

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 215 ACR 182/22

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

Submissions: The Appellant is self-represented
 S L K Shaw and M C Boyle for the Corporation

Hearing: On the papers

Judgment: 20 December 2023

**JUDGMENT OF JUDGE P R SPILLER
[Leave to Appeal to the High Court – Section 162
Accident Compensation Act 2001]**

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour, Judge McGuire, delivered on 19 September 2023.¹ At issue in the appeal was whether or not, for the purposes of section 17 of the Accident Compensation Act 2001 (the Act) Mr Saunders is a person who is ordinarily resident in New Zealand. The Court dismissed the appeal, for the reasons outlined below.

¹ *Saunders v Accident Compensation Corporation* [2023] NZACC 153.

Background

[2] In 2015, Mr Saunders moved to Australia.

[3] On 14 January 2017, Mr Saunders sustained an injury resulting from a fall he had after spinal surgery in Australia. The fall resulted in Mr Saunders becoming paraplegic. He applied to the Corporation for cover for his injury.

[4] On 23 August 2017, the Corporation issued a decision declining to accept Mr Saunders' claim for cover, on the basis that he was not "ordinarily resident in New Zealand" at the time of his accident:

Although we're able to accept some claims for accidents which occur overseas, section 17 of the Accident Compensation Act 2001 outlines situations where we are not able to offer cover.

While ACC completely acknowledges the unfortunate circumstances faced by you and your family, there is nothing within the bounds of ACC legislation that we can offer to support your situation. The length of time you have remained outside of New Zealand, the date of your claimed accident/s in Australia and the described injury condition you have been treated for are all reasons why ACC is unable to provide assistance for you at this time.

[5] Mr Saunders applied to review this decision. Following review proceedings on 1 September 2022 and 19 September 2022, the Reviewer dismissed the review. Mr Saunders then appealed to the District Court. On 19 September 2023, Judge McGuire dismissed Mr Saunders' appeal. He then applied to the District Court for leave to appeal to the High Court.

The Court's judgment of 19 September 2023

[6] Judge McGuire stated as follows.

[7] The ultimate issue for determination in this case is whether or not, for the purposes of section 17 of the Act, Mr Saunders is a person who is ordinarily resident in New Zealand. He needs to establish that, in order to be eligible for cover and entitlements under the Act. To be ordinarily resident in New Zealand, section 17(1)(a) requires that he has New Zealand as his permanent place of residence.

[8] In this case, there was some evidence that Mr Saunders has a house in New Zealand. However, s 17(2) states:

A person does not have a permanent place of residence in New Zealand if he or she has been and remains absent from New Zealand for more than six months or intends to be absent from New Zealand for more than six months.

[9] In this case, Mr Saunders moved from New Zealand to Australia in 2015. Although he maintained that his business was and is in New Zealand, he has had no New Zealand income as returned to the Inland Revenue Department since at least January 2014. This latter fact prevents Mr Saunders from being treated as having New Zealand as his permanent place of residence, by virtue of section 17(4).

[10] Accordingly, the Court must conclude that, for the purposes of s 22 of the Act, Mr Saunders fails to satisfy the requirements to obtain cover for personal injury suffered outside New Zealand, as he was not a person who was ordinarily resident in New Zealand when he suffered the personal injury. That is to say, he did not satisfy the definition in the Act of a person who is ordinarily resident in New Zealand (section 17).

[11] As stated by Judge Henare in the case of *Richards*,² the Court cannot provide an elastic interpretation of section 17(4). The Act sets out the criteria that must be met for those who claim cover and entitlements following personal injury. The Court has no power that a person injured overseas may obtain cover and entitlements if that person does not meet the criteria that Parliament has mandated.

[12] Accordingly, the Court is bound to find that the Corporation's decision of 23 April 2017 advising Mr Saunders that the Corporation was unable to offer cover was correct, and the Court must dismiss this appeal.

Relevant law

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

² *Richards v Accident Compensation Corporation* [2014] NZACC 81.

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.

[14] In *O'Neill*,³ 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 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

[15] In *Gilmore*,⁴ Dunningham J stated:

[55] I accept that, for the purposes of leave, it is not necessary to show that a decision was wrong, but only that there is an arguable question of law which is of sufficient importance to outweigh the cost and delay of a further appeal. However, in this case I consider no seriously arguable question of law arises, nor can it be said there is any factor which the District Court did not take into account. Instead, I consider the matters sought to be raised are, in substance, questions of fact and where the findings made were open to ACC, and to the District Court Judge, on the materials before them. For that reason, I do not need to go on to consider whether, in the exercise of my discretion, leave should be granted.

³ *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

⁴ *Gilmore v Accident Compensation Corporation* [2016] NZHC 1594.

[16] In *TR*,⁵ Isac J stated:

[24] ... the threshold for an appeal against factual findings on the basis of an error of law is very high. The challenged factual finding must be one that, on the evidence, was not open to the decision-maker. Put another way, TR must establish that the factual conclusion of the District Court was so clearly untenable that application of the law required a different answer.

The appellant's submissions

[17] The appellant submits as follows.

[18] The Corporation owes him a duty of care; was dishonest when he first submitted his claim; is paying for people to travel back to New Zealand during Covid-19 lockdowns on medical grounds; has a responsibility to provide a policy document but has not; the claims officer advised him that he was ordinarily a citizen in correspondence and that he needed to return to New Zealand to make a claim; the Corporation must have “waived the time rule reason before”; has not taken advice from a medical practitioner with spinal injury knowledge or looked at the file and interviewed him.

[19] He is unable to work to the same degree he worked at prior to suffering the injury. He has paid income tax and ACC premiums throughout his working life and does not have any tangible assets. He has a record of regular travel dating back to 1982 and was unable to travel between mid-2015 to 2018 due to his health. He has not been in Australia on a holiday. His property and business interests have been in New Zealand at all material times (his home sold in 2018 and his companies are still active and the trust pays tax in New Zealand). The judgment was incorrect to state that he had no property in New Zealand at the time of the surgery. *Richards* is irrelevant. The appellant in that case was on a sailing holiday whereas Mr Saunders was working for New Zealand companies.

Discussion

[20] This Court notes that Mr Saunders' claim for cover was in relation to an injury resulting from a fall he had after spinal surgery in Australia in January 2017. In

⁵ *TR v Accident Compensation Corporation* [2023] NZHC 2991.

terms of section 22(1)(c) of the Accident Compensation Act 2001, which applies to Mr Saunders' claim, he has cover for a personal injury suffered outside New Zealand only if he was "ordinarily resident in New Zealand" when he suffered the personal injury.

[21] Section 17 of the Act 2001 defines "ordinarily resident in New Zealand":

- (1) A person is ordinarily resident in New Zealand if he or she—
 - (a) has New Zealand as his or her permanent place of residence, whether or not he or she also has a place of residence outside New Zealand; and
 - (b) is in one of the following categories:
 - (i) a New Zealand citizen;
 - (ii) a holder of a residence class visa granted under the Immigration Act 2009;
 - (iii) a person who is a spouse or a partner, child, or other dependant of any person referred to in subparagraph (i) or (ii), and who generally accompanies the person referred to in the subparagraph.
- (2) A person does not have a permanent place of residence in New Zealand if he or she has been and remains absent from New Zealand for more than 6 months or intends to be absent from New Zealand for more than 6 months. This subsection overrides subsection (3) but is subject to subsection (4).
- (3) A person has a permanent place of residence in New Zealand if he or she, although absent from New Zealand, has been personally present in New Zealand for a period or periods exceeding in the aggregate 183 days in the 12-month period immediately before last becoming absent from New Zealand. (A person personally present in New Zealand for part of a day is treated as being personally present in New Zealand for the whole of that day.)
- (4) A person must be treated as having New Zealand as the person's permanent place of residence if—
 - (a) the person—
 - (i) intends to resume a place of residence in New Zealand; and
 - (ii) is absent from New Zealand primarily in connection with the person's employment duties (the remuneration for which is treated as income derived in New Zealand for New Zealand income tax purposes) or for up to 6 months following the completion of the person's period of employment outside New Zealand; or

(b) the person—

- (i) intends to resume (or assume) a place of residence in New Zealand; and
- (ii) is the spouse or partner, child, or other dependant of a person described in paragraph (a) and generally accompanies that person; and
- (iii) is outside New Zealand during the period of employment of the person described in paragraph (a) or for up to 6 months following the completion of it.

[22] In Mr Saunders' case, Judge McGuire correctly explained why Mr Saunders did not meet the requirements of ordinary residence in New Zealand in relation to his injury, and therefore was not eligible for cover. Judge McGuire, in deciding on Mr Saunders' appeal, was bound by the requirements for cover as outlined in the 2001 Act.

[23] The Court's previous judgment in *Richards* is relevant to Mr Saunders' appeal because the issue in the *Richards* appeal was also whether the appellant met the criteria for being ordinarily resident in New Zealand when he suffered an accident overseas. In line with Judge McGuire's judgment, the Court in *Richards* dismissed the appellant's appeal and commented that the Court is not empowered to provide an elastic interpretation of the requirements of section 17 of the Act.⁶

[24] However much this Court has sympathy for Mr Saunders' situation, the provisions of the 2001 Act are mandatory and not simply guidelines, and so this Court has no option but to find that Mr Saunders does not qualify for cover under the Act.

The Decision

[25] In light of the above considerations, the Court finds that Mr Saunders has not established sufficient grounds, as a matter of law, to sustain his application for leave to appeal, which is accordingly dismissed. The appellant 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

⁶ *Richards*, above note 2, at [30].

exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources and the finality of litigation. This Court is not satisfied as to the wider importance of any contended point of law.

[26] Costs are reserved.

A handwritten signature in dark ink, appearing to read 'P R Spiller', written in a cursive style.

Judge P R Spiller,
District Court Judge