NOTE: DISTRICT COURT ORDER IN [2020] NZACC 132, PURSUANT TO S 160(1)(B) OF THE ACCIDENT COMPENSATION ACT 2001, PROHIBITING PUBLICATION OF TN'S NAME AND ANY PARTICULARS THAT MIGHT IDENTIFY TN REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA395/2022
[2023] NZCA 664

BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
AND	TN Respondent

Hearing: 23 March 2023

Court: Brown, Lang and Palmer JJ

Counsel: L A O'Gorman KC and S M Bisley for Appellant
B H Woodhouse and T Mijatov for Respondent

Judgment: 20 December 2023 at 10.30 am

JUDGMENT OF THE COURT

A The answer to the question of law set out at [17] of the judgment is "no".

B The appeal is dismissed.

C There is no order as to costs.

REASONS OF THE COURT

(Given by Brown J)

Table of Contents

	Para No
Introduction	[1]
Relevant background	[5]
The High Court judgment	[10]
The issue on appeal	[17]
Legislative history	[22]
Accident Compensation Act 1972	[22]
Accident Compensation Act 1982	[25]
Accident Rehabilitation and Compensation Insurance Act 1992	[27]
Accident Insurance Act 1998	[37]
Accident Compensation Act 2001	[45]
Parties' submissions	[54]
ACC's case	[55]
TN's case	[57]
Relevant principles	[59]
The 1993 amendment	[63]
The 1995 amendment	[69]
The 1998 Act (and the 2001 Act)	[72]
Text	[72]
(a) The first limb of ACC's argument	[73]
(b) The second limb of ACC's argument	[78]
The purpose and effect of the 1992 Act	[96]
Purpose	[110]
Context	[118]
Conclusion	[125]
Result	[147]

Introduction

[1] For most of her childhood and adolescence a girl, TN, is the victim of severe and protracted sexual abuse. She is instructed to "shut up" about the abuse. She is not permitted to visit medical professionals unaccompanied. She falls pregnant following a rape in her home. Many years later, as an adult, she is diagnosed as having mental injury resulting from her abuse as a child.[1]

[2] Because she is not in employment when she eventually seeks treatment for her mental injury, TN is not entitled to standard earnings-related compensation.[2] So she

[1] At age 35 she lays criminal charges against her grandfather and uncle, both of whom are incarcerated for the crimes they committed against her: *TN v Accident Compensation Corporation* [2020] NZACC 132 [District Court judgment] at [4].

[2] Under ss 100 and 103 and cl 32 of sch 1 of the Accident Compensation Act 2001.

seeks compensation on the basis that she has been unable to work as a consequence of the impact of the sexual abuse during her childhood. The Accident Compensation Act 2001 (the 2001 Act) provides for weekly compensation for loss of potential earnings (LOPE)[3] to be available, in certain circumstances, to a "potential earner", namely a person who prior to turning 18 years suffers a personal injury, if that injury removes their capacity to work later in life.[4]

[3] In reliance on s 36(1) of the 2001 Act, which states that the date on which a person suffers mental injury caused by certain criminal acts is the date on which the person "first receives treatment for that mental injury as that mental injury", the appellant (ACC) maintains that TN is not entitled to such compensation because she did not receive treatment for her mental injury prior to her 18th birthday.

[4] In the High Court, Cooke J rejected ACC's contention and allowed TN's appeal from a District Court judgment in ACC's favour.[5] The Judge considered that the correct construction of the relevant provisions was that, in the context of the availability of LOPE compensation to a potential earner, the date on which the potential earner "suffered" mental injury was the date of the sexual abuse which gave rise to the mental injury.[6] ACC appeals, contending that the decision of the District Court should be reinstated.

Relevant background

[5] The facts are not in contest and can be shortly stated. A joint statement of agreed issues and facts filed in the District Court recorded:

> **AGREED FACTS**
>
> 2. The appellant was the victim of multiple Schedule 3 offences at the hands of family members, as well as an associate of the family. The abuse was severe and protracted, lasting from ages 2 to 15.

---

3 Which is typically less generous than standard earnings-related compensation.

4 Accident Compensation Act 2001, s 6(1) definition of "potential earner", para (a), ss 100(1)(c) and 105, and sch 1 cl 47.

5 *TN v Accident Compensation Corporation* [2022] NZHC 1280 [High Court judgment]; and District Court judgment, above n 1.

6 High Court judgment, above n 5, at [62].

3. At age 35 [TN] laid criminal charges against her grandfather and uncle. Both men were incarcerated for the crimes they committed against her.

4. [TN]'s evidence is that she disclosed that abuse to her parents as early as age 7, but she was told to "*shut up*" about the abuse and was not allowed to discuss it with others. [TN]'s family did not allow her to visit medical professionals unaccompanied.

5. At age 16, [TN] ran away from home. She was brought back by a man who her father then invited to stay in her room for several months. On one occasion, the man forced [TN] to have sex with his younger brother. [TN]'s evidence is that she conceived from that rape.

6. [TN]'s evidence is that she would have disclosed the abuse or the mental injuries resulting from the abuse when she visited her GP in relation to her pregnancy when she was 17 years old. She states, in her affidavit:

   i. Had her mother not been present at that consultation, she would have discussed her abuse with the GP as "*it was causing [her] distress*."

   ii. She was feeling deeply depressed, sleeping all day and rarely leaving the house.

   iii. Her pregnancy "was a reminder of the abuse that had occurred, as it was a product of the abuse".

7. The Corporation [ACC] has granted [TN] cover for mental injuries of post-traumatic stress disorder and major depressive disorder resulting from her abuse.

8. [TN] first sought treatment for her mental injuries as those injuries on 12 September 2008.

[6] Although ACC acknowledged cover for TN's mental injuries, it considered it was unable to provide compensation for loss of potential earnings because TN was over the age of 18, and had not been engaged in continuous study that began before the age of 18, at the time she lodged her claim.

[7] ACC's stance was confirmed on review under pt 5 of the 2001 Act. The reviewer saw no reason not to accept TN's evidence that she would have disclosed the abuse sooner were it not for the actions of her mother. However he concluded that TN did not meet the necessary criteria for two reasons:

> Firstly, the plain wording of section 36(1) is unambiguous, and requires that date of injury is based on when the person actually receive[s] treatment. Where the legislation states, "The date on which the person first receives

> treatment", that is a prescriptive requirement that there must be treatment delivered on the relevant date. It is not enough for a person potentially to have been able to receive treatment, as would be the case for [TN].
>
> A second significant difficulty would present for [TN], and that is that section 36(1) also requires the date of injury to be linked to a date when treatment is received, "For that mental injury as that mental injury." That means it is not enough simply to disclose abuse, there must be treatment delivered for the mental injury arising from that abuse. That would require a finding that a mental injury effect was present at the time, which would require medical evidence, even of a retrospective nature, directed to the particular circumstances likely to have been present at the time of the attendance, which is unavailable in this case.

While having considerable sympathy for TN's position, the reviewer concluded that the statutory provisions were clear and that TN did not meet the definition of a potential earner. The reviewer found support in the District Court's decision in *BRM v Accident Compensation Corporation*.[7]

[8] On appeal, Judge C J McGuire identified the issue for determination to be whether ACC was correct to decline TN compensation for LOPE because she did not seek treatment for the mental injury caused by the covered injury prior to turning 18 years old.[8] The Judge accepted that it was beyond question that TN had suffered grievous sexual abuse from ages two to 15 and that the effect of the abuse had been profound.[9] However he dismissed the appeal, reasoning as follows:

> [38] As [TN]'s counsel points out, it might be regarded as anomalous that the Limitation Act provides for exceptions to its "long stop" provision where childhood sexual abuse is concerned and that this does not sit well alongside the traditional interpretation of s 36(1) that would preclude a claimant from coming within the definition of a potential earner in s 6 of the [2001] Act because on a strict interpretation of s 36(1) she did not receive treatment for the arising mental injury as a mental injury before she turned 18.
>
> [39] Courts are well used to applying the legislation in a generous and unniggardly way, mindful of the ethos of the [2001] Act and its revisions since 1972.
>
> [40] What seems plain from the legislation is that the draftsman took deliberate care in the drafting of s 36(1). It is notable that s 36(1) stands in

---

7 *BRM v Accident Compensation Corporation* DC Wellington 224/2004, 6 August 2004. As discussed at [106]–[107] below, the appellant in that case sought treatment for childhood sexual abuse when he was aged 35. The District Court held that the appellant was not a "potential earner" because, applying s 36 of the Accident Compensation Act 2001, the date of injury was the date on which treatment was sought.

8 District Court judgment, above n 1, at [37].

9 At [36].

> contrast to s 36(2) which ties mental injury to the date on which the causative physical injuries were suffered.
>
> [41] To my mind that is frankly a conclusive indication that what the legislature did was premediated and specific.
>
> [42] The [2001] Act was never going to be nor intended to be the ultimate panacea for all cases where either physical or mental injury had occurred.

We infer the Judge was fortified in his conclusion by the High Court judgment in *Murray v Accident Compensation Corporation*, concerning several applications for special leave to appeal to that Court.[10]

[9] TN's application for leave to appeal was granted by Judge G M Harrison on 10 November 2021.[11] Identifying the fundamental issue as being whether TN was a potential earner,[12] the Judge framed the question of law in these terms:[13]

> Whether the date on which the appellant is deemed to have suffered mental injury is the date on which she might reasonably have been able to receive treatment for that mental injury.

He recognised that the final form of the question might have to await formulation in the course of the appeal.[14]

The High Court judgment

[10] Because in our analysis below we focus on the reasoning in the judgment, at this point we simply note the key findings.

[11] Addressing the form of the question of law the Judge stated:[15]

> [10] … The specific question for which leave was granted was not as formulated by the appellant but I do not think anything turns on that as the ultimate question of law in issue is clear — it is whether the deemed date of injury in s 36 applies to the definition of "potential earner" in s 6.

[12] Having reviewed several provisions of the 2001 Act, the Judge stated:

---

10 *Murray v Accident Compensation Corporation* [2013] NZHC 2967.
11 *TN v Accident Compensation Corporation* [2021] NZACC 180.
12 At [30].
13 At [31].
14 At [32].
15 High Court judgment, above n 5.

> [17] So the use of the defined term in s 105 ("potential earner") itself uses a defined term ("suffered", and accordingly "suffers") which in turn cross-references s 36 which deems the date of the injury to be when a person first seeks treatment for that injury, which here was when TN was an adult. This path through the provisions is complex, but the text of the provisions leads down that path.

[13] The Judge then discussed the earlier decisions in *BRM* and *Murray*.[16] His evaluation (later in the judgment) of the implications of those judgments was as follows:[17]

> [52] … But *Murray* was only a decision declining leave, and Kós J recorded that full argument had not been advanced. Moreover it is clear that the purpose of the deeming provision as revealed by the legislative history was not brought to the Court's attention, or to Judge Ongley's attention in *BRM*. For that reason both decisions are per incuriam. In my view, therefore, *Murray* is not binding. But it still has significant persuasive effect.

[14] The Judge traced the legislative history of the current s 36(1), concluding that the purpose of the introduction of its predecessor in 1992 was to remedy the injustice for sexual abuse victims that would have arisen from their being deprived of cover by the operation of the 12-month limitation period, as initially provided for in s 63(2) of the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act).[18]

[15] The concluding section of the judgment commenced in this way:

> [55] The factors referred to by the Corporation in combination suggest there are powerful reasons not to accept [TN]'s interpretation. The text alone appears clear. The Corporation has applied this interpretation for many years. It has been approved of by the Courts. And Parliament has not changed the approach in the later Acts, including the current Act. Indeed it has enacted provisions in the current Act which less clearly give effect to the original purpose of the deeming provision and which support the alternative view of the purpose for which Mr Bisley contends. The text of the provisions, and the scheme of the legislation now can be said to support the Corporation's approach.
>
> [56] But there are also strong countervailing considerations. Compensation for the loss of the ability to work is a central aspect of ACC cover. Parliament's purpose in establishing potential earner compensation under s 105 contemplates the kind of adverse consequences that can arise for childhood sexual abuse victims, and its original purpose in deeming the date of injury to be when treatment is first sought was to ensure full cover was available for such victims.

---

16 *BRM v ACC*, above n 7; and *Murray v ACC*, above n 10.
17 High Court judgment, above n 5 (footnote omitted).
18 At [36] and [62].

[16] The Judge considered that TN's interpretation was correct, reasoning that Parliament's clearly remedial initial purpose remained the purpose of the provision notwithstanding its re-enactment in the 2001 Act with different wording.[19]

The issue on appeal

[17] The Judge granted ACC leave to appeal on the following question agreed by the parties:[20]

> Did the High Court err in law in finding (at [62] of the Judgment) that the date on which a claimant "*suffered*" a personal injury for the purposes of the definition of "*potential earner*" in section 6 of the Accident Compensation Act 2001 (Act) is the actual date of the claimant's injury, rather than the deemed date in section 36(1) of the Act?

[18] The answer to that question involves a contest between, on the one hand, the remedial purpose discerned by Cooke J from the legislative history, and on the other hand what ACC contends is the plain meaning of the legislation, as reflected in the observation of Kós J in *Murray* (at the forefront of the submissions of Ms O'Gorman KC for ACC), namely:[21]

> [69] The outcomes under the present Act are unquestionably anomalous. It was not suggested otherwise before me. No Judge could frame common law duties in so inconsistent and erratic a fashion. Nor could insurers achieve such outcomes in an informed market. **But cover under the Act is the product of careful and crystalline drafting by legislators.** The meaning and effect of the statutory words in issue is quite clear.

[19] Applying that approach to s 36(1), ACC contends that, although TN's injuries were caused by childhood sexual abuse, her injuries are deemed to have been "suffered" when she was an adult because it was not until then that she first received treatment for her mental injury. Consequently she was not eligible for LOPE compensation. ACC submits that in concluding that the word "suffered" in the definition of "potential earner" has its natural meaning rather than the deemed meaning in s 36(1), Cooke J usurped Parliament's role by displacing Parliament's express words.

---

19 At [62].

20 *TN v Accident Compensation Corporation* HC Wellington CIV-2021-485-736, 20 July 2022 (Minute of Cooke J).

21 *Murray v ACC*, above n 10 (emphasis added). We recite the complete paragraph rather than simply the penultimate sentence, upon which Ms O'Gorman relied.

[20] With her submissions Ms O'Gorman provided a detailed schedule which tracked the evolution of material parts of the five accident compensation statutes, spanning 1972 to 2001. Before turning to address counsel's submissions it will be useful first to note certain material aspects of that evolution. Such an approach is consistent with that taken by this Court in *Campbell v Accident Compensation Corporation*:[22]

> [5] The statutory interpretation issues thrown up by the case are made particularly difficult by numerous amendments to the scheme introduced by the 1992 Act. In that context, we think it appropriate to adopt a chronological approach to the evolution of the relevant statutory provisions and their application to the situations of the two appellants. Although this is not an entirely orthodox way to structure an appellate judgment, it has the advantage of providing the clearest insight into legislative intention and a reasonably clear answer to the issue posed by the case stated.

[21] Although there were a number of developments along the way (including amendments in 1993 and 1995), it was common ground before us that the primary focus was the change said to have been effected with the enactment of the fourth statute, the Accident Insurance Act 1998 (the 1998 Act).

Legislative history

Accident Compensation Act 1972

[22] The Accident Compensation Act 1972 (the 1972 Act) was the first formulation of a compensation scheme in response to the report of the Royal Commission to Inquire into and Report upon Workers' Compensation, recommending a system which provided compensation for all accidental injuries, irrespective of fault and regardless of cause.[23]

[23] As originally enacted, the 1972 Act did not provide a comprehensive definition of "personal injury by accident".[24] However an amendment in 1974 (the 1974 amendment) introduced the following definition:[25]

---

22 *Campbell v Accident Compensation Corporation* CA138/03, 29 March 2004.

23 AO Woodhouse, HL Bockett and GA Parsons *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) at [55] and [278]–[279].

24 "Personal injury by accident" was defined in s 2(1) of the Accident Compensation Act 1972 as "including" incapacity resulting from an occupational disease to the extent that cover extended in respect of the disease under ss 65–68 of that Act.

25 Accident Compensation Amendment Act 1974, s 2(1).

"Personal injury by accident"—

(a) Includes—

(i) The physical and mental consequences of any such injury or of the accident:

(ii) Medical, surgical, dental, or first aid misadventure:

(iii) Incapacity resulting from an occupational disease or industrial deafness to the extent that cover extends in respect of the disease or industrial deafness under sections 65 to 68 of this Act:

(iv) Actual bodily harm arising in the circumstances specified in section 105B of this Act, which section was inserted by section 6 of the Accident Compensation Amendment Act 1974:

(b) Except as provided in the last preceding paragraph, does not include—

(i) Damage to the body or mind caused by a cardio-vascular or cerebro-vascular episode unless the episode is the result of effort, strain, or stress that is abnormal, excessive, or unusual for the person suffering it, and the effort, strain, or stress arises out of and in the course of the employment of that person as an employee:

(ii) Damage to the body or mind caused exclusively by disease, infection, or the ageing process.

A new s 105B was added:

(1) For the purposes of subsection (2) of this section the expression "actual bodily harm" includes pregnancy and mental or nervous shock.

(2) Where any person suffers actual bodily harm, by any act or omission of any other person (being an act or omission that occurs in New Zealand after the commencement of this section), and it is proved to the satisfaction of the Commission that the act or omission is within the description of any of the offences specified in sections 128, 132, and 201 of the Crimes Act 1961, that bodily harm shall, for the purposes of this Act, be deemed to be personal injury by accident occurring at the time of the act or omission, and the provisions of this Act shall apply accordingly, irrespective of whether any person is charged with the offence.

(3) For the purposes of subsection (2) of this section, a person shall be deemed to have intended an act or omission within the description of any of the offences mentioned in that subsection, notwithstanding that

> by reason of age, insanity, drunkenness, or otherwise he was legally incapable of forming a criminal intent.

[24] Section 149 of the 1972 Act imposed a limitation period for making claims for compensation of 12 months from the date of the accident causing the injury or (in the case of death) after the date of death.[26] However the failure to make a claim within time was not a bar to the claim if ACC was of the opinion that it had not been prejudiced in the determination of the case by the failure, whether in the making of inquiries or otherwise, or that the failure was occasioned by mistake of fact, or by mistake of any matter of law other than the provisions of the section, or by any other reasonable cause.[27] The 1972 Act made provision for LOPE compensation in certain cases.[28]

Accident Compensation Act 1982

[25] The Accident Compensation Act 1982 (the 1982 Act) contained an essentially similar limitation period provision to s 149 of the 1972 Act.[29] It also provided for LOPE compensation in certain cases, including where such loss was a result of incapacity due to personal injury by accident which occurred in New Zealand to a person who had not turned 16 years of age.[30]

[26] The definition of "personal injury by accident" contained an amended sub-para (a)(iv), specifying that the term includes:[31]

> (iv) Actual bodily harm (including pregnancy and mental or nervous shock) arising by any act or omission of any other person which is within the description of any of the offences specified in sections 128, 132, and 201 of the Crimes Act 1961, irrespective of whether or not any person is charged with the offence and notwithstanding that the offender was legally incapable of forming a criminal intent:

---

26 Accident Compensation Act 1972, s 149(1).
27 Section 149(2).
28 Section 118.
29 Accident Compensation Act 1982, s 98.
30 Section 63.
31 Section 2(1).

Accident Rehabilitation and Compensation Insurance Act 1992

[27] The Accident Rehabilitation and Compensation Insurance Bill 1991 (the 1991 Bill) introduced a definition of "personal injury" which included:[32]

> **3 Definition of "personal injury"—**
>
> (1) For the purposes of this Act "personal injury" means—
>
> (a) The physical injuries to a person; and
>
> (b) Any mental disorder suffered by that person which is an outcome of those physical injuries to that person; and
>
> (c) Any mental disorder suffered by a person which is an outcome of any act of any other person performed on, with, or in relation to the first person (but not on, with, or in relation to any other person) which is within the description of any offence listed in the First Schedule to this Act.
>
> (2) For the purposes of subsection (1)(c) of this section, it is irrelevant that—
>
> (a) No person can be or has been charged with or convicted of the offence; or
>
> (b) The alleged offender is incapable of forming criminal intent.
>
> …

[28] The first schedule contained a much expanded[33] list of sexual offences under the Crimes Act 1961[34] and one offence under the Mental Health Act 1969.[35] Clause 7(2)(d) of the 1991 Bill, relating to the extent of available cover, stated that cover extended to personal injury which resulted from the act of another person as defined in cl 3(1)(c).

[29] Clause 65, relating to claims for cover, stipulated a limitation period for filing claims in the following terms:

---

32 Accident Rehabilitation and Compensation Insurance Bill 1991 (103-1). Clause 3, with some alterations, became s 4 of the Accident Rehabilitation and Compensation Insurance Act 1992.

33 Compared to the provisions referenced in the previous Acts, which were limited to ss 128, 132 and 201 of the Crimes Act 1961.

34 Sections 128, 129, 129A, 130, 131, 132, 133, 134, 135, 138, 139, 140, 140A, 141, 142, 142A and 201.

35 Section 113.

> (2) No claimant shall be entitled to any payment in respect of personal injury unless that claimant has lodged a claim for cover within 12 months after the date on which the personal injury is suffered.

It did not repeat the proviso in the earlier legislation that ACC could only rely on the limitation period if a failure to meet it had caused ACC prejudice and there was no reasonable cause for the failure.

[30] The implications of the more exacting limitation period for those who suffered mental injury as a consequence of sexual abuse was a focus during the first reading where the Deputy Leader of the Opposition, the Rt Hon Helen Clark, said:[36]

> I want to deal with issues that are of particular importance to women. The issue that was of grave concern to many women's organisations was the Minister's initial announcement that the victims of rape and sexual abuse would not be covered by the legislation. However, under clause 3 compensation may be paid for any mental disorder suffered by a person, which is the outcome of any act of any other person performed on, with, or in relation to the first person, which is within the description of any offence listed in the first schedule.
>
> The first schedule to the Act lists such crimes as rape and other sexual crimes. I welcome the inclusion of that but I have to say that I am enormously disturbed by clause 65, which provides that no claimant for personal injury shall be entitled to any payment for that injury unless the claim is lodged within 12 months after the date on which the personal injury was suffered. Am I to read that provision as stating that unless a victim of sexual abuse lodges a claim for personal injury within 12 months of that abuse occurring then compensation for counselling expenses will not be paid? That is a question I should like the answer to, and if the answer is that the Bill intends that no compensation shall be paid unless the claim is lodged within 12 months I must say that I think that is atrocious.

[31] Following reference back from the Labour Committee, at the second reading of the Bill on 19 March 1992 the Minister of Labour, the Rt Hon W F Birch, said:[37]

> When I introduced the Bill I stated that officials should continue to work on three major issues. The select committee was asked to give more detailed consideration to those matters, which were as follows. First was medical [mis]adventure; second, compensation for loss of potential earning capacity for people temporarily out of the work-force; and, third, dependency definitions. I also announced that the requirement that a claim be made within 1 year of an accident would be reconsidered by the select committee to allow special consideration for those who have suffered sexual abuse.
>
> I will now address those matters in more detail. …

---

36 (19 November 1991) 520 NZPD 5397.

37 (19 March 1992) 522 NZPD 7075–7076.

…

> Sexual abuse has been dealt with as promised. Total cover is now provided for. The new clause 65(2A) meets the undertaking that I gave at the introduction of the Bill. It provides that the personal injury shall be deemed to have been suffered on the date on which the person first receives treatment for that personal injury.

[32] The new cl 65(2A)[38] ultimately became s 63(3) of the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act). Section 63 relevantly read:

> (2) No claimant shall be entitled to any payment in respect of personal injury unless that claimant has lodged a claim for cover within 12 months after the date on which the personal injury is suffered.
>
> (3) For the purposes of this section, where a claim involves conduct of a kind described in section 8(3) of this Act, the personal injury shall be deemed to have been suffered on the date on which the person first received treatment for that personal injury as that personal injury, being treatment of a kind for which the Corporation is required or permitted to make payments, irrespective of whether or not it makes any payment in the particular case.

[33] In the 1992 Act, the issue of cover for mental injury the result of criminal conduct was addressed in two provisions. The definition of personal injury in s 4 stated:

> (1) For the purposes of this Act, "personal injury" means the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person, and has the extended meaning assigned to it by section 8(3) of this Act.
>
> …

Then s 8 relating to cover included:

> (2) Cover under this Act shall extend to personal injury which—
>
> (a) Is caused by an accident to the person concerned; or
>
> (b) Is caused by gradual process, disease, or infection arising out of and in the course of employment as defined in section 7 or section 11 of this Act; or
>
> (c) Is medical misadventure as defined in section 5 of this Act; or
>
> (d) Is a consequence of treatment for personal injury.

---

[38] Accident Rehabilitation and Compensation Insurance Bill 1992 (103-2).

(3) Cover under this Act shall also extend to personal injury which is mental or nervous shock suffered by a person as an outcome of any act of any other person performed on, with, or in relation to the first person (but not on, with, or in relation to any other person) which is within the description of any offence listed in the First Schedule to this Act.

(4) For the purposes of subsection (3) of this section, it is irrelevant that—

(a) No person can be or has been charged with or convicted of the offence; or

(b) The alleged offender is incapable of forming criminal intent.

[34] Finally, we note that the former s 63 of the 1982 Act relating to LOPE compensation was recast as s 46 of the 1992 Act:

46 Compensation for loss of potential earning capacity payable to person in respect of incapacity resulting from personal injury suffered before attaining 18 years of age or while studying—

(1) Compensation for loss of potential earning capacity shall be payable in respect of a person who—

(a) Suffered personal injury before attaining the age of 18 years or while engaged in full-time study or training which has been continuous since before the person attained the age of 18 years; and

(b) Has attained the age of 18 years and is incapacitated by that personal injury; and

(c) Has a capacity for work of less than 85 percent as determined in accordance with the scales prescribed by regulations made under this Act; and

(d) Does not have weekly earnings in excess of $245 or, in the case of a person who has not attained the age of 20 years, does not have weekly earnings in excess of $196; and

(e) Is not engaged in full-time study or training; and

(f) Has been incapacitated for more than 6 months.

[35] During the life of the 1992 Act, there were two amendments upon which reliance was placed in ACC's submissions.[39] First, on 1 July 1993, s 63(3) was

39 See below at [55].

amended to extend to medical misadventure.[40] A new s 8(3) was also substituted, with that amendment deemed to have come into force on 1 July 1992:[41]

> (3) Cover under this Act shall also extend to personal injury that is mental or nervous shock suffered by a person as an outcome of any act of any other person performed on, with, or in relation to the first person (but not on, with, or in relation to any other person), being—
>
> (a) An act that is within the description of any offence listed in the First Schedule to this Act; and
>
> (b) An act that was performed in New Zealand, or outside New Zealand where the person on, with, or in relation to whom the act was performed was ordinarily resident in New Zealand when the act was actually performed (even if the person is ordinarily resident in New Zealand on the date on which the personal injury is deemed to have been suffered).

[36] Secondly, on 8 March 1995 s 63 was amended by the addition of a new s 63(2A):[42]

> (2A) A failure to lodge a claim in respect of personal injury within the time specified in subsection (2) of this section shall not be a bar to payment in respect of that personal injury if the Corporation is of the opinion that the Corporation has not been prejudiced in determining cover or payments in respect of that personal injury by the failure to lodge the claim within the time specified.

That second amendment was also deemed to have come into force on 1 July 1992.[43]

Accident Insurance Act 1998

[37] Although ACC places some reliance on the two amendments to the 1992 Act, as earlier noted[44] the primary focus of ACC's argument was the introduction of the 1998 Act.

[38] Both the form of the definition of "personal injury" and its placement within the statute were changed. The definition was moved to s 29 of the 1998 Act, within

---

40 Accident Rehabilitation and Compensation Insurance Amendment Act (No 2) 1993, s 26 (discussed at [63]–[68] below).
41 Section 5(2) and (3).
42 Accident Rehabilitation and Compensation Insurance Amendment Act 1995, s 3(1) (discussed at [69]–[70] below).
43 Section 3(2).
44 At [21] above.

pt 3 (headed "Cover"), and included "mental injury suffered by an insured in the circumstances described in s 40".[45]

[39] Provision of cover for mental injury caused by certain criminal acts was addressed in a discrete s 40, which relevantly provided:

> **40 Cover for mental injury caused by certain criminal acts—**
>
> (1) An insured has cover for a personal injury that is a mental injury if—
>
> (a) He or she suffers the mental injury inside or outside New Zealand on or after 1 July 1999; and
>
> (b) The mental injury is caused by an act performed by another person; and
>
> (c) The act is of a kind described in subsection (2).
>
> (2) Subsection (1)(c) applies to an act that—
>
> (a) Is performed on, with, or in relation to the insured; and
>
> (b) Is performed—
>
> (i) In New Zealand; or
>
> (ii) Outside New Zealand on, with, or in relation to an insured who is ordinarily resident in New Zealand when the act is performed; and
>
> (c) Is within the description of an offence listed in Schedule 3.
>
> (3) For the purposes of this section, it is irrelevant whether or not the insured is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury. (The date is described in section 44.)
>
> (4) For the purposes of this section, it is irrelevant that—
>
> (a) No person can be, or has been, charged with or convicted of the offence; or
>
> (b) The alleged offender is incapable of forming criminal intent.

Schedule 3 comprised the list of provisions of the Crimes Act 1961 in the first schedule to the 1992 Act, together with some additions.

---

45 Accident Insurance Act 1998, s 29(1)(d).

[40] The previous deeming provision in s 63(3) was replaced by a new standalone s 44, which stated:[46]

> **44 Date on which insured suffers mental injury caused by certain criminal acts—**
>
> (1) The date on which the insured suffers mental injury in the circumstances described in section 40 is the date on which the insured first receives treatment for that mental injury as that mental injury.
>
> (2) In subsection (1), "treatment" means treatment of a type that the insurer is liable to provide under Part 1 of Schedule 1, whether or not the insurer provides any treatment in the particular case.

[41] A definition of "suffers" was included in the interpretation section:[47]

> "Suffers" is affected in its interpretation by—
>
> (a) Section 44, when it is used in relation to mental injury suffered in the circumstances described in section 40:
>
> (b) Section 45, when it is used in relation to personal injury caused by a work-related gradual process, disease, or infection:
>
> (c) Section 46, when it is used in relation to personal injury caused by medical misadventure:

[42] The entitlement to LOPE compensation was addressed both in the body of the statute and in sch 1. Section 82(1) materially stated:

> **82 Entitlement to weekly compensation depends on insured's incapacity for employment and capacity for work—**
>
> (1) An insured who has cover and who lodges a claim for weekly compensation—
>
> (a) Is entitled to receive it for each employment for which the insurer determines the insured to be incapacitated within the meaning of section 85(2) to (5), if the insured is eligible under clause 7 of Schedule 1 for weekly compensation.
>
> (b) Is entitled to receive it if the insurer determines that the insured is incapacitated within the meaning of section 87(2) and if the insured is eligible under clause 22 of Schedule 1 for weekly compensation.
>
> (c) Is not entitled to receive it—

---

[46] Similar provisions specifying the date on which an injury was suffered were s 45 (date on which an insured suffers personal injury caused by a work-related gradual process, disease or infection) and s 46 (date on which an insured suffers personal injury caused by medical misadventure).

[47] Section 13(1) definition of "suffers".

(i) For any employment that the insurer determines, under section 85, the insured is able to engage in; or

(ii) If the insurer determines that the insured is not incapacitated within the meaning of section 87(2); or

(iii) If the insured is not eligible under clause 7 or clause 22 of Schedule 1 for weekly compensation.

Clause 22 of sch 1 stated:

> **22 Insurer to pay weekly compensation to insured entitled to it under section 82(1)(b)—**
>
> (1) The insurer is liable to pay weekly compensation for loss of potential earning capacity to an insured who—
>
> (a) Has an incapacity resulting from a personal injury; and
>
> (b) Was a potential earner immediately before his or her incapacity commenced.
>
> (2) The weekly compensation is payable when the insured has been incapacitated for at least 6 months.
>
> …

[43] The eligibility requirements were separated out into a new definition of "potential earner":[48]

> "Potential earner" means an insured who—
>
> (a) Either—
>
> (i) Suffered personal injury before turning 18 years; or
>
> (ii) Suffered personal injury while engaged in full-time study or training that began before the insured turned 18 years and continued uninterrupted until after the insured turned 18 years; and
>
> (b) Is 18 years or over; and
>
> (c) Is incapacitated by the personal injury; and
>
> (d) Is not engaged in full-time study or training; and
>
> (e) If aged—
>
> (i) Under 20 years, does not have weekly earnings in excess of $216.47; or

48 Section 13(1) definition of "potential earner".

(ii) 20 years or over, does not have weekly earnings in excess of $280.00:

[44] Finally, the limitation period for making claims was reframed as follows:[49]

> **61 Time for making claim**
>
> (1) The insured must lodge the claim with the insurer within the time limit specified in this section.
>
> (2) An insurer must not decline a claim lodged after the time limit specified in this section on the ground that the claim was lodged late, unless the claim's lateness prejudices the insurer in its ability to make decisions.
>
> …

Accident Compensation Act 2001

[45] The structure of the 2001 Act is materially the same as the 1998 Act but there were minor changes which were the subject of comment in submissions.

[46] The definition of personal injury in s 26(1) of the 2001 Act includes mental injury suffered by a person in the circumstances described in s 21.[50] Section 21, which is essentially the same[51] as s 40 of the 1998 Act,[52] states:

> **21 Cover for mental injury caused by certain criminal acts**
>
> (1) A person has cover for a personal injury that is a mental injury if—
>
> (a) he or she suffers the mental injury inside or outside New Zealand on or after 1 April 2002; and
>
> (b) the mental injury is caused by an act performed by another person; and
>
> (c) the act is of a kind described in subsection (2).
>
> (2) Subsection (1)(c) applies to an act that—
>
> (a) is performed on, with, or in relation to the person; and
>
> (b) is performed—

[49] The time limits were (i) within 12 months after the date on which the insured suffered the personal injury in respect of claims under s 54(a) or (b), and (ii) within the time limit specified by the insurer for a claim under s 54(c): see s 61(3) and (4), respectively.

[50] Accident Compensation Act 2001, s 26(1)(d).

[51] The bracketed words in the former s 40(3) are replaced by the new s 21(4).

[52] Schedule 3 in both Acts was also essentially the same.

(i) in New Zealand; or

(ii) outside New Zealand on, with, or in relation to a person who is ordinarily resident in New Zealand when the act is performed; and

(c) is within the description of an offence listed in Schedule 3.

(3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.

(4) Section 36 describes how the date referred to in subsection (3) is determined.

(5) For the purposes of this section, it is irrelevant that—

(a) no person can be, or has been, charged with or convicted of the offence; or

(b) the alleged offender is incapable of forming criminal intent.

[47] Section 36, which incorporated the content of the former s 44, states:

36 Date on which person is to be regarded as suffering mental injury

(1) The date on which a person suffers mental injury in the circumstances described in section 21 or 21B is the date on which the person first receives treatment for that mental injury as that mental injury.

(2) The date on which a person suffers mental injury because of physical injuries suffered by the person is the date on which the physical injuries are suffered.

(3) In subsection (1), **treatment** means treatment of a type that the person is entitled to under this Act or a former Act.

(4) This section does not apply for the purposes of clause 55 of Schedule 1.

[48] The definition of "suffers" was amended to include reference to cl 55 of sch 1:[53]

suffers is affected in its interpretation by—

(a) section 36 and clause 55 of Schedule 1, when it is used in relation to mental injury:

(b) section 37 and clause 55 of Schedule 1, when it is used in relation to personal injury caused by a work-related gradual process, disease, or infection:

[53] Accident Compensation Act 2001, s 6(1) definition of "suffers".

(c) section 38 and clause 55 of Schedule 1, when it is used in relation to treatment injury or personal injury caused by medical misadventure

[49] Clause 55 of sch 1 places transitional limits on eligibility for lump sum entitlements, stating that it overrides s 36.[54] So far as s 21(1)(c) is concerned, cl 55(1) states:

> (1) A person who suffers mental injury caused by an act to which section 21(1)(c) applies is not entitled to lump sum compensation for permanent impairment under this schedule if the act last occurred before 1 April 2002.

[50] Although the 2001 Act adopted a similar drafting technique in relation to potential earners' entitlements, the provisions were rearranged. The definition of "potential earner", located in s 6(1), was contracted:

> **potential earner** means a claimant who either—
>
> (a) suffered personal injury before turning 18 years; or
>
> (b) suffered personal injury while engaged in full-time study or training that began before the claimant turned 18 years and continued uninterrupted until after the claimant turned 18 years

The definitions in s 6 are expressed to apply "unless the context otherwise requires".[55]

[51] Section 100 relevantly provides:

> **100 Entitlement to weekly compensation depends on claimant's incapacity for employment and vocational independence**
>
> (1) A claimant who has cover and who lodges a claim for weekly compensation—
>
> …
>
> (d) is entitled to receive it if the Corporation determines that the claimant is incapacitated within the meaning of section 105(2) and if the claimant is eligible under clause 47 of Schedule 1 for weekly compensation.
>
> …

54 Schedule 1 cl 55(5).
55 Section 6(1).

[52] Clause 47(1) of sch 1 states:

> **47 Corporation to pay weekly compensation for loss of potential earnings capacity**
>
> (1) The Corporation is liable to pay weekly compensation for loss of potential earning capacity to a claimant who—
>
> (a) has an incapacity resulting from a personal injury; and
>
> (b) was a potential earner immediately before his or her incapacity commenced; and
>
> (c) is 18 years or over; and
>
> (d) is not engaged in full-time study or training; and
>
> (e) does not have earnings in excess of the amount of minimum weekly earnings determined under clause 42(3).
>
> …

[53] The general limitation period for making a claim in s 53 of the 2001 Act essentially echoes the former s 61 of the 1998 Act.

Parties' submissions

[54] Because the following discussion engages in detail with counsel's submissions, at this point we provide only an outline of their contentions.

ACC's case

[55] Ms O'Gorman acknowledged that s 63(3) of the 1992 Act (the precursor to s 36(1) of the 2001 Act) was introduced "in part" to ameliorate the effect of the newly introduced 12-month limitation period for bringing claims. However Ms O'Gorman submitted that the legislative history post-1992 was relevant when ascertaining Parliament's purpose. The submissions stated:[56]

> 9.9 Even taking Mr Birch's comment [about total cover] at face value, the legislative history post-1992 sheds further light on Parliament's purpose. To explain:
>
> (a) In ACC's submission, in cases involving historical sexual abuse it will often be difficult to identify the point at which the injury was in fact suffered (e.g. a latent vulnerability to

[56] Footnote omitted.

mental injury that develops later following a trigger). Certainty is important to cover, but still more important to assessing the entitlements. Section 36(1) provides certainty around that date.

(b) The legislative history shows that, whatever Parliament's intention when the 1992 Act was passed, the purpose of s 63(3) *became* the clear date that it provides for the assessment of cover and entitlements. That is apparent from the facts that:

(i) On 1 July 1993, section 63(3) was amended to apply to medical misadventure, as well as to mental injuries caused by sexual offending. The concerns discussed in Parliament and select committee do not, logically, relate to medical misadventure.

(ii) On 8 March 1995, the Act was amended to provide that a claim could not be declined on the basis that it was out of time unless the fact that the claim was lodged late prejudiced ACC's ability to make decisions about it. That provision has been retained ever since. It is section 53(2) of the present Act.

(iii) When s 36(1) was enacted, the words "[f]or the purposes of this section" were omitted, showing Parliament's intention that it was intended to apply generally rather than specifically to the restriction on when claims could be brought (which had previously been in s 63(3)).

Taken together, those three amendments were said to demonstrate that "from 1993 onwards" Parliament intended the primary purpose of s 63(3) (and its descendants) to be to provide certainty as to the date of injury.

[56] On the interpretation issue ACC submitted that s 36(1) of the 2001 Act, which stated that the date on which a person suffered mental injury caused by various criminal acts was the date of first treatment for the mental injury, admitted of no exceptions. It followed that sexually abused young persons (putative potential earners) who did not seek treatment before they turned 18 were, by definition, not potential earners. Hence they were not eligible for LOPE compensation. The Judge was said to have erred in finding otherwise.

TN's case

[57] For TN it was submitted that the statutory construction adopted by the High Court accords better with the text, purpose and context of the 2001 Act, its legislative history, and the interpretive presumptions of generosity in the construction of the ACC scheme. There was no evidence of a policy or intention either to prevent access to LOPE compensation for claimants in the position of TN or that at some point in time the deeming provision should operate to their disadvantage.

[58] Yet the interpretation advocated by ACC requiring childhood sexual abuse victims to report the mental injury suffered as a result of the abuse prior to turning 18 years old in order to qualify for LOPE compensation imposed a requirement that was almost invariably not met by claimants. The point was made that the Australian Royal Commission into Institutional Responses to Child Sexual Abuse reported that it took the childhood sexual abuse victims interviewed by the Commission an average of 23.9 years to disclose their abuse (from the date of abuse).[57] Attention was also drawn to a report of the New Zealand Royal Commission of Inquiry into Abuse in Care, which noted that only 1.25 per cent of those who had lodged claims with ACC since 2010 for injuries resulting from sexual abuse had received weekly compensation.[58]

Relevant principles

[59] The meaning of the relevant provisions of the 2001 Act is to be determined by consideration of the three indicia in s 10(1) of the Legislation Act 2019:

> **10 How to ascertain meaning of legislation**
>
> (1) The meaning of legislation must be ascertained from its text and in light of its purpose and its context.

[60] That provision, which for the first time explicitly recognised the role of context,[59] post-dated all the statutory variants addressed in this appeal. However

---

57 Peter McClellan and others *Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse* (2017) vol 4 at 9, 16 and 30.

58 Coral Shaw and others *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānui* (Royal Commission of Inquiry into Abuse in Care, 2021) vol 1 at 238.

59 Compare s 5(1) of the Interpretation Act 1999 and s 5 of the Acts Interpretation Act 1924.

context has always had a role to play in the interpretation of legislation. In *Commerce Commission v Fonterra Co-operative Group Ltd* the Supreme Court described the requirement to have regard to both the immediate and the general legislative context as part of the determination of purpose.[60] Earlier, in *Port Nelson Ltd v Commerce Commission*, Cooke P observed that the principle that plain words should be given their plain meaning has to be applied with due regard to the context in which they appear, the other provisions of the particular statute and the history of the relevant statutory provisions.[61]

[61] An unusual feature of this case is that, in the search for guidance on purpose and context, it is necessary to travel back to the third and fourth manifestations of the legislation. For while there may be some difference in view about the precise implications of the change, it is clear that it occurred not in 2001 but via the 1998 Act. Ms O'Gorman agreed with the proposition that the 1998 Act was "sort of the fault-line". The changes made then were later reflected in the equivalent provisions in the 2001 Act. As she observed:

> Yes, I think everyone treats the 1998 Act as equivalent to 2001 because substantively for our purposes they are the same.

[62] Applying the approach mandated in s 10 of the Legislation Act, we turn to address the issue whether, if the 1992 Act had the meaning which Cooke J found it to have, that meaning nevertheless changed in the manner contended by ACC via:

(a) the 1993 amendment; or

(b) the 1995 amendment; or

(c) the 1998 Act.

---

60 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

61 *Port Nelson Ltd v Commerce Commission* [1994] 3 NZLR 435 (CA) at 437.

The 1993 amendment

[63] As introduced, the Accident Rehabilitation and Compensation Insurance Amendment (No 3) Bill 1993 (the 1993 Bill) did not include any amendment to s 63(3).[62] The proposed insertion of the phrase "medical misadventure or" was recommended by the Select Committee as cl 22A.[63] The Select Committee did not provide an explanation for this addition. The Labour Committee's "Report for 1991–1993, Second Session, Forty-Third Parliament" recorded that the Committee's report on the Bill simply stated that the Committee had considered the Bill and recommended that "it be allowed to proceed with the amendments shown in the attached copy".[64] The addition of cl 22A does not appear to have been discussed in the House of Representatives (there being no mention of it in Hansard).[65]

[64] Section 63(3) was not the only new provision in the 1992 Act addressing the date of occurrence of personal injury. In the course of the second reading of the 1991 Bill,[66] the Minister of Labour said:[67]

> Part I, other than the medical misadventure changes referred to above, has not been changed to any great degree, except that the new clause 5A deals with those people who suffer exposure to occupational conditions that may not manifest as a disease until many years have passed. The clause provides that the date on which personal injury arose was the date on which the person first received treatment from a registered health professional for that personal injury.

That new cl 5A became s 7 of the 1992 Act.

[65] The Minister earlier described the medical misadventure changes in this way:[68]

> I will now address those matters in more detail. The new clause 4 has been inserted and defines medical misadventure as consisting of two elements: first, medical error; and, second, medical mishap. The first of those includes

---

62 Accident Rehabilitation and Compensation Insurance Amendment (No 3) Bill 1993 (241-1).

63 Accident Rehabilitation and Compensation Insurance Amendment (No 3) Bill 1993 (241-2). Clause 22A became s 26 of the Accident Rehabilitation and Compensation Insurance Amendment Act (No 2) 1993.

64 Labour Committee *Report for 1991–1993, Second Session, Forty-Third Parliament* (1994) at 19.

65 See (20 April 1993) 534 NZPD 14694–14710; (15 and 17 June 1993) 535 NZPD 15803–15810 and 15897–15912; and (22 June 1993) 536 NZPD 16229–16241.

66 Accident Rehabilitation and Compensation Insurance Bill 1991 (103-2).

67 (19 March 1992) 522 NZPD 7077. This comment immediately followed the final paragraph quoted in [31] above.

68 (19 March 1992) 522 NZPD 7075.

> negligence by registered health professionals, and the second is the unforeseen consequences of properly given treatment.
>
> Medical mishap is measured on a test of rarity and severity, which have been refined throughout the select committee process. The test of rarity is 1:100. The test of severity is either 14 days' hospitalisation, 28 days' significant disability, or receipt of the independence allowance. It is expected that the definition as now drafted will maintain the level of protection currently afforded to victims of medical error and medical mishap, and ensures that the boundaries of the scheme cannot be readily expanded by the courts. In that way the scheme will retain its financial integrity whilst retaining an appropriate level of cover for claimants.

[66] It would appear that the redrafting process did not focus on the fact that the consequences of medical error or medical mishap may not become apparent for some time. The Select Committee's insertion of cl 22A into the 1993 Bill would seem to have been prompted by the subsequent realisation of that oversight.

[67] ACC's submission was that the concerns discussed in Parliament, when debating the 1991 Bill, concerning mental injuries caused by sexual offending did not logically relate to medical misadventure.[69] That may be so. However the fact is that the different subject matter was addressed by Parliament at different points in time. Given the mode of resolution already provided in s 63(3), we do not consider it surprising that, having subsequently recognised the anomaly in the case of medical misadventure, Parliament chose s 63(3) as a convenient location in which to remedy the medical misadventure oversight.

[68] We are unable to accept the proposition that by the 1993 addition to s 63(3) the purpose and hence the meaning of the entire provision was somehow changed.

The 1995 amendment

[69] Clause 3 of the 1995 Bill was enacted without change as s 3 of the Accident Rehabilitation and Compensation Insurance Amendment Act 1995. The explanatory note to the Bill recorded:[70]

---

69 See [55] above.

70 Accident Rehabilitation and Compensation Insurance Amendment Bill 1995 (72-1) (explanatory note) at i.

> *Clause 3*, which is deemed to have come into force on 1 July 1992, authorises the Corporation to accept, in certain circumstances, claims that are not lodged within 12 months after the date on which personal injury is suffered.

The Bill was passed under urgency,[71] which seems to have been necessary because there was an element of the Bill which needed to be passed outside of normal trading hours.[72] There was no Select Committee report. In introducing the Bill the Responsible Minister, the Hon Bruce Cliffe, referred to the then current version of s 63 of the 1992 Act in this way:[73]

> There is no provision for any discretion to be exercised. This has resulted in hardship for some people. Consequently there have been excessive numbers of reviews and appeals … The provision causes major hardship when the circumstances are clearly deserving but the claim was not filed within the required period.

[70] The retrospective nature of this amendment was noted in this Court's judgment in *Campbell v Accident Compensation Corporation*:[74]

> [37] For reasons already indicated, the appellants lost all entitlements to compensation when they did not lodge claims by 1 October 1992; this given the combined effect of ss 63(2) and 135(3) of the 1992 Act as first enacted. With the retrospective amendment of s 63 in 1995, the appellants' ability to obtain compensation was reinstated.

[71] The precise manner in which this amendment was said to bear on the meaning of s 63(3) is unclear. If ACC's proposition was that s 63(2A) rendered s 63(3) otiose, then it is noteworthy that Parliament did not dispense with the latter provision. The amendment had potential relevance for all claims. We do not read it as removing the special limitation provision for medical misadventure and sexual abuse claims. Rather the consequence of the amendment was that, as with the time limit for all other types of claims, ACC now had the discretion to allow an extension of the limitation period for the types of claims addressed in s 63(3).

---

71 It had its first, second and third reading all on 7 March 1995: see (7 March 1995) 546 NZPD 5869, 5886 and 5890, respectively.
72 As it affected ACC's power to borrow funds.
73 (7 March 1995) 546 NZPD 5871.
74 *Campbell v Accident Compensation Corporation*, above n 22.

The 1998 Act (and the 2001 Act)

Text

[72] As earlier noted, it was ACC's case that the key change occurred with the enactment of the 1998 Act and that in due course that change was reflected in the 2001 Act. ACC's argument as formulated in its written submissions focused on the text of the 2001 Act, and in particular s 36(1) (we refer to this as the first limb). In the course of oral argument, Ms O'Gorman developed the theme of the relocation within the 1998 Act of corresponding provisions from the 1992 Act (the second limb). To minimise confusion, we address the first limb by reference to the section numbers of the 2001 Act. Then, when we come to the comparative analysis of the earlier statutes, we will refer to the provisions of those statutes.

(a) The first limb of ACC's argument

[73] ACC's written submissions described s 36(1) of the 2001 Act as central to the appeal. Emphasising the absence of any limitation on or qualification of the express words of s 36(1), it was submitted that "[t]hat definition" applies to all circumstances in which an injury covered by s 21 is suffered. Reliance was also placed on the fact that in s 21(4) there is a specific cross-reference to s 36.

[74] The point was then made that s 36 (along with ss 37 and 38) are "referenced" in s 6(1), which relevantly states:

> **suffers** is affected in its interpretation by—
>
> (a) section 36 and clause 55 of Schedule 1, when it is used in relation to mental injury:
>
> …

ACC submitted that s 6 does not provide a definition of "suffers". Instead it operates as a signpost to direct the reader to the "stipulative definitions" contained in ss 36–38.

[75] ACC submitted that the point of which an injury is suffered is relevant to three matters, one of which is the assessment of certain entitlements, in particular to weekly

compensation.[75] This submission was developed by reference to s 100(1) of the 2001 Act, which provides that a claimant who has cover is entitled to receive weekly compensation for loss of actual or potential earnings capacity in four situations, summarised by ACC as follows:[76]

> (a) Section 100(1)(a): the claimant was an "earner" at the time they "suffered" the personal injury, and they are incapacitated within the meaning of s 103(2) — in short, they cannot continue with their employment. …
>
> (b) Section 100(1)(b): the claimant is self-employed, has purchased weekly compensation from ACC under section 209, has "suffered" their injury within the agreement's cover period, and is incapacitated within the meaning of s 103(2). …
>
> (c) Section 100(1)(c): an employee who has purchased cover for weekly compensation under s 224, "suffered" incapacity within the period of that cover, and is incapacitated within the meaning of s 105(2): that is, they are unable to engage in work for which they are suited by reason of their experience and skills. …
>
> (d) Section 100(1)(d): the claimant was a "potential earner" immediately before their incapacity commenced and is incapacitated within the meaning of s 105(2). …

[76] "Potential earner" is defined to mean a claimant who suffered personal injury before turning 18 years, or who suffered personal injury while engaged in full-time study or training that began before they turned 18 years and continued uninterrupted until after they turned 18 years.[77] The consequence of ACC's interpretation of s 36(1) is that a young person who suffers sexual abuse but does not seek treatment for the resultant mental injury before turning 18 years, in circumstances where the full-time study or training exception does not apply, can never be a potential earner. As Ms O'Gorman acknowledged, unless the young person is an earner, "LOPE is not available and never will be". ACC's view was captured in the following exchange:

> **BROWN J**
>
> Isn't the anomaly the fact that the definition of potential earner doesn't limit itself to personal injury by accident but on its scope extends to mental injury under s 21? Because the reality is, how many instances are there likely to be of people suffering, young women suffering sexual abuse who will seek

---

75 The other two matters were (1) the determination of which accident compensation statute applies to the personal injury in a temporal sense and whether the statute applies to an event outside New Zealand and (2) the time within which a claim in respect of that injury must be filed.

76 Footnote omitted.

77 Accident Compensation Act 2001, s 6(1) definition of "potential earner".

> treatment for mental health before they are 18? You take a Gloriavale example or in this case where TN was prevented from seeking medical help.
>
> **MS O'GORMAN KC**
>
> Well there are two answers to that. They may well have employment and then have earnings-related compensation at the time the incapacity arises. The second answer is there are social welfare entitlements that sit separately that do apply and respond to people in these situations and did respond, but in a lesser amount than the compensation that is available under the accident compensation regime. One of the themes of the debate is whether the function of the legislation is social welfare or something more in the nature of insurance but it is not a situation where there isn't social welfare. It is a question of whether it qualifies within the line drawing that is made in the accident compensation provision.

[77] We accept that the meaning advocated by ACC is an available interpretation of the effect of the relevant provisions.

(b) The second limb of ACC's argument

[78] We turn now to consider the proposition developed in ACC's oral argument by reference to Ms O'Gorman's statutory evolution schedule.[78] As a precursor to a comparison of the 1992 and 1998 Acts, it will be convenient against the backdrop of the legislative history[79] to summarise developments culminating in the 1992 Act.

[79] There was no practical delineation in the 1974 amendment to the 1972 Act between physical and mental injury: in particular, s 105B provided that actual bodily harm (for the purpose of cover for injuries caused by certain criminal acts) included "pregnancy and mental or nervous shock".[80] That remained the position under the 1982 Act.[81] In *Accident Compensation Corporation v E* this Court received a submission from ACC that in the context of the 1982 Act, mental consequences or disturbances which were not accompanied by physical injury to the complainant did not fall within the expression "personal injury by accident".[82] This Court responded:[83]

---

78 See [20] above.

79 Set out at [22]–[53] above.

80 See also Accident Compensation Act 1972, s 2(1) definition of "personal injury by accident", para (a)(i), which provided that this term included both the physical and mental consequences of an injury or accident.

81 Accident Compensation Act 1982, s 2(1) definition of "personal injury by accident", para (a)(i) and (iv).

82 *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA).

83 At 433–434.

> We see no other construction than that mental consequences of the accident are included within the term personal injury by accident whether or not there is also physical injury. There is no reason not to construe the word "or" disjunctively.
>
> It would be a strange situation if cover under the Act for a person suffering serious mental consequences caused by an accident were to depend upon whether or not some physical injury however slight also is sustained. Further it would create major difficulties should it be necessary in particular cases to separate physical and mental injuries.

[80] In July 1991 the Minister of Labour, Mr Birch, published the National Government's statement of policy entitled *Accident Compensation: A Fairer Scheme*.[84] It drew upon recommendations of a working party which was established in December 1990 to examine the existing scheme and recommend changes. Addressing the issue of stress and mental injury, the Government advised that it supported the working party's recommendation that physical injury should be present before mental injury was covered, a requirement seen to be necessary to avoid stress claims[85] entering "through the back door".[86] On the subject of compensation for criminal injuries it stated:[87]

> The Government has considered whether criminal injuries should remain covered by the accident compensation scheme. Most victims of criminal injury suffer a physical injury and as such would be eligible for compensation under the proposed scheme.
>
> There is a small group of criminal injury victims who suffer mental injury but no physical injury. These are usually the victims of sexual crimes. The Government is very aware of their needs and of the need to achieve equitable compensation for them.

[81] One of the issues identified as requiring resolution was whether the mental consequences of criminal assault, where there has been no physical injury, should be compensated from the scheme. The response in the 1991 Bill on that issue was in the affirmative.[88] In speaking at the first reading, Mr Birch commented:[89]

---

84 W F Birch *Accident Compensation: A Fairer Scheme* (30 July 1991).
85 Which were not presently covered (something the working party considered should remain unchanged) and were identified as a major cause of escalating costs for comparable overseas schemes.
86 Birch, above n 84, at 32.
87 At 32–33.
88 Accident Rehabilitation and Compensation Insurance Bill 1991 (103-1).
89 (19 November 1991) 520 NZPD 5389.

> Clause 3 includes mental disorder in circumstances where there is a commission of a crime pursuant to stated sections of the Crimes Act 1961. These are principally sexual crimes and the inclusion fulfils our commitment to cover mental injury caused by sexual abuse.

[82] However, with reference to other types of mental injury there was a retreat from the broader interpretation favoured by this Court in *ACC v E*. Paragraph (b) of the definition of personal injury in cl 3(1) of the Bill referred to "[a]ny mental disorder suffered by [a person sustaining physical injuries] which is an outcome of those physical injuries to that person". The final form was to like effect.[90] It would appear that, although the limitation period for making claims for mental injury caused by certain criminal assaults was extended by s 63(3), the period for making a claim in respect of mental injury which was the outcome of physical injury ran from the date when the physical injury was suffered.

[83] Commenting on these changes, Fiona Thwaites stated:[91]

> This broad definition [of personal injury by accident in the 1982 Act] was, however, changed in 1992 where, following increasing ill-feeling over the associated costs of the accident compensation scheme, Parliament sought to save costs by eliminating uncertainty about the boundaries of the scheme placing a fetter on judges' ability to give expansive interpretations to coverage provisions. Thus the 1992 Act defined areas of coverage in exhaustive terms, with cover for personal injury caused by an accident, by employment-related disease or infection, by medical misadventure and treatment for personal injury, and finally, for mental or nervous shock suffered by the victims of certain specified sexual offences. This change had a lasting impact on mental injury coverage, removing any possibility of mental injury being covered in stand alone situations, and thereby placing mental injuries in an inferior position to physical injuries.

[84] In view of that background, we now compare the relevant provisions of the 1992 and 1998 Acts. As Ms O'Gorman observed, this comparative legislative analysis is a daunting task. We will endeavour to assist the reader by juxtaposing the relevant provisions of the 1992 Act and 1998 Acts. As earlier noted,[92] we refer to (and where necessary substitute) the section numbers of these two statutes:

---

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

91 Fiona Thwaites "Mental Injury Claims Under the Accident Compensation Act 2001" (2012) 18 Canta LR 244 at 246–247 (footnotes omitted).

92 At [72] above.

<table>
<tr><th>1992</th><th>1998</th></tr>
<tr><td>8 Cover for personal injury occurring in New Zealand—
…
(3) Cover under this Act shall also extend to personal injury that is mental or nervous shock suffered by a person as an outcome of any act of any other person performed on, with, or in relation to the first person (but not on, with, or in relation to any other person), being—
(a) An act that is within the description of any offence listed in Schedule 1 to this Act; and
(b) An act that was performed in New Zealand, or outside New Zealand where the person on, with, or in relation to whom the act was performed was ordinarily resident in New Zealand when the act was actually performed (even if the person is ordinarily resident in New Zealand on the date on which the personal injury is deemed to have been suffered).
…</td><td>40 Cover for mental injury caused by certain criminal acts—(1) An insured has cover for a personal injury that is a mental injury if—
(a) He or she suffers the mental injury inside or outside New Zealand on or after 1 July 1999; and
(b) The mental injury is caused by an act performed by another person; and
(c) The act is of a kind described in subsection (2).
(2) Subsection (1)(c) applies to an act that—
(a) Is performed on, with, or in relation to the insured; and
(b) Is performed—
(i) In New Zealand; or
(ii) Outside New Zealand on, with, or in relation to an insured who is ordinarily resident in New Zealand when the act is performed; and
(c) Is within the description of an offence listed in Schedule 3.
(3) For the purposes of this section, it is irrelevant whether or not the insured is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury. (The date is described in section 44.)
…</td></tr>
<tr><td>8 Cover for personal injury occurring in New Zealand—(1) This Act shall apply in respect of personal injury occurring in New Zealand on or after the 1st day of July 1992 in respect of which there is cover under this Act.
(2) Cover under this Act shall extend to personal injury which—
…
(c) Is medical misadventure as defined in section 5 of this Act; or;
(d) Is a consequence of treatment for personal injury covered by this Act.
…</td><td>39 Cover for personal injury suffered in New Zealand (except mental injury caused by certain criminal acts)—
(1) An insured has cover for a personal injury if—
(a) He or she suffers the personal injury in New Zealand on or after 1 July 1999; and
(b) The personal injury is any of the kinds of injuries described in section 29(1)(a), (b), or (c); and
(c) The personal injury is described in any of the paragraphs in subsection (2).
(2) Subsection (1)(c) applies to—
…</td></tr>
</table>

	(b) Personal injury caused by medical misadventure suffered by the insured; or (c) Personal injury caused by treatment given to the insured for personal injury for which the insured has cover; … …
63 Claims— … (3) For the purposes of this section, where a claim involves medical misadventure or conduct of a kind described in section 8(3) of this Act, the personal injury shall be deemed to have been suffered on the date on which the person first received treatment for that personal injury as that personal injury, being treatment of a kind for which the Corporation is required or permitted to make payments either directly or under an agreement or contract or arrangement under section 29A of this Act, irrespective of whether or not it makes any payment in the particular case. …	**44 Date on which insured suffers mental injury caused by certain criminal acts—** (1) The date on which the insured suffers mental injury in the circumstances described in section 40 is the date on which the insured first receives treatment for that mental injury as that mental injury. (2) In subsection (1), "treatment" means treatment of a type that the insurer is liable to provide under Part 1 of Schedule 1, whether or not the insurer provides any treatment in the particular case. **46 Date on which insured suffers personal injury caused by medical misadventure—**(1) The date on which the insured suffers personal injury caused by medical misadventure is the date on which the insured first receives treatment for that personal injury as that personal injury. (2) In subsection (1), "treatment" means treatment of a type that the insurer is liable to provide under Part 1 of Schedule 1, whether or not the insurer provides any treatment in the particular case.

For completeness we draw attention to (but do not set out) s 7(5) of the 1992 Act and ss 39(2)(d) and 45 of the 1998 Act concerning personal injury caused by a work-related gradual process, disease or infection.

[85] Despite some differences in phraseology,[93] it can be seen that the content of the juxtaposed provisions remained materially the same. However the point which Ms O'Gorman emphasised was the relocation of those provisions within the statutory architecture. In particular, the deeming provision in s 63(3) moved from within pt 5 ("Claims for payments") of the 1992 Act to s 44 within pt 3 ("Cover") of the

[93] And the deletion of the opening phrase of s 63(3) of the 1992 Act, "[f]or the purposes of this section".

1998 Act.[94] By contrast, the 12-month time limit in s 63(2) of the 1992 Act was placed within pt 4 ("Claims for cover and statutory entitlements") of the 1998 Act at s 61.

[86] Since the significance of this relocation was not prominent in ACC's written submissions, we draw attention to the way it was expressed in Ms O'Gorman's argument:

> … there are five different Acts that are summarised in this table and I have combined [the 1972 Act] and [the 1982 Act] because those distinctions aren't so relevant as the [1992] Act compared with the [1998 Act] and [the 2001 Act]. … but on the second page of the table, in the righthand column I have a reference to s 36 [of the 2001 Act]. That is the deeming provision. That falls in a row that is under "Cover", that is Part 2 of the legislation. Then the next row is about "Claims". The most significant cell in this table is the one which is the first row of "Claims" and under the [1992] Act column, it's s 63. That is relevant because as I show in the row above, the closest equivalent to s 36 [of the 2001 Act] is 63 in the [1992] Act. Subsection (3) is the one that had the first deeming provision of this type. So what I will be exploring when we come to this table is the amendments; the discussion about that deeming provision which is the core of those debates giving rise to the comment about total cover being provided for but also the subsequent amendments within s [63] itself during the [1992] Act's application and then the changes when that concept of deeming shifted up in the [1998] Act to s [44] and then its equivalent of [s 36] in the 2001 Act. So just highlighting at the moment that Justice Cooke took significance from the debates about s 63 of the [1992] Act and the differences between that and its appearance in the form of s 36 in the [2001 Act].

[87] Subsequently, in response to a question about the cross-reference in s 40(3) of the 1998 Act (s 21(4) of the 2001 Act) to the deemed date of mental injury, Ms O'Gorman explained:[95]

> The difference is the form of the deeming provision in the [1992] Act which isn't sitting within [s 40] via that exclusive reference. It is not even within Cover. Rather it is in the procedural claims section. So it is the difference that commonly arises in terms of conflicts of law with a question whether a limitation is a matter of procedure or substance that under the [1992] Act it sits within a provision that is procedural. And from the [1992] Act onwards it sat in a substantive section of Cover and had an explicit cross-reference in [s 40] itself which is one of the gateway requirements to even have a personal injury that is covered under the legislation.

---

[94] And in due course s 36(1) was located within pt 2 ("Cover") of the 2001 Act.

[95] Although the focus of the argument was on the asserted change in 1998, there was a natural tendency to refer to equivalent provisions in the 2001 Act. To assist comprehension Ms O'Gorman's references to "s 21" have been replaced with references to s 40 of the 1998 Act.

[88] It is apparent from s 10(3) and (4) of the Legislation Act 2019 that both the organisation and the format of legislation are "indications" comprising part of the text of legislation. As *Burrows and Carter Statute Law in New Zealand* suggests, organisation "no doubt refers to the division of the Act into Parts, subparts or other groups of provisions, and the order in which the various provisions appear".[96] Indeed in *S v Attorney-General*, an authority cited by ACC, this Court took into account the position of s 63 in the 1992 Act, stating:[97]

> [27] Thirdly, it is plain that s 63, both from its position in the statute — in Part 5 relating to claims for payment — and from its own content, deals not with cover but with the claims process for someone who already has cover under Part 2. Subsection (3) is said to apply only for the purposes of s 63, not more generally. For that limited purpose, the making of a claim, it gives extra time by deeming the injury to have been suffered on the date of the first treatment.

[89] The appellant in *S v Attorney-General* had been the victim of child abuse prior to 1 April 1974. He sought damages from the Crown on the basis it was vicariously liable for the tortious acts of his foster parents. The extract above was one of three considerations which led the Court to the view that the extension in s 8(3) of the 1992 Act was not intended to apply unless the event giving rise to the mental or nervous shock occurred after the 1992 Act came into force.[98] Consequently, the Court accepted S's argument that the 1992 Act did not apply to pre-accident compensation scheme injuries and held that his common law claim for compensatory damages in respect of mental injuries caused by childhood sexual abuse was not barred.[99]

[90] While we accept in principle that the reordering or relocation of essentially similar provisions in amending legislation is capable of signalling a change in the statutory meaning, much will depend on the circumstances, including matters of context and indications of purpose.

---

96 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 344. See for example *Wyeth (NZ) Ltd v Ancare New Zealand Ltd* [2010] NZSC 46, [2010] 3 NZLR 569 at [51].

97 *S v Attorney-General* [2003] 3 NZLR 450 (CA) per Blanchard, McGrath, Anderson and Glazebrook JJ.

98 At [25] per Blanchard, McGrath, Anderson and Glazebrook JJ.

99 At [24]–[29] per Blanchard, McGrath, Anderson and Glazebrook JJ.

[91] The 1998 Act incorporated a significant change in presentation, adopting what might be viewed as a more modern structure. This included a new part providing an outline of the scheme of the Act (pt 1) and a discrete interpretation part (pt 2). That said, many of the key terms relating to injuries were actually defined in pt 3, addressing cover. The introduction of s 63(3) by the Select Committee in 1992 was something of a band-aid, which was shortly supplemented by the medical misadventure addition in 1993. We consider it unsurprising that in drafting the 1998 Act an attempt was made to group together provisions addressing the same subject matter.

[92] Consequently, in our view it would be reading too much into the organisation of the 1998 Act to attribute a change of meaning of the nature contended for by ACC in this case. The legislation is complex and has been revised on a number of occasions. As we observed in *Accident Compensation Corporation v Calver*:[100]

> [58] Precisely why s 20(2)(g) [of the 2001 Act] should have the effect of excluding cover otherwise available via s 20(2)(a) is not made clear. We infer that the reasoning involves some variant of the maxim that the explicit mention of one thing implies the exclusion of another. However in our view the presence within s 20(2) of the particular manifestation of personal injury described in (g) simply reflects the outcome of a long legislative evolution and in particular the changes in the drafting mechanisms adopted.

[93] The fact that ACC's second limb of argument fails to gain traction does not of course undermine our conclusion, in respect of the first limb, that its interpretation of the text is an available meaning. However, our perception that there is a reasonably close correlation between the corresponding provisions in the 1992 and 1998 Acts leads us to conclude that the interpretation advocated for on behalf of TN, and ultimately accepted by the Judge, is another available meaning.

[94] Where there is more than one available interpretation of a statutory provision, the observations of Lord Simon are instructive:[101]

> But it is essential to bear in mind what the court is doing. … What the court is declaring is "Parliament has used words which are capable of meaning either X or Y: although X may be the primary, natural and ordinary meaning of the

---

100 *Accident Compensation Corporation v Calver* [2021] NZCA 211, [2021] 2 NZLR 721 (footnote omitted).

101 *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 (HL) at 236.

> words, the purpose of the provision shows that the secondary sense, Y, should be given to the words." So too when X produces injustice, absurdity, anomaly or contradiction. The final task of construction is still, as always, to ascertain the meaning of what the draftsman has said, rather than to ascertain what the draftsman meant to say. But if the draftsmanship is correct these should coincide. So if the words are capable of more than one meaning it is a perfectly legitimate intermediate step in construction to choose between potential meanings by various tests (statutory, objective, anomaly, etc) which throw light on what the draftsman meant to say.

[95] In a New Zealand setting those "tests" comprise purpose and context.[102] However, as a prelude to considering those two indicia with reference to the 1998 Act, it is convenient first to comment further on the 1992 Act.

The purpose and effect of the 1992 Act

[96] The 1992 Act is significant in this case for two reasons: first because the parliamentary debates contain material pertinent to the legislative purpose of the collective relevant provisions; second because the availability of compensation for victims of childhood sexual abuse (who in 1998 would come to be known as potential earners) was relevant context for the enactment of the 1998 Act. ACC's perception of both the purpose and effect of the 1992 Act concerning LOPE compensation for such young victims was fundamental to the arguments it advanced in its challenge to the judgment.

[97] On the issue of relevance of Parliament debates, Ms O'Gorman commenced by referring to *Turners & Growers Ltd v Zespri Group Ltd (No 2)*, a case where, as counsel, she faced an argument that a court should not have regard to such material.[103] While noting that she was making no such suggestion in the present case, she nevertheless highlighted a passage from *Wellington International Airport Ltd v Air New Zealand* which emphasised that the law is to be found in the enactment itself and not in the subjective intentions of the drafter, or of the Minister or other members of the legislature.[104]

---

[102] Legislation Act 2019, s 10(1).

[103] *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365.

[104] *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 675.

[98] Ms O'Gorman then submitted:

> So I have referred to that really to support my point that the primary question is the statutory text and in those passages it is really the check-back exercise and sometimes a very important one to look at the wider legislative history in context to see whether that objectively informs Parliament's intention, but my submission will be that ultimately in this case it is not particularly fruitful or useful in terms of impacting the interpretation of potential earner and the scope of s 36 and whether [s 36] could in fact be disapplied in the circumstances that Justice Cooke ultimately found [it] could.

[99] There may be force in that observation so far as the 1998 Act is concerned. However the contrast between the 1992 and 1998 Acts is noteworthy in terms of the insight provided by the parliamentary debates.

[100] Addressing the second paragraph of the observations made by Helen Clark during the first reading of the 1991 Bill, Ms O'Gorman emphasised that the particular question asked was whether "compensation for counselling expenses [would] not be paid" unless a victim of sexual abuse lodged a claim within 12 months of that abuse.[105] In Ms O'Gorman's submission the answer to that question was correspondingly confined, namely that, as a consequence of the deeming provision, there would be both cover and a treatment entitlement (payment of counselling expenses). She emphasised that LOPE compensation was not discussed at all in the debates, observing that there was no evidence that anyone even turned their mind to that.

[101] Hence Ms O'Gorman was critical of the emphasis which the Judge placed on the response of the Minister of Labour that "[t]otal cover is now provided for."[106] The Judge said:[107]

> [31] The purpose of the deeming provision was accordingly clear. It was introduced to remedy the injustice for sexual abuse victims that would have arisen from depriving them of cover because of the limitation period. Such a limitation period involved an unreasonable restriction given the difficulties with identifying and raising childhood sexual abuse injuries at the time of the abuse. The amendment ensured that those who suffered harm from childhood sexual abuse nevertheless received compensation. In the words of the Minister, the legislation was changed so that "total cover is now provided for".

---

105 (19 November 1991) 520 NZPD 5397–5398. See [30] above.
106 (19 March 1992) 522 NZPD 7076. See [31] above.
107 High Court judgment, above n 5.

It was ACC's submission that the Minister's comment was "legally meaningless" for the reason that under the 1992 Act (and all subsequent Acts) cover is binary. Claimants either have cover or they do not. ACC maintained that the Judge's focus on the Hansard comment about "total cover" meant that the Judge misunderstood the relevance of the legislative history and so misconstrued Parliament's intention.

[102] We consider that that argument is inappropriately narrow. We agree with the submission for TN that the reference to "total cover" was not used in a technical sense but must be understood as a statement by the Minister of Labour in the debate process to assure the House that the deeming provision would not work injustice to claimants. We consider that ACC's characterisation of the Minister's response fails to recognise the attention which the issue had received.

[103] On that point the speech of Mr Ian Revell during the second reading provided useful context:[108]

> As a member of the select committee that heard submissions on the Bill, I listened to and read hundreds of submissions both in support of and against the Bill. Many sensible changes were made by the select committee — and that is the function, and, indeed, the duty of select committees.
>
> I shall turn to and outline a number of the changes made and highlight some aspects of the Bill. …
>
> Let me turn to an issue that the select committee spent a great deal of time on — to ensure that there is proper coverage for the victims of sexual abuse. Substantial submissions were made by sexual abuse support groups, and it was quite clear that the horror of sexual abuse often does not surface for many years after the event. The select committee decided that the 12-month period for a claim to be initiated will be taken from the time at which medical treatment is first received for the abuse and not from the date of the sexual abuse. That means that children who have been abused and who seek treatment years afterwards will be eligible for coverage.
>
> During the select committee hearings objection was raised to the labelling attached to mental disorder, and the committee decided to revert to a definition based on that of the 1953 Act dealing with criminal injuries compensation, and that will now extend to those who suffer physical injury or mental or nervous shock.

[104] In our view it is plain that, in context, the references to coverage were not to the technical meaning of the term.

---

108 (19 March 1992) 522 NZPD 7095.

[105] Turning then to the effect of the 1992 Act, we consider that LOPE compensation was available to individuals who were the victims of childhood sexual abuse but did not make a claim until much later in life, provided the claim was made within the extended s 63(3) period. The availability of LOPE compensation was not a new development. It had been available under both the previous statutes. Section 118 of the 1972 Act initially provided LOPE compensation to certain young persons or students who were either injured in a motor vehicle accident or had cover under the earners' scheme. The introduction, via the 1974 amendment, of the definition of "personal injury by accident"[109] resulted in LOPE compensation becoming available to a young person who suffered "[a]ctual bodily harm" from conduct which offended against three provisions of the Crimes Act.[110] The age threshold was reduced from 21 to 16 in the 1982 Act,[111] but then was extended to 18 in the 1992 Act.[112]

[106] That LOPE compensation was available to such young persons under the two statutes that preceded the 1992 Act can be seen in *BRM v Accident Compensation Corporation*, a decision relied upon by ACC in support of its interpretation of the 2001 Act.[113] The claimant there suffered sexual abuse between 1972 (when he was five to six years old) and 1983 (when he was 17) but did not claim LOPE compensation until 2002. His claim was declined because his injury was deemed to have occurred at the age of 35 and he was therefore not considered to be a potential earner as defined in s 6 of the 2001 Act.[114]

[107] A submission was made on behalf of BRM that he had a right to have his claim considered under the provisions of the legislation in force at the time of the events that caused his physical injury or mental trauma. The proposition was advanced that, where a claimant suffered a physical injury due to sexual abuse during the time that the 1972 or 1982 Acts were in force, ACC should have been required to apply the transitional provisions and assess LOPE from the date when the incapacity

---

109 Accident Compensation Amendment Act 1974, s 2(1).
110 Accident Compensation Act 1972, s 2(1) definition of "personal injury by accident", para (a)(iv). The relevant provisions of the Crimes Act 1961 were ss 128, 132 and 201.
111 Accident Compensation Act 1982, s 63.
112 Accident Rehabilitation and Compensation Insurance Act 1992, s 46.
113 *BRM v ACC*, above n 7.
114 At [3]–[10].

really began.[115] While accepting ACC's submission that s 36(2) determined the situation,[116] the Judge commented:

> [20] Incidentally, one of the practical difficulties with this approach is that if the injury occurred when the appellant was aged 17 he would not have been covered for potential earnings under the 1982 Act. Section 118 required the claimant for potential earnings compensation to be under 16 years of age or to have been engaged in certain courses of study or progress towards employment. It seems likely that if the appellant had been able to establish that he suffered personal injury, or more specifically a criminal injury under s 105B of the 1982 Act, which caused his present mental injury, he would be unable to claim potential earnings compensation.

[108] In the present case, we found ACC's stance on the availability of LOPE compensation under the 1992 Act somewhat ambiguous. To the extent that it was ACC's contention that the 1992 Act may not have made provision for LOPE compensation for victims of childhood sexual abuse, we do not agree. Given the content of the debates already discussed, it would have been a remarkable change in stance given that LOPE compensation had been available to such claimants under the 1972 and 1982 Acts.

[109] Furthermore we do not discern any material difference between the relevant provisions in the 1982 and 1992 Acts. Indeed, we consider that the reasoning in *S v Attorney-General* concerning the phraseology of s 8 of the 1992 Act lends support to the view that the date of the personal injury was when the sexual abuse actually took place:[117]

> We do not accept [the respondent's] argument that "occurring" in subs (1) refers to the consequences of the injury so that if they manifest themselves after 1 July 1992 the injury can be said to have occurred at that time. In our view, the word obviously and naturally refers to the event of the accident (the sexual abuse). If it were otherwise, claims could be brought under the [1992] Act for other forms of latent personal injury suffered long ago but first noticed on or after 1 July 1992.

Purpose

[110] Unlike the 1992 Act, there is a singular absence of any indication, through parliamentary debates or otherwise, to signal a proposed change of the nature which

---

115 At [14]–[15].
116 At [19].
117 *S v Attorney-General*, above n 97, at [25].

ACC contends was the consequence of the relocation of provisions within the 1998 Act. In response to a question whether, arising from ACC's shift in location analysis,[118] ACC was seeking to make any point about different purposes, Ms O'Gorman replied:

> … I will come to that but primarily with reference to, but in order of timing, so the discussion of the reason for the introduction of the deeming provision which arose in the context of concerns about the 12-month time limit and then there isn't parliamentary debates or background material about it shifting [in the 1998 Act]. But the significance that can be taken from a shift to a different part and dropping of some wording has been identified in [the] *S v Attorney-General* decision, and in any case if those amendments and changes which I have already made submissions on as having significance to what s 36 [s 44 of the 1998 Act] has as purpose which is separate, well at least in aspects different, from the weight it had to carry to address time limit concerns in 1992.

[111] That absence cannot adequately be explained, as that response attempted to do, by reliance upon one consideration relied on in *S v Attorney-General* when, at the same time, this Court attached significance to the fact that Parliament had not expressly addressed the significant legislative change alleged. On that issue, the Court said:[119]

> [26] Secondly, it is most unlikely that Parliament would have taken the radical step of giving cover for injuries received prior to the first accident compensation scheme, and in the process depriving people of existing common law rights, without making that very explicit, as in fact it did in s 11 which does clearly extend cover under the [1992 Act] to gradual process injuries resulting from exposure before 1 April 1974 in the course of employment. Surely if retrospective coverage was also to be given to mental or nervous shock injuries within the description in subs (3) which had occurred before the accident compensation scheme, that would have been done by a section along the lines of s 11.

[112] Allied to that second consideration was the significance of the absence of any parliamentary discussion of the issue:

> [28] Nothing in the parliamentary debates on the [1992 Act] indicates an intention to deal with pre-[accident compensation scheme] accidents or to take away vested common law rights other than for gradual process injuries. Parliament's concern in s 63 was with the time for claims for persons with cover under the Act who had not appreciated that they were injured. Other than in s 11, Parliament was not dealing with persons who had no cover because their personal injury pre-dated [the accident compensation scheme].

---

118 Following the passage quoted at [86] above.
119 *S v Attorney-General*, above n 97.

[113] Given the clarity of purpose of the 1992 Act and what we have found to be its effect, it would come as a considerable surprise to discover that only six years later Parliament would contemplate a volte-face concerning such a serious societal concern. As suggested in *S v Attorney-General*, one would expect to find discussion of the issue in the parliamentary debates. Similarly one would expect such a negative outcome for victims of childhood sexual abuse to be formulated in an express provision.

[114] ACC's written submissions identified two relevant objectives which the 2001 Act sought to achieve: first to provide cover for personal injury caused by accident, and in certain other situations; second to provide cover in a sustainable way, whereby the costs of the entitlements available under the Act could be funded into the future. There was said to be an inherent tension between providing for full cover on the one hand and ensuring that the terms of cover and entitlements are financially sustainable on the other. It was for Parliament to make the policy choices and draw lines that strike an appropriate balance.

[115] Ms O'Gorman's answer to a question about anomalous outcomes (at [76] above) concluded by referencing such line drawing. The question was then posed why the legislation even bothered to provide for LOPE compensation when, given ACC's interpretation, it was in reality somewhat pointless. In her response Ms O'Gorman stated:

> … It is just that the impact of the deeming provision which is favourable to some categories and disfavourable to others means as a matter of timing it won't be available to that particular category.

[116] We are unable to discern any indication of an intention by Parliament that in the 1998 Act the availability of LOPE compensation to individuals who had suffered sexual abuse as a young person should turn on a post-1992 line-drawing exercise influenced by the financial sustainability of the scheme. Nor can we discern a legislative intention that the availability of LOPE compensation for an incapacitated victim of childhood sexual abuse should be an accident of the "timing" of treatment.

[117] In addressing this theme, the Judge said:[120]

> [57] It is often said that ACC legislation involves line drawing exercises which create anomalies and unfairness. Such anomalies are often attributed to the intention of Parliament, as they have been here. But if it is apparent that Parliament did not intend such a result and in fact had the opposite purpose, and an interpretation consistent with its purpose is available, there would need to be some very powerful reasons not to adopt that interpretation.

We endorse the view stated in the final sentence. We have not identified nor been supplied with any such reason which would justify our declining to adopt the Judge's interpretation.

Context

[118] ACC maintained that the legislative context supported its interpretation. It submitted that the High Court's reasoning proceeded on erroneous assumptions, including that s 36(1) of the 2001 Act would "deprive" a claimant in TN's position of "full cover". The submission stated:

> It is true that if the word "suffered" is given its defined meaning in the definition of "potential earner", TN is not able to access LOPE. That does not deprive her of "full cover".

[119] In the paragraph the focus of ACC's attack, the Judge stated:[121]

> [32] Once [the purpose of the deeming provision] is understood it can be seen that interpreting the provisions so that this change *deprives* a claimant of earnings-related compensation as a potential earner because the person did not seek treatment before they were 18 years of age is not only not consistent with Parliament's purpose, but is directly contrary to it. This would be to re-introduce the very kind of time limitation that Parliament had regarded as unreasonable for those suffering mental injury from sexual abuse as a child.

[120] In our view that statement is unexceptionable. The alleged error derives from ACC's misplaced interpretation of the 1992 parliamentary debates. Similarly the criticism levelled at the Judge in the course of oral argument — that he had sought to provide "expansive entitlements" — was unjustified. The Judge did no more than conclude that the right of a victim of childhood sexual abuse to access LOPE

---

120 High Court judgment, above n 5.
121 Emphasis in original and footnote omitted.

compensation under the 1992 Act was not effectively withdrawn by the 1998 Act — that is, that the status quo prevailed.

[121] ACC also submitted that as s 36 had come before the courts twice, in 2004 and 2013, by not amending the statutory wording Parliament had endorsed the interpretation applied in those decisions.[122] Such an argument would carry more weight if the relevant judgment was final or at least a judgment of this Court.[123] Neither of the judgments in *BRM v ACC* or *Murray v ACC* are binding on this Court and it is desirable that we explain why we do not consider they carry the weight suggested by ACC.

[122] Significantly, neither judgment addressed issues of either purpose or context of the nature explored in our judgment. In addition we consider that in *BRM* the Judge was unduly influenced by the fact that s 36 of the 2001 Act, unlike its predecessor (s 44 of the 1998 Act), included a second subsection specifying that the date on which a person suffers mental injury because of physical injuries suffered by that person is the date on which the physical injuries are suffered.[124] While that had always been the position, the Judge seemed to elevate its significance in his reasoning.

[123] The judgment in *Murray v ACC* addressed a series of six applications for special leave to appeal to the High Court under s 162 of the 2001 Act.[125] One of the several questions of law under consideration was whether the definition of potential earner in s 6 of the 2001 Act was met by accepting the actual date of the sexual abuse as qualifying even though the deemed date of injury was set later by s 36(1).[126] It is noteworthy that the Judge commenced a discussion of that point by observing that counsel did not press the argument on this question as strongly as for the other questions.[127]

---

122 Seemingly a reference to *BRM v ACC*, above n 7; and *Murray v ACC*, above n 10.

123 In respect of *BRM v ACC*, above n 7, the District Court granted leave to appeal to the High Court on questions of law: *BRM v Accident Compensation Corporation* DC Wellington 250/2006, 24 October 2006. The submissions for TN stated that no High Court ruling eventuated.

124 *BRM v ACC*, above n 7, at [21].

125 *Murray v ACC*, above n 10.

126 At [14(b)].

127 At [43].

[124] We are not aware of New Zealand authority on the weight to be accorded to judgments dismissing applications for leave to appeal. However, we consider that the observations of Lord Woolf MR in *Clark v University of Lincolnshire and Humberside* are of some significance on the point:[128]

> [43] Even if [respondent counsel] had been right, when he submitted there is no decision which directly deals with the status of judgments of this court on applications for permission to appeal, it is well established that the court does not regard them as binding authorities. … The court does not therefore have to follow the decisions given on applications for permission to appeal. They are at best only of persuasive weight. The court does not encourage reference to judgments given on applications for permission. However, if a court is prepared to be referred to such judgments, it should be clearly understood that they are not binding.

Conclusion

[125] The question raised by this appeal is whether a claimant, who as a result of childhood sexual abuse suffers mental injury, has access to LOPE compensation if the first occasion on which they seek treatment for the mental injury is on or after their 18th birthday. The answer to that question involves an issue of statutory interpretation, not of a single word or a single provision of the 2001 Act, but concerning the interplay of multiple definitions ("potential earner" and "suffers"), multiple sections (ss 21, 36 and 100), and cl 47 of sch 1.

[126] There are two available meanings. Adopting a purposive approach, Cooke J answered the question in the affirmative. He considered the 2001 Act (the descendant of the 1998 Act) did not involve a change from the position which prevailed under the 1992 Act, namely that it was not a prerequisite to accessing LOPE compensation that treatment be sought for the mental injury prior to the claimant turning 18. ACC contends that that was an error. Advocating a textual interpretation it submits the answer should be in the negative. Thus LOPE compensation would only be available to an incapacitated victim of childhood sexual abuse who obtained treatment for their mental injury prior to turning 18.

---

128 *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 (CA), a decision of the England and Wales Court of Appeal, where respondent counsel sought to rely on two previous judgments of that Court on applications for leave to appeal.

[127] From the outset the accident compensation scheme made provision for the payment of LOPE compensation to young persons. However it was not until the 1974 amendment that such compensation became available to those who were the victims of certain criminal offences.[129] Having posed the question in the 1991 statement of policy whether provision should continue to be made for such victims by way of compensation under the scheme, the Government's response in the 1992 Act was in the affirmative.[130]

[128] The parliamentary debates in 1992 recognised the reality that the fact of sexual abuse often does not surface until many years after the event. An extension of time for making a claim, by the technique (in s 63(3)) of the deemed date of suffering the injury, was inserted by the Select Committee for the purpose of ensuring there was "proper coverage" for the victims of sexual abuse, and with the object of providing that children who had been abused and who sought treatment years afterwards would be eligible for coverage.[131] It was this Court's analysis in *S v Attorney-General* that the relevant injury occurred on the occasion of the sexual abuse but that, via the deeming provision, the limitation for making a claim was extended to the date of the first treatment for the mental injury.[132]

[129] For the reasons explained above, we reject ACC's contention that the Minister's reference to "total cover" was legally meaningless and that the Judge misconstrued Parliament's intention in 1992.[133] We do not consider that the various references to coverage in the debates should be read in the technical manner advanced by ACC. The effect of the 1992 Act was that LOPE compensation was available to a claimant who, long after turning 18, sought such compensation for mental injury flowing from sexual abuse suffered as a young person.

[130] As earlier noted, s 46 of the 1992 Act, which provided for LOPE compensation for persons who suffered personal injury prior to turning 18, was divided in the 1998 Act into s 82, s 87, cl 22 of the first schedule and a new definition of

---

[129] See [105] above.
[130] Birch, above n 84, at [25].
[131] See [103] above.
[132] *S v Attorney-General*, above n 97, at [25]–[27]. See [88] above.
[133] At [102]–[104] above.

"potential earner". The deemed date of mental injury was located in s 44 of the 1998 Act and was the subject of a cross-reference in s 40, which provided for cover for mental injury caused by certain criminal acts. The critical question was whether the restatement and reorganisation of the provisions was a reflection of a parliamentary purpose to reverse what we have found was the clearly stated intention (and effect) of the 1992 Act.

[131] We have been unable to discern any such legislative purpose. We consider that, in relation to those who suffered mental injury due to certain criminal acts, s 44 of the 1998 Act (and subsequently s 36(1) of the 2001 Act) maintained the extension of the availability of the compensatory scheme to the date of identification of that injury.

[132] In our view it would be a perverse outcome if the maintenance of that status quo had the consequence that the particularly vulnerable cohort of those who suffer mental injury as a result of childhood sexual abuse could only obtain LOPE compensation in the relatively unlikely event that they obtained treatment for their mental injury before their 18th birthday.[134] We find it difficult in the extreme to attribute such an intention to Parliament against the contextual background of the passage of the 1992 Act and the absence of an intervening contrary indication.

[133] For those reasons we agree with the Judge's conclusion:[135]

> [62] … Parliament's initial purpose in deeming sexual abuse mental injury to arise at a later date was clearly remedial, and intended to ensure that full cover was available to those who were victims of such abuse. That remains a purpose of the provision notwithstanding its re-enactment in 2001 was with different wording. Parliament also had a particular purpose when specifying those who could be entitled to compensation as "potential earners" when defining that term in the Act. To say that the deemed definition deprives those suffering from childhood sexual abuse from earnings related compensation as a potential earner unless they sought treatment for the injury caused before they turned 18 is in conflict with those purposes. The ordinary meaning of the words in the definition of "potential earners" includes victims such as the appellant, and it is only another defined term that is said to exclude that meaning. But a stipulated definition can be departed from if the particular context requires. Given the different context, and Parliament's purposes, I agree that the date of injury being referred to in the definition of "potential earner" is the actual date of injury, and not the deemed date prescribed by s 36.

---

134 We infer that this consequence was one of the matters which Kós J had in mind when he referred to "unquestionably anomalous" outcomes in *Murray v ACC*, above n 10, at [69]. See [18] above.

135 High Court judgment, above n 5.

> The context requires that approach if Parliament's purposes are to be given effect. …

[134] In support of its challenge to the Judge's conclusion, ACC referred to the following passage from *Bennion, Bailey and Norbury on Statutory Interpretation*:[136]

> It used to be common for definitions in an Act to be expressed to apply "unless the context otherwise requires" or "unless the contrary intention appears". This has been described as "a standard device to spare the drafter the embarrassment of having overlooked a differential usage somewhere in his text". The practice is usually unhelpful and has almost fallen into disuse.

We would first observe that that passage is a "Comment" to the preceding proposition in that section:

> [18.8] Acts sometimes provide expressly that a definition applies "unless the context otherwise requires" or "unless the contrary intention appears". This wording is unnecessary as the same result is achieved whether or not it is included.

[135] In any event, we do not consider that the sentiment expressed in the comment reflects the current approach in New Zealand.[137] In *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*, Arnold J stated:[138]

> [65] … where there is a defined meaning of a statutory term that is subject to a context qualification, strong contextual reasons will be required to justify departure from the defined meaning. The starting point for the court's consideration of context will be the immediate context provided by the language of the provision under consideration. We accept that surrounding provisions may also provide relevant context, and that it is legitimate to test the competing interpretations against the statute's purpose, against any other policy considerations reflected in the legislation and against the legislative history, where they are capable of providing assistance. While … the context must relate to the statute rather than something extraneous, we do not see the concept as otherwise constrained.

[136] In light of our discussion of "purpose" and "context", we reject the submission that there was an insufficient basis in the present case for invoking the introductory phrase in s 6 of the 2001 Act.

---

136 Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020) at [18.8] (footnote omitted).

137 See for example *IRG v Professional Conduct Committee of the Psychologists' Board* [2009] NZCA 274, [2009] NZAR 563 at [42]–[55]; and *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425 at [82] per Blanchard, McGrath and William Young JJ.

138 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212.

[137] ACC also submitted that the High Court focused on the wrong provision, contending that the definition of "suffers" is set out in s 36(1), not s 6. For that reason it was said that the qualifier relating to context does not apply. We do not accept that proposition. The definition of "suffers" in s 6 is an unusual one which, so far as we can ascertain, is not replicated in any other New Zealand statute. While it has cross-references to all of ss 36, 37 and 38, along with cl 55 of sch 1, the definition simply states that suffers "is affected in its interpretation by" those sections. That curiosity aside, the fact remains that the word suffered is used in the definition of "potential earner". Furthermore s 6(1) commences: "*In this Act*, unless the context otherwise requires".[139] It follows there is no merit in ACC's submission that that qualifier is of no application because "suffers" is also addressed in s 36.

[138] Ms O'Gorman cautioned against our endorsing the Judge's conclusion, suggesting that it could lead to anomalous outcomes in other cases. The impact of that submission was somewhat diluted by her observation that the statute is riddled with anomalies.

[139] Our responsibility is to determine the instant appeal. With reference to the submission that in doing so we should not adopt a blinkered approach, we would note that the appeal concerns not only a provision as to cover which is confined to a particular set of "circumstances", but also a type of compensation which is accessible only to a subset of those who have cover arising from such circumstances, namely potential earners.

[140] The final point made in ACC's written submission was that the High Court judgment causes confusion in the administration of the accident compensation scheme. It stated:[140]

> In particular, it is not clear from the Judgment whether, on the High Court's interpretation of the legislation, LOPE entitlement should commence from the date of injury (ie, TN is entitled to a backdated amount from the date of injury onwards), even if this pre-dates the period of cover as determined by s 36(1).

---

139 Emphasis added.
140 Footnote omitted.

[141] Such confusion as there may be is not the consequence of the judgment but the opacity of the legislation. As Judge Ongley correctly observed in *BRM*:[141]

> The problem created by s 36 is that it does not prescribe a date for commencement of compensation, but an assumed or artificial date on which the injury is deemed to have occurred.

[142] As we explained earlier, mental injury suffered by the victims of certain criminal offences was treated as a special case in the 1992 Act.[142] The extension of cover in s 8(3) of the 1992 Act to deal with such "outcomes" was replicated in the cover provisions in both the 1998 Act (s 40) and the 2001 Act (s 21), which were discrete provisions confined solely to mental injury caused in that particular way. As the deemed date provisions recorded, it was those cover provisions which described the "circumstances" which defined the qualifying mental injury.[143] Neither of the deeming provisions provided for the determination of the period of cover. The ACC submission above was misconceived in that respect. In our view cover is provided under s 21 of the 2001 Act for mental injury which is the outcome of such "circumstances" which occur during the life of the statute. There is no temporal limitation to such cover derived from s 36.

[143] This appeal is concerned with a particular cohort of those mental injury victims who, having suffered personal injury before turning 18 years, qualified as potential earners.[144] Receipt of LOPE compensation is dependent on the claimant having an incapacity resulting from the personal injury and their being a potential earner immediately before the incapacity commenced. As the exchange with Ms O'Gorman recognised,[145] a deemed date of injury which was on, or at any date subsequent to, a claimant's 18th birthday would mean LOPE compensation would never be available. It would not be a case of LOPE compensation being deferred but rather removed in its entirety. In this judgment we have rejected the interpretation that would permit such a consequence.

---

141 *BRM v ACC*, above n 7, at [21].
142 At [79]–[82] above.
143 Accident Insurance Act 1998, s 44(1); and Accident Compensation Act 2001, s 36(1).
144 In the 1998 Act, via the definition of "potential earner" and cl 22 of sch 1; in the 2001 Act, via the definition of "potential earner" and cl 47 of sch 1.
145 At [76] above.

[144] Only two options were identified as possible commencement dates for payment of LOPE compensation: TN contends for the actual date of incapacity; ACC (we infer) contends for the deemed date of injury in s 36(1). Of course both would be subject to the minimum stand-down period of six months in cl 47(3) of sch 1.

[145] We recognise that, as ACC submits, the date on which the injury was actually suffered and the date of actual incapacity would be "a matter of historical inquiry". The reach of that inquiry would be a factor of (among other things) the extent to which the young person had been traumatised by the "circumstances" giving rise to cover under s 21 and hence the length of time before the person felt able to obtain appropriate treatment. However, against the background of our earlier discussion of purpose and context we do not consider Parliament could have contemplated that the more serious the impediment to obtaining treatment the longer the period that the person should be deprived of LOPE compensation. We are quite unpersuaded by the proposition in *BRM* that there is some logic in fixing a date for compensation as the time at which the effect of the mental injury is sufficiently serious or obvious that the person seeks treatment.[146] In our view that does not sit comfortably with the apparent rationale for the retention, as a special case, of compensation for mental injury resulting from offending, usually sexual, against young persons.

[146] The alternative to such an arbitrary outcome, namely the actual date of incapacity, is in our view the only plausible interpretation. It would mean that an incapacitated young person would be compensated (albeit not to the full extent) for the resultant lack of income. It would also be consistent (quantum aside) with the availability of "total cover" referred to in the parliamentary debates in 1992. Finally we consider that not limiting LOPE compensation to purely prospective compensation would be consistent with the philosophy reflected in s 17 of the Limitation Act 2010, which confers on a court a discretion to allow relief for claims in respect of sexual abuse of persons under 18 years of age.

---

[146] *BRM v ACC*, above n 7, at [21].

Result

[147] The answer to the question of law set out at [17] of the judgment is "no".

[148] The appeal is dismissed.

[149] TN does not seek costs in the circumstances where ACC has agreed to meet TN's reasonable legal costs. Hence there is no order as to costs.