IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 170 **ACR 255/18**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL TO THE HIGH COURT ON A QUESTION OF LAW UNDER SECTION 162 OF THE ACT
BETWEEN	NATHAN HARVEY Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

Appearances: Mr A Beck for the applicant
Mr C Light for the respondent

Judgment: 31 August 2022

JUDGMENT OF JUDGE C J McGUIRE
[Leave to appeal]

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[1] The applicant seeks leave to appeal to the High Court against the decision of the District Court in this matter delivered by Judge P R Spiller on 1 March 2022.

[2] Mr Beck on behalf of the applicant submits that Judge Spiller erred in law in the following respects:

- By failing to adopt the correct test for causation.
- By failing to consider and determine whether the applicant's covered injury was one of the causes of his incapacity.

- By rejecting the evidence of Dr Bell without a proper basis for doing so.

[3] Mr Beck refers to *Ellwood*[1] where Young J said that at this stage of seeking leave to appeal, it is not necessary to show that the decision was wrong. All the appellant needs to show is that an error of law is arguable.

[4] Mr Beck refers to *Pearce*[2] and *Hanmore*,[3]where the District Court held that it is not necessary to establish a particular injury was the sole cause of incapacity. It is efficient for it to be a contributing factor.

[5] Mr Beck submits that in this case, the District Court failed to ask the correct questions:

> It is not a question of finding a "direct causal nexus", but whether the 2013 accident was a material contributing factor. The direct causal nexus test was rejected in *W v ACC*.

[6] The particular passage in Judge Spiller's judgment which Mr Beck focuses on is at [62] where his Honour said:

> In light of the above considerations, the Court finds that Mr Harvey has not established a direct causal nexus between the covered injury which was suffered in the November 2013 accident and the physical condition which caused his later incapacity.

Respondent's submissions

[7] Mr Light submits that leave to appeal should not be granted because:

- The application is in attempt to reargue the appeal.
- The supposed errors of law identified on behalf of Mr Harvey are not questions of law but instead alleged errors of fact for which cannot be an appeal.
- Even if a question of law arises, such question of law is not capable of bona fide and serious argument to justify a further appeal.

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1 *Ellwood v Accident Compensation Corporation* (2007) 8 NZELC 98,657, [2007] NZAR 205 High Court, Wellington, 18/12/2006, CIV-2005-485-536.
2 *Pearce v Accident Compensation Corporation* [2014] NZACC 190.
3 *Hanmore v Accident Compensation Corporation* [2008] NZACC 145.

[8] Mr Light refers to the clinical advisory panel report of 13 September 2021 which found that the multi-level pathology seen on imaging was most unlikely to be related to any single episode of trauma or any combination of these. Also, the panel's opinion was that the disc prolapse at L5/S1 had resolved within around six months and Mr Harvey was able to undertake various activities returning to work. The panel found that the cause of Mr Harvey's low back and leg problems was most unlikely to be the accident suffered on 20 November 2013.

[9] Mr Light notes that issue is taken with Judge Spiller's use of the words "a direct causal nexus".

[10] Mr Light acknowledges that in *W*,[4] the Court held that it was an error of law to hold that a direct causal nexus was necessary for the purposes of cover under s 26(1)(c). However, Mr Light submits:

> The Court found that for cover for a mental injury caused by a physical injury, first, the "but for" test (with some possible exceptions) must be satisfied and secondly, the physical injury must "materially contribute" to the claimant's mental injury.

[11] Mr Light refers to what Collins J said in *W*:

> [60] The reference to the requirement of a "direct" causal connection in *Hornby* is one such example. Dobson J was using the word "direct" (alongside similar phrases expressing the same idea, such as "results from") in the sense that the physical injury must be a cause of the mental injury, not merely an indirect exacerbation of a pre-existing mental injury. "Direct" was not used in the sense that because it must be immediate or approximate, which is the sense that Dr Butler relied upon in this proceeding …

[12] Mr Light submits that it is clear that Judge Spiller is using the word "direct" in the sense used by Dobson J in *Hornby*,[5] i.e. that Mr Harvey's incapacity must be caused by the covered physical injury and not by a pre-existing condition or a non-covered condition such as degeneration to qualify for weekly compensation. Judge Spiller's use of the word "direct" in this way was therefore not an error of law.

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4 *W v Accident Compensation Corporation* [2018] NZHC 937, [2018] 3 NZLR 859, [2018] NZAR 829.

5 *Hornby v Accident Compensation Corporation* [2009] NZCA 576, (2010) 9 NZELC 93, 476.

[13] As to the second ground of appeal, namely, that Judge Spiller failed to consider and determine whether the applicant's covered injury was one of the causes of his incapacity, Mr Light submits that Judge Spiller set out in detail evidence both for and against Mr Harvey's incapacity being due to his covered personal injuries. He submits that Judge Spiller gave comprehensive reasons at [55] – [61] for his conclusion that Mr Harvey had now established that his covered personal injuries were responsible for his later incapacity.

[14] Mr Light also refers to the same paragraphs of Judge Spiller's judgment in answer to the allegation that the Judge rejected Dr Bell's the evidence without a proper basis. Mr Light says that Mr Harvey may disagree with Judge Spiller's findings in this respect, but as factual findings open to Judge Spiller, there can be no challenge in a further appeal restricted to a question of law.

Applicant's submissions in reply

[15] Mr Beck submits that it is indisputable that the District Court adopted and applied a "direct causal nexus test" and that is how the Court itself stated the test at [51] and expressed its conclusion in [62].

[16] Mr Beck submits that the respondent seeks to explain this way by contending that the Court was really applying some other yardstick.

[17] He submits:

> It is not for the respondent (or this Court) to expound on what a Court "really meant". The judgment has to be construed in its terms and they are quite clear.

[18] Mr Beck also says that the Court did not at any stage advert to the possibility that the appellant's accident could be a "material contributing factor" in relation to his incapacity.

[19] Mr Beck also submits that the Court failed to explain why Dr Bell's report was wrong. And there was no competing expert opinion and the panel's view was equivocal.

[20] Mr Beck submits that it is seriously arguable that there are substantial errors of law in the District Court decision and that the interest of justice required the matter to be reviewed by the High Court where the correct tests for causation can be applied.

Decision

[21] Section 162 of the Accident Compensation Act provides for appeals to the High Court for a party who is dissatisfied with the decision of the District Court being wrong in law. Leave of the District Court to appeal to the High Court is required.

[22] In *Accident Compensation Corporation v Stanley,*[6] Heath J summarised principles expressed in the leading case of *Bryson v Three Foot Six Limited*,[7] where his Honour said:

> (a) An appeal cannot be regarded as being brought on a question of law where the fact finding Court has merely applied law which it has correctly understood to the facts of an individual case. Provided that the Court has not overlooked any relevant matter, or taken account of some matter, which is irrelevant to the proper application of the law, the conclusion is a matter for the fact finding Court, unless clearly unsupportable.
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> (b) The ultimate conclusion of a fact finding body can sometimes be so insupportable, or so clearly untenable, as to amount to an error of law. It will occur when proper application of the law requires a different answer. Such cases will arise rarely; for example, cases "in which there is no evidence to support the determination", "one in which the evidence is inconsistent with or contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination".
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> (c) It does not matter whether an appellate court would have reached a different conclusion on the evidence. The issue was whether the decision under appeal was a permissible option.
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> (d) An error concerning a particular fact which is only one element in an overall factual finding cannot be said to give rise to a finding of "no evidence" where there is support for the overall finding in other portions of the evidence. It could, however, lead or contribute to an outcome that is unsupportable.

[23] Mr Beck focuses on Judge Spiller's use of the words "a direct causal nexus between the covered injury and the physical condition which caused his later

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6 *Accident Compensation Corporation v Stanley* [2013] NZHC 2765 at [34].
7 *Bryson v Three Foot Six Limited* [2005] 3 NZLR 721 (SC).

incapacity." In essence, he is saying that this is a misstatement of the law to be applied.

[24] Mr Beck appears to rely significantly on what the High Court said in *W*:[8]

> *W* did not need to establish a direct causal link between her physical injuries and her mental injuries in order to qualify under s 26(1)(c) of the Act. Judge Henare therefore erred in law when she applied that test to the circumstances of this case. Instead, what was required was an assessment of whether or not *W* satisfied the "but for" test and whether her physical injuries contributed in a material way to her mental injuries.

[25] It needs to be remembered that *W* involved consideration of whether the appellant, in terms of s 26(1)(c) had suffered a mental injury because of personal injuries she suffered.

[26] In that case, the appellant had been assaulted and injured when she was about 14 weeks old. She had no memory of suffering the injuries which had fully healed by the time she was 9 months old. When she was 5 years old, she was told about the injuries and from that time onwards suffered a pain disorder and developed a number of psychological conditions which fall within the definition of "mental injury" in s 27.

[27] Plainly, in such a case, finding a "direct" causal link between physical injury and the mental injury was impossible.

[28] In *W,* the Court stated:[9]

> …Dobson J (in *Hornby v ACC* [2009] NZCA 576) was using the word "direct" (alongside similar phrases expressing the same idea, such as "results from") in the sense that the physical injury must be a cause of the mental injury, not merely an indirect exacerbation of a pre-existing mental injury. "Direct" was not used in the sense that the cause must be immediate or proximate, which is the sense that Dr Butler relied upon in this proceeding. The issue of proximity never arose in *Hornby*, which could have been decided on the basis of the "but for" test, … the "but for" test could have determined Ms Hornby's case because her mental injury would have existed even if she had never broken her arm. It is, therefore, wrong to treat "because of" in s 26(1)(c) of the Act is always requiring a direct causal link (in a proximity sense) between the claimant's physical and mental injuries.

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8 ibid n4 at [86].
9 ibid at [60].

[29] In essence, the Court is saying that in the context of a mental injury suffered by a person because of physical injuries suffered by the person (in terms of s 26(1)(c)), applying a test of a direct causal nexus between the covered injury and the physical condition which caused the appellant's late incapacity, will not be possible and that the "but for" test is the one to be appropriately applied.

[30] What *W*'s case did not say is that it is wrong to articulate the test as being whether or not there is a direct causal nexus between the covered injury and the physical condition, for cases other than those under s26(1)(c).

[31] As Mr Light submits, Judge Spiller's approach is entirely consistent with High Court authorities.[10]

[32] For these reasons I find that there is no arguable error of law in this regard.

[33] As to whether Judge Spiller erred in law by failing to consider and determine whether the applicant's covered injury was one of the causes of his incapacity, Judge Spiller deals with this at [55] to [61] of his judgment. Included Judge Spiller's reasons for rejecting Dr Bell's evidence.

[34] As Mr Light submits, Mr Harvey may disagree with Judge Spiller's findings in respect of these two matters but they appear to have been factual findings open to Judge Spiller and do not meet the "no evidence" criteria that must apply if a finding of fact is to be challenged as a question of law.

[35] Accordingly, therefore, I conclude that the applicant in this has failed to make out grounds for leave to be granted to appeal in this case.

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

[37] Costs are reserved.

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[10] Such as *Gazzard v Accident Compensation Corporation* [2001] NZACC 313; *McDonald v ARCIC* (2002) NZAR 970 at [26]; *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 at [25] at *Johnston v Accident Compensation Corporation* [2010] NZAR 673 at [27].

Judge C J McGuire
District Court Judge

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