**IN THE DISTRICT COURT**
**AT WELLINGTON**

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

**[2022] NZACC 169 ACR 88/21**

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| UNDER | THE ACCIDENT COMPENSATION ACT 2001 |
| IN THE MATTER OF | AN APPLICATION FOR LEAVE TO APPEAL TO THE HIGH COURT ON THE QUESTION OF LAW UNDER SECTION 162 OF THE ACT |
| BETWEEN | KYE PORTER<br>Applicant |
| AND | ACCIDENT COMPENSATION CORPORATION<br>Respondent |

Hearing On the papers

Appearances: Mr B Hinchcliff for the applicant
Ms F Becroft for the respondent

Judgment: 25 August 2022

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**JUDGMENT OF JUDGE C J McGUIRE**
**[Leave to appeal to the High Court, s 162 Accident Compensation Act 2001]**

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[1] The applicant applies for leave to appeal to the High Court against the decision of the District Court in this matter delivered by Judge P R Spiller on 3 May 2002.

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

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

[3] In this case, written submissions have been filed on behalf of the applicant and the respondent.

**Applicant's submissions**

[4] Mr Hinchcliff, on behalf of the applicant submits generally that the decision maker's treatment of facts related to the 2005 MRI amounts to an error of law. He submits that the evidence is inconsistence with, and contradictory of, the decision.

[5] He refers to the case of *CIR v Walker*,[1] submitting that here there are mixed questions of fact and law which amount to an error of law.

[6] Mr Hinchcliff also refers to *Bryson v Three Foot Six Limited*.[2] In that case, the Supreme Court said:

> [21] …the task which the lower court is engaged upon is the application of the law to the facts before it in the individual case. It involves a question of law only when the law requires that a certain answer be given because the facts permit only one answer. Where a decision either way is fairly open, depending on the view taken, it is treated as a decision of fact, able to be impugned only if in the process of determination the decision-maker misdirects itself in law.

[7] Mr Hinchcliff submits that the following are errors of law in the Judgment:

- The decision maker's treatment of facts related to the 2005 MRI amounts to an error law.
- There are mixed questions of fact and law that amount to an error of law.

[8] Mr Hinchcliff states in his submissions that "the MRI in 2005 states that there was a disc bulge. The judgment states that there was no disc bulge".

[9] Mr Hinchcliff goes on to refer to spine surgeon, Mr Barnes' opinion that the disc bulge turned into a disc prolapse, whereas the judgment states that Mr Barnes does not establish a link between the accident and the disc prolapse.

[10] Mr Hinchcliff refers to the leading case for revocation of cover namely *ACC v Bartels.*[3] In that case, Gendall and Ronald Young JJ held that material must

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1 *Commissioner of Inland Revenue v Walker* [1963] NZLR 339.
2 *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [21].
3 *Accident Compensation Corporation v Bartels* [2006] NZAR 680, CIV-2005-486-2072.

clearly establish that the original decision was made "in error" before revocation of cover can occur.

[11] Mr Hinchcliff refers to examples given in *Bartels* of a person's X-ray being misread or someone else's X-ray being read as being evidence that would support revocation of an original decision as made "in error".

[12] Mr Hinchcliff submits leave ought to be granted on the following questions of law:

- Did the Judgment err in not identifying that there was a disc injury on the 2005 MRI?
- Did the Judgment err by not finding that the opinion to approve surgery did not have the 2005 MRI available?
- Did the Judge misapply *Bartels* when deciding that the original decision was clearly wrong. That there was no evidence of a disc injury in 2005?
- Did the Judge err by deciding that the facts clearly found that there was no disc injury condition in 2005?

**Respondent's submissions**

[13] Ms Becroft submits that each of the four proposed questions of law are all clearly matters of fact dressed up as matters of law. She submits that the applicant has not identified any misapplication of *Bartels*.

[14] She submits that the District Court determined that there was sufficient basis to conclude that the decision granting cover for the disc pathology was made in error, because when it granted cover, ACC and Mr Barnes had not considered radiological evidence from the time of the injury which plainly did not identify a disc injury. The surgery application was based on the incorrect premise that a disc injury was suffered in 2005 and that no scans had been taken at the time. The Court identified the error (a decision made without the benefit of the contemporaneous medical evidence), and the substance of the medical evidence (which the Court found did not support a disc injury).

[15] Ms Becroft submits that the Court's factual finding in this regard was open to it on the facts.

[16] She refers again to the MRI scan report from 2005 and notes that there is clearly no reference on the MRI scan to an L4/5 disc prolapse.

[17] She notes that when the MRI scan evidence was put to Mr Barnes, he acknowledges that no disc protrusion was evident on the scan but speculated that one may have developed subsequently due to an injury to the disc suffered in the accident.

[18] She submits that these factual matters were all considered by the District Court in its decision and that justifiably this factual matrix gave the Corporation sufficient basis to revoke cover for a lumbar disc prolapse with radiculopathy.

[19] She submits that the leave application does not raise any serious arguable question of law.

**Decision**

[20] Counsel have helpfully referred to the key principles engaged when considering an application for leave to appeal on a question of law.

[21] Judge Kelly, in *YZ*,[4] referred to the key principles articulated by Judge Cadenhead in *O'Neill*,[5] as follows:

> [a] the issue must arise squarely from "the decision" challenged;
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> [b] leave cannot for instance properly be granted in respect of obiter comment in a judgment;
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> [c] the contended point of law must be "capable of bona fide and serious argument" to qualify for the grant of leave;
>
> [d] care must be taken to avoid allowing issues of fact to be dressed up as questions of law;

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4 *YZ v Accident Compensation Corporation* [2020] NZACC 160, at [19].
5 *O'Neill v Accident Compensation Corporation* [2008] NZACC 250, at [24].

[e] where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law;

[f] a decision-maker's treatment of facts can amount of 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; and

[g] whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law.

[22] Also relevant is the Supreme Court's decision in *Bryson.*[6]

[23] Referring to the MRI taken in 2005, Mr Hinchcliff notes that the MRI report states there was a disc bulge. However, he says the judgment states there was no disc bulge.

[24] At [3] of the Judgment, Judge Spiller quotes the "comment" section of that MRI report virtually in its entirety.

[25] The comment section of the report is basically the radiologist's conclusions. The radiologist found in this case that appearances were consistent with a minor injury to the pseudoarthrosis.

[26] Judge Spiller did not, as alleged by Mr Hinchcliff, state in his judgment that there was no disc bulge.

[27] Mr Hinchcliff submits that Mr Barnes' report states that the disc bulge turned into a disc prolapse.

[28] In fact, Mr Barnes' report of 24 August 2020 says:

> It is still possible, as I speculated, that there was a disc protrusion which was not present on the day of the injury but may have developed over subsequent weeks because of injury to a disc which progressed to a protrusion.

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6 Note 2, *Bryson,* see para [6] above.

[29] What Judge Spiller said of this at [41] is as follows:

> Fourth, the subsequent advice of Mr Barnes after having been informed of the April 2005 MRI scan, was revised to one of speculation that it was still possible that there was a disc protrusion which was not present on the day of injury, but may have developed over the subsequent weeks because of injury to a disc which progressed to a protrusion. With respect, this revised view does not satisfactorily establish, with objective evidence, a causal link between Mr Porter's 2005 accident and his subsequent disc prolapse.

[30] Mr Hinchcliff's reference to *Bartels* is acknowledged. ACC's decision to revoke cover for lumbar prolapse with radiculopathy, dated 25 September 2020 was based on "new medical information, including imaging taken at the time of the accident, which does not support a causal link between the accident and the injury."

[31] As such, a conclusion to revoke cover, based as it was, on the 2005 MRI report, appears to satisfy the requirements of *Bartels*, being factual material significant to the original decision which is now being exposed to be clearly wrong.

[32] I now address the questions of law proposed by Mr Hinchcliff.

[33] The first question states: did the Judge err in not identifying that there was a disc injury on the 2005 MRI? Paragraph [41] of the judgment, set out above, makes it clear that Judge Spiller was aware of this issue and dealt with it. He found that Mr Barnes had not satisfactorily established with objective evidence a causal link between the 2005 accident and the subsequent disc prolapse.

[34] As to the next question: did the Judge err by not finding that the opinion to approve surgery did not have the 2005 MRI available? This question as drafted makes little sense in the context of this application for leave. Plainly the opinion to approve surgery was made without the 2005 MRI report. Had such report been available, it would have been open to ACC not to approve that surgery.

[35] The next proposed question of law is: did the Judge misapply *Bartels* when deciding that the original decision was clearly wrong that there was no evidence of a disc injury in 2005? In this regard, the Judge had the report of the clinical advisory panel who reviewed the case and who answered the question posed to it: is there any basis to link the cause of the symptoms in 2019 to the 2005 accident? The response

was “in the CAP’s opinion, no.” This clear-cut answer from the clinical advisory panel justified the Judge’s conclusion that the original decision was clearly wrong.

[36] As to the fourth question: did the Judge err by deciding that the facts clearly found that there was no disc injury condition in 2005? In deciding as he did, the Judge had the evidence of the clinical advisory panel report which concluded that the most likely cause of the applicant’s L4/5 disc prolapse was the congenital abnormalities at his lower lumbar spine. Plainly therefore, the Judge’s finding that there was no disc injury condition in 2005 was open to him on this account.

[37] Accordingly, I conclude that none of the questions of law posed are capable of bona fide and serious argument.

[38] Accordingly, the application for leave to appeal is declined.

[39] There is no issue as to costs.

Judge C J McGuire
District Court Judge

Solicitors: Benjamin Hinchcliff, Ellerslie
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