IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2003-485-2099

04/1566

IN THE MATTER OF	an appeal pursuant to Section 165 of the Accident Insurance Act 1998
BETWEEN	NORMAN ALLAN COCHRANE Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 27 May 2004

Appearances: A Beck for Appellant
C Hlavac for Respondent

Judgment: 2 June 2004

JUDGMENT OF MILLER J

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[1] This is an appeal against a decision of the District Court in which the respondent's 1999 decision to terminate the appellant's weekly earnings-related compensation was upheld. The Court held that the appellant had failed to discharge the onus on him to show that his incapacity is caused by a back injury that he suffered in 1984, and not by pre-existing degenerative disease of his spine.

[2] The appeal is brought under s.165 of the Accident Insurance Act 1998. The appeal is by leave, which was granted on 3 September 2003, and the appellant is required to show that the decision of the District Court was wrong in law.

Factual Background

[3] The appellant is aged 59. Before his injury in 1984 he worked in a variety of jobs involving heavy manual labour. He was variously a grader driver, freezing worker, and hydro-construction labourer. Although he had some back pain in his youth, he presented as being free of pain for some years before the 1984 injury, which was suffered while lifting a motor.

[4] Since his injury the appellant has suffered debilitating back pain. He worked part time for some years as a service station attendant but was made redundant, and is now unemployed.

[5] Following the injury, the appellant was assessed on two occasions by an orthopaedic surgeon, Mr McMillan. He concluded that the appellant suffered bad pain of mechanical origin in the lower lumbar spine. He recognised that the appellant also showed long-standing degenerative changes in his spine but accepted the appellant's statement that he had not suffered back pain for some years. Mr McMillan noted that degenerative back change may remain asymptomatic for many years, if not forever. The symptoms that the appellant displayed were not likely to have been caused by back pain suffered in his youth.

[6] The appellant was paid weekly earnings related compensation until 1999, when the respondent reviewed his entitlement to compensation under s.73 of the Accident Rehabilitation and Compensation Insurance Act 1992. Advice was taken from an orthopaedic surgeon, Mr Theis, who concluded that the appellant's incapacitating back pain was attributable to degeneration rather than the 1984 injury. The respondent suspended his compensation on 27 April 1999.

[7] The decision was upheld on review, and the appellant brought an appeal to the District Court under s.152 of the Accident Insurance Act. The Court considered reports from four medical experts. They were the original reports from Mr McMillan, several reports from Mr Theis, and reports from Professor Burry and Mr Fosbender, respectively a rheumatologist and an orthopaedic surgeon. Their reports

were to the effect that the pain suffered by Mr Cochrane was likely to be the result of the 1984 injury. Spinal degeneration frequently causes no pain, and it was not appropriate to assume, as Mr Theis had done, that the presence of spinal degeneration explains Mr Cochrane's condition. There was no oral evidence, and no challenge to Mr Cochrane's position that he was free of pain until the accident and has suffered severe back pain ever since.

[8] The District Court decision was dated 21 November 2001. Leave to appeal was granted on 3 September 2003.

The District Court Decision

[9] Judge Barber approached the matter on the basis that the appeal was governed by the Accident Rehabilitation and Compensation Insurance Act 1992, s.10 of which declared that personal injury caused wholly or substantially by gradual process, disease, or infection was not relevantly covered by the Act. The Judge held that the appeal raised two issues. The first was whether the respondent was correct to rely on s.10 to terminate the appellant's entitlements on the grounds that his entitlement to compensation ended if his incapacity ceased to be caused by the original injury. The second issue was whether the appellant's ongoing incapacity was causally related to the personal injury by accident that he suffered in 1984.

[10] The Judge concluded, in relation to the first issue, that a claimant has no entitlement for compensation in respect of a condition that arises wholly or substantially as a result of degeneration unless the degeneration was a consequence of the injury for which the complainant has cover. Where the effects of an accident have subsided and a person's condition is caused wholly or substantially by gradual process, disease, infection or the ageing process, entitlements can be terminated because the condition is no longer caused by the accident, or is not so caused to a sufficient degree.

[11] The Judge held, in relation to the second issue, that the appellant could not prove on the balance of probabilities that his ongoing pain was due to degeneration caused by his 1984 accident, rather than pre-existing degeneration. He went on to

hold that he preferred the medical evidence for the respondent. That evidence was that the effects of the 1984 injury settled long ago, and that the appellant's ongoing symptoms were wholly or substantially the result of degeneration that existed before the 1984 accident. It followed that the appellant did not qualify for entitlements.

The Governing Legislation

[12] Under s.73 of the Accident Rehabilitation and Compensation Insurance Act 1992 the respondent was entitled to cancel compensation payments if it was not satisfied that a person was entitled to continue receiving them.

[13] At the time of his injury, the appellant's entitlement to compensation was governed by the Accident Compensation Act 1982. Under that Act, cover was excluded in respect of "damage to the body or mind caused exclusively by disease, infection, or the ageing process".

[14] As already noted, the corresponding exclusion in the 1992 Act provides that personal injury "caused wholly or substantially by a gradual process, disease, or infection" is not covered by the Act.

[15] It was common ground before me that the respondent, in reviewing the appellant's cover, and the District Court both erred in applying the exclusion in the 1992 Act. A person who had cover under the 1982 Act for a personal injury as defined in that Act retains cover unless it is established that his or her current condition is exclusively caused by disease, infection or the ageing process; *Millar v ACC,* District Court Hamilton, 179/02, 2 July 2002, Judge Beattie, *Gray v ACC* [2003] NZAR 289.

Leave to Appeal

[16] Leave to appeal was granted by Judge Cadenhead under s.165 of the 1998 Act. In the course of his decision he noted that the question whether the wrong statutory test had been applied was plainly a question of law. However, he went on to deal with an argument for the respondent that the causation issue does not involve a question of law.

[17] Judge Cadenhead held that causation also involves a legal question, in that the Court must determine the correct test of causation and then determine the factual issues against that test. He relied on a passage from Lord Hoffman's speech in *Fairchild v Glenhaven Funeral Services Limited* [2002] 3 All ER 305 at 339:

> In my opinion, the essential point is that causal requirements are just as much part of the legal conditions for liability as the rules which prescribe the kind of conduct which attracts liability or the rules which limit the scope of that liability. If I may repeat myself what I have said on another occasions, one is never simply liable, one is always liable for something – to make compensation for damage, the nature and extent which is delimited by the law.

Submissions

[18] For the appellant, Mr Beck submitted that the appeal must be allowed on the ground that the District Court Judge applied the wrong test. With respect to causation, he submitted that the evidence did not support the findings of the Court. Mr Theis' evidence did not go so far as to show that pre-existing degeneration was the exclusive cause of the appellant's incapacity.

[19] Mr Beck submitted that, an error of law having been established, this Court is entitled to substitute its decision for that of the District Court. When the correct test is applied, the evidence establishes that the appellant's injury remains a cause of his continuing incapacity.

[20] For the respondent, Mr Hlavac accepted that the District Court Judge had applied the wrong test but sought to uphold the decision on the grounds that the Court's findings are consistent with the exclusion in the 1982 Act. He submitted that the evidence of Mr Theis, which was preferred by the Judge, excluded the appellant's 1984 injury as a cause of his present condition. The Judge's clearly expressed preference for Mr Theis' evidence was said to rest on matters of fact that are beyond the scope of the appeal.

[21] With respect to this Court's jurisdiction, Mr Hlavac accepted that it is open to me to apply the correct test to the facts as found by the Judge. But he submitted that it is not open to this Court to substitute its own view of the evidence in a case in

which an error of law has been established; to do so would be inconsistent with the narrow scope of the appeal.

Scope of this Court's appellate jurisdiction

[22] Section 165 of the 1998 Act gave this Court jurisdiction to hear an appeal, by leave, on questions of law. It also provided that sections 72-78A of the District Courts Act apply to appeals under s.165. Those provisions allow this Court to make any decision that it considers ought to have been made by the District Court.

[23] I accept Mr Beck's submission that there is no justification for reading down sections 72-78A. Those provisions are specifically referred to in s.165. An error of law having been established, the Court may substitute its own decision for that of the District Court. Plainly it will exercise an appellate Court's customary restraint, recognising any advantages that the District Court may have had in dealing with the evidence and the expertise that members of that Court have in this area. In a case in which further evidence might be called as a result of this Court's decision, the proper course will normally be to remit the matter to the District Court, as was done in *Gray v ACC* [2003] NZAR 289.

Causation and onus

[24] The respondent and its medical advisor, and subsequently the District Court, applied the wrong test when assessing the appellant's continued entitlement to compensation. The appellant was called upon to show that his incapacity was not wholly or substantially caused by pre-existing degeneration of his spine. The question ought to have been whether he could show that his incapacity was caused in some degree by the injury for which he was granted cover. Had he been able to do so, it could not have been said that his condition was caused exclusively by factors such as age or disease; *Millar v ACC,* District Court Hamilton, 179/02, 2 July 2002, Judge Beattie.

[25] An appellant may not establish causation simply by showing that the injury triggered an underlying condition to which the appellant was already vulnerable (the

'eggshell skull' principle) or that the injury accelerated a condition that would have been suffered anyway (the 'acceleration' principle); *McDonald v ARCI* [2002] NZAR 970. The question is simply whether the necessary causal nexus continues to exist between the injury and the condition. Relying on *McDonald*, Mr Hlavac submitted that the appellant suffered pre-existing spinal degeneration and was seeking to maintain cover on the basis that his injury had triggered pain the true cause of which was by now the pre-existing degeneration. However, the decision in *McDonald* is distinguishable. In that case the appellant suffered a knee injury that triggered incapacity from osteoarthritis, but the medical evidence was that his injury was the final straw rather than the cause. In this case, the experts accepted that spinal degeneration very frequently produces no symptoms at all; indeed, there was evidence that there is little if any correlation between degeneration and symptoms. In some cases an injury in a person who suffers from degeneration will produce symptoms in circumstances where that person may otherwise have remained asymptomatic forever. In such a case it is the injury, rather than the degeneration, that is the cause of the incapacity.

[26] The onus is on the appellant to show the necessary degree of causation on the balance of probabilities, but this Court has cautioned against placing too much emphasis on the onus; *Wakenshaw v ACC* [2003] NZAR 590. The question is whether the evidence as a whole justifies a conclusion that the necessary nexus between injury and incapacity exists. This point is important in a case such as the present, because the evidence shows that it is in the nature of back injuries of this kind that medical evidence frequently cannot establish clear cause and effect. For that reason, I consider that the District Court was wrong to dismiss the appellant's claim by pointing to the onus of proof and the inconclusive nature of the clinical evidence. At the end of the day, causation is a question for the Court. Temporal considerations may enter into it, as may questions of credibility that cannot be delegated to the experts.

[27] If the matter ended there, the appeal must be allowed and the matter remitted to the District Court. The District Court erred by applying the wrong test of causation. It held, relying principally on the conflict of medical opinion, that the appellant had failed to discharge the onus on him to show, on the balance of

probabilities, that his incapacity was due to degeneration caused by his injury and not from pre-existing degeneration.

[28] However, Mr Hlavac invited me to dismiss the appeal on the ground that the same result would have obtained had the respondent and medical experts, and the Judge in turn, been directed to the correct test. He contended that Mr Theis' evidence, which was preferred by the Judge, eliminated the injury as the cause of the appellant's incapacity. In the alternative, Mr Hlavac invited me to remit the matter to the District Court for rehearing. Mr Beck contended that the evidence revealed, on the contrary, near-consensus among the experts that the injury was not excluded as a cause. He invited me to allow the appeal on the basis that the appellant had discharged the onus on him to show a nexus between the injury and his present incapacity.

Whether a rehearing is required

[29] It is an unfortunate feature of the medical reports that the experts do not appear to have been directed to the legal test of causation that they were to apply.

[30] I accept that Mr Theis' reports contain expressions of opinion to the effect that pre-existing degeneration is the sole cause of the appellant's incapacity. But the reports must be read as a whole. When that is done several points emerge.

[31] First, Mr Theis expressed himself, understandably enough, somewhat more forcefully as he responded to written questions from Mr Cochrane's solicitor. His initial view was less definitive. He opined that the condition was 'mainly related' to degeneration that 'cannot be entirely attributed' to the injury. That opinion does not appear to exclude the injury as the cause. It does not appear that there was any additional clinical evidence to justify a change of stance. In his final report, written in response to Mr Fosbender's reports, he concluded that it was difficult to believe that the appellant's condition was 'entirely' caused by the injury.

[32] Second, Mr Theis accepted that a back injury will contribute to ongoing back pain in a small percentage of patients. However, he took the view that the injury

could be eliminated as the cause because most back injuries settle with minimal intervention within 6-12 weeks. He accordingly concluded that it would be speculative to attribute the symptoms to the injury. However, that analysis was equally open at the time the injury was suffered. X-rays taken then also showed degeneration but no specific anatomical damage. Mr McMillan, Prof Burry, and Mr Fosbender appear to have attached rather more significance to temporal factors, namely the pain suffered at the time of the accident and its continuation thereafter. A decision to discount these factors would presumably rest to some extent on a credibility finding adverse to Mr Cochrane. There is evidence of scepticism in Mr Theis' reports. For example, he referred to evidence that persons on earnings-linked compensation heal more slowly than those who are not. But a credibility finding is the province of the Court, and it made no such finding. No issue was taken with Mr Cochrane's position that he was free of pain before his injury and has suffered severe pain ever since. He was not cross-examined. Accordingly, as Mr Hlavac acknowledged, his evidence must be accepted for present purposes.

[33] Third, having eliminated the injury on the basis that most back injuries settle within 6-12 weeks, Mr Theis concluded that he was left with degeneration as the cause. Clinical evidence in the form of X-rays showed degenerative changes that are a possible cause of symptoms. However, he accepted that the clinical evidence was inconclusive. The appellant's experts pointed to evidence that there is little or no correlation between degenerative change and back pain. 40% of 60-year olds would show degeneration if X-rayed, yet it is not the case that 40% of that age group show some degree of incapacitating back pain. It seems to be common ground that a person with spinal degeneration may remain asymptomatic, as Mr McMillan concluded at the outset, for years if not forever. Further, it seems that degeneration is not necessarily a thing distinct from injury. Mr Fosbender's opinion was that an annulear tear resulting from injury caused the degeneration shown by the X-rays.

[34] Taken together, these considerations suggest that Mr Theis and the Court might conclude, when applying the correct test, that the injury continues to some degree to cause Mr Cochrane's symptoms. I have focused here on Mr Theis' evidence, but I add that the Court might also reconsider its preference for his opinion. It did not hear from the experts in person, and its conclusion may have been

based to some extent on the logical appeal of Mr Theis' opinion when applied to the test under the 1992 Act. It appears to have attached little weight to Professor Burry's evidence, which noted that the appellant had not been appropriately treated in 1984. His spine had been immobilised in a plaster of paris cast and he had not been offered any rehabilitation.

[35] Accordingly, I decline Mr Hlavac's invitation to dismiss the appeal.

[36] However, I accept his further submission that further evidence directed to the correct test might lead the Court to conclude that Mr Cochrane's undoubted symptoms are exclusively caused by pre-existing spinal degeneration. It is true, as Mr Beck submitted, that the experts agreed that an injury of this kind can cause continuing back pain, but the question is whether it remains a contributing cause in Mr Cochrane's case. That was not agreed. That being so, I consider that a rehearing is required.

Result

[37] The appeal is allowed. There will be an order that the appeal be reheard in the District Court.

[38] The appellant is entitled to costs on a 2B basis.

Delivered at 9.30 am this 2nd day of June 2004.

F Miller J

Solicitors:
Peter Sara, Dunedin for Appellant
Young Hunter, Christchurch for Respondent