

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2024] NZACC 33

ACR 277/18

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPEAL UNDER SECTION 162(1) OF
THE ACT

BETWEEN MACNAUGHTAN, JOHN
Applicant

AND ACCIDENT COMPENSATION
CORPORATION
Respondent

Submissions: K Mansfield, KC, for the Applicant
L Hawes-Gandar and F Becroft for the Corporation

Hearing: On the papers

Judgment: 19 February 2024

JUDGMENT OF JUDGE P R SPILLER

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour McGuire DCJ, delivered on 3 October 2023.¹ At issue in the appeal was a decision of the Corporation, dated 25 May 2017, declining Mr MacNaughtan cover for obsessive compulsive disorder (OCD) as a treatment injury. The Court dismissed the appeal, for the reasons outlined below.

¹ *MacNaughtan v Accident Compensation Corporation* [2023] NZACC 75.

Background

[2] In 2016, Mr MacNaughtan was 14 years old, and was attending College. He was a high-achieving individual, excelling academically and in sport. He had no genetic predisposition or family history of psychiatric illness, nor any precursor signs of mental illness. However, Mr MacNaughtan struggled with acne throughout his adolescence.

[3] On 17 May 2016, Mr MacNaughtan saw a dermatologist in relation to concerns over acne and was prescribed Isotretinoin, which he commenced taking on 20 May 2016. He suffered from some of the drug's usual side-effects, including dry skin and lips.

[4] According to the father of Mr MacNaughtan, he stopped taking Isotretinoin on 24 June 2016 due to ongoing lip issues, the unpleasant discolouration of facial pigment, and because he seemed rather stressed." At the time, Mr MacNaughtan's parents attributed the stress to the changes to his facial appearance and possibly school exams.

[5] By mid-to-late July, Mr MacNaughtan was displaying unusual symptoms such as spending excessive time showering and cleaning his hands. On 28 July 2016, his father contacted Child and Youth Mental Health Services about these symptoms. The intake/referral form stated that his family had "noticed significant change" in the prior four to five days. It noted that "Anxious type behaviours have been present before; but cleaning is new behaviour. Previously often nervous, concerned about doing speech in front of school".

[6] On 5 August 2016, Mr MacNaughtan was seen by Dr Sarah Temelkovksi, Psychiatrist, who assessed that he was suffering from acute onset OCD. Dr Temelkovksi recorded that Isotretinoin could have been a potential causal factor, also noting that there may have been some suggestion of developmental vulnerability.

[7] In August to October 2016, Mr MacNaughtan saw Dr Simon Bainbridge, Psychiatrist. He suggested that Isotretinoin could have contributed to the OCD as a “biological stressor”, also noting that perfectionist traits and psychological stressors relating to long hours of schoolwork, sports and lack of sleep may have contributed. On 9 September 2016, Dr Bainbridge said:

My current impression is that John suffered a severe side effect to his Roaccutane, which precipitated a severe case of OCD, as his body recovers from this, we are seeing an improvement in these symptoms.

[8] On 14 September 2016, Mr MacNaughtan’s GP, Dr North, lodged a claim for a treatment injury on the basis that the Isotretinoin may have triggered his OCD.

[9] The Corporation obtained advice from Dr Michael Tatley, Drug Safety Specialist, who advised that there is controversy in the research and literature as to whether there is evidence of an association (causal or not) between Isotretinoin and various adverse psychiatric conditions, including OCD. He advised that various potential mechanisms by which Isotretinoin could cause such psychiatric issues had been proposed, and referred to, amongst other material, research by an American Psychiatrist, Professor Douglas Bremner. Dr Tatley concluded that, while a causal link was possible, it was not established.

[10] The Corporation also obtained advice from Dr Mark Davis, Psychiatrist, who advised that the causes of OCD are not fully understood but it is thought to be the result of a combination of genetic and environmental factors and that there are certain factors which place a person at greater risk of developing OCD, but it also develops spontaneously. Dr Davis confirmed agreement with Dr Tatley that there is some suggestion of an association between Isotretinoin and various psychiatric events, but no established causal link. Dr Davis concluded that it was possible that Isotretinoin had been a causal factor in the development of Mr MacNaughtan’s OCD, but that it could equally have developed spontaneously or could have been a pre-existing, underlying, condition.

[11] The Corporation’s Medical Advisor, Dr Peter Jansen, reviewed matters and concluded that there was insufficient evidence to establish any causal link between the Isotretinoin and OCD generally, let alone in Mr MacNaughtan’s case. Dr Jansen

also noted that OCD constitutes a mental injury under the 2001 Act which could only be covered as a personal injury if it was suffered because of a physical injury. Dr Jansen advised that the various potential causal mechanisms proposed in the research, particularly that of Professor Bremner, appeared to involve changes in the brain function which he did not believe would meet the requirements for a physical injury under the Act.

[12] On 26 May 2017, the Corporation issued its decision declining cover for OCD saying:

We do not have expert advice nor any other evidence to conclude that a physical injury has occurred from the one month of isotretinoin. At best the single scientific report we are aware of is speculative about isotretinoin resulting in temporary changes in brain metabolism. Nor do we have expert opinion or scientific evidence to conclude that one month of isotretinoin causes physical damage in the brain that explains later development of OCD. In other words there is no credible evidence that isotretinoin has caused a physical injury.

[13] The Corporation also questioned whether Mr MacNaughtan's use of Isotretinoin caused his OCD, saying that there was, at best, a weak temporal connection between the drug and his OCD. The report then said that "even that is questionable given the lack of overlap in time and debatable or speculative theories about mechanisms by which isotretinoin causes psychiatric symptoms". Mr MacNaughtan lodged an application for review of the Corporation's decision.

[14] An affidavit from J Douglas Bremner, Professor of Psychiatry at Emory University School of Medicine, Atlanta, supported the conclusion that there is a link between the use of Isotretinoin and OCD by causing physical injuries to the brain, including changes in gene transcription, inhibition of neuron growth in the hippocampus, decreased function in the orbitofrontal cortex, and changes in neurotransmitters.

[15] This affidavit was reviewed by Dr Jansen, who largely disagreed with Professor Bremner's conclusion that the causes of OCD were physical injuries, instead finding that they were microscopic changes or normal bodily processes that might be affected by taking a medication. Dr Jansen said that these descriptors of sub-cellular changes do not meet the requirements for a physical injury.

Professor Bremner provided further replies to Dr Jansen's comments on 3 April 2018 and 5 April 2018, while Dr Jansen provided a further response on 1 May 2018.

[16] On 16 August 2018, a Reviewer upheld the Corporation's initial decision, citing the District Court's previous decisions which suggested that a microscopic level injury was not a personal injury for the purposes of ACC cover. The Reviewer also held that Professor Bremner "has provided largely speculative language in his reports", that "his language represents a more speculative stance" than a probability, and that there was no evidence that any form of alteration or damage occurred in Mr MacNaughtan's brain. Finally, the Reviewer noted that there was a chance that Mr MacNaughtan would have developed OCD even had he not used Isotretinoin, meaning that it could not be said "that the only reason Mr MacNaughtan is suffering with OCD, is because of his treatment". Mr MacNaughtan appealed to the District Court.

[17] On 15 November 2021, Professor Bremner filed a further report.

[18] On 6 October 2022, Dr Patrick Daniels, Psychiatrist, stated that there is no established causative association between Isotretinoin and the development of OCD. However, Dr Daniels noted that there is a strong temporal relationship between the use of Isotretinoin and the onset of OCD. This, he said, "suggests that Isotretinoin may have contributed to the obsessive compulsive disorder in the sense of being a precipitating factor". Dr Daniels also said:

On the balance of probabilities, Isotretinoin has contributed to the onset of obsessive compulsive disorder, that is, has been a precipitating factor.

It is less likely that the Isotretinoin continues to be a factor in the ongoing symptoms of obsessive compulsive disorder and it is also likely that had it not been for the use of Isotretinoin, Mr MacNaughtan would still have developed this disorder.

The mechanism by which the Isotretinoin may have precipitated the obsessive compulsive disorder is uncertain, however there are a number of possibilities, including those described in the expert opinion by Dr Bremner, which are likely to be at the "microscopic" rather than the "macroscopic" level, as noted by Dr Jansen.

The Court's judgment of 3 October 2023

[19] McGuire DCJ set out the factual background of the appeal, discussed the parties' positions and traversed the medical reports by Dr Bainbridge, Dr Tatley, Professor Bremner and Dr Karl Jansen.

[20] In relation to Professor Bremner's report dated 15 November 2021, McGuire DCJ held that:

Dr Bremner's conclusions do not readily assist the appellant in our case. There were no identified symptoms of OCD brought on by the use of Isotretinoin in our case. They first appeared a month after the Isotretinoin had been discontinued.

[21] McGuire DCJ then discussed Dr Daniels' report dated 6 October 2022. His Honour noted that, on the one hand, Dr Daniels said that there was no causative association between Isotretinoin and obsessive compulsive disorder, but then said in Mr MacNaughtan case that "[i]t was a precipitating factor on account of the strong temporal relationship". McGuire DCJ did not accept Dr Daniels' conclusion, saying that there is "no evidence at all that during the 26-35 days during which the appellant was medicated with Isotretinoin he developed OCD-type symptoms".

[22] McGuire DCJ noted that Mr MacNaughtan stopped taking Isotretinoin on 24 June 2016 because of ongoing lip issues, facial pigment discolouration and because he seemed stressed, after which he attended a fencing competition in Sydney from 5 to 12 July. He emphasised that the first report of Mr MacNaughtan being significantly stressed came on 27 July 2016 in Dr Gould's notes from behaviour two or three days earlier, concluding that there is "a 30 day gap from 24 June when the Isotretinoin was stopped and 24 or 25 July when an obsessive behaviour was first noted". His Honour then held:

The appellant's parents present as highly diligent, caring and responsive. I therefore conclude from all the information before the Court, that for the month following the cessation of Isotretinoin, there was nothing suggestive of obsessive compulsive disorder symptoms.

Such a gap of time in terms of causation is not found in any of the research information put forward by Dr Bremner.

On the basis of this analysis therefore, I find that the appellant has not proved on the balance of probabilities that his using Isotretinoin for acne has caused or contributed to causing injuries that caused obsessive compulsive disorder, or as the Act puts it in section 26(1)(c), he did not “suffer” obsessive compulsive disorder “because of physical injuries suffered” by him from the Isotretinoin treatment.

[23] McGuire DCJ determined that section 26 of the Act requires that a mental injury be suffered because of physical injuries. He held that:

Given the analysis of the timeline, I do not accept that in this case there is a strong temporal relationship between the use of Isotretinoin and the onset of obsessive compulsive disorder. This is especially so when one considers the strong temporal linkages present in the case studies referred to by Professor Bremner in his Expert Report. As a result, therefore, I disagree with Dr Daniels’ conclusion that on the balance of probabilities, Isotretinoin has contributed to the onset of obsessive compulsive disorder in that it was a precipitating factor.

[24] However, McGuire DCJ agreed with Dr Daniels’ conclusion that it is “less likely” that Isotretinoin continued to be a factor in Mr MacNaughtan’s ongoing OCD symptoms and that it is likely he would have developed the disorder even if he did not use the drug. This is on the basis that it was “common ground that prior to his commencement of Isotretinoin, anxieties regarding school work and other activities often kept the appellant awake until 2-4 am”.

[25] McGuire DCJ then turned to the other requirement for cover under s 26, namely that Mr MacNaughtan developed OCD because of physical injuries caused by the Isotretinoin. His Honour held that s 26(1)(c) necessarily implies mental injuries are different from physical injuries, before citing *Jones, Teen, and Mura*,² District Court decisions from 2002 and 2003, which referred to the need to prove a physical injury in the context of underlying conditions. His Honour compared these to Professor Bremner’s report, in which he advised that OCD is caused by changes to the brain, which are equivalent to physical injury, and that those injuries result in the OCD-symptoms.

[26] McGuire DCJ noted that Professor Bremner’s conclusion “leaves the Court in a similar position to that of Judges Beattie and Cadenhead in *Jones, Teen and Mura*”.

² *Jones v Accident Compensation Corporation* [2002] NZACC 242; *Teen v Accident Compensation Corporation* [2002] NZACC 244; and *Mura v Accident Compensation Corporation* [2003] NZACC 133.

His Honour said that he agreed with that line of authority to the extent that it provides:

There is a need to prove a physical injury in line with the natural and ordinary meaning, that is, involving physical damage or hurt; bodily harm or damage, which is in in accord with the statutory framework.

[27] McGuire DCJ concluded that a change to the way in which “physical injury” must be interpreted, away from its natural and ordinary meaning, is properly a matter for Parliament and not the Court. As such, he found that the OCD was not suffered because of a physical injury, as s 26 required, and dismisses the appeal.

Relevant law

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

A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District Court, appeal to the High Court.

[29] 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

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

[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

[30] 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.

[31] 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 applicant's submissions

[32] Mr Mansfield, for Mr MacNaughtan, submitted that a number of questions of law arise from McGuire DCJ's judgment, based on the definition and application of the phrase "physical injury" in the context of s 26(1)(c), the ability to prove causation, and the District Court Judge's ability to come to the conclusion that he did. Those questions of law are stated as follows:

(a) *Is "personal injury" as required by section 26(1)(c) of the Accident Compensation Act 2001 only "limited to physical damage or hurt; bodily harm or damage" and cannot include an injury to the brain.*

(b) *Are changes to the brain that are caused, or can be inferred to have been caused by, a treatment and which manifest in a mental injury a personal injury as defined by s 26(1)(c).*

(c) *Can a treatment be said to have caused or contributed to injuries to the brain, as required by section 26 (1)(c) of the Accident Compensation Act 2001, that manifest after the cessation of the treatment.*

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

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

(d) *Was the District Court's finding that the use of Isotretinoin did not cause a mental injury, and thus constitute a "personal injury" as defined by s 26(1)(c), reasonably supported by the available evidence.*

[33] Mr Mansfield noted, in relation to the first two questions, that *Jones, Teen, Mura* and *Greenwell*⁶ stand for the proposition, which is accepted, that pain, in of itself without evidence of a physical change or injury to the body, cannot constitute a physical injury. However, it is submitted that, where there is scientific and medical evidence to suggest, on the balance of probabilities, that a person has suffered such injury, as is provided by Professor Bremner in the instant case, then a physical injury can be proven. It is submitted that the instant case, therefore, is not analogous to *Jones, Teen, and Mura*, and the District Court Judge erred in applying them.

[34] Mr Mansfield submitted, in relation to the third question, that McGuire DCJ assumed that causation cannot be established where the symptoms of an injury manifest or arise after the cessation of a treatment. This is to hold applicants to an unduly high standard to find symptoms or injuries that perhaps cannot be proven to a medical standard of certainty but can be inferred on the balance of probabilities.

[35] Mr Mansfield submitted, in relation to the fourth question, that there are a number of factors which, in totality, render the McGuire DCJ's findings unsupported. These factors include the lower standard of proof in proving causation, the dispensing of the need to prove a physical injury which is required to be covered in of itself, and the acceptance of the parties that the use of Isotretinoin was a treatment and that OCD is a mental injury. It is submitted that His Honour also failed to take into account a number of factors which point towards a causative link between Mr MacNaughtan's use of Isotretinoin and the onset of his symptoms due to a physical injury that occurred. Those factors include Mr MacNaughtan's lack of history of mental or psychiatric illness, or that within his family; Professor Bremner's conclusions that Isotretinoin causes physical changes to the brain which manifest in OCD-type symptoms and other recognisable mental illnesses; and Dr Daniels' conclusion that there was a temporal link between the treatment and onset of symptoms, and that the use of the treatment played a precipitating role in the onset of those symptoms. Finally, it is submitted that His Honour placed undue

⁶ See above note 2, and *Greenwell v Accident Compensation Corporation* [2007] NZACC 225.

weight on the fact that Mr MacNaughtan might have developed OCD due to the presence of certain low-level risk factors, such as his age, gender, and lifestyle at the time of the onset of symptoms. Such factors are, it is submitted, purely speculative and unsubstantiated to the extent that they may have contributed to Mr MacNaughtan's injuries. As such, it is submitted that, in finding that the use of Isotretinoin had not caused Mr MacNaughtan's OCD, His Honour came to a conclusion that was not reasonably supported by the available evidence.

Discussion

[36] This Court acknowledges the submissions of Mr Mansfield for Mr MacNaughtan. However, this Court points to the following considerations in relation to each of the proposed questions of law.

Question (a): Is "personal injury" as required by s 26(1)(c) of the Accident Compensation Act 2001 only "limited to physical damage or hurt; bodily harm or damage" and cannot include an injury to the brain.

[37] This Court finds that McGuire DCJ did not suggest, or determine, that s 26(1)(c) "cannot include any injury to the brain". McGuire DCJ determined, based on the evidence before him, that the types of changes in the brain, proposed by Professor Bremner, were not of a type that constitutes physical injury under the Act. This Court notes that this was a factual determination, based on the evidence before the Court.

Question (b): "Are changes to the brain that are caused, or can be inferred to have been caused by, a treatment which manifest in a mental injury, a personal injury as defined by s 26(1)(c)."

[38] This Court does not discern how this question is relevant to, or arises from, the current appeal. The question refers to "treatment", which is relevant to the requirements for a treatment injury under ss 32 and 33 of the Act, but is distinct from the inquiry as to whether there has been a personal injury under s 26 of the Act. Further, the answer to the question whether changes to the brain which result in

mental injury constitute personal injury will depend on the particular facts of each case.

Question (c): “Can a treatment be said to have caused or contributed to injuries to the brain, as required by s 26(1)(c) of the Accident Compensation Act 2001, that manifest after the cessation of the treatment.”

[39] This Court does not discern how this question is relevant to, or arises from, the current appeal. McGuire DCJ did not determine or suggest that there could not be a causal link due to Mr MacNaughtan’s OCD symptoms not arising until after he stopped taking Isotretinoin. McGuire DCJ determined that there was not a strong temporal relationship.

(d) “Was the District Court’s finding that the use of Isotretinoin did not cause a mental injury, and thus constitute a “personal injury” as defined by s 26(1)(c), reasonably supported by the available evidence.”

[40] This Court finds that McGuire DCJ’s finding on this issue was reasonably open to him on the evidence presented. Dr Tatley, Dr Davis, Dr Jansen and Dr Daniels assessed that there was conflicting evidence regarding the existence of any association between Isotretinoin and psychiatric disorders such as OCD, and that there was no established causal connection between the two. Dr Davis advised that, while Isotretinoin was a possible cause of Mr MacNaughtan’s OCD, the OCD could equally have been pre-existing or have developed spontaneously for unrelated reasons. Dr Daniels advised that, while he thought Isotretinoin had been a precipitating factor in the onset of OCD symptoms, he did not think it was the cause of the ongoing disorder, and he thought that Mr MacNaughtan would have developed OCD even if he had not taken Isotretinoin.

The Decision

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

McGuire DCJ made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources and the finality of litigation.

[42] Costs are reserved.

A handwritten signature in black ink, appearing to read 'P R Spiller', with a stylized flourish at the end.

Judge P R Spiller,
District Court Judge