IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 129 ACR 068/18

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	NICOLA GRIFFITHS Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: Christchurch/Otautahi
Heard at: 20 July 2021

Appearances: Ms M Watson advocate for the appellant
Mr C Hlavac for the respondent

Judgment: 5 August 2021

RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Work Related Mental Injury – s 21B, s 28 and s 36(1) Accident Compensation Act 2001]

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[1] At issue on this appeal is a decision of WellNZ dated 9 March 2017 declining the appellant's entitlement to weekly compensation on the basis that she was not an earner at the time of her incapacity.

Background

[2] The appellant, Mrs Griffiths, is a nurse who was formally employed by the Canterbury District Health Board working at Christchurch Hospital.

[3] During the course of her work as a nurse Mrs Griffiths was exposed to a range of traumatic events and in particular was working in the intensive care unit at Christchurch Hospital on the night of 22 February 2011 and was exposed to extreme trauma during the immediate aftermath of the 22 February earthquake.

[4] The appellant gave evidence of the events of 22 February 2011 before the Reviewer. She stated:

> I started having really bad nightmares and it was nightmares of seeing what I had dealt with and particularly this one patient I had had and I got to the stage where I didn't want to get out of bed, - even though I wasn't sleeping I wasn't tired, I was up at one stage for 48 hours. I couldn't sleep. I was anxious. If there were any loud noises, I would jump and at work they thought it was funny that I was jumpy. I was frightened. I was feeling nauseous all the time. I was having migraines. I was having gut issues where I was running to the toilet all the time. I had a fear of going to work.

[5] The appellant saw her GP on 10 May 2011. He recorded amongst other things that she was depressed and under the heading 'objective' he has recorded:

> Overweight 97 kg, BP 120/80. Emotional and in tears from time to time, life has been in turmoil.

[6] The appellant saw her doctor again on 23 June 2011. The doctor has recorded:

> Subjective
>
> From old notes: July 2010 husband walked out after 20 years together and 17 years married, no real explanation but reasonably amicable, got depressed. Has had course IVF and works permanent night shift at cardiac ICU, been on fluoxetine since Feb 08 til 2011.

[7] On 13 July 2011 the appellant was seen by the psychiatric emergency staff having been referred by her shift supervisor with concerns about her depressed mood.

[8] The psychiatrist's report dated 14 July 2011 included this:

> Although Nicky had been struggling with grief after the breakup of her relationship, she had really only clearly been depressed for 4 to 6 weeks prior to her presentation to us. She described a range of depressive symptoms including disturbed sleep, disturbed appetite (either over or under eating), tearfulness, lethargy and impaired concentration.

[9] Dr Faulkner the psychiatrist, changed her antidepressant medication and gave her a "sick note" to cover the period through until 1 August 2011.

[10] She saw her GP again on 29 August. Her GP noted she was still feeling very tired and she was forcing herself to get out and exercise. She was working decreased hours and no night duty. She was referred for counselling.

[11] On 29 September 2011 she was admitted to hospital with a major depressive disorder.

[12] She saw her GP again on 7 October 2011. Counselling was discussed. The surgery note says that "it was having effect … resolving long term issues".

[13] The next GP note is 12 January 2012. She is described as upset, tearful in the clinical notes. Her weight gain was also discussed.

[14] Her GP's note on 5 April 2012 records "depression controlled".

[15] On 14 July 2012 Dr Faulkner of Psychiatric Emergency Services records:

> Recent depression of moderate severity. Disturbed sleep, tearfulness …

[16] Her GP's note on 28 August 2012 records:

> Filed for divorce yesterday – that emotional otherwise depression under control.

[17] From 2012 to 2015 the appellant improved although she was still on treatment for depression.

[18] On 20 April 2015 her GP noted:

> Not coping at work (ICU nurse) and feels at risk of making dangerous error.

[19] She consulted her GP again on 20 April 2015. There was a discussion of her recent history of poor work attendance. It was suggested she be placed in a low stress environment such as outpatients to aid her recovery.

[20] In a further GP consultation on 25 May 2015 it was noted that the appellant had not been moved out of ICU. The GP suspected she had been set up to fail.

[21] In a further consultation of 30 June 2015, it was noted that the appellant's nurse manager was not willing to shift her elsewhere until she could turn up for work regularly. The appellant complained of a constant headache from feeling stressed. Her GP noted:

> Nicola just so burned out she can hardly drag herself to work each day.

[22] At a further GP consultation on 29 October 2015 she presented as "miserable, depressed". It was also noted that she had made no move to improve any part of her life. She was referred to a counsellor and the mental health team.

[23] On 9 November 2015 Dr Harley, psychiatric registrar noted:

> Difficulty sleeping. She has been isolating herself from friends. She is easily startled, she has nightmares. She wakes with sweats and a perception of bed paralysis.

[24] In November 2015, an agreement was reached with the director of nursing that the appellant would be moved out of ICU and into the medical day stay unit. This had a positive effect on her mood and resulted in an improvement in the number of hours and days worked.

[25] On 12 February 2016, she saw her GP. She reported she had not slept for the past two nights "head going round". The clinical notes records:

> Long discussion re her past medical history which is extensive. Says mood better than it was, working 4 hours a day in medical day unit. Good support from head of nursing.

[26] A further GP consultation on 7 March 2016, recorded:

> Mood slowly improving … slowly improving number of hours per day and days per week.

[27] In a further consultation on 2 May 2016, it is recorded that the director of nursing at Canterbury District Health Board has told the appellant to take three months off work to address her health issues.

[28] In June 2016, the appellant self notified to the Nursing Council that she had a prolonged depressive episode and was not able to meet her work hours or education hours due to the amount of time she had had off work. She indicated that she had attempted a graduated return to work from January to March 2016, but this was unsuccessful, and she was not able to cope.

[29] In October 2016 the Nursing Council instructed Dr Foulds, a consultant psychiatrist, to provide a comprehensive medical report under s 49 of the Health Practitioners Competence Assurance Act 2003 (HPCA Act), for the purpose of assessing whether the appellant was able to perform the functions required of a nurse because of her mental or physical condition.

[30] On 28 October 2016, Dr Foulds provided a comprehensive medical report under s 49 of the HPCA Act. This was to address whether the appellant was able to perform the functions required as a nurse because of her mental or physical condition. Included in Dr Foulds' report is the following:

> Mrs Griffiths presents with a 5 year history of severe psychiatric illness associated with depression and symptoms of post traumatic stress disorder.
>
> Depression
>
> Ms Griffiths developed a range of symptoms of depression developing in 2011.
>
> … between 2011 and 2015 she reported being anxious at work but her functioning outside work had improved to the extent that she had been able to return to socialising and was generally enjoying life.
>
> In May 2015 she again saw her general practitioner after becoming aware that her mental health was deteriorating. She was significantly depressed and anxious and was referred for special psychiatric outpatient treatment by the public mental health system.
>
> …
>
> The present situation is that Ms Griffiths remains severely depressed.
>
> Post Traumatic Stress Disorder
>
> In relation to symptoms of post traumatic stress disorder, Ms Griffiths was initially surprised when I questioned her in this area as she had not previously considered she might have PTSD. However it was clear that Ms Griffiths had been exposed to a range of traumatic events both earlier in life and in her work. In particular she was working in the intensive care unit at Christchurch Hospital on the night of the 22 February 2011 earthquake and was exposed to extreme

trauma during the immediate aftermath of 22 February. She also describes being traumatised by the death of a close friend in the ICU.

In order to establish whether Ms Griffiths may have post traumatic stress disorder I administered a self report screen tool known as the PCL-5. Ms Griffiths' score of 65 is clearly in the clinically significant range suggesting further evaluation for PTSD was indicated.

I therefore went on to administer the clinician administered PTSD for DSM-5 (CAPS-5) this is a structured interview tool developed by the National Centre for PTSD in the US, and is regarded as a current gold standard for diagnosing PTSD.

Ms Griffiths' response on the CAPS-5 were consistent with a current diagnosis of PTSD.

…

She described avoiding talking about events surrounding the night of the earthquake and avoiding the hospital in general.

[31] Under the heading "Opinion" Dr Foulds noted:

1. Ms Griffiths is experiencing a severe major depressive episode. This is ongoing in spite of intensive pharmacological treatment.

2. There is also evidence for post traumatic stress disorder as a consequence of her work place exposures in the intensive care unit at Christchurch Hospital on a background of exposure to domestic violence in early childhood.

…

6. Given the apparent work place contribution to her post traumatic stress disorder I have suggested that Ms Griffiths look into whether she may meet criteria for mental injury under the current Accident Compensation Act legislation.

[32] Dr Foulds concluded that due to the severity of her psychiatric illness the appellant was not fit to return to work and that a return to work would be unlikely within the next six months.

[33] On 17 November 2016 the appellant's nursing practicing certificate was suspended.

[34] At a consultation with her GP on 28 November 2016, the appellant completed an ACC45 claim form for post traumatic stress disorder (PTSD). The form notes the same day, 28 November 2016 as the "accident date".

[35] On 19 January 2017 the appellant was seen by Dr Mehmood a consultant psychiatrist. Under the heading "past psychiatric history" he noted:

> Nicola's first episode of depression was in 2006 when she was prescribed Fluoxeinc by her GP. The dose was increased up to 60 mg and this episode started in the context of a number of failed courses of IVF.
>
> …
>
> She had a relationship breakup on 2010 and also the earthquakes impacted on her and she also developed PTSD symptoms in the context of earthquakes. She was prescribed venlafaxine and bupropion which she responded to initially and was discharged back to GP care at the end of 2015.

[36] The appellant's claim was managed by WellNZ on behalf of the Canterbury District Health Board (CDHB) as an accredited employer who sought a further opinion from Dr Foulds. In a letter dated 21 February 2017 Dr Foulds said:

> The confirmed mental injury (post traumatic stress disorder) was caused by two series of events in the course of Ms Griffiths' employment as an intensive care nurse at Christchurch Hospital.
>
> The first set of events relates to direct exposure to seeing and providing treatment for trauma victims of the 22 February 2011 Christchurch earthquakes. In particular, Ms Griffiths was exposed to caring for a young female patient with severe pelvic and lower extremity crush injuries. Ms Griffiths found this intensively traumatic, and many of her re-experiencing symptoms were focused on this event.
>
> The second set of exposures relates to a close friend who was in the intensive care unit with multi organ failure and subsequently died. … this event caused Ms Griffiths to feel helpless, and to doubt the effectiveness of the care she was providing as a nurse.

[37] Dr Foulds advised that the events surrounding treating victims of the February earthquake were directly experienced and could reasonably be expected to cause mental injury to people generally.

[38] On 27 February 2017 WellNZ wrote to the appellant advising that her PTSD injury "which resulted from the accident on 28/11/2016" had been covered as a work-related accident by her employer CDHB.

[39] The appellant subsequently applied for weekly compensation in relation to her covered injury. On 9 March 2017, WellNZ wrote to Mrs Griffiths advising that she

was not entitled to weekly compensation because she was not an earner at the time of her incapacity. The appellant subsequently applied to review WellNZ's decision.

[40] On 28 October 2017 Dr Foulds provided a further report to the appellant's advocate. Amongst other things he said this:

> I note that Nicola's GP saw her on multiple occasions between 2011 and 2016, and while Nicola presented with a variety of physical and psychiatric symptoms over that time these were not attributed to PTSD. Nicola also received treatment from specialist mental health services in Christchurch in 2015, where she saw an experienced psychiatric registrar (a psychiatrist in training). I have reviewed some of the notes of this contact, which describe symptoms which would be consistent with PTSD including nightmares and an exaggerated startle response. PTSD is not mentioned as a preferred diagnosis at that time, with the primary diagnosis having been depression.
>
> The date of onset of mental disorder is very difficult to determine in retrospect, in the absence of detailed contemporaneous information. The fact that Nicola was not discharged with post traumatic stress disorder prior to me seeing her in late 2016 is not surprising, given that the PTSD symptoms were likely overshadowed by many other issues going on in her life including her medical problems, infertility and marital separation.
>
> PTSD is not always easy to diagnose, and this is why I use a validated structured interview tool to assist with diagnosis. This greatly improves the diagnostic sensitivity and reliability. Previous clinicians who saw Nicola did not use this type of diagnostic tool.
>
> In my view PTSD was most likely present prior to 2016 and was probably present during the 2011 to 2016 period in which Nicola was presenting with a range of physical and mental health problems and life difficulties and was continuing to work in the ICU.

The Appellant's Submissions

[41] The appellant's advocate submits that the 2011 Christchurch earthquake was the event that led to the appellant suffering from PTSD.

[42] She points to the fact that following the earthquake on 22 February 2011 the visits of the appellant to her GP relating to depression were linked to her marital breakup.

[43] She notes that the appellant was an earner at the time she first sought treatment from her GP on 10 May 2011 and in fact remained employed until she herself took the step to stop working in June 2016.

[44] Ms Watson acknowledges that PTSD was not recognised at the time by either her GP or the appellant herself.

[45] Ms Watson produced a calendar of the appellant's sick leave during the 2011 year. It shows that she had approximately 16 days (or shifts) of paid sick leave and approximately 51 days or shifts of sick leave without pay. That situation plainly continued until she ceased work in 2016.

[46] Ms Watson notes that PTSD is difficult to diagnose although symptoms of it had been noted by previous mental health providers.

[47] She submits there is a strong connection in this case between the earthquake events and the onset of PTSD.

[48] She submits that the appellant's evidence shows that she had denied the impacts that the 2011 earthquake had had on her mental health which included symptoms of flashbacks, nightmares, anxiety going to work.

[49] She submits on the balance of probabilities that the symptoms of PTSD were present post the 2011 earthquake and that the appellant was an earner throughout until April 2016.

[50] She submits that Dr Foulds' expert evidence on PTSD in this case is not challenged in any way and must stand.

[51] She submits that although the diagnosis was not formally made until 2016 it is more likely than not that the appellant was suffering PTSD after the traumatic events of the earthquake and that her symptoms continued to worsen.

The Respondent's Submissions

[52] Mr Hlavac immediately acknowledges that there is no question that the appellant has cover for PTSD. The issue her relates to entitlements, namely weekly compensation.

[53] He submits that the difficulty here relates to working out when the appellant's PTSD commenced.

[54] Mr Hlavac refers to s 36 of the Accident Compensation Act which provides:

> (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.

[55] Mr Hlavac refers to *BRM v ACC*[1] where the District Court held with specific reference to s 36 that there was some logic in fixing a date for compensation as the date on which the effect of the mental injury is sufficiently serious or obvious that the person seeks treatment.

[56] Mr Hlavac points out however that the same judgment notes that s 36 does not prescribe a date for commencement of compensation. Rather that date must be used as the date of enquiry for calculation of entitlements and conditions qualifying a claimant for compensation for mental injury.

[57] He further submits that although Dr Foulds considers that the appellant's PTSD had been present for a considerable period of time (at least 12 months – probably much longer) there is no suggestion in any of the GP or other medical reports/notes prior to that date that Mrs Griffiths might be suffering from this condition.

[58] He submits that even if the appellant's depression did satisfy the requirements of s 27 it is unlikely that the requirements for cover for mental injury under the Act will be satisfied.

[59] He points to the number of life events since 2006 that have affected the appellant's wellbeing.

[60] He submits that while the appellant's work in ICU on 22 February 2011 may have triggered or aggravated her depressive symptoms it did not cause her depression and so is unlikely to satisfy the causation requirement of s 21B(1)(b).

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1 *BRM v Accident Compensation Corporation* [2004] NZACC 224.

[61] He also notes that the given accident date is 28 November 2016 the date on which her GP completed the ACC45 form. At that date the appellant was not working and therefore based on the relevant definitions in s 6 of the Act the appellant did not satisfy the definition of earner from April 2016 onwards.

[62] Given the appellant's history of depression prior to 22 February 2011, as Mr Hlavac submits, it cannot be established on the balance of probabilities that her depression was triggered by her work in ICU on 22 February 2011, the date of the earthquake.

Decision

[63] The prior history leading to the appellant's diagnosis of PTSD is documented in the background section of this judgment. What is clear in this case is that in the lead up to the Christchurch earthquake of 22 February 2011 the appellant had been suffering from depressive symptoms relating significantly to her marriage breakup which was preceded by fertility issues.

[64] From the evidence that is available to us, in 2011 and following, her depressive issues compounded by weight gain worsened and in spite of regular visits to her GP and remedial steps in the way of counselling, exercise and medication her progression worsened to a point where in April 2016 she stopped work and in June 2016 she advised the Nursing Council that she was not able to meet her work hours or education hours due to the amount of time she had had off work.

[65] It was not until Dr Foulds completed his report of 28 October 2016 that PTSD was formally diagnosed. That diagnosis was confirmed in his subsequent reports of 21 February 2017 and 29 October 2017. The diagnosis is not otherwise challenged.

[66] In his report of 29 October 2017 Dr Foulds says:

> In my view PTSD was most likely present prior to 2016, and was probably present during the 2011 to 2016 period in which Nichola was presenting with a range of physical and mental health problems and life difficulties and was continuing to work in the ICU.
>
> … the PTSD was caused by a series of traumatic events experienced in her work as an ICU nurse at Christchurch hospital.

[67] Dr Foulds concludes:

> The date the PTSD developed is difficult to determine in retrospect, but it had undoubtedly been present for a considerable time (i.e. at least 12 months, probably much longer) prior to my diagnosis in October 2016.

[68] In determining when, on the balance of probabilities, the appellant's PTSD commenced, one of the matters I have considered, which provides some objectivity to the issue, is the appellant's sick leave record the year of the earthquake, 2011.

[69] What the sick leave record for 2011 shows is that following the earthquake on 22 February the proportion of days that the appellant was absent from work on paid or unpaid sick leave increased dramatically.

[70] In the 53 days of the year from 1 January to 22 February the appellant had 12 hours (one and a half days) sick leave. That equates to one sick leave day for every 35 days worked. After 22 February 2011 the appellant had unpaid and paid sick leave for the remainder of the year of 526.5 hours which on the basis of an eight hour day amounts to approximately 66 days sick leave. So, for the remainder of the 2011 year after the earthquake the appellant was absent on sick leave at the rate of one day for every 5 days worked. And included in that is her hospital admission in September 2011 with a major depressive disorder.

[71] Even if some allowance were made for possible or probable leave (1-2 weeks) during the popular January time, the increase in sick leave after the earthquake in 2011 remains dramatically higher than before.

[72] PTSD is plainly not a straight forward mental injury to diagnose. Dr Foulds makes that clear in his reports. And the diagnosis is invariably been made retrospectively, often years after a traumatic event.

[73] In this case I accept Dr Foulds' evidence that it was undoubtedly present for a considerable time, as he says, at least 12 months, probably much longer.

[74] The dramatic increase in the appellant taking sick leave after the earthquake of 22 February 2011 allows me to conclude on the balance of probabilities on the

evidence before me that the appellant's PTSD mental injury arose as a result of the trauma she was subjected to in her role as an ICU nurse following the earthquake in which she suffered the trauma of the direct exposure to seeing and providing treatment for trauma victims as well as having her close friend in ICU die of multi organ failure.

[75] Dr Foulds was of the view that the events surrounding treating victims of the February earthquake were directly experienced and could reasonably be expected to cause mental injury to people generally.

[76] Accordingly, for the purposes of s 21B the appellant satisfies the criteria of subs 1(b) in that the mental injury is caused by a single event of the kind described in subs (2). In this case there were two events, the death of her friend as well as the treatment of multiple trauma cases.

[77] For the sake of completeness, I find that the requirements of subs 7 of s 21(b) are satisfied. The earthquake event was sudden and the trauma arose for the appellant as a direct outcome of this sudden event.

[78] It is uncontested that for the purposes of s 27 the mental injury here is a clinically significant behavioural cognitive or psychological dysfunction.

[79] That then leaves the issue arising from s 36(1) which prescribes:

> 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.

[80] I may be argued that until the appellant had the diagnosis of PTSD, she did not receive treatment for that mental injury as that mental injury.

[81] However, having already found it proven that the appellant was in fact suffering from PTSD within a very short time after the February 2011 earthquake, it was not specifically diagnosed as such until 28 October 2016 by Dr Foulds.

[82] That situation accepted, I do not think it can be seriously challenged that from the time shortly after the earthquake, the appellant was in reality being treated by her GP and by the CDHB psychiatrist for her PTSD mental injury although at the time it was not labelled as such.

[83] Accordingly, I find that the requirement of s 36(1) is satisfied in that, certainly by the time of the appointment with her GP on 10 May 2011, when he recorded;- "Emotional and in tears from time to time, life has been in turmoil" - the appellant received treatment for the mental injury she suffered, as that mental injury.

[84] To interpret the legislation as requiring the label for the injury to be correctly applied from the outset of treatment is not in keeping with the ethos of the Act and more particularly not in keeping with the reality of the situation in this case where her GP initially, and later the psychiatrist, were in fact treating the appellant for a more serious mental health injury than was present prior to the earthquake.

[85] For the foregoing reasons the appeal is allowed and the decision of WellNZ dated 9 March 2017 declining the appellant's entitlement to weekly compensation on the basis that she was not an earner at the time of her incapacity is reversed.

[86] Should there be any issue as to costs the parties have leave to file memoranda in respect thereof.

Judge C J McGuire
District Court Judge

Solicitors: Young Hunt, Christchurch for the respondent