

Reference No. HRRT 012/2011

UNDER SECTION 51 OF THE HEALTH AND
DISABILITY COMMISSIONER ACT 1994

BETWEEN ERIC RICHARD PILON

PLAINTIFF

AND VASUDHA IYENGAR

FIRST DEFENDANT

AND CAPITAL AND COAST DISTRICT
HEALTH BOARD

SECOND DEFENDANT

AT AUCKLAND

Mr RPG Haines QC, Chairperson
Dr S Hickey, Member
Mr R Musuku, Member

Mr Pilon in person
Mr MF McClelland for First Defendant
Mr D La Hood for Second Defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 19 April 2012

DECISION OF TRIBUNAL

Introduction

[1] In *Pilon v Iyengar* [2011] NZHRRT 2 (3 February 2011) this Tribunal held that Mr Pilon is not an “aggrieved person” as that term is understood in s 51 of the Health and Disability Commissioner Act 1994 (HDC Act) and therefore cannot bring proceedings before the Tribunal. Notwithstanding the Tribunal’s clear ruling and an abandoned appeal to the High Court, some four months later, Mr Pilon on 24 May 2011 commenced the present proceedings in HRRT 012/2011. The identical parties and the same facts are involved. Mr Pilon once again asserts that he is an “aggrieved person” under s 51 of the Act. The second defendant has applied to strike out the proceedings on the grounds that they are an attempt to re-litigate a matter which has already been determined against Mr Pilon and on the grounds that the proceedings amount to an abuse of process.

[2] By memorandum dated 5 July 2011 Mr McClelland advised that Dr Iyengar no longer resides or practises in New Zealand. She has not been served with this proceeding. The position adopted by counsel on behalf of Dr Iyengar is that while supporting the second defendant’s application, counsel does not wish to take any further part in this application or proceeding generally.

Background

[3] The circumstances leading to the first decision of the Tribunal given on 3 February 2011 and also leading to these present proceedings filed on 24 May 2011 are conveniently set out in the first decision of the Tribunal at paras [4] to [11].

[4] The plaintiff’s daughter was born in February 2001. There were complications in the delivery process as a result of which she suffered severe hypoxia and has developed cerebral palsy. The plaintiff’s case is that he has suffered a diagnosable illness as a result of the events at and surrounding the birth of his daughter. He has made a claim for compensation under the ACC legislation, but that has been declined on the basis that the plaintiff did not himself suffer any personal injury by accident.

[5] The first defendant was the obstetrician responsible for the delivery. The plaintiff claims that the harms he has suffered are a result of breaches of the Code by the first defendant during the delivery of his daughter.

[6] The delivery took place at Wellington Hospital which operates under the auspices of the second defendant, the Capital & Coast District Health Board.

[7] Questions relating to the standard of care provided during the delivery and birth were referred to the Health and Disability Commissioner. There were some significant delays, and it was not until 18 November 2005 that the Commissioner began an investigation of the matter. On 19 September 2006 the Commissioner issued his report. In it he concluded that the first defendant’s conduct in respect of the delivery had fallen below the standards required by the Code. After some further correspondence, however, he decided not to refer the matter to the Director of Proceedings designated under the Act, on the basis that by then the first defendant was no longer practising obstetrics, and in any event that a contributory factor in what happened reflected shortcomings in the Board’s resources, for which the first defendant was not responsible.

[8] On 13 November 2007 the then Director of Proceedings confirmed that she would not be taking the matter up in the Tribunal.

[footnote citations omitted]

The jurisdiction issue

[4] The tribunal has jurisdiction over two categories of proceedings (and only two) under the HDC Act. First, proceedings brought under s 50 by the Director of Proceedings

designated under s 15(1) of the Act. Second, where the proceedings are brought by “the aggrieved person” under s 51:

51 Aggrieved person may bring proceedings before Tribunal

Notwithstanding section 50(2) but subject to section 53, the aggrieved person (whether personally or by any person authorised to act on his or her behalf) may bring proceedings before the Tribunal against a person to whom section 50 applies if he or she wishes to do so, and—

- (a) the Commissioner, having found a breach of the Code on the part of the person to whom that section applies, has not referred the person to the Director of Proceedings under section 45(2)(f); or
- (b) Director of Proceedings declines or fails to take proceedings.

[5] The threshold issue faced by Mr Pilon in both sets of proceedings is whether he is an “aggrieved person” as that term is used in s 51 of the HDC Act. Only if he is such a person does the Tribunal have jurisdiction to hear his claim.

[6] In *Marks v Director of Health and Disability Proceedings* [2009] NZCA 151, [2009] 3 NZLR 108 it was held at [62] that only consumers with rights under the Code of Health and Disability Services Consumers Rights can be aggrieved persons under the HDC Act.

[7] However, in so holding the Court of Appeal left open the question whether fathers in the course of pregnancy and the birth process can be seen to be derivative consumers in their own right and thus aggrieved persons under the Act. In *Pilon v Iyengar* this Tribunal held at [24] to [27] that the point left open in *Marks* should be determined against Mr Pilon. That is, fathers of babies in the course of pregnancy and the birth process are not aggrieved persons under the HDC Act because they do not have any relevant rights under the Code of Health and Disability Services Consumers Rights.

Mr Pilon’s appeal to the High Court

[8] Mr Pilon challenged this decision in the High Court. See *Pilon v Iyengar and Capital & Coast District Health Board* (High Court Auckland, CIV-2011-404-001266). However, by certificate dated 24 June 2011 the Deputy Registrar of the High Court certified that the appeal had been abandoned.

[9] One month earlier, on 24 May 2011, Mr Pilon commenced the present proceedings in HRRT 012/2011.

The second proceedings before the Tribunal

[10] In his new proceedings Mr Pilon once again relies on the report by the Health and Disability Commissioner, *Case 05HDC16711* (19 September 2006). Mr Pilon again alleges that as a result of witnessing the circumstances surrounding the birth of his daughter he suffered a diagnosable mental disorder and as a consequence has been unable to work since March 2006. He seeks an award of damages under s 57(1) of the Act relating to “economic loss and pain and suffering”. He also seeks “an inquiry into damages”.

The course of proceedings

[11] At a telephone conference convened on Friday 17 June 2011 counsel for the first and second defendants expressed concern at Mr Pilon’s attempt to re-litigate an issue

already determined and urged Mr Pilon to obtain independent legal advice. The then Chairperson of the Tribunal, agreeing that it would be prudent for Mr Pilon to take this step, observed at [3]:

The obvious problem with the claim that has been filed is that it simply repeats the claim that was filed earlier, and which was struck out by the Tribunal in its decision in *Pilon v Iyengar & Capital Coast DHB* [2011] NZHRRT 2. It is certainly not clear to me how it can simply be advanced again.

A timetable was fixed for the exchange of submissions on the application by the second defendant that the proceedings be struck out.

Submissions for the second defendant

[12] The submission for the second defendant is that the Tribunal having held in the first proceedings that Mr Pilon is not an aggrieved person for the purpose of s 51 of the Act, the Tribunal similarly lacks jurisdiction in relation to these second proceedings. The claim amounts to an attempt to re-litigate a matter already determined and the proceedings amount an abuse of process and should be struck out. The second defendant further submits that cause of action estoppel applies here because the question in issue in the second proceedings has already been determined by the Tribunal in the first set of proceedings. Reliance was placed on *Thoday v Thoday* [1964] 1 All ER 341 (CA) at 352 where Diplock LJ defined cause of action estoppel in the following terms:

The particular type of estoppel relied on by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call "cause of action estoppel", is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, ie, judgment was given on it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam.

[13] In summary the submission for the second defendant is that:

[13.1] The present claim, despite seeking slightly different (or at least more detailed) remedies, amounts to an assertion on the part of Mr Pilon of a cause of action, namely that he is an aggrieved person in respect of the birth of his daughter in February 2001;

[13.2] That cause of action was determined by the Tribunal in the earlier decision to be non-existent in the sense that Mr Pilon is not an aggrieved party;

[13.3] The same parties were involved in litigating the previous claim; and

[13.4] Consequently, Mr Pilon can no longer assert that this cause of action exists.

It is submitted that the claim should be struck out as an abuse of process. The second defendant also seeks an award of costs in the range of \$500 to \$750.

Mr Pilon's response

[14] As a lay litigant Mr Pilon has presented submissions which in many respects do not grapple with the central issue namely, whether the issue left open in *Marks* is to be determined in favour of fathers in the course of pregnancy and the birth process. Specifically he does not demonstrate that he is a consumer with rights under the Code and that those rights were breached by either of the defendants. His principal arguments appear to be as follows:

[14.1] The decision of the Tribunal given on 3 February 2011 did not dismiss the claim. We observe this is an untenable argument. At para [27] of the Tribunal's decision the claim is expressly dismissed on the grounds of an absence of jurisdiction.

[14.2] Mr Pilon "abandoned the claim due to his mental incapacity when it was under the jurisdiction of the High Court. The present claim is a new claim as it was submitted before the abandonment of the High Court appeal". We do not see how this point has any legal relevance or is of any assistance to Mr Pilon. The refiling of his claim before this Tribunal on 24 May 2011 does not, of itself, improve the strength of his claim.

[14.3] There is a complaint that the Tribunal failed to warn Mr Pilon of the consequences of failing to comply with the statutory requirements for bringing an appeal. In this regard the consequences of failing to meet time periods are prescribed by law and it is difficult, if not impossible to see how this point is of assistance to Mr Pilon in establishing jurisdiction under s 51 of the Act.

[14.4] Mr Pilon then submits that his second proceedings before this Tribunal are a new claim "which has yet to be determined by a court of competent jurisdiction". We disagree, the two claims are based on the same facts and are in reality indistinguishable. The threshold or jurisdictional issue in both claims is the same: is Mr Pilon an "aggrieved person" for the purpose of s 51 of the HDC Act?

[14.5] It is then claimed that Mr Pilon's rights under s 27 of the New Zealand Bill of Rights Act 1990 have been breached. We do not see how, on the facts, the right to the observance of the principles of natural justice are relevant to establishing jurisdiction under s 51 of the HDC Act nor do we see how the right to judicial review under s 27(2) of the NZBORA has any relevance to this issue.

[14.6] As to the cause of action estoppel relied on by the second defendant Mr Pilon submits that such estoppel does not apply in a tribunal setting, it applies only where the issue has been determined by a court. He submits that the abandonment of his High Court appeal "due to mental health issues" does not amount to an estoppel. We do not accept that cause of action estoppel is limited to proceedings before a court. The principle is of wider application. In any event the jurisdiction issue under s 51 is a stand alone point. Either the Tribunal has jurisdiction or it does not. This is not really an estoppel issue. Second, by virtue of s 58 of the HDC Act the Tribunal has jurisdiction under s 115 of the Human Rights Act 1993 to dismiss proceedings if satisfied that they are "trivial, frivolous, or vexatious or are not brought in good faith". These concepts are not bound by or restricted to cause of action estoppel.

[14.7] Finally Mr Pilon submits that as Dr Iyengar has not been served and has not applied to have the proceedings struck out, the proceedings cannot be struck out as against her. As to this there is no requirement for Dr Iyengar to file a separate strike out application. The Tribunal has an independent duty to satisfy itself that it has jurisdiction over a particular matter. Where, as here, Mr Pilon has simply refiled his proceedings the Tribunal is under a duty to take the jurisdiction point.

Decision – jurisdiction

[15] In its decision given on 3 February 2011 this Tribunal held that Mr Pilon is not an “aggrieved person” under s 51 of the HDC Act and the Tribunal has no jurisdiction to hear his claim. In these new proceedings in HRRT 012/2011 Mr Pilon is relying on the same factual circumstances as in the first proceedings. The question in the second proceedings is the same as in the first: on these facts is Mr Pilon an “aggrieved person” as that term is understood in s 51 of the HDC Act? The decision given in the first set of proceedings answered this question in the negative. Having heard no or no coherent challenge to this ruling by the Tribunal we do not intend to depart from that decision. It follows that the Tribunal has no jurisdiction to hear these second proceedings and they must be dismissed for want of jurisdiction.

Decision – vexatious or not brought in good faith

[16] While we are of the view that the primary ground on which the claim must fail is an absence of jurisdiction under s 51 of the HDC Act, we would in the alternative dismiss the proceedings under s 115 of the Human Rights Act 1993 which provides:

115 Tribunal may dismiss trivial, etc, proceedings

The Tribunal may at any time dismiss any proceedings brought under section 92B or section 92E if it is satisfied that they are trivial, frivolous, or vexatious or are not brought in good faith.

New proceedings brought to re-litigate issues already determined by the first decision of the Tribunal are, in our view, vexatious or not brought in good faith.

[17] In the circumstances we are not sure that any point would be served by separately addressing cause of action estoppel. It is sufficient to note that we are of the view that such estoppel does apply and is a further ground for dismissing these proceedings.

Costs

[18] At the telephone conference on 17 June 2011 both counsel and the then Chairperson cautioned Mr Pilon that were he to continue with the present claim he would expose himself to an application for costs. Mr Pilon having elected to press on regardless must accept the consequence. As requested by the second defendant the Tribunal makes an award of costs in the sum of \$750.

Formal orders

[19] For the foregoing reasons the decision of the Tribunal in HRRT 012/2011 is that:

[19.1] The claim by Mr Pilon is dismissed.

[19.2] Mr Pilon is to pay the second defendant costs of \$750.

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Mr RPG Haines QC
Chairperson

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Dr S Hickey
Member

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Mr R Musuku
Member