

What we can learn from NZ's workers' compensation scheme regarding hernia claims?

David MacDonald v Accident Compensation Corporation
[2009] NZACC 153

Background

In the United Kingdom in 1996, Smith G D, Crosby D L and Lewis P A conducted a study into 129 patients who had a total of 145 inguinal hernias. The study showed that in only 7% of cases the hernia was subjectively attributable to a single muscular strain. The study confirmed that there is seldom any subjective association between a muscle strain and the onset of a groin hernia. It found that constitutional factors are of considerable importance in the causation of a groin hernia.

Following this study, the Accident Compensation Committee (**ACC**) in New Zealand developed its own guidelines based on the Smith report's findings. The purpose of the guide is to provide certainty to doctors when considering hernia claims that arise in the workplace.

The Law

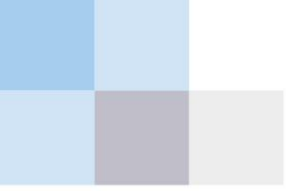
Under New Zealand legislation, a person has cover under the *Accident Compensation Act 2001* (NZ) (**the Act**) if he or she satisfied the criteria in sections 20, 21 or 22 of the Act. For a claim to be accepted under New Zealand legislation the hernia must be caused by "**an accident**" and not "wholly or substantially" by disease or ageing nor merely bringing to light a pre-existing condition.

According to the ACC's guide, when considering inguinal hernias, the factors that must be present are:

1. The worker reports that a single strenuous event has caused the hernia.
2. The event involves the application of an unusual, sudden, unexpected force as opposed to a controlled movement.
3. The patient suffered significant groin pain at the time of the event and the pain was substantial enough to cause the patient to cease activity at that time or soon afterwards.

The ACC guide provides that generally traumatic abdominal wall hernias will most likely be covered, e.g. when a hernia is caused as a result of being struck by something. In comparison, femoral, epigastric, umbilical or spigelian hernias are unlikely to be covered. Inguinal hernias are decided on a case-by-case basis.

In the decision of *David MacDonald v Accident Compensation Corporation* [2009] NZACC 153, the Court considered the application of the ACC guide in relation to a claim for compensation for an inguinal hernia. Mr MacDonald was working as a chef. On 28 June 2006 he lifted a 30-litre bucket of turnips when he first noticed a lump with pain in his right groin. On 3 July 2006 Mr MacDonald went to see his GP and the notes of this visit record "*lump in right side of groin present for a few days. Tender sometimes*". On 7 July 2006 he returned to his GP and reported that his discomfort was increasing and he was sick of it.



On 28 July 2006 Mr MacDonald saw General Surgeon Mr Packer who found that clinically he had a right inguinal hernia and due to the degree of his symptoms surgery was indicated. Mr MacDonald underwent the surgery. Clinical notes from a consultation on 20 September 2006 record that his insurance company wanted him to fill out an ACC form. It was noted that he was always doing heavy lifting at work and that following the incident on 28 June 2006 he got immediate pain after he put the bucket down. Mr MacDonald then filled out an ACC Hernia Questionnaire. He indicated that the pain he experienced was similar to being kicked in the testicles and it was “very tight”.

On 17 October 2006, ACC denied cover and said, “the information we have suggests that your hernia condition did not result from a traumatic rupture of the abdominal wall.” The ACC sought a report from Dr Walker, General Practitioner and ACC Branch Medical Advisor. Dr Walker was of the opinion that an inguinal hernia cannot occur, as it had in this case, in the absence of a physical injury. He referred to the case law and said that in order to obtain cover for a personal injury caused by accident there must be an injury to the abdominal wall over and above the appearance of a hernia.

Mr MacDonald submitted that his hernia was a personal injury, first caused by a specific event, or a series of events, that occurred while lifting the 20-30kg bucket of parsnips and he should therefore receive cover. Mr MacDonald referred to the ACC policy guidelines for deciding cover for hernias.

Conclusion

The Judge in making his decision referred to four evidentiary principles that have developed in New Zealand case law when considering what has caused a hernia, being:


1. An officially reported incident of muscle strain.
2. Severe groin pain at the time of the strain.
3. Diagnosis of a hernia by a doctor within 30 days.
4. No previous history of hernias.

Mr MacDonald argued that he had satisfied all of the evidentiary criteria and that the evidence relied upon by the ACC from Dr Walker was contrary to the expert evidence of the treating surgeon, Dr Packer. Mr MacDonald submitted that the ACC was applying the guidelines too rigidly.

When considering the report, the Court found that less weight should be given to Dr Walker’s report as he was an employee of the ACC and not truly independent. Further his expertise relates to the area of general practice and he did not have the benefit of a personal examination of Mr MacDonald, he was reliant on second hand information.

In comparison Mr Packer, Mr MacDonald’s treating surgeon, was of the view that it was more likely than not that the incident at least contributed to the cause of Mr MacDonald’s hernia.

In response the ACC simply relied on the evidence of the first review decision and the reports from Dr Walker. The court assessed that the main thrust of Dr Walker’s report seemed to be that he did



not think that Mr MacDonald had experienced severe enough pain and that it had not been proved that the incident caused a rupture of the abdominal wall.

The Court concluded that it preferred the evidence of Mr Packer as the operating surgeon and that Mr MacDonald had satisfied the evidentiary criteria. On this basis he set aside the original review decision and found in favour of Mr MacDonald.

Lessons Learnt

What we can learn from the New Zealand approach to compensation for hernia claims is that the current weight of the medical evidence appears to suggest that absent a traumatic workplace “injury”, hernias may not be caused or contributed to by the worker’s employment. When assessing hernia claims, it may be useful to have regard to the following in determining whether or not the hernia has been caused by the worker’s employment:

- A single strenuous event is claimed to have caused the hernia.
- If the accident occurred in a workplace, an incident of muscle strain is officially reported. Significant groin pain was present at the time of the accident.
- A medical practitioner diagnosed traumatic inguinal hernia within 30 days of the accident but preferable within 10 days.
- There is no history suggestive of gradual onset or congenital inguinal hernia.

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