IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 103 ACR 297/19

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	NIGEL RENTON Appellant
AND	THE ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

Submissions: A Beck for the Appellant
I Hunt for the Respondent

Judgment: 31 May 2022

DECISION OF JUDGE P R SPILLER
[Leave to appeal]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour Judge McGuire, delivered on 5 November 2021.[1] At issue in the appeal was whether the Corporation's decision dated 15 June 2018, relating to Mr Renton, was correct. The Corporation rejected a claim for bilateral optic nerve atrophy secondary to elevated intracranial pressure, on the basis that the Corporation had already considered a previous claim Mr Renton had made for the same injury, which was declined. The Court dismissed the appeal, for the reasons outlined below.

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1 *Renton v Accident Compensation Corporation* [2021] NZACC 176.

Background

[2] In 1997, Mr Renton was admitted to hospital for treatment as a result of ongoing headaches. On 4 March 1997, Mr Renton was examined by Professor Samir Bishara, a Neurosurgeon. Mr Renton was discharged but readmitted on 14 March 1997 with a left retinal vein occlusion which led to blindness in his left eye.

[3] On 22 April 1997, a claim was lodged with the Corporation for "benign intracranial hypertension with left retinal vein occlusion causing blind left eye". This claim was made on the grounds that the local Accident and Emergency Department ("A&E") had missed symptoms on three occasions. The date of injury was specified as 27 February 1997, 2 March 1997 or 16 March 1997. The essence of Mr Renton's claim was that medical staff had failed to diagnose that he had suffered "florid papilloedema" (swelling around the optic disk), which led to him suffering "optic atrophy" (damage to the optic nerve).

[4] Mr Renton's claim was referred to the Corporation's Medical Misadventure Unit, and reports were sought from various medical professionals from the A&E Unit, including Professor Bishara.

[5] In the course of investigations, the Medical Misadventure Unit considered the actions of members of the A&E, and in particular the actions of Drs Forrester and Every, who were on duty at the particular times. The focus of Mr Renton's claim at that time was on the actions of either the local hospital, or other health professionals, not Professor Bishara, with counsel for Mr Renton making it clear in correspondence of 26 April 2000 and 13 August 2001, that medical error was not alleged against Professor Bishara.

[6] On 29 May 1998, the Corporation issued a decision declining Mr Renton's claim for cover for "florid papilloedema and subsequent optic atrophy" and determined that no medical error had been committed by any health professional at the A&E in respect of Mr Renton's treatment.

[7] Mr Renton sought a review of that decision. This application prompted further investigation by the Corporation's Medical Misadventure Unit. Whilst that investigation was taking place, the review application was put on hold. Ultimately, the investigation did not disclose any evidence of medical error on the part of Drs Forrester or Every, and for this reason Mr Renton's then counsel conceded at the review hearing that the review could not succeed.

[8] On 4 September 2003, the Reviewer confirmed the Corporation's primary decision that there had been no medical error and therefore the Corporation had been correct to decline cover.

[9] In 2006 Mr Renton consulted his present counsel, and further medical opinion was sought as to the likely nature of Mr Renton's medical condition on 4 March 1997, as seen by Professor Bishara. On 21 September 2006, a Notice of Appeal was filed against the review decision, some three years out of time. The Notice alleged that Professor Bishara had failed to provide the standard of care reasonably expected of a Neurosurgeon.

[10] On 15 November 2010, a decision was issued by Judge Beattie.[2] Additional concerns had been raised in the course of the appeal regarding the possibility of medical error on the part of Professor Bishara. Judge Beattie noted that the case had not reached the point where any decision had been made in respect of Professor Bishara's action, and there had been no act or omission on his part that was the focus of any enquiry as to medical error. Judge Beattie quashed the review decision of 4 September 2003. Judge Beattie directed that another review be conducted to consider the substantive issue of whether Mr Renton was entitled to cover for a personal injury by medical misadventure, being medical error, which error allegedly had been committed by Professor Bishara at the hospital on or about 4 March 1997.

[11] On 12 February 2013, the Reviewer dismissed the review. The Reviewer concluded that the evidence presented to him did not establish that Professor Bishara had committed an error, and that Mr Renton had failed to establish that he had suffered a medical misadventure. An appeal against that decision was filed. A

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2 *Renton v Accident Compensation Corporation* [2010] NZACC 204.

protracted process then took place as a result of Mr Renton's failure to comply with directions as to the filing of evidence.

[12] On 2 April 2015, Judge Powell issued a Minute directing Mr Renton to file, by 8 May 2015, any further evidence he wished to rely on in support of his appeal. Judge Powell directed that, if Mr Renton did not comply with that deadline, the appeal would be determined on the basis of the evidence that was then before the Court. Judge Powell's decision was taken on appeal.

[13] In a decision dated 15 June 2015,[3] Collins J dismissed the appeal saying:

> [29] Whilst justice should always prevail over finality, Mr Renton has had more than sufficient time to obtain evidence (if any is available) in order to pursue his appeal. The delays to date have been inordinate and now genuine prejudice is being suffered by Professor Bishara, who has explained he is now 86 years old and in failing health. It is unreasonable for the allegations against Professor Bishara not to be resolved.
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> [30] The effect of Judge Powell's decision and this judgment is that Mr Renton must decide if he wishes to pursue his appeal in the District Court relying only on the evidence that exists or abandon his appeal all together.

[14] On 4 September 2015, Judge Powell conducted a telephone conference and recorded that Mr Renton's counsel had indicated that he had now received advice from a Dr Elliott that the papilloedema suffered by Mr Renton was in fact chronic, and had already occurred before Professor Bishara had assessed Mr Renton. Judge Powell noted that this was significant, as it meant that there would appear to be no further need for Professor Bishara to be involved in the appeal.

[15] On 3 February 2016, the appeal was discontinued by Mr Renton. His counsel noted that his instructions were to "withdraw the appeal and to relodge an application for cover under the current legislation". On 29 April 2016,[4] Judge Powell concluded in a judgment that leave to withdraw the appeal was not required and thus no consideration had to be given to whether it should be dismissed. Judge Powell awarded costs to Professor Bishara. In June 2016, Professor Bishara died, aged 87 years.

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3 *Renton v Accident Compensation Corporation* [2015] NZHC 1356.
4 *Renton v Accident Compensation Corporation* [2016] NZACC 120.

[16] On 13 February 2018, a claim was lodged on behalf of Mr Renton by Dr Ben Haywood for bilateral optic nerve atrophy secondary to elevated intracranial pressure. Dr Haywood identified the date of the accident as 4 March 1997 (when Mr Renton was examined by Professor Bishara). Dr Haywood's diagnosis was failure to identify papilloedema during neurosurgical hospital admission, leading to delay of diagnosis of elevated intracranial pressure.

[17] On 5 March 2018, further information was sought from Dr Haywood. On 27 March 2018, a treatment injury claim form was provided to the Corporation. In that document, Dr Haywood acknowledged that a previous medical misadventure claim existed for the event.

[18] On 15 June 2018, the Corporation declined the claim for treatment injury/cover on the basis that the Corporation had already considered a previous claim that Mr Renton had made for the same injury, which was declined. On 10 July 2018, Mr Renton applied for a review of this decision.

[19] On 1 November 2019, the Reviewer dismissed the review. The Reviewer determined that Mr Renton's claim was the same as the claim that had been considered by the previous Reviewer and concluded that Mr Renton was estopped from further reviewing the Corporation's decision of 15 June 2018. On 20 November 2019, Mr Renton filed a Notice of Appeal.

[20] On 17 December 2020, following a telephone conference, Judge Mathers issued a Minute stating, *inter alia*:

> [3] This present appeal can only arise from a review hearing, that review hearing only considered matters of res judicata and issue estoppel. It concluded that the appellant was in fact estopped from further reviewing the decision of 15 June 2018. It is clear to me that was all that was decided by the Reviewer and the merits as to whether or not the appellant is entitled to cover for a treatment injury was not really in issue at all.
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> [4] In these circumstances, in my view, the appeal can proceed only upon the res judicata and issue estoppel because I or any other Judge will not have anything before us on appeal as to the treatment injury issue, quite simply because there is nothing in the review decision about it.

[21] On 28 September 2021, an appeal hearing was held before Judge McGuire. At the hearing, counsel for the Corporation submitted that Mr Renton's attempt to pursue a second claim should not be permitted on three grounds, namely, *res judicata*, issue estoppel and abuse of process. Counsel submitted that to permit Mr Renton's treatment injury claim to proceed would require the very same factual territory as was exhaustibly surveyed in the hearing before the Reviewer to be considered, without the benefit of another transcript of Professor Bishara's evidence, as he had died some years ago. Counsel submitted that this case had had a huge amount of scrutiny both from reviewers and Judges, and had been ongoing since 1998.

[22] In reply, counsel for Mr Renton submitted that Judge Mathers had directed that the appeal could proceed only on the basis of the *res judicata* and issue estoppel points. Counsel submitted that *res judicata* and issue estoppel did not apply. As to the issue of abuse of process, counsel said that it was not clear how a claim for cover for treatment injury could constitute a collateral attack on a decision which did not deal with that question. Counsel submitted that Mr Renton was not challenging any conclusion reached in the 2013 review decision, and he had a personal injury which required consideration by the Corporation. Counsel further submitted that, in the context of accident compensation legislation, the Court should be slow to conclude that a claimant must be denied cover because he did not previously raise all possible aspects of a claim. Counsel submitted that the claim lodged in February 2018 was not the same as that declined in 1998: the 1998 claim related to optical atrophy in Mr Renton's left eye as a result of medical misadventure suffered in February 1997, whereas the claim lodged in 2018 relates to both eyes, based on a treatment injury suffered in March 1997.

Judge McGuire's judgment of 5 November 2021

[23] Judge McGuire outlined the timeline and relevant facts relating to the appeal. His Honour noted that a total of 24 years and 5 months had elapsed since the lodging of the medical misadventure claim and the hearing of the appeal. His Honour concurred with Justice Collins' comments (in June 2015), that delays had been inordinate and that genuine prejudice was suffered by Professor Bishara. Judge

McGuire noted that, regrettably, delays had continued, with just over two years elapsing between 3 February 2016 and 13 February 2018, from the withdrawal of the original appeal to the lodging of a new injury claim.

[24] Judge McGuire noted that Judge Mathers' case management minute was necessarily focused on bringing the appeal on for hearing. His Honour concluded that, in the context of the uniquely long history of this case, together with the provisions of sections 155 and 156 of the Act, Judge Mathers' minute did not stand in the way of this Court fully considering all the matters raised in this appeal including *res judicata*, issue estoppel and abuse of process.

[25] In response to counsel's argument that the claim lodged in 2018 was fundamentally different from the claim lodged in 1997, Judge McGuire noted that it was not at all uncommon in long-running ACC cases for diagnoses to be redefined, altered and changed. Judge McGuire noted that, throughout, the focus remained on whether the person (claimant), was entitled to cover for personal injury arising from the treatment. Judge McGuire found that withdrawing the original appeal and lodging a new claim for cover had not put Mr Renton in a position where he was able to start afresh, without what had occurred between 1997 and 2018 brought to account. His Honour concluded that he did not accept the submission that the 2018 claim was fundamentally different.

[26] Judge McGuire addressed the submission that what had occurred was a serious injury and that Mr Renton's claim needed to be determined in accordance with the treatment injury provisions of the Act. Judge McGuire concluded that what stood in the way of this proposition was the history of this case. His Honour noted:

(a) Judge Beattie's decision of 15 November 2010, that another review be conducted to consider the substantive issue of whether Mr Renton was entitled to cover for personal injury by medical misadventure.

(b) The lapse of a further two years and three months before the review took place and a decision became available on 12 February 2013.

(c) The lapse of a further three years before the appeal was withdrawn on 3 February 2016.

(d) Justice Collins' judgment of 15 June 2015, noting that Mr Renton had had more than sufficient time to obtain evidence in order to pursue his appeal, and that the delays to date had been inordinate and genuine prejudice was being suffered by Professor Bishara.

(e) Judge Powell's decision that Mr Renton had to decide if he wished to pursue his appeal in the District Court, relying only on the evidence that existed, or abandon his appeal altogether.

(f) The period of seven and a half months before the appeal was withdrawn on 3 February 2016.

(g) The lapse of a further two years before the new injury claim was lodged on 13 February 2018.

[27] Judge McGuire then referred to case-law on the topic of abuse of process. His Honour found, on the basis of the authorities he referred to, that what had regrettably occurred in this case amounted to abuse of process. His Honour noted that the inordinate length of time that had passed in this case, and in particular the delays that he had specifically referred to, overwhelmingly led to a conclusion that what had occurred here more than met the criteria of abuse for process. His Honour found that, because of his findings regarding abuse of process, it was not necessary to determine finally the *res judicata* and issue estoppel questions raised by counsel. Accordingly, as the ground of abuse of process was proven, His Honour dismissed the appeal.

Relevant law

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

> 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.

[29] In *O'Neill v The Accident Compensation Corporation*,[5] Judge Cadenhead stated:

> [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: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment …;
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> (ii) The contended point of law must be *"capable of bona fide and serious argument"* to qualify for the grant of leave …;
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> (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed …;
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> (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law …;
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> (v) A 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 …;
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> (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law … .
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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 proper use of scarce 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 … .

Submissions for Mr Renton

[30] Counsel for Mr Renton submits that Judge McGuire erred in law by:

(a) Departing from the scope of the appeal that had been directed by the Court in Judge Mathers' Minute, which stated that the appeal was limited to *res judicata* and issue estoppel, and which did not include abuse of process.

(b) Failing to identify the personal injuries that were the subject of the claim and by addressing only one of Mr Renton's injuries: the 1997 claim related solely to optical atrophy in Mr Renton's left eye as a result of medical misadventure suffered in February 1997, whereas the claim

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5 *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

lodged in 2018 was for a treatment injury suffered in March 1997 resulting in optical atrophy in his left eye and his right eye.

(c) Wrongly interpreting the abuse of process doctrine and holding that a claim relating to an injury that had never been considered by the Corporation could amount to an abuse of process: there was no consideration of the nature of accident compensation legislation or its legislative purpose or how the abuse of process doctrine was to be applied in accident compensation cases. The abuse of process doctrine should not be applied to a claim that could not have been appealed a long time ago, which did not cover essentially the same ground as that covered in a previous appeal, and which did not constitute an affront to justice.

Discussion

[31] This Court notes that issues of *res judicata*, issue estoppel and the applicability of section 34 of the Act were raised and then discussed in Judge McGuire's judgment. However, His Honour's decision was based upon his finding that abuse of process had been proven, and he expressly stated that it was not necessary to determine finally the *res judicata* and issue estoppel questions. This Court therefore confines its discussion to the issue of abuse of process, upon which Judge McGuire's decision was based.

Scope of the appeal

[32] This Court makes the following findings.

[33] First, the Minute of Judge Mathers did not prevent Judge McGuire from considering the issue of abuse of process. Section 155(1) of the Act provides that an appeal is a rehearing, and section 156(1) provides that the appeal court may hear any evidence that it thinks fit. In *Green*,[6] Judge Powell correctly noted:

> … the legislation is clear that appeals of decisions of reviewers to this Court are by way of rehearing. Matters relating to procedure at review hearing will

6 *Green v Accident Compensation Corporation* [2018] NZACC 17.

> therefore in general have no bearing on the outcome of appeals. Instead, on appeal, judges in this Court consider the substantive issues afresh on the basis of the evidence presented at review and any other evidence subsequently admitted in the course of hearing the appeal.

[34] Second, there was no prejudice to Mr Renton, in the procedural sense, in the issue of abuse of process being decided on appeal. As noted above, the issue was clearly raised and argued at the appeal hearing by counsel for the Corporation, and counsel for Mr Renton then took the opportunity to present contrary submissions on the issue. Judge McGuire then considered and weighed the submissions of both sides before reaching his decision.

Identifying the personal injuries that were the subject of the 2018 claim

[35] This Court makes the following findings.

[36] First, the Court notes that Judge McGuire's finding, that the 2018 claim was not fundamentally different from the claim lodged in 1997, is a finding of fact, and so not, in principle, a question of law. Judge McGuire noted that, throughout, the focus remained on whether the person was entitled to cover for personal injury arising from the treatment. Judge McGuire found that withdrawing the original appeal and lodging a new claim for cover had not put Mr Renton in a position where he was able to start afresh, without what had occurred between 1997 and 2018 brought to account.

[37] Second, this Court finds that Judge McGuire's finding of fact does not amount to an error of law in the sense that: there was no evidence to support the decision; the evidence was inconsistent with, and contradictory of, the decision; or the true and only reasonable conclusion on the evidence contradicted the decision. This Court notes:

(a) The 1997 claim was for florid papilloedema and subsequent optic atrophy, and intracranial hypertension. From September 2006, the focus of Mr Renton's claim in this regard was that Professor Bishara had failed to provide the standard of care reasonably expected of a Neurosurgeon.

(b) The 2018 claim was for bilateral optic nerve atrophy secondary to elevated intracranial pressure, based on a failure by Professor Bihara to identify papilloedema during neurosurgical hospital admission, leading to delay of diagnosis of elevated intracranial pressure.

[38] Judge McGuire's finding of fact, that the 2018 claim was not fundamentally different from the claim lodged in 1997, was therefore supportable by the evidence.

Interpretation of the abuse of process doctrine

[39] The Court makes the following findings.

[40] First, Judge McGuire's interpretation of the abuse of process doctrine, with reference to the extensive delays in the present case, was based upon substantial legal authority. In *Re Norris*,[7] Lord Hobhouse noted that abuse of process must involve something which amounts to a misuse of the litigation process, and that attempts to relitigate issues which had already been the subject of judicial decision might amount to abuse of process. In *Johnson v Gore Wood and Co*,[8] Lord Bingham stated:

> The underlying public interest is … that there be finality in litigation and that a party should not be twice vexed by the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceeding if it was to be raised at all …

[41] Second, the application of the abuse of process doctrine extends to the accident compensation jurisdiction. In *Wood*,[9] Judge Cadenhead stated:

> …
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> [v] The celebrated dictum in *Henderson v Henderson* requires the parties, when a matter becomes the subject of litigation between them in a Court of competent jurisdiction, to bring their whole case before the Court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the Court to

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7 *Re Norris* [2001] UKHL 34; [2001] 1 WLR 1388 (HL), at [26].
8 *Johnson v Gore Wood and Co* [2002] 2 AC 1 (HL) at 498 – 499..
9 *Wood v Accident Compensation Corporation* [2003] NZACC 80 at [19].

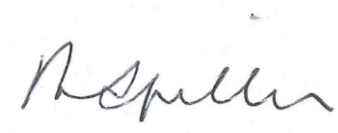
> advance arguments, claims or defences which they could have put forward for decision on the first occasion, but failed to raise. The rule is based on public policy. It is desirable in the general interest and that of the parties themselves, that litigation should not drag on forever, and that a defendant should not be oppressed by successive suits.

[42] In the present case, Justice Collins remarked (as early as April 2015), that: Mr Renton had had more than sufficient time to obtain evidence (if any was available) in order to pursue his appeal; that the delays to date had been inordinate and genuine prejudice was being suffered by Professor Bishara (aged 86 years and in failing health); and that it was unreasonable for the allegations against him not to be resolved.[10]

The Decision

[43] In light of the above considerations, the Court finds that Mr Renton has not established sufficient grounds to sustain his application for leave to appeal, which is accordingly dismissed. Mr Renton has not established that Judge McGuire made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources. Proceedings in the present matter were first launched over 25 years ago, and this Court is not satisfied as to the wider importance of any contended point of law.

[44] There is no issue as to costs.



Judge P R Spiller,
District Court Judge

Solicitors: Jenny Beck Law for Mr Renton
R Wanigasekera for the Respondent

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[10] *Renton v Accident Compensation Corporation* [2015] NZHC 1356, at [29].