

**UNDER S 160(1)(b) OF THE ACCIDENT COMPENSATION ACT 2001
THERE IS A SUPPRESSION ORDER FORBIDDING PUBLICATION
OF THE RESPONDENT'S NAME AND IDENTIFYING PARTICULARS.**

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2022-485-174
[2023] NZHC 266**

UNDER	the Accident Compensation Act 2001
IN THE MATTER OF	an application for special leave under s 162 of the Accident Compensation Act 2001
BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
AND	D Respondent

Hearing: 21 November 2022

Appearances: A S Butler KC for the Appellant
B H Woodhouse and M J McKillop for the Respondent

Judgment: 23 February 2023

JUDGMENT OF PALMER J

Counsel/Solicitors
A S Butler KC, Wellington
B H Woodhouse, Barrister, Wellington
M J McKillop, Barrister, Wellington

What happened?

D's injuries and claim

[1] D was born in Russia in August 2001.¹ In August 2004, when he was three years old, he was adopted by New Zealanders and immigrated to New Zealand.

[2] In November 2019, D was diagnosed with severe Post Traumatic Stress Disorder (PTSD) caused by physical injuries he suffered before he was three. D made a claim for cover under the Accident Compensation Act 2001 (the Act).

[3] The Accident Compensation Corporation (ACC) declined to accept the claim for cover. In February 2020, that was confirmed on review. Relevantly, the reviewer concluded:

- (a) under ss 20 and 22 of the Act, the personal injury was not suffered in New Zealand and D was not ordinarily resident in New Zealand at the time it occurred; and
- (b) under s 36(2) of the Act, the date on which a person suffers mental injury because of physical injuries, is the date on which the physical injuries are suffered.

District Court judgment

[4] On 5 August 2021, in the District Court at Wellington, Judge P A Cunningham held, in summary:²

- (a) D's PTSD is a mental injury as a consequence of physical injuries under s 26(1)(c) of the Act.³ Section 36(2) of the Act deems that the date such a mental injury is suffered is the date of the physical injury.

¹ Given the sensitive nature of this matter, as in the District Court, the name and identifying particulars of the respondent are anonymised and suppressed under s 160(1)(b) of the Act, by consent.

² *D v Accident Compensation Corporation* [2021] NZACC 125.

³ At [1].

- (b) Section 22 of the Act requires a person to be ordinarily resident in New Zealand to have cover. D was not ordinarily resident in New Zealand at the date of his physical injuries.⁴ The fact D's parents were employed from New Zealand was not enough to establish that under s 17 of the Act. They were not working overseas when they travelled to northern Europe to adopt him.
- (c) But *Accident Compensation Corporation v Monk* held that it does not matter that there was no cover for the physical injuries.⁵ D just needs to have suffered them.⁶ The fact the physical injuries were not suffered in New Zealand is only relevant to determining when cover for the mental injury is available.⁷ The mental injury was suffered in New Zealand. There is cover for the mental injury.
- (d) D's status as a child of his New Zealand parents under the Adoption Act is consistent with him having ACC cover.⁸

[5] On 15 March 2022, Judge P R Spiller granted leave to appeal to the High Court on a point of law: the correct interpretation of s 26(1)(c), in bold below:⁹

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

⁴ At [19] and [49].

⁵ At [36], citing *Accident Compensation Corporation v Monk* [2012] NZCA 615, [2013] NZAR 1.

⁶ At [52].

⁷ At [43].

⁸ At [45].

⁹ *Accident Compensation Corporation v D* [2022] NZACC 39.

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

Relevant accident compensation law

[6] The other most relevant provisions of the Act are:

3 Purpose

The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through—

- (a) establishing as a primary function of the Corporation the promotion of measures to reduce the incidence and severity of personal injury:
- (b) providing for a framework for the collection, co-ordination, and analysis of injury-related information:
- (c) ensuring that, where injuries occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation:
- (d) ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment:

...

6 Interpretation

- (1) In this Act, unless the context otherwise requires, —

...

mental injury has the meaning set out in section 27

...

personal injury has the meaning set out in section 26

...

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:

...

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
 - (ii) outside New Zealand on, with, or in relation to a person who is ordinarily resident in New Zealand when the act is performed; and
 - (c) is within the description of an offence listed in Schedule 3.
- (3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.
- (4) Section 36 describes how the date referred to in subsection (3) is determined.

...

21B Cover for work-related mental injury

- (1) A person has cover for a personal injury that is a work-related mental injury if—
 - (a) he or she suffers the mental injury inside or outside New Zealand on or after 1 October 2008; and
 - (b) the mental injury is caused by a single event of a kind described in subsection (2).
- (2) Subsection (1)(b) applies to an event that—
 - (a) the person experiences, sees, or hears directly in the circumstances described in section 28(1); and
 - (b) is an event that could reasonably be expected to cause mental injury to people generally; and
 - (c) occurs—
 - (i) in New Zealand; or
 - (ii) outside New Zealand to a person who is ordinarily resident in New Zealand when the event occurs.
- (3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.
- (4) Section 36(1) describes how the date referred to in subsection (3) is determined.

22 Cover for personal injury suffered outside 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 outside 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 person is ordinarily resident in New Zealand when he or she suffers the personal injury; and
 - (d) the personal injury is one for which the person would have cover if he or she had suffered it in New Zealand.

27 Mental injury

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

36 Date on which person is to be regarded as suffering mental injury

- (1) The date on which a person suffers mental injury in the circumstances described in section 21 or 21B is the date on which the person first receives treatment for that mental injury as that mental injury.
- (2) The date on which a person suffers mental injury because of physical injuries suffered by the person is the date on which the physical injuries are suffered.

...

Submissions

[7] Dr Butler KC, for ACC, submits that the District Court erred because:

- (a) D says his personal injury is described in s 20(2)(a), as a personal injury caused by an accident to the person. ACC does not dispute that. But s 20(1)(a) does not apply because D was not in New Zealand when he suffered the physical injury. The Court of Appeal in *Accident Compensation Corporation v Monk* held that it does not matter that physical injuries from which a mental injury arises are not covered. But the Judge erred in assuming that this enabled the Court to ignore s 20(1)(a). *Monk* does not exempt a claimant from showing that they suffered a personal injury in New Zealand.
- (b) The personal injury suffered here was not a mental injury but a s 26(1)(c) personal injury, which is a composite injury consisting of two elements. A claimant must demonstrate that both the mental injury and the physical injury which caused it were suffered in New Zealand, under s 20(1)(a), unless some other provision says otherwise. All *Monk* decided was that the physical injury did not need separate cover. It said nothing about where the injury occurs or the status of the claimant at the time the relevant physical injury occurred.

- (c) Section 36(2) deems the date upon which a mental injury caused by a physical injury is suffered to be the date on which the physical injuries are suffered. That is part of a careful, crystalline statutory scheme that fixes relevant dates of injury for the purposes of cover. The relevant date specified by s 36(2) is the date on which the physical injuries are suffered. The purpose of s 36(2) is to avoid the complexity of establishing the actual date of an injury. The Court cannot ignore Parliament's language, which reflects parliamentary choices that must be respected. A common sense approach needs to be taken to the ACC legislation and it is not surprising Parliament only intended to provide cover for s 26(1)(c) injuries where both elements occurred in New Zealand. D would presumably be able to sue in Russia, which is where liability should be resolved. He can seek medical assistance and income support in New Zealand.
- (d) In respect of personal injuries established by ss 21 and 21B, s 36 adopts the relevant date of injury as being the date on which the claimant first received treatment for a mental injury as a mental injury. Parliament could have, but did not, fix the same relevant date for a s 26(1)(c) personal injury. Similarly, s 37 shows that where Parliament wanted to give a claimant the benefit of two options as to relevant date, it did so. The case of *Bryant v Attorney-General* is distinguishable because there was a true connection to New Zealand.
- (e) The physical injury was not suffered in New Zealand, for the purposes of s 20. As the Judge found, D was not ordinarily resident in New Zealand under s 17 at the time he suffered the injury, for the purposes of s 22(1)(c). So, there is no cover under either route. Adoption is irrelevant and makes no difference.
- (f) D's New Zealand Bill of Rights Act 1990 (Bill of Rights) argument is raised for the first time on appeal and lacks the evidential record required to establish discrimination, which would have precedential implications for other provisions. This is not a case of a clear breach

of s 19 which is unable to be justified under s 5. There is no discrimination here where someone with no connection to New Zealand is treated differently to someone with a connection. We have a Bill of reasonable rights. Different treatment is reasonable and reflects the statutory scheme.

[8] For D:

- (a) Ms Woodhouse submits the District Court was correct to determine cover is available for D's mental injury given it was suffered in New Zealand. ACC's argument is that s 36(2) requires the Court to create a hypothetical alternative where the mental injury occurred in a different location to where it occurred. But s 36(2) relates to time, not location. There is no need to stretch its scope in such a complicated way. Section 20(1)(a) does not require both the physical and mental components to be in New Zealand. It is not a composite injury but a mental injury. ACC's argument rests on the assumption that the physical injury requires cover, but it does not as the Court of Appeal held in *Monk*.
- (b) D suffered the mental injury in December 2018 in New Zealand. Accordingly, he has cover under s 20. There is no link between the deemed timing of the mental injury and the location where the physical injury occurred. The PTSD was suffered at age 17 in Wellington. Once there is cover, counselling can follow. The deemed date does not override a factual finding of where an injury was actually suffered, as the High Court held in *Bryant v Attorney-General* and *TN v Accident Compensation Corporation*.¹⁰ That is not required by the Act, is inconsistent with its legislative history and purpose, is inconsistent with Court of Appeal authority, and is discriminatory.
- (c) Mr McKillop submits that s 6 of the Bill of Rights requires the Court to prefer a rights consistent interpretation of a statutory provision when

¹⁰ *Bryant v Attorney-General* [2000] NZHC CP 44/00 at [37]; and *TN v Accident Compensation Corporation* [2022] NZHC 1280 at [62].

that meaning can be given. Section 19 of the Bill of Rights affirms the right to freedom from discrimination on prohibited grounds, including ethnic or national origin. ACC's restrictive interpretation would have an indirect discriminatory impact on those with a non-New Zealand ethnic or national origin. There is ambiguity. Irrespective of s 5 justification arguments, D's more rights-consistent interpretation must be preferred.

Should the appeal succeed?

[9] Under s 20(1), a person has cover for a personal injury if they suffer a personal injury in New Zealand and the injury is described in s 26(1) and in s 20(2). It is agreed the injury is described in s 20(2)(a). The issue is whether the injury is a personal injury, as defined and described in s 26(1).

[10] The terms of s 26(1)(c) indicate that a mental injury, suffered by a person because of physical injuries suffered by the person, is a personal injury. I do not accept Dr Butler's submission that s 26(1)(c) refers to a composite injury. It is a mental injury as defined in s 27. The terms of s 26(1)(c) indicate it is a mental injury with a specified cause. Under s 26(1), it is a mental injury as distinct from, for example:

- (a) physical injuries (s 26(1)(b));
- (b) other mental injuries caused by certain criminal acts (s 26(1)(d)); and
- (c) work-related mental injuries which are caused by a single event (s 26(1)(da)).

[11] Accordingly, the relevant personal injury for the purposes of s 20(1) is the mental injury. As a matter of fact, D's mental injury was suffered in New Zealand from 2019. That conclusion involves applying, not ignoring, s 20(1)(a).

[12] As a matter of law, s 36(2) deems the date on which D is to be regarded as suffering the mental injury to have been the date the physical injuries were suffered. In this case, that was before August 2004. As Ms Woodhouse submits, the language

Parliament used in s 36(2) does not deem the mental injury to have been suffered in any particular location. I conclude that the effect of the text of the Act is that D has cover.

[13] Dr Butler argues that s 36(2) fixes a date for mental injuries caused by physical injuries which is different to the dates set under s 26(1) for mental injuries caused by certain criminal acts or work-related mental injuries which are caused by a single event. It does. But s 36(1) only fixes the date on which mental injuries are suffered, as confirmed by ss 21(4) and 21B(4). Section 36 does not fix a location for any of those mental injuries. Section 21(2)(b) and (3) govern the location for mental injuries caused by certain criminal acts. Section 21B(2)(c) and (3) govern the location for work-related mental injuries caused by a single event. The provisions governing the location of mental injuries caused by physical injuries are ss 20(1)(a) and 22. As I hold above, those mental injuries here were suffered in New Zealand. For all of these mental injuries, different provisions govern the location where, and the date on which, a personal injury is suffered. That conclusion is consistent with the decision in *Bryant v Attorney-General*.¹¹

[14] The above interpretation is also consistent with the purpose of the Act, as expressed in s 3. Minimising the incidence of mental injury and the impact of mental injury on the New Zealand community is achieved through access by D to the services made available by cover under the Act. As s 3(c) provides, where injuries, including mental injuries, occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life. This can be done through the entitlements that restore, to the maximum practicable extent D's health, independence and participation.

[15] I do not consider the Bill of Rights argument make much difference to the interpretive issue here. A requirement of cover related to the location where an injury was suffered could affect those of New Zealand or non-New Zealand ethnic or national origin. There may be a tendency for it to impact more frequently on the latter. But, if so, that is inherent in the overall statutory regime for cover. Whether that is consistent

¹¹ *Bryant v Attorney-General*, above n 10, at [37]

with the Bill of Rights is likely to depend on whether there is a reasonable justification for any limitation of rights. The justification for limitation of rights is relevant to interpretation.¹² I have not heard sufficient argument on that, or on the appropriate comparator, to conclude the Bill of Rights makes a difference to this issue. In any case, my interpretation of the legislation is consistent with what Mr McKillop submits is the rights-consistent interpretation.

[16] I also consider that the legislative history and case law supports the interpretation I have reached. In *TN v Accident Compensation Corporation*, in a context where cover was established but entitlements were not, Cooke J reviewed the legislative history of s 36(1).¹³ He concluded its predecessor was enacted to remedy injustice of depriving victims of sexual abuse of cover because of a previous limitation period.¹⁴ It ensured that those who suffered harm from childhood sexual abuse nevertheless received compensation. To the extent that is relevant to this case, it supports my interpretation.

[17] In 1991 the Court of Appeal, in *Accident Compensation Corporation v E*, held that “accident” included the unexpected consequences of an intended activity including mental consequences, whether or not there was also physical injury.¹⁵ In response, a Ministerial Working Party concluded that stress should not be included and that physical injury should be present before mental injury is covered to avoid stress claims entering “through the back door”.¹⁶ Accordingly, the Accident Rehabilitation and Compensation Insurance Act 1992 contained a definition of personal injury that is now effectively that reflected in s 26(1)(c).

[18] After reviewing that history, the Court of Appeal in *Monk v Accident Compensation Corporation* held that the ordinary meaning of the statute is that a mental injury under s 26(1)(c) may be covered, although the separate physical injury from which it results is not.¹⁷ After reviewing the legislative history, the Court stated:

¹² *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064 at [50]–[51].

¹³ *TN v Accident Compensation Corporation*, above n 10, at [26]–[34].

¹⁴ At [31] and see [39].

¹⁵ *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA).

¹⁶ *Report of the Ministerial Working Party on the Accident Compensation Corporation and Incapacity* (1991) at [362] – [364].

¹⁷ *Monk v Accident Compensation Corporation*, above n 5, at [18].

[26] It appears, then, that the restriction on mental injury claims must have originated with the Ministerial Working Party and been adopted in the Bill. The legislative history indicates that Parliament sought only to prevent workplace stress claims. That purpose does not indicate that the physical injury required under s 26(1)(c) must itself be covered.

...

[30] A mental injury may be covered under s 26(1)(c) of the 2001 Act only if it results from a physical injury, and the mental injury must further result from an accident or qualify as a treatment injury. Like Mallon J, we are not persuaded that the ordinarily meaning of the statutory language or the object of the legislation further requires that the physical injury be defined as a physical injury that is itself covered.

[19] This history and case law confirms that the sort of mental injury at issue here is an injury covered by the Act and is not a composite injury. There does not have to be cover for the physical injuries that cause the mental injury, in order for the mental injury to be covered.

[20] I conclude that D has cover under the Act for his mental injury, on the basis of the text, purpose and context of the Act.

Result

[21] I dismiss the appeal.

[22] It is not clear to me whether D seeks costs. If so, and if costs cannot be agreed, I reserve leave for D to file submissions of up to 10 pages within 10 working days of this judgment. ACC may file submissions in response of the same length within 10 working days of that and D may file and serve reply submissions of up to five pages within five days of that.

Palmer J