

Decision No. 11/09

Reference No. HRRT 36/2008

BETWEEN

ANTHONY GIBBONS

Plaintiff

AND

**ACCIDENT COMPENSATION
CORPORATION**

Defendant

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

Mr R D C Hindle	Chairperson
Ms J Grant, NZN	Member
Mr G J A Kerr QSO JP	Member

APPEARANCES:

Mr A Gibbons, plaintiff.
Mr J E Castle for defendant.
Ms E Pond for Privacy Commissioner.

HEARING: 7 May 2009 (Nelson)

DATE OF DECISION: 29 May 2009

DECISION

Preliminary

[1] This claim has been brought by the plaintiff in respect of information that he was asked to give to the defendant ('the ACC') in connection with a request that was made to the ACC for it (the ACC) to pay for certain medicines that had been prescribed for the plaintiff by his doctor. The plaintiff says that the ACC's request for information amounted to an infringement of Rule 1 of the Health Information Privacy Code 1994 ('the Code'), the effect of which is that the ACC is not allowed to collect health information unless it is required for some lawful purpose connected with the ACC's functions (and the information is necessary for that purpose).

[2] The Code has been promulgated by the Privacy Commissioner under s.46 of the Privacy Act 1993 ('the Act'). The issues we are required to deal with have all been the subject of investigation by the Privacy Commissioner, and it is common ground that we have jurisdiction to deal with the plaintiff's claim.

[3] At the hearing there was a good deal of discussion about personal and sensitive health information concerning the plaintiff. That gave rise to an obvious question as to whether publication of the plaintiff's name in connection with this litigation should be prohibited, in order to protect his privacy. When the matter was raised at the commencement of the hearing, however, the plaintiff made it clear that he would prefer an order which prohibits publication of any of the detailed medical information instead.

Neither the defendant nor the Privacy Commissioner had any objection to that course of action.



[4] Although an order prohibiting publication of the medical information means that this decision must be crafted in rather more general terms than it might otherwise have been, we were willing to agree to the plaintiff's request. We certainly had no hesitation accepting that there should be an order to protect the plaintiff's privacy, and we accept that an effective order can be made in the terms which he has suggested.

[5] For these reasons, at the commencement of the hearing on 7 May 2009 we made an order permanently prohibiting publication of any of the medical information about the plaintiff that was discussed at the hearing and/or which was contained in the papers filed in advance of the hearing. The order is made under s.107(3) of the Human Rights Act 1993. To avoid any uncertainty, however, we make it clear that this decision will be publicly issued in the usual way, and the order does not extend to anything that is contained in this document.

Background

[6] The plaintiff has had an association with the ACC over many years both in his own capacity as a recipient of ACC-related payments, and also as an advocate for others who have ACC-related issues.

[7] Amongst its functions and responsibilities under the Injury Prevention, Rehabilitation and Compensation Act 2001 ('the IPRCA') the ACC is responsible for funding pharmaceuticals for individual ACC recipients in certain circumstances. (The relevant legislation defines 'pharmaceuticals' in some detail but if there is a difference between a 'medicine' and a 'pharmaceutical' nothing turns on that difference in this case. We prefer to use the word 'medicine' in this decision).

[8] For present purposes, the relevant statutory provision is in clause 3 of the First Schedule to the IPRCA. The ACC is liable to pay or contribute to the costs of any medicine that is prescribed by a treatment provider who has statutory authority to prescribe medicines, as long as the medicine is reasonably required as an ancillary service related to the treatment (of an injury). The ACC is not, however, obliged to pay for medicines that are not ancillary to such treatment.

[9] In order to decide whether a particular medicine will facilitate treatment in any given case, and is therefore 'reasonably required', a decision has to be made as to whether or not it will be clinically effective. Since some medicines may interact with other medicines, there is a need for the person who makes the assessment to know something about any other medicines a claimant may be taking – not only in relation to an injury that is covered by the ACC, but also for any other non-injury related conditions. It follows that if an application is received by the ACC to fund a particular medicine the person who makes the funding decision has good reasons to know something about any other medications that the claimant is taking, not just those that are related to the treatment of injury.

[10] The focus of this case had to do with an ACC standard form that is identified as 'ACC 1172' and is entitled 'Evaluation of Pharmaceutical Use'. The form has to be filled in by a claimant's treatment provider (here, the prescribing doctor) and then submitted to the ACC for assessment. One of the questions that the prescribing treatment provider has to answer is:

"Please attach the following information:

- *A list of other medications the client is currently on – include strength, dose, duration of use to date . . ."*



[11] The plaintiff says that this request for information contravenes Rule 1 of the Code. He is very reluctant to provide the ACC with any more personal health information about himself than is strictly necessary, and it is his position that the ACC does not need to know about any medications that he is taking for non-injury related reasons. In effect, he says that the clinical judgment as to whether the combination of medicines that he is taking at any given time should be left to his doctor. He says that it is or should be enough for the ACC to know that the particular medicine he is asking the ACC to fund has been prescribed by his doctor.

Relevant Legislation

[12] Rule 1 of the Code provides:

"Health information must not be collected by any health agency unless:

(a) The information is collected for a lawful purpose connected with a function or activity of the health agency; and

(b) the collection of the information is necessary for that purpose."

[13] It was not seriously suggested that the ACC's purpose in collecting information about an ACC claimant's non-injury related medicines in a case of this kind is unlawful. Nor was it suggested that the ACC's purpose in collecting such information in a case of this kind is not connected with the ACC's functions and objectives. The only real question is whether the collection of non-injury related information (specifically, in relation to medicines that have been prescribed for non-injury related reasons) is 'necessary' for the ACC's purposes in the circumstances.

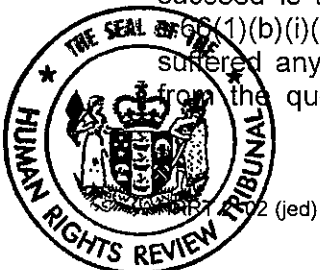
[14] The Tribunal has considered the meaning of the word 'necessary' in the context of Principle 1 of the Act in *Lehmann v CanWest Radioworks Ltd* [2006] NZHRRT 35. The Tribunal stated:

"[47] The use of the word "necessary" in Principle 1(b) is not qualified. Taken at face value, the word may convey a sense of that which is essential; something but for which the purpose cannot possibly be achieved. If interpreted in that way, Principle 1 imposes a very high standard indeed for agencies to have to achieve before it can be said that the collection of personal information is justified within Principle 1.

[50] We have no doubt that Principle 1 is intended to set a standard that is workable and achievable, having regard to the circumstances of each case. We therefore agree with Ms Evans' argument that Principle 1 should be approached as setting a standard of reasonable rather than absolute necessity."

[15] There is no reason not to apply the same approach to the interpretation of Rule 1 of the Code.

[16] In addition to the question of whether or not there has been an infringement of Rule 1 of the Code, a second element that is necessary for the plaintiff's claim to succeed is to show that he has suffered some loss or harm within the meaning of s.66(1)(b)(i)(iii) of the Act. There is no suggestion that the plaintiff in this case has suffered anything in the nature of a pecuniary loss falling under s.66(1)(b)(i). Aside from the question of whether the requirement to supply non-injury related medical



information complies with Rule 1, nor was there any suggestion in the evidence or argument that the plaintiff might have suffered any adverse effects of the kinds contemplated by s.66(1)(b)(ii) of the Act either.

[17] If there is an interference with privacy in this case, it will only be because any infringement of Rule 1 “. . . has resulted in or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings . . .”. of the plaintiff: see S.66(1)(b)(iii) of the Act.

Application of Rule 1

[18] When the ACC is asked to fund a medicine for injury-related reasons it has a responsibility to decide whether or not to provide the funding requested in accordance with its statutory responsibilities. They include the obligations in s.262(3) of the IPRCA for the ACC to carry out its functions in such a way as to minimise the overall incidence and costs to the community of personal injury (while ensuring fair rehabilitation and compensation for loss from personal injury, and in a manner that is cost-effective and promotes administrative efficiency).

[19] A funding decision in any given case must include some assessment as to whether or not the medicine will have therapeutic value for the injury in question. A potentially significant factor in that assessment is whether or not the person who will be taking the medicine is taking any other medicines that may limit the effectiveness of the medicine for which funding is sought. In some cases, the administration of a particular medicine may even be contra-indicated if a different medicine is also being taken.

[20] We accept Mr Castle's submission that the funding decision (should the ACC fund this particular medicine in this individual case?) needs to be informed by a clinical assessment as to what medicines are indicated or contra-indicated, having regard to all of the medicines that a particular individual is taking at any given time.

[21] It is true, as the plaintiff says, that in supplying a list of all medications to the ACC an ACC claimant may thereby effectively be supplying non-injury related health information to the ACC that the ACC would not otherwise have. We give an anonymous example to illustrate the point: assume an individual takes drug A for a chronic condition. The plaintiff suffers personal injury by accident, and in due course is prescribed medicine B for the injury. Medicine B is not fully funded by PHARMAC, and so if it is accepted that it will be of therapeutic value in dealing with the claimant's injury then the ACC will incur the cost of its supply (at least, to the extent that it is not funded by PHARMAC). But if the prescribing treatment provider can be required to supply a complete list of all medicines being taken, the likelihood is that listing medicine A will effectively inform ACC about the other non injury-related condition the claimant suffers from.

[22] The plaintiff says that the ACC has no reason to know about non-injury related conditions or treatments. It is his position that the prescribing treatment provider must be left with the responsibility for ensuring that the mix of medicines that will be administered is appropriate, that nothing is contra-indicated, and that it will be safe to take all of the medicines in combination.

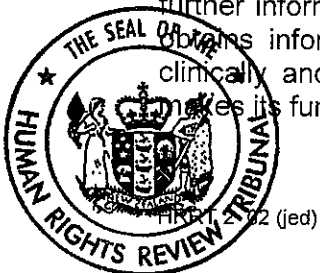


[23] We heard evidence from a pharmaceutical advisor who is employed by the ACC in relation to these issues. She told us that the ACC has developed a policy in order to comply with the IPRCA and related legislation when it comes to deciding whether a particular medicine is reasonably required as an ancillary service to treatment for personal injury. The following six questions are asked:

- (a) Does the medicine for which funding has been applied for come within the definition of 'pharmaceutical' in the IPRCA?
- (b) Has it been prescribed by a treatment provider with statutory prescribing rights?
- (c) What other treatment and pharmacological options are there to assist in achieving the health outcome desired in the treatment of the client's situation?
- (d) ACC also considers evidence-based health care information, the PHARMAC pharmaceutical schedule of pharmaceuticals, and other claim related information;
- (e) Is there some evidence to support the clinical effectiveness of the medicine in relation to the injury?
- (f) What are the likely benefits of the prescribed medicine in assisting achievement of the health outcome, and whether, on balance, they justify the cost of the medicine?

[24] Ultimately ACC's decision is a funding decision: should the ACC pay for the suggested medicine or not? It is a decision that can only be made with the benefit of full information about the claimant's condition, including any other medicines that are being taken and which could affect the outcome. As long as ACC is making that evaluation, then it seems to us clear that asking the prescribing treatment provider for information about other medicines being taken by a claimant is reasonably necessary to achieve the ACC's purpose in making the funding decision.

[25] It is possible that the ACC could leave the clinical assessment to the prescribing health care provider, and that the ACC 1172 form could be limited to simply asking for a certificate (or something to that effect) that the medicine for which funding is sought is not contra-indicated by any other medicines being taken by the claimant. The ACC representative who gave evidence explained, however, that such an arrangement had applied prior to 2005. It was not found to be particularly effective because the information held by the prescribing treatment provider was not always complete, and for other reasons besides. To give some sense of the scale of the problem, the ACC witness estimated that there are something in the vicinity of 20,000 requests every year by claimants to fund medicines for injury-related treatment. In order to meet the demand, the ACC has around 70 or so staff whose task it is (amongst other things) to receive and assess information relevant to applications for injury related funding of medicines. If the first level staff member is uncertain as to what decision should be made in any given case, there is an advisory panel to which the matter can be referred. If necessary, the advisory panel will require (via the relevant ACC case manager) further information to be provided. This process is designed to ensure that the ACC obtains information relevant to specific funding requests, evaluates the information clinically and accordance with the other considerations that are relevant, and then makes its funding decision on a case-by-case basis.



[26] As Ms Pond submitted, while it might be more protective of personal privacy for the ACC to effectively rely on the clinical assessment of the treatment provider, such a regime may not be viable for reasons of cost, efficiency and (we would add) even safety. More importantly, it seems to us that once it has been accepted that the ACC has a lawful purpose in asking for the information then, as long as the request is reasonably necessary for that purpose, the request falls within Rule 1. As noted at the outset, it was not seriously suggested that the ACC does not have a legitimate purpose in asking for information of the kind at issue in this case (nor could it have been). So, to express our conclusions in the language of Rule 1:

- [a] When it is asked to fund medicines as in this case, the ACC has a lawful purpose in collecting non-injury related health information from prescribing treatment providers;
- [b] That purpose is clearly connected with a function or activity of the ACC, namely the activity of making case-by-case funding decisions in response to individual requests to pay for injury-related medicines;
- [c] The collection of information about all medicines that have been prescribed for any given claimant (including medicines prescribed for non-injury related reasons) is reasonably necessary for that purpose.

[27] We do not accept that ACC's request in form ACC 1172 for information about all medications that an ACC claimant is taking at any given point in time (even if non-injury related) gives rise to a breach of Rule 1 of the Code.

[28] The plaintiff's claim is dismissed on that basis.

The question of harm

[29] Given our conclusion that there is no breach of Rule 1, it is not necessary to deal in any detail with the question of whether or not there was an interference with the plaintiff's privacy in terms of s.66(1)(b)(iii) of the Act. Furthermore, because the evidence on this part of the case involved reasonably specific information about the plaintiff, it is not desirable for us to discuss it in any detail.

[30] Nonetheless we make it clear that even if we had found there to have been a breach of Rule 1, the plaintiff did not satisfy us that he has suffered any significant humiliation, loss of dignity, or injury to feelings as a result. We can see that the plaintiff has certain anxieties as to what might become of his non-injury related medical information on the ACC's files, but he candidly accepted that there has been no real embarrassment to him in the fact that his treatment provider has given the ACC information about his non-injury related medicines. That is because the ACC already knew the most significant information that it might have been able to discern from any list of his non-injury related medicines. The plaintiff's main concerns were instead expressed in terms of events that might (possibly) occur in the future. In that way his argument on the issue of harm was essentially speculative.

[31] We can see that the plaintiff has an high level of resistance towards providing any personal health information to the ACC. Even so, in our assessment, his anxiety in respect of the rather remote possibilities about what might happen in the future fails by a narrow margin to cross the threshold of significance that is required by s.66(1)(b)(iii). There is no basis for any finding of interference with privacy.

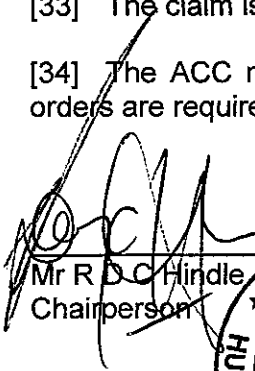


[32] We therefore make it clear that even if we found that Rule 1 had been infringed, we would have dismissed this claim on the basis that there was no interference with the plaintiff's privacy in any event.

Conclusion

[33] The claim is dismissed.

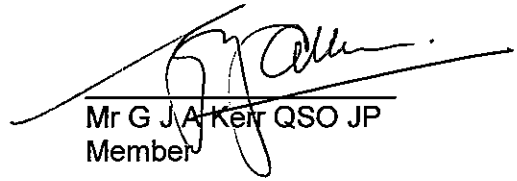
[34] The ACC made it clear at the outset that it would not ask for any costs. No orders are required in that regard.



Mr R D C Hindle
Chairperson



Ms J Grant MNZN
Member



Mr G J A Kerr QSO JP
Member