IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 84 **ACR 124/21**
ACR 234/21
ACR 235/21

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	NICOLA EMTAGE Appellant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	SOUTHERN TRANSPORT COMPANY LIMITED Second Respondent

Hearing:	9-10 March 2023 19 April 2023
Heard at:	Invercargill/Waihopai
Appearances:	Mr P O'Sullivan, Advocate for the Appellant Mr I Hunt for the First Respondent Ms N McAlister for the Second Respondent
Judgment:	24 May 2023

RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Revocation of Cover – Causation s 65 Accident Compensation Act 2001]

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[1] Appeal ACR 124/21 is an appeal against a decision of the second respondent dated 22 December 2020, when it revoked cover previously granted by the first respondent, for contusion of the appellant's lower back, which decision was upheld by a reviewer in a decision dated 27 May 2021.

[2] Appeal ACR 234/21 is an appeal against a decision by the reviewer dated 17 September 2021 in which the reviewer found that the appellant was not entitled to a specific decision regarding a claim for entitlements, given the provisions of the Act and the finality which the decision of 22 December 2020 brought to the issue of cover.

[3] Appeal ACR 235/21 is in respect of the reviewer's decision as to costs.

The Factual Background

[4] The appellant was employed as a driver by Southern Transport in February 2016. Her role involved driving and operating waste collection trucks.

[5] The appellant made a claim for a workplace injury in 2019. Her claim was that the injury occurred when she was operating truck 204 and was collecting green waste on Racecourse Road, Invercargill on 11 March 2019.

[6] The appellant first informed Southern Transport of her injury on 6 May 2019. She attended her GP that day following an incident at her home, which she described to the Court as occurring when she was getting dressed. She said she had one foot in her pants when she became locked in that position and could not move and that she had to call her ex-husband for help. In her evidence before the Court, she referred to a text sent to Chris Smyth, her boss and Operations Manager which said:

> Was great til I got up … now pretty much crippled. Can't walk. Drs. Chiropractic or fucken ane … I don't care. Whatever I can get in to see … will keep you updated …

[7] A little later that morning, she texted Chris Smyth: "Docs at 12.15"

[8] Then at 12.41pm she texted:"2 weeks…got cert. Booked in for xrays and physio … ffs"

[9] Subsequent to 6 May 2019, the appellant presented a number of variations of the date on which she claimed she was injured at work. They ranged over four separate dates:

(a) 11 March 2019

(b) 19 March 2019

(c) 3 April 2019

(d) 5 April 2019

[10] In respect of all of these dates, Southern Transport advised the appellant why it said the injury could not have occurred on that date, essentially due to the fact that the appellant and truck 204 did not go to Racecourse Road on any of those dates.

[11] On 7 August 2019, Ms Emtage acknowledged in a letter to Southern Transport that she was "unsure precisely what day" the injury occurred.

[12] Initially her doctor wrote the date of the accident as 3 April 2019. However, the appellant was on leave that day and she changed the date to 4 April 2019. The date was further changed to 5 April 2019 following advice to her by Southern Transport that she was still on leave on 4 April 2019.

[13] The 5 April 2019 date was also incorrect, as her employer advised her, according to the GPS records, she was not in truck 204, nor collecting green waste on that day.

[14] On 19 March 2019 she was in truck 204 on Racecourse Road. However, Chris Smyth, Operations Manager, Waste and Recycling Division, was not at work that day as it was Saint Patricks weekend and as Ms Emtage had reported informing Mr Smyth of the injury at the time, the injury could not have occurred that day

[15] After eliminating the possible dates of injury, Ms Emtage concluded that the injury occurred on 11 March 2019 and the GPS record has truck 204 in Racecourse Road, Invercargill on that date between 15:14 hours and 15:18 hours.

[16] It was this date that the appellant eventually concluded was the date of the accident, when she says the bin lifter plate of truck 204 dropped on her right leg.

[17] It is the appellant's position that she reported the incident to Mr Chris Smyth, but Southern Transport has no record of that.

[18] The appellant worked a full day on 11 March 2019 and she proceeded to work for the remainder of the month of March 2019 with no apparent issues or visible injury or impediment. She continued to perform the full range of duties for her position until 6 May 2019.

[19] On 6 May 2019, the appellant went to her GP, Dr Kamali, who completed an ACC injury claim form, giving the description of injury as:

> Got hit by a heavy bar of the truck while emptying bin – paid work – impact with a sharp object.

[20] Dr Kamali recorded the accident date as 3 April 2019.

[21] After 6 May 2019, the appellant completed an incident reporting record on 21 May 2019. This report referred to the accident happening in Racecourse Road, Invercargill. In this document, she listed the date of the accident as 5 April 2019. Her description was as follows:

> Heavy G/W (green waste) bin would not empty properly. Lifted and shook out more, offset clasp for drum holder spun around during this time when I went to remove bin, drum holder part dropped down, throwing W/B back and plate corner caught my right leg running down length of thigh, throwing me back and tipping on curb.

[22] An initial needs assessment was also completed on 21 May 2019, again with the date of injury as 5 April 2019. This document included the following as to how the injury happened:

> Unloading bin off truck – grabbing system lifts up green waste – plate attached to lifter offset hook – shake the bin for it to come out. Plate hit her on leg once released 10mm plate sliced right down thigh. Will stop muscle damage potentially.

[23] The document also recorded that the injury happened in "Racecourse Road area".

[24] In answer to the question "Did you report it at work?" is the response:

> 5/4/19 – advise Chris (supervisor) of injury.

[25] In answer to the question "Did you complete an incident report?", she records:

> No incident form filled in to date.

[26] In answer to the question "Did you stop work straight away and seek medical attention?" is this:

> Completed shift. Carried on working thinking it will get better.
>
> Getting dressed, turned the wrong way, hip gave way while getting dressed – felt like hip was dislocated. 6/5 9.10am.

[27] In response to the question "Do you have any ongoing symptoms?" is this:

> Range of movement minimal – painful. Not strong, no twisting.

[28] The report goes on to note that she has had physio treatment, an xray, and an MRI requested by her physio.

[29] The assessment noted that she was taking pain killers.

[30] In answer to the question "Do you feel you will be able to return to full normal capacities at the end of your latest incapacity?" is this:

> Recovering slowly. She is hopefully trying really hard.

[31] On Thursday 16 May 2019, the appellant again texted Chris Smyth as follows:

> I have a labrum tear in my hip. Physio and docs have me off for another 2 months … need MRI and awaiting app with ACC doc … I'm honestly in shock. Was expecting work Monday … got paperwork here for you. Me deliver or Katy.

[32] On 17 May 2019, the appellant's physiotherapist reported:

> I reviewed your client on 16.5.2019 after she was working, with a heavy steel plate landed on her right thigh and she stepped back, twisting her hip joint. She is struggling walking, sleeping, sitting and lying for a period of time. She complains of a moderate achy/burning pain in her quad and a strong sharp popping click in her right hip JT. Once the hip pops, it is very painful, she struggles to walk and must rotate it a certain way to unlock it … as the xray was clear, I suspect that she has a relatively large labral tear of her right hip and associated femoral neuropraxia. She is very sensitive, so I have given her some hydrotherapy exercises to do in the pool to try and strengthen and desensitise the region. I would appreciate your opinion on her condition and whether you think an MRI is appropriate.

[33] This report was directed to the appellant's GP.

[34] On 22 May 2019, the appellant was texted by her work colleague, Katy English.

[35] So far as it is relevant, the text exchanges is set out below:

> K Gary just witnessed the drum bit drop down!!! (11.54am)
>
> Appellant Fuxkin awesome … hope it didn't get ya (11.55am)
>
> K Nah. I knew it was going to happen LOL (11.56am)

Appellant U set it up? (11.56am)

K No just banging the fuck out of heavy bin. Took 3 crushes. Had a feeling it was going to happen (11.58am)

Appellant How did he react … (12.00pm)

K He didn't see it come down as he took bin and turned but I showed him all about it and he's like oh fuck (12.02pm)

Appellant Would love to get that on video … LOL (12.03pm)

K Hahah (12.04pm)

K At Gilkies. Getting it welded up now (2.16pm)

Appellant Chris gave it the OK did he … did Gary say anything to Chris about it? Bet you did LOL (2.17pm)

K He told me to go over and get it done so I flew to the truck and left before he changed his mind LOL (2.18pm)

Appellant LMFAO … you should a taken a photo (2.18pm)

Appellant How many times I told him it dropped … frustrating (2.37pm)

K I didn't even tell him it dropped. The guy that built the truck was done today and suggested that I think

[36] On 19 June 2019, the appellant emailed Megan Lane, who although employed by Gallagher Bassett, insurance agency, was in effect ACC's case manager for this case. The email included the following:

In response to your questions:

1. Date of injury was 5 April 2019.

2. A 10mm plate attached to the rear of my truck on the bin lifter came loose while I was emptying a heavy green waste wheelie bin. As I went to remove the wheelie bin once it was empty, the plate pushed the bin backwards and proceeded to drop and land on the upper part of my right thigh, sliding down the middle of my thigh to just above my knee … the leg had been bent when the impact began … also threw me back and I tripped on the curb but managed to stay upright. The weight of the plate stretched the jeans material of my trousers but did not cut through. Managed to complete job and climb back in truck, but pain was so intense I sat in truck crying for a while. Have had increasing problems with right thigh and hip joint since the incident occurred to the point that on 6 May I was no longer capable of working.

3. I reported incident to Chris Smyth, Operations Manager, Waste Division, when I returned to base on 5/4/19. He has a "she will be right" attitude and that was exactly his response when I told him and asked if I should do an incident report.

4. Incident report done as requested by Lochie before he left and was handed in to work … you should have a copy of this I hope.

[37] In a letter that is undated but because it refers to the appellant to see a specialist on 27 August (2019), it was obviously written before that date, the appellant tells the Operations Manager, Chris Smyth, the following:

> The date regarding the injury to my right leg did have some confusion behind it, as I was aware I had done it at the beginning of a month and as I was unsure of precisely what day I believed it was April. This is what I told my doctor. He put the 3rd and realising that I was on leave at this time, I requested it be changed to the 5th. Obviously this is also incorrect as it comes down to being in truck 204, on Racecourse Road and doing green waste. As the IBright indicates, on 19 March I was in this location and in truck 204 doing green waste. However, Chris, you are not at work this week due to it being St Paddy's weekend, a yearly tradition for you. I also did G/W on 11 March. This is the day I believe the incident occurred with truck 204's drum lifter plate dropping onto my right leg. At this time, you were at work and I told you when I returned to base and reported the incident to you. I also asked if I should fill out an incident form at this time and you replied "you'll be right". Now things are obviously not right, if only I could turn back time. Health and safety protocol was not followed by either of us.
>
> Yes, this is nearly a month prior to the 5th of April. I know I have struggled with this right thigh and hip for a long period of time. As you are also aware, I have been dealing with a long line of personal issues, the dog attack on my husband, next the separation, my mother being seriously ill, my daughter leaving the country, my niece being diagnosed with a brain tumour and my closest friend being diagnosed with a tumour, which she only had a 40% chance of surviving.
>
> Although this has been successful, because it has not affected my work, in fact work has been a godsend in helping me through this time, suddenly finding myself single made work my number one priority, as I could no longer depend or rely on anyone else for income. I felt I needed to keep working even though the injury was deteriorating from week to week. I could just handle the days but found myself in a lot of pain at night. This only escalated to the point I could no longer move on the 6th of May and stayed home. I did not foresee the consequences of this injury, honestly believing that two weeks under medical care would have me, if not fully recovered, then on my way to recovery …

[38] Mr Lionel Wood, Manager, Vehicle Waste Operations for Southern Transport Co Limited, acknowledged receipt of Ms Emtage's undated letter, in a reply dated 17 August 2019. In his letter, Mr Wood noted the date that the appellant had confirmed that she had walked into a trailer at home in early April 2019 "but it was a superficial injury to your left leg".

[39] The letter went on:

> You have confirmed that you believe your right leg injury was sustained early in a month and initially believe it to be April 2019. You now believe the injury to your right leg was

> sustained on 11 March 2019, when you were in truck 204 doing the green waste. You also provided a photo dated 16 March 2019 showing a cut and a bruise.
>
> We are investigating this to understand the details as to how and when the injury occurred and whether it was sustained at work. There has been conflicting information provided and we are concerned we may not have the full picture.

[40] On 21 August 2019, Ms Emtage signed an authority for her employer to obtain from Dr John Scanelli full details of her medical condition.

[41] On 13 September 2019 Chris Smyth, Operations Manager, Waste and Recycling, wrote to the appellant as follows:

> Dear Nicci
>
> Re: Response to Your Letter
>
> On the 11th of March 2019 I do not recall you telling me that the lifter hit your leg. I would have thought after all the toolbox meetings and being a health and safety rep, you would have known the importance of filling out an incident report as you have done in the past for other things. I was unaware that there was a problem as you had previously complained about a sore hip well before 11 March 2019. It did not come to my attention the lifter had hit your thigh until you went off on sick leave after thinking it was because you had walked into a trailer while you were off on annual leave, in the first week of April 2019. After I was notified that there could be a problem with the plate on truck 204, I got the engineer, Paul, to look at the truck on the 21st of May 2019. Paul, who has built the truck, had a look and could see no reason that this could happen if proper procedures were followed by the operator.

[42] In a letter addressed to "To Whom it May Concern" dated 13/9/19, Katy English says this:

> Can't remember what day it was, but I do remember Nicci coming in after greenwaste and saying the dump plate had fallen and got her on her right thigh as she hobbled into Chris' office. Also recall Chris saying not to worry about an incident report as she would be right. Also recall all the bitching about the drum plate constantly falling when dealing with the heavier bins.

[43] On 4 February 2020, Orthopaedic Surgeon, John Scanelli, reported:

> I have been working up Nicola Emtage's right leg pain now for the last few months. In summary, I don't have a clear explanation for her ongoing symptoms. My sense is that she may have some early hip arthritis that is causing the ongoing nature of her musculoskeletal deterioration.

[44] On 1 March 2020, the appellant's new GP, Dr Steiner, wrote to Dr Scanelli in part saying:

> In her last hip MRI report, there was mention of an ill-defined labral segment and possible labral tear. Based on her story and functional limitation of her right hip, I am suspicious that osteoarthritis would cause such an acute change in her hip function and pain, when a labral tear is in keeping with her story to me.

[45] On 22 December 2020, the appellant's claim for cover was revoked in accordance with s 65 of the Accident Compensation Act 2001. In the letter the case manager, Megan Lane, from ACC's agent Gallagher and Bassett said:

> Cover for your claim has recently been reviewed following a recent review of all the medical information in relation to your claim along with confirmation from the Richardson Group (Holding).
>
> We now advise that the decision of (sic) to accept your claim has been revoked in accordance with Section 65 of the Accident Compensation Act 2001 and your claim is now declined for cover.
>
> Your claim is now declined because there is no supporting evidence that you had an accident as per ACC 45;:LZ76532 which resulted in a physical injury.

[46] The appellant unsuccessfully sought review of ACC's decision and an appeal to this Court was lodged. By agreement, Dr Steve Bentley, Musculoskeletal Physician, gave vive voce evidence and answered questions from the appellant's advocate and from Counsel. Amongst other things, Dr Bentley highlighted the following things in his evidence-in-chief, which is in fact his report dated 12 February 2023:

> Nicola gives a very good consistent account of her injury when the heavy steel plate on the back of the rubbish truck fell down and landed, impacted on her right thigh, with immediate pain, right antromedial thigh.
>
> … She did not want to go off work because she had recently divorced and needed income. Carrying on working, getting up and down into the truck became increasingly difficult, and she would use the left leg to support and climb up into the cab.

[47] Dr Bentley noted that Mr Leucker, Orthopaedic Surgeon, who did not see the appellant, but who responded to Dr Kamali, GP's referral saying that:

> The small femoral head osteophyte reflects osteoarthritis of the hip.

[48] This, Dr Bentley, describes as "an astonishing claim".

[49] Dr Bentley referred to Mr Scanelli's report in which he describes a morel-lavallee lesion right side. He stated:

> This is a closed degloving soft tissue injury as a result of abrupt separation of skin and subcutaneous tissue from the underlying facia.

[50] He also notes that Mr Scanelli suggested treatment that would focus on pain management.

[51] He comments that Mr Scanelli clearly was not convinced that the primary or only problem was an osteoarthritic hip. He notes that, in his report of 4 February 2020, Mr Scanelli said:

> I don't have a clear explanation for her ongoing symptoms. My sense is that she has some early hip arthritis.

[52] Dr Bentley also refers to Dr Steiner's ultrasound scan, 1 December 2020. Dr Bentley notes that Dr Steiner's conclusion was "two probable low grade muscle tears with associated fluid on the adjacent aponeurosis". Dr Bentley says this strongly supports the appellant's description of injury to her right thigh.

[53] Dr Bentley referred to his conclusions from his report of 25 May 2022:

> (i) Impact injury posterior right hip joint.
>
> (ii) Sprain right sacroiliac joint and symphysis pubis.
>
> (iii) Sprain abductors right hip, rectus femoris, obturator internus and quadratus femoris associated with the pelvic SIJ joint and innominate rotation.
>
> …
>
> (iv) Right gluteus medius tendinopathy evident on MRI scan 2019.

[54] Dr Bentley went on to say that Nicola needed further investigation to clarify pathology, sources of pain and specific treatment, including radiologically guided joint injections. He then said:

> The history and mechanism of the injury is clear and consistent and accepted by various medical providers. Nicola tried to carry on working, but this aggravated the problem until she couldn't work. Aggravated right gluteal and iliopsoas tendinopathy and synovitis right hip? Post traumatic, right SIJ disfunction.

[55] Dr Bentley went on to say:

> All other medical assessments have been very superficial and failed to assess in-depth her musculoskeletal problem.

[56] In cross examination from Mr Hunt, Dr Bentley said that his practice, including in this case, was to see the patient, examine them and then access earlier reports from the website.

[57] Dr Bentley acknowledged that the appellant had received an injury from her accident, but "other things were going on". He said "to write a person off with osteoarthritis is not good enough".

[58] The appellant, Ms Emtage also gave evidence and she reiterated that following what occurred on 11 March 2019, she asked Chris Smyth "Chris, do you want me to put in a report?" and that he said "Nah, all good". And she described her appointment as health and safety officer to being "an invisible job", she said "if I was queried, I wasn't doing it".

[59] As to the accident, she referred to the photograph at page 134, which she said was the photograph she sent to Lionel Wood and Chris Smyth. She pointed out to the Court the drum plate that is held at the top by a locking pin and that it was the drum plate that dropped on her thigh without warning when the locking pin came out of its housing in the drum plate.

[60] She said she was standing on the curbside with her left hand on the controls. She described grabbing the bin with her right arm to flick it off its coupling above the drum plate, as she said that as the bin flew out, the drum plate dislodged and hit her on the top of her right leg, which was raised and bent. She said it hit her thigh and went down her leg, and by the time it got to her knee, her leg was straight.

[61] She referred to the texts to Chris Smyth on 6 May 2019 when reporting she could not work. She confirmed that she could only get one leg in her trousers and then couldn't move and that she had to yell out for help.

[62] She reiterated that she asked Chris Smyth on the day of the accident "do I report it?" and he said "No, you'll be right". She said "stupid me, I didn't report it".

[63] She referred to the near miss that Katy English had in May 2019 after she, the appellant, had stopped work.

[64] She said that Dr Bentley, unlike the other doctors, spent nearly three hours appraising her injury and that he was silent throughout. She said "he was 100% focussed on what happened to me and that at his consultations, he talks through everything at the end". She was critical of other doctors who did not examine her.

[65] The appellant told Ms McAlister in cross examination that she had been a driver since 2016, working full time and was 90% committed to truck 204.

[66] She assured Ms McAlister she had the accident at work and not at home and she spoke of the speed of the plate coming down on her at the time of the accident. She said "it was on me before I could move". She said she cried in the truck, but that she just had to carry on. She said the accident happened at 172 Racecourse Road and that the timesheet for that day showed four minutes between appointments at the relevant time. She said she just wanted to get home and that she had no breaks for the rest of the day until 4:45. As she said to Ms McAlister "You don't know me – how hard I push myself".

[67] She confirmed that she had reported it to Chris Smyth but he was not interested.

[68] She confirmed the first medical appointment was on 6 May after the incident of her not being able to dress herself and having to call on her ex husband to help her.

[69] She was asked about the "trailer incident" at her home. She said "that involved my left leg" and that was a case of her walking into the wheel arch of the trailer with her left leg leading and that it left a scratch on her thigh.

[70] In cross examination from Mr Hunt, she again referred to what happened immediately after the accident and she said "You freak. You want to get the day over and get home. One legged and hopping, but getting the job done.". As she said, there was plenty of verbal advice to Chris Smyth that she was injured, and that she was in excruciating pain each day, but she needed to work as she could not rely on anyone else.

[71] She reiterated to Mr Hunt that she told Chris Smyth about the accident and that "he told me not to put in an incident report".

[72] Mr Lionel Wood, Manager of Southern Transport, also gave evidence. He told the Court that he himself had operated the truck in question and was very familiar with the appellant from a work perspective, as he played a part in her induction.

[73] He did not believe that Mr Smyth would discourage reporting of accidents and he said "if we had a blasé attitude, we would have injuries". He said there are lots of internal audits, that there are regular health and risk assessments done and that he always followed up on incidents if they were escalated to him. He disagreed that Mr Smyth, the Operations Manager, would tell the appellant not to put in an incident report.

[74] He said he has used the mechanism on the back of truck 204 and that he is very familiar with it. He said that the span of his arms is 1.75 metres and that fully extended, he would struggle to reach a bin attached to the lifting mechanism while his other hand was on the shift lever. He said that you cannot pull the bin away until it detaches.

[75] He said there had never been an incident where the drum plate fell and that it could not fall on its own. He also said he had never encountered the latch on the drum plate becoming undone. He said there were approximately 200 trucks with this mechanism operating in New Zealand at the moment.

[76] He said his first recollection of this matter was on 21 May 2019. He said he spoke to Chris (Smyth) and he said he was not aware of the appellant's claim that she had been hit by this mechanism.

[77] He said that they took truck 204 off the road and did a simulation on the same route taken by the appellant and that the times the appellant achieved on the day in question "were as good as any of us could have done."

[78] He said that Chris rang the engineer to come and look at the mechanism and that the engineer had said that everything was in working order.

[79] He said the drum plate was welded to the adjacent housing after the incident with Katy English.

[80] He spoke of the confusion over dates and how eventually the date of 11 March was settled on.

[81] At this point, the Court rose for the day and on the morning of 10 March 2023, I was advised that truck 204 had been brought to the Court.

[82] In the presence of Counsel, appellant's advocate and the appellant, the mechanism was demonstrated by Mr Wood. The bin was attached and lifted by the mechanism to empty into the truck, then brought back to the ground. When the bin is lowered to the ground, the plate falls and noisily detaches the bin from the lifting mechanism.

[83] Without prompting, the appellant came forward and demonstrated the process that she is used to. With her left hand on the controls, her right hand is almost, but not quite, touching the bin as it is lowered.

[84] She demonstrated raising the bin and using the control to shake the bin at the top of its reach so that it emptied it contents into the truck and then she lowered it. However, she took her hand off the control when the bin was still around 40 centimetres above the ground and reaching up to the top of the bin with her right arm and at the same time doing a right "knee kick" of the side of the bin, she dislodged the bin from its housing and it dropped to the ground.

[85] It was very obvious in doing this manoeuvre that in angling her "knee kick" in a horizontal upwards right direction to dislodge the bin, her right leg is left briefly in a position adjacent to and below the drum plate. It follows that if the drum plate were to fall at that point, it would connect with the appellant's upper right leg.

[86] When the mechanism is worked fully, that is to say when the bin is emptied and returned to the ground, it is the backplate that pushes the bin free of the truck. In this last manoeuvre, when the bin is already on the ground, the backplate detaches to achieve this last step.

[87] After this demonstration, Mr Wood was cross examined in Court.

[88] Mr Wood acknowledged that there had been a claim by Katy English the day after the appellant wrote her incident report that she had witnessed the drum plate drop.

[89] Mr Wood also acknowledged that Bridie Taylor, who formerly drove trucks for Southern Transport Limited, had sworn an affidavit that included:

> At some point, late 2017 or 2018, when I was doing a "bone run" in truck 204, I was emptying a heavy bin when the drum plate dropped close to me of its own accord. I can fix that approximate timeframe because it was shortly before truck 204 was involved in an accident that put it off the road for about nine months.
>
> I had to go back to the yard and get the Operations Manager, Chris Smyth, to show me how to put it back.
>
> Chris did not ask me to make an incident report.

[90] Mr O'Sullivan put to Mr Wood a number of propositions relating to the sameness of the appellant's description of her accident. Mr Wood agreed that the description of injury by the appellant had not changed.

[91] In re-examination by Ms McAlister, Mr Wood confirmed that there had been no issues with the mechanism since 2019.

Appellant's Submissions

[92] Mr O'Sullivan says that causation is the central issue in this case He submits that the issue of causation is essentially a medical question which must be determined by medical evidence.

[93] He refers to *Murphy*,[1] where at paragraph [46] Judge Joyce said:

> What is important is whether there is an accident and if there was, what was its nature and what were its consequences.

[94] He says that the "demo in the yard", when the second respondent's truck 204 was brought to the Court on the morning of 10 March 2023 "has not remedied Mr Wood's effort to trammel facts of the mechanism of accident" and he says that in any event this attempt was fruitless because in this particular case the medical evidence dovetails with the claimed mechanism of injury.

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1 *Murphy v Accident Compensation Corporation* [2013] NZACC 398.

[95] He refers to Exhibit 1, namely the drawing of the right leg and spine with the pathway of the femoral nerve shown from L2, L3 and L4 vertebrae in the spine and showing the pathways of the femoral nerve as it divides into branches just below the thigh. And that in significant measure, the branches of the femoral nerve go down the front of the thigh. Each of these branches has its own name.

[96] The diagram also shows what is alleged to be a point of impact on the front of the upper leg, approximately half way between the hip and the knee.

[97] Mr O'Sullivan dismisses the proposition that the appellant's medical problem with her right thigh and hip is attributable to arthritis, saying that x-rays taken a year apart showed no significant change in what was described as mild arthritis.

[98] He submits that in this case, Dr Steiner and Dr Bentley have "gone the extra yard" to prove the injury caused by accident.

[99] Mr O'Sullivan says that given the extent of the injury, the force of the accident, the primary location of damage and the synthesis of pathology and accident dynamics, the only plausible cause and effect is an acute injury by a malfunctioning device on truck 204.

[100] Mr O'Sullivan referred to the appellant's demonstration of what she did to release the bin on the day of the accident and that with her right raised knee and foot "hooking the bin", it left her in a position where the drum plate came down with force to a horizontal position and injured her.

[101] He submits:

> … my general observation is that Nicola, after four years of the job was able, without notice or rehearsal to repeat a well established routine consistent with her previous experience based on the honed instinct and muscle memory she had developed on the job.

[102] He also comments that what occurred after the accident when the appellant reported it. That the response of Mr Smyth and Mr Wood was not consistent with the assertions that Southern Transport Limited had a responsible approach to reporting accidents.

[103] When she sought medical assistance on 6 May 2019, the ACC 45 form identified an impact injury at work and the appellant was referred to Southland Hospital for a lumbar spine x-ray.

[104] He notes that Mr Leucker, Orthopaedic Surgeon, did not see the appellant, recommended no further investigation and was of the opinion that the problem should not be covered by ACC because she had osteoarthritis of the hip. On referral to Mr John Scanelli, Orthopaedic Surgeon, that specialist acknowledged that there was quite significant nerve pain around the right hip and thigh, which seemed consistent with regional pain syndrome. Mr O'Sullivan says that it is significant that Mr Scanelli observed nerve damage symptoms at the right hip and thigh, which was endorsed by Dr Short, Branch Medical Advisor.

[105] In his report of 3 October 2019, Branch Medical Advisor, Dr Short, says:

> The accident won't have caused her right hip OA, but it might have aggravated it and additionally, it might have caused neural sensitisation/a secondary RPS.

[106] Mr O'Sullivan refers again to Mr Scanelli's report of 27 August 2019, where he says:

> Over the last four months she has had quite significant nerve type pain around the right hip and thigh. Her symptoms seem consistent with RPS. She has tried physiotherapy, but it was too painful to continue.

[107] He says that when the appellant was examined by Dr Bentley, it was noted:

> She was then asked to lift her right leg up, which was extremely painful and difficult.

[108] He submits that Dr Bentley, unlike some of the other medical professionals, went after the appellant's pain source in order to make a diagnosis.

[109] He says it is significant that no physician disputed the mechanism of injury; that all the physicians who engaged with Nicola personally observed pain in the leg, but only Dr Bentley tested for an objectively attributed source of the pain, primarily to the leg.

[110] Mr O'Sullivan submits there is no time bar on presenting evidence of causation of injury.

[111] He says that ultimately the ultrasound tests put the focus squarely on muscle injury and he says there was evidence of that throughout.

[112] He refers to Dr Bentley's report of 26 May 2022:

> 1 Impaction injury posterior right hip joint, there is evidence of bone bruise osteochondral injury, posterior acetabulum and femoral head, possible small anterior superior labral tear and synovitis. There was mild early osteoarthritis right hip present, but a-symptomatic prior to the injury, the xray right hip 7/5/2019 four weeks after the injury shows small femoral head osteophyte, minimal joint space narrowing and acetabular sclerosis, these changes don't develop in four weeks. But Nicola had no hip joint pain or symptoms prior to the injury. The pre-existing mild osteoarthritis right hip is not the cause of her pain and ongoing problems.
>
> 2 Sprain right sacroiliac joint and symphysis pubis resulting in a right anterior innominate rotation of the pelvis (right groin and buttock pain) …

[113] Mr O'Sullivan says that Dr Bentley has not come to court in the formal role of "an expert witness", for the purposes of s 4 and s 25 of the Evidence Act 2006. He has been the appellant's treating doctor. He says, however, that Dr Bentley has acted like an expert witness because he has been thorough. He says that Dr Bentley is non-partisan and is not really interested in the legal outcome. He is only interested in the medical facts.

[114] Mr O'Sullivan submits that it is a matter of logic and law that if HW Richardson Group Limited did not consider cogent medical evidence then, and strives to exclude its expansive cogency now, there axiomatically cannot have been a sufficiency of contemporary medical evidence to make requisite reasonable decisions at the time they were made.

[115] Mr O'Sullivan submits that ACC's decisions were not reasonable. He says that the essential point from the perspective of reasonability is that all of this was discernible to HW Richardson Group Limited – particularly the observation of all physicians of the emanating symptom of Nicola's pain focally at the mid-thigh, which only Dr Bentley took steps to physically pinpoint with targeted testing.

[116] He submits that on the weight of evidence, the appellant has proven the cause and effect of her impact injury. He says the original ACC decision is correct and he says that HW Richardson Group Limited "designs on cover and entitlements are unlawfully contrived, inadequate in substance and related process and inherently wrong".

[117] He therefore seeks:

(a) A finding that at work accident has occurred because an impact injury to Nicola's right side and is the continuing cause of her incapacity.

(b) Modifying and substituting review decisions on both appeals.

(c) Order for the reinstatement of compensation and entitlements claim.

(d) Costs and disbursements.

Second Respondent's Submissions

[118] In presenting her submissions Ms MacAlister commences by taking exception to Mr O'Sullivan mischaracterised the medical facts when referring to the evidence of Dr Short in the context of the diagnosis.

[119] She also rejects Mr O'Sullivan's allegation of manipulation of computer documents to suppress particulars of the accident event by Mr Wood.

[120] She concurs with Mr Hunt's submissions and she refers to previous submissions on behalf of Southern Transport Limited dated 1 April 2022 and 15 July 2022. She submits that the appellant has failed to prove that an accident causing injury occurred while the appellant was at work. She refers not only to the conflicting evidence, but also the physical impossibility of the accident occurring as described.

[121] She submits that that calls into question the credibility of the appellant and that there is a lack of contemporary evidence on 11 March 2019.

[122] She notes that the appellant was the health and safety representative and that she knew how to report accidents and health and safety concerns. She says Ms Emtage's evidence does not provide a credible explanation for the lack of contemporaneous reporting.

[123] Instead, the appellant continued to work through March, when she would otherwise have had cover. She notes that getting in and out of trucks is difficult to do and that no sick leave was sought until 6 May 2019 and an incident report was not filed until 21 May 2019.

[124] She submits that the proposition of the appellant "soldiering on" is plausible for a few days, but implausible for seven weeks. She notes the appellant's text on 6 May where she said she was great until she got up, but was now pretty much crippled.

[125] She notes that the date of the injury changed on at least four occasions, so there is a credibility issue.

[126] She said that the employer had no option but to investigate the dates, given the lack of other contemporaneous evidence that the accident occurred.

[127] She submits that the appellant should have been able, at least, to identify the month the accident occurred, but could not.

[128] She refers to the decisions in *Newman v ACC*[2] and *Taylor Preston Limited v ACC*[3] where there were date discrepancies, but only a few days apart.

[129] She also refers to *McIver v ACC*[4], which involved a similar fact scenario of treatment not being sought until five weeks later. However, she says in that case that there was sufficient evidence to support her claim that the injury had occurred at work, in contrast to there being no objective evidence to support Ms Emtage's claim.

[130] She notes that when the date of 11 March 2019 was identified as the date of the accident, Mr Wood gave evidence that a re-creation of the truck circuit for that day showed that it was completed "really fast". That would have been difficult if the appellant had been injured, as she claims.

[131] She refers to the appellant's statement of 7 August 2019 where the appellant described the rest of the day and the jobs that she still had to do as "nightmarish".

[132] Ms MacAlister notes that nothing was reported to her employer on that day or the next day. She also notes that Ms Emtage's logbook entry dated 11 March 2019 records a normal start and finish time and does not provide any comment regarding an incident.

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2 *Newman v ACC* [2021] NZACC 98
3 *Taylor Preston Limited v ACC* [2017] NZACC 138
4 *McIver v ACC* [2022] NZACC 29

[133] She submits therefore that this empirical information is entirely inconsistent with Ms Emtage's account that she was in such pain at the time that she got into the truck and cried.

[134] Ms MacAlister refers to the evidence of Mr Wood, that the lifter mechanism on Truck 204 remains unchanged, other than routine replacement of hydraulic rams due to wear and tear. Mr Woods' evidence also was that Ms Emtage walked with a limp and he recalled that she had previously complained of a sore hip before 11 March 2019.

[135] She says that the practical demonstration of the lifter mechanism on Truck 204 demonstrates the implausibility of the bin lifter plate to make contact with the right leg in the way reported by Ms Emtage. She says:

> If the plate fell, pushing the bin backwards towards the operator, the bin itself would come in the way of any connection the plate could make with the operator.

[136] Ms MacAlister acknowledges that an ultrasound scan taken on 1 December 2020 referred to two low grade muscle tears, however this was two years after the event, and that other medical professionals had reviewed all the evidence before this.

[137] She submits that the demonstration in the yard with Truck 204 "demonstrates the implausibility of the bin lifting plate to make contact with the right leg in the way reported by Ms Emtage". She says the wheely bin is between the steel plate and the operator. She says:

> Ms Emtage, in her evidence, demonstrated her technique for dismounting the bin. This involved her halting the mechanism loaded with the bin quite a distance from the ground at approximately waist height to her. She then demonstrated lifting the bin with her leg, to physically unhook it and lift it to the ground from the height of the lifter and twisting around to bring the bin back to the ground.

[138] She says it is implausible that Ms Emtage would instead of using the mechanism, physically lift and lower the bin herself. The approach she claims in evidence to have taken is "awkwardly implausible."

[139] In respect of Dr Bentley's evidence, she says that he is partisan and adopts a position of an advocate for Ms Emtage, making submissions and criticising other medical practitioners and the second respondent.

[140] She says that Dr Bentley's comment that the appellant has not been assessed and investigated adequately is at odds with the weight of the contemporaneous medical investigations. She notes that Dr Bentley's examination of the appellant began on 26 April 2022, over three years after the claimed date of injury. She submits it cannot therefore be relied upon to make a finding of an accident at work.

[141] She submits that the opinions of Dr Leucker, Dr Scanelli, Dr Taylor and Dr Short are consistent with Ms Emtage having arthritis of hip and that this medical evidence was closer in time than that of Dr Bentley.

[142] She concludes that in spite of 625 pages of evidence as well as submissions, there is no empirical objective evidence to support a finding of a workplace injury. She submits that the steps taken by Southern Transport in reaching the decision to treat this matter as a non-work related injury was correct and is supported by the evidence provided at the hearing and should not be overturned. She says it was entitled to revoke the original decision on 22 December 2020 because it had been made in error as established by the further medical evidence obtained in the intervening period.

First Respondent's Submissions

[143] Mr Hunt, on behalf of the first respondent, relies on submissions filed dated 1 April 2022 and 15 July 2022, in addition to his closing submissions that he took the Court through, dated 19 April 2023. He also relies on the submissions already filed on behalf of the second respondent, Southern Transport Limited dated 1 April 2022 and 15 July 2022, as well as his earlier submissions on behalf of the first respondent dated 21 April 2022.

[144] He notes that in a three party appeal of this nature, ACC may often, particularly where both appellant and second respondent are represented, leave it to the parties to advance their respective views as to the facts and the outcome that the Court should reach and in that case take a comparatively neutral position. However, in this case, as Mr Hunt said in his submissions of 21 April 2022, the first respondent does not consider that the circumstances disclosed in this case, in terms of the reliability of the evidence of the appellant, are such that it supports her claim as it did in contrast to the support it gave the appellant's case in the cases

of *Brooks v ACC and Oceania Gold NZ Limited*[5]; *K&R Belling Trust v ACC*[6] and *MHF v ACC*[7].

[145] Also in those submissions, Mr Hunt refers to the reviewer's comment:

> There has been no credible explanation for Ms Emtage as to why she did not report the accident at the time, especially given the claimed severity of the effects of the incident at the time.

[146] He notes that in this case, the appellant had a role in health and safety matters and the fact that she did not report an accident incident is significant.

[147] Mr Hunt refers to the "multiple guesses" of dates of the accident.

[148] Mr Hunt refers to paragraphs 93 to 95 of the reviewer's decision relating to entitlements in respect of personal injury for which cover has been revoked. He also refers to the reviewer's finding that in this case litigious costs have been increased for no plausible reason in pursuing the claim for entitlements when cover has been revoked.

[149] Mr Hunt refers to the case of *Lucas v ACC*[8] where Judge Powell summarised the approach to be taken by this Court on assessing the evidence relating to the injury and whether or not a treating specialist evidence must be preferred.

[150] Mr Hunt submits that if the injury alleged by the appellant had occurred, it would have provoked an immediate response.

[151] Mr Hunt is critical of Dr Bentley's evidence. He says it contains considerable repetition, which does not improve its quality.

[152] He is critical of some of the language that Mr O'Sullivan uses, referring for example to his paragraph 213, where he alleges that Counsel, Ms MacAlister, has conjured up the misjudgement of an epileptic trapeze artist. Mr Hunt says that none of this is helpful and that the obligations of Counsel do not bind Mr O'Sullivan.

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5 *Brooks v Accident Compensation Corporation and Oceania Gold NZ Limited* [2011] NZACC 6.
6 *K&R Belling Trust v Accident Compensation Corporation* [2008] NZACC 294.
7 *MHF v Accident Compensation Corporation* [2020] NZACC 18.
8 *Lucas v Accident Compensation Corporation* [2015] NZACC 216.

[153] Mr Hunt submits that Dr Bentley's evidence is not admissible.

[154] He refers to ss 7 and 8 of the Evidence Act, which provide respectively that relevant evidence is admissible and that the Judge must exclude evidence if its probative value is outweighed by the risk … of having an unfairly prejudicial effect on the proceeding …

[155] Sections 25 and 26 relate to the admissibility of the expert opinion evidence.

[156] He notes that s 26(1) provides that in civil proceedings experts are to conduct themselves in preparing and giving evidence in accordance with the applicable rules of court relating to the conduct of experts.

[157] He notes that the code of conduct of expert witnesses in the High Court Rules provides that:

> **Duty to the Court**
>
> (1) An expert witness has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise.
>
> (2) An expert witness is not an advocate for the party who engages the witness
>
> …
>
> **Evidence of Expert Witness**
>
> (3) In any evidence given by an expert witness, the expert witness must:
>
> a. Acknowledge that the expert witness has read this code of conduct and agrees to comply with it;
>
> b. State the expert witness's qualifications as an expert;
>
> c. State the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise;
>
> d. State the facts and assumptions on which opinions of expert witnesses are based;
>
> e. State the reasons for the opinions given by the expert witness;
>
> f. Specify any literature or other material used or relied on in support of the opinions expressed by the expert witnesses

[158] Mr Hunt notes that Rule 9.34 of the District Court Rules 2014 provide that an expert witness is required to comply with the code of conduct of expert witnesses as set out in the High Court Rules.

[159] Mr Hunt refers to the case of *R v Gwaze*[9] and he submits that although *Gwaze* related to a criminal trial, many of the statements of the Court are equally applicable to Accident Compensation jurisdiction.

[160] Mr Hunt refers to *Prattley Enterprises Limited v Vero Insurance New Zealand Limited*[10]. That case involved an expert witness who was the principal of the firm which held a pecuniary interest in the litigation. The Court of Appeal concluded that the trial Judge had been justified in concluding that the evidence in question was neither helpful nor reliable, and that the Judge could not have been faulted had it been ruled inadmissible in its entirety.

[161] In respect of the Accident Compensation Act 2001, Mr Hunt acknowledges s 156, which provides:

> The court may hear any evidence that it thinks fit, whether or not the evidence would be otherwise admissible in a court of law.

[162] Mr Hunt referred to a number of cases in this jurisdiction which remind us that the Evidence Act remains as a framework within which all evidence is admitted and considered. Although in none of those cases was the evidence excluded completely, in *Braidwood v ACC*[11], Judge Powell said this:

> In the absence of any credible explanation of the inconsistencies in Mr Rietveld's reports. It is difficult to place any weight on his opinions, particularly as his later comments indicated that he appeared to have lost objectivity with regard to the case and instead appeared to have become visible partisan in support for Mr Braidwood.

[163] Mr Hunt submits that Dr Bentley's evidence in our case is similar to that of Mr Keys in *Prattley* and submits that Dr Bentley's evidence is inadmissible and should not in terms of s 156 of the Act be admitted in the exercise of the Court's discretion. He says:

> (a) It is inadmissible when considered against the framework applicable pursuant to the Evidence Act 2006.

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9 *R v Gwaze* [2010] NZSC 52.
10 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd,* [2016] NZCA 67, [2016] 2 NZLR 750.
11 *Braidwood v Accident Compensation Corporation* [2015] NZACC 21.

(b) It is inadmissible because Dr Bentley has failed to comply with the mandatory provisions as per Rule 9.34(1) District Court Rules, in terms of the code of conduct of expert witnesses.

(c) It is inadmissible because it is obvious that Dr Bentley is not impartial, has become partisan and an advocate for the appellant.

[164] If Dr Bentley's evidence were to be admitted and taken into account, then it is Mr Hunt's submission that it should be given substantially less weight.

[165] Mr Hunt submits that Dr Bentley's evidence is not impartial and that he has allowed his treating role to influence his judgment and that therefore he cannot be regarded as an expert witness.

[166] Mr Hunt notes that all of Dr Bentley's evidence proceeds on the basis that there was an injury.

[167] Mr Hunt submits that in any event, the best that Dr Bentley can do, if his evidence were admissible, is to offer an opinion as to whether the appellant's presentation is consistent with the injury she described.

[168] He submits at the very least, Dr Bentley be accorded much less weight than that of Drs Scanelli and Short.

[169] Ultimately, he submits that endorsing the submissions made on behalf of the second respondent, the first respondent submits that the picture has overwhelming been demonstrated whereby the appellant has failed to prove on the balance of probabilities that she is entitled to cover. Accordingly, he submits that the appeal should be dismissed and he notes that the first respondent wishes to be heard in respect of costs in due course.

Reply Submissions on Behalf of the Appellant

[170] In reply, Mr O'Sullivan says that ultimately the facts in this case speak for themselves. He confirms that the pathology supports the accident having occurred as described by the appellant.

[171] He says that Dr Bentley was not retained as an expert witness in this case, he was treating the appellant.

[172] He says, in fact, it is clear that Dr Bentley did not want to be in Court.

[173] He says that Dr Bentley based all his opinions on objective evidence, including the further empirical tests around pain. He looked at the mode of injury and related it back to the pathology and the tests that were undertaken. He says that Dr Bentley was the only medical professional that approached the consideration of the injury, starting at where the metal plate hit the appellant in the upper leg.

Decision

[174] In this case, at the request of the parties and by agreement amongst them, the court heard viva voce evidence from Dr Bentley, Ms Emtage and Mr Wood, the manager of the second respondent.

[175] Ordinarily ACC is the sole respondent. However, if the are two, as here, then as a matter of practicality and efficiency, one of the two respondents normally bears the burden of the argument. Here the two respondents, ACC and Southern Transport Company Limited both presented full submissions.

[176] The file also shows that it was Gallagher Bassett, the claims administrator on behalf of ACC, that revoked the appellant's cover by letter of 22 December 2020.

[177] That letter of revocation refers to the decision being made "on behalf of the employer at H W Richardson Group Ltd (Holding)".

[178] So, in this case a total of four entities, ACC, Southern Transport Company Limited, Gallagher Bassett and HW Richardson Group Ltd have had active involvement in dealing with Ms Emtage's claim for cover and its revocation when ordinarily there would be just one.

[179] As a result, clear and measured appraisal and analysis of the evidence supporting the appellant's claim for cover has suffered.

[180] The fact that the documents relating to this case now extend to over 670 pages when it relates to a blow on the thigh and upper leg of the appellant, of itself, speaks of an intensity that this case has generated since it had its genesis with the appellant, Ms Emtage, seeing her

GP on 6 May 2019 and an ACC 45 injury claim form being lodged for "contusion of lower back" which carried the accident description "got hit by a heavy bar of the truck while emptying bin – paid work – impact with sharp object".

[181] On that occasion, the appellant gave the date of accident as being 3 April 2019, that is to say, just over a month prior.

[182] At that stage, the appellant had been employed by Southern Transport Limited, the second respondent, as a truck driver for over three years.

[183] The following day, on 7 May 2019, on referral by GP, Dr Kamali, her lumbar spine and right hip were x-rayed. The following findings were recorded:

Lumbar spine:	Mild broad based lower lumbar scoliosis convex to the left.
	Disc height preserved.
	No fracture identified.
	Mild osteoarthritic change involving the right side facet joints at the L4 and S1 levels.
Pelvis and right hip:	SI joints normal.
	Mild osteoarthritic change involving the right hip joint with early marginal osteophytosis, but preservation of joint space.
	The left hip joint is normal.

[184] The appellant's GP, Dr Kamali, referred the appellant to physiotherapist, Mitchell Van Schalk, who reviewed the appellant on 16 May 2019. The physiotherapist noted this description of injury:

> A heavy steel plate landed on her right thigh and she stepped back, twisting her hip joint. She is struggling walking, sleeping, sitting and lying for a period of time. She complains of a moderate achy/burning pain in her quad and a strong sharp popping click in her right hip joint. Once the hip pops, it is very painful, she struggles to walk and must rotate it a certain way to unlock it. On examination, I could only passively flex her hip gently to 80 degrees and she was in excruciating pain (tears) and she had very limited internal and external rotation of the hip joint due to pain and pulling in the joint. As the xray was clear, I suspect that she has a relatively large labral tear of her right hip and associated femoral neuropraxia. She is very sensitive, so I have given her some hydrotherapy exercises to do in the pool to try and strengthen and desensitise the region. I would appreciate your opinion on her condition and whether you think an MRI is appropriate.

[185] On 21 May 2019, the appellant completed an Incident Reporting Record for the second respondent HW Richardson Group Limited. She reported an accident occurring at 11.30am on 5 April 2019. Under the heading "Incident Type", she underlined "tripping/stumbling/ slipping – object coming loose". Under the heading "Equipment" she has underlined "mobile plant or transport". Under the heading "Location", she has underlined "customer site" and has added "Racecourse Road, Invercargill".

[186] Under the heading "Description of Incident", she has written:

> Heavy G/W (green waste) W/B (wheely bin) would not empty properly. Lifted and shook out more, offset clasp for drum holder, spun around during this time when I went to remove bin, drum holder part dropped down throwing the W/B (wheely bin) back and plate corner caught my right thigh, running down the length of thigh, throwing me back and tipping on curb".

[187] On 30 May 2019, the appellant again saw the physiotherapist, who reported:

> No change, still sore, moving the hip slightly easier to move the hip now. Heavy plate came unlocked from truck and landed on her R thigh 6/52 ago. It all happened pretty quickly and she stepped back and twisted his R hip. Main pain is in the ant hip and into the thigh, over the six weeks, thigh pain slightly better. Feeling R hip popping very often, which is very sore. Feels like the hip freezes and can't put heel down. Had xrays – nil bony damage, aggs – walking, getting up, no PNN or red flags meds – 50 mm diclofenac.
>
> …
>
> Still antalgic gait yesterday, so given crutch to take load off R hip. Needs to cont hydrotherapy. Needs to get a referral …

[188] Her GP, Dr Kamali, requested and obtained a report dated 5 July 2019 from Mr Leucker, Orthopaedic Surgeon. It appears that Mr Leucker did not actually examine the appellant. However, in his report of 5 July 2019, he said this:

> The presence of the osteophyte at the lateral margin of the hip is consistent with mild arthritis of the hip. No further interventions would be indicated and certainly more advanced diagnostic imaging, such as an MRI is not needed in this instance. Symptomatic treatment would be all I would recommend for her current conditions, but it is likely that if she has begun to have real trouble from her arthritis, it may be some months before things settle to the point where she is able to manage her day to day affairs without undue discomfort.

[189] Some time after the incident reporting record to HW Richardson Group Limited, the appellant, in an undated document that included a diagram of the wheely bin attached to the drum lifter mechanism, the appellant said this:

> When an overweight or wet green waster bin is emptied, you manipulate the controls so the bin bounces upside down to release G/W in the wheely bin. On the day in question, I did this three or four times to release everything, in doing so, the offset locking pin spun around and settled into the flush position. With the wheely bin covering this, there was no way I could see what was about to happen, as it was almost half a metre above my height.
>
> Once the W/B was emptied, I brought the wheely bin back down, one hand on the controls, one hand on the side of the bin. As it hit the ground and was released from the W/B locking system, the drum lifter sections weight pushed the wheely bin backwards, causing me to half turn and my right leg to lift. The corner of the drum plate struck the top of my thigh and felt like it sliced through my leg as it ran down to my knee to the full open position, in the process pushing me backwards and around until I tripped on the edge of the curb. I did not receive an … (unreadable) where the plate finally came to rest just above my knee. I was wearing jeans, which I am extremely thankful for, as they at least saved my skin from being torn. However, the damage underneath is muscle, nerve and ligament, is at yet undiagnosed, but for me crippling. The pain was immense and the sensation of heat and sharpness had me freezing on the spot till I could assess whether I could even move my leg. I was actually waiting to see if blood came through the material of my jeans, when none appeared, I gingerly tried moving, it was incredibly painful and I had the dead leg sensation of my entire thigh area and immense pain in the hip area. The rest of the day and jobs that I still had to do were nightmarish, immediately after this incident once I had managed to put the bin back and climb into the truck, I just sat and cried. I took nurofen (x2) and tried to complete the day.

[190] The appellant also provided her employer with photocopied photos of the whole drum plate, as well as a close up of the locking mechanism, in each case adding in handwriting her description of how she believes the mechanism malfunctioned to cause the accident.

[191] Her evidence then as set out in factual background section of this judgment is that she "soldiered on" until 6 May 2019 when, as described in paragraph 6, she suddenly could not move.

[192] Her GP referred her to Mr Scanelli, Orthopaedic Surgeon, Dunedin, who examined the appellant on 27 August 2019. Mr Scanelli reported:

> I discussed with Nicci that I think an MRI scan of her hip and her thigh would be reasonable to rule out anything untoward. I would also like to get some nerve conduction studies to evaluate the nerve type symptoms she has in her lower leg. I discussed if these were both negative, then a referral to pain management for physiotherapy and regional pain syndrome would be the next best way forward.

[193] An MRI was undertaken on 20 September 2019. In respect of her right hip it was found there was moderate hip joint effusion and a degree of hip joint synovitis. There was also a degree of labral tearing. There was also some low grade bone oedema, with regard to the femoral head. The Radiologist, Dr Meikle, also said:

> Chondral loss in hip as described likely on the basis of osteoarthritis and the presence of osteoarthritis with labral change and a significant hip joint effusion with a degree of synovitis.

[194] Regarding the right thigh, the findings were:

> Markers have been placed in areas of concern. Marrow signal is normal. No bony injury is identified. Muscle signal is normal and all muscle groups with no focal muscle or soft tissue injuries seen.

[195] Next, there is the opinion of ACC's medical advisor, Dr Short, dated 3 October 2019.

[196] In answer to specific questions, he said that her current diagnosis was right hip osteoarthritis associated with labral tearing and right thigh contusion. He also accepted possible regional pain syndrome. He said that her right thigh contusion was caused by the accident. He said it remained unclear if she was suffering from a secondary regional pain syndrome. He was also in favour of nerve conduction studies of her right hip to be undertaken.

[197] These were carried out on 28 November 2019. In the report of Dr Taylor, Clinical Neurophysiologist, he said that all electromyographic parameters were normal, except motor unit recruitment, which was impaired by pain during any loading of the leg/hip. Dr Taylor added:

> Nicola's sensory symptoms do indicate she has had some nerve involvement, possibly at L3 level.

[198] Orthopaedic Surgeon, Mr Scanelli, saw the appellant again on 10 December 2019. He said:

> Given that her symptoms seem to be mostly over the anterior thigh and L3 dermatome in nature, it is reasonable to obtain an MRI of the lumbar spine to see if there is any nerve root impingement causing her symptoms.
>
> …

> It is also possible that this injury has flared up some of the arthritis in the right hip and is causing her symptoms to be worse and referred. The discomfort is over the lateral hip and also the anterior thigh. It is quite tender in nature … watching her work, she does have an antalgic gait pattern, which would suggest that there could be some intra-articular hip involvement.

[199] Mr Scanelli wrote to Dr McCallum on 4 February 2020 and said this:

> In summary, I don't have a clear explanation for her ongoing symptoms. My sense is that she may have some early hip arthritis that is causing the ongoing nature of her musculoskeletal deterioration. I would recommend obtaining a new AP pelvis and a lateral view of the right hip to see if there has been any interval progression in arthritis compared to her previous radiograph.

[200] On 1 March 2020, the appellant's new GP, Dr Steiner, wrote to Mr Scanelli:

> I am writing to ask for your consideration of order an MR arthrogram of her right hip in order to fully evaluate the joint. In his last hip MRI report, there was mention of an ill defined labral segment and possible labral tear. Based on her story and functional limitations of her right hip, I am suspicious that osteoarthritis would cause such an acute change in her hip function and pain when a labral tear is in keeping with her story to me.

[201] The appellant's pelvis and right hip was xrayed on 13 July 2020. The findings recorded:

> There is mild osteoarthritic change seen most marked on the right with subchondral sclerosis and small rim osteophytes. … No acute bony injury.

[202] On 1 December 2020 an ultrasound of the appellant's right thigh was carried out. Under the heading "Findings", there is this:

> …
>
> There is fluid at the aponeurosis between the sartorius and rectus femoris in the proximal thigh suggesting a tear involving the muscle adjacent to the aponeurosis. There is also fluid along the deep/medial aspect of the sartorius muscle.
>
> There is fluid surrounding the rectus femoris distally, with extension towards the vastus lateralis aponeurosis, again suggesting a (?) of the muscle adjacent to the aponeurosis. There is a change to the normal architecture of the rectus femoris distally. Although there is no evidence of retraction of fibres. The area of altered echotexture involving the central muscle belly likely reflecting oedema or haematoma.
>
> **Conclusion**
>
> Two probable low grade muscle tears with associated fluid on the adjacent aponeurosis.

[203] In spite of this report, highly supportive of injuries to the appellant's upper right thigh and leg, consistently described by the appellant since 6 May 2019, just 21 days later on 22 December 2020 ACC cover was revoked.

[204] On 26 March 2021, Dr Steiner provided the appellant's advocate with an expanded explanation of the ultrasound findings. It also included a diagram of the musculature of the thigh, showing the two areas where the ultrasound had indicated injury. The first was on the front of the thigh, just below the hip, and the second being again on the front of the thigh, just above the knee. Dr Steiner said in this report:

> The ultrasound findings are consistent with the reported mechanism of injury – a large steel plate falling onto Nicola's leg. The mechanism of injury and the ultrasound findings are consistent with Nicola's physical exam findings.

[205] He concluded his report saying:

> I therefore conclude that the steel plate falling onto her leg has caused the ultrasound findings and physical exam findings, which have severely affected her capacity to perform activities of daily living and job duties.

[206] On 28 May 2021, Dr Steiner referred the appellant to Dr Bentley, Rehabilitation Specialist. An appointment with Dr Bentley was unable to occur until 26 April 2022, 11 months later.

[207] In the meantime, on 11 November 2021, the appellant underwent a further ultrasound. Under the heading "Findings" was this:

> …
>
> In the mid-thigh, there is an inhomogeneous region, involving the rectus femoris aponeurosis, in the region of the previously seen tear. This likely represents interval healing.
>
> In the distal thigh, a similar inhomogeneous area is identified between the rectus femoris and the sartorius, in the region of the previously seen tear. This also likely represents interval healing.
>
> **Conclusion**
>
> There appears to be interval improvement, but not resolution of the injured regions, corresponding with the patient's regions of tenderness and symptoms.

[208] In a report to the appellant's advocate dated 4 December 2021, Dr Steiner notes this:

> We have two xrays of the right hip. The first is from 7 May 2019. The second is from 14 July 2020. These studies are separated by 434 days. There are small, non-significant changes in the hip when comparing the two xrays.

[209] He also refers to the ultrasound scans and the MRI and says:

> The imaging findings are consistent with the documented injury. There are no other documented injuries for Nicola that would explain the imaging findings. In my opinion, it is unreasonable to assume that Nicola's incapacity and her imaging findings were present prior to the injury given that there is a documented injury with sufficient force energy and mechanism that explains her imaging findings and her incapacity.
>
> Given that Nicola has sustained an injury with a mechanism of action and sufficient force energy to cause soft tissue damage consistent with the imaging findings, it should be considered that the injury caused the damage found on imaging findings.

[210] The appellant was finally able to see Dr Bentley on 26 April 2022. In his assessment summary, Dr Bentley said:

> In my opinion, the contusion injury by the heavy steel plate onto Nicola's right anterior thigh has caused the following injury:
>
> 1. Impaction injury posterior right hip joint, there is evidence of bone bruise, osteochondral injury posterior acetabulum and femoral head, possible small anterior superior labral tear and synovitis. There was mild early osteoarthritis right hip present but a-symptomatic prior to the injury, the xray right hip 7/5/2019 four weeks after the injury shows mild joint space narrowing and acetabular sclerosis, these changes don't develop in four weeks, but Nicola had no hip joint pain or symptoms prior to the injury. The pre-existing mild osteoarthritis right hip is not the cause of her pain and ongoing problems.
>
> 2. Sprain right sacroiliac joint and symphysis pubis, resulting in a right anterior innominate rotation of the pelvis. (Right groin and buttock pain.)
>
> 3. Sprain abductors right hip, rectus femoris obturator internus and quadratus femoris associated with pelvis SIJ sprain and innominate rotation. Three years old clinically she has tendinopathy adductors right hip and ? iliopsoas which is weak and dysfunctional, secondary myofascial pain right iliopsoas, rectus femoris, adductor longus, quadratus lumborum and gluteus medius. There was no muscle tear or haematoma quadriceps, adductors or sartorius on MRI scan 20/9/2019 five months post injury.
>
> 4. Right gluteus medius tendinopathy evident on MRI scan 2019.
>
> 5. Nicola has a weak dysfunctional diaphragm and impaired dynamic neuromuscular spinal stability which perpetuates iliopsoases dysfunction and pelvic dysfunction.
>
> 6. Nicola does not have lumbar pathology. She has not injured her lumbar spine. The history and clinical cause is not that of a lumbar sprain or contusion. I have no idea why the doctor who made out the original ACC M45 form diagnosed a lumbar contusion. There is nothing in the history or any reports available to me that indicates lumbar contusion. This diagnosis is incorrect and should be amended to "Right hip and pelvis sprain, contusion right thigh".

7. Nicola has not been assessed and investigated adequately, consequently a decision to reject her injury claim is based on inadequate information, inadequate investigation and incorrect conclusions. Nicola needs further investigation to clarify pathology, sources of pain and specific treatment, including radiologically guided joint injections, including:

    - Repeat MRI scan right hip and pelvis;
    - SPECT NM bone scan;
    - Radiologically guided right hip joint injection with local anaesthetic and corticosteroid;
    - ? right SIJ diagnostic block.

[211] Dr Bentley saw the appellant again on 19 May 2022. He reported:

> I arranged an ultrasound guided right hip joint local anaesthetic injection with ropivacaine and kenacort performed on 1/5/2022 Pacific Radiology. This did not relieve the right groin pain, reduced hip pain a little. She felt more heavy, dead feeling right leg. There was no improvement on right medial thigh pain. Right buttock lateral hip pain or right posterior ilium. This confirms that Nicola's pain arises from other structures outside the right hip joint.
>
> …
>
> Nicola has been quite disabled by her injury, couldn't stand on her right leg, had trouble getting dressed and all ADL, she couldn't actively lift her right leg (flex hip) off the examination couch, let alone climb into a truck. Nicola's employment as refuse collector, waste division, Southern Transport, involves driving a truck, getting in and out of her truck up to 160 x day, drag heavy bins to and from the truck 160 x day … This is a very physically demanding job, extremely hard, heavy work and Nicola, as discussed, could not and currently cannot possibly do this, she couldn't lift the right leg off the bed. However, she is responding to treatment and rehabilitation. Nicola's rehabilitation is going to take months, but I expect her to recover to her pre-injury level of function or not far from that. Whether she will be able to do the same job remains to be seen.

[212] The appellant saw Dr Bentley again on 7 July 2022. He reported:

> Nicola is making steady progress, she has no groin pain, less medial thigh pain, she has good diaphragm breathing and dynamic neuromuscular spinal stability, the pelvis is level, leg length equal … Iliopsoas function much improved, there is minimal tenderness, greater trochanter gluteal insertion and she has much better functional stability, pelvis and left leg. She has benefitted from a corticosteroid local anaesthetic injection right SIJ iliolumbar ligament. The right SIJ now not as tender, the right buttock iliosacral pain has pretty much resolved. Nicola is now able to start regular short walks.

[213] I have considered the medical evidence in a more painstaking way than is normal in a case like this. That is because, firstly, there was and continues to be denial on the part of the second respondent that there was a work place injury. Secondly, because the initial medical focus centred on her mild osteoarthritis, it seems to have been an assumption on the part of

both respondents that any pain or disability presentation by the appellant derived from her osteoarthritis, or even possibly from an inferentially degenerative spine.

[214] Although it took until 1 December 2020 before ultrasound of her right thigh identified the two tears, these were verified again by the ultrasound that occurred on 11 November 2021. These two scans quintessentially supported what the appellant had consistently described from the outset as the mechanism of her injury.

[215] The scans also supported what the appellant's physiotherapist had recorded as early as 17 May 2019 as a "moderate achy/burning pain in her quad"; and again on 30 May 2019 as "main pain is in the ant hip and into the thigh".

[216] The respondents' position was that there was no injury by accident. However the twice verified ultra sound conclusions in the last paragraph were not challenged by either Counsel. And respondents' Counsel were left in the position where they had to concede that the appellant's description of her injury event had been consistent throughout.

[217] The fall of the steel plate onto her upper thigh, down her upper leg towards the knee, absolutely supports the site of the two injuries found on ultrasound.

[218] Furthermore, the two injuries lie on the track of the femoral nerve and its branches after it enters the thigh from L3 of the lumbar spine, - as shown on the diagram produced to the court by consent of the parties.

[219] The appellant's employer initially had justification to be sceptical of her injury claim, given that from their perspective, it was not raised officially until 6 May 2019.

[220] The appellant's response to that is that she was told not to worry about putting an injury claim in at the time.

[221] Experience in this jurisdiction with work place accidents and their proper reporting shows that unless there is constant follow-up by diligent employers and safety officers, some will be missed, overlooked or simply ignored. I am satisfied that in this case that at least until 6 May 2019 her accident was overlooked or ignored by her employer, although she reported it on the day that it happened.

[222] In this jurisdiction, that reality often leads to a second reality, namely that when the overlooked or ignored injury does not heal, there is often confusion over when exactly the accident occurred. This is often because where, as here, there is a daily routine, in this case of driving and collecting the bins, the pinpointing of dates and times is more difficult because of the general sameness of daily activities.

[223] In this case, on account of GPS and "run sheets", the date of the appellant driving truck 204 to Racecourse Road, where she was injured, could be confirmed as 11 March 2019, excepted that the appellant's belief that it occurred at 11.30 was wrong, when it fact it was at 3.15pm.

[224] The first respondent's scepticism was bolstered by the fact that on 11 March 2019, the appellant, newly injured, completed her bin collection circuit in good time. Then of course it was not until some seven weeks later, on 6 May 2019, that the appellant again reported her injury to her employer, to be met ultimately by disbelief. However, what is not challenged about that is that on 6 May 2019, the appellant did in fact have to call her ex-husband when the effect of her injury meant that she was unable to dress herself.

[225] In the more than four years that I have been almost exclusively involved in this jurisdiction, I have at times been astonished at how some claimants are able to continue to function in a "normal" fashion for weeks after a quite serious injury accident. I find that that occurred here, until 6 May 2019

[226] The appellant had every incentive to keep working. She had separated from her husband and financially she had only herself to rely upon.

[227] I have taken the time to record in this judgment in more detail than would ordinarily be the case, the sequence of medical consultations had by the appellant and where those consultations led. This again derives from the stance on behalf of the respondents that there was "no supporting evidence" that she had an accident, in its decision revoking cover, on 22 December 2020.

[228] The medical records show that the path to an accurate diagnosis from was long. Diagnosis did not become clear until the soft tissue injuries to the thigh revealed by the

ultrasound of 1 December 2020 and 11 November 2021 put the matter beyond doubt. The two ultrasounds carried out, showing the two sites of injury high on the appellant's right thigh and also above her knee, comprehensively support what the appellant says was the mechanism of injury with a steel plate falling high on her thigh, and then down her leg towards the knee.

[229] Therefore, even if, as Mr Hunt asks it to, the Court were to rule that Dr Bentley's evidence is inadmissible in whole or in part, the ultra sound reports supported by the physiotherapist's record and the appellant's consistent description of her accident remain as primary proof of the appellant's injury by accident.

[230] Regarding Dr Bentley's evidence, it is fair to say that in his brief of evidence, read at the hearing, from the paragraph commencing "There has been a series of failures regarding this injury problem …", Dr Bentley as the treating physician, does to some extent advocate on the appellant's behalf.

[231] In this jurisdiction medical professionals often do become quite eloquent advocates for their own point of view. Sequential "tit-for-tat" opposing opinions from medical professionals, often over extended periods, are commonplace.

[232] Mr Hunt refers to ss 7 and 8 of the Evidence Act. He also refers to ss 25 and 26, which relate to expert opinion evidence. He notes that the code of conduct of expert witnesses in the High Court Rules applies and that an expert witness has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise and that the expert witness is not an advocate for the party who engages the witness.

[233] He submits that Dr Bentley's evidence is not admissible in terms of s 156 of the Accident Compensation Act because when considered against the framework of the Evidence Act 2006, it is inadmissible. He submits it is also inadmissible because Dr Bentley has failed to comply with the mandatory provisions of Rule 9.34(1) of the District Court Rules in terms of the code of conduct for expert witnesses. Finally, he submits that it is inadmissible because it is obvious that Dr Bentley is not impartial; that he has become partisan and an advocate for the appellant.

[234] Dealing with the latter point first, as I have mentioned above, it is commonplace in the ACC jurisdiction for medical professionals, to a greater or lesser extent, to advocate for not only the appellant but for ACC. Indeed, Clinical Advisory Panels of eminent medical experts routinely provide reports supportive of and in effect advocating for ACC's position.

[235] They do this, putting forward their own view of injury and causation issues, and in an endeavour to rebut opposing medical views. Often some of the language used is direct, even terse.

[236] It is fair to say that the portion of Dr Bentley's brief that is specifically objected to is quite critical of the care, or the lack of it, that Ms Emtage received. However, the intent of s 156 is very clear in giving the Court a wide discretion to hear any evidence it thinks fit. It is a discretion included not only so that a Court may hear and receive all evidence "that it thinks fit", but so that justice arising out of the social contract that is the essence of Accident Compensation can be seen to be done.

[237] Furthermore, s 150 provides:

> An appeal under s 149 is dealt with in accordance with the District Court Rules… as modified by this Act and any regulations made under it.

[238] S 156 (1), allowing the court to hear such evidence as it thinks fit, whether or not the evidence would be admissible in a court of law, is plainly such a modification. Accordingly the rules relating to expert witnesses do not apply.

[239] It is the Judge's role to weigh evidence. In this case, as with many ACC claims, the issue of causation was initially less than obvious and there have been the complicating factors of not only the disbelief on the part of the appellant's employer that an accident causing injury occurred, but also the rather superficial approach taken initially by some of medical professionals and adopted by the respondents, that attributed the appellant's problems to the "mild" arthritis that she had.

[240] Counsel have not pointed to any prior ACC case where evidence of a medical professional has been excluded as inadmissible. I too am unaware of any. And that state of

affairs appears plainly to be the result of the application of s 156(1), being a modification of the District Court Rules that s 150 speaks of.

[241] Mr Hunt also notes that the test of expert opinion is whether it is substantially helpful as provided for by s 25(1) of the Evidence Act. Because of my finding regarding the application of s 156(1), "substantial helpfulness" as per s 25(1) of the evidence Act is not a prerequisite to admissibility.

[242] Nevertheless I am in no doubt at all that Dr Bentley's evidence is substantially helpful for the purposes of s25 (1) of the Evidence Act even though on occasion his criticism of the evidence of others is clear.

[243] The high point of that criticism of reports of other medical professionals is his statement:

> All other medical assessments have been very superficial and failed to assess in depth her musculosketal problem…"

[244] I find that the totality of the evidence in this case supports such a view, particularly where reliance on the appellant's mild arthritis is resorted to, with consideration of little else.

[245] Part of the evidence Mr Hunt sought to have excluded includes Dr Bentley's criticism of the failure of workplace safety and health; failure to investigate injury problems with appropriate tests investigations; the failure of radiologists to give accurate reports; the failure to make an early accurate diagnosis and management plan and the failure to offer any effective treatment and management.

[246] The most direct statements in that portion of Dr Bentley's evidence are these:

> Southern Transport alleges that Ms Emtage could not have been injured in the way alleged. In effect they are saying she is lying. Mr Scanelli, Dr Taylor, Dr Steiner and myself all accept the same description of the injury. I have no reason not to believe Ms Emtage. I challenge the second respondent to give proof this injury did not occur and explain her problem based on sound medical evidence. Are you prepared to state in this court she is a liar?
>
> ……

> The submissions of Counsel for Southern Transport show considerable ignorance delving into medical issues they have no knowledge and understanding, they are disrespectful and insulting to my professional training and integrity. Their attitude reflects desperation and there is no effort to discuss or communicate and analyse the problem in depth. Case Managers need to be able to listen, assimilate information, communicate and analyse information, report thoroughly and be prepared to change decisions when appropriate.

[247] These are trenchant criticisms. Dr Bentley's words in this case are direct, even blunt, but they are justified by what I find occurred in this case.

[248] Ultimately, therefore, all of the evidence submitted on this appeal, of which Dr Bentley's evidence is a part, is considered.

[249] In support of his submission to exclude Dr Bentley's evidence Mr Hunt referred to *Prattley Enterprises Ltd v Vero Insurance Ltd*[12] where the Court excluded the evidence of a Mr Keys, who was the principal of a firm who held a pecuniary interest in the litigation as the litigation funder.

[250] The first thing to note is that *Prattley* did not in any way relate to ACC matters or the ACC Act. Therefore, there was no legislative provision similar to s156 of the ACC Act applicable to allow the court to hear any evidence it thinks fit.

[251] In any event, Mr Keys' position, as such, was far removed from that of Dr Bentley, as the appellant's treating physician. In that case, Dunningham J found that Mr Keys' evidence was neither reliable nor helpful, although he possessed expertise to assist the Court's determination of the proper approach to be applied to depreciation.

[252] In our case, all that might fairly be said of Dr Bentley is that he spoke his mind. The portion of his evidence specifically objected to squarely relates to the issues before the Court, namely multiple issues around investigation of the injury and its cause; workplace safety; the effect of delay on the injury; the proposition that this injury did not occur, (with the necessary corollary that the appellant was untruthful); that other medical assessments have been very superficial; and the opinion that Southern Transport showed ignorance delving into medical issues it had no knowledge or understanding of; thereby being disrespectful of and insulting to his professional training and integrity.

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12 *Prattley see n12 above.*

[253] These are all matters, at very least, of potential relevance in the particular circumstances of this case. I find there are no grounds for Dr Bentley's evidence to be excluded in whole or in part. It is there to be weighed along with all the other evidence and it is fair to say in the course of the saga that this case has become, there is a plethora of evidence before the Court that is of no help to the Court whatsoever, including, for example, photographs of trucks that are different from truck 204.

[254] Indeed, if there are learnings to come from this case, at the head of the list would be, some rational dialogue between the parties as to the documents to be included, so that the chaotic disorder that the joint bundle of documents has become in this case is avoided in the future.

[255] As to the insistence by the second defendant that the accident could not have been caused as described by the appellant, this was laid to rest not only by the other reports on the file of other occasions where the back plate on truck 204 prematurely dislodged and fell, but also by the impromptu "demo in the yard" as the appellants' advocate called it, namely the demonstration using truck 204 at the courthouse on the second morning of the hearing.

[256] The initial demonstration on behalf of the second respondent having shown that with the left hand on the hydraulic lift controls, it was impossible to reach the descending bin with the right hand, the appellant then stepped forward and performed a very slick manoeuvre, obviously as a result of years of practice. Having lowered the bin until its base was about 40 centimetres above the ground, she took her left hand off that control and was thereby free to lean towards the bin; place her right hand on the bin handle; and with bent knee, raise her right foot, and in a kicking motion, dislodge the bin from its coupling and onto the ground.

[257] In that manoeuvre it was plainly obvious that had the back plate become lose and dislodged, it would have fallen onto the front of her right upper thigh and leg above the knee. That demonstration by the appellant removed all doubt in the Court's mind as to whether such injury by accident was possible. It plainly was.

[258] Looking at what she did also included her using the controls to shake the bin when it was in its highest position above the ground emptying its green waste contents into the truck. Her evidence was that given the nature of green waste, it was prone to get stuck in the bottom

of the bins. So what she did, by way of using the controls to shaking the bin, was a sensible, logical thing to do to dislodge the "stuck" green waste. That in turn, however, plausibly would loosen the nut that held the back plate in place and render it liable to fall prematurely when the bin was lowered again to the ground.

[259] The further lesson taken from the appellant's demonstration was that her technique of leaning to her right and kicking the bin free from its cradle onto the ground would, for her, on a daily cumulative basis, save quite a lot of time. The lifting and lowering mechanism was quite slow and so to be able to dislodge the bin to the ground from a height of about 40 centimetres would save the appellant valuable seconds on each occasion she emptied a bin. Over the period of a day, many minutes could be saved.

Conclusions

[260] In summary, therefore, for reasons already given, I find that on 11 March 2019, the appellant suffered the accident that she reported to her doctor on 6 May 2019, which after erratic medical examinations proved to be a labral tear and two sites of soft tissue damage on her upper and lower thigh affecting the femoral nerve.

[261] Accordingly, in respect of ACR 124/21, I find the decision of 22 December 2020 revoking cover was plainly wrong and is reversed. It needs to be noted as Dr Bentley pointed out, that the originally covered injury was misdescribed as a contusion of the lower back when it related to her right hip and thigh.

[262] In respect of review ACR 234/21, the challenge facing the appellant in respect of this particular matter was the lack of a decision by ACC relating to the appellant's request for entitlements.

[263] I find the reviewer was correct in deciding that ACC's decision revoking cover of 22 December 2020 meant that the appellant was not entitled to a specific decision regarding a claim for entitlements. It is axiomatic that entitlements follow cover. With cover restored, entitlements, including backdated entitlements, must now follow.

[264] ACR 225/21 relates to the reviewer's decision as to costs. This issue was not argued before me. Accordingly, that appeal is dismissed.

[265] Overwhelmingly, the case before me has been about whether an accident causing injury occurred and if so what the extent of the resulting injury was. Notwithstanding the somewhat atypical backdrop of the claim, it was nevertheless a claim that ACC should have been able to satisfactorily investigate through to an enduring positive conclusion for the appellant. Instead it revoked cover.

[266] With cover now restored, entitlements follow. Plainly these will include treatment and rehabilitation. They may also include assessments of weekly compensation and possibly lump sum payment for permanent impairment. These are matters that ACC, including those contracted to ACC, must now work through with the appellant in a way that is not affected or influenced by what has occurred before.

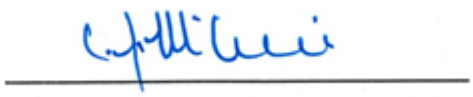
[267] Section 3 (c) and (d) of the Act reminds us that entitlements are to restore to the maximum practicable extent the claimant's health, independence and participation; and ensuring that during rehabilitation claimants receive fair compensation for loss from injury.

[268] In his submissions Mr Hunt has taken exception to some of the language resorted to by Mr O'Sullivan, in his written submissions. I note his concern. The language is unhelpful. However, the focus of this judgment is and must ultimately be on the correctness or not of the revocation of Ms Emtage's cover.

Result

- ACR 124/21- Appeal Allowed
- ACR 234/21- Appeal Dismissed
- ACR 225/21- Appeal Dismissed

[269] As the appellant has been successful in respect of the revoked cover decision which is at the heart of these appeals, she will be entitled to costs. The parties are to file memoranda in respect thereof within three weeks, with any reply responses within four weeks. The timeframes are deliberately short. This saga must be brought to an end.



CJ McGuire
District Court Judge

Solicitors: Young Hunter, Christchurch
Copeland Ashcroft Lawyers, Invercargill