IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 84 **ACR 98/21**

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

Hearing:	22 April 2022
Held at:	Auckland/Tāmaki Makaurau By AVL
Appearances:	B Hinchcliff for the appellant F Becroft for the respondent
Judgment:	10 May 2022

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

Introduction

[1] This is an appeal from the decision of a Reviewer dated 5 May 2021. The Reviewer dismissed an application for review of:

(a) the Corporation's decision dated 7 July 2020 declining cover for treatment injuries, being nerve damage resulting in impaired swallowing, thyroid damage/hypothyroidism, loss of left epiglottis and chronic left shoulder pain; and

(b) the Corporation's decision dated 6 November 2020 declining cover for treatment injury to the pectoralis muscle.

Background

[2] Mr Olliver was born in 1955. He developed tongue cancer.

[3] In July 2011, Mr Olliver was diagnosed with p16-negative T4NOMO squamous cell carcinoma (SCC) of the left base tongue. The cancer was treated with chemoradiation.

[4] On 8 April 2011, a nursing assessment recorded that Mr Olliver was asthmatic and diabetic, had a previous left shoulder rotator cuff tear, smoked more than 40 packets of cigarettes each year, and engaged in heavy alcohol use. Further hospital notes record that Mr Olliver had other medical problems, which included a stroke in 2014 and myocardial infarctions in 2004, 2014 and 2018, severe emphysema and hemochromatosis, polymyalgia rheumatica and gout. Mr Olliver also had a history of gastro-oesophageal reflux disease, hypertension and porphyria.

[5] In 2018, Mr Olliver had another cancerous growth removed from the back of his throat.

[6] On 31 January 2019, Mr Olliver had a punch biopsy on his tongue which showed that he had a squamous cell carcinoma.

[7] On 4 March 2019, Mr Olliver was hospitalised with pneumonia.

[8] On 27 March 2019, Mr Olliver had surgery to treat a squamous cell carcinoma on his right postero-lateral tongue. The surgery was performed by Ms Diana Kahill, Oral Surgeon. Mr Olliver was discharged the next day.

[9] On 16 April 2019, following post-operative bleeding, Mr Olliver was admitted to Auckland hospital for further treatment.

[10] On 17 April 2019, Mr Olliver had a CT scan of his neck, chest and liver, which reported evidence of post-surgical swelling of the base of his tongue on the right side. Mr Olliver started experiencing food sticking in throat. On 7 May 2019, he had a barium swallow test. This detected evidence of tracheal penetration and silent aspiration with liquids.

[11] On 13 May 2019, Mr Olliver underwent a suspension micro laryngoscopy and biopsy for interarytenoid pachydermia by Mr Ilia Ianovski, Head and Neck Surgeon.

[12] On 23 May 2019, Mr Olliver's cancer in his right posterolateral tongue was excised more widely. He underwent a wide local excision of the right posterolateral tongue (hemi glossectomy), ipsilateral neck dissection level I-IV and right pee major flap, tracheostomy and nasogastric tube placement, performed by Mr Ianovski.

[13] On 24 May 2019, Mr Olliver was discharged from hospital. The discharge summary stated that Mr Olliver developed biochemical hypothyroidism with T4 10.3 and TSH 28.4.

[14] On 25 May 2019, Mr Olliver returned to hospital to investigate tracheal bleeding. Ms Khalil, Head and Neck Surgeon, reported that an arterial bleed from the right medial aspect of the thyroid was identified and ligated. The medial borders of the thyroid isthmus were then bipolared with good control. Mr Olliver required a percutaneous endoscopic gastrotomy (PEG), because he then experienced aspiration when feeding.

[15] Mr Olliver had a long recovery from these surgeries, with hospital documents recording that he had multiple aspiration pneumonias, congestive heart failure, hypothyroidism, atrial fibrillation with sepsis, and hyponatraemia.

[16] On 29 May 2019, a laboratory report stated that there were no tumours in Mr Olliver's lymph nodes, tongue and lingual nerve.

[17] On 5 June 2019, Mr Olliver had a CT scan of his neck, and the scan recorded extensive inflammatory change in the right neck and supraclavicular fossa. On 8 June 2019, a chest x-ray described pneumonia.

[18] On 24 June 2019, Dr David Spriggs, Physician/Geriatrician, reported that Mr Olliver had hypothyroidism, and that he needed T4 replacement.

[19] On 1 July 2019 Mr Olliver had a PEG tube placed for feeding. On 3 July 2019, he was admitted to hospital with bronchopneumonia secondary to aspiration.

[20] On 25 July 2019, Mr Olliver was seen by Mr Ianovski. The medical issues were identified as persistent hypothyroidism, old granulation tissue of the right neck and tracheotomy site, and a persistently open wound right chest. A flexible naso-endoscopy revealed a normal base of the tongue with eroded epiglottis that was longstanding, and a new finding of an immobile left vocal cord. The right vocal cord was moving normally with good adduction and airway protection, but there was a lack of sensation on the left. Mr Ianovski was concerned about the new left vocal cord immobility and recommended a CT scan.

[21] On 8 August 2019, the CT scan of the neck, chest and liver was taken to examine the new finding of left vocal cord immobility. The findings were:

> Normal vocal cord function post radiotherapy in 2011 for pT4NO left oropharyngeal sec. Vocal folds are opposed making evaluation difficult but appearances are fairly symmetrical. Pooling of fluid in the hypo pharynx was noted. No cause for the left-sided vocal fold paralysis identified.

[22] On 23 September 2019 and 25 October 2019, Mr Olliver was admitted to hospital for treatment of a chest infection.

[23] On 19 November 2019, Mr Olliver had a barium swallow test. Also, on 19 November 2019, Ms Caroline Leakey, Speech-language Therapist, examined Mr Olliver. She reported that he presented with pharyngeal dysphagia with persistent aspiration, and that his cough response to aspiration was either absent or ineffective. Ms Leakey further noted that Mr Olliver's oropharynx appeared to have been significantly affected by previous cancers and that the left section of the

epiglottis was absent. She noted that Mr Olliver had all his food by PEG feeding, and that he was allowed thin water only for pleasure.

[24] On 12 December 2019, Dr Ianovski noted:

> The left vocal cord is immobile and it is most likely that his swallowing is affected by the condition of his oropharynx as a result of recent surgery, chemoradiation therapy and signification scar tissue.

[25] On 15 February 2020, an ACC injury claim form was filed for an injury to the nerve during surgery, and post-operative pain. The claim form referred to an accident date of 23 May 2019, and noted that there were multiple complications following an operation to treat tongue cancer.

[26] On 22 February 2020, a treatment injury claim form was completed. The form listed injuries caused by the treatment including, vocal cord paralysis, possible nerve damage resulting in impaired swallowing, chronic pain of the left shoulder and pain of the right shoulder, and damage to the thyroid. The form indicated that Mr Olliver was unable to eat, that he was suffering chronic pain, and that he had been subjected to recurrent hospital admissions with chest infections.

[27] On 2 March 2020, a further treatment injury claim form added the injury of left vocal cord immobility, causing loss of voice. This condition was also linked to the surgery of 23 May 2019.

[28] In April 2020, the Corporation indicated that it was waiting on a report from Mr Ianovski, the surgeon involved, and that more time was needed to assess the claim.

[29] In May 2020, the Corporation wrote again and indicated it was still waiting on a report from Mr Ianovski. It appears that no comment from Mr Ianovski was forthcoming. The Corporation then sought independent advice from Mr Andrew Currie, Otolaryngologist.

[30] On 2 June 2020, Mr Currie, in his report noted that there was little mention of shoulder discomfort in the clinical records, and no mention of any evaluation of the

spinal accessory nerve. Mr Currie accepted that the nerve was prone to damage during neck dissection, and that shoulder discomfort was a well-known complication of the surgery. He concluded that Mr Olliver suffered a spinal accessory nerve injury, from the neck dissection, and that this injury was causing shoulder discomfort. Mr Currie described the condition as an expected complication of neck dissection, but not a more probable than not complication.

[31] Mr Currie did not know the cause of the left vocal cord weakness. He noted that the laryngeal nerve had not been surgically accessed. Mr Currie worked through a number of possibilities, including cancer in the laryngeal ventricle, but concluded that the paralysed vocal cord was definitely not due to injury. Mr Currie observed:

> Radiology has not identified a lesion that could be affective these laryngeal or vagus nerves nor the larynx. But since the lesion of on the side opposite to that surgery, the paralysed vocal cord is definitely not due to an injury and the cause is ultimately, at this stage, unknown. …
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> The cause of the vocal cord immobility is, at this stage, unknown but the presence of loss of sensation of the larynx means that the lesion could be anywhere along the course of the vagus nerve above the takeoff point of the recurrent laryngeal nerve. Since the surgery did not access the left side of the neck, the paralysis of the vocal cord does not constitute an injury.

[32] On 6 July 2020, Ms Louise Robertson of the Corporation considered Mr Currie's evidence, and, in the cover decision tool, summarised:

> Based on the clinical information on file and the ECA report Mr Olliver likely has a right spinal accessory nerve injury caused by traction on the nerve, or pressure on the nerve during retraction or to sharp damage sustained during dissection of the nerve and attempts to preserve its function. Such damage to the nerve is a well recognised complication of neck dissection and is not an ordinary consequence of treatment in this case.
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> Mr Currie said there was no evidence of laryngeal or recurrent laryngeal nerve injury that has resulted in Mr Olliver's impaired swallowing. The cause of Mr Olliver's left vocal cord weakness and swallowing difficulty is unknown and Mr Currie states as it is on the opposite side from the surgery it is definitely not due to an injury and therefore declined. The chronic pain in the left shoulder is listed as pre-existing on the lodgement form There is no evidence of an injury causing the left shoulder pain and as it was pre-existing to the surgery on 23/5/2019 it is not eligible for cover. Mr Olliver does not have damage to his thyroid. The clinical evidence shows he has hypothyroidism which developed one month post-surgery and that he has biomechanical hypothyroidism. Hypothyroidism is not an injury of itself and there is no evidence to show a physical injury occurred to Mr Olliver's thyroid at any time. Mr Olliver has an absence of the left aspect of his epiglottis.

> Mr Currie states this appears to be due to the previous presence of a tumour that involved those structures and was eaten into by the tumour When this was destroyed by the chemoradiation and the tumour had gone there was a defect in the epiglottis. Therefore the loss of the left aspect of Mr Olliver's epiglottis is not caused by treatment but by the underlying cancer.

[33] On 7 July 2020, the Corporation issued a decision approving cover for damage to the spinal accessory nerve of the right shoulder, but declining cover for possible nerve damage resulting in impaired swallowing, damage to the thyroid with hypothyroidism, loss of the left aspect of the epiglottis and chronic left shoulder pain.

[34] On 4 August 2020, Mr Olliver applied for a review of the Corporation's decision.

[35] On 7 August 2020, a further medical certificate was filed, asking for the diagnosis of pectoralis injury to be added to the claim. The Corporation investigated the request, again seeking updated medical records and a report from Mr Ianovski.

[36] On 29 September 2020, Mr Ianovski advised:

> The patient had a pee major muscle local flap - the muscle was not injured, but rather transferred from his chest into his oral cavity to reconstruct his post partial glossectomy defect. As such, I do not see a relevance of a "treatment injury" claim.

[37] The Corporation then considered that advice and concluded:

> Based on the clinical information on file and the report from Mr Ianovski, treating ORL Surgeon, the injury to the pectoralis muscle was a necessary part of treatment as the muscle was removed from Mr James Olliver's right chest to be used as part of the reconstruction of his post-partial glossectomy defect (this was an intended and planned part of the surgery and therefore is not eligible for cover as a treatment injury).

[38] On 6 November 2020, the Corporation issued a further decision declining cover for a pectoralis muscle injury.

[39] On 2 February 2021, Mr Olliver applied for a review of that decision.

[40] On 8 April 2021, review proceedings were held. On 5 May 2021, the Reviewer dismissed the review. The Reviewer accepted Mr Currie's advice that the nerve damage resulting in impaired swallowing, loss of the left epiglottis, and chronic left shoulder pain were not caused by Mr Olliver's treatment. She held that there was insufficient evidence to conclude that there was cover for any injury or disease in relation to the thyroid or the pectoralis muscle. However, the Reviewer identified deemed cover for post-operative pain of the right shoulder, because the Corporation did not make a decision about this matter within the statutory time limit.

[41] On 6 May 2021, the Corporation confirmed deemed cover for post-operative pain of the right shoulder.

[42] On 10 May 2021, Mr Olliver filed an appeal against the Reviewer's decision.

Relevant law

[43] Section 32 of the Accident Compensation Act 2001 ("the Act') provides:

> **32 Treatment injury**
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> (1) Treatment injury means personal injury that is—
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> (a) suffered by a person—
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> (i) seeking treatment from 1 or more registered health professionals; or
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> (ii) receiving treatment from, or at the direction of, 1 or more registered health professionals; or
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> (iii) referred to in subsection (7); and
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> (b) caused by treatment; and
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> (c) not a necessary part, or ordinary consequence, of the treatment, taking into account all the circumstances of treatment, including
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> (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:
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> (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.

[44] In the High Court judgment in *Adlam*,[1] Gendall J stated:

> [39] And, the ACC's interpretation here in my view is also consistent with these definitions and the context of the provision whereby s 32(1)(c) requires that treatment injury not be a necessary part or ordinary consequence of the treatment, taking into account the clinical knowledge at the time of the treatment. The Court of Appeal in *McEnteer v Accident Compensation Corporation* has held that s 32(1)(c) requires an analysis that is rooted in the facts of particular cases, requiring expert opinion reflecting what actually occurred.

[45] In the Court of Appeal judgment in *Adlam*,[2] 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.
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> …
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> [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.

[46] In *Ng*, the Court of Appeal stated the following in relation to the phrase "not [an] ordinary consequence":[3]

> [68] In our view, it should be interpreted as meaning an outcome that is outside of the normal range of outcomes, something out of the ordinary which

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1 *Accident Compensation Corporation v Adlam* [2016] NZHC 1487, [2016] 3 NZLR 497 at [39].

2 *Adlam v Accident Compensation Corporation* [2017] NZCA 457, [2018] 2 NZLR 102 at [62] and [65]; see also *McEnteer v Accident Compensation Corporation* [2010] NZCA 126, [2010] NZAR 301 at [20].

3 *Accident Compensation Corporation v Ng* [2020] NZCA 274, [2020] 2 NZLR 683.

> occasions a measure of surprise. That is an interpretation that we consider, as did the Court in *Childs v Hillock*, best captures Parliament's intent in the context of a scheme which is underpinned by the concept of "personal injury by accident" and which does not provide universal compensation for sickness or ill-health. So, for example, side effects of chemotherapy of a nature and severity that are encountered reasonably often and occasion no surprise are ordinary consequences of that chemotherapy even if (as will often be the case) such side effects are not encountered in more than 50 per cent of cases.
>
> [69] 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 decisionmaker. It is to be exercised on a case specific basis taking into account all of the circumstances of the treatment and the particular claimant. Thus, relevant considerations will include not only the nature of the harm suffered but also its duration and severity as well as any other circumstances pertaining to the patient which may have rendered them more or less susceptible to the adverse consequence. The decision may be informed by medical studies including relevant statistical analysis … as well as the clinical experience of the treating physician(s) and other specialists.

[47] In *Sam*,[4] 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.

Discussion

[48] In May 2019, Mr Olliver underwent surgery in which the cancer in his right posterolateral tongue was excised more widely. The issue in this case is whether Mr Olliver's treatment surgery caused nerve damage resulting in:

(1) impaired swallowing and vocal cord paralysis,

(2) thyroid damage with hypothyroidism, and

(3) chronic left shoulder pain.

[49] Mr Olliver accepts that loss of the left aspect of epiglottis and pectoralis injury (originally claimed) are not recoverable conditions under the Act.

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4 *Sam v Accident Compensation Corporation*, CIV 2008-485-829, High Court, Wellington, 31 October 2008.

[50] Mr Olliver carries the burden of proving on a balance of probabilities that he suffered a treatment injury which was caused when he received treatment from a registered health professional, and which was not a necessary part, or ordinary consequence, 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] The test of "not an ordinary consequence" means an outcome that is outside of the normal range of outcomes, something out of the ordinary which occasions a measure of surprise.[7]

[51] Mr Olliver submits that his conditions are as a result of treatment surgery and are not necessary parts or ordinary consequences of that treatment. Mr Olliver submits the following in relation to the three matters disputed:

(a) Nerve damage: undergoing medical treatment and being left unable to swallow of talk would be a surprise. The contemporaneous evidence is consistent with the resulting symptoms. Dr Ianovski and Dr Currie could not find a reason for the vocal cord injury. As no cause for the left cord immobility has been found, and it occurred at the time of the surgery, it should be covered.

(b) Damage to the thyroid with hypothyroidism: on 25 May 2019 (two days after the operation), Ms Khalil reported that an arterial bleed from the right medial aspect of the thyroid was identified and ligated. Mr Olliver submits that, had the thyroid not been cut by the surgery or repaired at the time of the surgery, the injury to the thyroid would have been less likely to occur. The damaged thyroid occasioned a measure of surprise and is not explained by the Corporation.

(c) Chronic right shoulder pain: on 2 June 2020, Dr Currie described how the covered spinal accessory nerve injury had caused Mr Olliver's shoulder pain condition, and so he is entitled to cover for this shoulder pain.

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5 Section 32(1) of the Act and *Adlam*, see n 2 above.
6 See *Ng*, above n3.
7 ibid.

[52] This Court acknowledges the above submissions and evidence presented by Mr Olliver. However, the Court notes the following considerations:

(a) Nerve damage: Mr Currie noted that radiology had not identified a lesion that could be affecting the laryngeal or vagus nerves or the larynx; and that, since the lesion was on the side opposite to the surgery, the paralysed vocal cord was definitely not due to an injury and the cause was ultimately unknown. The Court notes that Mr Olliver has not produced any medical evidence supporting the claim for cover for nerve damage arising out of treatment injury.

(b) Damage to the thyroid with hypothyroidism: the Corporation has submitted that Mr Olliver does not have damage to his thyroid. The clinical evidence showed that he has hypothyroidism which developed one month post-surgery and that he has biomechanical hypothyroidism. The Corporation notes that hypothyroidism is not an injury of itself, and that there is no evidence to show that a physical injury occurred to Mr Olliver's thyroid at any time. The Court notes that Mr Olliver has not produced any medical evidence that his surgery caused damage to the thyroid with hypothyroidism.

(c) Chronic right shoulder pain: the Reviewer correctly identified that there was deemed cover for postoperative pain of the right shoulder, and the Corporation has confirmed this deemed cover, and therefore this issue is moot.

Conclusion

[53] In light of the above considerations, the Court finds that Mr Olliver has not established that his treatment surgery caused nerve damage resulting in impaired swallowing and vocal cord paralysis, or thyroid damage with hypothyroidism. The Court further notes that the Reviewer correctly identified that there was deemed cover for postoperative pain of the right shoulder, and the Corporation has confirmed this deemed cover.

[54] The decision of the Reviewer dated 5 May 2021 is therefore upheld. This appeal is dismissed.

[55] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors for the Corporation: Medico Law.