IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 163 **ACR 134/19**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION UNDER SECTION 162(1) OF THE ACT FOR LEAVE TO APPEAL TO THE HIGH COURT
BETWEEN	THOMAS HARVEY Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Submissions: M Darke for the Appellant
B Johns and T Morrison for the Respondent

Hearing: On the papers

Judgment: 22 August 2022

JUDGMENT OF JUDGE P R SPILLER
[Leave to appeal]

Introduction

[1] This is an application for leave to appeal against a judgment of Her Honour Judge Mathers, delivered on 29 March 2022.[1] At issue in the appeal was whether the Corporation's decision of 10 October 2018, declining cover for Mr Harvey's left-sided keratoconus,[2] was correct. The Court dismissed the appeal, for the reasons outlined below.

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1 *Harvey v Accident Compensation Corporation* [2022] NZACC 51.

2 A condition in which the clear tissue on the front of the eye (cornea) bulges outward (also called conical cornea).

Background

[2] Mr Harvey has cover with the Corporation for cerebral palsy.

[3] On 22 June 2010 an eye specialist at Auckland Hospital diagnosed Mr Harvey with a left eye keratoconus, noting he had "longstanding double vision in the left eye".

[4] On 5 July 2010, Mr Harvey saw Mr Sacks, Optometrist, who, in his report of 12 July 2010, said:

> Although the left eye does have some possible signs of hydrops and mild scarring with definite signs of irregularity/keratoconus - pellucid marginal degeneration, it is otherwise healthy. The right eye is healthy with size of form fruste keratoconus/marginal pellucid degeneration which fortunately is not having much, if any detrimental effect on his right eye vision. ... I have mentioned to Thomas the importance of trying as far as possible to avoid eye rubbing so as not to aggravate or cause a progression of the right eye keratoconus.

[5] Mr Harvey considered the option of wearing a contact lens but, because of his lack of co-ordination, he decided to undergo a corneal transplant (also known as a penetrating keratoplasty) on his left eye. On 19 October 2011, Mr Harvey underwent that treatment. The subsequent clinical letters recorded a good outcome from the transplant.

[6] Around March 2016, an ACC claim was lodged for a treatment injury, but it was declined. On 16 March 2016, Mr Harvey's GP, Dr Hefford, noted:

> ACC Reviewer declined cover for/Review withdrawn pending further info in future. [ABR eye rubbing and dental pain / feels they should not have been assessed as treatment injury - if reviewed they should be covered under consequential gradual process - not treatment related. ... In eye / keratoconus genetic, left side stuffed and rels to the more severe CP on left and therefore clumsy rubbing of eye eventually resulting in corneal graft on left. ACC eye specialist opinion was keratoconus is not rel to rubbing. There is no other information relating to this application to ACC.

[7] On 30 November 2016, Dr Hefford records that:

> Wants to appeal as eye rubbing can be associated with keratoconus [dual causality along with genetic + develop mental problems causing eye rubbing]. [H has an opinion from specialist]

[8] Dr Hefford lodged a claim with the Corporation for cover for keratoconus of left side consequent to eye rubbing. This was a consequential gradual process claim with the injury described as "clumsy eye rubbing by ataxic limb caused corneal changes. Consequent injury".

[9] On 21 December 2016, the Corporation obtained advice from Dr Wilson, who proposed that cover should be declined because keratoconus may have been aggravated by the client's eye rubbing, but it did not cause the condition. Dr Wilson noted:

> BMA/BAP summary of relevant clinical evidence
>
> The cause of keratoconus is currently unknown. It is thought to be related to a complex interplay of factors (including environmental) in genetically predisposed patients. It was previously classified as a degenerative disorder but there is now evidence that inflammatory mediators also play a role.
>
> It is a condition of progressive corneal change characterised by thinning and weakening of the cornea that leads to the cone like appearance of the cornea, scaring [sic] and visual loss.
>
> The link between keratoconus and eye rubbing is discussed in the medical literature however eye rubbing alone in itself does not cause keratoconus. This is also discussed in the article supplied by the client.
>
> Eye rubbing is associated with atopy (allergies).
>
> The medical literature does not support any connections between "cerebral palsy, hypoxic brain injury, depression" and keratoconus.
>
> BMA/BAP opinion and recommendation(s)
>
> The client's eye rubbing is not a work related gradual process and it has occurred over too long a period to be considered a series of events. It is not a single episode PICBA (personal injury caused by accident).

[10] On 16 February 2017, the Corporation declined cover on the basis that it could not provide cover for a condition that developed gradually over a period of time unless it was caused by something at work.

[11] Mr Harvey applied for a review of the Corporation's decision. The Reviewer, after considering various articles and reports, said that he was unable to determine whether cover should or should not be granted. The Reviewer directed the Corporation to obtain a medical opinion from a suitably qualified consultant medical

practitioner who specialised in eyes to advise whether keratoconus in Mr Harvey's case arose from eye rubbing.

[12] On 30 April 2018, the Corporation's medical advisor, Dr Sprott, provided a report responding to this issue. He noted:

> The wording in article (2) is that the disease has "an underlying genetic predisposition" that is "influenced" by external factors. ... This is a genetically determined factor in response to the environmental factors eg eye rubbing.
>
> The evidence is that keratoconus is not caused by a single episode, or a short series of episodes, of eye rubbing. The role of eye rubbing is regular exposure over a longer period of time. ... On the evidence available I am unaware of any workplace exposures that would increase the risk of the client developing keratoconus. Thus I do not think that the criteria for a work-related gradual process injury are met.
>
> Eye rubbing may be a contributing factor to the development of keratoconus. But the client does not have a history to establish a causal link, a workplace exposure and the keratoconus. Thus I think the evidence is that the client's keratoconus has developed independently of gradual process.

[13] On 8 May 2018, the Corporation's technical specialist, Linda Baker, noted:

> As stated, a genetic predisposition is considered to be the first factor in the development of such a condition so applying the "but for" test, the covered injury or injuries cannot be plausibly linked to this condition with reference to the available medical evidence and research at this time.

[14] On 24 July 2018, Dr Susan Ormonde, Ophthalmologist, reported as follows:

> 1. It is recognised that eye rubbing can cause keratoconus to progress. This is noted in patients who have significant allergic eye disease and rub their eyes a lot as well as patients with Down syndrome who tend to rub their eyes. It is believed that you need a genetic predisposition for eye rubbing to actually cause keratoconus to progress. The vast majority of people can rub their eyes without the development of keratoconus. I think that it would be reasonable to assume that, if he has been rubbing his eye on the left, this has helped the keratoconus to progress.
>
> 2. I cannot comment particularly on whether the manner of eye rubbing has caused the development of keratoconus. He does have keratoconus in the right eye albeit much milder. I am not aware of any studies that have looked into the manner of eye rubbing in the causation of keratoconus. It is certainly possible that due to his other medical conditions that he may rub the left eye more vigorously (and with less control), but I can't comment with certainty whether this makes any difference.

> 3. Most keratoconus patients show asymmetry between the degree of keratoconus in both eyes. I do not think therefore that the asymmetrical development in this case offers any explanation of causation.
>
> 4. Genetic factors definitely predispose in the development of keratoconus and I note that his grandfather had pellucid marginal degeneration (a related ectatic condition).
>
> I think it is therefore reasonable to assume that Thomas has a genetic predisposition.

[15] On 8 August 2018, Dr Ormonde provided a further report in which she noted as follows:

> Mr Harvey does have a genetic predisposition in that his grandfather had pellucid marginal degeneration which is a related condition to keratoconus. This predisposition can cause the condition. In other words, there does not need to be any other influencing factors for keratoconus to develop. On the flip side of that, it is perfectly possible for someone to have family members with keratoconus but they never go on to develop keratoconus themselves.
>
> Eye rubbing is a recognised cause of progression of keratoconus. By this we mean that the cornea continues to get progressively thin and pointy. This progression can happen in anybody with keratoconus naturally, but we know that it is encouraged by eye rubbing.
>
> It is not possible to say with certainty that the manner of eye rubbing in this case caused progression of the condition. The reason that eye rubbing causes progression of keratoconus is thought to be due to the mechanical stresses on the cornea during the rubbing action. It is certainly plausible therefore that the more vigorous the rubbing action the more likely it is to cause mechanical change in the cornea resulting in progression. It is therefore equally plausible to conclude that it is possible that the manner of rubbing in the left eye due to the cerebral palsy condition may have contributed to progression of keratoconus more than "normal" rubbing but no-one will ever be able to say with exact certainty.

[16] In response, Dr Sprott advised:

> I have carefully reviewed the two Ophthalmologists reports by Dr Sue Ormonde.
>
> Dr Ormond [sic] notes that the customer has a genetic predisposition for keratoconus through his grandfather, who had pellucid marginal degeneration which is a related condition.
>
> The customer has bilateral keratoconus, more severe in the left eye.
>
> Keratoconus is a progressive condition of the cornea in the absence of any other factors.

> Dr Ormond [sic] noted that eye rubbing is a recognised cause of progression of keratoconus - ie it may accelerate the progression of this condition.
>
> But there is the need for the underlying genetic predisposition for keratoconus for eye rubbing to progress it.
>
> I agree with Dr S Ormond's [sic] opinion that the balance of the current evidence is that eye rubbing aggravates keratoconus but that the cause is the underlying genetic predisposition.
>
> Thus my opinion is that the index event is not cause of the keratoconus and there are no identified environmental/or work related causative factors.

[17] On 10 October 2018, the Corporation issued a new decision declining cover on the basis that the report received from Dr Ormonde supported its original decision.

[18] On 20 December 2018, Mr Harvey applied for a review of the Corporation's decision. He provided an article by Professor McGhee et al, "Contemporary Treatment Paradigms in Keratoconus" (2015), in support of his original application for review. The Reviewer requested the Corporation to provide further information, in particular, because his interpretation of the McGhee report was contrary to the interpretation of the Corporation's medical advisor to the extent that there was a causal relationship between micro-trauma and the development of keratoconus.

[19] At the review hearing on 3 May 2019, the Reviewer accepted the evidence of Mr Harvey's mother regarding the nature of his eye rubbing from around 2006, and acknowledged that she firmly believes his condition was caused by the rubbing. However, the Reviewer dismissed the review on the basis that the evidence showed that the eye rubbing may have aggravated Mr Harvey's condition, but it did not cause it. Mr Harvey appealed to the District Court.

[20] On 30 July 2020, Dr Ormonde provided a further report in which she addressed the progressive nature of keratoconus irrespective of eye rubbing:

> In normal keratoconic cases it is perfectly possible for the keratoconus to progress without any eye rubbing at all, although there is clear evidence to show that eye rubbing will exacerbate progression.
>
> As I mentioned in my previous correspondence, I do not think it will be possible to ascertain whether it was eye rubbing or genetic predisposition or a combination of both that has caused the progression of keratoconus in this patient. It is entirely possible that his cornea could have ended up the way it is

> without any eye rubbing at all but it must be acknowledged that it has likely been contributed to by the eye rubbing.

[21] On 20 May 2021, Mr Harvey's appeal was heard by Judge Mathers. In the course of Mr Darke's submissions for Mr Harvey, it was noted that in 2003, there was no evidence of keratoconus, that between 2003 and 2010, keratoconus developed to such an extent that Mr Harvey needed to have an operation, and that during that period of time, Mr Harvey vigorously rubbed his eye. At the conclusion of the hearing, Her Honour reserved her decision.

[22] On 3 August 2021, Judge Mathers issued a Minute noting that:

> [1] In the course of preparing my decision, it has become clear to me that I would be very much assisted by an actual report from Professor McGhee. I note the criticism of ACC in saying that no medical practitioner has presented the McGhee report.
>
> [2] In ACC's submissions I set out the first two paragraphs summarising the issue, which again I have found helpful:
>
> > 1. The issue in this appeal is whether the Accident Compensation Corporation (ACC) was correct in its decision of 10 October 2018 to decline Mr Harvey cover for his left eye condition, keratoconus.
> >
> > 2. Mr Harvey says that keratoconus was caused by him rubbing his eye clumsily due to his ataxic left arm (as a result of his covered cerebral palsy injury); and therefore he suffered a personal injury by accident. ACC says, however, that while rubbing the eye may have aggravated and/or expedited the condition, it did not cause it. In essence, ACC says the Keratoconus was more likely than not due to an underlying genetic predisposition, rather than eye rubbing (which was only an aggravating feature).

[23] On 31 October 2021, Professor McGhee provided a report, not having examined Mr Harvey, and commented as follows:

> I have detailed the basis of my opinion hereafter, but in essence I entirely agree with the position postulated by ACC: "that while rubbing the eye may have aggravated and/or expedited the condition, it did not cause it. In essence, ACC says the keratoconus was more likely than not due to an underlying genetic predisposition, rather than eye rubbing (which was only an aggravating feature)". …
>
> Although clinical studies show that keratoconus is typically a bilateral disease, due to eye rubbing or other environmental factors, the severity of disease may be asymmetric between the eyes, or affected individuals present with apparently unilateral keratoconus. It is therefore possible that Mr Harvey's eye rubbing may have exacerbated, but not caused, his keratoconus, leading to the

> asymmetry of his eye disease. Indeed, among individuals with a history intense eye rubbing, it has been suggested that more severe forms of keratoconus occur on the eye on the same side as the dominant hand. It has also been postulated that individuals affected with keratoconus may tend to rub their eyes with the knuckle or finger-tip which exerts pressure over a concentrated area compared to a non-keratoconic patient affected with allergies. Furthermore, people with keratoconus may rub their eyes frequently and for longer compared to non--keratoconic patients who typically rub their eyes for <15 seconds. However, currently there are limited, well-constructed, studies to determine the magnitude of effect of eye rubbing on the progress of keratoconus.
>
> Laboratory studies have shown that mechanical micro-trauma from eye rubbing may result in alterations at a molecular level that may affect the underlying keratoconus as noted by Mr Harvey's advocates. Since inflammatory mediators may be involved in the cellular remodelling and degradation observed in keratoconus, these inflammatory processes can be aggravated by eye rubbing. Even light experimental eye rubbing among non-keratoconics has been shown to result in an upregulation of EGF, IL-8 and loss of cells of the corneal stroma (keratocytes). Additionally, moderate experimental eye rubbing for 60 seconds, even among non-keratoconic patients displayed an increase in inflammatory mediators: MMP-13, IL-6 and TNF-a in the tear film and would be further exacerbated in patients with keratoconus. …
>
> Finally, in relation to the role of eye-rubbing and keratoconus, the effect and magnitude of effect of eye-rubbing per se is yet to be unequivocally established, indeed, a major review of the topic in 202/15 concludes: "Eye rubbing showed consistent association with keratoconus. However, the current evidence is limited to only a small number of case-control studies which present as heterogeneous and of sub-optimal methodological quality. Additionally, the cause-effect temporal relationship cannot be determined. Further studies are needed to address this intricate relationship of eye rubbing and its induction, ongoing progression, and severity of keratoconus".

[24] On 14 December 2021, Mr Darke, for Mr Harvey, submitted *inter alia* in reply:

> (3) It is useful to refer to the evidence of the appellant's mother at review that she would observe the appellant rubbing his left eye in a forceful, digging, grinding manner. Her evidence was accepted by the reviewer as credible in its entirety. This describes considerably greater force still, and in turn lends further credence to the hypothesis that the eye rubbing. which was abnormal as a result of the effects of the cerebral palsy on the left upper limbs, resulted in further damage to the keratoconic left cornea.
>
> (4) While it is true that Prof McGee says that he agrees with the position taken by ACC in this matter, it is important to bear in mind the relevant comments of the District Court in the case of *Beaumont* (07/139) where the Court states at para 40:
>
>> It is often difficult to align the specialist conclusions with the test for a causal nexus between a covered injury and the condition for which entitlements are sought. Doctors employ descriptions such as aggravation and acceleration of a pre-existing condition, terms

> that could be taken to describe merely the development of pain or could describe further accident related damage to an existing condition.
>
> (5) The essential question seems to be: does the way by which eye rubbing often causes a pre-existing keratoconus to worsen amount to the creation of new damage to the cornea, or does it just bring to light new or worse symptoms of the already existing corneal damage?
>
> (6) Taken as a whole, Professor McGhee's opinion corroborates the view that eye rubbing causes keratoconus by effecting new physical damage to the patient's cornea. He says that inflammatory markers may result in cellular remodelling and degradation in keratoconus and that eye rubbing has been shown by relevant scientific studies to aggravate these inflammatory processes. This is a description of a process involving cellular changes which result in significant distortion of the cornea, and consequent visual problems.
>
> (7) The reason that the courts in this jurisdiction have held that mere aggravation of an underlying condition does not give rise to cover and entitlements is that sections 20 and 26 of the Act extend cover to physical injuries. As the High Court in *Johnston* [2010] NZAR 673 at [27] noted, if it was enough that an accident brought to the fore previously hidden or absent symptoms without causing actual physical damage, the effect would be to bypass the statutory requirement for cover of physical injuries.
>
> (8) Here, however, the evidence of Professor McGhee makes clear that the underlying causal factor in. keratoconus is an inherited genetic predisposition, but that external factors, such as vigorous eye rubbing, exert pressure on the cornea. causing further damage and deterioration of vision. That is what happened in this case, to the extent that the appellant needed to receive a corneal transplant.
>
> (9) The total lay medical and statistical evidence (*Ambros*) in this case, including the evidence of the appellant's mother, establishes on the balance of probabilities that the keratoconus was caused by a range of factors, including abnormal eye rubbing: That abnormal eye rubbing was a gradual process, in tum consequent on the cerebral palsy for which the appellant has cover as contemplated by s 20(2(g)) of the Act under which the claim was made.

[25] On 29 March 2022, Judge Mathers delivered her decision dismissing the appeal. Her Honour noted that she had not received any further submissions from counsel for the Corporation which were due to be filed (if it wished to respond) by 21 December 2021. On 30 March 2022, Judge Mathers received an email from the Registry enclosing an email from counsel for the Corporation advising that supplementary submissions had in fact been filed on 21 December 2021. In an addendum to Her Honour's judgment, she noted that, unfortunately, the Corporation's submissions were never forwarded to her. Her Honour added, for clarity and for the sake of completeness, that, if she had received those submissions, they would not have altered her final decision to dismiss the appeal.

Relevant law

[26] Section 162(1) of the Accident Compensation Act 2001 (the Act) provides:

> A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District Court, appeal to the High Court.

[27] In *O'Neill*,[3] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:
>
> (i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment …;
>
> (ii) The contended point of law must be *"capable of bona fide and serious argument"* to qualify for the grant of leave …;
>
> (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed …;
>
> (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law …;
>
> (v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision …;
>
> (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law … .
>
> [25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law … .

[28] Section 20 of the Act sets out the circumstances in which a person will have cover for an injury. Those circumstances include whether the person has suffered a personal injury that is described in any of the paragraphs in section 20(2). The applicable section in this case is section 20(2)(g) which provides cover for a personal injury caused by a "gradual process, disease, or infection consequential on personal injury suffered by the person for which the person has cover".

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3 *O'Neill v Accident Compensation Corporation* [2008] NZACC 250, at [24].

[29] In *Allenby v H*,[4] Elias CJ in the Supreme Court stated:

> [24] While there is some awkwardness in the references both to the "personal injury" for which cover is provided by s 20(2)(f) and (g) and the causative "gradual process ... that is personal injury caused by medical misadventure suffered by the person" or the causative "gradual process ... consequential on personal injury for which the person has cover", the meaning is clearly intended to be expansive in relation to the consequences of the original personal injury, whether caused by medical misadventure or in some other way that is covered under the Act. If linked by "gradual process" or "disease" or "infection" to the original personal injury, subsequent personal injury is covered.
>
> [25] Since I accept that impregnation is physical injury, I also consider that the physical consequences brought about by the process of pregnancy, which are themselves physical injuries within the definition of "personal injury" (for the reasons given at [20]), are within the cover provided by s 20(2)(f) and (g). The scheme of s 20 is that impregnation as a result of failed sterilisation is a physical injury covered by s 20(2)(b) and the consequential physiological changes through pregnancy are covered as personal injury "caused by a gradual process that is personal injury caused by medical misadventure" under s 20(2)(f) or "consequential on personal injury ... for which the person has cover" under s 20(2)(g).

[30] In *Beaumont*,[5] Ongley DCJ stated:

> [40] It is often difficult to align the specialist conclusions with the test for a causal nexus between a covered injury and the condition for which entitlements are sought. Doctors employ descriptions such as aggravation and acceleration of a pre-existing condition, terms that could be taken to describe merely the development of pain or could describe further accident related damage to an existing condition. Mr Grant's opinion that "*the injury event did cause a significant part of the degeneration in the medial compartment of Mrs Beaumont's right knee by itself*" is an injury description. He went on to say he would be confident "*that the injury did accelerate some very minor pre-existing degeneration*". In my view, that is a description that identifies a causal nexus based on accident related injury rather than mere aggravation or acceleration. Mr Fong wrote "*I am of the opinion that her right knee symptoms which she has suffered from since August of last year is a direct consequence of the injury dated 06.08.05*". That is also an injury description. Both are clearly linked to the need for surgery.

[31] In *Ambros*,[6] the Court of Appeal envisaged the Court taking, if necessary, a robust and generous view of the evidence as to causation:

> [65] The requirement for a plaintiff to prove causation on the balance of probabilities means that the plaintiff must show that the probability of causation is higher than 50 per cent. However, courts do not usually undertake accurate probabilistic calculations when evaluating whether causation has been proved.

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4 *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425 (SC).

5 *Beaumont v Accident Compensation Corporation* [2007] NZACC 139.

6 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

> They proceed on their general impression of the sufficiency of the lay and scientific evidence to meet the required standard of proof ... The legal method looks to the presumptive inference which a sequence of events inspires in a person of common sense …
>
> [67] The different methodology used under the legal method means that a court's assessment of causation can differ from the expert opinion and courts can infer causation in circumstances where the experts cannot. This has allowed the Court to draw robust inferences of causation in some cases of uncertainty -- see para [32] above. However, a court may only draw a valid inference based on facts supported by the evidence and not on the basis of supposition or conjecture … Judges should ground their assessment of causation on their view of what constitutes the normal course of events, which should be based on the whole of the lay, medical, and statistical evidence, and not be limited to expert witness evidence …

[32] In *J*,[7] Kos P stated:

> [52] In *Accident Compensation Corporation v Mitchell* Richardson J observed that the proper approach to construing the Act was that it be given a "generous and unniggardly" construction.[8] We endorsed that approach in *Harrild v Director of Proceedings*.[9] The importance of this principle lies where more than one available interpretation exists. If the Act is unavoidably niggardly or ungenerous, that is that. But if a reasonable choice presents, the more generous path should be taken.

[33] In *Thompson*,[10] Collins J stated:

> [40] There is no universal rule concerning the extent to which a court should provide reasons for its decision. It is essential, however, that in order to ensure justice is achieved between the parties, Judges hearing ACC appeals must do what they can to ensure the parties can understand why an appeal has either been allowed or dismissed. The extent to which reasons are required depends on the context.
>
> …
>
> [42] This was a case which required Judge Beattie to resolve the conflicts in the evidence in a reasoned way. He was required to consider all of the relevant evidence and then deliver a judgment which explained the reasons for his conclusions.
>
> [43] Judge Beattie did not do this. It is apparent Judge Beattie adopted Dr Wallis's opinion and did not explain why he favoured that opinion over the expert opinion of other experts, such as Dr Finnis, Dr Brunton, Dr Luke and Dr Newburn.

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7 *J v Accident Compensation Corporation* [2017] NZCA 441, [2017] 3 NZLR 804.
8 *Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436 (CA) at 438.
9 *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA).
10 *Thompson v Accident Compensation Corporation* [2015] NZHC 1640, [2015] NZAR 1163.

> [44] Ultimately, Judge Beattie may have been right to prefer the evidence of Dr Wallis over evidence which conflicted with his opinion. It is, however, impossible to ascertain from Judge Beattie's judgment why he reached his conclusions.

The Court's judgment of 29 March 2022

[34] In Judge Mathers' "Discussion and Decision" section of her judgment, Her Honour began by noting that she had called for a report by Professor McGhee. Her Honour commented that:

> [40] It is well to repeat that Mr Harvey says that keratoconus was caused by him rubbing his eye clumsily due to his ataxic left arm, which resulted from his covered cerebral palsy injury and therefore Mr Harvey says that he suffered a personal injury by accident. ACC of course says that the keratoconus was more likely due to an underlying genetic predisposition.

[35] Judge Mathers then noted the issue put to Professor McGhee and his agreement in essence with the position postulated by the Corporation. Judge Mathers then referred to the submissions of Mr Darke in the following terms:

> [42] ACC did not find it necessary to file any more submissions but Mr Darke for the appellant in thoughtful and helpful submissions did so. Mr Darke in his supplementary submissions submitted that the essential question seems to be: "Does the way by which eye rubbing often cause a pre-existing keratoconus to worsen amount to the creation of new damage to the cornea, or does it just bring to light new or worse symptoms of the already existing corneal damage?". Mr Darke then refers me to a decision of Simon France J in *Johnston v ACC*. I have also been referred to the *Allenby* decision, which I have already referred to, a decision of the Supreme Court and also to the proposition that the way in which a Judge approaches possibility can be rather different to the way in which medical experts do so.

[36] Judge Mathers then concluded her judgment as follows:

> [43] Taking into account all these factors and the earlier medical reports and Professor McGhee's report I have come to the view that there is no causal connection between the keratoconus and the eye-rubbing as a result of Mr Harvey's covered cerebral palsy.
>
> [44] In all of these cases there must be an accident and in the *Allenby* decision the accident was held to be the active impregnation and the continuing pregnancy was as a result of the covered injury. This is a difficult area of the law and can be contentious but in my view and in this particular case, even though I have sympathy for Mr Harvey's present circumstances, I agree with Professor McGhee that the keratoconus was not covered by the eye rubbing and that the keratoconus arose due to an underlying genetic pre-disposition.
>
> [45] The appeal is therefore dismissed.

The appellant's submissions

[37] Mr Darke, for Mr Harvey, submits:

(a) That the District Court made an error of law by failing to give adequate reasons for its conclusions and decision; and

(b) That, in finding that the applicant's left keratoconus was caused by a genetic predisposition, the District Court made an error of law by taking into account an irrelevant consideration, namely, the existence of that predisposition.

Discussion

Did the District Court make an error of law by failing to give adequate reasons for its conclusions and decision?

[38] In *Thompson*,[11] Collins J noted that Judges hearing ACC appeals must do what they can to ensure that the parties can understand why an appeal has either been allowed or dismissed. His Honour noted that the Judge is required to resolve the conflicts in the evidence in a reasoned way, consider all of the relevant evidence, and then deliver a judgment which explains the reasons for the conclusions reached. His Honour noted further that, where a Judge adopts an expert opinion, the Judge needs to explain why that opinion is favoured over the opinion of other experts. Collins J granted leave to appeal and directed that the District Court rehear the matter and provide proper reasons for the conclusions it reached.

[39] In the present case, Mr Harvey has cover for cerebral palsy. His claim, lodged in December 2016, was for cover for left-side keratoconus, caused by corneal changes resulting from "clumsy eye rubbing by ataxic limb".[12] The claim was founded on section 20(2)(g) of the Act, which provides for personal injury caused by a gradual process consequential on personal injury for which the person has cover. The issue in Mr Harvey's appeal, as noted by Judge Mathers, was whether Mr Harvey's keratoconus was caused by him rubbing his eye clumsily due to his

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11 *Thompson*, See n10 above, at [40], [42]-[44].

12 Ataxic refers to poor muscle control, usually resulting from brain damage, that causes clumsy voluntary movements.

ataxic left arm, or was more likely due to an underlying genetic predisposition with the eye rubbing only an aggravating feature.

[40] This Court makes the following observations:

(a) A period of over five years elapsed between the lodging of Mr Harvey's claim and Judge Mathers' decision. In this time there was an initial inconclusive review, where the Reviewer was unable to determine whether cover should or should not be granted, and the Reviewer directed the Corporation to obtain a medical opinion from a suitably qualified consultant medical. Following a further review, dismissing the claim, there was a District Court proceeding which resulted in Judge Mathers directing a further medical opinion. In the ensuing judgment, Judge Mathers noted that the appeal involved a difficult area of the law which could be contentious.

(b) Central to the evidence of Mr Harvey's condition was a series of reports (in the period July 2018 to July 2020) from Dr Ormonde, Ophthalmologist. Bearing in mind that Mr Harvey's claim is based on a personal injury caused by a gradual process, Dr Ormonde, *inter alia*, repeatedly affirmed that eye rubbing is a recognised cause of progression of keratoconus. Dr Ormonde pointed out that it is certainly plausible to conclude that the manner of rubbing in Mr Harvey's left eye due to his cerebral palsy condition may have contributed to progression of keratoconus more than "normal" rubbing. Dr Ormonde later noted that it had to be acknowledged that the progression of keratoconus in Mr Harvey had likely been contributed to by the eye rubbing. However, Judge Mathers, in her judgment, did not refer to Dr Ormonde's reports other than to allude to "the earlier medical reports".

(c) The report of Professor McGhee, based on documentary evidence and research findings, concluded by agreeing with the position postulated by the Corporation, that, while rubbing the eye may have aggravated and/or expedited the condition, it did not cause it. However, in the body of

Professor McGhee's report, he acknowledged that laboratory studies had shown that mechanical micro-trauma from eye rubbing may result in alterations at a molecular level that may affect the underlying keratoconus, as noted by Mr Harvey's advocates. Further, Professor McGhee noted, in relation to the role of eye-rubbing and keratoconus, that the effect and magnitude of effect of eye rubbing *per se* was yet to be unequivocally established. Professor McGhee noted that a major review of the topic had concluded that, while eye rubbing showed consistent association with keratoconus, further studies were needed to address the intricate relationship of eye rubbing and its induction, ongoing progression, and severity of keratoconus. Judge Mathers, in her judgment, noted that she agreed with Professor McGhee's conclusion that the keratoconus was not covered by the eye rubbing and that the keratoconus arose due to an underlying genetic pre-disposition. However, Her Honour did not refer to the rest of Professor McGhee's report, and did not explain why she agreed with the Professor's conclusion.

(d) In *Allenby v H*,[13] Elias CJ in the Supreme Court stated that the meaning of the causative "gradual process consequential on personal injury for which the person has cover" (in section 20(2)(g)), is clearly intended to be expansive in relation to the consequences of the original personal injury. Elias CJ added that, if linked by "gradual process" to the original personal injury, subsequent personal injury is covered. Judge Mathers noted in her judgment that, in the *Allenby* decision, the accident was held to be the active impregnation and the continuing pregnancy was as a result of the covered injury. However, Her Honour did not explain whether or how the *Allenby* decision applied to Mr Harvey's case, and did not refer to Elias CJ's comment on the meaning to be given to section 20(2)(g).

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13 *Allenby*, See n4 above, at [24].

(e) In *Ambros*,[14] the Court of Appeal envisaged that a Court can infer causation in circumstances where the experts cannot, can draw robust inferences of causation in some cases of uncertainty, and can in some cases decide in favour of a plaintiff even where the medical evidence is only prepared to acknowledge a possible connection. Further, in a series of cases,[15] the Court of Appeal has observed that the proper approach to construing the Accident Compensation legislation was that it be given a "generous and unniggardly" construction where more than one available interpretation exists. In an earlier part of Judge Mathers' judgment (at paragraph [26]), Her Honour acknowledged that Mr Darke had urged Her Honour to adopt the "well-known approach of adopting an unniggardly and generous approach" in cases such as this, and had also referred Her Honour to the "well-known decision of *ACC v Ambros*". However, in the reasons for Her Honour's decision, she did not refer to the "unniggardly and generous approach" or to the judgment in *Ambros.* Judge Mathers' only reference in this regard was to "the proposition that the way in which a Judge approaches possibility can be rather different to the way in which medical experts do so".

(f) In *Ambros*,[16] the Court of Appeal also stated that Judges should ground their assessment of causation on their view of what constitutes the normal course of events, which should be based on the whole of the lay, medical, and other evidence, and not be limited to expert witness evidence. During the course of the proceedings, lay evidence was presented that in 2003, Mr Harvey had no evidence of keratoconus, that, between 2003 and 2010, keratoconus developed to such an extent that Mr Harvey needed to have an operation, and that, during that period of time, Mr Harvey vigorously rubbed his eye (as attested to by his mother). However, Judge Mathers' decision and supporting reasons contains no reference to lay evidence presented.

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14 *Ambros* See n6 above, at [67] and [69].
15 See *J* n7 above, at [52] and the cases referred to by the Court of Appeal.
16 Supra.

[41] In light of the above considerations, this Court concludes that there is a question of law as to whether the District Court made an error of law by failing to give adequate reasons for its conclusions and decision.

In finding that Mr Harvey's left keratoconus was caused by a genetic predisposition, did the District Court made an error of law by taking into account an irrelevant consideration; namely, the existence of that predisposition?

[42] Mr Darke, for Mr Harvey, submits that, although Judge Mathers' reasons for her decision lack any detailed analysis, it is plain that Her Honour concluded that the keratoconus arose due to an underlying genetic predisposition, and therefore that cover for the appellant's left eye keratoconus could not be granted. Mr Darke submits that Judge Mathers must have decided that the predisposition which it found gave rise to the keratoconus operated as a bar to cover for that condition. Mr Darke notes that it has been the consistent ruling of the District Court that predisposition to an injury by some constitutional factor cannot disqualify a claimant from cover and that the Corporation must take an injured person as it finds him or her in deciding eligibility for cover.[17]

[43] This Court does not accept that Judge Mathers' decision should be construed as a decision that the predisposition giving rise to the keratoconus operated as a bar to cover for that condition. The issue which Judge Mathers put to Professor McGhee was one of causation: whether Mr Harvey's rubbing of his eye caused keratoconus or aggravated/expedited his condition. Judge Mathers did not dispute Mr Darke's "thoughtful and helpful submissions" in reply to Professor McGhee's report. In these submissions, Mr Darke expressed the essential question to be: "Does the way by which eye rubbing often cause a pre-existing keratoconus to worsen amount to the creation of new damage to the cornea, or does it just bring to light new or worsen symptoms of the already existing corneal damage?" Judge Mathers found that there was no causal connection between the keratoconus and the eye-rubbing as a result of Mr Harvey's covered cerebral palsy. Judge Mathers noted that her finding was made "in this particular case". There is no suggestion that Judge Mathers considered that

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17 *Carter v Accident Compensation Corporation* [2007] NZACC 248; *Johnston v Accident Compensation Corporation* [2009] NZACC 46; *Sorrell v Accident Compensation Corporation* [2011] NZACC 33; *Venn v Accident Compensation Corporation* [2012] NZACC 373; and *Rennie v Accident Compensation Corporation* [2013] NZACC 205.

cover could never be granted in a case where a claimant has a predisposition to the relevant injury.

[44] In light of the above considerations, this Court concludes that, in finding that Mr Harvey's left keratoconus was caused by a genetic predisposition, the District Court did not make an error of law by taking into account an irrelevant consideration, namely, the existence of that predisposition.

The Decision

[45] This Court finds that the appellant has, on the first question of law, established sufficient grounds to sustain his application for leave to appeal, which is accordingly allowed.

[46] Mr Harvey is entitled to costs. If these cannot be agreed within one month, I shall determine the issue following the filing of memoranda.

P R Spiller,
District Court Judge