**IN THE DISTRICT COURT**
**AT WELLINGTON**

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

**[2023] NZACC 180 ACR 304/21**

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| UNDER | THE ACCIDENT COMPENSATION ACT 2001 |
| IN THE MATTER OF | AN APPLICATION FOR LEAVE TO APPEAL TO THE HIGH COURT UNDER SECTION 162 OF THE ACCIDENT COMPENSATION ACT |
| BETWEEN | LESLEY NORMAN AUSTIN<br>Applicant |
| AND | ACCIDENT COMPENSATION CORPORATION<br>Respondent |

Hearing: On the papers

Appearances: Mr G J Thwaite for the Applicant
Ms L Hansen for the Respondent

Judgment: 7 November 2023

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**RESERVED JUDGMENT OF JUDGE C J MCGUIRE**
**[Leave to appeal to the High Court**
**Section 162(1) Accident Compensation Act 2001]**

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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 Spiller on 6 April 2023.[1]

## Background

[2] The applicant was born in 1952. In 1982 he was prescribed Roaccutane (the brand name for the drug Isotretinoin in tablet form) to treat his acne. From 1991 to

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1 *Austin v Accident Compensation Corporation* [2023] NZACC 59.

1996, and again in 2005, the applicant was prescribed Roaccutane. The appellant also suffered spinal pain and stiffness for which he sought chiropractic and osteopathic treatment.

[3] On 29 March 2015 Dr Holtzhausen, musculoskeletal medicine specialist, lodged a treatment injury claim with the respondent. This claim sought cover for diffuse idiopathic skeletal hyperostosis (DISH), which is a form of arthritis which involves the tendons and ligaments around the spine.

[4] On 11 December 2015, the Corporation accepted cover for DISH, secondary to Roaccutane use in the 1980s and 1990s. The Corporation agreed that, on balance, the use of Roaccutane in the 1980s and 1990s had resulted in DISH and that this would not be an expected or ordinary outcome of treatment. In the same decision letter, the Corporation declined cover for spondylosis. The Corporation said that this was a degenerative condition and excluded from cover.

[5] On 4 April 2016 the Corporation issued a revised and amended decision on Mr Austin's claim to clarify the scope of his covered injury. The Corporation decided to accept cover for DISH manifested by osteophytes in the cervical spine and the thoracic spine as a treatment injury resulting from Mr Austin's use of Roaccutane. The Corporation declined cover for spondylosis and for cervical disk protrusions at C5/6 and C6/7.

[6] The Corporation advised on 5 April 2016 that it owed the applicant backdated weekly compensation of $159,548.60. The Corporation paid the applicant ongoing weekly compensation of $1,553.91, to cease when he reached superannuation age in 2017.

[7] In 2016 the applicant initiated a claim in the High Court against Roche Products (New Zealand) Limited, the New Zealand distributer of Roaccutane. He sought compensatory and exemplary damages. Roche Products (New Zealand) Limited applied to strike out the applicant's claim for compensatory damages as barred by the Accident Compensation Act. The Court of Appeal agreed and struck out the claim. The Supreme Court granted leave to appeal.

[8] In its decision of 21 March 2021,[2] the Court said:

> [20] Section 133(5) is … not triggered by coverage under the Act, but by the making of a claim for which there is a right of review or appeal. "Claim" is defined in s 6 as a claim – that is, an application – to ACC for coverage under s 48 of the Act. So a claim is an application for an entitlement under the Act. It is not actual entitlement. The effect of s 133(5) is therefore that once a person lodges a claim, they are locked into the Act's procedures. No court may "consider or grant remedies in relation to that matter if it is covered by [the] Act" …
>
> [35] Given the Act's comprehensive system for challenging coverage decisions, including a right of appeal on a point of law to the High Court, and in light of the terms of s 133(5), we conclude that this Court does not have jurisdiction to consider Mr Austin's appeal. Nor did the Courts below.

[9] On 19 April 2021 Mr Austin lodged an application to review the Corporation's decisions of 11 December 2015 and 4 April 2016. He asked for a finding that his injury was an ordinary consequence of the treatment he received, and therefore outside the scope of Accident Compensation.

[10] On 23 July 2021 the Corporation accepted that extenuating circumstances affected Mr Austin's ability to lodge his review in time.

[11] On 13 December 2021, review proceedings were held. The focus of the submissions presented on behalf of Mr Austin was that his injury should be excluded as an ordinary consequence of extended, high dose treatment with Roaccutane. His advocate also noted in passing that some expert opinion did not find causation at all.

[12] On 22 December 2021 the reviewer dismissed the review on the basis that Mr Austin's skeletal hyperostosis is a personal injury caused by treatment. The reviewer found that the evidence was sufficient to establish a causal link between Mr Austin's case of Roaccutane and his skeletal hyperostosis, and that it was not an ordinary consequence of the treatment.

[13] On 22 December 2021 a notice of appeal to the District Court was lodged.

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[2] *Austin v Roche Products (New Zealand) Ltd* [2021] NZSC 30.

[14] In his judgment of 6 April 2023, Judge Spiller reached the following conclusion:

> [58] In light of the above evidence, this Court finds that Mr Austin's treatment injury was caused when he received treatment from a registered health professional and which was not a necessary part or ordinary consequence of the treatment.
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> [59] As a result, the Court finds that the Corporation's decision dated 4 April 2016 accepting cover for Mr Austin for a treatment injury was correct. The decision of the reviewer dated 22 December 2021 is therefore upheld. This appeal is dismissed.

[15] In an application dated 27 April 2023 the applicant sought leave to appeal to the High Court against Judge Spiller's judgment of 6 April 2023.

**Applicant's Submissions**

[16] Mr Thwaite in his submissions in support of this application dated 27 May 2023 acknowledges the history of this case thus far.

[17] He says that the applicant's current position is that cover under the Accident Compensation Act was incorrect. He submits that the precise issue in this litigation is whether the pharmaceutical Roaccutane caused damage in the "ordinary course" in terms of ss 32 and 33 of the Accident Compensation Act. He submits that if Roaccutane caused damage in the ordinary course, it could not be a treatment injury for the purposes of the Accident Compensation Act, because it did not satisfy the requirement of s 32(1)(c) namely that the injury was not a necessary part or ordinary consequence of the treatment taking into account all the circumstances of the treatment.

[18] Mr Thwaite says Judge Spiller's judgment is flawed in law because:

- It did not identify the burden of proof, nor did it consider whether professional literature can be considered in assessing the evidence in the light of the burden of proof;

- It considered the history of the claim in the High Court litigation which was not a relevant factor, and which provided an appearance of bias or

predetermination; and did not consider how the Accident Compensation Act permitted some recovery of the payments;

- It relied upon the opinions of medical practitioners, or scientists, without identifying:

  [1] Whether they were "experts" in terms of the Evidence Act 2006;

  [2] Whether the evidence should have been received if a witness did not agree to comply with the statutory code; and

  [3] Whether the evidence of Dr Brown (who did not examine the applicant or have any connection with him) qualified him as a "witness" at all.

- In denying the appeal, the Court;

  [4] Upheld the Corporation's decision, even though the decision did not correctly rely on medical evidence or measure the evidence against the legal criterion;

  [5] Did not consider all the evidence, and did not properly assess it;

  [6] Did not recognise the difference between DISH and DISH-like injury and the frequency of DISH-like injury;

  [7] Did not properly assess x-ray evidence, as to the nature of the medical problem;

  [8] Did not assess the evidence collected by the Corporation by reference to the burden of proof;

  [9] Did not assess the proof of gradual process or acceleration;

  [10] Did not assess whether the treatment arose from the supply of a product by manufacturing.

[19] The Court should exercise its discretion to grant leave to appeal because;

- Each point of law identified above has or was reasonably likely to have had, an impact on the outcome of the appeal;

- The case is relevant to the case in the Supreme Court, and is related to the underlying action in the High Court;

- The case is relevant to the applicant and any person in similar position; but also to the Corporation:-
    - For liability to individuals involved in similar cases, of which the number is unknown;
    - On a strategic level, for the question whether the insurance system to funded to cope with liability for a mass tort, such as thalidomide or opioids; and/or

- A determination is essential as to the role of experts in the Court system.

**The Applicant's points of law**

*Point of Law 1: Who had the burden of proof? And should professional literature have been taken into account?*

[20] Mr Thwaite notes that s 155 provides that the appeal to the District Court is by way of rehearing. In the present case, at the review hearing and the appeal to the District Court, the Corporation was the party claiming coverage, hence on the appeal to the District Court the Corporation had the obligation to prove coverage for the applicant.

[21] Mr Thwaite submits that the judgment does not identify the burden of proof. Hence it does not determine whether on the balance of probabilities coverage exists. He submits that the judgment does no more than identify evidence which might support that conclusion.

[22] He submits that the proper legal analysis is that the Corporation has the burden of proof and professional literature should have been taken into account in assessing the claim.

*Point of Law 2: Was the history of applicant's claim a proper factor for the judgment?*

[23] Mr Thwaite submits that the first consideration of the Court was the history of the case. Namely, that the applicant applied for coverage and received money, and he is now denying coverage as part of the litigation against the Roche Group. The evidence is clear that the change of position of the applicant resulted from his discovery of the connection between Roaccutane and his medical condition, as set out in the judgment of the Court of Appeal (dealing with the limitation defence of Roche) in *Roche Products (New Zealand) Ltd v Austin*[3]. There is no suggestion of bad faith or fraud in the actions taken by the applicant. Hence the litigation is not a relevant factor for the Court's decision.

[24] Mr Thwaite notes that if coverage was wrongly granted, s 251 of the Act sets out the procedure to be followed and should have been analysed. Hence, a fair minded, impartial and properly informed observer could reasonably conclude that the implication carries a personal disapproval of the conduct of the applicant, presumably on the basis that the applicant is wrongly aiming to obtain further compensation for his medical condition. As per Tipping J in *Saxmere Company Limited v Woolboard Disestablishment Company Inc*,[4] the test is whether "… a fair minded, impartial, and properly informed observer could reasonably have thought that the Judge might have been unconsciously biased …".

*Point of Law 3: Were the "experts" properly qualified?*

[25] Mr Thwaite notes that under the Evidence Act, opinion evidence can only be admitted if the witness is an expert qualified by *a specialised knowledge or skill based on training, study or experience*[5]. He submits that there is no evidence from the any of the medical practitioners or scientists as to how their particular expertise permitted them to be an expert in the area of bone growth arising from the use of Roaccutane.

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3 *Roche Products (New Zealand) Ltd v Austin*, [2019] NZCA 660, (2019) 25 PRNZ 95.

4 *Saxmere Company Limited v Woolboard Disestablishment Company Inc* [2010] 1 NZLR 35 at [37].

5 Section 4(1) of the Evidence Act 2006.

[26] He submits that the proper legal analysis is that the Corporation adduced no expert evidence upon which the Court could rely.

[27] Acknowledging that s 156 of the Accident Compensation Act provides that the Court may hear any evidence that it thinks fit, whether or not the evidence should be otherwise admissible in a Court of law, Mr Thwaite says that the question is whether the Court should have used its discretion to admit the evidence in the absence of a recognition by the witnesses that they would comply with the code.

[28] He submits that the proper legal analysis is that the Court should not have recognised as an expert any person who did not comply with the requirements of the code of conduct for expert witnesses. Alternatively, the Court should have recorded a proper reason for recognising such evidence.

[29] As to the evidence of Dr Brown, Mr Thwaite submits that his evidence was not original and that his role was to summarise and comment on the opinions of other medical people. Mr Thwaite notes that Dr Brown appears to be no more than a general practitioner with no known competence to analyse the opinions of experts and that his evidence introduced a filter between the experts and the Court. He submits that Dr Brown's evidence was not capable of being such that the Court, as fact finder, is likely to obtain substantial help from it in terms of s 25 of the Evidence Act 2006.

*Point of Law 4: Did the Court properly assess the evidence?*

[30] Mr Thwaite submits that the Corporation in its decisional process did not rely upon the medical evidence cited by the Court and/or did not measure the evidence against the legal criteria in ss 32 and 33 of the Accident Compensation Act. He refers to the panel report of 10 December 2015.

[31] He further submits that the Court did not properly consider the evidence in the following circumstances:

(i) It did not take into account the evidence of Dr Downey or Dr Moughan;

(ii) It did not recognise the particular expertise of Dr Holtzhausen;

(iii) It did not take into account directly any of the substantial medical literature: bundle 17, 19 and 64/424;

(iv) It did not properly assess evidence and in particular, it did not accept the views of Professor Burgess in his report of 24 September 2015 that Roaccutane was not a major factor, but accepted his opinion that the medical condition would not have been an expected outcome;

(v) It did not take into account the differences of opinion among the expert witnesses (eg. Dr Moughan who did not believe in causation by Roaccutane in his report of 7 August 2015; and Mr Taine of 24 October 2015, who said he could not determine whether the injury was to be expected, and seek to resolve them.

[32] He further submits that the Court had trouble recognising the difference between DISH (which comes with the ageing process) and DISH-like injury (which could be the result of treatment, which was the injury claimed by applicant:[6]

(d) The Court did not pay proper attention to x-rays.

[33] The Court did not make a full analysis of all the expert evidence, and in particular that of Dr Holtzhausen when it reached the conclusion without considering the burden of proof.

[34] In respect of Point of Law 4, he submits that the proper legal analysis is that the Court did not make a proper analysis of the evidence.

*Point of Law 5: Did an accident occur?*

[35] Mr Thwaite submits that the Court did not assess evidence of the acceleration or precipitation of injury by way of gradual process which led to damage, and to determine whether the gradual process precluded the finding of an accident in terms of s 25 of the Accident and Compensation Act.

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6 See *Austin* note 1, [16] to [25].

[36] He further submits that the Court did not assess whether the treatment injury defined in ss 32 and 33 of the Act could apply to the supply of a product by a manufacturer, as opposed to the medical analysis and prescription provided by a medical practitioner.

[37] He submits that the Court granted coverage for treatment injury, in the context of a claim against the manufacturer for supply of a pharmaceutical.

**Good cause exists for leave to be granted**

[38] Mr Thwaite submits that each of the separate grounds of appeal would have had an impact or was reasonably likely to have had an impact on the outcome. He noted the following:

***Ground 1***

a. Firstly, the burden of proof is critical to the outcome of an appeal, as is the use of professional literature.

b. Secondly, the Court's inclusion of the history component in [55] as one of the three considerations indicates that the history of the litigation against the Roche Group was a significant factor in the outcome, even though it was not relevant.

c. Thirdly, while some looseness might be acceptable in the review process within the Corporation, the gravity of an appeal in the District Court requires a clear analysis of expert evidence, which naturally has a significant impact on the outcome.

e. Fourthly, the consideration of the evidence particularly considering the divergence of opinion among the ACC experts, was critical to the outcome of the case. The Court relied on some only of the experts. The experts, and thus the Court, failed to draw a proper line between injury that could be attributed to ageing (true DISH), and injury attributable to an outside source (DISH-like injury). Further it did not take into account the importance of x-ray evidence for analysing the location and expansion of

the injury over a period of time, which would preclude the injury as a gradual process being an accident.

f. Fifthly, no determination was made whether the acceleration of a medical problem as a gradual process took the injury outside the definition of "accident" in s 25 of the Accident Compensation Act. It did not consider the role of the manufacture and supply of the pharmaceutical.

***Ground 2***

The appeal to the district Court is part of a procedure mandated in *Austin v Roche Products (New Zealand) Ltd*[7] in which the Supreme Court has expressly retained jurisdiction. It is also relevant to the civil litigation,[8] which involves the liability of the manufacture of Roaccutane and is presently frozen because of the Supreme Court's jurisdiction. Both Courts deserve a decision at the level of the High Court.

***Ground 3***

A determination of the points of law will impact upon the applicant, and any other person now or in future engaged in similar litigation. Coverage of widespread harm as a result of defective pharmaceuticals would also have an impact on the philosophy of the whole Accident Compensation system. Further, an expansion of coverage to cover the manufacture of pharmaceutical with a track record of damage raises the prospect of the risk analysis by the Corporation as insurer will be inadequate and bankrupt the Accident Compensation system.

***Ground 4***

The activity of the medical witnesses retained by the Corporation provides an opportunity to consider the level of credibility that an expert or injury person must show in the District Court appeals, and also to consideration in the Corporation.

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7 *Austin v Roche Products (New Zealand) Limited* [2021] 1 NZLR 294.
8 *Austin v Roche Products (New Zealand) Limited* CIV-2016-404-003299.

***Ground 5***

> No unfair burden falls upon the Corporation in allowing an extra level of appeal. It had consented to the review process being brought out of time. Thus, it accepted that there is a bona fide claim by the applicant. Further, a High Court review will set a standard of procedural and substantive law in respect of defective pharmaceuticals.

**Respondent's submission**

[39] Ms Hansen submits that at issue in this appeal is whether ACC correctly granted Mr Austin cover for a treatment injury in its decision dated 4 April 2016.

[40] Ms Hansen on behalf of the respondent briefly covered the background to Mr Austin's case noting that he had been prescribed Roaccutane to treat his acne at various periods between 1991 and 1996 and again in 2005. A claim for a treatment injury for DISH was made on 29 March 2015 by Dr Holtzhausen, musculoskeletal medicine specialist.

[41] She notes that ACC obtained a range of specialist input and comment from a number of medical professionals and was eventually satisfied that the DISH was a treatment injury secondary to Roaccutane use in the 1980s and 1990s and that it was not an ordinary consequence of treatment. ACC granted cover for DISH on 11 December 2015. Cover for spondylosis was not accepted. ACC issued a revised decision on 4 April 2016 accepting cover for DISH manifested by osteophytes in the cervical and thoracic spine as a treatment injury resulting from the applicant's use of Roaccutane. Cover was declined for spondylosis and for cervical disk protrusions at C5/6 and C6/7.

[42] Mr Austin unsuccessfully sought review of the decline decision.

[43] Ms Hansen notes that Judge Spiller refers to Mr Austin's civil claim against Roche at paragraphs 32 and 33 and that the Supreme Court indicated the Court did not have jurisdiction in relation to that, given that he had cover under the ACC regime. Ms Hansen also notes that from paragraphs 34 to 42 Judge Spiller set out the steps

taken by Mr Austin to commence a late review of his cover decision of 4 April 2016; the outcome of the review decision dated 13 December 2021; and the further medical evidence filed in support of the appeal by Dr Holtzhausen and Dr Garry Brown, ACC medical advisor. Mr Austin also provided further evidence. Dr Holtzhausen confirmed that it is highly probable that Roaccutane use over a 20 year period had led to Mr Austin's disk degeneration.

[44] She refers to a further report from Dr Brown, ACC medical advisor, dated 10 November 2022 to the effect that Mr Austin's treatment injury is skeletal hyperostosis and that it was not an ordinary consequence of Mr Austin's retinoid therapy.

[45] She notes that Mr Austin replied and said that correct physical injury is retinoid hyperostosis. He did not agree with Dr Brown's view that the personal injury was not an ordinary consequence. He emphasised that it was the prolonged use of his retinoid therapy that ultimately led to his skeletal problem and that the evidence shows that adults on prolonged therapy, almost without exception, develop retinoid hyperostosis.

[46] Ms Hansen notes that Judge Spiller referred in detail to the applicable law and relevant legal principles from paragraphs 43 to 49 of his judgment. Judge Spiller referred to the issue for determination and then pointed to three key considerations. First, Mr Austin had previously maintained, over six years, that his skeletal hyperostosis qualified as a treatment injury caused by his Roaccutane use. Secondly, in relation to whether Mr Austin's treatment caused his skeletal hyperostosis, the Court noted the evidence of Dr Holtzhausen, musculoskeletal medicine specialist; Professor Burgess, clinical pharmacologist; and Mr Taine, Orthopaedic Surgeon, and in the light of this evidence the Judge noted the Corporation found on balance that Mr Austin's use of Roaccutane had resulted in his skeletal hyperostosis.

[47] She refers to paragraph 57 of his judgment where Judge Spiller noted the evidence of Professor Burgess, Mr Taine and Dr Brown, medical advisor, and at paragraph 58 concluded:

> In the light of the above evidence, the Court finds that Mr Austin's treatment injury was caused when he received treatment from a registered health

> professional, and which was not a necessary part or ordinary consequence of the treatment.

[48] Ms Hansen then referred to s 162 which provides for a party to an appeal who is dissatisfied with the decision of the District Court as being wrong in law may, with the leave of the District Court appeal to the High Court.

[49] She notes that Collins J said in *W*:[9]

> An appeal on a question of law cannot succeed where the Court below has applied correct law to the facts of the particular case.

[50] Ms Hansen also notes that the reason that leave is required to appeal is to ensure that scarce judicial time is allocated sensibility.[10]

[51] She also refers to *Waller v Hider*[11] which noted that to obtain leave a proposed appeal must involve an interest that is sufficiently important to outweigh the cost and delay of a further appeal.

[52] She also notes that on the basis of *Impact Manufacturing Limited*[12] that leave should not be granted if the issue is not capable of bona fide and serious argument.

[53] She also refers to *Meridian Energy Limited v Central Otago District Council*[13] which noted there is a long standing policy not to set aside decisions for errors of law that are not material. As a consequence, the Courts will take a cautious approach to hearing questions of law in circumstances where the outcome will not materially affect the parties and only do so where the question is one of public importance.[14]

[54] Ms Hansen refers to s 32 and the decision in *Ng*,[15] where the Court held that the phrase "ordinary consequence" should be interpreted as meaning an outcome that is

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9 *W v Accident Compensation Corporation* [2018] NZHC 937 at [32].
10 *Tohu v Accident Compensation Corporation* HC Auckland CIV-2003-404-000469, 12 November 2003 at [11].
11 *Waller v Hider* [1998] 1 NZLR 412.
12 *Impact Manufacturing Limited v Accident Rehabilitation Compensation and Insurance Corporation* HC Wellington AP 266/00, 6 July 2001, at [4].
13 *Meridian Energy Limited v Central Otago District Council* [2011] 1 NZLR 482 at [46].
14 *Gordon-Smith v R* [2009] 1 NZLR 721 (SC) at [22] to [29].
15 *Ng v Accident Compensation Corporation* [2020] 1 NZLR 683 at [68].

outside the normal range of outcomes, something out of the ordinary which occasions a measure of surprise. The Court in that case also said at paragraph 69:

> [69] Where an adverse consequence is inside or outside the normal range of consequences of medical treatment given to a particular claimant is ultimately a matter of judgment for the decision maker. It is to be exercised on a case specific basis taking into account all the circumstances of the treatment and the particular claimant. Thus, relevant circumstances will include not only the nature of the harm and also its duration and severity as well as any other circumstances pertaining to the patient which may have rendered them more or less susceptible to the adverse consequence ...
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> [71] … the focus should be on whether the outcome that occurred is within the range of ordinary consequences rather than whether the risk of the outcome was predicated in advance of treatment in a particular claimants case.

***Point of Law 1:Who had the burden of proof? And should professional literature have been taken into account?***

[55] Ms Hansen notes that Mr Austin says the judgment does not identify the burden of proof and hence does not determine whether on a balance of probabilities coverage exists, and that the applicant's position is that the judgment does no more than identify evidence which may support that conclusion. She submits that the claimant has the onus of establishing cover and if cover is granted, it remains until ACC revokes or revises that cover. She submits that while the Judge did not express his conclusion with specific reference to the burden of proof, it is clear that he made an assessment based on the medical evidence as a whole. She further submits that there was sufficient evidence available, and it was open to the Judge to conclude that ACC's cover decision was correct.

[56] As to the applicant's submission that the Court should have taken the extensive evidence contained in the professional literature into account when assessing the claim, she notes that at paragraph 108 of the review decision, the reviewer noted:

> The District Court has explained that medical literature presented by a lay applicant cannot be taken into account without accompanying specialist comment to assist in its interpretation and application.

[57] The reviewer then referred to a passage in *Green*[16] in support of the comment.

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16 *Green v Accident Compensation Corporation* [2012] NZACC 272 at [17].

[58] Ms Hansen also noted that the Court was aware of Dr Yoder's evidence, as it had been referred to in Dr Holtzhausen's evidence at paragraph [14]. She also says that Professor Burgess had referred to Pittsley and Yoder's research in his report dated 28 April 2015.

***Point of Law 2: Was the history of the Applicant's claim a proper factor for the Judgment?***

[59] Ms Hansen submits that this does not raise an error of law. She submits that history in this case is relevant for the purposes of background and context, because the applicant was attempting to reverse his previous position of having established on the balance of probabilities that he suffered a treatment injury.

***Point of Law 3: Were the "experts" properly qualified***

[60] Ms Hansen submits that s 156(1) of the Accident Compensation Act provides a broad discretion for the Court to hear any evidence that it thinks fit, whether or not the evidence would otherwise be admissible in a court of law. She says it is a long standing practice in the ACC jurisdiction that specialist evidence from a claimant or ACC's accepted on the basis of a report.

***Point of Law 4: Did the Court properly assess the evidence?***

[61] Ms Hansen says that this does not raise an error of law and that an error of law would only arise if it could be said that the ultimate conclusion of the fact finding body is insupportable or untenable because there is no evidence to support the determination; one in which the evidence is inconsistent with or contradictory of the determination; or one in which the true and only reasonable conclusion contradicts the determination. She refers to the decision in *ACC v Stanley*[17].

***Point of Law 5: Did an accident occur?***

[62] Ms Hansen submits that this does not raise a seriously arguable error of law, as there is no tenable argument to suggest that Mr Austin's skeletal hyperostosis could be anything other than a treatment injury as defined in s 32 of the Act and the only

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17 *Accident Compensation Corporation v Stanley* [2015] NZHC 1640

material issue in dispute is whether it was an ordinary consequence and that point is not raised as a ground for leave.

[63] She submits that it is accepted by ACC that it was Roaccutane prescribed by a medical practitioner that has ultimately caused Mr Austin's personal injury. The fact that the treatment injury occurred gradually does not disqualify cover, as such gradual process is included in the definition of personal injury in s 20(2)(f).

**Applicant's reply**

[64] In his reply submissions Mr Thwaite said that the Applicant does not accept the Judgment's conclusion because of errors of law in the Judgment. He submits that the Judgment cannot lawfully reach the conclusion it did about the ordinary consequence of treatment because of errors of law in the Judgment. He says the Respondent is asserting coverage.

**Decision**

[65] Judge Cadenhead in *O'Neill*[18] helpfully summarised the principles applicable to applications for leave to appeal on questions of law:

> [24] The Courts have emphasised that for leave to be granted:
>
> (i) The issue must arise squarely from "the decision challenged" e.g. *Jackson v ACC* unreported, HC Auckland, Priestley J, 14 February 2002, AP 404-9601; *Kenyon v ACC* [2002] NZAR 385. Leave cannot for instance properly be granted in respect of obiter comment in a judgment: *Albert v ARCIC* 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 proscribed: e.g. *Northland Cooperative Dairy Co. Ltd v Rapana* [1999] 1ERNZ 361, 363 (CA);

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18 *O'Neill v Accident Compensation Corporation* [2008] NZACC 250 at [24] and [25].

(iv) Where an appeal is limited to questions of law, a mixed question of law in fact is a matter of law: *CIR v Walker* [1963] NZLR 339, 354;

(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: *Edwards v Bairstow* [1995] **sic** [1955] 3 All ER 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] **sic** [1955] 3 All ER 48,57.

[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: eg *Jackson* and *Kenyon* above.

[66] On 4 April 2016, ACC accepted cover for diffuse idiopathic skeletal hyperostosis manifested by osteophytes in the cervical and thoracic spine as a treatment injury resulting from Mr Austin's use of Roaccutane.

[67] Mr Austin also pursued civil remedies against Roche Products, the distributor of Roaccutane. On 21 March 2021 the Supreme Court ruled that Mr Austin could not pursue his claim for damages unless it was first determined that his injury was not covered under the Act.

[68] Mr Austin then lodged a late review of the 2016 decision accepting cover for his injury.

[69] In a review decision dated 22 December 2021, the reviewer ruled that ACC's decision to accept cover for a treatment injury was correct and the application for review was dismissed. The reviewer said:

133. The evidence in this case indicates that Mr Austin was over prescribed this medication and not informed of the risks. It seems to me that this is precisely the type of accidental injury that Parliament intended ACC to cover when it drafted the treatment injury provisions. To find that an injury is the expected outcome of an overdose, and therefore excluded from cover, would be contrary to the spirit of the Act.

**Conclusion**

> 134. In light of the above, I find that Mr Austin's skeletal hyperostosis is a personal injury caused by treatment with Roaccutane, and that it was not an ordinary consequence of the treatment.

[70] Leaving aside the unusual background to this case, it is in essence one where a claimant was dissatisfied with ACC's decision. He sought review of that decision unsuccessfully. He then appealed against the reviewer's decision and the appeal was dismissed by Judge Spiller in his judgment of 6 April 2023. In that judgment, Judge Spiller, after considering the evidence, found:

> … that Mr Austin's treatment injury was caused when he received treatment from a registered health professional and which was not a necessary or ordinary consequence of the treatment.

***Who has the burden of proof?***

[71] In the course of his judgment, Judge Spiller referred to *Ambros*[19]. Judge Spiller cited paragraph 65 of that decision which reads:

> The requirement for a plaintiff to prove causation on the balance of probabilities means that the plaintiff must show that the probability of causation is higher than 50 per cent. …

[72] It is plain, therefore, that Judge Spiller proceeded on the basis that the burden of proof rested with the applicant, to prove that the decision of 4 April 2016 accepting cover for a treatment injury was wrong.

[73] In the Applicant's submissions at paragraph 6.1 is this:

> In the review hearing and the appeal in the District Court, the Corporation is the one claiming coverage. Hence in the appeal the Corporation had the obligation to prove coverage for Appellant.

[74] The applicant appears to proceed on the basis that the Corporation is the party claiming coverage and therefore it has the obligation to prove coverage. No authorities to support this submission are referenced.

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

[75] It is the applicant's application for leave to appeal and were leave to be granted, as a matter of first principles, it would be up to the applicant to prove that the Corporation's decision was wrong. Accordingly, I conclude that this submission is not capable of bona fide and serious argument.

***Should professional literature be taken into account?***

[76] The applicant's next point is that the District Court should have taken into account evidence from the professional literature. Section 156(1) allows the Court to hear any evidence that it thinks fit.

[77] Judge Spiller notes at paragraph [57]:

> (c) Dr Brown, medical advisor, advises that both the literature, and expert pharmacology opinion, support that the adverse outcome of skeletal hyperostosis following treatment with Isotretinoin is a rare event, which likely represents an individual reaction …

[78] Judge Spiller also refers to Professor Burgess, clinical pharmacologist, who assessed that if Isotretinoin was a major factor, Mr Austin's skeletal hyperostosis would not be an expected outcome, as this is a rare complication of the use of Isotretinoin.

[79] It is plain that both these medical professionals relied on professional literature.

[80] The decision in *Edwards v Bairstow*[20] acknowledges that 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

[81] It is a routine feature of ACC cases that there will be medical evidence before the court that arguably favours each side's standpoint. In this case Judge Spiller refers to and accepts the evidence in support of causation and in support of the applicant's skeletal hyperostosis. I must again find therefore that this point of law is not capable of bona fide and serious argument.

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[20] *Edwards v Bairstow* [1955] 3 All ER 48, 57.

***Was the history of Applicant's claim a proper factor for the Judgment?***

[82] Tracing the history of an applicant's claim is not only a standard component of ACC appeal judgments in the District Court, but is essential in the understanding of how the appeal has come about.

[83] Ms Hansen points out the history is relevant to background and context.

[84] Mr Thwaite refers to *Saxmere*[21] which articulated the test as whether:

> … a fair minded, impartial, and properly informed observer could reasonably have thought the judge might been unconsciously biased …

[85] Mr Thwaite submits that the proper legal analysis is that the history of the applicant's claim in the High Court should not have been taken into account in assessing the appeal.

[86] Judge Spiller mentions the High Court claim and a small portion of the Supreme Court's decision of 21 March 2021, at paragraphs [32] and [33] of his judgment. He does so as part of the background of this appeal. The background section of Judge Spiller's judgment commences at paragraph [2] and concludes at paragraph [42]. I conclude that the brief reference that Judge Spiller makes to this portion of the background of this case is proper. It was a concise recitation of the background of this case. I conclude that applying the test of Justice Tipping in *Saxmere* there would be no basis for a fair minded, impartial and properly informed observer to reasonably think that the Judge might have been unconsciously biased. I find that this point of law too is not capable of bona fide and serious argument.

***Were the experts properly qualified?***

[87] The next point of law raised by the applicant is whether the "experts" were properly qualified. Mr Thwaite refers to s 4(1) of the Evidence Act which provides that evidence can only be admitted if a witness is an expert qualified by special knowledge or skill based on training, study or experience.

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[21] *Saxmere* see note 4 above.

[88] He submits that there is no evidence that any of the medical practitioners or scientists involved had the particular expertise of an expert in the area of bone growth arising from the use of Roaccutane. He submits therefore that their "evidence" was not evidence in terms of the Evidence Act and thus not evidence in terms of s 156 of the Accident Compensation Act.

[89] The evidence that the reviewer and the Court routinely hears or receives on ACC reviews and appeals may include pro forma reports of first responders to an accident; practice nurse notes; physiotherapists' notes; and notes of general practitioners with no expert knowledge in respect of the injury caused by accident. In order for the appeal provisions of the Act to work and the Act to function as Parliament intended, such evidence is admitted under s 156(1).

[90] So, the Court and the reviewer routinely receive and admit evidence similar to that of Dr Brown, general practitioner, in this case. Accordingly, I again find that this does not raise a point of law capable of bona fide and serious argument.

***Did the Court properly assess the evidence?***

[91] The next point raised by the applicant is whether the Court properly assessed the evidence. After setting out a detailed background to this case from paragraphs [2] to [49], Judge Spiller then discusses the issues to be answered in the following seven paragraphs. As was said in *Edwards v Bairstow*[22] a decision makers 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.

[92] That was not the case here. The evidence the court relied on is detailed in paragraphs [56] and [57] and I find again that the applicant has not raised a point of law that is capable of bona fide and serious argument.

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22 *Edwards v Bairstow* note 20.

***Did an accident occur?***

[93] The final point of law raise is: did an accident occur? Mr Thwaite submits that the Court did not assess the evidence of the acceleration or precipitation of the injury by way of gradual process which led to damage. Ms Hansen responds that there is no tenable argument to suggest that the applicant's skeletal hyperostosis could be anything other than a treatment injury as defined in s 32 of the Act.

[94] She also notes that a treatment injury that occurred gradually does not disqualify cover and refers to s 20(2)(f) of the Act.

[95] I accept Ms Hansen's submissions in this regard and find that no seriously arguable error of law is disclosed.

[96] Finally, I note that the Supreme Court at paragraph 20 of its Judgment referred to s 133(5) of the Act describing a claimant as being "locked in" to the Act's procedures once they have lodged a claim. The Supreme court's statement in this regard aligns with the dicta in *Jackson* and *Kenyon* regarding the proper use of scarce judicial resources, given that the applicant already has the remedy of ACC cover.

[97] In this case having found that none of the grounds of the applicant raises a seriously arguable error of law, I must dismiss this application for leave to appeal. Costs are reserved.

CJ McGuire
District Court Judge

Solicitors: Lisa Hansen, Barrister, Wellington
Gregory J Thwaite, Solicitor, Auckland