

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 105

ACR 94/22

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

Hearing: On the papers

Appearances: The Appellant is self-represented
C Sinclair and S Kinsler for the Respondent

Judgment: 29 June 2023

**JUDGMENT OF JUDGE D L HENARE
[Leave to appeal to the High Court
Section 162(1) Accident Compensation Act 2001]**

[1] The applicant, Dhirender Kumar applies for leave to appeal to the High Court pursuant to s162 of the Accident Compensation Act 2001(the Act) against a decision of Judge PR Spiller delivered on 7 March 2023.¹

[2] At issue in the appeal is a claim for cover for a treatment injury, whether Mr Kumar's hepatitis C was caused by treatment which he received in hospital for a brain haemorrhage. The Court dismissed the appeal for the reasons outlined below.

¹ *Kumar v Accident Compensation Corporation* [2023] NZACC 34.

Background

[3] In January 2015 Mr Kumar suffered a brain haemorrhage. He was admitted to Palmerston North Hospital and then transferred to Wellington Hospital for surgery. In July 2015 he had further surgery at Dunedin Hospital.

[4] In February 2016, Mr Kumar underwent a medical assessment as part of his visa application. In the course of this assessment, it was discovered that Mr Kumar was positive for hepatitis C. His visa application was declined on this basis.

[5] Mr Kumar contended that he received a blood transfusion as part of his treatment at Wellington Hospital, and this was how he contracted hepatitis C. He therefore sought cover for hepatitis C as a treatment injury.

[6] On 23 June 2016, the Corporation declined cover on the ground that there was no evidence Mr Kumar received blood or blood products while he was an inpatient at Wellington Hospital.

The case for Mr Kumar

[7] Mr Kumar says he is not satisfied with the District Court decision and submits:

- (i) He was photographed by his elder brother when he was receiving a blood transfusion at the ICU ward on 13 January 2015.
- (ii) His GP, Dr Lockwood says his hepatitis C is associated with brain haemorrhage treatment.
- (iii) He attached information about hepatitis C from the Southern Cross medical history website.

The District Court Judgment

[8] In dismissing Mr Kumar's appeal, Judge Spiller noted that the temporal connection between Mr Kumar's hospital treatment and his subsequent hepatitis C

diagnosis was weak, and in any event, this was in itself insufficient to establish causation. Further, His Honour accepted the expert medical evidence that:

- (a) there was no evidence in the medical records that Mr Kumar underwent a blood transfusion;
- (b) the New Zealand Blood Service confirmed while it performed a blood group test on Mr Kumar in its Wellington Blood Bank in 2015, it has never issued any blood to Mr Kumar for transfusion;
- (c) Mr Kumar's onset of symptoms did not exclude the possibility that he was already infected with hepatitis C when he was admitted to hospital;
- (d) Mr Kumar is unlikely to have required a blood transfusion as part of his brain haemorrhage treatment;
- (e) Mr Kumar is unlikely to have contracted hepatitis C through any other means in the course of his treatment; and
- (f) the residual risk of transfusion-transmitted hepatitis C in New Zealand is very low.

[9] Accordingly, His Honour concluded that Mr Kumar had failed to establish, on the balance of probabilities, that his hepatitis C was caused by his brain haemorrhage treatment.

Relevant Law

[10] Section 162 of the Accident Compensation Act 2001 provides for appeals to the High Court on a question of law with the leave of the District Court.

[11] In *O'Neill*,² the Court summarised the principles relevant to the granting of leave under s 162 that:

...

² *O'Neill v Accident Compensation Corporation* DC Wellington 250/2008 at [24] and [25].

- i The issue must arise squarely from “the decision challenged” e.g. *Jackson v ACC* unreported, HC Auckland, Priestley J, 14 February 2002, AP 404-9601; *Kenyon v ACC* [2002] NZAR 385. Leave cannot for instance properly be granted in respect of obiter comment in a judgment: *Albert v ARCIC* unreported, France J, HC Wellington, AP 287/01, 15 October 2002;
- ii The contended point of law must be “capable of bona fide and serious argument” to qualify for the grant of leave: e.g. *Impact Manufacturing* unreported, Doogue J, HC Wellington, AP 266/00, 6 July 2001;
- 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: e.g. *Northland Cooperative Dairy Co. Ltd v Rapana* [1999] 1ERNZ 361, 363 (CA);
- iv Where an appeal is limited to questions of law, a mixed question of law in fact is a matter of law: *CIR v Walker* [1963] NZLR 339, 354;
- 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: *Edwards v Bairstow* [1995] 3 All ER 48, 57;
- vi Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law: *Commissioner of Inland Revenue v Walker* [1963] NZLR 339, 353-354 (CA); *Edwards v Bairstow* [1995] 3 All ER 48, 57;

[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 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: e.g. *Jackson* and *Kenyon* above.

Discussion

[12] An application for leave to appeal to the High Court must identify a question of law. Mr Kumar has not identified any question of law he wishes to dispute.

[13] Mr Kumar did not file any written submissions in support of his application for leave to appeal. Instead, he filed photographs of himself in hospital, and links to websites, including to the Southern Cross medical library website providing general information about hepatitis C. Mr Kumar indicated this material is evidence that he contracted hepatitis C during his hospital treatment.

[14] The Court agrees with counsel for the Corporation that no meaningful inference can be drawn from the material filed by Mr Kumar. It is not clear where or when the photographs were taken, or what treatment they show Mr Kumar receiving.

[15] Reviewing the decision, it is clear that it involved the straightforward application of well-settled authority on causation to the available evidence. While His Honour acknowledged Mr Kumar's account of his treatment, he preferred the unequivocal specialist evidence that:

- (a) Mr Kumar did not receive a blood transfusion as part of his brain haemorrhage;
- (b) Mr Kumar is unlikely to have contracted hepatitis C even if he did have a blood transfusion;
- (c) Mr Kumar is unlikely to have contracted hepatitis C by any other means during his treatment; and
- (d) It is possible that Mr Kumar had already contracted hepatitis C prior to his treatment.

[16] In light of this evidence, this Court finds no other conclusion on causation was reasonably available to Judge Spiller.

The Decision

[17] Given the above considerations, the Court finds that Mr Kumar has not established sufficient grounds as a matter of law, to sustain his application for leave to appeal, which is accordingly dismissed.

[18] No question of law capable of *bona fide* and serious argument arises from Judge Spiller's decision. 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.

[19] This Court is not satisfied as to the wider importance of any contended point of law.

[20] Accordingly, the appeal is dismissed.

[21] Costs are reserved.

A handwritten signature in blue ink, reading "D L Henare". The signature is written in a cursive, flowing style with a large initial 'D' and 'H'.

D L Henare
District Court Judge