

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 47 ACR 246/21

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

Hearing: 15 February 2023
Heard at: Auckland/Tāmaki Makaurau

Appearances: Mr PG Schmidt for the Appellant
 Mr IG Hunt for the Respondent

Judgment: 24 March 2023

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Impairment Assessment, Part 3 Schedule 1, Accident Compensation Act 2001]**

[1] This is an appeal against a decision dated 11 February 2021 in which the respondent determined the appellant’s whole person impairment was to be assessed at 19%.

[2] The issue in this appeal is whether that decision is correct.

[3] The appellant suffered a brain tumour that was surgically removed in October 1999. Unfortunately, not all of the tumour was able to be removed and the part of the tumour that remained was treated with radiotherapy. Around 20 years later, Mrs Smith developed progressive expressive dysphasia, resulting in focal intractable fits and right hemiplegia. It was determined that the cause of these problems was a rare outcome of her radiation therapy. Because this outcome was not a necessary part or ordinary consequence of treatment, it was covered as a treatment injury.

[4] As set out in the review decision of 30 July 2021, the appellant has cover for:

- Hydrocephalus – left; late effect of radiation;
- Encephalopathy, not elsewhere classified – left;
- Operation wound dehiscence – left; post-operative infection – left;
- Partial epilepsy with impairment of consciousness;
- Right hemiplegia; late effects of cerebrovascular disease; dysphasia; and
- Mild cognitive disorder.

[5] In January 2021 the respondent referred the appellant to its Whole Person Impairment Assessor, Dr Keith Murray, for an impairment assessment.

[6] The assessment of whole person impairment of 19% is based on an independence allowance report by Dr Murray dated 20 January 2021.

[7] At the commencement of his report, Dr Murray listed the appellant's injuries as:

- (a) Hydrocephalus – left;
- (b) Late effect of radiation;
- (c) Encephalopathy, not elsewhere classified – left;
- (d) Operation wound dehiscence – left;
- (e) Post-operative infection – left;
- (f) Partial epilepsy with impairment of consciousness;
- (g) Right hemiplegia;
- (h) Late effects of cerebrovascular disease;
- (i) Dysphasia;
- (j) Mild cognitive disorder.

[8] In his report, Dr Murray assessed the degree of permanent whole person impairment (WPI) as being 80 per cent. An additional 1 per cent for scarring was added to give a whole person impairment of 81 per cent.

[9] Dr Murray included in his assessment impairments due to the appellant's covered injuries and impairments due to a condition that is not the result of personal injury, namely right homonymous hemianopia. He assessed this impairment at 62 per cent. He then deducted this 62 per cent impairment caused by the non-covered condition from the whole person impairment of 81 per cent, resulting in a final whole person impairment for ACC purposes of 19 per cent.

Appellant's Submissions

[10] Mr Schmidt, for the appellant submits that the assessment is flawed.

[11] He notes that having reached the conclusion of a whole person impairment, Dr Murray said:

This 18 per cent is rather a low figure considering the extent of her difficulties, and is due to the prescribed method used for apportionment, which results in a high weighting for the pre-existing visual loss.

[12] Mr Schmidt submits that first, the assessment is flawed for two very important and interrelated reasons. He submits that the apportionment method used in the ACC User Handbook to the AMA Guides ("The Handbook") does not fairly assess injury related impairment.

[13] Second, Mr Schmidt submits the assessment of non-covered conditions – and, by operation of logic, the deduction of such non-covered conditions, is prohibited by clause 59(3)(b)(i) of Schedule 1 of the Accident Compensation Act 2001 (the Act).

[14] On 5 April 2022, Mr Schmidt wrote to Mr Hlavac of Young Hunter, Lawyers, acting for the respondent, and asked:

Could ACC please discover the material it holds regarding the introduction of a deduction for pre-existing impairment into the Handbook?

[15] ACC responded as follows:

ACC's use of the Handbook did not introduce a deduction for pre-existing conditions into an impairment assessment. Consequently, we are refusing your request for material help, with introduces a deduction for a pre-existing impairment into the Handbook, as this information does not exist.

...

For further reference, please see the below section of the Accident Rehabilitation and Compensation Act 1992:

54 Independence Allowance –

1 Subject to this section, every person who has cover under this Act is entitled to receive an independence allowance where the person's personal injury has resulted in a degree of disability of 10 per cent or more

...

13 In any assessment of disability under this section, any disability that does not arise from personal injury covered by this Act, or personal injury by accident covered by the Accident Compensation Act 1972 or the Accident Compensation Act 1982, and in respect of which a claim has been accepted by the Corporation, shall be disregarded.

The 1998 Accident Insurance Act is the point at which the American Medical Association (AMA) Guides (4th Edition) were confirmed to describe how to assess and rate permanent impairment.

The following clauses are relevant to your request:

60 Assessment of Entitlement to Independence Allowance

...

(4) In doing an assessment under this clause, an assessor must –

(a) Use the American Medical Association Guides to the Evaluation of Permanent Impairment (4th Edition) (subject to any regulations made under section 403(2); and

(b) Exclude from the assessment any impairment that does not result from the personal injury for which the insured lodged the claim for cover.

It is thus noted that the core consideration of permanent impairment (though assessed as disability in the 1992 Act) has been from the outset intended to allow solely for injury related impact.

Therefore, when determining apportionment for an impairment assessment, the key materials are the AMA Guides and legislation governing ACC.

[16] Mr Schmidt then referred to s 3 of the Act, setting out the Act's purpose and he notes s 3(d) says:

Ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment.

[17] Mr Schmidt next turns to cl 59 of Schedule 1. This relates to the assessment of entitlement to lump sum compensation. Clause 59(3) provides:

In doing an assessment under this clause, an assessor must –

- (a) Assess the claimant in accordance with regulations made under this Act; and
 - (b) Exclude from the assessment any permanent impairment –
 - (i) That does not result from personal injury for which the claimant has cover under the Act;
 - (ii) Arising from personal injury suffered before the commencement of this part;
- ...

[18] Clause 59(5) goes on to require the combined effects of injuries, where there has been more than one personal injury.

[19] Mr Schmidt next refers to clause 4 of the Injury Prevention, Rehabilitation, and Compensation (Lump Sum and Independence Allowance) Regulations 2002, which reads as follows:

- (iv) Assessment tool for assessing eligibility for lump sum payments and independence allowance.
 - (1) Assessment of person's whole person impairment, for the purposes of determining the person's eligibility to receive lump sum compensation or an independence allowance, must be carried out by an assessor using the assessment tool prescribed by subclause 2.
 - (2) The assessment tool comprises –
 - (a) The American Medical Association Guides to the Evaluation of Permanent Impairment (4th Edition); and
 - (b) The ACC User Handbook to AMA4.
 - (3) The ACC User Handbook to AMA4 prevails if there is a conflict between it and the American Medical Association Guides to the Evaluation of Permanent Impairment (4th Edition).

[20] Mr Schmidt notes that ACC subsequently issued “the ACC User Handbook to the AMA Guides to the Evaluation of Permanent Impairment (4th Edition)”. Page 8 of the Handbook sets out the “assessment process”. The assessment process sets out several mandatory steps the assessor must follow.

[21] Step 4 requires the assessor to establish the claimant’s medical history; Step 5 requires the assessor to determine impairment for “each condition”; and Step 6 requires the assessor to determine whole person impairment using AMA 4.

[22] Following this, on page 10 of the Handbook, under the heading “Apportionment”, the assessor is directed to determine any impairment that existed prior to the covered condition occurring. The assessor also determines injury related impairment. These are combined to arrive at a whole person impairment and then pre-existing impairment is deducted to arrive at what ACC asserts is the injury related impairment.

[23] Mr Schmidt submits that the method thus set out does not in reality yield a proper level of injury related impairment.

[24] Mr Schmidt submits that the concept of apportionment between injury and non-injury related impairment is not in the Schedule, and it is not in the AMA Guides.

[25] He submits that ACC “dreamed up” apportionment.

[26] He refers to page 10 of the Guides, which deals with apportionment.

Apportionment

An impairment may be the result of multiple conditions, not all of which are covered by ACC. In this situation, apportion the percentage into covered and non-covered impairments.

...

Description

If possible, analyse the impairment that existed prior to the covered condition occurring, using the following method:

- *Calculate the pre-existing percentage (base on medical records).*
- *Calculate the percentage that currently exists (from the combination of covered and non-covered conditions).*
- *Deem the difference between the two to be the impairment apportioned to the covered condition.*

Note that one figure is deducted from the other. Don’t attempt a “reverse combine”.

Use clinical judgement

Description

- *If it's not possible to calculate the pre-existing impairment, base the apportionment on your clinical judgement, using historical records and your own clinical evaluation.*
- *Very occasionally, you won't feel you can confidently do this. If so, note this in your report.*

[27] Mr Schmidt submits that ACC has introduced an additional step that is not in the AMA Guides. He submits that ACC “has invented” the method of apportionment and it is not clear how this came about. He says the result reached by the assessor of 18% is acknowledged by the assessor as unfair.

[28] He submits that “a small group” of persons unknown in ACC have come up with the Handbook, whereas something as important as this should be in the Act or in the AMA Guides.

[29] Ultimately, he says the assessment is contrary to the intent of cl 59, which I infer from his submissions should yield a more “balanced” result between included injuries and non-included injuries/impairments.

Respondent's Submissions

[30] Mr Hunt acknowledges that he has not seen Mr Schmidt's argument before. He says the argument is “ingenious” but fundamentally flawed.

[31] ACC's position, he submits, is that Mr Schmidt's argument “cannot be found in the legislation” and that he is, in effect, seeking to have the appellant compensated for conditions which he does not have.

[32] He refers to s 67 which states that a claimant who has suffered a personal injury is entitled to one or more entitlements if he or she has cover for the personal injury and is eligible under the Act for entitlements in respect of the personal injury.

[33] He refers to cl 59(3)(b) which requires the assessor to exclude any permanent impairment that does not result from the covered personal injury or injuries suffered before the commencement of that part of the Act.

[34] He refers to the reviewer’s analysis and that the assessor is required by the ACC Handbook to “apportion the per centage into covered and non-covered impairments”.

[35] He refers to *U v ACC* where Judge Powell, said¹:

Having concluded that an apportionment is appropriate, there is no way for the Court to form a view as to whether the final amount apportioned by Dr Todd in this case was correct or not. While to a certain extent the Court is able to look at figures arising from the calculations of a whole person impairment assessment itself (because these can be checked against the relevant tables in AMA4), this cannot be undertaken regarding apportionment because amounts to be apportioned are not prescribed in AMA4, but instead require the assessor to exercise clinical judgment as to the level of apportionment that should be made. In this regard, having concluded that an apportionment is appropriate, there is no identifiable basis for me to interfere with the conclusion as to the amount of apportionment reached by Dr Todd, and confirmed as appropriate by Dr Collier.

[36] Mr Hunt also referred to the decision of *MT v ACC* where Judge Ongley said:²

[22] Apportionment cannot be an exercise of precision. It is complicated by the probability that one kind of disorder inhibits response to treatment for other mental disorder, and by difficulties of precise psychiatric diagnosis. Apportionment is a skilled exercise, assisted by specialist skill and experience, and by particular experience in assessment of impairment and apportionment within the structure of the American Medical Association’s “Guides to the Evaluation of Permanent Impairment” (the AMA Guides). The ACC User Handbook to the Guides has authority under regulations made under the Injury Prevention, Rehabilitation and Compensation Act 2001. Those are the documents that govern the process of assessment and apportionment.

[23] Dr Sheikh and Dr Newton-Howes did not attempt assessments under the Guides. They presented a diagnosis of PTSD or equivalent symptomatology associated with sexual abuse. Clearly the other opinions accept that there is serious impairment related to sexual abuse, but those opinions have stopped short of a specific diagnosis of PTSD, possibly because the academic debate over such a diagnosis, but that does not mean to say that the symptoms have not been recognised as part of a significant mental injury impairment. Quite obviously the doctors who apportioned 30 per cent or 35 per cent did recognise that there was significant mental injury impairment caused by sexual abuse.

[37] Mr Hunt submits that inherent in the whole process is the principle that only qualified assessors with the requisite expertise and judgment make the assessments. Mr Hunt submits that because Dr Murray acknowledged that the 18 per cent figure (without the 1 per cent for scarring) was “rather a low figure”, he no doubt looked very closely at the assessment.

¹ *U v Accident Compensation Corporation*, [2018] NZACC 28 at [34].

² *MT v Accident Compensation Corporation*, [2009] NZACC 213 (10 December 2009).

Appellant's Reply

[38] Mr Schmidt says the nub of this appeal is: What does "exclude", as it is used in cl 59 mean? He says again that there is no mention of apportionment in the 1972 and 1982 Acts and there was lump sum compensation regardless of the other conditions the claimant had.

[39] He says that as cl 59 excludes non-covered conditions, the assessor should not include these conditions and then deduct them. He says that ultimately, ACC's approach discriminates against aged, infirmed and disabled people because the inherent disability factors result in lower assessments of their injury related impairments.

Decision

[40] It is plain that the appellant in this case is significantly disabled.

[41] Following the hearing, Counsel filed a joint memorandum in which it was agreed that at present the appellant receives 64 hours 20 minutes a week of attended care assistance, and also 8 hours 40 minutes a week of home help assistance, making the current level of support funded by ACC as 73 hours per week.

[42] While the joint memorandum acknowledges that the respondent's position is that this level of attendant care provided to the appellant is not relevant evidence in respect of the issue before the Court, it is, nevertheless, indicative of the appellant requiring a relatively high level of care provided by ACC, which allows for an inference that disability due to ACC covered conditions is significant.

Analysis

[43] The process under the Act and Regulations is as follows:

- (a) As Schedule 1, cl 59 provides, after the Corporation receives a certificate under cl 57(1) (the claimant's condition resulting from the personal injury has stabilised and it is likely there is permanent impairment resulting from the injury), an assessor assesses the claimant's percentage of whole person impairment (cl 59(2)) in accordance with regulations made under the Act (cl 59(3)(a)) and excludes any impairment that does not result from personal injury for which the claimant has

cover (cl 59(3)(b)) and includes in the assessment any permanent impairment for which the claimant has received lump sum compensation under this part (cl 59(3)(c)), subject to any regulations made under the Act (cl 59(4)).

- (b) The Injury Prevention, Rehabilitation and Compensation (Lump Sum and Independence Allowance) Regulations 2002 provides that an assessor appointed by ACC (under cl 58 of Schedule 1) then assesses the person using the assessment tool which comprises the AMA Guides (4th Edition) and the ACC Handbook to AMA4 (Injury Prevention, Rehabilitation and Compensation - Lump Sum and Independence Allowance - Regulations 2002, clause 4(2)).

[44] Plainly, as both a matter of logic and fairness, non-covered conditions including, natural degeneration components of an injured person's presentation should not be included. In fact, they are excluded by cl 59(3)(b).

[45] How then to achieve a result in a fair manner? Is ACC's methodology in this regard unfair?

[46] Dr Murray's comment, in his independence allowance report, that a whole person impairment of 18 per cent that is due to the covered injury "is rather a low figure considering the extent of her difficulties" warrants careful consideration.

[47] Dr Murray goes on to say that this "is due to the prescribed method used for apportionment which results in a high weighting for pre-existing visual loss".

[48] The history of ACC scheme has been one of evolution and change since it commenced in 1972.

[49] Mr Schmidt has rightly referred to s 3 of the Act, which provides:

...

- (c) Ensuring that, where injuries occur, the Corporation's primary focus should be on rehabilitation, with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence and participation.

[50] In order to, in reality, reflect what s 3(c) says, this country had recourse to the AMA Guides (4th Edition) and ACC compiled a Handbook to the AMA Guides, both of which were sanctioned by the Injury Prevention, Rehabilitation and Compensation (Lump Sum and Independence Allowance) Regulations 2002.

[51] Under the heading “Explanatory Note” at the end of these Regulations is this:

These regulations come into force on 1 April 2002 and prescribe, for the purposes of the Injury Prevention, Rehabilitation and Compensation Act 2001 [now renamed the Accident Compensation Act 2001]:-

- the assessment tool to be used to assess a person’s eligibility for lump sum compensation or the independence allowance:
- the scale of lump sum compensation.

[52] Schedule 1 of the Act, at cl 59, provided for the assessor, when assessing the claimant’s per centage of whole person impairment, to assess the claimant in accordance with regulations made under the Act, and to exclude from the assessment any permanent impairment:

- (a) That does not result from personal injury for which the claimant has cover under this Act; and
- (b) Arising from personal injuries suffered before the commencement of this part; and
- (c) Include in the assessment any permanent impairment for which the claimant has received lump sum compensation under this part.

[53] Mr Schmidt is critical of the fact that in interpreting this provision, the way in which assessors such as Dr Murray go about their task is to assess a whole person impairment and then deduct whole person impairment due to conditions other than the covered injury.

[54] In this case, the total whole person impairment was 80 per cent, but 62 per cent was deducted due to other conditions, leaving a balance of 18 per cent whole person impairment due to the covered injury.

[55] He says that cl 59 of Schedule 1 requires that the assessor exclude from the assessment any personal impairment that does not result from personal injury for which the claimant has cover, or which arose before the commencement of this part of the Act.

[56] Effectively, he is saying that the assessor should just assess the covered personal impairment to the exclusion of other impairments.

[57] I do not interpret cl 59 as requiring assessors such as Dr Murray to go about their task in a way different to what they presently do.

[58] Dr Murray has taken the appellant's current whole person impairment and has removed from that whole person impairment the impairment due to other conditions.

[59] It seems that in the appellant's case, the figure of 62% that was deducted from the whole person impairment of 80% was due to the appellant's "right homonymous hemianopia" which was caused by a tumour and pre-dated any treatment the appellant had that gave rise to her claim.

[60] It may well be that, as has frequently occurred in the past, a re-think or adjustment may need to be made to matters that impact ultimately on a person's entitlement, so that the underlying ethos of s 3 remains authentic.

[61] However, in this case, there is nothing to suggest that the original whole person impairment for the appellant's non-covered homonymous hemianopia was not 62%.

[62] Dr Murray then excluded that from the appellant's total current whole person impairment, resulting in a figure of 18% whole person impairment.

[63] Plainly, this Court is not in a position to adjust in any way the appellant's resulting whole person impairment and as Mr Schmidt's argument as to principle acknowledged, he too is unable to put forward a cogent argument for a different whole person impairment figure, other than to submit that non-injury related whole person impairment should be excluded.

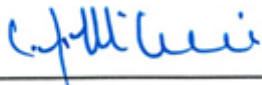
[64] In this case, a possible inference to be taken from his submissions is that the whole person impairment relating to the homonymous hemianopia is not taken into account in the assessment and the appellant's covered whole person impairment is at 80%.

[65] In fairness to Mr Schmidt, he did not make that submission. However, he did not suggest an alternative way of excluding non-injury related whole person impairment that in his view would yield a "more acceptable" result.

[66] Nevertheless it may well be that a review of the process is warranted if there is some consensus of collegial medical opinion that the present process on occasion yields an unfair result.

[67] In this case however I am unable to fault what Dr Murray has done and I therefore must find on the balance of probabilities that the appellant has failed to show that ACC's decision is wrong. The appeal is therefore dismissed.

[68] I make no order as to costs.



CJ McGuire
District Court Judge

Solicitors: Schmidt and Peart Law, Ellerslie
Young Hunter, Solicitors, Christchurch