

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN  
[SQUARE BRACKETS]

**IN THE DISTRICT COURT  
AT WHAKATANE**

**I TE KŌTI-Ā-ROHE  
KI WHAKATĀNE**

**CIV-2023-087-000263  
[2024] NZDC 15646**

BETWEEN

[BENNY COLE]  
Appellant

AND

THE DIRECTOR OF LAND TRANSPORT  
Respondent

Hearing: 24 June 2024

Appearances: Appellant self-represented  
B McConnell for the Respondent

Judgment: 6 July 2024

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**RESERVED JUDGMENT OF JUDGE J P GEOGHEGAN**

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[1] By letter dated 20 October 2023 the director of Land Transport wrote to Mr [Cole] advising that his driver licence had been revoked as he was not considered to be medically fit to drive. The revocation applied to classes 1-6 (inclusive) of the Licence and the Forklift Passenger and Vehicle Recovery Endorsements on his driver licence.

[2] Mr [Cole] now appeals that decision.

### **Background**

[3] The general background to the revocation of the driver licence is set out in an affidavit sworn by Ms Catherine Knight in support of the respondent's opposition to the appeal. Ms Knight is a team leader in the driver safety team for Waka Kotahi and is duly authorised to give evidence on behalf of the director.

[4] On 17 October 2023, Mr [Cole]'s general medical practitioner Dr Emily McNicholas sent an email to Waka Kotahi. That email stated:

Kia ora

My name is Dr Emily McNicholas, I am a GP at Kawerau medical centre.

I have a patient [Benny Cole] DOB [deleted] NHI [deleted]

He continues to drive despite me telling him that he is not medically fit to drive.

He has moderate severity obstructive sleep apnoea and is at risk of daytime sleepiness, he is non-compliant with the CPAP machine (he returned it to the hospital so does not use it). He also has severe dementia (mini-ACE score 20/30).

I have told him multiple times (including in writing) he should not be driving but he doesn't listen to me and continues to drive. He now says I am harassing him. I told him I have no other option but to inform your agency.

Thank you

Dr Emily McNicholas

[5] Doctor McNicholas wrote that email to discharge her obligation under s 18 of the Land Transport Act 1998 which imposes an obligation on health practitioners who have attended or been consulted in respect of a driver licence holder, to give written

notice to the director of Land Transport, as soon as practicable, of any opinion the practitioner has formed that the licence holder's physical condition is such that, in the interests of public safety, they should not be permitted to drive motor vehicles.

[6] Section 18(3) of the Land Transport Act 1998 ("the Act") provides that a health practitioner who gives such a notice in good faith is not liable to civil or professional liability because of any disclosure of personal medical information in that notice.

[7] On 20 October, a senior licencing officer made the decision to revoke Mr [Cole]'s driver licence and sent a letter to him accordingly. That letter explained that Waka Kotahi had received advice from Dr McNicholas and set out the nature of the advice received. Mr [Cole] was advised that he should return his photo driver licence to the director of Land Transport in the enclosed prepaid envelope provided with his endorsement identification card. The letter also stated:

To review this revocation, you must provide Waka Kotahi with a satisfactory medical report from your usual General Practitioner which specifically addresses the effects your medical condition would have on driving. The report must include the results of cognitive testing (e.g. MMSE or equivalent). An Occupational Therapy Driving Assessment and Epworth sleepiness score report may also be required to confirm your medical fitness to drive. Please discuss this with your General Practitioner.

[8] The letter also contained other advice.

[9] A notice of appeal was filed by Mr [Cole] on 16 November 2023. The notice of appeal stipulated that the grounds of the appeal were:

(1) That the director cannot show that the revocation of the licence is justifiable; and/or

(2) Appearing in affidavits filed with the notice.

[10] Mr [Cole]'s affidavit accompanied the notice of appeal stated inter alia that he had intended to request of copy of his clinical records to show that the decision was unjustifiable and that the decision did not correctly apply the medical aspects of fitness to drive guide for health practitioners and did not consider Mr [Cole]'s personal circumstances.

[11] On 17 January 2024 timetabling directions were made in respect of the appeal. Mr [Cole] was consulted in respect of those directions. Those directions required Mr [Cole] to file and serve any further affidavit evidence in support of the appeal by Friday, 1 March, the director to file and serve any affidavit evidence in response by Thursday, 28 March. Mr [Cole] was to file and serve any affidavits in reply by Friday, 19 April. The directions also required Mr [Cole] to file and serve any written submissions in support of the appeal no later than 10 working days prior to the hearing and the director to file and serve written submissions in opposition of the appeal no later than five working days prior to the hearing.

[12] Despite these directions, Mr [Cole] filed no further affidavit evidence but on 12 June filed a number of documents presumably in support of his appeal. Those documents included a “commentary” in which Mr [Cole] made the following comments:

- (a) That he was uncertain as to the identity of Dr McNicholas.
- (b) That he had spoken to Dr McNicholas on two occasions by phone and that on the first of those occasions she advised Mr [Cole] that she was unable to process his application for an annual medical assessment as required by Waka Kotahi with reference to his commercial class licences.
- (c) Sometime later he had been asked to attend an appointment at the Kawerau Medical Centre and that when he attended that appointment (no date was provided) he was informed that he needed to “do a test something to do with your licence” by someone with “unknown qualifications” and that such a test was conducted without his hearing aids or reading glasses.
- (d) That the second call received from Dr McNicholas was a call in which she stated to him that he had dementia and should not be driving and that she would report him to the police.

- (e) That Mr [Cole] had received no mail or consultation from Dr McNicholas prior to, during or after her determination that he had dementia and that “technically” he considered that to be an “integrity issue” for which Dr McNicholas needed to take “full responsibility”.
- (f) Mr [Cole] referred to the fact that Dr McNicholas’ actions had affected access to food, medical appointments and the servicing of payments, that he had been waiting 10 years for a hip replacement, that he and his son were living in an RV since February 2023 and both had mobility issues and that pain, inflammation and discomfort had been caused to his lower back, hip, knees and legs due to excessive walking and movement, including a two hour walk to get groceries.

[13] Another document provided in Mr [Cole]’s bundle of documents appears to be a mini-Ace test dated 12 October 2023, undertaken by a health care assistant which recorded Mr [Cole]’s score as 20/30. Presumably this was the document which Dr McNicholas had referred to in her email.

[14] Mr [Cole] did acknowledge in the documents he filed that he and his son had been enrolled at the Kawerau Medical Centre since approximately 2017.

[15] It was clear in speaking to Mr [Cole] that he took issue with the information provided to Waka Kotahi by Dr McNicholas and that he had expected Dr McNicholas to be present giving evidence. He referred to the dementia test as being “a test originated with the eugenic movement to separate(sic) the poorly educated lower classes of society” and that he considered it a “sham as a test for general medical use”.

[16] In her affidavit, Ms Knight had annexed various correspondence between the lawyers for the Director of Land Transport and Mr [Cole]. It also annexed a letter from Mr [Cole] dated 24 April to the Director’s lawyers in which he referred to various issues which were essentially repeated in the documents filed by Mr [Cole] which I have just referred to. It is clear that he takes considerable issue with Dr McNicholas’ assertion of his medical condition and her actions which he described as “a deliberate professional assault on [his] intellectual, mental health and physical well-being in

order to achieve a medical outcome, using her professional status, to support Waka Kotahi requirements, ignoring any consideration for the patient in the process”. He referred to Dr McNicholas’ actions as those of a “lying narcissist”.

[17] Ms Knight’s affidavit stated that in 2006 NZTA imposed a medical condition on Mr [Cole]’s commercial class driver licence (classes 2-5 and passenger or “P” endorsement and vehicle recovery or “V” endorsement) that NZTA must receive a satisfactory annual medical report advising that Mr [Cole]’s history of myocardial infarctions is under control and that he was compliant with medication and/or treatment. A copy of that notice was annexed to Ms Knight’s affidavit. Ms Knight deposed that NZTA last received that annual medical report confirming Mr [Cole] was fit to drive in November 2022. That report was from Dr McNicholas. A copy of the report dated 4 November 2022 was annexed to Ms Knight’s affidavit.

[18] Ms Knight explained in her affidavit that although Dr McNicholas’ email of 17 October 2023 did not mention Mr [Cole]’s myocardial infarction or confirm that Dr McNicholas knew Mr [Cole]’s medical history, NZTA was prepared to accept the report because the previous year’s medical report had been issued by the same medical practitioner, that it was therefore reasonable to suppose that Dr McNicholas had access to Kawerau Medical Centre’s medical records about Mr [Cole].

## **Analysis**

[19] Section 106 of the Act confers a general right of appeal. The principles applicable to such appeals were summarised by Judge Kellar in *Brown v NZ Transport Agency*.<sup>1</sup> In short, it is for this court to reach its own view of the evidence and of the merits of the case.

[20] For the Director, Mr McConnell submitted that in the context of this appeal the question for the court is whether it was appropriate to revoke Mr [Cole]’s driver licence. If so, the appeal should be dismissed and if not, the appeal should be allowed. There is however an onus on Mr [Cole] as the appellant to satisfy the court the decision under appeal should be different.

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<sup>1</sup> *Brown v NZ Transport Agency* DC Dunedin CIV-2010-012-808, 14 April 2011 at [32].

[21] Having considered the evidence I am not satisfied that the outcome should be different on appeal. There is clear evidence that the director acted on a notification from a health practitioner filed pursuant to s 18 of the Act. The advice received was clear. Given that a previous medical certificate had been provided from the same doctor in November 2022 the Director could have had reasonable assurance that Dr McNicholas was familiar with Mr [Cole] and had good grounds for the medical opinion being expressed. Despite Mr [Cole]'s desire that I do so, there is no proper basis for me to go behind the advice received by the Director and to have come to a different conclusion. I say this, despite the fact that Mr [Cole] was able to speak for himself very eloquently and fluently and certainly showed no signs of severe dementia. That observation of Mr [Cole] however is the observation of a judge and not a medical practitioner. As submitted by Mr McConnell, Mr [Cole]'s affidavit did not explain why he contended that the director's decision was unjustifiable and nor did it explain his contention that the decision did not "correctly apply" the medical aspects of fitness to drive guidelines which are guidelines issued by Waka Kotahi or medical practitioners.

[22] I agree with Mr McConnell's submission that Mr [Cole] has failed to identify any appealable error in the decision to revoke his licence.

[23] While I have some sympathy for Mr [Cole]'s position, particularly given his advice to me that he cares for his dependent son, and that the revocation of his licence poses hardship upon him, that is not relevant to the issues to be considered in this appeal.

[24] Further, as was made clear in Mr McConnell's submissions and as I relayed directly to Mr [Cole] during the course of the hearing, it remains open to Mr [Cole] to provide satisfactory medical evidence to the director confirming that he is medically fit to drive. Clear advice regarding this is provided in Ms Knight's affidavit. I made it clear to Mr [Cole] that he was perfectly within his rights to contest the medical opinion of Dr McNicholas but that would inevitably require attending another medical practitioner and preferably someone with expertise in the areas identified in Dr McNicholas email for the director to come to a different conclusion in respect of Mr [Cole]'s ability to drive.

[25] For the reasons given Mr [Cole]'s appeal is dismissed. I direct that a copy of this judgment is to be sent to Mr [Cole] at his email address [deleted].

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Judge JP Geoghegan

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 06/07/2024