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Introduction

[1] This appeal arises out of the tragic stillborn birth of Ms Griffiths’ and Mr Garry’s son, Ryker. It stems from a treatment injury claim, claiming injury to Ms Griffiths (the mother of the stillborn), the injury being whatever caused the death of baby Ryker. Ms Griffiths claimed accident compensation on the basis that Ryker’s death was due to a placenta abruption/haemorrhage caused by osteopathic manipulation. In essence, Ms Griffiths claims that Ryker’s death occurred because of osteopathic treatment.

[2] Ms Griffiths received osteopathic treatment on 13 February 2015 and on 25 February 2015 by Mr Neil Maidment for pregnancy related sciatica in her right hip.

[3] On 26 February 2015, Ms Griffiths experienced reduced foetal movements and by 27 February 2015, when Ms Griffiths had a scan at the Women's Assessment Unit at Auckland Hospital, it was confirmed that her baby had passed away. The clinical term for such an occurrence is intrauterine foetal demise.

[4] On 9 January 2017, Mr Joshua Garry, Ms Griffiths' partner, filed an ACC21 advice of an accidental death form, regarding the stillborn birth of his son on 1 March 2015. This form can be used to apply for cover and entitlements relating to an accidental death.

[5] The Corporation made a decision dated 17 September 2018 (the Decision) declining cover for an injury said to have been caused by manipulation during osteopathic treatment. A subsequent Review Decision dated 15 March 2021 (the Review Decision) maintained the Corporation's Decision. Ms Griffiths appeals against the Review Decision and says that it and the Corporation's Decision are incorrect and she should be covered on the basis claimed.

[6] The matter took some time to reach a Review Hearing and Appeal Hearing due to a combination of several factors through no fault of Ms Griffiths, Mr Garry or the Corporation. To comply with the initial default decision-making period, the Corporation notified a decision declining the claim on 31 May 2017 due to insufficient information, but confirmed that investigations into the claim would continue. Further medical reports were obtained, and the file was reviewed by a Complex Claims Panel from June 2017 through to September 2018. After consideration of the additional material, the Corporation notified a further decision on 17 September 2018 declining the claim.

[7] A late Review Application was made two years later by Ms Griffiths and Mr Garry. This was accepted by the Corporation and was heard on 20 February 2021 with the Review Decision dated 15 March 2021. A late appeal to the District Court was filed by Ms Griffiths on 4 November 2022 due to difficulties with instructing counsel and other reasons beyond Ms Griffiths' control. The late filing was not opposed by the Corporation and in a judgment dated 16 January 2023, Judge Spiller exercised his discretion to allow the appeal to be filed out of time. The appeal was heard in May 2023.

[8] Ms Griffiths and Mr Garry appeared in person at the appeal hearing. Mr Garry made submissions on behalf of Ms Griffiths and spoke to the written submissions that they had previously.

Facts

[9] On 9 January 2017, an ACC21 advice of accidental death form was filed by Mr Joshua Garry, the partner of Ms Griffiths. The form indicated that Ms Griffiths' son, Ryker, was stillborn as a result of injury. The date of death was 1 March 2015.

[10] Mr Garry subsequently corresponded with the Corporation and provided documentation generated during a Health & Disability Commissioner ("HDC") investigation. This included a report from the HDC dated 11 March 2016, which assessed the treatment provided by Mr Neil Maidment, Osteopath. The letter details:

You received treatment from Mr Maidment on 25 February 2015. Some days after this, you suffered a placental abruption which caused you to lose your baby, Ryker. You believe that the osteopathic treatment you received may have caused your placental abruption.

[11] The letter from the HDC noted that Mr Maidment had provided a response to the claim and advice had been provided by Dr Maplesden, General Practitioner and inhouse HDC medical advisor. The letter further details:

Dr Maplesden advises that you had a stillbirth on 1 March 2015 at 31 weeks' gestation. Intrauterine death had been confirmed on 27 February 2015, and you were induced when spontaneous labour did not establish. Dr Maplesden confirms that a post-mortem examination concluded that the cause of foetal death was attributed to a probable placental abruption. He confirms that you had an anterior placenta clear of the cervical opening. You received osteopathic treatment on 13 February 2015, and again on 25 February 2015. On 22 February 2015, you experienced reduced foetal movements and had a CTG and ultrasound performed, which were reassuring. On 23 February 2015, foetal movements were apparently normal. On 26 February 2015, you were concerned at reduced foetal movements, and a scan on 27 February 2015 confirmed intrauterine death.

[12] The HDC concluded that there was no evidence that the treatment provided by Mr Maidment caused the placental abruption. It noted Dr Maplesden's advice that the cause of placental abruption is difficult to determine, but is usually caused by either an underlying pathology or an acute trauma. Although Dr Maplesden agreed there was some evidence to

suggest that minor trauma could cause a placental abruption, the HDC thought it not possible to make a conclusive finding in the circumstances.

[13] Mr Garry then completed a more detailed ACC21 advice of accidental death form later in January 2017. This also set out the background to the claim.

[14] Subsequently, the Corporation considered a claim for the placental abruption itself, due to manipulation of an osteopath.

[15] The Corporation began collating the information necessary to consider the claim.

[16] The notes subsequently received included:

- (a) GP notes of consults in September 2014, when Ms Griffiths presented with bleeding and a threatened miscarriage.
- (b) Other GP notes.
- (c) Hospital notes relating to Ryker's birth.

[17] On 31 May 2017, the Corporation issued a decision declining the claim on the basis that at that stage it had not received sufficient information to make an informed decision on the claim. The Corporation however indicated that it would continue to investigate and make a further decision in due course.

[18] The Corporation then received a post-mortem examination report completed by Dr Strachan, Consultant Pathologist, the conclusion of which was "an intrauterine foetal demise of a male infant delivered at 31 weeks gestation with a probable placental abruption."

[19] The Corporation then sought advice from Associate Professor Westgate, Obstetrician/Gynaecologist. Associate Professor Westgate's report set out a summary of Ms Griffiths' and Mr Garry's concerns. Associate Professor Westgate did not consider that the findings in the post-mortem report were consistent with a placental abruption. She suggested getting a second opinion on the post-mortem conclusions from Dr Jane Zuccollo, a leading Perinatal Pathologist. She added however that there was no suggestion that

Mr Maidment palpated the lower abdomen in the suprapubic area, and there was no evidence of intra-abdominal trauma. She suggested that Dr Zuccollo comment on whether there was evidence of direct foetal trauma.

[20] The Corporation then sent a referral to Dr Zuccollo. Dr Zuccollo reviewed Associate Professor Westgate's report and concluded:

On balance I find nothing to confidently persuade me in the pathology that this baby has died as a result of a placental abruption/significant acute retro placental haemorrhage. A marginal haemorrhage was observed that had extended beneath the decidua for a short distance with localised marginal compression of the placental parenchyma. Whether this was sufficient to cause the foetal death – I cannot say. My inclination would be to report that the death was associated with a marginal haemorrhage – that does not imply certainty with regard to causation. More commonly, I would expect such a pathology to present with vaginal bleeding and perhaps the onset of pre-term labour.

[21] In relation to causation, she advised:

The most common causes of trauma in pregnancy are motor vehicle accidents, falls and assaults. The outcome may be related to the effect of the trauma on the placenta, uterus, mother, and foetus, individually or in combination.

Trauma is a recognised cause of placental abruption, but trauma is not the most common cause of placental abruption. The cause of placental abruption in the setting of trauma, is thought to be due to sheering between the elastic myometrium and the relatively inelastic placenta.

Abdominal massage in pregnancy has been considered in the past to be the "cause" of intracranial haemorrhage in the foetus, that may lead to foetal death. Not all congenital intracranial haemorrhages are related to abdominal massage. Placental abruption is not particularly associated with this group of babies.

I am of the opinion that it is not possible to state with certainty that the osteopathic manipulation did not contribute to the foetal death at 30+ weeks gestation. However, if the consideration of such an association had not been drawn to my attention, it is not a risk factor for placental haemorrhage that I would have considered, in spite of the temporal relationship.

[22] The matter was then considered by the Complex Claims Panel, which considered (incorrectly) that osteopaths were not treatment providers under the Act because they were not registered health professionals. Technically the claim was therefore one of personal injury caused by accident rather than a treatment injury.

[23] The Corporation then obtained further advice from two osteopaths, Nigel Brooke, and Jonathan Paine, on 24 April 2018. They advised that the forces used by osteopaths, even at

the most vigorous end of the range, would not exceed the typical forces encountered in activities of daily living. They concluded that there was no evidence of any direct force to the uterus and that the type of treatment and techniques applied were not out of the ordinary and would not cause any more external force to the body than movements caused by activities of daily living.

[24] The Panel then reviewed the matter again concluding:

First and foremost, there is no placental abruption; therefore, no personal injury. The Panel also found that the evidence is that the osteopathic treatment given is not causative of a placental abruption. Lastly, the Panel noted mention of a possible foetal cranial haemorrhage; however, the post-mortem findings under head and central nervous system found no insult to this anatomy whatsoever – the anatomy was entirely normal.

[25] On 17 September 2018, the Corporation issued a decision declining the claim. The decision reads:

We can only cover accidents that result in a physical injury. Based on all the medical information we hold there is no evidence to support that the placental abruption had resulted from the described event and there was no evidence to suggest that a physical injury was sustained, hence this claim has now been declined for cover.

[26] On 3 September 2020, Ms Griffiths applied for a late review of the Corporation's decision. The late review was subsequently accepted.

[27] For the review, the Corporation filed additional evidence from Associate Professor Westgate, dated 11 December 2020.

[28] The review proceeded on 19 February 2021 before Ms Robertson, Reviewer. Ms Robertson issued a decision on 15 March 2021 dismissing the review. She was unable to find sufficient evidence of a link between treatment and an injury suffered.

[29] A late appeal was filed against the review decision on 4 November 2022.

[30] On 16 January 2023 leave to appeal out of time was granted.¹

¹ *Griffiths v Accident Compensation Corporation* [2023] NZACC 003

Submissions for Victoria Griffiths

[31] From the four and half page written submission filed by Ms Griffiths and the oral submissions presented at the hearing by Mr Garry, I summarise below the submissions for Ms Griffiths.

[32] The injury to Ms Griffiths' and Mr Garry's son, Ryker, was intrauterine foetal demise, occurring on 25 February 2015 due to placental abruption, resulting in the still birth of an anatomically normal male infant at 30.5 weeks gestation, on 1 March 2015.

[33] The cause of the injury was the force applied directly adjacent to the placenta site, by way of osteopathic manipulation techniques (thoracic diaphragm tension release and colon stretch) performed by Mr Maidment, osteopath, on 25 February 2015.

[34] The post-mortem report of Dr Kate Strachan, including a comprehensive mortality report, supports Ms Griffiths' position. The official post-mortem diagnosis was "probable placental abruption". The post-mortem report said that the baby died on the same day as the osteopathic manipulation. The post-mortem report shows that, other than Ryker's death, everything else about him was completely perfect. He was not quite 31 weeks. The umbilical cord was functioning correctly. The post-mortem report was completed six weeks after delivery.

- (a) The customised foetal growth chart recorded by midwife Gina Meredith during the pregnancy and after delivery, showed excellent growth for a foetus of 31 weeks gestation (Ryker was 30 weeks at the time of death).
- (b) The independent expert opinion of Dr Norman McLean, former head of obstetrics and maternity at Invercargill Hospital, supports Ms Griffiths' position.
- (c) Notes of the Auckland Hospital attending midwife from the time of delivery noted visible signs of rupture/trauma to the placenta.
- (d) Dr Tony Baird, former head of obstetrics at Auckland Hospital, agreed that Ryker's official cause of death was as stated in the post-mortem report and believed there was a possibility that osteopathic manipulation caused death.

[35] Foetal demise was not due to an umbilical cord issue. Ryker was not under-developed for his gestational age. The thorough post-mortem report shows that Ryker was healthy in every way prior to his sudden demise, and supports placental abruption alone as the cause of death.

[36] The timing, place and level of force of the osteopathic manipulation caused the injury.

Timing

- (a) At the time of delivery, the midwife expressed concern about the osteopathic manipulation. “Chatter” around the time suggested that the osteopathic manipulation was the cause.
- (b) The official cause of death matches both the exact date and the method/area of unnecessary force of osteopathic treatment from Mr Maidment.
- (c) Ryker’s passing occurred on the same day as the osteopathic manipulation. The post-mortem report said that the baby died on the same day as the osteopathic manipulation. Ms Griffiths and Mr Garry do not accept the osteopathic manipulation as coincidental timing.
- (d) Ms Griffiths had scans and tests done for placental and umbilical function in the days prior to delivery, with positive results.

Place

- (e) The osteopathic manipulation was of the abdomen, where the placenta was.
- (f) The osteopath denied manipulation of the lower abdomen. Mr Garry says the osteopath pressed under the ribcage of a 31-week pregnant woman to stretch the diaphragm. Ms Griffiths and Mr Garry say that put too much pressure on the placenta.
- (g) Mr Maidment, Osteopath, incorrectly believed that as long as he avoided the lower abdomen, he would avoid the uterus, and it was safe to manipulate internal organs in multiple locations around a woman’s abdomen in the third trimester. At this stage of pregnancy, the uterus takes up almost the entire abdominal area up to the lower end of the breastbone, where the placenta was positioned.

Force

- (h) Mr Maidment forcefully manipulated the exact site of Ms Griffith's placenta – at the upper abdomen and also “stretched Victoria's colon” - a manipulation which, according to Dr McLean, would not have been able to be performed gently.
- (i) Ms Griffiths and Mr Garry believe that a “maternal – foetal haemorrhage” occurred on the presumed lack of visible bleeding and the notable spiderweb-like bruising which was visible on Ryker's abdomen at his umbilical site on birth. This suggests that at the time of membrane rupture, the haemorrhage occurred within the placental wall, meaning “bad blood” was directed into the maternal circulatory system, where it caused his heart to stop beating as soon as it entered his personal bloodstream. The diameter of the bruising around the umbilical site suggests that approximately one heartbeat of deoxygenated, or bad blood volume, entered the foetus and caused immediate death.

[37] Although the notes of Ryker's bedside scan recorded that Ryker was below 50 percentile, this was demonstrated not to be the case by the post-mortem report that indicated that on delivery Ryker was a perfect male baby. The inconsistency between the delivering midwife's notes and the post-mortem report may indicate that the midwife notes were incorrectly written at the time.

[38] Associate Professor Westgate and Dr Zuccollo may have overlooked evidence.

[39] The HDC investigation and report should not be taken into account as the HDC did not get in touch with the experts preferred by Ms Griffiths and Mr Garry, especially Dr McLean.

Submissions for the Corporation

[40] The Corporation accepts:

- (a) Ms Griffiths suffered injury, whether that injury is regarded as a placental abruption (unlikely), a marginal haemorrhage (possible but uncertain) or the death of the foetus itself.
- (b) Ms Griffiths was receiving treatment at the relevant time from an osteopath.

- (c) The treatment was provided by a registered health professional (Mr Maidment, Osteopath).

[41] However the Corporation's position is that the evidence does not establish on the balance of probabilities that the osteopathic treatment caused the personal injury. In this appeal, the only treatment injury criterion that is in issue is whether the treatment caused the personal injury suffered (placental abruption (unlikely), a marginal haemorrhage (possible but uncertain) or the death of the foetus itself).

Issue

[42] The issue is whether:

- (a) the Corporation's Decision dated 17 September 2018 declining cover for an injury said to have occurred as a result of a manipulation during osteopathic treatment, and
- (b) the Review Decision dated 15 March 2021 maintaining the Corporation's Decision

are correct.

[43] To determine this issue, it is necessary to consider whether or not there is sufficient evidence that a physical injury (whether that be a placenta abruption/haemorrhage/the death of baby Ryker) was a result of treatment (in this case an osteopathic manipulation).

Law

[44] The cover criteria for a treatment injury are summarised in *Fifield v Accident Compensation Corporation*:²

- [22] ... the appellant must establish the following:
- (a) A personal injury;
 - (b) Suffered at a time when she was taking or receiving treatment;
 - (c) From a registered health professional; and
 - (d) A causal link between the treatment and the injury.

² *Fifield v Accident Compensation Corporation* [2009] NZACC 8 at [22].

Personal Injury

[45] The Corporation accepts that Ms Griffiths suffered injury, whether that injury is regarded as a placental abruption (unlikely), a marginal haemorrhage (possible but uncertain) or the death of the foetus itself.

[46] Although the claim was initially considered as one involving a placental abruption/or some similar mechanism as the personal injury to Ms Griffiths, Ryker's death in itself can in law be a personal injury suffered by his mother, Ms Griffiths. In *Harrild v the Director of Proceedings*³, the Court of Appeal considered a case where a child was stillborn. It was claimed that the mother's obstetrician breached provisions of the Code of Health and Disability Services Consumer Rights by failure to exercise reasonable care and skill. Potential cover for accident compensation was considered. The Court of Appeal accepted that there was a physical injury suffered by a mother when her child dies in utero and therefore that injury was coverable as a personal injury if it were established as being caused by medical misadventure.⁴

[47] What *Harrild* establishes is that if it could be established that Ryker's death was caused in some way by treatment, then cover could extend to the death, as a personal injury to Ryker's mother in and of itself.

Receiving Treatment/Registered Health Professional

[48] The Corporation also accepts that Ms Griffiths was receiving treatment and that this treatment was provided by a registered health professional (Mr Maidment)⁵.

Causation

[49] In this appeal the only treatment injury criterion that is in issue is whether the treatment caused the injury. Specifically, whether or not there is a causal link between the osteopathic treatment and the personal injury suffered (haemorrhage and/or Ryker's death).

³ *Harrild v Director of Proceedings* [2003] NZCA 125, [2003] 3 NZLR 289.

⁴ "Medical Misadventure" is now known as "treatment injury" under the current legislation, but for all material purposes, is no different.

⁵ An osteopath is a registered health professional under the Accident Compensation (Definitions) Regulations 2019.

[50] A temporal connection does not prove causation of itself. As observed in *Coombridge v Accident Compensation Corporation*:⁶

The claim has to be decided on the basis of the medical evidence. From the claimant's standpoint, there was a distinct event that resulted in pain and level of disability that appeared to be an injury. However a medical view takes account of more than the occurrence of acute symptoms.

[51] The onus is on Ms Griffiths to satisfy the Court that the legislative criteria are met. What is required is described in one case in these terms:⁷

The appellant must establish, on the balance of probabilities, that his ongoing symptoms are the result of personal injury for which he has cover; he is not entitled to the benefit of any doubt; he cannot rely on possibilities; and he cannot call on the respondent to prove that it is not liable to provide cover. It is up to the appellant to prove his case.

[52] Ms Griffiths is not entitled to ask the Court to speculate.⁸ A degree of precision is required.

[53] The balance of probabilities means more probable than not and higher than 50 per cent. However the courts do not engage in mathematical calculations, but rather form a general impression of the sufficiency of the law and scientific evidence and the presumptive inference which a sequence of events inspires in a person with common sense.⁹ The Court should not place too much emphasis on the onus as the question is whether the evidence as a whole justifies a conclusion that the necessary causal nexus between injury and medical condition exists.¹⁰

[54] The question of causation is answered by determining whether there is a sufficient basis that points to proof of causation on the balance of probabilities for a Court to draw a robust inference of causation between the treatment and any injury to Ms Griffiths.¹¹

⁶ *Coombridge v Accident Compensation Corporation* [2012] NZACC 360.

⁷ *Sarten v Accident Compensation Corporation* [2004] NZACC 2 at [26].

⁸ *Accident Compensation Corporation v Ambros* [2007] NZCA 304 at [63] and [70].

⁹ *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR3 40 at [65].

¹⁰ *Wakenshaw v Accident Compensation Corporation* [2003] NZAR 590.

¹¹ *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR3 40.

[55] The Court of Appeal in *Accident Compensation Corporation v Ambros*¹² recognised that a legal assessment of causation differs from that of a medical or scientific approach and stated:

[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 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

[70] It must, however, always be borne in mind that there must be sufficient material pointing to proof of causation on the balance of probabilities for a court to draw even a robust inference on causation. Risk of causation does not suffice.

[56] Accordingly, robust inferences in regard to causation can be made, but should be made only on the basis of sufficient evidential material. The mere risk of causation does not suffice.

[57] For Ms Griffiths' appeal to succeed, it is necessary for her to establish on the balance of probabilities a causal nexus between Ryker's death and the treatment received.

Analysis of the medical evidence – did the treatment cause Ryker's death?

Post-mortem

[58] The hospital post-mortem found the placental findings of marginal blood clot and possible depression of the maternal surface were consistent with a clinical history of placental abruption, which it in turn found to be the cause of the intrauterine foetal demise. The post-mortem report does not deal with the question whether osteopathic manipulation caused a placental abruption.

¹² *Accident Compensation Corporation v Ambros* [2007] NZCA 304 at [67], [70].

HDC Evidence

[59] Dr Maplesden provided evidence for the HDC investigation. His report of 3 February 2016 describes the process of a placental abruption and notes that the cause of most abruptions cannot be determined, although a small proportion are related to sudden mechanical events such as blunt abdominal trauma. He was unable to link the osteopathic treatment undertaken by Mr Maidment to the placental abruption/Ryker's death and concluded:

I do not think it is possible to determine with any certainty that Ms Griffiths' osteopathic treatment caused or contributed to her placental abruption and the loss of her son.

[60] The results of the HDC investigation were conveyed to Ms Griffiths on 11 March 2016. No evidence of a link between Mr Maidment's treatment and Ryker's death was found.

Corporation Claim Evidence

[61] Associate Professor Westgate provided two reports, one prior to the claim decline and one on 11 December 2020.

[62] Associate Professor Westgate's first report sets out a history to the claim, noting Ryker's stillbirth, but also that, anatomically, he was normal. She then reviewed the information regarding the placenta and the earlier pathologist's post-mortem findings. She did not think that the clinical history or examination findings were consistent with abruption and therefore suggested a second opinion on the post-mortem conclusions from Dr Zuccollo.

[63] Dr Zuccollo also did not think the case was consistent with a placental abruption, although noted there was evidence of a marginal haemorrhage, that was "quite fresh". She expressed the opinion that a marginal haemorrhage was a possible cause of Ryker's death but this was uncertain as such a pathology would ordinarily present with vaginal bleeding and perhaps the onset of pre-term labour. Dr Zuccollo's full conclusions are set out in paragraph [20] above.

[64] Dr Zuccollo's opinion was that there was no evidence of trauma to Ryker to indicate a link between his death and the osteopathic treatment. She acknowledged that it is not possible to state with certainty that the osteopathic manipulation did not contribute to the foetal death

at 30 plus weeks gestation. However it was not a risk factor for placental haemorrhage that she would have considered. Dr Zuccollo's full conclusions are set out in paragraph [21] above.

[65] Dr Zuccollo concluded that:

- (a) This was not a placental abruption, but rather a case involving marginal haemorrhage.
- (b) There is no evidence of a link between the osteopathic treatment and that haemorrhage, although a link could not be ruled out, and
- (c) There is no evidence of a direct link between the osteopathic treatment and Ryker's death.

[66] Approaching Dr Zuccollo's evidence with the legal test in mind, that is, is it more likely than not that the osteopathic treatment caused the mechanism that led to Ryker's death; the answer is, no.

[67] Associate Professor Westgate, in her second report of 11 December 2020, reviewed Dr Zuccollo's evidence (as well as further details provided by Mr Garry). Associate Professor Westgate confirmed her opinion that this was not a case of a placental abruption. When asked what did happen, Associate Professor Westgate indicated that there was clinical evidence that Ryker's foetal growth was not as good as expected and there were also some abnormalities described in the umbilical cord, factors which may have contributed to foetal demise. She did not think that there was any objective evidence of trauma to the foetus or the placenta and could not link Ryker's death to the osteopathic treatment. She advised:

I believe the amount of pressure applied to the abdomen to cause foetal demise by direct trauma or damage to the placenta would have to be of such force that it would be extremely painful for the mother and would leave bruising on her abdomen. I would not expect this degree of pressure to be applied to a pregnant uterus by a healthcare professional or to be tolerated by a woman.

[68] Associate Professor Westgate also advised that in her view the haemorrhage noted by Dr Zuccollo was not large enough to cause foetal demise.

[69] The evidence from Dr Zuccollo and Associate Professor Westgate, both recognised experts in their fields, is compelling. Both had different views to those expressed in the post-mortem report. Neither considered there was any link between Ryker's death and the osteopathic treatment provided by Mr Maidment.

[70] In addition to the above evidence, the Corporation also obtained evidence from two osteopaths, Mr Brooke, and Mr Paine. After reviewing the notes and with their osteopathic expertise, they concluded that the forces used, even at the most vigorous end of the range of available techniques, would not exceed typical forces encountered in activities of daily living. They accepted that Mr Maidment avoided any direct force to the uterus.

Analysis of submissions for Ms Griffiths

[71] I acknowledge Ms Griffiths' and Mr Garry's sincerely held belief that the timing of the osteopathic manipulation and the possible time of Ryker's death was no coincidence. However as a matter of law, a temporal connection does not prove causation of itself.

[72] I do not accept the submission that the HDC investigation and report should not be taken into account. The HDC findings and the opinions of Dr Maplesden referred to by the HDC are relevant and I take them into account. The views of Dr MacLean had not been obtained before the HDC investigation and report – it was the HDC report which appears to have prompted Mr Garry to seek Dr MacLean's assistance.

[73] When advising on a complaint about an osteopath, Dr Maplesden logically considered whether osteopathic treatment could have caused the placental abruption, which the post-mortem report had found to be the likely cause of Ryker's death. In Dr Maplesden's opinion, the cause of most placental abruptions cannot be determined. They are usually caused by either an underlying pathology or an acute trauma, although a small proportion are related to sudden mechanical events such as blunt abdominal trauma. Dr Maplesden agreed there was some evidence to suggest that minor trauma could cause a placental abruption, but he did not think it was possible to make a conclusive finding in the circumstances. He was unable to link the osteopathic treatment undertaken by Mr Maidment to the placental abruption and Ryker's death. He concluded that he did not think it was possible to determine with any certainty that Ms Griffiths' osteopathic treatment caused or contributed to her placental abruption and the loss of her son.

[74] Dr Maplesden and the HDC considered the Osteopath's (Mr Maidment) denial that he palpated Ms Griffiths' lower abdomen or undertaking any manoeuvre or manipulation that might have placed pressure on the uterus or placenta. Dr Maplesden reported that there was nothing in the osteopath or hospital notes, or in Ms Griffiths' complaint to the HDC that Ms Griffiths experienced sudden abdominal pain, uterine contractions or vaginal bleeding at the time or, or immediately following the treatment provided by Mr Maidment. That is to say, there were no classic symptoms of acute placental abruption following Ms Griffiths' osteopathic treatment. The HDC's decision was to take no further action on Ms Griffiths' complaint.

[75] Following the HDC decision, Mr Garry got in touch with Dr MacLean and the two exchanged emails. Dr MacLean was provided with some background information but Dr MacLean did not have available to him all of the information that was ultimately considered by Associate Professor Westgate, Dr Zuccollo, the Corporation, or the Reviewer who made the Review Decision. Dr MacLean reviewed the background information he was sent by Mr Garry and Ms Griffiths, and responded to them on 29 January 2017.

[76] Dr MacLean's email is relatively informal. He questioned the osteopath's indication that his examination had been gentle with a light touch and thought that more significant pressure would be required to diagnose a disorder of the colon. He then indicated that he thought it inappropriate that there was any palpating of the abdomen in advanced pregnancy. He questioned the HDC's reliance on evidence from a General Practitioner, and described a link between the treatment, a placental abruption, and the intrauterine death as being a far more plausible sequence, than the relationship being coincidental. He suggested that the case should be reviewed by a specialist obstetrician and an osteopath.

[77] Dr MacLean made general observations, but did not provide his medical opinion on whether the osteopathic manipulation in this case caused Ryker's death. He discussed possibilities and then only in an anecdotal kind of way. Ultimately, he recommended further review from expert specialists. The Corporation acted on Dr MacLean's recommendation and obtained reports from relevantly qualified medical specialists in the course of the Corporation's ongoing investigation.

[78] The specialists were Associate Professor Westgate, Obstetrician and Gynaecologist, Dr Jane Zuccollo, Perinatal Pathologist, Nigel Brooke, Osteopath, and Jonathan Paine, Osteopath. I prefer their evidence for the reasons outlined below.

[79] Messrs Brooke and Paine, both Osteopaths, reviewed Mr Maidment's notes. Their view was that, even at the most vigorous end of the range of available techniques, the force used would not exceed typical levels of force encountered in the activities of daily living. Their view was that it appeared that the techniques used by Mr Maidment were at the minimal force end of the spectrum of techniques.

[80] Dr Zuccollo is recognised as the most experienced Perinatal Pathologist in New Zealand. She reviewed the post-mortem report and medical history and concluded that on balance she could find nothing to confidently persuade her that Ryker died as a result of placental abruption/significant acute retro-placental haemorrhage. She would have been inclined to report the death as associated with a marginal haemorrhage, but this was uncertain as this would more commonly involve vaginal bleeding and perhaps the onset of pre-term labour. While she acknowledged it was not possible to state with certainty that the osteopathic manipulation did not contribute to the foetal death at 30+ weeks gestation, it was not a risk factor that she would have considered.

[81] Associate Professor Westgate, Obstetrician and Gynaecologist, agreed with Dr Zuccollo that there was no placental abruption and noted, in particular, that there were no clinical features of an abruption. Dr Zuccollo's report found no pathological features within the placenta to support a diagnosis of abruption. Associate Professor Westgate found no objective evidence of trauma to the foetus or to the placenta.

[82] As to other possible causes, Associate Professor Westgate noted some clinical evidence that Ryker's foetal growth was not as good as expected:

- (a) Reduced amniotic fluid volume was noted on the beside scan done on 21 February 2015 (29 weeks and 6 days gestation) when Ms Griffiths presented with reduced foetal movements.

- (b) An ultrasound of 27 February 2015 showed foetal abdominal circumference less than the 5th centile and estimated foetal weight was less than the 10th centile.

[83] Associate Professor Westgate recorded that the umbilical cord was described as being abnormal in two places by clinical staff. The cord was narrowed by nearly half in at least one section. These factors suggested to Associate Professor Westgate that a possible cord complication could have occurred. A narrowing in the cord could have reduced blood and oxygen flow and/or could have been the site of recurrent kinking. A prolonged episode of kinking could have been the cause of foetal death. However Associate Professor Westgate does not put this at more than a possibility. Otherwise she could not identify any other possible cause.

[84] Associate Professor Westgate saw no evidence that osteopathic treatment caused Ryker's death. Associate Professor Westgate referred to her 30 years' experience with external cephalic version (breech birth presentation) and of cases with abdominal trauma in pregnancy. In her experience, she believed the amount of pressure applied to the abdomen to cause foetal demise by direct trauma or damage to the placenta would have to be of such force that it would be extremely painful for the mother and would leave bruising on her abdomen. She would not expect this degree of pressure to be applied to a pregnant uterus by a healthcare professional or to be tolerated by a woman.

Conclusion

[85] After carefully considering the evidence as a whole, I am not satisfied on the balance of probabilities that there is a sufficient basis to draw a robust inference that the death of baby Ryker was caused by osteopathic manipulation on 25 February 2015.

[86] The exact cause of that death remains unknown.

[87] The weight of the evidence does not support cover for a treatment injury.

[88] The Corporation's Decision of 17 September 2018 and the Review Decision of 15 March 2021 are correct and are maintained.

Result

[89] The appeal is dismissed.

Costs

[90] Although Ms Griffiths is unsuccessful on appeal, I make no order for costs.



I C Carter
District Court Judge

Representation: Victoria Griffiths and Joshua Garry for appellant
Medico Law Ltd, Lawyers, Grey Lynn, Auckland.