

**‘IN THE DISTRICT COURT
AT WELLINGTON**

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

[2021] NZACC 162 ACR 121/21

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	HARRIET MURRAY Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 27 September 2021

Heard at: Wellington/Te Whanganui-A-Tara

Appearances: Ms M Howard for the appellant
 Ms L Hansen for the respondent

Judgment: 18 October 2021

**RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Causation – Injury or Gradual Process]**

[1] This appeal arises following a left shoulder injury that the appellant suffered in an accident on 14 June 2019. She had had several previous accidents affecting this shoulder. ACC granted cover for a shoulder sprain in July 2019. However, on 27 August 2020 ACC declined cover for bursitis and declined to fund surgery. ACC concluded that the appellant’s shoulder condition had been wholly or substantially caused by a gradual process.

Background

[2] It is acknowledged that the appellant injured her left shoulder on a number of occasions and these injuries were accepted by ACC.

[3] They were:

- 11 November 1992 – sprain or strain shoulder (including clavicle/blade);
- 25 January 2007 – rotator cuff sprain left;
- 27 February 2008 – sprain of shoulder and upper arm left;
- 31 August 2010 – rotator cuff sprain left; and
- 13 March 2014 – rotator cuff sprain left.

[4] On 14 June 2019, the appellant injured herself when she tripped over a concrete bollard while holding her daughter, aged one. She over corrected in order to prevent a fall onto her baby falling forward with her left arm out to balance herself and protect her daughter.

[5] She initially heat-packed and iced the shoulder but the pain persisted. She went to her GP on 5 July 2019. He lodged an ACC45 injury claim form for a left shoulder sprain, which ACC accepted.

[6] On 15 July 2019 she had an x-ray and ultrasound. Dr Newnham, radiologist, concluded:

Subacromial subdeltoid bursitis.

Probable bursal surface partial thickness tear as described, no evidence of progression to a full thickness tear.

[7] On 13 February 2020, Dr McKenzie, musculoskeletal pain specialist, assessed the appellant. He noted that she had a previous left shoulder injury from 2009 while she was at Police College.

[8] Dr McKenzie records:

With the recent injury there has been a change in pain and she is getting severe catching pain much worse than before i.e. this tended to occur if she was reaching out with her arm and then applying a slight rotation. The pain was excruciating, made her drop everything else and she would get a shooting pain down her arm. This could last up to a minute and then would have the residual aching which would take longer to settle down. Thankfully she has not had such an event over the last couple of months.

[9] Dr McKenzie also noted that since her 2009 accident at Police College:

... she has had ongoing pain in the shoulder despite being very diligent with rehab strengthening exercises. The shoulder has never felt right, often feels it is not positioned quite correctly. She saw Perry Turner and myself and an MRI scan was underwhelming i.e. it showed a small intrasubstance infraspinatus tear but otherwise normal.

[10] On 27 February 2020, the appellant had an MRI on her left shoulder. It was interpreted by Dr Busby, radiologist. It showed:

- (i) Intrasubstance anterosuperior infraspinatus and anterior supraspinatus tears.
- (ii) Subacromial – subdeltoid bursitis.
- (iii) Thickening acromial origin coracoacromial ligament.
- (iv) Features suggestive but not diagnostic of adhesive capsulitis.
- (v) Uncomplicated proximal humeral enchondroma.

[11] On 11 March 2020, Dr Peter McKenzie reported further:

The MRI scan does show a worse shoulder since 2014, i.e. she now has a supraspinatus tear along with the infraspinatus tear, subacromial bursitis and thickening of the acromion origin of the coracoacromial ligament.

[12] On 16 June 2020, Mr Turner, orthopaedic surgeon, assessed the appellant and in a report sought ACC approval for left shoulder arthroscopic bursectomy, debridement and acromioplasty.

[13] Under the heading “causal medical link between proposed treatment and covered surgery” Mr Turner said:

Harriet had recurrent injuries to her left shoulder, the latest one on the 14.09.2019 when she slipped and fell while holding on to her daughter. Harriet has had ongoing recurrent pain with above head activities, pain that radiates down over the side of her arm and some stiffening of her glenohumeral joint, some tightening and tension through her trapezius, headaches up into the base of her skull and tight shoulders. This is typical of recurrent bursitis and adhesive capsulitis. Imaging has shown bursitis and some degree of adhesive capsulitis with a thickened coracoacromial ligament especially around the acromial origin. She has intrasubstance tears of the infraspinatus and anterior supraspinatus, not full thickness. Because she has a thickened infraspinatus teres minor and coracoacromial ligament she is more prone to having bursitis. The bursa gets pinched within these two and gets inflamed setting off a cascade of events of pain in the shoulder, stiffness and trapezial spasm and pain. Harriet

would benefit from a left shoulder arthroscopic bursectomy, debridement and acromioplasty. The operation would allow Harriet's shoulders to become less prone to irritation and bursitis causing the ongoing painful symptoms. Harriet would therefore be able to restore strength and function to her shoulder and enable her to return to all normal daily activities and work commitments.

[14] On 24 August 2020, Dr Fong, the Corporation's clinical advisor, provided comment. He concluded:

In summary, the client is suffering from her left shoulder longstanding subacromial impingement, subacromial-subdeltoid bursitis and rotator cuff tendinopathy/tear. This condition is longstanding and recurrent. This is a gradual process condition symptomatically aggravated by the accident of 14/06/2019 but not caused by it.

[15] On 27 August 2020, ACC declined cover for left shoulder bursitis and declined to fund the recommended surgery. It decided that the need for surgery was not primarily due to the appellant's injury on 14 June 2019.

[16] On 9 February 2021, Mr Turner provided a further report. On the issue of a causal link between her accident and her left shoulder bursitis, Mr Turner said:

Yes. An accident results in inflammation. The left shoulder bursa was clearly inflamed (bursitis). This was adjacent to her area of injury. I think there is a direct causal link between (her) accidents and her bursitis.

Furthermore, in answer to the question:

In your opinion is there any evidence that (the appellant's) injury was caused wholly or substantially by a gradual process disease or infection?

No. Although (the appellant) has had multiple injuries to her shoulder each scan and subsequent examination shows intrasubstance injuries to her shoulder but no full thickness component.

This change following her surgery in 2019 with subsequent investigations on the 27.02.2020 which showed advancement of the tearing of the infraspinatus and anterior supraspinatus of her shoulder and surrounding bursitis and adhesive capsulitis.

[17] In a further report of 23 February 2021, Mr Turner said:

Harriet's shoulder pathology changed on the day that she fell with her young daughter. She slipped and fell injuring her left shoulder while carrying her daughter on 14.06.2019.

[18] He also said that previous to the accident:

Her left shoulder had been seen to be inflamed without any evidence of full thickness tears. Following this injury she had evidence of full thickness tearing of the rotator cuff ... she had clear changes in her tendon following this accident.

[19] Dr Fong provided a response on 18 March 2021. He said:

The ultrasound of 2014 and subsequent ultrasound of 2019 have shown a progression and MRI scan of 27/02/2020 again has shown a partial thickness tear of the supraspinatus. Ultrasound 2019 reports there is no progression of the rotator cuff tear and MRI shows similar changes in the rotator cuff of partial thickness tear. i.e. there is no clear evidence of any significant progression of the rotator cuff tear. Even if there progression of rotator cuff tear in the presence of ongoing subacromial impingement, this is part and parcel of the natural history of this condition. This is not a traumatic condition.

[20] Mr Turner provided a final report on 16 April 2021. In it he said:

Bursitis is not a static condition. It is a dynamic condition. If someone tears their rotator cuff they very much have a bursitis. They have a very strong, acute inflammatory reaction both of the synovial lining of the joint and of the surrounding bursa. This is exactly what happened in (the appellant's) case. Dr Fong's misrepresentation of chronic bursitis as opposed to an acute rotator cuff tear with acute bursitis should not be used in (the appellant's) case to decline her injury claim. They are two very different conditions.

The Appellant's Submissions

[21] Ms Howard submits there is a strong causal link between the 2019 accident and the appellant's left shoulder supraspinatus tear with bursitis.

[22] She refers to the traumatic nature of the mechanism of injury when in a reactive motion to stop herself falling onto her daughter after she tripped, she jerked her left arm up.

[23] She submits it was a significant injury with instantaneous onset of symptoms.

[24] She relies substantially on Mr Turner's evidence. His assessment is that the appellant's shoulder pathology changed on the day she fell with her young daughter.

[25] She refers to the radiological evidence and the fact that Mr Turner noted new tearing following the 2019 accident as compared with the MRI scan taken in 2014.

[26] She also notes Mr Turner's report of 16 April 2021 in which he says:

Bursitis is not a static condition. It is a dynamic condition. If someone tears their rotator cuff they very much have a bursitis. They have a very strong acute inflammatory reaction from the synovial lining of the joint and the surrounding bursa. This is exactly what happened in (the appellant's) case.

[27] Ms Howard submits that it is important that it is the treating surgeon in this case who is supportive of the causative link.

[28] She submits that in this case, the injury was not caused wholly or substantially by a gradual process.

[29] She refers to Judge Ongley's decision in *Hanmore v ACC*¹ where His Honour says, concerning the word "substantial":

... I take that to mean a cause of substance rather than the main cause.

[30] She submits that the evidence of degeneration present in the appellant's shoulder is not at such a level that it was the whole or substantial cause of her presentation.

[31] Ms Howard, while acknowledging the appellant's prior left shoulder injuries, notes that as a policewoman the appellant was otherwise fit and healthy and maintained a regular fitness regime.

[32] She also submits that while the appellant may have, at some stage in her life, needed surgery to her shoulder on account of a gradual process condition, in this case it was the injury that damaged her shoulder sufficiently for her to require surgery.

The Respondent's Submissions

[33] Ms Hansen submits that in this case, there is no evidence of an acute injury upon a chronic injury.

[34] She refers to the scans taken in 2014, 2019 and 2020, and Mr Fong's evidence that they indicate pre-existing subacromial impingement and any deterioration or

progression of a pre-existing rotator cuff tear is part and partial of the natural history of such a condition. She submits that Mr Fong provides a cogent and logical explanation of the appellant's shoulder condition.

Decision

[35] There is no doubt at all in this case that the appellant has a long history of left shoulder injuries dating at least from 2007.

[36] The respondent has covered left shoulder injuries of the appellant in 2007, 2008, 2010 and 2014.

[37] It is plain from the narrative that in keeping with the role as a policewoman the appellant prided herself in maintaining a high level of fitness.

[38] It is also acknowledged that at the time of her accident the effects of the earlier injuries were not spent. They were still present, but the evidence is that they were at a well managed level.

[39] I find that the mechanism of injury here, namely her tripping and falling forward with the weight of her one-year old child resulting in her hyperextending her left arm and shoulder was sudden and moderately traumatic. As she described it to the Reviewer "the best way to explain it is that by falling forward, with the weight of her, I've hyper sort of extended my shoulder and my arm out".

[40] She went on to explain that for a couple of weeks she "heat packed it, iced it and did the normal what I would do for a, what I believed was just a strain".

[41] However again according to her evidence before the Reviewer:

What occurred was I started noticing that if I was reaching out to turn a tap or mopping and hitting the wall, I was getting a sharp pain that would go right up my arm through my shoulder and ... I instantly want to drop what I was doing.

¹ *Hanmore v Accident Compensation Corporation* [2008] NZACC 145 at [40].

[42] This evidence invites a conclusion that what occurred when she was carrying her child that day was traumatic and thereafter resulted in a sharp pain when she undertook some activities. As Mr Howard put it, there was a significant change in function.

[43] In her submissions on behalf of the respondent Ms Hansen refers to a critique by the Reviewer of Mr Turner's various reports.

[44] I acknowledge that on their face, the criticisms by the Reviewer are open.

[45] One matter that Ms Hansen highlights from the Reviewer's decision is that following the 2019 accident a full thickness rotator cuff tear was not observed, whereas it was in the operation in 2020, more than a year after the accident. The submission is that this is supportive of the proposition that the appellant's presentation has been caused wholly or substantially by a gradual process and therefore excluded by s 26.

[46] The Reviewer also concluded that the mechanism of the accident was "less likely to have caused a traumatic injury", that is, the rotator cuff tear.

[47] The Reviewer noted that Mr Turner did not explain how a tear that appeared fresh at surgery in November 2020 might have been caused by an accident a year and a half earlier.

[48] It is accepted that treating doctors, surgeons and other medical professionals are often the most eloquent advocates for the patient's claim for cover under the Accident Compensation Act and it is plain that Mr Turner is supportive of the appellant's claim.

[49] In her submissions Ms Howard refers to the decision in *Maher v ACC*² where the Court accepted that a mechanism of wrenching was sufficient to cause a rotator cuff tear.

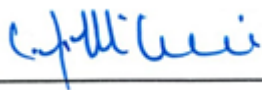
² *Maher v Accident Compensation Corporation* [2015] NZACC 165.

[50] Ultimately however all cases of this kind turn on their own particular facts and circumstances. In his report of 16 April 2021, Mr Turner acknowledges the chronic nature of her shoulder condition. However, his position is that she has suffered a new acute injury.

[51] In this regard, I have no reason to doubt the accuracy of the appellant's description of her injury or the immediate physiological effect it had on her and that when it did not respond to her self help measures she consulted her GP. Accordingly, I am satisfied on her evidence, supported as it is by the conclusions of her treating surgeon, that she did suffer an acute injury to her left shoulder that had already been weakened by earlier injuries. Prior injuries to a part of a person's anatomy are not a bar to there being further covered injuries for that same part of the anatomy so long as the injury is not caused wholly or substantially by a gradual process.

[52] I find, for the reasons given, that the appellant has established on the balance of probabilities that she did suffer an acute injury to her left shoulder on 14 June 2019. Accordingly, the appeal is allowed and the respondent's decision of 27 August 2020 declining cover for bursitis and declining to fund surgery is reversed.

[53] Counsel have leave to file memoranda in respect of costs should the need arise.



Judge C J McGuire
District Court Judge

Solicitors: John Miller Law, Wellington for the appellant
Lisa Hansen, Barrister, Wellington for the respondent