

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 200 ACR 146/21

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

Hearing: 1 December 2023

Held at: Wellington/Whanganui-a-tara by AVL

Appearances: B Hinchcliff for the Appellant
 F Becroft for the Accident Compensation Corporation (“the
 Corporation”)

Judgment: 12 December 2023

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for cost of treatment – Schedule 1, cl 1-2,
Accident Compensation Act 2001 (“the Act”)]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 2 June 2021. The Reviewer dismissed an application for review of the Corporation’s decision dated 11 June 2020 declining to fund further pain management and other rehabilitation programmes (including neuro-physiotherapy) for Ms Hartley.

Background

[2] Ms Hartley was born in 1980. On 19 February 2019, she had an accident when she closed the car boot onto her head with force, cut her head and cracked her teeth together. On 20 February 2019, Dr Turi Aseev lodged an ACC42 claim for a tooth injury claim. On 26 February 2019, the Corporation approved cover for the claim.

[3] On 14 April 2019, Dr Bradley Little, GP, diagnosed concussion due to a head injury. On 17 April 2019, the Corporation approved concussion services for Ms Hartley. The injuries stated were, neck sprain, broken tooth, head injury and open wound of the forehead.

[4] On 10 May 2019, Dr Frederick Anthony, Consultant Physician, recorded that Ms Hartley had felt tired, fatigued, and lethargic since 2016, with significant recent weight loss. Dr Anthony referred to a range of other symptoms, including heart-related symptoms, bony pain in the tibia, hip, right shoulder and left arm, painful armpits, hair loss and intermittent rashes. Dr Anthony concluded that he had no unifying diagnosis for the multitude of symptoms that Ms Hartley had, but noted that she was quite distressed by these symptoms. Dr Anthony suggested that Ms Hartley might have post-infection chronic fatigue symptoms.

[5] On 11 May 2019, Dr Jan Schepel, Neurologist, reported that, since the injury, Ms Hartley had been overwhelmed by severe fatigue, nausea, and other symptoms. Dr Schepel's impression was of a mild head injury with post-concussion symptoms, increased emotionality, and a lack of energy, as well as neuropathic pain secondary to direct trauma. He recommended clinical psychology assessment and ongoing physio and occupational therapy.

[6] On 30 May 2019, an MRI of Ms Hartley's brain was undertaken (the indication for the scan being tinnitus and pain). Dr Amanda Ragg, Radiologist, reported a normal examination.

[7] On 11 June 2019, Dr John Bridgman, Oral & Maxillofacial Surgeon, stated that Ms Hartley had symptoms consistent with temporomandibular joint and myofascial pain dysfunction.

[8] On 14 June 2019, Ms Hartley had another accident, causing injury. The claim for cover states: "Passenger in stationary car hit from behind. Teeth slammed together on impact when thrown forward in seat".

[9] On 15 June 2019, an ACC42 dental injury claim form requested cover for two teeth injuries and pain in the right mandible due to the 14 June 2019 accident.

[10] On 17 June 2019, Ms Kelly Griffiths, Physiotherapist, requested cover for neck, shoulder, back, hips, teeth and jaw injuries on 14 June 2019.

[11] On 20 June 2019, the Corporation accepted cover for Ms Hartley's injuries received on 14 June 2019.

[12] On 25 June 2019, Dr Andrew Chancellor, Neurologist, completed an assessment of Ms Hartley for the Corporation after a review of her documentation and attendance on her in person. Dr Chancellor reported:

1. What is the primary and substantial cause of the client's incapacity? and
2. Is the condition you describe above in answer to question 1, causally linked to the ACC covered injury?

Shannon's presentation is atypical. After what appears to be an unpleasant, but minor injury with abrasion to the scalp and jarring of her teeth, she has developed an extensive pain field/chronic pain scenario with a protracted post injury course, which would not have been predicted from early examinations, based on the severity of the injury. There are also symptoms affecting cognitive domains, a description of abnormal movements, dizziness and fatigue (polyneurosymptomatology).

Furthermore, her situation is complicated by concurrent protean investigations with specialist physician opinion regarding a fatigue syndrome, which is more longstanding than the injury symptoms, with serological evidence of prior exposure to an infective agent (R. Australis) - a finding of dubious clinical significance but possibly contributing to a fatigue syndrome. Shannon has had multiple anti-microbial drug treatments.

At early phases after injury there are associations between neurological signs and symptoms, neurocognitive functions and self-reports. Over time, such associations become less coherent and psychological issues become increasingly relevant.

For the meantime ACC is obliged to accept responsibility for the management of her pain problem, as there is a temporal relationship to the injury but ACC input should be time or service limited to specific goals, which if unsuccessful should be abandoned and not repeated.

3. If this is an injury related condition, what in your opinion is the duration of the incapacity for such injury? Is the injury spent?

Shannon's case has characteristics of a somatic symptom disorder with prominent pain. There is no clear end to her symptoms in sight. Already, she has had normal examinations by multiple medical specialists without improvements.

The question "is the injury spent?" is always difficult to answer and somewhat ambiguous. If by this you mean, has the direct tissue damage caused by the injury resolved then I would have to conclude that, yes, it is. There is no biomarker or pathology to correlate with her ongoing symptoms.

4. What is your recommendation for further treatment or rehabilitation management?

This is a notoriously difficult management paradigm. Shannon is yet to have a concerted approach to pain management including suitable medications. Such prescriptions are ideally managed via a comprehensive pain programme, such as the Auckland Regional Pain Service, based at Auckland City Hospital.

I am unsure whether ACC is in a position to provide co-ordinated multi-disciplinary pain management? This would need a physician who is prepared to take on regular assessments, prescriptions of medications, monitoring for efficacy and adverse effects, with regular follow up. This is best supported by psychological and nursing expertise. I note that Shannon does not feel particularly enamoured with the psychological approaches thus far, which she has not found helpful, unfortunately.

5. What are the barriers for the client to return to her pre-injury independence?

- Shannon's profile is one of multiple somatic symptoms which are difficult if not impossible to formulate into a cohesive whole (other than in terms of central up-regulation or 'sensitisation' of pain pathways).
- Lack of a reversible organic diagnosis/pathology to which specific remedies can be directed eg dental treatments.
- A pre-injury fatigue syndrome may be influencing current symptomatology.
- Psychology opinion indicated clinically significant depression, anxiety, magnification and helplessness.
- There are difficulties for Shannon, and possibly a lack of will to engage with treatment providers and drug therapies - which she has largely avoided.
- Attempts at treatment thus far have failed - eg anti-microbial drugs, dental splints.
- Finally, the very nature of her disorder ie somatic symptom disorder with chronic pain has a poor prognosis.

[13] On 26 June 2019, an x-ray of facial bones of Ms Hartley was taken. No jaw fracture was evident.

[14] On 27 June 2019, a claim was lodged for Ms Hartley's injuries following the car accident on 14 June 2019.

[15] In July 2019, an update report for the Training for Independence programme advised that Ms Hartley was continuing to experience anxiety with significant avoidance and low mood. She was also worried about ongoing pain in the jaw and believed that her bite had changed, with damage to five teeth. The report also noted:

She has seen a range of other specialists including an infectious disease specialist regarding her diagnosis of Rickettsial disease, a cardiologist regarding an increased heart rate since the index injury, an ENT specialist for sinus problems since moving to Tauranga, alternative medicine practitioners, as well as her providers under Active Plus, resulting in daily appointments and sometimes two, the many appointments leaving her exhausted and the cost of them has resulted in financial worries.

[16] On 26 July 2019, the Corporation declined claimed orthodontic treatment costs, on the basis of advice from Dr Gilbert, Orthodontist, who concluded that the treatment claimed was not necessary or appropriate, and that it was doubtful that there was any relationship between the various orthodontic issues and Ms Hartley's accidents.

[17] On 30 August 2019, Dr Peta Levin, Psychology Advisor, reviewed the file and agreed that input via comprehensive pain management programme with further assessment by a pain specialist were required.

[18] On 2 September 2019, Ms Hartley's file was reviewed by Dr Michael Tombros, Medical Advisor. He recommended seeking comprehensive medical notes, and, in the meantime, agreed that Ms Hartley should be supported with a pain management programme on a limited basis. Various notes, including the initial Emergency Department note from Tauranga Hospital, were subsequently provided.

[19] On 4 September 2019, Ms Carmen Goodwin, Occupational Therapist, noted that Ms Hartley's concussion symptoms were resolving but that her teeth/jaw problems continued. Ms Goodwin recommended a pain services programme to enable "integration of education from the training for independence programme and

enable review with a pain specialist and further pain management focused psychology”.

[20] In November 2019, a mental injury assessment was undertaken by Mr Wayne Hewlett, Psychologist. He thought that Ms Hartley’s condition had improved, but he noted mild signs of psychological change due to injury. He did not think Ms Hartley met the criteria for any DSMV diagnosis.

[21] On 9 December 2019, Mr Brian Whitley, Oral Surgeon, reviewed Ms Hartley and could not find any bony abnormality.

[22] On 30 January 2020, Dr Chris Dowling, Psychology Advisor, reviewed Ms Hartley’s file. He thought that there were indicators of a somatic component to Ms Hartley’s presentation. He questioned the link between symptoms and the minor head injury one year earlier and advised that further pre-injury notes needed to be reviewed.

[23] On 19 February 2020, Dr Alan Farnell, Pain Specialist, completed a report. Ms Hartley presented to him with widespread pain around the head and neck and other symptoms. Dr Farnell stated:

[the] list alone would make one wonder about the somatic symptom disorder as suggested by Dr Chancellor. There is no neural pathway that supplies this symptom complex.

[24] Dr Farnell noted that Ms Hartley’s main concern was her inability to eat and weight loss. His impression was of a recovering post-concussion syndrome, with some teeth trauma. He disputed the diagnosis of somatic symptom disorder but said that it was very hard to “put it all together”.

[25] On 13 March 2020, a pain management completion report by Ms Kelly Griffiths advised that Ms Hartley had made good progress in balance, ability to drive and ability to tolerate screen time, and that the vertigo condition had resolved. Ms Kelly proposed that this progress now needed “to be consolidated and progressed using a biopsychological approach to pain management”. Ms Griffiths recommended that “ongoing post-concussion support via neurophysiotherapy for

oculomotor and vestibular symptoms would enable Shannon to be progressed as able towards a better recovery”, and that “possibly this is again done best under a TI programme”.

[26] On 24 March 2020, Dr Tim Sprott, BMA, reviewed Ms Hartley’s file. He noted that hers was a complex situation:

1. The index event was a minor injury and there are none of the markers of moderate or severe head injury.
2. There have been a wide range of clinical and psychological symptoms that are currently unexplained.
3. This is a difference of specialist opinion about the cause of persistent symptoms.
4. Dr Farnell has opined that they relate to post-concussion syndrome.
5. This is not the specialist neurologist opinion (Dr C Chancellor) who has opined the. at the presenting symptomatology is not explained by neurological disease or injury, including post concussion syndrome. He concluded that a somatic symptom disorder was a likely diagnosis.
6. Mrs Hartley also disputes the diagnoses to date.
7. There is a background history of chronic fatigue dating back to 2016.
8. The initial psychology assessment (6 June 2019) indicated the presence of potentially influencing psychosocial factors, mood change, and significant responses on mood, anxiety, and pain catastrophising scales.

Neither Dr Chancellor nor Dr Farnell are specialist psychiatrists. I strongly support the PA opinion for a Psychiatrist MICPI.

[27] On 31 March 2020, Ms Hartley’s GP, Dr Pamela House, provided notes back to 2017, and these recorded some mood-related issues. Weight loss, fatigue and neutrophilia were mentioned in a note on 15 December 2017, as well as the possibility of fibromyalgia.

[28] On 8 April 2020, the Corporation received a Concussion Service Client Summary, which proposed the following:

Medical assessment - to confirm a diagnosis, and to consider what, if any, other investigations are required and what, if any, pharmacological recommendations are made.

Urgent referral for a Training for Independence (TBI) programme is recommended given the length of time post injury and the severity and complexity of symptoms. Clinical psychology to address mood and provide education/support for coping, neurophysiotherapy to address vestibular, musculoskeletal, cervical and mandibular dysfunction, and occupational therapy to provide education and techniques for improved fatigue management with improved activity tolerances are indicated. An 8-12 week programme is suggested.

[29] On 27 May 2020, Dr John Vickers, Psychiatrist, following a mental injury assessment of Ms Hartley, stated that she had developed numerous symptoms, since her head injury in January 2019, which had been largely pain-related and had as yet not been well explained. Dr Vickers assessed that her symptoms did not equate with a mental disorder.

[30] On 29 May 2020, Ms Hartley sent an email to the Corporation, noting that she was suffering greatly (with ongoing dental concerns) without the hands-on treatment she had previously been receiving, and she requested scans of her skull, neck, shoulder, and spine to assess structural issues, via a referral to a pain specialist.

[31] On 8 June 2020, Dr Levin noted that there was no consensus specialist opinion on the underlying cause of Ms Hartley's ongoing symptoms, which appeared to be medically unexplained at that stage. Dr Levin concluded that:

Prior to provision of further TBI informed rehabilitation it would appear most appropriate for a comprehensive NP 104 [in-person neuropsychological] assessment to be undertaken – this will provide rehabilitation providers with a clearer understanding of what, if any neurocognitive limitations are present – this information may be used to inform future rehabilitation planning.

[32] On 10 June 2020, Dr Helen Shrimpton, Branch Medical Advisor, reported that Ms Hartley's ongoing symptoms appeared medically unexplained and that the vertigo injury had resolved. Dr Shrimpton did not think that ongoing symptoms were injury-related, advising:

The client has cover for a neck sprain, minor TBI, microfracture to the teeth (which have resolved on examination) and open wound forehead. The wound would have healed in 1 to 2 weeks, the teeth injury has resolved from external dental opinion on file. The neck sprain would be expected to resolve within 4 to 6 weeks with physiotherapy which the client has had. The minor TBI would be expected to resolve within three months - most of the client's symptoms were atypical of a minor TBI and are better explained by the client's underlying medical problems or anxiety - but there is no MI cover.

[33] On 11 June 2020, the Corporation issued a decision declining Ms Hartley further pain management and other rehabilitation programmes (including neurophysiotherapy), on the basis that the requested treatment and rehabilitation were not supported by specialist opinion, and there was no clinical link to the accident injury event of 19 February 2019. The Corporation advised that the injuries for which there was cover from the accident event would now be expected to have resolved, and Ms Hartley's pre-existing medical conditions could be causing the ongoing symptoms.

[34] On 24 June 2020, Ms Griffiths stated that Ms Hartley's 14 June 2019 car accident caused a sore chest from the seatbelt and worsened a sore neck and jaw and shoulder.

[35] On 24 June 2020, Dr Fraser Burling, Rheumatologist, stated that Ms Hartley's chronic pain condition was caused by the accidents. He also noted cervical and thoracic joint dysfunctions, soft tissue injuries of the bilateral TMJ's, rotator cuffs, greater trochanters, and medial collateral ligaments of the knees.

[36] On 21 July 2020, Ms Hartley had a CT scan of her sinuses, which showed minimal paranasal sinus disease, but no findings to indicate a facial fracture following the 2019 accident.

[37] On 29 July 2020, a TMJ MRI scan of Ms Hartley was undertaken. Dr Adam El-Dieb, Radiologist, reported:

Right temporomandibular joint derangement with anterior disc displacement on closed mouth imaging and partial reduction on open mouth imaging ... Articular disc morphology is preserved. Also noted on dynamic imaging is limited translation of the RIGHT mandibular condyle compared to the LEFT in the open mouth position, consistent with clinical diagnosis of decreased range of movement of the RIGHT temporomandibular joint.

The LEFT temporomandibular joint is normal in appearance.

[38] On 14 August 2020, Mr Salil Nair, Consultant Rhinologist, stated:

Looking at the most recent CT scan of her paranasal sinuses it shows some very mild mucosal thickening in the floor of the right maxillary sinus adjacent to the right upper molar on that side. There is a suggestion of lucency around the

upper molar but I think this is more to do with the bony matrix rather than represent a true infection.

[39] On 19 August 2020, Mr Whitley reported that he could not find a cause for Ms Hartley's various complaints (temporomandibular joint dysfunction, myofascial pain dysfunction and teeth discomfort). He noted that Ms Hartley was also having speech problems and needed input from a speech therapist.

[40] On 11 September 2020, two review applications were filed by Ms Hartley against the 11 June 2020 decision, regarding pain management and neuro-physiotherapy funding.

[41] In September 2020, Ms Hartley was referred for a social rehabilitation needs assessment, which was completed in October. The provision of two hours a week home help was recommended.

[42] On 18 September 2020, Dr Edward Green, Psychology Advisor, stated that Ms Hartley had no mental injury.

[43] On 21 September 2020, Ms Hartley underwent an MRI of the cervical spine and left shoulder. Dr Matt Andrews, Radiologist, reported multilevel cervical spondylosis and mild left-shoulder bursitis and tendinosis.

[44] On 23 September 2020, Ms Hartley had another MRI of her jaw. Dr El-Dieb reported that the left TMJ joint was normal, but that there had been progression of derangement on the right side.

[45] On 5 October 2020, Dr John Burford, Dentist, provided a report describing Ms Hartley as a chronic pain patient with complex pain and disability exposure. Dr Burford stated that Ms Hartley's TMJ disc, cervicalgia, jaw pain, tinnitus and oromandibular dystonia were all caused by the accidents. He stated:

In the whiplash impact the head is violently flung posteriorly and anteriorly, and the jaw is snapped open and slammed shut. This causes significant TMJ capsular soft tissue tearing, trauma, swelling, and pain and leads to arthritic degradation of the condylar heads known as traumatic arthritis.

[46] On 8 October 2020, Mr Rodney Gordon, Orthopaedic Surgeon, reviewed the MRI scan taken on 21 September 2020, which showed cervical lordosis and significant disc protrusions at C3/4, C4/5, C5/6, and C6/7. He advised:

It is my opinion that the injury to her left shoulder and not her neck were caused by the injury on 19 February 2019. It disappointing that appropriate imaging was not performed at a much earlier phase. ...

[47] On 27 October 2020, Dr Spratt reviewed Ms Hartley's file. He considered the previous evidence and concluded that a recent request for speech therapy and home help did not arise for reasons linked to injury.

[48] On 28 October 2020, the Corporation declined home and community support services and speech therapy for Ms Hartley.

[49] On 2 November 2020, Mr Evan Brown, Optometrist, stated that Ms Hartley presented with "dysfunction in oculomotor, convergence, accommodation, depth perception and vestibular ability indicating visual dysfunction secondary to concussion injury". Ms Hartley requested assistance with funding prescription spectacles and vision therapy.

[50] On 9 December 2020, Dr Shrimpton provided advice recommending that Ms Hartley's claim for post-concussion syndrome be declined because it was an invalid medical diagnosis, not causally associated to the accident. Dr Shrimpton accepted that Ms Hartley had cover for a minor head injury, but concluded that any concussion would be expected to have resolved within three months.

[51] On 14 December 2020, the Corporation declined Ms Hartley cover for post-concussion syndrome, arising from her accident on 19 February 2019.

[52] On 20 December 2020, the Corporation's Principal Dental Advisor provided comment, concluding that Ms Hartley's left TMJ issue also should not be covered.

[53] On 26 February 2021, an assessment was undertaken by Dr Susan Shaw, Neuropsychologist. The results of validity testing were poor, but testing was still able to be completed. Dr Shaw noted that Ms Hartley had suffered a mild

concussion in the index accident, but Dr Shaw thought it likely that that would have resolved within a few days, a few weeks at the very most. Dr Shaw did not think that any cognitive changes Ms Hartley was currently noticing were due to a concussion which had for some reason not resolved as expected over the past two years. Dr Shaw thought that it more likely that the cognitive symptoms that Ms Hartley currently reported experiencing were due to other factors including pain, codeine use, poor sleep, and psychological distress including feelings of frustration and grief. Nevertheless, Dr Shaw believed that Ms Hartley was generally distressed by an array of poorly understood symptoms which were quite debilitating. Dr Shaw added:

She has not found psychological approaches to pain management to be helpful and agreed with my comment that providing more of this type of input is unlikely to result in any additional gains and is only likely to add to her fatigue and disrupt the routine she has developed for herself.

[54] Dr Shaw did not think that additional concussion-related input was needed at that stage and urged Ms Hartley to pay close attention to her mental well-being as well as her physical health.

[55] On 25 March 2021, Dr Gil Newburn, Psychiatrist, stated that Ms Hartley had mild neurocognitive disorder consequent from traumatic brain injury, adjustment disorder and chronic regional pain syndrome. The injury events were the sole cause of the presentation. Dr Gilburn stated:

Thus, what seems to be a complex and difficult to analyse situation is relatively simple and straightforward. There is a combination of traumatic brain injury and its consequences, and damage to the temporomandibular joint and cervical facet joints, with expected symptoms, but with the change in central modulation of the nociceptive stimulus, resulting in a chronic regional pain syndrome, as described by Dr Burling. It should be noted that traumatic brain injury is associated with a lower threshold for developing a chronic regional pain syndrome, presumably due to altered central modulation of inhibitory processes.

[56] On 21 April 2021, the Corporation declined funding for spectacles and vision therapy for Ms Hartley.

[57] On 27 April 2021, Dr Shrimpton provided further advice on Ms Hartley, and concluded as follows. There was no radiculopathy to support an acute disc injury

caused by accident. The mechanism was also not indicative of significant injury. The eating issues were not injury-related (noting non-injury diagnosis of Lyme disease and adrenal and hormonal dysfunction). There were multilevel changes present. Ms Hartley had been seeing a chiropractor for spinal problems for 20 years. The shoulder pathology was degenerative.

[58] On 29 April 2021, Dr Shrimpton commented again regarding Ms Hartley's vision symptoms, which Dr Shrimpton also did not think were injury related.

[59] On 11 May 2021, Mr Whitley stated that a CT scan of Ms Hartley was consistent with a right neck fractured styloid process.

[60] On 25 May 2021, Mr Christopher Low, ENT, Head and Neck Specialist, reported:

Complex history of symptoms of right facial pains, poor functioning tongue (right), poor speech and swallowing in 2019. Recent CT scan showed a discontinued right styloid process consistent with a fracture. Previous CT scans as far as May 2019 showed the same feature.

[61] On 31 May 2021, Dr Muammar Abu-Serriah stated that he wished to learn if the right styloid process fracture caused any nerve compression.

[62] On 2 June 2021, following review proceedings concerning the Corporation's decision of 11 June 2020, the Reviewer dismissed the review. The Reviewer found that there was no expert evidence in favour of further pain management input, and the neurophysiotherapy was to treat post-concussion syndrome, a condition for which Ms Hartley did not have cover. On 17 June 2021, a Notice of Appeal was lodged.

[63] On 18 June 2021, Ms Lorna Byrne, Orofacial Myology, advised that Ms Hartley's orofacial muscles were maladapted and there was a TMJ disease due to the covered accidents.

[64] On 6 July 2021, a conciliated agreement with the Corporation stated that it would arrange another occupational therapy assessment within 10 days to determine

injury-related needs, home help and taxi support; issue a decision on weekly compensation from 19 February 2019; and make decisions on cover in relation to the 19 February 2019 and 14 June 2019 accidents.

[65] On 30 August 2021, Dr Shrimpton recommended a referral to an orthopaedic specialist.

[66] An undated report from Ms, Dunia Mouneimne, Physiotherapist, stated:

As you are aware, Shannon suffered a severe head and jaw injury.

Shannon has since had an MRI showing she has a R anterior displaced disc in her jaw that functionally partially relocated with opening. This has left her with a severely dysfunctional jaw, and she is unable to open her mouth fully with eating a significant issue for her particularly solid foods.

She also has noticeable left sided jaw muscle atrophy, and this is likely due to pain-inhibition inhibiting the muscles from working. This causes the left side of the jaw firstly to over work due to the restriction of her R joint mobility and in turn, the left fatigues and goes into spasm.

[67] On 5 November 2021, the Corporation issued cover decisions on a range of health issues affecting Ms Hartley. She applied to review these decisions.

[68] On 10 May 2022, review proceedings were held to consider two reviews filed by Ms Hartley:

- (a) A review relating to injuries claimed to have arisen as a result of the accident on 19 February 2019: Ms Hartley claimed cover for concussion, post-concussion syndrome, TMJ sprain, TMJ trauma related degeneration, trigeminal neuralgia, C3/4, C4/5, C5/6 and C6/7 disc protrusions, chronic regional pain syndrome, bilateral tinnitus, oculomotor dysfunction, visual vestibular dysfunction, fracture styloid process, PTSD, depression, mild neurocognitive disorder consequent to TBI, and adjustment disorder. During the hearing counsel for the Corporation conceded that its decisions should be quashed and reinvestigated on all matters except the cover sought for concussion.

- (b) A review relating to injuries claimed to have arisen as a result of the accident on 14 June 2019: Ms Hartley claimed cover for whiplash, a right hip sprain, and contusion injury to her left chest.

[69] On 3 June 2022, a Reviewer held that:

- (a) As to the injuries claimed to have arisen as a result of the accident on 19 February 2019: the Corporation was right to agree to provide cover for a concussion as it was plain from the evidence that a concussion likely would have resulted from the mechanism of injury as described by Ms Hartley; and it was also clear that the remaining elements had not been properly investigated and so the Corporation was right to submit that it needed to reconsider the remaining claims.
- (b) As to the injuries claimed to have arisen as a result of the accident on 14 June 2019: Ms Hartley suffered whiplash and a contusion to her left chest and so she has cover under the Act for these injuries.

[70] On 11 June 2022 a CT scan of Ms Hartley's sinus found small bone fragments seen in the right maxillary sinus.

[71] On 11 August 2022, Dr Ray Kim, Rhinologist, reported an odontogenic sinusitis, and trauma history was sufficient that some oral microbes could have been introduced into the sinus cavity.

[72] On 10 October 2022, Ms Ruth Pracy, Psychology Advisor, stated that it could be expected that symptoms of concussion would have resolved at this period after the accident and concussion services were not recommended. Ms Pracy added:

[Concussion] symptoms resolve within a time frame of three months.

Symptoms lasting longer than three months is sometimes erroneously referred to as "Post-Concussion Syndrome".

Post-Concussion Syndrome is a contentious diagnosis that is not universally accepted.

[73] On 14 March 2023, Dr Shrimpton reported that a sinus floor fracture in the medical literature is most commonly caused by significant direct blunt force trauma to the facial bones, as in an assault. Dr Shrimpton considered that the reported injury had insufficient force to cause a sinus floor fracture.

[74] On 14 March 2023, the Corporation issued a decision declining cover for sinus floor fracture.

[75] On 31 May 2023, the Reviewer quashed the Corporation's decision of 14 March 2023 declining cover for sinus floor fracture. The Reviewer directed the Corporation to make the decision again after obtaining the opinion of an expert such as an oral and maxillofacial surgeon or rhinologist, on whether Ms Hartley's sinus floor fracture was caused by either of her accidents of 19 February 2019 and/or 14 June 2019.

[76] On 15 June 2023, Dr Vasudeva Pai, Orthopaedic Specialist, stated:

She has had ongoing pain since the injury event, and she has been treated by the concussion team and pain management. In my opinion, her symptoms cannot be improved with any surgical treatment.

[77] On 26 June 2023, Dr Joseph Earles, Otolaryngologist, Head and Neck Surgeon, stated:

After the February incident, she was seen in Tauranga Hospital and diagnosed with concussion. She reports immediate right-sided pain and sensation that she had cracked teeth and that her tongue felt too big for [her] mouth and would not move properly. She has since developed malocclusion with an anterior open bite. She has had frequent right-sided throat discomfort with odynophagia, headaches, and otalgia. She also noticed frequent burning sensation on the right side of her oral cavity as well erythema of her right cheek. She is unable to open her mouth or swallow without discomfort. Some of Shannon's symptoms are consistent with trigeminal or even glossopharyngeal neuralgia. Her fractured styloid process could be causing the discomfort as well.

Relevant law

[78] Section 3 of the Act provides:

The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its

overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through— ...

- (c) ensuring that, where injuries occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation.

[79] Section 54 provides:

The Corporation must make every decision on a claim on reasonable grounds, and in a timely manner, having regard to the requirements of this Act, the nature of the decision, and all the circumstances.

[80] Section 67 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.

[81] Clause 1, Schedule 1, of the Act provides:

- (1) The Corporation is liable to pay or contribute to the cost of the claimant's treatment for personal injury for which the claimant has cover if clause 2 applies,—
 - (a) to the extent required or permitted under an agreement or contract with any person for the provision of treatment; or
 - (b) if no such agreement or contract applies, to the extent required or permitted by regulations made under this Act; or
 - (c) if paragraphs (a) and (b) do not apply, the cost of the treatment.
- (2) In subclause (1)(c), cost means the cost—
 - (a) that is appropriate in the circumstances; and
 - (b) as agreed by the Corporation and the treatment provider.

[82] Clause 2, Schedule 2, of the Act provides:

- (1) The Corporation is liable to pay the cost of the claimant's treatment if the treatment is for the purpose of restoring the claimant's health to the maximum extent practicable, and the treatment—

- (a) is necessary and appropriate, and of the quality required, for that purpose; and
 - (b) has been, or will be, performed only on the number of occasions necessary for that purpose; and
 - (c) has been, or will be, given at a time or place appropriate for that purpose; and
 - (d) is of a type normally provided by a treatment provider; and
 - (e) is provided by a treatment provider of a type who is qualified to provide that treatment and who normally provides that treatment; and
 - (f) has been provided after the Corporation has agreed to the treatment, unless clause 4(2) applies.
- (2) In deciding whether subclause (1)(a) to (e) applies to the claimant's treatment, the Corporation must take into account—
- (a) the nature and severity of the injury; and
 - (b) the generally accepted means of treatment for such an injury in New Zealand; and
 - (c) the other options available in New Zealand for the treatment of such an injury; and
 - (d) the cost in New Zealand of the generally accepted means of treatment and of the other options, compared with the benefit that the claimant is likely to receive from the treatment.

[83] In *Ambros*,¹ Glazebrook J, for the Court of Appeal, envisaged the Corporation taking an inquisitorial role, and the Court taking, if necessary, a robust and generous view of the evidence as to causation:

[64] An important factor that favours the Supreme Court of Canada's approach applying in that context is the essentially inquisitorial role of the Corporation, both when an initial claim is made and in the review function. ... The inquisitorial approach should generally mean that, to the extent this is practical, all aspects of the claim (including causation) have been investigated by the Corporation before matters reach the courts. ... In our view, it is in keeping with the non-adversarial nature of the claim and review process that the Corporation should investigate all possible aspects of a claim, at least in a rudimentary fashion and as far as practicable. It would thus be in a position, once the matter comes before a court, to lead evidence on all points that were investigated, whether strictly obliged to or not.

[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

¹ *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

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 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 ...

Discussion

[84] The issue in this case is whether the Corporation, in its decision dated 11 June 2020, correctly declined a further pain management programme and other rehabilitation programmes (including neurophysiotherapy) for Ms Hartley.

[85] Ms Becroft, for the Corporation, submits as follows. The Corporation's June 2020 decision declined funding further pain management and neuro-physiotherapy at that particular point in time. The decision was based on advice from Dr Shrimpton and Dr Levin who could not correlate Ms Hartley's symptoms with the covered injuries. The evidence available at that time, on balance, did not suggest that the need for treatment was related to any covered injury. It is difficult to see why, at that time, further physiotherapy and/or pain management would be warranted for what at that stage was understood to be minor injuries. Based on Dr Chancellor's advice, there was then no sense in repeating these programmes in June 2020. It is not even clear that Ms Hartley was seeking further pain management. The Corporation quite appropriately funded both pain management and physiotherapy in the early stages of Ms Hartley's claim, and there were then significant question marks around the efficacy of doing so again (that quite apart from the issue of whether the need for same was injury related). The Corporation's decision is now history and there is nothing to be gained in the appeal.

[86] This Court notes the above submissions. However, the Court points to the following considerations.

[87] First, the 2001 Act places significant duties upon the Corporation in managing personal injuries such as those suffered by Ms Hartley. Section 3 of the Act provides that the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation. Section 54 provides that the Corporation must make every decision on a claim on reasonable grounds, having regard to the requirements of the Act, the nature of the decision, and all the circumstances. Clause 2, Schedule 2, provides that the Corporation is liable to pay the cost of the claimant's treatment if the treatment is for the purpose of restoring the claimant's health to the maximum extent practicable. Further, the Court of Appeal has stated that the Corporation has an inquisitorial function and must investigate all possible aspects of a claim, at least in a rudimentary fashion and as far as practicable.²

[88] Second, by the time of the Corporation's 11 June 2020 decision, it had provided cover for Ms Hartley in respect of two accidents: (a) concussion services for neck sprain, broken tooth, head injury and open wound of the forehead, in respect of the accident on 19 February 2019; and (b) cover for neck, shoulder, back, hips, teeth and jaw injuries, in respect of an accident on 14 June 2019. In terms of section 67 of the Act, the Corporation was under a statutory duty to provide entitlements in relation to these covered injuries, for which Ms Hartley was eligible under the Act.

[89] Third, by the time of the Corporation's 11 June 2020 decision, a number of medical specialists had advised that Ms Hartley receive pain management and other rehabilitation programmes following the above covered injuries:

- (a) On 11 May 2019, Dr Schepel, Neurologist, reported, *inter alia*, *post-concussion symptoms and neuropathic pain secondary to direct trauma*; and recommended *clinical psychology assessment* and ongoing *physio and occupational therapy*.

² *Ambros*, above note 1, at [64].

- (b) On 25 June 2019, Dr Chancellor, Neurologist, reported that Ms Hartley had developed an *extensive pain field/chronic pain scenario* with a protracted *post injury course*, and also symptoms affecting *cognitive domains*; and stated that *the Corporation is obliged to accept responsibility for the management of her pain problem, as there is a temporal relationship to the injury*.
- (c) On 30 August 2019, Dr Levin, Psychology Advisor, reviewed the file and agreed that input via comprehensive *pain management programme with further assessment by a pain specialist were required*.
- (d) On 2 September 2019, Dr Tombros, Medical Advisor, agreed that Ms Hartley should be *supported with a pain management programme*.
- (e) On 4 September 2019, Ms Goodwin, Occupational Therapist, noted that Ms Hartley's teeth/jaw problems continued; and recommended a *pain services programme to enable review with a pain specialist and further pain-management focused psychology*.
- (f) On 19 February 2020, Dr Farnell, Pain Specialist, reported that Ms Hartley presented with *widespread pain* around the head and neck and other symptoms, and his impression was of a recovering *post-concussion syndrome, with some teeth trauma*, and encouraged further recovery in the normal way from post-concussion syndrome.
- (g) On 13 March 2020, Ms Griffiths, Physiotherapist, advised that Ms Hartley's progress *needed to be consolidated and progressed using a biopsychological approach to pain management*. Ms Griffiths noted that *ongoing post-concussion support via neurophysiotherapy* for oculomotor and vestibular symptoms would enable Ms Hartley to be progressed towards a better recovery, and that possibly this was again done best under a traumatic injury programme.

- (h) On 8 April 2020, a Concussion Service Client Summary proposed to the Corporation:
- (i) *medical assessment* of Ms Hartley to confirm a diagnosis, and to consider what, if any, other investigations were required; and
 - (ii) urgent referral for a Training for Independence programme (including *neuropsychiotherapy*), given the length of time post-injury and the severity and complexity of Ms Hartley's symptoms.
- (i) On 27 May 2020, Dr Vickers, Psychiatrist, advised that Ms Hartley had developed numerous symptoms, *since her head injury in January 2019*, which had been largely *pain-related*.
- (j) On 8 June 2020, Dr Levin advised that, prior to provision of further TBI-informed rehabilitation, it would appear most appropriate for a comprehensive NP 104 [in-person *neuropsychological*] assessment to be undertaken. Dr Levin noted that this assessment would provide rehabilitation providers with a clearer understanding of what, if any *neurocognitive limitations* are present - this information may be used to inform future rehabilitation planning.

[90] Fourth, on 29 May 2020 (prior to the Corporation's decision), Ms Hartley sent an email to the Corporation, noting that she was suffering greatly (with ongoing dental concerns) without the hands-on treatment she had previously been receiving, and she requested scans of her skull, neck, shoulder, and spine to assess structural issues, via a referral to a pain specialist. Despite Ms Hartley's own evidence about her ongoing pain condition (backed by the evidence of medical specialists), the Corporation appears to have ignored Ms Hartley's request for scans via a pain specialist. Significantly, Mr Rodney Gordon, Orthopaedic Surgeon, who later reviewed an MRI scan taken on 21 September 2020, advised that it was disappointing that appropriate imaging was not performed at a much earlier phase.

[91] Fifth, doubt is cast on the Corporation's decision by medical evidence subsequent to the decision of 11 June 2020:

- (a) On 24 June 2020, Dr Burling, Rheumatologist, stated that Ms Hartley's chronic pain condition was caused by the accidents.
- (b) On 5 October 2020, Dr Burford, Dentist, stated that Ms Hartley was a chronic pain patient with complex pain and disability exposure, and that her TMJ disc, cervicgia, jaw pain, tinnitus and oromandibular dystonia were all caused by the accidents.
- (c) On 8 October 2020, Mr Gordon, Orthopaedic Surgeon, noted that an MRI scan taken on 21 September 2020 showed cervical lordosis and significant disc protrusions at C3/4, C4/5, C5/6, and C6/7. He advised that the injury to Ms Hartley's left shoulder and neck were caused by the injury on 19 February 2019.
- (d) On 2 November 2020, Mr Brown, Optometrist, stated that Ms Hartley presented with dysfunctions secondary to concussion injury.
- (e) On 25 March 2021, Dr Newburn, Psychiatrist, stated that Ms Hartley had mild neurocognitive disorder consequent from traumatic brain injury, adjustment disorder and chronic regional pain syndrome; and that the injury events were the sole cause of her presentation.

[92] Sixth, further doubt is cast on the Corporation's decision by the review proceedings on 10 May 2022. Here, the Corporation conceded that its decisions on a range of matters relating to Ms Hartley's accident on 19 February 2019 should be quashed and reinvestigated, covering areas such as post-concussion syndrome. In the review decision of 3 June 2022, the Reviewer found that the Corporation was right to agree to provide cover for concussion as it was plain from the evidence that concussion likely would have resulted from the mechanism of injury as described by Ms Hartley; and it was also clear that the remaining elements had not been properly investigated and so the Corporation was right to submit that it needed to reconsider

the remaining claims. The Reviewer also granted cover for whiplash and a contusion to her left chest as a result of the accident on 14 June 2019.

[93] This Court finds, in light of the above considerations, that the Corporation did not, on 11 June 2020, make a decision on Ms Hartley's claim on reasonable grounds, having regard to the requirements of the Act, the nature of the decision, and all the circumstances. The Corporation had clear medical advice before it issued its decision that Ms Hartley required further pain management and other rehabilitation programmes (including neuro-physiotherapy), or, at least, further assessment in relation to rehabilitation. The Corporation therefore incorrectly stated in its decision that the requested treatment and rehabilitation were not supported by specialist opinion. Further, the Corporation's unqualified statement that there was no clinical link to the accident injury event of 19 February 2019 was out of line with the fact that the Corporation had, based on medical advice, provided rehabilitation programmes based on Mr Hartley's existing cover, and that the Corporation's own advisor (Dr Shrimpton) advised that Ms Hartley's ongoing symptoms appeared medically unexplained. Further, the Corporation's decision made no reference to the covered accident injury event of 14 June 2019 and why rehabilitation programmes were not available for this injury.

Conclusion

[94] This Court finds that the Corporation, in its decision dated 11 June 2020, incorrectly declined a further pain management programme and other rehabilitation programmes (including neurophysiotherapy) for Ms Hartley.

[95] This appeal is therefore allowed, and the review decision dated 2 June 2021 is set aside.

[96] Ms Hartley is entitled to costs. If these cannot be agreed within one month, I shall determine the issue following the filing of memoranda.

A handwritten signature in black ink, appearing to read 'P R Spiller', written in a cursive style.

P R Spiller
District Court Judge

Solicitors for the Respondent: Medico Law Ltd.