Chapter 14

LIFE AND ACCIDENT INSURANCE

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14.1 Nature of life and accident policies

14.1.1 Nature of life insurance

(1) Types of policy

Life policies may be of various types, but in general they can be subdivided into four classes:

(1) Endowment policies, whereby the primary liability of the insurer is to pay a fixed sum at the end of a fixed period or on the death of the life assured, whichever first occurs.

1 Additionally, pt 2 of the Life Insurance Amendment Act 1920 provides for “industrial insurance,” namely insurance where premium is paid in periods shorter than three months. These forms of insurance are restricted with respect to their terms and the circumstances under which the policy may be forfeited.

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(2) Whole life policies, where the sum insured is payable on death only, and not on the expiry of any fixed period.

(3) Accidental death policies, which insure death by accident only.

(4) Investment contracts in the form of life policies, whereby the assured pays premiums which are used to purchase investments capable of being realised on the assured’s death or by the policyholder’s voluntary surrender of the policy.

(2) Definition of “life insurance”

There are a number of statutes containing different definitions of “life insurance” for different purposes. A life policy is, as a general rule, not a contract of indemnity. Rather, it is a contract to pay a specified sum or a sum realisable from a fixed level of investment upon the happening of an event which is uncertain in time, for example death or a given date if death has not first occurred. Where an indemnity is payable on the death of a third party, for example under a liability policy in respect of the death of a third party, it is not a case of life insurance at all. Further, not all contracts under which liability is dependent on the happening of a contingency related to human life are contracts of life insurance. Thus a contract whereby two or more people purchase property as joint tenants with the object of the survivor getting the benefit of survivorship would clearly not be a contract of life insurance.

A life policy operates by reference to one or more specified events, and such events must be connected to the life or death of the assured. At one time it was thought that the event had to be adverse to the assured, but it was subsequently established that a contract is nonetheless a life policy even though the event is not adverse to the assured. Thus contracts under which a sum is payable to the assured on death or when they reach a given age, or on the expiry of a fixed period if the assured has survived to the end of that period, are life policies.

The life or death of the assured need not be the event which triggers payment, provided that there is sufficient connection between the assured’s life or death and the availability of benefits. It was held in Fuji Finance Inc v Aetna Life Insurance Co Ltd that a policy taken out for a single premium and whose proceeds were payable on death or early surrender by the assured was one of life insurance within the Life Assurance Act 1774 (GB), and that a broad approach was called for in order to recognise the changing nature of life insurance.

See the Life Insurance Act 1908, the Insurance Law Reform Act 1977 and the Insurance Companies (Ratings and Inspections) Act 1994. See also Johnston v Ocean Accident & Guarantee Corp Ltd [1913] 34 NZLR 356 (SC) and Australasian Temperance & General Mutual Life Assurance Society Ltd v Johnson [1933] NZLR 408 (SC), where it was held that a personal accident policy is not a life policy for legislative purposes. As will be seen below, there is an important distinction between life and non-life policies in the operation of the law of misrepresentation under the Insurance Law Reform Act 1977.

Prudential Insurance Co v Commissioners of Inland Revenue [1904] 2 KB 658. The distinction between indemnity and contingency insurance is described in Jones v AMP Perpetual Trustee Co NZ Ltd [1994] 1 NZLR 690 (HC).

See Lancashire Insurance v Inland Revenue Commissioners [1899] 1 QB 353 at 359 per Bruce J.

Prudential Insurance Co v Commissioners of Inland Revenue [1904] 2 KB 658 at 664 per Channel J.

Joseph v Law Integrity [1912] 2 Ch 581; Gould v Curtis [1913] 3 KB 84.

Fuji Finance Inc v Aetna Life Insurance Co Ltd [1996] 4 All ER 608.

Since 1 April 1986, no longer part of New Zealand law.
In the present case there were two links to the life and death of the assured: the policy came to an end on the assured’s death, and the right to surrender could be exercised only while the assured was alive. These links were sufficient to render the policy closely related to life or death. In so deciding, the English Court of Appeal approved earlier decisions holding that contracts providing benefits on survival to a given date, to a given event (for example retirement) and on the exercise of an option were contracts of life insurance. It accordingly follows that a contract which gives the policyholder equivalent benefits on the assured’s death or on voluntary surrender, while not one on an uncertain event, nevertheless constitutes life insurance as the death of the life insured forms the basis of the policy.

14.1.2 Insurable interest

It was uncertain whether the common law permitted a life policy to be taken out by a person without interest in the life assured, and the answer was probably to be found in the complex case law governing the validity of wagering contracts. The English Parliament stepped in by passing the Life Assurance Act 1774 (GB), which was designed to stamp out wagering policies, and in particular those based on newspaper reports on the health or otherwise of public figures. The 1774 Act subsequently became law in New Zealand. The legislation did not define insurable interest, and that was left to the courts. A mass of judicial decisions established that a person had an unlimited insurable interest in their own life and that of their spouse, but that there was no insurable interest to be derived from family relationships, and that in all cases what was required was proof of some financial interest which would be affected on death. The concept has been greatly relaxed over the years.

The legislation was flawed in a number of respects, but there is no need in the present work to agonise over its weaknesses and inconsistencies. This is because, since 1 April 1986, by virtue of the Insurance Law Reform Act 1985, there is no longer a requirement in New Zealand law for an insurable interest in a life insured. So, for example, while formerly an employee under a fixed-term contract seeking to insure the life of their employer would have had their recovery limited to the value of their outstanding salary under the contract of employment, they may now recover to the full extent of the amount fixed by the policy. The same rules apply to personal accident policies (to the extent they are not for an indemnity) because, similarly by virtue of the Insurance Law Reform Act 1985, the requirement for an insurable interest in all forms of contingency insurance has been abolished.

14.1.3 Accident insurance

Accident insurance, as generally understood, is a branch of insurance closely allied to life insurance, by which persons are enabled to provide against loss to themselves or their families in case they are injured or disabled for a time or permanently, or killed, by some

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10 Joseph v Law Integrity [1912] 2 Ch 581.
11 NM Superannuation Pty Ltd v Young [1993] 41 FCR 182 (FCA).
14 The Life Assurance Act 1774 (GB) remains law in England, only minor reforms to its terms have been proposed: see Law Commission and Scottish Law Commission Insurance Contract Law: Post Contract Duties and Other Issues (Law Com CP No 201, December 2011).
15 Hebdon v West (1863) 3 B & S 579.
cause operating on them from without. In New Zealand the statutory no-fault compensation scheme under the Accident Compensation Act 2001 provides compensation and rehabilitation services without reference to fault, so the incentive for accident insurance has been reduced. But it is nevertheless common, and any claim under the accident compensation scheme will not operate to reduce the insured’s claim under the accident insurance in question.

Accident policies, like marine policies, may be divided into time and voyage policies. Railway and aviation insurance against accident are common instances of the latter type. Most accident policies are, however, for a fixed period. Accident insurance provides benefits in the event of the person assured:

1. sustaining injury as the result of an accident (or of an accident of a specified class); or
2. dying as the result of an accident (or of an accident of a specified class); or
3. becoming incapacitated in consequence of disease (or of disease of a specified class).

Sickness insurance, by contrast, insures against risk of loss to the person insured attributable to sickness or infirmity.

A policy of insurance against accidents, as usually drafted, is not a contract of indemnity. It is a contract to pay a certain fixed sum per week in case of injury, and a certain other fixed sum in case of death. But accident policies need not necessarily be in this form. Thus in *Theobald v Railway Passengers’ Assurance* there were two distinct contracts contained in the policy: (1) to pay £1,000 to the assured’s executors if he was killed by accident, and (2) to compensate him to any amount, not exceeding £1,000, for the expense and pain and loss caused to him by accident. The second, though not the first, of these contracts was a contract of indemnity. So a policy insuring against personal accident to a third person was held to be a contract of indemnity in a case in which the employer of a lecturer insured her performances for £100 each against her absence owing to accident or illness.

14.1.4 Renewal of life and accident policies

Life policies are continuous, so that a renewal does not bring the policy to an end and create a new policy: were that the case, the insurer would have a right to demand full disclosure on renewal, and might refuse to renew at all or other than at a substantially increased premium. In the event that a life policy is prematurely terminated, a situation most likely because the assured has failed to pay premiums, and is then reinstated by the insurer, the

16 “It is, however, important to bear in mind the broad distinction which exists between a life policy and an accident policy. The former is a valuable piece of property which continues to increase in value from year to year; the latter cannot be said to have any present value beyond the amount of the unexhausted premium. One relates to an event which certainly must happen and which is always present to the minds of the parties; the other relates to an event which as to any particular year is not likely to happen, and which in everyday life parties do not regard as impending. In one case the duration of the risk usually coincides with the life of the assured; in the other it expires with the current year. To give away one is to make a highly valuable gift; to give away the other is at most to make a gift of the premium”: *Johnston v Ocean Accident & Guarantee Corp Ltd* (1915) 34 NZLR 356 (SC) at 368–369.

17 See s 394 of the Accident Insurance Act 1998 (which section remains in force by virtue of s 343 of the Accident Compensation Act 2001).

18 *Theobald v Railway Passengers’ Assurance* (1854) 10 Ex 45.

19 *Blascheck v Bussell* (1916) 33 TLR 74.
reinstatement takes effect as a new contract and accordingly a fresh duty of disclosure applies to it.\textsuperscript{20} 

Accident policies, by way of contrast to life policies, are annual and there is no obligation on insurers to renew,\textsuperscript{21} so that each renewal takes effect as a new policy\textsuperscript{22} attracting a fresh duty of disclosure.

14.2 Assignment of life policies

14.2.1 Assignability

Life policies are to be considered something more than contracts. They are choses in action\textsuperscript{23} and are treated as securities for money\textsuperscript{24} payable at an uncertain but future date which is bound to occur. Apart from the operation of an excepted peril, the insurer will be bound to pay the sum insured at some date, and the original contract is therefore to be considered as the purchase of a reversionary sum in consideration of the payment of an annuity.\textsuperscript{25} Even the present “surrender” value of the policy is computable actuarially. Insurance offices will usually accept surrender for such a consideration, and banks will therefore lend money on it to this amount. If a life policy is in the possession of a third party on the death of the assured, the assured’s personal representatives can maintain an action against the third party to recover possession of it.\textsuperscript{26} If the insurance is upon the assured’s own life, the right to the policy moneys will devolve on the assured’s personal representatives upon death, who will be bound to treat it as money owing to the assured and forming part of the estate.\textsuperscript{27}

Life policies are freely assignable whether they are expressed to be payable to the assigns of the assured\textsuperscript{28} or not.\textsuperscript{29} The assignment may take the form of sale, mortgage, settlement, trust\textsuperscript{30} or gift. The free assignability of a life policy thus means that the assignee is able to recover under it following the death of the life assured or the occurrence of the event specified in the policy merely on proof that they are the assignee.\textsuperscript{31}

The right of the assured to deal with the policy as they choose is subject to any condition in the policy to the contrary. Thus a condition forbidding assignment has been held to make a policy non-assignable at law.\textsuperscript{32} A court would be slow, however, to construe such a condition in such a way as to prevent an assignee’s interest from being enforceable in equity.

\textsuperscript{20} Mundi v Lincoln Assurance Ltd [2005] EWHC 2678 (Ch), [2006] Lloyd’s Rep IR 353.
\textsuperscript{21} Simpson v Accidental Death Insurance Co (1857) 2 CB (NS) 257.
\textsuperscript{22} Stockell v Heywood [1897] 1 Ch 459. Contrast Mulchrone v Swiss Life (UK) plc [2005] EWHC 1808 (Comm). [2006] Lloyd’s Rep IR 339, in which an accident policy was held to have been made for an initial 22-month period, rather than for 10 months renewable for 12 months.
\textsuperscript{23} Re Moore (1878) 8 Ch D 519.
\textsuperscript{24} Stokoe v Cowan (1861) 4 LT 675 at 685.
\textsuperscript{25} Fryer v Morland (1876) 3 Ch D 675 at 685; Re Harrison and Ingram, ex parte Whinney [1900] 2 QB 710 at 718.
\textsuperscript{26} Rummens v Hare (1876) 1 Ex D 169.
\textsuperscript{27} Petty v Wilson (1869) LR 4 Ch 574.
\textsuperscript{28} Williams v Thorp (1828) 2 Sim 257.
\textsuperscript{29} Haas v Atlas Insurance [1913] 2 KB 209.
\textsuperscript{30} McCarthy v Public Trustee of the Dominion of New Zealand (1981) 2 ANZ Insurance Cases 60-450 (HC); Lamb v Reynolds (1982) 2 ANZ Insurance Cases 60-492 (HC).
\textsuperscript{31} See NM Rothschild & Sons (CI) Ltd v Equitable Life Assurance Society [2003] Lloyd’s Rep IR 371 (QB), where the insurer wrongly refused to accept assignments as evidence of the assignee’s title and caused loss to the assignee, who was unable to surrender the policies at the most favourable time.

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nor will it affect the interest of a beneficiary under a declaration of trust. In the same way, a restriction on the assured’s ability to assign their “rights, powers or obligations” under a policy cannot preclude them from agreeing with a third party how the recoveries under the policy will be applied.33 Further, the assignment of a claim on a policy after loss is not a breach of a condition against alienation of the property insured.34 A life policy which is not assign able is not in fact the full property of the assured at all, but comprises the type of insurance in which they have only a limited power of appointment of funds standing to their credit.

14.2.2 Assignment under Life Insurance Act 1908

(1) Legal assignment

The Life Insurance Act 1908 specifies the only method by which one can achieve the legal assignment of a life insurance policy. Hence complying with its formalities is the only way that will give the assignee the legal right to sue the insurer in their own name without joining the assured,35 and is the only way that will give the insurer the power to discharge its liability by paying the assignee. The formalities are set out in s 43 and require a signed transfer in the form set out in sch 8 of the 1908 Act,36 along with registration of that transfer with the secretary37 of the company.38 Section 43 makes provision for assignments on trust, assignments by way of surrender to the company liable under the policy, and the assignment of a policy issued by a foreign company without a place of business in New Zealand.

Where the policyholder is not the insured person (for example, the assignee of an own-life policy) and dies in the lifetime of the insured person, the insurer may – without requiring probate or administration – declare that any person entitled to the policy under will or intestacy rules is the holder of the policy. That may be done as long as the premiums actually paid do not exceed the sum of $9,000, or if the sum payable under the policy (exclusive of bonuses) does not exceed $9,000.39

(2) Equitable assignment

But the Life Insurance Act 1908 does not prevent the creation of an equitable assignment. This appears at first sight to be contrary to s 43, which provides that “[e]very assignment of a policy by way of ordinary transfer shall be by transfer” (s 43(1)) and that “[n]o

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assignment shall be of any validity until registered as herein provided” (s 43(3)). Nevertheless, enforcement of equities is covered in s 60 in the following terms:

“Notwithstanding the provisions of this Act as to registration, nothing herein shall operate to prevent any Court of competent jurisdiction from enforcing any equities which may exist as between the parties to any transaction or matter relating to any policy or any interest therein, or in any money payable thereunder.”

Section 60 was explained by the Court of Appeal in Re Watkins (deceased) as “primarily directed towards negativing any implication that might otherwise be drawn that the provisions of s 43(3) prevent the creation of equitable interests which have not been protected by registration”. In Watkins a bank was given an equitable unregistered transfer of a policy to secure an overdraft, and this was held by the Court of Appeal to be enforceable against the policyholder. It was also held in Fox v Harvey that an equitable assignment of a life insurance policy by way of gift which substantially complied with sch 8 of the Act and with s 43 could be registered after the donor’s death, provided the donor had completed the transfer before he died and provided the donee then completed the formalities required of him under the Act. An equitable assignment differs from a legal assignment in that consideration is required, and in that the assignee cannot sue in their own name without joining the assured.

(3) Formalities

The formalities for the assignment of a policy at law as set out in s 43 of the Life Insurance Act 1908 find their equivalent for the registration of a mortgage of a policy in s 44 – which, in turn, requires the mortgage to be in the form or “to the effect” set out in sch 11 of the Act. Section 53 provides that provisions relating to assignment of policies apply mutatis mutandis to assignments of mortgages.

14.2.3 Payment of proceeds

It is common, in the case of insurance on the assured’s own life, for the assured to nominate a beneficiary at the time of taking out a policy. At common law the person nominated, by reason of their status as a stranger to the contract, had no remedy at law against the insurer. Further, such a nomination did not by itself constitute the assured a trustee of the proceeds. The weakness of the nominee’s position has, however, been reversed by the Contracts (Privity) Act 1982, although if that Act is for some reason inapplicable, or if it has been expressly excluded, the property in the policy will pass to the personal representatives of the assured on their death and the nominee has no rights whatsoever unless: (1) the nomination amounts to a declaration of trust; (2) the person taking out the

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40 Re Watkins (deceased) [1938] NZLR 847 (CA) at 866 per Fair J. See also Public Trustee v Bank of New Zealand (1888) 6 NZLR 680 (SC); Public Trustee v Wallis (1911) 30 NZLR 592 (SC); Thomas v Harris [1947] 1 All ER 444.
41 Fox v Harvey [1968] NZLR 394 (SC).
42 There may be a valid gift of an insurance policy to an infant. See Dolfh v New Zealand Government Insurance Commissioner (1900) 19 NZLR 157 (SC) per Stout CJ.
43 Robinson v McWilliam (1905) 24 NZLR 694 (SC).

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policy is merely the agent of the nominee;47 (3) the Property (Relationships) Act 1976 applies to attribute the policy or its proceeds to “relationship property” within a marriage, civil union or de facto relationship; or (4) the nomination creates a binding contract between insurer A and assured B to pay C on an event or contingency, so that B can use the equitable remedy of specific performance against A to obtain an order against A to pay what may be due to C.48

14.3 Insurance of minors

14.3.1 Insurability

Two questions of policy relating to the protection of minors49 were before the Contracts and Commercial Law Reform Committee in 1983 when it considered,50 among other things, life insurance and the requirement for an insurable interest, then provided for in the Life Assurance Act 1774 (GB).51

The first was a concern that minors were more vulnerable than others to being murdered for insurance proceeds on policies on their own lives. While the majority of the Committee concluded – and those conclusions were passed into law by the Insurance Law Reform Act 1985 – that the general fear of destruction of the life insured would not be a significant risk in modern times were the requirement of an insurable interest abolished, the same arguments appear not to have carried sufficient weight where the life insured was a minor. Section 67 of the Life Insurance Act 1908 (as modified by s 3(1)–(3) of the Life Insurance Amendment Act 1921-22) then provided rules limiting recovery (apart from return of premiums with interest up to a maximum of five per cent per annum) to $12 on the death of a child under five to $12 from all insurers and to $20 for a child between five and 10 years of age. This provision was designed to withdraw any such nefarious incentive and was thought by the Committee to remain necessary, following abolition of the requirement to have an insurable interest in life policies, save that the amounts and restriction were out of date.

Section 67B of the Life Insurance Act 1908 (as inserted by s 9 of the Insurance Law Reform Act 1985) now provides:

“67B Limitation on total amount of payments where deceased minor under the age of 10 years

“(1) No company shall knowingly pay, on the death of a minor who is under the age of 10 years, any sum that is more than the total of the following amounts:

46 Johnson v Ball (1851) 5 De G & Sm 85; Pedder v Mosley (1862) 31 Beav 159; Re Keen’s Estate [1937] 1 Ch 236; Re Gordon [1940] 1 Ch 851; Re Foster’s Policy [1966] 1 WLR 222; Re Independent Air Travel Ltd [1961] 1 Lloyd’s Rep 604.

47 Re Scottish Equitable Life Policy 6402 [1902] 1 Ch 282.


49 For the purposes of the Life Insurance Act 1908 and the Minors’ Contracts Act 1969, “minor” is now defined by s 2(1) of the Minors’ Contracts Act 1969 (as amended by the Minors’ Contracts Amendment Act 2005) to mean a person who has not reached the age of 18. For other purposes a minor is a person who has not reached the age of 20: Age of Majority Act 1970, s 4.


51 Now no longer part of New Zealand law: Insurance Law Reform Act 1985, s 8.
Extract from Colinvaux's Law of Insurance in New Zealand

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“(a) the total amount of premiums paid under the policy issued by the company on the life of the minor, together with interest thereon (compounded annually) at the rate prescribed for the purposes of section 87 of the Judicature Act 1908 at the date of the death of the minor; and

“(b) the amount that, when added to any other sum permitted by this paragraph to be paid by any other company or by any friendly society, equals $2,000 or such larger sum as may from time to time be specified by Order in Council for the purposes of this paragraph.

“(2) Nothing in subsection (1) limits section 41A and interests under that section may be paid in addition to the amounts required to be aggregated for the purposes of subsection (1) of this section and irrespective to the limit imposed by that subsection.”

14.3.2 Limitations

Section 67C of the Life Insurance Act 1908 provides:

“67C Limitation on persons to whom payments may be made where deceased minor under the age of 16 years

“No company shall pay, on the death of a minor who is under the age of 16 years, any sum under any policy issued on or after 1 April 1986 to any person other than—

“(a) a person specified in section 67(1) of this Act; or

“(b) an executor or administrator of a person specified in section 67(1); or

“(c) a person to whom payment may be made under section 65(2) of the Administration Act 1969; or

“(d) any person who is entitled to that sum by virtue of an assignment approved under section 66C(1)(b).”

The second policy consideration was that minors who make insurance contracts on their own lives ought to be protected from oppression in the same way as minors are protected when concluding any sort of contract. The Contracts and Commercial Law Reform Committee also noted the uncertainty in the law as to whether a minor under 16 could, in any event, effect an insurance on their own life. It recommended that: (1) a minor under 10 years of age should have no power to insure their life; and (2) the class of persons who may insure the life of a minor under 16 years of age, or collect on a policy on the life of such a minor, be limited by law.52

These recommendations led to the following reforms:

(1) Section 66A of the Life Insurance Act 1908 provides that a minor under the age of 10 years may not effect a policy on their own life unless it is approved by a District Court under s 9 of the Minors’ Contracts Act 1969.

52 Contracts and Commercial Law Reform Committee Aspects of Insurance Law (2) (19 May 1983) at [5.2].

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(2) Section 66B(1) of the Life Insurance Act 1908 provides that a minor over the age of 10 years may “do, execute, suffer, and perform all acts, deeds, matters, and things necessary or proper for the purpose of effecting a policy on the minor’s own life”. However, under s 66B(2) the policy of a minor over 10 years but under 16 years is subject to s 6 of the Minors’ Contracts Act 1969, and the contract of a minor who has attained the age of 16 is subject to s 5(2) of the Minors’ Contracts Act 1969.

(3) Section 66C of the Life Insurance Act 1908 sets out general powers of a minor with respect to the policy once concluded: surrender, discharge, disposal by will and disposal in other ways authorised by the Act. While a minor under 16 may surrender, discharge and dispose subject to the approval of a District Court, a minor over 16 has their interests in these circumstances protected in that these activities are subject to the s 5(2) of the Minors’ Contracts Act 1969.

(4) Section 66D of the Life Insurance Act 1908 sets out certain presumptions with respect to the age of a minor for the purposes of making a life insurance contract and also for the purposes of disposing of the policy.

14.4 Utmost good faith

14.4.1 The common law

At common law it is the duty of the assured to disclose material facts, and not to misstate material facts, when applying for cover under a life or accident policy. In both cases a fact is material if it would affect the underwriting judgment of a prudent insurer, although – as a result of the case law traced in chapter 4 – the insurer may avoid the policy only if there is proof that the insurer would, with full disclosure, have acted differently in writing the risk. The right to avoid has been replaced with a right to cancel under the Contractual Remedies Act 1979.

A particular problem nevertheless arose with misrepresentation. It was possible for an insurer to treat its obligations under a contract of insurance as discharged by a written misrepresentation which was not material to the risk. This was achieved by use of a “basis of the contract” clause, which ousted the general common law duty to avoid material misrepresentations. Owing to widespread use of the “basis” clause, breach of the general duty of utmost good faith by misrepresentation did not play a significant role in many classes of insurance. Where the insurance was initiated by the completion of a proposal form by or on behalf of the insured, it was common for the insured to warrant, by virtue of a “basis of the contract” clause contained in the form, that their answers were true. The effect of this statement was to convert all the assured’s answers on the form into warranties. These warranties could also be created by express provision in policies or in other documents incorporated into policies. The effect of a breach of warranty was to permit the insurer to treat the risk as not having attached, irrespective of the materiality of the assured’s false statement.

14.4.2 The 1977 reforms

(1) Misstatements to be material

The law was altered by the Insurance Law Reform Act 1977. Sections 4–7 of the 1977 Act deem that no policy may be avoided for written misrepresentation unless “substantially
incorrect” and “material” – with slight variations as between life insurance (ss 4, 6 and 7) and other insurance (ss 5 and 6).

With particular reference to life insurance, s 4 of the Insurance Law Reform Act 1977 provides:

“4 Misstatements in contracts of life insurance

“(1) A life policy shall not be avoided[53] by reason only of any statement (other than a statement as to the age of the life insured) made in any proposal or other document on the faith of which the policy was issued, reinstated, or renewed by the company unless the statement—

“(a) was substantially incorrect;[54] and

“(b) was material;[55] and

“(c) was made either—

“(i) fraudulently; or

“(ii) within the period of 3 years immediately preceding the date on which the policy is sought to be avoided or the date of the death of the life insured, whichever is the earlier.

“(2) For the purposes of subparagraph (i) of paragraph (c) of subsection (1), a statement is made fraudulently if the person making it makes it—

“(a) knowing it is incorrect; or

“(b) without belief in its correctness; or

“(c) recklessly, without caring whether it is correct or not.”

Hence a positive misrepresentation in writing will not render a life insurance contract void unless it is material – regardless of the existence of a “basis of the contract” clause or any other warranty to the contrary. However, in the case of life insurance, additional protection is given to the proposer in that, except for misrepresentations as to the age of the life insured, the misrepresentation must also be made either (1) fraudulently or (2) within three years of the death of the life insured or within three years of the date that the policy is sought to be avoided (whichever is earlier).

(2) Misstatements of age

Misrepresentations with respect to age, even if made fraudulently, do not permit the insurer to avoid the insurance contract. Rather s 7 of the Insurance Law Reform Act 1977 provides for proportional adjustments to be made in the sum insured (plus any bonuses) in the case of

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53 The remedy of avoidance for misrepresentation has been affected by the Contractual Remedies Act 1979, which restricts remedies for misrepresentation to cancellation and damages except where an avoidance remedy is expressly provided for in the insurance contract.

54 Section 6(1) of the Insurance Law Reform Act 1977 provides that “a statement is substantially incorrect only if the difference between what is stated and what is actually correct would have been considered material by a prudent insurer”.

55 Section 6(2) of the Insurance Law Reform Act 1977 provides that “a statement is material only if that statement would have influenced the judgment of a prudent insurer in fixing the premium or in determining whether he would have taken or continued the risk upon substantially the same terms”.

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of over-statement of age and, in the case of under-statement of age, similar proportional adjustments or a “credit” for “overpaid” premium. Section 7 provides:

7 Misstatement of age

“(1) A life policy is not avoided by reason only of a misstatement of the age of the life insured.

“(2) Where the true age as shown by the proofs is greater than that on which the policy was based, the company may vary the sum insured by, and the bonuses (if any) allotted to, the policy so that, as varied, they bear the same proportion to the sum insured by, and the bonuses (if any) allotted to, the policy before variation as the amount of the premiums that have become payable under the policy as issued bears to the amount of the premiums that would have become payable if the policy had been based on the true age.

“(3) Where the true age as shown by the proofs is less than that on which the policy was based, the company shall either—

“(a) vary the sum insured by, and the bonuses (if any) allotted to, the policy so that, as varied, they bear the same proportion to the sum insured by, and the bonuses (if any) allotted to, the policy before variation as the amount of the premiums that have become payable under the policy as issued bears to the amount of the premiums that would have become payable if the policy had been based on the true age; or

“(b) reduce, as from the date of issue of the policy, the premium payable to the amount that would have been payable if the policy had been based on the true age and repay to the policy owner the amount of overpayments of premium less any amount that has been paid as the cash value of bonuses in excess of the cash value that would have been paid if the policy had been based on the true age.”

14.4.3 Material facts

(1) Discrimination

In considering the decided cases it is necessary to bear in mind the requirements of the Human Rights Act 1993, which outlaws discrimination on the grounds of certain characteristics including: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion, colour or belief; sex; and sexual orientation and ethnic or national origins (including nationality or citizenship) (s 21).

There is a general prohibition on discrimination in the provision of services (s 44). Such discrimination may take the form of refusing to supply a service or of supplying a service on discriminatory terms, and expressly includes insurance services. However, s 48 provides exceptions in the insurance context with respect to sex, disability and age. Services in these contexts may be offered on different terms and conditions provided that the different treatment:

“(a) is based on—

56 Human Rights Act 1993, s 48(1)(a)–(b).
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“(i) actuarial or statistical data, upon which it is reasonable to rely, relating to life-expectancy, accidents, or sickness; or

“(ii) where no such data is available in respect of persons with a disability, reputable medical or actuarial advice or opinion, upon which it is reasonable to rely, whether or not contained in an underwriting manual; and

“(b) is reasonable having regard to the applicability of the data or advice or opinion, and of any other relevant factors, to the particular circumstances.”

In assessing whether it is reasonable to rely on any data or advice or opinion, and whether different treatment is reasonable, the Commission or the Complaints Division may: (1) require justification for the reliance and for the different treatment; and (2) request the views of an actuary on the justification for the reliance and for the different treatment.

There are no relevant exclusions relating to discrimination on the ground of race, national origins, nationality or citizenship.

(2) **Age**

The proposer’s age is material since it affects their life expectancy, and in the case of an endowment policy it may affect the date on which the policy is to mature. In this regard is permitted subject to s 48 of the Human Rights Act 1993. Misstatements of age are governed by s 7 of the Insurance Law Reform Act 1977 (set out in [14.4.2(2)] above).

(3) **Residence and domicile**

It is not normally fatal for an insured not to disclose their domicile, although such an omission may be so were the occupation of the assured a particularly dangerous one, or had they been for a long period in an unhealthy climate. The term “residence” in a proposal for insurance means the place where the proposer is living or residing at the time of making the proposal, and not where they have been residing before or where they are going to reside afterwards. It is a matter of fact whether the assured’s imprisonment is material and therefore to be disclosed.

(4) **Health**

Life insurance is peculiar in that the assured is often ignorant as to the fact that is most material in assessing the premium, the state of their own health. Though they may have a general idea as to their own physical well-being, they may be unaware of an incipient but deadly disease within their system that a doctor might have diagnosed. A person might not even know, it has been held, that they have gout. And if an assured may be ignorant as to their own health, one who takes out a policy on the life of another is even less in a position to inform the insurer accurately as to the state of that other’s health. The rule is that the insurer may avoid the policy if the assured fraudulently misrepresents their state of health.

57 Human Rights Act 1993, s 48(2).
58 *Keeling v Pearl Assurance Co* (1923) 129 LT 573; *Hemmings v Scipere Life Assic Ltd* (1905) 92 LT 221.
59 *Grogan v Landon & Manchester Industrial Assurance* (1855) 2 TLR 75.
60 *Huguenin v Kayley* (1815) 6 Taunt 186.
61 *Fowkes v Manchester & Landon Life* (1863) 3 B & S 917.
62 As defined in s 4 of the Insurance Law Reform Act 1977.

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or that of the life insured. Similarly, the assured is bound to disclose no more than they actually know, although they are bound to disclose a serious disease of which they are aware. Independently of this development, courts the world over have been slow to construe such answers as stating anything more than the belief of the assured, but unless the questions are so framed as to require the assured to answer as to their own knowledge only, the assured is advised to qualify their answers in this respect. Where the assured warrants their answers to questions to be put to them in the future by the company’s medical examiner to be true, this binds the assured to do no more than tell the truth to the best of their knowledge, and their answers will be construed accordingly. It may be argued that the principal case in New Zealand, National Mutual Life Assoc of Australasia Ltd v Smallfield, was one in which the “basis of the contact” clause was put in sufficiently clear terms to exclude the interpretation that the questions were adequately answered if those answers accorded with the proposer’s opinion and belief. In that case the majority of the Court of Appeal held that answers given were not “correct and true” as demanded by the basis clause. While this case was appealed to the Privy Council and the appeal was successful, the Privy Council did not find it necessary to disturb this aspect of the Court of Appeal’s judgment. However, with the passing of the Insurance Law Reform Act 1977, were the facts of this case to arise again the real issue would be whether the proponent’s answers were fraudulent (albeit incorrect or untrue).

(5) Medical history

Information as to past illnesses and medical attendance including any operations is plainly material, as it may affect life expectancy. However, express questions on this matter are in a different position from questions as to present state of health, since from their nature the insurer can expect the answers to be true in fact, and not mere matters of belief. But even such questions have been construed to have a limited meaning. Thus a question as

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65 Sealed v Scanlon (1843) 6 Ir LR 367 at 401 per Burton J; Fowkes v Manchester & London Life (1863) 3 B & S 917 at 925–926 per Cockburn C.j; Life Assoc of Scotland v Foster (1873) 11 M 351; Thompson v Wexne (1884) LR 9 App Cas 671.
67 Delahaye v British Empire Mutual Life (1897) 13 TLR 245.
68 Joel v Law Union & Crown Insurance Co [1908] 2 KB 863 at 884 per Fletcher Moulton L.J.
69 National Mutual Life Assoc of Australasia Ltd v Smallfield [1922] NZLR 1074 (CA).
71 Watt v Southern Cross Assurance Co Ltd [1927] NZLR 106 (SC). Prior operations are material even if for a condition having no connection with the cause of death.
73 Huclchman v Lawrie (1838) 3 M & W 505; Metropolitan Life Insurance Co v Madden 117 F 2d 446 (5th Cir 1941).

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to how long it was since the assured had been “attended” by a doctor has been construed not to include attendance for mere minor ailments; and the question “What medical men have you consulted?” has been construed not to extend to consultations during early childhood. Similarly, questions as to the medical history of the assured’s relatives will be given a reasonable and limited meaning. A question asking about “stress” is to be construed as confined to some medically diagnosed stress condition extending beyond what may be experienced on an ordinary day-to-day basis.

The principle upon which such decisions rest was clearly enunciated by the Privy Council in Condogianis v Guardian Assurance Co Ltd:

“In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent’s answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity would be a trap against which the insured would be protected by Courts of law.”

Existing disability or illness is plainly material. Not every trivial illness will call for disclosure, even in answer to specific questions about medical history. It has been held that questions as to past illnesses include diseases of the mind, but not minor ailments.

74 In Kumar v Life Assurance Co of India [1974] 1 Lloyd’s Rep 147 the deceased had had a Caesarean operation, after which she consulted a doctor and was prescribed an oral contraceptive. She had taken out a life policy, declaring that she had not consulted a medical practitioner and had not had an operation. Kerr J held, in an action on the policy, that it could be avoided. Quaere, whether a Caesarean is usually thought of as an operation, or seeking a prescription for a contraceptive as “consulting” a medical practitioner.

75 Connecticut Mutual v Moore (1881) LR 6 App Cas 644. See also Mundi v Lincoln Assurance Ltd [2005] EWHC 2678 (Ch), [2006] Lloyd’s Rep IR 353: failure to disclose consulting a doctor in advance of a trip to India and subsequent consultation in respect of digestive infection contracted in India, not material facts. Contrast Lewis v Norwich Union Healthcare Ltd [2010] Lloyd’s Rep IR 198 (County Court), where a visit to the assured’s GP was held to be a material fact.

76 Joel v Law Union & Crown Insurance Co [1908] 2 KB 863.

77 Joel v Law Union & Crown Insurance Co [1908] 2 KB 863 at 891.


79 Condogianis v Guardian Assurance Co Ltd (1921) 29 CLR 341 (PC) at 344–345.


81 Life Ass of Scotland v Foster (1873) 11 M 351; Chattuck v Shaw (1835) 1 Mood & R 498. In Law Charn Yang v AXA China Region Insurance Co (Bermuda) Ltd [2007] 1 HKLRD 770 (HKDC) the assured had complained of an occasional pain in her right breast, and she was advised by a doctor in 1996 to have her breast rechecked. In 1997 the assured submitted a proposal for life insurance, and at a medical examination by the insurer answered “No” to the question “Have you ever had any disorder of the breast, uterus, ovaries, or tubes?” A lump was detected in March 1998, and the insurer rejected her claim for major illness and purported to avoid the policy for misrepresentation. The assured’s answer was held to be misrepresentation. Where the assured has suffered various unexplained symptoms, nice questions as to materiality may arise, the issue being whether the assured ought to have realised from their symptoms that material facts might be involved. See Morrison v Maxpratt (1827) 6 Bing 60; Lindenau v Desborough (1828) 8 B & C 586; Joel v Law Union & Crown Insurance Co [1908] 2 KB 863; Godfrey v Britannic Assurance [1963] 2 Lloyd’s Rep 515; British Equitable Insurance Ltd v Great Western Railway Co (1869) 20 LT 422; Lee v British Law Insurance Co [1972] 2 Lloyd’s Rep 49.

82 Connecticut Mutual v Akens 150 US 468 (1893).

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“Afflictions of the liver” do not include every disorder of that organ, and “afflicted with fits” does not include a fit caused by an accident. But the question “Have you ever had fits?” has a wider significance. “Spitting of blood” means the disorder so called, but one act of spitting blood should be stated to the insurer. A disorder is not one “tending to shorten life” simply from the circumstance that the assured dies from it. Good health means reasonably good health. A question relating to good health can “never mean that a man has not in him the seeds of some disorder. We are all born with the seeds of mortality in us.” But where a man suffering from tuberculosis, of which his mother, brother and sister had died, stated that he was in good health, the policy was held voidable, and more generally the health of the assured’s close relatives is also potentially material. “Paralysis” has been held to mean the shock of paralysis, and not local paralysis resulting in lameness caused by a fall. Near-sightedness has been held not to be a bodily infirmity.

(6) Intemperate habits and other risks
In some of the older cases this was the subject of an express question or warranty. Even in the absence of such a question, it would appear to be material that the proposer is in the habit of drinking more than is good for them, since the harmful effects of excessive consumption of strong drink are well known. Once again, though, the difficulty will lie in determining how much (and how regularly) the proposer may drink before the fact needs to be disclosed to the insurer. Dicta suggest there is no simple test, not least since the ability to withstand alcohol differs so much from one person to another. No satisfactory judicial definition of “intemperance” has been given, but it has been held not to be limited to such intemperance as would impair the general health of the assured. It is essentially a matter of degree as to what constitutes intemperance. In an insurance policy it means habitual, immoderate indulgence in alcohol, or addiction to it, not immoderate consumption.

83 Connecticut Mutual v Moore (1881) LR 6 App Cas 644 at 648.
84 Connecticut Mutual v Union Trust Co 112 US 250 (1884).
85 Chattock v Shawe (1835) 1 Mood & R 498; Shilling v Accidental Death (1858) 1 F & F 116.
86 Aetna Life v France 94 US 561 (1876).
87 Goad v Ingelt (1845) 14 M & W 95.
88 Watson v Mainwaring (1813) 4 Taunt 763.
90 Willis v Poole (1780) 2 Park on Insurance 935 per Lord Mansfield.
91 Davis v Canadian Order of Foresters (1923) 61 CS 492 (QCCS).
92 Deuff v Ganti (1852) 20 LTOS 71; Holmes v Scottish Legal Life Assurance Society (1932) 48 TLR 306.
93 Cruikshank v Northern Accident Assurance Co (1895) 23 R 147.
94 Cotten v Fidelity & Casualty Co 41 F 506 (Miss 1890).
95 Hackman v Fane (1838) 3 M & W 505; Maynard v Rode (1824) 1 Car & P 360; Scandan v Seales (1849) 13 Ir LR 71, but see Essex v Desborough (1829) 5 Bing 503.
96 Palmer v Hanes (1841) Ellis Ins 131. See also Connecticut Mutual Life Insurance Co of Hartford v Moore (1881) LR 6 App Cas 644; British Equitable Ins Co v Muir (1887) 3 TLR 630.
97 Pole v Rogers (1840) 2 Mood & R 287; Craig v Penn (1841) Car & M 43; Thomson v Wemms (1884) LR 9 App Cas 671; Southecliffe v Merriman (1842) Car & M 286; Hutton v Waterloo Life (1859) 1 F & F 735.
99 Thomson v Wemms (1884) LR 9 App Cas 671 at 697–698; Southecliffe v Merriman (1842) Car & M 286 at 287.
100 Southecliffe v Merriman (1842) Car & M 286 at 287 per Coleridge J.
on an isolated occasion.\textsuperscript{102} The exemption of death of or injury to the assured while “under the influence of liquor” sometimes to be found in accident policies raises a similar problem: to fall within it “the balance of a man’s mind” or “the quiet, calm, intelligent exercise of the faculties” must be disturbed.\textsuperscript{103} The taking of drugs on regular occasions is equally capable of being a material fact.\textsuperscript{104} In Canada it has been held that the fact that the assured smokes tobacco is material,\textsuperscript{105} although the modern practice is to ask a specific question on this matter and to load the premium accordingly.

Modern life policies expressly ask whether the assured belongs to a group which is high-risk in respect of AIDS, for example intravenous drug users or homosexuals.

(7) Occupation and hobbies

The proposer’s occupation will affect the hazards to which they are exposed. In the absence of an express question, occupation will not be a material fact unless that occupation has some direct link to the physical hazard.\textsuperscript{106} In practice, life assurance companies operate according to a number of different classes of occupation, and all that is material is to disclose accurately the class into which the proposer falls. Thus in \textit{Biggar v Rock Life Assurance Co}\textsuperscript{107} the assured was described on the proposal form as a tea-traveller. It was held that he should have disclosed that he was also a publican, this being an occupation attracting significantly higher premiums. By contrast, in \textit{Perrins v Marine & General Travellers’ Insurance Society}\textsuperscript{108} an esquire omitted to state that he was also an ironmonger. The court held that the fact omitted was not material, after hearing evidence that the rate of premium was the same for either class of person.

Similarly with hobbies, the proposal form commonly enquires whether the proposer engages in any dangerous leisure activity, such as rock-climbing or hang-gliding. Even without a specific question, it is obvious that such a fact would be material to the assessment of the risk run. In practice, personal insurance will in any event exclude loss resulting from dangerous activities, although whether this removes the duty of disclosure is unclear.

14.5 Coverage of life policies

14.5.1 Scope of policies

The cover afforded by policies of life insurance, unlike that of other policies, is not restricted to loss by accident: they cover also the death of the assured from disease or other natural causes. The exceptions of inherent vice, which might be compared with disease, and of

\begin{footnotesize}
\textsuperscript{101} Scottish Widows Fund \textit{v} Buist (1876) 3 R 1078; \textit{Scottish Equitable \textit{v} Buist} (1877) 4 R 1076 at 1078; \textit{Thomson \textit{v} Weems} (1884) LR 9 App Cas 671.

\textsuperscript{102} \textit{Ridley \textit{v} Bradford Insurance} [1971] RTR 61. Thus for the purpose of an exclusion clause in a private motor car insurance policy, in a case where there was 145 mg of alcohol in 100 ml of blood in a man of moderate drinking habits who died in a road accident, this could not be described as “intemperance”.

\textsuperscript{103} \textit{Mair \textit{v} Railway Passengers’ Assurance} (1877) 37 LT 356 at 358 (Lord Coleridge CJ) and 359 (Denman J), applied in \textit{Louden \textit{v} British Merchants Insurance Co Ltd} [1961] 1 WLR 798 at 801.

\textsuperscript{104} \textit{Yorke \textit{v} Yorkshire Insurance Co} [1918] 1 KB 662.


\textsuperscript{107} \textit{Biggar \textit{v} Rock Life Assurance Co} [1902] 1 KB 516.

\textsuperscript{108} \textit{Perrins \textit{v} Marine & General Travellers’ Insurance Society} (1859) 2 El & El 317.

\end{footnotesize}

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wear and tear, which might be compared with senile decay of the life insured, apply to insurance policies generally, but do not apply in the case of life insurance.

14.5.2 Suicide

(1) Common law principles

In England suicide was a common law felony until s 1 of the Suicide Act 1961 (UK) provided: “The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated.” In New Zealand all common law felonies and misdemeanours were abolished by the Criminal Code Act 1893, so that – with some exceptions not relevant here – no one can now be charged with an offence unless the offence is provided for by statute, and suicide is not referred to. Also, because murder requires killing “by another”,110 suicide is not murder either.110

In Beresford v Royal Assurance111 the policy expressly included sane suicides as one of the insured perils. The House of Lords held that there could be no recovery under the policy where the life assured committed suicide while of sound mind.112 The Beresford decision was based upon (1) the fact that in committing suicide the life assured had committed a crime, so that it was contrary to public policy for his estate to benefit by that crime, and (2) the further consideration that the assured, by his wilful act, had brought about the insured event. The only reported decision in New Zealand on suicide in this context is Smallfield v National Mutual Life Assoc of Australasia Ltd,113 in which it was alleged by the insurer that the life insured had committed suicide, and that his widow could not recover because the policy contained an exception for suicide within 13 months of the date of the policy and the date of death was in fact within that period. In the Supreme Court the jury found the cause of death was not suicide but heart failure. That judgment and the subsequent appeals to the Court of Appeal and the Privy Council turned upon the insurer’s application to amend by introducing the defence of misrepresentation, and nowhere was the argument in Beresford discussed. If it had, the first basis in Beresford could not have applied to the New Zealand situation.

In the United Kingdom the reasoning in Beresford has been undermined by the fact that suicide is no longer a crime. Although there is no reported authority on the point subsequent to the change in law, the general understanding is that a policy which covers the risk of sane suicide by the life assured is fully enforceable, a wilful act being expressly within the scope of the cover. However, as the implied term that the assured is not entitled to recover where the loss is caused by their wilful misconduct is still applicable to life policies, where an own-life policy is silent on recoverability following suicide, sane suicide by the assured precludes recovery by their personal representatives.
By contrast, insane suicide is, absent an express exclusion, an insured risk as there is no wilful act involved.114 Suicide is insane if the balance of the assured’s mind was affected so that their actions cannot be regarded as intentional if they died after deliberately performing an act which they believed could not hurt them (such as jumping from a high building).

(2) Express terms

There is nothing to prevent the insurer from expressing the policy to cover even sane suicide by the assured, or from excepting all suicide – sane or insane – from the risk,115 provided it uses apt words to do so. In the former case innocent assignees of the assured will be entitled to recover before the death,116 and so will assignees or others deriving title through the assured after the death. But no one who has committed the crimes set out in ss 179 and 180 of the Crimes Act 1961 can lawfully recover. Any payment made would be subject to forfeiture under the Criminal Proceeds (Recovery) Act 2009, which applies to the proceeds of “significant criminal activity”, defined in terms of penalty (up to five years’ imprisonment) or in terms of the gross amount of the proceeds ($30,000 or more) disregarding any expenses or outgoings.117

Generally no suicide-exception clause is inserted in life policies. If it does appear, it is as a result of investigation revealing that the life assured’s family has a history of suicide, or the life assured himself seems otherwise likely to take his own life. If an investigation is unfavourable to the assured on this point, they are usually given an option: they can either accept the policy with the exception clause, they can pay a higher premium and have the clause excluded. When a suicide-exception clause is inserted, there is a tendency for it to be limited so as to apply only for one or two years from the date of the policy. If the suicide clause does operate and the life assured take their own life whilst insane, the insurer might make an ex gratia return of premiums.

Exceptions for “suicide”, or of death by the assured’s “own hands”, have been construed, in effect, to cover all cases of intentional self-destruction,118 where the assured knew the nature of their act and the natural consequence of what they were doing.119 Thus, like the implied exception of sane suicide, “suicide” so expressed does not cover cases in which the assured did not know what they were doing, for in such cases their act cannot be said to have been intentional, and their representatives will be entitled to recover. But, unlike the implied exception, such words will cover circumstances such as those in Borradaile v Hunter,120 where the assured voluntarily threw himself into the Thames, knowing that he would destroy his life, but without being able at the time to judge between right and wrong. His act was held to amount to death by his own hands, within the meaning of the policy, although it did not amount to the crime of suicide owing to his temporary moral insanity.

114 Horn v Anglo-Australian Life (1861) 30 LJ Ch 511.
115 Horn v Anglo-Australian Life (1861) 30 LJ Ch 511; White v British Empire Mutual Life (1868) LR 7 Eq 394; Ellinger v Mutual Life of New York [1905] KB 31.
118 Borradaile v Hunter (1843) 5 Man & G 639; Clift v Schwabe (1846) 3 CB 437; Dufaur v Professional Life (1858) 25 Beav 599; Rawett, Leakey & Co v Scottish Provident [1927] 1 Ch 55.
119 Borradaile v Hunter (1843) 5 Man & G 639 at 654 per Maule J; Clift v Schwabe (1846) 3 CB 437 at 465 per Patteson J; Stormont v Waterloo Life (1858) 1 F & F 22.
120 Borradaile v Hunter (1843) 5 Man & G 639.
Policies sometimes provide that in cases of suicide during insanity the policy shall not be paid in full, but treated as surrendered, and that its surrender value shall be paid to the deceased’s representatives. By this means substantial justice is done, since the insurer avoids having its risk increased by the acceleration of death by suicide, and the assured’s representatives are not deprived of the benefit of the policy so far as it has already been earned by the payment of premiums.

14.5.3 Death caused by wilful misconduct

A life policy does not cover death caused by the wilful misconduct of the assured themselves, unless the policy otherwise provides. Such misconduct is an implied exception to the risk, as in the case of insurance generally. The misconduct must be the proximate cause of the death, and not merely the occasion of it, to exclude the death from the risk covered by the policy. The latter was found to be the case where the assured was killed in a motor accident while driving while intoxicated and at excessive speeds.

Where the person whose life is insured is murdered by the person who took out the policy, neither the murderer nor anyone claiming through them will be entitled to recover, by reason of an implied term in the policy excepting loss caused by their wilful misconduct from the risk, quite irrespective of any questions of public policy. Public policy will in any event prevent a murderer from obtaining any financial benefit from their crime. This principle has been given statutory force by the Criminal Proceeds (Recovery) Act 2009 (and its predecessors). It follows that a murderer who is the beneficiary of the deceased’s life policy can never recover any sums under the policy. The bar on recovery by the murderer extends also to any assignee of the murderer’s rights under the policy, as the murderer has no entitlement to the proceeds and therefore has nothing to assign. By contrast, if the murderer has assigned the policy itself under the Life Insurance Act 1908, the assignee’s rights are not derived from those of the murderer and a claim may be made by the assignee.

The forfeiture principle does not apply where the misconduct is by a stranger to the original contract of insurance, even where the stranger is the beneficiary under the policy by reason of a trust in their favour. An ordinary policy covers the risk of the assured being murdered by third parties just as it covers the risk of death by accident or disease, and there is no reason in such a case why the innocent assured, or their representatives, should not enforce the policy.

Thus where a policy was taken out on the joint lives of A and B, and was assigned to a building society, the building society was able to recover under the policy where A murdered B. Had the assignment been merely of the right to recover under the policy on the life of the survivor, the building society would have failed to recover.

121 A claim on a policy on the life of a murderer who was hanged was thus held not to be valid: Amicable Insurance v Bolland (1830) 4 Bligh (NS) 194.
123 See Beresford v Royal [1938] AC 586 at 595 per Lord Atkin.
124 Cleaver v Mutual Reserve Fund Life Ass' [1892] 1 QB 147.
125 Davitt v Titcomb [1989] 3 All ER 417.
126 Cleaver v Mutual Reserve Fund Life Ass' [1892] 1 QB 147, but the person guilty of the misconduct will not be able to benefit and the proceeds will be held on resulting trust for the estate of the life assured.
127 Wainewright v Bland (1835) 1 Moo & Rob 481 at 486 per Lord Abinger.
128 Davitt v Titcomb [1989] 3 All ER 417. The building society used the funds to discharge the mortgage debt owing to it. When the mortgaged property was subsequently sold, it was held that the proceeds belonged entirely to B’s estate. This result prevented A from deriving any benefit as the result of his wrongful act.

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14.5.4 Provisions as to age

Life policies may be expressed as providing cover only if the assured is “not over” a specified age. Thus in *Lloyds Bank Ltd v Eagle Star Insurance Ltd* the insurer was to be liable only if the assured was not over the age of 65 years. At the material time he was 65 years and seven months, and it was held that he had exceeded the age limit, so that the insurer was not liable. This principle is not affected by s 4 of the Insurance Law Reform Act 1977, because it is not derived from a misstatement of age on the basis of which the contract was entered into. Nor is it affected by s 11, because it delimits the duration of the risk. In any event, s 11 appears to be directed at indemnity insurance, not contingency insurance.

14.5.5 Territorial limitations and restrictions on occupation

A condition that once commonly appeared in life policies limited the territory in which the assured might reside, allowing them to go outside the specified geographical limits only on payment of an increased premium. Similarly, restrictions may be made in the policy against the assured engaging in military service or other such dangerous occupations unless they pay an increased premium. But there has long been a general tendency on the part of insurers to remove local restrictions and grant “whole-world” policies, so as to avoid the obvious inconveniences of this old system. By questioning the assured as to their occupation and intentions, the insurer is able fairly to estimate the probable risk of the assured travelling to unhealthy localities and can fix the premium accordingly. The answers to such questions amount to no more than an expression of intention and, if they are made in good faith, the policy will continue to be valid even if the assured changes their mind. An insurer who wishes to restrict the assured’s future conduct must obtain an express continuing warranty to this effect, although this may possibly be subject to s 11 of the Insurance Law Reform Act 1977.

As regards hazardous occupations, in *Scragg v United Kingdom Temperance & General Provident Institution* a motor racing driver insured his life under a policy, excluding the recovery of full profits accruing under it if he were killed whilst engaging in “motor racing, motor speed hill climbs, motor trials or rallies”. He died as the result of an accident in a sprint event. Mocatta J held that, while “motor racing” covered sprint events as a matter of ordinary English, it also had a restricted meaning, known to the insurer, which did not cover sprint events. The insurer was liable in full on the policy.

14.5.6 Effect of war on a life policy

A contract of life insurance with an enemy, unlike an insurance of property, is not abrogated by the outbreak of war, at any rate where the policy is expressed as an entire contract for

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129 *Lloyds Bank Ltd v Eagle Star Insurance Ltd* [1951] 1 All ER 914.
130 *Wing v Harvey* (1854) 5 De GM & G 265.
131 *Duckworth v Scottish Widows Fund* (1917) 33 TLR 430.
132 *Grant v Aetna Assurance* (1862) 15 Moo PCC 516.
133 *Scragg v United Kingdom Temperance & General Provident Institution* [1976] 2 Lloyd’s Rep 227.

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life. A contract of life insurance with an enemy made during a war is, by contrast, illegal and void as it amounts to trading with the enemy.

14.6 Coverage of personal accident policies

14.6.1 “Accident”

(1) General definition of “accident”

Personal accident policies always include a requirement that the injury suffered be caused “accidentally” or “by accident” or some similar phrase. Many questions arise concerning the true meaning of this word, and it is difficult to define the word so as to include the innumerable mishaps which occur in the daily course of human life. It is equally difficult to decide whether a mishap comes within the risk taken, or the exceptions made, by the terms of a particular policy: this is in essence a matter of causation. In general terms the courts have been generous to assureds, and have held that the assured may claim when an accidental event gives rise to illness or when illness gives rise to an accidental event, as in both cases the loss is the result of “accident” rather than sickness. Appropriate wording may, however, restrict the causation principle, and may allow the assured to recover only where accident was the sole or independent cause of the loss.

One of the most litigated issues in this area has been the meaning of the word “accident”. The Workmen’s Compensation Acts, which were repealed in the United Kingdom in 1947, conferred upon employees a cause of action in respect of “injury by accident” arising in the course of employment. Such actions were to be determined by arbitration, and were intended to afford a cheap and speedy method of compensating employees for industrial injuries. The term “accident” was considered in a series of cases brought under the Acts, and was defined by the House of Lords in Fenton v J Thorley & Co Ltd as “denoting an unlooked-for mishap or an untoward event which is not expected or designed” and “any unexpected personal injury resulting … from any unlooked-for mishap or occurrence”.

It was thus held in Brintons v Turvey that a workman who was employed to sort wool, and who became infected by anthrax by a bacillus passing from the wool to his eye, had died from an “injury by accident”. However, it has now been decided by the English Court of Appeal in De Souza v Home & Overseas Insurance Co Ltd that little weight should be given to the decisions under the Workmen’s Compensation Acts, for two reasons: (1) decisions under those Acts were intended to further the objectives of the Acts and were thus unreliable in relation to the meaning of words in private contracts; and (2) the legislation covered industrial diseases as well as injuries, whereas accident policies generally exclude diseases, so that authorities which treated exposures to disease as “accidents” ought to be disregarded.

Mustill LJ in De Souza laid down the general definition of “accident” for insurance purposes:

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134 Seligman v Eagle Insurance [1917] Ch 519.
135 Fenton v J Thorley & Co Ltd [1903] AC 443 at 448 (Lord Macnaghten) and 451 (Lord Shand).

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“The word ‘accident’ involves the idea of something fortuitous and unexpected, as opposed to something proceeding from natural causes; and injury caused by accident is to be regarded as the antithesis to bodily infirmity by disease in the ordinary course of events.”

(2) **Requirement of fortuity**

The requirement of fortuity may be satisfied either by the nature of the cause of the injury or by the nature of the result. In *De Souza v Home & Overseas Insurance Co Ltd*[^139] the English Court of Appeal adopted verbatim the analysis in Welford on Accident Insurance on the question of fortuity, and held that there is an injury by accident in four situations:

1. Where the injury is the natural result of a fortuitous and unexpected cause – for instance, where the assured: is run over by a train[^140] or is thrown from a horse while hunting[^141]; or is injured by a fall, whether through slipping on a step[^142] or otherwise;[^143] or drinks poison by mistake[^144]; or is suffocated by the smoke of a house on fire[^145] or by an escape of gas[^146]; or is drowned while bathing[^147]. In this case the element of accident manifests itself in the cause of the injury. To this list may be added: reacting adversely to medical treatment[^148]; or choking on aspirated food while drunk[^149].

2. Where the injury is the fortuitous or unexpected result of a natural – for instance, where a person: lifts a heavy burden in the ordinary course of business and injures their spine[^150]; or stoops down to pick up a marble and breaks a ligament in their knee[^151]; or scratches their leg with a nail while putting on a stocking[^152]; or ruptures

[^139]: *De Souza v Home & Overseas Insurance Co Ltd* [1995] LRLR 453.
[^140]: *Lawrence v Accidental Insurance* (1881) 7 QBD 216; *Cornish v Accident Insurance Co* (1889) 23 QBD 453.
[^141]: *Re Etherington and Lancashire & Yorkshire Accident Insurance* [1909] 1 KB 591.
[^142]: *Theobold v Railway Passengers Assurance Co* (1854) 10 Exch 45.
[^143]: *Fittow v Accidental Death Co* (1864) 17 CB (NS) 122; *Isitt v Railway Passengers Assoc* (1889) 22 QBD 504. If a person walks and stumbles, thus spraining their ankle, the injury is accidental, for while they intend to walk they do not intend to stumble: *Re Scarr and General Accident Assurance Corp Ltd* [1905] 1 KB 387 at 394 per Bray J.
[^144]: *Cole v Accident Insurance Co Ltd* (1889) 61 LT 227, although here the policy excluded death by poison.
[^145]: *Trew v Railway Passengers’ Assurance Co* (1861) 6 H & N 839 at 844 per Cockburn CJ.
[^147]: *Trew v Railway Passengers’ Assurance Co* (1861) 6 H & N 839; *Reynolds v Accidental Assurance* (1870) 22 LT 820.
[^148]: *Groves v AMP Fire & General Insurance Co (NZ) Ltd* [1990] 2 NZLR 408 (CA).
[^149]: *Tracy-Gould v Maritime Life Assurance Co* (1992) 112 NR (2d) 417; 89 DLR (4th) 726 (NNSC). If the drunkenness was self-induced, recovery might be denied on that ground; see the discussion in [14.6.6(1)] below of *Dhak v Insurance Co of North America (UK)* Ltd [1996] 1 WLR 936. In the same way, an assured who drowns having fallen into water while intoxicated is the victim of an accident for the purposes of a personal accident policy (*Ward v Norwich Union Insurance Ltd* [2009] CSOH 27); and an assured who is killed in a motor accident while intoxicated is also the victim of an accident (*Marcel Beller Ltd v Hayden* [1978] QB 694).
[^150]: *Martin v Travellers’ Insurance Co* (1859) 1 F & F 505.
[^151]: *Hunlyn v Crown Accident Insurance Co Ltd* [1893] 1 QB 750. The English Court of Appeal held that the injury was accidental because the assured did not intend to get into such a position that he might wrench his knee. See also *Colonial Mutual Life Assurance Society Ltd v Long* [1931] NZLR 528 (CA) (injury to arm by throwing tennis ball).
[^152]: *Mardorf v Accident Insurance Co Ltd* [1903] 1 KB 584.

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themselves whilst playing golf. In this case the element of accident manifests itself not in the cause but in the result.

(3) Where the injury is the result of the intervention of a third person, the accident being the act of that person.

(4) Where the injury is the result of the assured’s own activities, provided that the injury is not the natural and direct cause of an act deliberately done by the assured, as in such a case the assured must be taken to intend the natural consequences of their activities.

Category (2) may be illustrated by *Hamlyn v Crown Accidental Insurance Co*,153 where the assured bent down to pick up a marble which had been dropped on the floor. In the process he dislocated his cartilage. The English Court of Appeal held that there had been an accident within the meaning of the policy, since the event was unexpected and unforeseen, and it was not such as might be considered the natural consequence of the act of bending down. This decision was followed in *Voisin v Royal Insurance Co of Canada*,154 in which the assured suffered spinal injuries as the result of moving while lying in an unusual position: the injury was accidental as it was unforeseen, unintended and unusual. By contrast, in *Sinclair v Maritime Passengers’ Assurance Co*155 the assured, the master of a vessel, was insured against personal injury or death resulting from any “accident”. He died of sunstroke incurred while commanding the vessel on a river in India. It was held that his personal representatives could not recover on the policy. Cockburn CJ, speaking of the distinction between accidental death and death from natural causes, said:156

“If, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident.”

This decision was followed in *De Souza* itself (above). Here a travel policy was obtained to cover Mr and Mrs De Souza for a holiday in Torremelinos. The policy was applicable “if the insured person shall sustain accidental bodily injury caused solely by outward violent and visible means”. On death, the sum of £15,000 was payable. Mr De Souza died during the course of the holiday, his death being attributed to heatstroke, in that he had dehydrated as a result of excessive exposure to the sun and had suffered cardio-respiratory arrest. The insurer argued that Mr De Souza’s death was not accidental. The English Court of Appeal, relying in particular on *Sinclair*, held that the circumstances of Mr De Souza’s death could not be regarded as accidental. The Court further held that Mr De Souza had not suffered any “injury”, as it was simply the case that he had become ill and had died. It would seem to follow from this that, unless the assured can point to an event which has caused them injury, they cannot recover under an accident policy.

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155 *Sinclair v Maritime Passengers’ Assurance Co* (1861) 3 E & E 478.
156 *Sinclair v Maritime Passengers’ Assurance Co* (1861) 3 E & E 478 at 485.
(3) Accident excludes disease

It follows from the above principles that a disease cannot be classified as an accident. If disease supervenes upon an accident and is the proximate cause of it, a personal accident policy will respond. For example, in Victoria Insurance Co Ltd v Harrison-Wilkie[157] the policy provided cover where the insured “dies solely as the direct result of the physical injuries” and the insured suffered minor abrasions in an accident, but those abrasions allowed the contemporaneous infection of tetanus from which he shortly died. This would have been covered had it not been for a proviso which stated:

“Provided that … No compensation shall be payable … when the death … is due to a disease which is the direct or indirect result of the injuries received in the accident, or which may attack the insured in consequence of his lowered vitality, whether such lowered vitality is due to the accident or not, or for death … due to a disease from which the insured suffered prior to the accident and which has been intensified by the accident.”

This, the Court of Appeal held, prevented recovery under the policy. It is well established that the word “accident” does not include disease and other natural causes, and implies the intervention of some cause which is brought into operation by chance and which can be described as fortuitous. So, by analogy, a severe allergy is not a “personal injury”; rather, it is the result of having a severe allergy and coming into contact with the allergen which is the personal injury.[158]

The matter was put thus by Mustill J in De Souza v Home & Overseas Insurance Co Ltd[159]:

“An injury is not caused by an accident when it is the natural result of a natural cause as, for instance, where a person is exposed in the ordinary course of his business to the heat of a tropical sun and in consequence suffers from heatstroke,[160] or where a person with a weak heart injures it by running to catch a train,[161] or by some other intentional act involving violent physical exertion.[162] In this case the element of accident is broadly speaking absent, since the cause is one which comes into operation in the ordinary course of events, and is calculated, within the ordinary experience of mankind, to produce the result which it has in fact produced. In considering whether an injury is caused by accident, it is necessary to take into consideration the circumstances in which the injury is received.”

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[157] Victoria Insurance Co Ltd v Harrison-Wilkie [1938] NZLR 375 (CA). See also Public Trustee v Provident Life Assurance Co [1933] NZLR s153 (SC), in which the insured caught pneumonia as a result of working in a stream, the uneven bed of which caused water to flow into his gumboots and which provided the accidental element.
[162] Re Scarr and General Accident Assurance Corp Ltd [1905] 1 KB 387. Here there was held to be nothing accidental in the assured (Scarr) pushing and pulling a drunken man from his (Scarr’s) place of work, even though unknown to Scarr his (own) heart was in a weak condition and he died from the exertion.

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Thus there is no accident where the injury results from natural cause without the intervention of any fortuitous event, nor where the injury results from a latent disease. In *Pass v Gerling Australia Insurance Co Pty Ltd*\(^{163}\) it was held that heart failure caused by narrowing of the arteries was not an “accident”. In *Weyerhauser v Evans*\(^{164}\) it was held that an assured who suffered sepsicaemia following the accidental piercing of a pimple had not died as the result of any accident, as the pimple itself was not an accident and there was no evidence that the pimple had been pierced by accident.

(4) **Accident limited to particular activities and purposes**

An accident policy may provide cover for the assured only where the assured is, at the time of the accident, engaged in an activity specified by the policy or for a particular purpose specified by the policy. If the assured’s intention is mixed, the question for the court is to isolate the predominant purpose: if the predominant purpose is insured, the assured may recover;\(^{165}\) although if a predominant purpose cannot be found, then the assured will be unable to recover if any one of the purposes was an excluded peril.\(^{166}\)

In *Theobald v Railway Passengers’ Assurance*\(^{167}\) the cover was limited to railway accidents. Cover may also be restricted to injuries sustained by the assured in the discharge of their duty. This will not be confined to their ordinary everyday duties. Thus a signalman, so insured, was held to be covered when he was injured trying to stop a train, one of the carriages of which was broken.\(^{168}\)

### 14.6.2 Bodily injury

It is usual for a personal accident policy to require an accident to manifest itself as “bodily injury” to the assured. The most obvious form of bodily injury is external trauma causing physical injury, but the phrase is not limited to injury to the exterior of the body: the term “bodily injury”, when used in a personal accident policy, is not limited to lesions, abrasions or broken bones.\(^{169}\) Nor is it essential that there should be an external mark of injury on the assured’s body.\(^{170}\) Thus the introduction of some foreign agent into the assured’s body which causes injury or death remains a bodily injury. On this basis bodily injury has been held to include asphyxia following the ingestion of alcohol,\(^{171}\) food\(^{172}\) or drugs,\(^{173}\) and drowning.\(^{174}\) On the other hand, a disease developed in the body by natural causes is not

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\(^{164}\) *Weyerhauser v Evans* (1932) 43 LJ LR 62.


\(^{166}\) *Passmore v Vulcan Boiler & General Insurance Co Ltd* (1936) 54 LJ LR 92; *Külker v Rendell* [2000] Lloyd’s Rep IR 581 (CA). By contrast, if none of the purposes are actually excluded, but are simply uninsured, then the assured can recover as long as one of the purposes was an insured purpose. This follows from the ordinary rules relating to losses proximately arising from two or more causes.

\(^{167}\) *Theobald v Railway Passengers’ Assurance* (1854) 10 Exch 45 at 57–58.

\(^{168}\) *Pugh v LB & SC Railway* [1896] 2 QR 248. See also *Wilkinson v Drayton* [1897] 2 QB 57.

\(^{169}\) *Trew v Railway Passengers’ Assurance Co* (1861) 6 H & N 839; *Re United London & Scottish Insurance Co Ltd (Brown’s Claim)* [1915] 2 Ch 167.

\(^{170}\) *Fitzton v Accidental Death Insurance* (1864) 17 CB (NS) 122; *Hooper v Accidental Death Insurance* (1860) 5 H & N 546.

\(^{171}\) *Dhak v Insurance Co of North America (UK) Ltd* [1996] 1 WLR 936.

\(^{172}\) *Dhak v Insurance Co of North America (UK) Ltd* [1996] 1 WLR 936 at 944, where Neill LJ gave the example of a peanut becoming lodged in the assured’s windpipe.

“bodily injury” for these purposes, although a disease which is capable of occurring naturally may still be “bodily injury” if it is in fact caused by accident. Exposure to a potentially harmful substance is not of itself injury; there is only injury at some later stage where the assured develops a disease caused by the exposure. More difficulty may be caused by the effects of mental grief or nervous shock, although in recent years the distinction between physical and mental injury has become increasingly blurred. In McLoughlin v O’Brien the House of Lords paved the way for this development, by holding that the witness to an accident or its aftermath may, in certain circumstances, be entitled to proceed against the wrongdoer in tort; and subsequently in Page v Smith the House of Lords ruled that, whether the claim is for physical injury or nervous shock, the test for liability is foreseeability. This principle was applied by the Court of Session in Connelly v New Hampshire Insurance Co, in which it was decided that the term “bodily injury” encompassed both physical and psychological injury, in that case post-traumatic stress disorder suffered by a fireman following his attendance at two harrowing incidents. It is unclear whether this ruling represents English law, in the light of the ruling of the House of Lords in Rothwell v Chemical & Insulating Co Ltd that exposure to a harmful substance does not amount to bodily injury unless and until the organs of the body are affected, and the mere fear of such injury following exposure is not of itself injury.

14.6.3 Violent, external and visible means

(1) General meaning

The usual form of wording of a personal accident policy provides cover in the event of injury caused by “violent, accidental, external and visible means”. Despite the comment of Cozens-Hardy MR in 1915 that “[i]t seems to me seriously open to doubt whether that does not exempt the company upon every occasion which is likely to occur”, the phrase has remained in widespread use. In recent years it has been given a restricted meaning. In De Souza v Home & Overseas Insurance Co Ltd the policy covered the assured where he sustained “accidental bodily injury caused solely and directly by outward violent and visible means”. The assured died of sunstroke. The English Court of Appeal held that the insuring clause had to be read as a whole so that, while the existence of accidental bodily injury was a condition precedent to any claim, the remaining words were purely explanatory and did not impose a further requirement. Thus the words “by violent, external and visible means” add

174 Trew v Railway Passengers’ Assurance Co (1861) 6 H & N 839.
176 See, for example, Mardorf v Accident Insurance Co [1903] 1 KB 584; Fitten v Accidental Death Insurance (1864) 17 CB (NS) 122; Isitt v Railway Passengers’ Assurance Co (1889) 22 QBD 504.
182 Re United London & Scottish Insurance Co Ltd (Brown’s Claim) [1915] 2 Ch 167 at 170.
little, if anything, to an accident policy and were accordingly criticised by the Court in *De Souza*.

(2) **“Violent”**

The notion of violence in the context of personal accident policies is a very wide one. It is not limited to the situation where another person does violence to the assured, and it has been said that the word is used simply as the antithesis of “without any violence at all”.184 “Violent means” include any external, impersonal cause, such as drowning,185 the inhalation of gas186 or the act of throwing a tennis ball.187 Thus “violent” does not necessarily imply actual violence, as where the assured is bitten by a dog.188 The heat of the sun is not, therefore, “violent”.189 As is illustrated by cases such as *Hamlyn v Crown Accidental Insurance Co Ltd*190 and *Re Scarr and General Accident Assurance Corp Ltd*,191 there will be violence for these purposes where the injury arises from any extra or unusual exertion on the part of the assured. The element of violence will obviously be present where the injury is inflicted by a third party or by some natural phenomenon,192 since there could otherwise be no effect upon the body of the assured.

(3) **“External”**

It is the means of causing the injury which must be external, rather than the injury itself. Thus a rupture or other internal injury is quite capable of falling within the ambit of a personal accident policy.193 Given this distinction, it appears that the word “external” in these policies merely serves to reiterate the general principle that the injury must not be attributable to natural causes.194 It will therefore be obvious that a given type of injury may fall within or outside the policy according to the event which caused it, and it is this cause which must always be examined.

(4) **“Visible”**

It is probable that this word adds nothing to the policy coverage, since every external cause must also be visible. It appears to be included merely for purposes of emphasis.195

184 Sinclair v Maritime Passengers’ Assurance Co (1861) 3 E & E 478.
185 Trew v Railway Passengers’ Assurance (1861) 6 H & N 839; Reynolds v Accidental Insurance (1870) 22 LT 820.
186 Re United London & Scottish Insurance Co Ltd (Brown’s Claim) [1915] 2 Ch 167.
187 Colonial Mutual Life Assurance Society Ltd v Long [1931] NZLR 528 (CA).
188 See Mardorf v Accident Insurance [1903] 1 KB 584 at 588 per Wright J.
191 Re Scarr and General Accident Assurance Corp Ltd [1905] 1 KB 387.
192 For example, exposure to light: *Aguilar v London Life Insurance Co* (1990) 65 Man R (2d) 221, 70 DLR (4th) 510 (MBCA). But contrast *De Souza v Home & Overseas Insurance Co Ltd* [1995] LRLR 453, where it was held that the Mediterranean sun could not be described as per se “violent”.
193 As in Colonial Mutual Life Assurance Society Ltd v Long [1931] NZLR 528 (CA) and Aguilar v London Life Insurance Co (1990) 65 Man R (2d) 221, 70 DLR (4th) 510 (MBCA).
194 As in *De Souza v Home & Overseas Insurance Co Ltd* [1995] LRLR 453, where the sun, while doubtless an “outward” event, had not given rise to accidental injury. See also Hamlyn v Crown Accidental Insurance Co Ltd [1983] 1 QB 750 at 754 per Lopes J.
195 Colonial Mutual Life Assurance Society Ltd v Long [1931] NZLR 528 (CA) (injury to arm suffered by throwing a tennis ball was “visible”).

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14.6.4 Pre-existing disability

Accident policies often contain an exclusion of liability where the death of or injury to the life assured is caused by a pre-existing disability. In any event, the policy is likely to be voidable if such disability has not been disclosed in the proposal form, but subject always to s 4 of the Insurance Law Reform Act 1977. In this statutory context the ambit of utmost good faith is, as regards consumer contracts, in practice limited to facts which the assured ought to have known and answers given to the best of the assured’s knowledge and belief, so that misrepresentation or failure to disclose relating to a pre-existing disease which had not given obvious symptoms will not constitute a breach of duty.

Where there is an express exclusion, on its proper construction it may not be absolute and may apply only to any disease or condition in respect of which the assured had received treatment prior to the inception of the policy. This was the terminology used in *Cook v Financial Insurance Co Ltd*, in which the assured collapsed while on a training run in September 1992. He was diagnosed as suffering from a mild infection. In October 1992 the assured completed a proposal form for disability insurance and paid the premium on the same day. The policy excluded “any sickness, disease, condition or injury for which an insured person received advice, treatment or counselling from any registered medical practitioner during the 12 months preceding the commencement date”. The following day the assured was examined by a cardiologist, who diagnosed angina. The House of Lords, by a four-to-one majority, held that the exclusion was inapplicable. The assured had not received advice, treatment or counselling for angina before 15 October 1992, as the disease had not been diagnosed at that point. Lord Lloyd, speaking for the majority, ruled that a disease could not be said to have been treated until it had been diagnosed, and in any event the inhaler and the antibiotic were inappropriate treatments for angina. The House of Lords further held that the policy exclusion did not apply to treatment or advice which related to symptoms which had not been diagnosed. The policy required advice, treatment or counselling for a “condition”, and this was something more than symptoms which might indicate any one of a number of diseases or indeed no disease at all.

An exclusion in respect of pre-existing disabilities may, if appropriate wording is used, be construed as applying to pre-existing disabilities that would normally be expected of a person in the assured’s position. Thus where a policy on a footballer excluded “permanent total disablement attributable either directly or indirectly to arthritic or other degenerative conditions in joints, bones, muscles, tendons or ligaments”, and the assured suffered a training ground injury, it was held that a degenerative condition of the lower spine that affected some 75 per cent of the population in general and was a particular problem for top-class footballers would nevertheless operate to exclude the liability of the insurer if it was a contributory cause of the footballer’s career coming to an end.

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196 As in *Southampton Leisure Holdings plc v Avon Insurance plc* [2004] EWHC 571 (QB), where a policy taken out in respect of a professional footballer confined coverage to accidental bodily injury occurring solely and independently of any other cause. The player was unable to recover from an injury which ended his career, as the injury was found to be partly the result of an earlier injury. See also *Preston v AIA Australia Ltd* [2013] NSWSC 282, (2013) 17 ANZ Insurance Cases 61-970.


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14.6.5 Causation

The issues of causation which may arise in the context of personal accident policies are rather different from those commonly found in insurance law. In personal accident policies there are two issues. First, is the assured’s death or disablement the result of bodily injury? Secondly, is that injury proximately caused by an accident? It is only when both questions can be answered in the affirmative that the assured is entitled to recover on the policy. As appears above, it may also be necessary to consider the circumstances of the accident, since an accident brought about by the wrongful act of the assured may well not be covered.

Many of the problems in this area have arisen under accident policies which contained clauses excluding the insurer’s liability if the injury arose from a pre-existing medical condition, or a “natural disease or weakness”, or some similar phrase. In *Winspear v Accident Insurance Co* the assured suffered an epileptic fit while fording a stream, fell into the water and drowned. The policy contained a clause of the kind under discussion, and the insurer relied upon it as a defence to the claim. However, the court held that the true cause of the death was the drowning, and since this was clearly accidental it followed that the insurer was liable. Similarly, in *Lawrence v Accident Insurance Co Ltd* the assured suffered a fit while standing on a railway platform. He fell on to the track, where he was run over by a train and suffered injuries from which he died. Again the insurer’s defence was rejected, the court holding by analogy with *Winspear* that the true cause of death was being run over by the train rather than the fit.

Of course, it might be said that decisions such as these are authorities only on their own particular facts, but they do illustrate the tendency of the courts in such cases to look only at the immediate cause and to refuse to look any further back in the chain of causation. However, it is instructive to compare with these cases the observations of Cockburn CJ in *Sinclair v Maritime Passengers’ Assurance Co*. There it was assumed that a supervening event could be sufficient to change the true cause of death from natural causes to accident. It is submitted that any apparent contradiction between these two approaches can be reconciled if it is remembered that in *Sinclair* the issue was whether the assured had brought himself within the policy coverage, whereas in the other two cases it was whether the insurers had brought themselves within the terms of exceptions contained in the respective policies. In all three cases the answer to the relevant question was in the negative, but this produced different results according to the form of the question.

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199 This type of clause applies even if the assured was unaware of their earlier illness: *Cook v Financial Insurance Co* [1999] Lloyd’s Rep IR 1 (angina).

200 *Winspear v Accident Insurance Co* (1880) 43 LT 459.

201 *Lawrence v Accident Insurance Co Ltd* (1881) 45 LT 29.

202 *Sinclair v Maritime Passengers’ Assurance Co* (1861) 3 E & F 478 at 485.

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14.6.6 Relevance of assured’s conduct

(1) Scope of “accident”

An injury brought about by the conduct of the assured may still be considered to have been an “accident” within the meaning of a personal accident policy. It is here that the distinction between an accidental result and an accidental means must be most clearly borne in mind. Save in the wholly exceptional case where the assured inflicts injury upon themselves for the purpose of making a claim, the result of the assured’s behaviour will hardly ever be intended; but the means by which the injury is arrived at may well have been deliberate. Thus it is likely that an assured who wilfully exposes themselves to the risk of serious injury will be held not to have been injured “by accident”.

It appears, though, that the notion of wilful exposure may be given a somewhat restricted construction. In *Marcel Beller Ltd v Hayden* the claimant company insured the life of a key employee. He attempted to drive home one night after consuming so much alcohol that, according to the medical evidence, he would have been unable to steer a car with any degree of certainty. He was killed after losing control of the car and crashing through some railings. It was nevertheless held that his death was an “accident” for the purposes of the policy, although it may be observed that the learned judge was still able to find for the insurer, as there was in the policy an exception applying where the death was caused by the assured’s own criminal act.

*Marcel Beller* was considered by Laurenson J in a summary judgment application in *Tangaroa v Bank of New Zealand Ltd* on similar facts. But summary judgment against the insurer was declined because “the circumstances of the drinking and the question of the deceased’s awareness or otherwise of any risk, are matters which have to be determined [on the evidence] in each case.” Laurenson J observed that a court must distinguish between a conscious act of volition – as, for example, was found in *Candler v London & Lancashire Guarantee & Accident Co of Canada*, where the insured, in order to demonstrate to a friend that he had not lost his nerve, balanced himself on the coping of a hotel patio, 13 floors above the street, and fell to his death (not an accident) – with a situation where the deceased is unaware of the danger, much less voluntarily entering into it. In *Tangaroa* the circumstances of the deceased’s intoxication and his behaviour immediately prior to his driving were considered by Laurenson J to need further elucidation. Dicta by Cooke J in *Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co Ltd* were also cited with approval, namely that simply determining whether or not the risk was deliberately run may not always be decisive if the risk was reasonably seen by the insured as not a high one. So, as far as New Zealand law is concerned, the issue may develop with some flexibility.

The dicta in *Marcel Beller* (above) should be regarded with some care in the light of more recent authority. In *De Souza v Home & Overseas Insurance Co Ltd* the English Court of...
Appeal indicated that a deliberate act of the assured which directly causes death or injury as the act’s natural consequence could not be regarded as an accident. In the words of Mustill LJ:\textsuperscript{211}

“A man must be taken to intend the ordinary consequences of his acts, and the fact that he did not foresee the particular consequence or expect the particular injury does not make the injury accidental if, in the circumstances, it was the natural and direct consequence of what he did, without the intervention of any fortuitous cause.”

This principle may, however, call for some very fine distinctions to be made. In Colonial Mutual Life Assurance Society Ltd v Long\textsuperscript{212} the insured injured his shoulder when throwing a tennis ball across a long distance as a kindly act to return it to players. “Ordinary movements of the body may produce ricks and sprains”,\textsuperscript{213} and the evidence was that this sort of movement – attempting to cast a light ball a long distance by a very strenuous movement – frequently causes injury. The Court of Appeal found that the means were not accidental, distinguishing Hamlyn v Crown Accidental Insurance Co Ltd\textsuperscript{214} (stooping to catch a marble and injuring one’s knee) on the basis that there the assured stooped forward “awkwardly” and “overreached” himself in assuming the position he did, whereas there was no evidence in Long that the insured’s injury was anything other than “the natural result of [a] purely voluntary act”.\textsuperscript{215}

The comment in De Souza by Mustill LJ (above) was amplified by the English Court of Appeal in Dhak v Insurance Co of North America (UK) Ltd.\textsuperscript{216} Here the deceased was the assured under a personal accident policy, under which benefits were payable in respect of “bodily injury resulting in death or injury within 12 months of the accident occurring during the period of insurance and caused directly or indirectly by the accident”. The deceased, a hospital ward sister, had suffered a severe back injury as the result of lifting a patient, and found alcohol to be a means of controlling the pain. The deceased died from asphyxiation due to vomiting while under the influence of alcohol. The Court held that four matters had to be considered:

1. Did the assured intend to inflict some bodily injury upon herself?
2. Did the assured take a calculated risk that she might sustain bodily injury if she continued with the course of conduct in question?
3. Was the bodily injury the direct and natural cause of the assured’s actions?
4. Did some fortuitous cause intervene?

The deceased had plainly not intended to inflict the injuries upon herself, but the Court was of the view that she had taken a calculated risk of bodily injury, a conclusion reinforced given her medical knowledge, and also that her drunkenness directly resulted in death. In the absence of some fortuity, the injuries could not be regarded as accidental and the claim had to fail. It might be thought that this decision is unduly harsh, particularly as the Court

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\textsuperscript{211} De Souza v Home & Overseas Insurance Co Ltd (1993) LRLR 453 at 459.
\textsuperscript{212} Colonial Mutual Life Assurance Society Ltd v Long (1931) NZLR 528 (CA).
\textsuperscript{213} Colonial Mutual Life Assurance Society Ltd v Long (1931) NZLR 528 (CA) at 541.
\textsuperscript{214} Hamlyn v Crown Accidental Insurance Co Ltd (1893) 1 QB 750.
\textsuperscript{215} Colonial Mutual Life Assurance Society Ltd v Long (1931) NZLR 528 (CA) at 542.
recognised that other jurisdictions permitted recovery in these circumstances. However, it may be that in many other situations a deliberate course of conduct will lead to an intervening fortuitous event which may of itself be regarded as the accident. In *Morley v United Friendly Insurance plc* 217 a claim was upheld under an accident policy where the assured jumped onto the bumper of a moving car and fell off: the accident appears to have been regarded as the falling off, thereby breaking the chain of causation from the jump itself, even though injury was a natural consequence of the conduct. Indeed, the only question which the English Court of Appeal regarded as being of any difficulty was whether the policy’s exclusion of “wilful exposure to needless risks” precluded recovery, a question answered in the negative.

An exception to this general principle is found where the act is done for the purpose of avoiding some imminent danger, such as jumping from the window of a burning house, 218 or, possibly, where it is done in an effort to rescue another person from imminent danger. 219 Cases of this latter kind are perhaps best explained as resting on a notion of public policy that such behaviour is to be encouraged, 220 or even as an attempt at mitigation. This exception may underlie the otherwise difficult decision of the Court of Session in *Connelly v New Hampshire Insurance Co*. 221 This was a claim brought by a fireman, who had suffered post-traumatic stress disorder following his attendance at two fires where he had witnessed particularly gruelling scenes. The Court of Session, distinguishing *De Souza* and *Dhak* (both above), held that while the assured had deliberately attended the fires it was not his intention to suffer injury, nor was injury the natural and probable consequence of his loss, and accordingly it could be said that his injury was accidental. The Court of Session’s findings on the assured’s intentions and on the limited natural or probable consequences of his attendance at the fire were enough to distinguish the English authorities, although it is noteworthy that counsel for the assured was prepared to ask the Court to refuse to follow those cases; the Court ultimately decided that this drastic step was not necessary to justify the result.

(2) **Wilful exposure to risk**

Accident policies frequently contain express conditions against wilful or voluntary exposure to risk. These words add little to the common law. In *Sangster’s Trustees v General Accident Assurance Corp Co Ltd* the Court of Session ruled that an assured who drowned while bathing alone in a loch on a cold spring evening had not wilfully exposed himself to risk, as what was required was an act by the assured “so grossly imprudent as to infer utter recklessness of his own safety”. 222 Equally, the exception does not apply merely because one travels 223 in a vehicle along the road, 224 or crosses the street. By contrast, in *Cornish v Accident...*
Insurance 225 the assured had crossed a main line and waited for one train to pass, and was re-crossing when a second train killed him. There was no crossing at the place and nothing to obstruct his view. The assured’s death was held to fall within an exception of “exposure of the insured to obvious risk of injury”. The exception will also apply to an assured who takes a short cut along a railway line, 226 or goes too near the edge of a cliff whilst gathering flowers and falls over. 227

(3) Negligence
The assured is not disqualified from recovering on the ground that they have themselves caused the injury where their act is merely negligent rather than a wilful exposure to danger. In fact, one of the commonest causes of accidents is negligence, and an accident policy applies, excepted perils apart, whether the injury is caused by the negligent act of the assured themselves or of a third party. 228 An injury to the assured otherwise falling within an exception to the policy will do so even though it is caused by their negligence or mistake, unless the express words of the exception clearly read otherwise. In Cole v Accident Insurance Co 229 the assured drank poison from a bottle under the impression that it was medicine and died. The policy excepted “poison or intentional self-injury”, and it was held that his representatives could not recover under the policy. Again, where in the policy there was a clause excepting liability where the injury was caused by “anything … inhaled”, and the assured accidentally inhaled coal gas, it was held that the injury was within the exception, which could not be read as being limited to “anything voluntarily inhaled”. 230

(4) Act or omission of a third party
There is no difficulty where the assured suffers injury through the negligence or inadvertence of a third party. In such a case there is, by any possible standard, an “accident” and it is clear that the assured will be able to recover. It is irrelevant to this whether or not the conduct of the third party amounts to a civil wrong or even to criminal negligence. The difficult cases in this area occur where the third party deliberately inflicts the injury on the assured. In these cases there is, from the point of view of the third party, no “accident”, but it is submitted that this is irrelevant as between insurer and assured. So far as the assured is concerned, the chain of events is accidental, and this is sufficient to satisfy the terms of the policy. 231

(5) Influence of intoxicant
Another common exception excludes injuries while the assured is under the influence of alcohol or other intoxicant. It does not matter whether or not the assured’s drunkenness caused the accident: it is enough for the insurer, relying on this exception, to show that the assured was under the influence of liquor when they received the injury, 232 although such cases must always be considered with the possible application of s 11 of the Insurance Law.

225 Cornwall v Accident Insurance (1899) 23 QBD 453.
226 Laurel v Accident Insurance (1875) 39 JP 293.
227 Walker v Railway Passengers’ Assurance (1910) 129 LT 64.
228 Childs v Scottish Accident (1892) 19 R (Ct of Sess) 355 at 363 per Lord M’Laren.
229 Cole v Accident Insurance Co (1889) 61 LT 227. See also Cornwall v Accident Insurance Co (1889) 23 QBD 453.

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Reform Act 1977 in mind. The expression “under the influence of liquor” in accident policies has been held to refer to circumstances where “a man’s conduct is banefully influenced by the liquor he has drunk”, or where he is “under such influence of intoxicating liquor as disturbs the balance of a man’s mind or the intelligent exercise of his faculties”, or where:

“… intoxicating liquor in the form of alcohol in his bloodstream was a material factor which was really exerting its influence so as to create a substantial diminution of the insured’s normal power to comprehend and react normally to his surroundings, to pass a rational judgment on his actions, and to exercise his normal reaction to situations which ought otherwise to be apparent to him and be appreciated by him.”

14.6.7 Disablement

(1) Meaning of “disablement”

Accident policies are commonly expressed to provide cover in the event of the “death or disablement” of the assured. The meaning of the term “disablement” has sometimes given rise to difficulty, although in most cases it will not be necessary to make a once-and-for-all determination of this question, as the insurer can normally insist upon periodic health checks.

Some policies respond only where the assured is unable to carry on any occupation whatsoever or to undertake gainful employment, whereas others are more widely drafted and allow the assured to recover if they are unable to carry on their own previous occupation. The usual tendency of the courts is to construe the former type of wording in a narrow fashion, and to hold that unless the wording is clear the assured is entitled to recover where they are no longer able to carry on their own previous occupation. If a clause is construed as applying to the assured’s own previous occupation, it is necessary to determine what constitutes carrying on that occupation. In Johnson v IGI Insurance Co Ltd the clause restricted recovery to the case in which the assured was unable to undertake “similar gainful employment”: it was held that a taxi driver who was injured in an accident and thereby rendered unable to drive was not capable of similar gainful employment simply because he remained able to derive an income from renting his taxis to other drivers. In Hooper v Accidental Death Insurance Co a policy which granted recovery where the assured was unable to “follow usual business or occupation” was read as meaning that the assured was entitled to be paid if he was prevented from following a substantial part of his occupation: the policy was not to be read as applying only where the assured was entirely unable to perform any part of his business or occupation since, if the policy was to be so

233 MacRobbie v Accident Assurance (1886) 23 SLR 391.
234 Mair v Railway Passengers’ Assurance (1877) 37 LT 356.
238 Sargent v GRE (UK) Ltd [2000] Lloyd’s Rep IR 77 (CA).
240 Hooper v Accidental Death Insurance Co (1860) 3 H & N 546.

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restricted, it should expressly say so. By contrast, in *Howells v IGI Insurance Co Ltd*241 a professional footballer who was forced by injury to drop from the Premier League to a lower division and reserve football was held not to have been permanently disabled from carrying on his “occupation” as a footballer. If the disablement is calculated by reference to a qualifying period, that cannot be interrupted by an event unrelated to the anticipated disability, such as by the employee having their employment terminated for unrelated reasons (either for good cause or not), although this will depend on a purposive construction of the particular policy terms.242

Where the policy applies only in the situation in which the assured is unable to carry on any occupation or paid employment whatsoever, it is necessary to define exactly what constitutes an occupation or paid employment. In *Pocock v Century Insurance Co Ltd*243 the policy stated that cover attached where the assured suffered an “inability to attend to business of any kind”. The assured, a travelling buyer, was injured in an accident and was no longer able to drive but remained able to carry out different functions for his employer on a part-time basis. The court ruled that, if an assured is restricted to a minor contribution, they no longer have the ability to attend to their business. In *Walton v Airtours plc*244 it was held that a pilot was unable to carry on any occupation even though he could undertake temporary employment: the term “occupation” was held to imply full-time employment with an element of continuity rather than sporadic part-time work, or work that could not be carried out without structured support. It is not sufficient, however, for the assured to show that they are incapable of carrying out some forms of work but not others. In *McGeown v Direct Travel Insurance*245 the assured’s travel policy provided cover against:

> “… permanent physical disability which prevents you from doing any paid work (if you are not in paid work we will provide the same cover for any permanent disability which prevents you from doing all your usual activities) — £50,000.”

The assured was injured in a road accident in Turkey and suffered severe injuries that prevented her from carrying on one of her usual activities: horse-riding. The English Court of Appeal held that the wording was not ambiguous and was to be construed as meaning that cover was granted only where the assured was unable to carry on any substantial activity: this followed from a reading of the policy as a whole (which applied only to catastrophic events) and from reading the insuring clause as a whole (which referred back to “any” paid work). Accordingly, the clause was not satisfied by picking out one activity to see whether the assured was able to carry it out, and that it was necessary to refer back to the trial judge the question whether the assured’s condition met the test laid down by the clause. The Court did comment, however, that whether the claimant was unable to carry on all of her usual activities was a matter of degree, and that if the assured was unable to carry on the normal incidents of living, including “reasonable mobility, coping with domestic chores and personal care”, then there would be a strong indication that the assured could no longer pursue all of her usual activities.246


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(2) **Causation**

The mere fact that there has been an accident and the assured has thereafter become unfit for work does not automatically mean that there is a causal link between the accident and the assured’s inability to work. The assured’s inability to work must be based on objective medical evidence and not the assured’s own perception of the nature of their incapacity. The assured cannot assert that their inability to work is the result of sickness where they have resigned from their employment on terms that they will not work for any competitor.

(3) **Loss of sight**

Complete loss of sight is another particular peril sometimes specifically insured against. This may occur where a one-eyed person loses their remaining eye in an accident. In a Canadian case it was held that the assured had “irrevocably lost” the “entire sight of one eye” so as to recover for it under a policy when he had lost all useful sight of the eye, although still able to distinguish light from darkness and to see a shadow if an object was placed close to his injured eye. Sight is not to be treated as permanently lost when it still exists but remains hidden by an operable cataract.

(4) **Mitigation of loss: medical treatment**

Even where the assured can demonstrate that they are disabled, a further question arises as to whether the assured can be obliged to mitigate their loss. In *Porter v NEL*, the Scottish Court of Session ruled that an assured is entitled to recover for total and permanent disability rendering them unfit to carry on their trade or profession despite the facts that: (1) they have refused to undergo an operation which might relieve the problem; or (2) they are fit for other forms of work. The court held as to (1) that an assured cannot be required to undergo medical treatment in respect of which success is not guaranteed, and that if this is required by the insurer the policy must so specify; and as to (2) that a general allegation that the assured is fit for some (unspecified) work cannot be a defence unless it can be shown that there is an alternative occupation open to the assured in which they have reasonable prospects of employment. However, that approach has not been accepted in New Zealand. In *Hunt v Westpac Nominees New Zealand Ltd*, Tipping J ruled that the assured was under a duty to take reasonable steps to reduce his loss, including undergoing corrective surgery on a shoulder injury. That comment was obiter, however, because the assured’s claim was held to be fraudulent.

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248 Hoghiran v Allied Dunbar Insurance [2001] 1 All ER (Comm) 97 (CA).
251 Shaw v Globe Indemnity Co of Canada (1921) 29 BCR 157, [1921] 1 WWR 674 (BCCA).
253 Particular sympathy has been shown by the courts in personal accident cases: see Napier v UNUM Ltd [1996] 2 Lloyd’s Rep 550.
254 Porter v NEL (unreported, Court of Session, 1992).

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(5) Return of policy benefits

In *Alder v Moore* a group personal accident policy for professional football players provided that no claim for permanent total disablement should be paid unless the claimant signed a declaration that he would not play professionally in the future, "and that in the event of infringement of this condition he will be subject to a penalty of the amount paid". The English Court of Appeal (Devlin LJ dissenting) held that such repayment was to be regarded as a payment by way of damages and not a penalty, and was therefore enforceable.

14.6.8 Effect of assured’s insolvency

In the event of the assured’s insolvency, the proceeds of a permanent disability policy accrue to the Official Assignee and not to the assured personally. In *Cork v Rawlins* it was held that an assured who became permanently disabled after his bankruptcy was not entitled to treat the proceeds of his life and permanent disability policies as his own, and that they vested in his trustee in bankruptcy. Such policies were to be regarded as assets forming part of his estate, and the proceeds became payable because the assured was no longer able to work. The English Court of Appeal noted that the common law did not treat personal damages for pain and suffering as forming part of a bankrupt’s estate, but that the policy was not based on pain and suffering. It would seem, therefore, that to the extent the amount payable is calculated by reference to the insured’s actual pain and suffering, it will accrue to them as it is personal to them. A similar result may be argued by analogy where the policy provides for loss of income, calculated by actual reference to the income, rather than to a fixed sum because income earned by the bankrupt generally does not pass to the Official Assignee (although the law in this area in New Zealand is confused).

256 *Alder v Moore* [1960] 2 Lloyd’s Rep 325.
258 *Young v Bay of Plenty District Health Board (No 2)* [2013] NZEmpC 131, [2013] ERNZ 395.

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