PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE IS A SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE APPELLANT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE APPELLANT

IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 141 **ACR 191/18**
ACR 273/19

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 162 OF THE ACT
BETWEEN	L M Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the Papers

Judgment: 20 September 2021

JUDGMENT OF JUDGE D CLARK
[Leave to Appeal to the High Court on a Question of Law
Pursuant to s 162 Accident Compensation Act 2001]

Introduction

[1] The applicant applies for leave to appeal to the High Court under s 162 of the Accident Compensation Act 2001 ("the 2001 Act") on a question of law against the decision of Judge AA Sinclair dated 8 October 2020[1].

[2] The application was referred to Judge Henare, who in a minute dated 3 November 2020, directed the parties to file submissions in accordance with the dates therein. The application would then be dealt with on the papers.

[3] Submissions in support, in opposition and, in reply have been filed.

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[1] *LM v Accident Compensation Corporation* [2020] NZACC 145.

Background

[4] Two claims were determined by Judge Sinclair in her judgment of October 2020. They concern review claims brought by the applicant in respect of decisions made by the respondent under ACR 273/19 and ACR 191/18.

ACR 273/19

[5] The applicant was the subject of a sexual assault which occurred in 1988. She lodged a sensitive claim in 1997, and her claim was eventually[2] accepted and acknowledged by the respondent that she had suffered a personal injury by way of accident for the purposes of cover in 1988. That decision was communicated to the applicant in a letter from the respondent dated 10 November 2017.

[6] Cover was granted under s135(5) of the Accident, Rehabilitation and Compensation Insurance Act 1992 ("the 1992 Act") which falls within the transitional provisions of the 1992 Act. The section states:

> **135 Relationship of this Act and former Acts**
>
> …
>
> (5) Any person who has suffered personal injury by accident within the meaning of the Accident Compensation Act 1972 or the Accident Compensation Act 1982 that is covered by either of those Acts, and who has not lodged a claim with the Corporation in respect of that personal injury by accident before the 1st day of October 1992, shall have cover under this Act only if that personal injury by accident is also personal injury that is covered by this Act.

[7] On the basis that the applicant met the definitions for personal injury by accident under the Accident Compensation Act 1982 ("the 1982 Act"), but had not filed her claim until 1997, she was nevertheless covered by the 1992 Act. However, because the 1982 Act and the 1992 Act had both been repealed and replaced by the 2001 Act by the time the respondent made its decision in 2017, any entitlements that would be paid to the applicant would be

[2] Judge Sinclair sets out the background as to the delays it took for the respondent to reach this decision (see paras [4]-[9]) and it is unnecessary to repeat the chronology here.

under the 2001 Act given the entitlement to compensation under the 1982 and 1992 Acts survived as a result of the transitional provisions of the 2001 Act.[3]

[8] Notwithstanding that cover has been granted to the applicant, she contended that cover should not have been granted under the 2001 Act but directly under the 1982 Act.[4] That position is confirmed by the applicant in submissions in support of this application for leave to appeal.

ACR 191/18

[9] On 30 January 2018 the respondent wrote to the applicant following a query by her as to under which Acts, she had cover. That letter which the respondent says was confirmation of its earlier decision of 10 November 2017, was also the subject of a review that was consolidated with ACR 273/19. The applicant, in respect of this letter and the review maintains her position as set out above; namely that she should receive her entitlements under the 1982 Act.

The District Court Decision

[10] The appeal hearing by consent, proceeded on the papers following the August 2020 lockdown. The primary issue turns on the wording of the relevant legislation and in particular, the transitional provisions of the legislation given that both the 1982 Act and the 1992 Act have been repealed. Although ACR 191/18 deals with the treatment of whether the letter of 30 January 2018 was a "new" and therefore reviewable decision, the substantive position of the applicant has constantly remained the same; that she should receive cover under the 1982 Act.

ACR 273/19

[11] Judge Sinclair summarised the applicant's position as follows:

> [16] In the present case, the claim for mental injury was lodged on behalf of the appellant in 1997. I note that at the review hearing, the appellant confirmed there was no

[3] See ss 354-361…
[4] See para [8] of the judgment.

evidence that a claim had been lodged at any earlier date and in particular, not before 1 October 1992.

[17] When the claim was lodged, the Act which was in force was the 1992 Act. Section 135(5) of the 1992 Act provides cover for claimants who suffered a personal injury by accident under either the 1982 or 1972 Acts but had not lodged a claim on or before 1 October 1992. The section states

> **135 Relationship of this Act and former Acts**
>
> (5) Any person who has suffered personal injury by accident within the meaning of the Accident Compensation Act 1972 or the Accident Compensation Act 1982 that is covered by either of those Acts, and who has not lodged a claim with the Corporation in respect of that personal injury by accident before the 1st day of October 1992, shall have cover under this Act only if that personal injury by accident is also personal injury that is covered by this Act.

[18] Section 8(3) of the 1992 Act provides cover for mental injury or nervous shock suffered by a person as an outcome of an offence listed in the first schedule of that Act.

[19] In the present case, although the appellant's injury occurred in 1988 when the 1982 Act was in force, the appellant obtained cover for mental injury under the 1992 Act as this was the Act in force when the claim for cover was made.

[20] For the above reasons, I am satisfied that the Corporation accepted the claim under the correct Act.

ACR 191/18

[12] Judge Sinclair referred to the relevant statutory provisions, namely s 134(1) and s 6(1) of the 2001 Act and also the decision of Judge Cadenhead in *Thomas and Jones v Accident Compensation Corporation*[5] in which he referred to a number of cases considering what constitutes a decision (capable of being reviewed):

> [25] From these decisions the following may be stated:
>
> (a) The mere confirmation of a prior decision does not constitute a new decision.
>
> (b) The request of a claimant to reconsider or revise its original decision does not turn into a fresh decision if the Corporation declines to do so and maintains the earlier decision was correct.
>
> (c) The Corporation is able to issue an amended decision, which amends, revokes or substitutes a new decision and in that event, there are new appeal rights.

[5] *Thomas and Jones v Accident Compensation Corporation* DC WN 145/2006.

(d) A statutory estoppel might arise, but the Court should not be ready to look for one.

[Footnotes omitted]

[13] Judge Sinclair also referred to the High Court decision of *Estate of Adam Waenga*[6] where His Honour Justice reaffirmed the principle that the confirmation of an existing decision did not create a new decision in determining whether a decision had been made or not and the emphasis was on the fact that substance should prevail over form.

[14] Based on the contents of the 30 January 2018 letter, the relevant legislation and the applicable legal authorities, Judge Sinclair concluded that the letter was not a decision capable of review.[7]

The Question(s) Posed for the High Court

[15] The applicant poses five questions of law in relation to both ACR 273/19 and ACR 191/18 which I consider to be different iterations of the same fundamental issue. The various phrasing of the questions stems from her contention that the 2001 Act has been wrongly applied. In my view the applicant questions can be distilled down to – should her claim be covered and entitlements assessed in accordance with the Act in force (ie: the 1982 Act) at the time the personal injury by way of accident (supported by the evidence) occurred? In other words, was the correct legislation applied to the applicant's claim?

Legal Principles in Relation to Applications for Leave to Appeal to the High Court on a Question of Law

[16] The principles are clear. Section 162(1) of the 2001 Act states:

> "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."

[17] The application for leave will only be granted where it is on a question of law capable of bona fide and serious argument. In *Gilmore v Accident Compensation Corporation*[8] Her Honour Dunningham J stated:[9]

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[6] *Estate of Adam Waenga* [2006] NZAR 396 at [25].
[7] See para [27].
[8] *Gilmore v Accident Compensation Corporation* [2016] NZHC 1594.

> [28] Section 162 makes it clear that an appeal is only allowed on a question of law. A question of law does not arise where the 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 the matter for the fact-finding Court unless clearly unsupportable. Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law. However, issues of fact should not be dressed up as questions of law.
>
> [Citations omitted]

Analysis and Discussion

[18] In considering the question of law posed in this leave application I am of the view that Judge Sinclair applied the correct legislation to the applicant's claim. As Ms Becroft, counsel for the respondent stated:

> "… Because of the way that the transitional provisions work, and with particular reference to s 135(5) of the 1992 Act (as well as s 8(3)), the applicant was granted cover under the 1992 Act."[10]

[19] The wording in s 135(5) of the 1992 Act[11] is clear. Cover is provided under the 1992 Act if a claim had not been lodged before the 1st day of October 1992. That was the position of the applicant when she lodged her claim in 1997 and therefore, she falls under the ambit of the 1992 Act. There is simply no ability for her to claim under the 1982 Act.

[20] Her Honour was also correct in her determination that the letter of 30 January 2018 was not a "new" decision capable of review. She correctly applied the authorities of *Thomas and Jones v Accident Compensation Corporation*[12] and *Estate of Adam Waenga*[13] in reaching her conclusion.

[21] In summary and in my view in respect of both issues arising under ACR 273/19 and ACR 191/18, Judge Sinclair has correctly applied the law and therefore no questions of law have been identified which are capable of bona fide serious argument in the High Court.

Result

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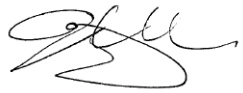
[9] At [28]. See also *Bryson v Three Foot Six Ltd* [2005] NZSC 34; [2005] 3 NZLR 721 (SC); *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.
[10] At para 2.14 of her submissions.
[11] Supra at [6].
[12] Ibid at n 4.
[13] Ibid at n 5.

[22] The application for leave to appeal is dismissed. There is no issue as to costs.

Suppression

[23] The order as set out in paragraph [29] of Judge Sinclair's judgment shall continue.



D Clark
District Court Judge

Solicitors: Medico Law.