egg shell skull

IN THE DISTRICT COURT
AT DUNEDIN
WELLINGTON REGISTRY

Decision No. 46 /2009

AI 267/08

UNDER	The Injury Prevention, Rehabilitation, and Compensation Act 2001
AND	
IN THE MATTER	of an appeal pursuant to section 149 of the Act
BETWEEN	**PETER JOHNSTON**
	Appellant
AND	**ACCIDENT COMPENSATION CORPORATION**
	Respondent

HEARD at DUNEDIN on 18 December 2008

DATE OF THIS DECISION 30 March 2009

COUNSEL

Mr P Sara for appellant
Mr H A Evans for ACC

RESERVED DECISION OF JUDGE P F BARBER

The Issue

[1] The issue is the correctness of ACC's decisions of 10 December 2007 declining to fund surgery for the appellant (Review no. 114613), and of 4 March 2008 that the appellant was no longer entitled to weekly compensation and other entitlements (Review no 121191). On those respective dates ACC suspended such entitlements on the basis that the appellant's continuing incapacity and pain were caused by degenerative changes which were not the consequence of his covered injury. Accordingly, the question is whether the appellant's ongoing incapacity and the need for surgery is caused by the injury for which he has cover i.e. mainly, the injury to his back or spine.

Background

[2] On 12 March 2007, the appellant slipped on an unstable step and fell heavily injuring his left leg and shoulder. An ACC 45 medical certificate recorded that he had suffered the following injuries: left rotator cuff sprain, left lumbar sprain, left thigh sprain.

[3] ACC granted cover and the appellant was paid abated weekly compensation. On 19 October 2007, Dr Munro certified the appellant as being fully unfit for work. At the outset, the appellant had physiotherapy treatment but his back condition did not resolve so that he was referred by his GP to Mr M Fosbender, an eminent orthopaedic surgeon.

Medical Evidence

[4] Mr Fosbender examined the appellant to assess him for surgery. The following extracts from his 21 November 2007 report to the appellant's GP are relevant.

> *"Diagnostic testing and x-rays:*
>
> *Plain x-rays of the lumbar spine demonstrate multiple levels of change of osteophytosis. There is narrowing at the lowest three levels. An MRI scan demonstrates normal anatomy, dehydration of the lowest four discs, or especially L3-4 and down. There is some narrowing associated with this.*
>
> *At L3-4 there was a prolapse, more to the (R) therefore I do not think it is significant. At L4-5 and L4-S1 there is lateral stenosis associated with prolapse bulging of the discs at that level, on the (L).*
>
> *Specific Diagnosis:*
>
> *Entrapment of the L4 and L5 nerve roots, that is, at the level of L4-5 and L5-S1 on the (L), <u>due to lateral stenosis with disc bulge</u>. (emphasis added)*
>
> *ACC obtained copies of the appellant's x-ray and MRI scan reports and referred these to its Clinical Advisory Panel. The Panel's comment was recorded by Mr Patrick Medlicott, an Orthopaedic Specialist, noted as 4 November (but should be 2 December) 2007 as follows:*
>
> "Changes on imaging are of lateral canal stenosis with disc bulge on left at L4, L5 and L5/S1, contributing to symptoms now present. (Mr Fosbender's assessment of MRI report).
>
> The report is of broad "base disc bulges" not direct protrusions, lateral canal stenosis of degenerative type at 2 levels. The L5/S1 seems to be the most symptomatic. Probably the underlying cause is degenerative."

[5] By letter of 10 December 2007, ACC wrote to the appellant and declined his request for surgery because it was *"not related to your accident but to degenerative changes"*.

On 17 December 2007 Mr Fosbender wrote to ACC and again noted that x-rays showed:

> *"multiple levels of change of osteophytosis" and "... lateral stenosis.*

This man does have the diagnosis of lateral stenosis at L4-5 and L5-S1, giving him symptomatic sciatic pain ...".

On 16 January 2008 Mr Fosbender again wrote to ACC's Branch Medical Advisor, Dr Hancock and said:

"This man's primary problem is of lateral stenosis at L4-5 and L5-S1, which is symptomatic. There is no doubt that these symptoms were initiated by injury. The whole problem is, that while you recognise the injury has occurred and initiated its symptoms, and have provided cover in the past for this condition, to try and eliminate his pain we would need to alleviate the stenosis. There is no doubt the stenosis is pre-existent, but it is obvious the injury has destablished this to give him his current symptoms."

[6] By letter of 4 March 2008, ACC wrote to the appellant advising that his weekly compensation entitlements would cease because his ongoing symptoms were no longer related to his covered injury but *"rather to the degenerative changes present within your spine, which were present prior to the injury on March 12, 2007".*

[7] On 19 May 2008 in a letter to counsel for the appellant, Mr Fosbender said:

"... The so called degenerative changes are pre-existent, thus he already had these degenerative changes, with no symptoms. He was managing a heavy job as an engineer. <u>There is no recognisable injury or damage that would have been perpetrated by the impact</u>. He has destablished his back from the impact which has caused the pressure on his nerve root to become symptomatic". (emphasis added)

[8] At the request of Mr Sara, on 16 June 2008 Mr Fosbender again provided further comment (to Mr Sara) where he said: *"Therefore it is a high probability that the injury caused his symptoms. The basis of the injury is the soft tissue damage and destabilisation of those levels, which have impacted upon the lateral stenosis to create the changes and have provoked his problem."*

The Review Hearing

[9] A review hearing took place on 26 June 2008 and the decision was issued on 8 July 2008 upholding the decisions of ACC. On page 17, the Reviewer (Ms K Stringleman) concluded:

"The medical evidence is that Mr Johnston's fall did not cause the degenerative changes in Mr Johnston's spine. The stenosis causing nerve root entrapment was present prior to the accident, although not causing him problems. It was the event of the accident which rendered these degenerative changes symptomatic. It is the ongoing effects of the degenerative changes which is the condition for which surgery is required and which is presently causing Mr Johnson's disability. There is no evidence which indicates that the back strain for which cover was granted is of itself causing ongoing pain and incapacity."

[10] Mr Sara sent a copy of the reviewer's decision to Mr Fosbender for his further comment, particularly in view of the reviewer's discussion at page 15 of the decision where (it is put to me), in the second paragraph, she implied that Mr Fosbender had altered his opinion to allow the appellant to receive a monetary entitlement. Mr Fosbender was

specifically asked to explain why he initially thought that there was no recognisable injury or damage which had been perpetuated by the impact, but later said that the basis of the injury was of soft tissue damage and destabilisation of pre-existent stenosis. Mr Fosbender's 1 August 2008 response contained the following:

> *"... I do not think that the two statements I have made are incompatible, and I have not changed my statement at all, but rather clarified it. The first statement made had no evidence of injury within the spine, but the appearance of lateral stenosis. This is indeed true. The problem is that the man has had an injury, clearly stated, and has gone on to have symptoms of nerve root pressure, and with the appearance of lateral stenosis, the cause of the pain is pressure associated with lateral stenosis. The problem is however trying to correlate the injury with a process which was entirely silent up until the time this man had his injury.*
>
> *My correlation is that indeed the injury did play a significant part in initiating this man's symptoms and the injury is likely to be soft tissue, not bony, and the MRI scan has not picked this up. Given that the MRI scan does have a failure rate of detecting such processes because the actual area of damage is ill defined, too small or the acute process has resolved.*
>
> *I do not believe that a person can live with for many years accruing a condition of lateral stenosis in the absence of symptoms, then has an accident, then develops the symptoms, and yet the accident cannot be correlated with the ongoing problem. There must be a connection between the injury and this man's ongoing symptoms which I think are significant ..."*

Relevant Law

[11] Section 117 of the 2001 Act provides that ACC can suspend, cancel or decline entitlements: *"(1) ... if it is not satisfied, on the basis of the information in its possession, that a claimant is entitled to continue to receive the entitlement."* Clause 1 of Schedule 1 of the 2001 Act provides: *"The Corporation is liable to pay or contribute to the cost of the claimant's treatment for personal injury for which a claimant has cover."*

[12] One of the leading cases in relation to entitlements where there have been degenerative changes is the High Court decision of *McDonald v ARCIC* (AP 2/02) [2002] NZAR 970. There, Panckhurst J made reference to a decision of Judge Beattie in *Hill* (189/98) and endorsed Judge Beattie having said:

> *"... personal injury caused wholly or substantially by the ageing 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 pre-existing degenerative condition that can be covered. The fact that it is the event of the accident which render symptomatic that which was previously 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."*

[13] Section 117(1) was examined by Judge Cadenhead in the case of *Holland* (256/05), where His Honour said:

"[i] *The onus is upon the appellant to show that he is entitled to continue receiving compensation. His onus is satisfied on a probability basis. The substantive law that applies is that subsisting at the date of cover.*

[ii] *The first step is causal issue: An appellant to have a continuing entitlement to weekly compensation has to satisfy the respondent on the balance of probabilities that the present current incapacity is presently a substantial and effective cause of the original injury, for which cover was granted. This issue will generally involve the considerations of type of injury suffered, the initial x-rays, and medical reports evaluating the present symptoms against what were the reasonable consequences to be expected of the original injury.*

[iii] *If the appellant can demonstrate on a probability basis that the symptoms complained of are still an effective cause of the accident, then the appellant must go on and demonstrate that the present injury giving rise to entitlements is not caused wholly or substantially by the ageing process. The onus of proof of this step is upon the appellant upon the balance of probabilities. What is necessary is a critical analytical assessment of the original injury in the light of the medical reports. This step, while intertwined in many cases with the causation step, is nevertheless an independent step and has to be satisfied by a claimant once the first issue of causation is hurdled."*

[14] In *Yuen* (20/30) Judge Beattie said:

"The foregoing statement of law precludes the proposition of ... which in effect is the notion best described as the "but for" *test often referred to by specialists in which it is contended that but for the accident the degenerative condition would have remained asymptomatic because it has been rendered symptomatic by the accident and therefore was attributable to the accident. That test whilst understandable from a medical perspective has no basis in law under Accident Compensation legislation. It is only physical injury* <u>*caused*</u> *by accident which is entitled to be covered and pre-existing conditions such as arthritis which may well be accelerated cannot be the subject of cover or inclusion under cover with the covered injury as the essential element of causation is absent ..."*

[15] In *Cochrane* (Wellington High Court, CIV 2003-485-2099), the High Court held that aggravation of an underlying condition does not afford cover or entitlements. Justice Miller stated:

"The question ought to have been whether he could show that his incapacity was caused in some degree by the injury for which he was granted cover. Had he been able to do so, it could not have been said that his condition was caused exclusively by factors such as age or disease. An appellant may not establish causation simply by showing that the injury triggered an underlying condition which was already vulnerable (the eggshell skull principle) or that the injury accelerated a condition that could have been suffered anyway. <u>*The question is simply whether the necessary causal nexus continues to exist between the injury and the condition.*</u>*"* (emphasis added)

[16] In *Baettig* (19/2007) Judge Beattie considered an appeal arising from a decision of Air New Zealand. This accredited employer suspended entitlements to Mr Baettig on the

grounds that his ongoing back condition was not attributable to the personal injury for which he had been granted cover. Mr Baettig was employed by Air New Zealand as a Customer Service Agent. He lifted a heavier than expected suitcase and experienced severe discomfort and pain in his neck and upper back. An MRI scan of his cervical and thoracic spine identified prominent degenerative changes at C3/C4 with further degenerative changes at C4/C7 as well. Medical evidence obtained by Air New Zealand confirmed that the appellant's condition was caused by aggravation of a pre-existing degenerative condition of his neck. Judge Beattie concluded at paragraph 22 of the judgment:

> *"[22] From the medical evidence presented I find that the appellant's ongoing pain is a consequence of the underlying spondylotic condition of his cervical spine. It has not been established as being attributable to the strain injury which he suffered in March 2005. If there was evidence that nerve root compromise had occurred then that would be a different story, but the evidence from the nerve conduction studies is that no such compromise exists."*

[17] In order to be entitled to funding for surgery, a claimant needs to establish that the need for surgery arises from injury for which cover was granted. In *Dobbs* (46/05), the court said:

> *"The crux of this case is the causal issue: The appellant to have an entitlement for the costs of surgery has to satisfy the respondent (ACC) on the balance of probabilities that the need for surgery arises from and is an effective consequence of the original injury or injuries, for which cover was granted. This issue will generally involve a consideration of the type of injury or injuries suffered, the x-rays, and medical reports evaluating the present symptoms against what has brought about the need for the present surgery. I would have thought that on this type of issue the view of the general practitioner and the medical specialists, who have actually examined and seen the claimant would be important.*
>
> *The appellant must demonstrate on a probability basis that the need for surgery arose from the accident or accidents and that the need for surgery was not* "wholly or substantially" *caused by the ageing process. The onus of proof of this step is upon the appellant upon the balance of probabilities."*

[18] Likewise in *Sparks* (45/06), the court said: *"The legal test for entitlements require sufficient evidence to show that the need for assistance arises as a consequence of the covered injury. Where there is an accompanied degenerative or gradual process condition, entitlements will not be available if the personal injury is caused wholly or substantially by that condition."*

[19] A helpful summary of the relevant principles can be found in *Edwards* (70/2007) and at [62] Judge Ongley held:

> *"The appellant is not disqualified from cover and entitlements because she already had a condition that could have resulted in ulceration. It is not a case of acceleration of a pre-existing condition (because there had been no ulceration) or of an underlying condition becoming symptomatic (because the ulceration was a new injury). It is rather a case of predisposition to ulceration that might never have occurred but for the accident. There is no strong evidence that ulceration was inevitable, or that the*

pre-accident deformity was the only substantial cause of ulceration in various locations where it developed."

Analysis

[20] The appellant relies upon the various reports and letters from Mr Fosbender. Inter alia, Mr Sara submits that the appellant: *"suffered a natural physical injury in his fall which caused soft tissue damage and destabilisation of the stenosis producing symptoms. This is a discrete injury in respect of which the appellant is entitled to cover."*

[21] Criticism is also made by Mr Sara of the decision of *McDonald*, but that decision (and *Cochrane*) is binding on this Court, and also of comments the Reviewer has made which, Mr Sara submitted, has impugned the professional integrity of Mr Fosbender by implication. However, Mr Fosbender's integrity is not at issue and is fully respected by me.

[22] The substantive issue is whether the appellant's ongoing incapacity and, therefore, need for surgery and other entitlement is caused by the injury for which he has cover. The x-rays and MRI scan both show that he has significant degenerative changes in his spine which appear to be the cause of his current pain. It is settled law that the *"but for"* test has no application in this area of the law.

[23] ACC's position is that the specialist medical opinion available to it, through Messrs Medlicott and Fosbender, is entirely supportive of the proposition that the appellant's condition was wholly or substantially a consequence of the ageing process rather than the March 2007 accident. Therefore, it is submitted for ACC that entitlements are no longer available for the appellant.

[24] I agree with Mr Evans that a careful reading of Mr Fosbender's reports show that his first view was that the appellant's current condition is due to natural degeneration. In his report of 21 November 2007, under the heading of *"Specific Diagnosis"*, he specifically says that the entrapment of the L4 and L5 nerve roots, are *"due to lateral stenosis with disc bulge"*. Under the heading of *"Diagnostic Testing and X-rays"* he noted that the plain x-rays of the lumbar spine showed *"multiple levels of change of osteophytosis"*.

[25] Again, in his letter of 17 December 2007, he says:

> *"This man does have the diagnosis of lateral stenosis at L4-5 and L5-S1, giving him symptomatic sciatic pain. He did not have symptoms prior to his injury, and did have a very significant high impact fall to provoke his symptoms. It is well known that a sizeable portion of the population do have changes within the lumbar spine suggestive of lateral stenosis, and they are able to go about their usual activities without any symptoms of that process. Injury has initiated this man's symptoms".*

[26] It is significant that he does not attribute the injury as being the cause of the degenerative changes; but as having *"initiated"* the pain symptoms.

[27] In his letter of 16 January 2008 he implicitly refers to the *"but for"* test where he says: *"If he had not had the injury, the probability is highest that he would not have these symptoms."* He had preceded that by saying:

> *"Thank you for your note regarding this man, and the situation of the decision made to decline funding for his surgery. It is undoubted he does have changes within his*

lumbar spine and multiple levels of disc dehydration and narrowing, which certainly can create the ridges and bulges as so described in his MRI scan. He does demonstrate lateral stenosis at the level of L4-5 and L5-S1 bilaterally, but more so to the (L). The description of a bulge at the level of L5-S1, I though was low grade. This man's primary problem is of lateral stenosis at L4-5 and L5-S1, which is symptomatic. There is no doubt that these symptoms were initiated by injury. The whole problem is, that while you recognise the injury has occurred and initiated his symptoms, and have provided cover in the past for this condition, to try and eliminate his pain we would need to alleviate the stenosis. There is no doubt the stenosis is pre-existent, but it is obvious the injury has destabilised this to give him his current symptoms."

[28] In Mr Fosbender's report of 16 January 2008, he goes on to say: *"My feeling in terms of fairness, is that this man should be recognised as having an injury related process and must be covered for his surgery."* Of course, Mr Fosbender is an expert on medical matters, as distinct from legal issues and whether they can take account of fairness.

[29] As indicated above also, in his letter of 19 May 2008, Mr Fosbender says: *There is no recognisable injury or damage that would have been perpetrated by the impact. He has destablished his back from the impact which has caused the pressure on his nerve roots to become symptomatic ..."* Simply put, Mr Fosbender's then view is that although the accident or impact injuries have healed in themselves, the accident also *"destablished"* pre-existing degeneration which has not settled down.

[30] It seems to me that this case falls squarely within the parameters of the *MacDonald* decision. The accident rendered previously asymptomatic degenerative changes to come into effect and become symptomatic. It is the ongoing effects of those degenerative changes which are causing the appellant's current disability and need for surgery. In terms of *McDonald*, the injury caused by the accident is what ACC covers and not that caused by degeneration. Also, as put by Miller J in *Cochrane*, the necessary causal nexus no longer exists between the accident injury and the appellant's current incapacity. This is because the appellant's degeneration was not caused by the accident but, as Mr Fosbender puts it, the pre-existing degeneration was *"destablished"* by the accident impact i.e. it was triggered from being asymptomatic to being symptomatic.

[31] Having said that, I am conscious of the thoughtfulness of Mr Sara's submissions which I now cover.

[32] There is uncontested medical evidence that prior to his fall in March 2007, the appellant had no back trouble of any kind. It seems also to be the case that, prior to the fall, the appellant had asymptomatic stenosis at two lumbar levels of his spine.

[33] Mr Sara submits that the facts do not fit the proposition that the appellant had a pre-existing condition which was merely rendered symptomatic by the injury, nor is it the case that he had a pre-existing condition which would have inevitably have become symptomatic without injury. He puts it that, as Mr Fosbender makes clear, the appellant suffered an actual physical injury in his fall which caused soft tissue damage and destabilisation of the stenosis producing symptoms; so that (he submits) this is a discrete injury for which the appellant is entitled to cover. Mr Sara understands Mr Fosbender to be opining that there is now no evidence of bony injury, and not that the appellant now has no back injury from the accident. He submits that the facts of this case show that the appellant has an unhealed soft tissue accident injury. However, it seems to me that

cannot be so because, in his letter of 19 May 2008, Mr Fosbender stated: *"There is no recognisable injury or damage that would have been perpetrated by the impact"*. Mr Fosbender's letter of 1 August 2008 does not seem to me to abrogate from that.

[34] The evidence is that the appellant had pre-existing degeneration which was rendered symptomatic by the injury from the fall, but, as at March 2008, all effects of the accident injury had healed. I agree with Mr Sara that I cannot assume that the pre-existing degeneration would inevitably have become symptomatic without injury. I do not think that the evidence shows that the appellant still has an unhealed soft tissue injury from the accident. I assess the evidence to be that there is now no evidence of injury whether bony or soft tissue. I am very conscious of Mr Fosbender's view, in his 1 August 2008 letter, *"There must be a connection between the injury and this man's ongoing symptoms which I think are significant"*.

[35] I accept that it is settled law that the respondent must take the appellant as it finds him and that the eggshell skull principle still applies. The effect of that rule is that if a person who has a predisposition to a certain type of injury actually suffers that injury, the existence of the predisposition does not disqualify that person from cover. The respondent cannot avoid responsibility if the consequences of the injury are much worse for the appellant than would be the case had he not had a pre-existing condition. Nevertheless, in the present case there is not a sufficient nexus between the appellant's current incapacity and the accident injury, because the current incapacity is due to degeneration and that was caused by the ageing process and not by the accident which must have triggered off the likely pain effect of degeneration.

[36] Mr Sara also submitted that very careful consideration needs to be given to the principle of law which states that if there is an aggravation by the accident of a pre-existing condition, ACC is not responsible. Mr Sara submits that a thoughtful analysis of this whole area of the law is long overdue; and that, as a matter of law, if the pathophysiological process by which a person's condition is changed from being asymptomatic to symptomatic is due to a physical injury, then that person is entitled to cover and/or consequential entitlements; and that, put another way, if the aggravation itself is a physical injury, ACC is responsible for that injury.

[37] Mr Sara referred to Judge Ongley recently holding in *Hamilton* (No. 318/06):

> *"A reasonable assessment of causation should involve both the structural and functional aspect of the injury. In this case the substantial loss of a functioning shoulder should not be regarded as being caused wholly or substantially by the pre-existing gradual process condition."*

[38] Mr Sara submits that, in the present case, the appellant had full function of his back prior to his injury and that no evidence has been tendered to rebut Mr Fosbender's opinion about the existence of actual physical injury causing the appellant's symptoms. Mr Sara accepts that ACC is not responsible for the appellant's pre-existing stenosis condition; but puts it that ACC is responsible for the stenosis condition which has changed as a result of the physical injury. As explained above, I disagree. Mr Fosbender is clear that here is no recognisable accident injury.

[39] Mr Sara submitted that ACC was dealing with two different conditions with regard to the appellant's situation. On the one hand, it was dealing with a pre-existing asymptomatic condition which could possibly be injurious, but was not. On the other hand, it was dealing

with a change in the appellant's back condition which had been caused by the accident. Mr Sara submits that the result of the accident is actually a different back for the appellant, which is not the same back that the appellant had before 12 March 2007. He puts it that the reason the appellant's back is different is that he has had an injury caused by an accident. It seems to me that the appellant's ongoing suffering is caused by degeneration and, as I have already explained, not by the accident injury which has healed.

[40] Mr Sara also submitted that this area of the law has been plagued by vague and woolly expressions of a medico-legal flavour which have caused a forensic fog to descend over the whole issue. The classic example of such an expression is one such as *"the accident merely triggered the onset of symptomology"*; another one is *"the accident merely caused the previously asymptomatic pre-existing condition to become symptomatic"*; and there are other formulations of the same kind. He adds that the question is rarely if ever asked of a medical specialist: what structures or tissues in the person's body were injuriously affected by the accident so as to cause the symptoms?

[41] Mr Sara notes that recourse is often had to the High Court decision of *McDonald* which states that aggravation of a pre-existing condition does not entitle the sufferer to cover or entitlements. He submits that if it was the case that the accident event caused a change in the pathophysiological state of a person's body which would otherwise be called an injury, and that this injury comprises the aggravation of pre-existing degeneration, then, as a matter of law, the person is entitled to cover for that injury i.e. the aggravation.

[42] However, it seems to me that if ACC must cover an accident injury and grant entitlement for incapacity from that, entitlements must cease when all effects of the injury have healed as in this case. The appellant's current incapacity flows from degeneration. Maybe that was triggered by and continues from the accident, maybe not. Maybe, the degeneration would have incapacitated the appellant regardless of any accident, maybe not. The evidence is that the appellant's current incapacity is not caused by his accident injury but by pre-existing degeneration. I accept that if it could be shown that degeneration (with incapacity) is caused by the accident, then entitlements should continue, but the appellant's degeneration preceded the injury accident.

[43] Finally, Mr Sara reaffirmed that all the appellant needs to do is prove his case to the balance of probability. I agree. He submitted that he has done that; and that *Ellwood* requires ACC to be satisfied that the appellant is no longer entitled to weekly compensation and other entitlements; the onus is on the ACC to prove that; and it has failed to do so. In my view, that has been proved.

[44] While I understand Mr Sara's approach that a disease (e.g. degeneration) which was dormant until an injury accident but, by that is triggered into physical damage or hurt, should be part of the accident injury; the law seems to me to fairly deal with that situation. This is because the issue must be whether the hurt to the appellant remains to any extent an effect of the accident injury. If so, then entitlements remain due from ACC. If not, then the accident injury has healed but the degeneration (disease or whatever) has taken its likely and eventual path had there been no injury accident.

[45] Also, it may be that upon the healing of the accident injury and its effects, the suffering connected to that (including the need to settle the disease which had been triggered) has healed at least for a time. When the disease again begins to cause suffering, that effect is independent of the accident injury. This means that the affected

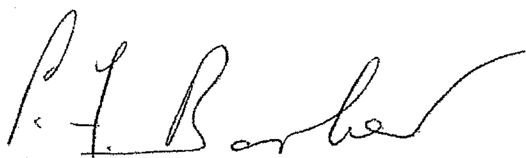
person cannot expect entitlement, because the fresh effect of the degeneration has not been caused by an accident.

[46] In any case, the nexus principle from *Cochrane*, and the causation approach from *McDonald* support the decisions of ACC in this case, as I have explained above. Those High Court authorities are binding on this Court.

[47] In the present case, the medical evidence shows that the appellant's current suffering is caused by degeneration and that all injury hurt has healed. Of course, s.26(2) of the 2001 Act makes it clear that *"personal injury"* does not include personal injury caused wholly or substantially by (inter alia) disease. Section 26(4)(a) states (inter alia) that personal injury does not include personal injury caused wholly or substantially by the ageing process. Mr Sara seemed to submit that those provisions apply to cover under the Act and not to incapacity. That must be correct but entitlements rely on continuing incapacity from personal injury. I find the appellant's continuing injury incapacity has not been caused by the covered accident but by pre-existing degeneration. I agree with Mr Sara to the extent that if the appellant's degenerative spinal area suffering had been caused by the accident, rather than by pre-existing degeneration, he would still be due ACC entitlements.

[48] In the present case, the medical evidence shows that the appellant's current suffering is caused by pre-existing degeneration and that all injury hurt has healed. Accordingly, the said decisions of ACC were correct and I agree with the decision of the Reviewer.

[49] For the above reasons, this appeal is dismissed.



Judge P F Barber
District Court Judge
WELLINGTON