New Zealand Accident Compensation Appeals - ACC Appeal Decisions

MC v Accident Compensation Corporation [2016] NZACC 264 (20 September 2016)

Last Updated: 12 October 2016

PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE IS A SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE APPELLANT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE APPELLANT

IN THE DISTRICT COURT
AT WELLINGTON

[2016] NZACC 264 ACR 117/15

UNDER THE ACCIDENT COMPENSATION ACT 2001

IN THE MATTER OF AN APPEAL UNDER SECTION 149 OF THE ACT

BETWEEN MC
Appellant

AND ACCIDENT COMPENSATION CORPORATION

First respondent

AND NEW ZEALAND DEFENCE FORCE
Second respondent

Hearing: 30 June 2016, with final submissions 1 August 2016

Appearances: L J Newman, counsel for the appellant
P McBride, counsel for the first respondent
No appearance on behalf of the second respondent

Judgment: 20 September 2016

RESERVED JUDGMENT OF JUDGE A N MACLEAN

[1] This is an appeal stemming from a decision dated 11 April 2014 issued by the second respondent declining cover for a work-related mental injury under s 21B of the Act.

[2] The relevant parts of s 21B are:

21B Cover for work-related mental injury

(1) A person has cover for a personal injury that is a work-related mental injury if—

(a) he or she suffers the mental injury inside or outside New Zealand on or after 1 October 2008; and

(b) the mental injury is caused by a single event of a kind described in subsection (2).

(2) Subsection (1)(b) applies to an event that—

(a) the person experiences, sees, or hears directly in the circumstances described in section 28(1); and

(b) is an event that could reasonably be expected to cause mental injury to people generally; and

(c) occurs—

(i) in New Zealand; or

(ii) outside New Zealand to a person who is ordinarily resident in New Zealand when the event occurs.

...

(5) In subsection (2)(a), a person experiences, sees, or hears an event directly if that person—

(a) is involved in or witnesses the event himself or herself; and

(b) is in close physical proximity to the event at the time it occurs.

...

(7) In this section, ***event***—

(a) means—

(i) an event that is sudden; or

(ii) a direct outcome of a sudden event; and

(b) includes a series of events that—

(i) arise from the same cause or circumstance; and

(ii) together comprise a single incident or occasion; but

(c) does not include a gradual process.

[3] The specific issue concerns the application of s 21B(7), in particular the reference to "a series of events", to the largely agreed facts.

[4] It is agreed between the parties, that the appellant has been diagnosed as having symptoms of delayed onset post-traumatic stress disorder, coupled with moderately severe major depression. Those symptoms include: hyper vigilance, alertness and being startled easily, impaired sleeping and irritability, low mood, poor concentration, restriction of motivation, restriction of pleasure and enjoyment and no energy levels. He has received a variety of mental health interventions and psycho therapy with signs of improvement.
[5] It is also not in contest that the symptoms and diagnosis are linked to a number of traumatic events over about a decade that arose in the course of the appellant's employment as a Police Officer, but in particular as a reserve force Soldier serving both in New Zealand and overseas, particularly in Afghanistan, in an active combat environment, in two separate (2005 and 2009), tours of duty.
[6] Work related events occurred over that period which were compounded by domestic matters. The events will be described in more detail.
[7] The key expert medical evidence is contained in a March 2014 report to the first respondent from Dr Shieff, a consultant psychiatrist. The thrust of that report is contained in the following:

It is my opinion that (appellant) has over the course of the last nine years approximately been exposed to a constellation of traumatic stressors; the body of these related directly to his experience while undertaking duties within the New Zealand armed forces whilst stationed in Afghanistan. However, in addition to those stressful events (appellant) has also experienced significantly traumatic stressors; both in his career as a Policeman, and in his domestic life, following the witnessing of a dog attack on his five year old daughter.

It is difficult to apportion responsibility to the provocation of the psychological problems relative to the various stressors. It is however important to note that the majority of memory intrusions experienced by (appellant) relate to his army experiences, rather than the other traumatic events mentioned. As a result of this my opinion is that the significant proportion of his post-traumatic stress disorder relate to the experiences sustained during his service in Afghanistan, particularly during the tour of 2009.

[8] The difficulty arises as to what to make of the expressions such as "a constellation of traumatic stressors" and the difficulty described by Dr Shieff as to how to "apportion responsibility" and then weigh that up against his conclusion that: "the body of these related directly to his experience while undertaking duties within the New Zealand armed forces whilst stationed in Afghanistan" and; "the majority of memory intrusions experienced ... relate to his army experiences rather than the other traumatic events" and; "the significant proportion ... relates to the experience sustained during his service in Afghanistan, particularly during the tour of 2009".
[9] The appellant's submission is that the deployment to Afghanistan in 2009 and traumatic events occurring during that tour of duty in Afghanistan amount to an "event", within the meaning of s 21B(7)(b), noting that the section states that "event" includes " a series of events that arise from the same cause or circumstance and together comprise a single incident or occasion".
[10] The first respondent's submission, is that the stressful experiences of the appellant were an extended series of separate events, some separated by years and not all occurred at work, so that in total they did not equate with the type of single, sudden traumatic "event" envisaged by the section. Instead, rather than there being one identifiable cause of the mental condition, the second respondent submits that what has happened, was an accumulation of traumatic work and non-work factors, and there was no single index event in the workplace which, on the evidence, has been established to have caused the agreed mental condition.
[11] Both the appellant and the first respondent have referred to a number of cases within the District Court dealing with the particular section in question and also referred to the legislative history leading up to the time when s 21B came into force.
[12] The cases are *Waghorn v Accident Compensation Corporation*[1], *K B v Accident Compensation Corporation*[2], *OCS Limited v TW*[3], *Jeffrey v Progressive Enterprises Limited*[4], *M v Accident Compensation Corporation*[5]. Reference was also made to *Sam v*

Accident Compensation Corporation[6] a decision of Mallon J and *Guertjens v Accident Compensation Corporation*[7].

[13] Both parties also made reference to *Harrild v Director of Proceedings*[8], the Human Rights Act 1993 and the Hansard reports from the second and third readings of the Injury Prevention Rehabilitation and Compensation Amendment Bill and the Cabinet Social Development Committee *Proposal to Provide cover for mental injury caused by a work-related traumatic event under the Injury Prevention Rehabilitation and Compensation Act 2001*.

[14] To set what happened in 2009 in proper context a brief timeline includes:

- 1999/2000 – Severe car accident with possible loss of consciousness and temporary loss of sight and feeling in the legs. Although not diagnosed at the time it has more latterly emerged, from a spinal x-ray, that he has an old neck fracture.
- 1976 – At age 16 the appellant commenced what turned out to be a 25-year period of service in the armed forces, initially as a cadet.
- Over ensuing years in the regular army he undertook tours of duty in a number of overseas locales including a brief period in a combat role in East Timor.
- 2003 – Commenced employment with NZ Police. There were at least two traumatic stressors which have occurred during his time in the Police, one involving the discovery of a hanging by suicide victim needing to be cut down, and attending a vicious assault with a victim stabbed in the abdomen and disembowelled.
- 2005 – A four month tour of duty in Afghanistan in an active, hostile environment prompting a state of high anxiety, although no personal exposure to violent activity.
- 2006 – The appellant was present at a friend's property when his then five year old daughter was attacked by a large dog sustaining multiple puncture soft tissue injuries to her face.
- 2009 – A second tour of duty in Afghanistan where he was, in the words of a Psychiatrist, Dr Shieff based on a personal statement by the appellant, exposed "to a continuation of this frequent high-intensity anxiety in his mission around (location suppressed), he was also in direct proximity to violent traumatising events. In particular the base where (appellant) spent the majority of his time in (suppressed) was subject to a number of rocket attacks, with destruction to property and loss of life. During one of these attacks (appellant) was himself only 80 metres away from the point of impact and explosions. In addition to this whilst a passenger on an aeroplane making its descent into (suppressed) he witnessed a military helicopter containing 16 passengers exploding in the air and falling to the ground with a devastating loss of life.
- Approximately November 2009 – The appellant became aware of concern regarding his wellbeing, from his wife and friends, drawing his attention to a change in personality and he noted from mid-2013 awareness of frequent tension headaches, frustration, anger and withdrawal from other people as a result of social anxiety. In addition, the appellant described the symptoms of post-traumatic stress disorder "inclusive of intrusive daytime recollections of the incidents of rocket attacks in Afghanistan, recollections of the helicopter accident, but with nightmares". (Appellant) went on to describe cued memories of the rocket attack on hearing loud noises at night.
- From March 2013 (approximately) – The appellant received a variety of mental health interventions including anti-depressant medication although he has moved away from this. He also attended three sessions of psychotherapy.
- Late 2013 (approximately) – The psychiatrist describes:

Evidence of a pleasing improvement in his symptom profile ... A lift in his mood in general, feeling happier and more positive and better motivated. He reported an improvement in his sleep routine. ... Also reported a progressive reduction in his experience of symptoms relatable to post-traumatic stress disorder.

- 23 October 2013 – The appellant's GP's medical notes include "not in good headspace at work –

doesn't feel in the right place to go to work – did have homicide in 2006 and daughter's incident with the dog – getting short tempered at work". She noted a range of other issues.

- November and December 2013 – Further medical notes from the General Practitioner about attendances with a clinical psychologist, funded by Police, and that he was, in particular, still concerned about the issues from Afghanistan in what is described as "shelling" but probably referring to the rocket attacks. Also the homicide and the dog attack.
- 13 January 2014 – The General Practitioner discussed work-related issues with the Police and furnished an off-work certificate noting that he was due to see a psychiatrist.
- 21 January 2014 – In a follow up to an ACC claim form lodged by the General Practitioner she, having included the medical notes referred to above, noted:

Appellant and his wife noted that his sleeping problems started since the return to NZ. He found the persistent nature of the rocket attacks difficult and is clearly anxious when he speaks of them. He has been depressed for some time now and has not been able to return to his usual job as a Police Officer because of the depression and his general irritability. He has been on anti-depressant medication and didn't tolerate it very well. It has now been stopped. He did see a clinical psychologist (funded through his work) but I have not received any notes from these consultations. He has been referred to the local mental health team but they have not as yet seen him.

- 3 March 2014 – Dr Ichim, a consultant psychiatrist with the Waitemata District Health Board, wrote a letter to the second respondent. Key extracts include the following:
    - He had been referred to her by his GP in January.
    - A psychiatric assessment had been done.
    - The appellant had been on sick leave since October 2013.
    - She noted that since August/September 2013 he had been gradually becoming more anxious with a range of difficulties quite inconsistent with his normal easy-going and relaxed nature.
    - That he had had poor sleep since 2009.
    - After noting the events in Afghanistan described earlier she noted another stressor that whilst in Afghanistan he had received advice from his employer that he was being transferred.
    - She noted the dog attack, the disembowelling homicide and the car accident previously referred and that there was no family history of mental illness or a history of mental illness for the appellant. Her impression was:

Presents with PTSD symptoms –delayed onset, and associated symptoms of anxiety and depression on the background of major past traumatic events and more recent work related stress (at the police station). These have affected his self esteem and confidence as well which in turn is increasing his anxiety and depression. The poor sleep patterns in the last 4 years have undoubtedly contributed to the decline in mood and anxiety...

- Her opinion was "the main form of intervention for his mental health symptoms is psychotherapy which possibly/hopefully could be offered by the Veteran's Affairs Service.

[15] On 11 April 2014 the case manager of the second respondent wrote to the appellant. Extracts from that letter include:

We have considered your claim for cover for a work-related personal injury. ... Dr Shieff's report of 31/3/2014 notes that this is a result of an accumulation of events over time. ... Therefore we regret to advise you that your claim has been declined as it does not meet the criteria of work-related mental injury as outlined in s 21(1)(b) which states the injury must be caused by a single event. ... All medical costs relating to this claim are covered to the date of this letter, any further costs are no longer the responsibility of the NZDFAEP Unit.

[16] The letter of 11 April 2014 contained review rights, a review was lodged, and the matter

went to review with a decision being given on 28 November 2014 declining the application, whilst expressing sympathy for the appellant's situation and noting that he had given his evidence openly and honestly. After referring to many of the events already mentioned in this judgment, the reviewer considered himself bound by *K B v ACC* and that the principle therein outlined that a mental injury for which cover is sought must be caused by a single event. Commenting on the submissions before the reviewer, by the representative of the second respondent, he noted that the submission had been "that the evidence available points to a series of traumatic events over several years, both during appellant's careers as a soldier and a Policeman, as well as outside the work environment. Therefore no single event could be established as required by the legislation".

[17] I now turn to consider in more detail the respective submissions of the appellant and the first respondent in this appeal, and during that process discuss the various cases previously referred to.

[18] The appellant submits that s 6 of the New Zealand Bill of Rights Act 1990 and its statement that whenever an enactment can be given a meaning that is consistent with the freedoms contained in the Act that meaning should be preferred to any other meaning, and to s 19 of that Act making specific reference to the right for freedom from discrimination under the Human Rights Act are pertinent. It was submitted that a prohibited ground of discrimination in the Human Rights Act, is psychiatric illness, therefore, consistent with the Bill of Rights Act, a meaning should be adopted consistent with the principle in *Harrild* of interpreting the meaning of words in a generous manner, so that the term "series of events" under s 21B(7) ought to be interpreted in a generous rather than a restrictive manner.

[19] The appellant then analysed *KB* which was a case of PTSD following an aftermath of a suicide, involving an embalmer, in the course of employment. The appellant submits that case can be distinguished from the present because in that case the Court had found that there were a number of events, not just a one-off event, where a causal link could be identified. In contrast, the submission is that the appellant's circumstances in the present case was a single event, namely the tour to Afghanistan in 2009. It is submitted that the appellant's "circumstances can be comfortably accommodated within the events subsection".

[20] The appellant also referred to *Jeffrey* where Her Honour Judge Mathers was dealing with the issue of a series of events "from the same cause or circumstance". The events included a stressful rebranding of the workplace over three weeks, compounded by the aftermath of the Pike River mine disaster. The appellant noted that in that case the Judge had said:

I consider there must be some connection to an identifiable event or series of events. The emphasis in the Act is to the identification of an event in subsection 7(b) includes a series of events which the form the basis for subparagraphs (i) and (ii). Judge Ongley in *Waghorn* adopting an approach with which I agree distinguished between events which are so gradually incremental that they cannot be distinguished one from the other as against a series of forceful events each contributing in some gradual process. I would add that there must be a focus on what the series of events are. Are there any events that can be distinguished from say a gradual process of mental stress caused by work overload.

[21] The submission then is, that it is possible for a series of events to give rise to a work-related mental injury claim, excluding only that which is the result of a gradual workplace stress.

[22] The appellant submits that there have been a number of traumatic events which can be summarised from, the psychiatric report Dr Shieff of 31 March 2014 as:

- Rocket attacks in Afghanistan in 2009.
- Being metres away from the point of impact during of these attacks where soldiers were killed.
- Witnessing a military helicopter explode in the air containing 16 passengers with a devastating loss of life.
- Whilst with Police discovering a suicide victim.
- Attending to a victim who had been disembowelled.
- The personal incident of witnessing his five year old daughter attacked by a large dog.

[23] The appellant submits that, out of that series of traumatic events, the inference can be drawn from Dr Shieff's report that the PTSD is primarily attributable to the tour of duty in Afghanistan in 2009 including his references to:

- "Symptoms of post-traumatic stress disorder inclusive of intrusive daytime recollections of incidents of rocket attacks in Afghanistan, and recollections of the helicopter accident.
- Cued memories of the rocket attack on hearing loud noises at night.
- ... Exposed to a constellation of traumatic stressors, the body of these related directly to his experience while undertaking duties with the NZ armed forces whilst stationed in Afghanistan.
- It is however important to note that the majority of memory intrusions experienced by (appellant) relate to his army experiences rather than the other traumatic events mentioned. ... My opinion is that a significant proportion of his post-traumatic stress disorder relates to experiences sustained during his service in Afghanistan, particularly during the tour of 2009.
- It is my belief also that the depressive syndrome described by the appellant was secondary to these traumatic events and the provocation of post-traumatic stress disorder."

[24] Accordingly, the appellant submits that the appellant's mental injuries were predominantly caused by the traumatic events in Afghanistan and in particular during the 2009 tour.
[25] The appellant submits that the deployment in 2009 and the series of traumatic events occurring during that deployment can be characterised as a "event" within the meaning of the sector in that "event" includes "series of events" that arise from the same cause or circumstance and together comprise of a single incident or operation but does not include a gradual process.
[26] Further, that *Jeffrey* is distinguishable because there the Court accepted there was not a single event but rather the stress of employment which led the Court to conclude that the "conceded mental injury was caused by incremental and gradual steps to mental stress".
[27] The appellant submits that his situation is analogous to a series of contributory discrete traumatic events as discussed in *Waghorn* namely, a number of rocket attacks which it is submitted could be characterised as a series of events inclusive of witnessing the attack on the military helicopter and as such, discrete events distinguishable from incremental stress. That each event is clearly identifiable and contributable to the PTSD diagnosis, and indeed that each event alone would be sufficient to cause a mental injury in the population generally.
[28] Addressing the issue of "arise from the same cause or circumstance" the appellant notes the Oxford Dictionary definition of "circumstances" as "a fact or condition connected with or relevant to an event or action". Consequently it is submitted that the rocket attacks and the military helicopter incident arose by virtue of the same cause or circumstance, namely insurgent attacks on soldiers stationed in Afghanistan with the circumstance being the fact that he was required to be stationed in Afghanistan for his deployment.
[29] Then turning to the phrase "together comprise a single incident or occasion" the appellant submits that "incident" is defined by the Concise Oxford Dictionary as:

An event or occurrence, an instance of something happening ... a violent event such as an assault or skirmish.

"Occasion" is defined as:

A particular event or the time at which it takes places, a suitable or opportune time, a special event or celebration.

The appellant submits that these definitions lead back to the word "event" and that word can be given a broad meaning.

> [30] The appellant further submits that Parliament could not have intended to exclude cover where a person was subject to a number of traumatic events and that, as observed by Judge Mathers in *Jeffery* the Parliamentary materials indicate that "series of events" provision was intended to exclude incremental mental stress from cover, but not to exclude a number of traumatic events, all of which individually would have met the requisite threshold.
> [31] The appellant referred to a discussion on the legislative history of the section of an article by John Hughes *New cover for work-related mental injury*[9] which stated:

Several of the original policy options had proposed an additional requirement that the exposure should not be a normal or reasonably expected part of employment. This was designed to recognise that in some occupations, such as the Police and armed forces, involve regular exposure to traumatic events and might be expected to be prepared for them and have support mechanisms in place. Like the "reasonable expectation" requirement however, this approach also had overtones of fault-based liability. Some overseas tort systems have excluded cases where psychiatric damage is sustained by an emergency worker on the basis that potential defendants could not reasonably foreseen that a professional might be so affected. Faced with this proposal the New Zealand Police has expressed particular concern at the difficulty in determining what was normal within a Police environment. Both sworn and unsworn Police Officers are exposed to incidents which might not be normal for those individuals, but might reasonably be expected as part of the employment. Similarly individuals might be involved in events which are normal for them whilst working alongside staff for whom the events are outside the norm. The proposal was eventually rejected on the grounds that it would exclude valid claims where a risk factor was known to be present.

> [32] The appellant further submits that it is unthinkable that a person with the misfortune to be exposed to more than one traumatic event in the course of their employment is excluded from cover because that would mean that a claimant who witnesses one person killed in the course of their employment and sustains a mental injury would be covered, but a person who witnesses several people killed in the exact same circumstances has no remedy. The appellant submits that such a result is "axiomatically inequitable" and in line with the generous interpretation direction from the Court of Appeal in *Harrild* and the reference to the Bill of Rights Act mentioned earlier, that more generous interpretation should be preferred.
> [33] As an aside from that, and as an alternative, the appellant submits that on *Ambros* principles it is open to the Court to draw a robust inference of causation to concede that the helicopter and rocket incidents constitute a discrete event causative of the appellant's diagnosed mental injury.

Submissions for the Respondent

> [34] The first respondent submits that s 21B(1)(b) explicitly requires that the cause of the mental injury is *single event*. Further that *an event* is repeated through the rest of the section, and that the singular nature of the event is emphasised by s 21B(7) in that a single *sudden* event is required as the cause – s 21B(7)(a)(i) and (ii).
> [35] Further, that these are cumulative requirements in that it is not, any cause or circumstance, that comes within (b)(i) but only a sudden one and that it is not any compilation of causal circumstances that triggers (b) but rather a compilation of *events* in the context of subparagraph (a) – namely sudden ones comprising *a single incident or occasion*. That that approach is reinforced when reference is made to subparagraph(7) (c) excluding gradual process.
> [36] Accordingly, it is submitted that the text plainly requires an established direct causal link between a particular sudden single event and the particular mental injury and, while it is accepted that the Interpretation Act 1999 in s 33 addresses the singular relative to the plural, that is subject to context and the context in this case is that the focus must be on a particular single discrete event causing a particular mental injury.

[37] Discussing the context, as to the submission of the appellant is that one needs to consider the development of the accident compensation scheme as a whole starting with the Woodhouse report, the first respondent notes that under the 1972 and 1982 Acts the concept of *accident* as opposed to *an accident* was relevant. Further that under the 1992 Act there was a substantial tightening of the scope of cover with more closely defined definitions as to" accident" and as to" personal injury caused by accident" which meant that cases that may have obtained cover under the previous Acts, would no longer. The first respondent points to the case of *Childs v Hillock* where the Court noted that there had been a *change from a more generous to a less generous compensation scheme*. *Under the new Act certain eventualities occurring after 1 July 1992, that were covered under the earlier Acts are no longer covered*. In particular that there was a requirement for *an accident* as opposed to *accident*.
[38] The first respondent further submits, that that less generous regime continued through the 1998 Act to the 2001 Act, but that the latter Act was amended with the insertion of s 21B with effect from 1 October 2008 and that the narrow and specific regime under s 21B was deliberately of that scope, rather than a broad reversal of the position introduced in 1992.
[39] Against that background, the first respondent submits that the legislative history and policy behind s 21B following through from the explanatory note to the Bill, then the first reading then the third reading is informative. For instance in the explanatory note to the Bill the following comments were made *no cover is currently available for mental injury caused by exposure to a sudden traumatic event in the course of employment (for example, witnessing a colleague shot in a bank robbery, or a train driver hitting someone on the tracks ... The Bill introduces cover for mental injury caused by exposure to a sudden traumatic event in the course of employment. This provides cover for clinically significant mental injuries rather than a temporary distress that constitutes a normal reaction to trauma. It does not introduce cover for mental injury caused by non physical stress (gradual onset) in the workplace.*
[40] Then, at the first reading of the Bill in December 2007 the then Minister of Justice noted:

The Bill introduces cover for mental injury caused by exposure to a sudden traumatic event in the course of employment. This means, for example that a train driver whose train hit somebody on the tracks, or a bank worker who witnesses a colleague shot during a robbery and goes on to develop a mental injury as a result will now be covered by the accident compensation scheme ... the Bill does not introduce cover for mental injury caused by non physical stress.

[41] In the third reading the then Minister for the ACC stated:

The Bill introduces cover for a mental injury caused by exposure to a sudden traumatic event in the course of employment. ... the Bill is not intended to provide cover for work related mental injuries caused by a gradual process such as mental stress caused by work overload or the temporary distress that constitutes a normal response to trauma.

[42] In support of its position the first respondent submits there is a strong analogy with the reasoning process as outlined in *KB v ACC* where the issue was whether the appellant there, had cover in terms of s 21B. In that case His Honour Judge Beattie said:

On the basis that the appellant did experience significant events on a number of occasions, I find that it cannot be identified that only one event in this case the event of September 2007 caused the onset of the appellant's mental injury some two years after the event itself particularly when there are a number of subsequent events which the appellant had indicated had caused her significant mental problems ... I find that the evidence does not satisfy the statutory requirements of s 21B and that the appellant's onset of PTSD cannot be identified as having arisen from a single event.

[43] Also *OCS v VTW* was referred to wherein in the context of ongoing bullying at the hands of co-workers and a minor assault the appellant suffered significant mental health issues and sought cover under s 21B. On appeal His Honour Judge Joyce QC said:

Dr Finucane nowhere provides a reasoned basis for holding that any mental health problem that may have befallen her did so because of a single event ... whatever actually happened ... such amounted to no more than an event forming an integral part of a reasonably long running pattern of bullying and harassment; it was a "last" or "final straw" event at most. ... A "squashing" of the face is far removed from the league of seriously traumatic events the mischief of which s 21B is designed to address.

> [44] The first respondent also referred to *J v ACC* where a prison officer both in the course of employment and outside experienced traumatic incidents and Her Honour Judge Henare said:

Based on the policy considerations of the legislation and legal principles in the cases referred to ... being *KB v ACC* and *OCS Limited v TWI* the following elements must be established before a claimant is entitled to cover;

> Diagnosis of "mental injury".
> Evidence that the diagnosed mental injury was caused by a single event.
> The event was a single sudden traumatic event (as opposed to a gradual process) such as seeing someone hit by a train or shot in a bank robbery.
> It must be a single event that occurs at work ...
> It is an event that could reasonably be expected to cause mental injury to people generally.
> [45] The first respondent submits that by applying those tests as outlined Her Honour upheld at a decision that single incident to which the appellant there sought to attribute the mental health condition (a single difficult forcible restraining of a prisoner) was not shown by medical evidence to qualify for cover. In particular that was because of other events that were impacting on the appellant and all the surrounding circumstances.
> [46] Reference is also made to *Jeffrey v Progressive Enterprises* where in the context of work pressures over a four month secondment against the background of the Pike River disaster the reviewer had considered by analogy with agricultural field days and Olympic Games being *an event* there was an event or series of events namely the four months secondment. On appeal Her honour Judge Mathers applied the five point summary from *J* and said that she could not identify any single event or series of events such as to come within the Act. Her Honour concluded:

I consider that the conceded mental injury was caused by the incremental and gradual steps of mental stress caused by the pressure and isolation ... felt compounded to a limited extent by the added emotions of the Pike River disaster and are therefore caught by s 7(c). I am therefore of the view that ... cannot establish on the balance of probabilities that she comes within s 21(b) of the Act.

> [47] Also reference is made to *M v ACC* where the primary issue is whether the appellant was at work and qualified for cover when he was robbed at gunpoint on his way home while in uniform.
> [48] Mr McBride noted that the same counsel were involved as in this present appeal and while the issue was a different one it is an example of a case where the Court adopted the plain words and meaning of the Act when assessing whether the appellant was at a *place for the purposes of his ... employment* concluding he was not, and therefore had no cover.
> [49] The first respondent's submission in summary is, that s 21B is narrow and quite specific and, while it is not contested that the appellant has suffered a mental injury and, nor that some or all of the events described were of a type that could be reasonably expected to cause mental injury to people generally, the diagnosed mental injury was not caused by a single event and, at least in respect of some of the events they did not occur at work, although clearly what happened in Afghanistan and in the Police force did.
> [50] The argument therefore is, that the *event* was a series of separate events extended over a much longer period than the factual scenario in *E* that the legislature had excluded from 1992 and that the situation is more akin to *KB* mainly a number of traumatic events over a number of years and the resulting conditions being attributable to the accumulation rather than any single event.
> [51] Further, that the issue is about the cause of the mental condition and in particular whether

that was a cause satisfying the sections cumulative requirements with the facts being more akin to those of *KG* and/or whilst a matter of degree, *TW* or *J*. It submits that those should be properly regarded on the evidence as part of a continuum (or gradual process) rather than any discrete event.

[52] The first respondent submits that reference to the Human Rights Act and the New Zealand Bill of Rights Act is misconceived as the issue is not one of discrimination but whether or not there is statutory cover for the mental injury. Disability is not material. It is submitted further the Act deliberately draws lines as to cover and the cause of disability is not in any event a prescribed ground of discrimination.

[53] The first respondent submits that potentially a person who suffers a first traumatic single incident and is thereby covered could, if they suffered a second mental injury as a result of a second traumatic incident, have further cover but in this case there is no one or two incidents, rather an accumulation of incidents, both work related and non work related.

[54] The first respondent submits that in terms of drawing *Ambros* type robust inferences, for the Court to attribute the mental injury to one discrete event would not be applying the evidence before it by way of a robust inference, but rather to "conjure that up".

[55] The first respondent notes that s 21B is not potentially the sole recourse that an employee might have in relation to mental injury, and that arguably, a personal grievance or other employment law claim could be successful, but the point is that s 21B was deliberately of narrow scope and was not intended as an answer to all emotional distress or mental injury.

[56] As to the proposition that the first respondent's approach could be seen as a harsh one in light of the purposive aspects of the accident compensation legislation that that is not the answer because:

- There has always been a somewhat arbitrary drawing of lines as to cover or none with the reference to *Childs v Hillock – this is not a plainly unintended result. There may be hard cases; but no doubt the line had to be drawn somewhere.*
- In *Allenby v H*[10]*: the Act provides cover on the basis of line drawing which reflects policy choices. Such line drawing has resulted in legislation which is technical.*
- Citing Justice Kos in *Murray v ACC*[11] *- Mr Miller's argument has an emotional cogency. But the statutory words eliminate it. ... but cover under the Act is the product of careful and crystalline drafting by legislators. The meaning and effect of the statutory words in issue is quite clear*.

Post Hearing Submissions

[57] Because of time constraints, there was not an opportunity for the appellant to formally make reply submissions to the first respondent's submission, so they were done on the papers. In those further submissions the appellant repeated and expanded on points made earlier including:

- As to the submission that some of the traumatic events occurred outside of work that that was not disputed but that needed to be set in context particularly from Dr Shieff's report, when he said *my opinion is that the significant proportion of the post traumatic stress disorder relates to the experience sustained during his service in Afghanistan particularly the tour of 2009*.
- By analogy with *Sinclair v Accident Compensation*[12] it is not necessary to establish that the incidents in Afghanistan in 2009 need to be the sole cause and it is irrelevant that other non coverable factors may have contributed to some degree noting that His Honour Judge Beattie said *whilst it may be the case that the appellant's condition might be regarded in some ways as being multi factorial, I find that as a matter of law it must be found to be the case that her covered personal injury were a direct cause of the onset of a mental injury condition and it is the case that it need not be found to be the sole cause providing it is established as being a cause which was directly causative*.

- That accordingly this is not a case of cumulative mental stress over a long period of time which was intended to be excluded by Parliament.
- That an appropriate approach in this case is a purposive one and that the true meaning needs to be ascertained from the text of the legislation in light of its purpose noting that the purpose of the Accident Compensation Act includes addressing *the impact of injury on the community ...* and *ensuring that when injuries occur ...the focus should be on rehabilitation with the goal of obtaining appropriate quality of life ...* and that the interpretation advanced by the appellant is consistent with that, in providing cover to a meritorious case and issuing appropriate rehabilitation to restore him to becoming a productive member of the work force. By contrast the appellant argues the first respondent's interpretation *forces a rigid reading down of the legislation that produces anomalous and unjust results that are inconsistent with the rehabilitative needs of the claimants.*
- The appellant referred to *Guertjens,* noting the observation there – *but the Court is not likely to sanction an unfair result where it is not clearly brought about by application of the statute*.
- The appellant distinguishes *Murray v Accident Compensation Corporation*[13], in that the Court there, considered there was no alternative interpretation but, that Kos J there stated *this however is a case where lines of delineation have been brought clearly* but then added *in a recent decision I respectfully suggested that the principles stated by Richardson J in Accident Compensation Corporation v Mitchell that the 1982 Act be given a generous unniggardly interpretation still had application despite the more crystalline legislative drafting that is followed in later versions of the Act. I suggested that the lines of exclusion in a social welfare context needed to be drawn clearly. Expectations which were the "fair and reasonable product of statutory language and ... consistent with the overall statutory purpose should not be read down except by language of the clearest kind*. The appellant submits that the interpretation of the *series of events* provision in s 21B(7) advanced by the appellant leaves it open to the Court, and consistent with the generous approach to the legislation emphasised by the Court of Appeal.

[58] In his reply submissions, the appellant took issue with part of the first respondent's original submissions to the effect that an event is required to be *unexpected* to qualify for covert. It is not necessary to take that any further because in a further reply to the reply submissions, the first respondent submitted (correctly in my view) that that was not particularly relevant, because what is "unexpected" substantially coincides with what is "an accident". An expected matter is not accidental and focus on what is "unexpected "does not assist in a context in which the cover is secondary to the accident.
[59] As to the first respondent's submission that this is not a case of drawing robust inferences ala *Ambros* but a case of "conjuring up evidence", the appellant noted a recent decision of Collins J in *Di-Gandomenico v Accident Compensation Corporation*[14] :

It is explained by the Court of Appeal that the only time a Judge is not able to draw a robust inference in relation to causation is where medical science says there is no possible connection between the events and the claimant's physical injury. As a consequence, the Court of Appeal recognised that causation could be inferred by the courts in some cases where the medical evidence was prepared to recognise only the possibility of a connection between treatment and the patient's physical injuries.

[60] The appellant submits that although that case was dealing with causation in relation to treatment injuries, the principle is the same, and when one considers the medical evidence of the psychologist about the difficulty of apportioning responsibility, but noting the significant proportion of the condition related to the 2009 events, that it remains within the Court's discretion to draw a robust inference where the medical evidence is problematic. The argument is that the Court is entitled to draw an inference when there is only a possibility of connection in causative terms and that the medical evidence in the present case goes further

than that and, there is no medical evidence to preclude such a link being drawn.
[61] The concluding point of the appellant is that *KB v Accident Compensation Corporation* can be distinguished because in the present case the event in question "can be delineated to the tour of Afghanistan in 2009" and "can be confidently accommodated within the series of events subsection". The appellant contrasts the situation in *Jeffrey* where the conclusion had been that there was no basis that the event in question could reasonably be expected to cause mental injury to people generally, and *OCS* where the Court said *quashing the face is far removed from the league of serious traumatic events the mischief of which s 21B is designed to address* and submits that by way of contrast the appellant's situation is very much within the realm of mischief that s 21B was designed to prevent.
[62] Further that the appellant's case is unique in that over a short delineated period he was subjected to a number of very traumatic incidents, any one of which would reasonably be expected to cause mental injury and that:

It is an inconceivable anomaly that a person who has had the misfortune of witnessing more than one traumatic event is not able to secure cover. Parliament cannot have intended that a claimant such as ... who suffered very traumatic incidents would be excluded from cover. This is indicated by the references to the train driver during the Parliamentary debates.

Analysis and Discussion

[63] It is appropriate at this stage to review the state of the evidence. In summary key aspects are:

- There is the appellant's own statement of 19 February 2014 to the case coordinator of the second respondent. This described "a great deal of stress to my role as I had limited sleep over a two week period ..." during his first tour along with a number of other demanding and confrontational events. More pertinently, talking about the 2009 deployment he describes witnessing "a helicopter explode in mid air and crash killing 16 personnel on board. This incident occurred as the aircraft I was travelling in was undertaking a landing ...". He describes "a near miss to our contingent by approximately 80 metres where two US personnel were killed. ... these attacks cause constant disruption to sleep whereby I averaged two to three hours sleep per night". He also added that some detail about some New Zealand employment related problems which emerged at the same time causing "unnecessary stress". He said "since returning from this deployment I have had sleep issues averaging about four hours of sleep a night struggle to relax and have been unable to return to normal routines ...".
- These points were reinforced in a first psychiatric report from Dr Ichim previously described which repeated that information but also painted a wider picture going back as far as 1999/2000. She noted a presentation "with PTSD symptoms – the delayed onset and associated symptoms of anxiety and depression on the background of major past traumatic events and more recent work related stress ...".
- The fuller report of 30 March 2014 from psychiatrist Dr Shieff made the comments previously referred to noting no previous psychiatric issues and that the appellant's "current problems can be directly attributed to an accumulation of significant traumatic stressors over an extended period of time". Whilst a number of these events occurred in Afghanistan while (he) was involved in his required duties in the armed services he has also sustained traumatic stressors both within his policing career and away from work life. After noting both the "high level state of vigilance and arousal" in the 2005 tour, he noted in the 2009 tour that there was "a continuation of the frequent high intensity anxiety ... he was also in direct proximity to violent traumatising events". He later described "as a result of this accumulation of stress events (he) described the onset of significant psychological and emotional problems ... in approximately August 2013", however prior to this time dating from approximately November 2009 (he) was aware of expressions of concern with a change in his

personality from happy go lucky and relaxed and demonstrating agitation and aggression.

- Dr Shieff concluded "most probably as a secondary downstream consequence of these events and the subsequent development of post traumatic stress disorder (he) described a moderate severity episode of major depression ...". Dr Shieff had described "a constellation of traumatic stressors; the body of these related directly to his experiences while undertaking duties within the NZ armed forces while stationed in Afghanistan". After noting other outside work stressful events in domestic life, including the dog attack referred to earlier, and also internal issues in his police career, he concluded "it is very difficult to apportion responsibility to the propagation of his psychological problems ... it is however important to note that the majority of memory intrusions experienced by (him) relate to his army experience rather than the other traumatic events mentioned. As a result of this my opinion is that the significant proportion of his post traumatic stress disorder relates to the experiences sustained during his service in Afghanistan particularly during the tour of 2009".

[64] In summary, there is no medical expert evidence to contradict the finding of PTSD, nor to contradict the fact that there was a strong linkage with events in Afghanistan particularly in the 2009 tour. The expert evidence then available to the Court together with the appellant's own statement is the only evidence the Court has throwing light on causation issues.
[65] No authorities were cited to the Court, nor am I aware of any, relating to cases of post traumatic stress disorder being dealt with in the New Zealand courts linked with stressors occurring in the context of hostile military environment.
[66] Dr Shieff, while clearly leaning towards the concept that the particular events described earlier in 2009 were very much a material contributor to the undisputed PTSD, probably understandably, when dealing with issues of the mind, could not go any further and specifically isolate out the helicopter and shelling incidents from the "constellation of stressors" and say that was the only direct causal link, but he did go a long way towards that, putting them in a different category from the others.
[67] The words "a series of events" and "gradual process" in s 21B(7) appear elsewhere in the Act, for example the definition of "accident" in s 25 includes "a specific event or a series of events other than a gradual process ...".
[68] Section 21B can be seen as a subset of category intended to ensure that people who suffer mental injury caused by exposure to sudden trauma during the course of employment receive cover in the same way that other work injuries receive cover, albeit not as a result of a gradual process.
[69] That can be seen to also then link with s 26(1)(d) which includes in the definition of "personal injury", a "work related mental injury that is suffered by a person in the circumstances described in s 21B". Section 26(2) excludes "personal injury caused wholly or substantially by a gradual process ... unless it is a personal injury under s 20(2)(e) – "personal injury caused by a work related gradual process".
[70] Thus by somewhat of a roundabout method, the combination of the sections means that while in general, cover can be available for a work related gradual process, in the specific example of a work related mental injury under s 21B, by virtue of s 21B(7)(c), gradual process is excluded.
[71] To aid with understanding what is meant by "a gradual process" cases under s 30, (where establishment of a "gradual process" can provide cover) and s 25(1)(a) where a "gradual process" will not amount to an "accident", may be of assistance.
[72] His Honour Judge Ongley in *Waghorn* discussed s 25(1)(a) observing:

It is implicit in the text that a *series of events* may be a series of specific events or a gradual process. There is no guidance as to the dividing line. Continuous processes such as where on a joint would not be called a series of events. A logical approach to the problem at least in the case of a PARS defect is that if events are so gradually incremental that they cannot be distinguished one from the other they should be regarded as a gradual process. Whereas a series of forceful events each contributing in some significant

way would attract cover. That does not solve the evidential difficulty. A process ... could involve a combination of both causes, that is to say a process of indistinguishable minor events as well as more significant stresses capable of causing a fracture.

> [73] While *Waghorn* was dealing with a different situation, in my view the explanation of distinguishing a "series of events" from a "gradual process" is helpful.
> [74] Looked at against that matrix, I am of the view that what the psychiatrists have described amounts to a series of events and not a gradual process.
> [75] However in the context of s 21B that is not the end of the matter, because there is the further criteria under s 21B(7)(b), that if one is considering not just a single event but a series of events, that series of events needs to "arise from the same cause or circumstance and together describe a single incident or occasion but ... not include a gradual process". As indicated previously I have concluded this was not a gradual process but the question is whether the events can be said to be linked as required in s 21B(7)(b).
> [76] Then there is the further criteria to be met under s 21B(1)(b) that the mental injury has been "caused by ... the series of events provided they qualify as arising from the same causal circumstance and together comprise a single incident or occasion".
> [77] What is missing, and no criticism is intended by this, it is just a fact, is any explanation in the psychiatric evidence to reinforce the proposition that it was not the cumulative total of all the relevant stressors over nearly a decade that as it were "tipped the balance" or were causative of the PTSD. This is not the same thing as describing the type of "final straw" event as in *OCS Limited,* if only because the background of other stressors, and then the final event, are of an entirely different degree to that in the present case (i.e. squashing of the face as opposed to the events in Afghanistan) also the background of bullying in *OCS* as opposed to the other stressors described in this case.
> [78] In my view the situation here is distinguishable from that in *Jeffrey* to the extent that there are not the same difficulties as the Court encountered in that case in distinguishing any particular, causative single event or series of events coming within the Act. There the surrounding relevant circumstances were a short period of secondment causing stresses in a work environment of a completely different type to the present case and the background of the Pike River disaster where the appellant was well removed from the event itself. In the present case both the surrounding circumstances and arguably triggering events were of considerably more severity.
> [79] To some extent, the Court can apply a degree of judicial knowledge particularly relevant as we remember the centenary of the massive tragedy for New Zealand of the Battle at the Somme and the reams of literature and discussion about the impact of that intensely traumatic campaign on thousands of ordinary New Zealanders. We all know about how that reaction to trauma sometimes described at the time as "shell shock" or "lack of moral fibre" morphed into a concept of PTSD.
> [80] Even now a century later the concept seems to be evolving. A very recent analysis of PTSD in the American Medical Association Guides to the Evaluation of Disease and Injury Causation second edition 2014 notes:

Only recently have researched designs emerged that allow for a consideration of the symptomatic nature of PTSD apart from this definitional confounding with trauma. That research has reliably produced results indicating that there is no actual correlation between a protocol-type trauma and the clinical presentation of PTSD. If a traumatic experience is actually the cause of PTSD then the symptoms of PTSD should be more common among individuals who report that they have experienced such trauma. Research findings have indicated that this is not the case.

> [81] The reference to "a protocol type trauma" is a reference back to a passage in DCM-IV-TR "the essential feature of post traumatic stress order is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or threats to the physical integrity of another person: or learning about an unexpected or violent death,

serious harm or threat of death or injury experienced by a family member or other close associate".

[82] The point of all that is simply that when dealing with mental injury and particularly PTSD there is not the opportunity to access concrete physical evidence in terms of scans and the like available when assessing gradual process and causation questions in bio-mechanical areas such as back and hips, because one is dealing with the mind, and dependent on psychiatric and/or psychological evidence. Whatever the current state of knowledge about PTSD both parliament and the psychiatrists in the present case accept that" protocol type trauma "exist.

[83] The question then is, does the psychiatric evidence coupled with the appellant's own statement meet the required standard of identifying that the most serious events in 2009 were a material cause of the post traumatic stress disorder and can in effect be isolated out from the other stressors so that it is not an accumulation or constellation of stressors as a whole, that can be said to be causative, but a smaller number that can be encompassed within the various identified stressors, as arising from the same cause or circumstance and together comprising an "event".

[84] What is the "same causal circumstance".? The appellant submits that it is being in a hostile, dangerous environment exposed directly to death or near death over a relatively short tour of duty which in its turn can be seen as a "single incident or occasion".

[85] In my view, in the absence of any opposing psychiatric evidence, it is possible to draw the inference from Dr Shieff's considered opinion that those seriously troubling events in Afghanistan were a material cause of the PTSD. The first respondent in my view incorrectly focused on that part of Dr Shieff's report describing "an accumulation of events over time" and disregarded his refining, other comments.

[86] It may be that reflecting on the extracts from Hansard in the lead up to the Amendment Act coming into force on the train driver type of situation, as demonstrating that the intent of Parliament was to focus on a single event misses the point. The question could equally be; "would the fact that such a train driver have witnessed more than one such event and/or that happened against a background of other domestic, or work related stressors preclude an entitlement to cover?". In my view the answer to that is, no. Ultimately however, whilst the material in the Parliamentary debate process are of assistance, the question still comes back to what is the proper interpretation of the applicable words in s 21B(7). While the implications of the Interpretation Act and the Bill of Rights Act do not in my view have particular relevance here, nevertheless the indications as in *Harrild* and the observations of Kos J in *Murray* to the effect that the overall statutory purpose of the Act should not be disregarded unless there is language of the clearest kind and that the "generous unniggardly interpretation" described by Richardson J in *Accident Compensation v Mitchell* could still apply, have application here.

[87] I consider that the evidence establishes on the balance of probabilities that the criteria in s 21B have been established.

[88] Accordingly the appeal is allowed and the review decision quashed. So too is the decision of the second respondent.

[89] The appellant is entitled to cover. He is also entitled to costs, but I assume that counsel will be able to resolve that between them. Should that not be possible they will need to get submissions to me to be dealt with on the papers within a month.

Judge A N Maclean
District Court Judge

Solicitors: John Miller Law, Wellington for the appellant
McBride Davenport James, Wellington for the respondent

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[1] [2013] NZACC 2

[2] [2013] NZACC 41

[3] [2013] NZACC 177

[4] [2015] NZACC 4

[5] [2015] NZACC 286

[6] High Court of New Zealand, CIV 2008-485-829

[7] [2007] NZACC 93

[8] [2003] NZCA 125

[9] [2008] 8 ELB 118

[10] [2012] NZSC 33

[11] [2013] NZHC 2967

[12] [2013] NZACC

[13] [2013] NZHC 2967

[14] [2015] NZHC 2193
