

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 74 ACR 277/19

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPEAL UNDER SECTION 149 OF
THE ACT

BETWEEN MICHAEL WILLIAMS
Appellant

AND ACCIDENT COMPENSATION
CORPORATION
Respondent

Hearing: On the papers

Submissions: B Hinchcliff for the Appellant
J Coates and R Mould for the Respondent

Judgment: 4 May 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 McGuire, delivered on 5 November 2021.¹ At issue in the appeal was whether the Corporation's decision dated 13 May 2019, declining cover for Mr Williams' left leg numbness and weakness as treatment injuries, was correct. The Court dismissed the appeal, for the reasons outlined below.

Background

[2] On 14 May 2018, Mr Williams was admitted to a hospital emergency department, reporting worsening symptoms of upper right and lower limb weakness.

¹ *Williams v Accident Compensation Corporation* [2021] NZACC 177.

On 15 May 2018, an MRI scan of the C6 level demonstrated expansion of the C5/6 lesion, then measuring 17mm in maximum diameter, with features of haemorrhage. The radiological differential diagnoses were detailed as including haemorrhage into a nerve sheath tumour, metastases, vascular neoplasm or meningioma.

[3] On 16 May 2018 Mr Edward Mee, Neurosurgeon, and Dr Daniel Raper, Senior Registrar, carried out C5/6 laminectomies and resection of haemorrhagic intradural nerve sheath tumour.

[4] Following his surgery, Mr Williams' symptoms of right upper and lower limb weakness improved. However, on the day following surgery, he reported left leg tingling. Two months later, he also reported numbness of his left leg. Mr Williams consulted various treating practitioners, and underwent imaging, but was not able to obtain a specific diagnosis or reason for his symptoms.

[5] On 11 January 2019, Dr Li, GP, filed a treatment injury claim. The injury subject to the claim was "C5/6 cord oedema" and listed the signs and symptoms of this injury as "left leg paraesthesia and weakness". The treatment recorded as having caused the injury was "cervical laminectomy C5/6" described as "surgery for intradural haematoma in cervical spine".

[6] In March 2019, Mr Mee, the operating surgeon, advised that the cause of Mr Williams' left leg numbness was not clear, as it did not appear to have been noted at the time of discharge, and was not typical of numbness due to spinal cord compression, being in a nerve distribution only.

[7] On 13 May 2019, the Corporation issued a decision advising that it was unable to provide cover for the claimed treatment injury of "left leg numbness". This was on the basis that there was insufficient evidence of a physical injury giving rise to Mr Williams' symptoms and, therefore, there was not a personal injury capable of cover under the Act. Mr Williams applied for a review of this decision.

[8] On 18 August 2019 Dr Gorman, Occupational Health Physician, advised that there was no doubt that Mr Williams' left leg problems constituted a treatment injury.

[9] On 21 October 2019, the Reviewer upheld the Corporation's cover decision and dismissed the review, concluding that Mr Williams had not established that he had suffered a personal injury in terms of the legislation. Mr Williams appealed to the District Court.

[10] On 23 December 2019, Dr Reuben Johnson, Neurosurgeon, noted that Mr Williams underwent successful surgery to decompress his cervical cord in a timely fashion and, without that surgery, it was most likely he would have been left severely disabled and possible tetraplegic. On 30 September 2020, Dr Johnson provided a further report, having seen Mr Williams, noting that he (Dr Johnson) was not able to identify a specific diagnosis that explained Mr Williams' left leg symptoms.

[11] On 5 November 2021, Judge McGuire dismissed Mr Williams' appeal, for the reasons outlined below. On 21 January 2022, Mr Williams sought leave to appeal the Court's decision.

The Court's judgment of 5 November 2021

[12] Judge McGuire, in his judgment, canvassed the facts, medical reports, legislative provisions and submissions relating to the case at hand.

[13] Judge McGuire, in conclusion at paragraphs [91]-[94], noted that it was clear from the evidence that the surgery carried out on Mr Williams, after discussion at a multidisciplinary meeting, proved to be uncomplicated, and that, post operatively, it resulted in immediate significant improvement in symptoms and prevented further serious neurological deteriorations. Judge McGuire found that, taking into account Mr Williams' underlying health condition and the clinical knowledge at the time of his treatment, his condition proved to be an ordinary consequence of the treatment. Judge McGuire accepted that it might well be that, at some future time, clinical knowledge relating to the particular and serious underlying neurological issue that

required the surgery would be enhanced to allow for an outcome that did not result in the new but far less serious injury that had occurred here. However, Judge McGuire was satisfied that, given the clinical knowledge at the time of the treatment, the outcome for Mr Williams in this case was as good as could be expected. Judge McGuire concluded that it followed from the foregoing that, in this case, what occurred to Mr Williams did not satisfy the definition of a treatment injury as set out in section 32 of the Act.

Relevant law

[14] 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.

[15] In *O'Neill v Accident Compensation Corporation*,² Judge Cadenhead stated:

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

- (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

² *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

The appellant's submissions

[16] Mr Williams seeks leave to appeal on the basis of two questions of law:

- (a) “Did the Judge err by not considering whether the left leg problems occasioned a measure of surprise?”
- (b) “If surgery is successful and prevents further injury, can a new injury be caused by the surgery?”

[17] Mr Hinchcliff submits that Judge McGuire held that Mr Williams' original condition led to the new condition following surgery, but that there is no evidence that the original condition caused the new injury. Mr Hinchcliff further submits that Judge McGuire held that the outcome for Mr Williams was that the new injury condition was an expected condition, but that there is no evidence for this finding and there was a separate, new injury identified following surgery. Mr Hinchcliff notes that Judge McGuire's judgment did not find whether Mr Williams' left leg problems following surgery occasioned a measure of surprise, a test outlined in the Court of Appeal judgment in *Ng*.³

Discussion

[18] This Court addresses the two questions posed by Mr Williams.

- (a) **Did the Judge err by not considering whether the left leg problems occasioned a measure of surprise?**

[19] This Court does not accept that Judge McGuire erred by not expressly mentioning that Mr Williams' left leg problems occasioned a measure of surprise, for the following reasons.

[20] First, Judge McGuire, at paragraphs [43]-[44] of the judgment, referred to Mr Williams' submissions which quoted the *Ng* authority and argued that developing left leg numbness and weakness after treatment would create an element of surprise.

[21] Second, Judge McGuire's finding at paragraph [94], that “the outcome for the appellant in this case was as good as could be expected”, encompasses the *Ng* test.

[22] Third, the element of surprise test is only part of what needs to be considered to sustain a treatment injury claim. Legislative boundaries have been set around entitlement to cover for injury suffered by a person seeking treatment from a registered health professional.⁴ In particular, treatment injury does not include personal injury that is not a necessary part, or ordinary consequence, of the treatment, taking into account all the circumstances of treatment, including the person's underlying health condition at the time of the treatment and the clinical knowledge at the time of the treatment.⁵ The injury said to be a treatment injury must be the consequence of a departure from appropriate treatment choices and treatment actions, objectively assessed.⁶ These considerations are accurately reflected in Judge McGuire's findings at paragraphs [91] to [94].

(b) If surgery is successful and prevents further injury, can a new injury be caused by the surgery?

[23] This Court fails to see how the above question emerges from the judgment of Judge McGuire, with the inference that Judge McGuire held (wrongly) that Mr Williams' left leg symptoms could not attract cover given that he had successful treatment for his right leg symptoms. This Court cannot find any such statement or finding in Judge McGuire's judgment. Judge McGuire's conclusion at paragraphs [91]-[94] was in line with the provisions of the Act, as interpreted by established case-law.

Decision

[24] In light of the above considerations, the Court finds that Mr Williams has not established sufficient grounds to sustain his application for leave to appeal, which is accordingly dismissed. In particular, the Court finds that the contended points of law are not capable of *bona fide* and serious argument, to qualify for the grant of leave.

³ *Accident Compensation Corporation v Brenda Ng and L* [2020] NZCA 274, at [68].

⁴ *Adlam v Accident Compensation Corporation* [2017] NZCA 457, at [62].

⁵ Section 32(1)(c).

⁶ *Adlam*, at [62] and [65].

[25] There is no issue as to costs.

A handwritten signature in black ink, appearing to read "P R Spiller". The signature is written in a cursive style with a large initial "P".

Judge P R Spiller,
District Court Judge

Solicitors: Claro Law, for the respondent