

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2024] NZACC 013 ACR 64/23

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

Hearing: On the papers

Appearances: J Cartwright for the Appellant
L Hansen for the Accident Compensation Corporation (“the Corporation”)

Judgment: 30 January 2024

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim 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 7 February 2023. The Reviewer dismissed an application for review of the Corporation’s decision dated 9 September 2022 declining cover for left knee osteoarthritis.

Background

[2] Ms Cotter, born in 1966, has worked in various roles, including as a wool handler and in the fishing industry.

[3] On 11 November 2001, Ms Cotter was involved as a passenger in a serious car accident. Ms Cotter later recalled that control of the car was lost on a gravel surface. Her seatbelt failed to restrain her. The vehicle rolled twice, and the left side of her body slammed up and down within the vehicle. Her left knee and hip took the brunt of the impact. The medial side of her left knee was where the pain afterwards “particularly hurt”. The accident was in back country Wairoa, and she did not seek medical attention.

[4] On 31 August 2002, Ms Cotter had an accident at sea on a fishing boat and injured her right knee and forearm. She was granted cover for these injuries and, for a period, received weekly compensation.

[5] On 9 February 2007, when Ms Cotter was on a fishing boat, her left leg was caught in a belt and she twisted her left knee.

[6] On 28 July 2010, Dr Christopher Strack, Specialist Occupational Physician, reported that Ms Cotter had been referred to him. He was provided with medical notes relating to Ms Cotter dating back to 1 August 2002. He recorded that she summarised her problem as that of a sore right knee. He noted the history of her right knee problems and that she “has no previous history of knee problems or injuries other than that described above”. However, he added that Ms Cotter experienced “some pain at times in the left knee”, “this might be present perhaps 2 days a week”, and “there is no swelling or locking of the left knee”. Dr Strack’s examination included:

The left knee showed a range of movement of 0-110 degrees, with no obvious effusion (difficult to assess). There was no tenderness or crepitus of the left knee, and the ligaments of the left knee were stable.

[7] Dr Strack diagnosed lateral meniscal pathology and osteoarthritis of the right knee, contributed to by Ms Cotter’s increased body mass index. Dr Strack also noted:

More recently, there is some left knee pain. — I suspect that Ms Cotter may be developing osteoarthritis of the left knee. I have not investigated this further, as it was not the reason Ms Cotter was referred to me. She also appears to be experiencing only relatively modest symptoms in relation to the left knee.

[8] On 18 January 2011, Dr Margaret Fielding, GP, noted that Ms Cotter had had three surgeries to her right knee, having first injured her knee in 2002.

[9] On 9 May 2011, Dr Bianca Cantera, GP, noted three meniscal tears to Ms Cotter's right knee, having suffered an injury in 2002.

[10] In November 2011, Mr Simon Johnston, Orthopaedic Surgeon, reviewed Ms Cotter's left knee and advised that it was healthy. On 14 November 2011, Ms Cotter wrote in a letter that "not once did I state that I have pain in my left knee", and "the x-rays Mr Johnson and I looked at shows my left knee was healthy".

[11] On 22 September 2016, Dr Fiona O'Sullivan, GP, recorded Ms Cotter as complaining about left knee pain for the previous two weeks and reported "no trauma and no remembered aggravant, has been back in the gym, usually her right knee which has been the troublesome one". Dr O'Sullivan noted medial strain, and advised rest and backing off from some of the gym work which would appear to strain her knees.

[12] On 4 October 2016, Dr O'Sullivan noted medial tenderness and mild swelling of the left knee and referred Ms Cotter for an x-ray.

[13] On 4 October 2016, an x-ray of Ms Cotter's knees was conducted. Dr Umesh Pandey, Radiologist, reported:

There is advanced osteoarthritis of the left knee joint, predominantly involving medial compartment with mild varus inclination. There is advanced osteoarthritis of the right knee joint, predominantly involving the lateral compartment with mild valgus inclination. There are mild degenerative changes in right patellofemoral articulation. There is mild progression of osteoarthritis bilaterally since last examination of 14 June 2011.

[14] On 3 November 2016, Dr O'Sullivan reviewed Ms Cotter's "knee OA – left knee worse", and note this was "not accident related so will likely have to be WINZ medical and not ACC".

[15] On 9 November 2016, Dr John Bannister, GP, recorded Ms Cotter as wanting to claim her knee problems as an ACC claim. Dr Bannister noted that Ms Cotter

said that her left knee pain was “bad for 2 years”, but she “accepts no particular injury but there has been repeat stresses and strains on her L knee from her rousing in shearing gangs”.

[16] On 28 November 2016, Dr Bannister lodged an injury claim form on Ms Cotter’s behalf, requesting cover for a left knee injury as a work-related gradual process injury (WRGPI). Dr Bannister filed a medical certificate with a date of injury as 21 July 2016, with a diagnosis of working on stage board (wool handling).

[17] The Corporation referred Ms Cotter’s claim for clinical comment to Dr John Monigatti, Occupational Medicine Specialist. Dr Monigatti considered the epidemiological studies. He concluded that Ms Cotter’s work tasks as a wool handler did not contain the risk factors which would have likely caused or contributed to her knee osteoarthritis. He advised that there was no epidemiological evidence that wool handlers were at significantly greater risk of developing the condition.

[18] On 4 January 2017, the Corporation issued a decision declining cover for Ms Cotter’s WRGPI claim. This was because the information provided by her employer, and the questionnaire she completed, indicated that her work environment did not cause her condition and/or her work environment did not put her at significantly greater risk of developing her medical condition.

[19] On 9 January 2017, Ms Cotter lodged a claim for a left medial collateral ligament sprain caused by her accident on 9 February 2007.

[20] On 2 February 2017, the Corporation issued a decision declining Ms Cotter cover for left knee sprain as a traumatic injury caused by her accident on 9 February 2007. This was because the available information did not show the accident described caused her injury, and the medical information supported that she had advanced osteoarthritis in her left knee and there had been no trauma to the knee from an accident. The Corporation added that, although it was able to accept claims for injuries more than 12 months after they happened, it could do this only when there was enough information to support cover.

[21] Ms Cotter lodged applications for review of the Corporation's decisions dated 4 January 2017 and 2 February 2017.

[22] On 3 February 2017, Dr Soleil Arrieta, GP, diagnosed Ms Cotter with osteoarthritis in the knees "advanced bilaterally".

[23] On 20 February 2017, the Corporation confirmed its decline of Ms Cotter's work-related gradual process condition, as the information provided indicated that her work did not put her at significantly greater risk of developing the lower leg/foot medical condition.

[24] On 7 April 2017, the Corporation rang Ms Cotter about her claim arising from the fishing boat accident, and she was recorded as saying that "she can't think of anything else that would have caused it".

[25] On 7 April 2017, Dr Caroline Graas, GP, advised:

There is not enough medical evidence that the left knee causes ongoing symptoms since 2007. There is not enough medical evidence that the event has caused an injury causing a tricompartmental osteoarthritis of the left knee in particular in light of the fact that she has generalised osteoarthritis.

[26] On 18 May 2017, Dr David Prestage, Occupational Physician, reported on Ms Cotter's left knee. Dr Prestage recorded Ms Cotter as saying she first developed left knee pain about two years before, that there was no specific incident, but the knee pain came on gradually and slowly got worse, and it was possibly related to an incident when she fell while at sea in 2007. She agreed that there had been no history of trauma to the knee. Dr Prestage advised:

Ms Cotter presented as a 50-year-old lady with bilateral knee osteoarthritis diagnosed clinically and radiologically. The left knee is clinically worse than the right. The diagnosis is clear but the issue is whether the left knee osteoarthritis is secondary to Ms Cotter's work tasks. There is no evidence to support this. ...

The very strong risk factors present in Ms Cotter's case are age and overweight ... Her right knee is likely to be post-traumatic in nature but there is no evidence of an injury to the left knee.

1. What is the diagnosis?

Ms Cotter suffers from bilateral knee osteoarthritis, the right knee is possibly injury-related but there is no evidence the left knee is.

2. Is there a differential diagnosis? Please provide a rationale for your preferred diagnosis.

The diagnosis is clear based on the clinical assessment and the x-ray findings.

3. Do you believe that the client has suffered actual damage to the body?

There is clear evidence of pathology affecting the left knee.

4. Were there any employment properties or characteristics that caused or contributed to the client's condition(s)? Please explain your conclusions and identify those particular properties or characteristics.

No; while Ms Cotter's work tasks may have aggravated her left knee symptoms there is no evidence to support them being causative. Her weight would have had a similar effect. ...

5. Accepting that most conditions are multifactorial in their aetiology, what were the causal factors (including age-related change) and their relative significance in this case?

Ms Cotter's left knee osteoarthritis is most likely idiopathic i.e. there is no specific cause (though the nonoccupational risk factors of age and overweight are present), with her work tasks and weight acting as aggravating factors.

[27] On 13 July 2017, review proceedings were held to consider Ms Cotter's two applications for review. At the hearing, Ms Cotter stated that she did not have any problems with her left knee until February 2016, and that her first real problems with her left leg were in August 2016 when she failed a medical test because of her left knee problem. She related her problems to the accident at sea in February 2007.

[28] On 2 August 2017, the Reviewer dismissed Ms Cotter's two applications for review. The Reviewer found that there was insufficient evidence for the Corporation to extend cover (nearly 10 years later) to an injury caused by accident in February 2007; and that the Corporation fairly considered that it was unlikely (based on Dr Prestage's report) that Ms Cotter's arthritis was caused by work exposures. Ms Cotter lodged an appeal against the Reviewer's decision in the District Court.

[29] On 18 June 2019, Ms Cotter's appeal was heard in the District Court. On 16 July 2019, McGuire DCJ dismissed the appeal¹ and found as follows:

[29] Given the reports of Dr Graas and Dr Prestage I am driven to conclude that the appellant has been unable to establish that her present left knee presentation with osteoarthritis was on the balance of probabilities caused by her accident on the 'San Enterprise' in 2007.

[30] Furthermore, I also conclude from all the evidence before me and in particular the evidence contained in Dr Prestage's report that the appellant has not established that her left knee osteoarthritis was caused by her work tasks throughout her occupational history predominantly as a wool handler and as a general hand on a fishing vessel at sea.

[30] On 3 August 2021, Dr Anne Hurly, GP, lodged an ACC45 injury claim form on behalf of Ms Cotter for various injuries claimed to have been caused by the motor vehicle accident on 11 November 2001. The accident was described in the claim form as "travelling to work. Car rolled twice on loose metal, seatbelt came loose hit the roof twice with head and left side body." Dr Hurly diagnosed contusions to left side of Ms Cotter's back, left knee, left hip and scalp. Dr Hurley noted in the claim form that this was a "claim for historical accident, did not seek medical attention at the time".

[31] On 11 October 2021, the Corporation issued a decision that, based on the information it had received, it was unable to accept Ms Cotter's claim. The Corporation noted that it could accept claims for injuries more than 12 months after they happened only when there was enough information to support cover. The Corporation advised that there was not enough information to support her claim. Ms Cotter applied to review the decision.

[32] On 21 January 2022, Ms Cotter and the Corporation attended a conciliation meeting. Ms Cotter explained that she was being driven back to the shearing quarters in 2001 when the car she was riding in rolled, her seat belt came undone and she bounced around the car, hurting her left knee. She noted that at the time she did not feel too bad and finished working that shed, and unfortunately, there was no medical evidence from that time. The outcome of the conciliation was that the parties agreed to write to Mr Johnson, Ms Cotter's treating Orthopaedic Surgeon,

¹ *Cotter v Accident Compensation Corporation* [2019] NZACC 81

and ask him to provide comment on her claim. The Corporation agreed to issue Ms Cotter fresh new reviewable decisions after it had received and considered Mr Johnson's report. Ms Cotter agreed to withdraw her review application.

[33] On 9 August 2022, Mr Johnson reported to Dr Hurly that:

Joanne's history goes back to 2001 when she was involved in a motor vehicle accident and she twisted her knee during that time and I believe she injured the medial aspect of the knee. She has had ongoing pain over the years and to add insult to injury she fell on the knee in 2007 whilst out on a fishing boat and this irritated an already slightly painful knee.

[34] On 9 August 2022, Mr Johnson reported the following to the Corporation:

As you know [Ms Cotter] has injured her left knee on the 11th of November 2001. An application has been made to ACC for Joanne to have an oxford unicompartmental knee replacement because of the medial compartment osteoarthritis. The need for surgery has been related to the injury date of 11th November 2001.

In answer to your questions - what is the current diagnosis of Jo's knee.

Question1 "What is the current diagnosis of Jo's knee?" - Jo has medial compartment arthritis.

Question 2 "What is the cause of the pain in Jo's knee?" - The medial arthritis is causing her pain.

Question 3 "Is the diagnosed injury or injuries more likely than not to have been caused or contributed to by any of Jo's covered accidents or the car accident in 2001?" - Osteoarthritis could have developed in Jo's knee as a consequence of the injury she sustained in November 2001. At the time she may have torn the medial meniscus and she may have sustained some medial sided chondral damage, it would certainly contribute to her symptoms. If that was indeed the case then it is quite clear that the injury is the trigger that led to the arthritis and if that is the case than a causal medical link has been established.

Question 4 "If there is a degenerative condition (such as osteoarthritis) in Jo's left knee was it wholly or substantially caused by gradual process or has it been materially contributed to by one or more of Jo's covered injuries or treatment for them?" - Jo does have some osteoarthritis in her left knee and this has come about as a result of the injury described above. Unfortunately we do not have any imaging from 2001 all we have is her history which does seem consistent with medial joint line damage sustained during the motor vehicle accident, which in itself is consistent with a medial compartment degenerative condition.

Question 5 "Please provide an opinion on causation for each condition you identify. Please note that a comment on general causation (is the mechanism of injury capable of causing the condition) and specific causation (did the mechanism of injury cause the condition in this particular individual and

circumstance) is required.” - I believe this question has been answered above and I do believe a causal medical link has been established. Any damage to the medial joint or meniscal pathology that she sustained whilst being involved in a rolling car on the 11 November 2001 has been going on in her knee for the last 21 years. It is quite conceivable that this has gone on to develop medial compartment arthritis.

[35] On 10 August 2022, Mr Johnson sent the Corporation an assessment report and treatment plan. He sought surgery funding approval for an oxford unicompartmental knee replacement of Ms Cotter’s left knee. He submitted the request under the current 11 November 2001 claim and noted that Ms Cotter had told him that she has had ongoing pain in that knee since the motor vehicle accident. Addressing the causal medical link between the proposed treatment and covered injury, Mr Johnson said that: “Joanne injured her knee back in 2001”.

[36] On 28 September 2022, Ms Anna Preston-Thomas, Physiotherapist, reported after analysing the medical evidence available. She advised that the information found in the specialist report did not establish that the accident caused the diagnosis requested for cover:

The current diagnosis in the left knee is advanced medial compartment osteoarthritis. This is the condition which requires surgery. Osteoarthritis in the knee is a joint disease distinguished by progressive degeneration of articular cartilage, underlying bone and menisci. Knee osteoarthritis can be consequential to a significant traumatic injury to the joint, such as a fracture, dislocation or meniscal tear. The left knee contusion (bruise) requested for cover on this claim could not plausibly result in subsequent osteoarthritis. The surgeon has reported the accident on this claim may have torn the medial meniscus and she may have sustained some medial sided chondral damage resulting in consequential osteoarthritis. The question is therefore whether medical information supports these injuries occurred. The described mechanism of accident could potentially have caused a significant traumatic injury such as medical meniscal tear or chondral damage.

Traumatic meniscal tears and/or chondral damage are very painful. The resulting knee pain, swelling, giving way and inability to put weight through the knee typically prompts early presentation to a medical practitioner - typically within a few days. There is no evidence of presentation for treatment for the left knee for at least 10 years, a timeline not consistent with these injuries.

The client has a long history of ACC covered injuries before and after the accident. I have examined all the medical information available within 2 years after the accident and cannot see a reference to a left knee injury as would be expected if the client had sustained a significant knee injury such as a traumatic meniscal tear or chondral injury. This includes an Orthopaedic assessment dated 3/10/2002 and GP assessment dated 25/9/2002 which only refer to RIGHT knee pain and swelling. The clinical history is therefore not consistent

with the client sustaining a traumatic left knee meniscal or chondral injury in 2001.

In 2016 the client reported to ACC she worked as a general hand/fin fisher between 2001 and 2008, a job which involved loading freezers on a boat for 8 hours. When she was not working the client described her activities as gym, swimming and cycling for 7 hours per week. This level of activity is not consistent with the disability of traumatic meniscal tears. I note in 2016 the client sent a form to ACC linking her left knee symptoms to an accident on a boat in 2007.

The client does not have an ACC claim for an injury in 2007. Further, the Surgeon states the osteoarthritis was not caused by a 2007 event. In 2016 the client reported to her GP there was no particular knee injury but repeated stress and strains from her rousing in shearing gangs. A request for cover for a left knee gradual process work related injury was declined by ACC and upheld at review.

In conclusion, medical evidence does not support the client sustained an injury to the left knee in 2001 capable of causing subsequent knee osteoarthritis. Her osteoarthritis is more likely part of an age-related gradual process condition (client is 56 years).

[37] On 29 September 2022, the Corporation issued a decision that it was unable to approve Ms Cotter's cover for osteoarthritis of the left knee as caused by her accident on 11 November 2001, based on the information that the Corporation had available. The Corporation noted that medical evidence did not support that Ms Cotter sustained an injury to the left knee in 2001 capable of causing subsequent knee osteoarthritis and advised that her osteoarthritis was more likely part of an age-related gradual process condition. Ms Cotter applied to review this decision.

[38] On 20 January 2023, review proceedings were held. Ms Cotter recalled that she forgot about the motor vehicle accident until she returned to work in August 2021, when her shearing gang reminded her of the accident. She stated that, after her motor vehicle accident, there were four to five months when she was unemployed anyway, and that whatever was happening with her knee in this time was not enough for her not to be working.

[39] On 7 February 2023, the Reviewer dismissed the review, on the basis that the Corporation was correct to decline cover for left knee osteoarthritis caused by the November 2001 accident. The Reviewer noted that the complete lack of contemporaneous medical evidence and the late lodgement of the claim had

prejudiced the Corporation's and Ms Cotter's ability to make a decision on the claim in favour of her.

[40] On 24 March 2023, a late Notice of Appeal was lodged. On 30 March 2023, McGuire DCJ granted Ms Cotter leave to appeal out of time.

[41] On 7 July 2023, Ms Cotter provided an affidavit in which she described the accident on 11 November 2001 as follows. She injured her left knee, and particularly the inside of her left knee where the arthritis is central. She did not report to a medical practitioner at the time. She went back to work and limped around for another two days or so because she wanted to finish the job she had started. She then decided that she could not keep working and finished up at work and tried to focus on regaining her mobility. She took the next four months away from work to give her body time to heal. She then forgot about her left knee injury and started working around April 2002. Her left knee seemed to come right. When the pain in her left knee became worse in 2015 she began searching for an explanation without thinking about the accident of 2001. She recalled the injury to her left knee from the accident only after she went back to work in 2021 for the same shearing gang that she had left in 2001.

[42] On 25 July 2023, Ms Cotter's sister, Ms Charmaine Cotter ("Charmaine"), provided an affidavit about Ms Cotter's 2001 accident. She stated that later, on the day of the accident, Charmaine saw that Ms Cotter was strapped and bandaged around her leg. The following morning, they started shearing work at 5.00 am, although Ms Cotter was limping around and sore. Ms Cotter limped around work for a while on her bad knee, though she kept working for a couple of days. She was on crutches at some point afterwards and complained about her knee a lot in those days.

Relevant law

[43] Section 360 of the Accident Compensation Act 2001 ("the Act") provides:

- 1) Subsection (2) applies to a claim for cover, if the claim—
 - (a) is for personal injury suffered before 1 April 2002; and
 - (b) is not lodged with the Corporation before 1 April 2002.

- (2) A claimant has cover under this Act only if—
- (a) the claimant would have had cover under this Act, had the injury occurred on or after 1 April 2002; and
 - (b) the claimant would have had cover under the Act that was in force at the time that the person suffered the injury.

[44] The Act in force at the time that Ms Cotter suffered the 2001 injury was the Accident Insurance Act 1998. The following are the relevant provisions of the 2001 Act, footnoted with the equivalent provisions of the 1998 Act.

[45] Section 20(2)(a) of the 2001 Act provides that a person has cover for a personal injury which is caused by an accident.² 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)).³ 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.⁴ 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.⁵

[46] In *Ambros*,⁶ Glazebrook J, for 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

² Cf section 39(2)(a) of the 1998 Act.

³ Cf section 29(2) of the 1998 Act.

⁴ Cf section 28(2)(a) of the 1998 Act.

⁵ Cf section 28(4) of the 1998 Act.

⁶ *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

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 ...

[47] In *Johnston*,⁷ France J stated:

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

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

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

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

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

[48] In *Stewart*,⁸ Barber DCJ stated:

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

[49] In *Sarten*,⁹ Barber DCJ 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

⁷ *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

⁸ *Stewart v Accident Compensation Corporation* [2003] NZACC 109.

⁹ *Sarten v Accident Compensation Corporation* [2004] NZACC 2.

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.

[50] In *Sparks*,¹⁰ Ongley DCJ 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.

[51] In *Clouston*,¹¹ Beattie DCJ stated:

[10] In the present case the fact of the matter is that the appellant lodged his claim for cover through his GP on 31 January 2001. Leaving aside any statements which the appellant may have made at or about that time which may be construed as being self-serving, I find that there is considerable evidence to support the appellant's contention that the rolling of the dump truck did occur back in 1986.

[11] At the time the appellant made such statements to Dr Malik in 1988 and to other specialists to whom he had been referred for other covered injuries the appellant had no reason to start manufacturing an incident which had not occurred. ...

[52] In *Robinson*,¹² Beattie DCJ stated:

[26] In this case, as a matter of law, the onus is on the appellant to establish a causative link between the covered personal injury and the need for surgery, that is, that the surgical procedure is to treat a medical condition associated with the covered personal injury. This case has difficulties for the appellant as the evidence does not establish precisely what injury the appellant may have suffered to his left knee in the accident of January 1994. In this case there was no medical intervention until some five years after the event, and that was only cursory insofar as the knee was concerned, as the primary problems that the appellant was facing at that time were to his ankles, and it is of course the case that the appellant did not seek cover for any injury pertaining to that accident event until 2006. ...

[32] In all the circumstances, I find that there is just not sufficient evidence to identify that this appellant suffered a type of physical injury in January 1994

¹⁰ *Sparks v Accident Compensation Corporation* [2006] NZACC 45.

¹¹ *Clouston v Accident Compensation Corporation* [2003] NZACC 10.

¹² *Robinson v Accident Compensation Corporation* [2012] NZACC 228.

[over 18 years before] which caused the onset of osteoarthritis. No long-term or major injury has ever been identified, and of course it is the need for a physical injury to have occurred causing the osteoarthritis, and it is that fact which I find is lacking in the case of this appellant. I find therefore that in the circumstances of this case, the respondent was correct to decline to grant cover for the knee replacement surgery that was required.

Discussion

[53] The issue in this case is whether Ms Cotter has established on the balance of probabilities that the advanced medial compartment osteoarthritis of her left knee was caused by her accident of 11 November 2001.

[54] Mr Cartwright, for Ms Cotter, submits as follows. The fact of Ms Cotter's accident is not challenged. The accident caused damage to the medial compartment of her left knee, and a personal injury can be inferred to have occurred. The medical notes record a suspicion that the left knee problems are related to a physical injury such as a torn meniscus. The arthritis is recorded as emerging when Ms Cotter was only approximately 44 years old. Mr Johnson opines that a torn meniscus and chondral damage were the reason why the arthritis in the left knee came about, and Ms Cotter's history was consistent with medial joint line damage sustained during the motor vehicle accident. Accordingly, Ms Cotter's arthritis was materially caused and/or contributed to by her injuries sustained in the accident. A robust inference can be drawn that the injuries sustained in the accident caused the arthritis of which Ms Cotter now complains, and that she has cover under both the 2001 and the 1998 Act.

[55] This Court acknowledges the above submissions. However, the Court points to the following considerations.

[56] First, there is the absence of contemporaneous evidence that Ms Cotter's injury on 11 November 2001 was a significant injury having lasting effect:

- (a) There is no medical record or assessment of the injury sustained by Ms Cotter, as following the accident she did not consult a doctor;
- (b) Ms Cotter did not file a claim for cover with the Corporation following the accident;

- (c) Ms Cotter returned to work the following morning and continued working for around another two days, before taking four months off work: Ms Cotter is recorded as saying (in review proceedings on 20 January 2023) that whatever was happening with her knee at this time was not enough for her not to be working;
- (d) Ms Cotter, by the time she returned to work after four months leave, forgot about her left knee injury as it seemed to come right.

[57] Second, there is a substantial time-gap between Ms Cotter's accident of 11 November 2001 and her claim for cover on 3 August 2021 for her left knee condition caused by this accident:

- (a) In November 2011, Mr Johnston, Orthopaedic Surgeon, advised (based on x-rays) that Ms Cotter's left knee was healthy; and, on 14 November 2011, Ms Cotter wrote that "not once did I state that I have pain in my left knee".
- (b) Ms Cotter stated (in her affidavit) that the pain in her left knee became worse in 2015 and that she began searching for an explanation without thinking about the accident of 2001. She is also recorded as stating (at a review hearing on 13 July 2017) that she did not have any problems with her left knee until February 2016, that her first real problems with her left leg were in August 2016 when she failed a medical test because of her left knee problem, and that she then related her problems to the accident at sea in February 2007.
- (c) On 18 May 2017, Dr Prestage, Occupational Physician, recorded Ms Cotter as saying that she first developed pain about two years before, there was no specific incident involving her left knee, but the knee pain came on gradually and slowly got worse, and there had been no history of trauma to the knee.
- (d) On 3 August 2021 (nearly 20 years after the car accident), a claim form was filed on behalf of Ms Cotter for various injuries claimed to have been caused by the car accident. Ms Cotter stated (in her affidavit) that

she recalled the injury to her left knee from the 2001 accident only after she went back to work in 2021 for the same shearing gang that she had left in 2001, who reminded her of the accident.

[58] Third, there is a substantial body of medical evidence that Ms Cotter's left knee condition is the result of age-related gradual osteoarthritis rather than an accident injury:

- (a) On 28 July 2010, Dr Strack, Occupational Physician, after an examination of Ms Cotter, noted that while she experienced some pain at times in the left knee, there were only relatively modest symptoms. He noted no swelling, locking effusion or crepitus and found the ligaments in the knee to be stable. Dr Strack suspected that she might be developing osteoarthritis of the left knee.
- (b) On 22 September 2016, Dr O'Sullivan, GP, recorded Ms Cotter as complaining about recent left knee pain and that she reported "no trauma and no remembered aggravant".
- (c) On 4 October 2016, Dr Pandey, Radiologist, reported that an x-ray of Ms Cotter's left knee showed advanced osteoarthritis of the left knee joint, predominantly involving medial compartment with mild varus inclination, and mild progression of osteoarthritis bilaterally since the last examination of 14 June 2011.
- (d) On 3 November 2016, Dr O'Sullivan noted that Ms Cotter's left knee osteoarthritis was not accident related.
- (e) On 9 November 2016, Dr Bannister, GP, recorded that Ms Cotter was wanting to claim her knee problems as an ACC claim, but that she "accepts no particular injury".
- (f) On 3 February 2017, Dr Arrieta, GP, diagnosed Ms Cotter with osteoarthritis in the knees "advanced bilaterally".
- (g) On 7 April 2017, Dr Graas, GP, advised that there was not enough medical evidence that an accident event had caused an injury causing a

tricompartamental osteoarthritis of the left knee, in particular in light of the fact that she had generalised osteoarthritis.

- (h) On 18 May 2017, Dr Prestage, Occupational Physician, diagnosed that Ms Cotter suffered from bilateral knee osteoarthritis, and that the right knee was possibly injury-related but there was no evidence the left knee was injury-related. Mr Prestage also noted that the very strong risk factors present in Ms Cotter's case were age and overweight.
- (i) On 28 September 2022, Ms Preston-Thomas, Physiotherapist, stated that medical evidence did not support that Ms Cotter sustained an injury to the left knee in 2001 capable of causing subsequent knee osteoarthritis, and that her osteoarthritis was more likely part of an age-related gradual process condition.

[59] This Court has closely examined the opinion of Mr Johnson, Ms Cotter's treating Orthopaedic Surgeon, that her left knee replacement, required because of her medial compartment osteoarthritis, could be related to the injury date of 11 November 2001. This Court has the following reservations about Mr Johnson's opinion:

- (a) Mr Johnson's belief in a link between Ms Cotter's osteoarthritis and the car accident in 2001 is phrased in terms of possibility rather than probability. This is evident in the use of the terms "could have", "may have", "if that were the case" and "quite conceivable".
- (b) Mr Johnson notes, in his opinion to the Corporation, that "any damage to the medial joint or meniscal pathology that she sustained whilst being involved in a rolling car on the 11 November 2001 has been going on in her [left] knee for the last 21 years". In Mr Johnson's accompanying report to Dr Hurly, he notes that Ms Cotter "has had ongoing pain [in her left knee] over the years". These notes appear to be at variance with the self-reports of Ms Cotter and the medical reports noted above. Mr Johnson's notes also appear to be at odds with the evidence that, in

November 2011, he advised (on the basis of x-rays) that Ms Cotter's left knee was healthy.

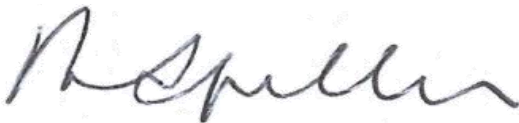
- (c) Mr Johnson does not engage with the medical evidence of Dr Strack (Occupational Physician), Dr Pandey (Radiologist), Dr O'Sullivan (GP), Dr Arrieta (GP), Dr Graas (GP), and Dr Prestage (Occupational Physician), indicating that Ms Cotter's left knee condition was the result of developing osteoarthritis rather than an injury event.

[60] This Court accepts that it may draw robust inferences of causation in some cases of uncertainty. However, the Court is required to ground its assessment of causation, not on the basis of supposition or conjecture, but on a common-sense appreciation of the whole of the lay and medical evidence. In Ms Cotter's case, the clear weight of evidence is to the effect that she has not proved that the osteoarthritis of her left knee was caused by her accident on 11 November 2001.

Conclusion

[61] In light of the above considerations, the Court finds that Ms Cotter has not established on the balance of probabilities that the advanced medial compartment osteoarthritis of her left knee was caused by her accident on 11 November 2001. The decision of the Reviewer dated 7 February 2023 is therefore upheld. This appeal is dismissed.

[62] I make no order as to costs.



P R Spiller
District Court Judge

Solicitors for the Appellant: Henderson Reeves.