Neutral Citation Number: [2013] EWHC 1203 (Admin)

Case No: CO/3004/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 May 2013

Before:

Mr Justice Collins

- -

Between:

Commissioner of Police of the Metropolis	Claimant
- and -	
The Police Medical Appeal Board	Defendant
- and -	
David Walther	Interested Party

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- -

Mr Timothy Pitt-Payne, Q.C. (instructed by **the Directorate of Legal Services**) for the **Claimant**
Mr David Lock, Q.C. (instructed by **Messrs Lake Jackson**) for the **Interested Party**

Hearing dates: 25 April 2013

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Judgment

Mr Justice COLLINS :

1. This claim raises issues concerning the construction and application of the Police (Injury Benefit) Regulations 2006 (SI 2006/932) insofar as they provide for an injury award to an officer who is permanently disabled as a result of an injury received without his own default in the execution of his duty and so has had to retire from the police force prematurely. An application is made to the police pension authority, which in the case of the Metropolitan Police is the Commissioner for the Police of the Metropolis, who must refer medical aspects of the decision making process for decision to a selected medical practitioner (SMP). There is a right of appeal from decisions made by SMP to the defendant. There is no further right of appeal to the court so that judicial review is the only way in which the defendant's decision can be challenged. As is normal in such claims, the defendant has not appeared but the police officer as the Interested Party has. I shall refer to him as the IP.

2. There is a somewhat lengthy background to this case since the IP was refused an award by the defendant in July 2009. That decision was quashed by Irwin J in judicial review proceedings on 23 November 2011. The IP's application was reconsidered by the SMP who on 22 May 2011 maintained his conclusion that the IP was not entitled to an injury award. The IP appealed and the defendant allowed his appeal on 21 December 2011. This claim to challenge the decision of the defendant of 21 December 2011 was lodged on 20 March 2012 and permission was granted on 18 June 2012.

3. The IP is now 46 years old. He joined the Metropolitan Police Force when he was 17 and continued to serve in it until medically retired in March 2008 following a consultation with Dr Baxendine, the SMP, on 19 December 2007. Following his retirement he applied for a police injury pension. The SMP in his report of 9 October 2008 found the IP to be suffering

from three separate disabilities, namely "left shoulder impingement syndrome, lumbar disc degeneration and depression". The first two were considered to be permanent, but the shoulder injury was not of continuing significance. The only relevant injury for the purposes of this claim is the lumbar disc degeneration.

4. There is no dispute about the history of the IP's back problems. In June 1995 he was injured while trying to restrain a prisoner. He was off duty as a result until August 1995 but was then travelling in a car which was hit by a drunk driver. As a result he suffered significant injury and was off duty with low back pain until July 1996. In September 2001 he was treated by a physiotherapist for back pain and in November 2001 an MRI scan showed degenerative disc disease in the lumbar region together with mild facet joint disease. He was able to continue to carry out his duties despite a back injury in March 2003 which resolved itself. A further MRI scan in early July 2004 reported "degenerative disc changes of the L4/5 and L5/S1 discs" and prominent disc bulges at T12/4, L4/5 and L5/S1. However, he was able to continue full operational duties until he sustained an injury on 27 April 2006. Following that injury he was unable to perform full duties and was retired in March 2008.

5. He was undertaking safety training on 27 April 2006. In the course of this, a fellow officer weighing some 15 stone jumped on him. As a result he suffered immediate and continuing pain to his back. The SMP agreed with the IP's expert, Dr Reynolds, that the injury was 'the major contributor to the ongoing pain and disability'. Dr Reynolds considered that, although the IP may have had a genetic tendency towards lumbar disc degeneration, both the injury back in 1995 and that of April 2006 had materially and substantially contributed to the degeneration. The SMP's view, which he has maintained throughout, was that the April 2006 injury resulted in an acceleration of his pre-existing condition which was likely to have rendered him unfit to perform his duties. In his report of 23 October 2011, the SMP stated that in his view there was a steady progression of the IP's condition and, irrespective of the incident of 27 April 2006, it would have resulted in an inability to perform his duties and so premature retirement. His view was that that would have been likely to have occurred 'in something of the order of 18 months to 2 years'. That led the SMP to decide, as he believed consistently with Irwin J's judgment, that an injury award should not be made. The IP's appeal succeeded, hence this claim for judicial review.

6. The proper answer to this claim depends upon the true construction of the relevant paragraphs of the 2006 Regulations in their application to a case such as this where there is an underlying degenerative condition and an injury which has affected that condition. The starting point is Regulation 11 which provides:-

> "(1) This regulation applies to a person who ceases or has ceased to be a member of a police force and is permanently disabled as a result of an injury received without his own default in the execution of his duty …
>
> (2) A person to whom this regulation applies shall be entitled to a gratuity and, in addition, to an injury pension, in both cases calculated in accordance with Schedule 3 …"

Essentially an injury pension is calculated on the basis of the degree of disablement, the average pensionable pay and the period in years of pensionable service.

7. One then goes to Regulation 8 which provides:-

> "For the purpose of these Regulations disablement … shall be deemed to be the result of an injury if the injury has caused or substantially contributed to the disablement."

Regulation 7 defines disablement for the purposes of the Regulations. So far as material, it provides:-

> "(1) …[A] reference in these Regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the

> time when the question arises for decision and to that disablement being at that time likely to be permanent.
>
> (4) … [D]isablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force …
>
> (8) In this regulation, 'infirmity' means a disease, injury or medical condition …"

8. Regulation 30 deals with the reference of medical questions. So far as material, it provides:-

> "(2) … [W]here the police authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions –
>
> (a) whether the person concerned is disabled;
>
> (b) whether the disablement is likely to be permanent …
>
> And, if they are further considering whether to grant an injury pension, shall so refer the following questions –
>
> (c) whether the disablement is the result of an injury received in the execution of duty, and
>
> (d) the degree of the person's disablement."

Questions of degree under (d) are relevant in considering the amount of any award but are not material for the purposes of this claim. The decision of the SMP is to be expressed in the form of a report which, subject to rights of appeal by the former officer to the defendant, is final.

9. Regulation 37, which does not feature in Irwin J's judgment, is in my view as will become apparent of some importance. It deals with reassessment of awards. So far as material, it provides:-

> "(1) Subject to the provisions of this part, where an injury pension is payable under these regulations, the police authority shall, at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered and if after such consideration the police authority find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly."

Although the heading to Regulation 11 states "Police officer's injury award", Regulation 11(2) uses the expression 'injury pension' and so Regulation 37(1) relates to the amount of the person's pension which is awarded because of a qualifying injury which has resulted in since it has caused or substantially contributed to his permanent disablement. Thus any alteration in the degree of disablement within Regulation 37, which is concerned only with a reassessment of injury pension, must relate to the degree of disablement resulting from the qualifying injury. A reassessment under Regulation 37 will in most if not all cases require a medical examination. This will be able to show whether there has been any improvement or deterioration in the disablement resulting from the qualifying injury and more particularly whether an underlying condition has overtaken any disablement resulting from the injury.

10. The purpose of an award is to give a minimum income guarantee depending on degree of disablement and length of service. This is an attempt to ensure that the person's reduced earning capacity caused by the disablement resulting from the qualifying injury is compensated for by the amount of the injury pension. It is done on the basis of a percentage of average pensionable pay determined by the degree of disablement within brackets of 25%. But, since it means that a sum based on the continuing effect of a

qualifying injury is payable, it is necessary in the interest of ensuring that only the deserving continue to receive the injury pension at a particular level to be able to carry out checks. These may, of course, work both ways in that they may show that the effects of the injury have increased the degree of disability just as they may show the contrary.

11. The decision of the defendant which was dealt with in the judicial review before Irwin J had refused an award on the basis that the injury sustained on 27 April 2006 had brought about an acceleration of a degree of disablement which would have occurred in any event at some time in the future. It was to be distinguished from an aggravation of an underlying condition which would otherwise have remained dormant. The defendant had believed that the construction of the Regulations in the decision of the court precluded the award of the injury pension in an acceleration case. This belief stemmed from *Jennings v Humberside Police* [2002] EWHC 3064 (Admin), a decision by H.H. Judge Wynn Williams Q.C., as he then was. The medical evidence in that case was that the injury in question, which was caused in a road traffic accident, had accelerated the onset of symptoms which would have resulted from pre-existing degenerative changes by between 18 and 24 months. By then the claimant in that case would have been suffering the same disablement without any intervening injury. The judge thought that the issue whether an officer was within or without what is now Regulation 11 could not depend upon the chance of when the various constituent elements of 11(1) were decided so that whether an officer was entitled should be the same whether consideration was given to all of the elements of 11(1) at the same time or on different occasions. Thus he decided that the injury from the accident in that case did not cause or substantially contribute to the disablement. Home Office guidance following from *Jennings* led to the view that injuries causing acceleration could not qualify for injury pensions. That was the approach adopted by the defendant. It was, as Irwin J decided, wrong.

12. Reliance was placed on observations in the Court of Appeal in *R(London Fire and Emergency Planning Authority) v Board of Medical Referees* [2008] EWCA Civ 1515. That case (the 'Fire Authority case') concerned the construction of similar provisions to those with which I am concerned in the Fireman's Pension Scheme Order 1992. Tuckey LJ, with whose judgment the other members of the court agreed, referred to the relevant findings in the medical reports relied on by the defendant Board. The fireman had been impaired when he slipped on a muddy bank whilst carrying a portable generator and landed on his back. He sustained some bruising to his hip and back and was detained in hospital overnight. An X-ray taken a month later revealed that he had osteoarthritis to both hips, worse to his right hip. He had before the accident been pain and symptom free. Pain persisted after the accident and he was unable to continue to work and so was medically retired. The report stated:-

> "Index fall was substantial and on orthopaedic assessment sufficient to have been the final straw in bringing to light the underlying degenerative changes in the right hip.
>
> The degenerative change was sufficiently severe for symptoms to have arisen around this time in any event, either as a matter of natural cause or following relatively minor trauma.
>
> The orthopaedic assessment of the Board Hearing is that the symptoms … brought forward by a period of [about] one year."

13. In paragraph 10 of the decision, Tuckey LJ said:-

> "The remaining question is whether "the infirmity was occasioned – caused or substantially contributed to – by" the injury. It is here that the difficulty arises in this type of case. What is the infirmity? Is it the pre-existing degenerative change in the joint which makes it vulnerable to injury but has not been caused by that injury? Or is it the symptomatic arthritis which has been triggered by the injury? Does it make a difference that the arthritis has merely been accelerated rather than aggravated?"

14. He then referred to *Jennings*, agreeing with Mr Michael Supperstone Q.C., sitting at that point as an additional Judge of the High Court, (from whose judgment the appeal was brought) who had said that it did not lay down any general principle that an injury which accelerated the onset of symptoms in an already degenerative part of the body could not substantially contribute to disablement. The causation question was essentially a medical question to be determined by doctors. Tuckey LJ continued in Paragraphs 14 and 15:-

> "14. I agree with the way in which the judge dealt with *Jennings*. There is, it seems to me, no one answer to the question which I have posed. Each case must depend upon its own facts and be left to the assessment of the medical jury. If the injury is trivial it will be open to a Board to conclude – as the judge did in *Jennings* – that the necessary causal link between the injury and the infirmity has not been made out. Likewise, if, for example, the affected joint had begun to show signs of arthritis before the qualifying injury occurred. On the other hand, it does not follow that, because the injury has merely accelerated the onset of symptoms a casual link cannot be made out. It is common ground that it will be made out in a case where the condition has been aggravated by the injury, but there is not, in my judgment, any bright line between cases of acceleration and cases of aggravation.
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> 15. In this case one can see from the Board's discussion what led to its conclusion. The fall itself would have been sufficient trauma to cause symptomatic traumatic arthritis. Although there was degenerative change in the joint, the absence of inflammation and pain indicated that the joint was not arthritic before the accident. It became arthritic as a result of the fall. The Board did not consider whether the injury had aggravated the condition, although it seems to me that there was evidence from which it could have concluded that it had."
>
> "

15. It is to be noted that in Paragraph 16 it had been said to be necessary to pursue the judicial review because the award could not be reduced after the acceleration period to reflect the fact that the claimant would have been suffering the same symptoms even if he had not sustained the qualifying injury. That, Tuckey LJ said, was the fault of the Regulations and not something the court should seek to cure by interpreting them in a way which was in the court's view erroneous. As I have already said, in my view Regulation 37 does enable a review and a reduction in the pension awarded to the former officer if the progress of an underlying medical condition means that the duty injury is not still an operative cause of any reduction in the former officer's earning capacity.

16. I confess to some difficulty in applying what Tuckey LJ has said in paragraph 14 of his judgment. Since aggravation would, as apparently was agreed by counsel in that case, always justify an award but acceleration might or might not, the distinction between the two is of some importance. It is said there is no bright line, but aggravation would normally be appropriate to describe the position where the injury produced symptoms which would not otherwise have developed. That is what Mr Pitt-Payne submitted, but it seems to me that that does draw a bright line between aggravation and acceleration, since acceleration presupposes that the symptoms would have developed in any event within x months or years. There is then the problem of deciding how much acceleration should result in a decision that the injury has substantially contributed to the disablement. It is again to be noted that in the Fire Authority case the acceleration was 12 months whereas in *Jennings* it was 18 to 24 months. The former justified an award, the latter did not. While each case inevitably must turn on its own facts, a degree of consistency so far as possible is desirable.

17. In the previous claim made by the IP, Irwin J stated his conclusions in Paragraphs 40 to 42. He said that the proper approach was relatively simple to state in that disability was to be equated to incapacity and must be permanent. He then considered what was meant by permanent and decided that the length of time over which the condition was borne was relevant when assessing a contribution to a 'permanent disability'. I should cite Paragraph 42, in which he said this:-

> "A short acceleration of the onset of a permanent disability is unlikely to be held to be a "substantial" contribution to that disability. Acceleration to any degree is some contribution, but not likely to be regarded as substantial. The opposite applies, it seems to me. A significant acceleration – taking the extreme case, an acceleration of a decade or more – clearly would be a significant contribution to a permanent disability. Where the dividing line comes must be a matter of fact in each case. In my judgment such an approach is consistent with the language of the Regulation and with common sense."

Thus on his approach the degree of acceleration would be determinative. He used the adjective 'significant' which he clearly regarded as synonymous to 'substantial' which is the word used in the Regulations.

18. In Paragraph 39 Irwin J referred to but rejected an argument raised by Mr Lock, who represented the IP then as now, that one should take 'a snapshot of the level of disability at the relevant time in the process set out in paragraph 30(2) and that the question of acceleration is irrelevant'. The argument of Mr Lock continued:-

> "If the disability is of sufficient degree at the moment of the snapshot, the fact that it would have arisen anyway within a very short time is to be ignored."

Irwin J rejected this argument, saying

> "That too does not strike me as either sensible practice or good law."

It is perhaps noteworthy that Mr Pitt-Payne argued, the Commissioner having succeeded before the Board, that it was not necessary to offer any formulation of the approach that should be adopted because it was a matter of fact for the experts making up the panel and, as he put it, "simple deference required the courts to let the experts approach the question as they wished". Unsurprisingly, Mr Pitt-Payne did not make that or any similar submission before me.

19. I am concerned that the approach indicated by Irwin J leaves a real doubt for the defendant and any officer or police authority where acceleration or aggravation is in issue. How great an acceleration will mean the injury was a substantial contribution? Irwin J gives an example of 10 years but, as I have said, in the Fire Authority case the Court of Appeal thought the medical jury were entitled to come to the conclusion that 1 year was enough. Mr Pitt-Payne submits that 18 months to 2 years was insufficient to justify an award, his case being that the defendant erred in failing to deal with the evidence of the SMP that that was the degree of acceleration and whether that meant that the contribution of the injury was not substantial.

20. It seems to me that Irwin J's approach has not had sufficient regard to the wording of the Regulations. Regulation 7(1) is in my judgment of fundamental importance in this regard. As will be recalled, it reads, so far as material:-

> "… a reference in these Regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision and to that disablement being *at that time* permanent."

The only relevant time is when the 'question arises for decision' which is when the police authority refers the questions to the SMP as required by Regulation 30(2). If at that time there is a disablement which is permanent and if the injury sustained caused or substantially contributed to that disablement at that time, the right to receive an injury award arises. It is thus important to consider the injury itself. If it was relatively trivial and the disablement was thus largely due to the underlying degenerative problems, no doubt the finding would be that there was no substantial contribution. If however the injury was such that it did substantially contribute to the permanent disability (since the question of causation or contribution will only arise if the disablement is found to be

permanent), the right to an award arises and the extent of any acceleration is not determinative of that right. An injury which causes disablement which is permanent because there will be no reasonable prospect of recovery due to an underlying degenerative condition is likely to be regarded as a substantial contribution to that disablement. It must be borne in mind that the purpose behind an injury award is to compensate the officer who has to be retired for the 'degree to which his earning capacity has been affected as a result of' a qualifying injury (see Regulation 7(5) of the Regulations). If his earning capacity is affected for a period of time, he should be entitled to that compensation. The matter can be reviewed pursuant to Regulation 37 and a suitable interval for such review can be determined by the police authority in the light of the forecast given of the degree of acceleration.

21. There is one caveat to be applied to what I have said. The time when the question arises for decision will inevitably be after the injury occurs. In this case it was not until the end of 2007 that the SMP was instructed, some 18 months at least after the injury. If by then the underlying degeneration had subsumed the effect of the injury or was about to do so, it could not be said that the injury, albeit a different view might have been taken at an earlier time, had substantially contributed at that time to the permanent disability. A sensible approach then would be to consider whether the officer, who has been kept in the force on full pay, would have had his earning capacity affected as a result of his injury for any meaningful period. But he should receive compensation for the loss he is bound to sustain even for a relatively short period.

22. There is a further problem which was raised by Mr Lock. Determination of the degree of acceleration will inevitably in most if not all cases be imprecise. In addition, the fact that the officer would have become unable to perform his duties as a police officer would not necessarily have meant that he would have been compulsorily retired on medical grounds. Desk jobs can be found. Where degenerative changes produce the disablement the relevant effect, namely medical retirement, might well have been delayed or avoided entirely.

23. In the light of what I consider to be the correct approach in law to the questions to be determined by the SMP and the defendant, it is necessary to consider the defendant's report. It sets out the factual background, which I have already referred to. It notes the submissions on behalf of the Commissioner in the light of the authorities, particularly the decision of Irwin J, that 'what is relevant now is the period the acceleration brought forward the permanent disablement'. The IP's evidence was that prior to the injury he had been managing full duties without difficulty. He saw an osteopath once or twice a year and managed his condition by proper posture and core stability exercises. When the officer jumped on his back, he felt some pain and tingling in his right leg. He thought that this would recover and was able to continue to work but back pain worsened and after "some weeks" it became so severe that he would no longer work even at the office job with which he had been provided.

24. The Board consisted of three doctors, one of whom was a surgeon. He carried out a clinical assessment of the IP. His conclusion was as follows:-

> "I conclude that the new development of disc extrusion at L5/S1 after the index accident was likely to be the cause of the severe back pain and right leg sciatica experienced by the Appellant, necessitating excision surgery.
>
> There was no immediate cause for the disc protrusion other then the index incident. There was no reason why the degenerative changes previously noted would have prevented him from continuing his normal police duties, as had been the case prior to the injury."

25. In setting out relevant case law, the defendant cited paragraph 42 of Irwin J's judgment which clearly indicated that ascertainment of the degree of acceleration was the correct approach. It stated that it considered that the degenerative lumbar disc disease was the main reason the IP was permanently disabled and retired from the force. However, there was no evidence of any specific change in his condition or symtomatology attributed to any injury on duty until the injury of 27 April 2006. Following that, an MRI scan revealed a

large prolapsed intervertebral disc which required surgery. The medical evidence showed that the IP developed right sided symptoms following the relevant injury which he had never before experienced. There was increased incapacity following the injury. It noted a report from Dr Reynolds of 29 October 2008 which stated:-

> "Whilst this officer nay have had genetic tendency towards lumbar disc degeneration, I personally believe that the injuries on duty of 8th June 1995 and 27th April 2006 materially and substantially contributed to be determinative in his spinal condition."

The SMP in his original report of 17 October 2007 had supported Dr Reynolds' view that the injury of 2006 'was the major contributor to the ongoing pain and disability'. But this did not in his view exclude it from being an acceleration of the pre-existing degenerative condition.

26. I should set out what the Board said under the heading 'Case law' and it's summary. It said this:-

> "The Board considers that the judgment handed down by the High Court in the Appellant's case in November 2010 contains much useful discussion of the legal position, *Walther v PMAB and MPA* [2010] EWHC 3009 (Admin).
>
> It appears to the Board that the question to be answered in this case is clearly outlined by the Regulations. Regulation 8 of the Police Benefit Regulations states that disablement shall be deemed to be the result of an injury if an injury has caused or substantially contributed to that disablement. In the Board's view, this is the test for determining whether an individual should receive an injury award or not. The issue of permanent disablement is not one for this Board as that has already been determined.
>
> The Board considers that the concepts of acceleration and aggravation, whilst made with the best intentions in the case of *Jennings*, are not particularly helpful. The Board does not believe that it can be right that all cases of acceleration fail to qualify for an injury award or that all cases of aggravation necessarily qualify for an injury award. A simplistic view, based solely on those concepts, cannot, in the Board's view, be the correct approach. What is important is whether any injury has made a significant contribution to a permanent disablement or was in itself a cause of a permanent disability. The Board does not view the *Walther* judgment as requiring SMPs or Boards to assess the quantum of any acceleration, but rather to ask whether an injury has made a significant contribution to or caused a permanent disablement.
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> As the judge in the *Walther* case indicates, what is a significant contribution must be a matter of fact in each case. Essentially, this is a medical decision and the one that the Board must make in the current case.
>
> Summary
>
> The Board concludes that there is a considerable weight of evidence that strongly suggests that the injury on duty sustained by the Appellant in April 2006 did substantially contribute to his permanent disablement. Prior to the injury on duty he was undertaking full duties as a Police Officer. Whether or not the injury on duty caused the acute event of a prolapsed intervertebral disc is in the Board's eye not materially important. What is important is the fact that the Appellant was not able to return to work in any capacity following the injury and was determined to be permanently disabled by an SMP the following year. He did attempt a return to work but was unable to manage. Both GP and occupational

> health notes are consistent with the Appellant's history that his function became significantly compromised following this accident and his requirement for pain relieving medications increased.
>
> The Board has not received any convincing evidence to the contrary."

27. Mr Pitt-Payne in his skeleton quarrelled with the use of the word 'significant', asserting that the defendant had misunderstood its task. However, it is to be noted that Irwin J fell into the same error, if it was such. I have no doubt that the defendant was fully aware of the test to be applied and 'significant' was synonymous to 'substantial'. To be fair to him, Mr Pitt-Payne did not pursue that submission in argument.

28. I have much sympathy with the defendant's view that the concepts of acceleration and aggravation are not helpful. If symptoms are absent or insufficient to create a disability before an accident, it is possible to describe the result of the accident, if following it there is disability, as having aggravated or accelerated the pre-existing condition. In my judgment, although it may be that Mr Pitt-Payne is at least apparently correct in submitting that Irwin J's decision did require an assessment of the quantum of acceleration, the defendant was for the reasons I have given correct to adopt the approach that it did. The true question is indeed whether at the relevant time the injury has substantially contributed to the permanent disability. Whether it has will be a question of fact which is likely to turn in most cases on the seriousness of the injury and its effects. Only if there will be no loss of earning capacity resulting from the injury when the officer is medically retired will it be likely to be the case that there was no substantial contribution.

29. Not only was the defendant entitled to conclude that the injury had substantially contributed to the disablement but any other decision would in my view have been wrong. The sentence in the middle of the final paragraph "whether or not … important" is somewhat curious unless perhaps 'caused' is being considered as opposed to 'substantially contributed to'. It may possibly be that the disc prolapse was not regarded as determinative. It may be that there is some lack of complete clarity, as is apparent from the defendant's findings based on what was essentially agreed medical evidence that the injury did result in the onset of pain and the need for an operation and the inability of the IP to return to work.

30. It will be apparent that it is my view that the approach based on aggravation or acceleration and the extent of any acceleration is not appropriate. To that extent I must disagree with Irwin J's decision. The defendant was in my view correct in its approach. But, as I think will be apparent, even if it had approached its task by considering whether the acceleration (if such it was) was sufficient to show that there was a substantial contribution, it would have been correct to decide that it was.

31. It follows that this claim is dismissed. Thus even if the approach indicated in Irwin J's decision was one which the defendant should have adopted, its decision would not have been wrong.