

16 January 2019

Hon Andrew Little
Minister of Justice

By Email

andrew.little@parliament.govt.nz

Copy to:

Hon Ian Lees-Galloway
Minister for ACC

Dear Hon Andrew Little

Re: Accident Compensation Appeals to the Supreme Court

1. ACC Futures wishes to follow up our letter of the 15th of January 2019 to highlight the current inconsistency that some ACC cases can be heard in the Supreme Court.
2. ACC Futures wrote to you as Minister of Justice to raise the issue of the statutory bar on appeals to the Supreme Court in ACC cases. Since our letter was sent, it has been highlighted by members of ACC Futures that there are inconsistencies in the way that the statutory bar in subs 163(4) is currently operating.
3. Two ACC cases have been decided by the Supreme Court. In *McGrath v ACC*, the Supreme Court judicially reviewed a decision of ACC to require a claimant to undergo vocational independence assessment on the basis that the Corporation did not have the power to require that assessment under s 110.¹ The Supreme Court corrected erroneous approaches to both judicial supervision of the conditions set out in s 110(3) taken in the High Court and in the Court of Appeal,² and the statutory requirements of timeframe and purpose of vocational independence testing taken in the Court of Appeal.³
4. In *Allenby v H*, the Supreme Court allowed an appeal by a medical practitioner on a decision by the Court of Appeal.⁴ The case concerned the definition of personal injury under the Accident Compensation Act 2001. The Court of Appeal determined pre-trial question asked by the High Court in a negligence action. The Court of

¹ *McGrath v ACC* [2011] NZSC 77; [2011] 3 NZLR 733.

² At [31].

³ At [36].

⁴ *Allenby v H* [2012] NZSC 33; [2012] 3 NZLR 425.

Appeal followed its earlier decision *D v ACC* regarding the definition of the Personal Injury.⁵ The appeal to the Supreme Court was successful, resulting in ACC covering the injury and the bar in the Accident Compensation Act on common law actions applying.⁶

5. These cases are significant as some persons affected by ACC decisions have been able to access adjudication by the Supreme Court through resort to the normal civil system. Both resulted in the Supreme Court reversing decisions of the Court of Appeal; had they been normal appeals on ACC decisions, the effected parties would have not been able to be heard by the Supreme Court due to subs 163(4) and the Court of Appeal judgment would remain. Not allowing appeals beyond the Court of Appeal in individual cases, yet allowing statutory declarations and judicial review proceedings leads to inconsistency in access to justice determined by route taken at first instance.
6. Several experienced lawyers have made the point that they are adjusting the way they are filing ACC cases to avoid the statutory bar. Access to justice should not be contingent on the experience of lawyers at first instance.
7. If some claimants can access the Supreme Court, then *all claimants* should be able to. Otherwise, this leads to inconsistency in access to justice, determined by route of first filing.

Yours sincerely,

Hazel Armstrong

On behalf of ACC Futures.

⁵ Allenby, Above n 4, at [34].

⁶ At [84].