

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2023] NZACC 153      ACR 182/22**

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

Hearing:                                      22 August 2023

Heard at:                                      Wellington

Appearances:                                Kevin Saunders, Appellant (via AVL)  
    Ms S Shaw and Ms V Squires for the Respondent

Judgment:                                    19 September 2023

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**RESERVED JUDGMENT OF JUDGE C J MCGUIRE  
(Section 117 – Ordinarily Resident in New Zealand)**

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[1] This is an appeal against ACC’s decision of 23 August 2017 in which ACC declined to accept his claim for cover on the basis that the appellant was not ordinarily resident in New Zealand at the time of his accident.

[2] The decision letter also said:

Although we’re able to accept some claims for accidents which occur overseas, section 17 of the Accident Compensation Act 2001 outlines situations where we are not able to offer cover.

While ACC completely acknowledges the unfortunate circumstances faced by you and your family, there is nothing within the bounds of ACC legislation that we can offer to support your situation. The length of time you have remained outside of New Zealand, the date of your claimed accident/s in Australia and the described injury condition you have been treated for are all reasons why ACC is unable to provide assistance for you at this time.

[3] The appellant sought to review this decision. The review was commenced on Thursday, 1 September 2022 and concluded on 19 September 2022.

[4] In dismissing the application for review, the reviewer said:

I accept that Mr Saunders considers there is an unfairness in the situation he has found himself in, given the good reasons he and his family had for moving to Australia. Unfortunately, that is not a consideration that I can bring to bear in this review. ACC is a statutory scheme, and both ACC and myself, as a reviewer, are required to decide the matter based on the statutory considerations that apply. As noted by the Court in the District Court decision of *Anderton v ACC* [2012] NZACC 384:

Consequent unfairness that can affect some injured persons is a matter for legislative policy, not an area in which the Court can strike down a ... decision validly made.

Such is the situation we find ourselves. I must therefore dismiss the application for review.

[5] Accordingly, Mr Saunders has appealed to this Court.

[6] Mr Saunders had previously received cover for a lumbar sprain suffered in March 2006 and a lumbar sprain suffered in February 2013.

[7] The present claim concerns the injury resulting from a fall he had on 14 January 2017 after spinal surgery in Australia to address his degenerative kyphoscoliosis. The fall resulted in Mr Saunders becoming paraplegic.

[8] As mentioned, ACC's decision declining cover made on 23 August 2017 was upheld on review in a decision of 27 September 2022.

[9] Since his personal injury was suffered outside of New Zealand, he must, under the Accident Compensation Act 2001, meet the requirements of s 22 of that Act, which include that the claimant be "ordinarily resident in New Zealand". To be "ordinarily resident" in

accordance with s 17(2) of the Act, the claimant must have a permanent place of residence in New Zealand, which is described in s 17(3) as follows:

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

### **Appellant's Submissions**

[10] Mr Saunders told the Court that he had two reasons for being in Australia:

- (a) First, because his daughter was being badly bullied in New Zealand; and
- (b) Secondly, on account with his involvement with the Christchurch earthquake. He has developed a new foundation system and he wished to learn from experience gained in Australia. The intention was to be in Australia for some six to 12 months.

[11] He told the Court that his foundation system was finally patented this year. He says his business was and is in New Zealand, however he came to Australia in May 2015 for meetings regarding his new foundation system.

[12] He says he could not travel between 2015 and 2018 because he was medically unable to.

[13] He said that:

We are left with the clothes on our back, living in a friend's house.

[14] Regarding the surgery on 14 January 2017, which was complex spinal surgery to correct degenerative kyphoscoliosis, he said he was very scared about getting that surgery and that is why it did not happen earlier.

[15] He told the Court that there was "a whole bunch of costs which included scans and a lumbar block, totalling A\$96,000". Through that time, he said he continued to try and work.

[16] He refers to the report on neurosurgeon, Dr Campbell, dated 1 September 2020. In that report, the neurosurgeon notes:

[17] He underwent anterior and posterior thoracolumbar surgery on 14 January 2017. In the post-operative period, he fell out of bed, resulting in paraplegia. He subsequently underwent multiple thoracolumbar decompression laminectomy operations, which resulted in a partial recovery.

[18] He told the Court that in spite of this, he was “on site” every day when he worked and he would struggle up a few stairs, but that was the extent of his mobility. He said that life had been extremely hard.

[19] He says that he was medically unfit to travel and that is why he did not go back to New Zealand.

[20] He said he is not asking for millions of dollars, he is just asking for setup costs and a minimum wage.

[21] He said “I’m struggling and the whole family is struggling”. He said:

I just want to know on what basis they say I was fit to travel to New Zealand. Lawyers don’t know spinal injuries ...

### **Respondent’s Submissions**

[22] Ms Shaw referred to ss 17 and 22 of the Act. She says the difficulty here is that the appellant was outside New Zealand for too long and that he was not paying tax in New Zealand through that period.

[23] She refers to a report of orthopaedic surgeon, Mr McEntee dated 21 March 2017, which included the following:

I confirm that I am the spinal consultant looking after Mr Kevin Saunders currently. Mr Saunders underwent complex spinal surgery on 14 January 2017, for correction of a degenerative kyphoscoliosis. The surgery was performed without complication. However, on the ward post-operatively, Mr Saunders had a fall and, as a result of that fall, has ended up paraplegic and has required multiple further surgeries as a consequence.

Mr Saunders is now slowly regaining some strength in his legs and has a prolonged recovery ahead of him. I would anticipate this will take a minimum of six to 12 months ...

[24] Ms Shaw told the Court that before ACC issued its decision of 23 August 2017, it had received information from Mr Saunders relating to his hospitalisation in 2017. It also had verification from the Inland Revenue that there were no New Zealand earnings.

[25] Ms Shaw refers to the review decision of 27 September 2022 and notes that under the heading “Analysis”, the reviewer says:

The ACC scheme is not a universal scheme to cover New Zealand citizens who have accidents whether in New Zealand or overseas, the scheme has limitations on cover. Therefore for a claim to be accepted for an accident overseas, it is a major departure from the general approach of the scheme and there are strict statutory criteria that must be met.

Mr Saunders has been quite direct about his situation and has forcefully impressed upon ACC that it must accept his claim. He has outlined on numerous occasions his desperation and the struggles he has had financially and medically. I do not want to underestimate those and accept that he is in a dire situation. However, I find that he does not meet the definition of “ordinarily resident” as he did not have a permanent place of residence in New Zealand at the time of the fall. Furthermore, while he once was a New Zealand tax payer, he has not been so for a number of years, and so he also does not qualify for cover as he has no New Zealand income as returned to IRD since at least January 2014.

[26] Ms Shaw refers to s 17(2), which says:

A person does not have a permanent place of residence in New Zealand if he or she has been and remains absent from New Zealand for more than 6 months or intends to be absent from New Zealand for more than 6 months.

[27] She refers to the decision of Judge Henare in *Richards v ACC*<sup>1</sup>. That case concerned whether the appellant could satisfy s 17(4), namely that a person does not cease to have a permanent place of residence in New Zealand because he or she is absent from New Zealand primarily in connection with the duties of his or her employment, the remuneration for which is treated as income derived in New Zealand for New Zealand income tax purposes, or for six months following the completion of a period of employment outside New Zealand, so long as he or she intends to resume a place of residence in New Zealand.

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<sup>1</sup> *Richards v ACC* [2014] NZACC 81

[28] In that case, the appellant had had a diving accident in Indonesia six months and 12 days after leaving New Zealand.

[29] Judge Henare said, at paragraphs 30 and 31:

[30] Finally, Ms Hollingsworth urged the Court to adopt a “generous and unrigidly” approach to this case. I acknowledge the work history of the appellant and the fact that he pays taxes in New Zealand, including ACC levies. I acknowledge too that the appellant’s injury would be considered a personal injury under the Act and would be covered if the injury had occurred in New Zealand. However, I cannot provide an elastic interpretation of s 17(4) when the evidence does not support that the appellant was absent from New Zealand “primarily in connection with the duties of his employment”. Rather, the evidence is to the contrary, that the appellant was primarily on holiday, preparing his vessel for service, enjoying his passion for sailing, touring, renewing his friendships and social acquaintances and checking his business and investments, as he went about his recreational activities in the Philippines and Indonesia.

[31] For the reasons set out above, I find the appellant did not meet the criteria for being ordinarily resident in New Zealand under s 17(4) of the Accident Compensation Act 2001.

[30] Here, Ms Shaw submits that the appellant was in Australia outside six months and there was no taxable income in New Zealand during the relevant timeframe.

[31] Accordingly, she submits that the appellant is in a similar situation, having gone to Australia for family reasons and for business.

[32] She submits that s 17(4) cannot apply, as there was no taxable income in New Zealand.

### **Appellant’s Reply**

[33] Mr Saunders submits that it is not correct to say that he had no intention to return to New Zealand. He refers to family residing here, as well as having a home here.

[34] Mr Saunders says that he has no income and that everything he had and owned went into developing a product to save people. He said that even a reasonable amount to cover costs would make a great difference to him.

## **Decision**

[35] The ultimate issue for determination in this case is whether or not, for the purposes of s 17, Mr Saunders is a person who is ordinarily resident in New Zealand.

[36] He needs to establish that in order to be eligible for cover and entitlements under the Accident Compensation Act 2001.

[37] To be ordinarily resident in New Zealand, s 17(1)(a) requires that he has New Zealand as his permanent place of residence.

[38] In this case, there was some evidence that the appellant has a house in New Zealand.

[39] However, s 17(2) states:

A person does not have a permanent place of residence in New Zealand if he or she has been and remains absent from New Zealand for more than six months or intends to be absent from New Zealand for more than six months.

[40] In this case, Mr Saunders moved from New Zealand to Australia in 2015.

[41] Although he maintained that his business was and is in New Zealand, he has had no New Zealand income as returned to the Inland Revenue Department since at least January 2014.

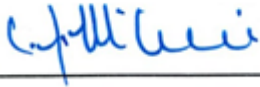
[42] This latter fact prevents the appellant from being treated as having New Zealand as his permanent place of residence, by virtue of s 17(4).

[43] Accordingly, therefore, I must conclude that for the purposes of the ACC Act, the appellant is not ordinarily resident in New Zealand and therefore for the purposes of s 22, he fails to satisfy the requirements to obtain cover for personal injury suffered outside New Zealand, as he was not a person who was ordinarily resident in New Zealand when he suffered the personal injury. That is to say, he did not satisfy the definition in the Accident Compensation Act of a person who is ordinarily resident in New Zealand (s 17).

[44] Like Judge Henare in the case of *Richards v ACC*, I cannot provide an elastic interpretation of s 17(4). The Accident Compensation Act sets out the criteria that must be met for those who claim cover and entitlements following personal injury. I have no power that a person injured overseas may obtain cover and entitlements if that person does not meet the criteria that Parliament has mandated.

[45] Accordingly, therefore, I am bound to find that ACC's decision of 23 April 2017 advising the appellant that ACC was unable to offer cover was correct. Accordingly, therefore I must dismiss this appeal.

[46] Costs are reserved.



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C J McGuire  
District Court Judge

Solicitors: MC, Wellington