

**BEFORE THE ACCIDENT COMPENSATION APPEAL AUTHORITY  
AT WELLINGTON**

**[2014] NZACA 8**

**ACA 11/13**

**IN THE MATTER** of the Accident Compensation Act  
1982

**AND  
IN THE MATTER** of an appeal pursuant to s.107 of  
the Act

**BETWEEN** **NOEL BORST**  
Appellant

**AND** **ACCIDENT COMPENSATION  
CORPORATION**  
Respondent

**HEARING:** 4 December 2013 at Auckland

Supplementary submissions and evidence filed in March 2014

**AUTHORITY:**  
Robyn Bedford

**COUNSEL:**  
Mr Darke, advocate for appellant; Ms McLachlan counsel for respondent

**DECISION**

[1] Mr Borst has cover under the Accident Compensation Act 1972 for serious injuries he suffered in a motor vehicle accident on 26 May 1977. The appeal is brought against the decision of the Corporation dated 15 May 2012, whereby it declined cover for Neurotic (reactive) depression as certified by Mr Borst's GP. The decision letter states that ACC was unable to approve cover for his Depression injury because Mr Borst was not diagnosed by the psychiatric assessor, Dr Wilkinson, as having a clinical disorder under Axis 1 of the DSM IV TR. It was therefore ascertained that Mr Borst does not have mental consequences from his injury or accident of 26 May 1977.

[2] ACC's decision was upheld on review in the review decision issued 15 May 2013. Mr Wood awarded costs of \$1,903.65 including specialist's fees of \$935.54, making total costs of \$968.11 under the Injury Prevention Rehabilitation and Compensation (Review and Appeals) Regulations 2002 and amendments ("the Regulations"). The Reviewer gave the right of appeal to the District Court, but the notice of appeal was filed in the Appeal Authority as the decision was made under the 1972 Act (as applied by the 2001 Act pursuant to s 391(1)(b) of the Act), and ACC has accepted the jurisdiction of the Authority to hear and determine the appeal.

***The issues: substantive appeal***

[3] The appeal is brought against the Review Officer's finding that Mr Borst did not have cover for mental consequences in terms of his covered claim under the 1972 Act and primarily involves evaluating the competing opinions of Dr Wilkinson for ACC and Dr Cordyre, a psychiatrist instructed by Mr Darke for the review hearing, who diagnosed Mr Borst as suffering from mental consequences of the 1977 injury/accident in the form of chronic, severe Post-traumatic Stress Disorder, chronic, currently moderate Major Depressive Disorder and Pain Disorder secondary to medical and psychological factors.

[4] In her written submissions and orally at the hearing, Ms McLachlan said that Dr Wilkinson was instructed by ACC using the 2001 Act criteria and that his assessment addressed the question of whether Mr Borst has a clinically significant mental condition, which, as she pointed out, is not the correct test when the claimant has cover under s 2 of the 1972 Act, which is whether Mr Borst has suffered any "*mental consequences*" as a result of the 1977 injury or accident. In her submission, Dr Cordyre also applied the incorrect legal test and this, along with the issue of symptom validity raised by Dr Wilkinson, meant that both assessments were flawed. In Ms McLachlan's view, the only solution was for the Authority to return the matter to ACC with directions as to the test to be applied for assigning mental consequences and for objectively assessing symptom validity, and for the investigation of Mr Borst's mental condition to start again from the beginning.

[5] Mr Darke agreed that Dr Wilkinson addressed the wrong test and said that Dr Wilkinson did not comprehend the concept of "*mental consequences*", whereas, unlike Dr Wilkinson, Dr Cordyre correctly addressed the effects of the accident and the serious injuries Mr Borst suffered, as he was instructed to provide a second opinion psychiatric with the 1972 Act criteria in mind and he had done so and he also explained the possible reasons for Mr Borst's differing presentation in his follow-up comments. In Mr Darke's view, there was ample historic medical evidence to support Dr Cordyre's diagnoses that Mr Borst suffered and continued to suffer, mental consequences of the injury and the accident without the need to obtain yet another psychiatric assessment and he sought a finding to this effect.

[6] The questions for determination, given Ms McLachlan's concession regarding Dr Wilkinson's report, are first, whether Dr Cordyre addresses the matters that are necessary to make a diagnosis of mental consequences under the 1972 Act? Secondly, if so, whether Dr Cordyre's report should be accepted as a correct diagnosis of the mental consequences that Mr Borst suffered, and continues to suffer, as a result of his 1977 injury or accident?

[7] As Ms McLachlan's submissions on symptom validity put Mr Borst's credibility squarely in issue as the explanation for what she described as his "*significantly different*" presentation at the two assessments, I directed after the hearing that further evidence and supplementary submissions were to be filed to assist with my determination of credibility, thus the delay in issuing the decision. The comments below are drawn from the total evidence filed, but only deal with medical and background evidence that is relevant to the issues.

## ***The evidence***

[8] The first description of the accident and the injuries sustained is in the report dated 6 July 1977 by Mr McFarlane, the Visiting Orthopaedic Surgeon at the Auckland Hospital Critical Care Unit. Mr McFarlane said that on 26 May 1977, Mr Borst was involved in a motor vehicle accident in which he crashed his car into a lorry ahead of him. His fiancé was killed in this accident. The report was for Mr Borst's admission to the Critical Care Unit for the above-knee amputation of his left leg following the development of infection and gangrene during his six weeks of hospitalisation.

[9] The only mention of any non-physical injuries is in Mr McFarlane's report dated 26 October 1977. Mr McFarlane said that on admission to Rotorua Hospital on the day of the accident, in addition to his physical injuries, Mr Borst was suffering shock. Mr McFarlane's third report was dated 16 February 1978, and addressed to State Insurance and substituted blood loss for the shock diagnosis. Mr McFarlane also added the complication of renal tubular necrosis subsequent to the above-knee amputation.

[10] On 15 December 1977, Mr McFarlane reported that he thought Mr Borst would be fit for selected work for four hours a day following his trade of gunsmithing and suggested that arrangements were made for him to return to work accordingly. Mr Borst was in fact employed as a band saw operator with Onehunga Timber Holdings at the time of his accident, and he was returned to a number of physically demanding work roles that were well beyond him.<sup>1</sup> Mr McFarlane reported again on 4 April 1978 that Mr Borst had made an excellent recovery from the renal failure.

[11] The next report is dated 20 April 1978 and is from ACC to State Insurance to support Mr Borst's lump sum payment under s 120 of the 1972 Act. Mr Haines described Mr Borst's psychological and emotional states as follows:

*"3. Loss of enjoyment*

- a) *Domestic ...At this stage I should note the circumstances that surrounded the accident, namely the death of Mr Borst's fiancé. They were living together and planning to get married. The loss of his fiancé has caused Mr Borst much remorse. Looking to the future it is reasonable to suppose that he will meet someone else and settle down.*
- b) *Social – Mr Borst is still active socially, not with the confidence, but he is making an effort to mix. He did mention that he has great difficulty in mixing with the opposite sex. I would like to think that this gets better for him as time goes on.*

---

<sup>1</sup> See the Appeal Authority decision in *Borst v ACC* Decision No. 4/2009, in which Mr Cartwright made various findings of fact regarding Mr Borst's work capacity and work ability, and awarded him earnings related compensation from September 1980, when he left for Australia, until his return in 1985. Mr Cartwright held as a matter of fact that Mr Borst was continuously incapacitated by his injuries for the 13 years from the date of his injury until ERC was reinstated in 1991; see paragraphs [156] – [163].

*6. Mental Suffering and embarrassment - Mr Borst's loss of his fiancé, loss of his limb after 6 weeks of suffering and the embarrassment he suffers, all cause him much distress.... "*

[12] Mr McFarlane reported again on 20 June 1978 for Mr Borst's lump sum assessment under s 119. He assessed Mr Borst's loss of function for the above knee amputation at 70% and 5% for the fracture of the left acetabulum; he did not think there was any permanent disability with regard to the fractured pelvis. There was no investigation of Mr Borst's mental state for lump sum compensation purposes or to see if he should have any therapy or other psychological interventions.

[13] On 8 July 1980, Mr Kadri, Surgeon/Urologist, reported to ACC concerning Mr Borst's kidney function. Mr Kadri said that Mr Borst had fully recovered from renal failure and now had the same likelihood as anyone else of developing renal problems later in life. As asked, Mr Kadri concluded this report with comments that may assist ACC in dealing with Mr Borst's claim and said:

*"I do not know his personality too well, as I have seen him only occasionally. However, I have an impression that he does tend to lean on his accident of May 26<sup>th</sup> 1977, for every help he needs or social problems he encounters, probably with a view to compensation. He is a poor complier of advice and treatment, for the problems he has consulted me for."*

[14] This comment would inevitably have had a negative impact on ACC's ongoing claims management, but I am always disturbed by specialist comment along these lines, as an injured person who has ACC cover and his injuries are such that he would be likely to encounter a range of physical and social problems as Mr Borst would, is entitled to look to ACC for assistance, whether that takes the form of compensation or rehabilitation.

[15] Later in 1980, Mr Borst left New Zealand for Australia. The only objective description available of Mr Borst's condition between 1980 and 1985, when he returned to New Zealand, is in the affidavit of his then de facto wife Rhonda Clingan, reproduced at paragraph [149] of Mr Cartwright's 2009 decision. The last paragraph is relevant to the question of mental consequences, as it provides some evidence of continuity and the first reference to the anger that is recorded in the later medical reports. Ms Clingan deposed at paragraph 11 of her affidavit as follows:

*"I witnessed that the loss of Noel's leg affected him deeply, and caused him physical and mental pain. He is an intelligent and strong man but even he struggled to work through the consequences of his accident, the death of his fiancé, and the ongoing treatment he had to have. It would often manifest in anger and frustration".*

[16] The first report after Mr Borst's return to New Zealand is a letter to ACC dated 10 April 1985 from Dr Parkinson, Mr Borst's GP and also a Psychodrama practitioner. Dr Parkinson suggested that Mr Borst's lump sum compensation payments should be increased and asked for his case to be re-opened and re-considered. As the rationale for this, Dr Parkinson stated:

*"He presents with multiple sequelae related to the serious motor vehicle accident that he was involved in April or May of 1978.*

*Some of these sequelae are purely physical in the form of chronic back pain, problems with his stump, pain in his hips and persistent headache. Other problems are emotional and these pertain to continuing, unresolved anger which has impaired his ability to gain employment and to maintain a stable and loving relationship and attempted suicide...*

*Mr Borst is currently undergoing a course of therapeutic counselling with me and he is making all attempts to get his life in order so that he can as much as is humanely possible embark on gainful employment and form a stable loving family environment. His progress over the past month to six weeks has been most encouraging. I think that this would be an excellent time for the ACC to give their support to this man's sincere attempts to get himself out of the situation both physically and emotionally that the accident has left him with. I look forward to your response."*

[17] ACC responded by instructing an Orthopaedic Surgeon to re-assess Mr Borst's loss of function and to report on whether his current inability to work was entirely due to his injuries, but did not seek any psychiatric or psychological opinions. Mr Lane concluded that Mr Borst's "*accident and its unfortunate sequelae has obviously left substantial psychological as well as physical trauma.*" He supported Mr McFarlane's 75% disability under s 78, confirmed that Mr Borst's inability to work was caused by his injuries and recommended a permanent disability pension.

[18] While Mr Borst was staying at the Laura Ferguson Hostel he attended the Rehabilitation League from 22 March 1988 to some time in 1989. In November 1988, a Vocational Assessment was carried out by a specialist team comprising a Senior Rehabilitation Officer, a Social Worker, a Vocational Assessment Officer, a Psychologist and a Medical Officer. Following comment on Mr Borst's work attempts through ACC under the heading *Social Situation* the report states:

*"...After battling for 1 ½ - 2 years with the stump continually breaking down (he recalls continuing to work even though the stump was bleeding) his unresolved grief, and inability to accept his disability, he became severely depressed, was asked to leave the job because he was not coping and ended up on the unemployment benefit. He speaks of a 'breakdown' at this time including a suicide attempt. He speaks of tremendous unresolved anger especially as the accident had been caused by a drunken driver and Mr Borst was no way at fault.*

*He later left New Zealand, moved to Australia, travelling around by motorcycle and working intermittently. He finally met his second wife, married and they had a child. He states he was very hard to live with, continuing to be very angry about his losses, until finally the marriage broke up three years later. He left his wife when she was expecting their second child and has never seen this child. He believes the marriage would never have broken down if he had been in a better emotional state. He returned to New Zealand and eventually commenced having regular psychodrama sessions with Dr Peter Parkinson in Thames. He has regular contact with his wife and children in Australia by phone and mail. Staff discussions with Mr Parkinson reveal that it is hoped that eventually he will be reunited with his family.*

*On presentation at the Rehabilitation League it was obvious that Mr Borst is a man who suffered considerable loss. Initially he exhibited a fiery temper. However his rehabilitation programme supported by regular input from Dr Parkinson has assisted Mr Borst to:*

- (a) accept his disability;*
- (b) clarify his vocational aims (it should be recognised that he has had to make massive adjustments vocationally);*
- (c) accept his disability;*
- (d) deal with the residue of unresolved grief and conflict;*
- (e) learn appropriate skills to deal with his ongoing difficulties- thus learning to deal with anger and frustration appropriately;*

...

*Stress management training has also assisted him to identify his stresses and he has developed appropriate coping strategies which now enable him to deal with setbacks and frustrations in a calm and confident manner. It is felt he has made enormous strides in this direction."*

[19] The team concluded that Mr Borst's results in the psychological testing assessment did not clearly support a diagnosis of head injury, but his symptoms would fit with Specific Learning Difficulty and consequent failure to achieve at school at anything like his full potential. This was speculation and was not supported by any information concerning Mr Borst's educational history, but was prompted by the fact that Mr Borst's overall intellectual functioning was in the high average range and he had very superior intellectual skills, but his visuospatial scores were variable and his mathematical and numerical abilities were below par.

[20] In his report dated 24 September 1990, Mr Hooker, Orthopaedic Surgeon, noted Mr Borst's time in the Rehabilitation League and the psychological assistance he received in coping with his problem, but with no particular benefit to his back and leg symptoms. Mr Hooker was asked to reassess Mr Borst's s 119 entitlement and comment on his symptoms and work capacity, so the focus of the report was necessarily on Mr Borst's physical injuries and how they affected his gait and his degenerative hip symptoms and the resulting low back pain and the stresses thrown on the rest of his leg and his lumbar spine.

[21] Mr Tregonning, Orthopaedic Surgeon, was instructed by ACC to assess Mr Borst. Mr Tregonning noted in his report dated 16 February 1995 that Mr Borst was forced to give up work some two years after the accident because of stump problems and back pain and said:

*"Ever since then he has had low back pain and at one stage he had a lot of problem with drugs and alcohol but has managed to conquer this and more recently he has managed to keep his pain under control with acupuncture which he has managed to reduce down to about once a week.*

...

*As far as acupuncture is concerned, I believe that this is indicated for this man as it enables him to control his previous drug problem for his chronic pain."*

[22] The next report that mentions Mr Borst's psychological state is the Work Capacity Assessment by Dr Gavaghan dated 19 April 1999. Dr Gavaghan said

under the heading *History of Injury*, in the context of the termination of Mr Borst's employment in 1980:

*"At this time the level of pain increased with pain in the back, hips, shoulders and arms. He was taking high doses of painkillers and indicated he became "psychotic". There was no psychiatric intervention and he left to live in Australia where he lived for 6 years and also attended a rehabilitation institute in Melbourne. During this time he got himself off prescription drugs and was on an invalids benefit. He returned from Australia in 1985 and was under psychotherapy for 7 years."*

[23] The Independence Allowance Assessment by Dr McDonald dated 26 June 1999, was obtained to assess Mr Borst's physical injuries from the 1977 accident, but it is relevant because it provides the only evidence of Mr Borst's accident history since 1977. Dr McDonald essentially repeated Dr Gavaghan's comments concerning Mr Borst's circumstances in 1980 and recorded Mr Borst's involvement with psychodrama training from 1992 and that he was within 100 hours of completing the training, and he described Mr Borst as presenting in a straightforward manner. Dr McDonald recorded Mr Borst's medical history and the other injuries for which he had made claims since the amputation injury as follows:

*"In his previous medical history he had a fractured left humerus at age 12, fractured left patella in 1970 while in the Navy, tonsils and adenoids removed age 6-7, lost his front tooth during a diving accident and he reckons he has fractured his left wrist some 4 – 5 times."*

*On running through the previous list of injuries other than his major injury of 26/5/77, the injury of 28/10/91 was a sprain or strain of his cervical spine. He feels that this has left him with cervical pain radiating across the left trapezius. This occurred due to Housing Corporation having changed the lino in his house, leaving a slippery surface. On 26/1/92 he injured his left thumb and index finger with a chainsaw, the only impairment being a deformed nail.*

*29/6/92 and 20/2/93 were back strains.*

*17/8/94 he has no recall.*

*13/6/96 was a fall at a wharf with abrasions to the left hand.*

*3/7/96 was a fall on his right knee. He feels he has had ongoing pain intermittently since that time in the area of the knee.*

*2/4/97 was the result of a fall in his kitchen without fractures.*

*8/5/97 he has no recall.*

*2/7/98 was a fall injuring the left shoulder, elbow and wrist without evidence of a fracture."*

[24] ACC next referred Mr Borst to Robert Sellars for a Functional Capacity Evaluation (FCE). The FCE is dated 14 July 1999 and comprises 29 pages of comment, tests and test analysis. In his *Brief history*, Mr Sellars said that Mr Borst suffered multiple injuries when hit by a truck travelling on the wrong side of the road and he noted that Mr Borst had rehabilitation when he moved to Australia and came off all drugs and has remained drug free ever since. Mr Borst's psychotherapy was noted, but not his history of chronic pain, nor his amputation related degenerative changes and the impact on his gait on his lower back and hip pain diagnosed by Mr Hooker, nor any of the other injuries identified by Dr McDonald. Mr Sellars

described Mr Borst's covered injuries as comprising only "*Left above-knee amputation*". Under the heading *Summary of Validity Profile* Mr Sellars stated:

*"Mr Borst passed 22/43 validity criteria during the FCE, 51% suggesting very poor, voluntary submaximal effort not related to pain, medical impairment or disability."*

[25] The FCE is designed to test an injured person's capacity to undertake various physical tasks and the results are evaluated under specific criteria and then assigned a validity rating under a set of evaluation criteria and formulae to produce a Validity Profile by which to assess the degree to which the tested person achieves maximum effort without any pain increase. In this process, one must assume that a full and accurate understanding of the nature and extent of the injured person's injuries would be an essential element, as otherwise it could not be possible to accurately measure effort related to pain. Mr Sellar's FCE raised what the Branch Advisory Psychologist ("the BAP") later referred to as "*issues of symptom validity*" that do not seem to be well founded in light of the injuries that Mr Sellars was not aware of and therefore did not take into account in his testing.

[26] ACC next referred Mr Borst to Dr Emrys, Occupational Medical Specialist, for a Work Capacity Medical Assessment and his report is dated 30 July 1999. Under the heading *History of Injury, Treatment and Progress*, Dr Emrys repeated Dr McDonald's description of the accident and recorded Mr Borst's work history from the accident up to 1980 and said:

*"...he continues to remain angry that he was put in this position and he believes that the physical work he undertook at that time aggravated his existing injuries and has caused him permanent ongoing problems."*

*Mr Borst subsequently went into what he would describe as his 'psychotic phase' where he abused alcohol and prescription medicines and was generally involved in various types of antisocial behaviour. He states he fled the country for a period of 6 years where he worked for the majority of the time for a security company performing special runs. He subsequently weaned himself off all medications and was introduced to the power of psychodrama when unwittingly this treatment was presented to him by his new general practitioner. He was clearly moved sufficiently to have subsequently followed training to become a psycho-dramatist. He is now within 100 hours of completing this training and he is already performing some clinical work..."*

[27] Mr Borst's claim was transferred to Catalyst in 2000/2001, and another Occupational Medicine assessment was arranged with Dr Ruttenberg. Mr Borst refused to attend because he felt that ACC had a "*wealth of reports*",<sup>2</sup> all virtually saying the same thing, and his weekly compensation was suspended. No more medical reports were obtained until 2012, but there is an ACC record dated 3 June 2003, which describes the circumstances of Mr Borst's admission to the Henry Bennett Centre at Waikato Hospital from ACC's perspective. According to ACC, Mr Borst went to the Thames branch office and said he was going to take his own life because he could not cope. He complained that he was on a sickness benefit not

---

<sup>2</sup> 24 reports prior to 2000 were produced for the appeal, 21 of which dating from Mr McFarlane's report of 16/2/78 required Mr Borst to attend for an assessment.



W/C, and about to be thrown out of his house because he could not maintain the grounds because of his amputation and the pain, he had no money see his doctor or to pay his bills and his goods were being repossessed. His doctor and the police were notified and Mr Borst was admitted the same day.

[28] There is also Mr Borst's own statement, which ACC received on 23 March 2009, entitled "*A Tragedy by Noel Borst*" ("the 2009 statement"). This is a 10 page document which clearly and credibly describes Mr Borst's accident and his injuries and treatment in the immediate aftermath and the ongoing impact on him physically, emotionally, psychologically and financially, his attempts to rehabilitate and retrain himself without any assistance from ACC and the reasons for his refusal to continue to comply with ACC's investigation of his vocational independence after his file was transferred to Catalyst. I have repeated paragraphs 1.1 and 10.4,<sup>3</sup> in which Mr Borst describes his pre injury life and his situation in 2009:

*"1.1 I was a couple of months short of my 22<sup>nd</sup> birthday. I was 6ft 2 inches tall, 13 stone and navy fit with 8 hours hard work being no effort, bright, intelligent, living life to the max with my hobbies being reading, fishing, diving, hunting, driving cars, running, shooting, fire arm restoring, clubbing, parties and dancing not least. My life was Mary, my partner. Both of us were employed, the car was registered and warranted, I held a current drivers licence.*

*10.4. I live in a high degree of pain, poverty, isolation and high stress caused by other people's mistakes and ACC's inability to do anything other than run cost cutting exercises on me from day one. I have not been treated in any way fairly, my wife Mary died and nothing was done despite the coroners findings and report."*

[29] Following a Facilitated Agreement in 2011 aimed at settling Mr Borst's entitlements referrals were arranged by consent for mental injury and orthopaedic assessments. Mr Borst was first referred to Mr Finch, Orthopaedic Surgeon, for an updated report on the 1977 physical injuries. Mr Finch took a very full and detailed history from Mr Borst and he reviewed all the medical information ACC provided, which included a psychological report dated 10 June 2001<sup>4</sup>. In answer to the specific questions posed by ACC, Mr Finch said at page 3 of his report dated 9 March 2012:

*"1. The clarification of the diagnosis is that this gentleman has had a major motor vehicle accident for which he has had a huge amount of psychological and physical trauma not the least of which was his fiancé was killed in the motor bike accident and the fact that he tells me the person who he was told was on the wrong side of the road was not prosecuted and he still harbours a lot of those deep seated beliefs to this day.*

*8. I feel the prognosis for Mr Borst is poor. He has severe ongoing problems with a psychological disorder, he has pain problems and he also*

---

<sup>3</sup> The full document should be attached to Mr Borst's ongoing ACC file and provided to all future assessors as necessary background information.

<sup>4</sup> This is the only reference to the report and although ACC relied on it at the review hearing, it was not produced in evidence.

*has severe physical limitations, concentration difficulties and I believe is essentially unemployable."*

[30] ACC next instructed Dr Wilkinson, Psychiatrist, a regularly contracted psychiatric assessor for mental injury assessments to assess Mr Borst. ACC provided Dr Wilkinson with medical reports and Mr Sellar's FCE report, but omitted Dr MacDonald's report and the 2009 statement. The relevant parts of Dr Wilkinson's assessment dated 9 May 2012 are repeated below. The emphasis is mine:

#### **PART C: BACKGROUND INFORMATION**

##### **6. PRESENTING PROBLEMS AND RELEVANT BACKGROUND HISTORY**

*"Noel Borst says he had a breakdown when he lost his job at the Ministry of Works, with him having severe anger problems and he abused drugs. He felt he had been abused by the system as he was put into an inappropriate job, in which no account was taken of his injuries. He was also angry that the police did not want to investigate the accident, because, he believes, the other driver was a mate of theirs, and he was warned not to push the matter. He was grieving for Mary. When he returned from Australia in 1985 he remained angry and consulted Dr Parkinson in Thames, who practiced psychodrama on him, with such strategies as confronting him with the "truck driver" in treatment, which continued over 13 years.*

*Six years ago he was admitted to the Henry Bennett Centre, mental health unit in Hamilton. The car he had been provided needed repairs to get its Warrant, and he could not afford it, and was stopped by the police a couple of times for the car being illegal. He went to the ACC office to give it back, and he was said to be suicidal and the police were called. He reports he asked them to leave, and he was taken to the HBC rather forcefully. He says once there they wanted him to wear pyjamas and his clothes were removed. He refused the pyjamas and went naked for two days. On the third day his psychiatrist decided he was not mentally disordered and he was allowed home.*

*He says he still feels great anger at times, but can control it, which is directed at ACC and the system because of insulting assessments and his entitlements being stopped on more than one occasion. He enjoys carving for about three hours twice a week, and reading, and he watches TV. He is single but he has good friends in Thames, and enjoys their company. His energy is reasonable and his concentration is good. He does not believe he has mental health problems, and does not have features of PTSD, with no intrusive recollections of his injury. He says the Rotorua surgeons apologised to him for not saving his leg, and he accepted that. He still misses Mary, who has been the love of his life. He does not feel suicidal."*

#### **PART D: DIAGNOSIS**

##### **15. PERSONALITY ASSESSMENT**

*Noel Borst describes himself as a gregarious and outgoing person who loves parties and the outdoors, in which he camped, fished and hunted,*

and rode bikes and horses. He was prone to anger before the injury, and he has a stubborn streak. He does not have a personality disorder.

#### 16. MENTAL STATE EXAMINATION

... His affect was reactive and his mood was generally good such that he could laugh frequently. He showed some anger discussing his dealings with ACC, but was not distressed discussing the accident and its consequences. He has no intrusive recollections and no psychotic symptoms. He had no suicidal ideation. His insight into his problem was good.

#### 17. FORMULATION SUMMARY

... His anger at this time (when he lost his job) related to the police not investigating the accident and being pushed into unsuitable work, but this improved with Psychodrama treatment. He now does not feel depressed, anxious or markedly angry, except with ACC for suspending his entitlements.

...His childhood was marked by violence from his father, but he developed a good relationship with him. He has angry and stubborn personality traits, but enjoys socialising and does not have a personality disorder. He does not smoke or abuse alcohol, but uses cannabis two to three times a week. He is on no medications. His fiancé was killed in the accident, and he grieved for her, and subsequently married in Australia and has two children, but left due to anger problems in 1985, and has been single and on benefits since then. He had no psychiatric history before the injury."

[31] Under paragraph 18. *DIAGNOSIS DSM IV Multi Axial Classification*, Dr Wilkinson assessed Mr Borst at nil under Axis 1, (Clinical Disorders), Nil under Axis 11 (Personality Disorders) and he calculated Mr Borst's GAF Score under Axis V (Global Assessment of Functioning) at 75. The DSM IV TR Multiaxial Assessment text states that a GAF score of 80 indicates that if symptoms are present, they are transient and expectable reactions to stressors and the no more than slight impairment in social and occupational functioning indicated by a score of 71.

[32] Dr Wilkinson summed up his assessment under paragraph 20. The relevant parts are:

*"OPINION: RELATIONSHIP BETWEEN PHYSICAL INJURY AND MENTAL CONDITION: He felt angry about the circumstances of his injury and his fiancé's death being the fault of the other driver, and the police not investigating, and at being encouraged into physically unsustainable work. This has not improved with psychological treatment. He has not had intrusive recollections of the accident or injuries. He does not have depression. His anger towards ACC relating to his entitlement to benefits does not constitute a mental disorder.*

*OPINION: RELATIONSHIP BETWEEN OTHER LIFE EVENTS AND MENTAL CONDITION: His fiancé died in the accident, and he felt very angry at how he was treated when he returned to work. He remarried in Australia but this ended because of anger problems.*

*OPINION: WHERE THE DIAGNOSIS IS PTSD: He has no intrusive recollection of his injury, or subsequent ill-health. He does not have PTSD. He developed anger after the accident but this was linked to specific problems such as the death of his fiancé and the accident not being investigated by the police, and being put to unsuitable work, and more recently issues with ACC. His anger is not a symptom of PTSD."*

[33] Dr Wilkinson was instructed using the ACC standard 4 page mental injury assessment letter and questionnaire. Dr Wilkinson used the preferred ACC diagnostic tool, being the (obsolete) Diagnostic and Statistical Manual of Mental Disorders, the DSM IV TR Multiaxial Criteria, and the diagnosis of mental injury, particularly PTSD, was tied directly to the physical injury suffered, as required by s 26 of the 2001 Act. This excluded any consideration of the impact of Mr Borst's partner's death or the experiences and consequences of the accident and surgery, except in the context of other life events that may impact upon Mr Borst's mental condition under Axis IV (Psychosocial and Environmental Problems that may affect diagnosis and treatment of mental disorders), if they were considered at all relevant.

[34] In so far as concerns Mr Borst's current mental condition, the GAF score of 75 indicated that he was minimally affected by the 1977 amputation injury, which essentially left Dr Wilkinson's primary past and present "*diagnosis*" as being anger against ACC for the way in which Mr Borst felt he had been treated over the years, born of a personality that was prone to stubbornness and anger and which had affected him throughout his life. Along with the comments that Mr Borst's anger is directed at ACC, Mr Borst's diagnosed non-injury related anger is mentioned some 20 times in Dr Wilkinson's report and significantly underpins his assessment.

[35] In contrast to ACC's standard form mental injury instructing letter which limits the assessor's inquiry to the detailed and structured questionnaire and range of available diagnoses, Mr Darke's instructing letter to Dr Cordyre left the diagnostic tools to him and did not pre-determine the ambit and focus of his inquiry. Regarding the test to be applied, Mr Darke said:

*"It is my understanding of the case law, that as Mr Borst has cover under the 1972 Act, mental injury can just be a component of overall cover. There was no requirement (as there is in later Acts) for mental injury to arise from the physical injuries. Indeed, under the 1972 and 1982 Acts, mental injury could be covered in its own right in the absence of physical injury.*

*In any event it must first be identified whether Noel has a mental injury and then if so, whether the accident is a substantial cause of any mental injury. As you are aware, Dr Wilkinson is of the opinion that there is no mental injury – his report was included in the documents supplied.*

*Accordingly I would ask you to address the following questions:*

1. *In your opinion has Noel Borst suffered any mental injury?*
2. *If so, how do you differ from Dr Wilkinson's opinion?*
3. *In your opinion, is the accident of 1977 and its consequences, a substantial cause of any mental injury Noel Borst has suffered?"*

[36] In addition to the same reports that ACC gave to Dr Wilkinson, Mr Darke provided Dr Cordyre with a copy of Dr Wilkinson's report plus the 2009 statement and his own *Brief report on history/Issues* which includes case law comment on mental consequences under the 1972 and 1982 Acts.

[37] In his opinion dated 30 October 2012, Dr Cordyre recorded his understanding of his instructions as follows:

*"Noel was referred by the advocate supporting him in the proceedings with ACC, for a psychiatric second opinion regarding whether he suffers from any diagnosable mental health condition(s), and if so, whether such condition(s) reflect "Mental Injury" in that they may have been caused by or a consequence of an accident/injuries sustained in 1977"*

[38] Under HISTORY, Dr Cordyre summarised Mr Borst's information concerning his accident and injuries and the difficulties he had experienced since, and the history given in the prior reports. Dr Cordyre then said:

*"Noel's subsequent difficulties with ACC, and failed attempts to return to heavy physical work are well documented in past reports. What is clear from his history is that, having previously been well adjusted (in terms of not having issues with substance abuse, violence/anger, or depression), over the ensuing years he went on to develop significant issues with mental health. He felt constantly irritable/angry, and frequently was in fights. He battled with varying levels of depression. He also began abusing alcohol."*

*While retrospective assessment of symptoms is so far in the past is difficult to reliably undertake, it does seem clear that Noel was suffering from Major depression, and also symptoms of PTSD relating to the accident, through these years. He had clear re-experiencing PTSD symptoms (nightmares, intrusive recollections) involving multiple factors, in particular being trapped in the car post –accident, the moment of his wife's death shortly after he regained consciousness, and his waking during the amputation surgery. As noted, he also began abusing alcohol.*

...

*"Recent/current history is a continuation of these symptoms/difficulties, and the resulting impairment and disability. Noel remains with significant levels of chronic pain – stump pain and low back pain, - though one does feel that he mostly self-manages pain and is as active as he can be within the limitations imposed by both his restricted mobility, and pain. He self-manages all ADLs, maintains involvement in those leisure activities he is still able to (e.g. goes fishing at least once every week or so), and stays as active as he can. He also remains with significant symptoms be of PTSD relating to the accident and its aftermath – nightmares, intrusive recollection, hypervigilance, avoidance behaviours etc. Currently he also has moderate levels of depressive symptoms – low mood and anhedonia most days, and associated difficulties with sleep, negative thinking, appetite disturbance etc."*

*Given the marked difference in reported symptoms between the current assessment, and the recent psychiatric assessment of Dr A Wilkinson (May 2012), I did explicitly ask Noel how this could be explained. He stated that on the one hand he has been so sick of being referred for one assessment after another that he tends to go in and say little, and certainly not elaborate on his difficulties, as he expects not to be heard anyway; on the other hand he denies that Dr Wilkinson ever asked him explicit questions regarding individual symptoms. Of depression or PTSD, did not assess the impact of pain in any detail and did not administer any relevant testing scales."*

[39] Dr Cordyre identified the tests he carried out as follows:

*"PSYCHOLOGICAL TESTING*

*Kessler – 10 (a general measure of "psychological distress) - score 36/50 confirms high risk of anxiety or depressive disorder.*

*PHQ-p depression rating scale – score 19/27 confirming current moderate severity Major Depression.*

*Impact of Events Scale (a screening/quantification scale for PTSD) – score 57/88 indicated current severe PTSD.*

*Pain-Anxiety Symptom Scale – score 40/100 reflects moderate impact only of subjectively severe pain..."*

[40] Dr Cordyre assessed Mr Borst under DSM IV and his GAF score as follows:

*DSM IV Axis 1 (psychiatric disorders)*

- *Post-traumatic Stress disorder (PTSD) – chronic, severe*
- *Major Depressive Disorder, chronic, currently moderate*
- *Pain disorder, chronic, mild, secondary to medical and psychological factors*

*Axis 11 – Personality Diagnosis*

- *No diagnosis*

*Axis V - Function*

- *GAF – current – 31-40 (severe symptoms and or/impairment in function)*

[41] Dr Cordyre's conclusions are under OPINION at pages 4 and 5:

*"In my opinion, the PTSD, Major Depression, and Pain Disorder are all mental injuries" in that they date from the accident/injuries of 1977 and its immediate aftermath, and are in part or whole secondary to severe physical injuries sustained in that accident. The basis for this opinion is that Noel was previously well with no prior psychiatric history. He suffered threatening injuries and in the aftermath of these was left with PTSD symptoms related to these injuries – memories of being trapped in the car post-accident in intense pain, fearing he was dying; and memories of briefly waking during one of his amputation injuries, being conscious but unable to breathe, and feeling the surgeon cutting his leg. As he recovered he was left with chronic pain in the stump and phantom limb*

*pain. He then developed what has been persisting Major Depression, in part as a complication of the impact of chronic pain and PTSD (as this is recognised common complication of both these diagnoses), PLUS as a result of his struggles to adjust to the impairment and disability he faced as a result of his physical injuries.*

*The loss of his wife was also a factor in both the PTSD and Depression, but was not the major factor in either case, in my opinion – it is highly likely that even if his wife had survived, he would have been left with symptoms of these conditions as a result of the physical injuries alone, and their impact on his life.*

*This opinion does substantively differ from that of Dr A Wilkinson – in finding the above diagnoses, and in the resulting “mental injury” assessment. As outlined above, in asking Noel about that assessment he claims it was brief, he denies he was asked about symptoms I have screened for today (e.g. symptoms of depression, PTSD), and he said he felt the examiner was unsympathetic, BUT also acknowledged that he has such anger at ACC after attending so many assessments over the years that he did not fully cooperate with the assessment and was not open about his mental health issues. He claims that the context for this is that he would attend for assessment after assessment, that recommendations would be made, most often these would not be followed, and he sees them all as being driven by ACC’s primary aim of “getting rid of me ...”. It would seem from Dr Wilkinson’s report that he did in fact make some level of active enquiry re symptoms of depression, and PTSD, and did not elicit these; the opposite was true on the occasion of the present assessment. My assessment is thus based on history and findings as elicited in the course of the present assessment, BUT I note these findings are consistent with the assessments of other medical practitioners repeatedly over many years regarding the presence of “psychological factors ...”.*

*Finally, while I do not normally make such comment in a report, if Mr Borst’s account of the events relating to his difficulties with ACC over the many years since 1977 is accurate, then he does indeed have grounds to feel aggrieved – while his injuries and the resulting impairment and disability were severe, with access to the indicated combination of ongoing support and rehabilitation (including comprehensive mental health intervention), along with graduated return into more appropriate employment, then I have no doubt that the outcome in this case could have been much better, and much personal suffering could have been avoided.”*

[42] ACC asked Dr Wilkinson to comment on Dr Cordyre’s conclusions and did so in an Addendum to Psychiatric Assessment Report/Treatment Plan dated 14 November 2012. Dr Wilkinson denied that he had not asked Mr Borst about symptoms of PTSD, and intrusive recollections were not admitted to and nor did his questioning elicit symptoms of depression. Mr Borst described symptoms of grief and anger relating to the death of his wife and his injuries, but stated that it was physical issues rather than mental health issues that prevented him from working in his pre injury role and subsequent jobs. Dr Wilkinson said, wrongly I note, that only Mr Finch’s report mentions psychological issues and said concerning the issue of symptom validity:

*"I also note the FCE of 14/7/99, stating that he had only 51% validity criteria passed, indicating poor effort to give a true account of his functioning. This may have been a factor with Dr Cordyre's assessment, based on Noel Borst's self report of his symptoms, which were not disclosed on my inquiries."*

[43] Dr Wilkinson's assessment and Addendum and Dr Cordyre's assessment were then reviewed by the BAP, who was to recommend whether mental injury should be accepted or declined. The BAP's main criticism of Dr Cordyre's assessment was that there were no stand alone symptom validity measures used in his testing and symptom validity issues were raised on the file and also on the reading of the assessment, and ruling out symptom validity concerns was required in all mental injury assessments. This was an odd comment in light of the fact that Dr Wilkinson's assessment, which was prepared following ACC's specific instructions, was carried out without any testing at all, and has no independent symptom validity measures to support his conclusions.

[44] It seemed to the BAP that Mr Borst presented differently in each assessment and his/her inclination was to favour the assessor who routinely does ACC assessments, being Dr Wilkinson. The BAP suggested that although Dr Wilkinson did not think that Personality Disorder was a key issue, *"wherever there are persisting emotional, differential diagnosis questions about an underlying personality trait should be asked"*. This can only be a reference to the innate anger and stubborn personality that Dr Wilkinson attributed to Mr Borst throughout his assessment, and without the *"intervention"* of his cover being under the 1972 Act, the BAP's suggestions would no doubt would have been taken up for any future assessments.

[45] The addendum and BAP comment were given to Dr Cordyre for his comment. In his response dated 3 January 2013, Dr Cordyre responded to the BAP's numbered comments and said, in relation to the comments concerning a pre-existing personality disorder, first, that all the previous reports as well as his own history taking supported the view that there was no such disorder, and secondly, the pattern of maladaptive behaviour and coping style would have emerged in Mr Borst's late teens, early 20's, and this was not the clinical picture that presented on his assessment, and nor was it elicited in previous assessments. This effectively rules out Personality Disorder as a diagnosis, however, if untreated, severe acute PTSD commonly becomes chronic and persists over time.

[46] Regarding the BAP's symptom validity comments, Dr Cordyre said:

*"Issues of unhelpful incentives and "secondary gain" are implicit in any assessments undertaken regarding injury-related impairment, disability and disorder. Assessment of such factors is an integral part of the psychiatric assessment process, BUT as outlined above, can be complemented by use of validated structured symptom rating scales. I was satisfied that my assessment reflected the reality of Mr Borst's actual mental state."*

[47] Dr Cordyre said that Mr Borst's difficulties early on in coping with his physical impairment/disability and the impact of him subsequently developing a mental injury and his resulting combative coping style and maladaptive use of substances to cope all undoubtedly conspired against him in getting his needs met by ACC. He went on to say:



*“However, equally, the lack of timely response to identified mental health issues by ACC (concerns regarding his mental state were made in repeated specialist reports commissioned by ACC over a number of years), along with the totally inappropriate nature of the work he was put back into, have contributed to his continuing impairment, disability, and difficulty returning to any form of work. On this basis, his subsequent anger and lack of trust and cooperation with ACC processes including repeated specialist assessments (which from his perspective were/are never acted on), could be seen as being “normal” responses to a very stressful and difficult situation, in which he was dependent on help and support which was not adequately provided. It would seem to me that the energies of those involved including ACC personnel, would be more effectively focussed on working to address his injury-related needs, rather than putting spurious barriers up to continue to deny him the care he needs.”*

[48] The only other relevant evidence is the evidence Mr Borst gave at the review hearing, which has a direct bearing on his credibility. The transcript shows that Chris Geary, advocate for ACC, based his submissions squarely on Dr Wilkinson’s assessment of Mr Borst as having had pre-existing anger and stubborn personality traits and behavioural problems at school, along with specific learning difficulties Mr Geary claimed were identified in the 1988 Rehabilitation League Report, to challenge Dr Cordyre’s assessment that Mr Borst did not have prior adjustment or mental health issues. Mr Borst gave evidence on all these matters and denied all the allegations made by Mr Geary.

### ***The review decision***

[49] Mr Wood observed that two psychiatrists assessed Mr Borst for mental injury and have come to quite different conclusions working from much the same data. It appeared that both relied heavily on Mr Borst’s self reporting, with background from previous reports and Dr Wilkinson appeared to have been provided with a more complete set of reports. Mr Wood did not consider that Dr Wilkinson was in error giving in not giving more emphasis to Mr Finch’s or Mr Lane’s report, as had been submitted by Mr Darke, and he upheld ACC’s decision effectively by default. Mr Wood concluded his decision with the following comments:

*“I found Mr Borst a credible witness. At the hearing Mr Borst presented in a restrained but forceful manner. Mr Borst was articulate and reasoned in giving his evidence. To a layman he was clearly angry and frustrated because of the many issues that have been present or have developed over a very lengthy period of time. I have no doubt that the injuries have caused anguish, anger, frustration and a sense of hopelessness.*

*While acknowledging Mr Borst’s outward positive presentation I accept that it could belie the fact that someone can still be suffering from depression and/or post-traumatic stress disorder (PTSD) as the disorder manifests differently in people according to their individual characteristics.*

*That being the case there is no need to consider if there is a causal link between Mr Borst’s mental state and his motor vehicle accident in 1977.”*

## Case law

[50] Ms McLachlan referred me to the District Court decision *ACC v Tegus*<sup>5</sup> in which Ongley DCJ noted:

*“Whether the appellant had cover for mental injury does not appear to be a crucial matter in this appeal. He was entitled to cover for all the consequences of his physical injury under the 1972 Act and later transitional provisions. In that sense he had cover...”*

[51] Cover under s 2 of the 1972 Act is not limited to the consequences of the physical accident, as s 2 extends cover to the consequences of the injuries and the accident that caused them, but the principle is correctly expressed. The important distinction between the cover under the 1972 Act and the cover under the 2001 Act, is that under s 26(1)(c) and s 27, “*personal injury*” means mental injury suffered because of physical injuries suffered by the person and “*mental injury*” means a clinically significant behavioural, cognitive, or psychological dysfunction and where there is a claim for mental injury arising out of physical injury, as separate claim must be made.<sup>6</sup> However, in cases where PTSD as a mental injury has been upheld as arising from the circumstances of the accident, the Court has found for the appellant where it is difficult to separate the mental and physical consequences of an injury, there was no pre-accident history of emotional or personal difficulties and the injuries were life threatening.<sup>7</sup>

[52] Regarding the meaning of the term “*mental consequences*” under s 2 of the 1972 Act, both Ms McLachlan and Mr Darke referred me to the decision of the Court of Appeal in *Green v Mathieson*<sup>8</sup>, where Cook P for the Court said

*“On the other hand, having heard the point fully argued we adopt definitively the opinion indicated provisionally in Blundell at pp 738 –739 that, once there is personal injury within the scope of the Act, all the emotional or psychological effects fall within the statutory words “the physical and mental consequences of any such injury or accident”. These words are not limited to mental consequences identifiable by some particular medical or psychiatric description, not to what is often called shock or trauma. Parliament cannot have intended such fine distinction on this area “*

## Discussion

[53] Dealing first with the issue of “*symptom validity*”, Ms McLachlan’s submissions, when rendered in plain English, amount to the suggestion that once he read Dr Wilkinson’s assessment and noted that Dr Wilkinson did not think he had PTSD because he had no intrusive recollections of his injury, Mr Borst realised that he had to tailor the information he gave to Dr Cordyre if he wanted to get money from ACC. This is consistent with his attempts to manipulate the FCE testing to appear more

<sup>5</sup> [2009] NZACC 7

<sup>6</sup> See *Thomas v ACC* 12/11/08, Judge Beattie, DC Fielding 278/08.

<sup>7</sup> See e.g. *Woodd v ACC* 2/4/03, Judge Cadenhead, DC Wellington 54/03; *Robertson v A-G* 12/8/02, Gendall J, HC Palmerston North, CP16/01; see also *Dandorff v Rogozinoff* [1988] 2NZLR 588, as quoted and approved in *Green v Mathieson op cit*.

<sup>8</sup> [1989] 3 NZLR 564

incapacitated than he actually was, and the only way to explain the difference between the information elicited by each psychiatrist, is that Mr Borst was lying to Dr Cordyre, or at the least, exaggerating his symptoms.

[54] I have no sympathy whatsoever with this scenario. The simple explanation is that Dr Wilkinson was instructed to assess whether Mr Borst suffered any diagnosable clinical condition under the DSM IV TR as a result of his injury or subsequent ill health i.e. his amputation and its physical aftermath. Dr Wilkinson was not, by definition, seeking information concerning the mental consequences of the injury and accident and information concerning, for example, any intrusive recollections of the horror of the accident and Mr Borst's wife's death, or unresolved grief would not be sought and would be irrelevant if it was provided freely. This could explain why ACC did not give Dr Wilkinson the 2009 statement, which I feel is one of the most important documents for any truly informed assessment.

[55] If Mr Borst understood the nuances of Dr Wilkinson's instructions and resulting report, then he would have tailored any information he gave Dr Cordyre as a result, to his injury and anger. In my view, he did not do this, he simply presented as he had consistently done at every assessment since the 1977 accident. I did wonder whether Mr Borst was somewhat better placed than most claimants to understand what is required for a diagnosis of PTSD because of his psychotherapy training, or had, for example, researched PTSD for the interview with Dr Cordyre. Mr Borst filed a statutory declaration that satisfied me that this was not the case and I agree with the comment that if it was in Mr Borst's interests to convince Dr Cordyre that he suffered from PTSD for a second opinion, it was even more in his interests to convince Dr Wilkinson of this and provide him with as much information as he was able, despite any lingering frustration with yet another ACC assessment where he was not listened to.

[56] Dr Wilkinson justified his criticism of Dr Cordyre's assessment by reference to the credibility issues raised by Mr Borst's validity profile as measured by Mr Sellars for the FCE. However, the FCE was flawed and unreliable because Mr Sellars was either not aware of, or ignored, numerous injuries that in Mr Borst's circumstances would be expected to have quite a significant impact on his functioning and his pain condition, and any assessments based upon, or influenced by, the symptom validity score and comments, are equally flawed. Dr Wilkinson's assessment comes within this category. Dr Cordyre's does not.

[57] Finally, there is Mr Wood's very clear finding of credibility in Mr Borst's favour. I did not have the benefit of seeing Mr Borst give evidence in response to the somewhat unflattering and insulting submissions made by Mr Geary, but Mr Wood did. And it is worth noting that had Mr Wood properly understood the issues before him and considered causation in terms of whether Mr Borst had suffered mental consequences as a result of his injuries and accident, his concluding comments indicate that he should have found for Mr Borst.

[58] Turning to the issues, the first question is did Dr Cordyre address the matters that are necessary to make a diagnosis of mental consequences under the 1972 Act? For the following reasons, the answer must be "yes". Dr Cordyre had the passage from *Green v Mathieson* and Mr Darke's instructing letter to guide him, the 2009 statement and Mr Borst's additional comments elicited during the examination to inform him, and all the relevant medical reports and the FCE to provide source material and a means of checking Mr Borst's subjective evidence and his own views

for consistency. He did carry out the DSM IV TR analysis that he usually employed in his role as an ACC assessor, but his opinion was essentially that Mr Borst suffered significant mental health consequences of the accident, its aftermath and the injuries he sustained.

[59] Dr Cordyre diagnosed Mr Borst as suffering from PTSD, Major depression and Pain Disorder, which he said are all “*mental injuries*” in that they date from the 1977 accident and were in part or in whole secondary to severe physical injuries. However, Dr Cordyre’s use of the term “*mental injuries*” is entirely consistent with the accepted meaning of the term “*mental consequences*”, and following the reasoning in *Wood* and *Robertson*, his opinion would also have been valid for an assessment under s 27 of the 2001 Act. Dr Wilkinson’s approach to his assessment was so restrictive that Mr Borst would not have qualified under either Act criteria, and his opinion was rightly abandoned by ACC.

[60] Should Dr Cordyre’s assessment be accepted as a correct diagnosis of the mental consequences that Mr Borst suffered as a result of his 1977 injury or accident? In light of my findings on credibility and the totality of the evidence, the answer must also be “yes”.

### ***The review costs***

[61] Exclusive of Dr Cordyre’s specialist fee, which is not at issue, in submissions Mr Darke sought a reasonable contribution towards costs he advised of \$116.94 Filing, \$3,000.00 preparation, \$500.00 appearance and travel of \$126.00 for a total of 228kms at 56 cents per kilometre (for one review attendance only), with the costs already paid deducted from any increased award. The total amounts to \$3,743.94. ACC did not oppose the proposed costs appeal being considered in either set of submissions and nor is there anything recorded in my notes from the hearing to assist in my consideration from ACC’s perspective.

[62] Given the lack of opposition I will not go into the applicable case law save to say that following *Edwards v ACC*<sup>9</sup>, *Cox v Accident Compensation Corporation*,<sup>10</sup> *Huntley*,<sup>11</sup> *W of Wainuiamata v ACC*<sup>12</sup> and *Maude*<sup>13</sup>, all as discussed in *Smith v ACC*<sup>14</sup> at paragraphs [12] to [18], the costs awarded under the Regulations are appreciably less than should have been awarded under the 1972 Act.

[63] The first review hearing was adjourned without any fault on the part of Mr Borst or Mr Darke; it involved considerable travel time, which has not been included in the costs sought and it would have vastly added to Mr Darke’s overall preparation time to have to repeat the process second time around. In addition, if it was so abundantly clear on appeal that Dr Wilkinson’s assessment was obtained under the wrong legislation and applied the wrong test and threshold for mental consequences, this should have been conceded at review rather than forcing the application to a hearing

---

<sup>9</sup> [2013] NZACA 13

<sup>10</sup> [1982] NZAR 534

<sup>11</sup> (Decision No. 202/95)

<sup>12</sup> (Decision No. 58/90)

<sup>13</sup> (234/89)

<sup>14</sup> [2014] NZACA 3

based on Dr Wilkinson's assessment and an unfounded attack on Mr Borst's credibility and bona fides. Finally, there is no question of interfering in Mr Wood's discretion, as he did not exercise any discretion when he awarded the set Regulation amounts. Under the circumstances, I consider that an award of \$2,500.00 plus disbursements of Bureau fees of \$105.00 and Travel of 456 km @ 56 cents per km of \$255.36 is appropriate. Dr Cordyre's specialist fee is additional to this sum and has already been paid.

[64] Pursuant to the s 108(10) which provides that proceedings before the Authority shall not be held bad for want of form and the Authority's power to determine its own procedure under s 108(11) of the 1972 Act, Mr Darke is to file an amended notice of appeal to include an appeal against the costs awarded at review before the costs award will take effect.

### ***Decision***

[65] The substantive appeal is successful and the Corporation's decision of 15 May 2012 is quashed.

[66] Mr Borst has cover under the Accident Compensation Act 1972 for Post-traumatic Stress Disorder, Major Depressive Disorder and Pain Disorder (secondary to physical and psychological factors) as mental consequences of his injuries sustained in the accident he suffered on 26 May 1997 and of the accident.

[67] Subject to paragraph [64] above, the Corporation is to pay Mr Borst costs on review of \$2,500.00 plus disbursements of \$360.36 less the costs paid to date and exclusive of Dr Cordyre's specialist fee.

### ***Costs on appeal***

[68] If costs cannot be agreed on this appeal then submissions are to be filed within 14 days and a decision will be issued on the papers.

**DATED** at WELLINGTON this 31st day of March 2014

.....  
R Bedford