IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2005-485-965

	BETWEEN	DAVID SIMM Appellant
	AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 15 September 2006

Appearances: J Miller for Appellant
A Barnett for Respondent

Judgment: 20 December 2006 at 3.30at 3.30 pm

JUDGMENT OF MALLON J

Solicitors:
John Miller Law, Wellington for Appellant
Broadmore Barnett Solicitors, Wellington for Respondent

Introduction

[1] This appeal concerns whether a claim for cover can lie under the Injury Prevention, Rehabilitation and Compensation Act 2001 ("the 2001 Act") for lung cancer caused by passive smoking in the work place, diagnosed and first treated prior to the commencement of the 2001 Act. The issue arises because the 2001 Act provides cover for this kind of claim. The predecessor to the 2001 Act, the Accident Insurance Act 1998 ("the 1998 Act), does not provide cover for this kind of claim.

[2] The appellant was a non-smoker but was exposed to smoke in the course of his employment. He was diagnosed as suffering lung cancer and first treated in 1999. He has since died. This claim has been continued by his estate.

[3] The matter came before the District Court as a preliminary question. The District Court found that there was no cover under the 2001 Act. If this appeal were to succeed then the appellant would still need to prove a link between his lung cancer and the work place exposure. However, for the reasons which follow, I consider that there is no cover under the 2001 Act and the appeal fails.

Arguments on appeal

[4] There were two alternative arguments put forward on behalf of the appellant. The first argument was that the appellant suffered a work-related gradual process, disease or infection for which there was cover under the 2001 Act. The second, alternative, argument was that the appellant had cover because he suffered a personal injury by accident that was covered by the 1998 Act and the 2001 Act.

Difference between the 1998 and 2001 Acts

[5] Under the 1998 Act personal injury caused wholly or substantially by a gradual process or disease was excluded from cover unless it fell within s 39(2)(d),

(e), (f) or (g) (s 29(2)). Section 39(2)(d) referred to personal injury caused by a work-related gradual process, disease or infection. Work-related gradual process, disease, infection was defined in s 33. That definition specifically excluded personal injury attributable to passive smoking (s 33(3)(b)). Through this route injury caused by passive smoking in the work place was not a "personal injury" covered under the 1998 Act.

[6] Like the 1998 Act, the 2001 Act definition of "personal injury" excludes personal injury caused by gradual process, disease or infection unless it is of a kind within s 20(2)(e) to (h) (s26(2)). Section 20(2)(e) covers personal injury caused by work-related gradual process, disease or infection. That is defined in s 30 and, in contrast with the 1998 Act, does not exclude injury attributable to passive smoking. Injury caused by passive smoking in the work place is therefore a covered "personal injury" under the 2001 Act.

[7] If passive smoking was a personal injury covered by "accident" rather than by gradual process, disease or infection then cover would be available. For present purposes there is no relevant difference between the 1998 and 2001 Acts in the definitions of "accident".

First alternative: gradual process

[8] Counsel were agreed that the starting point was s 20 of the 2001 Act. That section sets out who has cover for personal injury. There are three requirements (s 20(1)(a) to (c)). For the purposes of this appeal there is no dispute about the second and third requirements of s 20[1]. The issue turns on the first requirement. The first requirement (s 20(1)(a)) is that a person "suffers personal injury in New Zealand on or after 1 April 2002".

[9] It is therefore necessary to determine when a person is considered to be suffering the injury. Where the injury is caused by work-related gradual process,

[1] Whether the appellant's exposure to smoke in his former work environment qualifies as a personal injury caused by work-related gradual process, disease or infection would need to be established if this appeal succeeds. For present purposes the important point is that passive smoking is not excluded.

disease or infection that question is determined by s 37. That section provides that "the date on which a person suffers personal injury" of this kind is the earlier of:

a) The date on which the person "first receives treatment" from a medical practitioner for that "personal injury" "as that personal injury"; and

b) The date on which the "personal injury first results in the person's incapacity".

[10] The parties are agreed that the latest date that the appellant was incapacitated was November 1999. If, pursuant to s 37, that is the relevant date then the appellant does not have cover under the 2001 Act pursuant to s 20. Cover would then be potentially available under the 2001 Act only if the appellant falls within the transitional provisions (see [19] to [23] below).

[11] Mr Miller submitted that 1 November 1999 is not the relevant date. He submitted that where an injury continues to be suffered at the time the 2001 Act comes into force then s 37 should determine the date by reference to the treatment of the "personal injury" as that term is defined in the 2001 Act. Mr Miller said that the reference to "personal injury" in s 37 must be a reference to personal injury as it is defined in the 2001 Act because the appellant's condition was not recognised as a "personal injury" before the 2001 Act. The appellant could not have received treatment for that "personal injury" as that "personal injury" before 1 April 2002 because it was not recognised as a "personal injury" before that date. Mr Miller said this interpretation was supported by the heading to s 37. That heading refers to the date a person is "suffering" the personal injury. That he says is recognition that the suffering can be on-going.

[12] Mr Barnett submitted that s 37 determines when a claimant first suffers, not whether a claimant is continuing to suffer, an injury. This question must be answered by reference to considering what the personal injury as a matter of fact is. In this case the personal injury as a matter of fact is lung cancer caused by passive smoking in the work place. Applying that to s 37, lung cancer (caused by passive

smoking) first resulted in the appellant's incapacity no later than November 1999 when the appellant had surgery. It defies common sense to say that the appellant first suffered lung cancer (caused by passive smoking) after the 2001 Act came into force.

[13] I consider that heading does not assist the appellant's argument. The heading says that the section is about determining "the date" on which a person is to be regarded as suffering the injury. It is a reference to determining a single date. The same is true of the opening words of s 37(1). Because it can be unclear in gradual process cases when an injury is suffered, s 37 is intended to set the date at which a person is deemed to be suffering that injury. I therefore agree with Mr Barnett that s 37 is about determining when an appellant first suffers the personal injury, rather than whether the appellant is continuing to suffer the personal injury.

[14] The question is what is meant by "personal injury" in s 37. That depends on whether "personal injury":

a) is to be given its defined meaning in the 1998 Act; or

b) is to be given its defined meaning in the 2001 Act; or

c) refers to the injury that has occurred as a matter of fact.

[15] Mr Miller submitted that the meaning of "personal injury" is of such fundamental importance that the legislature would not have left it undefined at any stage. He said personal injury could not be given different meanings in different places in the Act unless it was clear that the legislature intended to do that. He submitted that when the legislation wants to refer to a physical injury not as defined it uses the term "injury".

[16] I agree with Mr Miller about this, but reach a different view as to the consequence of this approach. I consider that "personal injuries" has been defined by the legislature and where it is used in the legislation it should be given its defined term unless it is apparent that this was not intended. I also agree that the legislature

has referred to "injury" where it means the harm to the claimant[2]. It would be odd, as well as confusing, if the legislature used "personal injury" sometimes by reference to the definition in the Act and sometimes by reference to something else. "Personal injury" in s 37 should therefore be given its defined meaning unless it can be said that this leads to a conclusion that cannot have been intended.

[17] Taking this approach "personal injury" is defined as meaning "physical injuries" (here harm to lungs) (s 20(1)(c)). It does not, however, include that harm to lungs if it is caused wholly or substantially by gradual process, disease or infection unless it is a personal injury of a kind described in one of s 20(2)(e) to (h) (s 26(2)). Section 20(2)(e) refers to personal injury caused by work-related gradual process, disease or infection suffered by the person. That in turn is defined in s 30 and, unlike the 1998 Act, does not exclude passive smoking.

[18] Therefore the reference in s 37 to "personal injury" refers, in this case, to harm to lungs including where that harm has been caused by work-related gradual process, disease or infection. When was that harm first treated or when did that harm first result in incapacity? The answer is November 1999. This means that there is no cover under s 20 because the "personal injury" (here harm to lungs caused by work-related gradual process, disease or infection) was suffered before 1 April 2002. This is, as I understand it, Mr Barnett's argument. I agree with it.

[19] If the personal injury is suffered before 1 April 2002 then cover may still be available if s 360 is satisfied. Section 360(1) provides that s 360(2) applies to a claim for cover if the claim:

> "(a) is for personal injury suffered before 1 April 2002; and
>
> (b) is not lodged before 1 April 2002."

[20] Section 360(2) provides that a claimant has cover if:

> "(a) the claimant would have had cover under [the 2001 Act], had the injury occurred on or after 1 April 2002; and

[2] See s 359 which provides that the Act "does not confer cover in relation to an injury suffered before 1 April 1974".

(b) the claimant would have had cover under the Act that was in force at the time the person suffered the injury."

[21] Mr Miller submitted that s 360 did not apply at all. He said it was concerned with claims for cover that could have, but which had not, been made under the 1998 Act (or its predecessors). Such claims would only be covered under the new Act if they would have been covered had the injury occurred after 1 April 2002. This was indicated by the heading. That heading refers to "Claim for cover under former Acts not lodged until on or after 1 April 2002".

[22] Mr Miller submitted that the appellant did not have a claim for "personal injury suffered before 1 April 2002". The appellant could not make, and did not make, a claim for cover under the 1998 Act because he had not suffered a "personal injury" for which the 1998 Act provided cover. He was outside s 360 because s 360(1)(a) was not satisfied.

[23] I consider that "personal injury" in s 360 must again be given its defined meaning in the Act unless it is clear that this cannot have been intended. Section 360 applies if the "personal injury" was suffered before 1 April 2002. As defined in the 2001 Act that means harms to lungs caused by work-related gradual process, disease or infection. That was suffered no later than November 1999 (by reference to s 37). Accordingly s 360(1)(a) is satisfied. Section 360(1)(b) is also satisfied because the claim was not lodged before 1 April 2002. This means that (under s 360(2)) the appellant only has cover if he would have cover under the 2001 Act had the injury occurred on or after 1 April 2002 (yes) *and* he would have had cover under the Act in force at the time he suffered the injury (no).

[24] The result is that the appellant does not have cover even though he continued to suffer from the injury after 1 April 2002 and even though had he first been treated after 1 April 2002 he would have had cover. Is this a conclusion that cannot have been intended by Parliament?

[25] Mr Miller submitted that if someone was still suffering lung cancer when the 2001 Act came into force it was difficult to see why that person should not have

cover under that Act when those who were first treated after the Act came into force would have cover. This contrasted with what he said was the intended effect of s 360 – that is, where a policy decision has been made that earlier claims that would previously have been covered were no longer to be covered.

[26] Mr Barnett submitted that providing cover for work-related lung cancer first treated after 1 April 2004 was just an example of line drawing. There were many examples in the history of the legislation. For example, if a person broke their leg in an accident and had that leg amputated before the accident compensation scheme commenced under the 1972 legislation, that person would not have cover under the legislation even though they continued to suffer incapacity. Mr Barnett also referred to *Livingstone v ACC* HC WN CIV 2005-4850-78 12 May 2006 as illustrating the line drawing that has occurred. In that case it was held that exposure to asbestos prior to 1972 would not be covered if it was diagnosed prior to that date but would be if it was diagnosed after that date.

[27] Mr Barnett said that, although this line drawing meant that some claimants missed out on cover, those claimants would have common law rights to sue where a cause of action against a defendant existed, whereas claimants that were covered had those rights removed. He also submitted that if cover was to be extended to claimants first treated prior to 1 April 2002 the legislation would be operating retrospectively. He said that clear words would be needed if this had been intended.

[28] I agree with Mr Barnett that the result in this case is just another example of line drawing that the legislature has made from time to time through the various stages of the accident compensation scheme. If Parliament intended in the 2001 Act to extend cover to passive smoking caused in the work place and diagnosed before the 2001 Act then it would have said so more clearly. This is not a case of taking a "niggardly" interpretation. Rather Mr Miller's argument seeks to provide expanded cover which, as is apparent from the words used in the legislation, was not intended.

Second alternative: accident

[29] The alternative argument for the appellant is that his lung cancer was caused by an "accident" rather than by gradual process or disease. If the personal injury qualifies as an accident it does not need to qualify as a work-related gradual process, disease or infection. The exclusion from work-related gradual process, disease or infection for passive smoking in the 1998 Act becomes irrelevant. If the lung cancer was caused by an "accident" there was cover under the 1998 Act and the 2001 Act because the relevant wording of the legislation is the same.

[30] There are two definitions of "accident" which the appellant relies on in the alternative. The first is under s 28(2)(c) of the 1998 Act (and 25(1)(a) of the 2001 Act). That requires that the physical injury (lung cancer) is caused by "a specific event, or a series of events" that "involves the application of a force … external to the human body". It also requires that the "series of events" not be "a gradual process".

[31] Mr Miller submitted that the series of events that caused the lung cancer was the daily attendances by the appellant in the employer's smoke filled lunch room. This was contrasted with a continuous unrelenting process of exposure to injurious substances. It was submitted that scientific evidence might be available to show that passive smoking can be caused by a series of specific events.

[32] I agree that the daily attendance in a smoke filled lunch room could potentially be described as a "series of events". That, however, does not take into account that a "series of events" is seen as something different from "gradual process". There is no evidence (as Mr Miller accepted) that passive smoking causes lung cancer other than by a gradual process. Further, it is clear that the legislation has viewed passive smoking as a gradual process and the legislature made the decision in the 1998 Act to exclude cover for that. It did that by excluding passive smoking from the definition of "work-related gradual process, disease or infection". If exposure to smoke in the work place were a "series of events" then that would be inconsistent with the legislature having excluded cover for that under the "work-related gradual process, disease or infection" definition.

[33] Even if exposure to smoke in the work place could be described as a "series of events" these events would also need to involve the application of a force. Mr Miller submitted that the application of a deleterious agent such as tobacco smoke which permeates clothing and the lungs can be described as a force. He said it was dangerous to interpret words only as encompassing their ordinary usage. By way of illustration he said that sexual violation and battery would not be within the ordinary usage of the word "accident" yet they are covered by the legislation.

[34] I do not agree with this submission. The ordinary meaning of force involves something in the nature of strength, movement, energy, violence, power, impetus, propulsion or the like. Smoking does not involve anything of this nature external to the body. The human body inhales an external agent. This kind of event is captured by a separate definition (which is Mr Miller's alternative argument under this part of the appeal). There is therefore no need to strain the meaning of "force" in the way Mr Miller has proposed.

[35] The second definition of "accident" the appellant relies is "the inhalation or oral ingestion of any solid, liquid, gas or foreign object on a specific occasion" (s 281(2)(b) of the 1998 Act or s 25(1)(b) of the 2001 Act). The difficulty with this argument is the requirement that the inhalation be "on a specific occasion". Mr Barnett said that on the basis that the appellant had been employed by his employer for 35 years, worked five days a week, 50 weeks a year and attended the lunch room three times a day (ie at morning and afternoon tea and lunch), that would amount to 26,000 occasions. This number is probably overstated because it apparently does not exclude sick days or occasions when morning or afternoon tea or lunch was not taken in the lunchroom. Even so, Mr Barnett's point is that, on any ordinary view, this does not fall within the meaning of "a specific occasion".

[36] Mr Miller said that "specific occasion" should be interpreted in the plural. He referred to s 33 of the Interpretation Act 1999. However in the context of the definition of "accident" in the legislation a different interpretation (that is, a singular interpretation) is required. In the first definition of "accident" the legislation has referred to "a specific event, or a series of events". This second definition is confined to a "specific occasion". There is also the problem, as with the first

alternative under this part of the appeal, that to interpret the legislation in the way Mr Miller contended is inconsistent with the legislature having made a decision to exclude work-related passive smoking.

[37] My conclusion on this part of the appeal is similar to that in *Winikerei v ACC* HC WN CIV 1999-485-000008 27 July 2005 where the Court was concerned with foetal harm through alcohol consumption during pregnancy.

[38] For these reasons, if it is unfair to deny cover to claimants who first suffered lung cancer from passive smoking in the work place prior to 1 April 2002 and who continue to suffer lung cancer, that is a matter for Parliament to address and not the courts.

Result

[39] The appeal is dismissed. If the parties cannot agree on costs they are invited to submit memorandum to me by 30 January 2007.

Mallon J