SUPREME COURT OF QUEENSLAND

CITATION:	*McGregor v The National Mutual Life Assoc of A'asia Ltd* [2006] QSC 379
PARTIES:	**MALCOLM JAMES McGREGOR** (plaintiff) **v** **THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED (ACN 004 020 437)** (defendant)
FILE NO:	BS6368 of 2001
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	18-19 July, 10 November 2006
JUDGE:	Byrne J
ORDER:	
CATCHWORDS:	INSURANCE – ACCIDENT AND SICKNESS INSURANCE – THE CONTRACT – ACCIDENT – where plaintiff suffered two incidents some months apart – where total disability followed second incident – whether second incident a separate injury – whether second incident caused by an accident *Insurance Contracts Act* (1984), s 37 *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 considered
COUNSEL:	M M Grant-Taylor SC, with him C Heyworth-Smith, for the plaintiff R C Morton for the defendant
SOLICITORS:	Maurice Blackburn Cashman for the plaintiff McInnes Wilson for the defendant

Injury by accident?

[1] In March 1994, the plaintiff procured an income protection policy from Australian Casualty and Life Limited. The defendant has assumed the obligations of that insurer.

[2] In the event of "total disability", the insurer promised to pay a "monthly benefit" of $2,000. "Total disability" means a "continuous inability" as a result of "Injury or Sickness to perform any gainful occupation" for which the insured is "reasonably suited …". Benefits are payable for five years for total disability arising from "sickness". For total disability arising from an "injury", "lifetime" benefits are assured.

[3] On 15 May 1995, the plaintiff claimed the prescribed benefits. The benefits were paid for five years. The plaintiff seeks to establish an enduring entitlement to them.

[4] By clause 1.4 of the policy, "Injury" is defined to mean:

> "injury … caused by an accident … If Total Disability commences after 30 days from the date of an accident, the Total Disability will be deemed to be caused by a Sickness".

[5] The insurer contends that the total disability, first apparent in early May 1995, derives from "injury" caused by an "accident" in November or December 1994. Invoking cl 1.4, on the insurer's case, the disability is deemed to have been caused by sickness.

[6] A critical question is, therefore, whether the injury that accounts for the admitted "total disability" that commenced in May 1995 was caused by an "accident" within the preceding 30 days. If so, the plaintiff is entitled to lifetime benefits.

Two incidents asserted

[7] The plaintiff gave this account of his circumstances.

[8] Towards the end of 1994, he was working as a carpenter on a house when a pre-cast concrete column fell towards him. In taking its weight, he twisted a shoulder and his back. The incident produced symptoms in the shoulder blades and shoulder. He did not consult a doctor about his condition. He continued working at the house, apart from a break from Christmas until early to mid-January 1995.

[9] The plaintiff's work thereafter included concreting, roof and framework construction, and building a large patio deck. Symptoms from the November/ December 1994 incident persisted, with the back remaining "just sore" in the region of the shoulder blades. No increase in the severity of the symptoms was noted.

[10] By late April or early May 1995, the plaintiff had been working, often on hands and knees, for two weeks laying the patio deck. One day, as he tried to stand, he experienced an "almighty pain" in his legs, "like a rubber band snapping". He had to hold on to a column to pull himself up. Immediate pain in the legs and lower back was "excruciating".

[11] The plaintiff kept working for about a week and a half. Then, on 6 May 1995, he consulted his general practitioner, Dr Wild. Dr Wild sent him straight to Dr Glasby.

Central issue

[12] The plaintiff, who has been unable to work since 2 May 1995, claims that his total disability is the result of accidental injury caused through that second incident in April/May 1995. On the insurer's case, the only "injury" the plaintiff suffered by accident happened in December 1994. Symptoms first emerging in April/May are, it is said, "no more than the buffeting encountered in ordinary living acting on a body that is infirm".[1]

Reliability of the plaintiff's evidence

[13] A critical issue is the reliability of the plaintiff's testimony about the two incidents and their consequences for him. The defendant contends that the plaintiff's evidence is so unreliable that it ought not to be accepted.

[14] The challenges to reliability concern distinct issues: whether the April/May 1995 incident occurred; pre-contractual representations allegedly made by an insurance agent who procured the policy; the plaintiff's receipt of an earlier income protection policy; and testimony about his capacity to afford income protection. In short, it is said that the plaintiff has made contradictory statements on several topics.

[15] Dr Boys, an orthopaedic surgeon retained by the insurer, saw the plaintiff in February 2000 and May 2004. Dr Boys directed his investigation to "an incident occurring on or about 23 November 1994" on a house site. His report records that, "[a]t some point subsequent to onset of symptoms to the lower back", the plaintiff "experienced right sciatica initiating consultation with Dr C Glasby". This consultation was on 6 May, 1995.

[16] The date of onset of the sciatica matters. If that leg pain was not experienced until the late April/early May second incident, according to Dr Boys (whose opinion is not challenged), that demonstrates that the plaintiff suffered actual injury in that incident: discal derangement at the L4/5 level, which was most likely an annular tear.

[17] The plaintiff testified that he had not experienced sciatica between the first and second incidents. Probably, when he entered the witness box the plaintiff realized that the sciatica mattered. Dr Boys testified, however, that the plaintiff was unable to tell him when he first suffered sciatica. But that the plaintiff did not remember the date does not mean much for his credit. Dr Boys learned (from the plaintiff or another, unidentified, source) that the novel sensation of sciatica occasioned the initial consultation with Dr Glasby.

[18] The history the plaintiff related to Dr Boys needs to be considered for another reason. When Dr Boys asked about progression of symptoms, he was not told of a distinct incident in April/May 1995. He did not become aware of such an episode until Mr Grant-Taylor SC told him of it shortly before the trial began. However, this is not an especially telling point. The statement of claim filed in July 2001 clearly pleads the second incident. Presumably, the insurer's solicitors did not tell Dr Boys about it. Dr Boys sought a history of symptoms over many years. He

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1 *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513, 533.

cannot recall whether he specifically enquired about another injury after November 1994. The history Dr Boys took is not inconsistent with the plaintiff's account.

[19] The defendant also relies on disparities between the plaintiff's evidence and a letter he wrote in May 1998, saying:

> "I was a carpenter on a house and we were lifting concrete columns in early December 1994, there was also other heavy lifting involved throughout the whole job. I was not able to stand straight particularly after spending whole days laying a patio deck where I was on my hands and knees all day. It was becoming harder for me to work and drive a vehicle.
>
> I had seen my doctor for a strained muscle and was treated with anti inflammotary [sic] tablets and physiotherapy. In late April 1995, I saw his partner who specialises in back problems. He attempted acupuncture and physiotherapy but by this time I had difficulty moving.
>
> My doctor asked me to see an orthopaedic surgeon but I was unable to have an appointment until September 1995. My initial claim form to my Insurance company was sent in April or May 1995.
>
> My Insurance company has advised me that I had crossed out on my initial claim form the words "when did my injury happen". I did not realise that I had a serious injury at the time of completing this form. I had been honest with them from the start.
>
> With the ongoing lifting on site my back became worse and an ongoing problem. While the initial strain may have been in December 1994, my fitness hid the full extent of my injury until late April 1995."

[20] The letter was written three years after the alleged second incident. Parts of it are not reconcilable with the plaintiff's evidence. He testified that there was no increase in the severity of his back symptoms between the two incidents: his letter claims that his back "became worse" over time. The letter does not speak of a distinct episode with excruciating pain in April/May 1995. Instead, he writes about his fitness having hidden until then the full extent of the December 1994 injury. On the other hand, the plaintiff is not a doctor and could not be expected to know what incident had produced his disabling symptoms.

[21] The letter matters for other reasons. The references to having seen a doctor for a strained muscle accord with his attendance on his general practitioner Dr Wild on 6 May. That he was initially treated with anti-inflammatory tablets and physiotherapy is consistent with assertions in the claim form that he was at Dr Wild's surgery on 6, 10, 11 and 12 May. The referral to Dr Glasby (the "partner who specialises in back problems") receives support from the evidence of Dr Boys that he "did document a consultation with Dr Glasby on 6 May 1995 with complaints at that time and subsequently" of "low back pain and sciatica".

[22] There are also credibility issues connected with the policy.

[23] The policy sued upon is the second the plaintiff got from the insurer. Both contained the cl 1.4 deeming provision. The plaintiff realizes that whether he received the first policy and read cl 1.4 is important. If the plaintiff had read the first policy before purchasing the second, arguably, that might defeat one of the plaintiff's alternative contentions: that s 37 of the *Insurance Contracts Act* 1984 precludes[2] reliance on the deeming provision.

[24] His surrejoinder pleads that he had a copy of one of the policies on or about 13 December 2003. This can only have been the first. He acknowledges receiving a letter from the insurer dated 13 December 1993. The letter asserts that it enclosed the policy. In testifying, however, the plaintiff was not willing to accept that the policy was enclosed. But he did admit to receiving two policies, including one that arrived in March 1994.

[25] This unwillingness to acknowledge that the first policy came with the 13 December letter is said to indicate a reluctance to tell the truth in the pursuit of self-interest. The plaintiff, it is said, was disinclined to accept that he had received and read the first policy before he approached Mr Maughan, his insurance agent, to get the second.

[26] In view of the admission in the surrejoinder, the plaintiff's unwillingness when testifying to accept that the first policy reached him before Christmas 1993 is a factor to be considered in assessing his reliability.

[27] The plaintiff also seeks to deny efficacy to the deeming provision on the strength of a contention that Mr Maughan's representations concerning policy coverage induced the plaintiff to purchase the policies. And he maintains that had he been told of the deeming provision he would have bought a policy that did not include it.

[28] The plaintiff testified that he would "certainly" have been prepared to pay twice the $54.93 premium payable under the first policy to have obtained a policy which did not contain the cl 1.4 deeming provision. But, in cross-examination, he at first appeared to accept that the agreed premium was all that he could afford to pay at the time. Later on, when taxed with the suggestion that he could not have afforded to pay double the premium, he answered, "[m]aybe I could have". This equivocation is to be taken into account in assessing veracity and reliability.

[29] At other times, in testifying, the plaintiff did look consciously to have adopted positions he thought would suit his interests. For example, in recalling Mr Maughan's representations concerning the policy, he denied that Mr Maughan had said "if you get injured on the job you get lifetime benefits". When challenged with the particulars his solicitors had provided contending that Mr Maughan's representation was to the effect of "[i]f you get hurt on the job and you can't work, it covers you for a lifetime …", he indicated that he believed that that could indeed have been the representation.

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[2] s 37 provides:
"**Notification of unusual terms**
An insurer may not rely on a provision included in a contract of insurance … of a kind that is not usually included in contracts of insurance that provide similar insurance cover unless, before the contract was entered into the insurer clearly informed the insured in *writing* of the effect of the provision (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise)." (emphasis added).

[30] He also refused to accept a suggestion put in cross-examination that he did not remember what Mr Maughan had said. Yet it is highly improbable that the plaintiff can recall precisely what Mr Maughan said more than 12 years ago. He has no contemporaneous record; and he has suffered very considerably for many years.

[31] Accordingly, there are good reasons for caution before acting on the plaintiff's testimony.

One timely account

[32] There is one contemporaneous document: the claim form the plaintiff signed on 15 May 1995. In it, asked to describe his "sickness or injury", the plaintiff wrote "prolapse [sic] disc". The next question was, "when were the first symptoms or when did injury happen?" The plaintiff struck through "when did injury happen" and wrote in "late April". The "full details of exactly how it happened" he supplied were: "lifting heavy materials". His date of first treatment is said to be 6 May 1995. He answered the question, "have you had this or similar trouble before" with "no".

[33] The plaintiff was not asked why he struck through "when did injury happen?" (His letter in May 1998 assigned a reason for this). Nor was he seriously challenged with a suggestion that "lifting heavy materials" was inconsistent with his account of experiencing pain when laying the patio deck. This may be because the nature of his work on the deck did involve lifting heavy things.

[34] The document does assert that the plaintiff's first treatment was on 6 May 1995. This accords with his evidence that he did not seek medical treatment for the back discomfort resulting from the November/December 1994 incident. The assertion that he had not had "this or similar trouble before" is also consistent with a significant episode of pain having afflicted the plaintiff in late April/early May 1995.

[35] Dr Boys records that it was the onset of sciatica that initiated the consultation with Dr Glasby on 6 May 1995 – just a few days after the second incident the plaintiff describes. This is consistent with information in the claim form. In these circumstances, nothing in the evidence of Dr Boys is inconsistent with the plaintiff's testimony that he had not experienced sciatica before late April/early May 1995. Nor is there other evidence to call that into question.

Injury sustained in second incident

[36] The significance of the onset of the sciatica has already been explained.[3]

[37] All considered, it is more probable than not that, within 30 days preceding the commencement of his "total disability", the plaintiff sustained a discal derangement in the nature of an annular tear. Plainly, such a condition is "injury".

Caused by an accident

[38] What, then, of the plaintiff's evidence of having experienced the pain when standing after working on the patio deck? If his account is acceptable, his "injury" did not result from progressive deterioration attributable to the December 1994 insult.

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[3] Para 16.

[39] Despite the caution with which the plaintiff's testimony needs to be approached, his account of having first experienced sciatica through the exertion he has described on the patio deck is, on the preponderance of probabilities, acceptable. It broadly conforms with his claim form. More importantly, it is consistent with the sciatica having emerged a few days before the plaintiff saw Dr Glasby on 6 May 1995. And such a conclusion is not in conflict with any proven fact.

[40] On this basis, the discal derangement that produced the nerve irritation responsible for the sciatica that first became apparent in or about early May 1995 was, more probably that not, the result of internal pressure within the body which unintentionally and unexpectedly caused damage to the body through exertion.

[41] That is an "accident" within the meaning of the policy.[4] So the plaintiff is entitled to lifetime benefits.

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[4] cf *Federico* at 522, 531, 538.