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

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This article examines the judgments of Calver v Accident Compensation Corporation *and its appeal in the 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.*

I INTRODUCTION

In the decisions of *Calver v Accident Compensation Corporation*, 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

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1 *Accident Compensation Corporation v Calver* [2021] NZCA 211, [2021] 2 NZLR 721 [*Calver* CA] at [74]–[77]; and *Calver v Accident Compensation Corporation* [2019] NZHC 1581, [2019] 3 NZLR 261 [*Calver* HC] at [140].

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. An enduring characteristic of the scheme has been a general denial to extend coverage to illness and disease. Cover for such conditions 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 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 is a principle which might reasonably be questioned in the 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 conception. 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

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2 *Calver* HC, above n 1, at [112] and [113].

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

4 See for example Kenneth Keith "The Law Commission's 1988 Report on Accident Compensation" (2003) 34 VUWLR 293 at 301; and Geoffrey Palmer "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* HC, above n 1, at [61] and [106]; and *Calver* CA, above n 1, at [60].

7 *Calver* HC, 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.

cover.[9] Although the view to privatise did not ultimately succeed, that more restrictive drafting did survive and the following two decades have seen relatively minimal expansion of the boundaries. At best, 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 seriously 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.

This article first examines the *Calver* judgments themselves. It then aims to provide an overview of the key legislative developments which underlie the scheme's policies, and tracks the "generous interpretation" principle through the case law. Some alternative approaches for interpreting boundary issues are then discussed. It is no longer convincing merely to 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 expansions of the boundaries have 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 had been exposed to asbestos in the course of his work, and the most likely explanation for Ms Trevarthen's illness was that she had inhaled asbestos fibres while hugging her father when he came home each day, 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 define it as the *physical impacts* of the mesothelioma disease (ascribing the disease itself 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 arguing for the latter approach, the claimant relied on *Stok v Accident Compensation Corporation*, a

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

10 *Calver* HC, above n 1, at [2].

decision of the Accident Compensation Appeal Authority, which dealt with mesothelioma over two decades earlier.[11]

Stok had directly confronted the question of whether mesothelioma could be covered as a "personal injury" despite being a disease condition. The Authority had concluded that it could, because there was some external cause and the legislation at that time would only exclude injuries caused *exclusively* by disease.[12] Because the case was decided under the Accident Compensation Act 1982, prior to the 1992 redrafting, the District Court had considered *Stok* inapplicable to the facts of *Calver*.[13]

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 1992 redrafting had been "eliminating uncertainty about the boundaries of the scheme" and "reining in the ability of judges to give an expansive interpretation".[14] It was argued that, in light of the legislative history, *Stok* should no longer apply. Mallon J, however, was unconvinced. Her Honour appeared to interpret the history as merely indicating a deliberate decision not to extend cover to disease *generally*.[15] 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 v H*, in which both Elias CJ and Blanchard J had concluded that the term "personal injury" had been given an expansive meaning in the statute.[16] 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".[17] 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".[18] Mallon J considered that approach to be binding on her in the context of *Calver*, and thus determinative of the first issue.[19] Applying this holistic approach, the disease and its impacts were classed together as a single "personal injury".

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11 *Stok v Accident Compensation Corporation* [1995] NZAR 396 (ACA).

12 At 403, 409 and 410.

13 *Calver (as executrix and trustee of the estate of Trevarthen) v Accident Compensation Corporation* [2018] NZACC 60 at [67], [123] and [136].

14 *Calver* HC, above n 1, at [57], quoting from Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [2.2.05].

15 *Calver* HC, above n 1, at [61].

16 *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425 at [24] and [68].

17 See Accident Compensation Act 2001, s 32.

18 *Calver* HC, above n 1, at [74].

19 At [75].

The second issue was that of causation. The medical evidence had confirmed it would be impossible to identify any *single* causative exposure where there were multiple inhalations of asbestos, so the question arose whether Ms Trevarthen's 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), requires inhalation on a "specific occasion".[20] One might then have reasonably assumed a *particular* date of causative exposure would need to be identifiable (immediately disqualifying Ms Trevarthen from cover). That interpretation would surely accord with ordinary usage of the word "specific", and would give strict effect to what is arguably a core policy underlying the boundaries of the scheme: that a causative "accident" must actually be identifiable before there is cover. However, the Corporation never contested this point.[21] It simply accepted that no particular date of causative exposure need be identified.

It seems odd that this interpretation of "specific occasion" was so readily accepted; it echoes the interpretation given to the phrase "by accident" in *Accident Compensation Corporation v Mitchell* and *Accident Compensation Corporation v E*.[22] 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".[23] This was one of the main expansive interpretations which prompted the redrafting in 1992,[24] so one might wonder how this kind of reasoning could persist today. Mallon J cited a number of District Court decisions as having established that the specific date of the accident need not be pinpointed.[25] It is difficult, however, to identify a principled justification for that view, as those cases tended to state simply that this is the correct interpretation (without further explanation).[26] The causation issue thus started on a somewhat generous footing.

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

21 *Calver* HC, above n 1, at [96].

22 *Accident Compensation Corporation v Mitchell*, above n 8; and *Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA).

23 *Accident Compensation Corporation v Mitchell*, above n 8, at 438–439 and 442–444; and *Accident Compensation Corporation v E*, above n 22, at 430–432.

24 See Ken Oliphant "Beyond Woodhouse: Devising New Principles for Determining ACC Boundary Issues" (2004) 35 VUWLR 915 at 924.

25 *Calver* HC, above n 1, at [96], n 76. Mallon J cited *Anderson v Accident Compensation Corporation* [2016] NZACC 63, *Murphy v Accident Compensation Corporation* [2013] NZACC 398, *Parsons v Accident Compensation Corporation* [2014] NZACC 39 and *Lilo v Accident Rehabilitation and Compensation Insurance Corporation* DC Wellington DCA210/95, 28 August 1996.

26 See for example *Murphy v Accident Compensation Corporation*, above n 25, at [46]; and *Lilo v Accident Rehabilitation and Compensation Insurance Corporation*, above n 25, at 6.

Mallon J then distinguished mesothelioma from diseases which involve a "dose-response relationship", noting that the medical evidence had suggested a single inhalation could have caused the disease, even if the particular occasion could not be dated.[27] Essentially, contracting mesothelioma does not depend on the dose of asbestos inhaled. Multiple exposures would mean an increased risk, but any *single* exposure could be causative, and the disease does not necessarily develop from an accumulation of exposures (as, for example, with cancer resulting from passive smoking). Thus, 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.[28] Her Honour explicitly acknowledged that this was a "generous interpretation" and appeared to be of the view that such an interpretation must be preferred (citing *Harrild v Director of Proceedings*).[29]

Although mesothelioma does appear to be contracted differently to "dose-response"-related diseases generally, this approach to the "specific occasion" requirement seems somewhat at odds with the legislative history. Mallon J's conclusion suggests that mesothelioma should be understood as a condition which will generally be contracted as a result of inhalation on a "specific occasion".[30] 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.[31] If Mallon J's interpretation is correct (and mesothelioma caused by asbestos is always covered), specifying it elsewhere in the Act seems 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 otherwise be covered.

It should be noted that this approach to mesothelioma would be difficult to replicate in the context of other diseases. Mesothelioma caused by asbestos inhalation is unique because, 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 ever so slightly. Nonetheless, it is a surprising outcome in that it has brought a disease condition into the general realm of cover.

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27 *Calver* HC, above n 1, at [96].

28 At [97] and [104].

29 At [106]. See *Harrild v Director of Proceedings*, above n 8.

30 Although not all mesothelioma cases involve an identifiable asbestos exposure, in the vast majority of cases the disease *is* linked to asbestos inhalation: see Anne Bardsley *Asbestos exposure in New Zealand: Review of the scientific evidence of non-occupational risks* (Office of the Prime Minister's Chief Science Advisor, April 2015) at 11.

31 Accident Compensation Act 2001, sch 2 cl 2.

To summarise: the first issue was determined by adopting an *expansive* reading of the term "personal injury" (drawing on the Supreme Court's approach 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).[32] Her Honour 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).[33] Simon Connell notes that, in order to take that reasoning further, Mallon J would have had to grapple with accident compensation case law which had thus far taken a narrow view of what could constitute a "physical injury".[34] 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.[35]

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*.[36] 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.[37] The Court 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.[38] The generous interpretation of "personal injury" was affirmed.

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32 The argument here is that, even if the mesothelioma is classed as a gradual process disease, the inhalation of asbestos could itself meet the definition of "personal injury" and the mesothelioma would be covered under s 20(2)(g) because it is a consequence of that injury.

33 *Calver* HC, above n 1, at [132] and [133].

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

35 *Calver* CA, above n 1, at [28]–[30].

36 At [32] and [33].

37 At [73] and [74].

38 At [74].

However, an argument could have been made that Mallon J's approach to the "specific occasion" requirement had undermined the intent of Parliament. Again, the 1992 reform had already attempted to discourage this type of reasoning. Furthermore, the medical evidence about mesothelioma has historically been uncertain and the risk of contracting the disease has been associated with the magnitude of exposure.[39] It was at one point noted that, although a single dose might have been causative, a series of doses could also have been responsible.[40] In this sense, contracting mesothelioma might have been equally as comparable to passive smoking as it was 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.[41] But, in reality, the issue might have been directly on the borderline. Mallon J's approach seems to give the benefit of the doubt to the claimant, but arguably that conflicts with the legal burden established in *Accident Compensation Corporation v Ambros*.[42] The Corporation did not raise any of these issues 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 the only possible route to cover for non-work-related mesothelioma would be through s 20(2)(g) of the Act.[43] That argument goes too far in the other direction, effectively suggesting that *no disease* can be treated as being caused by an "accident". This would exclude the aforementioned example of tetanus contracted from stepping on a nail. Unsurprisingly, the argument found little favour with the Court.

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

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

40 *Calver* HC, above n 1, at [98].

41 At [42] and [75].

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

43 *Calver* CA, above n 1, at [31].

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.[44] Sir Owen Woodhouse chaired a Royal Commission tasked with reviewing the adequacy of numerous then existing avenues to compensation for personal injury. The resulting report became a widely celebrated example of bold and progressive legal innovation,[45] and the ambitious ideals at the root 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 is the principle of "comprehensive entitlement".[46]

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 much additional context that should be taken into account.

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.[47] 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".[48]

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".[49] He notes that the legislative response to the Report was "timorous" and that Parliament opted not to stray from familiar forms and practices.[50] From the very beginning, the legislature was resisting the bold ideals of the Commission in favour of a scheme

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44 *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (December 1967) [Woodhouse Report].

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

46 Woodhouse Report, above n 44, at 39.

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

48 See Edward J Lemons "The Woodhouse Report: Relegated to the Archives?" (1973) 19 McGill LJ 195 at 196 and 202.

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

50 At 455 and 456.

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 of the scheme passed did not cover non-earners.[51]

The Accident Compensation Act 1972 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 redrafting from scratch.[52] The prospect of adverse political consequences, however, motivated the new Government to instead transplant notions of universal coverage into a scheme which was premised on restrictive logic. Rather prophetically, Palmer recognised from the outset that the legislation lacked clarity and predictability.[53]

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. Furthermore, 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.[54] 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.[55] The judicial emphasis fell on the "social policy underlying the Act" and the *philosophy* of what was deemed to be "major social legislation".[56] 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 of "personal injury by accident" was non-exhaustive. In *Mitchell* and

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51 See (3 October 1972) 381 NZPD 3004, 3005, 3007, 3008, 3017 and 3030–3032; and Palmer, above n 4, at 406.

52 Geoffrey Palmer "Accident Compensation in New Zealand: The First Two Years" (1977) 25 Am J Comp L 1 at 7 and 8.

53 At 9.

54 Woodhouse Report, above n 44, at 26 and 114.

55 Duffy, above n 9, at 368–370.

56 *Accident Compensation Corporation v Mitchell*, above n 8, at 438 and 439.

Accident Compensation Corporation v E, that non-exhaustive definition was leveraged as a means by which questionable claims could be brought into the boundaries of the scheme. Of particular note, *Mitchell* featured the first mention of the "generous unniggardly" rule for interpreting the scheme.[57] At this point, the courts were developing norms of interpretation that treated the scheme as an expansive piece of legislation 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. The result might not have been all that surprising in the 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.[58] Woodhouse himself had seen the distinction as being contrary to the concept of comprehensive entitlement.[59] It was about time, the Commission argued, that this "historical and pragmatic" distinction be done away with.[60] The Labour Government at that time thus announced an intention to pursue such an expansion; but whereas the Commission had recommended an expansion in stages, the Government apparently sought to achieve it in a "single stroke".[61] 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.[62]

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.[63] Over time, the new Government adopted an entirely different view about what principles should underlie 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 article, to outline the full scope of the 1992 and 1998 reforms. The key point of interest is the redrafting of the cover provisions in 1992. Again, the broad language was intentionally rewritten so that the scheme would be informed by highly prescriptive "pathways to cover",[64] and this was a deliberate response to the generous approach that the courts had

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57 At 438.

58 Law Commission *Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme)* (NZLC R4, 1988) at xi and xii.

59 Woodhouse Report, above n 44, at 26 and 114.

60 Keith, above n 4, at 301.

61 Oliphant, above n 24, at 920.

62 At 921.

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

64 See Duffy, above n 9, at 370 and 371.

been developing.[65] 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, expansions of the boundaries have tended to be slight and carefully calculated.[66] In a broad sense, those boundaries have become stagnant. An amendment in 2022 to allow coverage for injuries suffered during childbirth does demonstrate that Parliament is willing to make meaningful legislative amendments to extend the boundaries.[67] An income protection scheme, proposed in the same year, could also prove to be a major evolution.[68] Even so, the amendment to cover maternal birth injuries is another piecemeal development, not broadly changing the nature of the scheme; and, at the time of writing, it remains unclear whether the income protection scheme will go forward (and what it will even look like), as the Government refocuses its priorities during a cost-of-living crisis.

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.[69]

It is implicit in Richardson J's approach that his Honour 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 reasoning fails to recognise that the five Woodhouse principles were not entirely in harmony from the outset. Ken Oliphant has noted, for example, that there is an underlying tension between the principles of "comprehensive entitlement" and "real compensation".[70] 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

65 Oliphant, above n 24, at 924.

66 At 926 and 927.

67 See Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2022.

68 See Ministry of Business, Innovation and Employment *A New Zealand Income Insurance Scheme: Our proposals* (February 2022).

69 *Accident Compensation Corporation v Mitchell*, above n 8, at 438 and 439.

70 Oliphant, above n 24, at 921.

aim of tort law: to provide recompense for actual harm suffered.[71] 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*.[72] 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 in 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 that "second stride" the Woodhouse Report had once anticipated.[73] 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* judgments, one would get the impression that it was. But Parliament did deliberately attempt to rein in this type of thinking,[74] 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 consistently 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 developed by Parliament.

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71 Richard Gaskins "Regulating private law: Socio-legal perspectives on the New Zealand Accident Compensation Scheme" (2009) 17 TLJ 24 at 26 and 27.

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

73 Oliphant, above n 24, at 920.

74 At 924.

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 v Director of Proceedings*, which is often cited for its endorsement of the "generous unniggardly" interpretation.[75] 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".[76]

In finding that this was a personal injury covered by the scheme, Keith and McGrath JJ explicitly endorsed the "generous unniggardly" approach. Both Judges acknowledged that this approach had originated in *Mitchell* but did not consider the 1992 reform to have displaced it.[77] 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 effect of the reform to circumstances directly comparable to *Accident Compensation Corporation v E*).[78] McGrath J merely said he regarded the narrower definitions as not affecting the generous approach.[79]

Elias CJ affirmed the views of Keith and McGrath JJ. Interestingly, however, her Honour 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".[80] 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 suggests 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 appeared to doubt the applicability of the generous approach, and put considerable emphasis on the purposes and policies underlying the more prescriptive drafting.[81] Citing a Department of Labour report that had preceded the reform, Glazebrook J noted

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75 *Harrild v Director of Proceedings*, above n 8, at [39] per Keith J and [130] per McGrath J.

76 At [1], [2] and [7]. See also [79] and [80].

77 At [39] per Keith J and [130] per McGrath J.

78 At [39] and [40].

79 At [130].

80 At [19].

81 At [71]–[74].

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.[82] Her Honour further noted that, because the redrafting effectively overturned *Accident Compensation Corporation v E* by excluding mental injury not associated with physical injury, the legislation was "already less than comprehensive".[83]

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. The majority approach also sought to maintain the statutory bar, which was itself part of the Woodhouse vision.[84] Even so, 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 development. In contrast, the majority seemed to prefer that 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.[85] Thus, it appears the majority view had the effect of securing the expansive approach despite the more prescriptive drafting.

Even so, the principle of generous interpretation did not immediately crystallise following *Harrild*. Although the majority judgments in that case appeared to open the door for a general view that the 1992 reform had not displaced the generous approach which had been developing prior, the courts were still cautious not to overreach. It is hard to imagine that *Calver* would have been an uncontroversial judgment at this time.

Consider the way that the "generous unniggardly" approach was treated in *Accident Compensation Corporation 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.[86] It was determined that the legal burden of causation should remain on the claimant, although the generous approach would enable "robust inferences" to be drawn

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82 At [71].

83 At [72].

84 Woodhouse Report, above n 44, at 77, 178 and 180.

85 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]. Note, however, that the decision in *Accident Compensation Corporation v Ng* was later quashed by the Court of Appeal; the "generous unniggardly" approach was not discussed: *Accident Compensation Corporation v Ng* [2020] NZCA 274, [2020] 2 NZLR 683.

86 *Accident Compensation Corporation v Ambros*, above n 42, at [70].

in individual cases.[87] The reasoning was still favourable to the plaintiff, but the Court recognised that 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* had sought cover for a pregnancy following a failed sterilisation. This situation 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. Pregnancy resulting from rape had been explicitly stated as a covered personal injury in the 1972 form of the Act, but that explicit reference was removed in the 1992 reform. The Court concluded that Parliament could not have intended that such a pregnancy would cease to be covered, given that the matter was not addressed in any parliamentary materials and had not been suggested by the Law Commission.[88] Following that conclusion, however, there would be a stark inconsistency if the Court then held that pregnancy was not a personal injury in the "treatment injury" context.

The case had actually been preceded, only four years earlier, by *Accident Compensation Corporation v D*, a decision of the Court of Appeal to the exact opposite effect.[89] Interestingly, Mallon J had delivered the High Court judgment in that case and had deemed that pregnancy must amount to a "personal injury".[90] 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.[91] She also noted that the 1992 reform had not expressly excluded pregnancy from cover.[92]

When overturning Mallon J's judgment, the Court of Appeal once again brought the issue back to the true effect of that 1992 reform. Parliament had intended to reduce "elasticity" and narrow the boundaries of cover, and the Court of Appeal evidently thought it was important to give effect to that intention.[93] 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.[94]

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87 At [70].

88 The drafting history and resulting conclusions are set out in *Allenby v H*, above n 16, at [41], [42], [47], [68] and [71].

89 *Accident Compensation Corporation v D* [2008] NZCA 576.

90 *Accident Compensation Corporation v D* [2007] NZAR 679 (HC) at [94].

91 At [54] and [55].

92 At [94].

93 *Accident Compensation Corporation v D*, above n 89, at [61] and [62].

94 At [69].

By rejecting the Court of Appeal's ruling in *Accident Compensation Corporation v D*, the Supreme Court in *Allenby* 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 … still, after 1992, intended to provide universal coverage for accidents".[95] 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.

Further 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 resulting from consensual sex. Blanchard, McGrath and William Young JJ attempted to distinguish the degree of "physical harm" and suggested that the statutory definition could simply be adjusted as necessary.[96] 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 to allow cover.[97] 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 was particularly convincing. Perhaps wisely, Elias CJ intentionally avoided commenting on the issue.[98]

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*.[99] 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. In *Allenby*, it was decided that consistency demanded an expansive approach to cover for 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.[100] It eventually began to crystallise into an enduring rule of interpretation for

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95 *Allenby v H*, above n 16, at [78].

96 At [82].

97 At [92]–[94].

98 At [30].

99 *Calver* CA, above n 1, at [73] and [74].

100 See for example *Murray v Accident Compensation* Corporation, above n 9, at [36]; *Gibson v Accident Compensation* Corporation, above n 85, at [39]–[42]; *AZ v Accident Compensation Corporation* [2021]

accident compensation cases and, in *Murray v Accident Compensation Corporation*, Kós J built on the rule, by suggesting it can only be displaced by clear language.[101] That addition has likely strengthened the presumption of generosity, and it is against this background that the expansive reasoning of *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 interpretative 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 underlie the scheme. Thus, it might be preferable to develop a more comprehensive set of principles to accompany that presumption of generosity. An *explicit test*, balancing the many competing policy concerns, would better explain how these outcomes are justified.

One 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

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NZHC 2752, [2021] 3 NZLR 791 at [35] and [124]; and, most recently, the idea of "non-niggardly" interpretation was endorsed by the Supreme Court in *Roper v Taylor* [2023] NZSC 49, [2023] 1 NZLR 1.

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

factor for development of the scheme.[102] In *Calver*, the unique qualities of mesothelioma which distinguish it from other disease conditions were emphasised in Mallon J's reasoning. It was implied that allowing cover for mesothelioma would not open the door to cover for illnesses generally. Arguably, then, implications for the costs of administering the scheme were not a barrier to her Honour's generous reasoning. The notion that this outcome would be unlikely to significantly increase the costs of administering the scheme may actually have complemented 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 tended to import pro-plaintiff tort doctrines emerging in other jurisdictions.[103] It is not difficult to find evidence of this. In *Accident Compensation Corporation v D*, for example, Mallon J looked to influential cases from Australia and England in justifying her approach to pregnancy.[104] 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 v Glenhaven Funeral Services Ltd*.[105] 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.[106] Mallon J noted, very briefly, that both results avoid unfairly declining cover to a person exposed to asbestos on multiple occasions.[107] 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 of modern injuries and illnesses. Given the rights-limiting effect of the statutory bar, this seems like a perfectly valid factor to take into account.

Geoff McLay, in his article "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".[108] He noted that the "generous unniggardly" approach can be said to give effect to the

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102 See for example (17 June 2008) 647 NZPD 16641, 16642, 16647 and 16648.

103 Gaskins, above n 71, at 27–30.

104 *Accident Compensation Corporation v D*, above n 90, at [54] and [55].

105 *Calver* HC, above n 1, at [105]. See *Fairchild v Glenhaven Funeral Services Ltd*, above n 39.

106 See *Fairchild v Glenhaven Funeral Services Ltd*, above n 39, at [36]–[38] and [41]–[43] per Lord Bingham.

107 *Calver* HC, above n 1, at [105].

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

comprehensive Woodhouse vision, but that the legislation itself is not actually "unniggardly".[109] 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).[110]

Applying this concept, the Woodhouse principle of "comprehensive entitlement" could be tested against the need to maintain this integrity in the legislation. Overseas developments could be drawn on to ensure the scheme's operation maintains consistency with the community's changing understanding of the nature of injuries, and other factors such as cost implications could be used to determine whether extending cover would 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 can be established that this result will have a minimal impact on the costs of administering the scheme, and that this result reflects relevant developments in other common law jurisdictions, perhaps that incongruity could be 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 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 well beyond what Parliament could have possibly intended. That is a simpler and more rational explanation than the vague and troublesome justifications 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".[111] 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.[112] 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.

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109 At 72 and 73.

110 At 72–74.

111 Oliphant, above n 24.

112 At 927 and 928.

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 ended up being one of the decisive issues. Applying similar reasoning to *Calver*, one might wonder 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 it more thoroughly.

To bring these ideas together, a balancing test for the boundaries of cover might be formulated as follows. Where the courts are required to determine cover for a claimant whose condition appears to fall on the borderline of the boundaries of cover, a number of relevant policies and other considerations should be carefully balanced. These include a principle of generosity, but also the need to avoid unreasonably increasing the costs of maintaining the scheme, analogous developments in other common law jurisdictions, the desirability of maintaining consistency with other decisions on cover, the seriousness of the particular injury and the need to maintain the overall integrity of the scheme.

The unfortunate reality is that New Zealand's 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. If the courts, in a case such as *Calver*, wish to extend the boundaries, they will inevitably take into account underlying factors such as cost implications and common law developments in other jurisdictions, whether they choose to make that explicit or not. By evolving the "generous unniggardly" approach into a comprehensive balancing test, the courts could make interpretation of the scheme somewhat more predictable and better draw attention to the reality that Parliament has so far failed to achieve that "second stride" Woodhouse once anticipated.

V CONCLUSIONS

It seems 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 can find a way to interpret the legislation generously. But the differing approaches of *Accident Compensation Corporation 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*. This type of 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 make that sufficiently 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 best aligned with the original Woodhouse vision. But it also conceals the underlying tension between Parliament's failure to meaningfully expand the scheme and the tendency of the courts to wedge the boundaries open pragmatically.

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 the accident compensation scheme must reveal those aspects of the Report which successive governments have thought either should not, or could not, be achieved in the scheme. Given that the more restrictive drafting of 1992 has been retained and there has been a lack of any major 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.[113] A more nuanced explanation is necessary.

The courts have an unenviable task here. 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 development of the scheme up until this point. This might be modelled on the "principle of integrity",[114] or it might involve something more radical (akin to the "mid-level principles" concept).[115] Either way, a new approach to interpretation should be *comprehensive* so as to outline clearly how these decisions are being justified. Until then, cases such as *Calver* may risk confusing and frustrating the boundaries, as opposed to clarifying them.

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

114 See McLay, above n 108.

115 See Oliphant, above n 24.