IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA86/2023
[2023] NZCA 354

BETWEEN	AR Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Court: Gilbert and Mallon JJ

Counsel: J P Miller for Applicant
J P Coates and R E Mould for Respondent

Judgment: (On the papers) 8 August 2023 at 3 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is granted on the following question of law:

> **Whether the High Court misdirected itself on the application of *Ambros* by misapplying the relevant factors or overlooking relevant factors in assessing whether the claimant had proved on the balance of probabilities that the delay in treatment caused the claimant personal injury additional to the injuries he would otherwise have suffered because of his Guillain-Barré Syndrome.**

B Costs are reserved until the substantive appeal has been determined.

REASONS OF THE COURT

(Given by Mallon J)

[1] The applicant, then aged 15 years, became unwell while on holiday in January 2017. His mother contacted an out-of-hours medical centre helpline for assistance. Due to incorrect medical advice given through that helpline, there was delay of seven and a half to eight hours in a diagnosis of, and in hospital treatment for, Guillain-Barré Syndrome (GBS). The applicant remained in intensive care for three months on a ventilator. He was then transferred to a specialist unit in Burwood Hospital where he remained until he was discharged in November 2017. He suffers severe effects from GBS, including tetraplegia and requires assistance with all activities of daily living. The prognosis is not certain — the applicant may improve in the next two or three years, although some residual disability may remain.

[2] The applicant subsequently sought cover from the respondent (ACC) for treatment injury due to the delay in treatment. ACC declined the claim on the basis that the delay did not cause GBS nor increase the severity of its effects. ACC's decision was upheld on review and then on appeal to the District Court.[1] Leave to appeal to the High Court on a question of law was subsequently granted.[2] The High Court dismissed the appeal.[3] It also declined leave to appeal to this Court on a question of law.[4]

[3] The applicant now applies to this Court for special leave to appeal.[5] Special leave may be granted if the Court is satisfied there is a question of law capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of a further appeal. Other relevant considerations include the desirability of finality of litigation and the overall

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1 *[AR] v Accident Compensation Corporation* [2020] NZACC 158 [District Court judgment].
2 *[AR] v Accident Compensation Corporation* [2021] NZACC 140.
3 *[AR] v Accident Compensation Corporation* [2022] NZHC 1008 [High Court judgment]. The High Court had earlier declined leave for ACC to adduce further evidence: *[AR] v Accident Compensation Corporation* [2022] NZHC 542.
4 *[AR] v Accident Compensation Corporation* [2023] NZHC 10 [High Court leave judgment].
5 Accident Compensation Act 2001, s 163(2).

interests of justice.[6] If special leave is granted, the appeal is by way of case stated for the opinion of this Court on the question of law.[7]

Grounds of appeal

[4] As set out in the application for special leave, the applicant contends that the High Court was wrong in law because in treatment injury cases involving failure to treat:

(a) a generous and unniggardly approach to the drawing of a robust inference of causation should automatically apply where the opportunity to determine the medical outcome was lost by the actions of the treating medical professionals;

(b) the practical experience of specialists operating in the field should be given increased weight when there is a dearth of medical literature or research on the effects of delayed treatment; and

(c) the decision maker should discuss all relevant causation factors set out in *Accident Compensation Corporation v Ambros* to ensure affected claimants can understand whether a generous and unniggardly approach to the drawing of a robust inference has been taken.[8]

[5] This formulation caused the respondent confusion in the High Court about whether the applicant was arguing for a different causation test in failure to treat cases than that set out in *Ambros*.[9] The applicant clarified that he was not. The respondent says that if the applicant is now contending for a different causation test, then the question does not arise out of the High Court decision. It also says that if the question relates to the proper application of *Ambros* in failure to treat cases, there is no bona fide question of law capable of serious argument as the law is well settled.

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6 *Cullen v Accident Compensation Corporation* [2014] NZCA 94 at [5], recently affirmed in *Accident Compensation Corporation v Anderson & O'Leary Ltd* [2023] NZCA 198 at [18].

7 Accident Compensation Act, s 163(1).

8 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 at [65]–[70].

9 See High Court judgment, above n 3, at [27]–[28].

[6] In essence, however, and framed as a question of law, the applicant's concern is that the factors discussed in *Ambros* as to how a court should assess causation in cases of medical uncertainty (because the opportunity to determine the medical outcome was lost due to delay and the medical research data does not specifically cover the situation) were either not considered or were approached incorrectly by the High Court.[10]

Discussion

Evidence

[7] The evidence before the courts below for the purposes of the application for special leave can be summarised as follows:

(a) Dr Brian Dwyer, an infectious disease specialist instructed by ACC, observed the applicant to have GBS of the more acute kind with rapid onset of symptoms, where a patient may be well in the morning but dead by the evening. The applicant's GBS may have been fatal if he had not managed to text his mother at 3 am to seek help.

(b) Dr Dwyer considered it unlikely that earlier treatment would have kept the applicant out of intensive care or off a ventilator. Earlier treatment "may have had an influence on duration of disability or resumption of mobility or degree of independence". However, it was "not possible to confidently state" that it was "more likely" because "[t]he data is just not there".

(c) Dr Ian St George, a general practitioner instructed by ACC, referred to a medical review and a medical article and considered there was "no evidence that earlier treatment would have improved the outcome".

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[10] See, for example, *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[26]; and *Harvey v Real Estate Agents Authority* [2022] NZCA 498 at [11], citing *Brown v R* [2015] NZCA 325, (2015) 30 FRNZ 471 at [16].

(d) Dr Balraj Singhal, the clinical director of the Adult Rehabilitation Service at Burwood Hospital who has practised medicine for over 23 years and who has a special interest in conditions such as GBS, and was involved in the treatment of the applicant and prepared the application for cover, was of the opinion that "every hour, every day is important" for a "better neurological outcome" and "on the balance of probability the delay in treatment caused him greater disability".

(e) The medical reviews and articles drew a link between the time of treatment from the onset of symptoms with effectiveness of the treatment or the length of the hospital stay (the timeframes referred to were seven and five days), but there was no review or literature stating that a delay of the time that occurred here impacted the severity of the condition.

District Court

[8] Judge J H Walker in the District Court reviewed the medical literature referred to by the doctors. The Judge considered the "best medical evidence" on timeliness of treatment was the Cochrane review.[11] This review found that "treatment within seven days is most effective and that plasma exchange be initiated as early as possible within 30 days".[12] The Judge noted that the publication Dr Singhal referred to did not indicate that treatment within the timeframe he suggested "was essential to ensure there was no injury".[13] The Judge further noted that the other publications did "not provide any definitive timeframes".[14]

[9] As to the evidence of the doctors, the Judge said that Dr Singhal's evidence was only that the delay caused "probable injury".[15] The Judge did not accept this evidence because Dr Singhal did not have the experience or expertise of Dr Dwyer regarding the onset of GBS.[16] The Judge regarded Dr Dwyer's evidence that earlier

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11 District Court judgment, above n 1, at [268].
12 At [268].
13 At [269].
14 At [270].
15 At [257].
16 At [257].

treatment would not have kept the applicant out of intensive care or off a ventilator as "compelling".[17] The Judge referred to Dr Dwyer having said that "the data is just not there" and the Judge went on to say that "certainly there has been no medical evidence or literature, which supports that in all probability" the applicant's condition would have been improved or been shortened if he had been treated a few hours earlier.[18]

[10] The Judge concluded that ACC was correct to decline cover.[19]

High Court

[11] In the High Court, Grice J considered there was an evidential basis for Judge Walker to determine that causation was not established on the balance of probabilities.[20] The Judge considered that Judge Walker was correct to conclude that the medical evidence did not support causation to that required standard.[21] The Judge also considered that Judge Walker was entitled to prefer the view of Dr Dwyer and Dr St George and to come to the conclusion that legal causation was not established.[22] The Judge therefore concluded that Judge Walker had not erred on a question of law and the appeal was accordingly dismissed.[23] The Judge was not persuaded there was a serious question of law capable of bona fide and serious argument such that leave to appeal to this Court should be given.[24]

Special leave?

[12] We consider there is a question of law capable of serious and bona fide argument as to whether the District Court approach, upheld in the High Court, misinterpreted the test for causation in *Ambros* on the evidence before it. In particular, we consider it is arguable that the District Court approach looked for certainty in the medical literature, or relied on the opinions of the two doctors who were looking for certainty in the medical literature, that the period of delay in treatment that occurred

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17 At [259].
18 At [260].
19 At [267] and [271].
20 High Court judgment, above n 3, at [102].
21 At [103].
22 At [103].
23 At [104]–[106].
24 High Court leave judgment, above n 4, at [56].

here was likely to have caused an increase in the severity of the applicant's symptoms when that is not the test for legal causation.[25]

[13] We consider it is in the interests of justice to grant leave, despite the desirability of finality, because of the importance of the issue for the applicant.

Result

[14] The application for special leave is granted. The question of law for consideration on appeal is whether the High Court misdirected itself on the application of *Ambros* by misapplying the relevant factors or overlooking relevant factors in assessing whether the claimant had proved on the balance of probabilities that the delay in treatment caused the claimant personal injury additional to the injuries he would otherwise have suffered because of his GBS.

[15] Costs are reserved until the substantive appeal has been determined.

Solicitors:
John Miller Law, Wellington for Applicant
Claro Law, Wellington for Respondent

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[25] See Doug Tennent *Accident Compensation Law* (LexisNexis, Wellington, 2013) discussing causation in cases of medical uncertainty at 263, 267, 275 and 288; *Matthews v Accident Rehabilitation and Compensation Insurance Corporation* DC Wellington 62/97, 22 April 1997 at 7, discussed in Tennent at 267.