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CALVER AND THE 'GENEROUS INTERPRETATIONS' OF ACCIDENT COMPENSATION: A GRADUAL PROCESS…

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Abstract

This paper examines the judgments of Calver v Accident Compensation Corporation and its appeal, in light of the legislative history behind New Zealand's accident compensation scheme. It posits that the Calver judgments reflect an ongoing principle of generous and expansive interpretation, which can be tracked through the case law in this area; and that an overriding principle of generosity does not fully accord with the legislative history. That history has involved intentional redrafting to curtail overly expansive judicial approaches, and legislative development in this area has been relatively stagnant in recent decades. Alternative approaches for interpreting the scheme are discussed. A more comprehensive set of principles for interpretation of accident compensation cases would make this area more predictable and better explain the outcomes of cases where the boundaries appear to be widened. It does not seem convincing, in light of the full history, to simply suggest that outcomes should reflect the Woodhouse vision. Credence should be paid to real policy issues which have so far prevented a fully comprehensive scheme from being developed.

Keywords: *"Accident compensation" "Boundaries of cover" "Generous interpretation" "Legislative history" "Mesothelioma"*

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I Introduction

In the decisions of *Calver v ACC*, the courts have held that mesothelioma (a form of cancer contracted from the inhalation of asbestos fibres) constitutes a 'personal injury by accident', for the purposes of New Zealand's accident compensation scheme.[1] For a non-worker, the 'personal injury' is the entirety of the mesothelioma disease (viewed holistically, as one combined injury) and the 'accident' is the inhalation of asbestos fibres.[2]

One might be forgiven for expressing a measure of surprise at that result. For better or worse, an enduring characteristic of the scheme has been a general denial to extend coverage to illness and disease. Cover for illness and disease has traditionally been understood as being carefully restricted to a limited number of situations specifically recognised in the statute. For example, where the illness is work-related or a consequence of treatment injury.[3]

This reluctance to expand the boundaries of the scheme too far beyond the traditional 'accident' situation has not only been an enduring characteristic of the scheme; it has also been the subject matter of sustained criticism[4] and, in the scheme's recent history, of an ongoing political contention: should Parliament prioritise limiting the costs of the scheme, or strive to give effect to the ambitious proposals that once birthed it? A persisting emphasis on cost limitation has arguably limited the scheme's evolution.[5]

So what is going on with the *Calver* judgments? In both the High Court and Court of Appeal, mesothelioma has been considered a unique disease condition, which can be captured by the language *and the policy* of the scheme.[6] In order to reach that result, the

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[1] *Calver v Accident Compensation Corporation* [2019] NZHC 1581, [2019] 3 NZLR 261 at [140].

[2] At [112] and [113].

[3] Accident Compensation Act 2001, ss 26(2) and 20(2)(e)–(h).

[4] See, for example, Sir Kenneth Keith "The Law Commission's 1988 Report on Accident Compensation" (2003) 34 VUWLR 293 at 301; and Sir Geoffrey Palmer QC "A Retrospective on the Woodhouse Report: The Vision, the Performance and the Future" (2019) 50 VUWLR 401 at 420.

[5] Susan St John "Reflections on the Woodhouse Legacy for the 21st Century" (2020) 51 VUWLR 295 at 303.

[6] *Calver v Accident Compensation Corporation*, above n 1, at [61] and [106]; and *Accident Compensation Corporation v Calver* [2021] NZCA 211, [2021] 2 NZLR 721 at [60].

courts have adopted a 'generous interpretation' of the Accident Compensation Act 2001.[7] This notion of 'generous interpretation' originated 30 years ago and was famously endorsed as a "generous, unniggardly approach" in *Harrild v Director of Proceedings*.[8] It has persisted throughout the case law, but it is a principle which might reasonably be questioned in light of the full legislative history.

On one hand, generous interpretation is understood to give effect to the ambitious proposals of Sir Owen Woodhouse, which were the basis for the scheme's entire inception. On the other hand, political attitudes around the scheme gradually shifted throughout the 1990s, culminating in a short-lived attempt to privatise the scheme. For present purposes, the most relevant change of this period was a more prescriptive redrafting of the statute's cover provisions in 1992. A formerly non-exhaustive definition of 'personal injury by accident' was replaced with a set of highly prescribed pathways to cover.[9] Although the view to privatise did not ultimately succeed, that more restrictive drafting survived and the past two decades have seen relatively minimal expansion of the boundaries. For the most part, there has been sustained maintenance of the scheme, with legislative expansions tending to be carefully considered and limited in scope.

From a purely altruistic and humanitarian perspective, it is probably desirable that the judiciary readily extends the ambit of the scheme to those who truly need it, so long as the words of the legislation are not completely distorted. At the same time, it is worth closely examining *Calver* and the history of 'generous interpretation'. Expansive interpretations of the scheme have tended to narrowly open the door to cover, with a view to allowing specific and apparently meritorious cases on the borderline. Over time, one might wonder if these small expansions could amount to a 'gradual process' of *significantly* extending the boundaries, which does not truly accord with the full legislative background.

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[7] *Calver v Accident Compensation Corporation*, above n 1, at [106].

[8] *Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436 (CA) at 438; and *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) at 299.

[9] See the description of the redrafted cover provisions by Kós J in *Murray v Accident Compensation Corporation* [2013] NZHC 2967 at [36]; and see also Ailsa Duffy QC "The Common-Law Response to the Accident Compensation Scheme" (2003) 34 VUWLR 367 at 370 and 371.

This paper first examines the *Calver* judgments themselves. It then aims to provide an overview of the key legislative developments which underly the scheme's policies, and tracks the history of the 'generous interpretation' principle throughout the case law. In light of this review, some alternative approaches for interpreting boundary issues in the scheme are discussed. It is no longer convincing to merely say the scheme should give effect to the Woodhouse vision. Real credence should be paid to the reality that the scheme is not truly comprehensive, and legislative expansion of the boundaries has historically been limited in scope.

II The Calver Judgments

A In The High Court

The claimant in *Calver* was the estate of Deanna Trevarthen. It was accepted that Ms Trevarthen had contracted mesothelioma as a result of inhaling asbestos fibres in her youth. Her father was an electrician and had been exposed to asbestos in the course of his work. The most likely explanation for Ms Trevarthen's illness was that she had inhaled asbestos fibres while hugging her father when he came home from work, or while playing at his work sites.[10]

The case involved two key issues. The first was how the 'personal injury' was to be defined. One approach would find the personal injury was the *physical impacts* of the mesothelioma disease (ascribing the disease as the cause of injury). The more generous approach was to consider the disease and its effects holistically, as one *combined injury* (the entirety of which was caused by inhalation of asbestos). In contending for the latter approach, the claimants relied on *Stok v ACC*, a decision of the Accident Appeal Authority which dealt with mesothelioma over two decades earlier.

Stok had directly confronted the question of whether mesothelioma could be covered as a 'personal injury' despite it being a disease condition. The Authority had concluded that it

[10] *Calver v Accident Compensation Corporation*, above n 1, at [2].

could, because there was some external cause and the legislation *at that time* would only exclude injuries caused *exclusively* by disease.[11] Because the case was decided under the 1982 Act, prior to the 1992 redrafting, the District Court had considered *Stok* inapplicable to the facts of *Calver*.[12]

Indeed, the appropriateness of applying *Stok* under the current legislation was questionable. In its submissions, the Corporation rightly emphasised that an explicit purpose of the redrafting was "reining in the ability of judges to give an expansive interpretation".[13] It was argued that, in light of the legislative history, *Stok* should no longer apply. Mallon J, however, was unconvinced. She appeared to interpret the history as merely indicating a deliberate decision not to extend cover to disease *generally*.[14] She thus concluded that the reasoning of *Stok* could still apply, unless the new drafting had explicitly overturned it.

Mallon J then turned to the case of *Allenby*, in which both Elias CJ and Blanchard J had concluded that the term 'personal injury' had been given an expansive meaning in the statute.[15] The case had concerned the question of whether a pregnancy, following a failed sterilisation, could be considered a personal injury, in order to qualify as 'treatment injury'. The majority view was that the claimant's condition should be viewed holistically, by collectively classing the pregnancy and its physical impacts as a single combined 'personal injury'.[16] Mallon J considered that approach to be binding on her, and thus determinative of the issue in *Calver*.[17] Applying this holistic approach: the disease and its impacts were classed together as a single 'personal injury'.

The second issue was that of causation. The medical evidence had confirmed it would be impossible to identify any single causative exposure, so the question arose whether the mesothelioma should instead be classed as a disease caused by a gradual process (which would not attract cover). The relevant provision of the Act, s 25(1)(b), called for inhalation

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[11] At [39] and [40].
[12] At [31].
[13] Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [2.2.05].
[14] *Calver v Accident Compensation Corporation*, above n 1, at [61].
[15] *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425 at [24] and [68].
[16] *Calver v Accident Compensation Corporation*, above n 1, at [74].
[17] At [75].

on a 'specific occasion'.[18] One might reasonably assume this meant a *particular* date of causative exposure needed to be identifiable (immediately disqualifying Ms Trevarthen from cover). That interpretation would seem to accord with ordinary usage of the word 'specific'. However, the Corporation never contended the point.[19] It simply accepted that no particular date of causative exposure need be identified.

It seems odd that this interpretation of 'specific occasion' has been so readily accepted; it rings of the interpretation given to the phrase 'by accident' in *ACC v Mitchell* and in *ACC v E*. Those cases arose under the pre-1992 legislation, which defined 'personal injury by accident' in non-exhaustive terms. In both cases, the courts interpreted that definition as not requiring identification of any *particular* causative event, so long as the injury occurred 'by accident'.[20] This was one of the main expansive interpretations which had prompted the redrafting in 1992,[21] so one might wonder how this kind of reasoning could persist. Mallon J cited a number of District Court decisions as having established that the specific date of the accident need not be pinpointed.[22] It is difficult, however, to identify a *principled* justification for that view, as those cases tended to simply state this is the correct interpretation (without further explanation).[23] The causation issue thus started on a somewhat generous footing.

Mallon J went on to distinguish mesothelioma from diseases which involve a 'dose-response relationship'. She considered it sufficient that the medical evidence had suggested *some* single inhalation would have caused the disease, even if that occasion could not be dated.[24] Essentially, contracting mesothelioma does not depend on the dose of asbestos inhaled. Multiple exposures would mean an increased risk, but any single exposure could

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[18] Accident Compensation Act 2001, s 25(1)(b).

[19] *Calver v Accident Compensation Corporation*, above n 1, at [96].

[20] Ken Oliphant "Beyond Woodhouse: Devising New Principles for Determining ACC Boundary Issues" (2004) 35 VUWLR 915 at 923.

[21] At 924.

[22] *Calver v Accident Compensation Corporation*, above n 1, at fn 76.

[23] See, for example, *Murphy v Accident Compensation Corporation* [2013] NZACC 398 (DC) at [46]; and *Lilo v Accident Rehabilitation and Compensation Insurance Corporation* DC Wellington Decision No 64-96, DCA 210-95, 28 August 1996 at 6.

[24] *Calver v Accident Compensation Corporation*, above n 1, at [96].

have been causative, and the disease does not develop from an accumulation of exposures (as, for example, with cancer resultant from passive smoking). On the basis that any single one of the multiple inhalations could have amounted to the fatal dose, Mallon J concluded that the 'specific occasion' requirement was satisfied.[25] She explicitly acknowledged that this was a "generous interpretation", but appeared to be of the view that such an interpretation must be preferred (citing *Harrild*).[26]

Although mesothelioma does appear to be contracted differently to 'dose-response related' diseases generally, this reading of 'specific occasion' is very broad, and seems to be at odds with the legislative history of the scheme. Furthermore, Mallon J's conclusion inherently suggests that mesothelioma should be understood as a condition which will almost invariably be contracted as a result of inhalation on a 'specific occasion'.[27] If that is true, then mesothelioma must be expected to generally attract cover under the scheme. But that is an unusual result, as it leads to the question why Parliament thought it necessary to specify that mesothelioma caused by asbestos would qualify as an occupational disease (in sch 2 of the Act).[28] If Mallon J's interpretation is correct (and mesothelioma caused by asbestos is always covered), specifying it elsewhere in the Act is somewhat redundant. Perhaps it could be argued that Parliament sought to provide additional certainty, in the industrial disease context; but the far more likely explanation is that Parliament had thought it implicit that mesothelioma would not be otherwise covered.

It may be that this approach to mesothelioma is difficult to replicate in the context of other diseases, as mesothelioma will almost invariably be caused by an inhalation of asbestos (and unlike a virus or bacterium, asbestos is not excluded by s 25(1)(b)). On that basis, it is understandable that Mallon J did not see her reasoning as doing any significant injury to the scheme's boundaries. Allowing cover for mesothelioma only appears to widen them

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[25] *Calver*, above n 1, at [97] and [104].

[26] At [106].

[27] Although not all mesothelioma cases involve an identifiable asbestos exposure, in the vast majority of cases the disease *is* linked to asbestos inhalation; see Dr Anne Bardsley, "Asbestos exposure in New Zealand: Review of the scientific evidence of non-occupational risks" (The Royal Society of New Zealand, April 2015) at 11.

[28] Accident Compensation Act 2001, sch 2 cl 2.

ever so slightly. Nonetheless, it is a surprising outcome in that it has brought a disease condition into the general realm of cover.

To summarise: the first issue was determined by adopting an *expansive* reading of the term 'personal injury' (per the Supreme Court in *Allenby*), and the second issue was determined by favouring the most 'generous interpretation' available of the phrase 'specific occasion' (explicitly endorsing the 'generous unniggardly' approach).

Mallon J also considered an alternative pathway to cover, through s 20(2)(g). She did not conclude on this, as cover had already been established, however, she appeared to indicate that the mere inhalation of asbestos fibres might have itself been treated as a 'physical injury' (so as to establish there was an initial injury by accident, even if the mesothelioma were treated as a gradual process situation).[29] Simon Connell notes, in *Mesothelioma by Accident*, that in order to take that reasoning further, she would have had to grapple with ACC case law which had thus far taken a narrow view on what could constitute a 'physical injury'.[30] It is somewhat convenient then that Mallon J was able to put this approach to one side; it may have otherwise cast doubt on the validity of her expansive conclusions.

B In The Court of Appeal

The Corporation did not challenge the finding on the causation issue. Instead, the appeal emphasised the underlying policy of the regime and sought to establish that Mallon J was incorrect to find mesothelioma was a 'personal injury' under s 26. It was said that the integrity of the scheme would be compromised if that interpretation were accepted.[31]

In response, the claimants emphasised the uniqueness of mesothelioma and that an expansive reading of 'personal injury' was applicable, per the majority view in *Allenby*.[32] The Court of Appeal actually rejected the notion that *Allenby* was binding in this context, but held nonetheless that the routes to cover should be treated as expansive. The Court

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[29] *Calver v Accident Compensation Corporation*, above n 1, at [132] and [133].

[30] Simon Connell "Mesothelioma by accident" [2020] NZLJ 114 at 117.

[31] *Accident Compensation Corporation v Calver*, above n 6, at [28]–[30].

[32] At [32] and [33].

concluded it would be artificial to draw a distinction between the infliction of a disease and then, by reference to that distinction, nominate the disease itself as a separate infliction causing the ultimate injury.[33] Thus, the generous interpretation of 'personal injury' was affirmed.

An argument could have been made that Mallon J had undermined the intent of Parliament by regarding the final dose as an entirely unique 'accident', in order to satisfy the 'specific occasion' requirement. The medical evidence about mesothelioma has historically been uncertain and the risk of contracting the disease has been associated with the magnitude of exposure.[34] There is, therefore, some scope to argue that the inhalation of asbestos could be equally as comparable to passive smoking as it is to the example of stepping on a nail and contracting tetanus. In *Calver*, the power of that latter example appeared to be a strong influence.[35] But in reality, the issue might have been directly on the borderline. Mallon J's approach effectively gives the benefit of the doubt to the claimant (which appears to conflict with the legal burden established in *ACC v Ambros*).[36] The Corporation did not challenge any of this on appeal.

There was perhaps some merit in the Corporation's argument that an expansive reading of 'personal injury' was out of step with the underlying policy of the scheme. Given the apparently stagnant state of the scheme's boundaries, there is some dissonance in assuming that an expansive interpretation should always be favoured. The Corporation's submissions perhaps erred, however, in arguing that non-work related mesothelioma can *only* be covered by s 20(2)(g) of the Act.[37] That argument goes too far in the other direction, effectively suggesting that *no disease* could ever be treated as being directly caused by an 'accident'. That would exclude, for example, the situation of tetanus contracted from stepping on a nail. Unsurprisingly, the argument found little favour with the Court.

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[33] At [74].

[34] See *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 at [7]; and *Calver v Accident Compensation Corporation*, above n 1, at [23] and [24].

[35] *Calver v Accident Compensation Corporation*, above n 1 at [42] and [75].

[36] *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 341 at [13], [63] and [65].

[37] *Accident Compensation Corporation v Calver*, above n 6, at [31].

These comments are not necessarily to say that *Calver* was decided wrongly. The key point is that these judgments indicate 'generous' and 'expansive' interpretations are being *readily* accepted in this context, even if it leads to some anomalous reasoning. There appears to be an underlying *presumption* of generosity, which has perhaps been insufficiently challenged. It is therefore worth closely investigating the legislative history to see if it truly accords with the continued prominence of this 'generous interpretation' approach.

III The Legislative Background

A The Origins of Accident Compensation in New Zealand

New Zealand's accident compensation scheme was birthed from the ambitious recommendations of the Woodhouse Report in 1967. Sir Owen Woodhouse chaired a Royal Commission tasked with reviewing the adequacy of numerous then existing avenues to attain compensation for personal injury. The resulting report became a widely celebrated example of bold and progressive legal innovation[38] and these ambitious ideals, at the roots of the scheme, can be seen as providing a philosophical framework from which the 'generous interpretation' was derived. Woodhouse laid down five guiding principles for accident compensation; of particular note in this context: *comprehensive entitlement*.[39]

If the Woodhouse Report were used as the sole guide for interpretation, the judgments in *Calver* might seem fairly reasonable. The main reason is that taking a generous and expansive view of the scheme seems to closely reflect the principle of comprehensive entitlement. It would be easy to overlook, however, that the Report was far from an inevitable development. There is a great deal of additional context that should be taken into account.

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[38] Ross Wilson "The Woodhouse Vision – 40 Years in Practice" [2008] NZ L Rev 3 at 3.

[39] Sir Owen Woodhouse "Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry" (December 1967) at 39.

The Woodhouse Report actually exceeded the then National government's terms of reference, and there was no apparent pressure (from the public or elsewhere) for such ambitious reform.[40] It is perhaps unsurprising then that National was unprepared to adopt the full gamut of what Woodhouse was recommending. A white paper was commissioned in response to the Report which had a particular emphasis on cost, and a Parliamentary Select Committee took an even more conservative approach to the recommendations, "anxious to avoid any aura of social security".[41]

The first iteration of the scheme was described aptly by Alan Clayton as "a process in which the new Woodhouse wine was placed in old bottles". He notes that the legislative response to the Report was "timorous" and that Parliament opted not to stray from familiar forms and practices.[42] From the very beginning, the legislature was resisting the bold ideals of the Commission in favour of a scheme which, although more comprehensive than the existing avenues, did not stray too radically from old models. Only about half of the Woodhouse recommendations were adopted and, most notably, the first form the scheme passed did not cover non-earners.[43]

The 1972 Act was reworked after a change of government, but the 'timorous' drafting of that first iteration limited what could be achieved. Sir Geoffrey Palmer noted in 1977 that *universal* coverage could not have been realised without scrapping National's form of the Act and re-drafting from scratch.[44] The prospect of adverse political consequences, however, motivated the new government to instead transplant notions of universal coverage into a scheme that was premised in restrictive logic. Rather prophetically, Palmer recognised from the outset that the legislation lacked clarity and predictability.[45]

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[40] Peter McKenzie QC "The Compensation Scheme No One Asked For: The Origins of ACC In New Zealand" (2003) 34 VUWLR 193 at 206.

[41] At 202.

[42] Alan Clayton "Some Reflections on the Woodhouse and ACC Legacy" (2003) 34 VUWLR 449 at 455 and 456.

[43] See (3 Oct 1972) 381 NZPD 3004, 3005, 3007, 3008, 3017, 3030–3032; and Palmer, n 4, at 406.

[44] Sir Geoffrey Palmer QC "Accident Compensation in New Zealand: The First Two Years" (1977) 25 Am J Comp Law 1 at 7 and 8.

[45] At 9.

At this point in the scheme's history, it is hard to imagine anyone confidently predicting the outcome of *Calver*. The Woodhouse Report was ambitious, but the legislature had struggled to give effect to the full scope of its recommendations. And the Report itself did not actually recommend the scheme should cover illness; it merely acknowledged that drawing a line between injury and illness is an arbitrary exercise, positing that an extension of the scheme beyond 'accidents' should be achieved at a later date.[46] The notion that a cancerous disease would come within the boundaries of the scheme would surely have been unreal to the parliamentarians of the day.

B A Shift in Focus: Paring Back the Scope

Despite those rocky beginnings, the broad spirit of the Woodhouse Report did subsist in the early forms of the scheme. So in spite of that background, the courts opted to take a generous view of how the scheme should operate.[47] The judicial emphasis fell on the "social policy underlying the Act" and the *philosophy* of what was deemed to be "major social legislation".[48] Although the scheme was really a distorted product of the Woodhouse recommendations, it seems that the courts preferred to treat it as an actual realisation of those ideals, and this is where the early roots of the 'generous interpretation' principle can be found.

The words of the original statute actually allowed a surprisingly broad scope for interpretation. Note again that the definition for 'personal injury by accident' was non-exhaustive. In *Mitchell* and *ACC v E*, that non-exhaustive definition was leveraged as a means by which questionable claims could be brought into the boundaries of the scheme anyway. Of particular note, *Mitchell* featured the first mention of the 'generous unniggardly' rule for interpreting the scheme.[49] At this point, the courts were developing norms of interpretation which treated the scheme as being an expansive piece of legislation,

[46] Woodhouse, above n 39, at 26 and 114.
[47] Duffy, above n 9, at 368–370.
[48] *Accident Compensation Corporation v Mitchell*, above n 8, at 438 and 439.
[49] At 438.

at its core. Therefore, had it been delivered at this time, Mallon J's judgment in *Calver* might have actually been viewed as a contemporary of these leading judgments. From the perspective of the judiciary, the result might not have been all that surprising in light of *Mitchell*.

However, the legislative history was approaching a crossroads. In 1988, a report by the Law Commission re-emphasised the anomalous nature of the demarcation between injury and illness. Woodhouse himself had seen the distinction as being contrary to the concept of comprehensive entitlement.[50] It was about time, the Commission argued, that this 'historical and pragmatic' distinction be done away with.[51] The Labour government at that time thus announced an intention to pursue such an expansion.[52] But whereas the Commission had recommended an expansion in stages, that government apparently sought to achieve it in a 'single stroke'. In order to make such a Bill feasible, it had to be accompanied by excessive benefit cuts. Sir Geoffrey Palmer, then Prime Minister, attributed its eventual failure to those qualities.[53]

The failure of that Bill also coincided with a change of government, and the incoming National government would put emphasis on other aspects of the Commission's report. Large and sudden demands had been placed on employers as a result of increasing ACC levy payments, and these were accompanied by complaints about administrative costs.[54] Over time, the new government adopted an entirely different view about what principles should underly the scheme, and this led to a dramatic shift in the political attitudes surrounding accident compensation generally.

There is no need, for the purposes of this paper, to outline the full scope of the 1992 and 1998 reforms. The key point of interest is that redrafting of the cover provisions in 1992. Again, the broad language was intentionally rewritten so that the scheme would be

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[50] Woodhouse, above n 39, at 26 and 114.

[51] Keith, above n 4, at 301.

[52] Oliphant, above n 20, at 920.

[53] At 921.

[54] Sir Geoffrey Palmer QC "Accident Compensation in New Zealand: Looking Back and Looking Forward" [2008] NZ L Rev 81 at 85.

informed by highly prescriptive 'pathways to cover',[55] and this was a deliberate response to the generous approach that the courts had been developing.[56] It is at this point in the legislative history that the underlying policies shaping the scheme start to feel at odds with the reasoning in *Calver*.

When Labour regained power, it quickly undid the 1998 reforms (which sought to privatise the scheme). The 1992 drafting, however, was largely untouched. Perhaps in the wake of the privatisation debate, restoring the broad language of the past seemed like a trivial issue. Nonetheless, in the decades since, there have only been slight and carefully calculated expansions of the boundaries (most notably in relation to treatment injury).[57] For the most part, those boundaries have become stagnant. An income protection scheme, proposed in 2022, may be the next major evolution.[58] However, that development is still forthcoming. The ultimate success of that proposal, and how broadly it impacts the scheme, is yet to be determined.

C An Emerging Tension

The 1992 reform was a legislative response to judicial developments. A tension was emerging between the developing judicial approach to the scheme and Parliament's expectations about what should attract cover in practice. In *Mitchell*, Richardson J justified the need for a "generous unniggardly interpretation" in light of the policy underlying the Act (to provide *comprehensive* cover) and emphasised the *philosophy* of the legislation.[59]

It seems to be implicit in Richardson J's approach that he thought of the Woodhouse principles as an important guideline for interpretation of the scheme. In particular, emphasis was being given to comprehensive entitlement. But this approach perhaps fails

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[55] See Duffy, above n 9, at 370 and 371.

[56] Oliphant, above n 20, at 924.

[57] At 926 and 927.

[58] See Ministry of Business, Innovation and Employment "*A New Zealand Income Insurance Scheme: Our Proposals*" (2 February 2022).

[59] At 438 and 439.

to recognise that the five Woodhouse principles are not entirely in harmony. Ken Oliphant has noted, for example, that there is an underlying tension between the principles of 'comprehensive entitlement' and 'real compensation'.[60] The principle of 'real compensation' is not difficult to apply in a typical accident situation, because that would have otherwise fallen under the realm of tort law. 'Real compensation' closely reflects the aim of tort law: to provide recompense for actual harm suffered.[61] But where the concept of 'comprehensive entitlement' pushes the scheme into the realm of social security, issues may arise because that area has historically been conservative in nature and would typically only compensate a claimant in terms of their *essential needs*.[62] Thus, in the realm of illness and disease, 'real compensation' is a much more foreign concept.

The reform in 1992 appeared to indicate that Parliament was becoming concerned about the potential encroachment on the realm of social security (and the associated implication of cost increases). Indeed, it is evident that a key driver of policy in this area has been the issue of costs. It is a factor which one might argue has been equally as influential on the scheme's development as the Woodhouse Report itself. On one side of the political spectrum, the costs of the *existing* scheme were becoming unjustifiable, so truly comprehensive expansion was put on the backburner. On the other side, there was apparently a genuine interest in achieving the 'second stride' the Woodhouse Report had once anticipated. But the potential costs of a universal scheme were a significant barrier to that ambition, and in light of National's efforts to privatise, Parliament appeared to quickly become ambivalent about the prospect of truly evolving the scheme.

The *Calver* judgments do not really grapple with questions about cost in any meaningful way. At its core, *Calver* mostly reflects that period of expansive judicial reasoning which Parliament had attempted to curtail in 1992. This is most apparent in the treatment of that term 'specific occasion', which clearly reflects the philosophy of cases such as *Mitchell*. Although the redrafting of the cover provisions was not incidental, reading the *Calver*

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[60] Oliphant, above n 20, at 921.

[61] Richard Gaskins "Regulating Private Law: Socio-Legal Perspectives on the New Zealand Accident Compensation Scheme" (2009) 17 TLJ 24 at 26 and 27.

[62] Margaret McClure "A Decade of Confusion: The Differing Directions of Social Security and Accident Compensation 1969–1979" (2003) 34 VUWLR 269 at 272–274.

judgments, one would get the impression that it was. But Parliament did deliberately attempt to reign in this type of thinking,[63] and there has been no attempt to undo that reform.

So how can we make sense of *Calver*? In order to answer that question, it is necessary to understand how the 'generous interpretation' principle has continued to develop throughout the case law in this area. In exploring that development, it quickly becomes apparent that the judiciary has been reluctant to depart from the interpretative norms that were developed at the time of *Mitchell*, even if doing so would better reflect the way the legislation had been handled by Parliament.

IV Accident Compensation and the Common Law

A The Recent History of 'Generous Interpretation'

In tracking the recent history of generous interpretation, a useful starting point is the case of *Harrild*, which is often cited for its endorsement of the "generous unniggardly" interpretation. The case concerned a mother who had given birth to a stillborn child, allegedly as a result of inadequate medical care. The key issue was whether the mother would be prevented from taking civil action against Dr Harrild, as a result of the statutory bar. That depended on whether the death of the fetus amounted to 'personal injury'.[64]

It was Keith and McGrath JJ that explicitly endorsed the 'generous unniggardly' approach. Both judges acknowledged that this approach had originated in *Mitchell*[65] but did not consider the 1992 reform to have displaced it. Keith J explicitly acknowledged that the reform had narrowed the boundaries, but appeared to consider the only *significant* exclusion effected by it was in relation to mental injury (apparently confining the broad

[63] At 924.

[64] *Harrild v Director of Proceedings*, above n 8, at [1], [2], [7], and see [79] and [80].

[65] At [39] (Keith J) and [130] (McGrath J).

effect of the reform to circumstances directly comparable to *ACC v E*).[66] McGrath J merely said he regarded the narrower definitions as not affecting the generous approach.[67]

Elias CJ affirmed the views of Keith and McGrath JJ. Interestingly, however, she rephrased the principle. Her formulation was that the legislative policy "is not to be undermined by an ungenerous or niggardly approach to the scope of cover".[68] That rephrasing perhaps shifts the emphasis slightly and might suggest she considered the judicial policy to be one of avoiding unduly restrictive interpretations, as opposed to readily adopting expansive ones. Although it is not explicitly clear if Elias CJ intended the phrasing to be read that way, her expression of the rule does appear to suggest the principle is something more akin to a mandatory consideration, as opposed to an overriding principle of interpretation.

Of particular interest is that *Harrild* was decided by a narrow majority. In their dissenting judgment, Blanchard and Glazebrook JJ actually appeared to doubt the applicability of the generous approach, and put considerable emphasis on the purposes and policies underlying the more prescriptive drafting.[69] Citing a Department of Labour report that had preceded the reform, Glazebrook J noted that the redrafting had been specifically intended to contain costs and eliminate uncertainty about the boundaries of the scheme, which had been extended by expansive interpretations.[70] She further noted that, because the redrafting effectively overturned *ACC v E* by excluding mental injury not associated with physical injury, the legislation was "already less than comprehensive".[71]

It should be noted that the judgments in *Harrild* were concerned with particular policy issues raised by the mother/child situation, therefore they did not necessarily *turn* on the applicability of the 'generous interpretation' principle. But these differing approaches were important. The minority was clearly awake to the reality that the 'generous unniggardly' rule originated in a period of expansive judicial reasoning and that the 1992 reform had been a deliberate response to that reasoning. In contrast, the majority seemed to prefer that

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[66] At [39] and [40].
[67] At [130].
[68] At [19].
[69] At [71]–[74].
[70] At [71].
[71] At [72].

the courts continue interpreting the scheme in an expansive way, where the words of the legislation make that possible. *Harrild* has been widely cited for the 'generous unniggardly' rule in the past decade or so.[72] Thus, it appears the majority view had the effect of securing the expansive judicial approach in the context of the more prescriptive drafting.

At this point it is worth briefly returning to *Calver*. It should be recognised that a principle of generous interpretation did not immediately crystalise following *Harrild*. Although the majority judgments in that case appeared to open the door for a general view that the 1992 reforms had not displaced the judicial approach which had been developing prior, the courts were still cautious not to overreach. It is hard to imagine *Calver* would have been an uncontroversial judgment at this time.

Consider the way that the 'generous unniggardly' approach was treated in *ACC v Ambros*, only five years later. The Court of Appeal did explicitly take it into account, but ultimately considered it could not enable the court to modify the general rules of causation which would ordinarily apply to the scheme. It was said the legal burden of causation must be on the claimant, although the generous approach might enable "robust inferences" to be drawn in individual cases.[73] The Court therefore recognised there had to be practical limits to interpreting the legislation generously.

Allenby v H might actually be seen as a sort of turning point for the norms of interpretation in this context (although the 'generous unniggardly' approach was not actually mentioned in the Supreme Court judgment). The claimant in *Allenby* sought cover for a pregnancy, following a failed sterilisation. These facts gave rise to an issue of consistency which quickly appeared to dominate the Court's reasoning, and led to an expansive reading of the statute. There was good reason to believe that pregnancy resulting from rape would continue to be covered.[74] It was therefore considered that there would be a stark

[72] See, for example, *J v Accident Compensation Corporation* [2017] NZCA 441, [2017] 3 NZLR 804 at [13] and [14]; *Gibson v Accident Compensation Corporation* [2016] NZHC 1003, [2016] NZAR 587 at [39]–[42]; and *Accident Compensation Corporation v Ng* [2018] NZHC 2848 at [32] and [33].

[73] *Accident Compensation Corporation v Ambros*, above n 36, at [70].

[74] *Allenby v H*, above n 15, at [42], [47] [68] and [71].

inconsistency if the Court held that pregnancy was not also a personal injury in the 'treatment injury' context.

The case had been preceded, only four years earlier, by *ACC v D,* a decision of the Court of Appeal, to the opposite effect. Interestingly, Mallon J had delivered the High Court judgment in that case: deeming that pregnancy must amount to a 'personal injury'. Mallon J emphasised that decisions of other common law jurisdictions, while not having direct relevance to the accident compensation context in New Zealand, had indicated a changing societal view, which meant it would be inappropriate to exclude pregnancy from the definition. She also noted that the 1992 reform had not expressly excluded pregnancy from cover.[75]

The Court of Appeal overturned Mallon J, however, bringing the issue back to the true effect of that 1992 reform. It was concluded that Parliament had intended to reduce "elasticity" and narrow the boundaries of cover, and evidently the Court thought it was important to give effect to that intention. Thus, despite recognising that the result created an oddity in the scheme, the Court ruled that pregnancy would not be a personal injury, in the context of cover for treatment injury.[76]

By overturning *ACC v D*, the Supreme Court in *Allenby* actually vindicated Mallon J's earlier approach. The majority in *Allenby* evidently preferred an expansive view of the scheme and implicitly considered the 1992 redrafting to have minimally displaced that view. It concluded that denying coverage would be inconsistent with the "overall spirit of the statute, which appears to still intend to provide universal coverage for accidents".[77] But note the underlying presumption that the scheme was originally drafted in a 'universal' way. That seems questionable in light of the full legislative history.

Furthermore, difficulties in the Court's expansive approach became apparent when the judges had to grapple with the question of why there would be no personal injury for an unintended pregnancy resultant from consensual sex. Blanchard, McGrath and William Young JJ attempted to distinguish the degree of 'physical harm' and suggested that the

[75] At [49].
[76] At [52].
[77] At [78].

statutory definition could simply be adjusted as necessary.[78] Tipping J tried to draw the line on the basis that, where there was 'true consent', it would be contrary to the policy and purposes of the scheme for there to be cover.[79] The Court evidently recognised that such an extreme expansion would be difficult to justify in light of the legislative context, but found it difficult to align that point with a simultaneous endorsement of expansive interpretation. In the view of the author, neither of the approaches suggested are particularly convincing. Perhaps wisely, Elias CJ intentionally avoided commenting on the issue.[80]

Allenby is of particular importance because Mallon J, in *Calver*, directly relied upon it as authority for finding that the 'personal injury' of mesothelioma should be determined holistically. But as noted by the Court of Appeal, *Allenby* was not directly applicable to *Calver*. Pregnancy had already been treated as a 'personal injury' in the context of rape, so there was a clear inconsistency in treating it differently elsewhere in the scheme. A disease condition had never before been treated that way. But herein lies a difficulty with the arbitrary line drawing of the scheme. The court in *Allenby* felt that consistency demanded an expansive approach to cover of pregnancy; Mallon J in *Calver* then saw that conclusion as justifying an expansive approach to mesothelioma. The acceptance of one extension can create an avenue for another to follow. Thus, although the result of *Calver* is somewhat at odds with the legislative background, it feels consistent with the case law.

Following *Allenby*, a number of other decisions on accident compensation endorsed the generous interpretation approach.[81] It eventually began to crystallise as an enduring rule of interpretation for accident compensation cases and, in *Murray v ACC*, Kós J would build on the rule, by suggesting it can only be displaced by clear language.[82] That addition has

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[78] At [82].

[79] At [92]–[94].

[80] At [30].

[81] See, for example, *Murray v Accident Compensation* Corporation, above n 9, at [36]; *Gibson v Accident Compensation* Corporation, above n 72, at [39]–[42]; and most recently, *AZ v Accident Compensation Corporation* [2021] NZHC 2752, [2021] 3 NZLR 791 at [35] and [124].

[82] *Murray v Accident Compensation Corporation*, above n 9, at [36].

likely strengthened the presumption of generosity. It is against this background that the expansive reasoning endorsed in *Calver* can be understood.

B Alternative Approaches to Interpreting the Scheme

The generous approach ultimately demonstrates that the courts have prioritised the principle of comprehensive entitlement in developing interpretive norms for the scheme. From a socio-legal perspective, it may be that, despite the 1992 reforms indicating a more limited approach to social welfare, the judiciary has opted to perform what is ostensibly a 'private law function' by upholding the Woodhouse principles anyway. The statutory bar restricts common law rights in tort. Thus, the courts may have sought to treat interpretation of the scheme as being reflective of those 'fundamental rights' it has also barred.

But in light of the legislative history, one might wonder if there is a better way to interpret the scheme. On one hand, emphasising a generous approach has enabled persons who would otherwise be exempt from the scheme to obtain real compensation. From a humanitarian perspective, that seems desirable. And one would have to think, in light of his ambitious vision for the scheme, Woodhouse himself would support such outcomes. In this sense, having some recourse to a spirit of generosity is not of itself inappropriate. Furthermore, the 'generous interpretation' approach has become somewhat embedded in the judicial understanding of the scheme; so a significant departure is unrealistic. But on the other hand, the legislative history does not convey unbridled generosity, and the current drafting was probably not intended to be ambiguous. It seems disingenuous when the courts fail to give those aspects of the scheme's history comparable weight.

In the author's view, the true deficiency in the current judicial approach is not necessarily that the boundaries are being expanded; it is that generosity is being emphasised as an *overriding principle*, where it should really be balanced against other policy factors that underly the scheme. Perhaps what is necessary is a more comprehensive set of principles to accompany that presumption of generosity. An explicit balancing of all the competing policy concerns would better explain how these expansive outcomes are justified.

The most obvious factor for the courts to take into account is the potential costs imposed on employers and other levy-payers. In exploring the legislative history, it has been well established that the primary barrier to expansive reform of the scheme has been the question of how potential increases in cost can be justified. One could probably look to the Parliamentary debates surrounding any notable reform of the scheme in the past two decades and see that the question of cost has remained a fundamental policy factor for development of the scheme.[83] In the context of *Calver*, Mallon J might have noted that asbestos exposure is relatively uncommon in New Zealand, as the risks of using asbestos are now very well established. It does not therefore seem likely that allowing cover for mesothelioma will open the door to a floodgate of claims creating cost issues. From this perspective, taking the question of cost seriously does not undermine her generous reasoning but complements it.

Another aspect that is worth drawing on is the influence of the common law elsewhere. Richard Gaskins has noted that, in order to justify expansive interpretations, the courts have sometimes had a tendency to import pro-plaintiff tort doctrines emerging in other jurisdictions.[84] It is not difficult to find evidence of this. In *ACC v D*, for example, Mallon J looked to influential cases from Australia and England, in justifying her approach to pregnancy.[85] It can therefore be seen that this is actually a factor the courts are already taking into account, although they will often treat it as a subsidiary concern, being cautious not to simply transplant tort law developments into the accident compensation context. In *Calver*, Mallon J noted that her conclusions brought the scheme's treatment of mesothelioma into line with the reasoning of the House of Lords in *Fairchild*. In that case, the ordinary rules of causation, for establishing the tort of negligence, were modified in order to account for the difficulties of identifying the relevant defendant where there had been multiple exposures to asbestos over time.[86] Mallon J noted, very briefly, that both results avoid unfairly declining cover to a person exposed to asbestos on multiple

[83] See, for example, (17 Jun 2008) 647 NZPD 16641, 16642, 16647, 16648.

[84] Gaskins, above n 61, at 27–30.

[85] *Accident Compensation Corporation v D* [2007] NZAR 679 (HC) at [54] and [55].

[86] See *Fairchild v Glenhaven Funeral Services Ltd*, above n 34, at [36]–[38] and [41]–[43] (per Lord Bingham).

occasions.[87] But such a comment does not need to be a mere aside. Adopting an interpretation consistent with developments in other jurisdictions actually helps to ensure the scheme is reflecting contemporary understandings about modern injuries and illnesses. Given the effect of the statutory bar, this seems like a perfectly valid factor to take into account.

Geoff McLay, in *Accident Compensation, What's the Common Law got to do with it*, discussed the influence of common law decisions in other jurisdictions and suggested a 'principle of integrity'. He noted that the 'generous unniggardly' approach can be said to give effect to the comprehensive Woodhouse vision, but that the legislation itself is not actually 'unniggardly'. It features a number of major exclusions, and the 'niggardliness' is often a deliberate choice of the drafters. Thus, an 'integrity approach' would take seriously the failure of Parliament to expand the scheme (including the failure to extend coverage into the realm of illness).[88]

Applying this concept, the Woodhouse principle of 'comprehensive entitlement' could be balanced against the need to maintain the integrity of the legislation. Overseas developments might be drawn on to ensure the scheme's operation maintains consistency with the community's changing understanding about the nature of injuries, and other factors such as cost implications could be used to determine whether extending cover would *unreasonably* undermine the integrity of the scheme. The primary feature of *Calver* which puts it at odds with the legislative background is that extending cover to Ms Trevarthen broadly opens the door to cover for a condition which is unambiguously a disease. But if it is considered material that this result will have a minimal impact on the costs of administering the scheme, and that this result best reflects developments in other common law jurisdictions, perhaps that inconsistency is nonetheless justified.

Consider likewise the difficulty that the Supreme Court ran into in *Allenby*, when attempting to explain why unintended pregnancy should not be covered if it results from

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[87] *Calver v Accident Compensation Corporation*, above n 1, at [105].

[88] Geoff McLay "Accident Compensation – What's the Common Law Got to Do With It?" [2008] NZ L Rev 55 at 72–74.

consensual sex. The most logical answer to that question is that such a result would open the door to a floodgate of claims which would have cost implications beyond what Parliament could have possibly intended. That is a simpler and more rational explanation than what was suggested in the *Allenby* judgments.

An even more radical approach was suggested by Ken Oliphant in *Beyond Woodhouse: Devising New Principles for Determining ACC Boundary Issues*. He suggested the identification of various 'mid-level principles'. This would include giving priority to the most serious incapacities, taking into account community *causal* responsibility, being fiscally responsible and acknowledging a principle of private responsibility..[89] There are good reasons to question this model. Some of these 'mid-level principles' really amount to reading in new criteria that are not explicit in the legislative background. It is particularly difficult to justify that last element (concerning private responsibility), which risks impinging on the 'no-fault' policy of the scheme. Nonetheless, some of these ideas might be useful in the context of *Calver*. Mesothelioma is an extremely serious form of cancer. If the seriousness of the incapacity were material, that too could reasonably justify the extension of cover. Likewise, although perhaps controversially, one could even draw on Oliphant's notion of community *causal* responsibility and point out that mesothelioma is a disease caused by the use of asbestos in building. It is, in that respect, a man-made disease and the community perhaps bears some *causal* responsibility for its infliction.

One final factor, which should really be obvious, is the need to treat similar injuries consistently. A dominating issue in *Allenby* was the need to maintain consistency with the existing cover for pregnancy resulting out of rape. Although that was not at all what the case was about, it clearly ended up being a decisive factor. Applying similar reasoning to *Calver*, one might find themself wondering where the consistency lies in giving cover to a mesothelioma victim and not to any other person who finds themself afflicted with a cancerous disease or asbestos related illness. This is an issue that strongly counts against Mallon J's conclusions and, ideally, the *Calver* judgments would have explored the point more thoroughly.

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[89] Oliphant, above n 20, at 927 and 928.

The unfortunate reality is that the accident compensation scheme continues to be an imperfect instrument. A truly principled approach to interpreting the scheme is hard to nail down because, at its core, the regime is highly arbitrary. A principle of generosity is, to some extent, in keeping with the Woodhouse vision, but it does not give effect to the full range of policy factors that have shaped the scheme thus far. If the courts, in a case such as *Calver*, wish to extend the boundaries of the scheme, they will inevitably be taking into account underlying factors such as costs and common law developments in other jurisdictions, whether they choose to make that explicit or not. By evolving the 'generous unniggardly' approach into an explicit set of relevant factors for guiding interpretation, the courts could make interpretation of the scheme somewhat more predictable and could better draw attention to Parliament's failure to achieve that 'second stride' Woodhouse once anticipated.

V Conclusions

The result of *Calver* ultimately demonstrates that the principle of 'generous interpretation' functions as a sort of safety net. It captures those claims which are not readily collected in the words of the statutory scheme, so long as the courts are able to take advantage of some opportunity to read the statute in a generous way. The differing approaches of *ACC v D* and *Allenby* illustrate how an expansive interpretation can significantly alter the position in law. Note again that the interpretation adopted in *Allenby* ultimately opened the door for the generous reasoning in *Calver*. These cases demonstrate how this approach can cause the boundaries to be widened gradually over time.

It is not necessarily the author's view that *Calver* was decided incorrectly. At the very least, however, one would have thought this to be a case on the very borderline of cover. The *Calver* judgments do not sufficiently make that clear; nor do they meaningfully explore the current status of the legislation. The reality of New Zealand's accident compensation scheme is that there is a continuing conflict between its arbitrary boundaries and its expansive roots. When faced with difficult cases, it is perhaps unsurprising that the courts hold tightly to a principle of generosity. Doing so enables outcomes that feel just and are

probably more aligned with the original Woodhouse vision. But taking such an approach conceals the underlying tension between Parliament's failure to expand the scheme meaningfully and the evident readiness of the courts to pragmatically wedge the boundaries open.

If the Woodhouse Report was the seed planted in the collective mind of New Zealand's Parliament, then the various legislative initiatives which created and successively refined the functions of ACC must reveal those aspects of the Report which successive governments have thought either should not, or could not, be achieved in the scheme. To ignore that reality is to keep alive a legal fiction. Given that the more restrictive drafting has been retained and there has been a lack of any major expansive development since, it is no longer convincing to merely say that a broadly 'generous interpretation' is appropriate, simply because that reflects the Woodhouse vision. As Blanchard and Glazebrook JJ acknowledged in *Harrild*, the legislation is already less than comprehensive.[90] A more nuanced explanation is necessary.

The courts have an unenviable task. It is well known that the arbitrary boundaries of the scheme have a tendency to produce unexpected and inconsistent outcomes when a claimant stands at the fringes of cover. The exercise that these cases call for is inherently difficult, and it is well understood that the accident compensation legislation is drafted in a complicated and circular fashion. Nonetheless, it would be more convincing if the courts were willing to build on the 'generous interpretation' approach by explicitly balancing in the various factors which have informed the development of the scheme up until this point. That would amount to a truly purposive approach. In practice, it might be achieved by adopting a 'principle of integrity', or it might involve something more radical (akin to the 'mid-level principles' concept). Either way, a more comprehensive approach to interpreting the scheme should be developed. Until then, it is difficult to fully appreciate how a case like *Calver* truly reflects the legislative intent behind the scheme.

[90] *Harrild v Director of Proceedings*, above n 8, at [72].

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