IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 89 **ACR 040/22**

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

Hearing: On the papers

Appearances: S Zindel for the applicant
F Becroft for the respondent

Judgment: 1 June 2023

JUDGMENT OF JUDGE DENESE HENARE
[Leave to Appeal to the High Court –
Section 162(1) Accident Compensation Act 2001]

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[1] The applicant, Pania Henderson applies for leave to appeal to the High Court pursuant to s162 of the Accident Compensation Act 2001 (the Act) against a decision of Judge Spiller delivered on 23 November 2022.[1]

[2] The Corporation's decision of 5 March 2021 declining cover for a pelvis injury, being a fracture or disruption of the pelvis, as a result of an accident on 11 February 1982 was before the Court. Ms Henderson was then aged 11 years old and riding her bicycle when she was hit by a car.

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1 *Henderson v Accident Compensation Corporation* [2022] NZACC 216.

[3] His Honour dismissed the appeal, upholding the review decision dated 24 February 2022 and finding there is not sufficient medical evidence to support cover for a fracture or disruption of the pelvis being caused by the 1982 accident.

[4] The parties filed submissions in writing, having been directed to do so, and being informed by Minute dated 7 December 2022 that the leave to appeal application would be determined on the papers.

Background

[5] The Judge set out a comprehensive background in his judgment.

[6] The applicant received cover for contusion injuries and a haematoma right thigh and buttock following her fall from the bicycle in the 1982 accident. There was scant contemporaneous medical evidence between 1982 and 1980 before the Court.

[7] The applicant suffered a domestic assault in 1998. The Judge noted a judgment in the District Court in 2006 which set the facts relating to both the 1982 and 1998 events.

[8] The Judge considered medical evidence from the early 2000's including from orthopaedic surgeons, Mr Howie, Mr Taine, Mr Allen, Mr Brown, Mr Hardy, Mr Hopkins, pain specialist Mr Hancock, and occupational medical specialist Dr Monigatti. Mr Howie was not convinced that the pain was injury related. Mr Howie detected no abnormality apart from a left sided pars defect, considered to be congenital in origin. Mr Taine noted the findings in a CT scan and MRI and Mr Howie's report of no injury in the pelvic region and the cause of symptoms being unclear. Reporting from other specialists also showed no pelvic injury.

[9] Review decisions and the District Court's decision in 2006 were noted by Judge Spiller, particularly the analysis of Judge Beattie in 2006 who considered the specialist evidence and concluded no causal link between the pain symptoms and any covered injury.

[10] There is a gap in the medical record until 2017/2018.

[11] Judge Spiller detailed the medical evidence from 2018. Radiological investigations were also undertaken.

[12] In July 2018 a treatment injury claim was filed for an alleged failure to diagnose a fractured pelvis in the accident in 1982. The Corporation obtained a medical case review from Mr Pai, Orthopaedic Surgeon, who concluded there was no evidence of a pelvic fracture and also that the appropriate treatment had been provided to the applicant in 1982. The treatment injury claim was accordingly declined on 26 September 2018.

[13] At a conciliation meeting in 2019, the Corporation agreed to investigate the matter further and considered whether there was existing cover for a pelvic injury. Subsequently a report from Ms Hansen, Physiotherapist was obtained, along with a report from Pacific Radiology, dated 16 October 2019. Ms Hansen noted longstanding pain on the left pelvic side since the 1982 accident which she said fitted the description of central sensitisation. She recommended pain management. The Pacific Radiology report concluded it was possible there had been a fracture or traumatic disruption of the pelvis in childhood. The file was then reviewed by Dr Burns, Branch Medical Advisor who concluded the contemporaneous presentation did not support the applicant having suffered an acute fracture injury to the pelvis.

[14] On 21 November 2019 the Corporation issued a decision declining cover for a fracture or disruption of the pelvis. That decision was challenged on review, but the review application was withdrawn following an agreement by the Corporation to investigate further. Subsequently there were additional reports from orthopaedic surgeons Mr Willoughby, Mr Hardy and Mr Keddell. There was also an updated MRI scan. Mr Hardy did not consider the pathology present was noteworthy.

[15] Mr Keddell concluded there was no evidence of any significant lateral pelvic compression injury and thought that the applicant presented with a pain profile. A SPECT CT scan was undertaken that confirmed a left L5 pars defect together with mild degenerative changes. Mr Keddell concluded the evidence was not supportive of traumatic cause for the SPECT CT findings around the pars defect.

[16] The applicant then filed further evidence from Mr Deverall, Orthopaedic Surgeon, who acknowledged that pain had been constant and consistent since the accident.

[17] The file was reviewed by Dr Noonan, Branch Medical Advisor in January 2021, who confirmed there was no evidence of any structural injury having been suffered in 1982.

[18] Mr Keddell then provided another report in February 2021 and could not identify any traumatic origins to the pathology present.

[19] On 5 March 2021 the Corporation issued the decision on appeal. A review application was filed. The applicant also filed further evidence from rheumatologist Dr Doube, who assessed the applicant and reviewed radiological findings. Dr Doube linked the applicant's pain symptoms to the 1982 accident. He thought it likely the pars defect documented occurred at the time of her injury in 1982. He took issue with Mr Keddell's findings.

[20] Both Mr Keddell and Dr Doube provided final comment in November 2021.

The application for leave

[21] Mr Zindel claims an error of law because the Judge overlooked evidence that a major impact was likely the cause of a pelvic injury sustained in 1982 and findings of degeneration noted by medical experts amounted to degeneration secondary to the initial trauma. Mr Zindel submitted:

> Judge Spiller mentions Mr Taine at [8] of his decision but not the significance of his opinion and refers to Dr Doube supporting causation and dismissing degeneration at [53]. He also refers to other medical opinion supporting the applicant at [60]. However, the learned Judge considered other reports at [62] to [66] to the contrary. These reports appear to accept the pars defect but ascribe it to degeneration. However, it was apparently first diagnosed in 2001 when the applicant was only aged 30 or so.

[22] Mr Zindel also submitted that Judge Spiller ought not to have placed weight on Mr Howie's opinion because the SPECT CT scan including the technology, was not

available to him when he reported and therefore, he did not appreciate that a pelvic injury was the likely cause of the applicant's ongoing pain.

The District Court decision

[23] The Judge's decision set out the issue in the appeal, and the comprehensive background noting the considerable number of medical reports together with the contemporaneous evidence before him.[2]

[24] The Judge addressed the relevant test on causation for cover from the leading authority of the Court of Appeal in the jurisdiction.[3] He then considered the submissions for the applicant.

[25] After traversing all the available evidence His Honour concluded:[4]

> There is not sufficient medical evidence to support a fracture or disruption of Ms Henderson's pelvis having been sustained in the 1982 accident. The Court notes, in particular, the evidence of a series of orthopaedic surgeons to the contrary. The decision of the Reviewer dated 24 February 2022 is therefore upheld. The appeal is dismissed.

[26] The Judge found on the facts that there is not sufficient medical evidence to support a fracture or disruption of the pelvis having been sustained in the 1982 accident.

Legal principles governing application for leave

[27] Section 162(1) of the Accident Compensation Act 2001 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.

[28] An appeal lies only in a question of law and the question must be one that is seriously arguable.

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2 At [2] to [56].
3 *Accident Compensation Corporation v Ambros* [2007] NZCA 304.
4 At [67].

[29] The principles relevant to the exercise of the discretion to grant leave were discussed in O'Neill.[5] Judge Cadenhead held:

> [24] The Courts have emphasised that for leave to be granted:
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> (i) The issue must arise squarely from 'the decision' challenged: e.g., *Jackson v ACC* unreported, HC Auckland, Priestley 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: e.g., *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 being proscribed ; appeals on the former being proscribed: e.g., *Northland Co-operative Dairy Co Ltd 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;
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> (v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision *Edwards v Bairstow* [1995] 3 All ER 48, 57 (sic) [1955]3 All ER 48
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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 *Commissioner of Inland Revenue v Walker* [1963] NZLR 339, 353354 (CA); *Edwards & Bairstow* [1995] 3 All ER 48, 57 (sic) [1955] 3 All ER 48
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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 e.g., *Jackson and Kenyon* above.

[30] The Courts have been careful to ensure that scarce judicial resources are not tied up with a further consideration of matters of fact, factual arguments dressed up as questions of law, or questions of law that do not have a realistic prospect of success.

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

Discussion

[31] In *Bairstow*[6] terms, the applicant must show an error of law that the judgment is so clearly untenable that proper application of the law required a different answer.

[32] Mr Zindel is candid in his submissions there is a contest of expert evidence in this case.

[33] Mr Zindel's submission is that based on the evidence for the applicant, there is traumatic cause for the pars defect noted by Mr Howie in 1982. The Judge referred to Mr Howie's report in May 2001 noting his finding from the MRI scan that [he] "detected no abnormality apart from a left sided pars defect.." that it was congenital in origin as noted in Mr Taine's report.

[34] Mr Zindel referred to the opinions of Mr Taine and Dr Doube, quoting an extract from Mr Taine's report and submitted the quoted extracts contrasted with what the Judge took from those opinions.

[35] Review of Judge Spiller's judgment shows the reports relied on by the applicant were considered and weighed with other medical reports which proffered contrary opinions. The Judge was entitled to reach his own conclusions having regard to the entirety of all the reports before him.

[36] The Judge considered on balance there was insufficient evidence to support a significant pelvic injury caused by the accident in 1982 for reasons that:

[a] The contemporaneous evidence, including an x-ray taken on the day of the accident did not reveal any bony injury to the pelvis, and the clinical notes which confirmed the applicant was walking pain free on discharge from hospital.

[b] Reporting from many orthopaedic surgeons including Mr Howie, Mr Taine, Mr Allen, Mr Hardy and Mr Hopkins, none of whom identified any structural injury to the pelvis sustained in the 1982 accident. Mr

Howie in particular considered that the pelvic condition present was development/congenital, this point noted also by Mr Taine. Mr Hopkins agreed the applicant's condition was consistent with a congenital abnormality of the left hemipelvis which had no relationship whatsoever to the accident in 1982.

[c] Mr Pai's review in 2018 in which he concluded the applicant did not suffer a pelvic fracture in the event in 1982.

[d] Mr Keddell's reporting where he identifies mild degenerative changes around the L5 pars defect and his conclusion on balance, that the evidence did not support a traumatic cause for the applicant's symptoms.

[37] Mr Zindel submitted that the Judge ought not to have placed weight on Mr Howie's opinion because the SPECT CT scan (and the technology underpinning such a scan) was not available to him when he reported, and therefore he did not appreciate the injury was likely the cause of the applicant's ongoing pain.

[38] Having reviewed the judgment, this Court agrees with Ms Becroft's submissions and finds:

[a] Firstly, the Judge did not rely solely on Mr Howie's opinion but on a range of opinions from a series of orthopaedic surgeons who commented over the years, many of whom provided multiple reports.

[b] Secondly, there was no evidence before His Honour that any medical opinion prior to the SPECT CT scan report was flawed or invalid by virtue of the results of the SPECT CT scan. The SPECT CT scan confirmed the pars defect that had been identified by Mr Howie as referred to in the judgment. The SPECT CT scan did not identify any causal link.

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6 *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48.

[c] There was consistent medical opinion that in order to suffer a pars defect through a traumatic cause, there would need to be an accident of some force or impact. However, in this case such a conclusion was inconsistent with the contemporaneous evidence which did not indicate any pelvic injury suffered as a result of force or impact. Judge Spiller elaborated the evidence in detail, including the earlier evidence considered by Judge Beattie in his decision in 2006, showing no pelvic injury caused by the 1982 accident.

[d] While the applicant was admitted to hospital following the accident, the x-rays were unremarkable as reported by Dr Bourchier and the applicant was discharged walking freely. The results of imaging and the applicant's mobility on discharge were noted by the Judge. That evidence was not accepted as consistent with the applicant having suffered a significant bony injury, a finding made by Judge Spiller.

[e] In terms of the evidence of degenerative changes around the pars defect, Judge Spiller noted the opinion of Mr Keddell including his response to Dr Doube. Judge Spiller discussed this matter as a relevant consideration as part of his findings:[7]

> [66] Fifth, in February 2021, Mr Keddell, Orthopaedic Surgeon, after comprehensively reviewing Ms Henderson's medical reports and recent imaging, concluded that she was more likely to have a mild inflammatory condition of her sacroiliac joints and some mild degenerative changes around her left L5 pars defect. Dr Keddell assessed that the balance of evidence was not supportive of a traumatic cause for these findings and that her current disability was not directly related to her accident in 1982. In November 2021, Mr Keddell provided a further opinion (in response to a report from Dr Doube), noting that Ms Henderson had radiological and clinical evidence of arthritic changes in her SI joints and lumbar spine, and confirming that, on the balance of probabilities, the changes in her sacroiliac joints and lumbar spine were unlikely to be related to the accident in 1982

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7 See *Henderson* n1 at [66].

Decision

[39] This Court finds the Judge considered and weighed all the evidence on causation before him and he did not overlook any material factor in reaching his decision.

[40] The Judge was entitled to reach the findings he did, namely that there was insufficient evidence of any significant injury to the pelvis suffered in 1982. That conclusion was clearly open to him on the facts and supported by the weight of all the evidence which he considered.

[41] This Court finds no question of law arises.

[42] Accordingly, the application for leave to appeal to the High Court is dismissed.

[43] There is no issue of costs.

Judge Denese Henare
District Court Judge