ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRES(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF THE RESPONDENT.

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV-2015-412-000125
[2016] NZHC 1683

BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
AND	J Respondent

Hearing: 5 April 2016

Appearances: A S Butler for the Appellant
P Sara for the Respondent

Judgment: 22 July 2016

JUDGMENT OF NATION J

The issue

[1] A young woman, J, became pregnant following a failed sterilisation. The Accident Compensation Corporation (the Corporation) accepted she was entitled to cover under the Accident Compensation Act 2001 (the Act) for her pregnancy as personal injury in terms of the legislation.[1] On this appeal, the issue is whether she is entitled to claim weekly loss of earnings compensation for having to stay at home to care for her child.

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[1] The Act was originally enacted as the Injury Prevention, Rehabilitation, and Compensation Act 2001. Its name changed to the Accident Compensation Act 2001 as from 3 March 2010.

Background

[2] This was succinctly summarised in submissions from Mr Butler, counsel for the appellant:

> 3.1 The relevant factual background to the case is simple. On 23 April 1998, J underwent a sterilisation operation. On 6 April 2006, J became aware that she was pregnant. J's child was born in early June 2006. It transpires that the sterilisation operation failed because filshie clips which should have been attached to the fallopian tube were instead attached to the bladder wall reflection.
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> 3.2 J's original claim for cover for the pregnancy following the failed sterilisation was declined by ACC on 18 August 2006. That decision was quashed on review on 20 December 2007. ACC's appeal was upheld in the District Court, in light of the then leading authority of the Court of Appeal in *ACC v D*, such that ACC's original decision was restored. However, following the decision of the Supreme Court in *Allenby v H*, on 31 August 2012, ACC accepted J's renewed claim for cover.
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> 3.3 J was granted cover for her pregnancy. To expand, this is the period which begins with conception, and includes the physiological impacts of pregnancy, can include the physical or mental effects of the pregnancy and ceases when those physical or mental effects cease to operate (usually shortly after the birth of the child). In J's case, she was granted cover for the physical effects but not the mental effects of her pregnancy.
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> 3.4 ACC determined that J was entitled to weekly compensation for the period 15 May 2006 to 27 July 2006, and paid her backdated weekly compensation for that period. J was considered to be entitled to weekly compensation for that period because she was unable to work, because of her pregnancy, during that time. J sought review of the decision to end compensation on 27 July 2006, which was dismissed on 3 September 2013. J appealed.
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> 3.5 On 31 July 2015, the District Court allowed J's appeal, quashed the review decision of 3 September 2013, and set aside ACC's decision dated 28 March 2013.

The District Court judgment

[3] Judge Powell considered the starting point for his analysis was the Supreme Court decision in *Allenby v H*.[2] He said this had changed the legal landscape in determining that cover was available under the Act for the physical consequences of pregnancy, such that J was entitled to cover. He held that J's eligibility for weekly

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[2] *J v Accident Compensation Corporation* [2015] NZACC 222 at [11], citing *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425.

compensation after she had been discharged from medical services after her child was born was to be determined through consideration of s 103(2):

> **103 Corporation to determine incapacity of claimant who, at time of personal injury, was earner or on unpaid parental leave**
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> …
>
> (2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.

[4] Considering s 103(2), Judge Powell considered the question to be determined was whether J's obligation to look after her dependent child once he was born rendered J unable, because of her personal injury, to engage in her pre-injury employment.

[5] Judge Powell noted that in *Allenby* the Supreme Court had stated the expression "personal injury", in the Act, was to be used in an expansive way.[3] He acknowledged that the types of entitlements that might flow from pregnancy as a covered personal injury were not discussed but referred to a statement in the majority judgment when they stated there could be cover for the consequences of pregnancy.[4]

[6] He considered the words "because of… her personal injury", as used in s 103(2), were wide enough to encompass the broader consequences of the covered injury, namely J's obligation to care for her child. He said this interpretation was appropriate given he was required to apply a "generous and unniggardly approach" in the interpretation of the Act.[5]

[7] He considered the wording of s 103(2) did not require that J have an ongoing physical incapacity or injury. He rejected the submission that J's inability to return to work was a result of her own choice regarding parenting and/or childcare rather than incapacity. He considered she had little real choice given that, as a result of her treatment injury, she had a dependent child and a responsibility to look after that

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3 At [12], citing *Allenby v H*, above n 2, at [68].
4 At [13], citing *Allenby v H*, above n 2, at [80].
5 At [14], referring to *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) at [19], [40] and [130]-[131].

child. He considered the difference between J's situation and another (hypothetical) mother who had to deal with the consequences of an unwanted pregnancy was that J had cover because her pregnancy resulted from an event for which she had cover under the Act. He was not concerned that continuing entitlement under the accident compensation regime would mean that those eligible to entitlements would be treated differently to those who were not covered. He said this was no different from the situation where someone would be entitled to continuing compensation for particular traumatic injuries while a person who suffered the same disability as a result of degenerative process would not be entitled to cover. The availability of state benefits for those who fell outside the accident compensation system was not a basis for refusing to provide J weekly compensation in respect of her covered injury.

[8] Judge Powell held that J was accordingly entitled to weekly compensation because she was unable to work while she cared for her dependent child. He also noted that, although J had not applied for any other entitlements at that stage, it might be appropriate at some point for the Corporation to consider whether other entitlements, such as childcare, might be available, in order to meet J's needs and/or to facilitate her rehabilitation from her covered injury.

[9] Judge Powell gave the Corporation leave to appeal the following questions to the High Court:[6]

> Was the District Court correct to hold that the respondent is unable, because of her personal injury (the pregnancy), to return to her pre-injury employment in terms of s 103(2) of the Act? Specifically:
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> (a) Was the judgment inconsistent with the scheme of the Act governing entitlement to weekly compensation?
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> (b) Is a person "unable" to engage in pre-injury employment on grounds other than physical or mental inability?
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> (c) Is it correct that there is nothing in the Act that requires pregnancy as an injury to stop at the birth of the child?
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> (d) With regard to the phrase "because of … her personal injury" contained in s 103(2) of the Act:

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6 *Accident Compensation Corporation v J* [2015] NZACC 311 at [7].

(i) Was the fact that the respondent had no physical or mental incapacity immaterial to the question of causation under s 103(2)? and

(ii) Was the phrase wide enough to encompass the broader consequences of the respondent's covered injury, namely her obligation to care for her dependent child?

[10] As Mr Butler stated:

> Expressed in summary form, the issue on appeal is whether, where the pregnancy is considered a personal injury for which there is cover under the Act (here, because of failed sterilisation), weekly compensation is payable by ACC to a mother who is medically able to work but nevertheless decides to care for a child rather than return to work after a successful pregnancy.

Submissions for J

[11] In submissions for J, Mr Sara supported both the decision and reasoning of the District Court. He noted that the mother in *Allenby* would have pursued a claim for damages in tort against those responsible for the failed operation but for the Supreme Court's finding that her pregnancy was a personal injury for which she had cover. He said this would also have been the situation with J.

[12] J's position remains that her covered personal injury includes the consequences of her pregnancy (a live and dependent child), not just the state of being pregnant.

[13] Mr Sara suggested that, in contending cover should cease with the ending of J's hospitalisation, the Corporation appeared to have conflated the s 102(2) requirement for the Corporation to consider medical advice in determining any question under s 103 with the notion that medical advice must then determine the eligibility for weekly compensation. Mr Sara argued they were discrete matters. The question of medical certification for incapacity had not been a real issue in the history of J's claim.

[14] Mr Sara argued that the consequence of the covered pregnancy was the birth of a live child. He said the birth of a live child was a reasonably foreseeable consequence of a negligently performed sterilisation procedure which, if not covered, could be the subject of a civil suit claiming damages. He suggested that the

covered injury was not just the primary injury, such as a broken leg or a burnt hand, but the consequences of that injury, for instance a leg deformity as a result of a broken leg or scarring from the burn.

[15] Mr Sara made the point that, if cover for pregnancy is available under the Act, there is a need to determine how the consequences of pregnancy are to be dealt with within the scheme of the Act when the statutory language does not seem to deal with the eventuality of a child.

[16] Mr Sara acknowledged that, in terms of the statutory provisions of the Act, for J to have a continuing entitlement to compensation, the Corporation had to be able to find that the bringing up of a child after birth was part of the personal injury suffered by the mother. He contended that, if pregnancy was to be considered personal injury, then the birth and bringing up of the child should also be considered part of the personal injury for which there would continue to be an entitlement to compensation. He submitted that such an interpretation was necessary to make the legislation work.

Submissions for the appellant

[17] Mr Butler argued that, consistent with earlier High Court authority under previous accident compensation legislation and having regard to the scheme and purpose of the Act, cover does not continue to be available to a mother who is medically able to work after pregnancy. He contended that, once pregnancy was resolved, with no ongoing physiological, physical or mental impacts, there was no ongoing personal injury for which weekly compensation entitlements were payable. His detailed analysis of the authorities and the legislation is reflected in the discussion below.

Discussion

The common law position

[18] Mr Sara referred to the possibility of a mother having a claim at common law or in tort for the costs of bringing up a child who was born as the result of an

unwanted pregnancy brought about through medical negligence. Mr Butler pointed out that, in nearly all jurisdictions similar to New Zealand, courts at the highest level have decided that, as a matter of policy, a parent should not have the right to sue for damages for the costs associated with bringing up a child. Authorities to that effect are outlined in the judgment of Heydon J in *Cattanach v Melchior*.[7]

[19] A majority of the High Court of Australia in *Cattanach v Melchior* did hold that, in compensation for the birth of an unintended child resulting from the doctor's negligent advice and failure to warn, a couple was entitled to damages for the cost of raising and maintaining the child. The benefits received from the birth of a child were not legally relevant to the head of damage that compensates for the cost of raising and maintaining the child. The effect of that judgment has however been reversed by legislation in two Australian states. [8]

[20] The House of Lords in *McFarlane v Tayside Health Board* held that a mother could sue a doctor and hospital authority for the costs of an unplanned pregnancy resulting from medical negligence.[9] She could not sue for damages for the cost of bringing up the child. The High Court in Ireland decided similarly in *Byrne v Ryan*.[10]

[21] However, as Judge Powell noted, the Supreme Court in *Allenby* stated that overseas common law authorities on issues of compensation for the consequences of pregnancy and childbirth had no direct relevance to the interpretation of accident compensation legislation in New Zealand. Counsel for both J and the Corporation agreed this was the position.

The legislative history

[22] The legislative history relevant to the issue I have to consider was discussed by the Supreme Court in *Allenby*.[11]

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7 *Cattanach v Melchior* [2003] HCA 38, (2003) 215 CLR 1 at [313].
8 Civil Liability Act 2003 (Qld), ss 49A and 49B; Civil Liability Act 2002 (NSW), s 71.
9 *McFarlane v Tayside Health Board* [2000] 2 AC 59, [1999] 4 All ER 961 (HL).
10 *Byrne v Ryan* [2007] 1 IEHC 207, [2009] 4 IR 542.
11 *Allenby v H*, above n 2, at [41]-[47].

[23] The Accident Compensation Act 1972 established the scheme by which those suffering "personal injury by accident" became entitled to compensation on a no-fault basis in place of the right to sue for damages in tort. The Act did not originally define "personal injury by accident" except through including incapacity resulting from certain occupational diseases.

[24] In 1974, an amendment redefined "personal injury by accident". Since this amendment was both cumbersome and substantively identical to the more coherent 1982 amendment, the Supreme Court in *Allenby* preferred to explain the 1974 legislative changes by reference to the language used in 1982.[12] From 1974, then, "personal injury by accident" included:

> (i) The physical and mental consequences of any such injury or of the accident:
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> (ii) Medical, surgical, dental, or first aid misadventure:
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> (iii) Incapacity resulting from an occupational disease or industrial deafness to the extent that cover extends in respect of the disease or industrial deafness under sections 28 and 29 of this Act:
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> (iv) Actual bodily harm (including pregnancy and mental or nervous shock) arising by any act or omission of any other person which is within the description of any of the offences specified in sections 128, 132, and 201 of the Crimes Act 1961, irrespective of whether or not any person is charged with the offence and notwithstanding that the offender was legally incapable of forming a criminal intent:

[25] This definition extended coverage of the scheme to both physical and mental consequences of any medical misadventure. There was no definition of medical misadventure. In *Allenby*, Blanchard J stated the definition plainly extended to any form of medical negligence giving rise to physical or mental consequences for the patient.[13] The definition also expressly recorded that a pregnancy consequential upon rape was "actual bodily harm" and thus was a personal injury.

[26] In *XY v Accident Compensation Corporation*, a decision from 1984, the Corporation had met a claim for expenses and made a further payment in connection

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12 At [41].
13 At [42].

with a mother's pregnancy as a result of a failed tubal diathermy operation.[14] The mother made a claim for further expenses incurred in looking after the child after his birth. There was no dispute that, under the 1972 Act, she was entitled to compensation for the pregnancy. Jeffries J was uncomfortable in proceeding on the basis that pregnancy was an injury but nevertheless did so. He was however clear that once the birth had taken place there was no longer an injury. As he put it, "after the birth of a normal healthy child the injury is entirely healed".[15] He thus held the costs of looking after the child following birth could not be regarded as expenses or losses resulting from the injury for which there was cover.

[27] In a paper in the Victoria University of Wellington Law Review, Yasmin Moinfar considered how claims for compensation for unplanned pregnancy resulting from medical negligence had been dealt with under the differing accident compensation legislation.[16] In that paper the author stated that, between 1972 and 1992, "wrongful birth" cases could be covered by the accident compensation scheme as instances of medical misadventure or as personal injury by accident. A mother's compensation entitlement was limited to her physical and mental distress arising out of the pregnancy and any loss of earnings during the pregnancy and birth. The courts did not see compensation extending to include the costs of child-rearing.[17]

[28] In *Allenby*, the Supreme Court noted it was common ground the mother would have had cover for her pregnancy before the commencement of the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act).[18] Blanchard J said that the issue the Court had to determine was whether this changed as a result of the reforms and restructuring of the accident compensation scheme by the 1992 Act, the relevant provisions of which were carried forward in the Accident Insurance Act 1998 and in the 2001 Act without substantive change. Blanchard J referred to the judgment of Jeffries J in *XY v Accident Compensation Corporation* and his reluctant recognition that pregnancy and birth were part of the injury.[19] Blanchard J also

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14 *XY v Accident Compensation Corporation* (1984) 2 NZFLR 376 (HC).
15 At 380.
16 Yasmin Moinfar "Pregnancy Following Failed Sterilisation Under the Accident Compensation Scheme" (2009) 40 VUWLR 805.
17 At 810.
18 *Allenby v H*, above n 2, at [39].
19 At [45], citing *XY v Accident Compensation Corporation*, above n 14, at 380.

referred to a 1988 Law Commission report, a 1991 ministerial working party report, and a report from the Minister of Labour in 1992, all of which preceded that legislation.[20] He said that the signals were that the legislation would not affect any change to the pre-1992 position.

[29] The 1992 Act continued to give cover for "personal injury [which is] caused by an accident", defining "accident" as a specific event or series of events involving the application of force external to the human body.[21] It dropped the reference to "actual bodily harm (including pregnancy and mental or nervous shock)" arising from the commission of certain crimes. It continued cover for personal injury caused by "medical misadventure" but defined that expression as medical error or medical mishap.[22] There was no specific mention of pregnancy in any of the provisions for cover under the 1992 Act or its successors.

[30] As the Supreme Court noted, following the passage of the 1992 Act, there were several decisions in the District Court declining cover for unwanted pregnancies resulting from failed sterilisations on the basis they were not personal injuries within the reframed legislative scheme.[23]

[31] As Blanchard J noted, whenever the 2001 Act gave cover for some kind of personal injury, it required that the claimant had suffered some form of physical injury unless the personal injury came within other paragraphs of s 26(1).[24]

[32] In 2003, in *Harrild v Director of Proceedings*, Elias CJ in the Court of Appeal said:[25]

> The policy of the legislation is to provide comprehensive cover to compensate for personal injury, including mental injury which results from physical injury, in replacement of the remedies previously available under the common law.

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20 At [47], citing Law Commission *Personal Injury: Prevention and Recovery: Report on the Accident Compensation Scheme* (NZLC R4, 1988); *Report of the Ministerial Working Party on the Accident Compensation Corporation and Incapacity* (1991); WF Birch *Accident Compensation: A Fairer Scheme* (Office of the Minister of Labour, Wellington, 1991) at 8.

21 Accident Rehabilitation and Compensation Insurance Act 1992, ss 3 and 8(2)(a).

22 Sections 8(2)(c) and 3.

23 *Allenby v H*, above n 2, at [48].

24 At [56].

25 *Harrild v Director of Proceedings*, above n 5, at [19].

[33] Elias CJ agreed with Keith and McGrath JJ "that the legislative policy is not to be undermined by an ungenerous or niggardly approach to the scope of the cover provided". The majority held that the death of a foetus from inadequate medical service to the pregnant mother could constitute a physical injury to the mother although no direct physical injury occurred to her. It was crucial to the Court's judgment that they found there was cover for "the direct physical injury suffered by a mother where her child dies in utero".[26]

[34] In 2007, in *Accident Compensation Corporation v D*, Mallon J held in the High Court that pregnancy resulting from a medical error or mishap was covered under the 2001 Act.[27] On appeal, the Court of Appeal, by a majority, decided that an unwanted pregnancy was not a "personal injury" under the 2001 Act because it was not a "physical injury".[28]

The Supreme Court's judgment in Allenby

[35] The plaintiff in *Allenby* had sued Dr Allenby in tort seeking damages as a result of a failed sterilisation procedure. The doctor applied to strike out the proceedings as being precluded by the 2001 Act on the ground there was cover under that Act. His application was removed from the High Court to the Court of Appeal. The Court of Appeal, in a majority judgment, consistent with its judgment in *ACC v D*, declined strike-out on the basis there was no cover under the 2001 Act.[29] Dr Allenby appealed to the Supreme Court. His appeal was opposed by the Corporation which argued that pregnancy could not be described as personal injury or was a natural process excluded from cover under the Act. In his judgment for himself, McGrath and William Young JJ, Blanchard J stated that in the 2001 Act the expression "personal injury" is used in an expansive way but also that "it has a statutory meaning".[30] All five Judges of the Supreme Court held that neither the 1992 Act nor the 2001 Act had been intended to or did remove the previous coverage for pregnancy resulting from rape or a failed sterilisation. For the reasons discussed

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26 At [22].
27 *Accident Compensation Corporation v D* [2007] NZAR 679 (HC).
28 *Accident Compensation Corporation v D* [2008] NZCA 576 at [54].
29 *Allenby v Hannam* [2011] NZCA 251.
30 *Allenby v H*, above n 2, at [68].

by the Supreme Court, it held the plaintiff "had cover under the Act for the physical effects of her pregnancy".[31]

[36] Tipping J stated the key question in the case was whether the resulting pregnancy amounted to "personal injury" under and for the purposes of the legislation.[32] He noted the expression was defined to mean "physical injuries … including, for example, a strain or a sprain". He stated the changes which occurred to a woman's body as a result of pregnancy came within the expression "physical injuries" in the context of the legislation. The bodily changes were of a physical kind. They were apt to cause a substantial degree of physical discomfort, quite often substantial pain and suffering and bodily sensations which were of much greater consequence and duration than the examples of a strain or sprain.[33]

[37] Elias CJ stated that, for the reasons more fully developed by Blanchard and Tipping JJ, she considered that:[34]

> … impregnation following a failed sterilisation is a physical impact to the person of the woman being treated and is within the meaning of personal injury caused by medical misadventure.

[38] The Supreme Court's determination in this regard was sufficient for it to deal with the strike-out application. Its judgment was only concerned with whether there was cover for the unwanted pregnancy, not what compensation entitlements might flow from that under the 2001 Act.

[39] As Mr Butler submitted, in the judgments of the Supreme Court in *Allenby*, cover was consistently linked to the woman's pregnancy and its effects on her body.

[40] I accept the submission for the Corporation that the Act limits the cover which is available and it is personal injury which generates entitlement. There can be no entitlement where a personal injury is no longer affecting a claimant. In this case, in terms of the Supreme Court's judgment in *Allenby*, the personal injury suffered by J was her pregnancy, caused by the failed sterilisation. Accordingly, it

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31 At [84].
32 At [87].
33 At [88].
34 At [19].

was the physical effects of the pregnancy on the claimant that were covered, nothing more. Following the birth of her child, because J's pregnancy was no longer operative, she could no longer have any entitlements to compensation from it.

[41] I thus accept the submission for the Corporation that, as it was the physical effects of pregnancy for which there was cover, it was the physical effects of the pregnancy which established the limits of cover.

[42] Judge Powell cited the majority statement in *Allenby* that:[35]

> If, however, the purpose of that medical treatment is to prevent pregnancy from occurring and, by reason of medical error that purpose is not achieved, it does not seem that, because the pregnancy then occurs as a biological process, there should be no cover for the consequences.

[43] He used that statement to support the proposition that "there is nothing in the legislation that requires pregnancy as an injury to stop at the birth of the child".[36]

[44] Mr Butler submitted that Judge Powell erred in making that statement, in that Judge Powell stepped beyond the Act and beyond the definition of the personal injury for which the Supreme Court held there was cover in *Allenby*. I accept that submission.

[45] It is apparent from the passage of *Allenby* which immediately follows the words referred to by Judge Powell, that "the consequences" Blanchard J was referring to were the physical consequences of the pregnancy, the development of the foetus and the significant physical changes to the woman's anatomy which he acknowledged occurred naturally "but still caused discomfort and, at least ultimately, pain and suffering".[37]

[46] In explaining why pregnancy could constitute a personal injury, Blanchard J wrote:

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35 *J v Accident Compensation Corporation*, above n 2, at [13], citing *Allenby v H*, above n 2, at [80].
36 At [14].
37 *Allenby v H*, above n 2, at [80].

> [76] In addition, since, as we would hold, an impregnation resulting from rape is, under s 20(2)(a), a personal injury, it must follow that an impregnation resulting from medical misadventure in the form of a failed sterilisation is also a personal injury. The 2001 Act, as it stood at the time, keeps cover for medical misadventure (where it is necessary to show negligence) separate from cover for accident. *But a physical consequence* which constitutes a personal injury where accident is involved will equally be a personal injury where there is medical misadventure. (Emphasis added.)

[47] In holding that coverage under the Act had not been altered by the 1992 or subsequent legislation, and the mother therefore had cover under the Act for the physical effects of her pregnancy resulting from the failed sterilisation, the Supreme Court was holding that the legislation had to be applied in the same way as it had been before 1992. As discussed, between 1972 and 1992, it had been understood that compensation would not extend to the cost of bringing up a child. On that basis, it cannot be said the Supreme Court was allowing for the possibility that loss of earnings compensation or compensation for other costs might also be payable for having to bring up a child.

The accident compensation scheme

[48] I accept Mr Butler's submission that the purpose of the accident compensation scheme is to provide compensation and support to people suffering from physical injuries and for certain types of mental injuries. The scheme is not designed to provide compensation for all consequences that follow from the covered injury. The need to care for a child is not, of itself, personal injury to the claimant or a consequence which the accident compensation scheme was designed to compensate.

[49] As Mr Butler submitted, the Act is designed to provide cover and entitlements to people suffering from physical injuries and certain types of mental injuries. Relevantly, the Act in referring to its purpose in s 3 states:

> **3 Purpose**
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> The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through—

…

(c) ensuring that, where injuries occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation:

(d) ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment …

[50] The Supreme Court, in *Davies v Police*, recognised the accident compensation scheme is designed to provide fair compensation which, in any particular case, may not be a full indemnity:[38]

> Consistently with the origins of the accident compensation system, the benefits provided under the system, for reasons of affordability and the public interest in providing incentives to rehabilitation, were not set to be a complete indemnity. Claimants are to receive "during their rehabilitation", compensation for loss which is "fair" rather than full. That is a central plank in the "social contract" implemented through the legislation and its predecessors.

[51] Applying and interpreting the legislation in the context of the purpose of the Act, as stated, it is difficult to see how the economic costs of bringing up a child fit within the concept of personal injury, even with that term being applied in an expansive way.

[52] Interpreting the Act so as to limit personal injury to the physical or mental effects of the pregnancy is consistent with the purpose of the Act, namely, to facilitate the claimant's rehabilitation and to restore to the maximum extent practicable her health, independence and participation. Consistent with that purpose, where a claimant's health, independence and participation in society are no longer affected by the physical effects of her pregnancy, it is consistent with the scheme of the Act that entitlement to compensation should cease. J's inability to work was not the inevitable consequence of the physical effects of her pregnancy.

[53] Section 67 of the Act states that a claimant is entitled to entitlements if:

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[38] *Davies v Police* [2009] NZSC 47, [2009] 3 NZLR 189 at [18] (citations omitted).

(a) the claimant has cover for a personal injury; and

(b) the claimant is eligible under the Act for entitlements in respect of the personal injury.

[54] Entitlement to weekly compensation is determined through the application of s 100. Section 100 states, insofar as is relevant, that a claimant who has cover and who lodges a claim for weekly compensation is entitled to receive it if:

(a) the claimant is incapacitated within the meaning of s 103(2); and

(b) the claimant is eligible under cl 32 (claimants who were earners prior to injury) or cl 44 (claimants who were on unpaid parental leave prior to injury) of Schedule 1 of the Act or s 210 of the Act (self-employed people).

[55] Given the test it imposes for ascertaining a claimant's incapacity for employment, s 103 further suggests that entitlements depend on incapacitation *resulting from* the covered personal injury. Section 103 states:

> **103 Corporation to determine incapacity of claimant who, at time of personal injury, was earner or on unpaid parental leave**
>
> (1) The Corporation must determine under this section the incapacity of—
>
> (a) a claimant who was an earner at the time he or she suffered the personal injury:
>
> (b) a claimant who was on unpaid parental leave at the time he or she suffered the personal injury.
>
> (2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.
>
> (3) If the answer under subsection (2) is that the claimant is unable to engage in such employment, the claimant is incapacitated for employment.
>
> (4) The references in subsections (1) and (2) to a personal injury are references to a personal injury for which the person has cover under this Act.

(5) Subsection (4) is for the avoidance of doubt.

[56] The question in s 103(2) is whether the claimant is "unable, because of … her personal injury, to engage in employment", not whether the claimant is unable because of *the consequences* of her personal injury to engage in employment.

[57] The Corporation must cease payment of weekly compensation if it determines that a claimant is not incapacitated for employment.[39] Consistent with the way I interpret s 103(2), vocational independence is determined according to a claimant's capacity to engage in employment. A vocational independence assessment involves:[40]

(a) an occupational assessment under cl 25 of Schedule 1 of the Act; and

(b) a medical assessment under cl 28 of Schedule 1 of the Act.

[58] Vocational independence is defined in s 6 of the Act, independently of the claimant's personal injury and according to the claimant's capacity to engage in work:

(a) for which he or she is suited by reason of experience, education, or training, or any combination of those things; and

(b) for 30 hours or more a week.

The very purpose of a vocational independence assessment is to ensure completion of comprehensive vocational rehabilitation which has focused on the claimant's needs and addressed any *injury-related barriers* to the claimant's employment or vocational independence.[41]

[59] A medical assessment is a prerequisite of the vocational independence assessment because the issue for the Corporation is whether a claimant is still suffering the physical or mental effects of the covered personal injury. The specific purpose of this medical assessment, outlined in s 108(3), is to advise the Corporation as to whether, *having regard to the claimant's personal injury*, the claimant is able to

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39 Accident Compensation Act 2001, s 104.
40 Section 108(1).
41 Section 107(3).

undertake any type of work identified in the occupational assessment. The factors which might impact a mother's ability to be in employment through having to care for a child relate to different circumstances and primarily the needs of the child. As Mr Sara acknowledged, the Act does not mention any need to assess such factors.

[60] There is thus a disconnect between the matters which have to be addressed in a medical assessment for the purpose of assessing whether there is a continuing entitlement to compensation and the factors that would have to be considered in assessing a claimant's ability to return to work where that is affected, not by any physical incapacity on her part but by the need to care for her child.

[61] The medical assessor must prepare and provide to the Corporation a report specifying:[42]

> (a) relevant details about the claimant, including details of the claimant's injury; and
>
> (b) relevant details about the clinical examination of the claimant undertaken by the assessor, including the methods used and the assessor's findings from the examination; and
>
> (c) the results of any additional assessments of the claimant's condition; and
>
> (d) the assessor's opinion of the claimant's vocational independence in relation to each of the types of work identified in the occupational assessor's report; and
>
> (e) any comments made by the claimant to the assessor relating to the claimant's injury and vocational independence in relation to each of the types of work identified in the occupational assessor's report.

[62] The importance of the medical assessment and the matters it must address are clear from s 102. It permits the Corporation to determine from time to time any question under s 103 including the crucial issue of whether the claimant is unable because of her personal injury to engage in employment in which she was employed when she suffered the personal injury.[43] In determining any such question, the Corporation *must* consider an assessment undertaken by a medical practitioner or

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42 Clause 29(1).
43 Section 102(1).

nurse practitioner and may obtain any professional, technical, specialised or other advice from any person it considers appropriate.[44]

[63] It is thus apparent from ss 102, 103 and 104 that continuing entitlement to earnings-related compensation depends on an assessment of the physical or mental consequences of the injury for which there was cover. It is inconsistent with these provisions and the availability of entitlements under the Act to suggest that entitlements should respond to the non-injury-related aspects of a covered personal injury.

[64] It is because the Act works in this way that there can be entitlement for the continuing effects of a traumatic injury, for example, the scarring from a burn or a permanent leg deformity from a broken leg. With the ending of a pregnancy and the birth of a healthy child, once the mother has recovered from the physical or mental effects of the pregnancy and birth she would no longer be incapacitated and would be assessed to be vocationally independent in the sense of having the physical and mental capacity to engage in work for which she is suited.[45]

[65] I thus accept the submission for the Corporation that Judge Powell erred in ruling that the fact the claimant had no ongoing physical incapacity or injury was "immaterial", given the birth of the child was the "inevitable result" of her pregnancy.[46] The entitlement which is at issue is the availability of weekly compensation because of the claimant's inability to return to work. For her to have that entitlement, the inability had to be because of her personal injury.

[66] If, consistent with the approach taken by the Supreme Court, it is the pregnancy for which there is cover, then her continuing entitlement has to be determined by assessing whether the claimant is unable because of her personal injury, i.e. the pregnancy, to engage in employment in which she was employed when she became pregnant. "Unable", as used in s 103(2), is to be interpreted in the context in which it is used with due regard to the purpose of the Act. "Unable"

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44 Section 102(2).

45 ACC also accepts that, for the few weeks immediately before and the few weeks immediately after the birth of a child, a woman may well be "unable" because of her pregnancy to engage in the employment in which she was employed prior to her pregnancy.

46 *J v Accident Compensation Corporation*, above n 2, at [15].

should be given its plain meaning. Once a mother has recovered physically from her pregnancy and giving birth to her child, she will not be "unable" to work because of her pregnancy. Once she has recovered from that birth, her inability to work is almost certainly not going to be because of the physical or mental effects of the pregnancy but, as is the case with any woman who has had a child in circumstances for which there was no cover under the Act, factors such as childcare arrangements, the unavailability of the other parent and parenting choices.

[67] In his submissions, Mr Sara said there is a need for the courts to do what is necessary to make the Act work, given the Act is silent as to the basis on which claims for losses or costs suffered as a result of having to care for a child might be calculated. It is however because there is such a gap that it can be said the Act was not intended to provide compensation for the loss of earnings or other costs that might be incurred in bringing up a child that results from a pregnancy for which there was cover under the Act.

The end analysis of Allenby and the Accident Compensation Act

[68] The judgments of the Supreme Court in *Allenby* were relied on subsequently by the Court of Appeal in *Cumberland v Accident Compensation Corporation*.[47] The Court said the ratio of *Allenby* was that, with regard to pregnancy following a failed sterilisation, the relevant personal injury was impregnation/pregnancy. The Court, like the Supreme Court, emphasised the expression "personal injury" in the Act was to be used in an expansive way.[48] On that basis, the Court held it could be applied to a continued pregnancy which, but for a misdiagnosis, would otherwise have been terminated. The physical impact of the continued pregnancy on the mother was crucial to the Court of Appeal in *Cumberland*, which found that she had suffered personal injury in terms of the Act.[49] The Court was careful not to comment on the scope of entitlements that would flow from its judgment.

[69] I conclude the District Court was in error in deciding that J was entitled to continuing loss of earnings compensation through having to bring up a child. I

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47 *Cumberland v Accident Compensation Corporation* [2013] NZCA 590, [2014] 2 NZLR 373.
48 At [35].
49 At [35]-[38].

consider such entitlement was not within the scope of the accident compensation scheme as provided for in the Act. Nor was it consistent with the basis on which the Court of Appeal and Supreme Court have held that pregnancy resulting from a failed sterilisation can amount to personal injury in terms of the Act.[50]

[70] Whether entitlement should be extended in this way is not for the courts to decide. The extension cannot be justified simply as being consistent with an expansive interpretation of the term "personal injury". Whether or not the scheme should be extended to provide such cover is a matter for Parliament.

[71] In her paper referred to earlier, Yasmin Moinfar argued that, consistent with the original vision of the Woodhouse Report and the accident compensation scheme as provided for in the Act, there should be cover for a pregnancy resulting from a failed sterilisation in the manner that was subsequently adopted by the Supreme Court in *Allenby*. However, in advocating such an approach, she was careful to say:[51]

> It is not argued that the accident compensation scheme should cover the costs of raising a child who is born following a failed sterilisation. Rather, there should be compensation for the mother's physical and mental distress, medical expenses, and loss of earnings during the pregnancy, birth, and immediately afterward. In both New Zealand and in other jurisdictions, expenses for raising a child have generally been considered as "too remote" from the medical misadventure. This recognises that the line must be drawn somewhere, and that there are strong policy reasons against burdening levy-payers, rather than parents, with the potentially large costs of raising a child.

[72] The way in which the issue has been dealt with by the common law in other jurisdictions has been irrelevant in determining whether there could be continuing cover and entitlements under the Act as it stands. However, the sort of considerations that might be brought to bear on whether there should be an extension to the existing scheme are difficult. That is apparent from the differing reasons which their Lordships gave in the House of Lords when determining that neither a

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50 This is the first occasion the High Court has had to consider the issues raised by this appeal. I note the conclusion I have come to accords with Professor Todd's view as to what the legal position would be after reference to *Allenby* and *Cumberland v Accident Compensation Corporation*: Stephen Todd "Accident Compensation in Operation" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 21 at 59.

51 Moinfar, above n 16, at 818 (citations omitted).

doctor nor a health authority could be held liable for the costs of bringing up a child born as a result of an unplanned pregnancy resulting from medical negligence.[52]

Conclusion

[73] For J to have a continuing entitlement under the Act, both the birth of the child and the need to look after it had to be part of the personal injury suffered by J in becoming pregnant. To reach such a conclusion would be inconsistent with the scheme of the Act, its relevant provisions and the basis on which the Supreme Court found pregnancy could constitute an injury for which there would be cover under the Act.

[74] I answer the questions for this Court on the appeal as follows:

> Was the District Court correct to hold that the respondent is unable, because of her personal injury (the pregnancy), to return to her pre-injury employment in terms of s 103(2) of the Act?
>
> Answer: No.
>
> Specifically:
>
> (a) Was the judgment inconsistent with the scheme of the Act governing entitlement to weekly compensation?
>
> Answer: Yes.
>
> (b) Is a person "unable" to engage in pre-injury employment on grounds other than physical or mental inability?
>
> Answer: No. A person cannot be considered to be "unable" to engage in pre-injury employment on grounds other than physical or mental inability resulting from the personal injury for which they had cover under the Act.
>
> (c) Is it correct that there is nothing in the Act that requires pregnancy as an injury to stop at the birth of the child?

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52 *McFarlane v Tayside Health Board*, above n 9.

Answer: No. In terms of the Act, pregnancy will cease to be an injury when there are no longer any physical or mental disabilities associated with the pregnancy rendering the mother unable to engage in her pre-injury employment.

(d) With regard to the phrase "because of … her personal injury" contained in s 103(2) of the Act:

(i) Was the fact that the respondent had no physical or mental incapacity immaterial to the question of causation under s 103(2)?

Answer: No.

(ii) Was the phrase wide enough to encompass the broader consequences of the respondent's covered injury, namely her obligation to care for her dependent child?

Answer: No.

Disposition

[75] The appeal is allowed. I quash the decision of the District Court. I note that the effect of this is that ACC's decision to decline to provide weekly compensation entitlements to J beyond 27 July 2006 is upheld, in agreement with the decision of the reviewer dated 3 September 2013.

Costs

[75] The Corporation accepts that, because this was in the nature of a test case, it would not seek costs if the appeal was successful. Each party will bear its own costs.

Suppression

[76] J's name and any information that might identify her is suppressed. In recognition of that, this judgment is anonymised, hence the referral to her as J.

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