

11 April 2017

Minister for ACC
Parliament Office
Private Bag 18888
Parliament Buildings
Wellington 6160

Dear Minister

ACC appeals to the Supreme Court, following the decision in *J v ACC*

Introduction

1. The New Zealand Law Society wishes to draw your attention to the recent Supreme Court decision in *J v ACC* [2017] NZSC 3 (**attached**). In the Law Society's view, the decision highlights the need for legislative reform to allow a right of final appeal from a High Court decision made under section 162 of the Accident Compensation Act 2001 (the Act) to the Supreme Court, which has been New Zealand's court of final appeal since 1 July 2004.

Background

2. Currently, and as confirmed by the Supreme Court in *J v ACC*, the operation of section 163 of the Act means that an ACC claimant who considers that a court decision is wrong in law can take their case no further than the Court of Appeal.¹ Now that the final view of the courts on the matter has been given, only a legislative change can alter this position.
3. The decision in *J v ACC* confirmed that although section 163 was enacted when the Privy Council was the court of final appeal for New Zealand, the section applies to prevent appeals to the Supreme Court. The rationale for limiting access to the Privy Council was that "the Privy Council should not be troubled by appeals" in certain circumstances.² That view may have made sense in the case of the Privy Council, being a distant court of last resort for the entire Commonwealth. It is however not a particularly good reason for continuing to restrict access to the Supreme Court of New Zealand, given the purpose of establishing that Court was to achieve "the general principle that any matter should be able to be appealed to the Supreme Court with the leave of that Court".³ Nor was the Supreme Court in *J v ACC* satisfied that the legislative review of limits to that general principle has been "completely comprehensive";⁴ the Court could not identify a particular reason why the law has not been amended.

¹ There is no jurisdiction at any stage beyond the District Court for an appeal to be brought on anything other than a question of law.

² *J v ACC* [2017] NZSC 3 at [10].

³ At [11].

⁴ At [12].

Why appeals to the Supreme Court should be permitted

4. This curtailment of appeal rights is not only inconsistent with the treatment of other areas of law, it is also inconsistent with the treatment of other matters arising under the Act.
5. For example, an appeal to the Supreme Court is available from decisions of the Human Rights Review Tribunal (HRRT), at least in some circumstances.⁵ There is an inherent unfairness in, say, being able to argue in the Supreme Court about cover under the Act in a claim brought against a physician in the HRRT, but not being able to have those same arguments in the Supreme Court if challenging the cover decision directly under the dispute resolution procedures of the Act itself.
6. Examples of cases heard by the Supreme Court under the Act (and its predecessors) include *McGrath v ACC* and *Allenby v H*.⁶ It is incongruous for some personal injury law cases to be justiciable in the Supreme Court, but not others. This anomaly is compounded by the existence of indirect routes which, if taken, would permit the Supreme Court to hear an ACC case. For example, parties can seek a declaration under the Declaratory Judgments Act 1908 on the meaning of a particular provision.
7. As noted by the Court of Appeal in *Queenstown Lakes District Council v Palmer*:⁷

... the traditional principle, which enjoys fundamental constitutional status in our free and democratic society [is] that citizens are not to be denied access to the Courts save in rare and appropriate circumstances, and then only pursuant to explicit statutory language.
8. While the language of section 163 may be explicit, ACC appeals are not among those “rare and appropriate” cases where access to the courts should be denied.
9. Of course, denying access to the Supreme Court is not synonymous with denying access to the courts *per se*, and leave for any appeal to the Supreme Court will only be granted if the Supreme Court is satisfied that it is necessary in the interests of justice for the Court to hear and determine the appeal.⁸ However, ACC is a compulsory statutory contract, funded by public money, which is almost comprehensive in its coverage of personal injury and already involves a curtailment of citizens’ access to the courts by preventing injured people seeking compensation in tort for injuries caused by others. It is maintained as a complex legal system that has been through four major statutory reiterations. It is therefore appropriate that decisions by ACC made under the scheme should be amenable to the scrutiny of the Supreme Court. Most disputes involving ACC turn on the interpretation of statutory provisions and it is therefore appropriate that the highest court in the country should be the final arbiter as to the meaning of the statute.
10. It is also important to note that many people with disputes under the Act have a disability (often as a result of the injury that is the subject of their claim). This brings the government’s obligations under the Convention on the Rights of Persons with Disabilities into play. It

⁵ See *Fehling v Appleby* [2015] 178 at [4].

⁶ *McGrath v ACC* [2011] NZSC 77 and *Allenby v H* [2012] NZSC 33.

⁷ *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA) at 555.

⁸ See sections 73 and 74 of the Senior Courts Act 2016.

provides that “effective access to justice for persons with disabilities on an equal basis with others” will be ensured;⁹ and that people with disabilities are entitled “to the equal protection and equal benefit of the law”.¹⁰ Constraining access to the Supreme Court may be inconsistent with these obligations.

11. One potential argument against allowing access to the Supreme Court is that it would generate too many appeal rights. The Law Society considers that this is not the case. First, the usual safeguards, such as the requirement of leave, are in place. Secondly, the rights of appeal to both the High Court and the Court of Appeal are already restricted to questions of law and thus the only appeals which will survive that requirement and then cross the further hurdle into the Supreme Court will be those that genuinely warrant consideration by that Court.
12. Extension of the appeal path would not inundate the Supreme Court but would allow it to deal with cases of public importance. As noted above, appeals are already allowed only on a question of law. That requirement would not need to be relaxed. Recent research also indicates that the number of ACC appeals currently getting to the Court of Appeal is very small – a handful of cases over the past few years, in total.¹¹ The barriers inherent in getting a case to the Court of Appeal are substantial – leave is required both at the District Court and High Court level. The District Court routinely declines approximately 75% of applications made for leave to appeal.
13. Finally, any hopeful applicant would have to pass the Supreme Court Act threshold for granting leave. These criteria would ensure, as they do in all other areas of law, that only appropriate cases are heard in that Court. Such cases will often be those that affect classes of people or are test cases. The public interest in appropriate cases that affect a class of injured persons or levy payers is as high as in other areas of law which the Supreme Court has dealt with to date. As Justice McGrath has said of the Supreme Court:¹²

We are not here simply to provide another level of appeal. Rather, we seek out the cases that raise important legal principles or where the circumstances indicate that a miscarriage of justice may have occurred.

Conclusion

14. The Law Society recommends that you give consideration to recommending a law change to enable ACC appeals on points of law to be heard by the Supreme Court.

⁹ Article 13.

¹⁰ Article 5.

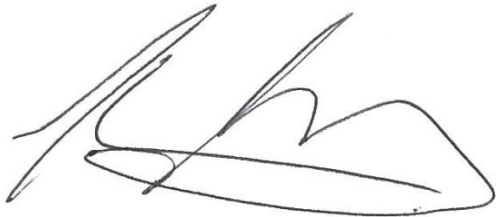
Tiho Mijatov, Warren Forster, and Tom Barraclough “Problems with access to law in personal injury disputes” (2016) 27 New Zealand Univ. L Rev 365 at 384.

¹² Available at:

www.courtsofnz.govt.nz/speechpapers/Justice%20%20McGraths%20Final%20Sitting%20Speeches%200150306.pdf/at_download/file.

15. The Law Society's ACC Committee, whose members have extensive knowledge and experience in ACC law, would welcome the opportunity to provide further information or to meet with you or your officials if that would be of assistance. Contact with the convenor of the ACC Committee, Don Rennie, can be made in the first instance through the Committee secretary, Jo Holland (jo.holland@lawsociety.org.nz / 04 463 2967). We look forward to hearing from you.

Yours sincerely

A handwritten signature in black ink, appearing to be 'K. Beck', written in a cursive style.

Kathryn Beck
President



Office of Hon Michael Woodhouse

Minister for ACC
Minister of Immigration

Minister for Workplace Relations and Safety
Deputy Leader of the House

Kathryn Beck
President
Law Society of New Zealand
PO Box 5041, Lambton Quay
Wellington 6145



Copy to:
Hon Amy Adams
Minister of Justice

Dear Ms Beck

Thank you for your letter of 11 April 2017 regarding section 163 of the Accident Compensation Act 2001, which restricts appeals against ACC review decisions to the Court of Appeal on points of law only, and your recommendation to amend the Act to allow appeals on ACC reviews to the Supreme Court.

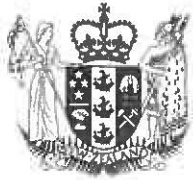
I do not consider that there is sufficient justification to consider amending the Act at this time to allow higher appeals for ACC reviews. I consider that the existing process of ACC's internal review system, Fairway and the three courts available to resolve disputes around interpretation of the law regarding claimant entitlements is sufficient. The limitation on appeals relating to reviews to the Court of Appeal only has been a feature of the Scheme since its inception.

As appeal pathways to the Supreme Court fall within the Justice portfolio, I have forwarded your letter to the Minister of Justice, Hon Amy Adams, for her consideration.

Thank you for taking the time to write to me.

Yours sincerely

Hon Michael Woodhouse
Minister for ACC



Office of Hon Amy Adams

Member of Parliament for Selwyn

Minister of Justice

Minister for Courts

Minister for Social Housing

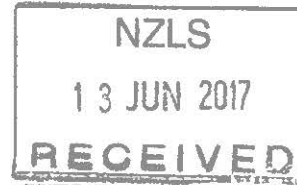
Minister Responsible for Social Investment

Minister Responsible for HNZA

Associate Minister of Finance

- 9 JUN 2017

Kathryn Beck
President
New Zealand Law Society
PO Box 5041
Wellington 6145



Dear Ms Beck

Appeals to the Supreme Court

Your letter dated 11 April 2017 to Hon Michael Woodhouse, Minister for ACC, has been referred to me for response as the issue of appeal pathways to the Supreme Court falls within my portfolio responsibilities as Minister of Justice.

In your letter you note that decisions made pursuant to the Accident Compensation Act 2001 (the ACC Act) cannot be appealed to the Supreme Court, and ask that legislative change enable ACC appeals on points of law be heard by the Supreme Court. I understand Minister Woodhouse has responded specifically in relation to the ACC Act. I can add some general comments about appeals to the Supreme Court.

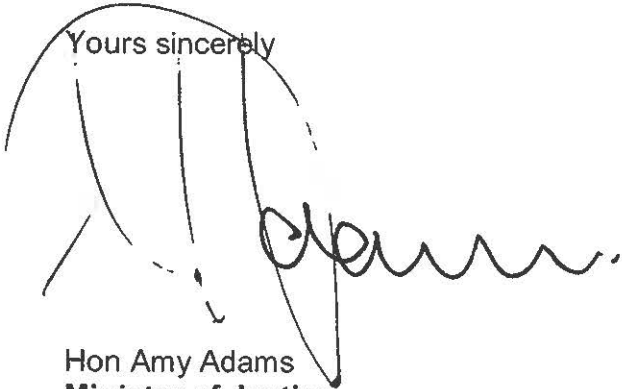
As you are aware, the Supreme Court Act 2003 (now superseded by the Senior Courts Act 2016) established the Supreme Court and ended appeals to the Judicial Committee of the Privy Council. At the time the Supreme Court Bill was being drafted, a review was undertaken to determine the appeal pathways. The Senior Courts Act reflects the principles established by that review; that the Supreme Court is ultimately able to hear any appeal on any judgments regardless of the Court in which the proceedings commenced, by leave of the Supreme Court, and unless any legislation prohibits such an appeal.

At the time the review was being undertaken, the decision was made to not change the general appeal provisions for most tribunals, including ACC. This was because of the complexity of existing appeal rights and the then forthcoming Law Commission report on its review of the courts and tribunals system. The Law Commission report was not implemented at that time, and as a result decisions from tribunals, with limited exceptions, are not able to be heard in the Supreme Court.

A further review of appeal pathways is not currently on the Ministry of Justice's work programme.

Thank you for taking the time to write.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Amy Adams', written over a faint, large, stylized outline of a person's head and shoulders.

Hon Amy Adams
Minister of Justice

20 July 2017

Hon Amy Adams, Minister of Justice,
Hon Michael Woodhouse, Minister for ACC,
Parliament Office
Private Bag 18888
Parliament Buildings
Wellington 6160

Dear Ministers

ACC Appeals to the Supreme Court

Introduction

1. Thank you for your responses to the Law Society's letter of 11 April 2017 on the issue of the pathway of ACC appeals to the Supreme Court.¹ In that letter, we drew to your attention the recent Supreme Court decision *J v Accident Compensation Corporation*, which highlights the need for legislative reform to allow a right of final appeal to the Supreme Court from a High Court decision made under section 162 of the Accident Compensation Act 2001 (the ACC Act).
2. Minister Woodhouse's response was that there is not sufficient justification to consider amending the legislation to allow higher appeals for ACC reviews, and that "the limitation on appeals relating to reviews to the Court of Appeal only has been a feature of the Scheme since its inception." As appeal pathways to the Supreme Court fall within the Justice portfolio, the Law Society's letter was forwarded to the Justice Minister for review.
3. Minister Adams' response was that at the time the Supreme Court Bill was being drafted, a review was undertaken to determine the appeal pathways, and that because of the complexity of existing appeal rights, and the then forthcoming Law Commission report on its review of the courts and tribunals system, the decision was made not to change the general appeal provisions for "most tribunals, including ACC". The Minister noted that the Law Commission report was not subsequently implemented, and "a further review of appeal pathways is not currently on the Ministry of Justice's work programme".
4. It appears that this issue has been put on hold pending a broader review of general appeal provisions for tribunals, with no timeline for the issue to be progressed. The Law Society considers that delay in resolving this issue is unsatisfactory, and that there is a compelling case – as set out below – for legislation to allow final ACC appeals to the Supreme Court to be introduced.

Access to justice

5. The ACC Act is very significant legislation because it removed the common law right to sue to recover damages for personal injury and replaced it with a unique statutory compensation scheme covering work and non-work injuries. It is therefore appropriate that decisions made by

¹ Response from the Hon. Michael Woodhouse, Minister for ACC, received 25 May 2017; response from the Hon. Amy Adams, Minister of Justice, dated 9 June 2017.

ACC under the scheme should be amenable to the scrutiny of the Supreme Court. Most disputes involving ACC turn on the interpretation of statutory provisions and New Zealand's highest court should therefore be the final arbiter as to the meaning of the statute. It is extraordinary that the Court of Appeal is effectively the court of last resort in this very significant area.

6. It is also important to note that many people with disputes under the Act have a disability (often as a result of the injury that is the subject of their claim). Constraining access to the Supreme Court may be inconsistent with the government's obligations under the Convention on the Rights of Persons with Disabilities, for example ensuring "effective access to justice for persons with disabilities on an equal basis with others"² and that people with disabilities are entitled to the "equal protection and equal benefit of the law".³

Inconsistency with other areas of law and other provisions of the ACC Act

7. The position is even more anomalous given that it is possible (provided the "exceptional circumstances" requirement in section 75 of the Senior Courts Act 2016 is met) for appeals to be made directly to the Supreme Court from decisions made under legislation such as the Animal Products Act 1999, the Animal Welfare Act 1999, the Biosecurity Act 1993, the Food Act 2014 and the Road User Charges Act 1971. There are also specific legislative provisions allowing such appeals, such as for example, section 58B of the Te Ture Whenua Māori Act 1993 (direct appeal to the Supreme Court from the Māori Appellate Court in exceptional circumstances).
8. The curtailment of appeal rights for ACC review decisions is not only inconsistent with the treatment of other areas of the law, it is also inconsistent with the treatment of other matters arising under the ACC Act.
9. The Supreme Court has previously considered appeals arising from determinations made by the Accident Compensation Corporation. In *McGrath v Accident Compensation Corporation* [2002] NZSC 77, the Supreme Court allowed an appeal and quashed a notice which had been given to the claimant by the Accident Compensation Corporation. It is anomalous that the Supreme Court can make decisions on the Accident Compensation legislation only when they arise in judicial review, or incidentally as in *Allenby v H* [2012] NZSC 33. As the ultimate judicial body for New Zealand law, the Supreme Court should be able to decide important matters interpreting the legislation by way of appeal.
10. In *J v Accident Compensation Corporation* [2017] NZSC 3, William Young J noted that the advisory group reporting prior to the Supreme Court Act's introduction was of the view that the jurisdiction of the Supreme Court should be comprehensive.⁴ In the Law Society's view this supports the argument that the Supreme Court should have jurisdiction in the important area of the accident compensation scheme. When the Supreme Court was established it opened up more avenues of appeal than had been the case with the Privy Council, which traditionally had been largely civil in nature, with a few criminal appeals.

No policy justification for retaining the status quo

11. To date the appeal pathway has not been extended only because of administrative considerations – namely, that the Law Commission was due to report on its review of the courts

² Article 13.

³ Article 5.

⁴ *J v Accident Compensation Corporation* [2017] NZSC 3, at [6].

and tribunal system (a report which subsequently has not been implemented) – rather than for policy reasons. The Supreme Court in *J v Accident Compensation Corporation* did not consider that such an appeal pathway should be prohibited, but William Young J was guided by the fact that to substitute an appeal to the Supreme Court for the appeal to the Court of Appeal on the present legislative framework would be contrary to the general scheme of the current appeal provision.⁵

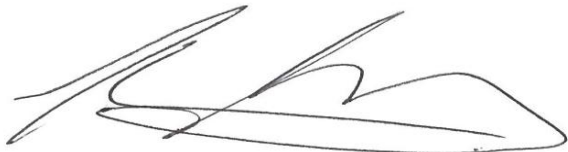
No “floodgates” argument against opening appeal pathway

12. It is also important to note that there are safeguards in the existing legislation to ensure that only appropriate appeals, on matters of genuine public significance, would be heard by the Supreme Court. There is therefore little likelihood of a significant number of ACC appeals to the Supreme Court. On the other hand, to preclude such appeals means that our highest court is unable to contribute to the development of ACC jurisprudence.

Conclusion

13. The current position is an historical anomaly and is of some significance given the unique nature of New Zealand’s accident compensation legislation. For the reasons set out above, the Law Society believes there is a strong case for the government to introduce legislation to allow final ACC appeals to the Supreme Court.
14. We would welcome the opportunity to meet with you to discuss this further.

Yours sincerely



Kathryn Beck
President

⁵ Ibid., at [12].



Office of Hon Amy Adams

Member of Parliament for Selwyn

Minister of Justice

Minister for Courts

Minister for Social Housing

Minister Responsible for Social Investment

Minister Responsible for HNZC

Associate Minister of Finance

16 AUG 2017

Kathryn Beck
President
New Zealand Law Society
PO Box 5041
Wellington 6145



Dear Ms Beck

Appeals to the Supreme Court

Thank you for your further letter dated 20 July 2017 relating to appeals to the Supreme Court. Your letter was also addressed to the Minister for ACC. I am responding on behalf of Hon Michael Woodhouse as the issue of appeal pathways to the Supreme Court falls within my portfolio responsibilities as Minister of Justice.

I acknowledge that the issue of reviewing appeal pathways to the Supreme Court has been put on hold, and currently there is no timeframe for progression. As you are aware, I have broad responsibilities as Minister of Justice. The portfolio is a large one with competing priorities, and many worthy issues have to wait their turn. The Ministry is currently fully engaged on my priority areas, which are the Trusts Bill, delivering the work programme of the Ministerial Group on Family Violence and Sexual Violence and developing a new Privacy Act.

It is unlikely that work will progress on appeal pathways in the near future. However, I have asked my officials to consider your letter when they next provide advice on possible work programme items.

Thank you for taking the time to write.

Yours sincerely

Hon Amy Adams
Minister of Justice