

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA592/2019
[2021] NZCA 211

BETWEEN ACCIDENT COMPENSATION
CORPORATION
Appellant

AND ANGELA CHRISTINE CALVER AS
TRUSTEE OF THE ESTATE OF DEANNA
TREVARTHEN
Respondent

Hearing: 25 November 2020

Court: Brown, Clifford and Gilbert JJ

Counsel: P J Radich QC and L I van Dam for Appellant
B H Woodhouse and T W R Lynskey for Respondent

Judgment: 27 May 2021 at 10.30 am

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B We answer the question of law submitted for determination by this Court:**
- Does mesothelioma, not caused by work-related exposure to asbestos, amount to a “personal injury” under s 26 of the Act?**
- Yes.**
- C The appellant must pay the respondent costs for a standard appeal on a band A basis plus usual disbursements. We certify for second counsel.**
-

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Mesothelioma is a fatal cancer caused by exposure to asbestos. Persons suffering from mesothelioma caused by work-related asbestos exposure have cover under the Accident Compensation Act 2001 (the 2001 Act).

[2] Deanna Trevarthen died from the disease at the age of 45. She maintained that her mesothelioma arose from contact as a young girl with her father whose occupation as an electrician likely involved high exposure to asbestos. Prior to her death, the Accident Compensation Corporation (ACC) declined her claim, reasoning that for cover to be available for mesothelioma it must arise as a result of work exposure. ACC's decision was upheld on review and by the District Court.¹ However Mallon J allowed the appeal in the High Court and held that Ms Trevarthen was entitled to cover under the 2001 Act because her mesothelioma was a personal injury caused by an accident to her.²

[3] ACC has appealed to this Court. The question of law for determination is:³

Does mesothelioma, not caused by a work-related exposure to asbestos, amount to a “personal injury” under s 26 of the Act?

Statutory framework

[4] Part 2 of the 2001 Act determines whether a person has cover under the Act. As Blanchard J proposed in *Allenby v H*, the best starting point is the definition of personal injury in s 26(1).⁴ Relevant to this appeal it provides:

Personal injury means—

(a) the death of a person; or

¹ *Calver v Accident Compensation Corporation* [2018] NZACC 60 [District Court judgment].

² *Calver v Accident Compensation Corporation* [2019] NZHC 1581 [High Court judgment].

³ Leave to appeal was granted by the High Court: *Accident Compensation Corporation v Calver* [2019] NZHC 2667.

⁴ *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425 at [56].

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

...

[5] Of particular focus in this appeal is the exclusion from the personal injury definition found in s 26(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).

[6] This leads back to s 20. Subsection (1) lists the three prerequisites for cover for personal injury (except mental injury caused by certain criminal acts):

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).

[7] The personal injuries described in s 20(2) are:

- (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 cardiovascular or cerebrovascular episode that is treatment injury suffered by the person:
- (j) personal injury that is a cardiovascular or cerebrovascular episode that is personal injury suffered by the person to which section 28(3) applies.

[8] In *Allenby*, noting that ss 20 and 26 each refers to the other,⁵ Blanchard J discussed the relationship in this way:

[59] Cover under s 20 is therefore available only if, first, the claimant has suffered a personal injury and, second, that injury was caused in one of the specified ways. As the language used in s 20 indicates, in referring to the “kinds” of injury “described” in other sections, the application of the Act depends on judgment of likeness by reference to described categories. In addition, the cumulative elements of the definition indicate that the “kinds of injury” described in the paragraphs of s 26 are controlled by the requirement that the injury be “described” in s 20(2).

His Honour further observed that:⁶

... the use of the term “personal injury” in para (f), and indeed throughout subs (2), in connection with events that would naturally be described as illnesses rather than injuries, showed that, despite s 26(1)(b), the term is being given an extended meaning.

[9] The phrase “personal injury caused by a work-related gradual process, disease, or infection” in s 20(2)(e) is defined in s 30:

- (1) **Personal injury caused by a work-related gradual process, disease, or infection** means a personal injury—
 - (a) suffered by a person; and
 - (b) caused by a gradual process, disease, or infection; and
 - (c) caused in the circumstances described in subsection (2).
- (2) The circumstances are—
 - (a) the person—
 - (i) performs an employment task that has a particular property or characteristic; or
 - (ii) is employed in an environment that has a particular property or characteristic; and

⁵ *Allenby v H*, above n 4, at [56].

⁶ At [76]. See also at [68].

- (b) the particular property or characteristic—
 - (i) causes, or contributes to the cause of, the personal injury; and
 - (ii) is not found to any material extent in the non-employment activities or environment of the person; and
 - (iii) may or may not be present throughout the whole of the person's employment; and
- (c) the risk of suffering the personal injury—
 - (i) is significantly greater for persons who perform the employment task than for persons who do not perform it; or
 - (ii) is significantly greater for persons who are employed in that type of environment than for persons who are not.

...

Schedule 2 of the Act specifies a list of occupational diseases in respect of which s 30 further provides:

- (3) **Personal injury caused by a work-related gradual process, disease, or infection** includes personal injury that is—
 - (a) of a type described in Schedule 2; and
 - (b) suffered by a person who is or has been in employment—
 - (i) that involves exposure, or the prescribed level or extent of exposure, to agents, dusts, compounds, substances, radiation, or things (as the case may be) described in that schedule in relation to that type of personal injury; or
 - (ii) in an occupation, industry, or process described in that schedule in relation to that type of personal injury.

...

- (4) Personal injury of a type described in subsection (3) does not require an assessment of causation under subsection (1)(b) or (c).

Schedule 2 includes “[l]ung cancer or mesothelioma as caused by asbestos”.⁷ Hence it is common ground that the 2001 Act provides cover for mesothelioma if it is work-related.

[10] Although the Judge’s conclusion, that Ms Trevarthen’s mesothelioma was a personal injury caused by accident, is not an issue on this appeal, we note that the definition of accident in s 25(1) includes the following kinds of occurrences:

- (a) a specific event or a series of events, other than a gradual process, that—
 - (i) involves the application of a force (including gravity), or resistance, external to the human body; or
 - (ii) involves the sudden movement of the body to avoid a force (including gravity), or resistance, external to the body; or
 - (iii) involves a twisting movement of the body;
- (b) the inhalation of any solid, liquid, gas, or foreign object on a specific occasion, which kind of occurrence does not include the inhalation of a virus, bacterium, protozoan, or fungus, unless that inhalation is the result of the criminal act of a person other than the injured person:

...

Relevant background

[11] Ms Trevarthen began to feel unwell in the middle of 2015, having a persistent cough and suffering from chest pain, shortness of breath and weight loss. After an initial diagnosis of bronchitis, following a chest x-ray, a CT scan and a biopsy she was diagnosed with malignant mesothelioma on 28 October 2015.

[12] In early December 2015 Ms Trevarthen made an application to ACC for funding. As the Mallon J explained:⁸

Ms Trevarthen advised that her father was an electrician and, on many occasions when she was between the ages of four and 10, she would play at his work sites. This would include breaking particle boards and pipes while playing at the sites. She would also hug him every day when he got home from work in his work clothes.

⁷ Clause 2.

⁸ High Court judgment, above n 2, at [16].

Ms Trevarthen's medical advice was that, given the timeframe for developing mesothelioma from when asbestos was inhaled, it was more than highly probable that she had contracted mesothelioma from asbestos in that manner.

[13] Ms Trevarthen's claim for cover was declined by ACC on 11 January 2016 for the reason that, because of its gradual onset, her mesothelioma was not a personal injury caused by a specific accident on a specific occasion. Rather it was a gradual process disease that had not arisen from work exposure. Ms Trevarthen requested ACC reconsider her claim for cover on the basis that the disease had arisen from the inhalation of a foreign object on a specific occasion.⁹

The decisions below

The review decision

[14] The review was directed to ACC's decision to decline the claim on the ground that mesothelioma was not caused by a specific accident but rather developed over the course of time. However at the hearing ACC also advanced the argument that in the context of the case mesothelioma was excluded from the statutory meaning of personal injury and was therefore excluded from cover.

[15] The reviewer accepted that mesothelioma caused by asbestos inhalation would meet the statutory definition of personal injury, rejecting ACC's argument that the s 26(2) exclusion of personal injuries caused wholly or substantially by a gradual process, disease or infection applied. He reasoned that:

... if the evidence establishes that the mesothelioma was caused by the inhalation of asbestos fibres then the mesothelioma must be viewed as a personal injury, in and of itself. The cause of the mesothelioma would then not be due to an idiopathic disease, but rather due to an external, non-disease related agent.

[16] The reviewer found support for this conclusion in the decision of the Accident Compensation Appeals Authority in *Stok v Accident Compensation Corporation* which concluded that Ms Stok's mesothelioma had a specific and identifiable external

⁹ Accident Compensation Act 2001, s 25(1)(b).

cause which moved it away from an idiopathic disease.¹⁰ Accordingly Ms Stok was found to have suffered a personal injury by accident and was therefore entitled to cover under the Accident Compensation Act 1982.

[17] However the review was nevertheless dismissed because the reviewer considered that the evidence established merely a risk or possibility that the diagnosed mesothelioma was caused by asbestos inhalation. Such a risk of asbestos exposure was insufficient to surmount the test that it was more likely than not that inhalation of asbestos fibres had caused Ms Trevarthen's mesothelioma. For this reason ACC's decision was upheld.

The District Court decision

[18] Ms Trevarthen's executor appealed to the District Court against the reviewer's conclusion that the mesothelioma was not shown to be caused by an accident. The ACC filed a cross-appeal directed to the finding that mesothelioma would meet the statutory definition of a personal injury.

[19] The District Court Judge considered that the reviewer was wrong to find that mesothelioma caused by asbestos inhalation was not within the s 26(2) exclusion, ruling that it was necessary for Ms Trevarthen to demonstrate a personal injury of a type described in s 20(2)(e) to (h). In the Judge's view s 20(2)(e) was the only possible candidate but it was inapplicable because Ms Trevarthen's condition was not caused by a work-related gradual process.¹¹ *Stok* was distinguished as having no application under the 2001 Act.¹²

[20] In any event the Judge considered that it was not established that the injury had been caused by an accident involving the inhalation of a foreign object on a specific occasion because the medical evidence available suggested that there may have been multiple occasions of inhalation.¹³

¹⁰ See *Stok v Accident Compensation Corporation* [1995] NZAR 396 at 402. Ms Stok's exposure over an extended period of time predominantly came from her lounge and bedroom ceiling which was spray-coated with asbestos, but also from asbestos dust from her husband's work clothing.

¹¹ District Court judgment, above n 1, at [124]–[126].

¹² At [136].

¹³ At [131].

The High Court judgment

[21] The Judge commenced her consideration of the availability of cover via s 20(2)(a) by considering and rejecting ACC's contention that *Stok* was wrongly decided. Observing that the 1982 Act excluded from the definition of personal injury damage to the body caused exclusively by disease,¹⁴ the Judge considered that the 1982 Act distinguished between diseases that arose by accident (which were covered) and diseases that were idiopathic (which were not).¹⁵

[22] The Judge then turned to consider whether the *Stok* analysis remained valid under the 2001 Act. After reviewing aspects of the legislative history and noting relevant changes in the drafting of the 2001 Act, the Judge identified the issue as being whether these changes meant s 26(2) applied to Ms Trevarthen's personal injury, in which event the *Stok* analysis would no longer apply. The Judge considered that relevant to that issue was whether the personal injury was the condition suffered by the person (in this case mesothelioma) or the physical manifestations of the condition (the pain and suffering).¹⁶

[23] The Judge proceeded to consider the majority and minority judgments in *Allenby*,¹⁷ a case considering whether a pregnancy following a failed sterilisation was a personal injury caused by medical misadventure covered by the 2001 Act. The Judge stated:¹⁸

[73] As I see it, the difference between the majority reasoning and the reasoning of Elias CJ is how they view what is the personal injury and what is seen as the cause of that injury. The majority considered pregnancy to be an injury because it has physical impacts on the body which progress. The pregnancy was caused by medical misadventure (the failed sterilisation). Elias CJ considered the physical impacts of the pregnancy to be the personal injury. Because pregnancy is a gradual process, those physical impacts, after the initial impregnation, were caused wholly or substantially by a gradual process.

¹⁴ See the definition of "personal injury by accident" in s 2(1) of the Accident Compensation Act 1982 at (b)(ii).

¹⁵ High Court judgment, above n 2, at [50].

¹⁶ At [63].

¹⁷ *Allenby v H*, above n 4. The majority decision comprised Blanchard, McGrath and William Young JJ, with Tipping J delivering a separate concurring judgment. Elias CJ dissented.

¹⁸ High Court judgment, above n 2.

[74] The difference in view between the majority and minority arose because the personal injury had progressive physical impacts. If it is the physical manifestations of the injury that constitute the “personal injury”, then what has caused the final stage of the injury (and whether that cause is a gradual process) might be something different from what caused the first physical manifestation of the injury. The majority approach took the injury as a whole (the pregnancy) and asked what caused it (the medical misadventure).

[24] The Judge concluded that mesothelioma is a personal injury under s 26(1) and that s 26(2) does not apply, reasoning as follows:

[75] The majority view is the one that binds this court. The personal injury is defined by the condition as a whole that a person has. The condition qualifies as a personal injury because it has physical impacts. Just as a sprain qualifies as a personal injury because it has physical impacts that causes pain and suffering, so too does pregnancy, and mesothelioma, because of their physical impacts on the body. As the Lord High Chancellor Earl of Halsbury put it, “when some affection of our physical frame is in any way induced by accident, we must be on our guard that we are not misled by medical phrases”. His example is someone sustaining a cut to their skin which sets up tetanus. As he explains, “tetanus is a disease; but would anybody contend that there was not an accident causing damage”? Another example, as given to ACC by Dr Monigatti in April 2016, is lead poisoning in a child who ate paint scrapings on a specific occasion.

[76] This does not mean all diseases are covered. They still need to come within s 20(2). Idiopathic diseases, that is those that develop in a person from an unknown cause, and that are not consequential on covered events, remain outside the scope of the Act. As the Authority said in *Stok*, for example, cancer is “something which occurs generally without explanation and in very few cases can it be directly related to any external cause”. Idiopathic diseases will generally be excluded because they are caused by a gradual (internal) process rather than a known external cause.

[77] In my view this approach is not inconsistent with the Act’s scheme to provide cover for work-related gradual process, disease or infection. Cover for this can, in theory, arise under s 26(2)(e) through two routes: as personal injury under s 26(1) which is not personal injury under s 26(2); or as personal injury under s 26(1) which is also personal injury under s 26(2). Which of these routes does not matter in a work-related personal injury because the s 30(1) definition essentially replicates the s 26(2) requirement for the personal injury to be caused by a gradual process, disease or infection. This allows work injuries to be covered where they might not have qualified as an accident at common law or under workers’ compensation legislation. Further, a number of occupational diseases are expressly within s 20(2)(e) by their inclusion in Schedule 2. Mesothelioma is one of those. Including some diseases and infections in Schedule 2 (and thereby providing clarity in such claims) does not necessarily show that Parliament intended that they could not be covered outside the work context on other grounds.

[78] Nor does this approach deprive s 26(2) of meaning. For example, degeneration of the back may be wholly or substantially caused by a gradual process (if there is no known external cause that triggered this, such as an

initial accident). Heart disease may be wholly or substantially caused by a gradual (internal) process. Some gradual processes, diseases or infections may go on to cause other diseases. In these cases, the personal injury for which the person is seeking cover, will only have cover if it is of a kind described in s 20(2)(e) to (h).

(Footnotes omitted.)

[25] A new argument was advanced in support of the appeal to the High Court that cover was alternatively available under s 20(2)(g), which allows cover for gradual processes, diseases or infections consequential on a personal injury for which a person has cover. ACC responded that it was prejudiced in having to address this argument for the first time on appeal, noting that it had not had the opportunity of presenting evidence that would be relevant to this ground.

[26] While considering that the conclusion under s 20(2)(a) meant that it was unnecessary to consider the new argument, the Judge nevertheless thought it was useful to determine if a different conclusion would be reached through s 20(2)(g) as a way of testing the analysis under the primary ground. On this issue, the Judge found that if there was initial damage from inhaling the asbestos fibres that constituted a personal injury covered by the legislation, the second personal injury (the development of mesothelioma) would be consequential of the first injury.¹⁹ She concluded:²⁰

I do not reach a final view on whether there would be cover under s 20(2)(g). It is not the way it was argued in the District Court, or earlier, and it was not the subject of leave to appeal. However, the analysis as far as it goes, suggests there may not be any difference in outcome whether s 26(2) applies or not. Under either basis for cover, the critical issue is whether there has been an “accident” as defined in s 25. In my view, there has been.

The issues

[27] The issue agreed by the parties was simply the question of law the subject of the grant of leave. The question is one of statutory interpretation concerning the meaning and effect of s 26(2). Is it effective to confine cover under the 2001 Act in respect of diseases to the personal injuries described in s 20(2)(e) to (h), as ACC contends? Or is s 26(2) to be construed as not extending to the scenario wherein the

¹⁹ At [137].

²⁰ At [138].

disease or infection is itself triggered by an accident (such as the inhalation described in s 25(1)(b)), with the consequence that cover would be available via s 20(2)(a)?

ACC's submissions

[28] ACC contends that s 26(2) is an expression of the general policy of the accident compensation regime to exclude disease from cover except in specified circumstances. Claimants who have a disease have cover only if they fall within those circumstances described in s 20(2)(e) to (h). Where the disease has a known, external cause, the only pathway to cover is under s 20(2)(g).

[29] ACC draws a distinction between a disease and its effects. In the context of s 26(2) it contends that “personal injury” is the specific harm to the claimant’s body for which cover is sought, not the label given to the claimant’s underlying condition. In other words, the “personal injury” is the physical manifestation of the disease, not the disease itself. Ms Trevarthen met the requirements for s 26(1)(a) and (b) as she sustained serious physical injuries (including pleural effusion and tumours). However, because those physical injuries and her death resulted from the disease mesothelioma, they were excluded from the definition of personal injury by reason of s 26(2).

[30] In support of this argument, ACC submitted:

- (a) Its interpretation is consistent with the definition of personal injury in s 26(1) which is defined by reference to specific examples of bodily damage, namely a strain, a sprain and death.
- (b) Its interpretation is also consistent with the way in which personal injury has been further articulated by the courts as requiring a tangible or appreciable harm or damage to the body.²¹
- (c) The description of personal injury by Elias CJ in *Allenby* supports ACC’s analysis. The Chief Justice distinguished between the types of

²¹ Citing *Teen v Accident Compensation Corporation* DC Wellington 244/2002, 3 September 2002 at [13]; *Falwasser v Attorney General* [2010] NZAR 445 (HC) at [90]; *Allenby v H*, above n 4, at [56]; and *Murray v Accident Compensation Corporation* [2013] NZHC 2967 at [60].

personal injury for which a claimant could seek cover: the impregnation/conception itself or the “physical consequences brought about by the process of pregnancy”.²²

- (d) The integrity of the statutory scheme would be compromised materially if personal injury was defined as the disease itself.²³

[31] Having regard to the scheme as a whole, ACC submits that non work-related mesothelioma can attract cover under the Act only through the application of s 20(2)(g). Hence ACC invited the Court to answer the question of law in the following qualified way: the physical manifestations of mesothelioma, not caused by work-related exposure to asbestos, can amount to a “personal injury” under s 26 of the 2001 Act only through s 20(2)(g).

Respondent’s submissions

[32] Ms Woodhouse for the respondent submitted that, unlike diseases which require cumulative exposure and would not attract cover under the legislation, mesothelioma has a single, uniform trigger and is “indivisible”. Such unique features allow mesothelioma to be conceptualised as personal injury caused by an accident.

[33] On the issue of the appropriate pathway to cover, Ms Woodhouse submitted that the issue for determination (whether mesothelioma is a personal injury caused by accident (s 20(2)(a)) or one caused wholly or substantially by a disease and thus excluded unless captured by s 20(2)(e) to (h)) engages the same distinction which the Supreme Court grappled with in *Allenby*. While acknowledging that *Allenby* was not binding on the High Court or on this Court, she submitted there are close analogies to be drawn with the *Allenby* reasoning and highlighted “two crucial points”:

- 3.8 First, it must be understood that the Court in *Allenby* was interpreting “physical injuries” broadly, not “personal injury” as whole. That sets up the availability of externally caused gradual processes (or, by extension, diseases) because a broad interpretation of physical injuries in s 26 leads to the enquiry as to what caused those injuries (to determine whether they satisfy s 20). It is here that almost all

²² *Allenby v H*, above n 4, at [25].

²³ The interpretation of a provision must be interpreted in light of the statute as a whole: Ross Carter *Burrows and Carter: Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 258.

gradual processes, diseases or infections will be excluded, and the integrity of the scheme thereby protected.

- 3.9 Secondly, and following on from this, it must always be recalled that requiring an approved s 20(2) pathway for the injury acts as a significant filter on coverable injuries. However, it is a filter that does not capture pregnancy caused by medical misadventure or mesothelioma caused by an accident, because causation is not at issue in either situation.

(Footnotes omitted.)

[34] Describing the language of s 26(2) as cumbersome, Ms Woodhouse viewed Mallon J's analysis that mesothelioma fell outside s 26(2) as resting on the footing that it is a physical injury, expansively viewed, caused wholly by an external agent, citing the observation of Elias CJ in *Allenby*:²⁴

[18] The meaning of "personal injury caused by medical misadventure" covers physical impact upon the person, expansively viewed. As Blanchard J says, it has a statutory meaning. An infection is not in general speech referred to as a personal injury. And yet the terms of [s 32(7)] make it clear that it is so regarded for the purposes of personal injury caused by medical misadventure. ... It must be interpreted in the light of the purposes of the Act which are concerned with establishing entitlements for impairment, rehabilitation, and treatment.

[35] Ms Woodhouse submitted that the focus is on the condition as a whole and importantly its cause because this reflects the concerns of the 2001 Act with establishing entitlements for impairment, rehabilitation and treatment. Understood from that angle it was submitted that the real utility of s 26(2) is as a filter in respect of causation, being a refinement on the original exclusion of damage caused exclusively by a disease. She contended that recognising a pathway to cover under s 20(2) when causation is not in issue (as in both pregnancy and mesothelioma) does not render the consequential paragraphs in s 20(2) otiose (as ACC maintains). As Ms Woodhouse put it, legal and factual causation remain significant filters in s 26 and the additional routes to cover under s 20(2) can then be understood as expansive, not reductive.²⁵

[36] In the event that this Court were to accept ACC's submission that cover is only available under s 20(2)(g), then Ms Woodhouse submitted that the Court has the

²⁴ *Allenby v H*, above n 4.

²⁵ Citing Blanchard J in *Allenby v H*, above n 4, at [76].

evidence necessary to decide the case on the basis of that provision and she invited us to do so.

Analysis

[37] ACC accepts that the accident compensation scheme has always made a distinction between diseases, providing cover for some and not others. However it contends that the parameters of cover for non work-related disease have changed over time. It says that there is no longer a simple distinction between idiopathic disease and disease with an external/accidental cause. As noted above, ACC's position is that under the current legislation diseases with an external cause are covered only if they fall within s 20(2)(g).

[38] We discern that there are two, seemingly interrelated, limbs to ACC's argument:

- (a) First, the endpoint of the statutory evolution is that cover is only available for non work-related disease in the circumstances stated in s 20(2)(g).
- (b) Second, in reliance on a distinction drawn between personal injury and disease, even where a disease is attributable to an external cause, only the disease is the cause of injury (namely tangible harm to the body), not the external cause.

[39] In order to evaluate the first limb of the argument it will be convenient to begin by tracing the path of the legislative evolution.

The 1972 and 1982 Acts

[40] The original purpose of the scheme was to provide cover for personal injury caused by an accident to the claimant.²⁶ The Accident Compensation Act 1972 as originally enacted contained a non-exhaustive definition of "personal injury by accident" which included incapacity resulting from an occupational disease to the

²⁶ *Allenby v H*, above n 4, at [60].

extent that cover extended in respect of the disease under ss 65 to 68 of that Act.²⁷ Section 67 made provision for compensation for diseases arising out of employment. However s 67(8) recorded that nothing in that section affected the right of any person to receive compensation in respect of disease if the disease was a personal injury by accident within the meaning of the statute.

[41] In 1974 a more detailed definition was substituted as follows:²⁸

Personal injury by accident—

(a) Includes—

- (i) The physical and mental consequences of any such injury or of the accident:
- (ii) Medical, surgical, dental, or first aid misadventure:
- (iii) Incapacity resulting from an occupational disease or industrial deafness to the extent that cover extends in respect of the disease or industrial deafness under sections 65 to 68 of this Act:

...

(b) Except as provided in the last preceding paragraph, does not include—

- (i) Damage to the body or mind caused by a cardio-vascular or cerebro-vascular episode unless the episode is the result of effort, strain, or stress that is abnormal, excessive, or unusual for the person suffering it, and the effort, strain, or stress arises out of and in the course of the employment of that person as an employee:
- (ii) Damage to the body or mind caused exclusively by disease, infection, or the ageing process.

That definition was replicated in the 1982 Act, the legislation under which *Stok* was decided.

²⁷ This is found in the interpretation provision in s 2(1). Pursuant to an amendment in 1973, all persons had cover in respect of personal injury by accident in New Zealand: Accident Compensation Amendment (No 2) Act 1973, s 4.

²⁸ By s 2(1) of the Accident Compensation Amendment Act 1974.

[42] There was no such composite definition in the Accident Rehabilitation and Compensation Insurance Act 1992. A definition of “accident” was introduced, similar to that in the current s 25(1), which included in the first limb an exclusion in respect of “any gradual process”. “Personal injury” was stated to have the meaning assigned to it by ss 4 and 8.²⁹ Section 4 provided the definition of personal injuries under the Act:

4. Definition of “personal injury”—(1) For the purposes of this Act, “personal injury” means the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person, and has the extended meaning assigned to it by section 8(3) of this Act.

(2) For the purposes of this Act, no cardio-vascular or cerebro-vascular episode shall be regarded as personal injury unless—

- (a) It is a result of medical misadventure; or
- (b) It is a work injury by virtue of section 6(1) of this Act.

[43] The availability of cover was specified in s 8, and exclusions were then listed in s 10:

8. Cover for personal injury occurring in New Zealand

...

(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.³⁰

...

²⁹ See interpretation provision in s 3.

³⁰ The phrase “covered by this Act” was added to para (d) by s 5(1) of the Accident Rehabilitation and Compensation Insurance Amendment Act (No 2) 1993.

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.³¹

...

[44] The new phrase “gradual process, disease, or infection”, which appeared in both ss 8 and 10, replaced the phrase “disease, infection, or the ageing process” in the former definition of personal injury by accident.³² An exclusion in respect of the ageing process was separately addressed in s 10(2)(a).

[45] The implications of the 1992 changes are summarised by *Todd on Torts* in this way:³³

The bases for cover were similar to those laid down in the earlier Acts but their scope was precisely, and in some respects far more restrictively, defined. So there was cover for personal injury caused by an accident, by employment-related disease or infection, by medical misadventure and by treatment for personal injury, and also for mental or nervous shock suffered by the victims of certain specified sexual offences. However, whereas formerly these categories all fell within the broad concept of “personal injury by accident” (which had only a non-inclusive definition), they were now treated as separate categories and made subject to a series of detailed definitions. Judicial discretion in determining their limits was largely removed.

[46] The submission for ACC emphasised that in 1992 cover for disease changed in two respects. First, the threshold for causation of damage to the body by disease was lowered from “exclusively” in the 1972 and 1982 Acts to “wholly or substantially”. As ACC put it:

In other words, the legislation contemplated that there could be another causal factor, but if disease was the *substantial* cause of the damage, it was *prima facie* excluded from cover.

³¹ The phrase “covered by this Act” was added to para (c) by s 7 of the Accident Rehabilitation and Compensation Insurance Amendment Act (No 2) 1993.

³² At [41] above.

³³ Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [2.2.05].

Secondly the addition of a definition of personal injury in finite terms was said to reflect a deliberate policy shift as explained in a report prepared by the Minister of Labour which stated:³⁴

... [S]ince the inception of the scheme, a series of statutory, administrative, and judicial decisions has resulted in an extension of the scheme's boundaries beyond what was originally intended in respect of "injuries" arising from an "accident"; and this has resulted in substantial cost increases.

...

Legislation will be introduced in this session of Parliament and will be enacted to take effect from 1 July 1992. The changes to the scheme will ensure that fair and equitable compensation and rehabilitation remains available to those who suffer injury as a result of genuine accident; it will ensure that the costs of the scheme are distributed fairly amongst users and that the costs are able to be met by users; it will ensure that the scheme remains viable and does not jeopardise New Zealand's economic recovery.

[47] We simply note at this juncture that, even following those changes, cover would have remained available via s 8(2)(a) for a non work-related personal injury caused by an accident and not caused wholly or substantially by a disease or infection.

The 1998 Act

[48] While the genesis of the current s 26(2) can be identified in s 10 of the 1992 Act,³⁵ the precursor first appeared in the Accident Insurance Act 1998. The significant drafting change for present purposes was that the mechanism for the exclusion of cover in respect of a gradual process, disease or infection was incorporated into the provision defining personal injury:

- 29. "Personal injury"**—(1) "Personal injury" means—
- (a) The death of an insured; or
 - (b) Physical injuries suffered by an insured, including, for example, a strain or sprain; or
 - (c) Mental injury suffered by an insured because of physical injuries suffered by the insured; or
 - (d) Mental injury suffered by an insured in the circumstances described in section 40.

³⁴ W F Birch *Accident Compensation: A Fairer Scheme* (30 July 1991) at 8–9.

³⁵ At [43] above.

(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 39(2)(d), (e), (f), or (g).

...

[49] The circumstances in which cover was provided were detailed in s 39:

39. Cover for personal injury suffered in New Zealand (except mental injury caused by certain criminal acts)—(1) An insured has cover for a personal injury if—

- (a) He or she suffers the personal injury in New Zealand on or after 1 July 1999; and
 - (b) The personal injury is any of the kinds of injuries described in section 29(1)(a), (b) or (c); 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 insured; or
 - (b) Personal injury caused by medical misadventure suffered by the insured; or
 - (c) Personal injury caused by treatment given to the insured for personal injury for which the insured has cover; or
 - (d) Personal injury caused by a work-related gradual process, disease, or infection suffered by the insured; or
 - (e) Personal injury caused by a gradual process, disease, or infection that is personal injury caused by medical misadventure suffered by the insured; or
 - (f) Personal injury caused by a gradual process, disease, or infection consequential on personal injury suffered by the insured for which the insured has cover; or
 - (g) Personal injury caused by a gradual process, disease, or infection consequential on treatment given to the insured for personal injury for which the insured has cover; or
 - (h) Personal injury that is a cardio-vascular or cerebro-vascular episode that is personal injury caused by medical misadventure suffered by the insured; or
 - (i) Personal injury that is a cardio-vascular or cerebro-vascular episode that is a personal injury suffered by the insured to which section 32(2) applies.

...

[50] This then was the point in the legislative development that the cross-referencing between the provisions occurred as described by Blanchard J.³⁶

[51] ACC submitted that the policy shift apparent in the 1992 Act was further entrenched under the 1998 Act:

The 1998 Act, in terms almost identical to the current Act, repeated the general policy that personal injury caused wholly or substantially by disease was not covered, but provided an exception for disease caused by an external factor where the disease was “consequential on personal injury suffered by the insured *for which the insured has cover*”.

(Footnotes omitted.)

The 2001 Act

[52] Section 39(1) and (2) reappeared as s 20(1) and (2) of the 2001 Act.³⁷ However subs 20(2) was amended to its current form in 2005 by the reform which replaced medical misadventure with treatment injury.³⁸ Section 26 of the 2001 Act was the broad equivalent of s 29 of the 1998 Act.

[53] With reference to the question of law we are required to address, there were no material differences between the pair of cross-referencing provisions in the 1998 and 2001 Acts.

The first limb of ACC's argument

[54] As earlier noted,³⁹ ACC argues that the parameters of cover for non work-related disease have changed over time such that there is no longer a simple distinction between idiopathic disease and disease with an external/accidental cause. It says now the only pathway for cover for non work-related diseases is s 20(2)(g).

³⁶ At [8] above.

³⁷ The original name of the 2001 Act was the Injury Prevention, Rehabilitation and Compensation Act 2001.

³⁸ Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005, s 7.

³⁹ At [37] above.

[55] The relevant changes are said to have occurred in 1992 and 1998. As ACC put it:

69. It is evident that the parameters of cover for disease have progressively narrowed. Under the 1972 and 1982 Acts, the damage had to amount to a physical consequence of an accident, with “accident” interpreted by the courts in very broad terms. The 1992 Act provided cover if the damage from the disease was a consequence of personal injury. Since 1998, cover for disease with an external cause is only available where the disease is “consequential on personal injury suffered by the person *for which the person has cover*”.

[56] With reference to the statement (in the third sentence) as to the implications of s 10(1)(c) of the 1992 Act, that exception only arose if the personal injury was caused wholly or substantially by disease. As we noted in the course of our historical review, cover remained available for a personal injury which was caused by an accident and not caused wholly or substantially by a disease.⁴⁰

[57] The second claimed legislative development upon which we infer ACC primarily relies (in the fourth sentence in the above extract) is that since 1998 cover for disease having an external cause is only available where the disease is of the nature described (currently) in s 20(2)(g), namely:

... consequential on personal injury suffered by the person for which the person has cover.

[58] Precisely why s 20(2)(g) should have the effect of excluding cover otherwise available via s 20(2)(a) is not made clear. We infer that the reasoning involves some variant of the maxim that the explicit mention of one thing implies the exclusion of another.⁴¹ However in our view the presence within s 20(2) of the particular manifestation of personal injury described in (g) simply reflects the outcome of a long legislative evolution and in particular the changes in the drafting mechanisms adopted.

[59] To recapitulate, the changes in 1992 and 1998 comprised:

⁴⁰ At [47] above.

⁴¹ Expressio unius est exclusio alterius.

- (i) in the 1992 Act the exclusion from cover of non work-related personal injury caused wholly or substantially by disease unless it was a medical misadventure (s 10(1)(b)) or, more relevantly, a consequence of personal injury or treatment for personal injury (s 10(1)(c));
- (ii) the amendment in 1993 to add to s 10(1)(c) the phrase “covered by this Act”,⁴² and
- (iii) the adoption in the 1998 Act of the drafting mechanism of including in the definition of personal injury the general exclusion for gradual processes, diseases or infections (s 29) and listing in the cover provision the various exceptions to the exclusion from cover (s 39), both of which were previously contained in s 10 of the 1992 Act.

[60] We are unable to discern from the tortuous⁴³ drafting history a legislative intention⁴⁴ whereby the instances of personal injury described in s 20(2)(e) to (h) should be construed so as to read down, or indeed impliedly repeal, other instances of personal injury within s 20(2).

[61] We say impliedly repeal for this reason. If there can only be cover for disease if one of the grounds in s 20(2)(e) to (h) is applicable, then presumably the same limitation must apply to both gradual process and infection. If so, then what is the fate of s 20(2)(c) which relates to treatment injury in the circumstances described in s 32(7) which states:

If a person (**person A**) suffers an infection that is a treatment injury, cover for that personal injury extends to—

- (a) person A’s spouse or partner, if person A has passed the infection on directly to the spouse or partner:
- (b) person A’s child, if person A has passed the infection on directly to the child:
- (c) any other third party, if person A has passed the infection on direction to that third party:

⁴² Above n 31.

⁴³ *Allenby v H*, above n 4, at [68].

⁴⁴ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

- (d) person A's child or any other third party, if—
 - (i) person A has passed the infection directly to his or her spouse or partner; and
 - (ii) person A's spouse or partner has then passed the infection directly to the child or third party.

[62] Criticising the judgment below, ACC submits:

- 70. The net effect of Her Honour's decision is that disease is covered, not only if one of the grounds in s 20(2)(e) – (h) is invoked (which is what s 26(2) expressly contemplates) but, additionally, if the situation falls within s 20(2)(a).
- 71. The statutory scheme is prescriptive. It was not open to Mallon J to go beyond the clear terms of s 26(2) to introduce a new category of cover for disease based simply on the existence of an external/accidental factor.

[63] Logically the same criticism should apply to the recognition of cover for infection under s 20(2)(c). However Parliament cannot have intended to include ss 20(2)(c) and 32(7) covering transmission of infection to others in the knowledge that it was then to be nullified by the combined effect of ss 26(2) and 20(2)(e) to (h).

[64] The criticism of the Judge for introducing a new or additional category of cover for disease is misconceived. The pathways to cover are specified in s 20(2). There is nothing in the 2001 Act, and certainly not in s 26(2), which states that personal injury associated with a disease or infection may only attract cover via s 20(2)(e) to (h) irrespective of the cause or origin of the disease.

[65] ACC then mounts an additional argument founded on the need to justify the existence of s 20(2)(g):

Section 20(2)(g) provides a contextual clue that diseases with a known cause are captured by s 26(2). This is because [s] 20(2)(g), which is triggered by the application of s 26(2), is dependent on, or presupposes, there having been a cause to the disease. The phrase "caused wholly or substantially" in s 26(2) has to be interpreted in a way that does not render s 20(2)(g) obsolete.

[66] The argument is as unattractive as it is unsound. We agree with Ms Woodhouse's submission that the various routes to cover in s 20(2) should be viewed as expansive, not reductive. Sometimes the additional dimension provided by

a separate statutory provision will not be easy to identify, at least in the abstract. For example we note that in his dissenting judgment in *Accident Compensation Corporation v D William Young P* saw little difference between s 20(2)(b) and (f).⁴⁵

[67] In our view it is not necessary for the meaning of s 26(2) to be constrained or distorted on account of the existence of s 20(2)(g). Section 26(2) simply envisages that some personal injuries will be caused wholly or substantially by disease or infection and others will not.⁴⁶ Those in the latter category are unaffected by the qualification in s 26(2) which cross-references to s 20(2). Neither the fact of s 20(2)(g) nor its terms are of any consequence for cases in that latter category.

The second limb of ACC's argument

[68] The Judge made reference⁴⁷ to the Lord Chancellor's example of an injury in *Brintons Ltd v Turvey*:⁴⁸

Suppose in this case a tack or some poisoned substance had cut the skin and set up tetanus. Tetanus is a disease; but would anybody contend that there was not an accident causing damage?

[69] In that example the originating event (and, we would say, the operative cause of the damage to the worker) was the accident whereby the worker's skin was cut. The cut caused tetanus and hence the worker suffered from that disease. In such circumstances, where the cut was the operative cause, could it fairly be said that s 26(2) applied to exclude cover?

[70] But it is at this point that ACC's further argument is deployed, to the effect that, while the accident may have caused the disease (or infection), it is the disease (or infection) that caused the injury (and not the accident). In response to the Lord Chancellor's rhetorical question, ACC would raise its hand.

⁴⁵ *Accident Compensation Corporation v D* [2008] NZCA 576 at [75].

⁴⁶ The omission of reference to gradual process reflects the exclusion of gradual process from the first definition of accident in s 25(1)(a).

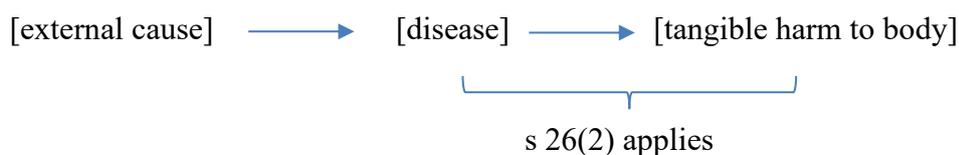
⁴⁷ High Court judgment, above n 2, at [75]: see [25] above. It was also noted in *Stok v Accident Compensation Corporation*, above n 10, at 403–404.

⁴⁸ *Brintons Ltd v Turvey* [1905] AC 230 (HL) at 233.

[71] In short ACC submitted:

- (a) Personal injury is tangible harm that something causes to the body.
- (b) The inhalation of asbestos caused the disease (mesothelioma).
- (c) The disease “in turn” caused the personal injury (pleural effusion, tumours and death). But the personal injury is not the disease.

[72] The submission may be diagrammatically portrayed in this way:



[73] The Judge rejected that submission. She did so for the reason she considered herself bound to follow the majority view in *Allenby*.⁴⁹ However we agree with Ms Woodhouse’s acknowledgment that *Allenby* was not binding on the Judge, nor indeed on this Court. *Allenby* concerned a failed sterilisation and the application of the statutory provisions relating to medical misadventure. Issues raised included whether pregnancy, a gradual process, amounted to a personal injury and the circumstances in which cover would be available.

[74] Nevertheless, we consider that the Judge’s conclusion was correct for the further reasons advanced in her judgment at [75].⁵⁰ There is no advantage in paraphrasing them. However in particular we agree that personal injury is defined by the person’s condition as a whole. In our view it is artificial to draw a distinction between being inflicted with a disease and experiencing the physical manifestations of the disease and then, by reference to such a distinction, to nominate the disease (as distinct from its external cause) as the cause of the personal injury. We cannot discern the intentional drawing of such a distinction in the legislation. Certainly it could not be said to derive from the confusing structure of s 26(2) which deploys the phrase “personal injury” three times.

⁴⁹ High Court judgment, above n 2, at [75].

⁵⁰ At [24] above.

[75] We also agree with the Judge’s analysis at [76] that such conclusion does not mean all diseases are covered and with her view at [77] that such an approach is not inconsistent with the statutory scheme to provide cover for work-related gradual process, disease or infection.⁵¹

Conclusion

[76] Ms Trevarthen suffered personal injury in terms of s 26(1)(a) and (b), subject to it being excluded under s 26(2). We have found that the personal injury was not excluded under s 26(2) because it was *not* caused wholly or substantially by a gradual process, disease or infection. Rather, the personal injury was caused by an accident to the person in terms of s 20(2)(a), namely the accidental inhalation of asbestos fibres.

[77] Consequently, our answer to the question of law, does mesothelioma not caused by a work-related exposure to asbestos amount to a “personal injury” under s 26 of the Act, is yes.

[78] Even if we had answered the question in the negative, we would not have entertained Ms Woodhouse’s request to consider the s 20(2)(g) argument. To do so would have necessitated making factual findings which would not be appropriate in an appeal confined to questions of law.⁵²

Result

[79] The appeal is dismissed.

[80] The appellant must pay the respondent costs for a standard appeal on a band A basis plus usual disbursements. We certify for second counsel.

Solicitors:
Accident Compensation Corporation, Wellington for Appellant
John Miller Law, Wellington for Respondent

⁵¹ At [25] above.

⁵² Under s 163 of the 2001 Act.