

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV 1999-485-000008

UNDER The Accident Rehabilitation and
Compensation Insurance Act 1992

IN THE MATTER OF an appeal pursuant to Section 97 of the Act

BETWEEN KAHURANGI WINIKEREI
Appellant

AND ACCIDENT REHABILITATION AND
COMPENSATION INSURANCE
CORPORATION
Respondent

Hearing: 21 July 2005

Appearances: RHK Jerram for Appellant
P J Radich and M Ahern for Respondent

Judgment: 27 July 2005

JUDGMENT OF FOGARTY J

Introduction

[1] The appellant is the grandmother of Kahurangi Winikerei, a young girl. Mrs Winikerei filed a claim on 13 April 1995 for cover and treatment for Kahurangi for the effects of alcohol consumption during pregnancy by Kahurangi's mother. The ACC declined the claim because it considered it did not meet the definition of an accident under s 3 of the Accident Rehabilitation and Compensation Insurance Act 1992. That was the statute then covering the ACC scheme.

[2] That decision of the ACC has been confirmed upon review and on appeal to the District Court. It now comes to this Court upon the contention that the District

Court decision is erroneous on point of law. Leave has been granted because the question of law is of some importance.

The relevant statutory provisions

[3] The particular statute in force at the time was the Accident Rehabilitation and Compensation Insurance Act 1992 (“the Act”). Section 8 of that Act provides.

8 Cover For Personal Injury Occurring In New Zealand

(1) This Act shall apply in respect of personal injury occurring in New Zealand on or after the 1st day of July 1992 in respect of which there is cover under this Act.

(2) Cover under this Act shall extend to personal injury which—

- (a) Is caused by an accident to the person concerned; or
- (b) Is caused by gradual process, disease, or infection arising out of and in the course of employment as defined in section 7 or section 11 of this Act; or
- (c) Is medical misadventure as defined in section 5 of this Act; or
- (d) Is a consequence of treatment for personal injury covered by this Act.

(3) Cover under this Act shall also extend to personal injury that is mental or nervous shock suffered by a person as an outcome of any act of any other person performed on, with, or in relation to the first person (but not on, with, or in relation to any other person), being—

(a) An act that is within the description of any offence listed in the Schedule 1 to this Act; and

(b) An act that was performed in New Zealand, or outside New Zealand where the person on, with, or in relation to whom the act was performed was ordinarily resident in New Zealand when the act was actually performed (even if the person is ordinarily resident in New Zealand on the date on which the personal injury is deemed to have been suffered).

(4) For the purposes of subsection (3) of this section, it is irrelevant that—

- (a) No person can be or has been charged with or convicted of the offence; or
- (b) The alleged offender is incapable of forming criminal intent.

[4] For the child to have cover she has to come within s 8(2)(a). To do that she must be able to prove that she has suffered “*personal injury which is caused by an accident*”.

[5] The definition of personal injury is in s 4(1):

4 Definition Of “Personal Injury”

(1) For the purposes of this Act, personal injury means the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person, and has the extended meaning assigned to it by section 8(3) of this Act.

[6] The relevant section of “accident” is in s 3(a) and (b):

3 Interpretation

In this Act, unless the context otherwise requires,—

Accident means—

(a) A specific event or series of events that involves the application of a force or resistance external to the human body and that results in personal injury, but does not include any gradual process; and the fact that a personal injury has occurred shall not of itself be construed as an indication or presumption that it was caused by any such event or series of events; or

(b) The inhalation or oral ingestion of any solid, liquid, gas, or foreign object where the inhalation or ingestion occurs on a specific occasion; but does not include inhalation or ingestion of a virus, bacterium, protozoa, or fungi, unless that inhalation or ingestion is the result of a criminal act of another person; ...

(Emphasis added)

The decision of the District Court

[7] The Judge found that each event of a drink of alcohol involves the introduction of alcohol into the mother’s blood and then into the foetal blood through the placenta. The Judge found that the alcohol in the foetal blood was not there as a result of the application of a force or resistance external to the foetal body. The Judge also found that the foetus did not inhale or inject the alcohol and so cannot come within subs (b).

[8] The Judge did not consider the proposition that the foetus ingested the alcohol when swallowing the amniotic fluid. This was a disputed theory on the evidence from the experts before the Court.

Appellant's submissions

[9] The appellant argued that the act of the mother swallowing alcohol was the application of force. Counsel for the appellant, Mr Jerram, argued a meaning of force, as used in the science of physics:

An influence operating on the body (in this case the foetus) so as to produce an alteration or tendency to alteration in its state of rest or of uniform motion in a straight line.

[10] He submitted that this is one of the ordinary meanings of the word force and the word as used in s 3(a) of the Act is not constrained by words of limitation and should be given its plain and ordinary meaning.

[11] As to s 3(b) he submitted that there was expert evidence before the Court that at least some of the alcohol may have been ingested by the foetus in the womb when swallowing the amniotic fluid, and that this was sufficient to bring the claim within s 3(b).

Submissions for the respondent ACC

[12] Mr Radich submitted that in terms of subs (a), of the definition of "accident", no specific event or series of events that involved the application of a force or resistance external to the human body of the appellant, occurred.

[13] Second, in terms of the subs (b) there was no inhalation or oral ingestion of liquid on a specific occasion by the appellant.

Analysis

[14] The Accident Compensation Scheme was introduced by Parliament by the Accident Compensation Act 1972. The long title of that Act is as follows:

An act to make provision for general safety and prevention of accidents for the rehabilitation and compensation of earners who suffer personal injury by accident in respect of which they have cover under this Act and of persons who in New Zealand suffer personal injury by a motor vehicle accident; and

for the compensation of certain dependants of those earners and persons where death results from injury.

(Emphasis added)

[15] The phrase “personal injury by accident” was not defined in the Act other than to say that it included incapacity resulting from an occupational disease.

[16] It is obvious that it was not defined because the concept was well known to the law. The concept was used in the Workers Compensation legislation and dates back, as far as New Zealand is concerned, to at least the Workers Compensation for Accidents Act 1900, s 6. In those statutes the concept was not further defined. By the time the Accident Compensation Act 1972 was enacted there was a large body of case law applying the concept. Parliament obviously considered that that case law should continue to apply.

[17] Counsel were agreed that the extended definition of personal injury by accident, particularly in ss 3(a) and (b) above were introduced by Parliament to prevent broad applications of the concept. The reasons for the change are discussed by Gault J in the case *Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436 at page 444.

[18] In that case the Court applied workers compensation cases, particularly a decision of *Fife Coal Co v William Young* [1940] AC 479, 488 which recognised injury by accident without the need to establish a precipitating external event.

[19] It is abundantly plain from this history that Parliament in the 1992 Act took the policy step of narrowing the concept of personal injury by accident to require an external event involving the application of force.

[20] “Force” in the context of ordinary use of the word “accident” refers to a significant force causative of injury. It is not the concept of force as used in physics, which is any influence sufficient to disturb a particle of matter in its state of rest or from its course if it is in motion.

[21] The narrowing of the definition of accident in subs 3(a) brings the concept much closer to the ordinary English meaning of personal injury by accident. It is simply not part of that ordinary English usage to say that the baby suffered an accident because the mother drank alcohol during the pregnancy. The act of swallowing alcohol is a forceful action inasmuch as it propels the alcohol into the body of the mother. But that is a different use of the word force from that contemplated by Parliament in the definition in s 3(a).

[22] Whatever the uncertainties as to the scope of personal injury by accident under the 1992 Act, it falls well short of capturing the events which led to the baby's condition.

[23] I turn to s 3(b). It is apparent immediately that in s 3(b) Parliament is distinguishing personal injury by accident occasioned by the inhalation or oral ingestion of something dangerous on a specific occasion, from the taking in of dangerous matter over a period of time. So the inhalation by a fireman of noxious fumes leaking from a crashed tanker is an accident, whereas the inhalation of glue fumes by a wood joiner over 20 years is not an accident.

[24] It is noteworthy that in s 3(a) Parliament refers to a specific event or series of events but in s 3(b) it simply refers to "on a specific occasion". It does not say: on a specific occasion or series of specific occasions.

[25] Theoretically it might be possible for a baby to suffer damage by the foetus swallowing amniotic fluid containing sufficient alcohol to cause damage. But that can in no way be said to be the character of this application for cover. The application for cover for this young girl is based on her presenting behavioural and intellectual problems which appear to be "a result of exposure to alcohol prior to her birth". This is the opinion of the clinical geneticist dated 13 March 1996. Plainly, the clinician is talking about continued exposure. The clinician is not talking about one specific occasion, let alone the theoretical possibility that the occasion was the ingestion of amniotic fluid. The reality of the case is that it is built on the behaviour of the mother drinking alcohol during the pregnancy. This behaviour cannot be brought within s 3(b), as an event on a "specific occasion".

Result

[26] There is no error of law in the decision of the learned District Court Judge. The appeal is dismissed. Costs are reserved.

Fogarty J

Solicitors:
Norris Ward McKinnon, Hamilton, for Appellant
Izard Weston, Wellington, for Respondent