

Michael John Jones
Applicant

**ACCIDENT COMPENSATION
CORPORATION**
Respondent

Before: D J Plunkett

Representative for the Applicant: Self-represented

Counsel for the Respondent: C Hlavac

Date of Decision: 7 October 2014

DECISION

INTRODUCTION

[1] This is an application by Michael John Jones to recall the decision of the Authority issued on 4 October 2013 and rehear the application for leave to appeal to the High Court against the decision of the Authority issued on 3 September 1987.

[2] Mr Jones has sought coverage under accident compensation legislation many times over the years since an alleged medical misadventure in about 1978. He has been to the Authority before. In 2013, the Authority refused him leave to appeal to the High Court against an earlier decision of the Authority in 1987. He has unsuccessfully challenged the Authority's refusal to grant leave in the High Court. Mr Jones now applies for a recall of the Authority's 2013 decision refusing him leave to appeal. The essential issue for the Authority is whether it has the power to recall a decision in these circumstances.

BACKGROUND

[3] The following narrative arises from the documents sent to the Authority by the parties in relation to this appeal. The complete file of the respondent Corporation is much larger. Mr Jones has made other claims and pursued them in proceedings before various review and appeal bodies over many years. The Authority is not aware of the extent to which they overlap the matters subject to this appeal.

[4] There is another issue concerning the chronology set out below. It is the factual narrative that was presented by Mr Jones to the Authority up until his last set of submissions (26 September 2014), and was that earlier presented to the courts that have been concerned with this matter. The narrative changed materially on 26 September in a way that will be considered later.

[5] In 1978, Mr Jones developed symptoms of panic, rapid heart-beat and palpitations. Based on the belief that these panic attacks were psychological rather than due to any physical disorder, in 1978 or 1979 Mr Jones' general practitioner prescribed various antidepressants, including the drug *Sinequan* (*Doxepin*). Mr Jones says the drug aggravated his palpitations and hypertension and caused him to suffer an attack of paroxysmal atrial tachycardia (rapid racing heart-beat). In 1984, Mr Jones was diagnosed with Lown-Ganong-Levine ("LGL") syndrome, a physical condition causing abnormal electrical communication and hence episodes of increased heart rate.

[6] At a time unknown to the Authority, Mr Jones lodged a claim with the Corporation for medical misadventure, alleging that his general practitioner's failure to diagnose LGL syndrome and his treatment with *Sinequan*, constituted medical misadventure.

[7] On an unknown date, the Corporation declined the claim. This was upheld on review on an unknown date.

[8] Mr Jones then appealed to the Authority. There was a hearing on 9 July 1987 and the Authority (Judge Middleton) issued a decision on 3 September 1987 dismissing the appeal (*Jones v Accident Compensation Corporation* Decision No.183/87). The Judge found that it would not have been unusual to prescribe *Sinequan*, given Mr Jones' condition, nor was it accepted that his reaction to the drug was grave and serious, as alleged. The Judge was not persuaded that medical misadventure had occurred.

[9] On 10 June 2013, some 26 years later, Mr Jones applied to the Authority for leave to appeal out of time to the High Court against the decision of the Authority given on 3 September 1987. That application was declined by the Authority (Judge Beattie) on 4 October 2013 (*Jones v Accident Compensation Corporation* [2013] NZACC 13). The Authority found that there could be an appeal to the High Court only in respect of a question of law and that there was no question of law arising out of Mr Jones' notice of appeal. The decision of September 1987 was wholly based on the facts. It is the decision of 4 October 2013 the applicant now seeks to have recalled.

[10] However, in the interim, Mr Jones applied to the High Court for special leave to appeal to that Court against the decision of the Authority of September 1987. As his application to the High Court was late, he first required an extension of time. There was a hearing on 5 February 2014 and a decision issued by Ellis J on 25 February 2014 declining an extension of time for the application for special leave (*Jones v Accident Compensation Corporation* [2014] NZHC 280).

[11] The High Court considered the delay of 26 years to be extraordinary, with no explanation being provided for the hiatus. The Court also agreed with the Authority (Judge Beattie) that the earlier decision of the Authority (Judge Middleton) had turned on its facts. There was a discussion of the questions of law and public importance articulated by Mr Jones. The Court found that there were no tenable questions of law or of public importance raised by the proposed appeal. Furthermore, the Court stated that it would have declined the application for special leave, even if an extension of time had been granted. In particular, there was no discernible issue of principle at stake, no significant amount at issue, no reasonable prospect of success and no extraordinary factor not taken into account by the Authority. It had not been shown that special leave was required in the interests of justice.

[12] Undeterred, Mr Jones applied to the High Court for leave to appeal to the Court of Appeal against the decision of Ellis J given on 25 February 2014. There was a hearing on 7 August 2014 and the decision of the High Court was issued by Ronald Young J on 14 August 2014 (*Jones v Accident Compensation Corporation* [2014] NZHC 1914). The Judge found that there was no general right of appeal from the judgment of Ellis J (refusing extra time) and accordingly refused leave for Mr Jones to appeal against that decision. Furthermore, he had identified no question of law of general or public importance, which could ground an appeal to

the Court of Appeal. The Court noted that Mr Jones might have the right to apply to the Court of Appeal for special leave.

[13] The Authority does not know whether Mr Jones has sought special leave from the Court of Appeal to appeal to that Court against the decision of Ellis J (which had refused an extension of time for special leave to appeal to the High Court against the decision of the Authority of September 1987).

[14] Earlier, on 7 August 2014, following the refusal of the High Court to grant an extension of time, Mr Jones applied to this Authority to recall its decision of 4 October 2013 refusing him leave to appeal to the High Court and to rehear his application for leave to appeal.

THE CASE ON APPEAL

[15] The Authority received submissions from the applicant (4, 11, 12, 13, 20 August, 3, 15, 26 September 2014), with supporting documents. Mr Jones' primary contention is that the Authority, on 4 October 2013, breached the applicable legislative provisions governing the Authority, its own practice and natural justice, in issuing a decision without holding a hearing or inviting submissions from the parties.

[16] The Corporation's submissions are dated 28 August, 15 and 30 September 2014. The Corporation submits that the Authority has no jurisdiction to recall a decision on a leave application.

THE LAW

[17] A right of appeal lies to the Authority against certain decisions of a review officer (sections 101, 107 Accident Compensation Act 1982 – "the 1982 Act"). An appeal is by way of a rehearing, with all findings of fact and law at large.

[18] Notwithstanding the repeal of the 1982 Act (and its predecessor, the Accident Compensation Act 1972 – "the 1972 Act"), the Authority continues to have jurisdiction over certain claims arising from personal injury by accident occurring on or before 30 June 1992 (section 391 Accident Compensation Act 2001 – "the 2001 Act").

[19] Any party dissatisfied with a decision of the Authority may, with the leave of the Authority, appeal to the High Court against that decision (section 111 of the 1982 Act). The Authority may grant leave on a question of law or a question

which, by reason of its general or public importance or for any other reason, ought to be submitted to the High Court. If the Authority refuses to grant leave to appeal, the High Court may grant special leave. An application for leave to appeal must be made within 28 days or such further time as the Authority may allow.

[20] The alleged personal injury by accident (medical misadventure) in this case occurred in 1978 or 1979, during the currency of the 1972 Act. In accordance with the transitional provisions of subsequent legislation, notably section 391(1) of the 2001 Act, it is the appeal process in the 1982 Act which is applicable. The decisions of the Authority in September 1987 and October 2013 and those of the High Court of February and August 2014 are all under the 1982 Act.

ASSESSMENT

[21] It is useful to briefly recap the procedural history of this matter.

[22] The substantive issue is whether Mr Jones has coverage under accident compensation legislation for an alleged medical misadventure in about 1978. He made a claim with the Corporation on an unknown date, which was declined on an unknown date. It was then declined on review on an unknown date. His appeal to the Authority (Judge Middleton) was dismissed in September 1987.

[23] Some 26 years later, Mr Jones applied to the Authority for leave to appeal to the High Court against the decision of September 1987. The Authority (Judge Beattie) refused to grant leave in October 2013. The High Court (Ellis J) then refused to grant an extension of time for special leave to appeal to the High Court against the decision of September 1987. Then, in August 2014, the High Court (Ronald Young J) refused leave to appeal the decision of Ellis J to the Court of Appeal.

[24] Mr Jones now seeks to have recalled the decision of the Authority of October 2013, a decision which has been upheld by the High Court, so that his leave to appeal application (against a decision now 27 years old) may be heard and re-determined.

[25] It is observed that the higher courts have expressed concern about the proliferation of unmeritorious recall applications made to them in recent years (see *Faloon v Commissioner of Inland Revenue* (2006) 22 NZTC 19,832 at [16]).

[26] Mr Jones seeks to recall the decision of October 2013, on the basis that there was neither a hearing nor an invitation to provide submissions.

[27] The Corporation submits that the Authority does not have the jurisdiction to recall a decision declining leave to appeal to the High Court.

[28] The Corporation has identified the essential issue for the Authority. It is not whether Mr Jones should have coverage for the alleged injury under accident compensation legislation, but whether the Authority has power to recall an earlier decision, specifically an earlier decision dealing with a leave to appeal application. Moreover, it is one which has been upheld by the High Court.

Whether Authority has jurisdiction to recall

[29] First, the Authority has no express power in statute or regulations to recall a previous decision and/or rehear an already determined appeal or application. Some tribunals do have such power (see, for example, the power to rehear of the Disputes Tribunal – s49 Disputes Tribunals Act 1988).

[30] Mr Jones relies on section 108(11) of the 1982 Act:

Except as provided by this Act or any regulations made thereunder, the procedure of the Authority shall be such as the Authority may determine.

[31] A general power to determine the Authority's procedures or practice is not at large. It must be exercised within the parameters of the Act and consistently with higher court authority establishing principles concerning the powers of courts and tribunals. Those principles, where applicable, are binding on this and other tribunals.

[32] The starting point is the important principle of finality in our judicial system. It enables parties to litigation, and indeed other courts and the public generally, to rely on decisions given by courts and tribunals. It was expressed by the English Court of Appeal in *Taylor v Lawrence* [2003] QB 528 at [6]:

The rule in *Ladd v Marshall* is an example of a fundamental principle of our common law – that the outcome of litigation should be final. Where an issue has been determined by decision of the court, that decision should definitively determine the issue as between those who were party to the litigation. Furthermore, parties who are involved in litigation are expected to put before the court all the issues relevant to that litigation. If they do not, they will not normally be permitted to have a second bite at the cherry: *Henderson v Henderson* (1843) 3 Hare 100.

[33] It is part of the law of New Zealand, as expressed by the Court of Appeal in *R v Smith* [2003] 3 NZLR 617, [46]:

Unless a judgment of a Court is set aside on further appeal or otherwise set aside or amended according to law, it is conclusive as to the legal consequences it decides. If it were not so, the principle of legality would be undermined.

[34] An exception to the principle of finality is the ‘slip rule’, whereby a court or tribunal can correct a slip or accidental omission. Indeed, it is not uncommon for courts or tribunals to have express statutory powers or formal rules which provide for the correction of clerical mistakes and accidental slips or omissions (for example, the Immigration and Protection Tribunal; clause 20, Schedule 2, Immigration Act 2009).

[35] There are considerable limitations on the general power of a court or tribunal to correct slips. It is a narrow jurisdiction, as it can be used only to correct clerical mistakes and accidental omissions. It cannot be invoked to vary an order in a fundamental way or where further evidence would need to be called. It is exercised sparingly, as the general rule concerning finality of judgments is not to be lightly weakened; *Beck McGechan on Procedure* (online, Brookers) at [HR11.10]. It can though be exercised to amend judgments before or after they have been sealed.

[36] The slip rule does not assist Mr Jones. His complaint arises from a failure to grant a hearing or an opportunity to make submissions, not the correction of any accidental slip or omission in the decision. He desires a recall of the decision, so that the application may be heard and re-determined.

[37] Outside the slip rule, a court or tribunal has power to recall a judgment that has not been perfected (sealed). The leading authority in this country is *Horowhenua County v Nash (No. 2)* [1968] NZLR 632, 633:

Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise, there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled – first, where since the hearing there has been an amendment to the relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the court’s attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

[38] This was approved by the Supreme Court in *Saxmere Company v Wool Board Disestablishment Company* [2010] 1 NZLR 76 at [2].

[39] In his application letter of 4 August 2014, Mr Jones relies on the principles set out in *Horowhenua*. However, in the case of the Authority’s decision of 4 October 2013, it has already been perfected. In accordance with the usual practice of the Authority and most tribunals, the decision was issued under seal of the Authority on 4 October.

[40] Accordingly, the jurisdiction set out in *Horowhenua* does not permit the recall of the decision of October 2013.

[41] The circumstances in which a perfected decision can be recalled are more circumscribed. The reason for that is that once perfected, not only the parties, but the public and other courts, are entitled to rely on the decision and arrange their affairs accordingly. In respect of the Authority, this is recognised in the Act in a way common to many tribunals (section 103(9)):

The Authority shall have a seal which shall be judicially noticed by all Courts for all parties.

[42] The English Court of Appeal in *Taylor v Lawrence* ([54]-[55]) found that, as a court of appeal, it had a residual jurisdiction to re-open appeal proceedings after the ordinary appeal process had been concluded “to avoid real injustice in exceptional circumstances”. This included a situation where, as alleged there, a decision was invalid because the lower court was biased. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy, where there was significant injustice and no alternative effective remedy.

[43] This was followed in New Zealand in *R v Smith* with the Court of Appeal accepting the principle in *Taylor v Lawrence*. It set aside an earlier decision (which had followed a process contrary to fundamental concepts of fairness and justice) and granted the party the right to request a rehearing:

[36] ... The Court has inherent power to revisit its decisions in exceptional circumstances when required by the interests of justice. Such power is part of the implied powers necessary for the Court to “maintain its character as a court of justice”. Recourse to the power to re-open must not undermine the general principle of finality. It is available only where a substantial miscarriage of justice would result if fundamental error in procedure is not corrected and where there is no alternative effective remedy reasonably available. Without such response, public confidence in the administration of justice would be undermined.

[37] There may be cases where it is a close call whether recourse to the exceptional power is appropriate. This is not such a case. The system supplied by the Court was held by the Privy Council to be “contrary to fundamental concepts of fairness and justice”. The errors include presumptive bias, breach of natural justice, and unlawful procedure. As a result, an appeal by right was denied. Justice miscarried because the failure to observe procedural due process meant that no decision that the appeal was unmeritorious could properly have been reached.

[38] There is no further appeal as of right ...

[44] The Court of Appeal in *Unison Networks v Commerce Commission* [2007] NZCA 49 [14], following *Payne v Payne* (2005) 17 PRNZ 518 (CA), found that the

effect of perfecting was that there was no jurisdiction to recall. However, the Court retained a general residual discretion to re-open an appeal to avoid injustice, as set out in *Taylor v Lawrence* and *R v Smith*. The Court in *Unison* (at [18]) noted that *Horowhenua* supplied the test for recall of an unperfected judgment and that the test for the re-opening of a perfected judgment, in accordance with *Taylor v Lawrence*, was more stringent.

[45] It is to be remembered that it is a perfected decision of the Authority which Mr Jones seeks to recall. The question that arises then is whether, based on the exception to finality allowed in *R v Smith*, this Authority has the power to recall earlier sealed decisions in exceptional circumstances in order to avoid injustice where there is no alternative remedy.

[46] Before answering that question, it is necessary to consider the decision of the High Court in *Khan v Accident Compensation Corporation* HC Auckland CIV 2007-485-1632, 25 February 2008, which found that the District Court had no jurisdiction or power to grant a rehearing of a decided appeal in its accident compensation jurisdiction.

[47] Starting with the principle that any power to rehear must not undermine the principle of finality, the Court in *Khan* noted the extensive statutory regime for reviews and appeals (the latter with three levels – District Court, High Court, Court of Appeal) under the relevant accident compensation legislation, in that case being the Accident Rehabilitation and Compensation Insurance Act 1992 (“the 1992 Act”). It considered that if Parliament had intended the District Court to have a right to rehear, there would have been an express statutory provision for that power (*Khan* [43]-[44]).

[48] Furthermore, it considered that the principle in *R v Smith* should be confined to the top appellate court, or the appellate court immediately underneath in circumstances where leave would be required to take the matter to the top appellate court and such leave was unlikely to be given (*Khan* [46]-[47]).

[49] In finding that the District Court (in its accident compensation jurisdiction) had no jurisdiction to rehear an appeal previously determined, the High Court in *Khan* noted that miscarriages of justice or profound procedural errors could be cured on appeal in the High Court without recourse to any recall jurisdiction of the District Court; *Khan* [46]-[47]. The Court in *Khan* [47] followed *Works Civil Construction v ARCIC* [2001] 1 NZLR 721 in this regard:

[41] ... it is difficult to accept that any profound procedural error, such as failure to observe natural justice or fettering of a discretion, does not equally amount to an error of law.

[50] The Court in *Khan* observed (at [48]) that this approach had also been followed in *Howard v Accident Compensation Corporation* [2003] NZAR 577 at [48], [53]. Even if there was difficulty framing the relevant error as an error of law (required to ground an appeal), an application for judicial review by the High Court could be made, notwithstanding any privative clause in the legislation (*Khan* [49]).

[51] In other words, a party dissatisfied with the decision of the District Court on the basis of a procedural error or breach of natural justice has an alternative remedy, namely the leave to appeal regime or, if that is not available, judicial review in the High Court. The criteria set out in *R v Smith* for recall could not therefore be met.

[52] The High Court found in *Khan* that the District Court in its accident compensation jurisdiction under the 1992 Act does not have the power to rehear an appeal already determined. Thus, the question for the Authority is whether the principle in *Khan* is equally applicable to it under the 1982 Act. Both Mr Jones and the Corporation submit, without advancing any argument, that *Khan* is not applicable as it deals with the position under the 2001 Act (actually the 1992 Act), not the 1982 Act.

[53] However, the statutory regime under the 1982 Act leading to an appeal to the Authority is, for these purposes, identical to the regime under the 1992 Act leading to an appeal to the District Court. It was that extensive regime which was the principal basis relied on in *Khan* for rejecting the applicability to the District Court of *R v Smith*.

[54] As the District Court is effectively the second layer of appeal (with a full rehearing) under the 1992 Act, so is the Authority under the 1982 legislation. The review below by a reviewer and then the appeal to the District Court or Authority are, at both levels, effectively at large. Further evidence and fresh arguments can be adduced at both levels in the review/appeal process. The statutory process and grounds of appeal after the decision of the District Court under the 1992 Act or the Authority under the 1982 Act, to the High Court and then the Court of Appeal, are also almost identical.

[55] That being the case, the Authority can see no principled reason for not following *Khan*. This rules out the Authority having the jurisdiction to recall earlier

sealed decisions and rehearing the relevant appeal or application, on the basis of *R v Smith*. The lack of any power to recall (and rehear) is not confined to leave to appeal applications only, but concerns appeals as well. The Authority has no such power, in respect of any application or appeal, once a decision has been sealed.

[56] Mr Jones observes that the Authority has previously recalled a decision. He relies on the decision of the Authority (Ms Bedford) in *Smith v Accident Compensation Corporation* [2014] NZACA 6, which recalled an earlier decision of the Authority made on 1 June 1995 and directed that the appeal be reheard. There is no discussion there of whether the Authority had the power to recall a decision. This is despite acknowledging the Corporation's submission that the Authority had no such power, as the 1995 decision had been perfected.

[57] The Authority in *Smith v ACC* relied on *Horowhenua* and *Saxmere*. However, *Horowhenua* concerns an unperfected decision. In *Saxmere*, the Supreme Court had observed (at [2]) that *Horowhenua* set out the test of recall of unperfected judgments, adding that it was "not suggested that there is any impediment to recall arising from perfection of our judgment". There is no discussion in *Saxmere* (or *Smith v ACC*) of the principle in *R v Smith*. Even if *Horowhenua* is the applicable test for recall of a perfected decision by the Supreme Court, as the top appellate court, it is not authority for a tribunal recalling sealed decisions based on *Horowhenua*.

[58] Furthermore, there is no discussion in the Authority's *Smith* decision of the High Court in *Khan* concluding that the District Court has no power to rehear an already determined appeal in its accident compensation jurisdiction.

[59] The Authority does not accept *Smith v ACC* as good authority for it having the power to recall and rehear.

Should the Authority exercise any such jurisdiction in this case?

[60] If the Authority is wrong in finding it has no power to recall, the next question would be whether the discretion to re-open in accordance with the principle in *R v Smith* should be exercised in recalling the decision of 4 October 2013 in respect of Mr Jones.

[61] The complaint made by Mr Jones, on which he grounds the application for recall, is that Judge Beattie did not grant him a hearing or invite submissions.

[62] Mr Jones contends that the Authority breached section 108(8) of the 1982 Act, which requires that the Authority “shall fix a time and place for the hearing of the appeal”. However, an application for leave to appeal to the High Court is not an “appeal”. Section 108(8) does not require an oral hearing for the type of application made by Mr Jones. It is the practice of the Authority to determine such applications on the papers.

[63] It is further submitted by Mr Jones that it is the normal procedure of the Authority to invite submissions on leave applications, in addition to any submissions made with the application itself.

[64] It is certainly the practice of the current member to do so, but whether it was the invariable practice of earlier members is not known.

[65] However, even if it amounts to a breach of natural justice, the Authority would not exercise any discretion to recall in favour of Mr Jones in the circumstances of this application:

1. He had an opportunity to make submissions to the High Court on the merits of his leave application, in his first application to the High Court. He availed himself of that opportunity, as is apparent from the decision of Ellis J dismissing his application. Her Honour dealt with the merits of his application and concluded that it had no reasonable prospect of success. The Judge found herself in agreement with Judge Beattie that the decision of Judge Middleton turned on its facts, so there was no basis for leave to be granted. While Judge Beattie somewhat narrowed the grounds of leave to appeal – confining it to questions of law only – Ellis J considered the broader grounds available in section 111(2) of the 1982 Act and decided that none were made out.
2. Mr Jones could have raised any infringement of natural justice, in the application to the High Court for special leave (as noted in *Khan* at [47]). It appears he did not. It is appreciated he was unrepresented but it required no skill or experience in law to make the point that he had no opportunity to make submissions. Furthermore, he has a considerable history in court and tribunal processes and in representing himself.

[66] The Authority accordingly finds that any breach of natural justice or of its practice was cured by the proceedings in the High Court. Mr Jones had an alternative remedy of which he availed himself and, on that basis alone, the Authority would not exercise any power in his favour to recall the decision of 4 October 2013 and rehear the application for leave to appeal.

[67] As foreshadowed earlier, the narrative presented to the Authority and the High Court changed materially in the applicant's submissions of 26 September. He disclosed there his discovery that he had in fact sought from the Authority leave to appeal to the High Court (from the decision of Judge Middleton of September 1987) much earlier, as early as February 1989.

[68] On 26 September, Mr Jones filed a copy of a handwritten letter dated 18 February 1989 addressed by him to the Authority and seeking leave to appeal to the High Court against the decision of Judge Middleton. It bears a Ministry of Justice stamp stating it was received on 21 February 1989. Mr Jones says he had forgotten about it. According to him, there is no evidence of a reply or of a hearing or decision from the Authority.

[69] There is no reason to doubt the authenticity of the letter. However, it is highly unlikely there was no response from the Authority, but that cannot be checked as it would have destroyed its file long ago. In any event, Mr Jones bore the responsibility of prosecuting his application.

[70] While the change in narrative is certainly material, this new information makes no difference to the outcome of this application for two reasons:

1. It is irrelevant to whether the Authority has the power to recall a previous decision.
2. It is true the High Court (Ellis J) dismissed the special leave application on the ground it was well out of time (26 years), but the Judge went on to consider the merits, as noted above. It is noted that the principal complaint made in the letter of 18 February 1989 concerns the influence of Dr Gluckman in Judge Middleton's decision, but this was a matter expressly dealt with by Ellis J.

Conclusion

[71] The Authority concludes that it has no jurisdiction to recall the decision of Judge Beattie of October 2013 and rehear the leave application determined by

him. Even if it did have such jurisdiction, it would not exercise its discretion in this case as Mr Jones had an effective alternative remedy. The interests of justice do not require the Authority to recall/rehear in this case.

OUTCOME

[72] As the Authority has no jurisdiction to recall the decision of 4 October 2013, this application is dismissed.

D J Plunkett