

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION
OR IDENTIFYING PARTICULARS OF APPELLANT PROHIBITED
BY S 160 (1), (2) AND (3) OF THE
ACCIDENT COMPENSATION ACT 2001. SEE
<https://www.legislation.govt.nz/act/public/2001/0049/latest/DLM101854.html>**

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

[2023] NZACC 131 ACR 98/20

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER S 149 OF THE ACT
BETWEEN	AT Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 14 March 2023

Heard at: Wellington/Te Whanganui-a-Tara

Appearances: M Kletzkin for the appellant (AVL)
 J Sumner with C Wood for the respondent

Judgment: 9 August 2023

**RESERVED JUDGMENT OF JUDGE I C CARTER
[Mental injury/ordinarily resident in New Zealand
- ss 21, 21A Accident Compensation Act 2001]**

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Introduction

[1] This is an appeal from the Corporation’s decision dated 24 October 2019, declining cover for mental injury arising from sexual abuse of the appellant when a child, on the basis that the appellant was living in Australia and not ordinarily resident in New Zealand at the time the sexual abuse took place in Australia (“the Decision”).

[2] The Decision was upheld in a review decision dated 28 April 2020 (“Review Decision”).

Orders prohibiting publication of appellant's identifying particulars

[3] The appeal involves a sensitive claim based in part on sexual abuse of the appellant as a child and its effect on the appellant's mental health. This clearly involves traumatic and deeply personal information relating to the appellant. I am of the opinion that it is necessary and appropriate to make orders prohibiting publication of the appellant's identifying particulars under s 160(1), (2) and (3) of the Accident Compensation Act 2001.

[4] Orders prohibiting publication of the appellant's identifying particulars were initially made by Judge McGuire on 17 November 2021 are now made permanent. Permanent orders are accordingly made prohibiting the publication of the name, address, or occupation or particulars likely to lead to the identification of the appellant.

Agreed issues on appeal

[5] Counsel for the parties agreed on the issues for determination and framed them in this way:

- (a) Whether the appellant's claim for cover falls under s 21 (cover for mental injury caused by specified criminal acts of sexual abuse) or 21A (cover under Accident Rehabilitation and Compensation Insurance Act 1992 ("the 1992 Act") for mental injury caused by specified criminal acts of sexual abuse) of the Accident Compensation Act 2001 ("the 2001 Act").
- (b) If the appellant's claim falls under s 21, whether the appellant can be defined as "ordinarily resident in New Zealand", under s 17 of the Act.
- (c) If the appellant's claim falls under s 21A, whether:
 - [i] the date of first treatment meets the criteria under s 21A(2)(a) and (b) of the Act; and

[ii] whether the appellant can be defined as “ordinarily resident in New Zealand” as per the definition provided in regulation 3 of the Accident Rehabilitation and Compensation Insurance (Ordinary Residence Definition) Regulations 1992 (“the Regulations”), under s 21A(1)(c)(ii) of the Act.

[6] On the view that I take of the law that applies to the appellant’s individual circumstances, the critical issue on appeal is whether the appellant was “ordinarily resident in New Zealand” at the time the specified criminal acts of sexual abuse occurred in Australia.

[7] The date of first treatment in New Zealand for the appellant’s mental injury becomes relevant only if the critical issue is determined in favour of the appellant.

Onus and standard of proof

[8] On an appeal to the District Court the onus is on the appellant to establish his or her case on the balance of probabilities. This applies to all the relevant elements necessary to establish eligibility under sections 21 and 21A of the 2001 Act, including the requirement to be ordinarily resident in New Zealand at a particular time.¹

[9] The appeal is by way of rehearing which means that the District Court is required to undertake its own evaluation of the evidence and merits generally.² Any Reviewer’s decision is considered but the District Court does not defer to the Reviewer’s position if it comes to a different conclusion.³ If the appellant’s case on appeal is that the Reviewer’s decision is wrong, the onus is on the appellant to establish that it is wrong.⁴

¹ *Accident Compensation Corporation v Bartels* [2006] NZAR 680 at [65]; *Atapattu-Weerasinghe v Accident Compensation Corporation* [2017] NZHC 142 at [23]; *BL v Accident Compensation Corporation* [2023] NZACC 106. It was suggested in one case, *Kneebone v Accident Compensation Corporation* [2014] NZACC 20, that under s 17(2) of the 2001 Act the onus is reversed and it is necessary for the Corporation to establish on the balance of probabilities that the intention of the claimant was to remain absent from New Zealand for more than six months. Intention to remain absent from New Zealand for more than six months is not in issue in this appeal and there is no evidence of the appellant’s intention, or of her mother’s intention, at the relevant time. The overwhelming weight of authority recognises that the onus is on the appellant.

² *Wildbore v ACC* [2009] NZCA 34, [2009] 3 NZLR 21 at [29].

³ Above note 2.

⁴ Above note 2 at [30].

Relevant Law

[10] Whether the appellant has cover for mental injury turns on whether the appellant was “ordinarily resident in New Zealand” at certain material times under ss 21 and 21A the 2001 Act.

[11] Cover extends⁵ under s 21 to mental injury suffered after 1 April 2002 by a victim of sexual abuse in circumstances where the mental injury is caused by certain criminal acts specified in Schedule 3 of the 2001 Act.

[12] Cover also extends under s 21A to mental injury suffered by a victim of historic sexual abuse in circumstances where a person suffered sexual abuse before 1 July 1992 caused by certain criminal acts specified in Schedule 1 of the 1992 Act. The first treatment must have been received by the claimant after 1 July 1992 and before 1 July 1999. Claimants who meet the requirements of s 21A are deemed to have had cover under the 1992 Act.

[13] Both ss 21 and 21A require a claimant who suffered mental injury caused by specified criminal acts to be “ordinarily resident in New Zealand” at the time the relevant criminal acts of sexual abuse are performed.

[14] The meaning of “ordinarily resident in New Zealand” for the purposes of the 2001 Act is defined in s 17 of the Act to mean a New Zealand citizen or residence class visa holder *and* his or her spouse, partner, child or other dependant who generally accompanies the New Zealand citizen or residence class visa holder,⁶ *and* who has New Zealand as his or her permanent place of residence.⁷ Such a person can have New Zealand as a permanent place of residence, whether or not he or she has another place of residence outside of New Zealand.⁸ However, if a person has been and remains absent from New Zealand for more than six months, or intends to be absent from New Zealand for more than six months, the Act expressly declares that the person does not have permanent place of residence in New Zealand.⁹

⁵ Accident Compensation Act 2001, s 26(1)(d). All section references are to sections in the 2001 Act unless otherwise stated.

⁶ Section 17(1)(b).

⁷ Section 17(1)(a).

⁸ Section 17(1)(a).

⁹ Section 17(2). The limited exception in s 17 in circumstances where a New Zealand citizen or residence class holder and any generally accompanying child is absent from New Zealand primarily in connection with employment, does not apply in this case.

[15] The meaning of “ordinarily resident in New Zealand” is defined in s 21A in similar, but not identical, terms as s 21. Section 21A(1)(c)(ii), which applies where the relevant sexual abuse occurs outside New Zealand, defines “ordinarily resident in New Zealand” in terms of the meaning of the 1992 Act. Under the interpretation section (s 3) of the 1992 Act, “ordinarily resident in New Zealand” in relation to any person, has the meaning assigned to it in regulations made under the 1992 Act. Regulation 3 of the Accident Rehabilitation and Compensation Insurance (Ordinary Residence Definition) Regulations 1992 sets out the relevant definition, using similar language to s 21.

[16] Both sections deem the mental injury to have been suffered on the date of the first treatment for that mental injury.¹⁰ Section 21A(2)(b) has the additional requirement that the first treatment must have been received on or after 1 July 1992 and before 1 July 1999. Both sections expressly provide that it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date when the mental injury is suffered.¹¹

[17] It is not disputed that most of the requirements of ss 21 and 21A are satisfied by the appellant, including that at the material time the appellant and her mother were New Zealand citizens, the appellant was a child aged under 18 years and that the appellant suffered mental injury caused by qualifying criminal acts of sexual abuse committed in Australia.

[18] The key statutory provisions are:

Accident Compensation Act 2001, ss 21, 21A, 36, 20, 22, 17

21 Cover for mental injury caused by certain criminal acts

- (1) A person has cover for a personal injury that is a mental injury if—
 - (a) he or she suffers the mental injury inside or outside New Zealand on or after 1 April 2002; and
 - (b) the mental injury is caused by an act performed by another person; and

¹⁰ Sections 21(4), 21A(2)(b), 36(1).

¹¹ Section 21(3), 21A(3)(c).

- (c) the act is of a kind described in subsection (2).
- (2) Subsection (1)(c) applies to an act that—
 - (a) is performed on, with, or in relation to the person; and
 - (b) is performed—
 - (i) in New Zealand; or
 - (ii) outside New Zealand on, with, or in relation to a person who is ordinarily resident in New Zealand when the act is performed; and
 - (c) is within the description of an offence listed in Schedule 3.
- (3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.
- (4) Section 36 describes how the date referred to in subsection (3) is determined.
- (5) For the purposes of this section, it is irrelevant that—
 - (a) no person can be, or has been, charged with or convicted of the offence; or
 - (b) the alleged offender is incapable of forming criminal intent.

21A Cover under Accident Rehabilitation and Compensation Insurance Act 1992 for mental injury caused by certain criminal acts

- (1) This section applies to persons who suffered personal injury that is mental or nervous shock suffered as an outcome of any act of any other person, which act—
 - (a) was performed on, with, or in relation to the claimant (but not on, with, or in relation to any other person); and
 - (b) was within the description of any offence listed in Schedule 1 of the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act); and
 - (c) was performed before 1 July 1992 (including before 1 April 1974) and was performed—
 - (i) in New Zealand; or
 - (ii) outside New Zealand, and the claimant was ordinarily resident in New Zealand within the meaning of the 1992 Act when the act was actually performed.

- (2) For the purpose of subsection (1),—
 - (a) the personal injury is deemed to have been suffered on the date of the first treatment that the claimant received for that personal injury as that personal injury; and
 - (b) that first treatment must have been received on or after 1 July 1992 and before 1 July 1999; and
 - (c) the treatment must have been of a kind for which the Corporation was required or permitted to make payments either directly under regulations made under the 1992 Act or under an agreement or contract or arrangement under section 29A of the 1992 Act, irrespective of whether or not it made any payment in the particular case.
- (3) For the purposes of subsection (1), it is irrelevant—
 - (a) that no person can be, or has been, charged with or convicted of the offence; or
 - (b) that the alleged offender is incapable of forming criminal intent; or
 - (c) whether or not the person who suffered the personal injury was ordinarily resident in New Zealand within the meaning of the 1992 Act when the personal injury is deemed to have been suffered.
- (4) Persons to whom this section applies are deemed to have had cover under the 1992 Act for the personal injury described in subsection (1), and the following provisions apply:
 - (a) payments made by or through the Corporation (or a subsidiary of the Corporation) or the Department of Labour to those persons for a personal injury described in subsection (1), whether made before or after the commencement of this section, are deemed to be entitlements paid under the 1992 Act to the extent that the correct amounts were paid:
 - (b) for the purpose of paragraph (a), it does not matter whether or not the payment is a payment made in the belief that section 8(3) of the 1992 Act provided cover:
 - (c) entitlements available as a result of cover deemed by this section are subject to Part 13 of the Accident Insurance Act 1998 and Part 11 of this Act:
 - (d) Part 5 applies to decisions made by or on behalf of the Corporation between 15 July 2003 and the commencement of this section on claims made under section 8(3) of the 1992 Act for which cover is deemed by this section, and Part 5 applies as if those decisions had been made on the date of the commencement of this section.

- (5) However, the following provisions apply to civil proceedings brought before or after the commencement of this section seeking general damages for mental or nervous shock suffered by a person as an outcome of any act described in subsection (1) (the proceedings):
- (a) if the plaintiff received judgment in the proceedings, in his or her favour, before the commencement of this section, the plaintiff does not have cover under this section for the injury or injuries to which the proceedings relate:
 - (b) if the proceedings were filed, but not heard, before the date of introduction of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005, nothing in this section prevents the proceedings from being heard or prevents a court from awarding the plaintiff general damages for the mental or nervous shock:
 - (c) if the plaintiff continues the proceedings, the plaintiff must declare to the court any payments and entitlements received from the Corporation for the personal injury for which damages are sought, and the court must take those payments and entitlements into account in awarding the plaintiff any damages:
 - (d) on the date judgment is given in the proceedings, the plaintiff—
 - (i) does not have cover under this section for the injury or injuries to which the proceedings relate; and
 - (ii) must advise the Corporation of the judgment:
 - (e) if the plaintiff loses cover by virtue of paragraph (a) or paragraph (d), the Corporation may not recover any part of an amount that is deemed by subsection (4)(a) to be an entitlement paid to the plaintiff under the 1992 Act.

36 Date on which person is to be regarded as suffering mental injury

- (1) The date on which a person suffers mental injury in the circumstances described in section 21 or 21B is the date on which the person first receives treatment for that mental injury as that mental injury.
- (2) The date on which a person suffers mental injury because of physical injuries suffered by the person is the date on which the physical injuries are suffered.
- (3) In subsection (1), treatment means treatment of a type that the person is entitled to under this Act or a former Act.
- (4) This section does not apply for the purposes of clause 55 of Schedule 1.

20 Cover for personal injury suffered in New Zealand (except mental injury caused by certain criminal acts or work-related mental injury)

- (1) A person has cover for a personal injury if—
 - (a) he or she suffers the personal injury in New Zealand on or after 1 April 2002; and
 - (b) the personal injury is any of the kinds of injuries described in section 26(1)(a) or (b) or (c) or (e); and
 - (c) the personal injury is described in any of the paragraphs in subsection (2).
- (2) Subsection (1)(c) applies to—
 - (a) personal injury caused by an accident to the person:
 - (b) personal injury that is treatment injury suffered by the person:
 - (c) treatment injury in circumstances described in section 32(7):
 - (d) personal injury that is a consequence of treatment given to the person for another personal injury for which the person has cover:
 - (e) personal injury caused by a work-related gradual process, disease, or infection suffered by the person:
 - (f) personal injury caused by a gradual process, disease, or infection that is treatment injury suffered by the person:
 - (g) personal injury caused by a gradual process, disease, or infection consequential on personal injury suffered by the person for which the person has cover:
 - (h) personal injury caused by a gradual process, disease, or infection consequential on treatment given to the person for personal injury for which the person has cover:
 - (i) personal injury that is a cardiovascular or cerebrovascular episode that is treatment injury suffered by the person:
 - (j) personal injury that is a cardiovascular or cerebrovascular episode that is personal injury suffered by the person to which section 28(3) applies.
- (3) Subsections (1) and (2) are subject to the following qualifications:
 - (a) section 23 denies cover to some persons otherwise potentially within the scope of subsection (1):

- (b) section 24 denies cover to some persons otherwise potentially within the scope of subsections (1) and (2)(e).
- (4) A person who suffers personal injury that is mental injury in circumstances described in section 21 has cover under section 21, but not under this section.

22 Cover for personal injury suffered outside New Zealand (except mental injury caused by certain criminal acts or work-related mental injury)

- (1) A person has cover for a personal injury if—
 - (a) he or she suffers the personal injury outside New Zealand on or after 1 April 2002; and
 - (b) the personal injury is any of the kinds of injuries described in section 26(1)(a) or (b) or (c) or (e); and
 - (c) the person is ordinarily resident in New Zealand when he or she suffers the personal injury; and
 - (d) the personal injury is one for which the person would have cover if he or she had suffered it in New Zealand.
- (2) Subsection (1) applies subject to subsection (3).
- (3) A person has cover for treatment injury if he or she suffers the personal injury on or after 1 July 2005 as a result of treatment given to him or her while outside New Zealand, but only if the circumstances described in subsection (4) exist.
- (4) The circumstances are—
 - (a) the treatment is given by a person who has qualifications that are the same as or equivalent to those of a registered health professional; and
 - (b) the personal injury would be personal injury caused by treatment if the treatment were given by or at the direction of the equivalent of a registered health professional and the person suffered the injury in New Zealand; and
 - (c) the person is ordinarily resident in New Zealand when the treatment is given (whether or not he or she is ordinarily resident in New Zealand on the date on which he or she suffers the personal injury).
- (5) Section 38 describes how the date on which the person suffers the personal injury referred to in subsection (4)(c) is determined.
- (6) A person who suffers personal injury that is mental injury in circumstances described in section 21 has cover under section 21, but not under this section.

- (7) A person who suffers personal injury that is work-related mental injury in circumstances described in section 21B has cover under section 21B, but not under this section.

17 Ordinarily resident in New Zealand

- (1) A person is ordinarily resident in New Zealand if he or she—
 - (a) has New Zealand as his or her permanent place of residence, whether or not he or she also has a place of residence outside New Zealand; and
 - (b) is in one of the following categories:
 - (i) a New Zealand citizen:
 - (ii) a holder of a residence class visa granted under the Immigration Act 2009:
 - (iii) a person who is a spouse or a partner, child, or other dependant of any person referred to in subparagraph (i) or (ii), and who generally accompanies the person referred to in the subparagraph.
- (2) A person does not have a permanent place of residence in New Zealand if he or she has been and remains absent from New Zealand for more than 6 months or intends to be absent from New Zealand for more than 6 months. This subsection overrides subsection (3) but is subject to subsection (4).
- (3) A person has a permanent place of residence in New Zealand if he or she, although absent from New Zealand, has been personally present in New Zealand for a period or periods exceeding in the aggregate 183 days in the 12-month period immediately before last becoming absent from New Zealand. (A person personally present in New Zealand for part of a day is treated as being personally present in New Zealand for the whole of that day.)
- (4) A person must be treated as having New Zealand as the person's permanent place of residence if—
 - (a) the person—
 - (i) intends to resume a place of residence in New Zealand; and
 - (ii) is absent from New Zealand primarily in connection with the person's employment duties (the remuneration for which is treated as income derived in New Zealand for New Zealand income tax purposes) or for up to 6 months following the completion of the person's period of employment outside New Zealand; or

- (b) the person—
 - (i) intends to resume (or assume) a place of residence in New Zealand; and
 - (ii) is the spouse or partner, child, or other dependant of a person described in paragraph (a) and generally accompanies that person; and
 - (iii) is outside New Zealand during the period of employment of the person described in paragraph (a) or for up to 6 months following the completion of it.
- (5) A person is not ordinarily resident in New Zealand if he or she is in New Zealand unlawfully within the meaning of the Immigration Act 2009. Any period during which a person is in New Zealand unlawfully is not counted as time spent in New Zealand for the purposes of subsection (3).

- (6) In this section,—

child, in relation to any person referred to in subsection (1)(b)(i) or (ii) or (4)(a),—

- (a) means a child who, at the date of that child's injury,—
 - (i) was aged under 18, or was aged under 21 and was in full-time study at a place of education; and
 - (ii) either—
 - (A) was that person's natural or adopted child; or
 - (B) would ordinarily have been regarded as that person's child because they were the child of that person's spouse or partner, and that person acted as their parent; and

- (b) does not include another dependant of that person

other dependant, in relation to any person referred to in subsection (1)(b)(i) or (ii) or (4)(a), means a dependant who, at the date of that dependant's injury,—

- (a) was financially dependent on that person because of the dependant's mental or physical condition; and
- (b) was not that person's spouse, partner, or child.

Accident Rehabilitation and Compensation Insurance Act 1992, s 3 definition of "Ordinarily resident in New Zealand"

"Ordinarily resident in New Zealand", in relation to any person, has the meaning assigned to it in regulations made under this Act.

Accident Rehabilitation and Compensation Insurance (Ordinary Residence Definition) Regulations 1992, regulation 3

3. Definition of term "ordinarily resident in New Zealand" -

- (1) For the purposes of the Act, the term "ordinarily resident in New Zealand", in relation to any person, means –
 - (a) Any person who is a New Zealand citizen and whose permanent place of abode is in New Zealand, whether or not that person also has a place of abode outside New Zealand; or
 - (b) Any person –
 - (i) Who holds a residence permit granted under section 35 of the Immigration Act 1987; or
 - (ii) Who holds a returning resident's visa or residence visa issued under the Immigration Act 1987 allowing that person to lawfully return to New Zealand or come to New Zealand for the purposes of residence; or
 - (iii) Who is exempt from any requirement to hold a permit under the Immigration Act 1987 –

and whose permanent place of abode is in New Zealand, whether or not that person has a place of abode outside New Zealand; or
 - (c) Any person who is a spouse, child, or dependant of any person referred to in paragraph (a) or paragraph (b) of this subclause, and who generally accompanies the person referred to in paragraph (a) or paragraph (b) of this subclause.
- (2) Subject to subclause (4) of this regulation, a person who is absent from New Zealand shall be deemed to have a permanent place of abode in New Zealand if that person has been personally present in New Zealand for a period or periods exceeding in the aggregate 183 days in the 12-month period immediately before last becoming absent from New Zealand.
- (3) For the purposes of subclause (2) of these regulations, where a person is personally present in New Zealand for part of a day, that person shall be deemed to be personally present in New Zealand for the whole of that day and not to be personally absent from New Zealand for any part of that day.
- (4) Subject to subclause (5) of this regulation, a person shall be deemed not to have a permanent place of abode in New Zealand if that person has been and remains absent from New Zealand for more than 6 months or intends to be absent from New Zealand for more than 6 months.

- (5) A person shall not cease to have a permanent place of abode in New Zealand by reason of absence from New Zealand primarily in connection with the duties of that person's employment, the remuneration for which is treated as income derived in New Zealand for New Zealand income tax purposes, or for 6 months following the completion of the period of employment outside New Zealand, so long as the person intends to resume a place of abode in New Zealand.
- (6) A person shall not be regarded as being ordinarily resident in New Zealand if that person is in New Zealand unlawfully within the meaning of the Immigration Act 1987; and any period during which any person is in New Zealand unlawfully shall not be counted as time spent in New Zealand for the purposes of subclause (2) of this regulation.

Summary of agreed facts

[19] The appellant was born on 31 December 1981. She is a New Zealand citizen and was issued a New Zealand passport in August 1989. The appellant's mother is a New Zealand citizen.¹²

[20] The appellant was sexually abused by her stepfather between the ages of seven and nine (between 1988 and 1990) whilst living in Australia with her mother. The appellant was absent from New Zealand between December 1987 and 5 September 1989 (approximately 21 months) and again between 19 September 1989 and 5 April 1991 (approximately 18½ months). The appellant was in New Zealand for a total period of two weeks between December 1987 and 5 April 1991.

[21] It is reported that after returning to New Zealand in 1991, she attempted suicide at the age of 13 (during 1995) and made two further attempts at age 19.

[22] On 10 June 1995, the appellant was admitted to hospital following a seizure. On the same date an Accident and Emergency Medical Report noted that the appellant "*went to a school dance last night & stayed with friends. Apparently had 3 fits during the night? Tonic – clonic. Picked up by father and brought into A&E – did not know father at the time – amnesia regarding events last night. Vomited on arrival*".

¹² No evidence was filed by either party to confirm that the appellant's mother is a New Zealand citizen. As no issue was raised by either party about this, and it appears to have been assumed by the Corporation, I infer from the overall circumstances that the appellant's mother was a New Zealand citizen at the material times.

[23] On 27 June 1995, Dr D Lal, Medical Registrar, and Dr R Hayton, Specialist Physician, reported that on 10 June 1995:

“[The appellant] was admitted with a history of 3 seizure-like attacks lasting a few minutes after [the appellant] had a night out partying and having alcohol and Ponstan tablets”....

It was presumed that the seizure-like attack might have been precipitated by alcohol and Ponstan use. The exact dose of Ponstan was not known, but it is known to decrease the threshold for seizures. [The appellant] wasn't started on any regular anti-convulsant medications.”

[24] During July 2003, the appellant attempted an overdose.

[25] On 22 September 2003, the appellant attempted suicide and was subsequently admitted to **[publication prohibited]**.

[26] In a Risk Assessment form dated 23 September 2003, Dr J Van Duin, Community Psychiatric Nurse, reported that the appellant had disclosed a history of sexual abuse. Furthermore, under “*Tick “Critical Point” at which Risk Assessment is occurring*”, Dr Duin selected “*First contact with the Service*” and “*Occurrence of a significant life event*”. On the same date, an in-patient clinical psychology referral reported that the suicide attempt of 23 September 2003 was the appellant’s third. Under “*What Specific Questions Do You Have?*”, the reporting specialist noted “*3. Initial investigations into the effects of early childhood abuse.*”

[27] In an undated medical report relating to the appellant’s admission to hospital in September 2003, Dr Rachel Kan reported that the appellant had overdosed on paracetamol, synflex and alcohol. The appellant had been thinking about ending her life on the day of the suicide attempt and “*her main problems stemmed from being abused as an 8 year old in Australia by her mother’s partner*”.

[28] In an Interim Discharge Summary report dated 14 October 2003, the reporting specialist¹³ reported that the reason the appellant was admitted to **[publication prohibited]** in September 2003 was due to an overdose and that the overdose seemed “*impulsive*” but “*was a reaction to “flashbacks” to sexual abuse*

¹³ It is unclear who authored this report.

aged 8". Furthermore, the appellant had not dealt with this issue, nor had told anyone until recently. The reporting specialist diagnosed Post Traumatic Stress Disorder and Dysthymia.

[29] On 16 July 2019, Dr Susan Banister, GP, lodged a claim for a sexual abuse related injury. The injury was recorded as a "*suicide attempt relating to historical sexual abuse, first disclosed at this attempt*". The date of accident was recorded as 23 September 2003.

[30] On 23 August 2019, Mr Lindsay Baker, Counsellor, lodged an engagement form that recorded:

- (a) The appellant was raped by her stepfather from the ages of 7 and 9 whilst living in Australia, and she returned to live in New Zealand in 1990; and
- (b) The abuse was disclosed in 2003 when the appellant was a patient in **[publication prohibited]** following a suicide attempt.

[31] On 29 August 2019, the respondent approved Early Planning funding for Getting Started sessions for the appellant.

[32] On 11 October 2019, Mr Baker recorded that the appellant:

- (a) Had been raped on numerous occasions by her stepfather between 1988 and 1990;
- (b) Attempted suicide at the age of 13 or 14;
- (c) At the age of 19, whilst a **[publication prohibited]** in **[publication prohibited]**, she started to experience traumatic memories and flashbacks to the sexual abuse. The appellant became depressed and made two suicide attempts;
- (d) Made two overdose attempts in July 2003 and a last attempted suicide in January 2017; and

- (e) Last sought help whilst in **[publication prohibited]** 2003 (following her suicide attempt).

[33] On 24 October 2019, the Corporation made the Decision declining cover. In the Decision Rationale dated 24 October 2019, the Corporation noted its reasons for the Decision as follows:

Although the client disclosed the event(s) and sought treatment when living in New Zealand she was living in Australia and not ordinarily resident at the time of the event(s). ACC can only provide cover for injuries resulting from events that happen in New Zealand or that happen overseas to people who are ordinarily resident in New Zealand at the time of the event(s). The client was not ordinarily resident at the time of the event(s) so therefore is not eligible for an ACC claim.

[34] On the same date, the Corporation approved four final Support to Next Steps sessions for the appellant.

[35] On 13 December 2019, Mr Baker made a Personal Wellbeing Index assessment and World Health Organisation Disability assessment of the appellant.

[36] On 23 December 2019, the advocate for the appellant, Mr Mike Kletzkin, filed an Application for Review of the Decision which recorded that *“it is well known that the date of injury is the day on which the injured person first sought treatment”* and submitted *“the respondent’s assertion regarding the country in which the incident occurred is irrelevant as at the date of injury, when the claim was lodged, the appellant was a full time resident of New Zealand”*.

[37] On 24 December 2019, the respondent wrote to Mr Kletzkin by way of email, requesting the following information:

- (a) How long the appellant was living in Australia;
- (b) Did the appellant ever come back to New Zealand, and if so, could she provide these dates; and

- (c) If she was a child during the abuse, any information regarding whether her caregiver/parents meet the criteria for ordinarily resident in s 17 of the Act.

[38] On 25 February 2020, Mr Kletzkin confirmed that the appellant:

- (a) Went to Australia in mid-December 1987;
- (b) Was issued a New Zealand passport in August 1989 and returned to her father on 5 September 1989 until 19 September 1989; and
- (c) Returned permanently to New Zealand on 5 April 1991 and her parents had a shared custody agreement in place during this period.

[39] The respondent sought comment by Ms Clare Fussell, ACC Technical Specialist.

[40] On 18 March 2020, Ms Fussell reported:

- (a) For cover to be considered the client must be eligible as 'ordinarily resident in New Zealand' at the time of the assault. Section 17(1) of the Act is specific about the criteria to be considered 'ordinarily resident in New Zealand'. Section 21 of the Act applies these criteria to cases of mental injury with a 'deemed date' of injury where the mental condition has a much later date.
- (b) In respect of maintaining a 'permanent address' in New Zealand, s 17(2) of the Act requires that a person has not been absent from New Zealand for more than six months prior to the date of injury. This section explicitly overrides any effect of a client having an ongoing address at which to stay when in New Zealand.
- (c) Section 21 of the Act deals with cover for a mental injury caused by a 'criminal act'. This provides that the mental injury can be covered only if the act is performed in New Zealand, or (if outside New Zealand) is in relation to a person who is considered ordinarily resident in New Zealand at the time of the act. The appellant's status at the time of the physical assault was therefore the critical element, not the 'deemed date of injury' for the mental injury (i.e. the date of disclosure).
- (d) Section 21(3) of the Act is explicit that: "*...it is irrelevant whether or not the person is ordinarily resident on the date on which he or she suffers the mental injury*". The requirement is that the client is ordinarily resident in New Zealand at the date of the physical injury.

[41] Ms Fussell opined that the Decision still stood because the appellant did not meet the ordinarily resident criteria.

[42] On 28 April 2020, the Reviewer, Mr Faizal Abba, concluded that s 21 of the Act was the relevant section, and upheld the Decision on the basis that the appellant was not ordinarily resident in New Zealand at the time the sexual abuse took place (“Review Decision”).

[43] On 14 May 2020, the appellant filed a Notice of Appeal for the Decision (“the Notice of Appeal”).

[44] On 26 January 2021, Mr Kletzkin provided copies of the following documents to the respondent:

- (a) The Decision;
- (b) *R v Accident Rehabilitation & Compensation Insurance Corporation* (ARCIC) HC New Plymouth AP 45-97, 24 April 1997;
- (c) Handwritten Mid Central Health Limited medical notes dated 10 June 1995;
- (d) Birth certificate of the appellant’s father, DT; and
- (e) DT’s passport.

[45] Mr Kletzkin contended that the medical notes dated 10 June 1995 provided evidence of the date of injury as 10 June 1995 on the basis that it related to “*an alcohol and drug overdose*” suicide attempt” by the appellant.

[46] Further, Mr Kletzkin confirmed that the appellant “*had a permanent place of abode in New Zealand, with her father, at the time the event occurred.* [The appellant’s] *parents had joint custody until her return to New Zealand 5 April 1991, around which time her father was granted full custody.*”

[47] On 24 February 2021, counsel advised Mr Kletzkin that the medical records dated 10 June 1995 related to a suspected seizure. There was no description of historical sexual abuse or suicide, or confirmation of an alcohol or drug overdose. Counsel advised that the evidence did not satisfy s 21A(2)(b) of the Act as the records would need to show a description of historical sexual abuse and suicide attempt.

[48] On 20 May 2021, Mr Kletzkin provided [publication prohibited] Psychology notes to counsel, which he contended related to the treatment sought by the appellant after her admission to hospital on 10 June 1995. These included the following records:

- (a) [publication prohibited] Psychology Clinic dated 19 June 1995;
- (b) Consultation notes dated 22 June 1995; and
- (c) Consultation notes dated 28 July 1995.

[49] The medical notes dated 19 June 1995 had been on referral by the appellant's father and noted that the appellant had a "*suicide attempt 10 days ago*" and the appellant had "*A lot of Ponstan (for period pain) & sherry – hospital stomach pump*". The appellant's father reported that he did not think it was a real suicide "*but attention seeking in front of friends*". He further reported that the appellant's mother's new partner was "*violent towards her, not to children*."

[50] The consultation notes dated 22 June 1995 noted that:

- (a) On the night of Ms AT's suicide attempt she had been to a friend's house, where they had been drinking sherry, and she had "decided that it would be a good idea to take an overdose of Ponstan, but cannot recall the details of the evening, or her reasons why."; and
- (b) Indicated the appellant's parents separated in 1985 and her mother subsequently gained custody of the appellant and her sister. The appellant's father gained custody following her mother's return to Australia in 1990.

[51] The consultation notes dated 28 July 2021 related to the appellant's suicide attempt and noted that:

- (a) [The appellant] had taken about 30 Ponstan pills, which were in her handbag. [The appellant] carried Ponstan with her all of the time. [The appellant] still cannot recall what she was thinking.; and
- (b) When the appellant woke up in hospital, she was “disorientated, and “shocked and surprised” to find out what she had done.” The appellant said that “the only other time she had considered suicide was when she was in form 1 ans (sic) was being bullied, however she decided that it was a silly idea.”

[52] The respondent proceeded to consider and investigate whether the appellant qualified for cover under the date of first treatment criteria under the 2001 Act in light of the further information provided by Mr Kletzkin.

[53] On 2 September 2022, Dr Itaj Zeegers, General Adult Psychiatrist, provided his psychiatric assessment report having assessed the appellant via Telehealth on 31 August 2022. Dr Zeegers diagnosed the appellant with:

Post-Traumatic Stress disorder, Moderate-Severe. Depressive disorder, recurrent episodes, without psychotic symptoms, partial remission. Pain disorder associated with both psychological and factors and general medical condition.

[54] Dr Zeegers further opined the sexual abuse suffered by the appellant likely contributed to her suicide attempt in 1995.

Appellant’s Submissions

[55] It was submitted for the appellant that Dr Zeegers’ specialist psychiatric opinion identified the 1995 suicide attempt had a causal nexus to the earlier sexual abuse. The appellant therefore satisfied the requirements of s 21A(1)(a) and (b), for cover to be granted under s 21A. (this is not disputed by the Corporation).

[56] Throughout the entire period of time the appellant was with her mother in Australia, including when the acts of criminal sexual abuse occurred, she had a permanent place of abode in New Zealand with her father. The High Court judgment in *R v Accident Rehabilitation & Compensation Insurance Corporation*¹⁴ was cited in support of the submission that the appellant had a permanent place of abode in New

¹⁴ *R v Accident Rehabilitation & Compensation Insurance Corporation* High Court, New Plymouth, 24 April 1997, AP45/97, Fisher J, at page 8.

Zealand at the time the sexual abuse occurred in Australia. The appellant satisfied the “ordinarily resident in New Zealand” requirement of s 21A(1)(c).

[57] Section 21A applies because the appellant received her first treatment for mental injury related to the sexual abuse, between 1 July 1992 and 1 July 1999.

Respondent’s Submissions

[58] It was submitted for the respondent that the legislative scheme applying to mental injury arising from sexual abuse occurring outside New Zealand provides for cover where the sexual abuse is suffered by a person who is “ordinarily resident in New Zealand” as at the date when the sexual abuse occurs.

[59] The appellant does not have cover under section 21 of the 2001 Act for any mental injury arising from sexual abuse because she was not “ordinarily resident in New Zealand”, within the meaning of section 17, at the time of the sexual abuse.

[60] Whilst the appellant meets the requirements under section 21A(1)(a) and (b), for cover under s 21A of the 1992 Act, the appellant must be “ordinarily resident in New Zealand” within the meaning of the 1992 Act, at the time the sexual abuse occurred. The 1992 Act defines “ordinarily resident in New Zealand” by reference to the meaning assigned to it in regulations made under the 1992 Act.¹⁵

[61] The appellant cannot receive cover for a personal injury that is mental or nervous shock suffered as an outcome of any act of any other person under s 21A as she does not satisfy the requirement under the regulations to be “ordinarily resident in New Zealand” when the sexual abuse occurred.

[62] The date of first treatment for mental injury is irrelevant when determining cover under the Act as the appellant was not “ordinarily resident in New Zealand” at the time of the sexual abuse.

¹⁵ Accident Rehabilitation and Compensation Insurance Act 1992, s 3 (Interpretation), “ordinarily resident in New Zealand”.

[63] The appellant, as a child aged under 18 years, could not be said to have ‘generally accompanied’ a parent outside of New Zealand who was ‘ordinarily resident in New Zealand’ in terms of regulation 3(1)(c) of the Regulations.

Analysis

Ordinarily resident in New Zealand – whether there is a permanent place of residence or abode

[64] Section 21 applies to certain acts which occurred outside New Zealand on or after 1 April 2002 and s 21A applies to certain acts which occurred before 1 July 1992 (including before 1 April 1974).

[65] The critical issue arising from the appellant’s individual circumstances is whether, at the time the acts of sexual abuse occurred, she was “ordinarily resident in New Zealand”. This is a requirement of both s 21 and s 21A. Both sections define “ordinarily resident in New Zealand” using definitions in the 2001 Act and the 1992 Act. While those definitions are not identical, there is no material difference between them for the purposes of this appeal.

[66] The interpretation of “ordinarily resident in New Zealand” by the High Court in *R v Accident Rehabilitation and Compensation Insurance Corporation* was of the 1992 Act definition.¹⁶

[67] While there are minor differences in subparagraph structure and sequencing, overall the language and structure of the two definitions are substantially the same. The 2001 Act definition requires a person to have “a permanent place of *residence* in New Zealand” whereas the 1992 Act uses the word “*abode*”. The change makes no material difference as the two words are interchangeable¹⁷ and denote the same concept.

¹⁶ Accident Rehabilitation and Compensation Insurance (Ordinary Residence Definition) Regulations 1992, regulation 3.

¹⁷ “Place of abode” usually means the place of residence; “in Johnson’s Dictionary ‘abode’ is defined to be ‘habitation, dwelling, place of residence’, and ‘residence’ is defined to be ‘place of abode, dwelling’. A man’s residence, where he lives with his family and sleeps at night is always his place of abode in the full sense of that expression” (per Campbell C.J., *R v Hammond* 17 QB 772) – *Stroud’s Judicial Dictionary of Words and Phrases* 9th edition 2016.

[68] The 2001 Act definition adds definitions of “child” and “dependant” and also adds more detail to the exception for absence from New Zealand in connection with employment. These differences do not raise any issue on the facts of this case.

[69] The definitions of “ordinarily resident in New Zealand” are substantially the same. The 2001 Act definition using the word “residence” followed the 1992 Act’s similarly worded provision using the word “abode”. The High Court in *R* interpreted the 1992 Act provision. Generally, where words in a statute are enacted against the background of an established interpretation of those words, it may indicate that the parliamentary purpose was to use the words in the same sense.¹⁸

[70] That is the case here and the interpretation in *R* of “ordinarily resident in New Zealand” applies equally to the 1992 Act and 2001 Act provisions. In particular, the same characteristics of “abode” described by the High Court in *R* equally apply to “residence”.

[71] On the facts in *R*, it was undisputed that the claimant was aged 2 years when he first accompanied his mother to Australia on a series of 4 visits in 1992/1993 (9 months), 1993 (5 months), 1993/1994 (4 months) and 1994 (2 months). The claimant’s mother was at all material times a New Zealand citizen, with her permanent home in New Zealand. During the first visit, the claimant’s mother developed a relationship with an Australian man. During the third and/or fourth visit, the man sexually abused the claimant. On discovering the abuse, the claimant’s mother brought her son back to New Zealand immediately, where the two had remained ever since. A claim was made for compensation arising from the sexual abuse.

[72] The claim was declined by the Corporation and a review officer on the basis that subparagraph (2) applied. This provided that personal presence in New Zealand for an aggregate of 183 days during a specified 12-month period deemed a person to have a permanent place of abode in New Zealand. That requirement could not be satisfied by the claimant. The High Court held that the deeming provision did not

¹⁸ *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 at [46].

apply where the claimant satisfied the primary test of being a New Zealand citizen whose permanent place of abode is in New Zealand.

[73] The High Court reasoned that:

- (a) The primary test for determining whether a person is “ordinarily resident in New Zealand” is whether the person is a New Zealand citizen or holder of a specified immigration permit or visa and has “a permanent place of abode in New Zealand”.
- (b) This phrase has no statutory definition and the general meaning applies. Under the general meaning, a series of considerations are taken into account to determine whether there is a “permanent place of abode in New Zealand”. These include the location of the person’s home, place of work, intention as to permanent place of abode, location of assets, and proportion of time spent, and intended to spend, in New Zealand.
- (c) The claimant was clearly a New Zealand citizen with a permanent place of abode in New Zealand, either on the basis that:
 - [i] He was at the material time a child, or dependant of his mother, he generally accompanied her, and the question of ordinary residence turned on whether his mother qualified as a “person ordinarily resident in New Zealand”.
 - [ii] The claimant’s independent qualification as a person with a permanent place of abode in New Zealand, since his own residence characteristics were the same as his mother’s, and the same tests applied.
- (d) Subparagraph (2), which that applies to those personally present in New Zealand for more than an aggregate 183 days in the 12-month period before last becoming absent from New Zealand, is a positive deeming provision that could be invoked if a person did not qualify under the primary test.

- (e) A further subparagraph of the definition was a negative deeming provision which disqualified persons from having “a permanent place of abode in New Zealand” if the person had been and remained absent from New Zealand for more than six months or intended to be absent from New Zealand for more than six months. This deeming provision did not apply on the facts because the claimant had not been absent from New Zealand for more than six months when the sexual abuse occurred.
- (f) The requirements of the positive deeming provision did not have to be satisfied if the person satisfied the primary test for determining whether a person is “ordinarily resident in New Zealand”.

“My conclusion is that if a person qualifies on the basis that he or she is a New Zealand citizen and has a permanent place of abode in New Zealand according to the natural and ordinary meaning of those words, and thus qualifies in terms of sub-clause (1) of reg 3, it is not necessary that he or she would also have to qualify on the basis of presence in New Zealand in terms of sub-clause (2). It is common ground that the claim in the present case is not excluded by any of the other sub-clauses in reg 3. It follows that the appellant was “ordinarily resident in New Zealand” for the purposes of the regulations and for the purposes of s 8(3). It being common ground that all other ingredients for a successful claim have been satisfied, the appeal is allowed.”¹⁹

[74] In the present appeal, the appellant was absent from New Zealand when she lived with her mother in Australia between December 1987 and 5 September 1989 (approximately 21 months) and again between 19 September 1989 and 5 April 1991 (approximately 18½ months). During this period totalling 3 years 3½ months, she made one two-week visit to New Zealand and stayed with her father in **[publication prohibited]** from 5-19 September 1989. The appellant was sexually abused by her step-father from the age of seven to nine years, between 1988 and 1990, when she was living in Australia with her mother.

[75] A feature of this appeal is the scarcity of evidence relevant to the issue of residence of the appellant and/or her mother at the time the sexual abuse occurred in Australia. There is no direct evidence from the appellant, her mother or her father

¹⁹ *R v Accident Rehabilitation & Compensation Insurance Corporation* High Court, New Plymouth, 24 April 1997, AP45/97, Fisher J, at page 8.

about what the living arrangements in Australia were, or each of their intentions. The appellant presumably attended school during the period of more than 3 years and 3½ months living in Australia. Her mother may have worked in Australia, although there is no evidence about that. There is no evidence of any formal or informal joint custody or shared parenting agreement, and no documentation has been provided about any of that. Evidence concerning residence is essentially limited to the period of time when the appellant lived with her mother in Australia.

[76] On the very limited evidence available, several characteristics of a permanent place of abode or residence in New Zealand are absent. As noted in *R*, these characteristics include the location of the person's home, place of work, intention as to permanent place of abode, location of assets, and proportion of time spent, and intended to spend, in New Zealand. The word "permanent" logically entails remaining personally present in the place of abode or residence as a home for consistently long periods of time. These periods of time need not necessarily be continuous, given that the legislation recognises that a person may also have another place of residence outside New Zealand.²⁰

[77] But here, the appellant and her mother spent a virtually continuous period of more than 3 years and 3½ months between 1987 and 1991 in Australia. Given that length of time, on any objective view (and absent information suggesting the contrary) the location of their home and permanent place of abode or residence was Australia.

[78] A very small proportion of that time was spent in New Zealand comprising a single two-week visit to the appellant's father in **[publication prohibited]** from 5 to 19 September 1991. The short, single visit to her father during a 3 years and 3½ month period is consistent with the appellant *not* having a permanent place of residence at her father's home in New Zealand. That did not change until 5 April 1991.

²⁰ Section 17(1)(a); Regulation 3(1)(a) Accident Rehabilitation and Compensation Insurance (Ordinary Residence Definition) Regulations 1992.

[79] During the 3 years and 3½ month period, the appellant was a child who, as a matter of common sense, generally accompanied her mother as the parent who travelled outside New Zealand. The appellant’s mother was clearly not ordinarily resident in New Zealand when the appellant accompanied her throughout the 3 years and 3½ months period.

[80] As in *R*, it makes no difference if the analysis is made of the appellant’s status independently as a person with a permanent place of abode/residence in New Zealand, as her own residence characteristics were the same as her mother, and the same tests apply.

[81] The appellant did not “accompany” her father in any relevant way as there is nothing to suggest that her father went outside New Zealand at any relevant time.

[82] Submissions for the appellant simply asserted that the appellant had a permanent place of abode with her father in New Zealand. But the evidence does not establish that.

[83] On the very limited available evidence, I am not satisfied on the balance of probabilities that either the appellant or her mother had a permanent place of abode or residence in New Zealand during the period of more than 3 years and 3½ months between 1987 and 1991 when the appellant and her mother lived in Australia.

Ordinarily resident in New Zealand – whether 6-month absence deems appellant not to have a permanent place of residence or abode in New Zealand

[84] Both s 21 and s 21A contain the same negative deeming provision declaring that a person does not have a permanent place of residence or abode in New Zealand if he or she has been and remains absent from New Zealand for more than six months. The period of absence falls to be assessed as at the date of the sexual abuse.

[85] The sexual abuse here occurred between 1988 and 1990. Victims of sexual abuse typically cannot recall specific dates or all details relating to the sexual abuse suffered. But even if it is assumed that the last act of sexual abuse in Australia occurred on 31 December 1990, the appellant had been absent from New Zealand for more than six months prior to that date. She remained absent from New Zealand as at

that date. In those circumstances, the appellant is deemed by operation of the statute,²¹ to not have a permanent place of residence/abode in New Zealand and is disqualified from being ordinarily resident in New Zealand at the relevant time.

Conclusion – Appellant was not ordinarily resident in New Zealand

[86] The appellant was not ordinarily resident in New Zealand during the 3 years and 3½ months between 1987 and 1991, including at the time the sexual abuse occurred, and neither section 21 nor section 21A apply in her circumstances.

Date of first treatment for mental injury - s 21 or s 21A?

[87] Under s 21(4) and s 36, the date on which a person suffers mental injury under s 21 is the date on which the person first receives treatment for that mental injury as that mental injury.

[88] Under s 21A(2)(a) and (b) the personal injury that is mental injury is deemed to have been suffered on the date of first treatment that a claimant received for that injury as that personal injury. Further, the treatment must have been received between 1 July 1992 and before 1 July 1999. For s 21A to apply, it is necessary to determine whether the appellant received treatment for her personal injury, as that personal injury, between 1 July 1992 and 1 July 1999.

[89] The appellant attempted suicide on 10 June 1995 on the evening of a school ball when she had been drinking alcohol with friends. At about midnight she took an overdose of 30 Ponstan pills and later suffered 3 seizures during the night. She was taken by her father to a hospital emergency department. The hospital notes of June 1995 and counsellor's notes of June and July 1995 indicate that the appellant did not at this time disclose the sexual abuse in Australia and there was no treatment given for mental injury relating to that sexual abuse.

[90] The appellant did not receive treatment between 1 July 1992 and 1 July 1999 for her mental injury relating to the sexual abuse in Australia. As the appellant does not satisfy the requirements of s 21A(2)(b) of the Act, her claim does not fall

²¹ S 21, s 17(2); s 21A, Regulation 3(4) Accident Rehabilitation and Compensation Insurance (Ordinary Residence Definition) Regulations 1992.

under s 21A. Section 21A would not apply to the appellant, even if she had been able to satisfy the “ordinarily resident in New Zealand” requirement.

[91] The appellant made two further suicide attempts in July 2003 and 22 September 2003 and was admitted to a psychiatric ward in [publication prohibited] hospital on 22 September 2003. The appellant’s first recorded disclosure of the sexual abuse in Australia and treatment for the related mental injury was, as recorded in hospital notes, on 23 September 2003. Dr Bannister listed the injury date as 23 September 2003. She specifically noted that this was the first date on which the historical sexual abuse was disclosed.

[92] The medical evidence establishes on the balance of probabilities that the appellant’s first disclosure of sexual abuse and first treatment for her mental injury was on 23 September 2003. Section 21 would apply to the appellant if she had been able to satisfy the “ordinarily resident in New Zealand” requirement.

Other recent authorities

[93] Submissions for the appellant cited several cases in support of the proposition that the accident compensation legislation is not to be interpreted in an ungenerous or niggardly way. That is on the basis that the underlying policy of the legislation is in the nature of a social contract intended to provide comprehensive cover to compensate for personal injury, including mental injury which results from physical injury, replacing the remedies previously available under common law.²² Kos J in the Court of Appeal noted that this principle applies where more than one available interpretation exists but “if the Act is unavoidably niggardly or ungenerous, that is that”²³.

[94] Submissions for the appellant did not articulate how these principles apply to the critical issue in this appeal of whether the appellant was ordinarily resident in New Zealand at the material time.

²² *Harrild v Director of Proceedings* [2003] 3 NZLR 289 at [19], [39], [130]; *J v ACC* [2017] NZCA 441 at [13], [14] and [52] to [54].

²³ *J v ACC* [2017] NZCA 441 at [52].

[95] In this case there is a plain and ordinary meaning of the words in the definitions of “ordinarily resident in New Zealand” of the 2001 Act and the 1992 Act. The definitions are substantially the same and their correct interpretation was confirmed by the High Court in *R*, which Parliament did not seek to modify when passing the 2001 Act. That plain and ordinary meaning is consistent with the section 3 purpose of providing for a fair and sustainable scheme for managing personal injury by requiring a claimant to be ordinarily resident in New Zealand in the circumstances to which sections 21 and 21A apply.

[96] Counsel referred to the recent High Court decisions in *TN v Accident Compensation Corporation*²⁴ and *Accident Compensation Corporation v D*.²⁵ Both cases involved a claim for cover for mental injury arising from physical injury (in *TN* the physical injury arose from sexual abuse) and the effect of section 36(2). Both decisions found against the Corporation and may be seen as a departure from longstanding Corporation practice which had been approved by the courts. Both are subject to appeal to the Court of Appeal. However neither decision involves interpretation of s 21 or s 21A and the corresponding definitions of “ordinarily resident in New Zealand”. They do not assist in the determination of this appeal.

Result

[97] The Decision and the Review Decision are correct in concluding that the appellant has no cover for her mental injury.

[98] The appeal is dismissed.

Costs

[99] Although the appellant has been unsuccessful, I make no order for costs.



I C Carter
District Court Judge

Solicitors/Representatives: Hazelhurst Advocates Limited, Palmerston North
Ford Sumner, Wellington for Respondent

²⁴ *TN v Accident Compensation Corporation* [2022] NZC 1280 (Cooke J).

²⁵ *Accident Compensation Corporation v D* [2013] NZHC 266 (Palmer J).