

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 149

ACR 89/23

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

Hearing: 23 August 2023

Heard at: Wellington

Appearances: Mr B Hinchcliff for the Appellant (via AVL)
Ms F Becroft for the Respondent (via AVL)

Judgment: 19 September 2023

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
(Deemed Cover – Section 58; Personal Injury – Section 26)**

[1] At issue in this appeal is a decision of the Accident Compensation Corporation dated 30 August 2022 which confirmed deemed cover, but simultaneously revoked deemed cover for:

- (a) an eye injury/eye trauma;
- (b) a lower back injury; and
- (c) a head injury.

[2] The same decision confirmed cover for contusion of the lower back.

[3] The appellant's position is that the above listed injuries were suffered when he was arrested by the New Zealand Police on 14 February 2012.

[4] The Corporation's position is that there is insufficient evidence to establish cover for eye or head injuries suffered on 14 February 2012. As for the decision regarding a lower back injury, while the Corporation revoked deemed cover for the general description of lower back injury, it confirmed cover for a contusion of the lower back.

Background

[5] An ACC injury claim form was completed by the emergency department at Dunedin Hospital on 18 February 2012. The diagnosis description on the claim form was:

Dislocation, sprain and strain of unspecified joint and ligament of trunk – left side.

[6] The description of injury was:

The New Zealand Police illegally entered my home without warrant, issued me a trespass notice, then pepper-sprayed, kicked and punched me.

[7] The accident date is recorded as 14 February 2012. The primary diagnoses of the emergency department were back sprain or strain and pain to the eyes from pepper spray.

[8] An x-ray to his back revealed no acute changes. The report noted that the appellant was comfortable with analgesia provided. The discharge plan was:

...

Advised to see physio.

Regular analgesia.

Mobilise and advice for back injury given.

Advice to see GP Monday for referral for counselling for current situation ...

[9] In respect of an alleged eye injury from pepper spray, the following is recorded:

Impression:

Other than vis acuity, no abnormality found. Symptoms seem inconsistent with chemical damage from pepper spray.

Requires formal ophthalmology review to look for other pathologies.

Discussed with eye reg (registrar), will see in clinic Mon 20th 8.30, time, date and location written down for patient.

[10] On 2 March 2012, the Corporation wrote to the appellant notifying him that his claimed injury (sprain/strain of unspecified joint and ligament of trunk) had been accepted.

[11] An x-ray was taken of the appellant's spine and reported on 4 March 2012:

There is a scoliosis of the lumbar spine concave to the right. There is degenerative reduction of the L5/S1 disc space. There is no other significant lesion. There is no other recent abnormality identified.

[12] The appellant presented at the emergency department again on 5 June 2013. The clinical note recorded:

From Wanaka.

In Dunedin for work.

Changing a car tyre.

Tweaked his back and then spasms started, initially so severe that he could not move.

Now things have settled down a bit.

No recent trauma to his back.

No pain radiating to his lower limbs.

Similar pain to previous.

In the centre and to the left.

...

[13] Next there is a letter from Rachel Upston Counselling Limited, Raglan, dated 2 July 2014. This relates to eight sessions of subsidised community counselling. The letter says:

Presenting issues for counselling have included Michael showing signs commonly associated with post traumatic stress disorder (commonly referred to as PTSD). Presenting symptoms have included low mood and anxiety.

Michael associated these symptoms with lifestyle problems he is having in regard to monetary, legal and police matters. Michael attributes the most recent trauma as being due to a “police assault”. He also links his trauma responses to losing the family farm, due to what he deems has been “a deceptive legal process”.

Michael made good progress and considers counselling to have supported him with his current lifestyle problems.

He states he will return for further therapeutic intervention/support if required in the future.

[14] There is also the report from Ms Dudley-Moore, Cranio Sacral Therapist dated 25 January 2019 who said:

I believe these compound traumas (the police ‘raid’ on his home and losing his home) have led to PTSD symptoms.

[15] Another ACC injury claim form was completed on 29 April 2020 seeking cover for post traumatic stress disorder associated with the 14 February 2012 arrest by the New Zealand Police.

[16] A mental injury report was completed by the appellant’s general practitioner, Dr McCuskey, on 13 May 2020. The form suggested that the PTSD was caused by the appellant being kicked, punched and kneed in the back and pepper sprayed in the face during the alleged assault by the police on 14 February 2012.

[17] The Corporation considered the available evidence. Dr Stormer, Medical Advisor, suggested that it was probable that a thoraco-lumbar sprain or contusion was suffered on 14 February 2012.

[18] The appellant completed a mental injury claim questionnaire on 21 June 2020 where he described the event as follows:

I was at home sitting at my desk. Police entered my house and I got up from desk and went outside. Police jumped on me from behind, punched and kicked me and pepper sprayed me three times. I was kicked into my right temple by a police officer. My eye was damaged and I sustained concussion. I suffered shock and trauma.

[19] The appellant was referred for a mental injury assessment with psychiatrist, Dr Levine, who conducted an examination via Zoom because the appellant had moved to Australia.

[20] Dr Levine gave diagnoses of:

- (a) Post-traumatic stress disorder; and
- (b) Major depressive disorder, chronic, in partial remission.

[21] Dr Dowling, Psychology Advisor, provided advice in respect of Dr Levine's report on 19 January 2021. Dr Dowling noted that the opinion of Dr Levine appeared to be primarily based on the appellant's description of the incident and that the actual events associated with that day were unclear. He identified that Dr Levine's report did not feature comments on the appellant's personality factors or symptom validity. Dr Dowling noted that the appellant had described that the police were acting as agents of the bank to secure a fraudulent sale of a property and that he believed a "Malaysian triad" was involved in the sale of the property. Dr Dowling also flagged the limitations associated with an assessment conducted remotely. He suggested obtaining further comment from Dr Levine and drafted further questions.

[22] The Corporation wrote to the appellant on 22 January 2021 issuing a preliminary decline of cover, but advising that a fresh decision would be issued once the Corporation had received further advice from Dr Levine.

[23] Dr Levine reported again on 28 January 2021.

[24] Responding to matters raised by ACC, Dr Levine said, amongst other things:

... I think it reasonable to consider the diagnosis provisional at this stage pending further information.

[25] He also said:

It is very difficult to make a comment on symptom validity without there being a collaborative history from third parties. As I have stated in my report, there is some consistency with regards to previous assessors noting anxiety and PTSD symptoms. However, there is also the inconsistency regarding Michael's description of the severe physical assault and the medical evaluation five days later which did not comment on injuries other than Michael experiencing back pain.

[26] Dr Dowling provided further comment on 4 February 2021, noting that Dr Levine had confirmed that the diagnosis was provisional.

[27] The appellant subsequently, on 16 July 2021, completed an affidavit in which he described being psychologically healthy before the encounter with the police in 2012 and since then he had endured PTSD and depressive symptoms.

[28] In January 2022, the parties attended a mediation to agree a path forward. This included further investigation to identify what physical injuries were said to have been responsible for the claimed PTSD. Once any additional physical injury claims had been made, the Corporation would then make a decision on whether to cover the physical injuries, and then would revisit the issue of cover for mental injury.

[29] On 16 April 2022, the appellant wrote to his counsel listing the injuries he said he sustained during the 2012 police assault being:

- (a) Eye injury and eye trauma;
- (b) Acute anxiety;
- (c) Lower back injury; and
- (d) Head injury.

[30] The appellant completed another document on 1 May 2022 entitled “Memorandum re ongoing PTS symptoms”.

[31] On 26 July 2022, the Corporation’s medical advisor, Dr Moonan, reviewed the file and concluded:

It is not possible to know exactly what injuries were sustained. However, the information provided indicates that he is likely to have sustained a contusion lower back ... I recommend cover be added for this. There is no evidence of any other injuries being sustained. There is also no evidence that the contusion was severe or required ongoing treatment; it accentuated pre-existing chronic back pain. There appears to be no medical indication that PTSD could result from the physical injuries sustained. Clearly the situation and circumstances are highly relevant.

[32] Subsequent technical specialist advice from Mr Barnes, dated 2 August 2022, noted that the appellant's letter dated 21 April 2022 was intended to be a claim for cover and that a decision was due to be issued on 21 June 2022. As no decision had been issued, cover was deemed for eye injury, eye trauma, and head injury. However, Mr Barnes confirmed that the contemporaneous medical evidence showed that deemed cover for those injuries should be revoked.

[33] Accordingly, on 30 August 2022, the Corporation issued a decision approving but revoking deemed cover for:

- (a) Eye injury/trauma;
- (b) Lower back injury; and
- (c) Head injury.

[34] The decision of 30 July 2022 also confirmed cover for contusion of the lower back.

[35] At review further evidence was filed by the appellant, including:

- (a) A case summary report prepared by the New Zealand Police dated 21 February 2012, which described an encounter where the appellant presented to the police watchhouse.
- (b) Another case summary report prepared by the New Zealand Police describing the incident on 14 February 2012.
- (c) An undated document titled "The Scott Chronicles - an act of war". In it the appellant offers his views on the events associated with the mortgagee sale and the subsequent seizure of the property. The document appears to be incomplete, but includes earlier reports already referred to from Ms Upston and Ms Dadley-Moore.

[36] There is also a further affidavit from the appellant dated 5 May 2023 in which the appellant says the 2012 assault directly resulted in him suffering eye trauma injury.

Appellant's submissions

[37] Mr Hinchcliff referred to the events of 14 February 2012 in which he said his client was “battered” by police.

[38] He acknowledges that, as cover has been revoked for eye injury/trauma and head injury, the appellant must prove on the balance of probabilities that he did sustain an injury to his eye and to his head on 14 February 2012.

[39] Mr Hinchcliff traversed the record from the emergency department of Dunedin Hospital dated 18 February 2012, where the appellant describes being sprayed “at least four times” in the eyes with pepper spray by the police.

[40] Mr Hinchcliff submits that the fact that the appellant was having “blurred vision, seeing double and triple and lights hurting his eyes” some four days after the incident supports the appellant’s claim.

[41] Mr Hinchcliff submits that the mental injury claim questionnaire completed by the appellant on 21 June 2020 where he says: “I was kicked in my right temple by a police officer. My eye was damaged and I sustained a concussion. I sustained shock and trauma”, he submits that the evidence is sufficient for ACC’s decision to be quashed and that he be covered for both eye and head injury.

Respondent's submission

[42] Ms Becroft submits that the appellant’s “end game” is that he is seeking cover for PTSD.

[43] She advises the Court that ACC has accepted cover for PTSD in a decision of 1 June 2023 and that it is based on the appellant’s back injuries.

[44] She says that there has effectively been nothing from the appellant since 2012 regarding injury to his head or to his eyes. She acknowledges, however, that the appellant is entitled to seek whatever cover he wishes.

[45] She notes, however, that contemporaneous evidence is important.

[46] She submits that while there is evidence of a police “assault” on 14 February 2012, she notes that on 14 February 2012 the appellant was twice at the emergency department of Dunedin Hospital. On the first occasion the focus was on a lower back sprain or strain and at 12.16 pm he was discharged home.

[47] He was back at the emergency department the same day and seen at 6.44 pm relating to the pepper spray. He was discharged home at 7 pm. On that occasion under the heading “Impression” was this:

Other than vis acuity, no abnormality found.

[48] The appellant had been complaining of blurred vision. The hospital note also records:

Discussed with eye reg, will see in clinic Mon 20th 8.30, time, date and location written down for patient.

[49] Ms Becroft says that following this, there is nothing further until 2020.

[50] She accepts, however, that the appellant has always said that he was kicked in the head. However, once again, no head injury is recorded or complained of when he presented himself at the emergency department.

[51] She notes also that the New Zealand Police reports associated with the incident do not refer to any punching, kicking or pepper spraying, or any contact with the head.

[52] She submits, therefore, that the claimed injuries are not supported in the contemporaneous evidence and, therefore, the Corporation, without the ability to investigate further, has correctly taken the position that the evidence is insufficient to establish cover.

[53] Accordingly, she submits that the appellant has not satisfied the evidential burden required to establish cover and that, accordingly, ACC’s decision of 30 August 2022 to revoke deemed cover for the eye and head injury is correct.

Decision

[54] In this case, cover was deemed pursuant to s 58 of the Accident Compensation Act 2001. Pursuant to s 65(2) of the Act, the Corporation has the power to revise deemed cover decisions.

[55] Ms Becroft refers to *Atapatu-Weerasinghe v ACC* and submits that the onus is not on the Corporation to show that deemed cover was granted in error.¹ Rather what is required is a consideration of the available evidence to the extent to which it supports cover.

[56] The question then is, did the appellant suffer personal injury by accident as those terms are defined in ss 25 and 26 of the Act?

[57] Here, it is clear that in the course of the arrest of the appellant and his removal from the property on 14 February 2012, the police deployed pepper spray and plainly had to exercise some force.

[58] The issue of an eye injury appears to have arisen first when the appellant, for the second time on 18 February 2012, attended the emergency department of Dunedin Hospital.

[59] It is plain from the emergency department record that no visual abnormality was found. However, after discussion with the eye registrar, an appointment was made for the appellant with the eye clinic for 20 February 2012. That was because the emergency department also recorded:

Requires formal ophthalmology review to look for other pathologies.

[60] Beyond that, however, there is no record of such eye examination taking place.

[61] Accordingly, the Court is left with no credible evidence of eye injury to the appellant from his encounter with the police on 14 February 2012.

[62] As to the head injury, the appellant in his claim form completed in the emergency department of Dunedin Hospital on 18 February 2012, described being kicked and punched.

¹ *Atapatu-Weerasinghe v ACC* [2017] NZHC 142.

[63] Nothing is recorded in the medical notes of the emergency department relating to injury to his head at the hands of the police.

[64] It is noted that the appellant went to the Dunedin watchhouse on 21 February 2012, a week after his alleged assault. On that occasion the appellant said he wanted to lay a complaint with the police in relation to wilful damage, and he referred to the destruction and removal of a letterbox and removal of a security gate lock.

[65] That document makes no reference to any head injury inflicted by the police.

[66] There is a further police document, a case summary report, referring to 2 October 2013, which includes the following:

Defended fixture in Dunedin District Court. All witnesses presented evidence and SCOTT found guilty and convicted for trespass and resisting. \$1,000 fine for each charge plus court costs.

[67] The level of fine imposed does not suggest there were major mitigating factors in support of Mr Scott.

[68] I note that in her letter of 25 January 2019, Ms Dadley-Moore, the appellant's therapist of the time in Takaka, said that the appellant:

Spoke to me about a trauma he had experienced during a police raid in his home where he was manhandled by the police which involved being pinned down with a foot on this area of his head.

[69] It is acknowledged that the appellant claims that he was kicked in his right temple by a police officer. However, on the totality of the evidence that is available, which notably includes the last mentioned statement, the case summary report of 2 October 2013 and the emergency department record from 18 February 2012, I must conclude that the appellant has not established on the balance of probabilities that he received a head injury at the hands of the police on that day.

[70] Accordingly, therefore, I must conclude that ACC's decision to revoke cover for eye injury/eye trauma and head injury was correct.

[71] Accordingly, therefore, I must dismiss this appeal.

[72] Costs are reserved.



C J McGuire
District Court Judge

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