil claim, a defendant can argue that a plaintiff has failed to mitigate their loss. In *Big Tuff Pallets*, the defendant had offered the victim a job in a specially created position, which would have had the effect of limited his financial loss. Harrison J noted that the victim was under an obligation to mitigate his loss, however, there was no reduction in the sum claimed for financial loss.

## **PLEADINGS AND SUBMISSIONS**

Against this background, I will attempt to offer some suggestions about how to approach these issues.

### **Civil Claims**

#### *What is the nature of the harm?*

Take detailed instructions about the harm that has been suffered. I suggest asking the client to prepare a written statement of this. It is much more compelling to have the client give their account in their own words.

*Is the harm a diagnosable medical condition?*

Decide whether the harm is medically diagnosable condition. This decision will affect the type of claim that is pursued, and whether a claim can be pursued.

Identify whether or not the client has seen a general practitioner, and if so whether they have been referred to a psychiatrist.

If they have not seen a psychiatrist, consider obtaining an expert's report.

*Use other witnesses*

Supplement the client's evidence with statements from other witnesses. If the client has seen a medical practitioner, obtain a report from the practitioner. If there are independent third parties who can give objective evidence of the mental state of the client, take statements. Take statements from friends and family members.

*Briefs of Evidence*

Use the witnesses' own words in briefs of evidence.

*Pleadings*

Do not confine the pleadings to bland statements, such as 'the plaintiff has suffered considerable distress.' Use particulars.

*Quantum*

Be realistic in the sum claimed for damages. Base the sum upon authority. Ensure that it is within the range of previous decisions, or, if it higher, that you have good reason for this.

**Sentencing**

*Attempt to resolve the issue before sentencing*

The best way to remove the uncertainty of the judge making a ruling is by trying to resolve the quantum of emotional harm reparations before sentencing. One way of doing this is through a restorative justice process.

*Make an offer*

If it is not possible to resolve the issue, make an offer. The court must take this into account.<sup>90</sup> Ensure that the offer is supported by authority.

*Point out the difficulties*

I have described some of the inconsistencies between civil claims and sentencing. These could be pointed out to the court. If the difficulties are so serious that your client might be prejudiced by the imposition of reparations in a 'summary' context, you could refer to the Supreme Court's statements in *Davies*<sup>91</sup> that compensation should be dealt with in a civil context, not at sentencing. (However, as reparations are taken into account when fixing a fine, it may increase the fine if there is no reparations order.)

## CONCLUSION

Courts are willing to make orders for damages and reparations for mental harm. The Court has the power to do so at common law and via statute, although the awards for such harm tend to be conservative.

When taking instructions about the losses a client sustains, it is worthwhile to remain alert to the possibility of such claims.

When asserting such a claim, it should be treated with the same level of detail and effort as any other claim. Cogent evidence should be gathered and the claim should be supported by authority.

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<sup>90</sup> Sentencing Act, section 10

<sup>91</sup> At paragraph [10]