IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2005-485-536

IN THE MATTER OF	an appeal under s 165 of the Accident Insurance Act 1998
BETWEEN	MICHAEL ERNEST ELLWOOD Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 12 September 2006

Appearances: A Beck for Applicant
C Hlavac for Respondent

Judgment: 18 December 2006 at 12.30 pm

JUDGMENT OF MALLON J

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Introduction

[1] Mr Ellwood, the appellant, suffers significant on-going neck pain. He is in receipt of a sickness benefit, his entitlements under the accident compensation legislation having been suspended. There is conflicting expert medical opinion over the cause of Mr Ellwood's pain. The opinion of experts consulted by the respondent ("ACC") is that the pain is caused by degenerative disease. The opinion of experts consulted by Mr Ellwood is that the pain is caused by nerve damage from earlier accidents which rendered Mr Ellwood unduly susceptible to pain from other incidents.

[2] This appeal concerns the test to be applied by ACC when suspending statutory entitlements. It also concerns whether rational reasons were given by the District Court in preferring the medical reports obtained by ACC over the medical reports obtained by Mr Ellwood.

[3] There have been other decisions which have considered the approach to causation under the ACC legislation where degenerative disease is present. However, none appear to have considered the issue of suspension in circumstances where the competing evidence is in balance. Mr Beck, counsel for Mr Ellwood, says this is such a case. He says the Judge's preference for ACC's experts was irrational. He says that to remove entitlements ACC must establish that causation between the accident and the incapacity does not exist and it cannot do this where the evidence is in balance.

[4] Mr Hlavac, counsel for ACC, says that the Judge gave reasons for his preference of the evidence and this Court should not interfere with it. He says that the test for suspending entitlements is whether the evidence establishes a nexus between the accident and the criteria for entitlements. If there is a case where the evidence is in balance, that would put the burden on the claimant. That, he said, was consistent with a claimant having the initial burden of establishing a right to cover and having a continuing burden to demonstrate that he or she meets the criteria for entitlements.

[5] For the reasons which follow I allow the appeal.

Background

[6] Mr Ellwood suffered neck injuries as a result of a series of accidents. The first accident was in 1992 when Mr Ellwood fell down some steps and landed on his head. No claim for cover was made for this accident. The next accidents were in 1993 and 1995. The 1993 accident involved a 15 stone man landing on his head. In the 1995 accident Mr Ellwood was hit by a heavy roll at work and fell awkwardly. Cover for these accidents was sought and accepted. Surgery was carried out on his neck in 1995 and 1997. After the 1997 operation Mr Ellwood was more or less pain free.

[7] In November 1998 a further incident occurred while Mr Ellwood was sliding a barbecue down some stairs with the help of his wife. Mr Ellwood was on the downstairs side of the barbecue with his back to the barbecue. His wife was on the upstairs side. The barbecue slipped and jolted Mr Ellwood. Within an hour or two Mr Ellwood developed pain "in the upper angle of the left scapula" which over the next few weeks worsened and spread to his left shoulder, waist and thumb/fingers. He continued to experience significant and ongoing pain in his neck following this incident and was unable to return to work. He was granted cover under the Accident Rehabilitation and Compensation Insurance Act 1992 ("the 1992 Act").

[8] Subsequently ACC reviewed Mr Ellwood's position. On 11 October 1999, pursuant to s 116 of the Accident Insurance Act 1998 ("the 1998 Act"), ACC suspended Mr Ellwood's entitlements. It did so on the basis of a medical opinion that the ongoing pain was not attributable to the November 1998 incident, but rather to degenerative changes present in Mr Ellwood's spine before any of the accidents. Mr Ellwood sought review of the ACC's decision. The reviewer upheld the ACC's decision. Mr Ellwood appealed to the District Court, which also upheld the suspension decision. Special leave to appeal was granted by the High Court.

Grounds of appeal

[9] For Mr Ellwood it was submitted that the District Court had erred by:

a) holding that the onus of proof in relation to the termination of benefits under the Act rested on Mr Ellwood;

b) discrediting, and therefore failing to take into account, the evidence from Mr Ellwood's experts to the effect that Mr Ellwood's ongoing pain was still causally linked to personal injury by accident;

c) apparently giving preference to the reports provided by ACC's experts without any rational justification; and

d) failing to take into account the effects of previous accidents suffered by Mr Ellwood, and by failing to take into account the strong causal nexus between the accident suffered by Mr Ellwood and the onset of Mr Ellwood's pain.

[10] These appeal grounds fall into two categories. The first concerns who has the onus of proof. The second concerns how the District Court assessed the competing evidence and whether rational reasons were given for preferring one set of reports to the other. I address them in reverse order. Before I do so I review the statutory scheme and the medical evidence.

The statutory scheme

[11] Entitlements under the ACC legislation arise from personal injuries covered by the ACC scheme[1]. Entitlements may be suspended under s 116 of the 1998 Act[2]. Under s 116(1):

> An insurer may suspend a statutory entitlement if it is not satisfied, on the basis of the information in its possession, that an insured is entitled to continue to receive the statutory entitlement.

[1] In this case Mr Ellwood had cover accepted under the 1992 Act and was therefore deemed to have cover under the 1998 Act when that legislation came into force.
[2] There is a similar power in the 2001 Act. It was common ground between the parties that the 1998 Act applied to the suspension decision.

[12] There is no provision in s 116 for the claimant to be heard before a suspension decision is made. There is no restriction on when an insurer (ie ACC) may make such a decision: if it is not satisfied that an insured (ie the claimant) is entitled to continue to receive an entitlement, it is able to suspend that entitlement. If it makes that decision, it is required by s 116(2) to give the claimant written notice of the proposed suspension within a reasonable period.

[13] Section 135 of the 1998 Act entitles a claimant to apply to ACC for a review of any of its decisions on the claim. That includes a decision under s 116. Reviews are then heard by an independent reviewer engaged by ACC in accordance with ss 138 to 151 of the 1998 Act. These provisions include a requirement for a hearing to be held[3]. The claimant is entitled to be present and represented.

[14] By s 148 of the 1998 Act, in making a decision on the review, the reviewer must:

a) put aside ACC's decision and look at the matter afresh on the basis of the information provided by the review; and

b) put aside any policy and procedure followed by ACC and decide the matter only on the basis of its substantive merits.

[15] Section 148(2) empowers the reviewer to dismiss, modify or quash the ACC's decision. By s 148(3), if the reviewer quashes ACC's decision, the reviewer must substitute the reviewer's decision for that of ACC or require ACC to make a decision again in accordance with directions the reviewer gives.

[16] Section 152 of the 1998 Act provides the claimant with an appeal right to the District Court from a review decision. Section 158 provides that the appeal is by way of rehearing. I was advised by both counsel that frequently fresh medical evidence is obtained and adduced with leave in the District Court and that the

[3] Unless the applicant withdraws the review application or all those entitled to be present and heard at the hearing agree not to have a hearing (s 144).

District Court's practice is generally to allow such evidence. The District Court may dismiss, modify or quash the review decision.

[17] Where a party views the District Court's decision "as being wrong in law" the 1998 Act (s 165) provided for an appeal to the High Court subject to the leave of the District Court. That appeal provision was replaced by s 162 of the 2001 Act. That section provides an equivalent appeal right. Like the 1998 Act, the 2001 Act also enables an appeal with the special leave of the High Court, where the District Court refuses leave. With leave an appeal can also be made to the Court of Appeal.

The medical evidence

[18] Mr Ellwood was examined by Mr Bishara following the 1993 and 1995 injuries. Compression of nerve roots was found. Degenerative changes in the spine were also present. Mr Bishara performed the successful 1995 and 1997 operations which left Mr Ellwood almost completely pain free.

[19] Following the November 1998 incident Mr Bishara examined Mr Ellwood in February 1999, March 1999 and May 1999. X-rays again showed degenerative changes. Adequate decompression of certain nerve roots was shown and there was no compression of any further nerve roots. Mr Ellwood's continued pain was similar to the pain he had suffered after the earlier accidents and before the surgery was undertaken to relieve the pain. Mr Bishara did not express a view on the reason for Mr Ellwood's continued pain, but concluded that further surgical intervention was not warranted.

[20] In September 1999 Mr Ellwood was examined by Dr Alison Drewry at the request of the ACC. Her opinion was that there was "no causal link" between Mr Ellwood's current symptoms of neck and shoulder pain with the incident on November 1998. Her report described the November 1998 incident as a "trivial injury". The report commented that:

a) Mr Ellwood had severe underlying changes in his spine prior to 1993;

b) There was no evidence of a structural change produced by the November 1998 incident which accounted for Mr Ellwood's symptoms;

c) There was no evidence that Mr Ellwood's current symptoms were directly due to any previous accident;

d) If Mr Ellwood had not had any previous spinal problems it was unlikely that the November 1998 incident would have produced any symptoms;

e) It was not plausible that the November 1998 incident itself would have produced the degree of pain Mr Ellwood was suffering;

f) In her opinion the pain was "attributable to degenerate changes and neoplastic phenomena". The accidents in 1992 and 1993 "made symptomatic" the degenerative changes in Mr Ellwood's spine.

[21] It was on the basis of this opinion that ACC advised Mr Ellwood that his entitlements would be suspended.

[22] For the purposes of the review application brought by Mr Ellwood, Mr Ellwood obtained a medical opinion from Dr Hugh Burry. His opinion was that Mr Ellwood's ongoing symptoms were "related" to the November 1998 incident. Dr Burry referred to the surgeries performed by Mr Bishara and to Mr Bishara's opinion that the 1998 accident "had not produced any lesion which was likely to be amenable to surgery". His report stated:

a) Dr Drewry's description of the incident as a trivial injury might have been appropriate if Mr Ellwood had a normal spine. His spine had, however, been substantially impaired by his previous accidents;

b) Nerve root entrapments are notorious for leaving a residue of chronic pain. Ongoing nerve root compression may be obscured. It is usually

not possible to say with certainty whether there is persisting nerve compression or not. In this case the further exacerbation of Mr Ellwood's symptoms after the November 1998 incident "suggests to me that further compression injury to the cervical spine and emerging roots occurred";

c) There were certainly features of long term damage and repair but there are other features "which it is not possible to say are the results of long standing or recent damage". He strongly disagreed with Dr Drewry's statement that "it was not plausible that the injury itself could have produced the degree of persistent pain". The previous accidents/surgery "could have been anticipated to result in enhanced vulnerability of the spine to sudden changes of posture or compressive forces".

[23] Dr Burry's report was referred to Dr Drewry for comment. She reaffirmed her view. She said her opinion remained that the effects of the injury had resolved and the current symptoms were due to pre-existing degenerative changes and other medical (non-injury) factors. Dr Burry similarly reaffirmed his opinion. He stated that it was not surprising Mr Ellwood developed disabling pain as a result of the 18 November 1998 incident. He said that persons who have undergone the surgery which Mr Ellwood had are very likely to experience subsequent attacks of pain particularly if a further traumatic event occurs. The reviewer preferred the opinion of Dr Drewry, and therefore confirmed ACC's decision.

[24] For Mr Ellwood's appeal to the District Court further medical opinions were obtained. For Mr Ellwood, an opinion was provided by Dr Jim Borowczyk. Dr Borowczyk received the reports from Dr Burry and Dr Drewry and examined Mr Ellwood. He referred to the existing degeneration and the surgery to relieve nerve root compression. His opinion was that Mr Ellwood's pain dated "directly to the accident which he had when he was hit on the stairs by the barbecue in 1998". In a subsequent report Dr Borowczyk said that the ongoing pain was "almost certainly" caused by chronic pain syndrome. He considered that Mr Ellwood's spine was

unduly sensitive from the earlier injuries although they had healed. He considered the 1998 incident triggered the pain.

[25] ACC obtained an opinion from Professor J C Theis. He referred to the absence of injury related abnormalities. He said that if Mr Ellwood's spine had been normal at the time of the 1998 accident any pain would have resolved itself within a few days or weeks. He said that Mr Ellwood "had previous neck problems on the basis of degenerative disease of the cervical spine which led to two operations". He commented that "cervical spondylosis" can lead to spontaneous episodes of neck pain and stiffness. He said that "these episodes are often retrospectively linked to minor injuries without there being a causal link between the injury and the symptoms of neck pain and stiffness". He concluded that if Mr Ellwood had "a normal neck" at the time of the November 1998 accident he would "not expect" Mr Ellwood to have ongoing symptoms. In a subsequent report Professor Theis stated that Mr Ellwood's pain and stiffness were "readily explained by the significant degenerative disease in his neck". He noted that Dr Borowczyk had not addressed the fact that Mr Ellwood had an underlying degenerative disease of the spine which pre-dated his earlier injuries. He said that Dr Borowczyk failed to appreciate that there was underlying tissue damage as a result of pre-existing degenerative disease "which explains his symptoms of pain and stiffness".

[26] Professor Theis' first opinion was referred to Dr Borowczyk. Dr Borowczyk said that it was accepted that Mr Ellwood had moderate to severe degenerative changes prior to 1998. He referred to the temporal relationship between the 1998 incident and the pain. He referred to even trivial injury being able to cause this pain. He said that it was "impossible to ascertain exactly the source of Mr Ellwood's pain" without resorting to invasive, costly and risky procedures. He said that Professor Theis' opinion "was just that" and there was "no hard scientific data to support his opinion". Dr Borowcyzk's view was that the pain was "the direct result of a traumatic incident". Dr Borowczyk provided one further report. He referred to literature and to Dr Burry's conclusion. He referred to the vast majority of patients with non-traumatic (age-related) degenerative spinal changes not suffering from pain. He referred to Mr Ellwood's previous nerve damage and stated "it is almost

impossible to conclude that this could be due to anything else other than as a result of the trauma he received to his neck".

The District Court's reasons

[27] The District Court discussed the various reports and concluded:

> [38] Accepting as I do the findings and diagnosis of Mr Bishara that the appellant was displaying symptoms of age related degenerative spinal pathology before any incident of trauma, then it follows that the opinions that the Court has received from Dr Borowczyk and Dr Burry must be considered suspect as each of them proceeds to give their opinion of an injury related condition as being the appellant's present diagnosis, having as its genesis the post-traumatic condition of the appellant's cervical spin, including nerve damage.
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> [39] In contrast, Dr Drewry and Professor Theis follow on from where Mr Bishara left off and note the degenerative and age related abnormalities in the cervical spine but a complete absence of abnormality which would be identifiable with any injury. Both come to the view that the circumstances of the injury were not severe, the two descriptions being 'moderate' and 'trivial'. However, that accident, however severe it may have been, produced pain similar to the pain which the appellant had experienced after the two previous neck injuries which surgery had cured.
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> [40] It is from that premise that Dr Drewry goes on to identify a regional pain syndrome as being the diagnosis, and Professor Theis is of the opinion that the appellant's condition is most likely the result of the degenerative state of his cervical spine now becoming symptomatic. As he stated, if the appellant had had a normal neck at the time of the November 1998 accident he would not have expected him to have had any ongoing symptoms some three years after the event.
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> [41] In this appeal the Court has received four opinions from respected experts in the field and while those opinions are diverse it is necessary for the Court to look at the underlying reasoning given for those opinions and to determine how that reasoning may hold up against the circumstances or facts which the Court finds are incontrovertible.
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> [42] In an appeal of this nature the onus of proof is upon the appellant and I find that, having regard to the opinions of Professor Theis and Dr Drewry and the reasoning for those opinions, the contrary opinions expressed by Dr Burry and Dr Borowczyk and the reasoning they have given for their opinions, do not persuade me that on the balance of probabilities, the appellant's condition, as it presented at the time the respondent made its decision, was attributable to and caused by the injury that he suffered in November 1998.

[28] Mr Beck takes issue with the District Court's apparent preference for ACC's expert evidence. He says that the Court has not provided clearly articulated reasons for preferring the ACC's expert evidence. He says that there is no objective basis on which the Court could have concluded that Dr Drewry and Professor Theis were right and Dr Burry and Dr Borowczyk were wrong.

[29] The difference between the experts was:

a) Whether the pain was caused by the long standing degenerative disease (Dr Drewry's and Professor Theis' view); or

b) Whether the pain was caused by the incident involving the barbecue because earlier injuries and the surgery for them made his back more vulnerable to pain from relatively minor further incidents (Dr Burry's and Dr Borowczyk's view).

[30] The District Court preferred the opinions of Dr Drewry and Professor Theis. The critical paragraph in the District Court's decision is [38] (see [27] above where it is set out). It is difficult to follow, but as I read it the Judge considered that Dr Borowczyk and Dr Burry did not take into account (adequately or at all) the findings of Mr Bishara. The Judge said that the finding was that Mr Ellwood was displaying symptoms of age related degeneration of the spine prior to any accident. He said that it followed that Dr Borowczyk's and Dr Burry's opinions must be considered suspect. He said this was because their opinion of an injury related condition had its genesis in the post-traumatic condition of Mr Ellwood's spine, including nerve damage.

[31] I am not certain whether the Judge's reference to "displaying symptoms" of age related degenerative spinal pathology refers to pain symptoms or the existence of degenerative changes evident on x-ray examination. If the Judge meant the former then I am uncertain whether, and if so where, Mr Bishara was saying that there were pain symptoms attributable to the degeneration prior to any of the accidents. Mr Bishara's letters/reports contain technical medical terms and are therefore difficult for me to follow in places. Mr Bishara's letters/reports refer to degenerative

changes. His reports also referred to pain arising after each of the three accidents. From my reading of the various reports, the view expressed by Professor Theis seems to come closest to this. His view was that it was degenerative disease which led to Mr Ellwood's neck problems and the surgery (see [25] above). That view does not say when the pain arose. He also expresses the view that episodes of pain and stiffness are often retrospectively linked to minor injuries without there being a causal link between the pain and stiffness and the injury. It is not clear to me whether Dr Drewry's view is the same or different from that – she referred to the accidents making "symptomatic" the degenerative changes in Mr Ellwood's spine.

[32] If the Judge meant the latter (ie that pre-existing degenerative changes were present although were not causing pain prior to any incident), then that ignores that Dr Burry and Dr Borowczyk were aware of that fact. They differed with Dr Drewry and Professor Theis not on that basis, but on whether it explained Mr Ellwood's present pain. Dr Burry had referred to the long term damage but considered there were features not explained by this. He discussed the possibility of degeneration but said "nor is there any reason to believe that but for his accidents he would have needed to have surgery on two occasions". He considered that the surgery gave benefit in the short term but resulted in "enhanced vulnerability of the spine to sudden changes of posture or compressive forces". Dr Borowczyk was specifically asked to respond to Professor Theis' comment that he had failed to address the underlying degenerative disease that was present. His view remained unchanged. In these circumstances the Judge could not reject their opinions because they did not proceed from the basis that there was degeneration. That was understood by the experts but nonetheless considered not the cause.

[33] The Judge also appeared to rely on the absence of injury evident from the November incident as supporting his view that ACC's experts' opinions were to be preferred. He referred at [39] (see [27] above) to the "complete absence of abnormality which would be identifiable with any injury". Dr Drewry had noted that there was no further damage evident after the 1998 incident. However Dr Burry and Dr Borowczyk acknowledged this. Dr Burry considered that further damage may have been obscured. Dr Borowczyk also commented that it would be impossible to ascertain the exact anatomical cause of Mr Ellwood's pain without resorting to

invasive and risky procedures. They both explained that a relatively innocuous incident could have triggered the significant pain.

[34] The Judge also referred at [39] (see [27] above) to the earlier injuries being cured by the surgery. He referred to Mr Ellwood's pain as being similar to the pain prior to the surgery. It appears that this was intended to support the view that the degeneration, rather than damage from the accidents, was causing the pain. This, however, ignores or gives no weight to Dr Burry's and Dr Borowczyk's opinion that despite the surgeries leaving Mr Ellwood relatively pain free, his spine was vulnerable to minor stimuli which could trigger significant pain. It also seems to ignore or give no weight to the temporal link between the onset of pain and each of the accidents.

[35] I consider that the District Court's reasons did not provide a rational basis for preferring one set of experts over the other. The position seems to have been that the two sets of experts had different views from the same facts. The experts may have been working off different descriptions of the nature of the incident, but the Judge did not consider that to be material – as the Judge referred to this difference but reached his view at [39] of his judgment (see [27] above) "however severe" the accident may have been. This was not a case where the Judge was more impressed with the expertise of one set of experts over the other – the Judge said at [42] of his judgment (see [27] above) that all of the opinions were from respected experts in their field. The Judge did not refer to the view of ACC's experts as being the more accepted view in the literature or anything of that nature. If there was a rational basis to prefer one set of experts over the other it is not clear to me what that is.

[36] A rational basis is not found in the reviewer's decision either:

a) The reviewer noted that Mr Bishara had said that the reason for Mr Ellwood's continued pain was unclear despite every possible investigation. The reviewer said that Dr Burry held the view that Mr Ellwood's pain was associated with cervical nerve root compression whereas Mr Bishara had concluded that there was no compression. The reviewer said it was unclear whether Dr Burry had

seen Mr Bishara's reports. The reviewer said that Dr Drewry's opinion had taken into account the relevant reports. Even if Dr Burry had seen these reports, the reviewer preferred Mr Bishara's view that there was no compression – that view having been made with full awareness of Mr Ellwood's previous history of trauma and surgery and in an area within Mr Bishara's expertise. I do not follow this reasoning because Dr Burry was aware of the pre-existing degenerative disease and was aware of the absence of evidence of further damage but commented why that was inconclusive.

b) The reviewer commented that Dr Drewry's diagnosis of "regional pain syndrome" had been made in other cases before the District Court. The reviewer therefore did not accept Dr Burry's statements that this was not a "diagnosis" but a description of a "predicament". Whether "regional pain syndrome" has been a diagnosis made in other District Court decisions is, in my view, beside the point. It does not address the correctness of the diagnosis or its cause in this case.

c) The reviewer commented that Dr Drewry gave full and cogent reasons for her diagnosis. However, Dr Burry's opinion could also be described as full and cogent.

[37] In these circumstances I consider that the District Court's decision was wrong in law because the Judge did not give rational reasons, or reasons consistent with the facts, for preferring the views of ACC's experts over those for Mr Ellwood. On the evidence before me it is not possible for me to be certain about the difference between the experts and whether one view is to be preferred over the other. It may be that further evidence or explanation from the experts is necessary. In these circumstances I consider that the appropriate course is to refer the matter back to the District Court.

[38] It seems to me that it would be helpful if the experts were each given a common and agreed statement of facts and were then asked the same set of questions in relation to those facts. In the absence of further evidence or explanation from the

experts, or if further evidence or explanation does not assist in providing a clear answer one way or the other, then the burden of proof may be material. I therefore go on to consider this ground of appeal.

Onus of proof

[39] Mr Beck submitted that the District Court's approach had been for the claimant to establish on the balance of probabilities that his pain was attributable to and caused by the injury that he suffered in November 1998. At the suspension and review stage Mr Beck said that the proper approach was to decide whether there was a sufficient basis on which termination could be justified. At the District Court stage the Court had to decide for itself whether the requirements of s 116 were met. The Court should have asked whether, in light of the reports, it could be concluded legitimately that Mr Ellwood's benefits should be terminated. There needed to be a clear justification before terminating benefits and the benefit of any doubt should be weighed in favour of Mr Ellwood.

[40] Mr Hlavac submitted that the District Court's reference to the onus being on an appellant in an appeal is correct. He referred to Court of Appeal authority[4] to the effect that in an appeal by way of rehearing the onus is on the appellant to show that the decision being appealed is wrong. Mr Hlavac also submitted that by the time the Judge referred to onus it was already clear which evidence he preferred. The question of who bore the onus was therefore not significant.

[41] An appeal by way of rehearing required the District Court to make whatever decision it considered ought to have been made by the reviewer. It therefore applies the same test as the reviewer. The Judge's conclusion was that the opinions of Dr Burry and Dr Borowczyk "do not persuade me that on the balance of probabilities" Mr Ellwood's condition was caused by the November 1998 accident. That indicates that Mr Ellwood had the onus of satisfying the Court that he was entitled to continue to receive the statutory entitlements. The question is whether that was correct under the s 116 test.

[4] *Wright v Powell* [1982] 1 NZLR 473.

[42] Mr Hlavac submitted that there was a difference in where the onus lay depending on the inquiry. The claimant has the onus of establishing cover (ie that he or she has suffered a personal injury as defined in the legislation). If cover is granted then it remains unless ACC revises or revokes that cover[5]. It is accepted that ACC has the onus where it is saying that its original cover decision was wrong[6]. Subject to review or appeal, if cover is revoked no entitlements can be claimed.

[43] If cover has been established a claimant becomes eligible to apply for entitlements. Mr Hlavac submitted that eligibility to receive entitlements depends on showing a causal link between the disability/medical condition which creates the need for the entitlement and the personal injury for which cover was granted. Mr Hlavac submitted that a claimant has an on-going obligation to show eligibility to entitlements. For example, for weekly compensation a claimant has to establish inability to work by regular medical certification of inability to work. With other entitlements (eg treatment) the claimant will continue to be eligible so long as the necessary causal nexus exists.

[44] Mr Beck accepted that when a claimant applied for entitlements, the onus was on the claimant to demonstrate the right to entitlements. However, once entitlements were granted he submitted that the onus ought to be different.

[45] Unless the words of legislation make it clear that this is intended, I do not see any obvious reason why the legislation would place the burden on ACC when it is making a decision to revoke cover but on a claimant where ACC is, on its own initiative, making a decision to suspend entitlements where it is doing so because it considers that there is no disability/condition that is caused by an accident. I accept that once cover is revoked there can be no entitlements claimed. In contrast if entitlements are suspended they can be reinstated on application from a claimant who can establish that he or she fulfils the requirements for that entitlement. That circumstance may arise because a claimant's condition may fluctuate over time. The

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[5] In the 1998 Act s 73 empowers ACC to revise, amend or revoke a decision where it "considers it made a decision in error". A similarly worded power is provided in s 390 of the 2001 Act if "it appears to [ACC] that the decision was made in error".

[6] See eg *ACC v Bartels* [2006] NZAR 680.

power to revoke is to be used where the initial decision is incorrect. The power to suspend is to be used where the effects of the injury are spent.[7]

[46] In Mr Ellwood's situation there is at best a fine distinction between suspending entitlements and removing cover. The approach taken was that whatever the effects of any injury from an accident they were spent. But it may have been the case that there was never any effects from an accident. That is, that degenerative disease has always been the cause of the symptoms. If that is the case then no cover ought to have been granted at all.

[47] In Mr Ellwood's case a suspension of entitlements has the same effect as a revocation of cover – Mr Ellwood's entitlements are terminated. Mr Ellwood can theoretically reapply for entitlements but to do so he would need to have new evidence which, on the balance of probabilities, establishes that it was the accidents that are causing the pain (and not degenerative disease). That must be only a remote possibility at best given Dr Borowczyk's comment that it is impossible to ascertain the cause of Mr Ellwood's pain without invasive, costly and risky procedures. The situation seems to be one where different experts have different views.[8]

[48] Additionally, there may be a difference between a requirement to establish on-going incapacity or the need for treatment or the like and a continuing requirement to establish that the disability/medical condition was caused by an accident which is covered. In the former situation Mr Ellwood would need only establish the existence of on-going symptoms. Mr Ellwood is able to do that. In the latter situation Mr Ellwood needs to establish that his symptoms are caused by injuries covered by the legislation in circumstances where he has previously been granted cover for those injuries.

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[7] See eg *Prasad v ACC* DC TAUR 81/2005 7 March 2005.

[8] Those different views seem to extend beyond the circumstances of this case. In reviewing the cases counsel referred to me, I note that Professor Theis has previously been consulted by ACC and provided the opinion that the back pain of other claimants is caused by degenerative disease. Dr Burry and Dr Borowczyk have previously been consulted by claimants and provided the opinion that the back pain of claimants was caused by accident. There is reference to Dr Burry being consulted in the past by ACC but his opinions on those occasions are not in the material before me.

[49] For these reasons I am not persuaded that there should necessarily be a different onus when ACC seeks to revoke cover and when it suspends entitlements.

[50] Mr Beck submitted that entitlements are rights granted to the claimant. He referred to the principle that rights should not be removed without due process. At the suspension stage the decision is on the basis of the information in the ACC's possession; there is no obligation to consult the claimant and there is no forum in which the claimant has an opportunity to prove his or her case. Mr Beck submitted that because the procedure does not provide natural justice rights it should be interpreted so as to involve the least departure from these rights.

[51] Mr Hlavac submitted that due process was provided by the legislative scheme. He referred to ACC's obligation to make reasonable decisions on claims (s 62 of the 1998 Act) which would include suspension decisions. ACC also has an obligation when reviewing entitlements to obtain evidence directed at the inquiry[9]. At the review stage the reviewer is required, in effect, to make a fresh decision. A hearing is held at which the claimant is entitled to be present and represented.

[52] I accept that due process is required before rights are removed. However that does not take the matter any further because how that due process is intended to be provided is a matter of statutory interpretation. In the present case the procedure is as follows:

a) A claim for cover is lodged by the person who has suffered an accident ("the claimant"). The claimant has the burden of establishing an entitlement to cover.

b) If cover is granted, entitlements may be suspended at any time if the ACC "is not satisfied, on the basis of the information in its possession" that the claimant "is entitled to continue to receive the statutory entitlement". ACC must act reasonably in making this decision. It must have evidence directed to the inquiry it is making.

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[9] *Gray v ACC* [2003] NZAR 289.

c) If entitlements are suspended the claimant may seek review. The reviewer must look at the evidence and hear from the parties and may only uphold ACC's decision if it "is not satisfied, on the basis of the information in its possession" that the claimant "is entitled to continue to receive the statutory entitlement".

d) An unsuccessful party can appeal – at the District Court level the parties again have the right to be heard and to present evidence and the Court considers whether the decision was correctly made under the statutory test and in light of all the evidence.

[53] The procedure is a fair one – but it does not answer how the test in s 116 is to be interpreted.

[54] Counsel referred to a number of cases which have considered causation where ACC is suspending or terminating entitlements.

[55] In *Gray v ACC* [2003] NZAR 289 the District Court had applied the test from the wrong legislation (the 1998 Act rather than the 1982 Act) and the expert evidence obtained had therefore been directed to the wrong test. The High Court (Ellen France J) referred the matter back for reconsideration stating that ACC was required to comply with the statutory requirements before removing entitlements. This case does not really assist with the correct approach to interpreting s 116 in this case.

[56] In *Cochrane v ACC* [2005] NZAR 193 the same error had occurred and the question was referred back to the District Court. In making that decision the High Court (Miller J) commented that, while the onus was on the appellant to establish the necessary degree of causation on the balance of probabilities, too much emphasis should not be placed on onus. The High Court said that the District Court was wrong to dismiss the appellant's claim by pointing to the onus and the inconclusive nature of the clinical evidence. At the end of the day causation was a question for the Court.

[57] In *Fowlie v ARCIC* HC WN AP50/00 4 October 2000 the High Court (Hansen J) considered that claimants had a "continuing onus" to satisfy ACC of their right to entitlements. However the Court was not concerned with a situation where the evidence was unclear. The medical evidence was that the injury did not account for on-going capacity. Even if there was some conflicting evidence, the High Court considered that the District Court's view was supported by evidence and there had been no misunderstanding of the findings of the expert.

[58] In *Jackson v ACC* HC AK AP 404-96-01 14 February 2002 the High Court (Priestley J) said:

> The causal nexus between accident and injury must be established as a factual matter and on the balance of probabilities. If the available information (or evidence) establishes that nexus on the balance of probabilities then an applicant's entitlement to cover is beyond dispute. If the nexus cannot be established to that degree then there is no entitlement.

[59] However in that case "on any sensible assessment of the evidence the decision reached by the Review Officer was inevitable".

[60] In *Wakenshaw v ACC* [2003] NZAR 590 there was evidence that the cause of Mr Wakenshaw's symptoms were unknown, but the expert evidence which the District Court accepted was that, whatever the cause, the symptoms were not caused by an accident. In an application for special leave the High Court (Priestley J) considered that the approach to s 116 was to ask whether the evidence as a whole justifies a conclusion that the necessary nexus between injury and incapacity exists. Priestley J said that the medical evidence "overwhelmingly destroy[ed] the crucial link in the required chain". His Honour went on to comment:

> "I suppose it is theoretically possible for all the evidence to be in equipoise with no certainty whether an injury was caused by accident or not. In such a situation it would necessarily follow that cover might have to be declined because a claimant had not established the required nexus on the balance of probability".

[61] Mr Beck submitted that these decisions did not accord with the wording of the scheme in the legislation and were wrong. Mr Beck referred to a number of decisions in other contexts where it was held that the party seeking to remove a right had the onus: *Kerr v Director of Land Transport Safety* HC WN AP 276/97 6

November 1998; *Dale v Director of Land Transport Safety Authority* DC AK M209/92, 146/94 14 September 1994; *Phillips v Commonwealth of Australia* (1964) 110 CLR 347 (HCA); *Turnbull v NSW Medical Board* [1976] 2 NSWLR 281. He also referred to some other cases that recognised that termination of benefits is a step not to be taken lightly and that discretions are required to be exercised judicially. He also placed reliance on the avoidance of a "niggardly interpretation" of accident compensation legislation: *Campbell v ACC* CA 138/03 29 March 2004; *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA). Mr Hlavac submitted that none of these cases were on point and that those concerning rights under other statutes depended on their particular statutory context.

[62] Against that background I turn to the words of s 116. The test is put in the negative. That is, it refers to ACC being "not satisfied" of the right to entitlements. It could have been expressed differently. That is, it could have said "if ACC is satisfied that the claimant is not entitled to the statutory entitlements". Is this relevant to the question of onus?

[63] I asked this question of counsel. Neither thought so. However I think there is a potential difference. If the ACC/the Reviewer/the District Court is "not satisfied" then the evidence has not persuaded them that there is a right to entitlements. That may occur where the evidence on the balance of probabilities establishes no right to entitlements. However it might also occur where the claimant has not established on the balance of probabilities that there is a right to entitlements. In that situation (if the evidence was in balance or unclear) the ACC would not be satisfied that there was a right – it would be uncertain.

[64] In contrast if the test required the ACC/the Reviewer/the District Court "to be satisfied that there is no right to entitlements" then that test would not be met where the evidence was in balance or unclear. They could not be satisfied because the evidence would have left the position unclear. That said, the ACC must make reasonable decisions. In a situation where the evidence is unclear or in balance, is it reasonable to suspend entitlements? In many cases it may not be. Before entitlements are suspended at ACC's initiative (or that suspension is upheld by a reviewer or the District Court) ACC should take steps to clarify the position one way

or the other. The claimant is not present at the first stage so the obligation must be on ACC at this stage to obtain sufficient evidence. Mr Beck's proposed test of asking whether there is a sufficient basis on which entitlements should be suspended (in effect, terminated) is a reasonable one. If there is an insufficient basis then the test of "is not satisfied" is not met. If there is a sufficient basis then ACC can be "not satisfied" of the right to entitlements. As the reviewer and the District Court apply the same test the same approach should be taken at each stage.

[65] I therefore consider that s 116 combined with the requirement in s 62 on ACC to make reasonable decisions requires ACC to have a sufficient basis before terminating benefits. If the position is uncertain then there is not a sufficient basis. The "not satisfied" test is not met in these circumstances.

Result

[66] The appeal is allowed. The matter is remitted back to the District Court for rehearing. I expect that further evidence will be necessary.

[67] I do not think that this is an appropriate case to award costs. If the appellant has a different view about costs the parties are directed to submit memorandum to me by 30 January 2007.

Mallon J