IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-829

IN THE MATTER OF	the Injury Prevention, Rehabilitation, and Compensation Act 2001
AND	
IN THE MATTER OF	an appeal under s 162 of the Act
BETWEEN	DESHAN SAM Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 17 September 2009

Appearances: Mr Miller for the appellant
Mr Barnett for the respondent

Judgment: 4 November 2009 at 4.30 pm

JUDGMENT OF MALLON J

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[1] The appellant seeks leave to appeal my decision *Sam v Accident Compensation Corporation* [2009] 1 NZLR 132. In that decision I held that the appellant's cerebral palsy was not caused by an "accident" and so compensation under the Injury Prevention, Rehabilitation, and Compensation Act 2001 was not available. The evidence established that the cerebral palsy was probably the result of the appellant being deprived oxygen while in utero in the latter stages of the mother's labour. There was a finite list of possible causes for the oxygen deprivation but on the evidence it could not be said which of those causes was (or were) the likely cause(s). The possible causes included placental disease or placental separation.

[2] In reaching my decision I rejected a submission that if some of a finite range of possible causes would be covered as an "accident" it was then for the ACC to disprove that cause. I also rejected a submission that causes of cerebral palsy occurring in utero would qualify as an accident within the meaning "a specific event or a series of events, other than a gradual process, that…involves the application of a force (including gravity), or resistance, external to the human body" (s 25(1)(a)(i) of the Act). I also rejected a submission that cerebral palsy caused by placental disease or placental separation would qualify as an accident as being "any exposure to the elements, or to extremes of temperature or environmnent" (s 25(1)(e) of the Act).

[3] As developed in the course of oral submissions on the leave application, the appellant says that there are two questions of law, capable of serious and bona fide argument, in respect of which leave should be granted:

a) Does a proper reading of *Accident Compensation Corporation v Ambros* [2008] 1 NZLR 340 at [54] to [78] mean that if a claimant adduces some evidence that a claim is covered, the onus then shifts to ACC to disprove that the claim is not covered?

b) Does the "born alive" principle extend retrospectively so as to be relevant to the interpretation of s 25(1)(a)(i) and (e) of the Act and so that causes external to the foetus can be the application of force external to the human body and/or an extreme of environment?

[4] As to the first question of law I consider that the appellant's submission is based on a misreading of *Ambros.* In *Ambros* a medical misadventure was established. The issue was whether that misadventure caused the injuries (or, in that case, death). The Court of Appeal affirmed an earlier decision that under the accident compensation legislation it is for the plaintiff to prove causation between the accident/medical misadventure and the injuries/death for which cover is sought (the legal burden). It said that in assessing whether the plaintiff has proved causation on the evidence, the Court can take into account the absence of counter evidence which ought to have been in ACC's power to produce (the tactical burden). It also said that legal proof of causation may be satisfied in cases where the medical or

scientific view was no more than that there was a possible connection. However that did not mean that "risk of causation" would suffice – there must still be sufficient material to point to proof of causation on the balance of probabilities.

[5] The issue here was whether there was an "accident". That turned partly on what caused the cerebral palsy (which involves lesions to the brain and which is said to be the injury). The available medical evidence could list only a range of possible causes for the cerebral palsy, all arising during labour and none being the more likely cause. It was not a case of ACC having the power to investigate the possible causes to narrow down the list but failing to do so. The legal burden was with the appellant and the tactical burden did not shift to ACC. I consider that the appellant's first question of law is not capable of serious and bona fide argument.

[6] I also consider that the second question of law is not capable of serious or bona fide argument. The born alive principle does not assist the appellant. The appellant argues that some of the finite list of possible causes of the cerebral palsy come within s 25(1)(a)(i) and others come within s 25(1)(e). The appellant therefore needs to establish that my interpretation of both of these subsections was in error.

[7] The overall context is that the legislation covers injuries (or death) caused by accidents or medical misadventures. It does not cover illness or, with express exception, disease. On the natural and ordinary meaning of the words in s 25(1)(a)(i) and (e), read in their context, I consider that causes occurring in utero during labour, which are internal to the mother but external to the foetus, are not forces external to the human body. I consider that causes arising from the deprivation of oxygen to the foetus occurring within the mother are not "any exposure to the elements, or to extremes of temperature or environment". I consider that plainer words would have been used if Parliament had intended to cover cerebral palsy caused during labour (and not arising from medical misadventure).

[8] There is a further difficulty with the appellant's claim. One of the possible causes of the cerebral palsy was placental disease. That raises the question of whether cover would be excluded under s 26(2) because it was an injury caused "wholly or substantially" by disease. I did not find it necessary to discuss this on the

substantive hearing and I therefore do not do so now except to say that it appears to raise another hurdle for the appellant.

[9] The application for leave is dismissed.

Mallon J

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