PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE IS A SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE APPELLANT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE APPELLANT

IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 106 ACR 173/22

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

Hearing: 21 June 2023
Held at: Hamilton/Kirikiriroa

Appearances: L Wilkie for the Appellant
S Bisley for the Accident Compensation Corporation ("the Corporation")

Judgment: 29 June 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for overseas personal injury - s 17(2), Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 30 August 2022. The Reviewer dismissed an application for review of the Corporation's decision dated 19 November 2021 declining the appellant's claim for cover for mental injury in relation to historic sexual abuse suffered by her outside of New Zealand in xx year.

Background

[2] The appellant is a New Zealand citizen.

[3] On 13 January of xx year, the appellant left for an exchange visit to Y country. The exchange had been organised via the American Field Service (AFS) through the appellant's school, and was to last 10-11 months.

[4] When the appellant arrived in Y country, her passport was confiscated. After two days, the appellant travelled to another town where the exchange family was located. The appellant was introduced there to an Egyptian man, A. While the two were out one day, A raped the appellant in his car.

[5] The day after this incident, the appellant appears to have attempted to normalise the experience. She wrote in her diary that that she was pleased to have finally lost her virginity. She also wrote that, if A were her boyfriend, the incident was "okay" as it was part of their "courtship", and she had not been raped.

[6] The appellant later met A's adoptive family. She was befriended by another man, B, who bought her meals and gave her money. The appellant also met C, who suggested that she remain with him during the rest of the trip. This resulted in a violent quarrel between C and B, which led C to drive off with the appellant to Ycity. That night C raped the appellant.

[7] After this, the appellant was moved out of town and lost contact with the AFS. C regularly offered her to other men for sex. She was introduced to high levels of alcohol and drug use. She was forced to marry a Somali man, witnessed female castration, and was threatened at times with a machete and a gun.

[8] On 1 July of xx year, the appellant's brother came to Y country. The US Embassy became involved, and US Marines were used to retrieve her passport. She was put on an aeroplane back to New Zealand. She returned on 20 July of xx year, six months and six days after she had left.

[9] On 22 June 2007, a claim was made on the appellant's behalf for cover for mental injury caused by sexual abuse in terms of the Act.

[10] On 30 August 2007, the Corporation declined the appellant's claim on the basis of insufficient information.

[11] On 28 October 2020, the appellant sought further treatment and a second application for cover was made.

[12] On 14 July 2021, Dr Glen Simblett, Psychiatrist, diagnosed BL with post-traumatic stress disorder (PTSD); enduring personality change disorder; generalised anxiety disorder; and an isolated phobia of flying. In terms of the cause of the mental injuries, Dr Simblett stated:

> After this assessment I have formed an opinion that the sexual assaults and sexual exploitation … reach a threshold to be considered a material and substantive (but not only) cause of the development of [PTSD].
>
> I believe that the sexual assaults and sexual exploitation [the appellant] experienced … reach a threshold of forming a material and substantive (but not only) cause of [enduring personality change] syndrome.
>
> Likely causation links to [generalised anxiety] disorder are more difficult to reliably attribute, particularly since its onset appears to be later in [the appellant's] life, long after [the sexual abuse] occurred, and [the appellant] describes high levels of anxiety … prior to the [sexual abuse] occurring. … After some consideration, I conclude that [the sexual abuse] form indirect causes of the later development of Generalized Anxiety Disorder, by being material and substantive causes of the PTSD and Enduring personality disorder.
>
> I could find no evidence that the sexual assaults … that [the appellant] experienced … are causal factors in the development of a phobia of flying.
>
> The sexual assaults, abuse and exploitation [the appellant] experience[d] … were accompanied by a wide range of other threats and adversities including: physical assault with a knife and robbery; being threatened and shot at with firearms and machete; physical assaults and threats of violence; witnessing institutionalised sexual violence … (rape and forced female castration); witnessing physical violence on others; ransom threats; psychological and emotional abuse and exploitation; physical neglect and severe, life-threatening physical illness. Even this is not a comprehensive list. All of these events in combination form the basis of a catastrophic experience and as such are additional causes to the development of PTSD. …
>
> The additional factors described above also constitute additional causes to the development of enduring personality change since they are also important factors in producing an extended and catastrophic level of traumatic experience.

> [D]uring [the appellant's] ordeal in [Y], [she] was exposed to [a] wide range of exceptionally and often life-threatening stressful events that are certain to cause pervasive distress is almost anyone. The threats [the appellant] experienced during those five long months were sufficiently severe to overwhelm [the appellant's] coping and adaptability resources. She demonstrated enduring personality change [f]ollowing an extended five-month series of inescapable, overwhelming traumas. That is, the medical evidence suggests that [the appellant's] mental injuries were caused by the entire course of events during her stay in [Y country], with the sexual abuse being a material and substantive (but not only) cause.

[13] On 19 November 2021, the Corporation declined the appellant's claim as she was not ordinarily resident in New Zealand at the time the sexual abuse occurred. The appellant filed an application to review that decision. She claimed that she was ordinarily living in New Zealand at the time of the events, and also noted that the exchange had an end date and the plan was to return to live in New Zealand when the exchange concluded.

[14] On 2 August 2022, review proceedings were held. On 30 August 2022, the Reviewer dismissed the review, on the basis that the Corporation had been correct to decline the appellant's claim for mental injury cover due to her not being an ordinarily resident in New Zealand. The Reviewer noted, *inter alia*, the undisputed fact that the appellant in fact remained outside of New Zealand for just over six months; and that she had stated that she intended to stay in Y country for 10 or 11 months.

[15] On 26 September 2022, a Notice of Appeal was lodged.

[16] On 1 March 2023, the appellant provided a statement containing further information.

Relevant law

[17] Section 21 of the Act provides:

> (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—

(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.

[18] Section 17 provides:

(1) A person is ordinarily resident in New Zealand if he or she—

(a) has New Zealand as his or her permanent place of residence, whether or not he or she also has a place of residence outside New Zealand; and

(b) is in one of the following categories:

(i) a New Zealand citizen:

(ii) a holder of a residence class visa granted under the Immigration Act 2009:

(iii) a person who is a spouse or a partner, child, or other dependant of any person referred to in subparagraph (i) or (ii), and who generally accompanies the person referred to in the subparagraph.

(2) A person does not have a permanent place of residence in New Zealand if he or she has been and remains absent from New Zealand for more than 6 months or intends to be absent from New Zealand for more than 6

> months. This subsection overrides subsection (3) but is subject to subsection (4).

[19] In *McAlister v Air New Zealand Ltd*,[1] Tipping J commented:

> [96] … The Court can correct a drafting error by addition, omission or substitution of words if three conditions are satisfied: (i) the Court must be sure that there is a drafting error; (ii) the Court must also be sure what Parliament was trying to say; and (iii) the necessary correction must not involve too great a re-writing of the defective language. This last consideration is obviously a matter of degree and will often depend on the Court's assessment of whether, in the light of the overall interests of justice, when balanced against the proper role of the Courts, the redrafting exercise should be left to Parliament. Indeed, the more elaborate the necessary redrafting, the less likely it is that the first two conditions will have been fulfilled.

[20] In *Estate of S C*,[2] Judge Barber stated:

> [17] When Mr C died, there were two remaining days before the expiry of the six month period. If he did not return to New Zealand within that six month period then, in terms of the first limb of s.17(2), he would have been excluded from cover in that he would have remained absent from New Zealand for more than six months. The second limb of s.17(2), that a person does not have a permanent place of residence in New Zealand if he intends to be absent from New Zealand for more than six months, could not assist Mr C once he had been absent from New Zealand for more than six months.
>
> …
>
> [22] … the second limb of s.17(2) about an intention to be absent for that period is not meant to alleviate or abrogate from actual absence for more than six months, but adds that if a person suffers an accident overseas within the six month period and did not intend to return to New Zealand within that period, then cover is not available even though the person had not been absent for six months at the time of the accident.

[21] In *Richards*,[3] Judge Henare stated:

> [21] The key issue is whether the appellant can satisfy s 17(4) that he was absent from New Zealand "primarily" in connection with the duties of his employment, the remuneration for which is treated as income derived in New Zealand for New Zealand income tax purposes, or for 6 months following the completion of the period of employment outside New Zealand, so long as he or she intends to resume a place of residence in New Zealand.

---

1 *McAlister v Air New Zealand Ltd* [2010] 1 NZLR 153.
2 *Estate of S C v Accident Compensation Corporation* [2005] NZACC 7.
3 *Richards v Accident Compensation Corporation* [2014] NZACC 81.

[22] In *Kneebone*,[4] Judge Smith commented on section 17(2) as follows:

> [19] Accordingly, I have concluded that it is necessary for the Corporation to establish on the balance of probabilities that the intention of the claimant was to remain absent for more than six months. In my view this imposes a relatively high onus on the Corporation and in many cases can be supported by extrinsic information, departure cards, interviews and the like.

Discussion

[23] The issue in this case is whether the Corporation erred in declining the appellant cover on the basis that she was not "ordinarily resident in New Zealand" at the time the causative criminal events occurred.

[24] Ms Wilkie, for the appellant, submits as follows. The Corporation has not discharged its onus in deciding that the appellant did not intend to return during the six months from the date of departure (in terms of the second alternative in section 17(2)). The Corporation has not adopted a reasonable approach to identifying the relevant evidence, neither has it considered the body of evidence appropriately in the circumstances of this case. The appellant's age and health precluded her from forming the necessary intent to return to New Zealand. Even if she had managed to form that intent, she had no way to act upon it, to convey the peril she was in, and no way to travel without a passport. The Reviewer did not consider it necessary to determine the issue of capacity to form intent about returning to New Zealand, and that was an error of law. Dr Simblett concluded that the appellant experienced severe trauma in the form of dissociation and her behaviour was consistent with that of trafficking victims; and that she had a diminished appreciation of her own trauma, and an exaggerated appreciation of the threats made against her own family.

[25] Ms Wilkie was invited by the Court to present further submissions in relation to the first alternative in section 17(2)). In response, Ms Wilkie submits as follows. It is acknowledged that the appellant did remain absent from New Zealand for a period of six months and one week, and that this is not a disputed fact. However, the circumstances in which she remained absent are relevant to the consideration of whether the appellant has been and remains absent from New Zealand for more than six months. It was simply impossible for the appellant to return home within six

---

4 *Kneebone v Accident Compensation Corporation* [2014] NZACC 205.

months, and so her obligation to do so became void. If the doctrine of impossibility can be applied, in howsoever a tortured sense, to the Accident Compensation Corporation and its offer of services to injured individuals, it could fill the gap in the legislature's drafting of section 17(2). The plain meaning of section 17(2) is not reasonable in this case.

[26] This Court acknowledges the above submissions. However, this Court points to the following considerations.

[27] The appellant's claim for cover is for mental injury in relation to sexual abuse suffered by her outside of New Zealand. Section 21(2)(b)(ii) of the Act restricts cover for personal injury that is a mental injury performed outside New Zealand to a person who is ordinarily resident in New Zealand when the act is performed. Section 17(1)(a) provides that a person is ordinarily resident in New Zealand if she has New Zealand as her permanent place of residence. Section 17(2) provides that a person does *not* have a permanent place of residence in New Zealand if either of the following situations applies: (1) she has been and remains absent from New Zealand for more than six months; or (2) she intends to be absent from New Zealand for more than six months.

[28] In the appellant's case, in the period when she suffered her mental injury, she was and remained absent from New Zealand for over six months. It is acknowledged by the appellant's counsel that this fact is not disputed. The effect is that the appellant, when she suffered her mental injury, did not have a permanent place of residence in New Zealand, was not ordinarily resident in New Zealand when the relevant act was performed, and therefore does not have cover for her injury.

[29] This Court is bound by the plain and ordinary meaning of the Accident Compensation Act, and the Court has no jurisdiction in this case to fill a perceived gap in the drafting of this Act. The plain and ordinary meaning of section 17(2) is not at odds with the purpose of the Act as reflected in its purpose, being to provide for a *fair and sustainable* scheme for managing personal injury (section 3). While the appellant's experience is a most unfortunate one, this Court finds that, when

balanced against the proper role of the Courts, any redrafting of section 17(2) of the Act should be left to Parliament.

[30] This Court adds the following for completeness, in relation to the onus of proof under section 17(2), although onus is not at issue in view of the above. This Court (differently constituted) has on one occasion commented that, under section 17(2), it is necessary for the Corporation to establish on the balance of probabilities that the intention of the claimant was to remain absent for more than six months, thus imposing a relatively high onus on the Corporation.[5] The present Court respectfully differs from this view. Higher Courts have recognised the standard onus on the appellant, in accident compensation appeals, to establish his or her case on a balance of probabilities.[6] The District Court has, in interpreting section 17(4) of the Act, required the appellant to satisfy the requirements of this provision.[7] Likewise, the present Court finds, on a plain and ordinary reading of section 17(2), that the onus lies on the appellant to satisfy the requirements of this provision.

[31] In light of the Court's finding that, under section 17(2), the appellant does not have a permanent place of residence in New Zealand because of the first alternative (she was and remained absent from New Zealand for more than six months), it is not necessary for the Court to make a finding on the second alternative (she intended to be absent from New Zealand for more than six months).[8]

Conclusion

[32] In light of the above considerations, the Court finds that the Corporation correctly declined the appellant cover on the basis that she was not "ordinarily resident in New Zealand" at the time the causative criminal events occurred. The decision of the Reviewer dated 30 August 2022 is therefore upheld. This appeal is dismissed.

---

5 *Kneebone*, above note 4, at [19].

6 See, for example, *Accident Compensation Corporation v Bartels* [2006] NZAR 680, at [65], and *Atapattu-Weerasinghe v Accident Compensation Corporation* [2017] NZHC 142, at [23].

7 *Richards*, above note 3, at [21].

8 *Estate of S C*, above note 2, at [17] and [22].

[33] I make no order as to costs.

Suppression

[34] The Court considers it is necessary and appropriate to protect the privacy of the appellant. This order, made under s 160(1) of the Accident Compensation Act 2001, forbids publication of the name, address, occupation, or particulars likely to lead to the identification of the appellant. As a result, this decision shall henceforth be known as *BL v Accident Compensation Corporation*.

P R Spiller
District Court Judge

Solicitor: Laura Findlater Law for the appellant.