IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-3299
[2018] NZHC 208

BETWEEN	LESLIE NORMAN AUSTIN Plaintiff
AND	ROCHE PRODUCTS (NEW ZEALAND) LIMITED First Defendant
	F. HOFFMANN-LA ROCHE AG Second Defendant
	ROCHE Third Defendant

Hearing:	20 February 2018
Appearances:	G J Thwaite for Plaintiff/Respondent J A MacGillivray / S M Jass for First Defendant/Applicant
Judgment:	21 February 2018

JUDGMENT OF AJ CHRISTIANSEN

This judgment was delivered by me on
21.02.18 at 4.00 p.m. pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date ……

[1] The first defendant's strike out application addresses the pleading of the plaintiff's second amended statement of claim filed on 22 February 2017. It appears the second defendant has not been served with the proceeding and it is unclear whether the proceeding against the third defendant is to be pursued.

The pleading background

[2] The claim against the first defendant identifies a single cause of action. The claim in negligence seeks various heads of compensatory and exemplary damages.

[3] The first defendant is a New Zealand registered company that is apparently owned by a Swiss company and is a manufacturer and distributor of pharmaceutical products. For present purposes the defendants will be referred to as the "Roche Group".

[4] In the 1950s the Roche Group developed Roaccutane for use in the treatment of acne. From about 1985 Roaccutane was distributed in New Zealand. Its primary use was for treatment of serious acne.

[5] It is pleaded that from 1983 a series of papers questioned the safety of Roaccutane linking long term use with skeletal abnormalities.

[6] In 1985 when he was 33 the plaintiff consulted a dermatologist about his acne and was prescribed Roaccutane. Further and under the medical guidance of two or more dermatologists the plaintiff used Roaccutane from 1985 to 2005.

[7] The plaintiff had been a keen and active golfer for many years and opened a business to supply products to golfers. From the early 1990's the plaintiff alleges that his skill in golfing was being affected by his "physical condition" and that he had ongoing treatment of spinal issues including:

- Partially prolapsed disks in 1993;
- Stiff neck and back in 1997;
- Carpal bossing in 2000;

- Cervical problems in 2001;
- Surgery to left wrist in 2005;
- Osteophytosis in 2011;
- Thyroidectomy surgery in 2011;
- Dorsal osteophytosis in 2012;
- Intra-articular fluoroscopy in 2013;
- Lower limb neurogenic claudication and prominent anterior ossification in 2015;
- Cervical spinal injury in 2015;
- Lumbar spinal surgery in 2016.

[8] The plaintiff says on 23 February 2015 he was advised for the first time by his musculoskeletal specialist that his medical ailments were, or may be, linked to his use of Roaccutane.

[9] The plaintiff ceased his use of Roaccutane in 2005 having at that time used Roaccutane that was prescribed to his sons.

[10] On 29 March 2015 the plaintiff lodged a treatment injury claim form with ACC seeking cover for spinal issues caused by Roaccutane.

[11] The plaintiff seeks cover for medical treatment and retrospective loss of income compensation.

[12] On 11 December 2015 ACC granted the plaintiff cover for spinal issues caused by Roaccutane.

[13] This proceeding was filed on 23 December 2016.

Strike out application

[14] The application asserts that the claim is time-barred under s 4 of the Limitation Act 1950 (the Act), or in the alternative, an order is sought striking out the claim for

compensatory damages on the basis that this part of the claim is prevented by the s 317 statutory bar of The Accident Compensation Act 2001 (because claims for damages cannot be brought when personal injury has occurred).

Principles

[15] The Court should only strike out a claim if it is clearly unsustainable. While pleaded facts are assumed to be true this does not extend to allegations that are purely speculative and without foundation.[1] While the Court will not attempt to resolve genuinely disputed issues of fact it can consider evidence that is not disputed.[2]

The claim

[16] An assessment of undisputed facts is obtained by reference to other pleadings, and the plaintiffs response to a notice requiring further and better particulars, and from undisputed or undisputable facts and evidence.

[17] That evidence includes:

(a) Between 1985 and 2005 the plaintiff took the prescription only drug Roaccutane to treat acne and during the periods of use he took various doses from 20mg and up to 60mg per day; the main period of use being 1991 to 1996;

(b) While the majority of the plaintiff's use was Roaccutane prescribed by dermatologists, he also took some prescribed to his sons;

(c) From 1993 the plaintiff suffered a range of medical problems relating to the ossification (abnormal bone growth) of the spine, and received medical treatments, including surgery for these problems from 1993 to 2016;

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1 *A-G v Prince* [1998] 1 NZLR 262 (CA).
2 *A-G v McVeagh* [1995] 1 NZLR 558 (CA).

(d) On or about 23 February 2015 the plaintiff was advised by a musculoskeletal medicine specialist that his spinal problems, in particular excessive growth of spinal lesions, were or maybe linked to his former use of Roaccutane;

(e) The plaintiff claims, and for present purposes it is assumed to be correct that his use of Roaccutane "has activated the growth of bony material in parts of his body, in particular in his spine". The plaintiff's claim that Roaccutane has caused his spinal problems relies on the medical reports he has received.

(f) On or about 29 March 2015 the plaintiff made an ACC claim for cover relating to his spinal problems, which were described in medical terms on his claim form as "Cervical Spine DISH (diffuse idiopathic skeletal hyperostosis)". DISH involves the bony hardening or ossification of ligaments in areas which attach to the spine, and cover was sought on the basis that his spinal problems were a treatment injury caused by his use of Roaccutane. The plaintiff sought cover from ACC for the cost of treatment and for retrospective loss of earnings;

(g) On or about 11 December 2015 ACC granted the plaintiff's claim for cover of diffuse idiopathic skeletal hyperostosis secondary to his use of Roaccutane. The decision to grant cover noted that there was evidence that the plaintiff was also suffering from a degenerative condition called Spondylosis causing issues with his lumbar spine, which was not covered because it was not caused by the use of Roaccutane.

[18] The plaintiff's case is that Roaccutane having being marketed and distributed in New Zealand he is owed a duty of care by the defendants to disclose the risks relating to Roaccutane or to inform him of recommendations relating to that use, and to arrange the cessation of the distribution of Roaccutane in New Zealand. The plaintiff says the first defendant breached that duty of care and as a result he took Roaccutane during the period 1985-2005 and that this caused him to suffer ossification

of the spine which has necessitated medical treatment and has prevented him from working.

Strike out issues

[19] The focus is on whether the plaintiff's claim is time barred under the Limitation Act 1950.

[20] The first defendant needs to satisfy the Court the plaintiff's cause of action is clearly statute-barred such that it can be regarded as frivolous, vexatious or an abuse of process.

[21] The first defendant asserts the cause of action is based on alleged acts or omissions that took place prior to 1 January 2011. Section 4 of the 1950 Act provides any action in respect of bodily injury must be brought within two years of the cause of action or within six years' subject to the consent of the defendant or with leave of the Court.

[22] The Court considers Mr MacGillivray has accurately defined the two issues for consideration, namely:

(a) Did the cause of action accrue when the plaintiff first suffered injury as a result of the first defendant's alleged breach of duty, or did it accrue only when he discovered that his injuries were caused by Roaccutane?

(b) If the former, does the plaintiff have an arguable case for postponement or extension of time on the basis of fraudulent concealment of his cause of action by the first plaintiff.

[23] The plaintiff's claim was filed on 23 December 2016. A cause of action in negligence accrues when there is an act or omission which breaches a duty of care owed, and there is loss caused thereby.

[24] The applicant's case is that the cause of action plainly accrued before 23 December 2014 (within two years) and before 23 December 2010 (within six years with leave of the Court).

[25] The applicant's case is that the alleged breaches of duty took place during the period 1985 to 2005 and the plaintiff's case is that he developed spinal problems as a result of taking Roaccutane and that he sought medical treatment for these from 1993 onward.

[26] Counsel submits the prevailing principles do not focus upon evidence about when the plaintiff discovered or could have discovered that his injury was caused by the acts and omissions of the first defendant.

[27] Case authority has indicated a need for caution in cases where it was almost impossible for a plaintiff to have discovered the connection between injury and breach.

[28] The plaintiff sought ongoing treatment for spinal problems from 1993. As Mr MacGillivray notes the plaintiffs' medical records would have revealed that he had taken Roaccutane since 1985, and, from 1991 to 1996, he was still regularly taking Roaccutane at high dosages and for extended periods.

[29] In this case the plaintiff has relied on published medical studies. Indeed these form the very basis for the pleaded case that skeletal abnormalities were known by the first defendant to be a risk associated with taking Roaccutane for extended periods of time.

[30] The plaintiff's claim pleads fraudulent concealment for the purposes of s 28 of the Limitation Act 1950, to invite use of the Court's discretion, if required, to extend the two-year period to six years for filing a claim. To do this the Court must be satisfied there is fraud or equitable fraud on behalf of the first defendant. In this case that requires proof that the first defendant had a duty to disclose to the plaintiff facts relevant to the cause of action and that a failure to do so was wilful and therefore it can be shown the first defendant had actual knowledge of the essential facts constituting the plaintiff's cause of action.

[31] Mr MacGillivray submits there is no basis for suggesting that the first defendant had actual knowledge of the facts constituting the plaintiff's claim i.e that the plaintiff was taking Roaccutane over an extended period, and therefore there is no basis on which it can be argued the first defendant wilfully kept facts from the plaintiff. The plaintiffs pleaded case rests on the proposition that there were known and published risks associated with Roaccutane. For the first defendant it is submitted there is no pleaded or evidential foundation for the proposition that the first defendant was wilfully complicit in concealing the risks of long-term use of Roaccutane from the plaintiff or at all. It follows, submits counsel that there is no proper basis for extending the period per s 28, within which the proceeding could have been filed.

Considerations

[32] Issues focus upon that date from which the limitation period runs in this proceeding. The plaintiff says he was only told on 23 February 2015 his medical issues may be linked to the first defendant's product. He had not used the product for ten years. For present purposes the Court needs to accept the plaintiff's claim that the product has caused his spinal issues. The first defendant's fault, the plaintiff claims, is its failure to disclose the risks of taking its product.

[33] When did the cause of action accrue? Was it when he was informed his injuries were caused by Roaccutane or was it earlier because of a breach of obligation by the first defendant to inform users of the risk involved.

[34] For the first defendant it is argued that prevailing principles do not focus upon evidence about when the plaintiff discovered or could have discovered his injury. The fact is, it is argued for the first defendant, that those medical studies to which the plaintiff refers in support of his case, have long since identified the very basis for pleading a connection of skeletal abnormalities associated with taking Roaccutane, and it is irrelevant that those were not known to the plaintiff by his research since February 2015, nor were they referred to by medics consulted earlier.

[35] Counsel's submissions have reviewed developments affected by decisions of the Court of Appeal and Supreme Court in the last 20 years.

[36] The plaintiff's case is that the cause of action accrued only upon actual or notional discovery, and says this occurred within two years but if discovery was deemed to have occurred earlier then the Limitation Act fraud exception extends that period to 2010.

[37] Both counsel focused attention upon the decisions of the Court of Appeal in *G D Searle and Co v Gunn*[3], and the Supreme Court in *Murray v Morley and Co Limited.*[4]

[38] In the *Searle* case the Court found that a negligence claim seeking damages for personal injury arising out of use of an intrauterine contraceptive device did not accrue until the plaintiff discovered or could have discovered that her bodily injury was caused by the acts and omissions of the defendant in that case.

[39] In *Murray v Morley* the Supreme Court rejected the general proposition that time runs from when the cause of action is reasonably discoverable. In the submission of Mr MacGillivray the Supreme Court's decision in *Murray v Morley* completely undermines the reasoning behind the result in *Searle,* while noting the Supreme Court did not overrule the decision. Counsel urges nonetheless that the case needs to be considered in light of the Supreme Court's decision, because in the *Searle* case it was near impossible for the plaintiff to have discovered the connection between injury and breach. Mr MacGillivray submits therefore that the principle of reasonable discoverability that applied in *Searle* should not as a general proposition extend to the present case because this case cannot be categorised as a case of impossibility. Counsel submits the plaintiff's medical records would have revealed he had taken Roaccutane since 1985 and from 1991 to 1996 and was still regularly taking Roaccutane at high dosages and for extended periods. As the published medical studies relied on by the applicant show, and which form the very basis for his pleaded case, those studies establish that skeletal abnormalities were a known risk associated with taking Roaccutane. It would not be appropriate counsel submits to hold that the plaintiff's cause of action would not accrue until he actually discovered the link.

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[3] *G D Searle and Co v Gunn* [1996] 2 NZLR 129.
[4] *Murray v Morley and Co Limited* [2007] NZS C27.

[40] The reasonable discoverability principle of *Searle* was refined by later decisions of the Supreme Court including that in *Murray v Morley*. But, the concept still survives and this whole case has its similarity to that. It concerns a medical treatment that produced injuries which the patient initially did not understand to be connected with the treatment. It is noted in *Searle* on pages 132-133:

> … a cause of action accrues when bodily injury of the kind complained of was discovered or was reasonably discoverable as having been caused by the acts or omission of the defendant.

[41] As Mr Thwaite submits there may be a dispute whether the plaintiff could with reasonable diligence have discovered his issues earlier but a fact intensive inquiry would be required before that issue can be resolved.

[42] The available evidence indicates the plaintiff only learned of the connection of his injuries to Roaccutane in February 2015, and there is no evidence the plaintiff knew of the literature about Roaccutane prior to that date. Arguably the plaintiff was relying upon a medical product delivered to him by a doctor and hence the defendants may be viewed as part of the fiduciary relationship. The evidence is the plaintiff has suffered long-term physical harm, has consulted many medical practitioners for that reason, but has only recently been told what has caused his issues.

[43] Mr MacGillivray is firm in his submission that the principle of reasonable discovery has little or any remaining force for consideration in cases of this kind. As much as apparent, counsel submits from the decision of the Court of Appeal in *White v Attorney-General*.[5] In that case the Court noted that the principle of reasonable discovery now needs to be considered in light of the Supreme Court's decision in *Murray v Morley*. The Court's view of that decision noted:

> But the conclusion that emerges from the judgment is that there is not a general doctrine of reasonable discovery applicable to when a cause of action accrues for the purposes of the Limitation Act (Gault J dissented on this point). When all members of the Court declined (for different reasons) to overrule *S v G* and *Searle*, it is fair to say that, generally, a cautious approach to extension of the doctrine is taken.

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5 *White v Attorney-General* [2010] NZCA 139.

[44] The Court commented that the *Searle* case, concerning a sexual abuse claim, was not a case of failure to appreciate the connection between the breach of duty and the consequences of the breach for the plaintiff in that case had no way of knowing the connection.

[45] What appears clear is that there are circumstances for which the principle of reasonable discoverability may survive. In the present case the Court does not accept there is sufficient evidence from which to conclude on a summary basis that the plaintiff's claim could not be sustained. As Mr Thwaite submits the matter should be subject for evidential enquiry in due course.

[46] Issues of reasonable discoverability address the probability or lack of such regarding the availablility of means to provide the knowledge of cause. An objective view of the plaintiff's medical history and his treatments is needed. It cannot easily be accepted that one or more of the plaintiffs earlier consulted doctors should have told him that which he says he heard for the first time in 2015.

[47] Clearly claims of fraudulent concealment relate to allegations that the Roche Group has continued to market the product whilst aware of significant literature challenging the product.

[48] Again this is a matter for further enquiry rather than for summary disposition.

[49] The remaining issue concerns the plaintiff's claim for compensatory as well as exemplary damages.

[50] As earlier noted the plaintiff has received ACC coverage since 11 December 2015. Section 317 of the Accident Compensation Act 2001 provides, inter alia, a prohibition against bringing proceedings independently for damages arising directly or indirectly out of personal injury covered by the Act.

[51] That provision does not prevent the claims for exemplary damages which the plaintiff has. But his claim for compensatory damages in connection to those personal

injuries for which he has ACC cover is, Mr MacGillivray submits, barred and provides further reason for that part of the claim to be struck out.

[52] In the Court's view that should not preclude, by this proceeding, an opportunity by the plaintiff to argue that the injuries he sustained in fact do not fall within the scope of the ACC regime.

[53] Effectively the plaintiff's case is that he wishes to argue that the injuries he sustained do not fall within the provisions of the ACC Act – and rather that what he suffered was an ordinary consequence of the consumption of Roaccutane.

[54] Again in this Court's view that is a matter for further consideration in due course and after full evidence has been heard.

Conclusion

[55] Issues raised by the strike out application are incapable of proper consideration without full evidence being heard.

Judgment

[56] The first defendant's applications are dismissed.

[57] The first defendant shall pay the plaintiff's costs on a 2B basis together with disbursements approved by the Registrar.

Further orders

[58] The first defendant is directed to file and serve a statement of defence within 20 working days of the date of this judgment, such order to be suspended if within 20 working days an appeal/review of this judgment is lodged.

Associate Judge Christiansen