

collapsing while he was walking the dog and that he had to be assisted to his feet. At 8.05 pm on 16 January the applicant's mother telephoned Healthcare Medical in Motueka. After quite a lengthy discussion with the nurse no immediate steps were taken at that point for the applicant to have a further medical assessment. Just over seven hours later at 3.22 am the applicant's mother made a second telephone call to Homecare Medical in Motueka. In the intervening period the applicant's condition had dramatically worsened. He had gone to bed but in the early hours of the morning, immediately prior to this phone call, he was found on the floor unable to move.

[3] An ambulance was called and at 5.05 am on 17 January 2017 he was admitted to Nelson hospital. After a short time including time in the intensive care unit he was flown to Christchurch Hospital and admitted to the intensive care unit there.

[4] His diagnosis at Nelson Hospital was:

Lower motor neurone dysfunction - ... Guillain Barre Syndrome, acute motor axonal neuropathy type.

[5] The issue before the District Court was whether or not a treatment injury had occurred in this case on the basis that the delay that occurred on the night of 16/17 January 2017 in having the applicant admitted to hospital, diagnosed and for treatment to commence for his Guillain Barre Syndrome, was a treatment injury for the purposes of the Accident Compensation Act in that there was a failure to provide treatment in a timely manner as provided for in s 33(1)(d) and that this delay caused a treatment injury for the purposes of s 32.

[6] The principles relevant to the exercise of the discretion to grant leave were discussed in *O'Neill*:¹

[a] The issue must arise squarely from "the decision" challenged;

[b] Leave cannot for instance properly be granted in respect of obiter comment in a judgment;

¹ *O'Neill v Accident Compensation Corporation* District Court, Wellington, 8/10/2008, Decision No 250/2008 at [23].

- [c] The contended point of law must be capable of bona fide and serious argument to qualify for the grant of leave;
- [d] Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed;
- [e] Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law;
- [f] A decisionmaker'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;
- [g] Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law.

[7] Both counsel have filed detailed and meticulous submissions.

[8] Ms Kerr frames the question of law as follows:

Did the District Court misconstrue the test for causation and/or incorrectly apply that test in relation to the treatment injury claim under sections 20(2)(b) and 32.

[9] The applicant raises these matters;

[a] How do we assess causation of personal injury where there has been a failure to treat in the circumstances of a case like this?

[b] How do we assess causation of personal injury where the personal injury is rare, severe and biologically not well understood by medical science? In the applicant's case, Ms Kerr submits that it will never be possible to discern with certainty how his outcome might have differed had the nurse recommended that he be immediately transferred to hospital on the evening of 16 January 2017 and that the best we can do is to assess what outcome would have been likely;

[c] How do we make this assessment where epidemiological studies and empirical data do not exist for the medical condition?

[10] Ms Kerr submits generally that the Court of Appeal in *Ambros*² goes some of the way to answering these questions but that there is scope for further judicial consideration particularly on account of what she submits was limited discussion of these issues in the case of *Adlam v ACC*³.

[11] She refers to paragraph [65] of the *Adlam* decision where the Court of Appeal said:

[65] 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.

The Respondent's Submissions

[12] On behalf of the respondent Ms Deans submits that the question proposed by the applicant is not capable of bone fide and serious argument and therefore leave to appeal should not be granted.

[13] She submits that issues of fact are dressed up as questions of law.

[14] She submits that the test of causation is well established and is summarised in *Ambros* and that it is clear from the decision that Judge Walker appropriately and properly considered *Ambros* in her decision.

Decision

[15] As already mentioned, both counsel in this case have filed detailed submissions on this issue. What I have to decide on this application is whether there is a question of law capable of serious and bona fide argument.

[16] It is helpful to refer to the key principles set out in *O'Neill*.

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

³ *Adlam v Accident Compensation Corporation* [2017] NZCA 457, [2018] 2 NZLR 102.

[17] Here, the question of law as drafted by counsel for the appellant does arise squarely from the decision challenged. It squarely focuses on the test for causation as it applies to treatment injury claims.

[18] Leave is not being sought in respect of an obiter comment in the judgment.

[19] The next issue is whether the contended point of law is capable of bona fide and serious argument to qualify for the grant of leave. In this case as already mentioned reference is made to *Ambros* and *Adlam*. Like our case *Adlam*'s case also related to a treatment injury as a result of failure to provide treatment.

[20] As the Court found at paragraph [61] of the decision in *Adlam*:

[61] ... we consider the relevant provisions properly construed mean that in order for there to be treatment injury as a result of a failure to provide treatment it is necessary to show that an alternative treatment would have prevented the injury suffered and could and should have been given having regard to the clinical indications at the time of the alleged failure.

... the injury said to be a treatment injury must be the consequence of a departure from appropriate treatment choices and treatment actions.

... 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 personal injury.

[21] The confounding matters in our case appear to be that, as Ms Kerr submits, the "personal injury", the Guillain Barre Syndrome, was rare, severe and biologically not well understood by medical science. Further, that epidemiological studies and empirical data regarding this condition do not exist.

[22] Ms Kerr therefore submits that in order to establish causation in such cases the standard should be that the failure to provide treatment meant that the outcome, as occurred in this case, would have been likely.

[23] In essence I understand her to be arguing that in such cases the assistance provided by *Ambros* and *Adlam* in respect of would amount to proof of causation falls short.

[24] It follows that I do not consider in this case that the issue the subject of this application is a question of fact dressed up as a question of law.

[25] I conclude in this regard therefore that the point of law she raises is capable of bona fide and serious argument.

[26] Accordingly, leave to appeal is granted.



Judge C J McGuire
District Court Judge

Solicitors: John Miller Law, Wellington for the appellant
Claro Law, Wellington for the respondent