



COURT OF APPEAL OF NEW ZEALAND

TE KŌTI PĪRA O AOTEAROA

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***Accident Compensation Corporation v AZ* [2023] NZCA 617**

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

Summary

Today, the Court dismissed the appeal of the Accident Compensation Corporation (ACC) in *ACC v AZ*. The Court found that a child born with spina bifida, whose mother lost the opportunity to terminate her pregnancy due to a failure to diagnose the spina bifida at the 20-week scan, has cover under the Accident Compensation Act 2001 for treatment injury.

Background

AZ, who is now 20 years old, developed spina bifida in utero at approximately five weeks’ gestation. AZ’s mother underwent a 20-week ultrasound scan when she was almost 20 weeks pregnant. The spina bifida should have been detected by the health professional who read the scan. Unfortunately, the scan was misread and, as a consequence, AZ’s spina bifida was not detected before she was born. AZ was born with spina bifida and several other related health conditions.

At the time AZ's mother was pregnant, spina bifida could not be treated in utero. The options available to a mother whose unborn child was diagnosed with spina bifida were either to continue with the pregnancy or seek a termination. It is an accepted fact that had AZ's mother been informed the foetus had spina bifida, she would have sought and obtained a lawful termination of her pregnancy when she was about 20 weeks pregnant.

AZ's mother qualified for cover under the Accident Compensation Act 2001 (the Act) for the period from the time the 20-week scan was misread until AZ's birth. In June 2019, a claim was made to the Accident Compensation Corporation (ACC) on behalf of AZ. It was contended AZ was entitled to cover in her own right for personal injury. In August 2019, ACC declined to accept AZ had cover. That decision was upheld on review and again on appeal to the District Court. In the High Court, van Bohemen J found AZ had cover after considering the following question of law:

Can a person born with spina bifida (claimant) obtain cover for treatment injury where:

- (a) the existence of the claimant's spina bifida was not, but should have been, detected at the 20-week scan stage;
- (b) had the spina bifida been detected, the claimant's mother would have elected termination; and
- (c) the misdiagnosis meant that the opportunity to elect termination was lost to the claimant's mother?

Issues

In order for AZ to have cover, it had to be established that under the Act:

1. AZ was a **person** capable of receiving treatment;
2. she had suffered a **personal injury**;
3. she was receiving **treatment**; and
4. the personal injury was **caused** by treatment.

Result

The Court unanimously dismissed ACC's appeal. Reasons were given by Cooper P and Collins J, with concurring reasons given by Mallon J.

1 A foetus is capable of receiving treatment under the Act

The Court confirmed the “born alive principle” applied. Once born alive, a person may be eligible for cover for personal injuries suffered in utero. A foetus that is harmed by medical treatment received in utero will, once born, live with the effects of an injury sustained from that medical treatment or lack thereof, and will consequently be entitled to cover under the Act. Although the injury underpinning AZ’s claim arose in utero, once she was born alive, she became “a person” and, provided her spina bifida was personal injury caused by a treatment injury, is entitled to cover regardless of the fact the injury in issue occurred before she met the definition of “a person”.

2 AZ’s spina bifida is a personal injury

The Court held the spinal defects associated with spina bifida satisfy the natural and ordinary meaning of the term physical injury as it appears in the Act. Determining whether spina bifida is a personal injury also required the Court to determine whether AZ’s injuries are excluded from cover on the basis that they are wholly or substantially caused by a gradual process condition, namely her spina bifida. The Court revisited this under its discussion of causation.

Mallon J, concurring, held that spina bifida is a gradual progress condition that continued to worsen after the 20-week scan. Both s 20(2)(b) and s 20(2)(f) require analysis of the definition of “treatment injury” and whether AZ’s physical injuries were caused by misdiagnosis.

3 AZ’s spina bifida a treatment injury?

The Court first examined the meaning of “treatment” before examining the misdiagnosis in this case.

A The meaning of treatment

ACC submitted that treatment must be looked at from AZ’s perspective, as she is the one seeking cover. It argues that there is no in utero treatment of spina bifida; it is not possible to have life without spina bifida if the condition exists in the foetus. It submits that termination is not treatment because it is not curative, does not confer a benefit on the foetus and only serves to end its life.

The Court held the term “treatment” is much broader than traditional curative definitions of treatment. This conclusion followed its assessment of the definition of treatment; legislative

context; the purpose of the accident compensation scheme including the avoidance of personal injury litigation; internal statutory context; the applicability of the treatment injury regime to medical procedures ending life; current expressions of the obligations of medical practitioners; and the right of a mother to elect termination.

Mallon J, concurring, held that it is for the mother to decide (involving others as she may consider appropriate in her circumstances), on behalf of her unborn child, what is in the interests of the child. A scan providing a proper diagnosis gives the mother the opportunity to make that decision, and, where termination would have been elected, is treatment preventing further development of the injury. The common law supports this interpretation. It is undesirable to have a gap in cover for medical misdiagnosis in this area relative to other treatment injuries and seems contrary to the public interest given the social contract on which the ACC scheme is premised.

B The misdiagnosis in this case

The Court held in this case, the administration of the 20-week scan involved treatment of both AZ's mother and AZ. The mother gave her consent for the scan which could only be performed by accessing the mother's body to achieve its primary purpose, namely to assess the development of the foetus. The purpose of the scan was to detect foetal abnormalities to either assure AZ's mother that her pregnancy was normal or provide her on what options were available to her in the event foetal abnormalities were detected. The Court concludes that the misdiagnosis of the scan at 20 weeks was treatment of AZ that potentially could give rise to a treatment injury for the purposes of the Act.

4 AZ's spina bifida caused by treatment injury

The Court found that AZ's spina bifida was materially caused by the failure to correctly diagnose spina bifida at the 20-week scan. Where the purpose of the scan was to identify and allow for the prevention of foetal abnormalities, such as spina bifida, and foetal abnormalities ensued because of missed diagnosis and a failure to provide treatment, those foetal abnormalities are rightly seen as caused by the failure to provide treatment. If the 20-week scan had been properly performed, AZ's mother would have had and exercised the opportunity to terminate the pregnancy of AZ. The misdiagnosis meant that this opportunity was lost, thus allowing the continued development of spina bifida in utero where it would otherwise have been halted by treatment, namely termination of the pregnancy.

A *Spina bifida is not excluded from being a personal injury on the basis of being caused “wholly or substantially by a gradual process”*

The Court held that by the time she was born with spina bifida, AZ’s personal injury was materially caused by the misdiagnosis of the scan conducted at 20 weeks’ gestation. The Court held that spina bifida is a gradual process injury for which cover is available under either ss 20(2)(b) or 20(2)(f).

Conclusion

When Parliament enacted the treatment injury provisions of the Act, it deliberately expanded the scope for cover under the Act for persons who suffer personal injury arising from an untoward medical event. The terms treatment and therefore treatment injury have been cast broadly and encompass injuries arising from medical procedures that extend beyond those that aim to cure a condition. Had AZ’s spina bifida been properly diagnosed in utero it would have been treated by AZ’s mother terminating her pregnancy, thereby ensuring AZ would never have been born with spina bifida. The failure to detect AZ’s spina bifida in utero caused her to be born with that condition. Having been born with spina bifida, AZ is entitled to cover for personal injury caused by treatment failure.