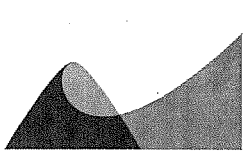

Medical Practitioner's Fact Sheet #1

The law in relation to accidental injuries and pre-existing conditions

Personal injury under the Injury Prevention Rehabilitation and Compensation Act 2001 ('the Act') does not include personal injury caused *wholly or substantially* by a non-work related gradual process, disease or infection, or age.

As to the issue of accidental injuries occurring alongside pre-existing conditions, degeneration and disease, the courts have said the following:

Cover can be revoked under the Act if it can be shown that the personal injury for which cover was granted results wholly or substantially from a pre-existing degenerative condition. In this instance the onus is on the insurer to prove that the original decision granting cover was incorrect. The High Court has held that if the medical evidence establishes that there are pre-existing degenerative changes which become symptomatic as a consequence of an accident, **it can only be the injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition, that can be covered**. The fact that it is the event of an accident, which renders symptomatic that which previously was asymptomatic, does not alter the basic principle enunciated by Judge Beattie in Hill v ARCIC who held that Act makes:

"it clear that personal injury caused wholly or substantially by the aging process is not covered by the Act. **If medical evidence establishes that there are pre-existing degenerative changes which are brought to light or which become symptomatic as a consequence of an event which constitutes an accident, it can only be the injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered**. The fact that it is the event of the accident which renders symptomatic that which previously was asymptomatic does not alter that basic principle. **The accident did not cause the degenerative changes, it just caused the effects of those changes to become apparent and of course in many cases for them to become the disabling feature.**" (emphasis added)

This stance effectively rejects the "but for" test.

Another indication of a personal injury, which may result wholly or substantially from a pre-existing degenerative condition is where an appellant undergoes treatment for an injury but does not recover in the time period expected for such an injury, had the degenerative condition not existed. In Morgan v ACC 29/4/03, Judge Middleton, DC Wellington 73/03, the claimant injured her shoulder while vacuuming and was granted cover. During surgery to correct her injuries it was discovered that she also had a pre-existing degenerative condition, which had been asymptomatic prior to the injury. The surgery corrected the injuries sustained in the accident and the fact that she continued to suffer pain was on balance due to the underlying degenerative condition rather than from the injury for which she had

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cover.

However, just because an injury is taking longer to resolve due to a pre-existing condition is not the same as saying it is caused wholly and substantially by that condition and there may be a residuum of injury for which the appellant is entitled to cover. In Grogan v ACC, the appellant suffered a lumbar strain in February 1999 working as a farmer and the injury was slow to resolve. The Court ruled that the power to suspend should be exercised when, on balance, there is sufficient medical evidence that the claimant no longer has an entitlement. In this case the evidence suggested that the fall tipped the scales and produced a sensitive disc at the L4/5 level, which produced ongoing symptoms. The reference by an ACC specialist to "substantially" needed to be elaborated on. This was not a case where the evidence clearly points towards a resolution of the original injury and all that is left is the continuing symptomatic state of the degenerative lumbar spine. In other cases where the degree of degeneration was minor, the appeal was allowed.

In Davy v ACC the Court held that a finding that the appellant "would have" developed the condition without occupational exposure did not exclude a claim that they in fact did develop the condition because of that exposure. A distinction was made between conditions that are pre-existing and are simply triggered by occupational exposure and those that a claimant is predisposed to. Predisposition does not affect a person's right to entitlement.

The relevant sections of the Act are attached along with the leading case on this issue: McDonald v ACC.

If you have any questions, or need clarification on points of law, please do not hesitate to contact us.

Hazel Armstrong Law
January 2010

Principles

20 Cover for personal injury suffered in New Zealand (except mental injury caused by certain criminal acts or work-related mental injury)

(1) A person has cover for a personal injury if—

(a) he or she suffers the personal injury in New Zealand on or after 1 April 2002; and

(b) the personal injury is any of the kinds of injuries described in section 26(1)(a) or (b) or (c) or (e); and

(c) the personal injury is described in any of the paragraphs in subsection (2).

(2) Subsection (1)(c) applies to—

(a) personal injury caused by an accident to the person:

(b) personal injury that is treatment injury suffered by the person:

(c) treatment injury in circumstances described in section 32(7):

(d) personal injury that is a consequence of treatment given to the person for another personal injury for which the person has cover:

(e) personal injury caused by a work-related gradual process, disease, or infection suffered by the person:

(f) personal injury caused by a gradual process, disease, or infection that is treatment injury suffered by the person:

(g) personal injury caused by a gradual process, disease, or infection consequential on personal injury suffered by the person for which the person has cover:

(h) personal injury caused by a gradual process, disease, or infection consequential on treatment given to the person for personal injury for which the person has cover:

(i) personal injury that is a cardio-vascular or cerebrovascular episode that is treatment injury suffered by the person:

(j) personal injury that is a cardio-vascular or cerebro-vascular episode that is personal injury suffered by the person to which section 28(3) applies.

(3) Subsections (1) and (2) are subject to the following qualifications:

(a) section 23 denies cover to some persons otherwise potentially within the scope of subsection (1):

(b) section 24 denies cover to some persons otherwise potentially within the scope of subsections (1) and (2)(e).

(4) A person who suffers personal injury that is mental injury in circumstances described in section 21 has cover under section 21, but not under this section.

Compare: 1998 No 114 s 39

Section 20 heading: amended, on 1 October 2008, by section 5(1) of the Injury Prevention, Rehabilitation, and Compensation Amendment Act 2008 (2008 No 46).

Section 20(2)(b): substituted, on 1 July 2005, by section 7(1) of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005 (2005 No 45).

Section 20(2)(c): substituted, on 1 July 2005, by section 7(2) of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005 (2005 No 45).

Section 20(2)(d): substituted, on 1 July 2005, by section 7(3) of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005 (2005 No 45).

Section 20(2)(f): substituted, on 1 July 2005, by section 7(4) of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005 (2005 No 45).

Section 20(2)(i): substituted, on 1 July 2005, by section 7(5) of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005 (2005 No 45).

Section 20(3)(b): amended, on 1 August 2008, by section 5(2) of the Injury Prevention, Rehabilitation, and Compensation Amendment Act 2008 (2008 No 46).

21 Cover for mental injury caused by certain criminal acts

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

(a) he or she suffers the mental injury inside or outside New Zealand on or after 1 April 2002; and

(b) the mental injury is caused by an act performed by another person; and

(c) the act is of a kind described in subsection (2).

(2) Subsection (1)(c) applies to an act that—

(a) is performed on, with, or in relation to the person; and

(b) is performed—

(i) in New Zealand; or

(a) any of those kinds of occurrences if the occurrence is treatment given,—

(i) in New Zealand, by or at the direction of a registered health professional; or

(ii) outside New Zealand, by or at the direction of a person who has qualifications that are the same as or equivalent to those of a registered health professional; or

(b) any ecto-parasitic infestation (such as scabies), unless it is work-related; or

(c) the contraction of any disease carried by an arthropod as an active vector (such as malaria that results from a mosquito bite), unless it is work-related.

(3) The fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.

Compare: 1998 No 114 s 28

Section 25(1)(a): substituted, on 1 July 2005, by section 10(1) of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005 (2005 No 45).

Section 25(1)(b): substituted, on 1 July 2005, by section 10(2) of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005 (2005 No 45).

Section 25(1)(ba): inserted, on 1 July 2005, by section 10(2) of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005 (2005 No 45).

26 Personal injury

(1) **Personal injury** means—

(a) the death of a person; or

(b) physical injuries suffered by a person, including, for example, a strain or a sprain; or

(c) mental injury suffered by a person because of physical injuries suffered by the person; or

(d) mental injury suffered by a person in the circumstances described in section 21; or

(da) work-related mental injury that is suffered by a person in the circumstances described in section 21B; or

(e) damage (other than wear and tear) to dentures or prostheses that replace a part of the human body.

(2) **Personal injury** does not include personal injury caused wholly or substantially by a gradual process, disease, or infection unless it is personal injury of a kind described in section 20(2)(e) to (h).

(3) **Personal injury** does not include a cardio-vascular or cerebro-vascular episode unless it is personal injury of a kind described in section 20(2)(i) or (j).

(4) **Personal injury** does not include—

(a) personal injury caused wholly or substantially by the ageing process; or

(b) personal injury to teeth or dentures caused by the natural use of those teeth or dentures.

(5) For the purposes of subsection (1)(e) and to avoid doubt, **prostheses** does not include hearing aids, spectacles, or contact lenses.

Compare: 1998 No 114 s 29

Section 26(1)(da): inserted, on 1 October 2008, by section 8 of the Injury Prevention, Rehabilitation, and Compensation Amendment Act 2008 (2008 No 46).

27 Mental injury

Mental injury means a clinically significant behavioural, cognitive, or psychological dysfunction.

Compare: 1998 No 114 s 30

28 Work-related personal injury

(1) A work-related personal injury is a personal injury that a person suffers—

(a) while he or she is at any place for the purposes of his or her employment, including, for example, a place that itself moves or a place to or through which the claimant moves; or

(b) while he or she is having a break from work for a meal or rest or refreshment at his or her place of employment; or

(c) while he or she is travelling to or from his or her place of employment at the start or finish of his or her day's work, if he or she is an employee and if the transport—

(i) is provided by the employer; and

[redacted]

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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 2/02

UNDER The Accident Rehabilitation & Compensation Insurance Act 1992

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

BETWEEN DONALD ALEXANDER McDONALD
Appellant

A N D ACCIDENT REHABILITATION AND COMPENSATION INSURANCE CORPORATION
Respondent

Hearing: 12 April 2002

Counsel: I J D Hall for Appellant
C J Hlavac for Respondent

Judgment: **20 May 2002**

JUDGMENT OF PANCKHURST J

Solicitors:
Weston Ward & Lascelles, Christchurch for Appellant
Young Hunter, Christchurch for Respondent

Introduction:

[1] This case involves effectively a single issue but one of general importance in relation to the Accident Rehabilitation and Compensation Insurance Act 1992 (the Act). It concerns whether incapacity arising from disease, the onset of which was brought about by an accident, is personal injury which enjoys cover under the Act. Ordinarily a disease is not of course covered, but is that general exclusion avoided where an accident triggered the onset of incapacitating symptoms of the disease? In such circumstances the accident has had a part to play but is that part sufficient to satisfy the test of causation under the Act.

[2] The appeal is one by leave of the District Court pursuant to s97 of the Act. In a decision dated 9 October 2001 Beattie DCJ held that the Corporation acted correctly in deciding to terminate the appellant's statutory entitlements. He did so in light of a number of cases decided in that Court in which it has been held that incapacity from disease albeit brought on by an accident does not enjoy cover. By contrast under the old Workers Compensation Act 1956 compensation would have been payable. In these circumstances Willy DCJ, on 25 January 2002, granted leave for the present appeal.

Background:

[3] Mr McDonald was employed as a fireman. On 9 April 1994 he suffered an injury to his right knee as a result of a fall on stairs while responding to a fire call. He was aged 53 years at the time.

[4] On 23 June 1994 Mr Fitzpatrick an orthopaedic surgeon carried out arthroscopy of both knees. He said that the left knee required *"debridement and washout"* and the right knee a *"partial medial meniscetomy"* on account of a *"posterior corn tear of the medial meniscius"*. Such report concluded with the opinion:

> *"This man claims that he had no problems with his knees prior to the accident – however the appearance at operation suggests that these knees were becoming degenerate and that his falls were more the final straw rather than the whole cause of degeneration in the knees. At operation there*

was not a great deal that could be done apart from washing the debris out and removing the torn medial meniscius in the right knee. Unfortunately during the recovery phase he developed deep venous thrombosis and this delayed his progress.

His knees have improved about as much as they are going to. The problem now is the degenerative joint disease and there is no way that he is going to be fit to return to full duties as a fireman ..."

In the event cover under the Act was still extended.

[5] Mr McDonald experienced ongoing problems. He saw Mr Fitzpatrick again in December 1995. The report which resulted included this opinion:

"This man has secondary osteoarthritis in both knees. He also has residual symptoms from a deep venous thrombosis in the right leg. His condition has not improved since he was seen one year ago and there is unlikely to be any further improvement, indeed his knees could deteriorate further in the future ..."

Mr McDonald continued to receive entitlements under the Act.

[6] In May 1999 the Corporation commissioned a further report. Mr Fitzpatrick reported in these terms:

"This man has early osteoarthritis of both knees, the right a little worse than the left and this is consistent with the findings at arthroscopy in 1994. His ongoing problems with the knees are related to the osteoarthritis rather than a specific injury. There is no specific treatment that is going to make his knees pain free and in time the condition is going to progress to a point where possibly he will require knee replacement. If his initial injuries had been simple cartilage tears in otherwise normal knees, recovery after surgery would have been a matter of weeks, but it is still my view that this man had degenerative changes in his knees prior to the injury and the injury simply accelerated the process to the extent that he was not able to get back to his former work. Another factor in his prolonged period of disability was the deep venous thrombosis which is a post-operative complication. This has been treated. He still has some residual symptoms with a tendency to swell towards the end of the day but if this were his only problem it would not prevent him from getting back to work."

In light of this report the Corporation reached a decision on 4 June 1999 to cease entitlements, in particular compensation for loss of earnings.

[7] Mr McDonald challenged that decision on review. To that end Mr McKie, another orthopaedic surgeon, examined him in June 2000 and prepared a report which included this assessment:

> *"There is no doubt that Mr McDonald has had a personal injury by accident and we have to take at face value that he did not have any symptoms from his knee prior to the incident in 1994. This is not in anyway unusual, although the degree of disability following his injury and surgery with respect to the knee would seem to be greater than usually expected. He did, however, have a significant complication from his accident surgery, namely a deep venous thrombosis, and one of the recognised problems of this condition is post phlebetic leg syndrome ie a problem with chronic swelling of the limb related to loss of normal function of the venous valves leading to pain and swelling. Even if he didn't have ongoing symptoms relating to his knee, he may well have had problems relating to swelling and pain as a consequence of the deep venous thrombosis which would have compromised his ability to work efficiently as a front line fire fighter.*
>
> *In answer to your question whether the condition would have been expected to remain latent behind April 1994 if he had not had an injury to his knee; the answer is definitely yes that it would have been expected to remain latent or to cause a more gradual increase in symptoms over time rather than the somewhat precipitous change that occurred in this man's case."*

[8] On review the decision-maker found that Mr McDonald suffered solely from degenerative joint disease and accordingly was not entitled to cover. The evidence was held to establish the existence of degeneration of the knees prior to the accident, albeit asymptomatic, and that the accident significantly accelerated the effects of the disease leading to Mr McDonald's ongoing incapacity. Such incapacity was on account of the disease, not any injury from accident.

The Appeal:

[9] The appeal was heard in the District Court on 16 July 2001. The parties relied upon the same medical evidence from Messrs Fitzpatrick and McKie as was used for the purpose of the review but in addition, of course, counsel presented detailed legal submissions.

[10] Mr Hall, by reference to workers compensation authorities and texts, contended that formerly Mr McDonald would have received compensation in terms of the *"acceleration rule"*. That is that where incapacity is attributable to some pre-existing condition (a disease) compensation is nonetheless payable if but for the

relevant accident the employee would have remained capable. In other words where an accident has triggered the onset of the disease to the point of incapacity compensation is payable throughout that period over which the worker would otherwise have been able to continue in employment. His entitlement would only cease at the point at which the natural progression of the disease would have caused incapacity. Mr Hall described this as an entitlement to compensation for the *"lost years"*.

[11] Mr Hlavac, however, mounted an argument based essentially upon Sections 8 and 10 of the Act which he said governed the issue of causation, and, to the exclusion of an approach based on previous workers' compensation legislation. I shall return to the terms of his argument shortly.

[12] Beattie DCJ held that the workers compensation jurisprudence relied upon by the appellant was *"simply not applicable"*. He considered that the evidence of Mr Fitzpatrick established that the incapacity was related to Mr McDonald's osteoarthritis, not any injury caused by his 1994 accident. Further the Judge accepted that absent degenerative changes to the knees a cartilage injury of the kind which Mr McDonald suffered in his fall would have mended within a matter of weeks after surgery. Hence it was osteoarthritis, the disease, which six years on was causative of incapacity.

[13] Moreover the Judge found that the opinion given by Mr McKie did not alter matters. Even if the osteoarthritis might have remained latent absent the accident, such did not affect the ultimate question whether Mr McDonald was entitled to ongoing entitlements.

[14] The Judge expressed his conclusion in these terms:

> *"[19] ... It is central to the accident compensation regime that entitlements are only able to be received for a qualifying personal injury by accident. Arthritis in the knees is not a qualifying injury. Indeed it is a disease and as such is specifically excluded by s.10 of the Act.*
>
> *[20] The acceleration principle to which Mr Hall referred is not applicable to accident compensation claims as the Act identifies what injuries are coverable and in respect of which entitlements can be received. Those injuries must only be those of personal injury by accident, and injury which*

is from disease or from the ageing process is excluded unless it comes within the exception provided for gradual process injuries arising from employment.

[21] In summary then the medical evidence, I find, establishes that the appellant is suffering from arthritis in the knees and is no longer suffering from the knee strain or torn meniscius which was the diagnosed personal injury. In those circumstances the Act does not permit the appellant to continue to receive entitlements as such entitlements cannot be identified with the continuance of the personal injury for which cover was granted."

Deep Vein Thrombosis (DVT):

[15] In support of the appeal Mr Hall endeavoured to raise what was to my mind a secondary argument. Both orthopaedic surgeons accepted that Mr McDonald suffered some effects from DVT when they saw him in 1999 and 2000. Mr Fitzpatrick said he *"still has some residual symptoms with a tendency to swell towards the end of the day but if this were his only problem it would not prevent him from getting back to work ...".* On the other hand Mr McKie gave an opinion different in emphasis, namely that Mr McDonald *"may well have had problems relating to swelling and pain as a consequence of the deep venous thrombosis which would have compromised his ability to work efficiently as a front line fire fighter."*

[16] A short answer to this issue is that leave was not granted in relation to it. Willy DCJ granted leave in relation to the question whether Judge Beattie was correct in concluding that decisions and principles applicable under the previous workers' compensation legislation were not relevant to accident compensation jurisprudence. It was accepted this was a question of law capable of serious argument, albeit one regarded as settled in a significant number of District Court cases. It is readily apparent that Mr Hall's argument referable to DVT was outside the scope of the question for which leave was granted.

[17] In any event it is evident from the brief excerpts from the evidence of Messrs Fitzpatrick and McKie set out above, that the issue was one about which the orthopaedic surgeons were divided but only to a limited extent, namely as to what degree the symptoms prevented a return to work. The assessment of evidence was for the Judge below. Even putting aside the leave point, it does not seem to me that

such conflict as there was in the evidence gives rise to a question of law capable of determination by this Court.

Discussion:

[18] I consider it is appropriate to go straight to the fundamental question, whether the Judge was correct in concluding that the arguments raised by Mr Hall based on principles from the workers' compensation regime were of no relevance to the decision required in terms of the present Act.

[19] As Mr Hlavac rightly stressed Sections 8 and 10 define when cover under the Act is available in respect of personal injury. Relevantly for present purposes those sections provide:

> *"**8. Cover for personal injury occurring in New Zealand** – (1) This Act shall apply in respect of personal injury occurring in New Zealand on or after the 1st day of July 1992 in respect of which there is cover under this Act.*
> *(2) Cover under this Act shall extend to personal injury which –*
> *(a) Is caused by an accident to the person concerned; or*
> *(b) Is caused by gradual process, disease, or infection arising out of and in the course of employment as defined in section 7 or section 11 of this Act; or*
> *(c) Is medical misadventure as defined in section 5 of this Act; or*
> *(d) Is a consequence of treatment for personal injury covered by this Act.*
> .....
> ***10. General exclusions from cover** – (1) For the avoidance of doubt, it is hereby declared that personal injury caused wholly or substantially by gradual process, disease, or infection is not covered by this Act unless it is –*
> *(a) Personal injury caused by gradual process, disease, or infection arising out of and in the course of employment as defined in section 7 or section 11 of this Act; or*
> *(b) Personal injury that is medical misadventure; or*
> *(c) A consequence of personal injury or treatment for personal injury covered by this Act.*
> *(2) For the avoidance of doubt it is hereby declared that –*
> *(a) Personal injury caused wholly or substantially by the ageing process; and*
> *(b) Personal injury to teeth that is caused by the natural use of those teeth – is not covered by this Act."*

[20] For completeness I note that s4 contains a definition of *"personal injury"* namely *"the death of, or physical injuries to, a person ..."* and (not presently

relevant) mental injury in some circumstances. Further s37 provides the test of *"incapacity"*, being *"whether or not the person is, by reason of his or her personal injury, for the time being unable to engage in employment in which the person was engaged when the personal injury occurred ..."*.

[21] To my mind the core concept in s.s. 8 and 10 is that of *"cover"*. It is extended under the Act in relation to *"personal injury"*, another of the core concepts. In this instance the cover which Mr McDonald enjoyed from 1994 to 1999 was on the basis that his personal injury was caused by an accident : s8(2)(a). There is no express definition of *"caused"*. However, s10 indicates the test to the extent that exclusions from cover only become operative when the particular personal injury is *"caused wholly or substantially by ..."* the defined exclusion. It follows that in the present case for example the disease, osteoarthritis, excluded cover only when it was the whole or substantial cause of Mr McDonald's personal injury. The impact of disease less than that, say at a minor or even moderate level, would not give rise to exclusion of cover. Put another way an accident remains causative until such time as disease (or other excluded conditions) is causative of the relevant injury to at least a substantial degree.

[22] An additional aspect of Mr Hlavac's argument was that the approach to the application of s.s. 8 and 10 was now well settled in a series of District Court decisions. He described such cases as having established a jurisprudence with reference to the availability of cover under the accident compensation regime. It is convenient to mention some examples of these cases.

[23] A starting point is ***Decision No 1 Accident Compensation Appeal Authority*** (1975) 1 NZAR 89. The issue in that case bore no relationship to that in the present. However, Blair J was faced with submissions which drew on decisions decided in the context of the previous workers' compensation scheme. As to this at 94 he observed:

> *"I do not think that s 122 of the Accident Compensation Act should be interpreted by reference to other statutes and in particular I think that reference to statutes having a different purpose and with an entirely different structure may be misleading. While the Workers' Compensation Act compelled the employer to give limited financial protection to workers*

employed by him and injured in the course of employment the Accident Compensation Act breaks new ground. In effect it imposes on the state itself substantial financial and rehabilitation responsibility for personal injury by accident occurring to all persons in New Zealand. In interpreting the Accident Compensation Act the interpreter must take cognizance of the fact that that Act is a new code of rights and responsibilities. It is not an offspring of the old Workers' Compensation Act but an entirely new species. While the Workers' Compensation Act created a code as between master and servant the Accident Compensation Act creates a code between state and subjects of the state."

[24] Of more direct relevance are a body of cases decided over the last twenty-five years in the very context of s.s. 8 and 10, or their equivalents. It is not, I think, necessary to refer to a great number of them. Two citations from quite recent decisions will suffice. In ***Smith v Accident Compensation Corporation (264/2001)*** Judge Willy said this:

"[38] Mr Barnett however submits that to import the concept into ACC cases is unhelpful and misleading. Mr Barnett submits, in my view correctly, that the Corporation, reviewers and Appellate Courts ought to approach their respective tasks in cases such as this (which are very common in this jurisdiction) by first considering the relevant statutory definition of personal injury by accident, applying the correct onus of proof and in doing so, examine whether, on the facts of the case, the symptoms complained of are causally linked to the injuries suffered in the accident for which cover is granted. In doing that it will inevitably be necessary to consider, in each case, what is the medical status of the claimant prior to the accident, together with any changes over the years intervening between the time of the accident and the date at which the Corporation seeks to terminate cover.

[39] I agree with Mr Barnett that in conducting that exercise it is unhelpful to import notions which were developed in the context of the rules relating to the liability of negligent tortfeasors for the purposes of assessing awards of damages at common law.

[40] It should not be forgotten that the so-called eggshell skull cases such as Smith v Leech Brain [1962] Q.B. 405 and Warren v Scruttons [1962] 1 Ll Rep. 497 were a response to perceived injustices that might otherwise flow from the rejection in Overseas Tank Ships UK Limited v Morts Dock and Engine Co Limited [1961] AC 388 of the 'direct cause test' which had been current in the common law since Re Polemis *[1921] KB 560.*

[41] As a number of commentators pointed out at that time following The Wagonmound decision, if strict notions of foreseeability were applied in the case of plaintiffs who suffered from some unknowable medical disability, then there could not be compensation for the full extent of the results of the defendant's negligence, but only for that which was reasonably foreseeable. Notions of fault and foreseeability do not apply to the Accident Compensation legislation and it is unhelpful to do so even by way of analogy. More importantly however, for the reasons given earlier, in my view it is unnecessary to do so."

[25] Although Mr Hall mounted his argument in terms of what he called the *"acceleration rule"* such principle is, I think, based on similar reasoning to that which featured in relation to so-called eggshell skull cases. In general terms the issue which arises for consideration is the prominence to be accorded an underlying condition, perhaps a disease like osteoarthritis, or an underlying weakness, such as a thin skull. Either may accentuate the impact of an accident or prolong its effects. Hence it was necessary to evolve principles which governed the assessment of causation and the assessment of damages. The point I wish to stress is that I regard Willy DCJ's observations as equally applicable in relation to Mr Hall's argument, albeit the Judge referred to the example of eggshell skull cases.

[26] A further example of the jurisprudence and one which is directly in point is the judgment in ***Hill v Accident Rehabilitation and Compensation Insurance Corporation***, decision 189/98, 5 August 1998. Beattie DCJ at 12 – 13 said this:

> *"I am attracted to the submission of Mr Palmer for the respondent that consideration of provisions of section 10 of the Act in relation to the eggshell skull principle really render that principle inapplicable in most cases.*
>
> *The Act is not concerned with issues of foreseeability of consequences or whether the relationship between trauma and consequence is reasonable or within bounds. Thus referring to the eggshell skull example itself the Act is not concerned with determining whether a claimant has a thin skull or not or that the injury his skull suffered from the blow was greater than that which an ordinary person would suffer. The claimant is entitled to cover and compensation for whatever the extent of the personal injury by accident happens to be.*
>
> *This court has on previous occasions considered the eggshell skull principle when assessing the continuance of the symptoms of injury past a date when medical opinion might have considered the effects of injury ought to have passed. In those circumstances if the evidence is that the particular injury was more long lasting or severe than the actual severity of the trauma would normally cause then that could be said to be a notion allied to the eggshell skull principle.*
>
> [But] *the provisions of section 10 make it clear that personal injury caused wholly or substantially by the ageing process is not covered by the Act. If medical evidence establishes there are pre-existing degenerative changes which are brought to light or which become symptomatic as a consequence of an event which constitutes an accident, it can only be the injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered. The fact that it is the event of an accident which renders symptomatic that which previously was asymptomatic does not alter that basic principle. The accident did not cause the degenerative changes, it just caused the effects of those changes to*

become apparent and of course in many cases for them to become the disabling feature."

The interpolation of the word *"But"* at the commencement of the last paragraph is mine.

[27] The facts in ***Hill*** were not dissimilar to those in the present case. The appellant suffered an injury to a calf muscle through accident. He was extended cover under the Act. A few years on Mr Hill was still unable to return to work. However the preponderance of medical opinion indicated that his then injury was longstanding arthritis in a knee joint. It was common ground that this condition was asymptomatic prior to the accident, but symptomatic thereafter. The appeal was unsuccessful since Beattie DCJ was satisfied the point had been reached where disease was the substantial operating cause. My reading of this decision suggests that the outcome of the appeal to the District Court was inevitable, unless the approach taken to the interpretation of s.s. 8 and 10 in this and many other cases was erroneous.

Conclusion:

[28] I am in no doubt that the approach applied by the Judge in dismissing the present appeal was correct in law. I am content to adopt the reasoning contained in the above extracts from the cases of ***Smith*** and ***Hill***.

[29] I agree that the relevant provisions in the Act supply a code. Principles drawn from the previous workers' compensation scheme or from the common law, in particular those relevant to foreseeability, are not applicable in relation to this legislation. That is not to say that from time to time cases decided in other contexts may not be of assistance. But it is one thing to seek guidance from the reasoning in other related contexts, but another to seek to directly apply the principles drawn from those sources.

[30] With regard to what Mr Hall called the acceleration rule I am satisfied it has no place in the context of the Act. Such rule presupposes on inquiry as to whether, absent the accident, the relevant disease symptoms would have remained dormant.

An inquiry of that kind is foreign to s10. It poses a single test : whether the disease is the whole or the substantial cause of the injury. If so, cover is unavailable regardless that the accident triggered (or accelerated) the progression of the disease.

[31] The answer to the question of law is that the Judge did not err in his approach to the case. The appeal is dismissed. If any question of costs arises memoranda may be filed.

Signed at 9.30a on 21 May 2002.