



- (b) ACR 220/20: the Reviewer dismissed an application for review of the Corporation's decision dated 6 April 2020 finding that Ms Reid did not suffer PTSD from a treatment injury arising out of a failure to provide psychiatric treatment.

## **Appeal ACR 219/20**

### ***Background***

[2] On 25 February 2012, Ms Reid sustained a treatment injury as a result of surgery. Ms Reid's injuries were identified as:

Injury to nerve during surgery; Complex regional pain syndrome type I, lower limb; Foot drop; Lumbar sprain; Sprain and strain of sacroiliac joint.

[3] On 30 April 2018, Ms Siobhan Grimshaw, Occupational Therapist, conducted an assessment of Ms Reid to determine her vehicle/mobility-related needs and limitations.

[4] On 4 December 2019, the Corporation identified that the purchase of a suitable vehicle was the recommended option to meet Ms Reid's injury-related transport needs, as the other available options such as public transport, taxis, short-term rental vehicles and contributions to mileage were either not suitable or not cost-effective. It was identified that the vehicle to be purchased must have the following features to meet Ms Reid's needs:

- (a) Automatic - to allow the vehicle to be driven with one (right) leg.
- (b) No or low door sill to lift feet over: lifting left leg over the sill is likely to increase Ms Reid's pain.
- (c) Space for left footrest in driver's seat: there needs to be space under the steering wheel to rest Ms Reid's outstretched left leg which is not used when driving.

- (d) Hatchback style boot with no or low door sill to lift loads over: a level access boot will reduce the need to lean forwarding and the loading of the lumbar spine while transferring goods to/from the car.
- (e) Seat height 550 to 700 mm range: transferring goods to/from the car to allow safer independent transfer which places less strain on lumbar spine when standing from or lowering body onto seat.
- (f) No or low seat laterals: to facilitate easier transfers.
- (g) Back lateral support: this could be provided with a lateral trunk support insert - to maintain stability and seating comfort, by providing support to trunk from lateral forces when driving.

[5] Six vehicle types were identified as potentially meeting Ms Reid's injury-related needs. Ms Grimshaw was to assist Ms Reid with finding a vehicle that had the features needed for her injury.

On 9 December 2019, the Corporation noted that, based on report of the assessor, it had applied the Corporation's policy of establishing the contribution amount on a Trademe vehicle search and applying an average calculation of the vehicles that were recommended and within the mileage/age requirements. This process led to the Corporation's contribution to the purchase of a vehicle was \$17,788, less the cost of Ms Reid's current vehicle.

[6] On 10 December 2019, the Corporation issued a decision that:

- (a) Its contribution to a vehicle is \$17,778 including GST (less the sale of Ms Reid's vehicle).
- (b) Ms Reid's contribution to a vehicle is the sale of her existing vehicle.

[7] On 27 January 2020, Ms Grimshaw reassessed Ms Reid's transport needs to ensure that her needs had not changed since the previous assessment undertaken.

[8] On 16 March 2020, Ms Grimshaw's updated assessment was submitted. In addition to the vehicle feature requirements listed in the 4 December 2019 assessment, Ms Grimshaw's updated assessment identified the following vehicle features:

- (a) Heated car seat: to reduce cold which triggers increased levels of injury-related pain, particularly important for Ms Reid in the winter months.
- (b) Good suspension (to be evaluated by Ms Reid on a test drive): to reduce jarring forces on back, when the vehicle travels over bumps/uneven surfaces, which are reported to trigger increased levels of injury-related pain.
- (c) Side-hinged tailgate or automatic opening tailgate: Ms Reid reported sudden onset extreme pain if pushing up to open tailgate, leading to her dropping items when lifting tailgate to lower the boot; it is possible that some hydraulic-assisted top-opening tailgates may require less force than others, so these should also be considered. The assessment noted that the cost to retrofit an auto opening tailgate was approximately \$5,000, depending on the vehicle. A physical vehicle-specific assessment with Ms Reid is required to identify ease of opening tailgate; advice re: opening/closing technique related to injury-management can be provided at this time.

[9] Ms Grimshaw also noted social/lifestyle vehicle features in her assessment report, including:

- (a) Boot space to allow space for mattress in boot: to support Ms Reid's ability to engage in leisure activities (camping) with son and grandchildren.
- (b) Tow bar: this is a feature that Ms Reid requires to meet her lifestyle needs in relation to engaging with her family, including carrying children's bikes when she takes them out, as it is difficult for her to lift

the bike into the boot, and easier for her to lift the lightweight children's bikes on to an easy lift bike-rack mounted on a tow bar; the tow bar is also used to pull a trailer if going camping with her son and grandchildren.

- (c) Four-wheel drive: not essential, but strongly preferred so that Ms Reid can still access off road areas (such as beach/camping) with her family, as was part of her previous lifestyle.

[10] Ms Grimshaw also detailed Ms Reid's needs and family situation. Ms Reid advised the assessor that she was seeking support to meet her transport needs so that she could more easily engage in everyday life activities and fulfil her role as a caring grandmother to her 18-month and five-year-old grandchildren. She wanted the Corporation to support the purchase of a replacement vehicle which would help her engage in a more active lifestyle including meeting her current lifestyle and social needs. For that reason, a vehicle with a similar boot size and tow bar were important to her. Ms Grimshaw identified:

- (a) Three vehicles as meeting Ms Reid's injury-related needs: a Honda CRV (estimate, \$30,000), Nissan La Festa (\$13,000 for 7-8 year old vehicle which did not have the automatic tailgate or heated seats, but that could be retrofitted), or a Toyota Rush (side-hinged door, with probable sleeping space to lie flat).
- (b) Two vehicles that met Ms Reid's injury-related and lifestyle-related needs: a Mitsubishi Outlander (price estimate \$20,000 to \$30,000) and a Nissan X-Trail (price estimate \$20,000 to \$25,000).
- (c) Two vehicles as possibly meeting Ms Reid's injury-related needs, subject to the ease of opening the tailgate (which required further assessment), and exact boot measurements (to be determined to see if they met lifestyle needs): a Mitsubishi RVR and a Ford Echo Sport. No price estimate was provided for these vehicles.

[11] On 20 April 2020, Ms Alison Balkiwill, the Corporation's Technical Specialist, advised that, while it was agreed that the heated seats could be added to a lower specification vehicle and that this was a suitable option, the automatic tailgate was not considered to be necessary for the appellant's injury related needs, nor appropriate. That was because alternate strategies could be discussed with an occupational therapist for the safe loading and unloading of a vehicle. The tow bar, additional boot space and four-wheel drive were not essential injury-related features. Ms Balkiwill also confirmed that:

I have reviewed the models that are included in the assessors report taking into account the requested feature above which are not essential, or where the need can be met via an alternate solution. I can confirm that the ACC contribution of \$17,778 minus the client's value of her current vehicle would fund a range of vehicles which meet the ACC policy of being under 7 years old and under 80,000km. The models available include: Nissan Xtrail, Mitsubishi Outlander, Toyota Rush, Nissan and Lafesta.

[12] On 22 May 2020, the Corporation issued a decision advising that it had approved its funding for the purchase of a vehicle, which remained \$17,778 less the sale of Ms Reid's current vehicle. The decision identified features that the new vehicle needed to have. These were the features identified in Ms Grimshaw's assessment, with the exception of the features for social/lifestyle needs. However, a heated car seat could be funded separately if it was not already a feature of the vehicle chosen, at a cost of \$700.

[13] Four vehicles suitable for Ms Reid's needs were identified in the decision, being a Nissan Xtrail, a Mitsubishi Outlander, a Toyota Rush and a Nissan La Festa. The vehicle had to be up to 80,000 kilometres and up to seven years old and, and if the vehicle was slightly outside these guidelines as to age and distance travelled, a mechanical report confirming the vehicle is in good condition was required. The decision also stated that:

Once you have found a suitable vehicle to purchase you need to contact Siobhan, so that she can check if it is a suitable vehicle before you purchase your new vehicle.

[14] On 18 June 2020, the Corporation, in response to Ms Reid's advocate's request, explained the advice from the Technical Specialist team, and noted that:

1. A number of features have been identified which are to 'minimise pain' such as the heated seat and the automatic tailgate. I have discussed these features with Clinical Advisor;

Heated Car seat - we agree that a heated seat can be funded separately to the vehicle. Heated seats for vehicles can be added without the higher spec vehicle model. This is the more cost effective option.

Automatic tailgate - the assessor remarks that Mrs Reid has noted sharp pain when trying to open the tailgate, leading to items being dropped. This would indicate that the difficulty is in opening the tailgate when carrying items. As the assessor identifies, alternate strategies can be discussed by an occupational therapist to assist with safe loading and unloading of the vehicle. There is insufficient rationale to justify that an automatic tailgate is an assessed need nor that it is necessary or appropriate.

2. The tow bar, additional boot space and 4WD are not essential injury related features.

"...I can confirm that the ACC contribution of \$17,778 minus the client's value of her current vehicle would fund a range of vehicles which meet the ACC policy of being under seven years old and under 80,000 kilometres. The models available include Nissan Xtrail, Mitsubishi Outlander, Toyota Rush, Nissan Fafesta.

In considering any social rehabilitation entitlement ACC exercises its statutory discretion. I recommend that a further decision letter is issued (with Review rights) which confirms that ACC has considered the new occupational therapy assessment report. Notifying the client of an ACC contribution towards her vehicle of 17,778 dollars minus the value of her current vehicle. ACC is also willing to fund a heated car seat, assessed as suitable by an occupational therapist.

ACC is required to weigh up and balance a number of key factors: I have applied the considerations of section 79 , 81 , 84 and schedule 1, part 1 clauses 21 and 22.

[15] The Corporation further noted that Ms Reid's case-manager issued the decision after considering the recommendations made.

[16] Ms Reid applied for a review of the Corporation's decision of 22 May 2020.

[17] On 27 August 2020, review proceedings were held. On 25 September 2020, the Reviewer dismissed the review, noting that noted that the case involved the Corporation making a decision that specifically permitted it to apply its discretion, and that, in such cases, the Reviewer's power was limited. The Reviewer found that there was no error of law or principle, irrelevant considerations were not taken into account, relevant considerations were taken into account, and the decision was not

plainly wrong. On 15 October 2020, a Notice of Appeal was lodged in respect of the Reviewer's decision.

[18] In October 2020, Ms Reid purchased a new vehicle, being a 2016 Hyundai Santa Fe for \$29,390.00. She located the vehicle herself and paid a \$12,000 deposit. Ms Grimshaw met her at the dealership and confirmed that the vehicle met Ms Reid's injury-related needs. Arrangements were then made for the heated car seat modification required, which the Corporation agreed to fund.

[19] On 7 June 2022, Ms Reid's appeal was dismissed for want of prosecution. On 16 August 2023, Judge McGuire issued a Minute reinstating this appeal and directing the prompt provision of submissions.

[20] On 20 November 2023, the Corporation offered an additional \$6,000 to its contribution to Ms Reid's replacement vehicle. This amount reflected the estimated cost of retrofitting additional vehicle features identified by the assessor which include the automatic tailgate, a rear-view camera, a panoramic rear mirror and blind spot mirrors. Ms Reid declined the offer.

### **Relevant law**

[21] Section 68 of the Accident Compensation Act 2001 ("the Act") provides:

- (1) The Corporation provides entitlements to claimants in accordance with this Act.
- (2) If any provision of this Act requires the Corporation to provide an entitlement (regardless of how that requirement is expressed), the Corporation is required to provide the entitlement only to the extent required by this Act.

[22] Section 69(1)(a) specifies the available entitlements of "rehabilitation, comprising treatment, social rehabilitation and vocational rehabilitation".

[23] Section 70 provides:

A claimant who has suffered personal injury for which he or she has cover—



- (a) is entitled to be provided by the Corporation with rehabilitation, to the extent provided by this Act, to assist in restoring the claimant's health, independence, and participation to the maximum extent practicable; but
- (b) is responsible for his or her own rehabilitation to the extent practicable having regard to the consequences of his or her personal injury.

[24] Section 79 states that “the purpose of social rehabilitation is to assist in restoring a claimant's independence to the maximum extent practicable”. Section 6(1) provides that practicable, in relation to rehabilitation, means practicable after considering and balancing the following:

- (a) the nature and consequences of the injury:
- (b) the achievement of rehabilitation outcomes:
- (c) costs:
- (d) cost effectiveness:
- (e) the availability of other forms of rehabilitation:
- (f) other relevant factors

[25] Section 81(1) provides that a key aspect of social rehabilitation includes transport for independence, and section 81(3) provides that the Corporation is liable to provide a key aspect of social rehabilitation to a claimant if the conditions in subsection (4) are met. Section 81(4) provides:

The conditions are—

- (a) a claimant is assessed or reassessed under section 84 as needing the key aspect; and
- (b) the provision of the key aspect is in accordance with the Corporation's assessment of it under whichever of clauses 13 to 22 of Schedule 1 are relevant; and
- (c) the Corporation considers that the key aspect—
  - (i) is required as a direct consequence of the personal injury for which the claimant has cover; and
  - (ii) is for the purpose set out in section 79; and
  - (iii) is necessary and appropriate, and of the quality required, for that purpose; and
  - (iv) is of a type normally provided by a rehabilitation provider; and

- (d) the provision of the key aspect has been agreed in the claimant's individual rehabilitation plan, if a plan has been agreed.

[26] Section 84 provides:

Assessment and reassessment of need 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.
- (5) The Corporation must provide to an assessor (whether employed or appointed by the Corporation) all information the Corporation has that is relevant to the assessment.

[27] Schedule 1 of the Act provides:

**21 Transport for independence: matters to which Corporation must have regard**

- (1) In deciding whether to provide or contribute to the cost of transport for independence, the Corporation must have regard to—
- (a) any rehabilitation outcome that would be achieved by providing it; and
  - (b) the cost, and the relevant benefit, to the claimant of the transport for independence service for which the claimant has lodged a claim; and
  - (c) the difficulties faced by the claimant in doing the following in relation to the transport used by the claimant before his or her personal injury, without the transport for independence service for which he or she has lodged a claim:
    - (i) driving or operating the vehicle:
    - (ii) gaining access to the vehicle:
    - (iii) enjoying freedom and safety of movement in the vehicle:
    - (iv) travelling as a passenger in the vehicle:
    - (v) transporting any essential mobility equipment in the vehicle; and
  - (d) the need for the claimant to own or have access to a vehicle, having regard to the times at which and the frequency with which the claimant is likely to need that form of transport; and
  - (e) alternative means of transport available to the claimant; and
  - (f) the effect that modifications, or purchase, of a vehicle will have on the likelihood of the claimant obtaining and retaining employment; and
  - (g) the existing vehicle or vehicles owned or used by the claimant; and
  - (h) whether and when the limitations caused by the claimant's personal injury are expected to improve; and

- (i) any plans and quotes an appropriately qualified person provides for proposed modifications to, or for the purchase of, a vehicle.
- (2) The Corporation may require the claimant to satisfy the Corporation of the matters set out in subclause (3) or subclause (4) before the Corporation approves the modification or purchase for which the claimant has lodged a claim.
- (3) The Corporation may require the claimant to satisfy the Corporation that a vehicle will be modified in such a way that it—
  - (a) will be able to be issued with a warrant of fitness; and
  - (b) will—
    - (i) comply with regulations made under the Transport (Vehicle Standards) Regulations 1990; or
    - (ii) comply with any alternative standards prescribed under regulation 6 of those regulations; or
    - (iii) be issued with an exemption under those regulations.
- (4) If a claimant wishes to drive a modified or newly purchased vehicle, the Corporation may require the claimant to satisfy the Corporation that he or she is likely to be able to drive the vehicle safely, and be legally permitted to drive it.

## 22 Transport for independence: rights and responsibilities

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- (3) In determining the amount to be paid in respect of a vehicle, the Corporation may take into account the value of any other motor vehicle owned by the claimant, if the claimant previously used the vehicle on a regular basis.

[28] In *Kacem v Bashir*,<sup>1</sup> 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.

[29] In *Reed*,<sup>2</sup> Henare DCJ stated:

[28] The requirements of section 81(4) are cumulative, which means that if one of the conditions is not satisfied, there is no need to consider any of the additional requirements.

<sup>1</sup> *Kacem v Bashir* [2010] NZSC 112; [2011] 2 NZLR 1, affirmed in *Gregory v Accident Compensation Corporation* [2016] NZACC 118, at [14].

<sup>2</sup> *Reed v Accident Compensation Corporation* [2021] NZACC 103 at [28].

## Discussion

[30] The issue in appeal ACR 219/20 is whether the Corporation's decision on 22 May 2020 is correct as to the quantum of the Corporation's contribution to Ms Reid's transport for independence costs.

[31] Ms Reid, as a person who has suffered personal injury for which she has cover, is entitled to be provided by the Corporation with rehabilitation, to the extent provided by the Act, to assist in restoring her health, independence and participation to the maximum extent practicable, but she is responsible for her own rehabilitation to the extent practicable having regard to the consequences of her personal injury.<sup>3</sup>

[32] One aspect of rehabilitation is social rehabilitation, which is aimed at assisting in restoring Ms Reid's independence to the maximum extent practicable.<sup>4</sup> This requires the Corporation to balance such factors as the nature and consequences of Ms Reid's injury, the achievement of rehabilitation outcomes, costs, cost effectiveness, and the availability of other forms of rehabilitation.<sup>5</sup> One aspect of rehabilitation is transport for independence, and the Corporation, in deciding whether to provide or contribute to the cost of transport, must have regard to a range of factors including cost and relevant benefit.<sup>6</sup>

[33] Mr Wood, for Ms Reid, submits as follows. The Corporation failed to take into account relevant considerations when making its decision as to the level of its contribution as to her transport for independence, being the need for an automatic tailgate and her social and lifestyle needs. Ms Reid's social needs and pre-injury commitments have been well documented as a fundamental injury-related need in respect to her mental wellbeing, to combat her ongoing mental deterioration of suicidality and isolation due to the crippling effects of her unchanged pain condition. The Corporation substituted personal, unqualified opinions and views as to Ms Reid's injury-related needs and requirements in conflict with the accepted, appropriately qualified and reasoned report/evidence of Ms Grimshaw. The vehicle

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<sup>3</sup> Section 70;

<sup>4</sup> Section 79.

<sup>5</sup> Section 6(1).

<sup>6</sup> Schedule 1, clause 21.

purchased by Ms Reid was chosen due to an unavailability of other options, and she is now in debt due to the shortfall from the Corporation's contribution.

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

[35] First, the Act envisages that the Corporation, in deciding on the funds to be provided for rehabilitation such as transport of independence, exercises a discretion after balancing out divergent factors, and is not required to meet the full cost of such transport. In relation to an appeal against a decision made in the exercise of a discretion, the criteria for a successful appeal are stricter. The appellant is required to establish: an error of law or principle, taking account of irrelevant considerations, failing to take account of a relevant consideration, or that the decision is plainly wrong.<sup>7</sup>

[36] Second, the Corporation, in its decision of 22 May 2020, exercised its discretion substantially in light of the assessment, by Ms Grimshaw, an Occupational Therapist, of Ms Reid's vehicle/mobility-related needs and limitations. The Corporation's determination of the extent of its financial contribution was achieved by a logical, practical approach of applying the Corporation's policy of a Trademe vehicle search and applying an average calculation of the vehicles that were recommended and within the mileage/age requirements. The result was that the extent of the Corporation's contribution to the purchase of a vehicle was determined as \$17,778 (including GST), less the cost of Ms Reid's current vehicle. This determination was later reviewed and confirmed in light of Ms Grimshaw's second assessment.

[37] Third, Ms Reid chose to buy a car for \$29,390.00, and the Corporation provided its assessed contribution and agreed to more. The Corporation further agreed to fund a heated car seat modification, and recently offered an additional \$6,000, being the estimated cost of retrofitting additional vehicle features identified by Ms Grimshaw. The Corporation has therefore paid or agreed to pay a significant part of the costs involved in providing Ms Reid with transport for independence, and

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<sup>7</sup> *Kacem v Bashir*, above note 1, at [32].

any shortfall is justified in terms of statutory considerations such as cost and cost-effectiveness, and the possibility that a claimant has some responsibility for her own rehabilitation.

[38] In light of the above considerations, this Court finds that Ms Reid has not established that the Corporation, in deciding its contribution to Ms Reid's transport for independence costs, made an error of law or principle, took account of irrelevant considerations, failed to take account of a relevant consideration, or made a decision that was plainly wrong.

### **Appeal ACR 220/20**

#### ***Background***

[39] As noted above, on 25 February 2012, Ms Reid sustained a treatment injury as a result of surgery. Ms Reid's injuries were identified as:

Injury to nerve during surgery; Complex regional pain syndrome type I, lower limb; Foot drop; Lumbar sprain; Sprain and strain of sacroiliac joint.

[40] Following Corporation-funded surgery in September 2013, Ms Reid developed foot drop and increased pain in her sacroiliac joint region. As a result, the Corporation accepted cover for a treatment injury.

[41] Following that injury, Ms Reid experienced emotional trauma, and, in 2016, she lodged a claim with the Corporation for cover for a mental injury. On 23 June 2016, the Corporation declined cover on the basis that the medical evidence did not support a DSM mental injury diagnosis. Ms Reid did not apply for review of that decision.

[42] Later in 2016, Ms Reid again sought cover for a mental injury. On 23 February 2017, the Corporation again declined cover for a mental injury. Ms Reid applied to review that decision. On 13 October 2017, the Reviewer dismissed the application. Ms Reid did not seek to appeal that decision.

[43] On 30 June 2017, Ms Reid was the victim of an assault for which she was granted cover. She subsequently lodged a claim with the Corporation for a mental

injury arising from that assault. In February 2018, the Corporation requested that a psychiatric assessment be carried out.

[44] On 2 March 2018, Dr Mary Davidson, Psychiatrist, reported that Ms Reid was suffering from PTSD. However, she noted that Ms Reid's condition was complex due to the overlay of the emotional effects of her sacroiliac injury, which had probably made her PTSD more severe. For this reason, Dr Davidson recommended that the Corporation engage a psychiatrist to assist in the team managing Ms Reid's illness.

[45] On 21 May 2018, the Corporation accepted cover for PTSD as a mental injury resulting from Ms Reid's 30 June 2017 assault injury.

[46] On 5 March 2020, a treatment injury claim was submitted to the Corporation by Ms Reid's GP, Dr Wayne McKenzie, for "failure to provide specialist psychiatric assessment as recommended" and noting that Ms Reid was diagnosed with PTSD and anxiety.

[47] On 6 April 2020, the Corporation declined cover for a treatment injury on the basis that:

ACC received this treatment injury claim from your GP, Dr Wayne McKenzie of Marshland Family Health Centre. The claim was lodged to consider whether ACC has failed to provide specialist psychiatric assessment for post-traumatic stress disorder (PTSD).

Legislative criteria states that a treatment injury is: an injury, caused by treatment (by a registered health professional), which is not a necessary part or ordinary consequence of treatment.

From the clinical notes provided ACC have not identified that you have suffered a treatment injury. ACC are not a registered health provider/treatment provider.

This claim relates to an injury which has previously been investigated, ACC is unable to cover an injury when cover has already been accepted on a previous claim. A diagnosis of PTSD has been accepted for cover under claim number 100 4035 2150. ACC is providing support under this claim number and any queries relating to this should be directed to your Case Manager, Fiona Gregg.

[48] Ms Reid applied to review the Corporation's decision.



[49] On 26 August 2020, Ms Charlotte West, Clinical Psychologist, noted that Ms Reid had described on a number of occasions her efforts to access a referral for psychiatric and medication review, with no success. Ms West commented that the impact of Ms Reid's sense of powerlessness and hopelessness in an aversive situation, added to the distress experienced in the two events for which Ms Reid had cover.

[50] On 2 September 2020, review proceedings were held. In a decision dated 25 September 2020, the Reviewer dismissed the application, holding that:

- (a) Ms Reid had failed to establish a treatment injury claim on the basis of the Corporation's delay in referring her to a psychiatrist, since the Corporation is not a registered health professional (as provided for by the Accident Compensation (Definition) Regulations 2019).
- (b) The personal injury claimed by Ms Reid was a mental injury arising from the delay in obtaining a referral to a psychiatrist: this did not meet the criteria for a personal injury as defined (in section 26) as a mental injury caused by physical injuries, a specified criminal act, or a work-related mental injury.

[51] Despite dismissing the application, the Reviewer awarded costs for lodging the application, preparing the case for review, preparation and appearance at the hearing and disbursements, totalling \$844.98. Ms Reid subsequently filed this appeal.

[52] In December 2020, Ms Reid was seen by Dr Deborah Wood, Consultant Psychiatrist, for the purpose of assessing her mental health with a view to providing appropriate treatment and rehabilitation recommendations for the Corporation.

[53] On 13 December 2020, Dr Wood reported, noting that Ms Reid was suffering from PTSD symptoms, which began shortly after her surgery (in 2013), and which became more severe after she was assaulted by her ex-partner in June 2017. Dr Wood advised:

I note that previous clinicians did not feel that Melani's post traumatic symptoms reached the threshold for a diagnosis of PTSD in the wake of the 2012 (sic) event and its aftermath but given what she has described for me today I'm not convinced that that is the case. I also note Dr Davidson's report emphasising the fact that the previous trauma was closely intertwined with the later one in terms of the PTSD picture presenting now and I'm inclined to agree with that. ... From what Melani described to me today it sounds as if she had PTSD from a time shortly after her first surgery but which subsequently were added to with the assault in 2017.

[54] On 16 May 2021, Dr Wood provided a further report addressing specific questions posed by the Corporation. Dr Wood identified that Ms Reid had experienced PTSD symptoms following two events: her surgery in 2013 and the assault in 2017. In relation to each event, Dr Wood went through the DSM V criteria, which included exposure to a traumatic event and presence of intrusive symptoms associated with that trauma. Dr Wood considered that Ms Reid had suffered two traumatic events (the surgery in 2013 and the assault in 2017) and that each one was serious enough in its own right to cause PTSD in anyone who had suffered them.

[55] On 28 May 2021, the Corporation issued a decision which advised that the Corporation had reconsidered Ms Reid's claim for a mental injury "following the physical injury you suffered after your accident" and had now approved cover for post-traumatic stress disorder. It appears that the effect of this decision was to recognise cover for PTSD as arising from the surgery in 2013, in addition to the assault in 2017 (which was already covered by the decision of 21 May 2018, noted above in paragraph [45]).

[56] On 20 July 2021, an initial case management conference was held in this appeal. At that conference, Ms Reid's advocate, Mr Wood, advised that, as a result of Dr Wood's report and the Corporation's decision on 28 May 2021, he wished to discuss matters with counsel for the Corporation which might resolve the appeal.

[57] In subsequent correspondence, Mr Wood advised that the Corporation's decision of 28 May 2021 now resolved the substantive issue in the appeal but left an outstanding question of costs. In an email dated 13 October 2021, Mr Wood advised that the costs that he was seeking were under the Accident Compensation (Review Costs and Appeals) Regulations 2002.

[58] On 13 October 2021, Ms Gall, for the Corporation, emailed Mr Wood advising that the above Regulations only dealt with costs payable on a review, and that Ms Reid had been awarded costs in respect of her review application giving rise to this appeal. Ms Gall requested that, if costs were being sought (in addition to those awarded) in respect of the appeal, Mr Wood advise what those costs were and the basis for them. In that regard, counsel noted that Ms Reid's treatment injury claim (to which the appeal related) alleged that the Corporation's failure to provide a psychiatric assessment caused Ms Reid to suffer PTSD and anxiety. This was dismissed at review, however, the Corporation had now agreed to accept cover for PTSD as having been caused by the treatment that Ms Reid underwent in 2013. Ms Gall advised that, while that resolved the question of cover for PTSD, it did not then follow that Ms Reid's current appeal was properly brought and that she should be entitled to costs in respect of it.

[59] On 15 November 2021, Mr Wood responded in an email dated in which he advised that:

In relation to ACR 220/20 (Mental Injury Cover) Costs are being sought in line with Regulated Costs, as the Review was brought reasonably as was the appeal, the corporation has since revised its position and Ms Reid now has the 'Cover' which she has sought since 2015.

[60] On 3 June 2022, counsel followed up in an email to Mr Wood, seeking advice as to what further costs were being sought and what the basis for the claim was. No substantive response was received to that email and, on 7 June 2022, the appeal was dismissed for want of prosecution.

[61] On 16 August 2023, Judge McGuire issued a Minute reinstating the appeal and making directions for the filing of submissions.

[62] On 18 September 2023, Mr Wood filed submissions for Ms Reid. Based on the submissions filed, counsel emailed Mr Wood and the Court seeking clarification as to whether the scope of the appeal was (as previously agreed) confined to the issue of costs, or whether Ms Reid was now seeking to pursue a challenge to the Corporation's decision of 6 April 2023. The Court directed the convening of a telephone conference.

[63] On 27 October 2023, following the telephone conference, the Court issued a Minute noting that it was clarified that there was a still a live issue in this appeal relating to the question of cover arising out of the two decisions of the Corporation dated 6 April 2020 and 28 May 2021.

### **Relevant law**

[64] Section 32(1) of the Act provides that treatment injury is defined as follows:

Treatment injury means personal injury that is-

- (a) suffered by a person-
  - (i) seeking treatment from 1 or more registered health professionals; or
  - (ii) receiving treatment from, or at the direction of, 1 or more registered health professionals; or
  - (iii) referred to in subsection (7); and
- (b) caused by treatment; and
- (c) not a necessary part, or ordinary consequence, of the treatment, taking into account all the circumstances of the treatment, including-
  - (i) the person's underlying health condition at the time of the treatment; and
  - (ii) the clinical knowledge at the time of the treatment.

[65] Section 33(1)(d) provides that treatment includes a failure to provide treatment, or to provide treatment in a timely manner.

[66] Section 26(1) provides that personal injury involving mental injury means:

...

- (c) mental injury suffered by a person because of physical injuries suffered by the person; or
- (d) mental injury suffered by a person in the circumstances described in section 21; or
- (da) work-related mental injury that is suffered by a person in the circumstances described in section 21B;

[67] In *Monk*,<sup>8</sup> Miller J (for the Court of Appeal) stated:

[30] A mental injury may be covered under s 26(1)(c) of the 2001 Act only if it results from a physical injury, and the mental injury must further result from an accident or qualify as a treatment injury. Like Mallon J, we are not persuaded that the ordinary meaning of the statutory language or the object of the legislation further requires that the physical injury be defined as a physical injury that is itself covered.

[68] In *Stanley*,<sup>9</sup> Heath J stated:

[58] Applying the principles set out in *Ambros*, confirmed in cases such as *McEnteer* and *Sam*, and taking account of the different senses in which lawyers and medical people assess questions of causation, it was within the power of the Corporation to put evidence before the Court to assist in assessing the true cause of the exacerbated personal injury. But, it did not do so. In those circumstances, I consider that Judge Joyce was entitled, in the absence of other evidence pointing to the exacerbated personal injury being caused wholly or substantially by the underlying health condition, to find that a treatment injury had been proved. Independently, on the evidence, I reach the same conclusion.

## Discussion

[69] The issue in appeal ACR 220/20 is whether the Corporation, in its decision on 6 April 2020, correctly declined cover for a treatment injury which was claimed on the basis that the Corporation had failed to provide specialist psychiatric assessment for post-traumatic stress disorder (PTSD).

[70] A treatment injury is a personal injury that is suffered by a person seeking or receiving treatment from one or more registered health professionals, caused by treatment and not a necessary part, or ordinary consequence, of the treatment.<sup>10</sup> Treatment includes a failure to provide treatment, or to provide treatment in a timely manner.<sup>11</sup> Personal injury involving mental injury (such as PTSD) means mental injury suffered by a person because of physical injuries suffered by the person.<sup>12</sup>

[71] Mr Wood, for Ms Reid, submits as follows. Once Ms Reid was permitted access to psychiatrists, their reports identified that Ms Reid had suffered mental injuries due to the initial treatment injury of the surgery, as well as an additional

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<sup>8</sup> *Accident Compensation Corporation v Monk* [2012] NZCA 615.

<sup>9</sup> *Accident Compensation Corporation v Stanley* [2013] NZHC 2765.

<sup>10</sup> Section 32(1).

<sup>11</sup> Section 33(1)(d).

<sup>12</sup> Section 26(1)(c).

instance of PTSD due to the delay in her treatments being provided because of the purgatory state that Ms Reid's claim(s) had remained in, within the Corporation. Reference is made to the extensive various reports of Ms West, Registered Clinical Psychologist, Dr Davidson, Registered Psychiatrist, and Dr Wood, Registered Psychiatrist. It is incorrect that an individual may only have cover for PTSD once, as cover is provided for the index event, not just for sole diagnoses. Ms Reid's exacerbated personal injuries, and desperate need for assistance, would not have been as dire if she had been afforded the ability to receive the assistance of the required psychiatrist's care in a timely manner.

[72] This Court acknowledges the above submissions. However, the Court refers to the following considerations.

[73] First, Ms Reid's claim for treatment injury, on the basis that the Corporation had failed/delayed to provide specialist psychiatric assessment for PTSD, does not qualify for treatment injury in terms of the Act. Section 32(1)(a) specifically requires that the injury must be suffered by a person seeking or receiving treatment from a registered health professional. The Corporation is not a registered health professional being sought for or providing treatment.

[74] Second, Ms Reid's claim for a mental injury, on the basis that the Corporation had failed/delayed to provide specialist psychiatric assessment for PTSD, does not qualify for mental injury in terms of the Act. Section 26(1)(c) specifically requires that the mental injury suffered by a person because of physical injuries suffered by the person. There is no evidence that any delay on the part of the Corporation caused a distinct physical injury in addition to the physical injuries in respect of which cover has been granted for PTSD. There is a reference by Ms West, Psychologist, to Ms Reid's sense of powerlessness and hopelessness and additional distress, but this does not amount to a distinct physical injury.

[75] Third, the Corporation has granted cover to Ms Reid for PTSD, on the basis of physical injuries caused by the September 2013 surgery and June 2017 assault. Cover for PTSD as arising from the June 2017 assault was granted by the Corporation in May 2018, and then cover for PTSD as also arising from the

September 2013 was granted by the Corporation in May 2021. The latter decision was taken in light of the report of Dr Wood, Psychiatrist, on the basis of Ms Reid's evidence, that she had PTSD from a time shortly after her first surgery and this PTSD was added to with the assault in 2017. This Court therefore finds that Ms Reid has adequate cover, backed by medical evidence, for her PTSD condition, and that there is no practical benefit in her continuing to dispute the Corporation's decision of 6 April 2020 declining treatment injury cover on the basis that the Corporation had failed to provide specialist psychiatric assessment for PTSD.

### **Conclusion**

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

- (a) ACR 219/20: the Reviewer's decision of 25 September 2020, dismissing an application for review of the Corporation's decision dated 22 May 2020 regarding payment towards the purchase of a vehicle for Ms Reid, is correct.
- (b) ACR 220/20: the Reviewer's decision of 25 September 2020, dismissing an application for review of the Corporation's decision dated 6 April 2020 finding that Ms Reid did not suffer PTSD from a treatment injury arising out of a failure by the Corporation to provide psychiatric treatment, is correct.

[77] The above appeals are dismissed. I make no order as to costs.



P R Spiller  
District Court Judge

Solicitors for the Respondent: Young Hunter