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MEDICAL MISADVENTURE UNDER THE ACCIDENT REHABILITATION AND COMPENSATION INSURANCE ACT: AN IMPROVEMENT FOR THE PATIENT?

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Contents

The National Government promised to reform the accident compensation scheme to make it fairer and more affordable. The result of this committment has been the Accident Rehabilitation and Compensation Insurance Act which came into force on 1 July 1992. This paper compares the cover for medical misadventure under the new 1992 Act with the old Accident Compensation Act. This papers shows that the Government has not kept its promises regarding the cover for medical misadventure. The new scheme imposes more stringent requirements on the medical misadventure victim to get cover under the new Act than for other accident victims. Furthermore, in a signinficant number of cases which would have been eligible for compensation under the old Act are not eligible under the new Act. This limitation of cover in the case of medical misadventure is incomprehensible, particularly in view that between 1990 and 1991 medical misadventure cost $5 million, which is 0.5% of the whole accident compensation payout. The medical misadventure provision in the new Act is, in effect, the reintroduction of medical negligence.

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Medical Misadventure under the Accident Rehabilitation and Compensation Insurance Act: An improvement for the patient?

I. Introduction

Legislators all round the globe are having problems in finding a just and efficient system for compensating victims of medical accidents.[1] The main options considered to date are to find new common law doctrines, for example, strict liability in the doctor-patient relationship, or to develop a whole new concept, for example, an insurance system based on compensation without fault. Since 1974 New Zealand has had a far-reaching no-fault insurance based scheme[2] for compensating the victims of accidents (including medical accidents).[3] The purpose of which is to shift a fair share of the burden of an accident which suddenly falls upon an individual to the community.[4] In short, the system neither resembles traditional tort law responses[5] nor does it operate like a social welfare system[6]: its insurance base makes it altogether different, and the extent of its cover (the Act applies equally to earners and non-earners) makes it unique. In the last few years significant criticism emerged about the fairness and affordability of the scheme as operated in New Zealand. The response to these criticism is the Accident Rehabilitation and Compensation Insurance Act which came into force on 1 July 1992. The Government claims to have "taken a realistic approach to the problems of the Scheme, and

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1 Deutsch, Arztrecht und Arzneimittelrecht, 2nd ed. Berlin (1991), p.100 et seq.; Smith, Compensation for medical misadventure and drug injury in the New Zealand no-fault system, (1982) 284 BMJ, 1457(1457).

2 Deutsch, Arztrecht und Arzneimittelrecht, 2nd ed. Berlin (1991), p.101; McGreevy, Accident Compensation Reform- A Fairer Scheme or a Breach of Contract?, Accident Compensation Reform Conference (materials), Wellington (1991), p.4.

3 Compare: Sweden and other Skandinavian countries have implemented compensation schemes, which only provide cover for medical and pharmaceutical injuries. The schemes are based on voluntary group insurance agreements and have no statutory authority.- Vennell, Medical injury compensation under the New Zealand Accident Compensation Scheme, Professional Negligence 1989, 141(152).

4 Royal Commission on Inquiry, Compensation for Personal Injury in New Zealand (Woodhouse Report) (1967), p.39 et seq..

5 That said, ideas of causation under the scheme have been borrowed from tort law: Dean v ACC, ACAA dec. 6/92, p.8.

6 McGreevy, Accident Compensation Reform- A Fairer Scheme or a Breach of Contract?, Accident Compensation Reform Conference (materials), Wellington (1991), p.4.

the result will be a new system which is fairer, cost-effective, and sustainable".[7] In addition the Government stated that: "those who have received compensation in the past will continue to receive it in the future".[8]

The aim of this paper is to analyse the 1992 Act and consider how it compares with the previous legislation on the particular issue of cover for medical misadventure. This analysis will show that while the definition of medical misadventure under the old legislation allowed recovery for acts (including acts of omission) which were less than negligent, the new Act is restricted to negligence. In addition while the courts and the Appeal Authority had developed a reasonably consistent and workable definition of medical misadventure, the new legislation by virtue of a number of superfluous "clarfication" provisions creates the potential for confusion and uncertainty.

II. History of the Accident Compensation Scheme

Initial ideas about some form of absolute liability were addressed by O.C.Mazengarb Q.C. in his doctorate for his LLD (New Zealand) in 1941[9] and A.A.Ehrenzweig who suggested a compensation scheme for victims of health care mishaps on a no-fault basis in 1951.[10] Mazengarb proposed a scheme for compensation with respect to motor accidents. However, no public demand for such a scheme of absolute liability was apparent in New Zealand at that time and it was not until 1962, when a Committee on Absolute Liability was set up to consider the issue of liability for motor accidents, that a no-fault scheme was considered. The majority of the 1962 committee recommended an accident insurance scheme which would cover all persons who were injured in any way, without the need to prove

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7 Hon WF Birch, quoted after: McGreevy, Accident Compensation Reform- A Fairer Scheme or a Breach of Contract?, Accident Compensation Reform Conference (materials), Wellington (1991), p.1.

8 Government, quoted after: Legislation Advisory Committee, Submissions on the Accident Rehabilitation and Compensation Insurance Bill to the Labour Select Committee, Wellington (1992), p.5.

9 McLeod, Medical Malpractice in New Zealand, 220(235) in: Medical Malpractice, J.L.Taylor (ed) (1980).

10 Ehrenzweig, Negligence without Fault, (1966) 54 Cal LR, 1422 et seq..

negligence. The committee, however, made the qualification that compensation must be provided so that the community could afford to carry the cost on an equitable basis.[11] Following discussion and the expressed dissatisfaction with the 1956 Workers' Compensation Act[12], a Royal Commission of Inquiry was set up by the Government in 1966. The Commission, having been principally charged with examining the workers' compensation scheme, took its cue from Direction 8 which gave it the power to examine "any associated matters that the Commission may deem to be relevant to the objects of the inquiry."[13] The Commission's report[14] was presented to the Government on 13 December 1967. The Report noted that remedies for a personal injury were reminiscent of a lottery in that negligence proceedings provided inconsistent solutions for a small percentage of victims. It recommended a comprehensive public scheme of compensation for every person in New Zealand who suffered personal injury or death by accident. The corollary of this was that all actions for personal injury or death should be abolished. This recommendation was informed by five principles: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.[15] Parliament acted on the Report and on 20 October 1972, the Accident Compensation Act 1972 came into force. A subsequent amendment in 1973 extended cover from earners to non-earners. The costs of the accident compensation scheme between 1972 and the mid 1980s were kept under control, but between 1985 and 1990 doubled dramatically (25% per annum between 1985 and 1990). In 1990, for the first time, the expenditure on the scheme exceeded $1 billion.[16] The scheme was no longer seen as being fair because 70% of all payments into the scheme were made by employers' contributions; whereas only 40% of those payments were work-related.[17] Additionally, it was accepted that the scheme was being subjected to significant abuse

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11 McLeod, Medical Malpractice in New Zealand, 220(236) in: Medical Malpractice, J.L.Taylor (ed) (1980).

12 That Act still remains in force for work injuries and occupational disease occuring prior to 1 April 1974.

13 Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand (Woodhouse Report) (1967), p.30 - hereafter Woodhouse Report.

14 After its chairman Mr. Justice Woodhouse known as the Woodhouse Report.

15 Woodhouse Report (1967), p.39 et seq..

16 Minister of Labour, Accident Compensation: A Fairer Scheme, Wellington (1991), p.1.

17 Accident Compensation Corporation, Annual Report 1991, p.45,46.

by claimants.[18] The newly installed National Government decided to address these problems and introduced reforming legislation, in the shape of the Accident Rehabilitation and Compensation Insurance Act (ARCI), which came into force on 1 July 1992. This legislation was primarily intended to cut costs, to broaden the contributions base and to combat abuse.

Obviously a key aspect of the practical operation of any accident compensation scheme is the definition of the circumstances which trigger the legislation's cover. The 1972 Act stipulated that the legislation applied to "personal injury by accident", but did not specifically refer to the notion of "medical misadventure". A definition of "medical misadventure" was orginally included in the 1973 Amendment Act referred to above[19], but withdrawn to allow for further and fuller submissions on the matter.[20] This process resulted in the enactment of the Accident Compensation Amendment Act 1974, section 8 of which stated:

" Personal injury by accident" -
"(a) Includes-
(ii) Medical, surgical, dental, or first aid misadventure".[21]

Another important aspect of the 1974 legislation was the abolition in section 27 of all civil claims for damages arising directly or indirectly from personal injury by accident. The obvious

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18 Minister of Labour, Accident Compensation: A Fairer Scheme, Wellington (1991).

19 The medico-legal committee, which had been set up according to the recommendation of the Woodhouse Report to examine the distinction between sickness or disease and injury be accident, did not use the term "medical, surgical, or first aid treatment, care, or attention" in their definition of personal injury by accident.- Collins, Medical Law in New Zealand, Wellington (1992), p.142,143.

20 Collins, Medical Law in New Zealand, Wellington (1992), p.142.

21 See sec.2 ACA 1982. The words were borrowed from the Australian National Compensation Bill 1974 where they had been included in an attempt to prevent actions for negligence against the medical profession.- Palmer, Accident Compensation in New Zealand: The first two Years in: The Welfare State Today, Wellington (1977), p.165(203). This amendment came into effect on 8 October 1974, whereas the Accident Compensation Scheme came into force on 1 April 1974. It is interesting to note that though there the definition of personal injury by accident contained no specific reference to "medical misadventure", the ACC regarded "medical misadventure" to be embraced by the phrase "personal injury by accident".-Accident Compensation Commission, Medical Handbook (1974), p.37 et seq.; Collins, Medical Law in New Zealand, Wellington (1992), p.144.

implication of this in the area of medical misadventure was that doctors could no longer be sued for what might be loosely called medical malpractice.

The amendment did not provide any definition of the key term "misadventure" and effectively left this task to the subsequent interpretation by the courts. The difficulties associated with this task we shall consider shortly.

After the amendment in 1974 a number of further amendments were enacted over the next few years (indeed a new codifying Act was passed in 1982)[22] but none included a definition of medical misadventure.

We have noted already, that the 1992 Act was primarily enacted to cut costs, to broaden the contributions base and to combat abuse.[23] However, the Act also attempted, for the first time in the history of New Zealand accident compensation legislation, to define the term "medical misadventure", section 5 ARCI providing:

"Medical misadventure" means personal injury resulting from medical error or medical mishap:"[24]

The focus of the rest of the paper will be on the treatment of medical misadventure in the accident compensation legislation and the possible changes which the new definition in section 5 ARCI may well bring about.

III. Medical misadventure: approaches to a comprehensive definition under the Accident Compensation Acts 1972 and 1982

1. GENERAL DEVELOPMENT

This section discusses the various approaches to comprehensive definition under the Accident Compensattion Acts 1972 and 1982.[25]

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22 Accident Compensation Act 1982, hereafter ACA 1982.
23 Compare above.
24 See for the complete sec.5 appendix.
25 It is not possible to refer to every decision by the Accident Compensation Corporation, Review and Appeal Authorities relating to medical misadventure. The discussed cases are

Regarding the analysis of the case law under the old regime, are two fundamental propositions. In examining the old Acts, these two arguments must always be borne in mind. Firstly, medical misadventure has never been used as a synonym for medical negligence. If that had been the intention of Parliament the word "negligence" would have been used instead of introducing the then non-legal phrase, "medical misadventure"[26]. Secondly, the definition of the term "personal injury by accident" is qualified by the phrase medical misadventure, that is medical misadventure identifies the type of accident by which the claimant alleges to have suffered various personal injuries.[27] Thus, in cases of alleged medical misadventure the misadventure is not enough to show that the claimant is the victim of some medical misadventure, but in addition it must be shown that that medical misadventure has caused some personal injury. This point, which assumes great impact in failed sterilisation operation cases, has not been appreciated by commentators and judges. Instead, there have been attempts to interpret the phrase personal injury by accident, in the form of medical misadventure as one term.[28]

There has never been any doubt that positive action to treat a patient which is negligent and which results in personal injury by accident is considered to be medical misadventure[29]. Unfortunately, the earlier cases drew a distinction between positive actions and omissions[30]. In Re Collier Blair J stated[31]:

"Various definitions of "misadventure" were furnished to me. Without committing myself to any of them I will accept for the moment that a medical misadventure is a mischance or accident, unexpected and undesigned, related to medical treatment, and arising out of a lawful act."

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those which, the author considers to be most pertinent. See for a broader overview: Collins, Medical Law in New Zealand, Wellington (1992), p.265 et seq. - schedule 6.

26 Compare: Blair J., Re Mrs.McR (1978) 1 NZAR, 567(570).

27 Blair, Accident Compensation in New Zealand, 2nd ed. Wellington (1983), p.81.

28 Compare: Hughes, Accident Compensation and Childbirth, [1981] NZLJ, 79(84)- the argument for that is the use of the expression "includes" in the definition.

29 Giesen, International Malpractice Law, Tübingen (1988), p.533. In addition, it was held that even acts which were merely intentional, though not negligent, causing injury are covered under the Act - G v Auckland Hospital Board [1976] 1 NZLR, 638.

30 Blair J., Re Collier (1976) 1 NZAR, 130(132).

31 Blair J., Re Collier (1976) 1 NZAR, 130(132), emphasis added.

This meant that a patient who suffered personal injury due to an act of omission (whether negligent or otherwise) could not receive compensation under the Act. This was so on the ground that the patient suffered from the consequences of an underlying disease or bodily condition and that had not been caused nor altered by medical activity. The implication of this case was therefore clear; that medical misadventure sometimes covered more than, sometimes less than, medical negligence.[32]

In Re E[33] the meaning of medical misadventure was accepted as a starting point, but the Judge, sought to define the concept of medical misadventure further. His honour concluded that the definition of positive actions was so that the misadventure had to be "in the nature of medical error or medical mishap".[34] Medical error was understood as meaning

"the failure of a person involved in the administering of medical aid, care or attention to observe a standard of care skill reasonably to be expected of him in the circumstances".[35]

Medical Mishap was described as

"the situation when there is the intervention or intrusion into the administering of medical aid, care or attention of some unexpected and undesigned incident, event or circumstance, of a medical nature, that has harmful consequences to the patient".[36]

Though it was emphasised earlier that medical misadventure should not be taken as a synonym for medical negligence, the approach adopted in Re E was to see medical misadventure as a part of those common law concepts which pertain to the standard of care expected from medical practitioners and the degree to which the undesired result was forseeable. In many cases these concepts became central.[37] In addition, the approach adopted in Re E meant that no compensation was payable under the Act when the injury was an

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32 Blair J., Re Collier (1976) 1 NZAR, 130(131); Giesen, International Malpractice Law, Tübingen (1988), p.534; Vennell, Medical Negligence and the Effect of the New Accident Compensation Scheme, ZVglRWiss (1981) 80, p.228(229,230).
33 Re E [1978] ACC Reports- July, p.44.
34 Re E [1978] ACC Reports- July, p.44(46).
35 Re E [1978] ACC Reports- July, p.44(46).
36 Re E [1978] ACC Reports- July, p.44(46,47).
37 Collins, Medical Law in New Zealand, Wellington (1992), p.148.

unsatisfactory outcome of a prudent and faultless medical treatment.[38]

The approach developed by the Appeal Authority in Re Collier and Re E was in effect adopted by the High Court. ACC v Auckland Hospital Board[39], the first decision of the High Court regarding medical misadventure concerned a woman who had undergone a sterilisation. A technical problem in the operating forceps resulted in the failure of the tubal ligation and the woman became pregnant. No approach was taken by Speight J to alter the definition and abolish the influence of the common law. He supported the definitions advanced in Re E and Re Collier but said that the attempted extension in Re E[40] "in no way improves on the ... expressions of Judge Blair [in Re Collier] ".[41] Speight J did suggest, however, (albeit in an obiter dictum) that no distinction should be made between acts of commission and acts of omission, when the act of omission was performed negligently or was a mishap.[42] Furthermore, he indicated what would not constitute medical misadventure:[43]

"All treatment, whether medical or surgical, has a chance of being unsuccessful. There is an expected failure rate in all these matters and such failure may be because no matter how correct the treatment, nature does not always respond in the desired way. It would be quite beyond the intention or wording of the Accident Compensation Act that cover should be granted on the basis of personal injury by accident merely because treatment was not 100% effective. Certainty cannot be underwritten. It is in the nature of medical and surgical treatment that unexpected and abnormal consequences may follow to a greater or lesser degree depending upon the simplicity or sophistication of the treatment being undertaken. Where there is an unsatisfactory outcome of treatment which can be classified as merely within the normal range of medical or surgical failure attendant upon even the most felicitous treatment, it could not be held to be a misadventure."

In short, if, on the one hand, a treatment (from an objective point of view) produced an unexpected, abnormal and rare consequence, outside the normal range of medical or surgical failure, then this would be seen as medical misadventure. On the other hand, failure of treatment to achieve the desired result, notwithstanding a proper standard of care and skill, is not misadventure if the patient, although not cured, was not any worse off than before or,

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38 Gellhorn, Medical Misadventure in New Zealand, [1988] Corn.L.Rev., 170(188(189)).
39 [1980] 2 NZLR, 748.
40 Re E [1978] ACC Reports- July, p.44(46).
41 ACC v Auckland Hospital Board [1980] 2 NZLR, 748(751-31).
42 ACC v Auckland Hospital Board [1980] 2 NZLR, 748(752-10).
43 ACC v Auckland Hospital Board [1980] 2 NZLR, 748(751).

if any worse off, this was only so because nature had not responded to the treatment.

In the instant case, the ACC's appeal was dismissed on the ground that the failure of the operation was caused by a mechanical and remediable fault which was not within an accepted failure rate.[44] In the light of the rulings up to that date, the ACC, in 1981, attempted to summarize "medical misadventure" in its internal Guidelines. According to the summary, medical misadventure was:[45]

"a mischance or accident, unexpected and undesigned, relating to medical treatment and arising out of a lawful act".[46]

This definition was said to embrace all cases with an "unsatisfactory outcome of treatment which can be classified as being outside the normal range of medical or surgical failure".[47] It was also emphasised that "an act of omission, for example in failing to respond to a call for treatment", would not be included.[48] From this it could be argued e contrario that an omission of treatment due to mis-diagnosis was now covered by the Act, if the omission could be classified as not being in the normal range of medical or surgical failure, since the example chosen to show what would not be caught by the Act embraced a very small category of cases. In doing so, the Commission effectively adopted Speight J's obiter dictum as the governing law and disregarded the approach in Re E and Re Collier on this point. This point of view was confirmed in Re Carroll.[49]

The second High Court decision[50] five years after ACC v Auckland Hospital Board, concerned a plaintiff who had undergone an operation for a malignant ovarian tumor. An adverse consequence developed, namely a fistula, which in the view of the operating surgeon was a surprising and extraordinary event. The chance of a fistula developing in this case was about 1%. The Accident Compensation Appeal Authority (ACAA) held that it was not uncommon that an operation like this could lead to the development of a fistula, however carefully it was performed, and thus no medical

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44 ACC v Auckland Hospital Board [1980] 2 NZLR, 748(753-35).
45 Guideline [1981] NZACR, 244.
46 Compare: Re Collier above p.6.
47 Guideline [1981] NZACR, 244.
48 Guideline [1981] NZACR, 244.
49 Compare: Re Carroll (1984) 4 NZAR, 335(338,339).
50 MacDonald v ACC (1985) 5 NZAR, 276.

misadventure had occurred.[51] In the High Court Bisson J, reviewed the definition of medical misadventure taking all of the previous approaches into account. In addition, he observed the derivation of the word misadventure from the French word mesavenir, meaning "to turn out badly". In his view:

"if sickness or injury calls for medical, surgical, dental or first aid treatment and " things turn out badly " for the sufferer of such sickness or injury then the Act affords cover because of his or her misadventure ".[52]

The significance of this definition is threefold: first, it is a change from an objective definition relating to the rare consequences[53], to a subjective one which refers to the victim's point of view. Second, this was the first definition in which no difference between acts and ommissions was clearly made. Third, instead of concentrating upon the common law concepts of the standard of care and foreseeability as had been done in Re E[54], his honour focused upon the natural and ordinary meaning of the word misadventure.[55] In doing so, a significant advance was made towards a broader definition of medical misadventure.

In Viggars v ACC[56] Tompkins J introduced another aspect. His honour said that it was not important to review the statistics regarding the possibility of the occurance of an adverse consequence[57] but rather that it was necessary to view each case individually.[58] His honour also supplemented the definition of Bisson J in MacDonald v ACC[59]:

"the essential question is whether the event that occurred was so unusual and unlikely that it could properly be described as mischance or bad fortune".[60]

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51 ACAA (1985) 5 NZAR, 146(151).
52 MacDonald v ACC (1985) 5 NZAR, 276(279).
53 See ACC v Auckland Hospital Board [1980] 2 NZLR, 748(751), compare p.8.
54 See p.7.
55 MacDonald v ACC (1985) 5 NZAR, 276(282,283).
56 (1986) 6 NZAR, 235.
57 Compare: ACC v Auckland Hospital Board [1980] 2 NZLR, 748(751)- 3,4.
58 Viggars v ACC (1986) 6 NZAR, 235(239).
59 See above.
60 Viggars v ACC (1986) 6 NZAR, 235(239).

The ACAA in a résumé of the three High Court decisions mentioned above regards medical misadventure as:[61]

1. Medical negligence or medical error;
2. A totally unforeseen adverse consequence of medical treatment;
3. An adverse consequence of such treatment which is outside the normal range of medical or surgical failure attendant upon such treatment.

However, an adverse consequence of such treatment which is within the normal range of medical or surgical failure attendant upon such treatment is not medical misadventure.

This definition does not emphasise the victim's point of view and to this extent it departs from the approach taken by Bisson J emphasised in MacDonald v ACC.[62] This may have been the reason why in the case Gregg v ACC[63] the appeal by the claimant was dismissed even though there was only a 0.3% risk of dying during the tests to determine the diagnosis. In his judgement Willis J conceded that the patient's death was a rare occurrence[64], but in this particular case his honour accepted the relevance of the possibilities of treatment and diagnosis.[65] It is difficult to understand these findings. What could be more unexpected for a patient than death during diagnosis? This case appears to be a throwback to the common law categories of standard of care and foreseeability.[66] In contrast to this decision and in accordance with Bisson J's approach in MacDonald v ACC[67], Middleton J. found in Re Scholten[68], that in the eyes of a 32 year old woman the resulting inability to bear children was bad-fortune.[69] The fact that the patient's point of view should be a decisive factor in the decision has been clearly endorsed in the only decision of the Court of Appeal regarding medical misadventure, Green v Matheson.[70] The Court described medical misadventure as follows: insufficient or wrong treatment, failure to inform, mis-diagnosis,

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61 Re P, ACAA dec.2/89, p.6.
62 See above.
63 ACAA dec. 121/87.
64 Re Gregg ACAA dec. 121/87, p.5.
65 Re Gregg ACAA dec. 121/87, p.5.
66 Compare: Re E above p.7.
67 See above.
68 Scholten v ACC, ACAA dec. 146/89.
69 Scholten v ACC, ACAA dec. 146/89, p.7,8.
70 Green v Matheson [1989] 3 NZLR, 564(572-38,57)- The issue the Court of Appeal was called upon to resolve was whether the respondent's claim for general and aggravated damages was barred by sec 27 ACA No.181 (1982)- see Collins, Medical Law in New Zealand, Wellington (1992), p.15 et seq..

misrepresentation (innocent or fraudulent), administrative shortcomings.[71] Apart from these, the Court of Appeal did not expressly adopt any of the definitions applied by the earlier High Court decisions.

Almost one year later Holland J in Polansky v ACC[72] appeared to depart from the previous High Court decisions. This case involved a woman who had undergone a series of tests to find the cause of continued gastric pain, urinary symptoms, loss of weight and anaemia. It was concluded by the surgeon conducting the tests (as well as other medical experts) that the appellant had a carcinoma. Surgery was performed during which the appellant's stomach and other organs were removed. It was only after the operation that it was found that there had been no carcinoma and that the appellant's condition might have been treated without surgery. The surgeon's decision to operate was considered to be acceptable as it was "what any prudent surgeon would have done".[73] In Holland's J opinion the description of medical misadventure as something which, from the patient's point of view, "turns out badly"[74] went too far because every undesirable result of a treatment would be considered a medical misadventure[75]. He also disagreed with Tompkins J's view that the Act covered the case in which uneventfully an arteriogram carried out to recognised standards of medical treatment caused a stroke.[76] His honour's preferred view of what constitutes medical misadventure was the following:[77]

"In my view the word misadventure in its context connotes the concept of something which should not have happened in the course of medical or surgical treatment and not merely an unfortunate result".

Relating this analysis to the case in hand Holland J pointed out:[78] "The stomach and other parts should not have been removed. Likewise, the mis-diagnosis was an error [in the course of the

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71 Green v Matheson [1989] 3 NZLR, 564(573-1).
72 Polansky v ACC [1990] 9 NZAR, 481.
73 Polansky v ACC [1990] 9 NZAR, 481.
74 Bisson J in MacDonald v ACC (1985) 5 NZAR, 276(279), see above p.9.
75 Holland J, Polansky v ACC (1990) 9 NZAR, 481(487,488).
76 See Viggars v ACC (1986) 6 NZAR, 235(239)- Holland J, Polansky v ACC [1990] 9 NZAR, 481(488).
77 Polansky v ACC [1990] 9 NZAR, 481(488).
78 Polansky v ACC [1990] 9 NZAR, 481(488).

treatment]. As such it should not have happened". Mrs.Polansky's appeal was therefore allowed.

Blackwood J as delegate of the Accident Compensation Appeal Authority attempted to clarify the meaning of medical misadventure after the Polansky case. He proceeded on the assumption that he was bound by the decision[79] since Holland J had examined and analysed the three previous High Court decisions. Blackwood himself made the following suggestion as to what does and what does not constitute a medical misadventure in Re Hazel:[80]

1. Medical negligence or medical error causing injury to a patient is medical misadventure.
2. If something happens which should not have happened during the course of medical or surgical treatment resulting in injury to the patient then that is medical misadventure.
3. An adverse consequence of medical or surgical treatment where the medical or surgical treatment has been carried out properly and uneventfully and according to recognised standards does not constitute medical misadventure.

Many doubts arose regarding this definition. The view has been taken that under clause 3 of Blackwood's definition not even Mrs. Polansky would have received compensation under the Act for her injuries since her treatment had been carried out properly in accordance with recognised standards.[81] There would not have been any compensation either for injuries suffered by the two claimants in the cases of MacDonald v ACC and Viggars v ACC. In the author's view the criticism of Blackwood's definition is not justified. If one reads Blackwood's definition objectively and with the statements of Holland J. in Polansky v ACC[82] in mind this definition is only a refinememt of the former definition of medical misadventure.[83] The criticism disregards the fact that there is no "unless" between clause 2 and 3. Therefore, the refinement of the medical misadventure definition after Re Hazel is that medical misadventure only can be established if something happened during the treatment which should not have happened; an severe outcome

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79 Re Hazel, ACAA dec. 100/91 p.9; also Re Child, ACAA dec. 130/91 p.15.
80 Re Hazel, ACAA dec. 100/91 p.9; also Re Child, ACAA dec. 130/91 p.16.
81 Collins, Medical Law in New Zealand, Wellington (1992), p.158.
82 Polansky v ACC [1990] 9 NZAR, 481(488), see above.
83 Cartwright J in Fletcher v ACC, ACAA dec. 18/92 p.6.

itself is not sufficient.[84] The emphasis has been shifted from the result of the treatment to the process of treatment. According to this interpretation Mrs.Polansky would have been able to get cover under the Act.

Much of the criticism was also based on Blackwood's assumption of being bound by Polansky.[85] On this point, the critics were surely on stronger ground. As Middleton J in Re Johns stated, that "each of the High Court decisions must be of equal persuasion before this Authority ...".[86] In fact, some later Authority decisions have adopted the pre-Polansky definition of medical misadventure.[87] Indeed, while others have attempted to incorporate aspects of the Polansky decision into the pre-Polansky definition.[88] As regards the latter, it has been argued that after Polansky the emphasis should be on the unfortunate events in the course of treatment rather than solely on the unexpected or unfortunate result.[89] For example, Mr.Cartwright understood the outcome of Polansky v ACC in Heberley v ACC[90] as applying

"a hindsight test by reference to an identifiably wrong result, without or irrespective of any element of fault rather than merely an unfortunate result or whether the manner of performance of the medical procedure in question was negligent or in error".[91]

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84 Compare Blackwood itself in: Re McMullen, ACAA dec. 220/92 p.7,8.

85 Re Hazel, ACAA dec. 100/91 p.9; also Re Child, ACAA dec. 130/91 p.15.

86 Johns v ACC, ACAA dec. 354/91 p.5

87 Re P, ACAA dec. 2/89 p.6; Samuels v ACC, ACAA dec. 33/92; In a later decision Blackwood J himself returned to this definition, on the ground that "it is undesirable ...that there should be such divergences of opinion in this jurisdiction. Therefore his honour acknowledged that an adverse consequence of medical or surgical failure attendant upon such treatment is medical misadventure.- McMullen v ACC, ACAA dec. 220/92 p.7 et seq.; see p.12 et seq..

88 Neilson v ACC, ACAA dec. 91/92 p.4,5; this comes back to the decision of Speight J in ACC v Auckland Hospital Board [1980] 2 NZLR, 748, where Speight J held that " it would be quite beyond the intention or wording of the Accident Compensation Act that cover should be granted on the basis of personal injury by accident merely because treatment was not 100% effective" (p.751), see also p.12 et seq..

89 See n.above.

90 Heberley v ACC, ACAA dec. 61/92.

91 Heberley v ACC, ACAA dec. 61/92 p.22; Ponifasio v ACC, ACAA dec. 146/92 p.18; see Denning LJ in Roe v Ministry of Health [1954] 2 All ER 131(137) (CA).

In summary,the current position regarding the definition of medical misadventure is to use the pre-Polansky definition and either to incorporate aspects of the Polansky decision into it or use it on its own.

2. SPECIAL CASES

Before comparing the definition of medical misadventure under the ACA 1982 with that under the ARCI 1992, it is necessary to focus on a number of special cases which posed particular difficulty under the 1982 Act or which show the development of the term.

a. Omission of treatment

We have seen that originally, the omission of a medical treatment or the omission of an act during the medical treatment did not constitute medical misadventure[92]. The argument was that the patients suffered from the consequences of an underlying disease or bodily condition that was not caused nor altered by medical activity.[93] Later it was assumed that at least omissions which were negligent or a mishap would be covered under the ACA.[94] The definition of Bisson J in MacDonald v ACC[95] abolished the difference between acts and ommissions almost completely. The only case in which it remains doubtful as to whether there is cover under the ACA 1982, is when the failure to provide treatment is not due to negligence.[96]

b. Informed Consent

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92 See Blair J., Re Collier (1976) 1 NZAR, 130(132)- see p.7.
93 See p.7 et seq..
94 Obiter dictum of Speight J. in ACC v Auckland Hospital Board [1980] 2 NZLR, 748(752-10); ACC Guideline [1981] NZACR, 244; Re Carroll (1984) 4 NZAR, 335(338,339).
95 (1985) 5 NZAR, 276.
96 Compare: Keith, Compensation and Accountability, London 13.05.1991, p.7 - but see also Green v Matheson where the Court of Appeal held that medical misadventure can occur because of administrative short-commings ([1989] 3 NZLR, 564(573-1), see p.11).

According to the House of Lords in Sidaway v Bethlem Royal Hospital Governors and others[97] where a doctor fails to inform his/her patient of the risks inherent in the treatment recommended by him/her and a responsible body of medical opinion would recognize it as proper practice to so inform, then it is open to the patient to sue the doctor for negligence.[98] In the New Zealand, the analogous problem has been: does the failure of the doctor to obtain informed consent to a particular procedure amount to medical misadventure? Until 1990 the view of the ACC and ACAA was that the doctrine of informed consent[99] has no part to play in New Zealand's accident compensation scheme. The argument was "that Parliament could not have intended that a patient who gave proper consent should be deprived of cover while a patient who did not should obtain cover".[100] If the patient had asked the doctor a specific question about the risks of treatment, then and only then was the doctor under a duty to inform the patient and when this was not done correctly there was medical misadventure.[101] That meant that patients who were less confident in their dealings with the medical profession or less able to ask the right questions were discriminated against.

This approach was disapproved in H v ACC. The facts again involved a sterilisation operation. The operation failed and the female claimant became pregnant. The surgeon had not informed her before the operation of the chance that the operation could fail. He had also neglected to answer the patient's question as to whether or not she should continue take contraceptives. Mr.Cartwright of the ACC Appeal Authority held that the judgment of Sidaway v Bethlehem Royal Hospital Governors [102] was particularly persuasive.[103] He

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97 [1985] 1 All ER, 643.

98 Sidaway v Bethlem Royal Hospital Governors and others [1985] 1 All ER, 643(658f-h, 659 c,d).

99 The origin of the term informed consent is attributed to Canterbury v Spence [1972] 464 F 2nd 772- compare: Collins, Submissions from the Medical Defense Union to Parliament's Select Committee on Labour concerning the Accident Rehabilitation and Compensation Insurance Bill, Wellington (1992), p.12.

100 H v ACC, [1990] 8 NZAR, 289(296).

101 Smith v Auckland Hospital Board [1965] NZLR 191(205) (CA); Re Priestley [1984] NZACR, 787.

102 It was held that a doctor does not act negligently if he has acted concerning warning and risks of the treatmemt in accordance with a practice accepted as proper by a responsible body of medical opinion: Sidaway v Bethlem Royal Hospital Governors and others [1985] 1 All ER, 643(658f-h,659c/d).

103 H v ACC [1990] 8 NZAR, 289(304).

applied the Sidaway test in the instant case and held that a duty of care was owed by the surgeon to inform the woman before the operation of the risks of failure of the operative procedure and concluded that a negligent omission to do this constitutes medical misadventure.[104] However, the appeal failed on this point because Mr.Cartwright held there was no causal link between the failure to inform and the pregnancy; it had been established that the woman would not have refused to undergo the sterilisation procedure even if she had known of the slight risk that the procedure could fail.[105] The appeal was upheld on the ground namely that the surgeon did not answer the woman's question correctly.[106] The approach of Mr.Cartwright in this case shows that a doctor's failure to warn or provide information in accordance with the Sidaway test may well be regarded as medical misadventure.[107] In Re Hazel Blackwood J. followed Mr.Cartwright's analysis and concluded:[108]

"A doctor may have a duty to inform a patient prior to treatment of the risks associated with that treatment depending upon practice accepted at the time as being proper by a responsible body of medical opinion."

c. Sterilisation Operation Cases

Pregnancies, resulting from unsuccessful sterilisation operations, have formed a significant number of decisions under the ACA. Problems in accepting the failure of sterilisation as medical misadventure have arisen related to the question of rare or adverse consequences[109] (the failure rate lies about 1%) and the question of informed consent.[110] The real fundamental issue, however, raised by these cases is whether pregnancy can be regarded as personal injury.

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104 H v ACC [1990] 8 NZAR, 289(305,306).
105 H v ACC [1990] 8 NZAR, 289(306).
106 See Smith v Auckland Hospital Board [1965] NZLR, 191(205) (CA); H v ACC [1990] NZAR, 289(310).
107 See Re Hazel, ACAA dec. 100/91 p.11; see Green v Matheson (CA) [1989] 3 NZLR, 564(572,573) where the Court of Appeal expresses no doubt that medical misadventure can apply by a failure to inform; Manning, Tort, [1991] NZ Recent Law Review, 65(79).
108 Re Hazel, ACAA dec. 100/91 p.11.
109 For example: Re M (1984) 4 NZAR, 339(340); H v ACC [1990] 8 NZAR, 289(301 et seq.).
110 See above.

The first case, Mrs.S v ACC[111], was not argued as a medical misadventure case but as personal injury by accident. The judge found that the process of conception, per se, was not an accident within the terms of the ACA[112] and therefore dismissed the appeal. In Re Mrs.McR, Blair J. held that an unexpected and unwanted pregnancy following a sterilisation operation was not in itself evidence of an accident.[113] In this particular case, however, the failure of sterilisation was found to be due to medical misadventure and therefore personal injury by accident.[114] In Re Mrs.McR the delegate of the Accident Compensation Corporation argued that pregnancy was a natural physiological process which as such could not be regarded as an injury.[115] In contrast, Blair J took the view that the injury to Mrs.McR was that she became pregnant because of the failure of the operation.[116] Blair J. did not analyse the term personal injury itself. He regarded "personal injury by accident" as one phrase (which should be seen as a whole). In cases concerning "medical misadventure" this phrase has to be read then as personal injury by medical misadventure.[117] Pregnancy is undoubtedly a natural process and as such does not fit into the categories of physical or mental harm. In addition, it is certainly not an illness. Thus pregnancies which result from medical misadventure may well satisfy the "by accident" requirement, but hardly satisfy the "personal injury" test, at first blush. When the defintion of injury set out in the Shorter Oxford Dictionary is considered, the possibility of seeing pregnancy as an injury becomes more apparent. Injury is defined there as:

" Wrongful action or treatment; violation or infringement of another's rights."[118]

The right which could be infringed in the case of an unwanted pregnancy is the woman's right of self-determination, an aspect of

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111 (1977) 1 NZAR, 297.
112 Mrs.S v ACC (1977) 1 NZAR, 297.
113 Re Mrs.McR (1978) 1 NZAR, 567(572).
114 Re Mrs.McR (1978) 1 NZAR, 567(572,573). This decision was upheld by the High Court and is known as ACC v Auckland Hospital Board.
115 Re Mrs.McR (1978) 1 NZAR, 567(572).
116 Re Mrs.McR (1978) 1 NZAR, 567(573).
117 Compare: Blair, Accident Compensation in New Zealand, 2nd ed. Wellington (1983), p.81; Hughes, Accident Compensation and Childbirth, [1981] NZLJ, 79(84); see p.6.
118 Shorter Oxford Dictionary, 3rd ed. Oxford (1973), volume I.

which is the right of family planning. It is questionable if this is a right which can be recognized under the Accident Compensation Scheme. The right family planning is not recognized as a right in tort law. That said, the idea behind the Accident Compensation Scheme is to provide cover even where tort law does not.[119] This rights which are not recognized in tort law may well be recognized under the ACA. Self-determination of women is recognized in a myriad of non-tort law situations: the possiblity of abortion in certain circumstances set out in the New Zealand Contraception, Sterilisation, and Abortion Act (1977), the English "wrongful birth" decisions and the right of access to family planning advice[120] indicate a strong tendancy to acknowledge this right.[121] The thrust of the law in these areas is that a woman has the right to decide whether or not she is to become pregnant and if necessary how she can prevent it. This right of self-determination is infringed the moment an unwanted pregnancy occurs.
To subsume self-determination generally as a injury under the accident compensation scheme may, however, go too far. Therefore there is the requirement that the injury must be a personal one. That means the injury must refer to the bodily and mental integrity of the claimant. Pregnancy interferes with bodily integrity and can therefore be regarded as a personal injury. This approach to the issue is preferable because it seeks to satisfy both requirements for cover under the Act, "personal injury" and "medical misadventure as accident".

d. Drug and Clinical Trials

Before Green v Matheson there is only one other known decision which deals explicitly with an experimentation on a patient. In Re Kishor Bava Blair J. dismissed the appeal on the basis of Speight

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119 Vennell, Medical injury compensation under the New Zealand Accident Compensation Scheme, Professional Negligence 1989, 141(143).

120 Finlay/Sihombing, Family Planning and the Law, 2nd ed. Sydney (1978), p.3; Brazier, Medicine, Patients and the Law, 2nd ed. London (1992), p.373 et seq. (especially p.392).

121 Compare also Bundesgerichtshof, BGHZ 86, 240- in Markesinis, Comparative Introduction to the German Law of Tort, Oxford (1986), p.99(104), where a right to plan a family as an emanation of the general right to one's personality was acknowledged.

J's decision in ACC v Auckland Hospital Board[122] that medical misadventure cannot be interpreted so broadly as to include all undesired results of medical treatment even if it involves an element of experimentation.[123] His argument was that if that had been the intention of Parliament "different language would have been used".[124] Dicta in Green v Matheson[125] suggest that compensation under the ACA is allowable as medical misadventure for injuries relating to experiments on patients.[126] The circumstances which constitute medical misadventure in such cases could be for example the failure to obtain informed consent and the breach of a fiduciary duty.[127]

3. CONCLUSION

One can trace the development from a narrow interpretation of medical misadventure to a much broader one. Policy adjustments have probably signifacantly contributed to this development. A major consideration in the development of medical misadventure has been the severity of the injury and/or the damage.[128] All in all the development has been successful in that the definition of medical misadventure under the ACA 1982 is one which can be worked with and which is quite predictable (Polansky v ACC[129] aside).

IV. Medical misadventure under the ARCI 1992

1. DEFINITION OF MEDICAL MISADVENTURE

Medical misadventure is defined in section 5(1) ARCI as:

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122 [1980] 2 NZLR, 748- see p.8.
123 Re Kishor Bava [1983] NZACR, 669(673d).
124 Re Kishor Bava [1983] NZACR, 669(673e).
125 [1989] 3 NZLR, 564 (CA).
126 Green v Matheson, [1989] 3 NZLR, 564(572 et seq.)
127 See n. above.
128 "The Panel still considers the outcome of the decision not to operate to be extremely severe, and therefore recommends that the claim be accepted." - Galbraith v ACC, ACAA dec.317/92, p.12;" the adverse consequences have been greater than those normally expected in these cases "- McMullen v ACC, ACAA dec. 220/92, p.5.
129 See p.12.

"personal injury resulting from medical error or medical mishap".

The reference to personal injury within the definition could lead to the assumption that medical misadventure has become an autonomous term under the new Act, whereas under the ACA 1982 "medical misadventure" only described one cause of personal injury. The different methods of defining "medical misadventure" in the two Acts are of no significance. The key concept under the ACA 1982 was "personal injury" and, due to section 8(2) ARCI, that remains the case. Section 8(2) states:

"Cover under this Act shall extend to personal injury which-
(a) is caused by an accident to the person concerned;
(c) is medical misadventure as defined in section5 of this Act."

Thus, cover under the 1992 Act is still dependant on proof of personal injury. Interestingly whereas the term "personal injury" was not defined in the ACA 1982, section 4 of the 1992 Act does set out a definition of that concept. We now turn to consider that concept.

a. Personal injury

Section 4(1) ARCI declares that personal injury means physical injuries. Mental injury is covered only if a person has previously suffered some physical injury. In contrast, the ACA 1982 provided cover for personal injury which was understood to include mental injuries[130]. Furthermore, compensation was granted for both physical and mental consequences of any such injury or of the accident (section 2(a)(i) ACA). The addition of the word physical in the ARCI is very important because it narrows the scope of the accident compensation scheme significantly[131] and opens up the field of non-physical injuries to litigation in the courts. A few areas arise which have to be dealt with in more detail because they are important with respect to the question as to whether cover for medical misadventure exists under the Act.

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130 Compare: Barnard, The Relationship between Compensation in Tort and the Accident Compensation System, [1990] NZ Recent Law Review, 162(171 with footnote 41).

131 Compare: ACC v E, CA 247/91 (unreported).

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even if one is not healthy that one has the right not to get worse and so it may be argued that the failure to diagnose and/or to treat is an infringement of this right.[136] In determining this issue the actual state the person was in and not in which (s)he could have been is important The next question then is whether the "injury" is a physical one. The underlying policy to have a definition for personal injury was to abolish the cover for mental injuries to a large extent. Therefore one has to see "physical" as a contrary to " mental " and therefore in the sense of bodily. The change for the worse of a diseased state is certainly a bodily injury.
Consequently, a person who is a victim of a failure to diagnose correctly or a failure to treat suffers personal injury.

cc) Secondary victims

Another group which could perhaps be excluded from the cover of the ARCI are the secondary victims. When a person suffers an injury due to medical misadventure, (s)he gets cover under the ARCI. However, what about the spouse, children or other relatives who suffer nervous shock or other mental distress because of the injury of this person?[137] Under the ARCI definition of personal injury the second person does not get cover because the mental injury suffered by that person is not an outcome of a physical injury to that person.[138] The question now arises as to whether the secondary victim has a remedy at all. There could be a major hurdle which

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136 Compare: Bison J. in MacDonald v ACC (1985) 5 NZAR, 276(279): "a certain physical state, whether good, bad or indifferent, which is adversely affected either by accident, which is fortune of one kind or by the treatment turning out badly despite all proper care and attention, which is bad fortune of another kind."

137 Compare: ACC v F, [1990] 8 NZAR, 492(499) where Holland J. took the view that the indirect consequences on the mental health of those who were merely observers of accidents to another made it unlikely that Parliament intended such persons to be compensated. He decided that to be covered under the Act there must be some sort of physical injury to the person who seeks cover. This was overruled by the Court of Appeal in ACC v E , CA 147/91 p.16, where the Court states that " We see no other construction than that mental consequences of the accident are included within the term personal injury by accident whether or not there is also physical injury."

138 Compare sec.4 ARCI.

will need to be overcome before a common law action can be commenced - section 14(1) ARCI.

"No proceedings for damages arising directly or indirectly out of personal injury covered by this Act ... that is suffered by any person shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or enactment."

The interpretation of this section is open to two possibilities. On the one hand, it could be argued that the secondary victim has suffered a personal injury which is not covered by the Act. Therefore his/her claim is not barred by section 14(1). On the other hand one could argue that the mental injury of the secondary victim arises at least indirectly out of the personal injury suffered by the primary victim.[139] The fact that the section includes "any person" and the phrase "whether by that person or any other person" is favourable for the second interpretation of the Act. The fact that the secondary victim would not have any remedy against a negligent health professional is a counter argument to this interpretation. In contrast, under the leading decision of the House of Lords in this area, McLoughlin v O'Brien,[140] a secondary victim of "negligent" medical misadventure would be most likely to have a chance of getting compensation under common law.[141] The argument that no compensation at all would be available bears more weight more than the ambiguous wording of the Act. To give the secondary victim a remedy against the negligent health professional only has a practical problem. The secondary victim could get more compensation under common law than the primary victim gets under ARCI. This result would be hardly fair and the Courts should consider the common law compensation on the basis of compensation the primary victim gets under ARCI.

dd) Blood transfusion

There have periodically been cases in which patients predominantly, due to religious grounds, refused to have a blood transfusion. It

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139 Tobin, Nervous Shock: The Common Law; Accident Compensation?, [1992] NZLJ, 282(287); compare also: Holland J. in ACC v F, [1990] 8 NZAR, 492(499).

140 [1983] 1 AC, 410.

141 See Tobin, Nervous Shock: The Common Law; Accident Compensation?, [1992] NZLJ, 282 et seq..

is questionable if someone who receives a blood transfusion which (s)he refuses suffers medical misadventure. An undesired blood transfusion is an infringement of the above mentioned right of bodily integrity.[142] It is also something what has to do with the body and therefore physical.[143] Therefore an undesired blood transfusion can be a medical misadventure. However, it is highly doubtful that a person would get any compensation especially since lump sum payment has been abolished under ARCI. The only possibility would be punitive damages.

ee) Sterilisation operation cases

The failure of a sterilisation operation which results in a pregnancy is covered under the ARCI even so a pregnancy is a natural process and therefore not in itself a physical injury. However, as argued above[144] the woman's right of self-determination is infringed "physically" if one interprets physical in the way it is proposed in this paper[145] because a pregnancy interferes bodily with the right of family planning.

ff) Conclusion

The restriction of personal injury under the ARCI means a reduction of cover in comparison to the old Act and opens the way to the courts where negligence is involved but this is unlikely to cause major changes as most cases concerning medical misadventure will include physical injuries. It is important to interpret physical injury in the manner proposed in this paper: this approach ensures that there is consistency between the definition of personal injury and medical misadventure.

b. medical error

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142 See above.
143 See above.
144 See p.18 et seq..
145 See above.

Medical error was a term used in Re E.[146] The statutory definition used in the ARCI is nearly the same as used in Re E.[147] According to section 5(I) medical error means:

"the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances. It is not medical error solely because desired results are not achieved or because subsequent events show that different decisions might have produced better results".

Two points about the first sentence are noteworthy: first the definition clearly contains elements of negligence as shown by, "standard of care and skill reasonably to be expected". Second, whereas the Accident Rehabilitation and Compensation Insurance Bill made reference to "in the actual treatment"[148], the Act speaks of "in the circumstances". This change in wording suggests a desire to embrace both positive actions and acts of omission.
It is questionable as to what meaning sentence 2 has. Although referring to the standard of care medical error does not literally mean the same as medical negligence. Situations which could generally be regarded as medical error are described in sentence 2, but are explicitly excluded from the meaning of medical error. This could mean that it is not a medical error if a situation falls into the meaning of sentence 2 even if it is due to negligence. This would be the case if sentence 2 was exclusionary. Consequently, this would lead to an enormous reduction of cases, which could be covered under the Act. Judging by the relationship of the clause to the use of the word "solely" in sentence 2 it must be concluded that sentence 2 should narrow the meaning of medical error to the meaning of medical negligence and therefore only has the function of clarifying this. Part one of sentence 2 also clarifies that not every undesired result is medical misadventure.[149] Sentence 2 also clarifies that the assessment of the standard of care must be made as at the time the registered health professional had to advise or act. The wisdom of hindsight is not to be used against him or her.[150]

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146 Re E [1978] ACC Reports- July, p.44.
147 Re E [1978] ACC Reports- July, p.44(46,47).
148 Clause 4(1) Accident Rehabilitation and Compensation Insurance Bill.
149 Compare: Speight J., ACC v Auckland Hospital Board [1980] 2 NZLR, 748(751); see p.8.
150 New Zealand Law Society Seminar, Accident Compensation- The New Legislation, July-August 1992, p.28 (3.72).

Clearly medical error and medical negligence are, in effect, synonyms in section 5 ARCI. That, however, does not mean that the definition of medical misadventure under the ARCI is narrower than that in the ACA 1982. Cases which cannot be subsumed under medical error in section 5(1) can fall under medical mishap.

c. medical mishap

Medical mishap means an adverse consequence of treatment by a registered health professional, properly given, if -
(a) The likelihood of the adverse consequence of the treatment occurring is rare; and
(b) The adverse consequence of the treatment is severe (section 5(1)).

Medical mishap embraces, in contrast to medical error, all cases in which no negligent behaviour results in a personal injury. The only questionable factor is how to interpret the words "treatment properly given". Applying a generous interpretation of the term treatment it is possible to argue that this word itself does not say anything about acts or omissions and includes obtaining informed consent, information gathering, diagnosis and general advise.[151] If a narrower view would be correct, a patient who was adviced by his/her doctor to do something which causes a rare and severe adverse consequence, which would otherwise qualify for medical mishap, would not be covered at all.
Adding the words "properly given" it cannot be doubted that this refers alone to actual treatment.[152] That means a failure to treat which is not negligent is not covered by the Act because it does not fall under medical mishap. What is then applicable to an incorrect but non negligent mis-diagnosis? A mis-diagnosis can lead to two different situations: First there may be a failure to treat. In this case there is no "treatment properly given" and therefore no medical mishap. Secondly, a mis-diagnosis can lead to a treatment, which is properly carried out but which has undesired results. The undesired result is not due to the properly given treatment but due to the mis-diagnosis. Because the properly given treatment caused an intended result there is no adverse consequence in accordance with the treatment. Therefore mis-diagnosis in the

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151 Compare: New Zealand Law Society Seminar, Accident Compensation- The New Legislation, July - August 1992, p.28 (3.76).

152 This phrase was used in the Bill, compare: clause 4(1) ARCI Bill. It also indicates that there is no overlap between medical error and medical mishap.

second case also does not constitute medical mishap. Mrs.Polansky in the case Polansky v ACC[153] would not get any cover under the new Act because the mis-diagnosis of cancer was not due to negligence and the removal of her stomach and other organs was the consequence of a properly given treatment based on the premise that she had cancer. The exclusion of "non negligent" mis-diagnosis and failure to treat reflects the underlying opinion which was expressed by Blair J. in Re Collier[154] that the patient in this case suffered only from the consequences of an underlying disease or bodily condition and therefore cover should be excluded.[155] These findings are supported by section 5(7) which expressly says that the failure to correctly treat due to a mis-diagnosis and the failure to treat at all do not give cover under the Act. It is one of the most significant limitations of cover for medical misadventure.

In an attempt to get cover under the Act it is possible that victims will try to argue that the injury they have incurred is due to a positive act rather than to an omission. The Courts therefore could be forced in many instances to clearly distinguish between acts and omissions in medicine.
It is questionable as to whether there is any other section of the ARCI which could provide cover for these situations. One possibility is section 8(2)(a) which states:

"Cover under this Act shall extend to personal injury which is caused by an accident to the person concerned."

The claimant would have to argue that a failure to treat or to diagnose correctly amounts to an accident. However, "accident" is defined in section 3(a) as:

"A specific event or series of events that involves the application of a force or resistance external to the human body and that results in personal injury, but does not include any gradual process; ..."

Clearly. omissions do not meet the requirement of "external to human body". They are precisely the opposite. Thus, initially omissions are excluded from cover.[156] In sum, those who suffer

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153 Polansky v ACC [1990] 9 NZAR, 481.
154 Re Collier (1976) 1 NZAR, 130(134).
155 See sec.10.
156 See Blair J. in Re Collier (1976) 1 NZAR, 130.

personal injury by a non-negligent failure to treat or diagnose correctly are not covered under the 1992 Act and furthermore have no common law action available to them.

The next point is that, a medical mishap as such does not constitute medical misadventure. In addition, two further requirements have to be fulfilled: The likelihood of the adverse consequence of the treatment must be rare and the adverse consequence must be severe.

aa) Rare adverse consequences

According to section 5(2) the likelihood of the adverse consequence of the treatment is rare

"if the probability is that the adverse consequence would not occur in more than 1 percent of cases where that treatment is given".

An objective guide like this is helpful for those who are in charge of administering the scheme. Administrators are assisted by precise definitions enabling them to decide who, and to what extent a person has, cover under the Act. It is also able to provide information for those people who intend to enter into a contract with a private insurance company for risks not covered under the Act.

As an argument for the necessity of an objective formula two cases are often used: Re Scholten where a 1.2% chance of an undesired result was held to be medical misadventure[157] and Re Gregg where a 0.3% chance of an undesired result was held not to be sufficient to constitute medical misadventure.[158] As has been pointed out earlier[159] the reason for the decisions, however, were not so much the percentages of the likelihood of an undesired result but rather the different approaches each judge took. The judges normally did not look only at the percentage of the likelihood under which an undesired result could occur but took other circumstances into account as well. Therefore it is difficult to maintain from the existing cases that without a legislative likelihood ratio the

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157 Scholten v ACC, ACAA dec. 146/89, p.7,8.
158 Re Gregg, ACAA dec. 121/87, p.5.
159 See p.11.

judges would have come to unequal and unfair decisions. On the other hand it is most likely that every judge considers different percentages to be rare or not rare. A fixed percentage of 1%, however, raises the question of justice in the individual case.

In addition, it appears peculiar to have a difference between medical misadventure and other accidents,[160] which are covered by the Act. Neither in the ACA 1982 nor in the ARCI has a distinction been made between rare and non rare consequences caused by work or car accidents, although it is a fact that on some streets more accidents occur than on others or that drivers of a special type of car on average have more accidents than others. Even more significant is the difference with regard to sports accidents.[161] Rugby, for example, is a sport where one can be sure that in almost every game there would be at least one accident, that is, rugby injuries would not be rare at all. There is no doubt, however, that these injuries are covered by the Act.

Furthermore it is questionable as to what the basis of the proposed formula is. Section 5(2) speaks of "more than 1% of cases where that treatment is given". As the Medical Defence Union pointed out, published data on how frequently each individual adverse effect occurs in medical practice is rare[162].
Speight J. in ACC v Auckland Hospital Board, for example, stated that he could not rely on any percentages.[163] It was however

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160 Compare: Hughes, Informed Consent and Medical Injury, [1990] NZLJ, 154(154,156), where he gives an example for the fact that the introduction of medical misadventure had a restrictive effect; also Mahoney, Informed Consent and Breach of the Medical Contract to achieve a Particular Result, (1985-88) 6 Otago Law Review, 103(108).

161 Sport injuries have always had a good position in the ACC system: The ACAA, for example, has awarded two sums of $ 10.000 each plus on of $ 6.000 to an amateur sports person for injuries received while playing over several seasons- the reason behind that was that the injuries impacted upon the claimant's enjoyment of life and, in particular, the enjoyment received from playing sport. In contrast, a tetraplegic who suffers one catastrophic injury receives only the maximum of $ 10.000.- compare: McGreevy, Accident Compensation Reform- A Fairer Scheme or a Breach of Contract?, in Accident Compensation Reform Conference (materials), Wellington (1991), p.10.

162 Collins, Submissions from the Medical Defense Union to Parliament's Select Committee on Labour concerning the Accident Rehabilitation and Compensation Insurance Bill, Wellington (1992), p.9 - further Collins, Submissions....

163 ACC v Auckland Hospital Board [1980] 2 NZLR, 748(752).

obvious that the consequences which had occurred were rare.[164] In comparison, in MacDonald v ACC[165] a likelihood ratio existed. It was approximately 1%. Bisson J. did not take the approach of relying entirely on the likelihood percentage[166] but this case would easily have been covered under the new Act.

To refer solely to New Zealand statistics would be insufficient because 3,5 million people do not provide sufficient data in relation to the quantity and variety of adverse consequences which occur.[167] The use of world-wide data or data collected in other countries could be an appropriate solution and normally is known by a physician when it has become recognised world-wide. The problem with this data, however, can be that its value is limited because the frequency of an adverse medical result can vary greatly depending upon the cross section of population used in the study. Factors which are also likely to influence the data on adverse consequences relating to medical treatment are the geographical location of the population from which the information is obtained, demography, the socio-economic standards of the community concerned (the standard of medical education varies across socio-economic groups) and the prevalence of a number of common diseases in the community studied.[168] Viggars v ACC[169] illustrates another problem: in that case two opposing medical opinions existed about the likelihood percentage of the occurred consequence.[170]

It is submitted that where there is no data available, as in ACC v Auckland Hospital Board or the medical opinion regarding it is not unamious, as in Viggars v ACC, then the criminal law principle "in dubio pro reo" should be applied so that the likelihood of an adverse consequence is regarded as being under 1%. Progress could perhaps be achieved by shifting the burden of proof to the ACC, so that ACC has to proove that there was more than a 1% likelihood.

Moreover, section 5(3) reads:

"Where the likelihood that an injury would occur is in the ordinary course rare, but is not rare having regard to the circumstances of

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164 ACC v Auckland Hospital Board [1980] 2 NZLR, 748(752).
165 MacDonald v ACC [1985] 5 NZAR, 276.
166 Compare: MacDonald v ACC [1985] 5 NZAR, 276(279).
167 Compare the considerations of Dr. Williams in Legislation Advisory Committee, Submissions on ARCI Bill to the Labour Select Committee, Wellington (1992), p.7-appendix.
168 Collins, Submissions..., Wellington (1992), p.10.
169 Viggars v ACC (1986) 6 NZAR, 235.
170 Viggars v ACC (1986) 6 NZAR, 235(237).

the particular person, it shall not be medical mishap if the greater risk to the particular person injured -
(a) Was known to that person; or
(b) In the case of a person who does not have legal capacity, was known to that person's parent, legal guardian, or welfare guardian, as the case be, -
prior to the treatment.

A number of points are comment worthy. First, the section clearly indicates that the determination as to whether the adverse consequence is a rare one takes place from the patient's point of view. That means it is crucial for the 1% likelihood to be considered in the context of the particular patient. The question should not be to the online group of patients who undergo the particular procedure. Second, section 5(3) allows the patient who is interested and well informed about his or her health to be worse off than the disinterested and uninformed patient. This could lead to a situation where a doctor and patient could come to an understanding with it being more favourable for both doctor and patient if the patient was not informed about the treatment. This does not encourage the free-flow and exchange of information between doctor and patient.
Besides that the problem is, what does knowledge of the "greater risk" mean? How much does the patient have to know - the full extent of the risk or merely that (s)he is more likely to suffer than the average patient? Most likely the question will be framed in terms of "the patient in the Clapham ambulance".[171]
This qualification also raises a fundamental philosophical question. Should those who are at greater risk of suffering an adverse outcome of treatment be prejudiced in their chances of recovering compensation simply because they are informed about the possibility of an adverse event before treatment?
No commercial driver would lose his right to receive compensation for damages under the ARCI simply for the reason that he knew that he was at a high risk of getting involved in an accident. The same applies as well for a rugby player who knows that it is most likely that he or she will be injured during a game. In the author's view there is no obvious justification for the different treatment of a car driver or rugby player and a patient.[172]

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171 Compare: New Zealand Law Society Seminar, Accident Compensation - The New Legislation, July - August 1992, p.29 (3.78).
172 Compare: Legislation Advisory Committee, Submissions on ARCI Bill to the Labour Select Committee, Wellington (1992), p.5.

In the author's view it would have been preferable to introduce the 1% formula as a general guideline instead of a manadatory statutory criterion. The judges and administrators should have been given the chance to view the individual circumstances of each case, with a statutory guideline provided.

bb) Severe consequences

The injury in question must furthermore be "severe" to receive cover under the ARCI. The requirement of severity must exist cumulatively to the requirement of a rare adverse consequence before the injury can be classified as medical misaventure. Severity is defined in section 5(4). That section reads:

"the adverse consequence of treatment are severe only if they result in death or-
(a) Hospitalisation as an inpatient for more than 14 days; or
(b) Significant disability lasting for more than 28 days in total; or
(c) The person qualifying for an independence allowance under section 54 of this Act.[which means a disability of 10% or more after the AMA guide]

The first two possibilities, death and hospitalisation seem to be clearly determinable. That said a causation problem could emerge.[173] In many cases there will be a combination of causes which contribute to death or hospitalisation. The question to be answered for the purpose of section 5(4) is what does "result" mean - is it sufficient to point to an indentifiable medical mishap which contributed to death or hospitalisation or must the mishap be the sole cause? Since in many cases there will be a lack of medical evidence on this point, it is submitted that it must be sufficient that the adverse consequence is only a contribution to the death or the hospitalisation. If not then there will be many patients who will receive nothing under the new regime, who would have been entitled to compensation under the old Act. Such an outcome would encounter to the Governments' stated policy that the new Act would not remove cover from those who would have been entitled under the old scheme.

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173 New Zealand Law Society Seminar, Accident Compensation - The New Legislation, July - August 1992, p.30 (3.82).

The third possibility "significant disability", however, is not so clear: Disability is defined under section 3 of the Act as:

"any restriction or lack (resulting form impairmnent) of ability to perform an activity in the manner or within the range considered normal for a person."

This definition does not raise any difficulties. Problematic, however, is the addition of "significant". Who will decide and how will it be decided what "significant" is? On its ordinary meaning "significant" is anything which for a particular individual has a substantial or unusual effect on their daily life. Significant" meters not only to the objective seriousness of the injury, but can also refer to the kind of injury and its negative effect on the particular individual. For a soccer professional a broken leg for 28 days is a "significant disability" which disqualifies him or her from work, whereas it is not for a professional violinist.

Leaving aside the notion of "significant disability" in section 5(4)(b), let us turn to section 5(4)(c), the fourth possibility. That provision states that consequences of a treatment are severe only if the person qualifies for an independence allowance under section 54 of this Act. There are difficulties with this criterion. If we look to section 54 itself, we see that to qualify for an independence allowance the claimant must show that (s)he suffers from a minimum 10% degree of disability (section 54(1)). In determining the question of the "degree of disability", the Act in section 54(15) permits (and the ACC uses) the American Medical Association Guides to Evaluation of Permanent Impairment (AMA Guides). This is where the difficulties begin.
Professor Sir Kenneth Keith, President of the Law Commission, advised ACC doctors in 1988 to use the AMA Guide to rate 168 randomly chosen persons who had received payments from the ACC. The average impairment was 10,5%.[174] The survey also showed that only 32.1% of the people had an impairment of 10% or more.[175] This can be interpreted as meaning that 67.9% of people who suffer from a non-negligently caused personal injury during a medical treatment are now excluded from ARCI compensation. One has however to consider that the group of 168 cases is a general example and

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174 Keith, Alternative Reform Options, Accident Compensation Reform Conference (materials), Wellington (1991), p.8.
175 Keith, Alternative Reform Options, Accident Compensation Reform Conference (materials), Wellington (1991), appendix.

includes more than just medical misadventure cases.[176] There is so far no statistics available which only considers medical misadventure cases. Theoretically, it could be the case that the percentage of people who can get compensation under the new Act is even less than 32.1% if one only considers medical misadventure cases.

In addition, the reference of the Act to the above mentioned AMA Guides in section 54(15) is far from clear. Does the 10% treshold mean whole-person impairment or organ-level impairment, such as the degree of impairment of the knee? The AMA Guides set out in several chapters how to measure for example a knee impairment, how to translate this data into percentage impairment of the lower extremity and how to translate this into a whole-person impairment.[177] According to section 54(15) it is possible for the ACC to extend or to modify the AMA Guides or even to use differing scales of measurement. A modification is needed in the author's view to avoid undesired results, as a highly skilled surgeon and a soccer professional receive the same amount of payment in the case of the loss of a thumb which hardly can be justified.

In conclusion, the severity requirement is a difficult one which will only be fulfilled in a few cases. This will mean a significant reduction in compensation payments related to medical misadventure under the new Act. To prevent the worst, "significant" in section 5(4)(c) should be interpreted in the way set out above. The ACC should also undertake to modify the AMA Guides as quickly as possible. One possibility so as to provide more victims with compensation, is to start with a more generous classification of impairments; this is allowed under section 54(15)(b).

d. Registered health professional

The definition of medical misadventure refers to the acts or omissions of a registered health professional. The phrase is defined in section 3 of the Act and means

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176 Compare: Legislation Advisory Committee, Submissions on the ARCI Bill to the Labour Select Committee, Wellington (1992), p.5 - further Legislation Advisory Committee, Submissions....

177 Compare: Pryor, A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment, (1990) 103 Harv.L.Rev., 964(966).

"(a) Any person who holds a current annual practising certificate issued by the Medical Council of New Zealand, the Nursing Council of New Zealand, the Chiropractic Board, the Dental Council of New Zealand, the Dental Technicians Board, the Occupational Therapy Board, the Pharmaceutical Society of New Zealand, or the Physiotherapy Board; or
(b) Any person registered with the Medical Laboratory Technologists Board, the Medical Radiation Technologists Board, or the Podiatrists Board".

The definition excludes healers, herbalist and other people practising an alternative form of medical treatment unless these people are members of the stipulated organisations. This approach is to be commended for two reasons: first, the definition is clear as to what limits are covered by the Act; second, without this exclusion one would run the risk of everything which bore a slight resemblance to a treatment or was advertised as such to be turned into a medical one. On the other hand, the argument against the restriction to health professionals is that the definition excludes first aid situations where no doctor is available to render first aid. That said, those who suffer personal injury due to a first aid treatment could get cover under the Act by virtue of section 8(2)(d). That section states:

Cover under this Act shall extend to personal injury which is a consequence of treatment for personal injury.

In first aid situations one normally helps someone who has a personal injury of one sort or another (excluded are only first aid treatments of mental injuries). Therefore this requirement is met. This view can also be strengthened by considering the fact that it is more encouraging for people to render first aid if they cannot be sued through common law.

e. Conclusion

Surprisingly, the definition of medical misadventure is a fall back to the definition given in Re E[178] from 1978. The criticism of that decision, that the defintion was based on the Common law concepts of standard of care reasonably expected and forseeability

178 Re E [1978] ACC Reports- July, p.44(46,47).

of the undesired result, also applies now. Negligence[179] now plays a major role in determining what constitutes medical misadventure under the 1992 Act. Due to the fact that the non-negligently caused failure to diagnose correctly and the non-negligent failure to treat fall outside the Act a significant number of all medical mistakes are not covered. Because severity of the injury must be shown only in a small number of cases can be achieved, the scope of the ARCI is significantly limited in the case of every action which is not negligent. In effect, this means, that the new Act in so far medical misadventure is concerned represents a codification of common law tort principles. The cases which would extend this are nearly all excluded. This effect could be avoided if, for example, an adverse consequence is assumed to be rare if there is no data available or if two different medical opinions about the likelihood exist.[180] Furthermore the requirement of a significant disability in section 5(4)(b) should be interpreted broadly[181] and the ACC should undertake a modification of the AMA Guides as quickly as possible.[182] The exclusion of first aid treatment from medical misadventure does not play a major role.

2. SPECIFIC EXCLUSIONS

Section 5 also explicity states a number of exceptions which do not constitute medical misadventure. The aim of this paper is to examine each exception separately and consider whether the exceptions restrict medical misadventure further, beyond the definition discussed above, or if the exceptions are only a clarification of exclusions which result from the interpretation of the definition of medical misadventure discussed above. As the analysis shows, it is the view of the author that the exclusions are merely clarificatory and for this reason are essentially superfluous. Moreover, there may well be the added danger that judges and administrators will use the exclusions to interpret the generally expressed subsections of section 5. Such a result would be unfortunate.

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179 Intentional behaviour falls also under the Act because negligence is only a minimum requirement.
180 See p.31.
181 See p34.
182 See p.35.

a. Abnormal reactions

Section 5(5) says that

"Medical misadventure does not include personal injury arising from abnormal reaction of a patient or later complication arising from treatment procedure unless medical misadventure occurred at the time of the procedure."

To exclude personal injury arising from abnormal reaction of a patient from cover under the Act is quite unbelievable because normally that is considered as a classical case of medical misadventure.[183] The scope of abnormal reactions has been limited anyway because of section 5(2) and section 5(3).[184] It is hard to think of cases which are not abnormal reactions and therefore left for section 5(2) and section 5(3).
This "abnormal reactions" exception applies particularly to the use and administering of drugs during a medical treatment. Many drugs have known side effects. Others which are usually safe can affect particular persons adversely. These situations would normally fall under section 5(3) or are a matter of informed consent. There would have been no need to explicitly exclude them. The cases which are left, namely where an abnormal reaction is unforeseen, would, without this section, have to meet the requirements of medical mishap anyway, which are stringent enough. These few cases, however, seem to be completely excluded by section 5(5).
Furthermore it is arguable that even abnormal reactions caused by negligence are exempted from cover due to section 5(5). Much depends on the the interpretation of the scope of the last half sentence of section 5(5) "unless medical misadventure occurred at the time of the procedure". If this provison were to apply to abnormal reactions it would mean that even negligent prescriptions or administration of drugs which cause an abnormal reaction would not be covered under the Act. This would clearly go too far. Therefore it is arguable that the last part of the sentence has to be read together with the first part. Cases which would be related to medical mishap are possibly excluded from cover because it is hard to conceive of a medical mishap which occurs and which does not cause an abnormal reaction.

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183 Compare: Claims Manual 1991, 4.2.4..
184 See IV.1.c.aa.

The second provision of section 5(5) is that medical misadventure does not include later complications arising from treatment unless medical misadventure occurred at the time of the procedure. This provision is just a clarification. Indeed, there are hardly any cases where a complication arises from treatment where the cause of the complication does not lie in the treatment. That situation, however, can be subsumed under the above discussed definition of medical misadventure. When, for example, after an operation the wound is not tended to satisfactorily due to negligence and results in an infection then one can subsume this situation easily under medical error. The cause of the infection is not the operation but the omission to tend the wound. Therefore there could seem to be little reason for this provision.
Besides that, the provision contains an interpretation problem: what does later complications mean? How much later is later? It has to be taken into consideration that it takes a different time for different abnormal reactions to occur. Therefore one should judge every case individually.

Section 5(5), which was inserted by the select committee, remains somewhat dubious. On the one hand it excludes a classical case of medical misadventure almost completely. On the other hand it only clarifies a well-known fact in its second part. The subsuming of abnormal reactions under the requirements of medical mishap and medical error would mostly have been excluded from cover. There is no obvious reason for excluding them as a whole. Cases such as Re Lloyd[185] or Re Kishor Bava[186] will clearly not be medical misadventure on any interpretation of the 1992 Act.[187]

b. Failure to obtain informed consent

In its submissions to the Accident Rehabilitation and Compensation Insurance Bill the Medical Defence Union expressed concern about the "unqualified and indiscriminate use" of the term "informed consent".[188] The Union presented three possible definitions, which ranged from an objective standard relating to the medical

185 [1982] NZACR, 259.
186 [1983] NZACR, 690.
187 Compare also: Vennell/Manning, Accident Compensation, [1992] NZ Recent Law Review, 1(5).
188 Collins, Submissions..., Wellington (1992), p.12.

profession, via an objective standard which related to the patient and finally to a patient's objective/ subjective standard.[189] The objection of the Medical Defence Union[190] to the Bill relating to the fact that failure to obtain informed consent from the patient was beyond the scope of medical misadventure[191] was taken into account so far, that the failure to obtain informed consent to treatment is, according to section 5(6) medical misadventure if the health professional acts negligently in failing to obtain informed consent. Informed consent itself is not defined in the Act. It is questionable as to what the patient has to be informed about and therefore, when it is negligent not to disclose possible side-effects or outcomes of the treatment. In effect, excluded from the Act's cover are situations where there has been a failure to obtain informed consent, but in circumstances amount less than negligence.This exclusion seems to reflect the outcome of H v ACC.[192] and establish the Sidaway test as decisive.

Whether this is correct or not could depend on the effect of the New Zealand Bill of Rights Act 1990. Section 6 of the Act states that it is preferable that every term in an enactment should be given a meaning consistent with the Bill of Rights Act. Section 11 of the 1990 Act states:

"Everyone has the right to refuse to undergo any medical treatment".

It is arguable that a patient only can exercise his or her right under section 11 if he or she has knowledge of all the circumstances and can make a free choice whether or not to undergo medical treatment. In the light of section 11 of the Bill of Rights Act it is preferable to define what a doctor should disclose to his or her patient, as information which would be desirable by a prudent and responsible patient.[193] The information must be given in the language of the patient, and the explanations must take into account, with respect to the patient's level of knowledge,

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189 Collins, Submissions..., Wellington (1992), p.12,13.
190 Collins, Submissions..., Wellington (1992), p.13.
191 Clause 4(5) Accident Rehabilitation and Compensation Insurance Bill.
192 H v ACC [1990] 8 NZAR, 289; see p.16.
193 Compare patient's objective standard in: Collins, Submissions..., Wellington (1992), p.13.

understanding and circumstances. This approach is significantly different from the Sidaway definition of informed consent.

c. Failure to diagnose / failure to provide treatment

One of the most significant limitations in the new definition is the exclusion of cover for those who are not diagnosed correctly, or who do not receive treatment when both cases are not due to negligence - section5(7). Failure to diagnose and treat constitutes an enormous amount of all medical mistakes.[194] There can be little doubt that a number of patients who have received compensation under the ACA 1982 are now excluded from cover. This exclusion is superfluous because it also results from the definition of medical mishap and medical error.[195] As shown earlier a failure to diagnose or a failure to treat can only be understood as "medical misadventure" if there is negligence involved. Subsection 7 adds nothing.

d. Drug or clinical trial

Finally, section5(8) excludes the carrying out of any drug trial or clinical trial from the scope of medical misadventure where the person has agreed in writing to participate in the trial. In some ways this exclusion can be regarded as superfluous, because if a patient does not know that (s)he takes part in a trial[196], (s)he has not given informed consent and, as we have seen already informed consent is addressed in section 5(6). If a patient has knowledge of his or her participation in a drug or clinical trial (s)he normally can be assumed to have known of a higher risk which already falls within the scope of the exclusion in section 5(3). The written clause only expresses a higher standard of informed consent. If a person takes part in a drug or clinical trial it can be assumed that a prudent and reasonable doctor would wish to obtain an appropriate level of informed consent - it would seem obvious to the author tha this would mean as minimum that the consent be set out in writing.

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194 Collins, Submissions..., Wellington (1992), p.13.
195 See IV.1.b.; IV.1.c..
196 Compare: Green v Matheson [1989] 3 NZLR, 564.

However, the explicit exception of drug and clinical trials makes certain that in an increasing field of modern medical law there is no claim for compensation under a non-fault scheme.

e. Conclusion

The specific exceptions to medical misadventure made in section 5(5) to 5(8) do not contribute to the simplification and the comprehension of medical misadventure. Sometimes the exceptions are superfluous because they are only a clarification (eg. section 5(7)) or they are not complete as in section 5(6) where a definition of informed consent is missing. Section 5(5) can be regarded as completely ill-conceived.

3. CONCLUSION

The development of the ARCI resulted in a restriction of compensation within a medical treatment framework. Although the administration of justice had almost overcome the concept of the standard of care and foreseeability under the old Act and the accident compensation scheme had acquired a prominent position world-wide, nevertheless a relapse back to common law is now evident. A particulary dramatic factor in this phenomenon is the exclusion of mis-diagnosis and failure to treat when they occur non-negligently. As the analysis shows, the specific exclusions in section 5 are merely clarificatory and for this reason are essentially superfluous. Since life is often of a much more diverse nature than the legislator can perceive, it would have been preferable if care had been taken to form a principled definition rather than trying to legislate for unique and individual cases. The restriction of compensation in the case of medical misadventure is incomprehensible, particularly in view of background facts such as that between 1990 and 1991 medical misadventure cost a mere $5 million, which amounts to 0.5% of the whole ACC payout.[197] The Government stressed in the preparatory report[198] that it would continue to adhere to the principles stated in the Woodhouse

197 Compare: Legislation Advisory Committee, Submissions..., Wellington (1992), p.3.

198 Minister of Labour, Accident Compensation: A Fairer Scheme, Wellington (1991), p.15.

Report.[199] One of these basic principles is that the community has a responsibility to help injured persons irrespective of any question of fault or liability. With the enactment of the new definition of medical misadventure in the 1992 Act, the Government has failed to adhere to this promise.

V. Keeping the medical profession in line

One point of criticism has long been that the old Act does not have a deterrent element in it.[200] This has changed under the ARCI. Section 5(10) imposes a duty on the Corporation to refer any medical misadventure claim it considers to be caused by "negligence or inappropriate action" to an appropriate disciplinary body. In addition, the registered health professional can be punished through the levy imposed on him/her to fund the accident compensation scheme.[201] The doctor can get a no claim bonus or on the other hand has to pay increased premiums.

The Act excludes in section 14(1)[202] actions for compensatory damage in common law arising directly or indirectly out of personal injury against the perpetrator (although common law actions would may be the best deterrents.[203]) More accurately, no proceeding for compensatory damages which arises (directly or indirectly) out of "personal injury" covered by the Act can be litigated. Since medical misadventure is a form of personal injury "covered" by the 1992 Act[204] medical misadventure suits cannot be brought before any court in New Zealand.
Because negligent acts or omissions are covered under the Act there are basically no cases left where the patient can sue the doctor under common law. Exemptions are cases where the patient only suffered mental injury or is a secondary victim.[205] Consequently the new scheme is an entire replacement of the tort law. In any

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199 Legislation Adivsory Committee, Submissions..., Wellington (1992), p.5.
200 Giesen, International Malpractice Law, Tübingen (1988), p.540- footnote 88, Auckland District Law Society, The New Accident Compensation Legislation, Auckland (1992), p.7.
201 Section 122 et seq. ARCI.
202 See appendix.
203 Compare: Cane, Atiyah's Accidents, Compensation and the Law, 4th ed. London (1987), p.546.
204 See: section 8(2)(c).
205 See IV.1.a.aa.; IV.1.a.cc.

instance where the scheme were to extend tort law the Act presupposes such stringent requirements, that the range of application for the area of non-negligent accidents is seriously restricted. That means that the policy which ACC has stood for in the past, for example, community responsiblity and comprehensive entitlement is not accomplished under the new Act. The medical profession could still almost be completely protected from common law claims.

Nevertheless, it had been argued that besides cover under the ACA 1982[206] the patient could have an action based on breach of contract.[207] The main argument has been that the damage suffered if a contractual promise to achieve a particular result with a medical treatment is breached is different from a suffered personal injury and does not arise directly or indirectly out of a suffered personal injury.[208] The reason for this is that the focus in a breach of contract case is on the failure to achieve the result bargained for, regardless of why that result was not achieved. In other words, it is mere coincidence that the result of the treatment can be classified as both a breach of contract and a personal injury. An even stronger argument for the existence of a breach of contract action alongside compensation under the ACA was advanced in Donselaar v Donselaar. There it was stated that the idea underlying the accident compensation scheme is to replace tort law.[209] In reverse, the object of the accident compensation scheme was certainly not to abolish actions for breach of contract. Therefore it would be unfair to let the Act serve as a shield for

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206 Sec.27(1): " Subject to this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment."

207 Mahoney, Informed Consent and Breach of the Medical Contract to achieve a Particular Result, 6 [1985-88] Otago Law Review, 103(126 et seq.).

208 Mahoney, Informed Consent and Breach of the Medical Contract to achieve a Particular Result, (1985-88) 6 Otago Law Review, 103(128).

209 Donselaar v Donselaar [1982] 1 NZLR (CA), 97(104 et seq.); compare: Palmer, Compensation for Incapacity, Wellington (1979), p.271 et seq..

doctors against breach of contract claims when it was never the purpose of the scheme to interfere with contractual relations. The counterargument to this has been that the damage arises directly or indirectly from medical misadventure.[210] Collins saw that while a distinction can be made between breaching a term of a contract and the results which follow, ultimately any act against a doctor who fails to achieve a particular medical result must inevitably be a claim for damages which arise directly or indirectly from medical misadventure.

In the author's view, Collins' view is wrong. The emphasis should not lie on "damages arising directly or indirectly out of the injury". Instead the emphasis should lie on "personal injury suffered by accident". Compensation for breach of contract is claimed, because a contractual term has not been carried out properly[211] and not because someone suffered personal injury, though both exist on the same set of facts. Consequently, in the author's view claims for breach of contract were not barred by section 27 ACA 1982.

The new Act attempted to clarify this point. Section 14(3) states that:

"Nothing in this section shall apply to any proceedings relating to, or arising from,-
(b) any express term of any contract or agreement,"

If this provision had not been included it is likely that breach of contract actions would not have been open, because of section 14(1) of the 1992 Act. It will be recalled that proceedings related to personal injury covered by the Act are prohibited. Since personal injuries which are caused by medical misadventure are "covered" by the Act, actions on the contract would be barred - they would be proceedings in relation to personal injury covered by the Act. It should be noted, however, that for section 14(3) to apply, the terms relating to the desired outcome must be express. Moreover, patients, partly where the contract is oral, may face evidentrary difficulties. The courts often have seen what might have been a

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210 Mahoney, Informed Consent and Breach of the Medical Contract to achieve a Particular Result, (1985-88) 6 Otago Law Review, 103(129); Collins, Medical Law in New Zealand, Wellington (1992), p.178: As a source for this argument Collins refers to Green v Matheson ([1989] 3 NZLR, 564). In the author's view no conclusion for the handling of claims for breach of contract can be drawn from this decision.

211 Smith/Keenan, English Law, 9th ed. London (1989), p.307.

guarantee of a particular result as a merely therapeutic reassurance.[212])

Nevertheless, in addition to the exception of section 14(3) ARCI, actions for exemplary damages at common law may still be brought.[213]) Actions for exemplary damages are, however, reserved for cases in which the court believes the perpetrator's outrageous conduct should be punished. Exemplary damages therefore do not aim to compensate a victim and do not arise directly or indirectly from the injury which the victim suffers.[214]) However, exemplary damages can help to keep the medical profession in line.

VI . Résumé

From 1974 until 1992 the evolution of what does and what does not constitute medical misadventure outlines policy orientated legal development which was based on the idea of community responsiblity set out in the Woodhouse Report. The outcome of this development has been rather successful and the definition of medical misadventure under the ACA 1982 has been one with which one could have worked and which possessed a certain amount of legal clarity and contributed to legal security.[215]) This definition had overcome the common law concepts of standard of care and foreseeability.

In the definition of medical misadventure in the ARCI however a relapse back to the common law concept of negligence is apparent. The requirements to get cover for accidents where negligence is not involved are so stringent that not many patients will get cover under the Act for non-negligent acts (including acts of omission). One of the most disturbing factors about the new Act is the exclusion of mis-diagnosis and failure to treat when they occur non-negligently because now a significant number of all medical "mistakes" are not covered.[216]) On the other hand there are

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212 Mahoney, Informed Consent and Breach of the Medical Contract to achieve a Particular Result, (1985-88) Otago Law Review, 103(127).

213 Donselaar v Donselaar [1982] 1 NZLR, 97; Auckland City Council v Blundell [1986] 1 NZLR, 732(739) (CA).

214 Donselaar v Donselaar [1982] 1 NZLR, 97; Green v Matheson [1989] 3 NZLR, 564(571) (CA).

215 See p.20.

216 See p.27,28.

normally no common law remedies available when there is no negligence and an action for exemplary damages will most likely be not possible by non-negligent acts. A claim for a breach of contract is only available under section 14(3).[217]

The new definition of personal injury, however, which restricts it to physical injuries, will not have a great impact of the cover for medical misadventure if one interprets physical injury in the way this paper proposes.[218] Nevertheless, this definition opens the way to common law claims where negligence is involved for cases where the patient suffers only mental injury, or gets pregnant after a failed sterilisation operation, or is a secondary victim.[219]

The aim of the legislator, to create a comprehensive definition of medical misadventure failed because of rather confusing "clarification" provisions and the inconsistency with especially the definition of personal injury. It would have been preferable if the legislator would have formed a comprehensive definition rather than trying to categorize individual and unique cases, especially, since the new definition shows rather weak terms which can be interpreted in different ways. To avoid major damage, an adverse consequence should be assumed to be rare if there is no data available or two different medical opions about the likelihood exist.[220] Furthermore the requirement of a significant disability in section 5(4)(b) should be interpreted broadly[221] and the ACC should undertake a modification of the AMA Guides as quickly as possible.[222]

The Government did not keep its promises. The new scheme is not fairer it imposes more stringent requirements on the victim of medical misadventure to get cover under ARCI than on other accident victims.[223] Furthermore a significant number of cases which would have been eligible for compensation under the old Act are not eligible under the new Act. The new Act does not adhere to the principle of community responsiblity set out in the Woodhouse Report anymore. There is no obvious reason for the restriction. The limitation of cover in the case of medical misadventure is incomprehensible, particularly in view of background facts such as

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217 See p.45 et seq.
218 See p.22 et seq.
219 See IV.1.a.aa.; IV.1.a.cc.
220 See p.31.
221 See p.34,et seq.
222 See p.35.
223 See p.30.

that between 1990 and 1991 medical misadventure caused a payment of $ 5 million, which means only 0.5% of the whole ACC payment.[224] The medical misadventure provision in the ARCI is basically a rewriting of the law of negligence with little extension.

224 Legislation Advisory Committee, Submissions on ARCI Bill to the Labour Select Committee, Wellington (1992), p.3.

Appendix

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of the period, or with the person's sooner complete recovery from incapacity due to the accident, or with his death:

"Person", in relation to any employer, includes a company or other body corporate, whether incorporated in New Zealand or elsewhere, and a public body; and also includes an unincorporated body of persons, a partnership, an association of persons carrying on a joint undertaking, and the Crown, and a Government department:

"Personal injury by accident"—

(a) Includes—

(i) The physical and mental consequences of any such injury or of the accident:

(ii) Medical, surgical, dental, or first aid misadventure:

(iii) Incapacity resulting from an occupational disease or industrial deafness to the extent that cover extends in respect of the disease or industrial deafness under sections 28 and 29 of this Act:

(iv) Actual bodily harm (including pregnancy and mental or nervous shock) arising by any act or omission of any other person which is within the description of any of the offences specified in sections 128, 132, and 201 of the Crimes Act 1961, irrespective of whether or not any person is charged with the offence and notwithstanding that the offender was legally incapable of forming a criminal intent:

(b) Except as provided in the last preceding paragraph, does not include—

(i) Damage to the body or mind caused by a cardio-vascular or cerebro-vascular episode unless the episode is the result of effort, strain, or stress that is abnormal, excessive, or unusual for the person suffering it, and the effort, strain, or stress arises out of and in the course of the employment of that person:

(ii) Damage to the body or mind caused exclusively by disease, infection, or the ageing process:

4. Definition of "personal injury"—(1) For the purpo of this Act, "personal injury" means the death of, or physi injuries to, a person, and any mental injury suffered by t person which is an outcome of those physical injuries to

person, and has the extended meaning assigned to it by section 8 (3) of this Act.

(2) For the purposes of this Act, no cardio-vascular or cerebro-vascular episode shall be regarded as personal injury unless—

(a) It is a result of medical misadventure; or

(b) It is a work injury by virtue of section 6 (1) of this Act.

Cf. 1982, No. 181, s. 2 (1)

5. Definition of "medical misadventure"—(1) For the purposes of this Act,—

"Medical error" means the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances. It is not medical error solely because desired results are not achieved or because subsequent events show that different decisions might have produced better results:

"Medical misadventure" means personal injury resulting from medical error or medical mishap:

"Medical mishap" means an adverse consequence of treatment by a registered health professional, properly given, if—

(a) The likelihood of the adverse consequence of the treatment occurring is rare; and

(b) The adverse consequence of the treatment is severe.

(2) For the purposes of the definition of the term "medical mishap", the likelihood that treatment of the kind that occurred would have the adverse consequence shall be rare only if the probability is that the adverse consequence would not occur in more than 1 percent of cases where that treatment is given.

(3) Where the likelihood that an injury would occur is in the ordinary course rare, but is not rare having regard to the circumstances of the particular person, it shall not be medical mishap if the greater risk to the particular person injured—

(a) Was known to that person; or

(b) In the case of a person who does not have legal capacity, was known to that person's parent, legal guardian, or welfare guardian, as the case may be,—

prior to the treatment.

(4) For the purposes of the definition of the term "medical mishap", the adverse consequences of treatment are severe only if they result in death or—

(a) Hospitalisation as an inpatient for more than 14 days; or

(b) Significant disability lasting for more than 28 days in total; or

(c) The person qualifying for an independence allowance under section 54 of this Act.

(5) Medical misadventure does not include personal injury arising from abnormal reaction of a patient or later complication arising from treatment procedures unless medical misadventure occurred at the time of the procedure.

(6) A failure to obtain informed consent to treatment from the person on whom the treatment is performed or that person's parent, legal guardian, or welfare guardian, as the case may be, is medical misadventure only if the registered health professional acted negligently in failing to obtain informed consent.

(7) Medical misadventure does not include a failure to diagnose correctly the medical condition of any person or a failure to provide treatment unless that failure is negligent.

(8) Medical misadventure does not include any personal injury resulting from the carrying out of any drug trial or clinical trial where the injured person has agreed in writing to participate in the trial.

(9) In making any decision under this section the Corporation shall obtain and have regard to independent advice in accordance with procedures prescribed by regulations made under this Act.

(10) Where the Corporation considers that medical misadventure may be attributable to negligence or an inappropriate action on the part of a registered health professional it shall—

(a) Give the registered health professional a reasonable opportunity to comment on the matter; and

(b) If satisfied that there may have been negligence or inappropriate action—

report the circumstances to the appropriate body with a view to the institution of disciplinary proceedings, and to any other body that may be appropriate.

6. Definition of "work injury"—(1) For the purposes of this Act, "work injury", in relation to any person, means personal injury arising out of and in the course of employment

Relationship with Other Rights

14. Application of Act excludes other rights—(1) No proceedings for damages arising directly or indirectly out of personal injury covered by this Act or personal injury by accident covered by the Accident Compensation Act 1972 or the Accident Compensation Act 1982 that is suffered by any person shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

(2) For the avoidance of doubt, it is hereby declared that nothing in this section shall be affected by—

(a) The failure or refusal of any person to lodge a claim for any treatment, service, rehabilitation, related transport, compensation, grant, or allowance under this Act or those Acts; or

(b) Any purported denial or surrender by any person of any rights under this Act or those Acts; or

(c) The fact that a person who has suffered personal injury covered by this Act or personal injury by accident covered by the Accident Compensation Act 1972 or the Accident Compensation Act 1982 is not entitled to any treatment, service, rehabilitation, related transport, compensation, grant, or allowance under this Act.

(3) Nothing in this section shall apply to any proceedings relating to, or arising from,—

(a) Any damage to property; or

(b) Any express term of any contract or agreement; or

(c) The unjustifiable dismissal of any person or any other personal grievance arising out of a contract of employment; but no compensation for personal injury covered by this Act or personal injury by accident covered by the Accident Compensation Act 1972 or the Accident Compensation Act 1982 shall be awarded in any such proceedings.

(4) Nothing in this section shall prevent the bringing of any proceedings for damages in any Court in New Zealand in respect of the personal injury or personal injury by accident suffered by any person, in New Zealand or elsewhere, if the cause of action is any liability for damages under the law of New Zealand pursuant to any international convention relating to the carriage of passengers.

(5) Where, in any proceedings before a Court, a question arises as to whether or not any person has suffered personal injury covered by this Act, or personal injury by accident covered by the Accident Compensation Act 1972 or the Accident Compensation Act 1982 or has died as a result of personal injury or personal injury by accident so suffered, no determination shall be made by the Court unless the Corporation is a party to the proceedings or is given an opportunity to be heard.

(6) Nothing in this section shall affect any proceedings in respect of personal injury to which this Act applies by virtue of section 11 of this Act.

Cf. 1982, No. 181, ss. 27, 86

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