

How **mental health** can affect RMA sentencing

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Anthony Rogers & Stuart Ryan

The recent District Court decision in *Auckland Council v M* (CRI No. CIV-2019-004-011926) on 9 April highlights the potential relevance of mental health factors in Resource Management Act (RMA) sentencing decisions and regulatory offences more generally.

M, in his 50s, had not complied with an abatement notice requiring him to remove cars stored at his residential property in Auckland.

According to the summary of facts, there were between 30 and 50 cars stored at the property and there was a prior history with the council involving another property with a similar number of vehicles, extending over 10 years.

M wrote to the council requesting further time to comply with the abatement notice following the death of his father and other personal circumstances. The council charged M with breaching rules in its District Plan and for breach of the abatement notice.

Strict liability

The offences, which attracted strict liability, carried potential maximum penalties of imprisonment of up to two years and fines of up to \$300,000 per offence. M pleaded guilty to the offending at the initial sentencing hearing. The council sought a starting point of \$70,000 (for the two offences) and an enforcement order limiting him to keeping not more than five 'hobby' vehicles at the property.

M applied for a discharge without conviction under s 106 of the Sentencing Act 2002. He filed extensive affidavit evidence as to the effects of a conviction on him. This included impact on travel overseas, with expert evidence from lawyers practising in the UK, Germany, Malaysia, Canada and the United States.

M relied on the decision of the Court of Appeal in *R v Edwards* which provides that a court will need to be satisfied that in the relevant jurisdiction the conviction must be disclosed, that the applicant is *prima facie* inadmissible



and that there is no alternative entry process available or that, if there is, such process is unreasonably difficult and uncertain in all the circumstances.

If the court is satisfied of these elements, then the sentencing court will need to be further satisfied that the offence is not so serious that it would be



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wrong to allow the applicant to present himself or herself to foreign immigration authorities without disclosing it.

M also produced expert psychiatric and psychological evidence, including from an Auckland-based psychiatrist, a psychologist and an English neuropsychiatrist, Dr Peter Fenwick.

Hoarding disorder

The evidence referred to M as having a hoarding disorder, depression exacerbated by grief from the death of his father and sleep apnoea.

Sleep apnoea was referred to as a serious sleep disorder in which the breathing repeatedly stops and starts during sleep, causing the person to wake. Symptoms in this case included feeling tired even after a full night's sleep. M attended a sleep laboratory to monitor his sleep over two nights, which confirmed the diagnosis. He was recommended to use a continuous positive airway pressure (CPAP) machine as treatment.

The court received submissions on the relevance of mental health factors in sentencing. Dr Fenwick deposed that the severe sleep disorder (with which M had been diagnosed) would have led to a disorder of brain function that will have impaired his executive function.

The executive function is responsible for problem-solving, flexibility, decision-making and initiating appropriate responses and actions. Dr Fenwick deposed that this was relevant to M having difficulty complying with the abatement notice.

Subsequent to his diagnosis, M had been supplied with a CPAP device which improves the effects of sleep apnoea by keeping the airway open during the night. He had seen a psychologist who deposed that M's adjustment disorder was now in remission.

M through his counsel had offered to pay the council's agreed costs, undertake voluntary community service (of up to 100 hours) and agreed to an enforcement order (akin to an injunction) which required him to limit his vehicles on the property to not more than one 'hobby' vehicle, in addition to personal vehicles. The sentencing was adjourned for M to receive treatment, to pay the council and to undertake

community service.

Discharge ordered

Updated psychiatric and psychological evidence was filed in court by way of affidavits. In discharging M without conviction, the Chief Environment Court Judge, David Kirkpatrick, said the consequences of convicting M would be out of all proportion to the gravity of his offending and the conditions described by the medical experts would likely be exacerbated by the stress of convictions.

Judge Kirkpatrick made the order for two main reasons. The first was that M had sought and taken high-level advice to deal with the problems he had and the judge commended M for his efforts in this respect.

The second was that M had faced the environmental matters that were the focus of the abatement notice and the subsequent charges. The enforcement order M had consented to was stricter than initially proposed and he also covered the council's costs of investigation. Judge Kirkpatrick considered this demonstrated a sense of accountability.

This decision is not the first time the subject of mental health has been brought up in an RMA sentencing.

In 2018, Lau appealed his sentence of imprisonment for numerous breaches of the RMA, which involved an ongoing flouting of various council rules. One of the grounds of appeal was that the court had not allowed a discount for Lau's mental health impairment (ADHD) as the judge at first instance was sceptical about the impact of ADHD on the offences.

The High Court judge allowed a discount of 5% on account of Lau's ADHD diagnosis because there was no evidence suggesting ADHD was directly causative of the offending but nevertheless the presence of ADHD provided a partial explanation. The court also considered Lau had found prison more difficult due to the diagnosis.

These decisions highlight the relevance of mental health factors in the sentencing process for regulatory matters, along with the importance of ensuring there is cogent medical evidence in support. ■

Auckland barristers Anthony Rogers and Stuart Ryan acted for M at sentencing ■

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