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 29 **ACR 166/22**

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

Hearing:	20 February 2023
Held at:	Wellington/Te Whanganui-a-Tara by AVL
Appearances:	J Carrigan for the Appellant F Becroft for the Respondent
Judgment:	1 March 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for overseas rehabilitation costs –
s 128, Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 26 August 2022. The Reviewer dismissed an application for review of the Corporation's decision dated 21 January 2022 declining the appellant's application for selective dorsal rhizotomy treatment at a Children's Hospital in America.

Background

[2] The appellant was born in September 2017. His birth was in traumatic circumstances, leaving him with disability later classified as 98%. His twin died in utero.

[3] On 11 October 2017, a treatment injury claim was filed on the appellant's behalf. The claim was for "brain injury, skin injury, kidney injury" and related to an alleged delay in obstetric care. The claim was lodged on the basis that there had been a failure to recognise and treat twin to twin transfusion syndrome ("TTTS") and arrange an earlier delivery.

[4] On 6 July 2018, the claim was investigated. It was confirmed that the appellant suffered from, *inter alia*, cerebral palsy with significant developmental delays and associated disabilities, including spasticity. However, the claim was declined because, at that stage, the Corporation was unable to establish an injury relating to treatment. The Corporation did not receive any further claims or requests for cover in the ensuing period of nearly three years.

[5] On 24 May 2021, Ms Carrigan, advocate for the appellant, wrote to the Corporation. Ms Carrigan asked the Corporation to revisit its decision and confirmed that cover was sought for both twins. The mother provided a statement of support with Ms Carrigan's letter. The statement detailed the mother's pregnancy experience, the treatment received, the birth and death of the twin, and the appellant's condition since birth.

[6] On 18 October 2021, Dr Jay Marlow, Maternal Foetal Medicine Subspecialist, provided a report for the Corporation. Dr Marlow concluded that there was a missed opportunity for admission on 8 September 2017 when the mother presented with increasing upper abdominal pain. Dr Marlow assessed that, if a CTG (cardiotocography record) had been interpreted correctly and excessive uterine activity noted, the mother would likely have been admitted for further investigations with the potential detection of compromise and delivery of the twins. Dr Marlow concluded that it was likely that an acute TTTS event occurred. In terms of the process, she explained:

> [the twin] died in an undetermined process (acute TTTS or sudden demise) and created an acute transfusional event which resulted in [the appellant] becoming suddenly anaemic and hypovolaemic due to acute exsanguination. The surviving twin in this situation will either succumb to this additional insult or be at risk of severe neurological injury (up to 34% chance) which occurs at the time of the event of the co twin demise. This is not an ongoing process. This is certainly the event which caused [the appellant's] global brain injury. …
>
> Early seizure activity and head imaging further supports his neurological injury being the consequence of an antenatal event.

[7] Dr Marlow suggested that there were three options that should have been thoroughly considered in the circumstances: continuation of pregnancy, delivery as soon as indicated, and consideration of late termination of pregnancy. Dr Marlow's conclusion was:

> The neurological injury sustained to [the appellant] was the result of an acute event when his brother … died. There was a missed opportunity for admission and further evaluation of the twins when Ms GV presented on the 8/9/2017. The retrospective documentation of this presentation provides little insight to the assessment. Admission could possibly have led to the delivery of two live twins given Ms GV's presentation and non- reassuring CTG.
>
> We cannot definitively determine whether [the twin] died suddenly or because of acute TTTS, although given Ms GV's presentation it is likely to be the later. Either pathology would have led to the acute transfusional event triggered by [the twin's] death and causing [the appellant's] neurological injuries.
>
> It is possible that the early delivery may have committed [the appellant] to a worse neurological outcome than if the pregnancy had continued. Antenatal steroids may have provided a small amount of benefit to reduce morbidity, as well as giving time to observe [the appellant's] recovery after the acute insult.

[8] On 20 October 2021, the Corporation issued a decision approving cover for the appellant for the following:

- Brain Injury: severe encephalomalacia (global brain injury); hydrocephalus; intravehicular and intraparenchymal; haemorrhages. consequential seizures.
- An acute kidney injury and a skin injury I (resolved).

[9] The Corporation began to consider entitlements, and social rehabilitation/ treatment was subsequently provided. The appellant is severely physically disabled: he is developmentally delayed, his sight is compromised, and he suffers from undiagnosed chronic and severe gut/pancreatic/kidney/bowel problems.

[10] On 22 November 2021, a report from Dr Peter Nobbs, Paediatrician, advised that the appellant's parents were considering selective dorsal rhizotomy in America (this surgery not being available in New Zealand):

> His parents are in the process of having him assessed by Paediatric Neurosurgical Services in [America] to see whether he would be a suitable candidate for specialist spinal surgery that would attempt to ablate the nerves involved in the hypotonicity that has so affected him. This assessment certainly should be considered as potentially may be something worthwhile to offer to [the appellant].

[11] On 19 January 2022, Ms Carrigan made a formal request to the Corporation for funding for selective dorsal rhizotomy in America.

[12] On 20 January 2022, the Corporation declined the request on the basis that the Act did not permit the Corporation to cover costs for treatment performed outside of New Zealand.

[13] On 25 February 2022, Professor Susan Stott, Paediatric Orthopaedic Surgeon, discussed selective dorsal rhizotomy and the extensive post-surgery rehabilitation that would be required. Her impression was that selective dorsal rhizotomy significantly reduced spasticity.

[14] On 14 June 2022, a late review application was filed against the Corporation's decision, and the application was accepted.

[15] On 15 August 2022, review proceedings were held. On 26 August 2022, the Reviewer dismissed the review, on the basis that the Corporation was not able to provide funding for overseas rehabilitation treatment.

[16] On 12 September 2022, a Notice of Appeal was lodged.

[17] On 14 September 2022, Ms Carrigan confirmed that she was still seeking $500,000 to pay for the appellant's surgery and rehabilitation overseas in America. On 15 September 2022, the Corporation reiterated that it was unable to meet this cost.

Relevant law

[18] Section 3 of the Act provides:

> The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs) …

[19] Section 6 of the Act provides that rehabilitation means a process of active change and support with the goal of restoring, to the extent provided under section 70, a claimant's health, independence, and participation, and comprises treatment, social rehabilitation, and vocational rehabilitation. Section 6 further provides that treatment includes physical and cognitive rehabilitation, and an examination for the purpose of providing a certificate including the provision of the certificate.

[20] Section 128 of the Act provides:

> The Corporation must not pay for costs incurred outside New Zealand for any rehabilitation, unless section 129 applies or regulations made under this Act require such a payment.

[21] Clauses 1 and 2 of Schedule One of the Act provide:

> **1 Corporation's liability to pay or contribute to cost of treatment**
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> (1) The Corporation is liable to pay or contribute to the cost of the claimant's treatment for personal injury for which the claimant has cover if clause 2 applies,—
>
> (a) to the extent required or permitted under an agreement or contract with any person for the provision of treatment; or
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> (b) if no such agreement or contract applies, to the extent required or permitted by regulations made under this Act; or
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> (c) if paragraphs (a) and (b) do not apply, the cost of the treatment.
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> (2) In subclause (1)(c), cost means the cost—
>
> (a) that is appropriate in the circumstances; and
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> (b) as agreed by the Corporation and the treatment provider.

2 When Corporation is liable to pay cost of treatment

(1) The Corporation is liable to pay the cost of the claimant's treatment if the treatment is for the purpose of restoring the claimant's health to the maximum extent practicable, and the treatment—

(a) is necessary and appropriate, and of the quality required, for that purpose; and

(b) has been, or will be, performed only on the number of occasions necessary for that purpose; and

(c) has been, or will be, given at a time or place appropriate for that purpose; and

(d) is of a type normally provided by a treatment provider; and

(e) is provided by a treatment provider of a type who is qualified to provide that treatment and who normally provides that treatment; and

(f) has been provided after the Corporation has agreed to the treatment, unless clause 4(2) applies.

(2) In deciding whether subclause (1)(a) to (e) applies to the claimant's treatment, the Corporation must take into account—

(a) the nature and severity of the injury; and

(b) the generally accepted means of treatment for such an injury in New Zealand; and

(c) the other options available in New Zealand for the treatment of such an injury; and

(d) the cost in New Zealand of the generally accepted means of treatment and of the other options, compared with the benefit that the claimant is likely to receive from the treatment.

[22] In *Siebers*,[1] Judge Beattie stated (in relation to the equivalent provision under the Accident Insurance Act 1998):

> [23] The provisions of s.130 and Regulation 18 indicate that it was the clear determination of the legislature to not allow for overseas treatment costs to be part of the accident compensation regime, even in circumstances where, as in the case of this appellant, there is not available within New Zealand the type of treatment that the claimant required to alleviate the pain or treat the injury that has been suffered.
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> [24] In some quarters this situation, as is highlighted up by the facts of the present case, might be considered to identify an anomaly in the legislation but this is not a matter which the Court can cure by judicial activism and intervention. The Court cannot create some discretionary power for the respondent to exercise where clearly the Act does not allow for any such discretion.

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1 *Siebers v Accident Compensation Corporation* [2001] NZACC 215.

> [25] Accordingly then, whilst this appellant on the face of it has obtained less than satisfactory treatment within New Zealand for her injuries suffered here in New Zealand and where those injuries were not able to be treated here, apparently because of a lack of expertise and facilities, nevertheless she cannot obtain recompense for the costs that she has incurred in having that treatment carried out overseas.

[23] In *Wacker*,[2] Judge Barber stated:

> [29] … s.128 of the Act expressly prohibits ACC from meeting the costs for the overseas travel and treatment as referred to above. I agree with Ms Becroft that the wording and prohibition contained in s.128 must include costs which are ancillary to treatment.

[24] The New Zealand Bill of Rights Act 1990, section 8 provides that no one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice. Section 4 of this Act provides:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
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> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
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> (b) decline to apply any provision of the enactment—
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> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

Discussion

[25] The issue in this case is whether the Corporation's decision declining an application for overseas treatment, namely, selective dorsal rhizotomy in America, is correct. Ms Carrigan, for the appellant, submits as follows:

(a) The Act is beneficial legislation: its primary functions are to implement measures to minimise injury or the severity of same, and to provide support sufficient to the extent possible to restore persons, via rehabilitation, to their former health. The Act's entire focus is on rehabilitation treatment. Section 128 should be given a rights-based interpretation, as indicated by the Supreme Court in *Fitzgerald v R* [2021] NZSC 131 at [56].

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[2] *Wacker v Accident Compensation Corporation* [2011] NZACC 186. See also *Venn v Accident Compensation Corporation* [2015] NZACC 201, at [9].

(b) The appellant's injuries were suffered in the womb: he cannot be rehabilitated, and he requires habilitation. Therapeutically and legally, habilitation is distinguishable from rehabilitation.

(c) As a result of repeated failings of the medical profession and compounded by the Corporation's ongoing efforts to refute a clear claim and therefore deny the very real benefits of early intervention, the applicant's quality of life has been severely impacted. The appellant is a good candidate for SDR. While this is a procedure that is recognised in New Zealand, this country does not provide the surgery.

(d) Section 8 of the New Zealand Bill of Rights Act 1990 (NZBORA) provides that no one shall be deprived of life, and jurisprudence extends the right not to be deprived of quality of life. Section 6 of the NZBORA provides that, wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning. Section 128 of the Accident Compensation Act should be read in light of the NZBORA.

(e) Support for the Court adopting a rights-based approach in this case is found in the Human Rights Act 1993 and in the United Nations Conventions that are applicable to this matter (the International Covenant on Civil and Political Rights 1978; the Rights of the Child 1993; and the Rights of Persons with Disabilities 2008).

[26] This Court acknowledges the submissions on behalf of the appellant, sympathises with his condition, and accepts that the rehabilitation assistance sought in America may well be of benefit to him. However, the Court notes the following considerations.

[27] First, the plain words of section 128 of the Accident Compensation Act dictate that the Corporation must not pay for costs incurred outside New Zealand for any rehabilitation (other than payment of attendant care, which is not applicable to the appellant). The clear meaning of this section is supported by clause 2(2)(b)-(d) of

Schedule One of the Act which requires the Corporation to take into account the options and cost of treatment of injury in New Zealand.

[28] Second, the plain words of section 128 of the Act are in line with its purpose which, as reflected in section 3, is to provide for a fair and *sustainable* scheme for managing personal injury that has, as its overriding goals, *minimising* both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal *costs*).

[29] Third, there is no provision in the Act for payment of habilitation costs. What is being sought for the appellant is treatment, which, in terms of section 6, includes physical and cognitive rehabilitation. As noted above, the Corporation is prevented by the Act from paying for his rehabilitation costs incurred outside New Zealand.

[30] Fourth, whatever failings of the medical profession and the Corporation there might have been cannot override the express words of the Act governing the payment of overseas rehabilitation costs. It is accepted that the appellant appears to be a good candidate for selective dorsal rhizotomy, which is not provided in New Zealand. However, it is established in case-law that the Court has no discretion to allow payment for rehabilitation costs incurred outside New Zealand, even where the person cannot be treated in New Zealand for his or her injuries.[3]

[31] Fifth, section 4 of the NZBORA provides that no court shall hold any provision of an enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective, or decline to apply any provision of the enactment, by reason only that the provision is inconsistent with any provision of this Bill of Rights. In that section 128 of the Accident Compensation Act unambiguously prevents the Corporation from paying for rehabilitation costs incurred outside New Zealand, this Court has no power to decline to apply this provision, however inconsistent it is with any provision of the NZBORA. Likewise, this Court has no power to decline to

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[3] See n1 *Siebers*, at [23]-[25].

apply the clear wording of section 128 by reason of the Human Rights Act 1993 or the United Nations Conventions ratified by New Zealand.[4]

Conclusion

[32] In light of the above considerations, the Court finds that the Corporation's decision, declining an application for overseas treatment, namely, selective dorsal rhizotomy in America, is correct. The decision of the Reviewer dated 26 August 2022 is therefore upheld.

[33] This appeal is dismissed.

[34] I make no order as to costs.

Suppression

[1] I consider 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 *LR v Accident Compensation Corporation*.

P R Spiller
District Court Judge

Solicitors for the Respondent: Medico Law.

[4] Section 21B(1) of the Human Rights Act 1993 provides that an act or omission of any person or body is not unlawful under this Part (Unlawful Discrimination) if that act or omission is authorised or required by an enactment or otherwise by law.