IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 5/2020
[2020] NZSC 49

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

Court: Glazebrook, Ellen France and Williams JJ

Counsel: G J Thwaite for Applicant
J A MacGillivray for Respondent

Judgment: 19 May 2020

JUDGMENT OF THE COURT

A The application for leave to appeal is granted in part (*Roche Products (New Zealand) Ltd v Austin* [2019] NZCA 660).

B The approved question is whether the applicant's claim for compensatory damages should have been struck out on the basis that his injuries were not an ordinary consequence of the consumption of Roaccutane.

C The application for leave to appeal is otherwise dismissed.

REASONS

Introduction

[1] Mr Austin claims that he has suffered ossification of the spine through long term use of an acne treatment (Roaccutane) distributed in New Zealand by Roche Products (New Zealand) Ltd (Roche). He was granted cover by the Accident

Compensation Corporation for spinal issues caused by Roaccutane from 11 December 2015 and received compensation until he turned 65 in early 2017.

[2] Late in December 2016 Mr Austin commenced a proceeding against Roche alleging negligence in relation to the distribution of Roaccutane, which is available only on prescription. He sought both compensatory and exemplary damages.

[3] Roche applied to strike out the whole claim as time-barred and, in the alternative, to strike out the compensatory damages claim as barred by s 317 of the Accident Compensation Act 2001 (the Act).

[4] The strike-out application was dismissed by the High Court.[1] In the Court of Appeal, the claim for compensatory damages was struck out but leave was reserved for Mr Austin to file an amended pleading seeking compensatory damages with regard to a period where he used Roaccutane that had been prescribed for his sons.[2]

[5] In Mr Austin's submission the Court of Appeal was wrong to strike out his claim for compensatory damages. He says that there are two issues of general and public importance: first, whether his injury was an "ordinary consequence" of the medical treatment under s 32(1)(c) of the Act and, second, whether the physical supply of a drug by a pharmaceutical company to a person constitutes a "treatment" in terms of s 33 of the Act.[3]

[6] We consider that the leave criteria are met with regard to the first proposed question.[4] Our reasons for refusing the application for leave to appeal on the second question follow.

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1 *Austin v Roche Products (New Zealand) Ltd* [2018] NZHC 208 (Associate Judge Christiansen).

2 *Roche Products (New Zealand) Ltd v Austin* [2019] NZCA 660 (Kós P, Brown and Goddard JJ) [CA judgment] at [51]–[52].

3 Mr Austin's argument is that as the supply of pharmaceuticals is not "treatment", then he could not have suffered a treatment injury: s 32(1)(b).

4 Senior Courts Act 2016, s 74(2).

Treatment

[7] Treatment is defined in s 33(1) to include the giving of treatment, diagnosis of a medical condition, a decision on the treatment to be provided including a decision not to provide treatment, and a failure to provide treatment either at all or in a timely manner.

[8] Before the Court of Appeal, Mr Austin argued that the supply of pharmaceuticals was not "treatment" under s 33, based on the provisions dealing with clinical trials.[5] He also argued that, while the supply of pharmaceuticals by a medical practitioner was treatment, manufacturers are not protected by the Act.[6] Finally, he argued that the provision of Roaccutane was a service rather than a treatment.[7]

[9] He essentially reprises the same arguments before this Court.

Court of Appeal decision

[10] As to the clinical trial provisions, the Court held that there was force in the suggestion that the underlying policy of the exclusion was that, since a commercial sponsor derives the financial benefit from a clinical trial, that sponsor should bear the cost of compensating participants injured in the trial.[8] There was nothing to suggest a broader interpretation is required.

[11] In particular, the Court held that there was no basis for the argument that, because some clinical trials involve pharmaceutical products, the Act should be read as excluding from treatment, and therefore cover, the administration of any pharmaceutical medicine.[9] The Court held that there was no basis for the argument that, while the supply of pharmaceutical products to a patient by a medical practitioner is treatment, the supply of pharmaceuticals by a manufacturer is not treatment. If the supply of pharmaceutical products to a person is treatment for the purposes of the Act and a treatment injury results which is covered by the Act, then the statutory bar in

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5 Relying on s 32(6) of the Accident Compensation Act 2001.
6 Relying on s 6(1) definition of "treatment provider" and submitting that "treatment" should take its context from "treatment provider".
7 Relying on cl 3(1) of Sch 1.
8 CA judgment, above n 2, at [41].
9 At [42].

s 317 prevents any proceedings being brought against any person. It is impossible to read s 317 as barring claims against some categories of defendants and not others.[10]

[12] Mr Austin's proposed distinction between treatment and service (with provision of Roaccutane being provision of a "service") was also rejected on the basis that it was not supported by the text of the Act. In the Court's view, the concept of treatment injury in s 32 was intended to include a personal injury suffered through the administration of medication by a health professional.[11] The definition of treatment in s 33, which is inclusive, necessarily includes the giving of medication consequent on diagnosis. The interpretation suggested by Mr Austin would give rise to an uncertain line of demarcation between diagnosis and treatment on the one hand and therapy by the administration of medicines on the other.[12] The Court considered that the provisions relating to services referred to by Mr Austin were in another context and have no bearing on what constitutes treatment for determining cover under the Act.[13]

[13] The Court concluded:

> [50] Accordingly we consider that the provision of a prescription for self-administration of a pharmaceutical involved giving a treatment (s 33(1)(a)) consequent upon the diagnosis of Mr Austin's DISH condition (s 33(1)(b)) by a registered health professional from whom Mr Austin had sought treatment (s 32(1)(a)(i)). Consequently Mr Austin suffered a treatment injury in respect of which he had cover and entitlements under the Act. Any different interpretation would be artificial and unrealistic. It could have unacceptable limitations for large numbers of New Zealanders who presently look to the Corporation for cover in respect of adverse reactions to prescribed pharmaceuticals.

Our assessment

[14] While the definition of treatment would be a matter of general and public importance, we do not consider Mr Austin's arguments have sufficient prospects of

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10 At [43].
11 At [45].
12 At [47].
13 At [48]–[49].

success to merit leave being granted. Nor does anything raised by Mr Austin suggest a miscarriage of justice in relation to this issue.[14]

Result

[15] The application for leave to appeal is granted in part.

[16] The approved question is whether the applicant's claim for compensatory damages should have been struck out on the basis that his injuries were not an ordinary consequence of the consumption of Roaccutane.

[17] The application for leave to appeal is otherwise dismissed.

[18] The appeal should be set down for hearing after the judgment of the Court of Appeal in *Ng v Accident Compensation Corporation* (heard on 29 April 2020) is released.[15]

[19] The Registrar should provide a copy of this judgment to the Accident Compensation Corporation.

Solicitors:
Tompkins Wake, Hamilton for Respondent

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[14] Senior Courts Act, s 74(2)(b). See *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5]; and *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* [2008] NZSC 26, (2008) 18 PRNZ 855 at [4].

[15] *Ng v Accident Compensation Corporation* (CA 125/2019), an appeal from *Accident Compensation Corporation v Ng* [2018] NZHC 2848.