**IN THE DISTRICT COURT**
**AT WELLINGTON**

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

**[2023] NZACC 212 ACR 154/23**

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| UNDER | THE ACCIDENT COMPENSATION ACT 2001 |
| IN THE MATTER OF | AN APPEAL UNDER SECTION 151 OF THE ACCIDENT COMPENSATION ACT |
| BETWEEN | ROBERT FRENCH<br>Appellant |
| AND | ACCIDENT COMPENSATION CORPORATION<br>Respondent |

Hearing: 11 December 2023

Heard at: Hamilton/Kirikiriroa

Appearances: The Appellant in person
Ms F Becroft for the Respondent

Judgment: 19 December 2023

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**RESERVED JUDGMENT OF JUDGE C J MCGUIRE**
**[Causation and Entitlement to Surgery s 67 and Schedule 1 Accident Compensation Act 2001]**

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[1] At issue on this appeal is a decision by the Accident Compensation Corporation dated 20 January 2023 declining cover and surgery costs to treat C4/5 right foraminal stenosis.

[2] The appellant submits that his condition is injury related, not only from an accident on 15 October 2020, but also to a number of earlier injuries dating back to an accident on 1 September 1974.

[3] The position of the respondent is that the weight of medical evidence identifies the C4/5 pathology as a degenerative process, not caused by any personal injury by accident.

[4] The respondent also notes that the appellant does not have cover for any injury suffered in the accident of 1 September 1974.

**Background**

[5] The appellant is presently aged 65. His schedule of injuries commences with an accident on 1 September 1974 with the injury description of "sprain or strain; neck, back of head vertebrae". The schedule lists a further neck sprain on 30 March 2007 and again on 17 July 2007; a further neck sprain on 13 May 2017, and again on 15 October 2020.

[6] With the effluxion of time, there are now only limited records that have been able to be placed before the Court.

[7] In respect of his accident of 1 September 1974, there is a Thames Hospital record note from surgeon PWB Lane, which contains this summary:

> Your patient was admitted on 1.9.74 for overnight observation following a motor vehicle accident, of which he was the driver. He was unable to remember details of the accident.
>
> When admitted he was fully conscious. Neck movements were reduced by muscle spasm. X-rays of skull and cervical spine showed no abnormality.
>
> The following day, he was symptom free and was discharged.

[8] The next record that was produced to the Court was that of orthopaedic surgeon, D E Allen, dated 17 June 1987. This was a referral from the appellant's GP at the time. Mr Allen's report said:

> After examination and reviewing the x-rays, which show minor C.5 changes, I do not believe Mr French has a problem for which active orthopaedic surgical attention has anything to offer him.
>
> However, I have suggested having a CT scan of C5, to which Mr French agrees, and I will review again once the scan has been carried out.

[9] Mr Allen reported again on 29 September 1987 as follows:

> The CT scan was carried out on 11.8.87 and demonstrated evidence of a disc protrusion at the C4-5 level, although it was difficult to tell if there was any significant root involvement.

[10] A bone scan was to be the next step and a further referral to a specialist, depending on the outcome.

[11] The next record is dated 18 June 2009, being a report of neurosurgeon, Edward Mee. The referral to Mr Mee apparently related to two episodes of acute loss of balance. However, the report also contains the following:

> He gives a past history of spinal pain and was seen by Mr Allen, orthopaedic surgeon. There is a previous history of a motor vehicle accident in 1974 and a CT scan performed around this time suggesting that there was a possible compression fracture involving C4 and C5. An MRI was performed in 1991, however, and shows normal disc spaces.
>
> In view of his persistent concerns following this recent episode, he recently obtained an MRI of the cervical spine reported on 13/5/09 as showing no evidence of disc disease and no evidence of spinal cord encroachment. I reviewed these images and there is no evidence of spinal cord or nerve root involvement. There is possible very slight wedging on the C5 body which may be a sequelae to the previously reported changes on CT back in 1974.

[12] Mr Mee reviewed the appellant again and reported on 21 July 2016. At the time, amongst other things, the appellant was complaining of neck pain.

[13] Mr Mee records the following:

> He dates a number of symptoms back to a motor vehicle accident which occurred in his teenage years in 1974. I reviewed the past history documents and there was an MRI of the cervical spine reported on 13 May 2009 that was normal, with no evidence of spinal cord involvement.

[14] Mr Mee referred the appellant to an Auckland specialist who has special interest in movement disorder.

[15] On 3 December 2020, an x-ray of the appellant's cervical spine revealed that the C4-5 and the C5-6 intervertebral disc heights were slightly reduced.

[16] An MRI of the cervical spine was taken on 18 April 2021. The report confirmed C5/6 canal narrowing due to posterior disc osteophyte complex with moderate foraminal narrowing on the left at C4/5, C5/6 and C6/7.

[17] On 31 May 2021, a medical certificate was filed certifying the appellant was unfit for work because of neck pain and spasm.

[18] The Corporation sought clinical notes to investigate the claim.

[19] The file was considered by Scott Burns, clinical advisor, on 30 August 2021. Mr Burns was of the view that the appellant's ongoing symptoms were due to a very long-standing condition unrelated to an accident.

[20] In 2022, the appellant was referred by his GP to Dr Matti, musculoskeletal physician, for review. Dr Matti noted the 2020 accident being a neck sprain sustained on 15 October 2020 when the appellant was planting a tree. Dr Matti noted that the 2020 accident had aggravated symptoms that had been going on for a long time. He referred to the original accident in 1974 and noted that "the appellant subsequently to the accident started getting neck pain and arm pain shock-like sensations in the arm …".

[21] On 29 April 2022, the appellant saw Dr Muthu, consultant neurosurgeon. Mr Muthu reported on 29 April 2022 and noted that there had been a CT guided injection in March 2022 which had provided some temporary relief. The appellant evidently wished to proceed with a C4/5 fusion, or foraminotomy. Mr Muthu was not sure that this would resolve all of the appellant's symptoms, in particular the abnormal movement. He suggested that it would be worth seeing a neurologist, but agreed to discuss the case with colleagues at an upcoming spinal meeting at Waikato Hospital.

[22] Mr Muthu saw the appellant again in November 2022 and again noted the history of injury. He indicated that he would write to the Corporation for approval for surgery funding.

[23] Mr Muthu completed an assessment report and treatment plan dated 9 December 2022. Under the heading "Causal Medical Link Between Proposed Treatment and Covered Injury", Mr Muthu said:

> Mr French has right radiculopathy with dystonic movements on the right side. He also has ongoing shooting pain from the neck into the right arm, which have been progressively worsening since his accident in the 1970's. He tells me that initially it was neck and arm pain, which has now resulted in almost persistent shock-like pain and dystonic movements on the right arm. MRI has shown significant foraminal stenosis at C4/5 on right side with nerve root compression.

[24] The recommended surgical treatment is:

> Cervical discectomy and fusion at C4/5.

[25] ACC obtained clinical comment from its principal clinical advisor/orthopaedic surgeon, Mr Hunter, who was of the opinion that the medical evidence did "not sufficiently" support a causal link between the appellant's covered accidents and the condition requiring surgery.

[26] A further assessment report and treatment plan was completed on 13 January 2023 by neurosurgeon, Mr Schweder. He noted the following under the heading "Causal Medical Link Between Proposed Treatment and Covered Injury":

> He has had a number of neck injuries and for the last ten years has had abnormal movements. Since the most recent accident (neck sprain whilst planting a tree), these dystonic movements have become much more pronounced. They involve the head, neck and trunk and upper extremities. He has been experiencing sharp shooting pain on the right side down into his right arm …

[27] Under the heading "Relevant Pre-existing Factors", Mr Schweder noted:

> Motor vehicle accident in the '70s when he hurt his neck and various neck injuries since that time. He too recommended C4/5 anterior cervical discectomy and instrumented fusion.

[28] In a decision letter of 20 January 2023, ACC declined his application for surgery. It said:

> After reviewing all of the information available to us, we consider that the need for the surgery is not primarily due to your injury on 15/10/2020. This

> means we are unable to cover this condition or other treatment and support for this injury.

[29] On 6 April 2023, ACC confirmed its decision to decline this cover.

[30] By letter dated 12 September 2023, ACC's counsel, Ms Becroft, addressed a number of questions to the Clinical Advisory Panel.

[31] Notably, she asked:

> Could you please consider the history of injury, including claims for accidents on 1 September 1974 (late claim declined), 30 March 2007, 19 July 2007, 12 December 2008, 15 June 2013, 20 June 2016, 15 May 2017 and 23 October 2020. Is there evidence to link an injury suffered in any of these accidents (or a combination of them) to the pathology you have identified in question 1, why/why not?

[32] In its report of 19 October 2023, the panel answered that question and in respect of the 1974 accident had this to say:

> On 1 September 1974, at the age of 15 years, the client was involved in a motor vehicle accident. He was admitted to hospital for overnight observation. The discharge summary states:
>
> > Neck movements were reduced by muscle spasm. X-rays of skull and cervical spine showed no abnormality.
> >
> > The following day, he was symptom free and was discharged.
>
> Isolated traumatic cervical disc herniations are rare and usually accompanied by other injuries. Patients will present with typical disc associated neurological deficits and/or pain. Symptoms are severe and will take at least several weeks to resolve.
>
> In this case, examination of the neck was inconsistent with a recent traumatic disc injury and the client's symptoms quickly resolved. The evidence available does not support that a C4/5 cervical disc injury was caused by the 1 September 1974 accident event, or any such injury that has caused post-traumatic degenerative change. The accident event has likely caused a soft tissue injury only.

[33] The Clinical Advisory Panel joins issue with what neurosurgeon, Mr Mee, said in his report of 18 June 2009:

> There is possible very slight wedging on the C5 body which may be a sequelae to the previously reported changes on CT back in 1974.

[34] The Clinical Advisory Panel said:

> The clinical evidence does not support that there was a CT undertaken in 1974. The x-ray undertaken in 1974 is reported to have revealed no abnormality. The "slight wedging on the C5 body" report by Mr Mee cannot be reconciled with the contemporaneous medical notes.

**Appellant's Submissions**

[35] In his submissions to the Court, the appellant was adamant that his condition all relates back to the 1974 accident and that two neurosurgeons support him in this. He requests that surgery funding be granted immediately, given his present discomfort, and he notes that surgery would not happen until March next year.

[36] He submits that ACC is in breach of its obligations under the ACC Act.

**Respondent's Submissions**

[37] Ms Becroft notes that the appellant has had cover for a number of injuries. She notes, however, there is no cover for the 1974 injury, but ACC would accept that there was an accident.

[38] She notes that the Clinical Advisory Panel considered the 1974 accident and was unconvinced that it was causally related to the need for surgery.

[39] She submits that the two assessment reports and treatment plans make no real attempt to find causation. Ultimately, there is no compelling rebuttal evidence in respect of what the Clinical Advisory Panel has concluded.

**Appellant's Reply**

[40] In reply, Mr French said that irrespective of the records, the fact is that he had an accident in 1974. He says that no claim was made because he was discharged "symptom free" when he was not. He said that all he wants is a decent night's sleep and his life back.

**Decision**

[41] The appellant has had a number of accepted ACC claims in relation to neck sprains since the motor vehicle accident of 1 September 1974.

[42] Assessment of what occurred then and since is limited by what evidence remains still available.

[43] In this regard, I note that the Clinical Advisory Panel states that the clinical evidence does not support that there was a CT undertaken in 1974.

[44] This contrasts with what is contained in the report of neurosurgeon, Mr Mee, of 18 June 2009 where he says that a CT scan was performed around this time (1974) and also contained in Mr Mee's report is the following:

> There is possible very slight wedging on the C5 body which may be a sequelae to the previously reported changes on CT back in 1974.

[45] The only surviving record of the 1974 accident is the Thames Hospital discharge summary after the appellant was kept overnight in hospital for observation after the accident. The summary reads:

> Your patient was admitted on 1.9.74 for overnight observation following motor vehicle accident, of which he was the driver. He was unable to remember details of the accident.
>
> When admitted he was fully conscious. Neck movements were reduced by muscle spasm. X-rays of skull and cervical spine showed no abnormality.
>
> The following day, he was symptom free and was discharged.

[46] The fact that it is recorded that the appellant was unable to remember details of the accident suggests that it was more than trivial.

[47] It is noted also that his neck movements were reduced by muscle spasm.

[48] The appellant was aged 15 at the time.

[49] The next medical record is from 1987. This relates to a referral to orthopaedic surgeon, Mr Allen, and it included x-rays and CT scan of his C5 vertebra. I infer that it

relates to ongoing problems that the appellant was experiencing from the 1974 accident; there being no other recorded injury between 1974 and 1987. At this time, the appellant was aged 28.

[50] Mention has been made that ACC "declined" cover for the 1974 accident.

[51] Given what we know of the 1974 accident, with the appellant unable to remember details of the accident at the time he was admitted to hospital, and the fact that he experienced muscle spasms, leads me to conclude that the "decline" status with ACC in respect of the 1974 accident, is meaningless.

[52] The fact is that by 1987, with no intervening trauma, the appellant was experiencing disc protrusion at his C5 vertebra.

[53] In her decision of 4 July 2023 the reviewer Ms Parkin says at paragraph 34:

> Mr French advised that he considered his neck issues started following an accident on 1 September 1974 and that he has suffered from symptoms with his neck from that time.

[54] In his affidavit of 12 June 2023 Mr French says:

> The radiologist did say 3/12/2020 that it would be hard to get a true result because of spasms but I am very grateful to her and her report.
>
> …..
>
> I went to see Dr Matti for stem cell treatment. He wanted to put me on epilepsy meds, said he could not treat the neck because of spasms.

[55] It follows that either this condition somehow arose naturally, for example, by premature degeneration, or that it was caused or contributed to by his 1974 accident.

[56] The dicta in *ACC v Ambros*[1], is relevant in this case. At paragraph 67 of the judgment, the Court, referring to the earlier case of *Smith v Auckland Hospital Board*[2]

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1 *Accident Compensation Corporation v Ambros* [2007] NZCA 304.
2 *Smith v Auckland Hospital Board* [1965] NZLR 191 at 214.

noted that 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 by expert witness evidence.

[57] In this case, one asks: Where did the C5 vertebral disc protrusion originate from?

[58] Absent any competing causative origins, of which there appear to be none, I am therefore left to conclude that the problem with his C4/C5 vertebra was caused or contributed to by the 1974 accident, and I note that Mr Mee, neurosurgeon, in his report of 18 June 2009, went so far as to say:

> There is a previous history of a motor vehicle accident in 1974 and a CT scan performed around this time suggesting that there was a possible compression fracture involving C4 and C5.

[59] Accordingly, I find that ACC's decision of 20 January 2023 declining cover and surgery costs to treat C4/5 right foraminal stenosis was wrong and that this condition and the resulting need for surgery was caused or contributed to his accident in 1974.

[60] Accordingly, his appeal is allowed and ACC's decision of 20 January 2023 is reversed.

[61] Costs are reserved.

CJ McGuire
District Court Judge

Solicitors: Medico Law Limited, Grey Lynn