IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 203 **ACR 103/21**

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	STEPHEN LARGE Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

Appearances: Mr A Beck for the appellant
Ms F Becroft and Mr Hawes-Gandar for the respondent

Judgment: 20 October 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 7 April 2022.[1]

[2] The grounds on which leave to appeal are sought are as follows:

a. The decision is wrong in law and Judge Spiller erred in law in the following respects:

(i) By failing to address the test for personal injury in s 26 of the Act.

(ii) By failing to adopt the correct test for causation.

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1 *Large v Accident Compensation Corporation* 2022 NZACC 58.

(iii) By failing to consider and determine whether the applicant's covered injury was one of the causes of his incapacity.

(iv) By rejecting the evidence of Dr Robinson and Dr Xiong without a proper basis for doing so.

[3] Judge Cadenhead listed the applicable principles to the exercise of granting leave to appeal in *O'Neill*:[2]

> [24] The Courts have emphasised that for leave to be granted:
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> (i) The issue must arise squarely from "the decision" challenged: e.g. *Jackson v ACC* unreported, HC Auckland, Priestly J 14 February 2002, AB 404-96-01; *Kenyon v ACC* [2002] NZAR 385. Leave cannot for instance properly be granted in respect of obiter comment in a judgment: *Varcic* unreported, France J, HC Wellington, AP 287/01, 15 October 2002;
> (ii) The contended point of law must be "capable of bona fide and serious argument" to qualify for the grant of leave: e.g. *Impact Manufacturing* unreported, Doogue J, HC Wellington, AP 266/00, 6 July 2001;
> (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being prescribed: e.g. *Northland Cooperative Dairy Co Limited v Rapana* [1999] 1 ERNZ 361, 363 (CA);
> (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law: *CIR v Walker* [1963] NZLR 339, 354;
> (v) The 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: *Edwards v Bairstow* [1995] 3 OER 48, 57;
> (vi) whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law: *Commissioner of Inland Revenue v Walker* [1963] NZLR 339, 353-354 (CA); *Edwards v Bairstow* [1995] 3 OER 48, 57.
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> [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 properly use of scares 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: e.g. *Jackson* and *Kenyon* above.

[4] An error of law will also arise where a decision is wrong in principle or where a decision maker has failed to take into account some relevant matter or has taken into account an irrelevant matter: *Legal Services Agency v Fainu.*[3]

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[2] *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.
[3] *Legal Services Agency v Fainu* (2002) 17 PRNZ 334 at [27].

[5] An error of law will also arise where the Court has reached a conclusion that is irrational, or not supported by reasons: *Lewis v Wilson and Horton Limited*;[4] *Thompson v ACC*.[5]

Applicant's submission

[6] Mr Beck submits the Court did not examine the tests for personal injury by accident.

[7] He says this is an important issue because one of the issues in this case is whether it can properly be concluded that Mr Large's incapacity was caused substantially by disease or the ageing process. Mr Beck notes that the Courts have held that issues as to causation are questions of law and he refers to the authorities, *Hornby v ACC*[6] and *W v ACC*.[7]

[8] Mr Beck says the question is whether a particular event was a "material contributing factor" to the claimant's condition. He says the District Court failed to ask the correct questions in this case and that it was not a question of whether something was "triggered" in 2018, but whether the incident in 2018 was a "material factor" contributing to his ongoing incapacity.

[9] He says that the evidence of Dr Robinson and Dr Xiong provided substantial support for the claim that the 2018 incident materially contributed to Mr Large's incapacity.

[10] He submits that no expert is able to say conclusively what caused the disc bulge and radiculopathy in Mr Large's spine. It is a matter of assembling all the evidence to establish possible and likely causes.

[11] Mr Beck says the significant point is that the District Court did not consider or resolve the issue as to whether the 2018 injury was a material contributing factor to his ongoing incapacity.

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4 *Lewis v Wilson and Horton Limited* [2000] 3 NZLR 546 (CA), at [63], [64], [86], and [87].

5 *Thompson v Accident Compensation Corporation* [2015] NZAR 1163.

6 *Hornby v Accident Compensation Corporation* (2009) 19 PRNZ 236 (CA).

7 *W v Accident Compensation Corporation* [2018] NZHC 937.

[12] Mr Beck says that the reports of Dr Robinson and Dr Xiong are the most important evidence for the applicant and that it was incumbent on the Court to explain why it did not accept their reasons. He says there is no proper justification for a conclusion that the expert opinion of Dr Xiong was incorrect.

[13] He accordingly says it is seriously arguable that there are errors of law that undermine the District Court decision and that they are capable of bona fide and serious argument and go to the heart of the conclusions reached by the District Court. Accordingly, he says the matter requires to be reviewed by the High Court.

Respondent's submissions

[14] Ms Becroft and Mr Hawes-Gandar submit that in this case there is no dispute that the applicant had a personal injury, being a disc prolapse at L4/5. However, they submit that the issue in dispute is whether this personal injury was caused by the accident on 10 October 2018 and therefore covered under s 22(a). The Court dismissed the appeal on the basis that the disc prolapse was not caused by the accident and therefore the Corporation was correct to revoke cover for it.

[15] They submit that the test for personal injury is not at issue in this appeal and no question of law arises.

[16] As to the alleged failure by the District Court to adopt the correct test for causation, counsel submit that in *W v ACC*,[8] the High Court was considering the meaning of s 26(1)(c) which extends the definition of personal injury to include a mental injury suffered by a person "because of" physical injuries suffered by the person. The High Court found a direct causal link between a physical injury and the consequential mental injury was not required; it was enough for the physical injury to have materially contributed to the mental injuries. They submit that this finding is specific to s 26(1)(c) and has no application in the present case.

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[8] See *W* note 7.

[17] Referring to *Ambros*,[9] counsel say:

> …The Court noted that it is possible for there to be a shift of the "evidential burden". The Court explained that this involves a tactical evaluation of who is winning at trial, so that if the claimant has produced sufficient evidence to satisfy the Court that there is a causal link, then it will be up to the Corporation to produce sufficient evidence to the contrary. This is a matter of common sense.

[18] As to the submission for the applicant that the Judge failed to determine whether the applicant's covered injury was one of the causes of his incapacity, it is submitted on behalf of the respondent that the applicant does not identify what the "covered injury" is that he refers to in relation to this alleged error of law. However, the opinions relied on by the applicant from Dr Moss, Dr Robinson and Dr Xiong are all in agreement that his ongoing incapacity was caused by the L4/5 disc prolapse. Therefore, the Court did not fail to determine the issue as it was not an issue that required determination and that the contrary is not seriously arguable.

[19] As to the ground that the Judge rejected the evidence of Dr Robinson and Dr Xiong without proper basis, the respondent's position is that this submission is wrong. The Court detailed their reports at length in the factual background and after considering all the evidence, the Court determined that the weight of the evidence supported the Corporation's decision revoking deemed cover. This finding was open to the Court on the evidence before it and it was clearly a factual determination.

[20] Counsel therefore submit that leave to appeal should be declined.

Applicant's reply submissions

[21] Mr Beck submits that in finding that ongoing L4/5 disc prolapse with radiculopathy was not caused by the accident in October 2018 but caused by long standing degenerative changes, the Court ignores the possibility of more than one cause. The covered injury is properly described as a prolapsed disc and the causes of that needed to be fully investigated.

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

[22] Mr Beck submits that detailed reasoning was required to allow the reader to understand why the evidence of Dr Robinson and Dr Xiong was found wanting. In this case, he submits the Court provided no justification for the rejection of this evidence.

Decision

First alleged error of law

[23] Is there a seriously arguable case that the Judge failed to address the test for personal injury in s 26?

[24] In this case, there is no dispute that the applicant had a personal injury on 10 October 2018 described in the ACC injury claim form as a lumbar sprain. That injury claim was accepted by ACC. As Judge Spiller notes, this was refined, after imaging, to be described as a broad-based disc bulge at L4/5. The issue for the Court was whether this was caused by the accident or materially contributed to by the accident. I conclude that the allegation that the Judge failed to address the test for personal injury in s 26 was not relevant for the purposes of deciding the appeal which was clearly focused on what caused this personal injury, namely the accident or degeneration. Accordingly, I conclude that the issue is not seriously arguable.

Second and third alleged errors of law

[25] Is there a seriously arguable case that the Judge failed to adopt the correct test for causation and failed to consider and determine whether the applicant's covered injury was one of the causes of his incapacity?

[26] Mr Beck says that the question is whether a particular event was a "material contributing factor" to the claimant's condition. Mr Beck says that the District Court failed to ask the correct questions in this case. It needed to ask whether the incident in 2018 was a "material factor" contributing to the appellant's ongoing incapacity.

[27] From [44] to [49] of the decision, Judge Spiller refers to the medical evidence which includes the X-rays and MRI scan; the evidence of physiotherapist

Ms Johnson-Chung; the review of Mr Pai, orthopaedic specialist; the report of Dr Xiong; the evidence of Dr Ames and the clinical advisory panel report.

[28] He concluded that the weight of the medical evidence supported ACC's decision that the appellant's disc prolapse was caused by longstanding degenerative changes. Having reached this conclusion on the evidence, there is no basis for the Judge to go on to consider "material contributing factors".

Fourth alleged error of law

[29] Did Judge Spiller reject the evidence of Dr Robinson an Dr Xiong without a proper basis for doing so?

[30] Judge Spiller summarises the reports from Dr Xiong and Dr Robinson and Mr Large's evidence in the background section of the Judgment. While the evidence of Dr Robinson is not commented on further, it is plain that Judge Spiller, as mentioned, found that the appellant's ongoing L4/5 disc prolapse with radiculopathy was not caused by the accident in October 2018 but was caused by a long-standing degenerative changes.

[31] It is acknowledged that in his reference to the medical evidence from [44] to [49] of his judgment, the evidence of Dr Robinson is not mentioned. This evidence is however included in some detail in the background section the judgment.

[32] Although not specifically mentioned by Judge Spiller, Dr Robinson acknowledges in her report of 15 August 2019:

> I do not have an in-depth knowledge of the literature regarding causation of broad-based disc bulges and their relation to trauma as I am trained in Sport and Exercise Medicine.

[33] In light of this concession by Dr Robinson I conclude that lack of further consideration of her report in the Judgment is understandable.

[34] Dr Xiong's report is referred to in paragraph 47 with Judge Spiller noting "while assessing that it was "quite likely" that Mr Large's disc bulge occurred on 10

October 2018, (Dr Xiong) accepted that there was evidence of lumbar spondylosis or degenerative condition affecting Mr Large."

[35] Thus, I find that the Judge had a proper basis for preferring medical evidence other than that of Dr Robinson and Dr Xiong and I therefore find that this ground is not capable of bona fide and serious argument.

[36] As a whole the Judge's consideration of the medical evidence is detailed and I therefore accept the respondent's submission that the other experts involved in this case did properly address the cause of the disc prolapse which led the Judge to dismiss the appeal.

[37] Accordingly, having considered the grounds advanced on this application I find that the applicant has not demonstrated that there is a point of law capable of bona fide and serious argument and accordingly I must dismiss the application.

[38] There is no issue as to costs.

Judge C J McGuire
District Court Judge

Solicitors: Armstrong Thompson Law, Wellington
Medico Law Limited, Grey Lynn