

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 214 ACR 155/17

UNDER THE ACCIDENT COMPENSATION ACT 2001

IN THE MATTER OF AN APPEAL UNDER SECTION 149 OF THE ACT

BETWEEN THE ESTATE OF MIHI PENE-ELLIS
Appellant

AND ACCIDENT COMPENSATION CORPORATION
Respondent

Hearing: 29 September 2022
Heard at: Auckland/Tāmaki Makaurau

Appearances: Ms L Stevens, daughter of the deceased on behalf of the appellant
Mr L Mailand and Ms F Becroft for the respondent

Judgment: 21 November 2022

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
(Cancellation of Entitlement Section 117(1) Accident Compensation Act 2001)**

[1] At issue is a decision of the respondent dated 12 September 2016 declining to fund equipment and home and community support services based on medical evidence which indicated that the ongoing symptoms (and associated needs) were unrelated to a personal injury suffered on 20 July 2016.

[2] Sadly, Ms Pene-Ellis passed away on 15 December 2019.

[3] Her Estate contends that Ms Pene-Ellis continued to suffer the ongoing effects of personal injury by accident at the relevant time and therefore was entitled to the entitlements sought.

Background

[4] On 20 July 2016, Ms Pene-Ellis underwent an operation at North Shore Hospital for the insertion of a stent for dialysis treatment. In the course of the operation she suffered a right aortic root perforation, resulting from a misplaced right internal jugular tunnel line.

[5] She was urgently transferred to Auckland Hospital, where she was admitted to the cardiothoracic and vascular intensive care unit, and on the same day underwent a sternotomy to allow the surgeon to repair the damage to the aorta and to remove and replace the catheter.

[6] On 22 July 2016, she was discharged from Auckland Hospital and transferred back to the renal ward at North Shore Hospital.

[7] On 2 August 2016, the Corporation formally accepted cover the following treatment injury: “Misplacement of internal jugular line and common carotid artery and aortic root, requiring sternotomy, with removal of intravenous line penetrating aortic root side right”.

[8] On 5 August 2016, a file note records that Ms Pene-Ellis’ advocate contacted the Corporation and it was agreed and acknowledged by the branch support manager that:

Once Mihi is released, we can send one of our assessors to her property to assess her needs. They will then provide a report to ACC advising us of their recommendation.

While we are waiting for that to happen, we will put a care package in place, while we are waiting for the assessor’s recommendations.

[9] On 8 August 2016, there is a further file note on ACC’s file of a telephone conversation with the charge nurse. The following is recorded:

I advise that the client has a treatment injury for a ruptured aorta. She advised that this was repaired in surgery and is no longer an issue. I asked her, so is the injury spent? She stated yes. To confirm this, she handed the phone to the renal specialist, who also advised that the client had surgery to repair the aorta and there are no further issues, no ongoing consequences of the ruptured aorta and this has resolved.

[10] On 22 August 2016, the file was referred to a branch medical advisor to review the issue of entitlements. It was suggested that further advice regarding the appellant’s condition be sought from Mr Lund, cardiothoracic surgeon.

[11] On 23 August 2016, the Corporation, through the Auckland District Health Board, asked for further comment regarding Ms Pene-Ellis' condition from Mr Lund, cardiothoracic surgeon, namely:

[a] Has the covered injury healed?

[b] Are there any complicating factors relating to the covered injury?

[c] Does the client have any function or limitations relating to the covered injury?

[12] Mr Lund reviewed Ms Pene-Ellis in his clinic on 24 August 2016. He said:

Ms Pene-Ellis is doing well. The sternotomy has healed well. She was explained what had happened to her during her admission at our department and she was very happy to get this explanation.

We don't need a further follow up ...

[13] Ms Pene-Ellis was discharged home on 26 August 2016. The discharge notes included the following:

Trialled weekend leave prior to D/C which went well.

Several family meetings were held between the renal team, MDT and family to ensure assistance and equipment was in place prior to D/C.

[14] On 19 September 2016, there is a note from Dr Thakurdas, branch medical advisor, who says:

On balance, consider that client's covered injuries have largely resolved.

[15] On 12 September 2016, ACC issued its decision as follows:

Thank you for your patience while we reconsidered your entitlement to equipment, and home and community supports and services. We have received medical information from Doctor Jens Lund, Auckland Hospital and North Shore Hospital.

...

We are unable to continue providing you with support, or any other entitlements relating to this claim, as the medical information confirms that your covered injuries have resolved and your current condition is no longer the result of your personal injury of 20 July 2016.

[16] On 29 September 2016, the appellant lodged a review application against the Corporation's decision. The application noted that the appellant was having ongoing difficulties in terms of personal cares and wanted support, as well as some aids and appliances.

[17] The review application, lodged by Ms Pene-Ellis' disabilities advocate noted the following:

1. The client has a sternotomy.
2. The client has difficulty with dressing herself.
3. The client needs some assistance with personal cares ...
4. I would like ACC to provide a hospital bed, electronic with a left side rail and right monkey bar, for at least three months until the breast bone has healed.

[18] On 3 March 2017, Mr Lund provided the following further information to ACC's lawyers:

1. The usual recovery time for a sternotomy is 6-8 weeks. After that period, the sternum is completely healed and the patient is not restricted in any ways.
2. In this case I did not recognise any complicated factors relating to the sternotomy.
3. I saw Mrs Pene-Ellis on 24 August, which was five weeks after the sternotomy. At that stage, the sternotomy had healed well and I would say that the effects of the sternotomy had resolved at that time. Definitely the effects would be resolved after 6-8 weeks.
4. It is very unlikely that Mrs Pene-Ellis needed extra care in September 2016 because of the sternotomy. It is more likely due to her end stage renal failure, age and general frailty.

[19] In the course of the reviewer's decision of 18 April 2017, he noted:

I have also advised that reviewers have an investigative role under section 140(e). Given the discrepancy between the specialist's opinion and the whanau evidence, I considered there was scope for further investigation to assess whether there is a causal link between the restrictions identified by the whanau and Ms Pene-Ellis' covered treatment injury claim. I advised an investigation could take place by way of an instructing letter to a specialist to address the questions raised in the review, or through existing medical appointments.

[20] The reviewer held further case conferences on 29 March 2017 with Ms Papuni, Ms Pene-Ellis' advocate, and Ms Becroft on behalf of ACC. Ms Papuni advised that the offer of further investigation was declined.

[21] In dismissing the review application in his decision of 18 April 2017, the reviewer, Mr Dunn, said:

The whanau only raised the possibility of an accident related condition. Medical evidence is needed to show that an ongoing accident related condition and need is more probable.

[22] An appeal was lodged against the review decision. The appeal was scheduled for a hearing in October 2018. However, it was agreed that the best path forward was to obtain further evidence from a geriatric specialist.

[23] Regrettably, the appellant's health declined and she passed away on 15 December 2019.

[24] It was agreed between the parties that the Estate would obtain the general medical records held by the ADHB and Ms Pene-Ellis' GP notes. A joint referral would then be made to a geriatric specialist to comment on the role of the treatment injury at the time entitlements were suspended.

[25] This referral was duly made to Dr Kenealy, geriatrician and general physician. In a report dated 7 March 2022, she acknowledged that Ms Pene-Ellis and her family believed that new problems had developed for her as a result of the treatment injury, namely the inability to:

- Chew or swallow most foods unless they were "soggy";
- Lift her arms above her shoulders;
- Carry out normal tasks of daily living, such as cooking for her whanau and dressing; and
- Mobilise properly.

[26] Dr Kenealy also noted Ms Penn-Ellis' medical comorbidities as at September 2016 being:

- Chronic kidney disease;
- Type 2 diabetes;
- Hypertension;
- Atrial fibrillation;
- Dyslipidaemia;

- Previous TIA 2001;
- Renal anaemia.
- Constipation while in hospital;
- Fracture right neck of humerus 2012;
- ESBL.

[27] She said:

I would not expect a woman in her late 70's on haemodialysis to cook meals for her extended whanau. I would expect she be able to make basic food for herself, such as toast and a cup of tea, and re-heat meals for her own nutrition. Such activities as cooking require high level planning and energy expenditure, and often even minor activities such as cooking, may require a rest afterwards.

I see no relationship between the operation and an inability to raise your hands over your head, or needing assistance with dressing and showering. Once a sternotomy scar is healed, whether it occurred in an acute or an elective setting, there is no reason for this scar to cause any restriction of movement and I have not seen this before that I can recall in my experience. In an acute setting, healing can be slightly slower than in an elective setting, however I would not expect the healing at, for example three months, to be any different between the two settings.

...

The most likely cause of needing assistance with dressing and showering, or increased time taken for these activities is most likely due to the fatigue aspect of being on haemodialysis, in my opinion. I cannot see any reason why the surgery itself and the treatment injury resulted in these changes. Again, as above, activities like showering and dressing require a reasonable amount of energy expenditure and may require a rest afterwards.

[28] In her concluding summary she said:

In summary, I cannot see any relationship between the events of the ACC treatment injury and the vascular surgery to remove the misplaced wire and the subsequent concerns raised from the patient and whanau.

From reviewing the medical notes, I feel there are much more likely explanations from her medical comorbidities and subsequent medical developments that explain these findings.

[29] In an email to the registry dated 12 April 2022, the Estate expressed its dissatisfaction with Dr Kenealy's report. It was suggested that Dr Kenealy did not appear to have a grasp of what Ms Pene-Ellis' pre-injury functionality looked like.

[30] A telephone conference was convened on 20 April 2022 and it was agreed that the Estate would compile further evidence from family members and associates who knew Ms Penn-Ellis well and could speak to her state of fitness and health prior to her treatment injury. The evidence was referred back to Dr Kenealy for consideration and her further report.

[31] Accordingly, further written evidence was obtained from Donna Mason; Amiria Pene; Hohepa Kiingi; Laurel Tito; Michael Main; and Taima Te Pairi.

[32] Dr Kenealy provided a further report on 30 May 2022. Under the heading “Summary” Dr Kenealy said this:

Ms Pene-Ellis’ family are still grieving and struggling with the loss of their beloved Mihi several years later. By all accounts, she was an outstanding member of her community, highly involved and engaged with multiple activities. Her whanau and friends noted a difference in her, that on a timeline they clearly associate with the hospital admission which included the ACC treatment injury. I acknowledge it is challenging doing a postmortem reviewing based solely on notes, having not met Mihi in person. The whanau, having many unanswered questions that lie outside the ACC jurisdiction.

[33] She went on to say that it was generally accepted that healing after a sternotomy takes six weeks and that as a geriatrician, she often considers that elderly patients need up to three months to recover from major surgery of this kind.

[34] She noted that the operation itself was not complicated and that there were no complications with it, and that the surgeons assessed that she had healed well.

[35] She said:

GP assessment from 2017 states that main issue with regards to impaired dressing and ADLS is markedly reduced range of motion due to issues with the shoulders, rather than the sternum. Rotator cuff injuries are often related to an accident or an injury and may be an ACC related event, but they are not related to the treatment injury/operation that I can determine.

The documents provided for review do not definitively provide any further medical or surgical information that allow me to draw a link between the treatment injury and the subsequent issues of concern in a pathophysiological manner.

Appellant's Submissions

[36] Ms Pene-Ellis' daughter, Ms Stevens, told the court that the appellant, prior to the accident, was living with her older sister. She had attended a tangi for her older sister's husband and had felt sick. As a result, she was admitted to hospital. She explained that her mother was a "super" woman who got all the food ready. She travelled extensively in New Zealand and she was 76 when this happened. Earlier that year, she had camped with her daughter at Waitangi. Ms Stevens described her as a "go go go" kind of a lady until her renal failure. She was told by the consultant that her mother had three per cent kidney function and that she would need dialysis.

[37] The family were not, at the time, told of the medical misadventure at North Shore Hospital, and as a result, all of the family were in shock when they heard about it.

[38] After the heart surgery at Auckland Hospital, she was transferred back to North Shore Hospital, where she says the hospital wished to discharge her mother early. She acknowledged that her mother kept saying "I want to go home".

[39] Ms Stevens said that the layout of the home made it difficult for her mother. She had to climb stairs to the shower and she says that the unwanted heart operation played on her mother's mind. She said, in 2017, her mother was in and out of hospital about 16 times with complications.

[40] Eventually, Ms Stevens said that her mother had "given up" because she did not want to be a burden on anyone after that.

[41] She said that the family assumed that the hospital would assist them to look after their mother and a few accidents could have been avoided if she had help. She said it was a few months after her mother's release from hospital that she was given two hours per week help. She said her mother might still have been here if they had had assistance.

[42] She said that on her mother's last visit to hospital "she told us to let her go". She said her mother died because she could not look after herself anymore.

[43] She said that after the sternotomy, the external scarring had healed, but that her mother could not raise her arms and swallowing was difficult.

[44] She said the promise of care for her mother was not upheld.

[45] Ms Hiini, Ms Pene-Ellis' carer, told the court that when she first met Ms Pene-Ellis, she complained about not being able to lift her arms. She said Ms Pene-Ellis could not eat as well.

[46] She said "I could see that her spirit was down after the operation and that she couldn't do much anymore". She too was critical of the fact that only two hours of care was provided for Ms Pene-Ellis.

Respondent's Submissions

[47] Mr Mayland's primary submission is that the Corporation's decision of 12 September 2016, in which it declined to provide further support and entitlements to Ms Pene-Ellis, being equipment and home and community supports and services, is grounded in the medical evidence.

[48] He refers to an investigation report by the Waitemata DHB that says:

Several family meetings were held with the renal team, the multi-disciplinary team involved in (the appellant's) care, (the appellant) and her family, to plan for discharge and ensure assistance and equipment was in place prior to (the appellant's) discharge. The He Kamaka Wairoa, Maori Health Services Team engaged with (the appellant) and her whanau during her admission in NSH.

(The appellant) was discharged home on 26 August with a plan of care, including:

- Fluid restriction, 1 litre/day.
- To dialyse in centre at NSH.
- Transport to and from dialysis has been organised.
- Rental of hospital bed had been organised by hospital.
- Iron studies to be checked on monthly bloods at dialysis and to commence on iron polymaltose complex if required.
- Outpatient bi-lateral arm venogram requested.
- To receive eprex at dialysis on Mondays and Thursdays (IV).

[49] Mr Mailand says that following the post-surgery consultation with cardiac surgeon, Mr Lund, on 24 August 2016, in which he said that the sternotomy had healed well, the focus shifted back to Ms Pene-Ellis' renal failure.

[50] He notes that in a further report to ACC on 3 March 2017, Mr Lund said this:

I saw Mrs Pene-Ellis on 24 August, which was five weeks after the sternotomy. At that stage, the sternotomy had healed well and I would say that the effects of the sternotomy had resolved at that time. Definitely the effects would be resolved after 6-8 weeks.

It is very unlikely that Mrs Pene-Ellis needed extra care in September 2016 because of the sternotomy. It is more likely due to her end stage renal failure, age and general frailty.

[51] Ms Pene-Ellis sought to review ACC's decision. However, in a decision dated 18 April 2017, the reviewer dismissed the review application.

[52] Following this, there was a joint referral by the parties to geriatrician and general physical, Dr Helen Kenealy, on 7 March 2022.

[53] The referral said this:

This is a joint referral from the parties seeking your opinion on the cause of Ms Pene-Ellis' health problems from September 2016 until she passed away in December 2019.

[54] The letter of referral said:

Ms Pene-Ellis' family believe that new problems developed as a result of the treatment injury, including the inability of Ms Pene-Ellis to:

- Chew or swallow most foods unless they were "soggy";
- Lift her arms above her shoulders;
- Carry out normal tasks of daily living, such as cooking for her whanau and dressing; and
- Mobilise properly.

[55] At the end of her report, under the heading "Summary", Dr Kenealy said this:

I note the injury was a vascular injury, rather than a cardiac (heart) injury. A sternotomy was needed to gain access to this area. We generally accept that healing takes six weeks, as a geriatrician I often consider that elderly patients need up to three

months to recover from major surgery, and I would include this vascular repair with sternotomy in this group.

...

A GP assessment from 2017 states that the main issue with regards to impaired dressing and ADLs is markedly reduced range of motion due to issues with the shoulders rather than the sternum. Rotator cuff injuries are often related to an accident or injury any may be an ACC related event, but they are not related to the treatment injury/operation that I can determine.

The documents provided for review do not definitively provide any further medical or surgical information that allow me to draw a link between the treatment injury and the subsequent issues of concern in a pathophysiological manner. ‘

Appellant’s Reply

[56] In reply, Ms Stevens said she could not understand why ACC closed off this claim so quickly after six-seven weeks. She said “we thought Mum would get help”.

Decision

[57] From all that I have read in respect of Ms Pene-Ellis and from all that I have heard on her behalf in this court, she was plainly an extraordinary person. The many letters from whanau and others that knew her that are on the file are testament to this.

[58] Her daughter rightly said she lived an extra active life in 2016, caring for a seven year old autistic grandson; being a full time caregiver of a 62 year old mental health patient; attending Waitakere Community Church twice a week; attending monthly hapu hui at Waimana; attending trustee hui at Piringathi Marae in Massey; making fortnightly trips to Ngaruawahia to watch her grandchildren play school sports and events. She also did regular fundraising for her church and camped at Waitangi on 6 February and 28 October each year.

[59] Mr Hohepa Kiingi rightly said in his testimonial “I often thought she worked like a trooper”.

[60] Ms Stevens rightly referred to her mother as a “go go go kind of lady”.

[61] As mentioned earlier, Ms Stevens told the court that her mother’s extraordinarily active life continued until renal failure occurred.

[62] Then, on 20 July 2016, at North Shore Hospital, during a stent insertion for dialysis, a treatment injury occurred when she suffered a right aortic root perforation resulting from a misplaced right internal jugular tunnelled line.

[63] She was rushed to Auckland Hospital, where she underwent a sternotomy and removal of the misplaced catheter. She also had to have a new vascular catheter inserted on the left side for dialysis for her renal failure.

[64] It is plain from the hospital notes and the evidence put forward on behalf of the appellant, that from the family's perspective this event was poorly handled and in effect her family heard about it "after the event".

[65] Cardiac surgeon, Mr Lund, saw the appellant on 24 August 2016 and noted that the sternotomy had healed well. He also said "we don't need a further follow up, but I think she is ready to proceed with a venogram in order to have a fistula created", so at that point, on 24 August, the focus was clearly on completing the procedure to enable her to have renal dialysis, which, on account of the treatment injury, had been delayed some five weeks.

[66] Following the joint referral of the appellant's case to Dr Kenealy, geriatrician and general physician, that doctor concluded in her report of 7 March 2022:

I cannot see any relationship between the events of the ACC treatment injury and the vascular surgery to remove the misplaced wire and the subsequent concerns raised by the patient and whanau.

[67] In respect of this report, Dr Kenealy's focus was on the problems that the appellant's family believed had resulted from the treatment injury, being the appellant's inability to chew or swallow most foods, unless they were "soggy"; lift her arms above her shoulders; carry out normal tasks of daily living, such as cooking for her whanau and dressing; and mobilising properly.

[68] Dr Kenealy gave a further report dated 30 May 2022 after reviewing further information that was provided to her.

[69] As mentioned, in her summary, she said:

We generally accept that healing takes six weeks, as a geriatrician I often consider that elderly patients need up to three months to recover from major surgery and I would include this vascular repair with sternotomy in this group.

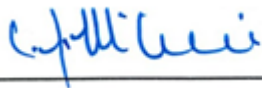
[70] In the appellant's case, she was discharged five weeks after the treatment injury and ACC cancelled its support on 12 September, some seven weeks after surgery.

[71] Ms Stevens candidly acknowledges that her mother was a "go go go" kind of lady until renal failure. So that is acknowledgement that the extraordinarily active and busy life that Ms Pene-Ellis led was suddenly curtailed, not only on account of the sternotomy, but on account of her renal failure.

[72] The fact remains however that Dr Kenealy's view that often elderly patients needed up to three months to recover from major surgery, plainly should have applied to the appellant, particularly so as she also had the massive impost of renal failure.

[73] Accordingly, therefore, I find that ACC's decision dated 12 September 2016 was wrong and that ACC's support to find equipment and home and community support services should, in the appellant's case, have continued for a full three months following her injury, until 20 October 2016.

[74] Accordingly, the appeal is allowed. Costs are reserved.



CJ McGuire
District Court Judge

Solicitors: Medico Law Limited, Grey Lynn