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

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

**[2023] NZACC 65 ACR 38/22**

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| UNDER | THE ACCIDENT COMPENSATION ACT 2001 |
| IN THE MATTER OF | AN APPLICATION FOR LEAVE TO APPEAL TO THE HIGH COURT ON A QUESTION OF LAW UNDER SECTION 162 OF THE ACT |
| BETWEEN | CW<br>Applicant |
| AND | ACCIDENT COMPENSATION CORPORATION<br>Respondent |

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| Hearing: | On the papers |
| Appearances: | Mr B Hinchcliff for the Applicant<br>Ms F Becroft for the Respondent |
| Judgment: | 27 April 2023 |

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**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] This is an application for leave to appeal against a judgment of Judge P R Spiller delivered on 12 December 2022.

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

> A part 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.

[3] In *O'Neill v Accident Compensation Corporation*[1], Judge Cadenhead listed the applicable principles to the exercise of granting leave to appeal as follows:

> [24] The Courts have emphasised that for leave to be granted:
>
> (i) The issue must arise squarely from "the decision" challenged: eg. *Jackson v ACC* (unreported) HC Auckland, Priestly J, 14 February 2002 AP 404-96-01; *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;
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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: eg. *Impact Manufacturing* (unreported) Doogue J, HC Wellington AP 266/00, 6 July 2001;
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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 be proscribed: eg. *Northland Cooperative Dairy Co Limited v Rapana* [1999] 1 ERNZ 361, 363(CA);
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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: *CIR v Walker* [1963] NZLR 339, 354;
>
> (v) The 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 consistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision: *Edwards v Bairstow* [1995] 3 All ER 48, 57;
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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: Commission of *Inland Revenue v Walker* [1963] NZLR 339, 353-354 (CA); Edwards v Bairstow [1995] 3 All ER 48, 57.
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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: eg. *Jackson* and *Kenyon* above.

## Applicant's Submissions

[4] At paragraph 38 of his written submissions, Mr Hinchcliff says:

> The questions for the High Court revolve around:
>
> 1. What does "reasonably" mean in s 55(1) of the Act?; and
>
> 2. Whether a specialist report did not review all of the available evidence is determined to be inaccurate and another assessment must occur.

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

[5] Mr Hinchcliff submits that the decision-maker's treatment of facts amounts to an error of law.

[6] He submits that the evidence is inconsistent with the applicant being able to reasonably attend a psychiatrist appointment.

[7] Further, he submits there is no evidence that ACC needs an "in person" psychiatric appointment to determine the matter.

**Background**

[8] The issue before the District Court was the Corporation's decision of 10 May 2021 declining cover for a mental injury caused by treatment on the basis that there was insufficient medical evidence of a causal link between a mental injury and a physical injury suffered in treatment.

[9] On 14 August 1980, the applicant received an injection into her L5/S1 interspinous space.

[10] Treatment injury claims were lodged for physical injuries in relation to this particular treatment in 1980 and 2010, but the claims were declined.

[11] The applicant lodged a claim for post-traumatic stress disorder, with a date of injury of 14 September 1993. Cover was granted for this.

[12] On 9 January 2019, an injury claim was lodged by the applicant's GP for post traumatic brain syndrome, said to be the result of an accident on 14 August 1980, when the applicant received a spinal injection for back pain.

[13] On 7 March 2019, the Corporation declined this claim.

[14] The Corporation's decision was quashed at review in April 2020 with directions for the Corporation to engage an appropriate specialist for the purposes of assessing whether a physical injury caused by the spinal injection in 1980 materially contributed to a possible diagnosis of post traumatic brain syndrome.

[15] There was disagreement between the parties with regard to who was an appropriate assessor. Ultimately, the applicant agreed only to be seen by Dr Newburn, Psychiatrist. The Corporation's view was that Dr Newburn was not an appropriate assessor. Mr Hinchcliff maintained that Dr Newburn was a suitable assessor and suggested that the Corporation could send the applicant to another provider afterwards, if necessary. The parties were unable to agree on this point, and ultimately the applicant refused to be seen by anyone other than Dr Newburn.

[16] Dr Newburn provided a report for the applicant on 11 February 2021. He diagnosed adjustment disorder and somatic symptom disorder relating to the injection.

[17] A Corporation psychology advisor, Ms Dickson, then reviewed Dr Newburn's report and concluded that there were significant oversights in it.

[18] On 10 May 2021, the Corporation again declined the claim.

[19] In July 2021, the applicant received further details from the Corporation on questions it considered still needed to be answered by a psychiatrist. Those questions were referred back to Dr Newburn.

[20] Dr Newburn provided a further report for the review on 9 December 2021.

[21] The review was determined by Ms Jordan, reviewer. In her decision dated 22 February 2022, she dismissed the review application, concluding that the available evidence was not sufficient to show that the applicant's mental injury was caused by a physical injury suffered on 14 August 1980.

[22] The applicant then appealed to the District Court and following a hearing on 2 December 2022, the Court delivered a reserved judgment on 12 December 2022 dismissing the applicant's appeal.

[23] The Court found there was not sufficient evidence on the balance of probabilities that the applicant had suffered mental injury because of a physical injury suffered in treatment (a spinal injection) received in August 1980.

[24] The Court said at paragraph 51 of the Judgment:

> [51] The Court concludes from the above evidence that the appellant has not established on a balance of probabilities, through Dr Newburn's report, that her physical injury caused by Dr Orr's injection, materially contributed to a diagnosis of PTSD. Despite the clear directions of the reviewer, not all relevant medical evidence was considered by Dr Newburn in his assessment. The Court does not accept that it is appropriate that the Corporation could have directed that a further psychiatric assessment be done on the papers. The appellant's claim, dating back many years, and covering complex mental issues, needs to be assessed through an examination of the appellant by an appropriate specialist.

[25] In the previous paragraph of the judgment, regarding Dr Newburn's reports, Judge Spiller said:

> Dr Newburn's ensuing reports were based primarily on the appellant's self-reported evidence. The reports contained no mention of the mental health reports of 2012 and 2016 (noted above), which made specific reference to her claims about the 1980 injury, and which provided a mental assessment of her at the time.

**Applicant's Submissions**

[26] Mr Hinchcliff proposes the following questions for the High Court relating to s 55 of the Act:

(a) Does s 11 of the NZBORA affect s 55 of the Act?

(b) What are the circumstances for a person to refuse to undergo a medical assessment as directed by ACC?

[27] Mr Hinchcliff submits that in many cases, such as those in the District Court, specialist opinions are found to be lacking. He says that this could be based on limited evidence provided by the specialist, inaccuracies of fact, incorrect application of the facts to the law, or incorrect statements of facts.

[28] He then asks whether, if that is found to be the case, must a reviewer or the District Court direct the Corporation to provide another assessment?

[29] He refers to *R v Accident Compensation Corporation*[2] where the Court held that normally a lump sum assessment will be binding on the Corporation unless there is a clear flaw in that assessment.

[30] He then submits that in this case, Dr Newburn's report was only flawed to the point that some evidence had not been disclosed to him. That evidence was inconclusive and 32 years after the injury.

[31] Mr Hinchcliff also asks the question: "When is a medical report declared invalid and when must a new medical assessment be ordered by a reviewer or the District Court?".

[32] At the end of his submissions, Mr Hinchcliff summarises the questions to be asked as follows:

(a) Does s 11 of the NZBORA affect s 55 of the Accident Compensation Act 2001?

(b) What are the reasonable circumstances for a person to refuse to undergo a medical assessment as directed by ACC?

(c) When is a vital medical report declared invalid and when must a new medical assessment be ordered by a reviewer or the District Court.

(d) If a vital medical report is found to be flawed, is ACC liable to provide another assessment?

**Respondent's Submissions**

[33] Ms Becroft notes that the applicant has not identified any error of law in relation to the statutory tests for cover in issue in this case.

[34] Ms Becroft submits that the crux of the applicant's submission is that it was unreasonable for the Court to conclude that further evidence was required to establish cover and that an in-person assessment was necessary.

[35] Ms Becroft's response is that this question is a question of fact.

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2 *R v Accident Compensation Corporation* [2014] NZACC 218.

[36] She next refers to the applicant's questions around the extent to which further evidence is required and the reasonableness of obtaining such evidence. She submits that a question regarding obtaining further evidence is not germane to the Court's findings.

[37] She submits that the District Court determined that there was insufficient evidence supporting cover and dismissed the appeal on that basis and that its reasons for doing so, that is, the supporting factual foundation, are set out in paragraph 50.

[38] She submits:

> Thus the appeal was determined on the facts. The Court did not direct any further evidence should be obtained. Its comments in relation to the appropriateness of an in-person psychiatric assessment were not necessary to its decision.

[39] Ms Becroft also draws attention to what Judge Spiller said at paragraph 54:

> The Court notes, however, the offer of the Corporation for a further mental injury assessment to be undertaken and commends this offer to the appellant for her consideration.

[40] She refers to *Edwards v Bairstow*[3] that factual matters only amount to errors of law where it can be shown that the Court's findings were completely divorced from the facts. She submits that that plainly was not the case here.

[41] She submits that the leave application does not raise any seriously arguable question of law and ought to be declined.

## Decision

[42] Mr Hinchcliff's submissions contain a fair measure of discussion as to what the errors of law are in this case that satisfy the legal tests for leave to be granted to appeal to the High Court. These are eventually reduced to the four questions asked in paragraph 54 to 57 of his submissions, namely:

> (54) Does s 11 of the NZBORA affect s 55 of the Accident Compensation Act 2001?
>
> (55) What are the reasonable circumstances for a person to refuse to undergo a medical assessment as directed by ACC?

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3 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).

> (56) When is the vital medical report declared invalid and when must a new medical assessment be ordered by a reviewer or the District Court.
>
> (57) If a vital medical report is found to be flawed, is ACC liable to provide another assessment?

[43] Section 11 of the New Zealand Bill of Rights Act 1990 provides:

> Everyone has the right to refuse to undergo any medical treatment.

[44] For leave to be granted, the contended point of law must be "capable of bona fide and serious argument to qualify for the grant of leave" (*Impact Manufacturing*[4]).

[45] This case however is not about challenging the right that everyone has to refuse to undergo medical treatment.

[46] Section 3 of the ACC Act sets out that:

> The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first Accident Compensation scheme by providing for a fair and sustainable scheme for managing personal injury …

[47] Section 3(b) goes on to say:

> Providing for a framework for the collection, co-ordination, and analysis of injury-related information.

[48] It seems therefore unanswerable that the right under the Bill of Rights Act to refuse to undergo medical treatment can affect what the social contract referred to in s 3 provides for.

[49] As to the next question, what are the reasonable circumstances for a person to refuse to undergo a medical assessment as directed by ACC? This proposed question of law appears to flow from the proposition that for Accident Compensation Act purposes, a person may invoke s 11 of the New Zealand Bill of Rights Act to refuse to undergo a medical assessment as directed by ACC. Having concluded that the New Zealand Bill of Rights Act does not affect s 55 of the Accident Compensation Act, I am bound to find that in respect of this question, that it too is not capable of bona fide and serious argument.

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4 *Impact Manufacturing Ltd v Accident Rehabilitation and Compensation Insurance Corporation*, HC Wellington AP 266/00, 6 July 2001.

[50] As to the next proposed question of law, when is a vital medical report declared invalid, and when must a new medical assessment be ordered by a reviewer or the District Court? First, as presented, this question is hypothetical. No medical reports in this case were declared invalid by the District Court. Secondly, the hearings before the reviewer and the District Court follow the format that civil cases have followed in the common law tradition, at review and in the District Court. The reviewer and the District Court make their respective findings on the evidence and submissions presented to them.

[51] Mr Hinchcliff refers to "a vital medical report declared invalid". Regardless of what the respondent ACC Corporation thought and said regarding Dr Newburn's report, that report and others from Dr Newburn, were before the District Court and were weighed along with the other evidence. Following this, Judge Spiller reached his conclusions. At best, therefore, the question asked by Mr Hinchcliff under paragraph 56 of his submissions (set out in para 42 hereof), is hypothetical. Hypothetical questions are not grounds for leave to appeal to be granted.

[52] At paragraph 57, Mr Hinchcliff asks:

> If a vital medical report is found to be flawed, is ACC to provide another assessment?

[53] All ACC review cases and appeal cases involve the consideration of all medical and other reports. That is what has occurred here. Judge Spiller weighed the evidence and medical reports that derived from a variety of sources and dated back to 1980.

[54] The social contract with the community referred to in s 3 of the Accident Compensation Act 2001 necessarily involves engagement between ACC and the claimant. S 55 is an expression of that engagement. As already mentioned, medical assessments will be obtained, with s 55 being one mechanism for this. Otherwise, there is nothing whatever preventing an applicant from obtaining other medical advice and assistance and often this is ultimately funded by ACC. This too is part of the expression of the social contract that s 3 speaks of. That said, the question asked in paragraph 57 of Mr Hinchcliff's submissions is a hypothetical one. In terms of *Jackson,*[5] it appears not to arise squarely from the decision challenged.

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[5] *Jackson v Accident Compensation Corporation*, HC Auckland AP404-96-01, 14 February 2002.

[55] It follows from the above, that none of the questions of law posed by Mr Hinchcliff, are capable of bona fide and serious argument. Therefore, the application for leave to appeal is dismissed.

[56] I make no order as to costs.

CJ McGuire
District Court Judge

Solicitors: Medico Law Limited, Grey Lynn for the respondent