IN THE DISTRICT COURT
AT WELLINGTON

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

	[2023] NZACC 143	**ACR 392/14** **ACR 393/14**
UNDER	THE ACCIDENT COMPENSATION ACT 2001	
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACCIDENT COMPENSATION ACT	
BETWEEN	JULIE AITCHESON as administrator of the Estate of IVAN MARTINAC Appellant	
AND	ACCIDENT COMPENSATION CORPORATION Respondent	

Hearing: 18 July 2023
Heard at: Dunedin/Otepoti

Appearances: Ms B Woodhouse for the Appellant
Mr I Hunt for the Respondent

Judgment: 11 September 2023

RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Social Rehabilitation – Attendant Care; Laundry Services
Schedule 1, cl 14 and cl 17 Accident Compensation Act 2001]

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[1] This is an appeal against a decision of the respondent of 25 June 2013 approving attendant care at level one for personal needs at 97.5 hours a week; home help at 14.5 hours per week; and sleepover care 56 hours per week; and a decision dated 25 June 2013 declining ongoing funding for external laundry services.

Background

[2] On 1 November 1993, Mr Martinac suffered a serious traumatic brain injury and visual impairment when a tractor tyre he was inflating exploded and threw him into the air.

[3] Following the accident, Mr Martinac was diagnosed with extensive cerebral injuries, including damage to his right frontal lobes and a subarachnoid haemorrhage. He underwent a craniotomy for decompression and evacuation of his subarachnoid haemorrhage. Post operatively, he was slow to recover and developed a communicating hydrocephalus which required a shunt. As a result of these injuries, Mr Martinac because cortically blind and had traumatic hearing loss in his right ear.

[4] As at the date of the decisions in question, Mr Martinac was 80 years of age and was then living with his daughter, Mrs Aitcheson, and her husband. They were his primary caregivers and lived on a rural property near Masterton.

[5] On 5 April 2012, Frances Bay, a registered nurse, provided a support needs assessment report. She considered Mr Martinac's general behaviours and needs were stable at level 1 of the complex indicators for complex support.

[6] On 3 April 2013, the parties underwent mediation. The Corporation agreed to undertake a new assessment of Mr Martinac's care needs and issue a fresh decision. No resolution of the laundry issue was agreed.

[7] On 28 May 2013, Ms Bay provided a supported needs assessment report. She rated Mr Martinac's personal care needs at level 1. She also determined that Mr Martinac's laundry needs were not in excess of what many other ACC clients required, including those living rurally, and when broken down, would amount to a maximum of one to one and a half loads of washing daily.

[8] On 25 July 2013, the Corporation issued a decision approving attendant care at level 1 for personal needs at 97.5 hours a week; home help 14.5 hours per week; and sleepover care 56 hours per week. On the same day, the Corporation issued a separate decision declining ongoing funding for external laundry services.

[9] On 20 November 2013, Sarah Mather, occupational therapist, peer reviewed Ms Bay's 6 May 2013 assessment, which was the basis of the 28 May 2013 report. Ms Mather concluded that there was no evidence of any improvement in his functional status, or any reduction in the persistent presence of overt behaviours that could indicate a safe reduction from level 2 to level 1 care.

[10] On 21 April 2014, Ms Bay provided a response to Ms Mather's November report. She disagreed that there was enough evidence to support the continuation of level 2 funded carer support.

[11] On 24 September 2014, Ms Mather provided a further report. She concluded that Mr Martinac required presence of level 2 carers, not because of skilled medical response, but, rather for skilled behavioural response management and the need for physical hands-on assistance to prevent falls and physical assault.

[12] On 7 November 2014, Mrs Wilson issued a review decision. She concluded, in part:

> I dismiss both Mr Martinac's applications. I am persuaded by the evidence that ACC was correct to rely on Ms Bay's assessment in determining the level of Mr Martinac's attendant care and declining funding for outsourcing laundry. ACC exercised its discretion properly. Mr Martinac is unsuccessful.

[13] On 20 June 2015, Mr Martinac died at age 82.

[14] On 22 November 2020, Ms Penny McGarry, rehabilitation nurse, provided a report. It was her opinion that Mr Martinac had required level 2 care and that funding for external laundry services ought to have been approved.

[15] In an undated report, Julie Shipton-Pasgaard, principal advisor for ACC, provided an opinion in response to Ms McGarry's report. She concluded:

> I acknowledge the difficulty in assessing the person's complex injury related needs, it is for this reason that ACC utilises the support needs assessment (SNA) undertaken by an independent and qualified assessment provider.
>
> …

> The SNA tools in conjunction with robust support information such as medical reports, engagement with Mr Martinac's family and in-person observation formed the basis of Ms Bay's 2013 SNA recommendations.
>
> The ACC Social Rehabilitation User Guide 2007 utilised by Ms McGarry is the general non-standardised guide and when being used to assist in identifying the needs of someone with complex injury related needs, lacks context and should therefore not be used in isolation of the tools mentioned above.
>
> While the ACC User Guide 2007 has been somewhat superseded by the support needs assessment tools, it can still be a valuable tool when considered in conjunction with the other SNA tools and importantly the in-person observation and assessment.
>
> In my opinion, Ms Bay's 2013 SNA utilised the appropriate tools, supporting information and in-person observations for assessing Mr Martinac's complex/ lifelong injury related needs that informed the changes in how ACC supported Mr Martinac's laundry needs and levels of care.

Appellant's Submissions

[16] Ms Woodhouse referred the Court to a support needs assessment in this case, with a referral date of 21 March 2012.

[17] Under the heading "Wellbeing Details" was this:

> Ivan's mood and behaviour is variable and can change very quickly into a volatile situation if he is not handled by carers who understand the warning signs.
>
> Ivan's challenging behaviour and rural location impacts on the availability of suitable carers.
>
> Ivan is unable to control his body temperature due to his TBI and requires careful monitoring to ensure he does not suffer from extreme heat changes.

[18] She noted that Mr Martinac had level 2 care for 19 years and was then reduced to level 1 care.

[19] She referred to page 122 of the bundle, which contained comment from then branch advisory psychologist, Dr James Hegarty and dated 17 February 2014. In that report, Dr Hegarty said:

> ACC's decision to fund level 1 care is based on the recommendations made by the assessor in the support needs assessment which were based on Mr Martinac's needs as well as ACC's complexity indicators. Mr Martinac was not at the time engaging in a behavioural support services programme.

> Since this time, he has been re-referred to another psychologist and the plan has been sent to Julie Aitcheson for her comments/approval.

[20] Dr Hegarty had earlier noted:

> The support needs assessment completed by ACC outlines the presence of challenging behaviours; however these do not meet the criteria for funding at level 2 based on the ACC complexity indicators (linked to this task) which are:
>
> (a) Current challenging behaviour;
>
> (b) The need is evidenced on the Overt Behaviour Scale completed as part of the ACC's Support Needs Assessment.

[21] Ms Woodhouse says therefore that the crux of the issue is the evidence in this case of the Overt Behaviour Scale.

[22] She notes that despite level 2 care for 19 years, there was no change in Mr Martinac's presentation that would justify a reduction to level 1 care. She refers to the report of Sarah Mather, occupational therapist, of 20 November 2013, which includes this statement:

> As I stated earlier, the severity and complexity of Mr Martinac's injury is well documented. This has been acknowledged by ACC through the provision of level 2 care for the last 19 years since returning home. Therefore, as I can see no evidence of any improvement in Mr Martinac's functional status or any reduction in the persistent presence of overt behaviours, both being key factors that may indicate a safe reduction from level 2 to level 1 care could occur, then my first and primary question from this review is: Where is the clinical justification to support the reduction from level 2 to level 1 care?

[23] She submits that the 2013 decision by Ms Fay is based on the Overt Behaviours Scale.

[24] She next refers to Sarah Mather's report of 24 September 2014. In the first paragraph Ms Mather notes:

> Following the last ACC care review in 2014, I have been asked to provide my opinion and comment in relation to the need for level 2 funded care and for funding for two carers for Mr Ivan Martinac and how this links with the complex care criteria used by ACC to fund level 2 care.

[25] In her report, Ms Mather says:

> In regards to the Overt Behaviour Scale (OBS), I have previously stated that I did not believe the OBS assessment completed by Frances Bay reflected the true behavioural burden of care and I therefore recommended that this be repeated with more investigation of daily care diaries that record behavioural incidences and contribution from the behavioural support consultant. Therefore, I do not believe that Mr Martinac can be declined on the basis of the OBS score alone.

[26] She next refers to the report of Penny McGarry, rehabilitation nurse, dated 22 November 2020, having been asked to respond to two questions:

(a) What was the ***level*** of care that would have been appropriate for Mr Martinac after his traumatic brain injury?

(b) Whether payment of laundry costs would have been appropriate.

[27] Ms McGarry says at page 4 of her report:

> When you consider the behavioural challenges that Mr Martinac presented with, it is clear that it is well in excess of the skill set required for a domestic worker providing basic personal cares. This is the level that is provided for straightforward injuries and easy to manage, relatively compliant, clients. This was definitely not the case for Mr Martinac, as he was totally blind, had impaired hearing, and a severe brain injury which meant that he struggled to make sense of the world and was scared and confused when people approached him to carry out basic cares. His response was frequently one of agitation, aggression and challenging behaviour. It was totally unsafe to put any person in to assist with his care unless they had some training and expertise in behavioural management. No credible agency would allow staff to take on this level of risk – working with a client prone to aggressive outbursts, inappropriate (sometimes sexually inappropriate) behaviours – without a reasonable level of training to ensure they understood the strategies and techniques to use to prevent escalation and to de-escalate when this occurs to ensure both their safety and that of the client.

[28] She submits there are two expert reports from Ms McGarry and Ms Mather saying that the support needs assessment is flawed.

[29] Counsel refers to Judge Ongley's decision in *ACC v O'Mara*[1] where His Honour said at paragraph 22:

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1 *ACC v O'Mara* [2013] NZACC 283.

> The claimant's starting point is the principle that provision of care for a severely injured claimant is not parsimonious. In *ARCIC v Campbell* [1996] NZAR 278, the High Court, in discussing social rehabilitation care for five similar 24-hour care claimants, elevated entitlements for these "shockingly injured" claimants into a special level and said:
>
> It must be realised that persons injured in the way these five individuals were, occupy a small space at the top of the pyramid which represents all those suffering personal injury by accident. It is implicit in the scheme of the Act that considerable resources should be directed to them.

[30] As to the decision regarding washing, Mr Martinac had external laundry funding for a long time, whereas Ms Bay says it could be done at home. Her basis is two loads of laundry per day, that equals seven hours.

[31] Counsel submits that this estimate is wrong. It is an under-estimate. With the family advising that they continued to outsource the cleaning of laundry as well as using the allocation of seven hours of home help for laundry tasks.

[32] She accordingly submits that Ms Bay's assessment is based on incorrect information.

[33] She submits that in making the special needs assessment, ACC did not appropriately exercise its discretion.

Respondent's Submissions

[34] Mr Hunt submits that as Mr Martinac is now deceased, a reassessment of his needs is at this point an almost impossible task.

[35] He submits that the question to be asked is whether ACC's discretionary decisions are impugned.

[36] He refers to the report of Dr James Hegarty, branch advisory psychologist, dated 17 February 2014.

[37] Mr Hunt read portions of Dr Hegarty's report and makes the submission that his report is not a summary of ACC's decision. Dr Hegarty addresses criticisms of the decisions, not the decisions themselves.

[38] Mr Hunt notes that Mr Martinac had an accepted complex personal injury under the Accident Rehabilitation and Compensation Insurance (Complex Personal Injury) interim regulations 1994. These regulations continue to apply because of ss 372(5) and (6) of the Accident Compensation Act 2001.

[39] The CPI Regulations provide that ACC must arrange for an assessor to identify the claimant's social rehabilitation goals in the form of a statement of social rehabilitation goals (Regulation 12). After the statement of social rehabilitation goals has been submitted to ACC, ACC must develop a social rehabilitation programme to assist a claimant to achieve the goals identified by ACC in respect of which ACC may provide social rehabilitation to the claimant (Regulation 13).

[40] Under Regulations 18(1) and 18(2), ACC may arrange at any time for an assessor to reconsider the claimant's social rehabilitation goals and must arrange an assessment at least every two years where the claimant is over the age of 17.

[41] Under Regulation 18(5), the assessor then refers the new statement of social rehabilitation goals to ACC for re-consideration of the claimant's social rehabilitation programme.

[42] Mr Hunt refers to the High Court decision in *S v ACC*. Justice Ellis said, in respect of Regulation 14:

> It may be noted that, in exercising its cl 14 discretion, ACC may choose only to make a *contribution* to attendant care. This is no doubt a reflection of the underlying principle that ACC's role under the Accident Compensation Scheme is to "cushion" against the consequences of an accident, rather than provide full restitution. Decisions in the District Court in relation to attendant care recognise that the matters listed in cl 14 of Schedule 1 may constitute reasons why ACC might not provide the full amount of rehabilitation recommended following an assessment or re-assessment, and reflect a parliamentary expectation that family members will supply at least some of the attendant care without financial assistance.

[43] Mr Hunt also refers to *Smith v ACC*[2] where Judge Ongley said:

> [27] The Court is not equipped to make its own assessment based on evidence of needs and estimates. This is done by an assessor under relevant legislative provisions. It is difficult for a claimant to accept

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2 *Smith v ACC* [2012] NZACC 233

> that attendant care and home help depends on the opinion of one assessor employed by the Corporation and not completely independent in the sense that the assessor is likely to rely on the Corporation for work. However, there is no more rigorous system available and the process adopted by the Corporation complies with the legislation.
>
> [28] The appellant has not commissioned a second opinion on the detail of the assessment. That may be difficult, but it could be done by an occupational specialist (medically qualified or not) equipped with the background reports and interviewing in the home as Ms Mains did. Unfortunately, there is no convenient shortcut to challenging a properly conducted assessment. In the absence of a competing assessment made by another qualified assessor, the only question that the Court can decide is whether the assessor erred to the extent that makes the assessment unreliable as a basis to reduce the appellant's entitlement.

[44] Mr Hunt therefore submits that the only means by which a competing analysis can be advanced is by a second opinion of an assessor.

[45] In this regard, neither Ms Mather nor Ms McGarry have seen the appellant, whereas Ms Bay had an enormous amount of information available to her.

[46] Mr Hunt refers to Ms Aitcheson's letter of 28 June 2012, which includes the following:

> While I am happy to work alongside behavioural support services, any recommendations for change would have to be proven effective and sustainable long term before I would agree to any changes in the level of Ivan's care.

[47] Mr Hunt notes that a mediated agreement was reached on 31 October 2012 and this was followed by ACC's decision on 4 November 2012. That decision provided for 112 hours of home and communication support for maximum independence (complex); home and communication support sleepover care of seven units; and home and communications support for maximum independence – support hours standard of 112 hours.

[48] On 15 February 2013, ACC issued a further decision relating to laundry. That decision said:

Why we cannot approve laundry costs:

> The initial decision to provide a laundry services was approved at that time due to a lack of available domestic water supply. On investigation with the Council, it is the understanding – there has now been an increase in the availability of water to your property. 1,800 litres are available via a Council scheme per day plus water storage tanks on your property.
>
> Given the availability of water and ACC's funding 112 hours attendant care; ACC is declining to contribute towards the cost of the laundry service as from 1st February 2013.

[49] There was a further mediated agreement on 3 April 2013. In part, the agreement provided for a new assessment of attendant care needs, which would have fresh review rights.

[50] The parties also agreed to engage a mediator over the following fortnight about how the laundry issue could be resolved prior to the review.

[51] What then followed was a second support needs assessment by Frances Bay.

[52] Mr Hunt submits that it is a very detailed report. It runs to some 44 pages.

[53] Also, in attendance at the assessment, as well as Mr Martinac and his family, were: Cathy Matthews from the Brain Injury Association; a representative from the Royal New Zealand Foundation for the Blind; and Caroline Inglis, occupational therapist.

[54] An assessment meeting took place on 6 May 2013 and went for seven hours and 30 minutes.

[55] The assessment included an overt behaviour rating scale that analysed the severity level, frequency and impact of Mr Martinac's behaviours.

[56] There was a detailed analysis of Mr Martinac's behaviours and the overall impact on Julie Aitcheson and her husband, Peter.

Overall impact on Julie and Pete

> Ivan's stated challenging behaviours reportedly generally only have minimal impact on Julie and Pete, as they have lived with and cared for Ivan for almost

> 19 years and are accustomed to his ways, able to detect his non-verbal cues and when behaviours may escalate, and are familiar with triggers which they can avoid. Julie said that she and Ivan had developed/evolved over time together. This intuitive insight that Julie has developed makes it difficult for her to objectively pass on her insights and expertise to others.
>
> However, the overall impact on Julie's life has been extreme. She moved back from Australia to care for her father full time, as her mother was not coping despite a full care team of two registered nurses and three caregivers at the time. Julie has not been able to work or pursue any regular personal activities outside of the home on a regular basis for almost 19 years. This is a choice that she has made, which has also left her for the most part socially isolated. Certainly, without the loving devotion and care provided by Julie and Pete over the years, Ivan's quality of life would be very different, with the likelihood of his being in a secure unit and possibly more highly medicated/sedated than he is at present.

[57] Ms Bay recommended attendant care at level 1 of 101 hours per week and home help of 14 hours 30 minutes per week.

[58] Ms Caroline Inglis, an occupational therapist, attended Ms Bay's assessment and peer reviewed the special needs assessment report. ACC's decision of 25 June 2013 then followed. The level of attendant care to be provided was as follows:

Attendant care level 1 for personal needs	97.5 hours per week
Home help	14.5 hours per week
Sleepover care	56 hours per week

[59] The decision letter itself contained a detailed summary of the assessment of Mr Martinac's related needs and reasons for the conclusions that he did not meet the criteria for, or have an assessment need for, level 2 attendant care.

[60] A number of other recommendations were referred to in Ms Bay's special needs assessment and the further steps to be taken in relation to those recommendations where identified.

[61] Shortly before the review hearing, a report was provided by Ms Mather, stated to be an independent peer review of Ms Bay's second support needs assessment report.

[62] On page 2 of Ms Mather's report, she said:

> It is my understanding the basis of request for review is to examine the validity and accuracy of the support needs assessments completed by Frances Bay that

has resulted in the change of funding from ACC of level 2 care to level 1 care now despite level 2 funding having been funded for the last 19 years.

[63] Ms Mather then says this:

> … My first and primary question from this review is: Where is the clinical justification to support the reduction from level 2 to level 1 care?

[64] Ms Mather concluded her report with the following recommendation:

> My considered clinical opinion is that there is enough evidence to support the continuation of level 2 funded care and support as has historically occurred for the last 19 years prior to the assessments completed by Frances Bay. I don't believe there is any clinical justification within the report to support a change to level 1 funding. This funding should be at 168 hours (24/7), which is currently recognised by ACC, but at level 1. If this recommendation is disputed by ACC, then a full assessment of the support needs assessment should be completed by a new assessor who has significant knowledge of traumatic brain injury and also a knowledge of managing overt behaviours. If a reassessment is completed, then careful attention should be paid to the care diaries that are completed daily, as they give a detailed account of the burden of injury related care.

[65] Mr Hunt notes that Ms Mather did not meet the appellant, nor did she undertake an assessment of his care needs before compiling her report.

[66] Mr Hunt refers to the comments of Dr James Hegarty, branch advisory psychologist, of 17 February 2014. He concludes his comments with this:

> It is unclear from Ms Mather's report if she personally assessed Mr Martinac, or if her comments are based on a file review. In any event, I believe that Ms Mather does not offer specific evidence for how Mr Martinac might meet ACC guidelines for level 2 care, or which would counter the evidence put forward by Ms Bay.

[67] On 21 April 2014, Ms Bay responded to Ms Mather's peer review. She says, under the heading "Conclusion":

> …
>
> 1. Based on all the information gathered by myself over the two assessments in 2012 and 2013, I cannot concur with Sarah Mather that there is enough evidence to support the continuation of level 2 funded care support (as per ACC criteria) and would challenge the peer review of my report in that it uses its own definition of what constitutes level 2 care and that the author has not documented any meeting with Mr Martinac or consultation with other health

professionals involved in Mr Martinac's care, basing her review on a combination of my report, Mrs Aitcheson's chosen supporting evidence and her own professional judgments.

2. The reason stated by Sarah Williams, ACC case manager, in her correspondence dated 25 June 2013 are the criteria for ***all*** ACC clients on which we as assessors are expected to base our determination of level and level 2 cares. If Sarah Mather believes this needs to be challenged, it is a matter that would need to be taken up at the level of policy making in the ACC Serious Injury Service, and not at case manager/support co-ordinator level.

3. At the time of my 2013 SNA assessment, Mr Martinac was observed to transfer in and out of the bath safely – any further modifications to the property for future proofing would be at the discretion of ACC.

4. I fully support the suggestion by Sarah Mather for a "review by a behavioural support service".

5. I have already suggested this training, however it should not be provided solely by Mrs Aitcheson who herself would benefit from updating and upskilling in some areas of challenging behaviour management, in particular behavioural event recording.

6. The suggestion to consider "completion of a sensory profile and sensory modulation treatment approach" is an excellent idea.

[68] Ms Mather provided a further response on 24 September 2014. Mr Hunt submits in respect of it that it fails to identify any flaw in Ms Bay's report.

[69] Ms Mather's concluding comments included the following:

> In summary, it is a simplified and flawed approach to only use one set criteria such as those proposed by ACC to determine care duties and funding levels for Mr Martinac. Because his care comprises of every day care duties and physical tasks, they require delivery from skilled carers who are constantly required to assess the situation, managing significant risk within the environment and provide skilled behavioural guidance in addition to full physical assistance.
>
> In the presence of numerous reports highlighting the complexity and risk involved in the daily care of Mr Martinac, in order for a fair care review process to occur, then all documentation and clinical recommendations should be considered and not just the ACC complexity indicators singularly when coming to a final decision regarding entitlement to both level 2 care and access to two carers.
>
> I do believe that there has been sufficient evidence provided to ACC from carers, family, ACC's own assessors and numerous other registered health professionals over an extended period of time to support not only the need for skilled level 2 carers, but also now following further deterioration post Mr

> Martinac's hip injury in 2014, the need for two carers to ensure safety to all involved in his care.

[70] Mr Hunt describes the above summary from Ms Mather's report as unfair. He wondered whether Ms Mather has properly read Ms Bay's report. He notes that Ms Bay had in fact done a detailed assessment of Mr Martinac's behaviour.

[71] In 2020, then Counsel for the appellant, Mr Beck, obtained a review from a rehabilitation nurse, Mr McGarry, responding to these two questions:

(a) What was the *level* of care that would have been appropriate for Mr Martinac after his traumatic brain injury.

(b) Whether payment of laundry costs would have been appropriate.

[72] Mr Hunt notes that almost all of the bullet points set out in Ms McGarry's report are taken from the format of the form that Ms Bay completed.

[73] He submits that Ms Bay's response of April 2014 closely analyses Ms Mather's criticism of Ms Bay's conclusion that level 2 funding was not required. Ms Bay makes two very pertinent and valid points which he submits Ms Mather simply ignores. They are that:

(a) When Ms Mather says she "can see no evidence of any improvements in Mr Martinac's functional status or any reduction in the persistent presence of overt behaviours", Ms Mather is making these comments from a background of having never in fact met or reviewed Mr Martinac herself, and made those comments from the perspective of a person who is presented with, and seemingly indiscriminately accepted, Mrs Aitcheson's account (primarily), without reference to other contrasting accounts which had been taken into consideration by Ms Bay.

(b) Ms Mather did not address her opinion to the complexity indicators used by ACC, and which were, of course, an area of focus in Ms Bay's assessment.

[74] Following a request for further comment, ACC's principal adviser physical injury, Julie Shipton-Pasgaard provided further comment. Amongst other things she said:

> The behaviours dot-pointed in Ms McGarry's report are not a reasonable representation of the behaviours noted in Ms Bay's 2013 assessment but rather a copy of the Overt Behaviour Scale (OBS) examples. The OBS is one of the tools used as part of the support needs assessment. The OBS tool, provides examples of behaviours that may or may not pertain to the person being assessed, the assessor's scores from 1 to 5 next to each relevant type of behaviour to indicate if the behaviour examples or similar behaviours relate to the person being assessed and where it does, the level, frequency and impact is noted, this then relates to a severity score. An example of how Ms Bay used this tool in the 2013 SNA follows:
>
> > OBS verbal aggression subscale;
> >
> > Example of possible behaviours;
> >
> > Makes loud noises, shouts in anger, is clearly not directed at some other person (e.g. bloody hell!);
> >
> > Ms Bay scored this a 1 to reflect the following similar but less severe behaviour;
> >
> > Grunting/growling sounds of displeasure/annoyance.

[75] Ms McGarry's report reflects the entirety of the OBS examples along with Ms Bay's outline of Mr Martinac's observed behaviours rather than only the specific behaviour that relates to Mr Martinac. By including the example behaviours, the behaviours appear intensive and more severe. Ms McGarry's example as follows:

> Makes loud noises, shouts in anger, is clearly not directed at some other person (e.g. bloody hell!), grunting/growling sounds of displeasure/annoyance multiple times a day.

[76] Mr Hunt says that Ms Shipton-Pasgaard's summary is a good summation of the complexity of assessing someone like Mr Martinac.

[77] As to laundry costs Ms Shipton-Pasgaard said this:

> The seven hours per week allocation of home help to complete laundry tasks outlined in Ms Bay's 2013 assessment was not an allocation of attendant care as Ms McGarry suggests in her report but of home help (home help does not include hands on personal care). The allocation of the seven hours to complete the laundry tasks were able to be provided by an agency and did not necessarily require carer's undertaking. While the family advised they continued to outsource the cleaning of the laundry, they also utilised the allocation of the seven hours' home help which was allocated specifically to laundry tasks.

[78] Mr Hunt submits that Ms Shipton-Pasgaard's summary report is a good summation of the complexity of assessing someone like Mr Martinac.

Ms Woodhouse's Reply

[79] Ms Woodhouse acknowledges that Ms McGarry did not see the appellant, but submits that often ACC's decisions are based on file reviews. She submits that looking at this case in its totality, for 19 years level 2 care was provided, but then reduced to level 1 and it is unclear as to why.

[80] Ms Woodhouse acknowledges what was said in *S v ACC* about the underlying principle that ACC's role under the Accident Compensation Scheme was to "cushion" against the consequences of accident, rather than to provide full restitution. However, she says there must nevertheless be fair compensation and a fair allocation of resources.

Decision

[81] Mr Martinac suffered a serious traumatic brain injury and visual impairment as a result of an accident on 1 November 1993 when a tractor tyre he was inflating exploded and threw him into the air. At the time of the decisions at large in this appeal Mr Martinac had been receiving ACC support for some 19 years. Since the time of the accident the appellant had been in receipt of level 2 care. However, the support needs assessment on this occasion assessed attendant care at level 1.

[82] Mr Martinac's principal carer, Julie Aitcheson, who is also his daughter, wrote to ACC in response on 28 June 2012 saying:

> While I am happy to work alongside behavioural support services any recommendation for change would have to be proven effective and sustainable long term before I would agree to any changes in the level of Ivan's care.
>
> I would like to let you know I was most upset at the comment from Pamela that Ivan should never have been receiving level 2 care at all, I don't believe that she is qualified nor has she even met Ivan to be able to make this statement.

[83] What then followed on 31 October 2012 was a mediated agreement with ACC being required to issue a written decision stating the level of care for Mr Martinac, based on the 2012 needs assessment.

[84] It also provided for ACC to discuss its decisions with Ms Aitcheson before issuing them.

[85] On 4 November 2012 ACC decided that Mr Martinac's package of care would continue until 3 February 2013 and that ACC would review this level of support prior to 2 February 2013.

[86] On 15 February 2013 ACC issued a decision declining to fund laundry services. Furthermore, attendant care at level 2 was provided until 3 February 2013 but with effect on 4 February 2013 attendant care was changed to level 1.

[87] A further mediation took place between Mr Martinac's representatives and ACC on 3 April 2013 at Dunedin. An agreed outcome of the mediation was that ACC would undertake a new assessment of Mr Martinac's attendant care needs, and issue a new decision, which would have fresh review rights. The laundry issue was briefly discussed at mediation, but there was no resolution of the issue.

[88] A further support needs assessment was carried out by Ms Bay on 6 May 2013. Also in attendance at the assessment, besides Mr Martinac and his family, were Cathy Matthews from the Brain Injury Association, a representative from the Royal New Zealand Foundation for the Blind, and Caroline Inglis, occupational therapist.

[89] The support needs assessment on this occasion extended to 44 pages.

[90] At page 38 of her report, under the heading "Funded Supports" Ms Bay says:

> Ivan will need ongoing support with all direct cares and safety oversight day and night. His general behaviours and needs are considered stable at level 1 as per the ACC complexity indicators for complex support.
>
> It is suggested that Julie and all carers involved in Ivan's care receive training in up to date best practice and also in accurate documentation.
>
> It is suggested that the 2011 care plan be updated following above suggested training.
>
> It is suggested that ACC consider funding of two carers on occasion to enable Pete and Julie to have time off together. This should only be required when only very new carers are available. Once all carers are trained to a similar level and suggested protocols are in place, this should no longer be required.

[91] At page 42 of the report is this:

> Therefore, the package total rounded up for all eventualities is as follows:
>
> > 16 hours attendant care daily + 30 minutes direct night time supports.
> >
> > 7 hours 30 minutes natural supports at night.
> >
> > In the event of both Pete and Julia being away, sleepover would need to be provided by the agency.

[92] Accordingly, the package provides for just over 17 hours 30 minutes of daily attendant care, direct night time supports and natural supports at night.

[93] Attendant care is provided for in clause 13 of Schedule 1 to the Accident Compensation Act 2001. It reads:

> In deciding whether to provide or contribute to the cost of attendant care, the Corporation must have regard to –
>
> (a) Any rehabilitation outcome that would be achieved by providing it; and
>
> (b) The nature and extent of the claimant's personal injury and the degree to which that injury impairs his or her ability to provide for his or her personal care; and
>
> (c) The extent to which attendant care is necessary to enable the claimant to undertake or continue employment (including agreed vocational training) or to attend a place of education, having regard to any entitlement the claimant has to education support; and
>
> (d) The extent to which household family members or other family members might reasonably be expected to provide attendant care for the claimant after the claimant's personal injury; and

(e) The extent to which attendant care is required to give household family members a break, from time to time, from providing attendant care for the claimant; and

(f) The need to avoid substantial disruption to the employment or other activities of household family members.

[94] For the 2013 assessment Ms Aitcheson provided an extensive folder that included:

- A nursing assessment for Mr Martinac dated 1 April 2005;
- Speech language therapy discharge report of 19 August 2008;
- GP correspondence from Veteran Affairs NZ dated 23 June 2011;
- 21 pages of behaviour monitoring chart dated March April 2013.

[95] Ms Bay included the following as her description of the assessment meeting:

> The assessment meeting took place at the home of Julie, Pete and Ivan and was for the most part conducted as a review of the previous report submitted with people present as listed above, except for Marion of the RNFB who had to leave after two hours. There was also opportunity for Caroline (OT) and me to observe Ivan being helped to get up out of bed in the morning, transferred to the toilet, self administer to standing from the toilet and have his medications administered while standing naked by the towel rail. Later on we were able to observe Ivan being assisted to transfer into the bath, be washed by Julie, assisted to transfer out of the bath and dry himself.
>
> When I spoke to Ivan, he did not reply, and I gave him my hand which he squeezed tightly, but not to the degree of causing pain or injury, and it was easy to extract my hand.
>
> For the most part, Ivan was in his room with Pete, and at times he could be heard calling out loudly for a few seconds. On one of these occasions, Julie said "Oh he's bad today".
>
> Much of the assessment was also taken up with Julie trying to explain the difficulties she had encountered in finding suitably trained and experienced carers, and how Ivan's support needs are, in her view, complex and need to be considered at level 2.

[96] The assessment meeting started at approximately 11:45 am and was finished at 7:15 pm (7 hours 30 minutes).

[97] In addition Ms Bay called the following people by telephone:

(a) Renee, Care Co-Ordinator for Nursing New Zealand – telephone call to inquire about current care provisions for Ivan, current carers and the experience of carers other than Julie in providing care, reports of incidents, training of carers including Julie, any concerns (20 minutes).

(b) Telephone call to Dr Jeremy Hay GP – telephone call with GP to discuss medications, timing and routine of medication, administration costs, possible benefit of melatonin, any concerns and ongoing support of Ivan and Julie.

(c) Telephone call with Liz Langer, nurse practitioner for Elderly Mentally Ill – telephone call to discuss Liz Langer's observations and concerns as a specialist nurse practitioner for the elderly mentally ill. Also opinion on training of Julie and carers as well as objectives of the behavioural supports programme which was never carried (out).

(d) Telephone call with Pippa Laverty, psychologist – telephone call to inquire about behavioural supports programme and reason the plan was not carried out.

(e) Telephone call with Cathy Matthews – telephone call to discuss assessment findings and strategies and hear some of Julie's concerns, also historically, as expressed through Ivan's advocate.

[98] The report went on to apply the overt behaviour rating scale.

[99] After assessing Mr Martinac's challenging behaviours Ms Bay recorded the following:

> Overall impact on Julie and Pete:
>
> Ivan's day to day challenging behaviours reportedly generally only have minimal impact on Julie and Pete as they have lived with and cared for Ivan for almost 19 years and are accustomed to his ways, able to detect his non-verbal cues when behaviours may escalate and are familiar with triggers

> which they can avoid. Julie said that she and Ivan had developed/evolved over time together. This intuitive insight that Julie has developed makes it difficult for her to objectively pass on her insights and expertise to others.
>
> However the overall impact on Julie's life has been extreme. She moved back from Australia to care for her father full time as her mother was not coping despite a full care team of two registered nurses and three care givers at the time. Julie has not been able to work or pursue any regular personal activities outside of the home on a regular basis for almost 19 years. This is a choice that she has made which has also left her for the most part socially isolated. Certainly without the loving devotion and care provided by Julie and Pete over the years, Ivan's quality of life would be very different, with the likelihood of his being in a secure unit and possibly more highly medicated/sedated than he is at present.

[100] Ms Bay also took time in her report to acknowledge the stress that the care had taken on Julie Aitcheson and her husband and said:

> In order for Julie and Pete to be able to confidently have a real break away, it will be necessary to consider universal training of all carers to the same agreed standards and procedures so that the current situation with over reliance on Julie can be alleviated. It may also be difficult for Julie to learn to trust the judgment and decisions of others, but without this, there is no realistic solution to the current situation.

[101] Then followed the report on behalf of the appellant by occupational therapist, Sarah Mather. As Mr Hunt pointed out, this is essentially a paper review with Ms Mather asking where the clinical justification to support a reduction from level 2 to level 1 care is. She says that in her considered clinical opinion there is enough evidence to support the continuation of level 2 funded care, as has historically occurred over the last 19 years.

[102] Then follows the report of Branch Advisory Psychologist, Dr Hegarty. He notes that with the reduction from level 2 to level 1 Mr Martinac would not be disadvantaged regarding the number of hours of care he might receive and that the independent assessment by Ms Bay indicated that level 1 care was appropriate. He says:

> No clear evidence has been put forward to counter this.

[103] He notes the thoroughness of Ms Bay's report, spending as she did seven hours with the family and the documented conversations with those involved in Mr Martinac's care.

[104] In a further report by Ms Bay on 21 April 2014 she answers the criticisms of Ms Mather.

[105] She said:

> My report notes the lack of incident reporting to back up Ms Aitcheson's report of severe challenging behaviour causing harm to Mr Martinac or carers (page 32 of 2013 SNA report). It is interesting to note that the number and frequency of reported "incidents" appears to have increased dramatically after my report was received by Mrs Aitcheson – it may be worth checking if anyone came to actual harm, or if they are all recorded as "near misses" and what detail is provided for each of these incidents.
>
> …
>
> The reasons stated by Sarah Williams, ACC case manager, in her correspondence dated 25 June 2013 are the criteria for ***all*** ACC clients on which we as assessors are expected to base our determination of level 1 and level 2 cares. If Sarah Mather believes that this needs to be challenged, it is a matter that will need to be taken up at the level of policy making in the ACC Serious Injury Service, and not at case manager/support co-ordinator level.

[106] In this case, after careful consideration of the evidence, I find that Ms Bay carried out her assessment in accordance with s 81(4)(a) and s 84 of the Act and in accordance with cl 14 of Schedule 1 of the Act relating to attendant care.

[107] I find that Ms Bay carried out her assessments in a thoroughly professional and conscientious manner and I am unable ultimately to find fault with them. While the views of Ms Mather and rehabilitation nurse, Ms McGarry, have been given careful consideration, they ultimately in my view do not supplant the conclusions of Ms Bay, who had the advantage of significant time spent with Mr Martinac and Ms Aitcheson and otherwise consulted widely on the issue and challenge before her.

[108] As to the issue of contribution towards laundry costs, I again find that ACC's decision of 25 June 2013 was correct, based as it is on a review of the breakdown of laundry usage by Alsco which was provided on 17 January 2013, the updated support needs assessment of 6 May 2013, together with the current availability of water on the property where Mr Martinac resided.

[109] The conclusion therefore reached by ACC was that:

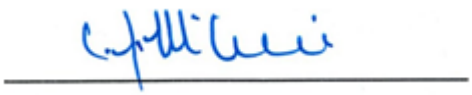
> When broken down your injury related laundry requirements equate to approximately 1-1.5 loads of washing per day. ACC has agreed to fund 7 hours/week of home help to meet your laundry needs.

[110] Ms Aitcheson, as Mr Martinac's daughter, took on the herculean role of being the main carer for her badly injured and incapacitated father for over 19 years. This has been an extraordinary example of care and devotion by a loving daughter. She deserves the highest praise.

[111] However, my task on this appeal is to decide whether the two decisions appealed from are wrong.

[112] For the foregoing reasons, I have had to conclude that they are not wrong and accordingly I must dismiss this appeal. Accordingly, I find that ACC's two decisions of 25 June 2013 setting out the level of attendant care, home help and sleepover care is correct as is the second decision of ACC of the same date providing seven hours of home help for injury related laundry needs.

[113] Costs are reserved.



CJ McGuire
District Court Judge

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