

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2022] NZACC 167      ACR 184/21**

|                  |  |
|------------------|--|
| UNDER            | THE ACCIDENT COMPENSATION ACT<br>2001              |
| IN THE MATTER OF | AN APPEAL UNDER SECTION 149 OF<br>THE ACT          |
| BETWEEN          | LYNDA PENI<br>Appellant                            |
| AND              | ACCIDENT COMPENSATION<br>CORPORATION<br>Respondent |

Hearing: 26 July 2022  
Heard at: Auckland/Tāmaki Makaurau

Appearances: the appellant in person and her support person Jennifer Hay  
Ms F Becroft for the respondent

Judgment: 24 August 2022

---

**RESERVE JUDGMENT OF JUDGE C J McGUIRE**  
**[s 26 Personal Injury and s 67 Entitlements, Accident Compensation Act 2001]**

---

[1] At issue on this appeal is a decision of the Accident Compensation Corporation dated 11 March 2021 declining cover and surgery funding for a right hip gluteus medius and minimus rupture on the basis that it was not caused by an accident on 26 May 2020.

**Background**

[2] On 26 May 2020, the appellant had an accident and injured her right hip while putting out rubbish bins.

[3] Two days later, on 28 May 2020, she attended the Bream Bay Medical Centre with her husband. On that occasion, the appointment was for her husband. However, the GP, Dr Chapman, noted the following:

Subjective

Mentioned injury during husband's consultation. Hurt R Hip when stumbled taking out recycling bins. Twisted hip. Strain?

[4] On 3 June 2020, the appellant had a telephone consultation with Suzie Costelloe, Practice Nurse, at the Bream Bay Medical Centre and an ACC injury claim form was completed. The description of injury was:

Putting rubbish bins out started to lose grip on recycling bins, turned quickly, stumbled, hurt hip and upper leg, not resolving.

[5] The nurse also noted:

Did go to osteopath as could barely walk afterwards. He suggested x-ray. X-ray form has been done, PT has appt next week.

[6] On 8 June 2020, an x-ray of the pelvis showed

No significant joint space abnormality noted. No fractures are seen. The sacroiliac joints are normal. There is no change compared to previous films.

[7] In her statement/submission, emailed on 24 May 2020, the appellant said:

On 26 May 2020 when I was putting the rubbish bins out, I slipped and fell on our sloped driveway and damaged my hip and lower back area. I felt something crack in my hip area when this happened and gingerly moved about for the next two days thinking it was just a sprain. I had a lump form on my right hip which started to throb and hurt so I made an appointment to go to Dr Chapman at Bream Bay Medical Centre. Dr Chapman referred me to a physiotherapist. On 8 June 2020, I was referred to the hospital for an x-ray of my pelvis. I was still in a lot of pain and taking pain killers, but there was no bone damage showing in this x-ray.

[8] On 8 September 2020, the appellant saw Dr Chapman again. Dr Chapman noted:

Back problem, waddling gait for long time. Getting worse as she gets older. Has had osteopathic, physio treatment. Some pain lateral R hip region but not significant hip joint pain. Has had x-rays hips.

...

OE Trendelenberg gait. Difficulty standing on R leg and pelvis drops L.

[9] On 25 October 2020, Dr Chapman referred the appellant to Dr Thompson, Musculoskeletal Physician, for review.

[10] The appellant was seen by Dr Malloy, Musculoskeletal Specialist. He reported on 3 December 2020. Dr Malloy's report included the following:

... Lynda ... presented on 3 Dec 2020 with a history of pain in the right lateral hip area, and less markedly in the right posterolateral thigh, described as dull aching, and sharp on weight bearing, and rated at 31/100 at usual levels and 56/100 at its worst when seen, the latter triggered by standing for sustained periods, lifting significant weight, or walking for more than 10 minutes. The pain has been present for the previous 6 months, after she fell while taking the rubbish out, lost her balance and landed on the right hip. She had acute onset of pain, rated at 63/100 on the visual analogue scale. She saw you as the GP and was treated with non-steroidal anti-inflammatory drugs and pain-relieving medication. She was treated with osteopathy, and underwent x-rays of the right hip, which were reported as normal. She was later treated with chiropractic, with some benefit.

...

She works as a Real Estate Agent, and as a part-time caregiver for her disabled husband. She was working in the garden, walking three-four days a week and playing golf once a fortnight to keep fit.

[11] Dr Malloy also noted:

There was marked disturbance of gait, and pain on weight bearing. There was evidence of pain arising from the tendons of insertion at the greater trochanter area on the right, but also pain arising from the lumbar spine. Initially, MRI of the right hip was requested. Should this not yield a useful diagnosis, MRI of the lumbar spine could be contemplated.

[12] An MRI scan of the right hip was taken on 11 December 2020.

[13] The MRI scan revealed:

1. Complete rupture of the gluteus minimus tendon at its complete rupture of the gluteus medius tendon with associated mild fatty infiltration of the gluteus minimus muscle belly and severe fatty infiltration of the gluteus medius muscle belly. Associated greater trochanter effusion
2. Mild changes of right hip joint osteoarthritis
3. Anterosuperior and superior labral tear and associated paralabral cyst remodelling the acetabulum.

4. High grade partial tear of the ligamentum teres
5. Ischiofemoral impingement

...

[14] The appellant saw Dr Chapman again on 30 December 2020 and indicated that the right hip pain was increasing and that she had extensive problems in the right hip region. He referred her to Mr Bradley, Orthopaedic Surgeon, for review.

[15] Mr Bradley saw the appellant and reported on 4 February 2021. He said:

She presents with a severe handicap secondary to her injury.

... This event has caused a complete rupture and major physical disability. He suggested tendon transfer surgery.

[16] On 25 February 2021, Mr Bradley completed an Assessment Report and Treatment Plan, claiming surgery funding. Under the heading, Causal Medical Link between Proposed Treatment and Covered Injury, Mr Bradley wrote:

Lynda was carrying a recycling bin down her driveway when she slipped and fell. Her leg twisted and she fell in a tumble with a combination of wrenching and direct impact. She had immediate pain and realised immediately weakness when attempting to mobilise. She has had an abductor sparing gait for some years, probably indicating more of a chronic condition, however, functioned normally and had no pain. This event has caused a complete rupture and major physical disability.

Lynda's main complaint is not pain but more of weakness and instability. The problem leaves her essentially unable to walk. When she moves around the house she clings to furniture for support. She has just begun using a walking stick which she finds helpful.

She was previously active both in the community and at home working in her garden, doing chores around the house and most importantly, caring for her husband who has had a stroke and relies on her fulltime care.

[17] On 9 March 2021, Mr Bradley's rooms requested an escalation of priority for the surgery application, noting the appellant's condition was deteriorating.

[18] ACC's Clinical Advisor, Ms O'Loughlin, in a report of 10 March 2021 was of the view that the appellant had suffered a sprain in the accident, but that sprain would have resolved by that time. She did not think that the rupture was injury related and

described this as a further progression of underlying tendinosis. She noted that tears of the gluteus medius and minimus in the elderly population were common.

[19] On 11 March 2021, the Corporation issued a decision declining cover for the right hip gluteus medius and minimus rupture and declined surgery funding.

[20] On 15 March 2021, the Corporation issued a further decision declining weekly compensation on the basis that the appellant's incapacity was not injury related.

[21] On 23 March 2021, the appellant applied for a review of the Corporation's cover/surgery decision.

[22] On 7 April 2021, Mr Bradley provided further advice:

... There was evidence on the MRI scan of extensive degenerative change, particularly in gluteus minimus which shows a large amount of old fatty muscle atrophy and evidence of long term degenerative change in the abductor muscles. Due to this, ACC have decided that this is a natural progression of degenerative condition rather than the result of a specific injury. My argument would be that even that there is evidence of degenerative change in those muscles, the resulting complete rupture of the remaining gluteus muscles has left the patient with a severe functional deficit and if the injury had not occurred, her level of function and independence would not be as severely affected as it is. This is a very difficult argument to win and we are going to proceed today with private medical insurance to facilitate surgery rather than spend many months arguing a difficult case.

[23] The matter proceeded to review on 5 July 2021 by AVL. Unfortunately, there were connection issues and the appellant was unable to take part in the hearing. The review proceeded and the Reviewer found against the appellant.

[24] Notice of appeal was filed on 27 July 2021.

[25] On 28 July 2021, Dr Chapman wrote:

Previous fractured left ankle ... 14 Oct 2004 ... requiring internal fixation. With this injury and the requirement to keep weight off the left side, would have put increased strain on the abductors of the right hip. This is likely to have precipitated the initial development of tendinosis R hip region and subsequent complete rupture of the gluteus minimus and gluteus medius tendons when Lynda stumbled and fell 26 May 2020.

[26] The Clinical Advisory Panel (CAP) provided a report for ACC on 5 May 2022. It was of the view that the mechanism of injury, a stumble or fall, when taking out the recycling bins did not have sufficient force to tear gluteal tendons. In respect of the radiological evidence, the CAP said that the MRI scan noted multiple chronic features and that each was consistent with chronic deterioration of the soft tissues of the right hip joint. The CAP said there were no features on imaging indicating any acute injury.

[27] The CAP also said:

The CAP agreed with Mr Lyndon Bradley, Orthopaedic Surgeon's assessment that Ms Peni had pre-existing gluteal tendinopathy with a severe gait derangement over many years. However, his opinion that her gluteal tendons ruptured on 26/06/2020 is speculative at least and not consistent with the objective medical evidence as discussed above.

...

There were no recorded signs of severe acute internal disruption such as bruising, severe swelling, or a recorded reduced range of motion, which would be expected with acute tendon tearing. According to the available records, Ms Peni's right hip function deteriorated slowly over some months and then she was reviewed by the specialists.

...

In summary, Mr Bradley's opinion was that the accident on 26/05/2020 caused Ms Peni's "partially torn and frail" gluteal tendons to tear completely. The CAP noted that if tendons had torn acutely, then there would have been bruising, swelling and immediate loss of function, which was not the case here.

The clinical picture was of a gradual functional loss over some months.

### **Appellant's Submissions**

[28] In her written submission, the appellant said:

On 26 May 2020 when I was putting the rubbish bins out, I slipped and fell on our sloped driveway and damaged my hip and lower back area. I felt something crack in my hip area when this happened and gingerly moved about for the next two days thinking it was just a sprain. I had a lump form on my right hip which started to throb and hurt so I made an appointment to go to Dr Chapman at Bream Bay Medical Centre. Dr Chapman referred me to a physiotherapist. On 8 June 2020, I was referred to the hospital for an x-ray of my pelvis. I was still in a lot of pain and taking pain killers, but there was no bone damage showing in this x-ray. I started using a walking stick then, just to give me some relief and stability when moving round. I also started taking anti-inflammatory tablets at this time. I was referred to John Malloy for an MRI scan in December

2020 which showed a complete rupture of gluteus maximus tendon. Mr Malloy gave me a cortisone injection to get me some pain relief over the holiday period.

... The right hip pain increased over the holiday period and on 12 January Dr John Chapman referred me to Lyndon Bradley. It was the holiday period so I had to put up with pain until I went to Dr Lyndon Bradley on 4 February 2021. I completed an ACC referral on 9 February after Dr Bradley did his report and he was very firm in his opinion that I needed surgery to correct what he referred to as a severe handicap diagnosed as full complete rupture of gluteus medius and minimus with complete defunctioning.

This injury has changed my whole life. Before the accident I was previously very active both in the community and at home working in the garden, doing chores around the house and caring for my husband who had a stroke 4 years ago and is wheelchair bound. I was also a keen golfer and did a lot of walking as well as selling real estate. There is no way I could have managed all this activity if as has been suggested I had a degenerative complaint in my hip and lower back. This is not the case. I was fit and healthy until my fall.

[29] In oral submissions to the Court, the appellant said that she knew she injured her hip in the accident on 26 May 2020. She took pain killers and anti-inflammatory medication until she saw Dr Chapman.

[30] She told the Court she saw Mark Cunningham, Chiropractor, but he “couldn’t do anything for me” and she got a referral for an MRI. She said that John Malloy, whom she saw on 3 December 2020 was the first person to take her injury seriously and diagnosed a high-grade tear.

[31] On 4 February 2021, the appellant saw Mr Bradley who, she said, described the torn ligament as “the worst he had ever seen”.

[32] She believes that people who haven’t seen her, have made assumptions.

[33] She said she needed pain killers and steroid injections and that on 15 June 2022 she underwent surgery through the public system.

[34] She is critical of the fact that ACC’s advisors have not met or seen her.

### **Respondent’s Submissions**

[35] Ms Becroft framed the medical questions to be answered in this case: “Where the gluteal tears caused by the accident?”.

[36] Ms Becroft submits that the history and mechanism of the accident, together with its clinical course and the radiological evidence does not establish a causal link between the accident and the gluteal tears.

[37] Ms Becroft notes that the initial consultation with Dr Chapman was in the context of a doctor's appointment for her husband. She notes that the next consultation with the practice nurse on 3 June 2020 was via telephone. It was a result of this consultation that a claim form was completed for a hip/thigh sprain injury.

[38] Ms Becroft notes that the next consultation with Dr Chapman was on 8 September 2020, some three months later, which ranged over a "back problem, waddling gait for long time". On that occasion, the Dr Chapman also noted "some pain lateral R hip region but not significant hip joint pain".

[39] On that occasion, Dr Chapman also noted the Trendelenberg gait, and difficulty standing on her right leg. He also noted "paralysis hip abductors" and referred her to Grant Thompson for assessment.

[40] The appellant was seen by Dr Malloy, who noted a markedly disturbed gait and who referred her for an MRI, which revealed the tendon ruptures. Ms Becroft notes that the report revealed that multiple tendons in the hip were affected.

[41] Ms Becroft refers to the report of Mr Bradley of 4 February 2021 and submits that Mr Bradley has not had sufficient regard to the existing deterioration that the appellant had in that region.

[42] She submits that Ms O'Loughlin considered the deterioration and pre-existing changes and that her conclusion, that the appellant's symptoms are not related to the covered injury, is to be preferred.

[43] Ms Becroft refers to Mr Bradley's further report of 7 April 2021 where he acknowledges that the MRI scan showed evidence of extensive degenerative change.



She submits that there is a degree of acceptance on the part of Mr Bradley of ACC's decision.

[44] She refers to the CAP report which she says had four key factors. First, the commonality of this condition, second, the prior Trendelenberg gait, third, the clinical course of a gradually worsening condition, and fourth, the radiological evidence of widespread issues throughout the hip, not just the gluteus rupture.

### **Appellant's Reply**

[45] The appellant emphasised in reply that her accident involved her falling heavily on a sloping driveway and she questions how the CAP is in a position to question the degree of force involved in her accident.

### **Decision**

[46] On 26 May 2020 when the appellant was putting out rubbish bins, she slipped and fell on the sloping driveway and according to her, damaged her hip and lower back area.

[47] She told the Court she had a lump on her right hip which started to throb and hurt. She consulted Dr Chapman. This consultation was on 28 May 2020, two days after the accident. The consultation occurred during what is assumed to be a planned consultation between her husband and Dr Chapman.

[48] The appellant, apart from being in employment as a Real Estate Agent, is the carer for her husband who, following a stroke some 4 years ago, is wheelchair bound.

[49] Although at the time of the accident the appellant was age 70, it is plain that then and now she lives an extremely active life.

[50] The initial consultation in the context of her husband's appointment with Dr Chapman appears to have been extremely brief and involved no examination by the doctor. It is noted that at the time, 28 May 2020, very strict Covid restrictions had come into force.

[51] The appellant's next consultation was by telephone with the practice nurse on 3 June 2020. The practice nurse notes:

Did go to osteopath as could barely walk afterwards. He suggested x-ray. X-ray form has been done, PT has appt next week.

[52] An injury claim form was completed the same day, including the description of injury mentioned earlier, that was "not resolving".

[53] When seen by Dr Malloy on 3 December 2020, he noted the following:

[The appellant] presented on 3 Dec 2020 with a history of pain in the right lateral hip area, and less markedly in the right posterolateral thigh, described as dull aching, and sharp on weight bearing, and rated at 31/100 at usual levels and 56/100 at its worst when seen, the later triggered by standing for sustained periods, lifting significant weight, or walking for more than 10 minutes. The pain has been present for the previous 6 months, after she fell while taking the rubbish out, lost her balance and landed on the right hip. She had acute onset of pain, rated at 63/100 on the visual analogue scale. She saw you as the GP and was treated with non-steroidal anti-inflammatory drugs and pain-relieving medication.

[54] The MRI scan undertaken on 11 December 2020 revealed:

Complete rupture of the gluteus minimus tendon at its complete rupture of the gluteus medius tendon with associated mild fatty infiltration of the gluteus minimus muscle belly and severe fatty infiltration of the gluteus medius muscle belly. Associated greater trochanter effusion

[55] On 30 December 2020, Dr Chapman saw the appellant again. Dr Chapman noted that the appellant "had Trendelenberg gait for some time, but right hip pain since had fall."

[56] In his report of 7 April 2021, Mr Bradley, acknowledges that the MRI scan contains evidence of extensive degenerative change, particularly in the gluteus minimus and in the abductor muscles. He then says"

... due to this ACC have decided that this is a natural progression of degenerative condition rather than the result of a specific injury. My argument would be that even if there is evidence of degenerative change in those muscles, the resulting complete rupture of the remaining gluteus muscles have left the patient with a severe functional deficit and if the injury had not occurred her level of function and independence would not be as severely affected as it is.

[57] Mr Bradley then adds:

This is a very difficult argument to win and we are going to proceed today with private medical insurance to facilitate surgery rather than many months arguing a difficult case.

[58] Mr Bradley's words regarding a difficult case and a difficult argument to win, is certainly borne out by the conclusions of the CAP on 5 May 2022. Plainly there was a great deal of chronic degeneration, as the CAP found, in her right hip.

[59] It is noted also that the CAP found:

There were no signs of severe acute internal disruption such as bruising, severe swelling or a recorded reduced range of motion, which would be expected with acute tendon tearing.

[60] While that is so, so far as the medical records are concerned, we have the appellant's evidence of what occurred as a result of her accident:

I felt something crack in my hip area when this happened and gingerly moved about for the next two days thinking it was just a sprain. I had a lump form on my right hip which started to throb and hurt so I made an appointment to go to Dr Chapman at Bream Bay Medical Centre. Dr Chapman referred me to a physiotherapist. On 8 June 2020, I was referred to the hospital for an x-ray of my pelvis. I was still in a lot of pain and taking pain killers, but there was no bone damage showing in this x-ray. I started using a walking stick then, just to give me some relief and stability when moving round. I also started taking anti-inflammatory tablets at this time.

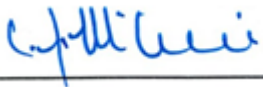
[61] I am satisfied on the basis of all that I have read regarding the accident and what followed so far as the appellant is concerned, that this was indeed a traumatic injury, which completely ruptured the remaining gluteus muscle as Mr Bradley contends. And I am equally satisfied, having seen and heard her that she is a person used to getting on with life and making the best of what she was able to do for herself, following this injury, notwithstanding that the injury was a significant one. She presents as a person who has always kept herself fit and even when she injured herself, in this significant accident, the appointment with her doctor that followed was primarily for her invalid husband.

[62] Her proactive attitude of getting on with life should not be held against her in the context of an ACC claim, when measured against what might be regarded as a typical response or reaction to such an injury.

[63] Accordingly, I find on the balance of probabilities that ACC's decision of 11 March 2021 declining cover and surgery funding for a right hip gluteus medius and minimus rupture on the basis that it was not caused by an accident on 26 May 2020, was wrong. She is therefore granted cover.

[64] The appeal is therefore allowed.

[65] Should there be any issues as to costs, the parties have leave to file memoranda in respect thereof.



Judge C J McGuire  
District Court Judge

Solicitors: Medico Law, Auckland for the respondent.