

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 233

ACR 282/21

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

Hearing: 29 November 2022
Held at: Hamilton/Kirikiri

Appearances: K Koloni for the Appellant
T Gee for the Respondent

Judgment: 5 December 2022

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for personal injury - s 26, Accident Compensation Act 2001]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 18 October 2021. The Reviewer dismissed an application for review of the Corporation's decision dated 8 March 2021 declining cover for umbilical hernia.

Background

[2] Mr Fulton was born in 1964.

[3] On 9 November 2020, Mr Fulton had spinal surgery to address an L4/5 extrusion. Mr David Ardern, Orthopaedic Surgeon, performed a right L4/5 lateral recess decompression and partial discectomy.

[4] On 10 February 2021, Mr Fulton was treated by Mr Darko Bejakovich, Physiotherapist, as part of physiotherapy treatment for rehabilitation. Mr Fulton was instructed to perform a “planking” exercise.¹

[5] On 11 February 2021, at about midday, Mr Fulton performed a further planking exercise, and that evening he experienced pain and saw a small lump on the lower side of his belly button, which was tender to touch. He later reported that he had never before experienced any pain, discomfort or bulge in his umbilical area.

[6] On 24 February 2021, Mr Fulton saw Mr Bejakovich, and when Mr Fulton reported the incident of 11 February 2021, he was advised to stop the exercise.

[7] On 26 February 2021, Mr Fulton saw his GP, Dr Liam Tranter, who recorded (*verbatim*):

Doing a ‘planking’ exercise when felt pain and bulging L belly button.

OE small umbilical herna easily reducible.

P; ACC claim.

signs and symptoms of incarceration/strangulation discussed.

[8] On 1 March 2021, Dr Tranter submitted an ACC claim form which stated:

Doing a “plank” exercise and sudden pain and bulging in umbilicus.

[9] On 8 March 2021, Ms Jess Warren of the Corporation spoke to Mr Fulton over the telephone as part of the Corporation’s investigation into the claim, and the following was recorded (*verbatim*):

As the client confirmed that I could speak with them regarding this claim I then explained the criteria surrounding hernias and stressed that hernias are not usually caused by a single event, rather gradually. Client confirmed that their hernia was umbilical, it is position on their belly button on the right side. Client

¹ An abdominal exercise performed to improve core strength and stability.

advised that they do not feel any pain but are aware of the hernia. The event occurred when they were planking, completing exercises required by their physio for their rehabilitation process in regard to their spinal surgery. Client noticed the hernia a couple of hours later (both pain and the lump) however confirmed that they did not feel anything at the time aside from the strain required for the exercise. ... Client confirmed that nothing unusual or unexpected occurred and there was no direct force or impact to the abdominal area. ...

Reconfirmed the clients answers with them and then explained that based on the criteria ACC has to follow and the information the client has provided ACC is unable to accept their claim.

Client advised that they were expecting that answer, stated that their GP informed them that there was no hope with ACC and the client knew it was a long shot. ...

[10] On 8 March 2021, the Corporation issued a decision declining cover for umbilical hernia, on the basis that it was not caused by the accident described. The Corporation noted that its attached guidelines for hernia claims had been developed in consultation with the New Zealand National Board of the Royal Australasian College of Surgeons, which provided a framework for assessing hernia claims.

[11] Mr Fulton applied to review the Corporation's decision.

[12] On 16 April 2021, the Corporation requested Dr Tranter to supply all medical notes regarding Mr Fulton's injury. On 20 April 2021, Dr Tranter forwarded his medical note of 26 February 2021.

[13] On 23 April 2021, Dr Alan Walker, Branch Medical Adviser, stated his opinion in response to questions:

1. Could a planking manoeuvre plausibly cause a traumatic defect of the abdominal wall, and subsequent herniation/protrusion of tissue? Please explain why, or why not.

No, the client has a common disease condition which has happened to become symptomatic associated with the planking exercise. It could have become symptomatic associated with a number of activities which result in raised intra-abdominal pressure.

2. Can you please explain the typical signs and symptoms that would follow traumatic tearing, and are those factors evident in this case?

Traumatic tearing of the abdominal wall is seen in the context of severe blunt force trauma to the abdominal wall such as that suffered by individuals in high-

speed motor-vehicle accidents. In addition to associated injuries to intra-abdominal organs there would be expected to be signs of a traumatic injury to the abdominal wall such as marked tenderness and bruising et cetera. ...

4. What is the current understanding of umbilical hernia causation?

... Adult umbilical and para umbilical hernias are common disease conditions caused by gradual weakening of the connective tissue in and about the umbilicus.

[14] On 7 August 2021, Mr Fulton provided a written statement which included the following:

... On 11 February 2021 at approximately 12pm I undertook a full program of my prescribed exercises, including the full planks, of which I did 3 repetitions of 15 seconds. I found doing the planks a real strain on my stomach, although I did not feel any sudden tearing sensation or pain. However, that evening I started feeling soreness in the umbilical area and noticed/felt a small lump on the lower side of my belly button which was tender to touch. ...

[15] On 15 September 2021, review proceedings were held. On 18 October 2021, the Reviewer dismissed the review, on the basis that it was unlikely that Mr Fulton's accident caused him to suffer a traumatic rupture of his abdominal wall.

[16] On 13 December 2021, a Notice of Appeal was lodged.

Relevant law

[17] Section 20(2)(a) of the Act provides that a person has cover for a personal injury which is caused by an accident. Section 26(2) states that "personal injury" does not include personal injury caused wholly or substantially by a gradual process, disease, or infection (unless it is personal injury of a kind specifically described in section 20(2)(e) to (h)). Section 25(1)(a)(i) provides that "accident" means a specific event or a series of events, other than a gradual process, that involves the application of a force (including gravity), or resistance, external to the human body. Section 25(3) notes that the fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.

[18] Section 54 of the Act provides:

The Corporation must make every decision on a claim on reasonable grounds, and in a timely manner, having regard to the requirements of this Act, the nature of the decision, and all the circumstances.

[19] The guide to Corporation cover for abdominal wall hernia, established by the Corporation and the Royal Australasian College of Surgeons provides:

Femoral hernia Epigastric hernia Umbilical or para-umbilical hernia Spigelian hernia

- It is unlikely that any of these types of hernia is caused by a single strenuous event.
- The available evidence indicates that normally these hernias develop slowly as a result of weakening of tissues in the abdominal wall, or through fascial defects, and then become obvious in some people.

[20] In *Johnston*,² France J stated:

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

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

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

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

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

² *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

[21] In *Ambros*,³ the Court of Appeal envisaged the Court taking, if necessary, a robust and generous view of the evidence as to causation:

[65] The requirement for a plaintiff to prove causation on the balance of probabilities means that the plaintiff must show that the probability of causation is higher than 50 per cent. However, courts do not usually undertake accurate probabilistic calculations when evaluating whether causation has been proved. They proceed on their general impression of the sufficiency of the lay and scientific evidence to meet the required standard of proof ... The legal method looks to the presumptive inference which a sequence of events inspires in a person of common sense ...

...

[67] The different methodology used under the legal method means that a court's assessment of causation can differ from the expert opinion and courts can infer causation in circumstances where the experts cannot. This has allowed the Court to draw robust inferences of causation in some cases of uncertainty -- see para [32] above. However, a court may only draw a valid inference based on facts supported by the evidence and not on the basis of supposition or conjecture ... Judges should ground their assessment of causation on their view of what constitutes the normal course of events, which should be based on the whole of the lay, medical, and statistical evidence, and not be limited to expert witness evidence ...

[22] In *Sparks*,⁴ Judge Ongley stated:

[29] By s26(2) and (4) of the Injury Prevention, Rehabilitation, and Compensation Act 2001, personal injury does not include personal injury caused wholly or substantially by a gradual process, disease, or infection, or by the ageing process. The legal test for entitlements requires sufficient evidence to show that need for assistance arises as a consequence of the covered injury. Where there is an accompanying degenerative or gradual process condition, entitlements will not be available if the personal injury is caused wholly or substantially by that condition. In the present case therefore, the appellant has to be able to point to evidence demonstrating that the condition, as it was when the need for surgery was identified in August 2004, was substantially and effectively caused by the covered injury and not by a pre-existing process.

[23] In *Stewart*,⁵ Judge Barber stated:

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

³ *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

⁴ *Sparks v Accident Compensation Corporation* [2006] NZACC 45.

⁵ *Stewart v Accident Compensation Corporation* [2003] NZACC 109.

[24] In *Bloomfield*,⁶ Judge Joyce noted:

[18] In this case, and when all is rendered down, the extension of cover claims pursued on appeal by Mr Bloomfield rest mainly on the foundation of a temporal connection argument. On occasion, a temporal connection may be of significance in the context of other, helpful to a claimant, evidence. But the mere presence of such a connection will usually do no more than raise the post hoc ergo propter hoc fallacy.

[25] In *Dobbs*,⁷ Judge Cadenhead noted:

[26] The crux of this case is a causal issue: the appellant to have an entitlement for the costs of surgery has to satisfy the respondent on the balance of probabilities that the need for surgery arises from and is an effective consequence of the original injury or injuries, for which cover was granted. This issue will generally involve a consideration of the type of injury or injuries suffered, the x-rays, and medical reports evaluating the present symptoms against what has brought about the need for present surgery. I would have thought that on this type of issue the view of the general practitioner and the medical specialists, who have actually examined and seen the claimant would be important.

[26] In *Burton*,⁸ Judge Ongley stated, in relation to the guidelines established by the Corporation and the New Zealand Association of General Surgeons as to whether a hernia was traumatic:

[11] The guidelines have been generally accepted in appeals in this Court. They do not substitute for medical evidence, but they are a standard against which medical evidence will be evaluated. Whether there is a physical injury accompanying a hernia is a medical question and in the absence of medical evidence the possibilities can be more or less evenly balanced between a traumatic hernia with tearing of the abdominal wall, or a non-traumatic hernia causing displacement but not involving a physical injury.

[27] In *Allan*,⁹ Judge Ongley stated:

[22] What must be accepted is that a hernia is more likely to develop gradually and its first obvious appearance is not then evidence of personal injury. I accept also that the pain that the appellant experienced could have signalled either pressure on an existing hernia or the occurrence of a new lesion. There is no evidence that either explanation of pain is more likely.

⁶ *Bloomfield v Accident Compensation Corporation* [2014] NZACC 1.

⁷ *Dobbs v Accident Compensation Corporation* [2005] NZACC 46.

⁸ *Burton v Accident Compensation Corporation* [2007] NZACC 174.

⁹ *Allan v Accident Compensation Corporation* [2008] NZACC 164.

[28] In *Cron*,¹⁰ Judge Barber stated:

[50] Contrary to the Appellant's submission, it is not for ACC to point to other causes. It is well known that hernias can be and, usually are, non-traumatic in origin. The onus is for the Appellant to show, on the balance of probabilities, that there is a traumatic injury-related cause for his hernia.

[29] In *Martin*,¹¹ Justice Ronald Young noted that:

... in assessing expert medical evidence factors such as (non-exhaustive) the extent and relevance of the practitioners' qualifications and experience, the comprehensiveness of the evidence gathered, the quality of the report, where the preponderance of opinion lies and the validity of criticism of other medical opinions, will all be relevant in deciding the ultimate question.

[30] In *Yde*,¹² Judge MacLean held that:

[28] As between the contrasting views, I do not think that the specialist opinion of the treating clinician necessarily has to prevail over that of the CAP. At the end of the day, both are applying their medical expertise to make an analysis of the total picture based on the various reports and MRI information.

Discussion

[31] The issue in this case is whether the Corporation's decision dated 8 March 2021, declining cover for an umbilical hernia, was correct. A personal injury which is eligible for cover does not, in principle, include personal injury caused wholly or substantially by a gradual process or disease.¹³ If medical evidence establishes that Mr Fulton had pre-existing degenerative changes which were brought to light or became symptomatic as a consequence of his 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.¹⁴

[32] The Corporation makes the following submissions. The medical evidence does not demonstrate a traumatic injury. Mr Fulton's hernia was an umbilical hernia which was due to a pre-existing gradual weakening of the abdominal wall. The 'planking' exercise that Mr Fulton did on 11 February 2021 simply made his

¹⁰ *Cron v Accident Compensation Corporation* [2011] NZACC 39.

¹¹ *Martin v Accident Compensation Corporation* [2009] 3 NZLR 701 at [36].

¹² *Yde v Accident Compensation Corporation* [2015] NZACC 108. See also *Topping v Accident Compensation Corporation* [2018] NZACC 182, at [82].

¹³ Section 26(2).

¹⁴ *Johnston* above note 2, at [12].

condition symptomatic, in that the exercise apparently caused a small protrusion through a pre-existing defect in the abdominal wall. This circumstance does not constitute an injury caused by an accident such as to attract cover under the Act.

[33] This Court acknowledges the submissions made on behalf of the Corporation. However, the Court notes the following considerations.

[34] First, section 54 of the Act provides that the Corporation must make its decision on a claim on reasonable grounds, having regard to the requirements of this Act, the nature of the decision, and all the circumstances. It is well established that the question of causation (central to Mr Fulton's case) cannot be determined by a matter of supposition, and there must be medical evidence to assist the Corporation, to determine that question.¹⁵

[35] Second, the Court notes that the evidence on which the Corporation made its decision comprised the following:

- (a) The ACC claim form submitted by Mr Fulton's GP, Dr Tranter, which noted an accident on 11 February 2021, doing a "plank" exercise and sudden pain and bulging in umbilicus, with Dr Tranter's diagnosis of umbilical hernia.
- (b) The Guide to Corporation Cover for Abdominal Wall Hernia, established by the Corporation and the Royal Australasian College of Surgeons, which stated that it was unlikely that umbilical hernia is caused by a single strenuous event; and that the available evidence indicates that normally umbilical hernias develop slowly as a result of weakening of tissues in the abdominal wall, or through fascial defects, and then become obvious in some people.
- (c) A telephone interview between a Corporation employee and Mr Fulton in which he confirmed that he did not feel anything at the time of his planking exercise aside from the strain required for the exercise, nothing

¹⁵ *Stewart*, above note 5, at [33].

unusual or unexpected occurred, and there was no direct force or impact to the abdominal area.

[36] Third, the Court notes that the only medical evidence specifically relating to Mr Fulton's condition, referred to by the Corporation in making its decision, was Dr Tranter's diagnosis of umbilical hernia. Especially in view of the fact that Dr Tranter had actually examined and seen Mr Fulton, his diagnosis was important.¹⁶ No attempt was made by the Corporation, before it made its decision, to elicit medical records or information from Dr Tranter or from the physiotherapist whom Mr Fulton consulted shortly after the incident. While the Guide to Corporation Cover for Abdominal Wall Hernia is a standard against which medical evidence is evaluated, it does not substitute for medical evidence.¹⁷ Further, the Guide's advice on umbilical hernia is qualified in terms of what is "unlikely", "normally" and "on available evidence". The interview assessment of Mr Fulton's incident was made by a Corporation employee who does not give any indication of being medically qualified.

[37] Fourth, the Court notes that the factual evidence noted by the Corporation employee in her interview of Mr Fulton concentrated on only part of the circumstances relating to his incident. Mr Fulton has noted in his evidence to this Court as follows. In the evening of the incident, he started feeling soreness in the umbilical area and noticed/felt a small lump on the lower side of his belly button which was tender to touch. In the following days, the pain and swelling in the umbilical area would wax and wane throughout the day. Prior to the incident he had never experienced any pain discomfort or bulge in his umbilical area. He later discussed the incident with his physiotherapist who instructed him to stop doing the exercises. His GP inspected his abdomen and diagnosed that he had a small umbilical hernia as a result of the full planks he had performed in his exercise regime.

[38] Fifth, the Court finds that the opinion of Dr Walker, that Mr Fulton's planking exercise could not cause his hernia, is of limited weight. The opinion was provided

¹⁶ *Dobbs*, note 7, at [26].

¹⁷ *Burton*, note 8, at [11].

13 months after Mr Fulton's incident and without the benefit of seeing or examining Mr Fulton. The report is primarily a general excursus on umbilical hernia, and there is very limited reference to Mr Fulton's condition or situation. Dr Walker's conclusion that Mr Fulton has a common disease condition, which happened to become symptomatic associated with the planking exercise, is not based on any medical examination of Mr Fulton himself.

Conclusion

[39] For the above reasons, this Court finds that the Corporation has not made its decision on Mr Fulton's claim on reasonable grounds, having regard to the requirements of the Act, the nature of the decision, and all the circumstances.

[40] The appeal is allowed, and the review decision dated 18 October 2021 is set aside. In terms of section 161(2)(b) of the Act, the Court requires the Corporation to undertake a fresh assessment of Mr Fulton's claim.

[41] Mr Fulton is entitled to costs. If these cannot be agreed within one month, I shall determine the issue following the filing of memoranda.



P R Spiller
District Court Judge