IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 93 **ACR 152/22**

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

Hearing: 1 June 2023

Held at: Hamilton/Kirikiriroa

Appearances: J Magee for the Appellant
K Anderson for the Accident Compensation Corporation (by AVL)

Judgment: 8 June 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for cover for personal injury – ss 20, 25, 26, Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 21 July 2022. The Reviewer dismissed an application for review of the Corporation's decision dated 30 September 2021 declining cover for an open wound of the right foot.

Background

[2] Mr Cockburn was born in November 1952, and he worked as a machine operator.

[3] On 21 November 2019, Mr Cockburn's GP noted an infection from a cut on the medial toe of Mr Cockburn's left foot.

[4] On 7 February 2020, Mr Cockburn stood on a stone in a shower at a campground.

[5] On 10 March 2020, Dr Jordan Thompson, GP, noted:

> couple of things knocked his left big toe last week
>
> - prev issues w ingrown toenail now entire toe swollen red and sore no fever or systemic upset
>
> L big toe swollen hot and erythematous with cracked areas between toes cellulitis big toe? coexisting tinea
>
> swab taken

[6] On 17 March 2020, Dr Thompson noted:

> toe improving, no fever or systemic upset
>
> less swollen, erythematous
>
> bp 158/90 erythematous toe but less so and less warm/swollen
>
> area between toes cracked
>
> A soft tissue infection improving
>
> P dress, cont abx - 2-week course (no SE so far) and antifungal, will see podiatrist discussed meds re bp - wants to avoid, for intensive lifestyle change then review in 1-3 months

[7] On 24 March 2020, Dr James Peckett, GP, noted after a telephone consultation:

> Ongoing toe infection since injury last year.
>
> Sore and exudative.
>
> Well in self, nil fever.
>
> Damaged nail that is ingrowing seems to be keeping the tissue inflammation going.
>
> Seeing as he is well and current restrictions with clinic riv, he will rest, bath it a few times per day and elevate it. oral antibiotics

[8] On 31 March 2020, Mr Cockburn visited an accident and emergency clinic with swollen toes and feet, and sores between toes and under the balls of his feet. He was prescribed antibiotics.

[9] On 1 April 2020, Ms N Armstrong, the nurse at the accident and emergency clinic, recorded a diagnosis of infection between the toes on Mr Cockburn's two feet. She referred him to the district nurse for dressings, and stated that the ulcers were "non-ACC".

[10] On 4 May 2020, Mr Cockburn's GP noted from a phone triage consultation:

> Over a month of chronically infected cracked skin of right big toe with multiple treatments tried plan: need to see this in clinic - booking given for Wednesday; note that he is a diabetic

[11] On 6 May 2020, Mr Cockburn had an in-person consultation with his GP. The GP found infected skin underneath the big toe of the right foot. The ulceration extended from underneath the big toe to the first web space onto the second toe and down onto the sole. There was purulent exudate, mild swelling and warm skin of the distal foot.

[12] On 13 May 2020, the GP reviewed Mr Cockburn's "ulcer right big toe".

[13] On 18 May 2020, Mr Cockburn's GP recorded increased pain and worsening inflammation, with cellulitis covering more of Mr Cockburn's right foot.

[14] On 20 May 2020, Dr Crisp, Mr Cockburn's GP, noted that Mr Cockburn noticed no obvious trauma, and Dr Crisp recorded:

> … presents with an infected wound right foot, first web space (and left as well to a lesser extent). He thinks it may have happened when he stood on a rock. He has had this wound for 5 weeks (prior to joining our practice) and has been seeing the district nurse to dress his wounds (using zinc now). The wound has been extending in size despite treatment. 2 swabs have been done with enteric flora noted but nil specific grown. He has been on erythromycin last week but, despite that, the wound has extended and has become more painful. On Monday, I switched him to clindamycin 450mg qid. Today, he says that the wound has become increasingly painful. His foot has become more swollen and inflamed over the last 2 days

[15] Also on 20 May 2020, Mr Cockburn was admitted to his local hospital for "bilateral foot wounds/cellulitis".[1] In the discharge summary notes, his history recorded was as follows:

> 5/52 ago went to hot pools and used shower without jandels on. Nil obvious trauma at the time but 5/7 afterwards noticed onset of wound to planter aspect of right foot.
>
> Receiving DN for wound care for last couple of weeks, dressed with Zinc with? Improvement. 4/7 ago was dressed with silver dressing pt feelds wound has deteriorated since. Left foot is in similar condition however extent is less severe. Investigations: Skin swab
>
> Right toe: Heavy growth of organisms resembling enteric flora.
>
> Mycology: No fungal elements seen.

[16] On 10 June 2020, Mr Cockburn's GP recorded:

> presents with a chronic wound on his right foot and left to a lesser extent since a visit to the hot pools in March. He was admitted under General medicine in May for cellulitis of his right foot and a worsening of his wound.

[17] On 18 June 2020, the GP recorded:

> Left big toe: wedge resection has been done lateral nail by podiatrist. wound left toes and foot improving.
>
> Right foot: gradual improvement. no cellulitis

[18] On 9 July 2020, the GP recorded excoriation of both feet, but no vascular problems were identified.

[19] On 15 July 2020, a wound care specialist nurse determined that Mr Cockburn had a likely fungal-driven infection.

[20] On 4 September 2020, Mr Cockburn's GP noted that the left wound was nearly healed; and that the right foot was "a little red and swollen still with persistent wound as before" and "has started to deteriorate again".

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[1] Cellulitis is a common bacterial skin infection of the lower dermis and subcutaneous tissue, resulting in a localised area of red, painful, swollen skin, and systemic symptoms.

[21] On 9 December 2020, the GP recorded:

> Stood on a sharp stone with right foot in a shower at campground with subsequent chronic wound right foot which has still not healed.
>
> DN concerned re worsening wound and? bacterial/fungal component; Also suggesting potassium permanganate washes
>
> Right foot: a little more swollen distal foot and red but no extension of cellulitis proximally. skin breaking down again and between toes

[22] On 18 December 2020, Dr Crisp, GP, lodged an injury claim form. The diagnosis was stated as "open wound toe(s) right", with the description of injury as "stood on a sharp stone with right foot in a shower at campground with subsequent chronic wound". The date of accident was stated as 7 February 2020.

[23] On 21 December 2020, the Corporation accepted cover without further investigation.

[24] On 7 January 2021, Mr Cockburn's GP recorded that the right foot had worsened again, and noted further:

> Right foot: well demarcated excoriation from distal foot, toes and sole over mtp jnts. Not very warm and no proximal cellulitis
>
> Skin - urticaria! typepapular rash - looks allergic

[25] On 20 January 2021, Dr Paul Noonan, ACC branch medical advisor, reviewed the information on file and advised the Corporation as follows:

> The incident of standing or apparently standing on a stone does not appear to be an accident. There is no evidence of any bleeding or break in the skin at the time; medical notes report nil obvious trauma, with a problem noted only 5 days later. Whilst he has been given cover for "open wound toes", there is no evidence of a wound being sustained at the time, as there was no bleeding.
>
> The bilateral nature of the problems suggests an underlying medical problem, indicating that the problem with his right foot is not the result of any incident of 7/2/20.
>
> I note that any incident of 7/2/20 is not 5/52 (five weeks) before the presentation of 20/5/20 as documented in the notes that day.
>
> I consider that there is no medical evidence of a PICBA and recommend cover be revoked. There is no medical evidence to support accident-related incapacity from 7/2/20 onwards, with all medical information indicating that any incapacity from then is NOT the result of any incident of 7/2/20.

[26] On 22 January 2021, Mr Ray Mallet, ACC technical specialist, reviewed the file and advised as follows:

> I agree with Medical Advisor direction, as the delegation holder, that cover should be revoked on medical grounds as there is no clinical evidence that finds our client suffered an open wound in an accident on 07.02.20.
>
> Further to this, the available clinical evidence does find that our client was suffering the effects of bilateral foot complaint. I am mindful of clinical notes of March 2020 that refers to both feet being dressed and, It not being ACC.
>
> There is also clinical record, among many, of client having had a culture report on 25.09.20 that refers to client having a moderate growth of organisms that reflect a heavy bacterial load and that may impact upon wound healing.
>
> On 09.07.20 a surgical registrar refers to the client having been admitted in May 2020 with bilateral plantar foot wounds and ascending cellulitis and that this occurred after some fungal cracks in his bilateral toes which then became infected. This presentation does not reflect a personal injury caused by accident to the right foot in February 2020.
>
> There is also presentation at hospital on 20.5.20 for bilateral foot cellulitis and there being reference to an event 5 weeks earlier (this cannot then be 07.02.20 and refers to not having jandals on when in hot pools.)
>
> There are numerous other clinical records that refer to bilateral foot complaint of a chronic nature and that do not refer to an acute event.
>
> ACC does not cover infection unless it may be consequent to a covered physical injury or if it may be work related.
>
> I agree with MA that there has not been verifiable evidence of an accident on 07.02.20 that has then caused an open would to the right foot.
>
> To that end, I agree that cover should be revoked under section 65 and subject to section 25 and 26 i.e. that there is no evidence of an accident or of a personal injury having been suffered because of an accident.
>
> There is no requirement to decide upon backdated incapacity given this conclusion as our client cannot receive entitlement unless it should arise from covered personal injury.

[27] On 26 January 2021, the Corporation revoked cover for the injury of "open wound of toes" (right) on 7 February 2020, and advised that the Corporation was not able to help with treatment costs or other support for his injury. This decision was made on the basis that the Corporation had looked carefully at all the information available, and found that the claim should not have been accepted as there was insufficient medical information to support that the accident occurred on 7 February 2020. On 18 February 2021, Mr Cockburn applied for review of this decision.

[28] On 22 February 2021, Dr Peckett referred Mr Cockburn to a dermatologist, stating:

> Clinical problems: one year of persistent left forefoot/toe infection following injury.
>
> Recurrent antibiotixs and ongoing daily nurse cares. Not making any progress.
>
> Currently on clindamycin.
>
> Hight risk feet, pre-diabetes.

[29] On 10 March 2021, Dr Ben Tallon, Dermatologist, reported:

> Problems:
>
> Right foot probable allergic contact dermatitis. Prior injury with? Pyoderma gangrenosum. …
>
> He describes an injury in the shower at the Mount over a year ago under the right forefoot. Subsequently there was an extensive ulceration which was debrided and slowly healed. This has involved course of antibiotics ...
>
> He subsequently has developed widespread emaciation of the toes extending over the dorsum of the foot. He has a small patch of erythema and scale on the left calf also.
>
> Today the appearances are of a contact dermatitis. This initial apparent injury and ulceration may have indicated pyoderma gangrenosum, but he appears to be over this component now. Hopefully by withdrawing other topical preparations, letting the area aerate, soaking in Condy's crystals and using potent topical steroid twice a day, we should make some progress there. He will let me know how things progress.

[30] On 6 May 2021, Ms Magee sent a letter to Dr Tallon with a photograph of Mr Cockburn's foot "some 6 months after the injury event in February 2020". Ms Magee asked whether Dr Tallon could comment:

> whether the cut (seen below Keith's third and fourth toes and just above the reasonably healthy skin) was more likely to have caused the severe fungal infection that subsequently became infected with a secondary issue.

[31] On 11 May 2021, Dr Tallon responded as follows:

> Further to the consultation letter from 10 March 2021, I agree that a superficial fungal infection following injury is uncommon. I was also not aware that there had been a significant fungal infection identified, having searched through the local microbiology lab results.

> The question though remains whether Keith developed pyoderma gangrenosum secondary to injury, which can result in significant ulceration.[2]

[32] On 13 May 2021, Ms Magee sent a follow-up email to Dr Tallon asking whether the incorrect diagnosis and subsequent treatment (up until Mr Cockburn was able to see Dr Tallon) had resulted in the condition diagnosed.

[33] On 13 May 2021, Dr Tallon responded as follows:

> Some uncertainties may always remain here, but it would seem mostly likely that the initial injury resulted in pyoderma gangrenosum (independent of infection). This type of ulceration can frequently become secondarily infected - but usually with a bacterial as opposed to a fungal infection. This bacterial infection is not necessarily a problem, as can often be just a bystander infection in an open wound/ulcer, but ii may also have slowed the healing process.
>
> Recognition and treatment of pyoderma gangrenosum can be exceptionally difficult at times, notorious for late diagnosis and a difficult treatment course.

[34] On 25 June 2021, Ms Magee sent a further email to Dr Tallon asking whether, on the balance of probabilities, Mr Cockburn would have caught the bacterial infection in his right foot if he had not cut it on 7 February 2020.

[35] On 13 May 2021, Dr Tallon responded as follows:

> Typically, unbroken skin has low risk of infection, due to natural skin barrier defence mechanisms. It is therefore more likely that bacterial infection would result from a cut to the foot.

[36] On 2 July 2021, review proceedings were held to consider Mr Cockburn's review of the Corporation's decision of 26 January 2021 revoking cover for "open wound of toes" on 7 February 2020. Mr Cockburn agreed that, when he visited the GP on 10 March 2020, he discussed his left toe, and did not discuss the right foot as it was not an issue for him then. In May 2020, both feet were infected with a bacterial infection and, on 6 May 2020, he had an ulceration on his right foot down to the sole. The Corporation counsel pointed out that the claim of December 2020 did not mention a cut or an infection, just an open wound to the toe on the right.

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[2] Pyoderma gangrenosum (PG) is an uncommon neutrophilic dermatosis that presents as an inflammatory and ulcerative disorder of the skin. The most common presentation of PG is an inflammatory papule or pustule that progresses to a painful ulcer with a violaceous undermined border and a purulent base.

[37] On 28 July 2021, the Reviewer held that the Corporation had discharged its onus and established on the balance of probabilities that the earlier decision granting cover was in error. The Reviewer upheld the Corporation's decisions revoking cover and refusing weekly compensation, on the basis that:

(a) There was insufficient contemporaneous medical evidence that, on 7 February 2020, Mr Cockburn suffered an open wound of the right toes on that date, and the medical evidence showed that he presented with ulcerations and cellulitis on both his right and left foot and toes;

(b) In terms of causation, it was more likely than not that the ulceration was due to the pyoderma gangrenosum, which also affected the left foot, which was not involved in the incident on 7 February 2020.

[38] Mr Cockburn did not appeal the Reviewer's decision.

[39] On 4 August 2021, Dr Peckett, on behalf of Mr Cockburn, claimed cover for "open wound foot excl. toe(s) right". The injury was described as "cut to plantar right foot - subsequently infected", and the accident date was stated as 7 February 2020. Dr Peckett noted that the claim was based on evidence supplied by Ms Magee, and that the district nursing and GP notes suggested an infected wound to the underside of the right foot.

[40] On 30 September 2021, the Corporation issued a decision declining cover for Mr Cockburn's open wound to his "right foot (excluding his toes)", on the basis that the information available showed that this injury was not caused by an accident.

[41] On 1 December 2021, Mr Cockburn applied to review this decision.

[42] On 10 June 2022, review proceedings were held. Ms Magee confirmed that the first medical note referring to Ms Cockburn standing on a rock was dated 20 May 2020. Mr Cockburn stated that, when he reported his right foot injury and said that he wanted to put in an ACC claim as he was going to be off work, Dr Crisp, his GP said that he did not think that the Corporation would "do it". Mr Cockburn stated

that the puncture wound was "nowhere near" the toe, but was on the flat part of the foot where it started to flatten out. Mr Cockburn did not have a date of the photograph of his foot he supplied, and said that it "takes a while for that sort of thing … approximately a couple of months".

[43] On 14 June 2023, Ms Magee provided an email letter and photographs of Mr Cockburn's foot, stated to be taken on 26 April 2020 and 17 May 2020.

[44] On 21 July 2022, the Reviewer dismissed the review, on the basis that there was insufficient evidence to show that an open wound to Mr Cockburn's right foot or toe was sustained on 7 February 2020 and/or that such a physical injury led to the development of the pyoderma gangrenosum.

[45] On 22 August 2022, a Notice of Appeal was lodged. On 12 September 2022, Judge Spiller granted leave to Mr Cockburn to file his appeal late.

[46] On 12 September 2022, Dr Lauren Roycroft, GP, provided the following report:

> I cannot identify any failure by the GPs involved in this claim to provide a reasonable and appropriate standard of care. The patient presented with recurrent and intractable wounds and infection on the feet. From the clinical notes provided, it appears that adequate history and examination were carried out at each of the multiple presentations over the course of approximately a year. Wound swabs were taken in appropriate manner, especially when questions arose over the pathogen responsible for these infections and if the infection was sensitive or resistant to the antibiotic treatment provided. Differential diagnoses were also considered such as fungal involvement, and the appropriate medications were prescribed for this possibility. Blood sugar levels were also monitored with regard to possible diabetic foot complications, although the patient's Hba1c fell within pre-diabetic levels. Wound review/dressing was regularly carried out, and the district nurse was requested to provide the ongoing wound care. The patient was consistently given what I would consider appropriate treatment and advice, and treatment was adjusted when the patient appeared to adversely react to the treatment provided. Specialist referral to both the general medicine and general surgery was carried out when the treatment provided by the GP did not seem to lead to improvement of his condition.
>
> There was no delay in diagnosis of either the wounds or the infection associated with the wounds. I believe the patient's complaints and the associated findings were taken seriously and the documentation was adequate. The unusual non-resolution of symptoms prompted the GP to consider several differential diagnoses. Swab results gave no reason to believe this was not an infected

wound. … In my opinion, the clinical pathway taken by the GPs in this claim was reasonable and appropriate taking the information available at the time into account.

I have been unable to identify a diagnosis of Pyoderma gangrenosum in the clinical documentation provided. This is a rare condition which develops in middle-aged persons with women more often affected than men. The clinical, histological and laboratory findings are non-specific in this condition and no definitive diagnostic test is available. This diagnosis is a diagnosis of exclusion, in other words, made when other diagnoses have been ruled out. I believe that the presence of infection is an exclusionary factor, therefore I do not believe that the GP would have considered (or been expected to consider) this (rare) diagnosis of pyoderma gangrenosum taking the information available at the time into account. Bacterial contamination was present on several swabs, therefore the conclusion of infection was reasonable.

In my opinion, there are several inconsistencies in this clinical history which should be pointed out. The patient is recorded to have reported several different methods and times of injury varying from stepping on a rock, to being at the hot pools to standing in the shower at a campground without slippers. Considering seemingly non-healing wounds were located on both feet, this has raised questions about the causation of the wounds in my opinion.

The patient was noted to be pre-diabetic, and the Hba1c results support this, however this is not the same as true diabetic. It is well known that diabetics may be at risk for foot complications; however, I cannot find evidence that this patient was actually classified diabetic. If so, I would consider his blood glucose during the time in question to be at a very reasonable level and would not be high-risk for diabetic foot complications such as poorly healing wounds.

The (ongoing) infection itself is also highly unusual in my opinion. Swabs taken report on at least two occasions showed the presence of enteric flora, i.e. bacteria originating in the digestive tract. This is a very unusual finding, and in my opinion, auto-inoculation with bacteria species from the gut cannot be ruled out as a possible causal factor. How this would have occurred is unclear from the documentation. Infected skin wounds would generally be expected to be contaminated with skin flora.

It is also highly unusual with regard to the recurrent infections that treatment with multiple types of antibiotics from different antibiotic classes were ineffective. Despite recurrent and adequate treatment based on swab results at appropriate doses and duration, the symptoms of infection often flared up again unexpectedly during or shortly after treatment.

Other red flags in my opinion aside from those discussed above are a very high rate of healthcare utilisation, being seen my multiple health care providers none of which seem to have been able to solve the problem and non-compliance with other medications for blood pressure and with the advice given regarding the infected wounds (rest and elevate reiterated several times).

In my professional opinion, these inconsistences and highly unusual outcomes raise questions around causation rather than suggesting a failure to diagnose or to provide the expected standard of care by the GP or GPs in this case.

Relevant law

[47] 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.

[48] 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.

[49] In *Johnston*,[3] 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.

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3 *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

> [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.

[50] In *Ambros*,[4] 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 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 …

[51] In *Sparks*,[5] 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.

[52] In *Stewart*,[6] 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

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4 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.
5 *Sparks v Accident Compensation Corporation* [2006] NZACC 45.
6 *Stewart v Accident Compensation Corporation* [2003] NZACC 109.

> 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.

[53] In *Bloomfield*,[7] 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.

[54] In *Sarten*,[8] Judge Barber stated:

> [26] I have referred above to the onus of proof on the appellant and the standard of proof. The appellant must establish, on the balance of probabilities, that his ongoing symptoms are the result of personal injury for which he has cover; he is not entitled to the benefit of any doubt; he cannot rely on possibilities; and he cannot call on the respondent to prove that it is not liable to provide cover. It is up to the appellant to prove his case.

[55] In *Marshall*,[9] Judge Cadenhead stated:

> [36] The appellant has not supplied any contemporaneous medical evidence to establish that she sustained any injuries on these dates or any other date that has been identified by the appellant. …

Discussion

[56] The issue in this appeal is whether Mr Cockburn has discharged the onus of proving that he sustained an open wound to his right foot (excluding his toes) on 7 February 2020, and that this injury led to the development of his subsequent foot infection. In order to obtain cover (and resulting entitlements), Mr Cockburn needs to establish that his condition resulted from a personal injury by accident, which does not, in principle, include personal injury caused wholly or substantially by a gradual process or disease.[10] If medical evidence establishes that Mr Cockburn had pre-existing degenerative changes which were brought to light or which became symptomatic as a consequence of an accident, it can only be injury caused by the

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7 *Bloomfield v Accident Compensation Corporation* [2014] NZACC 1.
8 *Sarten v Accident Compensation Corporation* [2004] NZACC 2.
9 *Marshall v Accident Compensation Corporation* [2005] NZACC 219.
10 Sections 20(2)(a) and 26(2) of the Act.

accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered.[11]

[57] Ms Anderson, for the Corporation, raises the issue of issue estoppel (*res judicata*), that is, whether it is now open to Mr Cockburn to pursue a claim for cover stemming from an injury to his right foot, when there has previously been a (non-appealed) review decision that Mr Cockburn did not suffer an injury to his right toes (in the same claimed accident). This Court accepts that there is merit in counsel's submission.

[58] However, this Court notes that the issue was not raised by the Corporation at the review hearing. The Court further finds that it is arguable that, in a technical sense, the cause of action in the previous review was injury to Mr Cockburn's right toes, whereas the cause of action in the present review was injury to his foot excluding his toes. The Court is prepared to give Mr Cockburn the benefit of the doubt on the issue of *res judicata*, in the interests of justice being seen to be done, and will decide on the substantive matter.

[59] Ms Magee, for Ms Cockburn, submits as follows. Photographs clearly indicate that there was an injury suffered to Mr Cockburn's right forefoot on the date in question. The Corporation's argument that Mr Cockburn had an underlying condition of pre-diabetes has been refuted by the Corporation's own medical advisor in her report dated 13 September 2022. Dr Tallon's reports support that there was an initial injury to Mr Cockburn's right foot that subsequently went on to become seriously infected and medically mistreated.

[60] This Court acknowledges the above submissions. However, the Court finds that neither the photographs of Mr Cockburn's wounds nor the reports from Dr Tallon establish, on a balance of probabilities, that the incident on 7 February 2020 caused Mr Cockburn's subsequent infection. The photographs were taken on 26 April and 17 May 2020, that is, 11 and 14 weeks after the February 2020 incident. Dr Tallon's reports were provided 13-15 months after the February 2020 incident. His reports offer tentative opinions, with comments, for example, "The question

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11 See *Johnston* note 1 above, at [12].

though remains …", "Some uncertainties may always remain here", "Typically", and "more likely that bacterial infection would result from a cut to the foot". Dr Tallon does not definitively link Mr Cockburn's injury in February 2020 with his subsequent infection.

[61] This Court also points to the following considerations.

[62] First, in the seven-and-a-half weeks after the incident on 7 February 2020, there were no concerns about Mr Cockburn's right forefoot recorded in any medical reports. During this period, there were three consultations with medical practitioners, and the concerns recorded by them related to the left foot only. The first medical report to include the right foot was on 31 March 2020, and this referred to "swollen toes, feet, and sores between toes and under the balls of his feet".

[63] Second, in nearly 15 weeks after the incident on 7 February 2020, there is no medical report in which Mr Cockburn linked his infected foot to this incident. The first mention of a possible linkage is on 20 May 2020, when Dr Crisp, GP, recorded that Mr Cockburn "thinks [the wound] may have happened when he stood on a rock", and that he had had this wound for five weeks. According to this record, Mr Cockburn thus estimated that his right foot wound emerged around mid-April 2020, that is, nearly 10 weeks after the February incident.

[64] Third, there is further medical evidence in a hospital record, dated 20 May 2020, that Mr Cockburn's right foot infection began well after, and was unrelated to, the incident of 7 February 2020. The hospital record notes a diagnosis of bilateral foot wounds/cellulitis. The record states that, five weeks before (that is, around mid-April), Mr Cockburn went to a hot pools' shower without jandals, there was "nil obvious trauma at the time", but, five days later, he noticed the onset of a wound to the planter aspect of his right foot. The record states that medical tests on the right foot found "heavy growth of organisms resembling enteric flora". The hospital record thus indicates that a wound emerged on Mr Cockburn's right foot around 20 April (that is, over 10 weeks after the February incident), and the medical tests contain no reference to this wound being caused by the February incident.

[65] Fourth, Mr Cockburn lodged a different claim for cover, relating to his right foot, with the Corporation on 18 December 2020, that is, over 10 months after the February 2020 incident. This claim was supported by the diagnosis of Dr Crisp, GP, of an open wound *in the right toe(s)*, linked to the February 2020 incident, with subsequent chronic wound. This claim contained no reference to the wound being on the part of the foot excluding the toes. The claim was declined by the Corporation, and then pursued in review proceedings, where the review was dismissed on 28 July 2021.

[66] Fifth, Dr Noonan, ACC branch medical advisor, in commenting on the above claim, advised that there was no medical evidence to support accident-related incapacity from 7 February 2020 onwards, with all medical information indicating that any incapacity from then was not the result of any incident of 7 February 2020. Dr Noonan added that the bilateral nature of Mr Cockburn's problems, that is affecting both feet, suggested an underlying medical problem.

[67] Sixth, the present claim, for cover for an open wound on the right foot excluding toe(s), was lodged by Mr Cockburn only on 4 August 2021, that is, 18 months after the incident of 7 February 2020. The claim was supported by Dr Peckett, GP, who stated that the claim was based on evidence supplied by Ms Magee, and that the district nursing and GP notes suggested an infected wound to the underside of the right foot. This claim was dismissed by the Corporation, and then taken on review. At the review proceedings, Mr Cockburn stated that that the puncture wound on his right foot was nowhere near the toe, but was on the flat part of the foot. This Court finds it extraordinary that, if this was the case, Mr Cockburn and his advocate would have earlier pursued a claim for an open wound *in the right toe(s)* for some seven months, including at review proceedings.

Conclusion

[68] This Court is, on balance, prepared to accept that, on 7 February 2020, there was an incident involving Mr Cockburn's right foot. However, in light of the above considerations, the Court finds that Mr Cockburn has not discharged the onus of proving that a physical injury sustained by him on 7 February 2020 led to the

development of (caused) his subsequent foot infection. The decision of the Reviewer dated 21 July 2022 is therefore upheld. This appeal is dismissed.

[69] I make no order as to costs.

P R Spiller
District Court Judge