

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 212 ACR 63/22

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

Hearing: 14 November 2022
Held at: Hamilton/Kirikirioa

Appearances: The Appellant is self-represented
 J Sumner for the respondent

Judgment: 18 November 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Alleged delay and requested funding for social rehabilitation
ss 134(1), 79 and 84, Accident Compensation Act 2001]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 26 July 2021. The Reviewer dismissed Mr Nottingham’s review:

- (1) arising out of his claim that there had been an unreasonable delay by the Corporation in processing his claim for entitlement to bathroom modifications; and
- (2) of the Corporation’s decision dated 6 August 2020 approving funding for rails in his shower and non-slip mat/flooring in the shower area.

Background

[2] Mr Nottingham was born in November 1963.

[3] On 23 April 2016, Mr Nottingham was involved in a motor vehicle accident, during which he sustained a left tibial plateau fracture, a comminuted right olecranon fracture, and a concussion.

[4] The Corporation accepted cover for other fracture of upper end of tibia, fracture of upper end of tibia with fracture of fibula, fracture of olecranon process of ulna, and concussion. Mr Nottingham continues to receive entitlements in relation to the covered injuries.

[5] On 6 October 2016, Dr Chris Walls, Occupational Medicine Specialist, reported to the Corporation, after having completed an assessment of Mr Nottingham. Dr Walls' report included the following recommendation:

I would suggest to ACC that an occupational assessment of Dermot's home be undertaken, Kirsten has organised some work-around methods so he can shower and the like, but hand-holds, appropriate shower seats and the like would seem appropriate, from his description.

[6] On 23 March 2017, Ms Angela Jones, Occupational Therapist, completed an Integration Assessment Report, and noted, *inter alia*:

Dermot reports that he is now able to stand independently in the shower and complete his own personal cares.

Dermot has been provided with a shower commode as due to access issue with the shower at home ACC had funded him being able to access showers at a local rest home. Dermot found this to be difficult as he needs to work around others timeframes so returned to showering at home. He has not used the commode for showering purposes

[7] On 1 July 2018, Ms Mandy Blake, Occupational Therapist, completed a Housing Modification Assessment Report - Standard and Complex Modifications. Ms Blake summarised Mr Nottingham's needs as:

... Dermot is unable to safely transfer into and out of his shower. Various options have been considered in the body of this report to facilitate safe transfers, including equipment options, however it appears that either

installation of a wet area shower or a shower unit with a low profile base will best meet Dermot's needs.

[8] On 25 September 2018, the Manager of Home Modifications reported and recommended as follows:

Solution proposed by supplier:

Accessible bathroom (wet area shower, toilet and vanity) Estimated cost \$55,000 + gst. Bathroom is noted to be in a semi renovated state (no linings to walls/floor and unknown if renovation work has been consented).

Delegation holder comment:

The solution appears as expected and the most durable option to meet the client's assessed needs. However the estimated cost is high compared to other similar projects and the 457 does not provide information as to why it is high. I also note issues with possible non consent of the renovations. ACC has an expectation that our supplier would manage and research any possible liability issues in regards to this (as in ensuring that all prior work has been adequately consented/or if not that it will not adversely impact the planned ACC funding modifications). I note the bathroom has no floor or wall linings. The supplier should guide ACC as to whether it is reasonable for the landlord to contribute towards these costs. There are some aspects of the concept which appear to be at a higher specification than the norm – for example the glass partition between shower and toilet.

Overall recommendation:

Subject to the above points being discussed with the supplier, I recommend ACC instruct Accessable to proceed to tender, complete working drawings and apply for necessary consent.

[9] On 16 October 2018, Mr Mark van Diepen, Housing Modification Service Provider, completed a Housing Modification Service Report, and provided an estimated renovation cost of \$55,000.00.

[10] On 13 May 2019, Mr Richard Angell, for Maynard Marks Property & Building Consultants, provided a report to the Corporation regarding the state of the relevant parts of the dwelling where renovations were proposed. The report noted a number of safety and substantive issues posed by the current state of the property including: exposed electrical wiring; potential asbestos risks; composite system material used in the bathroom inconsistent with the plans; and further investigation required regarding leak risks in the basement area.

[11] On 12 June 2019, the Corporation wrote to Mr Nottingham advising that a number of significant matters would need to be addressed by the property owner before any housing modifications could commence. Those issues included no council record of consent for parts of the property including the bathroom, and the health and safety issues noted above.

[12] On 8 July 2019, in the absence of a recorded response from Mr Nottingham, the Corporation wrote to Mr Nottingham again, referring to its earlier letter advising of the issues that needed to be addressed before any modifications could commence.

[13] On 24 July 2019, the Corporation again wrote to Mr Nottingham referring to its earlier letter advising of the issues that needed to be addressed before modifications could commence. It advised that the referral would be closed if a response was not received by 8 August 2019.

[14] In 2019, Mr Nottingham underwent bariatric surgery and reportedly lost approximately 60 kilogrammes in weight.

[15] On 21 February 2020, Ms Emma Walker, ACC Recovery Partner, advised Mr Nottingham that she was arranging an updated Occupational Therapist assessment for housing modifications, because his situation had changed.

[16] On 29 May 2020, Ms Walker wrote to Mr Nottingham advising him that an occupational reassessment by an independent medical specialist had been arranged.

[17] On 1 June 2020, Mr David Guest, assessor for Gains Geneva, completed a Housing Modification Assessment Report - Standard and Complex Modifications. That report noted that Mr Nottingham's situation had changed since the assessment report was completed in 2017, and offered the following options for addressing his needs (reproduced *verbatim*):

Since the assessment and report from 2017 Mr Nottingham has lost a significant amount of weight – 60kg and is still progressing with his weight loss. He reports further surgery is planned in future.

Mr Nottingham walks without any walking aids and is able to walk around his home and in the immediate area outside the home. Small threshold steps

through doorways are managed safely. Physically Mr Nottingham's issues are around his knees begin unreliable and unpredictable with a reported history of falls due to this issue. Mr Notting has reduced ROM in his right upper limb. Mr Nottingham is right handed. ...

Housing modifications

Handrails in the shower to assist with the step into the shower – the rails can only be placed on the rear wall or a vertical 'fireman's' pole type set up could be used.

Floor to ceiling pole – this could be only placed on the right of the door stepping up – which is Mr Nottingham's more affected side and will be of minimal benefit stepping in to the shower he something to grab – but this will be unlikely to significantly assist.

Change shower cubicle to lower step unit – this would need to be a rectangle unit with a sliding door to allow for fold down shower seats and handrail placement – the step may be as minimal as 50mm to cross into the shower.

Wet area shower as per NZS4121 specifications for the shower including fold down shower seat at 450mm from FL (adjustable brackets). The wet area shower will offer the maximum in terms of minimising risk with no step to negotiate.

NB having a wet area shower will not guarantee Mr Nottingham will not fall in the bathroom with his knee giving way unexpectedly. This will not stop falls but minimise activities that make trigger a fall. Falls are a possibility for Mr Nottingham in the home with his knees failing him at unexpected times – The increased risk when bathing is that he will be naked getting no protection from any clothes being worn at the time.

[18] On 15 June 2020, Dr Angela Kennedy completed a Clinical Advisor Referral Opinion/Recommendation, and reported:

In response to your specific queries (1) no recent orthopaedic assessment is evident and due to the passage of time orthopaedic opinion may have altered re the advisability of the previously requested procedure now. As expected there is lateral knee compartment arthrosis at this juncture but with the age of the client and the lessening of stress on the knee due to the significant weight loss, the best treatment option at this point may need to be reconsidered - therefore suggest an orthopaedic assessment of treatment options at this juncture

(2) it is also evident that the client is physically able to step up into his present shower and if extra safety needs to be addressed grab rails can fulfil the need for security, plus non slip coating application to the shower floor. "Wet area" showers are not inherently safer than "chub" showers but just provide a bit more space and opportunity to put in a shower seat, and improve the "value" of the housing stock. There is no physical reason presently that the client is unable to access or independently use his present shower, and the operation proposed will not alter that, judging from his present quoted physical abilities (3) suggest orthopaedic update before IMA.

[19] On 3 July 2020, Mr Nottingham applied for review of, *inter alia*: “Your decision at not making a decision [for whatever reason] on the urgent need for housing modifications”.

[20] The Corporation subsequently obtained technical advice. The Service Support Lead noted (reproduced *verbatim*):

Overall opinion: The combined findings of both housing reassessment from an Occupational Therapist and Clinical Advice appear to suggest there is no clearly defined injury related need for a structural bathroom modification at this time. The client has perhaps reported some perceived risks in using his shower with a high step. These would appear to be able to be reasonably mitigated with a handrail installation and non-slip mat type flooring products. Both the assessor and MA make the point that a wet area shower will not necessarily reduce safety risks for the client, or meet his safety needs any better than the rails and non-slip flooring option to the existing shower arrangement.

MA makes the point that there is no recent orthopaedic assessment on file, and post weight loss and reduced stress on the clients’ knees, the best course of treatment may now need to be reconsidered via an orthopaedic appellant.

Suggested next steps:

- Offer rails and non-slip mat/flooring in the shower area
- Orthopaedic assessment seems a very prudent suggestion by the MA.

[21] On 6 August 2020, the Corporation issued a decision approving funding for Mr Nottingham for rails in the shower area, and non-slip mat/flooring in the shower area.

[22] On 11 November 2020, Mr Nottingham filed an application for review of the above decision, on the following basis:

ACC has acted intellectually dishonest in arriving at its decision to put in hand rails and a mat on the floor as it has previously accepted that the modifications are needed, and has spent large sums of money on reports and other equipment that has been a rip off and does not impact on safety issues the claimant faces every day. The claimants GP has also supported him given the significant number of accidents that claimant has suffered some relatively serious and the danger to the claimants ongoing mobility and the current level of rehabilitation. ACC has obtained reports costs \$8,000.00 dollars and applied for and obtained building consent. ACC has acted manifestly cruelly.

[23] On 29 June 2021, review proceedings were held. On 26 July 2021, the Reviewer dismissed the review. This was on the basis that the Corporation had now

issued a decision approving bathroom modification, and so no remedy was available; and there were no grounds on which to interfere with the discretionary bathroom decision reached by the Corporation.

[24] On 23 August 2021, a Notice of Appeal was lodged.

Alleged delay

Relevant law

[25] Section 134(1) of the Accident Compensation Act 2001 (“the Act”) provides:

- (1) A claimant may apply to the Corporation for review of –
 - (a) ...
 - (b) any delay in processing the claim for entitlement that the claimant believes is an unreasonable delay...

[26] In *Gregory*,¹ Judge Beattie set out the scope of section 134(1)(b):

[12] I find that section 134(1)(b) is a provision which is really only appropriate where there is a continuing delay and the claimant perceives that his/her claim is not being processed with all due diligence. Once the claim has been processed in a decision and payment made, then it seems to me that the purpose of section 134(1)(b) is largely spent and the pursuance for some form of declaration is somewhat nugatory.

[27] In *Estate of Aubrey*,² Judge Barber stated:

[26] It is submitted for ACC that, as in *Gregory*, there is nothing which this Court can now determine which will have any effect on this claim; and there is simply no live issue to be determined. I agree. All the decisions the appellant was seeking have now been made with the appropriate review rights being made available.

...

[28] ... I have no power to assist the family of the late Mr Aubrey at this stage because the matter before me does not relate to any decision of the appellant (and any delay in processing has ended). I do not have power to issue the declarations sought by Mrs Aubrey. I simply have no jurisdiction. ...

¹ *Gregory v Accident Compensation Corporation* [2005] NZACC 45.

² *Estate of Aubrey v Accident Compensation Corporation* [2008] NZACC 108.

[28] In *McKenzie*,³ Judge Beattie reiterated the scope of section 134(1)(b):

[4] It is the case that where an application for review is made alleging unreasonable delay in the processing of a claim for entitlement, the jurisdiction of the Reviewer, if and when a review is heard, is limited to making a direction to the respondent for the making of the decisions which had been sought, if indeed the Reviewer was to determine that there had been unreasonable delay on the respondent's part and a decision had still not been issued. If a decision had been made before the review hearing date there is no basis for a review.

Discussion

[29] The issue here is whether the Corporation unreasonably delayed processing Mr Nottingham's claim for entitlement to bathroom modifications, and, if so, what remedy lies. Section 134(1)(b) of the Act entitles Mr Nottingham to apply for a review of a delay in processing his claim for entitlement that he believes was an unreasonable delay. However, it is well established that there needs to be a continuing delay to the time of review, and, if the Corporation makes a decision by this time, there is no live issue for the Reviewer (or the District Court on appeal) to determine.⁴

[30] Mr Nottingham submits that the lengthy timeframe between the bathroom modifications assessment and the decision to provide bathroom aids was created by the Corporation to disentitle him from the bathroom modifications. Mr Nottingham submits that his entitlement was obvious and approved in order to make his ablutions safe in an ongoing manner, to enable him to undergo further significant and risky surgeries.

[31] This Court acknowledges Mr Nottingham's submissions, and notes that there were ongoing delays between Dr Walls' recommendation in October 2016, that an occupational assessment of Mr Nottingham's home be undertaken, and the Corporation's decision of 6 August 2020, approving funding in respect of his bathroom. Certain of these delays could well be attributed to the Corporation. However, others were caused by issues found in the state of Mr Nottingham's property (see paragraphs [10]-[11] above), Mr Nottingham not recorded as responding promptly to the Corporation's advice in mid-2019 (paragraphs [12]-[13]),

³ *McKenzie v Accident Compensation Corporation* [2012] NZACC 263.

⁴ *Gregory*, see n1 at [12]; *Estate of Aubrey*, see n2 at [26] and [28]; and *McKenzie*, see n3 at [4].

and then the change in Mr Nottingham's situation following his surgery and weight loss which required a reassessment (paragraphs [14] and [17]).

[32] In any event, the Corporation made a decision in August 2020 on Mr Nottingham's entitlement to bathroom renovation funding, and this decision was made over 10 months prior to the review hearing. There was, therefore, no continuing delay in the Corporation issuing its decision, at the time of the review hearing. The Reviewer thus rightly concluded that no remedy was available to Mr Nottingham in respect of alleged delay, and so the review of this matter was correctly dismissed.

Corporation's decision of 6 August 2020

Relevant law

[33] Section 79 of the Act provides:

The purpose of social rehabilitation is to assist in restoring a claimant's independence to the maximum extent practicable.

[34] Section 84 sets out the Corporation's ability to reassess the claimant's needs for social rehabilitation:

- (1) An assessment under this section assesses a claimant's need for social rehabilitation and identifies the specific social rehabilitation that the claimant needs.
- (2) The Corporation may—
 - (a) do assessments and reassessments, itself, by using appropriately qualified assessors employed by the Corporation; or
 - (b) appoint and pay as many appropriately qualified assessors as it considers necessary to do assessments and reassessments; or
 - (c) both.
- (3) A claimant's need for social rehabilitation—
 - (a) may be reassessed from time to time; and
 - (b) must be reassessed if the Corporation considers that the claimant's condition or circumstances have changed.
- (4) The matters to be taken into account in an assessment or reassessment include—
 - (a) the level of independence a claimant had before suffering the personal injury:

- (b) the level of independence a claimant has after suffering the personal injury:
- (c) the limitations suffered by a claimant as a result of the personal injury:
- (d) the kinds of social rehabilitation that are appropriate for a claimant to minimise those limitations:
- (e) the rehabilitation outcome that would be achieved by providing particular social rehabilitation:
- (f) the alternatives and options available for providing particular social rehabilitation so as to achieve the relevant rehabilitation outcome in the most cost effective way:
- (g) any social rehabilitation (not provided as vocational rehabilitation) that may reasonably be provided to enable a claimant who is entitled to vocational rehabilitation to participate in employment:
- (h) the geographical location in which a claimant lives: (i) in the case of a reassessment,—
 - (i) whether any item that the Corporation provided for the purposes of social rehabilitation is in such a condition as to need replacing:
 - (ii) changes in the claimant's condition or circumstances since the last assessment was undertaken.

[35] In *Kacem v Bashir*,⁵ Tipping J stated in the Supreme Court:

[32] ... a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

[36] In *Gregory*,⁶ Judge Powell noted:

[14] Finally, with regard to the decisions made by the Corporation, as such decisions made under the social rehabilitation provisions of the Act involve the Corporation exercising its discretion, the case law is well established ... that the exercise of the Corporation's discretion can only be challenged where the Corporation has made an error of law, has failed to take into account some relevant matter, has taken into account an irrelevant matter, or the decision was plainly wrong.

⁵ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, [2010] NZFLR 884, (2010) 28 FRNZ 483.

⁶ *Gregory v Accident Compensation Corporation* [2016] NZACC 118. See also *Rameka v Accident Compensation Corporation* [2013] NZACC 219, at [32].

[37] In *Waaka*,⁷ Judge Beattie stated:

[17] As a matter of law, although this Court is hearing this appeal by way of rehearing, nevertheless it is an appeal against the exercise of a discretion and the clear principle of law pertaining to such appeals is that such a discretion should not be interfered with unless it can be demonstrated that that discretion has been exercised on a wrong principle. I find that it would require the appellant to demonstrate that the respondent had not complied with its statutory obligations when considering the appellant's application for attendant care or that having viewed the matter as a whole the Court could not accept that the decision was proper and fair.

Discussion

[38] The second issue in this case is whether the Corporation's decision dated 6 August 2020, approving funding for rails and non-slip mat/flooring in the shower area, was correct. This funding was approved with the aim of furthering Mr Nottingham's social rehabilitation. The purpose of social rehabilitation is to assist in restoring Mr Nottingham's independence to the maximum extent practicable.⁸ Mr Nottingham's need for social rehabilitation must be reassessed if the Corporation considers that his conditions or circumstances have changed.⁹ There are a number of matters to be taken into account in such reassessment, including the appropriateness, outcome and cost-effectiveness of the rehabilitation to be achieved.¹⁰ Because decisions on social rehabilitation involve the Corporation exercising its discretion, the Corporation's decision can be challenged only where the Corporation has made an error of law, has failed to take into account some relevant matter or has taken into account an irrelevant matter, or the decision was plainly wrong.¹¹

[39] Mr Nottingham's submissions relevant to this appeal are as follows:

- Section 3 of the Act requires the Corporation, as one of the purposes of the Act, to promote measures to reduce the incidence and severity of personal injury. The decision to provide rails in the shower area and non-slip mat and flooring in the shower area does not comply with this purpose of the Act.

⁷ *Waaka v Accident Compensation Corporation* [2003] NZACC 101.

⁸ Section 79 of the Act.

⁹ Section 84(3).

¹⁰ Section 84(4).

- The requirements for safety and injury prevention was identified, investigated and approved, but not yet delivered because of the intellectual dishonesty of the employees of the Corporation. The Court should favour the report of Ms Mandy Blake completed in 2018, and the injuries noted as a result of the work not being undertaken are well documented.
- The technical advice received by the Corporation has been authored by unnamed assessors in support of the decision. Dr Kennedy's report is a "self-serving litany of completely unsubstantiated conjecture, and supposition, elevated to evidence".
- The Corporation has issued a decision for bathroom aids which he has not applied for.
- The Corporation had no jurisdiction to revisit its decision to approve bathroom modifications. His disentanglement to the earlier assessed needs by the Corporation was fallacious, merciless, purposeful, and meritless, and the Corporation's sign off of its letter using "Kindest regards" indicates a level of malice given the Corporation's dishonesty.
- The Corporation's assessment of his social rehabilitation amounts to criminal fraud. There is no discretion at law to do what the Corporation has done, and the decision previously made must be implemented to the full extent of the costs of the plans which were approved by the Corporation.

[40] This Court acknowledges Mr Nottingham's submissions and his reference to section 3 of the Act. However, this section must be read in light of the provisions of the Act relating to social rehabilitation, as noted above in paragraphs [33]-[34]. This Court also acknowledges that the Corporation initially proposed the installation of a wet shower area or a shower unit with a low-profile base in Mr Nottingham's bathroom, and that he believes that this installation should proceed. However, in this regard, the Court notes the following considerations.

¹¹ *Gregory*, See n6 at [14].

[41] First, this Court finds that the Corporation reasonably found that Mr Nottingham's need for social rehabilitation had to be reassessed because his condition or circumstances had changed. The report done by Ms Blake in July 2018, recommending the installation of a wet area shower or a shower unit with a low-profile base, was provided in light of what was then assessed to be feasible and appropriate to meet Mr Nottingham's physical condition and needs. However, by early 2020, Mr Nottingham's situation had changed in two respects. First, in May 2019, a report from property and building consultants noted a number of safety and substantive issues posed by the current state of Mr Nottingham's property. Second, also in 2019, Mr Nottingham underwent surgery and reportedly lost approximately 60 kilogrammes in weight. As a result, in February 2020, Ms Walker, ACC Recovery Partner, advised Mr Nottingham that an updated Occupational Therapist assessment for housing modifications was required because his situation had changed.

[42] Second, this Court finds that the Corporation came to a reasonable, informed conclusion, based on the reports of suitably qualified assessors, as to the most appropriate facilities relevant to Mr Nottingham's changed needs. In June 2020, the Corporation received reports from an occupational therapist and a clinical advisor which noted the change in Mr Nottingham's condition and provided new options in light of his condition. Mr Guest, the occupational therapist, offered, as one of the options, handrails in the shower, and noted that a wet area shower would not guarantee Mr Nottingham would not fall in the bathroom. Dr Kennedy, the clinical advisor, noted that Mr Nottingham was physically able to step up into his present shower, and recommended that, if extra safety needed to be addressed, grab rails could fulfil the need for security, plus non-slip coating application to the shower floor. In light of these reports, the Corporation's technical advisor recommended rails and non-slip mat/flooring in the shower area, which formed the basis of the Corporation's decision to this effect. Mr Nottingham has not produced any medical evidence to counter the reports of Mr Guest and Dr Kennedy, and this Court finds that the allegations levelled against the integrity of the Corporation and its assessors have not been established.

Conclusion

[43] In light of the above considerations, the Court finds that:

(a) no remedy lies in respect of the Corporation's delay in processing Mr Nottingham's claim for entitlement to bathroom modifications; and

(b) the Corporation, in exercising its discretion in its decision of 6 August 2020, did not make an error of law, fail to take into account some relevant matter, take into account an irrelevant matter, or produce a decision that was plainly wrong.

[44] The decision of the Reviewer dated 26 July 2021 is therefore upheld. This appeal is dismissed.

[45] I make no order as to costs.



P R Spiller
District Court Judge

Solicitors for the Respondent: Ford Sumner.