UPDATE
ACC

ACC and appeals to the Supreme Court

BY **DON RENNIE**

On 1 April 1974 at the commencement of the amended Accident Compensation Act 1972, there was a massive and lasting change made to personal injury law in New Zealand. The common law right to sue for damages was removed and replaced with a statutory system that applied to all personal injury suffered in New Zealand by earners, non-earners and visitors.

Since then, the legislation governing the accident compensation scheme has undergone a number of changes. One feature that has however remained unchanged is that the right to appeal ACC's decisions stops at the Court of Appeal (appeals to the Court of Appeal require leave and are limited to questions of law).

Limiting appeals to the Court of Appeal may have made some sense when New Zealand's court of last resort was the geographically distant Privy Council, charged with hearing matters from the whole Commonwealth. However, since 2004, New Zealand's highest court has been the Supreme Court, based in Wellington. It is anomalous that such significant and complex legislation (involving fundamental rights of individuals who have no legal right to bring private proceedings in respect of their injuries, and are often vulnerable as a result of those injuries) cannot be interpreted by New Zealand's highest court.

A recent Supreme Court decision, *J v ACC* [2017] NZSC 3, has highlighted this anomaly. In that case, the judge noted that the advisory group reporting on the Supreme Court Act 2003 was of the view that the jurisdiction of the Supreme Court should be comprehensive, and that the Supreme Court Act was intended to achieve "the general principle that any matter should be able to be appealed to the Supreme Court with the leave of that court". The AC legislation has not been amended to achieve this end. Although the appeal in *J v ACC* was dismissed, the court was not satisfied that the principle of complete comprehensiveness of its jurisdiction had been satisfied, nor could it identify a particular reason why the law has not been amended.

Following the decision in *J v ACC*, the Law Society wrote to the ACC Minister, Michael Woodhouse, seeking an amendment to the AC Act. The minister responded that he did not consider there to be sufficient justification to consider amending the legislation to allow higher appeals for ACC reviews. He noted 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 Minister for ACC referred the Law Society's letter to the Justice Minister for her review.

The Minister for Justice advised that at the time the Supreme Court Bill was being drafted, a review was undertaken to determine the appeal pathways. 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 implemented at that time, and "a further review of appeal pathways is not currently on the Ministry of Justice's work programme".

It appears that the reason the appeal pathway has not been opened is purely the result of administrative process (ie, that there was a pending Law Commission report on its review of the courts and tribunal system, and the Law Commission report was not implemented at the time) rather than for policy considerations.

With regard to the reference to tribunals in the Minister's letter, it is noteworthy that the Law Commission report referred to by the minister, *Delivering Justice for All*, contains in Part 7 a review of tribunals

but makes no specific reference to the ACC statutory review and appeal system. It deals with tribunals described as "a statutory body with all or most of the characteristics that":

- It is independent of the administration and deals with cases impartially between the parties before it;
- It reaches binding decisions;
- Its decisions will usually be made by a panel or bench of members rather than by a single adjudicator who is not a judge and often not a lawyer;
- Its procedure is similar to but more flexible and simpler than a court of law;
- It will have been established specifically to deal with a particular type of case or a number of closely related types of cases.

Obviously the ACC review and appeal process does not reflect these criteria or characteristics and is not a tribunal.

The ACC review and appeal system is designed to determine the meaning of the wording and intent of the legislation in relation to a whole range of events. In addition it deals with the legal rights not only of claimants but also of employers, the self-employed, and other levy payers. It deals with highly complex legal issues like 'causation', medical injury, hearing loss, ingestion of toxic substances, self-inflicted injuries, injuries sustained during the commission of a crime and numerous other events which result in a claim being made.

ACC law applies universally to all aspects of unintended accidental injury suffered in New Zealand. It is inexplicable that there is no right to appeal, with leave, to the highest court in the land to determine the meaning of the legislation in relation to anything which results in a claim on which the ACC has made an adverse decision. Where it is a question of law the Supreme Court must have the final say. ■

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UPDATE
PROPERTY LAW

A New Land Transfer Act

BY **THOMAS GIBBONS**

THE MAIN THING I REMEMBER FROM the land law class I took at law school was the notion of 'indefeasibility', a word I have still never heard used outside land law (by way of comparison, words like caveat, and even moiety, have a place in other contexts). *Fels v Knowles*, and *Frazer v Walker*, and all that. One of my theses – opinions – has been that *Frazer v Walker* was such a lightning bolt to a generation of land law scholars that questions of immediate and deferred indefeasibility supplanted discussion of almost all other topics for a significant length of time, leading our land law study to focus attention on the register above almost all other topics.

The Land Transfer Act 2017

It is entirely appropriate that 50 years after *Frazer v Walker*, new land transfer legislation will finally see the light of day. The Land Transfer Bill received its third reading on 4 July 2017, and at the time of writing is awaiting royal assent. It has had a reasonable gestation: the Law Commission's Issues Paper was released in 2008, and its formal report and draft bill in 2010. A bill was introduced to Parliament in early 2016, and received the Royal Assent on 10 July 2017.

Terminology

The terminology 'Land Transfer Act' goes back to 1870, but invites comment. There can be no doubt that it facilitates transfer, by providing clarity and certainty on land ownership, but the Act applies whether or not land is transferred, and arguably 'Land Titles Act' would be a more apposite description.

Some terminology is fixed; other terminology is more flexible. Lawyers should now get used to the phrase 'record of title' (rather than 'certificate of title', or 'computer register'): see section 12. Title, we are reminded, is obtained by registration: 'Title by registration', section 51.

Manifest injustice

In one notable reform, a person (A) who is deprived of an estate or interest by the registration of a void or voidable interest by another person (B), or who suffers loss or damage by the registration of a void or voidable interest by another person (B), may apply to the court for an order cancelling the registration of B. This remedy is only available if the court is satisfied it would be "manifestly unjust" for B to remain the registered owner, and forgery or other dishonest conduct does not of itself constitute manifest injustice. The notion of an 'section 57 application' may yet gain traction in LTA parlance.

Covenants in gross

Section 115 allows for 'covenants in gross' to be noted on the register, and sections 240 and 244 of the Land Transfer Bill insert a number of new provisions into the Property Law Act. These reforms have been in the works for some time, though it is useful to remember that it was only in the mid-2000s that the enforceability of encumbrance instruments was decisively determined.