IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 217 **ACR 233/21**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 162(1) OF THE ACT
BETWEEN	JULIE BRUNTON Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

Submissions: The Appellant is self-represented
I Hunt for the Corporation

Judgment: 20 December 2023

JUDGMENT OF JUDGE P R SPILLER
[Leave to Appeal to the High Court – Section 162
Accident Compensation Act 2001]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour, Judge Carter, delivered on 17 November 2023.[1] At issue in the appeal was whether Ms Brunton suffered a treatment injury (or injuries) when undergoing an upper gastrointestinal endoscopy procedure at Tauranga Hospital on 1 July 2021. The Court dismissed the appeal, for the reasons outlined below.

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1 *Brunton v Accident Compensation Corporation* [2023] NZACC 187.

Background

[2] On 17 January 2020, Ms Brunton saw General Practitioner, Dr Geoffrey Dunn, with a feeling as if something was stuck in her throat. Dr Dunn was not her regular General Practitioner but works in the same medical practice as her regular General Practitioner, Dr John Aiken. Dr Dunn referred Ms Brunton to the gastroenterology department at Tauranga Hospital. Notes from his consultation with her were recorded in the referral.

[3] Due to COVID-19 restrictions in early 2020, Ms Brunton did not have her appointment at the hospital until 1 July 2020. There is an informed consent form taken from the Bay of Plenty District Health Board file. It is headed "Consent to the Surgery/Procedure/Treatment". It is signed by Ms Brunton for the gastroscopy procedure and records that she had been able to discuss the form with an identified registered nurse, who co-signed the form. The form described the procedure as "Gastroscopy +/- Biopsy". Ms Brunton had been provided with an "OGD patient info booklet".

[4] The form noted that the risks and benefits of the procedure had been explained to Ms Brunton including "Bleeding, Perforation, Infection, Medicine Reaction & Aspiration". Ms Brunton agreed to "further procedures or measures that my surgeon considers necessary and essential during the procedure". When asked whether Ms Brunton would like any body parts or tissue removed during the procedure returned to her, Ms Brunton ticked "N/A". Ms Brunton did not agree to have her procedure "delegated to a specialist in training".

[5] A second consent form, for anaesthesia, was also on the Bay of Plenty District Health Board file. This form is blank. However, in the treating gastroenterologist's report of the procedure it was noted "Pre-Anaesthesia Assessment: The risks and benefits of the procedure and the sedation options and risks were discussed with the patient. All questions were answered and informed consent was obtained. Routine symptoms".

[6] The procedure was conducted the same day by gastroenterologist David McGouran. His report of the procedure recorded findings as follows:

> The examined oesophagus was normal. Biopsies were taken with a cold forceps for histology.
>
> The entire examined stomach was normal. Biopsies for histology were taken with a cold forceps for histology.
>
> The examined duodenum was normal. Biopsies for histology were taken with a cold forceps for for (sic) evaluation of coeliac disease.

[7] Ms Brunton's admission assessment and discharge plan noted no issues. It states that the procedure was well tolerated by Ms Brunton and that she was very comfortable post-procedure.

[8] On 8 July 2020, consultant histopathologist Duncan Lamont reported all the biopsied specimens to be normal.

[9] Ms Brunton presented to Dr Aiken on 21 August 2020. He noted that her throat had "only modestly improved since H pylori eradication", that she had a "windy tummy" and that prior to her hospital visit she was "getting more energised". They discussed the option of a barium swallow, but Ms Brunton was "not keen at this stage". Dr Aiken recorded that Ms Brunton had emailed him a photo of her "premed". He recommended "pre and probiotics for gut health".

[10] Ms Brunton returned to Dr Aiken on 9 October 2020. He noted the issues that she was encountering.

[11] On 7 December 2020, Dr Alex Lampen-Smith, Consultant Gastroenterologist and Hepatologist, reported:

> Julie has significant concerns about the consent process and the procedure itself. She submitted a complaint with our Service. We have previously met with her to listen to her concerns, and responded as best as we were able to. We acknowledge that she does not feel that our consent process was adequate in terms of the symptoms that would be experienced during the procedure (she felt the biopsies were like she was being "punctured"), or the medications that we used, as she was not specifically informed of the names of the medications (fentanyl and midazolam). These medications are routinely used for moderate sedation in New Zealand and internationally, therefore Julie didn't get a chance to do research on them herself. Julie informed us that she had not wanted mind altering agents given to her.

> Julie feels that the procedure on the whole was deeply traumatising for her. She is attuned to her body and believes that she has been poisoned with heavy metals by contamination in the intravenous medicines administered that day.
>
> I have apologised to Julie again today for her experience, apologies have also been conveyed verbally in our initial meeting and in writing associated to Julie's formal complaint.
>
> With regards to the pharmaceutical agents that were used during her procedure. It is standard practice that fentanyl and midazolam as used for this procedure to Facilitate 'moderate sedation'. Previously Julie has requested vials of midazolam and fentanyl to independently test for contamination and the batch numbers for the vials of midazolam and fentanyl used for her gastroscopy procedure so quality factsheets can be obtained from the pharmaceutical manufacturers. Detailed documentation was provided to Julie explaining that that batch numbers are not recorded for intravenous medicines unlike immunisation administration, we also explained the process for administrating intravenous medication. I was unable to answer her questions as to where the drugs are sourced from (locally or internationally) or able to state what the quality assurance processes are in the pharmaceutical factory. As medical professionals I and my colleagues do implicitly trust the supply chain for pharmaceuticals used in New Zealand hospitals. We have been unable to provide her with samples of fentanyl and midazolam to independently test as a prescription can only be issued for the purposes of therapeutic treatment and as per the misuse of drugs legislation a licenced authority is necessary for the subject of research and analysis of medication.
>
> From a medical perspective, I am not aware of any parasites that could be causing throat symptoms. Her symptoms could relate to globus (a feeling of a sensation of something in the throat on swallowing when there is nothing present). In terms of further evaluation, I have offered a stool test for ova, cysts and parasites which she has declined at this time. If she did want to see an expert in parasites I could refer her to the Infectious Diseases Department or she could see Dr Massimo Gioia, Specialist in Infectious Diseases, privately.
>
> An outstanding issue is the Helicobacfer pylori stool antigen test for which she was prescribed a course of antibiotics. I neglected to mention to her in our wide ranging conversation that best practice is to do a stool test to check that this bacteria has been successfully eradicated. I will send her out a laboratory form for that with this letter, if she would like to do that.
>
> At this stage I have not made any further follow up arrangements for her in Gastroenterology clinic. She has requested and been provided with all of the medical correspondence relating to this referral, admission and procedure. I again apologised that we have not met her expectations in terms of our consent process, and that she had a such a bad experience in our Unit for her gastroscopy.

[12] The General Practitioner notes from Dee Street Medical Centre Limited recorded consultations of Ms Brunton on 21 August 2020, 9 October 2020, 14 and 22 December 2020 and 26 January 2021.

[13] The original accident compensation claim form was completed and submitted to the Corporation on Ms Brunton's behalf on 23 December 2020 by Dr John Aiken. Cover was sought for "complications/medical surgical care", in the context of an "unusual reaction following endoscopy".

[14] The Corporation's initial investigation included contact with Ms Brunton on 5 February 2021. The initial client contact summary was recorded.

[15] The Corporation applied its treatment injury cover decision tool assessment, which noted the documents referred to, but identified no physical injuries over and above the necessary parts of the procedure undertaken. To the extent that exclusionary criteria applied, the only identified physical injury was the necessary biopsies taken, to which Ms Brunton plainly consented and the extent of any injury was a necessary part or ordinary consequence of that treatment.

[16] On 16 March 2021, the Corporation issued a decision, which stated:

> ACC is unable to accept your claim for treatment injury
>
> After assessing the available information on your claim, we are unable to accept it for cover. The following injuries are unable to be accepted under treatment injury legislation:
>
> Fentanyl poisoning
>
> Punctured stomach
>
> Kidney problems
>
> Liver problems
>
> The reason we are unable to accept this treatment injury is defined in Section 32 of the Accident Compensation Act 2001 as 'personal injury suffered by a person seeking treatment or receiving treatment and caused by treatment; and not a necessary part, or ordinary consequence, of the treatment, taking into account all the circumstances of the treatment, including the person's underlying health condition at the time of the treatment; and the clinical knowledge at the time of the treatment'.
>
> ACC cannot evidence a definite physical injury in this case based on the information currently available. Therefore, this claim does not meet the legislative criteria.
>
> ACC received information about your claim.
>
> ACC received this treatment injury claim from your GP who provided the relevant notes. ACC also requested records from Bay of Plenty DHB.

> The claim related to a suggested unusual reaction following endoscopy.
>
> You were referred to Gastroenterology in January 200, as you had the feeling there was something in your throat.
>
> The gastroscopy was done in July 2020; it is reported that risks and benefits of the procedure and sedation options and risks were discussed with you. A consent form was signed.
>
> Clinical records report you tolerated the procedure well; biopsies were taken to identify if there were any abnormalities. Findings of the gastroscopy were normal, the biopsies reported on no abnormalities.
>
> Following the procedure, you advised of your concerns regarding the consent procedure and the procedure itself. You advised ACC that you regret that you consented to the biopsies being taken and you experienced concerns with your solar plexus. You advised you feel you have been given a lethal dose of fentanyl and did not consent to this. You have advised you are experiencing kidney and liver problems due to the procedure.
>
> We have assessed the relevant clinical information.
>
> When we assess a treatment injury claim for cover, we need to identify from clinical records that there is a physical injury (tissue damage/harm), caused by treatment, not being a necessary part or ordinary consequence of that treatment.
>
> In your case, we are only able to identify a physical injury from the biopsies taken; these were considered a necessary part of the procedure at that time and therefore we are unable to provide cover for this physical injury.
>
> We have been unable to identify any other physical injury from the gastroscopy procedure or medication provided as suggested.
>
> Although you have advised you didn't want to have the biopsies taken, you did consent to this procedure. We are unable to provide cover for decisions that in hindsight wouldn't have been made.
>
> On this basis, we respectfully decline this claim for cover.

[17] Ms Brunton filed a review application against the above decision. At the Review hearing on 10 August 2021, Ms Brunton gave evidence and made submissions, and she was supported by Tracy Livingston, an osteopath, and Phillip Bolten, who practises reiki. Ms Livingston and Mr Bolten gave evidence as witnesses at the hearing.

[18] During the Review hearing, Ms Brunton referred to further documents and submissions which she had not previously filed. The Reviewer adjourned the hearing part heard until 23 August 2021, in order to receive and consider the additional information, and for the Corporation to make further submissions if required. The

Corporation did not seek to make further submissions on the further material filed by Ms Brunton.

[19] In a decision dated 20 September 2021, the Reviewer found no evidence of any specific physical injury suffered by Ms Brunton and concluded that Ms Brunton's case did not meet the criteria for cover to be granted for a treatment injury. Ms Brunton filed an appeal against this decision.

The Court's judgment of 17 November 2023

[20] After outlining the relevant evidence and law, Judge Carter stated the following.

> [60] I am unable to find any error in the Reviewer's comprehensive, careful and empathetic analysis in the Review Decision, which I consider is correct, for the reasons given by the Reviewer.
>
> [61] The issue on appeal is whether Ms Brunton suffered a physical injury by her treatment of 1 July 202, that was not a necessary part or ordinary consequence of that treatment. The first requirement for cover is whether there was a physical injury, being some form of harm or bodily damage. No such physical injury is identified in the evidence relied on by Ms Brunton, which mostly describes symptoms as distinct from a physical injury. The closest that Ms Brunton gets to a physical injury is the suggestion of a stomach perforation and poisoning, as a possible injury that might arise from a biopsy. The only identified physical effect involved the necessary biopsies taken, to which Ms Brunton plainly consented, and the extent of any "injury" was a necessary part or ordinary consequence of that treatment. The suggestion that there may have been a perforation or puncture is not supported by any evidence from the treating medical professionals.
>
> [62] Dr Aiken lodged the accident compensation claim form describing an unusual reaction to the endoscopy procedure. This does not identify a physical injury. Ms Brunton described a large number of symptoms, but does not identify an injury causing them. Mr McGouran's operation report indicated that the procedure went as expected and the post-procedure notes record Ms Brunton as being very comfortable. Ms Brunton has suggested that during the endoscopy procedure that she was subjected to some kind of inappropriate procedure or that she was poisoned, vaccinated or microchipped and that her stomach was punctured. There is no evidence whatsoever to support these allegations.
>
> [63] As noted by the Reviewer, without identifying a physical injury, it is impossible to determine what treatment caused it. In these circumstances it is not possible to embark on a meaningful inquiry into causation or whether or not a necessary part or ordinary consequence of the endoscopy treatment.

[64] I am satisfied that Ms Brunton clearly consented to the endoscopy procedure and biopsy, having regard to the consent form which she signed and the treating specialist's report of the operation. In addition, according to the Corporation's record of communication with Ms Brunton, Ms Brunton stated that she had consented to the endoscopy procedure, consented to the fine needle biopsy and consented to sedation.

[65] To the extent there is an issue surrounding Ms Brunton's consent based on the blank anaesthesia consent form, the available evidence described in the previous paragraph satisfies me on the balance of probabilities that Ms Brunton did indeed consent to the anaesthesia and sedation that was administered. In any event, there remains the problem for Ms Brunton that no physical injury has been identified. Without identification of a physical injury, it is impossible to determine whether consent was appropriately given or not given to the aspect of treatment said to have caused the injury. If a physical injury was identified and an accident compensation claim were to be made on the basis of lack of informed consent, the claim would need to be informed by additional evidence, which may include further evidence from the treating specialist and any additional relevant and available hospital records.

[66] I have carefully considered the voluminous papers and documents provided by Ms Brunton in support of her appeal, including her detailed rebuttal/analysis of the Review Decision, ACR Submission and Review Hearing Submission. Nowhere in this material does Ms Brunton advance any credible evidence which would warrant overturning of the Review Decision or the Decision of the Corporation.

[67] I accept that Ms Brunton genuinely felt the numerous symptoms she has described in the evidence she has advanced, her personal testimony so far as it relates to identification of a physical injury and the other requirements to establish cover for a treatment injury carries no weight.

[68] On the other hand, the medical professional and other evidence carry considerable weight - including notes of several practitioners, the specialist's post-treatment report and subsequent medical notes, the consent form signed by Ms Brunton, and the Corporation's record of Ms Brunton's confirmation of consent to treatment and sedation. The evidence overall does not establish on the balance of probabilities that a physical injury was caused by the endoscopy procedure, biopsy or sedation and does not establish any of the other legislative criteria for a treatment injury.

[69] There is no evidence to support Ms Brunton's other allegations summarised above in paragraph [53] (b), (c), (d), (e), (f), which I reject.

[70] Finally, I turn to Ms Brunton's document described as an "Affidavit of Truth, Denial of Consent, Claim of Right and the Restoration of my "common law on the land unalienable rights". It asserts on its face that it has been served on the New Zealand Prime Minister, the Governor General of New Zealand, the Attorney General of New Zealand, the Solicitor General of New Zealand, the Minister of Justice, the Minister of Police, and the Minister of Internal Affairs. Whether or not that is the case is unclear. Ms Brunton declares in the document that she is a "sovereign person" who is not subject to any government control, jurisdiction of the courts or laws of New Zealand, without her consent.

[71] I infer from Ms Brunton bringing and pursuing this appeal that she consents to be subject to the Accident Compensation Act 2001 and to the jurisdiction of the District Court. But nothing in her affidavit advances her claim for compensation or this appeal. It does not establish that Ms Brunton suffered an identifiable physical injury, or that it was an injury which could properly be described as a treatment injury in terms of the legal requirements in the Act.

Conclusion

[72] On the evidence as a whole, Ms Brunton has not established on the balance of probabilities that she suffered a treatment injury for which there is accident compensation cover.

Relevant law

[21] 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.

[22] In *O'Neill*,[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

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

> 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 … .

[23] In *Gilmore*,[3] Dunningham J stated:

> [55] I accept that, for the purposes of leave, it is not necessary to show that a decision was wrong, but only that there is an arguable question of law which is of sufficient importance to outweigh the cost and delay of a further appeal. However, in this case I consider no seriously arguable question of law arises, nor can it be said there is any factor which the District Court did not take into account. Instead, I consider the matters sought to be raised are, in substance, questions of fact and where the findings made were open to ACC, and to the District Court Judge, on the materials before them. For that reason, I do not need to go on to consider whether, in the exercise of my discretion, leave should be granted.

[24] In *TR*,[4] Isac J stated:

> [24] … the threshold for an appeal against factual findings on the basis of an error of law is very high. The challenged factual finding must be one that, on the evidence, was not open to the decision-maker. Put another way, TR must establish that the factual conclusion of the District Court was so clearly untenable that application of the law required a different answer.

The appellant's submissions

[25] The appellant submitted, in part:

> • I have been presented with a very deceptive and fraudulent document under duress. Deception and fraud is a crime, to use fraud to conceal a fraud is also a crime; therefore the legal document presented to me is Null and Void in law.
>
> • The truth is my physical body was injured by medical treatment I never consented to, I was forced with deception, fraud and physical force. I was deceived into attending nefarious medical appointments under the guise of healthcare, a fraud. I was deceived into signing consent forms and forced into a medical bed when the only reason I went to the appointment was for a consultation with a doctor. My physical body was injected with drugs I never consented to, including an overdose of sedatives, vaccines and other other drugs. I was forced into a vaccine experiment I never consented to and would never consent to. My physical body was invaded with various medical procedures including stomach punctures by physical force, spinal surgery and various others including sexual organs. I did not consent to any biopsies or removal of physical tissues from my physical body, including ova (eggs), zygote, embryo or fetus. After being forced into an experiment and dying, my body was found fully clothed laying in coffin/supine position. I woke up very suddenly bolting up right into a sitting position, hours after the initial forced treatment and experiment. Then I lay back down and put myself into recovery

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3 *Gilmore v Accident Compensation Corporation* [2016] NZHC 1594.

4 *TR v Accident Compensation Corporation* [2023] NZHC 2991.

> position. It is a miracle I am alive today to tell this story. Thanks to my previous peak physical condition I came back to life when I woke up suddenly. I never consented to any treatment, or experimentation and saying I did is absolutely fraudulent. This is simple contract law, no contract no consent. These previous consent forms were made null and void by counter offers made in the day stay unit when speaking to the man who was allegedly Dr David Mcgouran. I agreed to let the camera take a look at my throat and to have the zylocane spray. I never gave consent for anything else, saying I did is fraudulent.
>
> • There was no full disclosure for any of these procedures, this means any assumed or presumed Contracts created in my name are Null and Void and illegal under Contract Law.
>
> • Those who lie, cheat, steal and cause harm to another are committing a crime. Is it true anyone who commits fraud is guilty of treason? Anyone who conceals a crime preventing justice is a conspirator? Is it not true anyone who willingly carries out war crimes under orders are complicit in crimes against humanity, therefore guilty of treason?
>
> • What is the point in having a legal system if it does not uphold the Law and is used as a weapon against the people it claims to serve? If the legal system is merely a tool to hide and allow others to carry out crime, then should it not be made null and void completely and common law on the land restored?

[26] Ms Brunton proceeded to provide a response to numbered paragraphs of Judge Carter's judgment, with criticism of His Honour's record of events and findings.

Discussion

[27] This Court is required to decide whether Ms Brunton should be granted leave to appeal to the High Court against the judgment of Judge Carter on the issue of a claimed treatment injury. The Court is not required to address broader issues raised by Ms Brunton.

[28] The requirements for leave to appeal to the High Court have been set out above (see paragraphs [21] to [24]). For leave to appeal to be granted, Ms Brunton must establish that the decision of Judge Carter is wrong in law. This means that Ms Brunton must show that there is an arguable question of law which is of sufficient importance to outweigh the cost and delay of a further appeal. In terms of the Judge Carter's factual findings, Ms Brunton must establish that the factual conclusion of His Honour was so clearly untenable that application of the law required a different answer.

[29] This Court has read the judgment of Judge Carter and the factual findings and the application of the law determined by His Honour. The Court can discern no arguable question of law which is of sufficient importance or any factual conclusion that is so clearly untenable that application of the law required a different answer.

The Decision

[30] In light of the above considerations, the Court finds that Ms Brunton has not established sufficient grounds, as a matter of law, to sustain her application for leave to appeal, which is accordingly dismissed. Ms Brunton has not established that Judge Carter made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources and the finality of litigation. This Court is not satisfied as to the wider importance of any contended point of law.

[31] Costs are reserved.

Judge P R Spiller,
District Court Judge

Solicitors for the Respondent: Young Hunter.