IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 5/2020
[2021] NZSC 30

BETWEEN		LESLIE NORMAN AUSTIN Appellant
AND		ROCHE PRODUCTS (NEW ZEALAND) LIMITED Respondent

Hearing:	10 September 2020
Further submissions:	24 September 2020
Court:	Glazebrook, O'Regan, Ellen France, Williams and Arnold JJ
Counsel:	G J Thwaite and Y S Kim for Appellant J A MacGillivray and S M Jass for Respondent H B Rennie QC and J B Orpin-Dowell for Accident Compensation Corporation as Intervener
Judgment:	31 March 2021

JUDGMENT OF THE COURT

A **The appeal will be dismissed one month from the date of this judgment unless the appellant makes an application under s 135 of the Accident Compensation Act 2001 together with an application to this Court for a stay of this proceeding pending completion of that process.**

B **There is no order as to costs.**

REASONS
(Given by Williams J)

Introduction

[1] A person who suffers a "treatment injury" has cover under the Accident Compensation Act 2001. A treatment injury is an injury that is *not* an "ordinary consequence" of treatment. Three issues arose in this appeal: what is treatment; what is an ordinary consequence of treatment; and who has the jurisdiction to decide those questions?

Background

[2] The background to this case is unusual. The appellant, Mr Austin, suffers from excessive bone growth in his spine. It causes him pain and stiffness in his neck and back. Mr Austin claims that these health problems were caused by the prescription drug, Roaccutane,[1] which he took at various times between 1984 (when he was 32) and 2005 at the latest.

[3] In March 2015, by which time he was 63 years old, Mr Austin claimed cover under the Accident Compensation Act (the AC Act) for his condition, which clinicians described as diffuse idiopathic skeletal hyperostosis (DISH), secondary to Roaccutane use. The Accident Compensation Corporation (ACC) accepted Mr Austin's claim in December 2015. In addition to covering his surgery, physiotherapy and consultation costs, ACC paid Mr Austin weekly compensation (including back payments) covering a period of about two years from April 2014. Mr Austin accepted the clinical treatment and the compensation. He did not pursue any of the review options under the AC Act to challenge ACC's acceptance of his claim. That was unsurprising, because he had succeeded in obtaining the entitlements he claimed.

[4] In 2016, Mr Austin changed his position on his ACC cover. He commenced proceedings in the High Court against the respondent, Roche Products (New Zealand) Ltd (Roche NZ). Roche NZ is the New Zealand distributor of Roaccutane. Mr Austin claimed that Roche NZ had negligently provided him with Roaccutane for which he

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[1] Roaccutane is the brand name for isotretinoin.

sought compensatory and exemplary damages. He says Roche NZ breached a duty of care it owed to him in that it failed to disclose the risks associated with Roaccutane, failed to communicate recommendations about its use, and failed to arrange for the cessation of the distribution of Roaccutane in New Zealand. He says his medical problems were caused by these breaches of duty.

[5] Roche NZ applied to strike out either the entire claim as time-barred, or, in the alternative, the claim for compensatory damages as barred by the AC Act.[2] In the High Court, Associate Judge Christiansen dismissed Roche NZ's application on the basis that the applicability of limitations and the bar under the AC Act could not be determined without further inquiry and full evidence.[3]

[6] Roche NZ's subsequent application for review of that decision was removed by consent to the Court of Appeal. The Court of Appeal agreed with the High Court that strike-out was not appropriate in respect of limitations,[4] but the Court struck out Mr Austin's claim for compensatory damages.[5] It held the injury suffered was covered by the AC Act.[6]

Issues

[7] This Court granted Mr Austin leave to appeal. The approved question was whether the Court of Appeal was correct to strike out his claim for compensatory damages because his injuries were not an ordinary consequence of consuming Roaccutane.[7]

[8] ACC then became involved. By the terms of s 320 of the AC Act, ACC is entitled to be heard whenever proceedings in any court raise an issue of coverage under the Act. ACC had participated in the Court of Appeal, and after this Court granted leave to appeal, the Corporation advised it wished to be heard on this appeal also. ACC's concerns related to the meaning of "ordinary consequence" under s 32(1)(c) of

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2 Accident Compensation Act 2001, s 317.
3 *Austin v Roche Products (New Zealand) Ltd* [2018] NZHC 208 at [45], [48] and [54].
4 *Roche Products (New Zealand) Ltd v Austin* [2019] NZCA 660, (2019) 25 PRNZ 95 (Kós P, Brown and Goddard JJ) [CA judgment] at [16].
5 At [54].
6 At [50].
7 *Austin v Roche Products (New Zealand) Ltd* [2020] NZSC 49.

the AC Act. That issue, however, fell away once the parties filed their written submissions, as they agreed that the Court of Appeal's decision in *Accident Compensation Corporation v Ng* set out the correct meaning.[8] The only issue was whether the application of that meaning to Mr Austin's case could be decided summarily or required a full trial.

[9] ACC raised two new issues that do not appear to have been raised in the Court of Appeal. The first is whether, once Mr Austin had made his claim under the AC Act, it was permissible for him to (in effect) challenge ACC's decision about coverage by any process other than via the review and appeal pathways provided in the AC Act, given the ouster clause in s 133(5). The second issue relates to whether, since the Act's definition of treatment includes "failing to obtain" a recipient's prior informed consent,[9] that necessarily meant Mr Austin's injury was a treatment injury. It appears to be common ground that Roche NZ did not advise Mr Austin of the possible side-effects of using Roaccutane, so his prior informed consent to run those risks had not been obtained.[10]

[10] Mr Austin and Roche NZ provided their own supplementary written submissions on these two issues and addressed them further in oral argument.

[11] Three issues were therefore addressed at the hearing of the appeal:

(a) Does Mr Austin's prior claim to coverage prevent him from bringing these proceedings, pursuant to s 133(5) of the Act?

(b) If not, does Roche NZ's failure to obtain Mr Austin's prior informed consent to the risks of Roaccutane mean he received treatment when he took it?

(c) If so, is DISH an ordinary consequence of Roaccutane treatment?

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8 *Accident Compensation Corporation v Ng* [2020] NZCA 274.

9 Accident Compensation Act, s 33(1)(e).

10 It is not yet proven whether Roche NZ knew of the risks of taking Roaccutane. If it did not, there is a separate issue of whether it should have known.

[12] If s 133(5) applies, then this Court has no jurisdiction to deal with the other issues, so we deal with that issue first.[11] We have concluded that s 133(5) does apply.[12] We therefore do not comment on the other issues. It is regrettable that this issue fell to be addressed for the first time in this Court without the benefit of the views of the Courts below, but this cannot now be avoided.

Can Mr Austin commence proceedings in the ordinary courts in relation to an injury for which he has made a claim under the AC Act?

[13] Section 133(5) of the AC Act provides as follows:

> (5) If a person has a claim under this Act, and has a right of review or appeal in relation to that claim, no court, Employment Relations Authority, Disputes Tribunal, or other body may consider or grant remedies in relation to that matter if it is covered by this Act, unless this Act otherwise provides.

[14] It should be read alongside s 317, which provides:

> **317 Proceedings for personal injury**
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> (1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—
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> (a) personal injury covered by this Act; or
>
> (b) personal injury covered by the former Acts.
>
> (2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from,—
>
> (a) any damage to property; or
>
> (b) any express term of any contract or agreement (other than an accident insurance contract under the Accident Insurance Act 1998); or
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> (c) the unjustifiable dismissal of any person or any other personal grievance arising out of a contract of service.
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> (3) However, no court, tribunal, or other body may award compensation in any proceedings referred to in subsection (2) for personal injury of the kinds described in subsection (1).

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[11] As this is a question of jurisdiction, we did not consider it necessary to amend the terms of leave. The parties in any event had full opportunity to argue the additional points.

[12] See below at [27]–[35].

(4) Subsection (1) does not prevent any person bringing proceedings under—

(a) section 50 or section 51 of the Health and Disability Commissioner Act 1994; or

(b) any of sections 92B, 92E, 92R, 122, 122A, 122B, 123, or 124 of the Human Rights Act 1993.

(5) Subsection (1) does not prevent any person bringing proceedings in any court in New Zealand for damages for personal injury of the kinds described in subsection (1), suffered in New Zealand or elsewhere, if the cause of action is the defendant's liability for damages under the law of New Zealand under any international convention relating to the carriage of passengers.

(6) Subsection (1) does not affect proceedings to which section 318(3) applies.

(7) Nothing in this section is affected by—

(a) the failure or refusal of any person to lodge a claim for personal injury of the kinds described in subsection (1); or

(b) any purported denial or surrender by any person of any rights relating to personal injury of the kinds described in subsection (1); or

(c) the fact that a person who has suffered personal injury of the kinds described in subsection (1) is not entitled to any entitlement under this Act.

Submissions

[15] ACC's formal stance (quite appropriately) was that it made submissions to assist the Court, rather than to advocate for a particular outcome in relation to this issue. Nonetheless, ACC submitted that a possible reading of s 133(5) is that where cover is approved, all subsequent decisions about that cover must be made under the Act's review and appeal processes. Here, ACC suggested, it could be argued that Mr Austin's claim against Roche NZ in substance asks the High Court to consider or grant remedies in relation to the injury for which he sought and was granted cover. This is prohibited by s 133(5). Mr Austin had a right to seek review of the decision approving cover if he considered it to be wrong. He has not yet availed himself of that right. If he now chooses to do so out of time, the relevant issues would be whether in fact Mr Austin's review right has expired and whether, either way, s 133(5) bars recourse to any other form of redress. In any event, ACC suggested, Mr Austin may

apply for a review out of time. Under s 135(3), ACC must accept late applications for review if satisfied there are extenuating circumstances that affected the ability of the claimant to meet the time limits.

[16] Roche NZ generally supported the thrust of ACC's suggested interpretation and argued further that the principle in *Ramsay v Wellington District Court* applied.[13] That is, Mr Austin may not challenge ACC's coverage decision indirectly via a civil claim. The bar remains even if Mr Austin is now out of time to apply for a review. To allow Mr Austin to leapfrog his review rights under the Act would defeat the purpose of the statutory time limits and the need for speedy and final determination of disputes over ACC's decisions.

[17] In oral submissions, Mr Thwaite, counsel for Mr Austin, accepted that the effect of s 133(5) was that if Mr Austin was unsuccessful in overturning his cover by the Act's own procedures, then that would be the end for his civil claim for compensatory damages. Counsel also accepted that a stay of Mr Austin's proceeding pending an application for review out of time might be the "best and reasonable outcome".

[18] But in supplementary written submissions filed after the hearing (at the Court's request), Mr Thwaite adjusted his position. He argued that, in fact, the s 133(5) bar applies only if a dispute resolution procedure has been commenced under the Act, as s 133(5) must serve a different purpose from s 317. Counsel continued, as Mr Austin is out of time to apply for review, this proceeding is not barred by s 133(5) because he no longer has a right of review or appeal as required by the provision. Further, it was recognised in *Ramsay* that the predecessor to s 133(5) was not an absolute bar.[14] In this case, it is argued that Mr Austin's unique position of opposing rather than seeking cover takes him outside the dispute resolution structure of the AC Act, and so s 133(5) does not apply.

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13 *Ramsay v Wellington District Court* [2006] NZAR 136 (CA).
14 At [29]–[33].

Analysis

[19] For the purposes of this appeal, s 317 provides that Mr Austin may not bring proceedings for compensatory damages for personal injury covered by the accident compensation regime, whether or not he has made a claim for such cover. This means it does not prevent proceedings for damages where the loss or injury is not covered by the Act.

[20] Section 133(5) is different. It is not triggered by coverage under the Act, but by the making of a claim for which there is a right of review or appeal. "Claim" is defined in s 6 as a claim—that is, an application—to ACC for coverage under s 48 of the Act. So a claim is an application for an entitlement under the Act. It is not *actual* entitlement. The effect of s 133(5) is therefore that once a person lodges a claim, they are locked into the Act's procedures.[15] No court may "consider or grant remedies in relation to that matter if it is covered by [the] Act".[16]

[21] It is to be noted that the subsection excludes the courts from considering or granting remedies in relation to the "matter", not the "claim". This means the exclusion relates also to any existing or concluded review or appeal in relation to the claim.

[22] Next, the section provides that courts and other bodies are excluded in relation to the matter "if it is covered by [the] Act". Clearly this cannot refer to whether the Act provides cover for the injury in question. Such an interpretation would lead to a hopelessly circular position where it is not known whether a court has jurisdiction to decide on cover until a court decides on cover.

[23] Whether the matter is "covered by [the] Act" must therefore refer to whether the matter relates to a question provided for by the Act. For example, proceedings relating to or arising from damage to property, a term of any contract, a personal grievance, the Health and Disability Commissioner Act 1994 or the Human Rights Act 1993 are not matters "covered by [the] Act".[17]

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15 Subject to the exception noted in *Ramsay*, above n 13, at [33], discussed below at [25].
16 Accident Compensation Act, s 133(5).
17 See s 317(2) and (4).

[24] The effect of s 133(5) can be explained by the principles articulated in *Ramsay*.[18] That case concerned an application by ACC to strike out judicial review proceedings brought by Mr Ramsay. Although the case came before the Court of Appeal after the AC Act had been enacted, the relevant legislation for the purpose of the proceeding was its predecessor, the Accident Insurance Act 1998. Section 134(4) of the 1998 Act (the predecessor to s 133(5)) provided:

> (4) If a person has a right to apply for a review or appeal about a matter, the person has no other remedy in relation to the matter, whether in any court, the Employment Tribunal, the Disputes Tribunal, or otherwise.

[25] The Court of Appeal upheld the High Court's decision to strike the proceeding out. It explained that s 134(4) was not a general exclusion of the High Court's jurisdiction in relation to personal injuries; rather, it channelled disputes about decisions made under the Act into a prescribed procedure.[19] That meant that if challenges could not be effectively addressed through that procedure, then s 134(4) did not exclude the High Court.[20] In Mr Ramsay's case, the Court considered that his challenges could have been made under the prescribed statutory procedure and so dismissed his appeal.[21]

[26] The Court of Appeal also noted in *Ramsay* that there is no substantive difference between s 134(4) and s 133(5).[22] We agree with the Court of Appeal's conclusions on both the effect of s 134(4) and its similarity with s 133(5).

[27] The first question, then, is whether Mr Austin's challenge could have been addressed under the prescribed procedure in the AC Act. This question is worth asking because Mr Austin's challenge is unusual. He argues that ACC's error was in accepting his claim because, he says, he does *not* have cover. He submits that this

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18 *Ramsay*, above n 13.

19 At [30]–[31].

20 At [32]–[33]. The Court was concerned in particular that breaches of natural justice duties going to the validity of the decision should be not excluded from review unless Parliament uses clear language. The approach in *Ramsay* was discussed by this Court in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [68] per Blanchard, Tipping and Gault JJ. See also at [16] per Elias CJ and McGrath J.

21 At [38].

22 At [27]. *Ramsay* was subsequently applied in *Dean v Chief Executive of the Accident Compensation Corporation* [2007] NZCA 462, [2008] NZAR 318 at [6].

takes him outside the normal dispute resolution structure and so s 133(5) does not apply to him.

[28] The procedures for review and appeal are contained in Part 5 of the Act. Unsurprisingly, there is no special provision in the claims process for a claimant to obtain a declaration that they do not have cover. But that aside, there is nothing in the language of Part 5 that suggests Mr Austin's challenge could not be appropriately addressed within its procedures.

[29] First, s 134(1)(a) of the AC Act provides that a claimant may apply to ACC for a review of "any of its decisions on the claim". A "decision" is defined in s 6 to include "a decision *whether or not* a claimant has cover".[23] So, on its face, s 134(1) allows claimants to apply for review of decisions on the ground that they do not have cover.

[30] Next, the procedure for applying for a review is described in broad terms: the application must (among other things) identify the decision or decisions being challenged, the grounds on which the application is made, and the relief sought, if known.[24] There is no limit on the possible grounds of review that might suggest only decisions declining or restricting cover may be challenged: the reviewer must simply (among other things) look at the matter afresh and on the basis of its substantive merits under the Act.[25] A claimant may then appeal to the District Court against a review decision,[26] and apply for leave to appeal to the High Court and Court of Appeal if the lower decision is considered "wrong in law".[27]

[31] Finally, there are various provisions suggesting that decisions to accept cover may be challenged on review. For example, s 58(1) provides that where ACC fails to comply with a time limit in assessing a claim, it is deemed to have decided that the claimant has cover. Section 63 then confirms that a claimant has a right to apply for a review of a decision under s 58. In other words, a claimant has a right to apply for a review of a deemed decision that they have cover. Realistically, those who suffer

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23 Accident Compensation Act, s 6(1) definition of "decision", para (a) (emphasis added).
24 Section 135(2)(c)–(e).
25 Section 145(1).
26 Section 149(1)(a).
27 Sections 162(1) and 163(1).

personal injuries will not commonly try to evade the benefits of the scheme, but it is clear that the Act's dispute processes are where such arguments must first be brought.

[32] Mr Austin's challenge is therefore one that could have been made under the prescribed procedure. So, assuming for present purposes that it is irrelevant that Mr Austin is now out of time to bring a review under the Act, this proceeding is caught by the s 133(5) bar.

[33] Mr Austin submits that the fact he is out of time to apply for a review does make a difference. He submits that s 133(5) only prevents claims being brought outside the prescribed procedure if a claimant has a review or appeal underway, or has the right to commence one. As Mr Austin is plainly out of time, he does not have a "right" to review or appeal, and he has not obtained consent to file a late appeal under s 151(3)(c). It is therefore submitted that he is not barred by s 133(5).

[34] This submission is without merit It would allow claimants in Mr Austin's position to obtain the benefit of cover under the Act, and then sue in the ordinary courts at the same time, simply by sitting on their review or appeal rights until time has run out. As the firm wording of ss 317 and 133(5) demonstrate, that would be the very antithesis of the Act's purpose in this respect.[28]

[35] Given the Act's comprehensive system for challenging coverage decisions, including a right of appeal on a point of law to the High Court, and in light of the terms of s 133(5), we conclude that this Court does not have jurisdiction to consider Mr Austin's appeal. Nor did the Courts below. We therefore cannot address the second and third issues identified above at [11].

Outcome

[36] In light of the fact that there remains a potential pathway in s 135 for Mr Austin to bring a review application out of time, we must consider whether the proceeding should be struck out or stayed. This will depend on whether Mr Austin wishes to

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[28] See also *Spencer v The District Court at Wellington* HC Wellington CIV-2006-485-1601, 5 October 2007 at [10]–[11].

pursue that avenue under the Act. If he does, a stay may be appropriate, but he will need to act promptly to preserve his position.

[37] The appeal will therefore be dismissed and the proceeding will be struck out one month from the date of this judgment unless the appellant makes an application under s 135 together with an application to this Court for a stay of this proceeding pending completion of that process.

Costs

[38] Although Roche NZ has succeeded in this appeal, it did so on a point it did not raise. In the circumstances, costs will lie where they fall.

Solicitors:
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