IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 230 ACR 157/20

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	SANDRA SHIELD Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing:	31 October 2022
Heard at:	Christchurch/Ōtautahi
Appearances:	The Appellant in person Mr I Hunt for the Respondent
Judgment:	1 December 2022

RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Treatment Injury s 32 Accident Compensation Act 2001]

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[1] At issue on this appeal is the decision of the respondent dated 19 May 2017 declining a claim for a treatment injury. The decision said:

> The declined claim is:
>
> - Unnecessary surgery and failure to obtain informed consent prior to wide excision of lesion on right lower leg, resulting in poorly healing wound and deep cavity.

Background

[2] Following the failure of topical treatments prescribed by her GP, Dr McGregor, to clear a lesion on her right lower leg in June 2016, the appellant saw plastic surgeon Mr Kenton-Smith on 6 September 2016.

[3] Mr Kenton-Smith's favoured diagnosis for this lesion was a squamous cell carcinoma, with a differential diagnosis of keratoacanthoma, a lesion that is usually benign.

[4] Mr Kenton-Smith said that if the lesion was a squamous cell carcinoma, it would require removal using a skin graft.

[5] The parties disagree about what Mr Kenton-Smith told the appellant regarding the results of such excision surgery and skin graft.

[6] The histology report on the lesion dated 6 September 2016 said:

> The histological findings are of a squamo-proliferative lesion and in this biopsy favour a keratoacanthoma. However, invasive well differentiated squamous cell carcinoma cannot be excluded.

[7] On 9 September 2016, Mrs Shield spoke with Mr Kenton-Smith's nurse and later with Mr Kenton-Smith himself. She says that on both occasions she was told she had cancer. There is no record of these calls in the notes provided by Mr Kenton-Smith, however, in respect of a complaint made by Mrs Shield to the Health and Disability Commissioner, Mr Kenton-Smith wrote:

> Sandy rang my practice to request the results on 9 December (sic). She was very concerned about the results. My nurse, Jackie Mills RN, contacted Sandy (after talking to me) to advise her that she would require a skin graft and that the details would again be discussed at her appointment on 13 September. Sandy was distressed by this news and insisted that I call her ... I explained to Sandy the results for biopsy i.e. squamo-proliferative lesion or squamous cell cancer could not be excluded (see histology). I did my best to allay her fears. I explained I would talk to her further on 13 September (face to face), which I did.

[8] On 13 September 2016, the appellant saw Mr Kenton-Smith again. His notes of this consultation are brief:

> Explain surgery again to Sandy. She does not want to stay overnight. Will plan a PICO dressing and for Jackie to change this the following week.

[9] Mrs Shield signed a consent form for excision of the lesion which was to be performed under general anaesthetic at St George's Hospital. The consent form states the provisional diagnosis was "SCC".

[10] The surgery was performed on 19 September 2016 under local anaesthetic and sedation. In his operation note that day, Mr Kenton-Smith described the operation as an excision and skin graft for "probable SCC" and excision of skin tags on Mrs Shield's inner thighs.

[11] Mr Kenton-Smith wrote:

> POST OP
>
> 1 Jackie to review one week – allow 30 mins
>
> 2 leave skin graft dressing intact if all well
>
> 3 remove padding for donor site
>
> 4 ? change of skin graft 14 days
>
> 5 organise district nurse dressing
>
> 6 JKS to review three weeks

[12] Specimens of the lesions were sent for histology. Regarding the lower leg lesion, the histology report dated 19 September 2016 concluded:

> The histological findings are of a squamo-proliferative lesion favouring a keratoacanthoma rather than an invasive well differentiated squamous cell carcinoma.

[13] On 20 September 2016, the appellant phoned Mr Kenton-Smith's rooms as she was feeling unwell. A nursing note of the call makes no reference to concerns about the state of the wound. The note indicates that Ms Mills spoke with Mr Kenton-Smith, whose comments were relayed to Mrs Shield. The notes states, in part:

> Phone call from Sandy … Appt made for Tues – unwrap donor, unwrap bandage – leave dressing intact unless necessary to change.

[14] On 23 September 2016, a nursing note by Ms Mills states:

> Returned Rodney's phone call. They are after histology results. Given the all clear news. They would like a copy emailed to them and I have suggested we print off a copy for Sandy when she comes to her appt on Tues.

[15] On 26 September 2016, Mrs Shield phoned Mr Kenton-Smith's rooms asking for the histology report to be sent to her general practitioner. A nursing note records that "histology faxed" to Dr McGregor at the Woodend Medical Centre.

[16] Notes provided by Mr Kenton-Smith record Mrs Shield's wound care at his practice following the surgery. According to the notes, on 27 September 2016, Mrs Shield's wounds were checked by Ms Mills. The skin graft was not disturbed, but the outer layers were rebandaged. The nurse note states:

> Graft site unbandaged and rebandaged as she says it is falling down. Not undressed any further than bandage. No wound issues noted.

[17] On 4 October 2016, Mrs Shield saw Ms Mills. The nursing note states:

> RO bandage and graft dressing not trimmed. Looks to be good take of graft. Firm in position. Sandy refusing to get it wet so redressed with inadine and foam mefixed on. No sign of infection … Sandy and Rodney insisting she has a PET scan to see if anything is "brewing inside her body". Apparently had a friend with what sounds like SCC "went rampant" and killed him and convinced she has the same thing. Will discuss with JKS at next visit.

[18] On 11 October 2016, Mr Kenton-Smith reviewed Mrs Shield. The same day, he wrote to Dr McGregor:

> I reviewed Sandy today regarding her right lower leg skin graft for keratoacanthoma, completely excised. The skin graft has excellent take. It is approximately 95% healed. The donor site has also healed.
>
> My nurse, Jackie, will check her in two weeks' time. She should shower in the interim and just wear a very light dressing.
>
> Sandy has requested to have a PET scan of her body relating to the keratoacanthoma on her leg. I explained to her that there is no indication to perform this and thus I was unwilling to make, what I believe, an inappropriate referral.

[19] The same day, the appellant wrote a five-page letter of complaint to Dr Kenton-Smith. The letter is wide-ranging and refers to a failure to provide crutches or a wheelchair. It says that:

> The wound fits no description that you gave to me and my husband, it is considerably larger, it is extremely deep, it does not appear to have taken to these grafted skin as you stated it had in my last visit to your clinic.

[20] Although dated 11 October 2016, the letter appears to have a 14 October 2016 update which includes the following:

> Doctor, I have seen my GP and I now understand why you will not refer me for a PET scan, as there is no need as I DID NOT have cancer in the first place.
>
> …

> This would mean that what you have done to me with this excessive surgery was completely unnecessary and was done with no informed consent as was all based on lies, I am shocked and disgusted.

[21] On 17 October 2016, an ACC injury claim form was completed by the appellant's GP, Dr McGregor, with the description of injury as follows:

> Right anterior pretibial lesion removed with wide excision and skin graft from upper right thigh wound has healed very poorly leaving cavity defect approximately 4cm deep. Sandra is adamant that she was not informed of cavity defect before surgery.

[22] On receipt of the claim, the respondent sought and received a report from Mr Kenton-Smith dated 10 November 2016. The report included the following:

> Sandra has been appropriately treated to the appropriate surgery with appropriate consenting process and a good outcome. When she last saw me, her wounds were well healed, as per my notes. I would expect them to remain so, but since she has declined to be reviewed in the practice at present, I cannot comment on her current status with certainty.
>
> …
>
> I am more than happy for another plastic surgeon to comment on the appropriateness of treatment.
>
> …
>
> Sandra has reported that "she has a large cavity in her leg". She has the normal contour defect that is present when a lesion is removed from the lower leg and the area skin grafted. This was discussed with her previously and is as I would expect. Obviously, I feel sorry that Sandra is not happy (with) the appearance, even though it is as I would expect. I believe that Sandra has had a very good outcome from her surgery.

[23] With his letter of 10 November 2016, Mr Kenton-Smith included consultation/medical notes and operation records.

[24] Mr Kenton-Smith referred the appellant to plastic and reconstructive surgeon, Sally Langley, for a second opinion. In her report of 8 January 2017, she said:

> From my point of view, Sandra has a well healed area of her left leg. Whether its healed residual skin graft or healing by secondary intention is now immaterial. The appearance is entirely consistent with the procedure that was undertaken and with the measurements and dimensions of the histology report.

[25] She concluded her letter saying:

> I have advised Sandra to not have a dressing, massage the area with oil or cream, and expect improvement in appearance and feel of the area over many months.

[26] The respondent then sought an expert opinion from plastic surgeon, Mr de Chalain.

[27] In his report of 27 March 2017, he said:

> I have now had the opportunity to read through the file of documents concerning this case and in my view, it would appear to be completely straightforward. In essence, Mrs Shield presented for an excision of a possible squamous cell carcinoma of her right anterior leg.
>
> …
>
> It would appear that appropriate management including biopsy, consent procedures and definitive surgical treatment were followed all along the line. Unfortunately, the result, while satisfactory in terms of establishing a firm tissue diagnosis and completely removing the offending lesion, was less aesthetically pleasing than the patient had anticipated. Accordingly, I believe this is a case of results not achieved rather than treatment injury.
>
> Receiving the images which the patient found so shocking and distressing I can see little more than a fairly average presentation of a split thickness donor site which is still in a process of maturation, and a surgical excision site which has healed by secondary intention albeit leaving somewhat more of a depression than might be desirable. Nevertheless, I think this is an appropriate result after an appropriately consented and performed procedure.

[28] On 19 May 2017, the respondent's clinical advisor wrote to the appellant declining her claim for a treatment injury. The letter said:

> The declined claim is:
>
> - Unnecessary surgery and failure to obtain informed consent prior to wide excision of lesion on right lower leg, resulting in poorly healing wound and deep cavity.

Appellant submissions

[29] Mrs Shield told the Court that both she and her husband had had previous dealings with Dr Kenton-Smith that were "great". She described to the Court the lead up to her surgery on the lesion in question. She was not given a general anaesthetic as have been planned. She said the initial cut into her leg was before she was anaesthetised.

[30] After the operation, she said that there was no wheelchair to the hospital car park and that she had to hop to her car. She said that after she went home on the day after the operation, the top dressing (donor site) was bleeding badly. She said it took two days for Mr Kenton-Smith to call her back and she was advised to wrap some more dressings over it. She said that when she next saw Mr Kenton-Smith on 11 October 2016, the nurse unbandaged the bottom wound and did not wash her hands and wore no gloves. She said she could see by the look on her husband's face that something was wrong.

[31] She said that when she unbandaged her leg, she was horrified at a significant hole. She said it was a large area that was deep. She says she ended up "quite ill".

[32] She said that a good plastic surgeon should have minimised the scars and that now she has two.

[33] She said that the reason for the "rushed surgery" was that she had been told she had cancer. However, she says it wasn't cancer.

[34] She says that if Mr Kenton-Smith had told her the truth, she would not have gone ahead with the surgery so quickly. She said she tried to get a hold of the histology report but they refused to send a copy, and they would not send it to her GP.

[35] She says it was her GP who finally told her, "You never had cancer", and that was a benign lesion. Therefore, she says that she should not have had the treatment as it was not needed.

[36] She said she was not given any aftercare or follow up and that is how she ended up in her GP's care. She said she was also told by her "nurse Maud" representative that the skin graft over the wound had died.

[37] She says she was given false information in order to obtain her consent for the operation and that she now has a very deformed leg in two places. She says her GP told her that, "he had never seen anything as bad as that". She said she had been unable to find anything that could be done to remedy the situation.

[38] The appellant produced a diagram of the size of the area of the wound, having a diameter of 38 mm. Regarding the biopsy that "couldn't rule out squamous cell carcinoma" she said that she would not have been rushed into surgery, but would have taken a couple of weeks so that it could be further investigated. She said the same type of lesion had been removed from the other leg and that went fine.

[39] She says that Dr Kenton-Smith should have given her options.

Respondent's Submissions

[40] Mr Hunt makes the point that some aspects of the appellant's evidence/submissions before the Court at not consistent with the clinical record produced from Mr Kenton-Smith and his nurse.

[41] As far as the histology is concerned, it is accepted that excision of the lesion was appropriate in the circumstances.

[42] Mr Hunt refers to Mr Kenton-Smith's report of 10 November 2016 where he states:

> I reviewed Sandra on 13 September, explaining the results of the histology and that the correct treatment was excision and split skin graft. The histological findings were "squamo-proliferative lesion favouring a keratoacanthoma rather than invasive well differentiated squamous cell carcinoma". This was the correct treatment based on the biopsy histology.

[43] Mr Hunt refers to the medical records prior to the surgery, including a letter to the appellant's GP on 6 September 2016 where again reference was made to the lesion being a keratoacanthoma, but that squamous cell carcinoma was the favoured diagnosis.

[44] Mr Hunt refers to the report of Mr de Chalain and notes that this plastic surgeon who gave advice to ACC said "It would appear that appropriate management including biopsy, consent procedures and definitive surgical treatment were followed all along the line".

[45] Mr Hunt refers to the report of specialist physician, Dr Macedo, of 23 February 2021 where he says:

> I would image that the treatment decision would be in the balance between conservative management of a lesion that may resolve spontaneously, or with topical treatments, but with risk of it being malignant lesion and become more invasive, against the decision to fully excise the lesion at the outset because on the original biopsy squamous cell carcinoma was in the differential diagnosis.

[46] Mr Hunt refers to the Court of Appeal's decision in *Adlam*[1], where the Court said:

> … A treatment injury must involve some act or omission that has a causative effect in producing the personal injury.

[47] He also refers to the decision in *Ng*[2] where the Court dealt with the phrase "not an ordinary consequence".

[48] The Court said:[3]

> Whether an adverse consequence is inside or outside the normal range of consequences of the medical treatment given to a particular claimant is ultimately a matter of judgment for the decision maker. It is to be exercised on a case specific basis, taking into account all the circumstances of the treatment and the particular claimant.

[49] Mr Hunt submits in this case the weight of evidence is against the appellant.

Appellant's Reply

[50] Mrs Shield reiterated that as it is her body, it is her right to have the information to make a proper informed consent. She reiterates that Mr Kenton-Smith said that she had cancer. She says there are inconsistencies in everything that Mr Kenton-Smith has reported. She said she only signed the consent form because she was told she had cancer. She said the opportunity to have the histology looked at was lost. She says to this day, the wound is not completely healed.

Decision

[51] This is a claim for a treatment injury. Section 32 defines a treatment injury as a personal injury that is suffered by a person seeking treatment from a health professional. Section 32(1)(b) provides that the treatment injury was caused by the treatment and (c) not a

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1 *Adlam v Accident Compensation Corporation* [2017] NZCA 457, [2018] 2 NZLR 102 at [40].
2 *Accident Compensation Corporation v NG* [2020] NZCA 274, [2020] 2 NZLR 683.
3 See note 2 at [69].

necessary part or ordinary consequence of the treatment, taking into account all the circumstances of the treatment, including –

[i] The person's underlying health condition at the time of the treatment; and

[ii] The clinical knowledge at the time of the treatment.

[52] Furthermore, the appellant must have sustained a personal injury (that is, a physical injury as defined in section 26).

[53] Section 32(3) states:

> The fact that the treatment did not achieve a desired result does not of itself constitute a treatment injury.

[54] Section 33 defines "treatment" as including a diagnosis of the person's medical condition, a decision on the treatment to be provided, and failing to obtain a person's informed consent to treatment.

[55] On the issue of consent, the appellant's position is she was told she had cancer. In the course of the hearing, she said that if she had not been told she had cancer, she would not have gone ahead with the surgery so quickly. Frankly that proposition takes her nowhere. All the professionals were of the view that the surgery was appropriate and the inference to be taken from her position is that she did too.

[56] Dr Macedo, who has had the appellant as a patient since 1998, says in his report of 23 February 2021:

> Sandra had indicated that part of her distress was that the keratoacanthoma was in the original differential diagnosis of the incisional biopsy, and that Sandra indicated to me that non-surgical options were not communicated to her. I imagine that the treatment decision would be in the balance between conservative management of a lesion, which may resolve spontaneously or with topical treatments, but with risk of it being a malignant lesion and become more invasive, against the decision to fully excise a lesion at outset because on the original biopsy squamous cell carcinoma was in the differential diagnosis.

[57] Dr Langley's comments were that based on the histology report, it was "highly appropriate" to proceed to surgery.

[58] Plastic surgeon, Mr de Chalain, said:

> It would appear that appropriate management including biopsy, consent procedures and definitive surgical treatment were followed all along the line.

[59] I conclude that she was told by Mr Kenton-Smith that cancer was in the differential diagnosis and that has resulted in her recollection that she was told she had cancer. I am sure that Mrs Shield would not be alone in believing, in the circumstances, that she had cancer, if only for the reason that the possibility of cancer was included in the differential diagnosis.

[60] The treatment carried out by Mr Kenton-Smith to remove the lesion was appropriate. None of the specialists consulted say otherwise.

[61] Likewise, I conclude that what occurred to her leg following surgery was an ordinary consequence of the treatment. Dr Langley found that the appearance of the appellant's leg wound was "entirely consistent with the procedure that was undertaken and with the measurements and dimensions of the histology report". Likewise, Mr de Chalain considered her treatment and management was proper.

[62] It follows that the indentation in her leg and the scarring was an ordinary consequence of the treatment. It is not seriously suggested that surgery of this kind carries with it a guarantee that, some infection; or a skin graft "not taking"; or a significant indentation at the site of the removal of the lesion, is not an ordinary consequence of the particular treatment.

[63] As section 32(3) states:

> The fact that the treatment did not achieve a desired result does not, of itself, constitute treatment injury.

[64] Skin grafts not taking; infections; and the surgery leaving more disfigurement than expected are all ordinary consequences of this kind of treatment.

[65] The reaction of Dr Langley was one of surprise at finding such a well-healed skin graft scar area.

[66] When Mr Kenton-Smith last saw the wound on 13 December 2016, the result was as he would expect.

[67] Mr de Chalain described the result as satisfactory in terms of establishing a firm tissue diagnosis and completely removing the offending lesion, but in his words, "less aesthetically pleasing than the patient had anticipated".

[68] In his view, this was a case of results not achieved, rather than treatment injury. Mr de Chalain went on to say:

> Reviewing the images which the patient found so shocking and distressing, I can see little more than a fairly average presentation of a split thickness donor site, which is still in the process of maturation, and a surgical incision site which has healed by secondary intention, albeit it leaving somewhat more of a depression than might be desirable. Nevertheless, I think it is an appropriate result after an appropriately consented and performed procedure.

[69] Ultimately, there is no professional evidence that supports the proposition that the outcome of the surgery did other than achieve the desired result, accepted there was a larger depression than might be desirable. Overall, the desired result was achieved.

[70] I find therefore, for the above reasons, that there was no treatment injury. What occurred was within the bounds of an ordinary consequence of the treatment that she received.

[71] Accordingly, I must dismiss the appeal.

CJ McGuire
District Court Judge

Solicitors: Young Hunter, Christchurch