IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

[2022] NZACC 126 ACR 150/20

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION UNDER SECTION 162 OF THE ACT FOR LEAVE TO APPEAL TO THE HIGH COURT
BETWEEN	THE ESTATE OF DU XIANG SU Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Decision: On the papers

Submissions: H Lee for the Applicant
S Kinsler for the Respondent

Judgment: 30 June 2022

JUDGMENT OF JUDGE P R SPILLER
[Leave to Appeal]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour Judge C J McGuire, delivered on 8 March 2022.[1] At issue in the appeal is whether the Corporation's decision declining cover for a treatment injury is correct. The Court dismissed the appeal, for the reasons outlined below.

Background

[2] In early 2019, Mr Su developed a cough, and, by the beginning of March 2019, he had increasing shortness of breath.

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[1] *Estate of Su v Accident Compensation Corporation* [2022] NZACC 30.

[3] On 10 March 2019, Mr Su was admitted to hospital. The hospital notes on his admission record that malignancy was regarded as the most likely aetiology, and he was informed of this. Over the next few days, Mr Su's lungs were drained and this made a significant difference to Mr Su's ability to breath without discomfort. Blood samples were taken for analysis, and Mr Su was advised that tuberculosis was also considered as he had no risk factors for lung cancer on account of not being a smoker.

[4] On 19 March 2019, Mr Su was discharged. At the time of his discharge, the test results were not yet available. A follow-up was recorded as due in the pleural clinic on either 27 or 28 March 2019.

[5] On 20 March 2019, a laboratory report recorded that:

> The only marker demonstrating positivity in the tumour cells is a wide spectrum cytokeratin. Since poorly differentiated pulmonary adenocarcinoma cannot be completely excluded, EGFR mutation analysis was ordered, to be available shortly.

[6] By 27 March 2019, Mr Su's condition had worsened and he was readmitted to hospital. Mr Su rapidly deteriorated during the night after his admission.

[7] On the morning of 28 March 2019, a family meeting was held with the respiratory consultant Dr Andy Davies, a palliative care specialist nurse, the family and a Cantonese interpreter. During this meeting the family were informed that Mr Su had metastatic lung cancer (histology results having only recently available), that the pleural effusion had reaccumulated very quickly, that he had suddenly deteriorated and was actively dying, and that there were no further treatments the medical team could offer, aside from making him comfortable.

[8] At 2.40 pm on 28 March 2019, Mr Su passed away.

[9] On 22 May 2019, Mr Su's estate supplied an ACC21 form, "advice of accidental death", and sought cover for a treatment injury. Mr Su's estate claimed that the outcome may have been different had Mr Su's diagnosis been detected on first presenting to the hospital.

[10] Following the treatment injury claim being lodged, Dr Meyer, Specialist Physician Respiratory and General Medicine, was asked to comment. He reported on 12 August 2019:

> *In your opinion if Mr Su was an in-patient at the time of diagnosis, would this have changed the outcome in this case?*
>
> It is most unlikely that it would have changed the outcome. In stage four cancer with pleural malignancy chest drainage is part of symptom good management without necessarily changing the prognosis as such ...
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> Mr Su unfortunately was not a candidate for palliative chemotherapy as this if anything would have resulted in harm rather than clinical benefit. Unfortunately an intensive care admission and life support would have been clinically futile interventions also resulting in likely harm and discomfort rather than benefit.

[11] On 5 September 2019, the Corporation declined cover for Mr Su's estate claim. On 11 December 2019, Mr Su's estate lodged an application to review the Corporation's decision.

[12] On 6 July 2020, the Reviewer upheld the Corporation's decision. On 31 July 2020, Mr Su's estate filed the current appeal.

[13] Mr Su's estate obtained the opinion of Dr Leong Ng, retired General Physician specialising in medical oncology. On 9 November 2020, he reported:

> The relevant period in this case in March 2019 appears very short (10-28 March 2019).
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> During the beginning of this period, I am of the view that if the rapidly reaccumulating pleural effusion was investigated, the input of an oncologist was necessary. That was the absolute medical indication. Whilst the differential diagnosis included lung cancer and TB, of equal importance, it is more likely to be cancer because the patient had resided in New Zealand for a long period of time and only returned to China occasionally.
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> I am of the view that if the palliative care team was consulted and intervention given early in the course of illness, diminished suffering would likely to have resulted.

The Court's judgment of 8 March 2022

[14] Having outlined the relevant facts of the matter, Judge McGuire noted that the basis for the estate's claim of a treatment injury included:

(a) Whether the doctors at Wellington Hospital failed to inform Mr Su and his family of the pathologist's report of 20 March 2019 and treat him for cancer;

(b) Whether there were clinical indications that Mr Su from 10 March to 19 March 2019 be considered for alternative treatment; and

(c) Whether the administration of the drug Erlotinib and/or palliative care would have materially delayed the death of Mr Su on 28 March 2019.

[15] Judge McGuire referred to the Court of Appeal's decision in *Adlam*:[2]

> [50] This brings us to s 33(1)(d): "a failure to provide treatment, or to provide treatment in a timely manner". It is clear that the word "failure" relates to both parts of this paragraph: the provision refers to both a failure to provide treatment, and a failure to provide treatment in a timely manner.
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> [51] A point that can then be made is that the reference to provision of treatment in a "timely manner" of itself necessarily incorporates a standard. It involves a judgment that something was not done as soon as it should have been done. This must turn on some standard that can be referred to in order to make the judgment. It is inherently unlikely in our view that "failure" in this context was intended to connote only the simple idea that the appropriate treatment was not given earlier; to say in this context that something was not done in a timely manner involves a judgement that it should have been done earlier.
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> [52] If that is right, we consider a similar approach must be taken to "failure" in the first part of the paragraph. Here, the standard is not established by reference to timing but simply by reference to a step not taken. In this setting, we consider a standard must again be involved as a reference point. In order for there to be a failure to provide treatment, we consider there must have been some indication at the time of the failure that the treatment not provided should have been provided. Unless that approach is taken it is difficult to see how there could be a relevant failure to provide treatment that caused the personal injury.
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> [53] Mr Butler emphasised that the words "caused by treatment" in s 32(1)(b), read together with s 32(2)(a) (which excludes personal injury wholly or substantially caused by a person's underlying health condition) show that a failure to provide treatment under s 33(1)(d) on its own would be insufficient to attract cover. A failure to provide treatment must in fact cause injury. Here, Mr Butler relied on this Court's decision in *Cumberland v Accident Compensation Corporation*.
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> [54] In that case, this Court said that on a "traditional" or "standard" approach to causation, in a case where it is alleged that a failure to diagnose has resulted in personal injury, the relevant question to ask is whether "if the diagnosis had been properly made, and proper treatment had followed, was the patient more likely than not to have recovered". The Court proceeded on the basis that for a

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2 *Adlam v Accident Compensation Corporation* [2017] NZCA 457, [2018] 2 NZLR 102.

> failure to be causative of injury, it was necessary to prove on the balance of probabilities that an alternative treatment that would have prevented the injury would have "actually taken place". Mr Butler argued that an alternative treatment must have been both clinically available and preferable to the treatment in fact given before it could have been said that the injury would have been prevented by an alternative course of treatment. The necessary causal element depends on what is clinically indicated: a course of action that is not clinically indicated could not be said to be available.
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> [55] We accept that argument. As a consequence, it would only be where there was a departure from what was clinically indicated that a failure to provide treatment could be regarded as having caused injury in terms of s 32(1)(b). …
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> [62] Taken as a whole the provisions indicate a legislative intent to limit cover for persons who suffer injury while undergoing treatment, rather than providing cover for all those who suffer. The injury said to be a treatment injury must be the consequence of a departure from appropriate treatment choices and treatment actions. The drafting could have simply provided for cover for all injury suffered while a person undergoes treatment. But that course was not taken. Rather, boundaries were set out that have the effect of limiting the availability of cover for injury during treatment. A failure in the sense of omitting to take a step required by an objective standard is necessary.

[16] Judge McGuire referred to the report of Dr Meyer, Specialist Physician Respiratory and General Medicine, of 12 August 2019. Judge McGuire acknowledged the opinion of Dr Leong Ng, retired General Physician of 9 November 2020. However, His Honour noted that Dr Ng did not say that Mr Su's prognosis would have been any different had palliative care been given.

[17] Judge McGuire also acknowledged the reference of Mr Su's representative to the Ministry of Health Faster Cancer Treatment document of April 2016. A footnote on page 7 of that document says: "It should be noted the incidence of non smoking related cancer is increasing particularly in women and east Asians". However, Judge McGuire considered that the footnote needed to be considered along with the steps that Mr Su's medical carers at Wellington Hospital had taken since his initial admission on 10 March 2019. Judge McGuire noted that, given the initial suspicion of cancer, the carers carried out the appropriate tests and awaited the laboratory results of samples taken. Judge McGuire considered that the representative's criticism of there being no treatment plan did not take account of the fact that, until the laboratory report was available, there was no certainty of diagnosis and, had there been in any event earlier cancer treatment, there was nothing to suggest that the outcome would have been any different. His Honour considered that the time for

involvement of oncologists, realistically, was when there was laboratory confirmation of cancer and, more particularly, certainty as to the mutations that were present.

[18] Judge McGuire noted the prevailing law in *Adlam*, that for a failure to be causative of injury, it was necessary to prove, on the balance of probabilities, that an alternative treatment that would have prevented the injury would have actually taken place. Judge McGuire found that there was no evidence of this requirement. His Honour noted that Mr Su's rapid decline and death on 28 March 2019 followed his readmission to hospital on the previous day, a day on which the deceased and his son actually left the ward for four hours. Judge McGuire also referred to the legal requirement in *Adlam*, that for there to be a failure to provide treatment, there must have been some indication at the time of the failure that the treatment not provided should have been provided. Judge McGuire found that no such failure was proven here.

[19] Judge McGuire added, for the sake of completeness, that he found no fault with the hospital authorities for not involving oncologists prior to laboratory confirmation that the issue was cancer and the cancer mutations had been identified. Judge McGuire noted that failure to apply targeted chemotherapy before this level of certainty had been achieved ensured that the health system's finite resources were used in the most appropriate way.

Relevant law

[20] Section 162(1) of the Accident Compensation Act 2001 (the Act) provides:

> A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District Court, appeal to the High Court.

[21] In *O'Neill*,[3] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:

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3 *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

(i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment …;

(ii) The contended point of law must be *"capable of bona fide and serious argument"* to qualify for the grant of leave …;

(iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed …;

(iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law …;

(v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision …;

(vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law … .

[25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law … .

Submissions presented for the Estate of Mr Su

[22] The representative of the Estate submits, first, that Judge McGuire misapplied *Adlam.* This was because his Honour did not decide whether there were clinical or observable indications of cancer, and his Honour should have made a finding on whether the initial views of the doctors and CT scan reports showing pleural effusion of the lung constituted observable or clinical indications that Mr Su had cancer.

[23] The representative submits, second, that Judge McGuire should have decided whether omissions by doctors to inform Mr Su and his family immediately of the pathologist report, and to recall Mr Su for immediate treatment, constituted a failure to treat under s 33(1)(d) of the Act.

[24] The representative submits, third, that Judge McGuire should not have referred to, or relied on, Dr Meyer's medical opinion because he gave his opinion with the benefit of objective hindsight.

Discussion

[25] This Court acknowledges the submissions made by the representative of the Su Estate. However, the Court makes the following findings.

[26] First, the Court finds that Judge McGuire correctly applied the law, as outlined in the *Adlam* judgment, to the evidence before His Honour. The principal findings which Judge McGuire drew from this evidence were that:

(1) the time for involvement of oncologists was when there was laboratory confirmation of cancer and, more particularly, certainty as to the mutations that were present;

(2) until the laboratory report was available, there was no certainty of diagnosis and, had there been in any event earlier cancer treatment, there was nothing to suggest that the outcome would have been any different; and

(3) Mr Su's rapid decline and death on 28 March 2019 followed his readmission to hospital on the previous day, a day on which the deceased and his son actually left the ward for four hours.

[27] In light of this evidence, Judge McGuire, following the *Adlam* judgment, found that it had not been established that an alternative treatment would have prevented the injury, or that treatment not provided should have been provided.

[28] Second, the Court finds that Judge McGuire did not make an error in law in relation to whether alleged omissions by doctors to inform Mr Su and his family immediately of the pathologist report, and to recall Mr Su for immediate treatment, constituted a failure to treat under s 33(1)(d) of the Act. The Court refers to its discussion above.

[29] Third, the Court finds that Judge McGuire did not make an error of law in referring to, or relying on, Dr Meyer's medical opinion which had the benefit of objective hindsight. As noted above, Judge McGuire's decision was essentially based on evidence of what was known at the time of Mr Su's treatment. The opinion

of Dr Meyer, a Specialist Physician Respiratory and General Medicine, was also evidence relevant to Mr Su's treatment, and Judge McGuire was entitled to take this into account.

The Decision

[30] In light of the above considerations, the Court finds that the Estate of Mr Su has not established sufficient grounds, as a matter of law, to sustain this application for leave to appeal, which is accordingly dismissed. The Estate has not established that Judge McGuire made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources. This Court is not satisfied as to the wider importance of any contended point of law.

[31] There is no issue as to costs.

Judge P R Spiller
District Court Judge