

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 77

ACR 50/22

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

Hearing: 3 April 2023
Heard at: Christchurch/Ōtautahi
Appearances: The Appellant in person
Mr C Light for the Respondent
Judgment: 17 May 2023

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Cover: Section 25; Section 26, Accident Compensation Act 2001]**

[1] The issue in this appeal is the correctness of ACC’s decision of 10 February 2021 declining to provide cover and to fund the appellant’s surgery for a right hip labral tear.

Background

[2] On 15 June 2020, the appellant lodged an injury claim with ACC through the Wanaka Medical Centre Limited. The accident was described as “playing football on 24 March 2020” and the diagnosis from the Wanaka Medical Centre was “other groin injuries right”. The appellant was referred to a physiotherapist.

[3] The appellant consulted a physiotherapist the same day, 15 June 2020. The physiotherapist notes record a provisional diagnosis of R hip flexor/labral.

[4] Under the heading “Current History” is this:

Injured before lockdown football-tennis. Painful after game. Tried to walk it out. Stayed the same. Three months ago no better. Can’t reach down to put shoes on. Bit more active since lockdown finished has been more active. Saw GP as worried? hernia. ... indoor hockey very painful after and biking for a weekend trip.

[5] The physiotherapist entered a diagnosis:

Hip flexor sprain chronic.

Analysis: 35 year old architect. Injured hip doing high kick in football-tennis three months ago. Worse in the last week with return to sport coming out of lockdown. Struggles to put R sock on EOR hip flexion.

[6] The appellant saw the physiotherapist again three days later on 18 June 2020. The physiotherapist’s notes record:

Diagnosis: Hip flexor sprain chronic.

Differential diagnosis: Labral FAI (femoral acetabular impediment).

[7] The appellant continued physiotherapy treatment on approximately a weekly basis, with the last treatment dated 22 July 2020. The report of that date noted that the appellant was “very protective on movements”.

[8] Under the heading “Plan” was this:

Review 2-3 weeks after MRI and referral on to see specialist.

[9] An MRI was undertaken on 3 August 2020. Under the heading “Comment”, the report included the following,:

Moderate iliopsoas bursitis.

Tearing of the anterior-anterosuperior labral associated chondral loss of the acetabular rim (chondromalacia grade 3/grade 4), consistent with osteoarthritis.

[10] The appellant saw Dr Ruth Hight, sports physician, on 18 August 2020. In a report of the same date, she noted the MRI report and recommended a trial of a “one off iliopsoas bursal injection”. She also emphasised the need to rest the hip.

[11] An ultrasound guided injection was carried out on 7 September 2020, and the appellant was seen again by Dr Highet. She noted:

... he still has markedly positive hip labral findings, with markedly positive quadrant and FABER. Still marked weakness also on resisted SLR in ER.

[12] Dr Highet recommended that the appellant see Dr Brick of the Millennium Institute of Sport and Health in Auckland. This occurred on 19 November 2020. In Dr Brick's report under the heading "Impression" is this:

Right hip chondrolabral injury with CAM impingement.

Plan: I have updated Lukas about his diagnosis. Non-surgical options include lifestyle modification, avoidance of high risk sports, pain killers and injections as and when necessary. In the case that his symptoms are persistent despite a prolonged course of non-surgical management, surgery is an option. This will be in the form of a keyhole repair of the labrum, as well as a micro fracture of the affected cartilage area. This will require him to be on partial weight-bearing with crutches for about six weeks, as opposed to the standard two weeks. We will also perform a femoral osteoplasty to reduce the future risk of impingement.

...

Lukas has had enough of his right hip symptoms which are curtailing his sporting pursuits and even simple things like tying his shoelaces. To this end, he wants us to make an ACC application on his behalf.

[13] Dr Brick completed an assessment report and treatment plan on 25 November 2020.

[14] Under the heading "Causal Medical Link Between Proposed Treatment and Covered Surgery" is this:

Lukas was playing a game of football-tennis and he was about to kick the ball with his right foot and he slipped and ended up falling backwards onto his right hip and twisting his hip awkwardly in the process. The pain was so severe that he was unable to return to the game, and he has been complaining of persistent pain during that time.

[15] ACC's clinical advisor, orthopaedic surgery, Mr Atkinson gave clinical comment on 27 January 2021, which included the following:

...

It is probable in this instance that the covered groin injury of 24/03/2020 has led to symptomatic aggravation of the pre-existing femoroacetabular impingement and early osteoarthritic change to the hip joint.

[16] Accordingly, on 10 February 2021, ACC declined to approve the recommended surgery as “we consider that the need for surgery is not primarily due to your injury on 24/03/2020”.

[17] On 13 April 2021, Dr Brick provided a letter of support to the appellant. It included the following:

...

4. The mechanism of injury in Lukas’ case is certainly consistent with an episode of high force damage to the hip. Lukas was playing tennis-football, which requires the athlete to kick the football backwards and forwards across a net using their foot. In Lukas’ case, he lunged for the ball in a high kicking position and slipped and fell onto his flexed hip. This would have had the effect of jamming the CAM shaped hip into the acetabulum with a force several times body weight. It is plausible that at this moment, the labrum went from being functional, stable and partly damaged to non-functional, unstable and very damaged.

This would explain the onset of symptoms. Support for this is that on the MR arthrogram, there is a large amount of fluid that had escaped beneath the anterolateral labrum and around the iliopsoas bursa. In 50 per cent of individuals, the iliopsoas bursa communicates with the hip joint. This rapid escape of fluid into the surrounding soft tissues would be consistent with a labrum that had completely broken free from the acetabulum and was now no longer forming a fluid seal.

5. The clinical advisory panel has worked with hip arthroscopists in New Zealand to discuss a range of factors that are both more supportive and less supportive of trauma. In Lukas’ case, being of a younger age of less than 40 years old, is more supportive of trauma. He has cover for an appropriate high force injury, again which is supportive. In the past history, he has no prior history of hip symptoms, another supportive factor. The history is also consistent in that Lukas was unable to continue participating in activities and had high dramatic loss of function and pain after his injury. His prior activity levels of being a high level football player is less supportive, as it would be consistent with the a-symptomatic CAM action and the early femoral neck osteophyte formation previously mentioned. His initial presentation is consistent with trauma with appropriate groin pain and loss of function occurring immediately. Imaging features are mixed and there is certainly features of long term a-symptomatic FAI. These are his early condral loss, his early femoral neck osteophytes and a single acetabular rim cyst.
6. There is no question that Lukas’ case is measured in shades of grey, rather than being black or white. He had a high functioning a-symptomatic hip, with very early wear and tear consistent with longer term CAM FAI. Yet he had a significant injury which has destabilised his labrum, resulting in a rapid loss of function and leaking of fluid into the anterior soft tissues.

...

9. Did the forceful injury contribute significantly to his requirement for surgery? The answer is most certainly yes.

[18] Mr Atkinson, commented again on 27 April 2021 and concluded:

...

Rather than causing an acute traumatic labral tear, it is more probable in this instance the covered injury has led to symptomatic aggravation of the underlying pre-existing non-injury pathology. The attritional tearing of the anterior superior labrum forms part of this pre-existing pathology.

[19] Mr Brick performed right hip surgery on 19 January 2022 with a diagnosis of severe CAM femoroacetabular of the right hip.

[20] Mr Bravenec was unsuccessful at review and has appealed to this Court.

[21] Since the review hearing, the respondent has obtained a report from its clinical advisory panel dated 3 August 2022.

[22] The report included the following:

Summary: An acute labral tear is most unlikely in Mr Bravenec's case.

The CAP concluded that an isolated, acute acetabular labral tear from a single traumatic episode seems most unlikely in this setting. Mr Bravenec's pre-existing right hip femoroacetabular impingement, osteoarthritis and associated labral tearing were the dominant and substantial cause of his symptoms, and there was no new, acute labral tearing with his 24/03/2020 accident.

[23] By way of further explanation, the CAP said:

...

Labral tears are common in a-symptomatic individuals and their presence generally does not indicate trauma. In people with CAM pathology, like Mr Bravenec, over 95 per cent have labral tearing without any trauma or accidents, simply due to the bony CAM pathology. Deterioration of the acetabular labrum has been observed in teenagers and are increasingly common with increasing age as part of the natural history of an aging hip joint.

Many people have severe pathology in their hip imaging without any symptoms or problems, like Mr Bravenec, for years prior to his symptom onset at the time of his 24/03/2020 accident. Mr Bravenec is unfortunate to have gradually developed advanced right hip osteoarthritis with full thickness cartilage loss and osteophytes.

Many active young people, including Mr Bravenec have a-symptomatic labral pathology, and no one knows why some people become symptomatic and why the symptoms often only affect one hip.

Appellant's Submissions

[24] He says that it took ACC nearly a year to decline coverage for his surgery and that during that time he tried his best to act as if he had no problems with his hip and attempted to live life and walk off any pain or discomfort like a tough person.

[25] He says he is willing to acknowledge the presence of certain pre-existing conditions in his hip, but he refers to what Dr Brick concluded, namely:

There is no question that Lukas' case is measured in shades of grey, rather than being black or white. He had a high functioning a-symptomatic hip, with very early wear and tear consistent with longer term CAM FAI. Yet he had a significant injury that has likely destabilised his labrum, resulting in a rapid loss of function and leaking of fluid into the anterior soft tissues.

[26] He told the Court that he engaged in activities such as skiing and ski touring in Japan a few weeks prior to his accident, without any noticeable impact on his mobility or experiencing any pain.

[27] He said that following the accident he was immediately unable to sit at work for longer than 15 minutes at a time and that his usual sports, like skiing and even biking, were not comfortable. He said he could definitely not play football-tennis or indoor hockey, which are more intense, and that he walked with a permanent limp.

[28] He says that due to Covid lockdown, there were delays in his injury being assessed, so that his acute presentation could not be recorded and documented notes from the GP and physiotherapist did not accurately represent his injury. He presented photographs of football-tennis to the Court and described it as a demanding sport requiring exceptional agility, explosive power and balance.

[29] He said that at the time of the accident, he experienced a situation where he had sudden and significant pain.

Respondent's Submissions

[30] Mr Light refers to the limited medical information available following the accident of 24 March 2020. He refers to the doctors note of 15 June 2020 where the doctor records:

Playing football-tennis four days before lockdown. Lifted leg up high. Has been painful since then. Worse also two weeks after two games of indoor hockey. Struggles to put on shoes on right side.

[31] Mr Light also refers to the physiotherapist's record of 18 June 2020 where the diagnosis is "hip flexor sprain chronic" with the differential diagnosis of "labral FAI (femoral acetabular impediment).

[32] Mr Light refers to the comment of Dr McKewen, radiologist, of 3 August 2020 regarding the MRI scan of the same date, noting that the presentation is "consistent with osteoarthritis".

[33] Mr Light refers to the assessment report and treatment plan dated 25 November 2020 and notes that this records for the first time that the appellant slipped and ended up falling backwards onto his right hip and twisting his hip awkwardly in the process.

[34] Mr Light notes that Dr Brick, in his report of 13 April 2021, acknowledges that there is evidence of pre-existing a-symptomatic CAM action in the appellant's hip.

[35] Mr Light refers to the report of Mr Atkinson, who notes:

An acute traumatic labral tear typically is associated with sudden and immediate onset of significant hip symptoms.

[36] Mr Atkinson goes on to say:

At presentation, some three months following injury, physical examination confirms some pain with hip flexion. A normal range of movement in the hip joint is recorded.

These physical findings are non-specific, could represent any underlying pathology within the hip joint. These do not aid in determining causation in this instance.

[37] Mr Light refers to the clinical advisory panel report of 3 August 2022.

[38] He notes that in the appellant's case, the panel said:

... There was no record of bruising, swelling, fractures, tendon or ligament tears, or any other soft tissue injuries. He did not describe immediate, severe impairment from critical shearing forces across his right hip, which stopped his usual activities ...

There was no clinical record of clicking, catching, locking, instability, stiffness or giving way. Mr Bravenec was able to continue playing tennis, hockey and tennis-football, and this points away from acute labral tearing.

[39] Mr Light also refers to the further comment of the panel at page 4 of its report:

The CAP noted that none of the mechanisms described by Mr Bravenec is consistent with acute labral tearing.

“Extreme” leg extension does not cause labral tearing. Humans extend our straightened leg each time we walk forward, turn around, kick balls or climb up inclines.

[40] Mr Light submits that when the overall clinical picture is considered, it does not support the appellant’s position of significant injury on 24 March 2020. Following the appellant’s accident, he was still able to ski. Mr Light accordingly submits that an injury requiring the remedial surgery to his right hip has not been established.

Decision

[41] The issue for determination in this appeal is the correctness of ACC’s decision of 11 February 2021 declining to provide cover and to fund surgery for a right hip labral tear.

[42] It is the appellant’s position that he was injured on 24 March 2020 while playing football-tennis.

[43] After the Covid lockdown, over two and a half months after the injury event, the appellant saw his GP in Wanaka on 15 June 2020 and an ACC accident claim form was lodged. The description of the injury at the time was:

Playing football-tennis four days before lockdown. Lifted leg up high. Has been painful since then. Worse also two weeks after two games of indoor hockey. Struggles to put shoes on right side.

Front flexion difficult on right side. Good lateral flexion. Good extension. Some pain on palpation of right inguinal ligament. Normal ROM of hip. Normal left hip and right knee exam.

.....

Impression-? inguinal ligament strain

[44] The ACC accident claim form lodged on that day had the Diagnosis- “Other groin injuries” ...“Suspected>likely inguinal strain”

[45] Following this doctor's appointment, the appellant undertook physiotherapy and this appeared to continue until 22 July 2020. At what appears to have been the last physiotherapy session, the physiotherapist recorded:

Skiing has been good. Has stopped fast accel decel rot sports. Not much change ...

[46] An MRI was undertaken on 3 August 2020, which recorded:

Moderate iliopsoas bursitis.

Tearing of the anterior-anterosuperior labral associated chondral loss of the acetabular rim (chondromalacia grade 3/grade 4), consistent with osteoarthritis.

[47] The next report follows a consultation of Orthosports, where he was examined by Dr Brick and his assistant Gen Foo, hip arthroscopy fellow.

[48] Mr Foo reported:

Lukas has had enough of his right hip symptoms which is curtailing his sporting pursuits and even simple things like tying his shoelaces. To this end, he wants us to make an ACC application on his behalf and he will inform us once the outcome has been received ...

[49] Following this, an assessment report and treatment plan was compiled by Dr Brick, which included additional information that, while playing football-tennis, the appellant slipped and ended up falling backwards onto his right hip and twisting his hip awkwardly in the process.

[50] In support of the appellant's request for ACC to fund the surgery, Dr Brick provided a letter dated 13 April 2021. Included in the report is this:

The mechanism of injury in Lukas' case is certainly consistent with an episode of high force damage to the hip. Lukas was playing tennis-football, which requires the athlete to kick the football backwards and forwards across a net using their foot. In Lukas' case, he lunged for the ball in a high kicking position and slipped and fell onto his flexed hip. This would have had the effect of jamming the CAM shaped hip into the acetabulum with a force several times body weight. It is plausible that at this moment, the labrum went from being functional, stable and partly damaged to non-functional, unstable and very damaged.

...

There is no question that Lukas' case is measured in shades of grey, rather than being black or white. He had a high functioning a-symptomatic hip, with very early wear and tear consistent with longer term CAM FAI. Yet he had a significant injury which

has destabilised his labrum, resulting in a rapid loss of function and leaking of fluid into the anterior soft tissues.

[51] The appellant underwent surgery on 19 January 2022. In his operation note, Dr Brick recorded these findings:

Labrum: Seldes type 3 tear with extensive damage. The labrum was very frayed, with longitudinal splitting and was unable all the way from 11.30 to 3 o'clock.

Acetabulum: Grade 1 changes. Widespread.

Rim: Very large chondral defect all the way from 11.30 to 3.30, 40mm x 14mm, extending 50% of the way to the cotyloid notch.

Cotyloid notch: Severe synovitis with a cartilage loose body. Central osteophyte.

Femoral head: Normal.

Ligamentum teres: Frayed but intact.

Synovium: Very severe synovitis, with haemorrhage and large fronds of synovium everywhere.

Peripheral compartment: Very large anterior plus superior CAM with osteophyte formation.

[52] Dr Brick concluded his operation report with this comment:

Lukas' hip was very severely effected and only time will tell how long the hip joint will last and what kind of performance we can get from this.

[53] Then follows the clinical advisory panel report of 3 August 2022. Amongst other things, the report noted:

There was no record of bruising, swelling, fractures, tendon or ligament tears, or any other soft tissue injuries. He did not describe immediate, severe impairment from critical sharing forces across his right hip, which stopped his usual activities. He described right groin pain and difficulty at the end of his various, strenuous, ongoing sporting activities ...

Mr Bravenec was able to continue playing tennis, hockey and tennis-football, and this points away from acute labral tearing.

[54] The panel later commented:

Many people have severe pathology in their hip imaging without any symptoms or problems, like Mr Bravenec, for years prior to his symptom onset at the time of his 24/03/2020 accident. Mr Bravenec is unfortunate to have gradually developed advanced right hip osteoarthritis and full thickness cartilage loss and osteophytes.

Many active young people, including Mr Bravenec have a-symptomatic labral pathology, and no one knows why some people become symptomatic and why the symptoms often only affect one hip.

[55] The clinical advisory panel on this occasion included five orthopaedic surgeons and a sports medicine specialist. Having considered all the evidence put before me, I conclude that the clinical advisory panel is correct, that there is no evidence of a post-traumatic acute injury component in this case.

[56] The efforts that the appellant has taken to assist the Court's understanding of football-tennis are appreciated. It is plainly an "extreme" sport in that it requires extraordinary dexterity to use one foot effectively as the tennis racket to hit the football over the net. In order to do this, the player with the toes of one foot on the ground, extends the other foot into poses akin to a karate high kick in order to make contact with the football and to return it over the net. On any basis, it seems to be quite an extreme sport.

[57] Mr Bravenec presents as a very fit young man who was aged 35 at the time of the accident.

[58] What ultimately tells against him in this case, notwithstanding the lockdown brought on by Covid at the time, was the fact that while there was undoubtedly an injury event on 24 March 2020, the legal burden that is on the appellant is for him to establish on the balance of probabilities that the reason or purpose of the medical treatment, in this case the surgery performed by Dr Brick, is to treat a medical condition caused or suffered in the injuring event.

[59] However, the injury event as documented by his GP on 16 June 2020 was "? inguinal strain" and this was the diagnosis provided to ACC for cover.

[60] As was said in the High Court decision in *McDonald*¹, where Justice Pankhurst cited with approval the comments of Judge Beattie in *Hill*,² at paragraph 26:

... The provisions of s 10 make it clear that personal injury caused wholly or substantially by the aging process is not covered by the Act.

¹ *McDonald v Accident Rehabilitation and Compensation Insurance Corporation*, HC Christchurch AP2/02, 20 May 2002

² *Hill v Accident Rehabilitation and Compensation Insurance Corporation*, decision 189/98, 5 August 1998.

...

If medical evidence establishes that 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 the accident which renders symptomatic that which previously a-symptomatic does not alter that basic principle. The accident did not cause the degenerative changes, it just caused the effect of those changes to become apparent and of course in many cases for them to become the disabling feature.

[61] It is plain from the operation report of Dr Brick that there was extensive damage to the appellant's right hip.

[62] Notwithstanding this and following the injury of 24 March 2020, the appellant continued with a range of sporting activities, notwithstanding the obvious inguinal (groin) discomfort.

[63] However, as the clinical advisory panel report noted:

Mr Brick's surgery of 19/01/2022 demonstrated extensive and severe changes consistent with CAM impingement, osteophytes, loose bodies, a large cartilage defect, hip joint narrowing, with osteoarthritis, extensive damage and fraying of the labrum, severe synovitis. Mr Brick performed bony burring, shaving and femoral osteotomy, micro fracturing, debridement and labral repairs with anchors, which had to be passed circumferentially because of the intrasubstance damage to the labrum. This all indicates severe, pre-existing pathology and there was no evidence of any post traumatic acute injury component here.

The CAP concluded that it is far more likely that Mr Bravenec's right hip complex and extensive acetabular labral tearing and chondromalacia occurred gradually, over a long time, due to his CAM impingement, where constant repetitive micro trauma from daily hip motion and sports caused his labral weakening and tearing. A causal link with his 20/03/2020 ACC – Covered Accident has not been established.

[64] Based on all the evidence in this case and in particular the evidence from the appellant's GP record and the Advisory Panel Report I must conclude that the hip surgery required by the appellant in this case arose from the pre-existing degenerative changes to his hip and not from the accident of 24 March 2020.

[65] Therefore, in accordance with *McDonald*, I must dismiss this appeal.

[66] Costs are reserved. Any memoranda in respect thereof are to be filed within one month.



CJ McGuire
District Court Judge

Solicitors: Shine Lawyers NZ Limited, Christchurch