IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 139 ACR 114/20

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	FELICITY VAN DER LEE Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 19 July 2021

Heard at: Christchurch/Otautahi

Appearances: The Appellant and her husband
D Tuiqereqere for the respondent

Judgment: 17 September 2021

RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Entitlements s 117, s 67 and Schedule1 Accident Compensation Act 2001]

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[1] At issue on this appeal are two decisions of the Accident Compensation Corporation. The first on 23 October 2019, declining cover for a tendon tear in the appellant's right elbow and declining to fund surgery to treat this. The second, on 12 November 2019 declining to pay weekly compensation on the basis that the appellant's incapacity was due to the lateral epicondylitis (tennis elbow) and not her covered injuries.

[2] The Corporation's decisions were made on the basis it considered the tendon tear in the appellant's right elbow was most likely caused by epicondylitis (tennis

elbow) and that this was a pre-existing gradual process injury, rendered symptomatic but not caused by the accidents in respect of which she has cover. The appellant disputes this.

Background

[3] The appellant has cover for injuries to her right elbow in respect of two separate accidents. One accident occurred when she was pulling out plants in September 2018 and the other occurred when she hit her elbow on a car door in May 2019.

[4] The claims for surgery and weekly compensation that arise in this appeal were lodged under the claim for the May 2019 car door accident. However, the Corporation considered both her accidents when issuing the decision and it is the gardening accident which the appellant now says is the cause of her problems.

[5] The appellant has cover for a sprain of the right elbow as a result of the gardening accident that occurred while she was removing weeds and plants in September 2018. The appellant reported she experienced pain in her right elbow, either when pulling the plant out of the ground, or when she was using a spade to dig into the ground.

[6] On 3 October 2018, the appellant visited a physiotherapist due to discomfort since the accident. She had nine physiotherapy sessions between then and 21 December 2018. The notes from the physiotherapist of 4 October 2018 give a provisional diagnosis of lateral epicondylitis right elbow. The report noted she was still working and doing horses and that her pain was activity related.

[7] On 16 November 2018 the appellant received a hydrocortisone injection and ultrasound scan of the right elbow. The ultrasound revealed some minor signs of degeneration, including some thickening and changes to the common extensor origin, but no significant injury or tear. The radiologist's report records:

> Comparative imaging on both sides has been performed thickening of the right common extensor is shown and there is focal hypoechoic change within the

> substance of the tendon over a 4-5 mm diameter. Vascularity is significantly increased with the local tenderness. There is no calcification.

[8] The appellant's symptoms appear to have initially settled with the physiotherapist's note of 21 December 2018 saying:

> Elbow pain settled – still protective of certain movements. Working on scap control and the shoulder is a lot better.

[9] However, on 13 May 2019 she hit her right elbow on a car door which appears to have led to a worsening of symptoms.

[10] The appellant visited her GP on 15 May 2019 and a claim was lodged for a wound to her elbow and forearm. Cover was granted on the same day.

[11] On 31 May 2019 the appellant's GP referred her to Mr Dawe, an orthopaedic surgeon. Mr Dawe saw the appellant on 19 July 2019 and arranged for an x-ray of the elbow. Mr Dawe noted some swelling and tenderness however the x-ray did not identify an injury and an MRI was arranged. This was performed on 1 August 2019 which identified a tear of the "common extensor tendon origin".

[12] On 9 July 2019 Mr Dawe applied for funding to repair the tear. In the application to the Corporation Mr Dawe stated that he thought there was a direct link between the need for surgery and what he described as the "wrenching incident".

[13] On 12 September 2019 Mr Dawe provided a further note to the Corporation expanding on his previous statement that he thought there was a causal link noting:

> Because of significant ongoing pain affecting the lower aspect of the elbow and because the scan shows a tear of the common extensor origin surgical treatment is now indicated. The tear of the common extensor origin could only have occurred post trauma.

[14] Mr Fong, Orthopaedic Surgeon, reviewed the claim for the Corporation on 14 and 22 October 2019.

[15] Mr Fong advised that in his opinion the tear was a result of lateral epicondylitis (tennis elbow) which is a gradual process condition and unlikely to be the result of any trauma. He said:

> MRI of 01/08/2019 shows full thickness tear of anterior fibre of common extensor origin, collateral ligaments intact. Full thickness tear anterior fibre common extensor origin. This is diagnostic of common extensor origin tendinopathy/tear commonly called tennis elbow/lateral epicondylitis. Lateral epicondylitis/tennis elbow are gradual process conditions. The tear of the common extensor origin represents an advanced stage of tennis elbow/lateral epicondylitis (i.e. stage 3 disease, i.e. an advanced degenerative condition. This tear is not caused by any trauma.
>
> Any way the described mechanism of injury is not a likely cause to the described accident of either hitting the elbow on a car or, the now described accident of straining the elbow while gardening. It is not a likely cause for a traumatic common extensor origin tear anyway.
>
> The statement that the tear of the common extensor origin could only have occurred post trauma is incorrect. As the common extensor origin tears are common in tennis elbow/lateral epicondylitis, it represents an advanced stage of this degenerative condition.

[16] On 23 October 2019, the Corporation issued a decision declining funding for surgery, and cover for lateral epicondylitis and the tear of the common extensor origin.

[17] On 30 October 2019, Mr Dawe completed a medical certificate certifying that the appellant was unfit to work more than two hours per day for one month.

[18] The Corporation treated this as an application for weekly compensation. On 12 November 2019, the Corporation issued a letter declining to pay weekly compensation on the basis that the incapacity was due to the lateral epicondylitis and not the appellant's covered injuries.

[19] On 4 November 2019 Mr Dawe provided a letter responding to the opinion of Mr Fong. Mr Dawe said he disagreed with Mr Fong's opinion that the described mechanism of injury was an unlikely cause of a tear, noting:

> I have seen many patients over the years who have sustained tears to the common extensor origin in an injury identical to that sustained by Ms van der Lee.

[20] Mr Dawe also said:

> Dr Fong outlines a number of stages of the condition of lateral epicondylitis, but the statement from his completely irrelevant, as Ms van der Lee did not have any symptoms in her elbow prior to the injury, and there is not any imaging to support Dr Fong's assumption that there was pre-existing epicondylitis of the elbow prior to the injury occurring.
>
> In my opinion patients who have epicondylitis of the elbow, particularly on the lateral side, always have symptoms from this condition. There is no clinical or other evidence to suggest that Ms van der Lee had a pre-existing condition of the elbow.

[21] On 5 December 2019 the appellant lodged a review application.

[22] On 4 February 2020 Mr Fong provided a further report. Mr Fong explained that he would have expected the ultrasound in November 2018 to have identified the tear of the common extensor origin if it had been present at the time. He also explained that the scan showed other signs of lateral epicondylitis including:

> Focal hypoechoic changes within the substance of the tendon and increased vascularity, as reported in the ultrasound, are typical findings of lateral hypoechoic.
>
> …
>
> Pulling out weeds represents a control low energy event, not a likely cause of a traumatic tendon tear and certainly not the cause of lateral hypoechoic/tennis elbow. Lateral epicondylitis (tennis elbow) is not a single episode injury condition. It is a gradual process condition.

[23] On 24 April 2020 the Reviewer issued a decision upholding the Corporation's decisions.

[24] On 31 August 2020 Mr Dawe provided a further report in which he raised a new possibility namely that the hydrocortisone injection of 16 November 2018 may well have been a significant causative factor.

[25] On 29 September 2020, the case was reviewed by the Corporation's Clinical Advisory Panel (the Panel). On that occasion the Panel comprised of four orthopaedic surgeons, one physiotherapist, one sports medicine specialist and one occupational medicine specialist. The Panel stated:

> The clinical advisory panel reviewed the available information on 29/09/2020 and preferred Mr Fong's opinion. We noted that Ms van der Lee's right tennis elbow is due to a gradual onset process of common extensor origin deterioration – commonly called tennis elbow. This includes the thickening, hypoechoic signal and the increased vascularity on the 16/11/2018 ultrasound scan. The common extensor origin is relatively superficial and easy to scan, and it is most unlikely that a full thickness tear was missed on the November 2018 scan. It is more likely that there was no tear on the November 2018 ultrascan, and this gradually appeared later in the August 2019 MRI scan, as part of the natural progression of Ms van der Lee's right tennis elbow. There is no evidence that the cortisone injection or the acupuncture/dry needling caused the common extensor origin tear.

[26] The Panel disagreed with Mr Dawe's suggestion that lateral epicondylitis/tennis elbow is always symptomatic, explaining that it can be completely asymptomatic and can be symptomatically aggravated by work activities or movements.

[27] On 21 January 2021 Mr Dawe provided a further report. He concluded:

> In summary the right common extensor origin tear has been described by the ACC as being solely degenerative in nature but there are a number of other factors which are at least equally important, namely the effects of injury, further repetitive trauma to the area and the effect of the hydrocortisone injection.

The Appellant's Submissions

[28] The following submissions were made on behalf of the appellant:

[a] The appellant had no issues prior to the accident with her right arm.

[b] When the accident occurred the appellant was involved in heavy work. In his statement the appellant's husband said:

> The work was heavy, certainly not light weed pulling as postulated by Dr Fong.
>
> …

> This involves digging deep, using your spade as a lever and then lifting it all into the wheelbarrow, to call this "a control low-energy event" is very far from the truth.
>
> We would have been doing this hard, labour intensive work for about 90 minutes when the wrenching injury occurred, and Felicity was in severe pain.

There is also the statement from Jillian Shepherd who said:

> Felicity pushed/pounded the spade into the ground, it didn't fully bite into the clay just stopped, resulting in Felicity jarring her arm and shoulder, she stopped immediately as she was in too much pain to continue. We went back to the house, and didn't continue that day.

[c] The appellant refers to the University of Cambridge article produced in the bundle of documents which says that in most cases of lateral epicondylitis no obvious underlying cause can be identified. This means that there will be cases where the cause can be identified. Reference is next made to Mr Dawe's report of 21 January 2021 where in reference to the same article Mr Dawe notes that lateral epicondylitis may develop from a variety of activities that involve excessive and repetitive use of the forearm extensors, such as typing, playing the piano and various types of manual work. This is followed by Mr Dawe saying that the work that the appellant was doing on 23 September 2018 falls into this category.

[d] Reference is made to the same report of Mr Dawe who says:

> The effect of the hydrocortisone injection of 16.11.2018 as a causal factor in the tear of the common extensor origin has been dismissed by Dr Fong and the other ACC reviewers. But in my opinion based on the evidence presented above, it is on the balance of probabilities the cause of the tendon rupture.

[e] The submission is made that the clinical advisory panel completely ignored the affidavits that the appellant provided.

[29] In a written submission dated 9 February 2021, tendered to the Court, these points are emphasised:

[a] At the time of the accident on 23 September 2018 "it was definitely not a control low energy event it was hard work digging out large plants with heavy root balls from a hard clay soil and replanting them in the desired area".

[b] The assertion by Dr Fong that there was an underlying medical condition is wrong. There was no such condition. The appellant reminds the Court that her right arm is not her dominant arm. Both her dominant left arm and her right arm were absolutely normal prior to the accident.

[c] The case of *Lyth v ACC*[1] is referred to and the submission is made that on the balance of probabilities the personal injury was not caused wholly or substantially by aging.

[d] There is no reason to not prefer Mr Dawe's opinion, as a highly acclaimed orthopaedic surgeon who has seen the appellant several times, over that of Dr Fong and his CAP colleagues who have never seen the appellant.

[e] Reference is made to *Dew v ACC*,[2] where the Court said:

> To assert that lateral epicondylitis is not caused by trauma is wrong in law.

This is supported by the journal article produced to the Court and in the ACC Review 45 document of July 2009, which says that the occurrence of epicondylitis as a consequence of direct trauma such as a blow is considered rare.

[f] Reference is made to *Nolan v ACC*[3] where the Court acknowledged that a temporal connection is an important piece of circumstantial evidence.

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1 *Lyth v Accident Compensation Corporation* [2010] NZACC 198.
2 *Dew v Accident Compensation Corporation* [2011] NZACC 217.
3 *Nolan v Accident Compensation Corporation* [2004] NZACC 333.

[g] Reference is also made to the case of *Ambros v ACC*[4] and the submission is made that if medical science is prepared to say there is a possible connection, a Judge may, after examining all the evidence decide that causation is probable.

[h] Reference is also made to the case of *Nand*,[5] to the effect that causation in this jurisdiction is not decided on a show of hands rather it is an issue of the relative quality of competing evidence.

[i] It is noted on behalf of the appellant that the Clinical Advisory Panel has not challenged any of the evidence provided by Dr Churchill, Ms Sheppard or the appellant's husband.

[30] In further submissions dated 13 July 2021, these points are made:

[a] The clinical advisory panel ignores the statement in the article on lateral epicondylitis in the Bone and Joint journal 2013, that the activities as carried out by the appellant on 23 September 2018 can cause lateral epicondylitis as evidenced in Mr Dawe's report from 21 January 2021.

[b] The statement by the clinical advisory panel that there is no objective evidence of any atypical trauma to the common extensor origin from the cortisone injection when Dr Churchill indicates there was corticosteroid extravasation.

[c] Issue is taken with ACC's counsel seemingly discrediting the statement from Jill Sheppard as being slightly different from the description of the accident.

[d] Contrary to ACC's counsel's submission, Mr Dawe has identified evidence that the hydrocortisone injection in this case is on the balance of probabilities a very likely cause of the tear.

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4 *Ambros v Accident Compensation Corporation* [2007] NZCA 304, [2008] 1 NZLR 340.
5 *Nand v Accident Compensation Corporation* [2012] NZACC 157.

The Respondent's Submissions

[31] Mr Tuiqereqere on behalf of the respondent acknowledges that the appellant is entitled to cover for the tear if it was caused by the garden accident or the car door accident. If that is established, it follows that the Corporation was wrong to decline funding for surgery or treat the tear and was also wrong to decline weekly compensation.

[32] Counsel refers to four key events, the first being the gardening accident on 23 September 2018.

[33] The next key event is the ultrasound scan of her right elbow on 16 November 2018. This did not show a tear. Counsel also notes that this scan occurred after the cortisone injection. The inference therefore is that the cortisone injection did not cause a tear.

[34] The next event is the car door accident on 13 May 2019. Counsel submits that no one is suggesting that this accident was responsible for the tear.

[35] The MRI scan undertaken on 1 August 2019 shows a tear which is not mentioned in the ultrasound report.

[36] Counsel refers to the questions Dr Fong was asked. One question related to whether the full thickness tear noted on the MRI scan would also show up on the ultrasound scan. Dr Fong's answered:

> If there was a full thickness tear of the common extensor origin, one would expect this to be picked up by the ultrasound and it should be reported in the ultrasound report.

[37] On this issue, in their report of 1 October 2020, the Panel says:

> The common extensor origin is relatively superficial and easy to scan, and it is most unlikely that a full thickness tear was missed on the November 2018 scan. It is more likely that there was no tear on the November 2018 ultrasound scan, and this gradually appeared later on the August 2019 MRI scan, as part of the natural progression of Ms van der Lee's right tennis elbow.

[38] Counsel submits that there is no contra opinion regarding this.

[39] Counsel submits that the signs observed by the physiotherapist, who was consulted by the appellant after the September 2018 accident, support the diagnosis that the physiotherapist in fact made of lateral epicondylitis of the right elbow.

[40] Counsel notes that the article before the Court from the Bone and Joint journal describes work related lateral epicondylitis. As the appellant is a gardener, there is a possible issue of a work related gradual process injury but thus far, that has not been pursued.

[41] Counsel submits that the evidence from Dr Fong and the Panel in this case comprises the best evidence.

[42] He submits that the Panel has not taken anything in isolation and they have considered Dr Dawe's alternative explanation as the treating surgeon.

[43] He submits however, that Dr Dawe is not better placed than the Panel to consider causation.

[44] Counsel submits that although cortisone injections can cause tears, apart from the existence of the tear in this case, it remains conjecture that it was caused by the cortisone injection.

[45] In this case there was no claim for cover for a treatment injury. If there had been, there would need to be a proper investigation by the Corporation. The present position with the issue arising in the course of the lead up to this appeal is unsatisfactory.

The Appellant's Reply

[46] The appellant specifically rejects any proposition that her injury came on slowly. She says it was a specific accident, a precise event and her incapacity was immediate.

Decision

[47] On 23 September 2018, when the appellant was aged 59, she was doing gardening work that involved pulling out weeds and bushes and digging to replant.

[48] In her statement her husband says:

> The bank in question was quite hard clay base and some of the plants were quite large with heavy root balls. The work was heavy, certainly no light weed pulling as postulated by Dr Fong.

[49] At the time she was working both with her husband and her friend Ms Shepherd, who stated:

> Felicity pushed/pounded the spade into the ground, it didn't fully bite into the clay just stopped, resulting in Felicity jarring her arm and shoulder, she stopped immediately as she was in too much pain to continue.

[50] She attended her physiotherapist, Ann Mitchell, on 3 October and an ACC claim form was completed with the description of injury:

> Digging with spade, planting plants, hurt right elbow.

[51] Ms Mitchell gave a provisional diagnosis as lateral epicondylitis right elbow.

[52] She recorded:

> Continuous stabbing pain ranging from 4/10 to 9/10.

[53] The physiotherapist noted easing factors:

> Ibuprofen, icing, K tape.

[54] Ms Mitchell was consulted again on 25 October 2018. She described the pain as "staying the same". The elbow was again strapped.

[55] The appellant attended the physiotherapist clinic again on 26 October 2018. The note includes:

> Tried icing and this flared it up. Not doing many exercises. Struggling to drive – can't hold the steering wheel. Very busy with work and horses. Reports the

> pain has got worse, increased swelling now, also getting pain in the shoulder and collarbone as protecting the arm.

[56] It is noted that the appellant struggled to straighten out her arm due to the pain. She was treated with acupuncture. Under the heading 'analysis':

> Able to full extn the elbow – soreness but easier to move, the shoulder is more relaxed.

[57] The plan was for "dry needling" if it didn't improve.

[58] On 5 November the appellant reported that the elbow "is a lot better". The same treatment was continued. At the next appointment on 9 November the physiotherapist observed that the elbow posture was more relaxed. It once again was taped. Again, dry needling was to be considered if it does not improve.

[59] The next report is dated 10 December 2018, some 10 days after the corticosteroid injection. The physiotherapist noted that the injection "has settled the elbow". The elbow was again strapped.

[60] In her final consultation with the physiotherapist on 21 December 2018 there is this note:

> Had injection end of November. Elbow pain settled – still protective of certain movements …

[61] The appellant had the ultrasound scan of her right elbow and the corticosteroid injection on 16 November 2018. Five weeks after that injection, the appellant is telling the physiotherapist "the elbow is pretty good but still aching intermittently" and the physiotherapist records "elbow pain settled". This would tend to argue against the corticosteroid injection being the cause of the full thickness tear involving the anterior fibres of the common extensor tendon origin found on the MRI scan of 1 August 2019.

[62] For that reason, although the Panel in its report of 1 October 2012 says "it is most unlikely that a full thickness tear was missed on the November 2018 scan", for the above objective reasons, I conclude that the full thickness tear was in fact missed in the November 2018 scan.

[63] The Panel notes that it accepts the documented clinical findings on file with preference for the contemporaneous record and that diagnosis and recommended treatment is established by the examining clinician.

[64] This being so, the contemporaneous record from the physiotherapist and in particular the record from 21 December 2018 which notes that things are much better in terms of the shoulder and overall arm pain and that the elbow is "pretty good" but still aching intermittently, describes further gains by the appellant in the aftermath of her 23 September 2018 accident.

[65] The focus therefore returns to what occurred on 23 September 2018 during the hard gardening work when according to the appellant's husband, the wrenching injury occurred rendering the appellant in severe pain.

[66] Before the Court is the ACC Best Practice Overview of Tennis Elbow dated July 2009.

[67] Amongst other things that document says:

> The occurrence of epicondylitis as a consequence of direct trauma such as a blow is considered rare; furthermore it is unclear whether direct trauma precipitates an otherwise quiescent (subclinical) condition or directly accounts for the condition.

[68] That review goes on to say that epicondylitis is more prevalent in certain manufacturing industries where forceful and repetitive movements are required e.g. meat processing workers.

[69] Also, before the Court is a review of pathology and management of lateral epicondylitis from the Bone and Joint journal 2013. The article notes that in most cases of lateral epicondylitis no obvious underlying cause can be identified. However, any activity that involves overuse of the wrist extensor or supinator muscles may be incriminated.

[70] Again, the article focuses primarily on the development of tennis elbow from a variety of activities that involve excessive and repetitive use of the forearm extensors. In fact, reference is made to "repetitive microtrauma".

[71] In this case the debate as to the causation of the appellant's epicondylitis focuses on the views of the Panel and Dr Fong, the Corporation's principle clinical advisor – orthopaedic surgery, and Mr Dawe, orthopaedic surgeon on behalf of the appellant.

[72] It is noted that Dr Fong says:

> Pulling out of weeds represents a control low-energy event, not a likely cause for a traumatic tendon tear and certainly not the cause for lateral epicondylitis/tennis elbow. Lateral epicondylitis tennis elbow is not a single episode injury condition. It is a gradual process condition.

[73] Dr Fong's statement, while broadly correct fails to acknowledge that in the Corporation's overview of best practice for tennis elbow it is acknowledged that on rare occasions epicondylitis can be a consequence of direct trauma.

[74] It is Mr Dawe's view set out in his letter of 12 September 2019:

> Because of significant ongoing pain affecting the lateral aspect of the elbow and because the scan shows a tear of the common extensor origin surgical treatment is now indicated. The tear of the common extensor origin could only have occurred post trauma.

[75] The other factor that has somewhat been lost sight of is the fact that the appellant is left-handed but in this case the epicondylitis affects her right elbow. That factor of itself argues somewhat against a "typical" presentation of epicondylitis through repetitive microtrauma to her dominant arm.

[76] The Panel says:

> If this had been torn traumatically, the CAP would have expected a high force, violent traction injury which would have also caused bruising/or other surrounding soft tissue and/or bony damage, which was not the case here. The initial physiotherapy notes were consistent with symptomatic tennis elbow; a common diagnosis in Ms van der Lee's demographic.

[77] The contrary evidence is from the appellant's husband and Ms Shepherd.

[78] The appellant rated the pain she experienced as 8 out of 10. She did not initially seek medical attention because she thought it would just settle itself by icing the right elbow and taking pain killers. She saw the physiotherapist 10 days later as the injury had not settled. On that occasion she complained of continuous stabbing pain, at its worst being 9 out of 10. Bruising is not mentioned in the physiotherapist's notes. However, 10 days had elapsed since the accident.

[79] From the above analysis I conclude therefore that the appellant's epicondylitis was traumatic in origin deriving from her accident on 23 September 2018.

[80] Accordingly, the appeal is allowed, and the Corporation's decisions of 23 October 2019 and 12 November 2019 are reversed.

[81] As a result, she is granted cover for a tendon tear in her right elbow and is entitled to have funded surgery to treat this. Also, on the basis of her incapacity due to the lateral epicondylitis she is entitled to weekly compensation.

[82] Should there be any issue as to costs the parties have leave to file memoranda in respect thereof.

Judge C J McGuire
District Court Judge

Solicitors: Medico Law Limited, Auckland for the respondent