IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 208 ACR 027/23

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

Hearing:	19 June 2023
Heard at:	Christchurch
Appearances:	Mr B Hinchcliff for appellant Ms F Becroft for respondent
Judgment:	15 December 2023

RESERVED JUDGMENT OF JUDGE I C CARTER
[Personal injury – ordinarily resident in New Zealand, Accident Compensation Act 2001, ss 17 and 22]

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Background

[1] Mr Oliver was working and living in the United Kingdom and travelling in Europe with his partner in 2015 and 2016. On 26 April 2016 he suffered a serious accident in the United Kingdom and underwent surgery and other treatment in the United Kingdom National Health Service. Mr Oliver returned to New Zealand in early March 2017.

[2] Just over three years later, Mr Oliver consulted an orthopaedic surgeon in New Zealand who recommended further surgery related to the injuries suffered in the United Kingdom accident. A claim for accident compensation was made to fund the surgery.

[3] This was declined in a decision of the Accident Compensation Corporation ("the Corporation") dated 24 November 2020 ("the Decision") and the decline was maintained in a subsequent Review Decision dated 9 January 2023 ("the Review Decision").

[4] The basis for declining the claim was that Mr Oliver was not ordinarily resident in New Zealand at the time of the 26 April 2016 United Kingdom accident and is ineligible for accident compensation for injury arising from that accident.

Issue

[5] Both parties agree that the issue is whether the Decision and the Review Decision were correct in declining cover for injuries suffered in an accident in the United Kingdom on 26 April 2016, on the grounds that Mr Oliver was not ordinarily resident in New Zealand at the time of the accident.

Submissions for Mr Oliver

[6] For Mr Oliver, it was submitted that he was ordinarily resident in New Zealand at the time of the United Kingdom accident by applying s 17 of the Accident Compensation Act 2001 ("the Act) to his circumstances. This was argued on two bases:

(a) Mr Oliver intended to be absent from New Zealand for less than six months, he was ordinarily resident within the meaning of s 17(2) and he is entitled to cover. A feature of the argument on this point, citing *Kneebone v Accident Compensation Corporation*,[1] was that the onus is on the Corporation to prove that Mr Oliver did not intend to return to New Zealand within six months and that the Corporation had not produced sufficient evidence to do that.

(b) Alternatively, the evidence establishes factors indicating that Mr Oliver had his permanent place of residence in New Zealand within the meaning of s 17(1) as interpreted in the leading case of *R v Accident Rehabilitation and Compensation Insurance Corporation*.[2]

Submissions for the Corporation

[7] The Corporation submitted that the evidence does not establish that Mr Oliver was ordinarily resident in New Zealand at the time of the accident suffered in the United Kingdom on 26 April 2016.

[8] The Corporation submitted that s 17(2) does not apply in Mr Oliver's case as the evidence is unclear whether he intended to be absent from New Zealand for more than six

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1 *Kneebone v Accident Compensation Corporation* [2014] NZACC 205

2 *R v Accident Rehabilitation and Compensation Insurance Corporation* HC New Plymouth AP 45-97, 24 April 1997 (Fisher J).

months. Further, the onus is on Mr Oliver, not the Corporation, to establish intention, or lack of it, for the purposes of s 17(2).

[9] The Corporation says that in Mr Oliver's circumstances, the focus falls under s 17(1) and involves inquiry into several factors identified in *R v Accident Rehabilitation and Compensation Insurance Corporation* to determine whether or not he had a permanent place of residence in in New Zealand at the time of his United Kingdom accident. The Corporation says the evidence does not establish that Mr Oliver had a permanent place of residence in in New Zealand at the material time.

Facts

[10] The facts are not materially in dispute and I summarise below the facts established by the documentary evidence filed in the appeal.

[11] Mr Oliver was living, working in the United Kingdom and travelling in Europe during the period from 11 August 2015 until 3 March 2017. He returned to New Zealand for three weeks in March 2016 to attend his brother's wedding. There is no evidence that at the end of this short visit when he departed from New Zealand on 25 March 2016 he held a return ticket.

[12] Mr Oliver suffered serious injuries including complex pelvic fractures in an accident in the United Kingdom on 26 April 2016.

Claim for Compensation in New Zealand

[13] After Mr Oliver's return to New Zealand in early March 2017, Mr Oliver was seen in June 2020 by Mr Van Rooyen, Orthopaedic Surgeon, in relation to ongoing discomfort in the knee and the mid shaft region of the left tibia. Mr Van Rooyen noted the earlier injury and the treatment provided in relation to it in the United Kingdom. He confirmed that the fracture had united "in a beautifully anatomical position" but nevertheless Mr Oliver was experiencing significant activity related discomfort in the two regions noted. Mr Van Rooyen arranged for various scans to be undertaken and ultimately thought that there was a role for further surgical intervention. In a letter dated 25 August 2020, he stated:

> He sustained this injury while overseas and has no ACC coverage for it. It's probably in his best interest to try to get retrospective approval, and he will approach his GP to attempt to do so.

[14] In the meantime, Mr Van Rooyen completed an assessment report and treatment plan ("ARTP") for a procedure to remove the plate and distil screws.

[15] Mr Oliver subsequently saw his General Practitioner, Dr Longworth, at Kaipara Medical Centre. Dr Longworth filed an ACC injury claim form for injuries including a fracture to the left tibia and fibula, an open wound of the lower limb and a fracture/disruption of the pelvis. The claim form described the accident on 26 April 2016, as follows:

> Fell six stories from the top of a hotel in Bath landing on concrete multiple injuries.

[16] The Corporation began looking into the claim and in particular whether it could cover an accident that occurred in the United Kingdom.

[17] There was a telephone conversation between the parties on 15 October 2020, in which it is recorded:

> Dan explained:
>
> He left NZ on 12/8/2015 to go to UK with no clear intention at that time but to return for brother's wedding in February 2016.
>
> He and his partner were on a youth mobility visa - this would allow them to work while in the UK.
>
> They had moved out of their rental accommodation in New Zealand and the room was leased out on a short-term contract in case if they returned they would go back to this accommodation. They did not do this on their return.
>
> They had travel insurance for 1 month while travelling in Europe but did not need it for the UK.
>
> He and his partner were working in the UK but just casual with no fixed contract. He told the people he was working for that he was going home and not sure if he would return and they said to make contact if he did return.
>
> His partner is a relief teacher and there are a lot of positions available.
>
> After coming home for the wedding they did not feel settled in New Zealand so they returned to UK about a month later in March 2016.
>
> He had his accident on 26/4/2016 and had 3 months of extensive rehab in hospital and then on discharge he had a further 5 months of physio for his physical injury and treatment for his head injury.
>
> They were in a part-time room when they went back until a room became vacant with a friend and were staying there when the accident happened.
>
> His partner was able to work during his rehab and they returned when the school term ended.
>
> They were not married at the time of travelling.
>
> Daniel will email a copy of his visa. He will also provide specific dates of his return to New Zealand and going back.

[18] The Corporation obtained advice from NZ Customs in relation to Mr Oliver's travels. The documents confirmed Mr Oliver's departure on 11 August 2015, his arrival back in New Zealand and departure in March 2016 and another arrival back into New Zealand on 3 March 2017.

[19] The claim was then reviewed by Ben Roberts, a Technical Specialist with the Corporation. He considered s 17 of the Act and concluded that Mr Oliver was not ordinarily resident in New Zealand at the time of the accident, and that therefore he was excluded from cover.

The Decision

[20] On 24 November 2020 the Corporation made a decision declining cover on the basis that Mr Oliver was not ordinarily resident in New Zealand at the time of the accident.

[21] On 8 December 2020 a telephone note records that Mr Oliver advised that the only reason that he stayed in the United Kingdom after his return in March 2016 was due to the accident keeping him there.

[22] On 31 December 2020 the Corporation declined to assist with the costs of surgery.

[23] On 19 May 2022 Mr Oliver filed a late review application against the Corporation's decision.[3] On the review application Mr Hinchcliff, Mr Oliver’s counsel, submitted that Mr Oliver expected to return to New Zealand within six months of his departure in March 2016.

[24] On 8 August 2022 Mr Oliver provided an affidavit which set out, inter-alia:

> My intent when my girlfriend and I left New Zealand on 25 March 2016, was to come back home before the UK autumn season at the beginning at September 2016 as this is when Ashley's 1 year unpaid leave expired for her job.
>
> On 16 April 2016, I had a serious accident causing severe traumatic injuries including brain damage.
>
> I was initially discharged from the hospital in mid July 2016.
>
> I had surgery to remove orthoses devices from my pelvic area around August 2016.

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[3] The Corporation subsequently accepted the late review application.

> I was instructed not to fly after that surgery for at least 3 months due to my oxygen levels in my blood.
>
> My mother is an orthopaedic nurse and she informed me that I should stay in the UK to finish my rehabilitation due to the new technology used in Bristol, that New Zealand surgeons had not yet trained for.
>
> I could not sit well until around the end of 2016.
>
> I could start walking more normally around the beginning of 2017.
>
> I returned to New Zealand on 3 March 2017 when my rehabilitation was completed.
>
> When I left New Zealand on 25 March 2016, I had only intended to be out of the country for 5 to 6 months.

[25] At a first review case conference on 10 August 2022, the Reviewer suggested that it would be helpful for Mr Oliver to provide further documentation including, for example, medical records (particularly around the advice not to fly), a statement from his mother, and any other relevant records.

[26] On 10 November 2022, Mr Oliver provided responses to questions put to him by the Corporation, as follows:

> - Does Mr Oliver have a home in New Zealand which Mr Oliver normally lives in.
>
>   Yes my permanent address in New Zealand during 2016 was 45 Grand Valley Rise, Glenfield, Auckland. All my personal items such as tools, vehicles and home contents were in this house throughout my travel overseas. I am able to provide an affidavit from my flatmate at the time if this is needed.
>
> - Does Mr Oliver have ongoing employment commitments in New Zealand?
>
>   No, being a mechanic, my employment is very fluid and able to secure jobs very easily. I resigned from my job in August 2015 as my plans were to travel.
>
> - Does Mr Oliver have a family connection in New Zealand?
>
>   Yes, my complete and immediate family is living in Auckland, New Zealand and were all born New Zealand citizens.
>
> - Does Mr Oliver have ongoing financial commitments in New Zealand?
>
>   Yes, my dog was being looked after by my parents. Money was provided to pay for pet insurance, food, etc.

[27] Further technical advice was prepared on 17 November 2022. Mr Roberts emphasised that Mr Oliver was not in New Zealand for an aggregate of 183 days in the 12 months prior to his last departure, and as a result s 17(3) applied to exclude Mr Oliver from being ordinarily resident in New Zealand.

The Review Decision

[28] The matter went to hearing on 8 December 2022 but was adjourned to allow Mr Oliver to provide further evidence. Subsequently, Mr Oliver filed an email from a flatmate stating that Mr Oliver had subleased his room to the flatmate from 8 August 2015 to 8 August 2016. Mr Oliver also filed a screenshot from Mr Oliver's partner's payslip containing evidence of her leave without pays with her employer during 2016.

[29] There was a case conference on 15 December 2022 to confirm that the matter would proceed followed by another hearing on 16 December 2022. The Review Decision was issued by Reviewer McIntosh on 9 January 2023. Mr McIntosh dismissed the review application, determining that there was insufficient evidence to meet the ordinarily resident requirements under s 17 of the Act.

[30] A Notice of Appeal was filed against the Review Decision.

Law

[31] Section 22 of the Act provides cover for personal injury suffered outside of New Zealand, if the following criteria are met:

(a) The personal injury is suffered outside New Zealand on or after 1 April 2002; and

(b) The personal injury is any of the kinds of injuries described in s 26(1)(a) or (b) or (c) or (e); and

(c) The person is ordinarily resident in New Zealand when he or she suffers the personal injury; and

(d) The personal injury is one for which the person would have had cover if he or she had suffered it in New Zealand.

[32] The critical question in this appeal is whether Mr Oliver was "ordinarily resident" in New Zealand when he suffered the injury on 26 April 2016 in the United Kingdom.[4]

[4] It is not disputed that the remaining criteria are satisfied.

[33] What it means to be ordinarily resident in New Zealand is defined by s 17 of the Act. Subsections (1), (2) and (3) of s 17 are relevant or potentially relevant to this appeal:

> 17 **Ordinarily resident in New Zealand**
>
> (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 six months or intends to be absent from New Zealand for more than six months. This subsection overrides subsection (3) but is subject to subsection (4).
>
> (3) A person has a permanent place of residence in New Zealand if he or she, although absent from New Zealand, has been personally present in New Zealand for a period or periods exceeding in the aggregate 183 days in the 12-month period immediately before last becoming absent from New Zealand. (A person personally present in New Zealand for part of a day is treated as being personally present in New Zealand for the whole of that day.)

[34] Subsections (4),[5] (5),[6] (6),[7] do not apply to this appeal.

[35] The key principle is stated in s 17(1). To be ordinarily resident in New Zealand, Mr Oliver, who is a New Zealand citizen, had to have New Zealand as his permanent place of residence, as at the date of the United Kingdom accident on 26 April 2016.

[36] A person can have New Zealand as a permanent place of residence, whether or not he or she has another place of residence outside of New Zealand.[8] However, if a person has been

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5 Ordinarily resident in New Zealand if outside New Zealand primarily in connection with a person's employment where remuneration income is derived in New Zealand and subject to New Zealand tax.

6 Not ordinarily resident in New Zealand if unlawfully present in New Zealand under immigration legislation.

7 Definitions of "child" and "other dependant".

8 Section 17(1)(a).

and remains absent from New Zealand for more than six months, or intends to be absent from New Zealand for more than six months, the Act expressly declares that the person does not have a permanent place of residence in New Zealand.[9] On the other hand, a person is deemed to have a permanent place of residence in New Zealand if he or she has been personally present in New Zealand for a period or periods exceeding in the aggregate 183 days in the 12-month period immediately before last becoming absent from New Zealand.[10]

[37] It is common ground of both parties that:

(a) The leading case on the correct interpretation and meaning of "ordinarily resident in New Zealand" in s 17 is the High Court judgment in *R v Accident Rehabilitation and Compensation Insurance Corporation*.[11]

(b) Although *R v Accident Rehabilitation and Compensation Insurance Corporation* was decided under provisions in the 1992 Act and s 17 is in the 2001 Act, the language and meaning of the provisions is not materially different.

[38] Counsel are undoubtedly correct that *R* is the leading case and there is no material difference in the language and meaning of the equivalent provisions governing who is "ordinarily resident in New Zealand" in the 1992 and 2001 Acts. While there are minor differences in subparagraph structure and sequencing, overall the language and structure of the two definitions are substantially the same. The 2001 Act definition requires a person to have "a permanent place of *residence* in New Zealand" whereas the 1992 Act uses the word "*abode*". The change makes no material difference as the two words are interchangeable[12] and denote the same concept. The 2001 Act definition adds definitions of "child" and "dependant" and also adds more detail to the exception for absence from New Zealand in

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9 Section 17(2).

10 Section 17 (3).

11 *R v Accident Rehabilitation and Compensation Insurance Corporation* HC New Plymouth AP 45-97, 24 April 1997 (Fisher J).

12 "Place of abode" usually means the place of residence; "in Johnson's Dictionary 'abode' is defined to be 'habitation, dwelling, place of residence', and 'residence' is defined to be 'place of abode, dwelling'. A man's residence, where he lives with his family and sleeps at night is always his place of abode in the full sense of that expression" (per Campbell C.J., *R v Hammond* 17 QB 772) – *Stroud's Judicial Dictionary of Words and Phrases* 9th edition 2016.

connection with employment. These differences do not raise any issue on the facts of this case.

[39] *R v Accident Rehabilitation and Compensation Insurance Corporation* involved a child whose mother was a New Zealand citizen with a permanent home in New Zealand, but who, with her mother, made a series of visits to Australia between 1993 and 1994, some for quite extended periods (i.e., nine months, five months, four months and two months). The child claimant was sexually abused while in Australia and was then immediately brought back to New Zealand.

[40] The High Court confirmed that the primary test for determining whether a person is ordinarily resident in New Zealand in the equivalent of s 17(1)) is to determine whether the person has a permanent place of abode/residence in New Zealand. In the absence of a statutory definition, the general meaning applies and to determine the issue, one would:

> ...expect to survey a series of considerations including the location of the person's home, place of work, intention as to permanent place of abode, location of assets, the proportion of time spent, and intended to spend, in New Zealand.

[41] The High Court then said that one moves on to consider the equivalent of s 17(2)-(6) to see, notwithstanding the result of the primary test, whether a different result is called for. The Court described the various additional subclauses as akin to "deeming" provisions i.e., they set out particular scenarios in which a claimant could be deemed to be either ordinarily resident in New Zealand, or not. Two of the subsections provide an additional way of qualifying[13] and two others[14] subtract from the way one could have expected to qualify under the primary test in s 17 (1) of permanent place of residence (abode).

[42] On this approach s 17(2) is a negative deeming provision which disqualifies a person from having a permanent place of residence in New Zealand if the person had been and remained absent from New Zealand for more than six months, or intended to be absent from New Zealand for more than six months.

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[13] 183 days personal presence in previous 12 months / New Zealand employment subject to New Zealand tax.

[14] Absence or intention to be absent for six months / unlawful presence in New Zealand under immigration legislation.

[43] Section 17(3) applies to those personally present in New Zealand for more than an aggregate 183 days in the 12-month period before last becoming absent from New Zealand. This is a positive deeming provision that could be invoked if a person did not qualify under the primary test.

[44] The High Court explained:

> Thus on the face of the regulation the general pattern might be colloquially described on the following basis. The legislature has adopted the normal meaning of the expression "permanent place of abode is in New Zealand" as the primary test (subclause 1) but has gone on to tinker with it in various ways in the later subclauses. One of the later subclauses has provided an additional way of qualifying, and the other has subtracted from the way one could otherwise have expected to qualify.

[45] The Court's conclusion was that one of the positive deeming provisions did not have to be satisfied if the person satisfied the primary test:

> My conclusion is that if a person qualifies on the basis that he or she is a New Zealand citizen and has a permanent place of abode in New Zealand according to the natural and ordinary meaning of those words, and thus qualifies in terms of subclause (1) of reg 3, it is not necessary that he or she would also have to qualify on the basis of presence in New Zealand in terms of subclause (2). It is common ground that the claim in the present case is not excluded by any of the other subclauses in reg 3. It follows that the appellant was "ordinarily resident in New Zealand" for the purposes of the regulations and for the purposes of s (8)(3). It being common ground that all other ingredients for a successful claim have been satisfied, the appeal is allowed.

[46] In *Estate of SC v Accident Compensation Corporation*[15], Judge Barber considered a case involving a claimant who had died accidently after leaving New Zealand on 1 October 2002 on a working holiday. The claimant sought medical attention overseas on 28 March 2003 and a follow up appointment was made. He then died on 30 March 2003. The Court focused on the appellant's intentions and undertook a factual enquiry into those intentions. The Court concluded that s17(2) excluded cover. At para [29]:

> As indicated above, when I stand back and look at the facts of this case overall, I cannot be satisfied on the balance of probabilities that, although the late Mr C on 29 March 2003 intended to return to New Zealand as soon as reasonably possible, he intended to be back in New Zealand as soon as 1 April 2003. Accordingly, he intended to be absent from New Zealand for more than six months. This means that he is excluded from cover under the Act by the operation of s17(2) of the Act.

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[15] *Estate of SC v Accident Compensation Corporation* DC Wellington 007/2005, AI 261/04, 11 January 2005 (Judge Barber).

[47] The submissions for Mr Oliver argue that the effect of s 17(2) is to put a reverse onus on the Corporation to establish the claimant's intention and relies on *Kneebone v Accident Compensation Corporation.*[16]

[48] The claimant in *Kneebone* was an exchange student to Costa Rica. She left New Zealand on 14 July 2012 with a return ticket scheduled for 15 June 2013. On 4 November 2012 she suffered serious injuries in a mountain biking accident and returned to New Zealand for medical assistance on 19 November 2012, when a claim was lodged. The evidence established that Ms Kneebone had been having difficulties on her exchange, and that there were serious discussions about whether she should remain in Costa Rica. Those conversations occurred prior to the November accident, but a decision as to her return was to be made at Christmas time 2012.

[49] Judge Smith disagreed with the approach taken in *Estate of SC* and concluded that it was necessary for the Corporation to establish, on the balance of probabilities, that the claimant's intention was to remain absent for more than six months, that is, a reverse onus. Judge Smith Court then went on to consider the facts and noted that Ms Kneebone's plans at the time of the injury were "inchoate". Ultimately, the Court concluded that the Corporation had not established that Ms Kneebone intended to remain absent from New Zealand for more than six months at the date of her accident. It therefore concluded (on the facts) that the appellant fulfilled the requirements for cover.

[50] The High Court judgment in *R v Accident Rehabilitation and Compensation Insurance Corporation* does not appear to have been referred to the District Court in either *Estate of SC* or *Kneebone*.

[51] *Kneebone* is inconsistent with the High Court's analysis. The District Court effectively turned the claimant's inability to prove the non-application of a disqualifying, negative, deeming provision in s 17(2) (for actual or intended absence for six months) into a positive affirmation of being ordinarily resident in New Zealand. *Kneebone* is also inconsistent with the well-established position on the onus and standard of proof in accident compensation appeals to the District Court.

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

Onus and standard of proof

[52] When a claim for accident compensation is made the claimant has the responsibility to establish eligibility for compensation. The Corporation, as a matter of best practice confirmed by the courts, generally investigates all possible aspects of a claim, at least in a rudimentary fashion and as far as practicable.[17]

[53] On an appeal to the District Court the onus is on the appellant to establish his or her case on the balance of probabilities. This applies to all the relevant elements necessary to establish eligibility under the Act, including the requirement to be ordinarily resident in New Zealand at a particular time.

[54] The appeal is by way of rehearing, which means that the District Court is required to undertake its own evaluation of the evidence and merits generally.[18] Any Reviewer's decision is considered, but the District Court does not defer to the Reviewer's position if it comes to a different conclusion.[19] If the appellant's case on appeal is that the Reviewer's decision is wrong, the onus is on the appellant to establish that it is wrong.[20]

[55] A reverse onus on the Corporation was recognised by the High Court in *Accident Compensation Corporation v Bartels*[21] in the situation where the Corporation revises a previous decision for error under s 65(1) of the Act. The High Court in *Atapattu-Weerasinghe v Accident Compensation Corporation*[22] declined to extend the application of a reverse onus beyond the situation where the Corporation revises an earlier decision for actual error. In that situation, it is fair that the Corporation should be required to justify the changed position. But in the absence of such an error, reversal of the onus makes no sense.

[56] The reverse onus which formed the basis of the decision under s 17(2) in *Kneebone* cannot be reconciled with the earlier leading High Court authority in *R v Accident Rehabilitation and Compensation Insurance Corporation.* It makes no sense to reverse the

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17 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR3 40 at [64].
18 *Wildbore v Accident Compensation Corporation* [2009] NZCA 34, [2009] 3 NZLR 21 at [29].
19 Above note 2.
20 Above note 2 at [30].
21 *Accident Compensation Corporation v Bartels* [2006] NZAR 680.
22 *Atapattu-Weerasinghe v Accident Compensation Corporation* [2017] NZHC 142 at [23].

onus on an inquiry into the claimant's intention – something which the claimant is singularly in the best position to prove to avoid the application of a disqualifying deeming provision. The possible application of a reverse onus to s 17(2) was recently rejected in *BL v Accident Compensation Corporation*[23] and *AT v Accident Compensation Corporation*.[24] The overwhelming weight of authority recognises that the onus remains on the appellant.

Analysis

[57] Key dates in this appeal are:

11 August 2015	Mr Oliver (then aged 23 years 8 months) and girlfriend/partner depart New Zealand.
6 March 2016	Returned New Zealand to attend brother's wedding during visit of two weeks five days.
25 March 2016	Depart New Zealand.
26 April 2016	Accident and serious injuries in United Kingdom.
Mid to late July 2016	Treatment, surgery, recovery in United Kingdom.
3 March 2017	Mr Oliver and girlfriend/partner arrive back in New Zealand.

The deeming subsections in section 17

[58] The High Court in *R v Accident Rehabilitation and Compensation Insurance Corporation* held that s 17(2)-(5) provide a set of scenarios in which a claimant will automatically be deemed to either have a permanent place of residence in New Zealand, or not.

[59] Subsection (4) (income from New Zealand employment with income subject to New Zealand tax) and subsection (5) (unlawfully present in New Zealand) do not apply to Mr Oliver.

[60] Under section 17(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 six

[23] *BL v Accident Compensation Corporation* [2023] NZACC 106.
[24] *AT v Accident Compensation Corporation* [2023] NZACC 131.

months, or, intends to be absent from New Zealand for more than six months. At the time of the accident in April 2016:

(a) Mr Oliver had not been absent for more than six months (having been in New Zealand in March 2016); but

(b) The objective indications as at April 2016 were that Mr Oliver intended to be absent from New Zealand for more than six months.

[i] The onus is on Mr Oliver to prove on the balance of probabilities that he was ordinarily resident in New Zealand at the material time, including that he did not intend to be absent from New Zealand for more than six months.

[ii] Mr Oliver (then aged 23 years 8 months) and his girlfriend/partner departed New Zealand on 11 August 2015 for the United Kingdom. Both held a United Kingdom youth mobility visa allowing them to work in the United Kingdom, he as a mechanic and she as a relief teacher. There was plenty of contract work available to both in the United Kingdom.

[iii] When Mr Oliver first communicated with the Corporation on 15 October 2020 regarding his intentions, he advised that when he left New Zealand on 11 August 2015, he had no clear intention to return to New Zealand, except for the sole purpose of attending his brother's wedding during a 19-day period in March 2016.

[iv] Mr Oliver also said in his initial communication with the Corporation on 15 October 2020 that after coming home for the wedding, he and his partner did not feel settled in New Zealand and so they returned to the United Kingdom.

[v] When Mr Oliver departed New Zealand for a second time on 25 March 2016, there is no evidence that he held a return air ticket. There is no other evidence of when/if he then intended to return to New Zealand after March 2016.

[vi] At the time of the accident Mr Oliver had been in the United Kingdom for nearly eight months, excluding the 19-day visit back to New Zealand in March 2016 to attend his brother's wedding.

[vii] Although Mr Oliver subsequently filed evidence suggesting that he did intend to return to New Zealand, he has not been able to provide any corroborating evidence of that intention such as travel/work/living arrangements.

[viii] Evidence advanced for the purpose of demonstrating that Mr Oliver did not intend to be absent from New Zealand for more than six months does not establish that:

1. Mr Oliver's girlfriend/partner taking one year's unpaid leave from her New Zealand employment from August 2015 to August 2016. But this might just have likely been arranged as a safeguard, should the decision have been made to return within that time frame. It does not indicate that Mr Oliver had a clear intention to return within that time frame.

2. Mr Oliver sub-leased to a friend his room in a home in Glenfield. But this does not establish that Mr Oliver intended to return to New Zealand within six months of departure. The converse could equally be argued - that the sub-lease arrangement was evidence of an intention not to return to live in New Zealand. Mr Oliver did not return to live at this address after returning to New Zealand in early March 2017.

3. Financial support to Mr Oliver's parents to look after his dog during his absence. This does not necessarily indicate an intention to return to live in New Zealand or when.

4. Mr Oliver suggested in evidence that the only reason he did not return to New Zealand earlier than he did was because of surgery,

treatment and recovery in the United Kingdom and injury-related travel restrictions. However the available medical records from the United Kingdom suggest that Mr Oliver could have safely travelled home after his last surgical operation as early as September 2016 (within six months of Mr Oliver's March 2016 departure from New Zealand).

[ix] Mr Oliver did not in fact return to New Zealand until 3 March 2017, more than 11 months after his 25 March 2016 departure. He did not return to the flat alleged to have been retained under a sub-lease arrangement.

[x] Standing back and looking at the evidence overall, the evidence satisfies me on the balance of probabilities that Mr Oliver intended to be overseas in the United Kingdom to live, work and travel for an extended period of more than six months, with a brief return to New Zealand in 2016 for a family event, and then returned to the United Kingdom in March 2016 with the intention of staying there for more than six months. He intended to live in the United Kingdom for more than six months, not in New Zealand.

[61] Section 17(2) therefore applies to deem that Mr Oliver did not have a permanent place of residence in New Zealand. The deeming effect operates to exclude the primary test in s 17(1) from applying. That is because Mr Oliver is disqualified from being able to satisfy the key element of the primary test that he "has New Zealand as his ... permanent place of residence …".

[62] Section 17(3) provides that a person has a permanent place of residence in New Zealand if he or she, although absent from New Zealand, has been personally present in New Zealand for a period or periods exceeding in the aggregate of 183 days in the 12-month period immediately before last becoming absent from New Zealand.

[63] The date of last becoming absent from New Zealand is clearly a date prior to the accident date. Mr Oliver last became absent from New Zealand, prior to the accident, when he departed on 25 March 2016, after his brother's wedding. The date immediately before he last became absent from New Zealand was 24 March 2016. Mr Oliver had been personally

present in New Zealand for 163 days in the relevant 12-month period from 24 March 2015 to 24 March 2016. This is less than an aggregate period exceeding 183 days personal presence in the relevant 12-month period and s 17(3) does not apply to Mr Oliver.

[64] Even if Mr Oliver had been present for an aggregate of 183 days or more it would still not have helped him because s 17(2) expressly states that s 17(2) overrides s 17(3). Section 17(2) applies to Mr Oliver because he intended to be absent from New Zealand for more than six months and is deemed not to have a permanent place of residence in New Zealand. This overrides whatever effect s 17(3) may have.

[65] On my analysis, Mr Oliver is deemed by s 17(2) not to have New Zealand as his permanent place of residence and he was not ordinarily resident in New Zealand as at the date of his United Kingdom accident on 26 April 2016.

[66] It is not therefore open to Mr Oliver to establish that he was ordinarily resident in New Zealand at the time of the accident under the broader factual inquiry[25] under the primary test contemplated by s 17(1).

[67] The Review Decision reached the same conclusion for broadly similar reasons except that it followed *Kneebone* and held that the onus was on the Corporation to prove Mr Oliver's intention for the purposes of s 17(2). I consider the Review Decision to be incorrect on the onus issue but otherwise find the Review Decision to be correct in its reasoning and result.

Conclusion

[68] Mr Oliver, as at the date of his United Kingdom accident, did not have New Zealand as his permanent place of residence and was not ordinarily resident in New Zealand.

[69] The Corporation's Decision of 24 November 2020 and the Review Decision of 9 January 2023 are correct and are maintained.

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[25] As recognised in *R*, relevant factors include location of the person's home, place of work, intention as to permanent place of abode, location of assets, the proportion of time spent, and intended to spend, in New Zealand.

Result

[70] The appeal is dismissed.

Costs

[71] Although Mr Oliver is unsuccessful on appeal, I make no order for costs.

I C Carter
District Court Judge

Solicitors: ACC and Employment Law, Ellerslie, Auckland, for appellant
Medico Law Limited, Lawyers, Grey Lynn, Auckland, for respondent