IN THE DISTRICT COURT
AT WELLINGTON

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

[2024] NZACC 008 ACR 006/23

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

Hearing: 20 June 2023

Heard at: Christchurch

Appearances: Mrs Judith McKenzie, appellant in person, supported by
Mr Allan McKenzie
Mr C Light for the respondent

Judgment: 17 January 2024

RESERVED JUDGMENT OF JUDGE I C CARTER
[Personal injury/causation / s 26 Accident Compensation Act 2001]

Table of Contents

Introduction

[1] Mrs McKenzie has cover for several injuries caused by an accident on 11 April 2019, including an acute meniscal tear of the right knee. On 19 January 2021, Mrs McKenzie underwent surgery to treat the meniscal tear.

[2] On 8 June 2022, Mrs McKenzie, through her treating orthopaedic surgeon, Mr John Rietveld, applied to the Corporation for additional cover for right knee medial compartment osteoarthritis and funding for surgery to treat that condition (right hemi knee replacement). This was on the basis that Mr Rietveld suggested that the osteoarthritis was caused by the 11 April 2019 accident.

[3] Mrs McKenzie's application for cover and surgery funding was declined in a decision made by the Corporation dated 2 August 2022 ("the Corporation's Decision"). The Corporation determined that Mrs McKenzie's right knee medial compartment osteoarthritis was not caused by the 11 April 2019 accident and was instead a pre-existing condition.

[4] Mrs McKenzie applied for review of the Corporation's Decision declining cover. In a Review Decision dated 20 December 2022 ("the Review Decision") the Reviewer upheld the Corporation's Decision to decline cover for right knee medial compartment osteoarthritis and funding for surgery. The Reviewer concluded on the evidence that Mrs McKenzie's right knee medial compartment osteoarthritis was not caused by her 11 April 2019 accident. The application for review was dismissed.

[5] Mrs McKenzie appeals from the Review Decision.

[6] The appeal is by way of re-hearing, which means that the District Court is required to undertake its own evaluation of the evidence and merits generally.[1] The Review Decision is considered, but the Court may come to a different conclusion.[2]

Issue

[7] The issue in this appeal is whether Mrs McKenzie's right knee medial compartment osteoarthritis was caused by her accident on 11 April 2019 and whether she should have been granted cover and funding for surgery to treat it.

Facts

[8] The facts are not in dispute.

Relevant medical history and the Corporation's Decision

[9] On 11 April 2019, Mrs McKenzie and a treatment provider completed an injury claim form for an accident on that date. The claim for cover was for a minor head injury suffered in an accident when Mrs McKenzie went to the toilet, fainted and hit her head on the floor.

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[1] *Accident Compensation Corporation v Bartels* [2006] NZAR 680 at [65]; *Atapattu-Weerasinghe v Accident Compensation Corporation* [2017] NZHC 142 at [23]; *BL v Accident Compensation Corporation* [2023] NZACC 106.

[2] *Wildbore v Accident Compensation Corporation* [2009] NZCA 34, [2009] 3 NZLR 21 at [29].

[10] The Corporation granted cover for this injury. The Corporation subsequently also granted cover for a right knee sprain injury.

[11] On 18 September 2019, Dr Anne Harkness, Radiologist, commented on an x-ray of the right knee. Dr Harkness said that there was no discernible joint effusion and no evidence of bony injury. The articular cartilage spaces were within normal limits.

[12] On 1 October 2019, Dr Melissa Rossaak, Orthopaedic Surgeon, reported following an assessment of Mrs McKenzie. According to her report, Mrs McKenzie recalled having knee pain and was then progressively less able to bear weight. She received treatment from a physiotherapist, but her pain persisted. Dr Rossaak referred to an x- ray as showing relatively well-preserved joint spaces. Dr Rossaak referred Mrs McKenzie for an MRI scan.

[13] On 3 October 2019, Dr Marcus Ghuman, a radiologist, reported on the MRI scan of the right knee. He concluded:

> **Interpretation:**
>
> Tearing of posterior horn and body of medial meniscus. Medial collateral ligament sprain.
>
> Relatively extensive tearing of lateral meniscus with large anterior parameniscal cyst formation. Probable osteochondral injury involving lateral tibial plateau.
>
> Focal full thickness chondral loss centred the median patellar ridge and medial patellar facet at the patellofemoral joint.

[14] Dr Rossaak reported again on 15 October 2019. The diagnoses were:

> 1. Tearing of posterior horn and body of medial meniscus with MCL sprain.
> 2. Relative extensive tearing of lateral meniscus with large anterior parameniscal cyst formation and probable osteochondral injury involving lateral tibial plateau.
> 3. Focal full thickness chondral loss centred on the median patellar ridge and medial patellar facet at the patellofemoral joint.

[15] Dr Rossaak was surprised by the results of the MRI scan because Mrs McKenzie's symptoms had further subsided and she was not having many problems at that time. Dr Rossaak considered that the parameniscal cyst injury could have occurred as a result of the fall in April 2019. Dr Rossaak did not recommend surgery at that time.

[16] Dr Rossaak reported again on 24 December 2019, 4 February 2020 and 25 February 2020. Mrs McKenzie's condition fluctuated during this period with periodic flareups of her condition. By the time of the assessment on 25 February 2020 there was mild swelling of the knee, but the knee was reported as stable.

[17] Dr Rossaak reported on 17 March 2020 that although Mrs McKenzie had benefited from a steroid injection she had persistent medial sided knee pain. Dr Rossaak considered that all non-operative options had been exhausted and the plan was to debride the medial meniscus.

[18] In an assessment report and treatment plan dated 18 March 2020, requesting accident compensation funding for an arthroscopic debridement of the right knee, Dr Rossaak referred to the causal link between the proposed treatment and the covered injury as follows:

> Judith can't recall her mechanism of injury as she lost consciousness at the time. She can also be quite vague with regards to her symptoms. Her MRI displays features of both acute and non-acute changes and she is aware of this. Her predominant issue has been that of medial sided knee pain.

[19] The Corporation's medical advisers, Mr Peter Hunter, Orthopaedic Surgeon, and Anna Preston-Thomas, Physiotherapist, commented on 16 June 2020 on the request for surgery. They acknowledged that a fall could potentially cause a traumatic meniscal tear. However, in this case, the onset of a knee complaint a month after the accident was inconsistent with a traumatic meniscal tear. They continued (footnotes omitted):

> The MRI reported a small region of partial thickness chondral loss involving weightbearing region of medial femoral condyle, a focal region of full thickness chondral loss involving weightbearing portion of lateral tibial plateau posteriorly accompanied by irregularity of the subchondral bone plate and subjacent cystic change and full thickness chondral loss at median patellar ridge and medial patellar facet with subjacent cystic change. This represents well established knee osteoarthritis (osteoarthritis). It is well recognised that clients with symptomatic osteoarthritis will have a 60-90% chance of having associated degenerative meniscal pathology.
>
> The MRI reported radial medial and lateral meniscus tears. The lateral meniscus tear was described as macerated and complex. While the configuration of a meniscal tear may not, in itself, be indicative of causation, radial tears that occur in the medial meniscus are generally considered to be degenerative. This is also the case with complex tears.
>
> The client does not have any previous ACC covered right knee injuries.
>
> In summary, considering the initial clinical findings are not consistent with a traumatic meniscal tear, the delay in knee signs and symptoms are not consistent with a traumatic meniscal tear, the presence of well-established degenerative change in the chondral

> surfaces and the configuration of the tears, medical evidence does not support a causal link between the client's accident and the medial meniscal tear requiring surgery.

[20] On 19 June 2020, the Corporation declined the request for surgery. Mrs McKenzie applied for a review of the decision. Reviewer Caleb Bridgeman dismissed the application in a decision dated 19 October 2020.

[21] On 27 October 2020, Mr van Rooyen, Orthopaedic Surgeon, reported on an assessment of Mrs McKenzie. Mr van Rooyen considered that Mrs McKenzie had pes anserine bursitis while she was being treated by Dr Rossaak.

[22] In respect of the MRI imaging, Mr van Rooyen said:

> An MRI scan was performed at Mercy Radiology, which demonstrated tears to both the medial and the lateral menisci, with areas of cartilage fissuring and focal loss noted in the weightbearing region of the medial femoral condyle, as well as the weightbearing portion of the lateral tibial plateau posteriorly with adjacent cystic changes. I presume this is what prompted ACC to decline her plan based on degenerative change. There is also full thickness loss seen at the median patellar ridge. There is no comment made on the scan of pes anserine bursitis, mention is made of a small volume of fluid in both sides of the distal medial collateral ligament consistent with an MCL sprain. This is fairly minor however.

[23] As to the need for surgery, Mr van Rooyen said:

> The aim of surgery would be purely to assess the medial compartment for any unstable meniscal fragments which could be causing irritation requiring removal. She understands we cannot change the fact that she has got areas of full-thickness cartilage loss, nor can we un-tear her menisci.

[24] Mr van Rooyen referred Mrs McKenzie for an updated MRI scan. He said that this may add weight to a decision to do an arthroscopy if an unstable meniscal fragment could be demonstrated.

[25] An MRI of the right knee on 5 December 2020 compared the previous MRI on 3 October 2019. The radiologists interpreted the imaging as follows:

Interpretation:

Since the prior study of October 2019, there has been worsening of the radial tear involving the body of the medial meniscus, with moderate medial compartment osteoarthritis and interval development of subchondral oedema in the medial tibial plateau with mild MCL strain. Small simple knee joint effusion. The medial tibial bone marrow oedema probably accounts for the symptoms in the pes insertion.

Intact ACL and PCL.

Stable complex tear of the anterior horn lateral meniscus with focal full thickness articular cartilage loss at the posteromedial tibial plateau. Small posterior third tear. Stable moderate medial patellofemoral osteoarthritis and MPFL strain.

[26] On 19 January 2021, Mr van Rooyen carried out a right knee arthroscopy, partial medial and lateral meniscectomies, and medial femoral chondroplasty. He reported the following in his surgery report:

1. Patellofemoral joint - Grade 2-3 changes medial patella facet with a small osteophyte medially. Lateral facet and median ridge normal.

2. Trochlea - Diffuse grade 2 changes entire trochlea.

3. Medial compartment - Unstable complex tear of the posterior horn of the medial meniscus with a large radial component in the region of the posterior border of the MCL. Unstable flap present. Diffuse grade 2 changes to the majority of the articular cartilage of the medial compartment with areas of grade 3 changes in the posterior aspect of the medial femoral condyle and far medial aspect of the tibial plateau.

4. ACL - Intact.

5. Lateral compartment - Diffuse grade 2 changes to the posterior distal femoral condyle and the entire tibial surface with a small area of grade 3 fissuring in the posterolateral tibia. An unstable horizontal cleavage tear of the anterior horn of the lateral meniscus present. Periphery intact.

[27] Dr Marcel Brew, Radiologist, reported on an x-ray of the right knee on 28 October 2021. He said that there was moderate to marked osteoarthritis in the medial compartment with joint space narrowing and osteophyte formation. An AP view[3] of the left knee showed no abnormality.

[28] On 11 April 2022, the Corporation revoked the decision to decline cover for a right medial meniscus tear and accepted cover.

[3] An *AP view* means anterior-posterior, i.e. from front to back.

[29] As an outcome of a conciliation meeting on 13 April 2022, the Corporation agreed to make a decision on a claim for cover for right knee osteoarthritis that Mrs McKenzie said was caused by the medial meniscus tear, if Mrs McKenzie made a claim for cover.

[30] Mr John Rietveld, Orthopaedic Surgeon, reported on 8 June 2022. Mr Rietveld said that the x-ray in October 2021 showed significant medial compartment osteoarthritis. His diagnosis was medial compartment osteoarthritis.

[31] On 29 June 2022, Mr Rietveld completed an assessment report and treatment plan on behalf of Mrs McKenzie. The requested surgery was a right hemi knee replacement.

[32] As to the causal link Mr Rietveld said:

> This lady had (sic) medial compartment osteoarthritis, this maybe (sic) the result of her having injured the knee.

[33] A Corporation medical adviser, Ms Preston-Thomas (Physiotherapist) commented on 25 July 2022 (signed off by Mr Hunter, Orthopaedic Surgeon) and 4 August 2022. Ms Preston-Thomas said in summary that osteoarthritis of the knee is a gradual process condition distinguished by progressive degeneration of the articular cartridge, menisci and the underlying bone. Meniscal tears were part of this process. The clinical symptoms after the accident were inconsistent with a significant knee injury capable of causing subsequent osteoarthritis. The MRI six months after the accident showed that the condition predated the accident. The extent of the knee osteoarthritis would have taken years to develop.

[34] On 2 August 2022, the Corporation declined cover and the request for funding for surgery (the decision in issue).

[35] Mr Rietveld said in a report on 5 August 2022 that:

> Therefore I think that there is a high correlation between the injury and the onset of her symptoms and the need for her now to have a hemi knee replacement.
>
> On the basis of this I think that she has a good argument to put forward to ACC that they should cover this. It is very clear from the radiology reports that the pathology occurred after the trauma in 2019.

[36] Ms Preston-Thomas commented in response to Mr Rietveld's report on 15 September 2022. With reference to the first x-ray on 18 September 2019, five months after the accident, she noted

that an x-ray would show changes to the bone, but would not show the cartilage. The x-ray was not reported as weight-bearing. If a person stood up for an x-ray, i.e. a weight- bearing x-ray, the distance between the two weight-bearing knee bones gives an indication of how much cartilage is present within the joint. An x-ray taken without weight on the knee would not show this and may give a false impression that the cartilage was normal. This x-ray therefore did not exclude cartridge loss consistent with osteoarthritis.

[37] As to the MRI on 3 October 2019, six months after the accident, Ms Preston-Thomas said that the reported findings were consistent with moderate to severe osteoarthritis in all three compartments of the knee. The extent of this knee osteoarthritis would have taken years to develop and the MRI findings confirmed that it predated the accident.

[38] Ms Preston-Thomas therefore concluded that the additional information from Mr Rietveld did not change her recommendation. That is, the medical evidence did not support the conclusion that Mrs McKenzie's current symptoms from her right knee medial compartment osteoarthritis were causally linked to the accident.

[39] Dr Mike Sexton, General Surgeon, commented on 29 September 2022. Dr Sexton said that the MRI report on 3 October 2019 showed significant tricompartmental osteoarthritis consistent with the operation findings on 19 January 2021 when Mrs McKenzie had a right knee arthroscopic, partial medial and lateral meniscectomies and medial femoral chondroplasty. He said that the severity of the articular cartridge changes indicated that the osteoarthritis could not have developed in the time between the claim and the imaging nine months later and was therefore not causally linked to the injury.

Review

[40] Reviewer Lisa Ormandy held a review hearing on 30 November 2022. Mrs McKenzie and her husband, Mr McKenzie, said in their evidence that she had been physically active before the accident event, that she had no restriction of movement, and she did not have right knee pain.

[41] In a decision dated 20 December 2022, the Reviewer dismissed the application for review.

[42] The Reviewer said that the specialists accepted that Mrs McKenzie had right knee osteoarthritis. This was further confirmed by the operation findings of Mr van Rooyen. The Reviewer noted that Mr Rietveld in his assessment report and treatment plan had reservations as to whether the osteoarthritis was caused by an accident, because he said that the osteoarthritis "may be" the result of an accident. He did not go so far as to state that it was probably caused by an accident, which was the legal standard.

[43] The Reviewer further noted that although Mrs McKenzie had been symptom-free before the accident, the osteoarthritis had been asymptomatic. The evidence was clear that Mrs McKenzie had pre-existing osteoarthritis/degenerative changes in her right knee. The accident may have accelerated the changes, but cover was not available in that situation, because theaccident did not cause the degenerative condition.

[44] The Reviewer concluded:

> 67 This means that although the evidence may support Mrs McKenzie's position that her osteoarthritis became much worse and more symptomatic after the April 2019 accident (although I'm not convinced this is the case, noting the evidence above), she is not entitled to cover for this condition.

Post-Review Evidence

[45] The Corporation, through counsel, requested the Corporation's Clinical Advisory Panel ("CAP") to consider the issues and to provide a report, which it did on 16 May 2023. The CAP was comprised of several medical specialists, including seven orthopaedic surgeons.

[46] The CAP set out the history. They noted that the initial presentation was inconsistent with a significant knee injury capable of causing post-traumatic osteoarthritis. The x-ray of the right knee on 18 September 2019 did not show articular cartilage changes, although it was possible that Mrs McKenzie was not weight-bearing through the right leg when the x-ray was taken. The CAP further noted that an MRI was much more sensitive than an x-ray and provided a detailed picture of the chondral surfaces.

[47] As to the MRI, the CAP said:

> MRI dated 3 October 2019 demonstrated tri-compartment osteoarthritis and associated degenerative meniscal pathology. At the medial compartment there was partial thickness chondral loss involving the weightbearing region of medial femoral condyle, consistent with osteoarthritis.

> The time interval between the accident event and MRI is six months. Considering the pathogenic process of osteoarthritis and the absence of a noteworthy injury, the osteoarthritis seen at the RIGHT knee could not have developed in this time.
>
> (emphasis added)

[48] The CAP said that the arthroscopy in January 2021 confirmed the presence of tri-compartment osteoarthritis with diffuse Grade II changes through the medial compartment, with areas of Grade III changes at the medial femoral condyle and the far medial aspect of the tibial plateau.

[49] There was no evidence that the medial compartment osteoarthritis had significantly deteriorated over the previous 15 months. The surgery findings were inconsistent with a rapidly deteriorating post-traumatic condition at the medial compartment.

[50] The CAP concluded:

> Whilst it is acknowledged that the client had no symptoms pre-dating the accident event, this does not infer the absence of osteoarthritis, with the prevalence of asymptomatic knee osteoarthritis in uninjured knees relatively high - up to 43% of adults aged over 40 years.
>
> In summary, the client's RIGHT knee medial compartment osteoarthritis predated the accident event and could not have been caused by it. Her RIGHT knee tri-compartment osteoarthritis is a gradual process condition unrelated to the accident event. No causal link can be established.

[51] The CAP was asked to comment on the role played by disease, a gradual process or the ageing process in respect of the condition, taking into account that an injury is only excluded from cover if the injury is wholly or substantially caused by one of these processes. The CAP explained that osteoarthritis is a degenerative joint disease resulting in the progressive loss of articular cartilage. Knee osteoarthritis could affect many other issues of the knee joint, including the menisci.

[52] The CAP noted that the increasing and high prevalence of asymptomatic osteoarthritis strongly supported that osteoarthritis reflected normal age-related changes. The CAP acknowledged that post-traumatic osteoarthritis could develop after an acute, direct trauma to the joint, for example an intra-articular fracture or a ligament rupture. But here the pathogenic process of osteoarthritis occurred over many years and not months.

[53] The CAP continued:

> In the absence of any noticeable structural injury and/or signs or symptoms of such injury e.g., severe swelling, synovial effusion, and intra-articular bleeding, the evidence does not support the presence of a significant knee injury capable of causing subsequent osteoarthritis.
>
> In addition, the osteoarthritis seen at the RIGHT knee could not have developed in the time interval between the accident event and MRI.
>
> The client's RIGHT knee osteoarthritis is not post-traumatic. The cause of the client's RIGHT knee osteoarthritis is entirely the result of a gradual ageing process.

[54] The CAP said that the surgery was required to treat right knee medial compartment osteoarthritis, which was also the opinion of the treating orthopaedic surgeon, Mr Rietveld, and was not required to treat a covered injury. The covered right medial meniscal tear was treated by arthroscopy in January 2021 and was not the condition for which surgery was required.

Appellant's submissions

[55] Based on the notice of appeal, memorandum for the initial case management conference and oral submissions made by Mr and Mrs McKenzie at the hearing, I summarise the main points made by Mr and Mrs McKenzie as follows:

(a) Mrs McKenzie had no right knee pain before the accident but developed significant right knee pain after the accident.

(b) The right knee medial compartment osteoarthritis did not pre-date the accident.

(c) Mrs McKenzie believes that her right knee injury requiring surgery was caused by the 11 April 2019 accident.

(d) The Corporation should have approved surgery earlier. The delay in treatment has caused the osteoarthritis. She now also has left knee damage because of the right knee.

(e) Mrs McKenzie has suffered pain, financial loss and a negative impact on her wellbeing as a result. She also lost her job as an earlier childhood teacher.

(f) Mrs McKenzie wants her right knee back so that she can walk and work.

The Corporation's Submissions

[56] The Corporation submits that the evidence does not establish that the right knee medial compartment osteoarthritis was caused by the accident on 11 April 2019.

[57] The MRI imaging in October 2019 (and subsequent imaging) shows that this condition pre-dated the accident event.

[58] Cover cannot be granted for a condition that was not caused by an accident.

[59] The Corporation was therefore correct to decline cover and to decline surgery funding for right knee medial compartment osteoarthritis.

Law

[60] In this part of the judgment, references to provisions of the Act are to provisions in the Accident Compensation Act 2001.

Cover

[61] Section 20(1) of the Act provides that a person has cover for a personal injury if:

(a) He or she suffers the personal injury in New Zealand on or after 1 April 2002; and

(b) The personal injury is any of the kinds of injuries described in s 26(1)(a) or (b) or (e); and

(c) The personal injury is described in any of the paragraphs in subsection (2).

[62] Under section 20(2)(a), a person has cover for a personal injury caused by an accident to the person. "Personal injury" and "accident" are defined in two further provisions.

[63] "Personal injury" is defined in section 26:

> **26 Personal injury**
>
> (1) **Personal injury** means -
>
> (b) physical injuries suffered by a person, including, for example, a strain or a sprain; or

[64] "Personal injury" is defined so as to not include:[4]

> (2) **Personal injury** does not include personal injury caused wholly or substantially by a gradual process, disease, or infection unless it is personal injury of a kind described in section 20(2)(e) to (h).
>
> …
>
> (4) Personal injury does not include -
>
> (a) personal injury caused wholly or substantially by the ageing process; or
>
> …

[65] "Accident" is defined in s 25:

> **25 Accident**
>
> Accident means any of the following kinds of occurrences:
>
> (a) a specific event, or a series of events, other than a gradual process, that -
>
> (i) involves the application of a force (including gravity) or resistance, external to the human body, or
>
> (ii) involves the sudden movement of the body to avoid a force (including gravity), or resistance, external to the body; or
>
> (iii) involves a twisting movement of the body:
>
> …

[66] By operation of s 25(3), the fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that the injury was caused by an accident.

[67] The leading authority regarding pre-existing degenerative changes is the High Court decision in *McDonald v Accident Rehabilitation and Compensation Insurance Corporation.*[5] Panckhurst J cited with approval[6] the comments of Judge Beattie in *Hill v Accident Rehabilitation and Compensation Insurance Corporation* as directly in point:[7]

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

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[4] Accident Compensation Act 2001, s 26.
[5] *McDonald v Accident Rehabilitation and Compensation Insurance Corporation* [2002] NZAR 970.
[6] *McDonald v Accident Rehabilitation and Compensation Insurance Corporation* [2002] NZAR 970 at [26].
[7] *Hill v Accident Rehabilitation and Compensation Insurance Corporation* [1998] NZACC 189 *alt* cit DC 189/98, 5 August 1998 pages 12-13.

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

[68] Panckhurst J concluded that there was a single test under the Act, namely:[8]

> … whether the disease is the whole or the substantial cause of the injury. If so, cover is unavailable regardless that the accident triggered (or accelerated) the progression of the disease.

[69] In *Johnston v Accident Compensation Corporation*,[9] Simon France J, with reference to *McDonald,*[10] *Cochrane v Accident Compensation Corporation*[11] and *Accident Compensation Corporation v Ambros,*[12] rejected an argument on behalf of the appellant that it was sufficient to link the incapacity to the accident. A claimant has to establish that the accident caused an identifiable physical injury that is causing or contributing to the claimant's present condition. A condition that has become symptomatic because of the accident will not be sufficient for a claimant to receive ongoing entitlements.[13]

[70] In *Ellwood v Accident Compensation Corporation*,[14] Dobson J held that it was settled law that a trigger to a pre-existing but asymptomatic condition becoming symptomatic was not a personal injury and declined to grant special leave to appeal.[15]

[71] In *Mehrtens v Accident Compensation Corporation*[16] Judge Ongley referred to the following factors as useful in determining whether there has been a new injury to which the claimant had a predisposition or the exacerbation of an underlying condition:[17]

- The nature of the injury - as initially identified - since it is generally reasonable to expect that an initial diagnosis, primarily directed at treatment rather than any issue of ACC coverage or entitlements - will represent an unvarnished

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[8] *McDonald v Accident Rehabilitation and Compensation Insurance Corporation* [2002] NZAR 970 at [30] (HC).
[9] *Johnston v Accident Compensation Corporation* [2010] NZAR 673.
[10] *McDonald v Accident Rehabilitation and Compensation Insurance Corporation* [2002] NZAR 970.
[11] *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 (HC).
[12] *Accident Compensation Corporation v Ambros* [2007] NZCA 304; [2008] 1 NZLR 340 (CA).
[13] *Johnston v Accident Compensation Corporation* [2010] NZAR 673 at [14], [20], [23] and [27].
[14] *Ellwood v Accident Compensation Corporation* [2012] NZHC 2887.
[15] *Ellwood v Accident Compensation Corporation* [2012] NZHC 2887 at [21].
[16] *Mehrtens v Accident Compensation Corporation* [2012] NZACC 25.
[17] *Mehrtens v Accident Compensation Corporation* [2012] NZACC 25 at [48].

assessment of "the injury", which may later require closer analysis in terms of any ACC issue.

- Any further or revised diagnosis of the injury - having regard to the observations above.

- The significance and seriousness of the accident, and in particular the mechanism of injury. In other words, is the injury which has been diagnosed plausibly or reasonably likely to have been caused by the event, or equally explicable by non-injury causes.

- The development of symptoms, and any change in those symptoms, following the accident - the onset (whether immediate or gradual), magnitude, and nature of those symptoms.

- The extent of any pre-existing condition and whether there had been prior symptoms consistent with that condition (as might be revealed by claimant history, or prior medical interventions and the results of x-rays, MRI scans, and the like).

- Whether any change in the presentation of symptoms is consistent with the natural course of the identified/diagnosed condition, or injury.

- The objective signs or indicia of injury. This may be simple where the injury is obvious - such as a laceration. It may be less obvious where the symptoms are explicable in different ways i.e., where the symptoms may be explained by reference of pre-existing conditions, which the injury has merely rendered symptomatic, but may equally be explained as having stemmed substantially from the accidental injury.

- The nature and quality of the evidence, both medical and factual. In relation to the medical evidence, particularly in an area where an opinion is relied upon, the Court will be influenced by the extent to which the medical opinion proceeds logically from as clear or settled a basis of fact as is possible (including the possible need for caution when significant reliance is based on a claimant's self report); appropriate analysis of that material including, where necessary, the presentation of a differential diagnosis; an appropriate level of regard for and consideration of medical research and studies bearing on the issue at hand applied to the particular facts of the case; and a logically reasoned conclusion which takes account of any differing views or factors which might contra indicate the opinion being presented. In this respect, an opinion which is seen to absorb and respond to matters (whether matters of fact or opinion) which challenge the view offered, will often be regarded as more persuasive.

[72] The approach discussed by Judge Ongley in *Mehrtens* has since been applied in a number of cases. For example, in *Lucas v Accident Compensation Corporation*[18] (a surgery case), Judge Powell accepted the factors as an outline of considerations that are applicable to many of the issues that come before the Court. They include the issues that arise in the present appeal. Further examples include *Duncan v Accident Compensation Corporation*[19] (Judge Maclean);

[18] *Lucas v Accident Compensation Corporation* [2015] NZACC 216 at [14].
[19] *Duncan v Accident Compensation Corporation* [2015] NZACC 347 at [29]-[30].

Andrews v Accident Compensation Corporation[20] (Judge McGuire); and *Toms v Accident Compensation Corporation*[21] (Judge Spiller).

[73] The legal burden is on the claimant to demonstrate that the requirements of the Act are satisfied, including to prove causation on the balance of probabilities.[22] That means showing that the probability of causation is more probable than not and higher than 50 per cent. However the courts do not engage in mathematical calculations, but rather form a general impression of the sufficiency of the law and scientific evidence and the presumptive inference which a sequence of events inspires in a person with common sense.[23]

[74] The claimant must establish on the balance of probabilities, based on all the evidence, that there is a causal nexus between the medical condition and a personal injury by accident.[24] The Court should not place too much emphasis on the onus as the question is whether the evidence as a whole justifies a conclusion that the necessary causal nexus between injury by accident and medical condition exists.[25] At the end of the day, causation is a question for the Court that cannot be delegated to the experts.[26]

[75] The claimant must show that his or her medical condition was caused in some degree by the covered injury.[27] If that is established, cover is not necessarily displaced on the basis that the condition was caused wholly or substantially by factors such as age or uncovered degenerative condition.[28]

[76] A proximate temporal connection between an event and a subsequent medical condition may be relevant, but its significance in any particular case will depend on the circumstances.[29]

[77] A treating medical specialist's opinion is often preferred, but the Court does not simply rubberstamp it. The specialist must provide proper reasoning for their opinion and the Court

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[20] *Andrews v Accident Compensation Corporation* [2021] NZACC 5.
[21] *Toms v Accident Compensation Corporation* [2020] NZACC 191.
[22] *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 at [63].
[23] *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 at [65].
[24] *Wakenshaw v Accident Compensation Corporation* [2003] NZAR 590 at [24].
[25] *Wakenshaw v Accident Compensation Corporation* [2003] NZAR 590.
[26] *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 at [26].
[27] *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 at [24].
[28] *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 at [24] and exclusions from the definition of "personal injury in s 26 (2), (4)(a) and s 20(2)(e) to (h).
[29] *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR3 40 at [77], [78].

will be influenced by the extent to which the medical opinion proceeds logically from as clear and settled a basis of fact as is possible.[30]

Treatment for personal injury

[78] Clause 1(1) of Schedule 1 to the Act provides that the Corporation is, "Liable to pay or contribute to the cost of the claimant's treatment for personal injury for which the claimant has cover."

[79] The treatment must therefore be required to treat a personal injury for which the claimant has cover, i.e. surgery is an entitlement and a claimant is not entitled to entitlements other than in respect of a covered injury.[31] The onus is on the appellant to establish, on the balance of probabilities, that the reason or purpose of the treatment is to treat a medical condition caused by or suffered in the injuring event.[32]

Analysis

What is and is not in issue

[80] There is no issue about the relevant diagnosis. The Corporation accepts that Mrs McKenzie has right knee medial compartment osteoarthritis. There is also no issue that the surgery is required to treat this condition.

[81] What is in issue is causation, namely whether the accident on 11 April 2019 caused the right knee medial compartment osteoarthritis. Cover can only be granted if this condition was caused by the accident.

[82] For cover to be granted, there must be a physical injury caused by an accident, which is required for cover under ss 20(2)(a) and 26(1)(b). If a pre-existing asymptomatic condition becomes symptomatic because of an accident, that does not result in cover, as for example in *McDonald, Johnston* and *Ellwood* (above).

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[30] *Lucas v Accident Compensation Corporation* [2015] NZACC 216.
[31] Accident Compensation Act 2001, s 67.
[32] *Das v Accident Compensation Corporation* [2011] NZACC 231 at [7] and *Te Puni* v *Accident Compensation Corporation* [2011] NZACC 229 at [6]. The surgery need not necessarily be for the injury originally diagnosed and for which cover was granted, but the condition to be treated must have been caused by the accident: *Bonsor v Accident Compensation Corporation* [2010] NZACC 196, [8]. However, if no cover was granted for a condition because there was never a claim for cover, then surgery cannot be granted for that condition: *Medwed v Accident Compensation Corporation* [2009] NZACC 86, [26].

[83] It is only if Mrs McKenzie is entitled to cover for the right knee medial compartment osteoarthritis that the Corporation will be liable to fund the surgery. The issue therefore turns on cover.

The right knee medial compartment osteoarthritis was not caused by the accident

[84] It is significant that the MRI on 3 October 2019, about six months after the accident, showed degenerative changes, that is, osteochondral changes, with full thickness chondral loss centred on the median patellar ridge and medial patellar facet at the patellofemoral joint.

[85] As Dr Rossaak commented in her assessment report and treatment plan dated 18 March 2020, the MRI showed features of both acute and non-acute changes. The reference to acute changes is presumably a reference to the medial meniscus tear, for which the Corporation accepted cover on 11 April 2022.

[86] Mr van Rooyen in his report on 27 October 2020 also referred to the MRI scan, which he said showed various degenerative changes. Mr van Rooyen thought this was why the Corporation had declined the request for surgery funding. The degenerative changes are also apparent from Mr van Rooyen's surgery report dated 19 January 2021.

[87] In the assessment report and treatment plan of Mr Rietveld dated 29 June 2022 (the request for surgery in issue) Mr Rietveld was uncertain as to the causal link between the medial compartment osteoarthritis and the accident event. He referred to this condition as "may be" the result of Mrs McKenzie having injured her knee. In causation terms, the highest that Mr Rietveld puts it in his later report on 5 August 2022 is "a high correlation" between the injury and the onset of Mrs McKenzie's symptoms.

[88] But the fact that the condition became symptomatic after the accident event is not evidence that the accident event caused the condition. Section 25(3) directs that the fact that a person suffered a personal injury is not in itself an indication or presumption that the injury was caused by an accident. It follows that in every case a claimant must prove that a physical injury was caused by the accident event.

[89] Mr Rietveld also said that it was clear from the imaging that "the pathology occurred after the trauma in 2019." Mr Rietveld gives no reason for this single sentence conclusion. Why

it should be clear from the radiology that the pathology occurred after the accident in 2019 is not explained in any way. Mr Rietveld also does not explain how the time sequence – 2019 accident then pathology – amounts to the accident causing the onset of symptoms. The statements that the osteoarthritis "may be" caused by the accident and “a high correlation” between injury/accident and symptoms do not express or explain how the accident caused the right knee medial compartment osteoarthritis.

[90] Mr Rietveld’s analysis does not say whether the April 2019 accident actually caused Mrs McKenzie’s physical injury and does not provide proper reasoning or explain how the accident caused the physical injury that is now causing the symptoms that require surgery. In this particular case the treating medical specialist’s opinion - which is unclear on the causation issue – does not carry weight. I am not persuaded by Mr Rietveld’s evidence that the necessary causal nexus exists between the accident and the injury now requiring surgery.

[91] Ms Preston-Thomas' response on 15 September 2022 to Mr Rietveld’s comment was that the imaging in October 2019 showed moderate to severe osteoarthritis in all three compartments of the knee. She said that the extent of this knee osteoarthritis would have taken years to develop and the MRI findings confirmed that it predated the accident.

[92] I prefer Ms Preston-Thomas’s analysis and opinions, which are clearly reasoned and explained and are more persuasive than Mr Rietveld's opinion. The key elements of Ms Preston-Thomas’s opinions were endorsed by Mr Hunter, Orthopaedic Surgeon. The opinions of Ms Preston-Thomas, Mr Hunter, Dr Sexton and (subsequently) the CAP are all consistent.

[93] The CAP report is detailed and thorough. As the CAP noted, there was no evidence that Mrs McKenzie had suffered a knee injury capable of causing post-traumatic osteoarthritis in the accident event. It was also not possible that the osteoarthritis shown on the MRI imaging in October 2019 had developed in six months.

[94] The CAP therefore concluded that although the osteoarthritis may have been asymptomatic before the accident, it was not caused by the accident event.

[95] I am satisfied by a wide margin on the evidence of Ms Preston-Thomas, Mr Hunter, Dr Sexton and the CAP that the accident did not cause Mrs McKenzie’s right knee medial

compartment osteoarthritis and that this condition was wholly or substantially caused by a pre-existing degenerative disease.

[96] One of Mrs McKenzie's submissions is that she did not have right knee pain before the accident and that because she experienced knee pain a relatively short time after her accident, she believes that the accident caused the injury resulting in pain. However, if the accident caused an underlying asymptomatic condition to become symptomatic, then cover cannot be granted under the Act. Further, the significance of a proximate temporal link between an injury and a subsequent medical condition depends on the circumstances and is generally not enough in itself to establish causation.[33] There is a temporal link in this case in that there is some proximity between the accident and Mrs McKenzie's knee pain. But this does not of itself point to causation, given the range of possible causes of the symptoms that Mrs McKenzie experienced.

[97] I acknowledge, as does the Corporation, that Mrs McKenzie has suffered ongoing pain and disruption to her life and that both Mr and Mrs McKenzie have approached accident compensation issues in good faith. The outcome of this appeal is not what they are seeking. However, the Court, like the Corporation, is bound to act within the boundaries of the law and individual circumstances when determining whether or not there is cover for the cost of medical treatment. The accident compensation scheme does not cover everything.

Conclusion

[98] Overall, the evidence does not establish on the balance of probabilities that the right knee medial compartment osteoarthritis was caused by the accident on 11 April 2019. The evidence instead shows that this condition was already present before the accident and had been caused by a gradual degenerative process over a lengthy period.

[99] The Corporation was correct to decline cover and to decline surgery funding for surgery to treat Mrs McKenzie's right knee medial compartment osteoarthritis.

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[33] *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR3 40 at [77], [78].

Result

[100] The Decision and the Review Decision are correct in concluding that Mrs McKenzie has no cover for and entitlement to surgery funding to treat her right knee medial compartment osteoarthritis.

[101] The appeal is dismissed.

Costs

[102] Although Mrs McKenzie is unsuccessful on appeal, the Corporation does not seek costs and I make no order for costs.

I C Carter
District Court Judge

Representation/Solicitors: Mrs Judith McKenzie, appellant in person, supported by Mr Allan McKenzie
Shine Lawyers NZ Ltd, Christchurch, for respondent