

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2022] NZACC 76**

**ACR 30/21**

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

Hearing: 26 April 2022  
Held at: Auckland/Tāmaki Makaurau  
By AVL

Appearances: B Hinchcliff for the appellant  
J Cole for the Accident Compensation Corporation

Judgment: 4 May 2022

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**RESERVED JUDGMENT OF JUDGE P R SPILLER**  
**[Claim for personal injury – ss 25-26 , Accident Compensation Act 2001]**

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**Introduction**

[1] This is an appeal from the decision of a Reviewer dated 15 February 2021. The Reviewer dismissed an application for review of:

- (a) the Corporation’s decision dated 10 July 2020, declining cover for a right supraspinatus tendon tear said to have been caused by an accident on 23 July 2019, on the basis that the tear was wholly or substantially caused by an underlying degenerative condition rendered symptomatic; and

- (b) the Corporation's decision dated 22 July 2020, declining to pay weekly compensation on the basis that Ms Sharma's right supraspinatus tendon tear was the cause of her incapacity, but that she did not have cover for that condition.

## **Background**

[2] Ms Sharma was born in 1979. She worked at a supermarket in the bakery department.

[3] On 23 July 2019, Ms Sharma was moving a heavy rack of cakes while at work, when the rack became stuck in a floor drain and fell onto her right shoulder. At various times, Ms Sharma has described the cake rack as weighing 80kg or 160kg.

[4] On 24 July 2019, Ms Sharma visited her GP, Dr Jenny Wong, who recorded the accident. The impression was a "rotator cuff sprain", with examination findings noting limited extension, internal rotation and tenderness in the acromion region. An ACC claim was lodged, with the mechanism of injury described as: "A he[a]vy rack fell on my R) shoulder".

[5] On 25 July 2019, the Corporation granted cover for a right rotator cuff sprain.

[6] On 26 July 2019, Dr Gavin Davis, Radiologist, reported findings of a right shoulder ultrasound and x-ray. Dr Davis recorded "intact rotator cuff tendons with no tear but there is tendinopathy involving subscapularis and supraspinatus and tensynovitis of the long head of biceps".

[7] Ms Sharma took annual leave and then sick leave, as she felt unable to work. She later returned to work despite her pain. She received acupuncture and took analgesia. GP records between August and October 2019 indicate ongoing pain and loss of function in the shoulder.

[8] On 24 October 2019, an ultrasound-guided steroid injection was administered by Dr Rory Davis. The clinical indication at the time of the injection was bursitis. After the injection, Ms Sharma had relief for about three months.

[9] On 21 February 2020, Ms Sharma commenced physiotherapy. The initial diagnosis was rotator cuff sprain and bursitis, with consult notes referring to the July 2019 event, as well as an earlier similar event. Subsequent physiotherapy notes query rotator cuff tear.

[10] On 17 April 2020, Ms Sharma attended Dr Wong. Dr Wong's impression at the time was significant pain and reduction in movement and Ms Sharma was certified unfit for work until mid-May 2020. This was later extended to 19 July 2020. She continued physiotherapy. Her pain continued around the anterior and lateral shoulder, with restricted movement.

[11] On 29 April 2020, Dr Barry Chatterton, Radiologist, reported on the findings of a second right shoulder ultrasound. He stated the findings were of supraspinatus tendinopathy, bursitis and impingement, but no rotator cuff tear.

[12] On 22 May 2020, Mr Thin Hong, Orthopaedic Surgeon, assessed Ms Sharma. He noted her history of injury, referring to an 80kg rack falling on her, and that she continued to have pain over the anterior deltoid region, provoked by almost all shoulder movement. On review of the x-ray and ultrasounds, his opinion was of right shoulder impingement and, given she was a diabetic, he assessed that she might be developing early frozen shoulder. Mr Hong arranged an MRI to exclude a rotator cuff tear.

[13] On 8 June 2020, the MRI was read by Dr Kevin Gilbert, Radiologist. He stated that the findings were interstitial damage to the distal supraspinatus tendon, and a full thickness tear separated showing subtle retraction through the central portions of the tendon.

[14] On 15 June 2020, Mr Hong reviewed the MRI scan and noted the findings of an insertional supraspinatus tear that was quite small. He proposed ongoing physiotherapy and a repeat steroid injection, which was performed on 29 June 2020.

[15] On receipt of further medical certificates, the Corporation sought further comment from Mr Hong with regard to the current diagnosis and the cause of Ms Sharma's shoulder symptoms.

[16] On 6 July 2020, Mr Hong advised that the diagnosis and cause of incapacity was a small insertional tear of the right supraspinatus. Mr Hong also noted that, given Ms Sharma's diabetes, her condition could also possibly be early frozen shoulder. On causation, he advised that, as Ms Sharma's pain started after the accident on 24 July 2019, it had to be assumed that her symptoms were substantially due to that event. Mr Hong noted that, while the Corporation indicated initial GP notes suggested prior shoulder symptoms, he had to accept the history given to him by Ms Sharma.

[17] The Corporation sought advice from Mr Tim Lamb, Registered Nurse and Clinical Advisor. On 20 July 2020, Mr Lamb advised, among other things, that Ms Sharma's supraspinatus insertional tear was likely an attritional change, rather than a personal injury caused by accident. Mr Lamb supported cover for a traumatic rotator cuff sprain, but not for a rotator cuff tear. Mr Lamb also advised that, as Ms Sharma's incapacity was due to a rotator cuff tear, which was not injury-related, weekly compensation should not be paid.

[18] On 22 July 2020, the Corporation issued two decisions:

- (a) The first decision stated that the Corporation was unable to approve cover for a rotator cuff tear as this was not caused by an accident but was a result of a degenerative condition.
- (b) The second decision stated that Ms Sharma was not entitled to weekly compensation because her incapacity related to a rotator cuff tear caused by a non-injury related medical condition.

[19] In August 2020, Ms Sharma lodged review applications.

[20] In November 2020, Mr Daniel Harvey, Physiotherapist, provided a report for Ms Sharma following a paper review. He supported cover for a traumatic rotator

cuff tear, analysing the case based on the Corporation's guidelines for assessing the causal link between accidents and rotator cuff tears. He noted Ms Sharma's relatively young age, immediate onset of pain and loss of function after a clear and relatively significant mechanism, lack of prior symptoms, the initial clinical presentation being consistent with a traumatic tear, ultrasound findings of fluid suggestive of acuity, and the MRI lacking any signs of rotator cuff degeneration/gradual process pathology. Mr Harvey also considered that the location of the tear at the distal end of the supraspinatus was significant and would require a lot of force and advised that Ms Sharma's history of pain was not consistent with the traditional phased pain experience of frozen shoulder.

[21] On 4 February 2021, review proceedings were held. On 15 February 2021, the Reviewer dismissed the review, on the basis that that overall the evidence did not allow her to draw a valid inference as to causation, and instead, overwhelmingly demonstrated trauma was not the probable cause of the appellant's rotator cuff tear.

[22] On 18 February 2021, a Notice of Appeal was lodged.

[23] The Corporation obtained new evidence from its Clinical Advisory Panel ("the CAP"), comprising of four Orthopaedic Surgeons, a Physiotherapist, a Sports Medicine Specialist, an Occupational and Environmental Medicine Specialist, and a General Surgeon. On 23 September 2021, the CAP found that a causal link between Ms Sharma's covered 24 July 2019 accident and her right shoulder impingement, ongoing right shoulder symptoms, impingement and work incapacity could not be established. The CAP found that her current problems are related to her pre-existing, previously asymptomatic longstanding right shoulder impingement and intrinsic tendon tearing.

[24] The CAP noted:

- (a) Ms Sharma's diagnosis was right shoulder chronic subacromial impingement and intrinsic rotator cuff tendon tearing, which was pathological rather than traumatic in nature. That condition, rather than an accident, was also the cause of her incapacity.

- (b) While the cake rack was extremely heavy, albeit described variously in clinical notes, the evidence did not support a traumatic tear of the supraspinatus tendon.
- (c) The radiological findings indicated that there were pre-existing changes in Ms Sharma's right shoulder before the accident and there were no signs of acute injury. The two ultrasounds would have identified a tear of the supraspinatus tendon had there been one present at the time of imaging, and the lack of such finding strongly indicated against traumatic causation.
- (d) Mr Harvey's view of traumatic causation was not supported by the contemporary medical evidence. For example, a direct impact injury severe enough to tear a tendon should also have been reflected in clinical documentations of initial bruising, swelling and adjacent injuries, which was not the case.

### **Relevant law**

[25] Section 20(2)(a) of the Act provides that a person has cover for a personal injury which is caused by an accident. Section 26(2) states that "personal injury" does not include personal injury caused wholly or substantially by a gradual process, disease, or infection (unless it is personal injury of a kind specifically described in section 20(2)(e) to (h)). Section 25(1)(a)(i) provides that "accident" means a specific event or a series of events, other than a gradual process, that involves the application of a force (including gravity), or resistance, external to the human body. Section 25(3) notes that the fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.

[26] Section 67 of the Act provides:

A claimant who has suffered a personal injury is entitled to 1 or more entitlements if he or she—

- (a) has cover for the personal injury; and
- (b) is eligible under this Act for the entitlement or entitlements in respect of the personal injury

[27] Section 102 of the Act provides:

- (1) The Corporation may determine any question [determining incapacity] under section 103 or section 105 from time to time.
- (2) In determining any such question, the Corporation—
  - (a) must consider an assessment undertaken by a medical practitioner or nurse practitioner; and
  - (b) may obtain any professional, technical, specialised, or other advice from any person it considers appropriate.

[28] In *Johnston*,<sup>1</sup> France J stated:

[11] It is common ground that, but for the accident, there is no reason to consider that Mr Johnston’s underlying disc degeneration would have manifested itself. Or at least not for many years.

[12] However, in a passage that has been cited and applied on numerous occasions, Panckhurst J in *McDonald v ARCIC* held:

“If medical evidence establishes there are pre-existing degenerative changes which are brought to light or which become symptomatic as a consequence of an event which constitutes an accident, it can only be the injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered. The fact that it is the event of an accident which renders symptomatic that which previously was asymptomatic does not alter that basic principle. The accident did not cause the degenerative changes, it just caused the effects of those changes to become apparent ...”

[13] It is this passage which has governed the outcome of this case to date. Although properly other authorities have been referred to, the reality is that the preceding decision makers have concluded that Mr Johnston’s incapacity through back pain is due to his pre-existing degeneration and not to any injury caused by the accident.

[14] ... I consider it important to note the careful wording in the McDonald passage. The issue is not whether an accident caused the incapacity. The issue is whether the accident caused a physical injury that is presently causing or contributing to the incapacity.

[29] In *Ambros*,<sup>2</sup> the Court of Appeal envisaged the Court taking, if necessary, a robust and generous view of the evidence as to causation:

[65] The requirement for a plaintiff to prove causation on the balance of probabilities means that the plaintiff must show that the probability of causation is higher than 50 per cent. However, courts do not usually undertake accurate probabilistic calculations when evaluating whether causation has been proved. They proceed on their general impression of the sufficiency of the lay and

<sup>1</sup> *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

<sup>2</sup> *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

scientific evidence to meet the required standard of proof ... The legal method looks to the presumptive inference which a sequence of events inspires in a person of common sense ...

[67] The different methodology used under the legal method means that a court's assessment of causation can differ from the expert opinion and courts can infer causation in circumstances where the experts cannot. This has allowed the Court to draw robust inferences of causation in some cases of uncertainty -- see para [32] above. However, a court may only draw a valid inference based on facts supported by the evidence and not on the basis of supposition or conjecture ... Judges should ground their assessment of causation on their view of what constitutes the normal course of events, which should be based on the whole of the lay, medical, and statistical evidence, and not be limited to expert witness evidence ...

[30] In *Sparks*,<sup>3</sup> Judge Ongley stated:

[29] By s26(2) and (4) of the Injury Prevention, Rehabilitation, and Compensation Act 2001, personal injury does not include personal injury caused wholly or substantially by a gradual process, disease, or infection, or by the ageing process. The legal test for entitlements requires sufficient evidence to show that need for assistance arises as a consequence of the covered injury. Where there is an accompanying degenerative or gradual process condition, entitlements will not be available if the personal injury is caused wholly or substantially by that condition. In the present case therefore, the appellant has to be able to point to evidence demonstrating that the condition, as it was when the need for surgery was identified in August 2004, was substantially and effectively caused by the covered injury and not by a pre-existing process.

[31] In *Stewart*,<sup>4</sup> Judge Barber stated:

[33] The cases consistently highlight that the question of causation cannot be determined by a matter of supposition. There must be medical evidence to assist the respondent Corporation, and now the Court, to determine that question. A temporal connection, in itself, will be insufficient. There needs to be a medical explanation as to how the ongoing condition has been caused by the originally covered injury. In this case the evidence does not establish this.

[32] In *Bloomfield*,<sup>5</sup> Judge Joyce noted:

[18] In this case, and when all is rendered down, the extension of cover claims pursued on appeal by Mr Bloomfield rest mainly on the foundation of a temporal connection argument. On occasion, a temporal connection may be of significance in the context of other, helpful to a claimant, evidence. But the mere presence of such a connection will usually do no more than raise the post hoc ergo propter hoc fallacy.

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<sup>3</sup> *Sparks v Accident Compensation Corporation* [2006] NZACC 45.

<sup>4</sup> *Stewart v Accident Compensation Corporation* [2003] NZACC 109.

<sup>5</sup> *Bloomfield v Accident Compensation Corporation* [2014] NZACC 1.

[33] In *Medwed*,<sup>6</sup> Judge Henare stated:

[26] The deciding point is however the status of cover under the Act. No cover had been obtained for the 1994 injury. The best medical opinion for the appellant was that the sole cause was the 1994 injury, and that it was unlikely that the later covered injuries were causative of the condition requiring surgery. I have rejected the argument that a treatment entitlement could be obtained without first obtaining cover for the specified injury. I find that, even if the condition resulted from personal injury caused by accident in 1994, there is no entitlement without cover for that injury.

[34] In *W*,<sup>7</sup> Justice Collins noted, in the context of a mental injury case, that the physical injuries do not have to be the sole cause of the mental injury, and it is sufficient that the physical injury materially contributes to causing the mental injury.

### **Discussion**

[35] The issue in this case is whether the Corporation's decision declining cover for a right supraspinatus tendon tear said to have been caused by an accident on 23 July 2019, on the basis that the tear was wholly or substantially caused by an underlying degenerative condition rendered symptomatic, was correct. The assessment of the Corporation's decision declining to pay weekly compensation, on the basis that the appellant's right supraspinatus tendon tear, for which she did not have cover, is dependent on the assessment of the decision declining cover.

[36] In order for Ms Sharma to obtain cover under the Act, she is required to show that her present personal injury, the supraspinatus tendon tear, was caused by her accident of July 2019.<sup>8</sup> There must, on the balance of probabilities, be sufficient evidence pointing to proof of causation, for a Court to draw even a robust inference on causation.<sup>9</sup> The fact that Ms Sharma suffered a personal injury in July 2019 is not of itself to be construed as an indication or presumption that it was caused by an accident.<sup>10</sup> A temporal connection between Ms Sharma's accident and symptoms, without sufficient supportive medical evidence, does not establish causation.<sup>11</sup> Ms Sharma's personal injury, a supraspinatus tendon tear, will not, in principle,

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<sup>6</sup> *Medwed v Accident Compensation Corporation* [2009] NZACC 86.

<sup>7</sup> *W v Accident Compensation Corporation* [2018] NZHC 937, at [65].

<sup>8</sup> Section 20(2)(a) of the Act.

<sup>9</sup> See *Ambros* n2, at [65] and [67].

<sup>10</sup> Section 25(3).

<sup>11</sup> See *Stewart* n4, at [28]

attract cover if it was caused wholly or substantially by a gradual process, disease, or infection.<sup>12</sup> If Ms Sharma does not have cover for her personal injury, the supraspinatus tendon tear, she is not eligible for any entitlements for this injury under the Act.<sup>13</sup>

[37] Ms Sharma submits as she has discharged the burden of proof and established that her right shoulder supraspinatus tendon tear was caused by her accident on 23 July 2019. She states evidence of Mr Hong and Mr Harvey should be preferred to that of Mr Lamb and the CAP. Mr Lamb, a Registered Nurse, is not qualified to provide an opinion on incapacity as required under section 102 of the Act. Therefore, the Corporation was incorrect in relying on Mr Lamb's evidence when declining to pay weekly compensation.

[38] The Court acknowledges the submissions of Ms Sharma and accepts that there is a temporal connection between her accident and her onset of right shoulder pain. The Court also acknowledges the views of Mr Hong, Orthopaedic Surgeon, and Mr Harvey, Physiotherapist. However, in light of the Court's finding on the issue of cover, it is not necessary to consider Ms Sharma's submissions on weekly compensation, including the issue of Mr Lamb's qualification to provide an opinion in terms of section 102 of the Act.

[39] On the issue of cover, the Court notes the following considerations.

[40] First, Ms Sharma's GP recorded, the day after her accident in July 2019, an impression of rotator cuff sprain, and did not record any evident signs of a tendon tear, such as bruising, swelling and adjacent injuries.

[41] Second, the ultrasound x-ray of Ms Sharma's shoulder, conducted three days after her accident, found intact rotator cuff tendons with no tear. This Court has no basis on which to hold that the ultrasound x-ray finding was incorrect.

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<sup>12</sup> Section 26(2).

<sup>13</sup> Section 67 of the Act, and *Sparks*, at [29].

[42] Third, the ultrasound scan of Ms Sharma's shoulder, conducted nine months after her accident, found supraspinatus tendinopathy, bursitis and impingement, but no rotator cuff tear. Again, the Court has no basis on which to hold that the ultrasound scan finding was incorrect.

[43] Fourth, as late as 10 months after Ms Sharma's accident, the opinion of Mr Hong, the Orthopaedic Surgeon who attended Ms Sharma, was that her condition was that of right shoulder impingement, rather than rotator cuff tear.

[44] Fifth, the first confirmed finding of a tendon tear was recorded in an MRI scan taken over 10 months after Ms Sharma's accident. This tear was noted by Mr Hong as being "quite small". Mr Hong's subsequent view, that Ms Sharma's current symptom was substantially due to the July 2019 accident, was based on his assumption, made in light of Ms Sharma stating that her pain started from the time of the accident. However, he acknowledged that GP notes recorded a slightly different story. This Court finds Mr Hong's guarded, revised view to be of limited assistance in establishing proof of causation between Ms Sharma's accident and her tendon tear.

[45] Sixth, Mr Lamb, Registered Nurse and Clinical Advisor, advised the clinical information indicated that Ms Sharma sustained an acute rotator cuff sprain, rather than tear, as a result of her accident. Mr Lamb assessed that Ms Sharma's supraspinatus insertional tear was likely an attritional change, an ongoing degenerative condition, rather than an accident-related pathology. The Court accepts Mr Lamb is not as qualified as Mr Hong to comment on the issue of cover, but nevertheless finds the evidence of Mr Lamb, as a registered nurse, is entitled to some weight.

[46] Seventh, the CAP, found that a causal link, between Ms Sharma's July 2019 accident and her right shoulder impingement, ongoing right shoulder symptoms, impingement and work incapacity, could not be established. The CAP found that Ms Sharma's current problems were related to her pre-existing, previously asymptomatic longstanding right shoulder impingement and intrinsic tendon tearing. The CAP found that Mr Harvey did not provide evidence of acuity of her injury and

did not explain why the MRI scan 11 months after the accident showed tearing, but the two prior ultrasound scans did not. The CAP noted that Mr Harvey did not consider the more probable clinical scenario that Ms Sharma's full thickness tendon tearing developed gradually as part of her chronic impingement.

### **Conclusion**

[47] In light of the above considerations, the Court finds that Ms Sharma has not shown that her present personal injury, supraspinatus tendon tear, was caused by her accident of July 2019. It follows from this finding that Ms Sharma is not eligible for weekly compensation or other entitlements for this injury.

[48] The decision of the Reviewer dated 18 August 2020 is therefore upheld. This appeal is dismissed.

[49] I make no order as to costs.



P R Spiller  
District Court Judge

Solicitors: Ford Sumner for the respondent.