IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 123 **ACR 246/21**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 162(1) OF THE ACT
BETWEEN	SANDRA SMITH Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Submissions:	P Schmidt for the Appellant I Hunt for the Respondent
Hearing:	On the papers
Judgment:	26 July 2023

JUDGMENT OF JUDGE P R SPILLER
[Leave to appeal to the High Court
Section 162(1) Accident Compensation Act 2001]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour Judge McGuire, delivered on 24 March 2023.[1] At issue in the appeal was whether the Corporation correctly determined that Ms Smith's whole person impairment was to be assessed at 19%. The Court dismissed the appeal, for the reasons outlined below.

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1 *Smith v Accident Compensation Corporation* [2023] NZACC 47.

Background

[2] In October 1999, Ms Smith underwent surgery for the removal of a brain tumour. However, not all of the tumour was able to be removed and the part of the tumour that remained was treated with radiotherapy.

[3] Around 20 years later, Ms Smith developed progressive expressive dysphasia, resulting in focal intractable fits and right hemiplegia. It was determined that the cause of these problems was a rare outcome of her radiation therapy. Because this outcome was not a necessary part or ordinary consequence of treatment, it was covered as a treatment injury. Ms Smith received cover for:

> Hydrocephalus – left;
>
> Late effect of radiation;
>
> Encephalopathy, not elsewhere classified – left;
>
> Operation wound dehiscence – left;
>
> Post-operative infection – left;
>
> Partial epilepsy with impairment of consciousness;
>
> Right hemiplegia;
>
> Late effects of cerebrovascular disease;
>
> Dysphasia; and
>
> Mild cognitive disorder.

[4] In January 2021 the Corporation referred Ms Smith to its Whole Person Impairment Assessor, Dr Keith Murray, for an impairment assessment.

[5] On 20 January 2021, Dr Murray met with Ms Smith, and, on 29 January 2021, provided an impairment assessment report. Dr Murray assessed the degree of Ms Smith's permanent whole person impairment (WPI) as being 80 per cent. An additional 1 per cent for scarring was added to give a whole person impairment of 81 per cent. Dr Murray deducted 62 per cent impairment caused by the non-covered condition of right homonymous hemianopia from the whole person impairment, resulting in a final whole person impairment of 19 per cent.

[6] On 11 February 2021, the Corporation issued a decision stating that Ms Smith's whole person impairment assessment rating was 19 per cent, and that Ms Smith was eligible for an independence allowance of $338.26 every three months because of her level of impairment. Ms Smith filed a review application against the Corporation's decision.

[7] On 30 July 2021, a Reviewer dismissed Ms Smith's review. The Reviewer found that the Corporation's decision, based on the assessment of Dr Murray, was correct. On 2 November 2021, Ms Smith appealed to the District Court.

[8] On 24 March 2023, Judge McGuire dismissed Ms Smith's appeal, upholding the Reviewer's decision.

[9] On 5 April 2023, the Corporation sought leave to appeal the Court's decision.

Relevant law

[10] 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.

[11] In *O'Neill*,[2] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:
>
> (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 …;
>
> (ii) The contended point of law must be *"capable of bona fide and serious argument"* to qualify for the grant of leave …;
>
> (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 …;
>
> (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law …;
>
> (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

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

> 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 …;
>
> (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law … .
>
> [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 … .

The Court's judgment of 24 March 2023

[12] Judge McGuire noted that the process under the Act and Regulations is as follows:

> (a) Schedule 1, clause 59 provides, after the Corporation receives a certificate under clause 57(1) (the claimant's condition resulting from the personal injury has stabilised and it is likely there is permanent impairment resulting from the injury), an assessor assesses the claimant's percentage of whole person impairment (clause 59(2)) in accordance with regulations made under the Act (clause 59(3)(a)) and excludes any impairment that does not result from personal injury for which the claimant has cover (clause 59(3)(b)), and includes in the assessment any permanent impairment for which the claimant has received lump sum compensation under this part (clause 59(3)(c)), subject to any regulations made under the Act (clause 59(4)).
>
> (b) The Injury Prevention, Rehabilitation and Compensation (Lump Sum and Independence Allowance) Regulations 2002 provide that an assessor appointed by the Corporation (under clause 58 of Schedule 1) then assesses the person using the assessment tool which comprises the AMA Guides (4th Edition) and the ACC Handbook to AMA4 (Injury Prevention, Rehabilitation and Compensation - Lump Sum and Independence Allowance - Regulations 2002, clause 4(2)).

[13] Judge McGuire observed that, plainly, as both a matter of logic and fairness, non-covered conditions, including natural degeneration components of an injured person's presentation, should not be included. In fact, they are excluded by clause 59(3)(b).

[14] Judge McGuire raised the questions: how then to achieve a result in a fair manner, and is the Corporation's methodology in this regard unfair?

[15] Judge McGuire noted that Dr Murray's comment, in his independence allowance report, that a whole person impairment of 18 per cent that is due to the

covered injury "is rather a low figure considering the extent of her difficulties", warranted careful consideration. Further, Dr Murray said that this "is due to the prescribed method used for apportionment which results in a high weighting for pre-existing visual loss".

[16] Judge McGuire observed that the history of the ACC scheme had been one of evolution and change since it commenced in 1972. His Honour noted that Mr Schmidt (counsel for Ms Smith) had rightly referred to section 3 of the Act, which provides:

> (c) Ensuring that, where injuries occur, the Corporation's primary focus should be on rehabilitation, with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence and participation.

[17] Judge McGuire stated that in order to reflect, in reality, what section 3(c) provides, there was recourse to the AMA Guides (4th Edition) and the Corporation compiled a Handbook to the AMA Guides, both of which were sanctioned by the Injury Prevention, Rehabilitation and Compensation (Lump Sum and Independence Allowance) Regulations 2002. Under the heading "Explanatory Note" at the end of these Regulations state:

> These regulations come into force on 1 April 2002 and prescribe, for the purposes of the Injury Prevention, Rehabilitation and Compensation Act 2001 [now renamed the Accident Compensation Act 2001]:-
>
> - the assessment tool to be used to assess a person's eligibility for lump sum compensation or the independence allowance:
> - the scale of lump sum compensation.

[18] Judge McGuire noted that Schedule 1 of the Act, at clause 59, provides for the assessor, when assessing the claimant's percentage of whole person impairment, to assess the claimant in accordance with regulations made under the Act, and to exclude from the assessment any permanent impairment:

> (a) That does not result from personal injury for which the claimant has cover under this Act; and
>
> (b) Arising from personal injuries suffered before the commencement of this part; and

> (c) Include in the assessment any permanent impairment for which the claimant has received lump sum compensation under this part.

[19] Judge McGuire observed that Mr Schmidt is critical of the fact that, in interpreting this provision, the way in which assessors such as Dr Murray go about their task is to assess a whole person impairment and then deduct whole person impairment due to conditions other than the covered injury. In this case, the total whole person impairment was 80 per cent, but 62 per cent was deducted due to other conditions, leaving a balance of 18 per cent whole person impairment due to the covered injury. Mr Schmidt says that clause 59 of Schedule 1 requires that the assessor exclude from the assessment any personal impairment that does not result from personal injury for which the claimant has cover, or which arose before the commencement of this part of the Act. Effectively, Mr Schmidt is saying that the assessor should just assess the covered personal impairment to the exclusion of other impairments.

[20] Judge McGuire stated that he did not interpret clause 59 as requiring assessors such as Dr Murray to go about their task in a way different to what they presently do. Dr Murray had taken the appellant's current whole person impairment and removed from that whole person impairment the impairment due to other conditions. It seemed that, in the appellant's case, the figure of 62% that was deducted from the whole person impairment of 80% was due to the appellant's "right homonymous hemianopia" which was caused by a tumour, and pre-dated any treatment the appellant had that gave rise to her claim.

[21] Judge McGuire stated that it may well be that, as has frequently occurred in the past, a re-think or adjustment may need to be made to matters that impact ultimately on a person's entitlement, so that the underlying ethos of section 3 remains authentic. However, in this case, there was nothing to suggest that the original whole person impairment for the appellant's non-covered homonymous hemianopia was not 62%. Dr Murray then excluded that from the appellant's total current whole person impairment, resulting in a figure of 18% whole person impairment.

[22] Judge McGuire noted that, plainly, this Court was not in a position to adjust in any way the appellant's resulting whole person impairment and, as Mr Schmidt's

argument as to principle acknowledged, he too was unable to put forward a cogent argument for a different whole person impairment figure, other than to submit that non-injury related whole person impairment should be excluded.

[23] Judge McGuire suggested that, in this case, a possible inference to be taken from Mr Schmidt's submissions was that the whole person impairment relating to the homonymous hemianopia was not taken into account in the assessment and the appellant's covered whole person impairment is at 80%. Judge McGuire acknowledged that Mr Schmidt did not make that submission. However, he did not suggest an alternative way of excluding non-injury related whole person impairment that in his view would yield a "more acceptable" result.

[24] Judge McGuire acknowledged that it may well be that a review of the process is warranted if there is some consensus of collegial medical opinion that the present process on occasion yields an unfair result. In this case, however, Judge McGuire was unable to fault what Dr Murray had done. His Honour therefore found on the balance of probabilities that the appellant had failed to show that the Corporation's decision was wrong. The appeal was therefore dismissed.

The appellant's submissions

[25] Mr Schmidt, for Ms Smith, submits that leave should be granted to appeal to the High Court on two questions of law:

(a) Does the apportionment method prescribed in the Handbook undervalue impairment caused by injury contrary to section 3 of the Act? It is submitted that the mathematical method for apportionment set out in the Handbook overvalues non-covered conditions and undervalues covered conditions when assessing injury-related impairment. This under-valuation arises from the method applied, which combines the impairments from both covered and non-covered conditions (using the Combined Values Chart in the AMA Guides) and then deducts the raw value of impairment due to non-covered conditions in order to arrive at a whole person impairment rating for the covered conditions. In terms of section 161(2)(b) of the Act, the District Court can require the

Corporation to take an action the Court specifies in relation to the Corporation's decision, and that action can be done by amending the ACC Handbook to ensure that it complies with section 3 of the Act.

(b) Does the term "exclude" as used in clause 59(3)(b)(i) of Schedule 1 of the Act require that the Corporation not assess impairment caused by non-covered conditions? It is submitted that it is not clear whether the term "exclude" means to assess impairment and then try to remove the impact of the non-covered conditions, or whether the term "exclude" simply means to assess injury-related impairment alone, as was the case for the assessment of lump sum under the 1972 and 1982 Acts. In terms of policy, those who have impairment due to pre-existing conditions are not receiving any additional compensation and are not less impaired by injury as a result. The fact that they suffer greater overall impairment does not mean that they should receive less compensation for impairment due to covered personal injury.

Discussion

ACC User Handbook

[26] The first question of law proposed by counsel for Ms Smith challenges the apportionment method prescribed in the ACC User Handbook, particularly in light of section 3 of the Act.

[27] Clause 59(3)-(4), Schedule 1, of the Act provides that the assessment of a claimant's percentage of whole-person impairment must be made in accordance with regulations made under the Act. The Injury Prevention, Rehabilitation, and Compensation (Lump Sum and Independence Allowance) Regulations 2002, clause 4, provides as follows:

> Assessment tool for assessing eligibility for lump sum payments and independence allowance
>
> (1) Assessment of a person's whole-person impairment, for the purposes of determining the person's eligibility to receive lump sum compensation or an independence allowance, must be carried out by an assessor using the assessment tool prescribed by subclause (2).

> (2) The assessment tool comprises—
>
> (a) the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition); and
>
> (b) the ACC User Handbook to AMA4.
>
> (3) The ACC User Handbook to AMA4 prevails if there is a conflict between it and the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition).

[28] This Court notes that Judge McGuire referred to the above regulations, section 3 of the Act, and Mr Schmidt's criticism of the method for apportionment set out in the Handbook. Judge McGuire explicitly addressed the question whether the Corporation's methodology in this case was unfair. However, Judge McGuire found that the Court was not in a position to adjust in any way Ms Smith's resulting whole person impairment, as he was unable to fault what Dr Murray (the Whole Person Impairment Assessor) had done.

[29] With respect, this Court agrees with Judge McGuire's finding. In the face of medical evidence which was not challenged by competing medical evidence, the Court's correct focus in this appeal was to address any flaw in the whole person impairment assessment conducted under applicable regulations sanctioned by the Act. In this case, the Act has mandated regulations which require that the assessment tool includes the ACC User Handbook. It is not the function of the District Court to change a whole person impairment assessment properly conducted in terms of the governing legislation. As noted by Judge Ongley in *T*:[3]

> [22] Apportionment is a skilled exercise, assisted by specialist skill and experience, and by particular experience in assessment of impairment and apportionment within the structure of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" (the AMA Guides). The ACC User Handbook to the Guides has authority under regulations made under the Injury Prevention, Rehabilitation, and Compensation Act 2001. Those are the documents that govern the process of assessment and apportionment.

Schedule 1, clause 59(3)(b)(i)

[30] The second question of law proposed by counsel for Ms Smith is whether the term "exclude", as used in clause 59(3)(b)(i) of Schedule 1 of the Act, requires that the Corporation not assess impairment caused by non-covered conditions.

[31] Clause 59(3) provides:

> (3) In doing an assessment under this clause, an assessor must— …
>
> (a) assess the claimant in accordance with regulations made under this Act; and
>
> (b) exclude from the assessment any permanent impairment—
>
> (i) that does not result from personal injury for which the claimant has cover under this Act: …

[32] This Court notes that Judge McGuire acknowledged counsel's submission, observing that this effectively was that the assessor should just assess the covered personal impairment to the exclusion of other impairments. However, Judge McGuire stated that he did not interpret clause 59 as requiring assessors such as the assessor in this case to go about their task in a way different to what they presently do.

[33] Again, with respect, this Court agrees with Judge McGuire's finding. Clause 59(3)(b) needs to be read along with clause 59(3)(a), requiring the assessor to assess the claimant in accordance with regulations made under the Act. As noted above, the applicable regulations require that the assessment tool includes the ACC User Handbook. This Handbook provides that the method of apportionment is to deduct the pre-existing impairment from the combination of covered and non-covered conditions. The appropriateness of assessors assessing overall impairment and then deducting impairment for non-covered injury has been recognised by this Court in relation to preceding and current legislation.[4]

The Decision

[34] In light of the above considerations, the Court finds that Ms Smith has not established sufficient grounds, as a matter of law, to sustain her application for leave to appeal, which is accordingly dismissed. Ms Smith 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

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3 *T v Accident Compensation Corporation* [2009] NZACC 213.

and the finality of litigation. This Court is not satisfied as to the wider importance of any contended point of law.

[35] Costs are reserved.

Judge P R Spiller,
District Court Judge

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[4] See, for example, *Gruar v Accident Compensation Corporation* [2004] NZACC 343, at [16]; *Fowler v Accident Compensation Corporation* [2005] NZACC 367, at [14]; and *G v Accident Compensation Corporation* [2014] NZACC 186, at [21].