

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2022] NZACC 69**

**ACR 91/20**

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

Hearing: 20 April 2022  
Held at: Auckland/Tāmaki Makaurau

Appearances: M Williams for the appellant  
K Feltham for the respondent

Judgment: 28 April 2022

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**RESERVED JUDGMENT OF JUDGE P R SPILLER  
[Claim for treatment injury - s 32, Accident Compensation Act 2001]**

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**Introduction**

[1] This is an appeal from the decision of a Reviewer dated 20 April 2020. The Reviewer dismissed an application for review of the Corporation's decision dated 22 November 2019. The Corporation declined Mrs Coakley cover for a treatment injury following alginate impressions of her top and bottom teeth by her dentist on 31 March 2019.<sup>1</sup>

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<sup>1</sup> Alginate is an elastic, hydrocolloid (gel-like) material commonly used in dentistry to make impressions of teeth and adjacent soft tissues.

## **Background**

[2] Mrs Coakley was born in 1954.

[3] On 25 February 2019, Mrs Coakley visited her dentist, Dr Kevin Lee, and he restored a molar (tooth 27).

[4] On 28 March 2019, Mrs Coakley again visited Dr Lee for the restoration of a molar (tooth 37). She had an injection in preparation for the treatment that left her cheek numb. That evening she accidentally chewed her cheek while eating dinner, causing a painful laceration.

[5] On 31 March 2019, Mrs Coakley returned to see Dr Lee. He took alginate impressions of her top and bottom teeth, in preparation for making a set of dentures. Mrs Coakley recalls her mouth being sore, but she consented to the impressions, as she was keen to get her dentures. Mrs Coakley said that she later felt dizzy, she could taste a strange metallic taste in her mouth, and her mouth felt itchy and irritated. Over the next few days her gums became painful.

[6] On 3 April 2019, Mrs Coakley saw Dr Ellen Yang, as Dr Lee was away. The tooth which had been restored by Dr Lee on 28 March 2019 (tooth 37) was extracted, as it was causing her a lot of pain.

[7] On 7 April 2019, Mrs Coakley again saw Dr Lee, due to the increased pain in her mouth. On this occasion, he drained an abscess, extracted a molar (tooth 36) and prescribed her antibiotics. The tooth extracted had been restored on two previous occasions (21 June 2017 and 11 November 2018).

[8] On 8 April 2019, Dr Lee extracted two of Mrs Coakley's molars (tooth 27 and tooth 26), due to pain and infection.

[9] Following this, Mrs Coakley did some research and concluded that her problems may have been caused by the toxicity of the alginate used in taking the impressions. She spoke to Dr Lee about this and gave him a copy of the articles she had found, and he refunded her the cost of the impression visit. At this time,

Mrs Coakley recalls that her mouth was still painful, she had visual disturbances, she was suffering from sinusitis, and she had a number of skin lesions on her lower lip and chin. During May 2019, Mrs Coakley suffered from sinusitis and the 'flu. She had headaches and poor concentration and visited an optometrist, who diagnosed cataracts.

[10] On 2 June 2019, Mrs Coakley visited Dr Lee and he removed a bone fragment from her mouth. At the time, her gum was inflamed, and this took some time to heal.

[11] On 7 June 2019, Mrs Coakley saw her GP, Dr Graeme Kidd. At her request, he referred her to a specialist.

[12] On 6 August 2019, Mrs Coakley saw another general dentist, Dr Mark Wakefield, for a second opinion. He carried out a root canal procedure (on tooth 46). He then referred her to a surgeon, due to a suspected fracture to her lingual plate.

[13] On 14 August 2019, Mrs Coakley saw Dr Rakesh Jattan, Oral Maxillofacial Surgeon. He noted that Mrs Coakley had numerous issues with her mouth, including the root of an extracted molar (tooth 26) having been dislodged into the antrum cavity. Dr Jattan discussed the option of surgery with her. He also referred her to an ear nose and throat surgeon for consideration of whether the root tip could be removed endoscopically.

[14] On 16 August 2019, Mrs Coakley again saw Dr Kidd. He lodged an ACC claim form (ACC45), noting that her injury was "abrasion inside cheek - alginate toxicity form impression material", and the diagnosis was "SLG7 Topical dental drug poisoning (suspected)".

[15] On 30 August 2019, Mrs Coakley saw Dr Kidd and a treatment injury claim form (ACC2152) was completed. The injury caused by treatment was described by Dr Kidd as "alleged poisoning from topical dental drug (suspected)", while the treatment itself was noted as being "dental impression taking with alginate material".

[16] In an undated letter, Dr Lee advised that the brand of alginate used at his clinic was Halas Alginate, which conformed with ISO 1563 1990 rules and with the European and Australian requirements. He said that this product was used thousands of times every day for the taking of dental impressions without any detrimental effects, and that, if the reason for the suspected poisoning was sought, the original instigator of the claim, Dr Kidd would need to be consulted.

On 1 November 2019, Dr Jonathan Leichter, a Senior Lecturer at the University of Otago School of Dentistry and ACC External Clinical Advisor, Dr Leichter reviewed all the available information. Dr Leichter advised that there was no clinical evidence to support the claim that Mrs Coakley had been poisoned by the alginate material. He noted that alginate is used millions of times every week worldwide, and that a literature review was unable to locate any clinical cases of alginate poisoning. He also noted that, while some types of alginate have chemical compounds that can cause cell damage in a glass dish in a laboratory, there was no evidence that a single two-minute exposure to alginate could cause the litany of lingering symptoms reported by Mrs Coakley. Dr Leichter advised that the fact that a compound was cytotoxic in a laboratory did not mean that it could produce the symptoms noted by Mrs Coakley, even if this particular alginate was cytotoxic, of which there was no evidence. Dr Leichter observed that the brand of alginate used by Dr Lee conformed to current international standards.

[17] On 21 November 2019, the Corporation's Treatment Injury Panel, comprising Jane Drummond and Juna Jardenico, registered nurses, considered all the relevant information. The Panel recommended declining cover for the claim of drug poisoning secondary to alginate toxicity, as there was no evidence of this and therefore no physical injury.

[18] By letter dated 22 November 2019, the Corporation declined the claim for a treatment injury, on the basis that the claim did not meet the criteria for a treatment injury.

[19] On 18 March 2020, review proceedings were held. On 20 April 2020, the Reviewer dismissed the review, on the basis that Mrs Coakley had not proved on the balance of probabilities that she had suffered a treatment injury.

[20] On 13 May 2020, a Notice of Appeal was lodged.

### **Relevant law**

[21] Section 32 of the Accident Compensation Act 2001 (“the Act”) sets out:

#### **32 Treatment injury**

- (1) Treatment injury means personal injury that is—
  - (a) suffered by a person—
    - (i) seeking treatment from 1 or more registered health professionals; or
    - (ii) receiving treatment from, or at the direction of, 1 or more registered health professionals; or
    - (iii) referred to in subsection (7); and
  - (b) caused by treatment; and
  - (c) not a necessary part, or ordinary consequence, of the treatment, taking into account all the circumstances of 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.
- (2) Treatment injury does not include the following kinds of personal injury:
  - (a) personal injury that is wholly or substantially caused by a person’s underlying health condition;
  - (b) personal injury that is solely attributable to a resource allocation decision;
  - (c) personal injury that is a result of a person unreasonably withholding or delaying their consent to undergo treatment.
- (3) The fact that treatment did not achieve a desired result does not, of itself, constitute a treatment injury.

[22] In *Ambros*,<sup>2</sup> the Court of Appeal envisaged the Court taking, if necessary, a robust and generous view of the evidence as to causation:

[65] The requirement for a plaintiff to prove causation on the balance of probabilities means that the plaintiff must show that the probability of causation

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<sup>2</sup> *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

is higher than 50 per cent. However, courts do not usually undertake accurate probabilistic calculations when evaluating whether causation has been proved. They proceed on their general impression of the sufficiency of the lay and scientific evidence to meet the required standard of proof ... The legal method looks to the presumptive inference which a sequence of events inspires in a person of common sense ...

[67] The different methodology used under the legal method means that a court's assessment of causation can differ from the expert opinion and courts can infer causation in circumstances where the experts cannot. This has allowed the Court to draw robust inferences of causation in some cases of uncertainty -- see para [32] above. However, a court may only draw a valid inference based on facts supported by the evidence and not on the basis of supposition or conjecture ... Judges should ground their assessment of causation on their view of what constitutes the normal course of events, which should be based on the whole of the lay, medical, and statistical evidence, and not be limited to expert witness evidence ...

[23] In *Sam*,<sup>3</sup> Mallon J stated:

[24] Having assessed what are the range of possible causes on the evidence, I reject the submission that, if any of the possible causes would be covered, it is for ACC to disprove that cause. I agree with ACC that *Accident Compensation Corporation v Ambros* [2008] 1 NZLR 340 does not support such an approach. Rather *Ambros* upheld the position previously taken in an earlier case that the legal burden of establishing causation on the balance of probabilities remains on the claimant.

[24] In the Court of Appeal judgment in *Adlam*,<sup>4</sup> Cooper J stated:

[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. ...

[65] As is always the case, it is necessary to focus on the words Parliament has actually used. It will be apparent from our reasoning that we have discerned a legislative policy that, while not requiring a finding of negligence, still operates on the basis that a treatment injury will only have occurred where there has been some departure from a standard and that departure has caused a personal injury.

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<sup>3</sup> *Sam v Accident Compensation Corporation*, CIV 2008-485-829, High Court, Wellington, 31 October 2008.

<sup>4</sup> *Adlam v Accident Compensation Corporation* [2017] NZCA 457, [2018] 2 NZLR 102; see also *McEnteer v Accident Compensation Corporation* [2010] NZCA 126, [2010] NZAR 301 at [20].

[25] In *Stewart*,<sup>5</sup> Judge Barber stated:

[33] The cases consistently highlight that the question of causation cannot be determined by a matter of supposition. There must be medical evidence to assist the respondent Corporation, and now the Court, to determine that question. A temporal connection, in itself, will be insufficient. There needs to be a medical explanation as to how the ongoing condition has been caused by the originally covered injury. In this case the evidence does not establish this.

[26] In *Bloomfield*,<sup>6</sup> Judge Joyce noted:

[18] In this case, and when all is rendered down, the extension of cover claims pursued on appeal by Mr Bloomfield rest mainly on the foundation of a temporal connection argument. On occasion, a temporal connection may be of significance in the context of other, helpful to a claimant, evidence. But the mere presence of such a connection will usually do no more than raise the post hoc ergo propter hoc fallacy.

## Discussion

[27] The issue in this case is whether the Corporation's decision of 22 November 2019 to decline Mrs Coakley cover for a treatment injury is correct. Legislative boundaries have been set around entitlement to cover for injury suffered by a person seeking treatment from a registered health professional.<sup>7</sup> Mrs Coakley is required to prove that she suffered personal injury in receiving treatment from a registered health professional, and that her injury was caused by this treatment.<sup>8</sup> The injury said by Mrs Coakley to be a treatment injury must be the consequence of a departure from appropriate treatment choices and treatment actions, objectively assessed.<sup>9</sup> A temporal connection between a claimed injury and symptoms, without sufficient supportive medical evidence, does not establish causation.<sup>10</sup>

[28] Mrs Coakley's position is that following the taking of the dental impressions on 31 March 2019, her health deteriorated substantially, and she suffered a series of abscesses, problems within her mouth, general malaise and blurring of her eyesight. Due to this, she conducted her own research about the use of alginate. Mrs Coakley believes the alginate used to take her dental impressions was crumbly and dirty and

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<sup>5</sup> *Stewart v Accident Compensation Corporation* [2003] NZACC 109.

<sup>6</sup> *Bloomfield v Accident Compensation Corporation* [2014] NZACC 1.

<sup>7</sup> See *Adlam* n4 above, at [62].

<sup>8</sup> Section 32(1).

<sup>9</sup> See *Adlam* n4 above.

<sup>10</sup> *Stewart v Accident Compensation Corporation* [2003] NZACC 109, at [33]; and *Bloomfield* above n6 at [18].

this caused the toxicity she experienced, and as a result the need for subsequent removal of a number of her teeth. There is research which suggests that the international (1990) standard used for the brand of alginate used in Dr Lee's clinic is out of date. Dr Kidd, GP, supported Mrs Coakley's claim for cover for treatment injury. Accordingly, the Corporation was wrong to decline her claim for a treatment injury.

[29] The Court acknowledges the submissions made by Mrs Coakley, and that she has had ongoing dental issues requiring treatment. However, the Court refers to the following considerations.

[30] First, in the period of over four months from the taking of alginate impressions of Mrs Coakley's teeth (in March 2019) to the lodging of her claim in August 2019, there is no clinical record supporting Mr Coakley's claim. During this period, Mrs Coakley was examined and treated on several occasions by the dentist Dr Lee (who took the impressions), the dentists Dr Yang and Dr Wakefield, and the Oral Maxillofacial Surgeon, Dr Rakesh Jattan. There is no indication in their records that Mrs Coakley suffered personal injury in the taking of alginate impressions by Dr Lee, or that any injury was caused by this treatment. Further, General Practitioner Dr Kidd's endorsement of Mrs Coakley's claim to the Corporation was not supported by any reasoned diagnosis provided by himself or any other medical practitioner.

[31] Second, Dr Lee advised that the brand of alginate used at his clinic conformed with the international, European and Australian standard requirements of dental alginate impression materials; and that this product was used thousands of times every day for the taking of dental impressions without any detrimental effects.

[32] Third, Dr Jonathan Leichter, a Senior Lecturer at the University of Otago School of Dentistry, advised (and twice subsequently confirmed) that there was no clinical evidence to support the claim that Mrs Coakley had been poisoned by the alginate material. He noted that alginate was used millions of times every week worldwide, and that a literature review was unable to locate any clinical cases of alginate poisoning. He also noted that there was no evidence that a single two-



minute exposure to alginate could cause the lingering symptoms reported by Mrs Coakley. Dr Leichter advised that the fact that a compound was cytotoxic in a laboratory did not mean that it could produce the symptoms noted by Mrs Coakley, even if this particular alginate was cytotoxic, of which there was no evidence. Dr Leichter observed that the brand of alginate used by Dr Lee conformed to current international standards.

### **Conclusion**

[33] In light of the above considerations, the Court finds that Mrs Coakley has not established that she suffered personal injury in receiving treatment from a registered health professional, or that her injury was caused by this treatment.

[34] The decision of the Reviewer dated 18 August 2020 is therefore upheld. This appeal is dismissed.

[35] I make no order as to costs.



P R Spiller  
District Court Judge

Solicitors: Luke Cunningham Clere for the respondent.