ORDER FORBIDDING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR PARTICULARS LIKELY TO LEAD TO IDENTIFICATION OF FIRST RESPONDENT.

IN THE SUPREME COURT OF NEW ZEALAND

SC 70/2011
[2012] NZSC 33

BETWEEN	KEITH ALLENBY Appellant
AND	H First Respondent
AND	MIDDLEMORE HOSPITAL OF COUNTIES MANUKAU DISTRICT HEALTH BOARD Second Respondent
AND	ACCIDENT COMPENSATION CORPORATION Interested Party

Hearing: 16 February 2012

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: A H Waalkens QC and C L Garvey for Appellant
J M Miller and M Dao for First Respondent
P N White and B P Mills for Second Respondent
D B Collins QC Solicitor-General, B A Corkill QC and S L Scott for Accident Compensation Corporation
F Geiringer for Intervener, Doctors for Sexual Abuse Care

Judgment: 9 May 2012

JUDGMENT OF THE COURT

A The appeal is allowed. The question framed in the High Court is answered "yes".

B Costs are reserved.

REASONS

Para No

ELIAS CJ

[1] The question raised by the appeal is whether a woman who becomes pregnant following a failed sterilisation has suffered personal injury caused by medical misadventure, for which she will have cover under the Injury Prevention, Rehabilitation, and Compensation Act 2001.

[2] I have had the advantage of reading in draft the reasons given by Blanchard J and Tipping J. I agree with their conclusion that the first respondent suffered personal injury through medical misadventure when she became pregnant following the failed sterilisation. I am in agreement and have little to add to the essential point on which the appeal turns: whether impregnation and the developing physiological impacts of pregnancy are properly treated as "personal injury" within the meaning of s 26 of the Act. I write separately to indicate why I think cover is available on that basis under s 20(2) of the Act and to reserve my position on some points which are not essential to the result.

[3] The legislative history described by Blanchard J is consistent with the interpretation reached as to the meaning of s 26. I do not think that the views expressed by Cooke J under earlier legislation in *L v M* (that pregnancy cannot amount to a "personal injury"),[1] which have proved influential in subsequent cases (as discussed by Blanchard J at [43] to [48]), are helpful when considering whether pregnancy may amount to a "personal injury" under the 2001 Act. I prefer not to join in the views expressed by Blanchard J and Tipping J about further circumstances in which pregnancy may be covered when it arises by accident. In particular, I have considerable reservations about whether consent is a helpful concept when assessing

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1 *L v M* [1979] 2 NZLR 519 (CA) at 529.

whether there is cover for personal injury caused by accident. These are not matters I think it necessary to consider in the present case.

The appeal

[4] The first respondent suffered mental illness after becoming pregnant following a sterilisation procedure carried out by the appellant, a medical practitioner.[2] She brought civil proceedings in tort against the appellant in the High Court. The appellant applied to strike out the proceedings as being precluded by the Injury Prevention, Rehabilitation, and Compensation Act 2001, as they are if there is cover under the Act. Because the Court of Appeal had held in a decision in 2008 (*Accident Compensation Corporation v D*) that pregnancy is not "personal injury" within the meaning of the Act,[3] in a case that was not appealed further, the High Court removed the application into the Court of Appeal which granted a formal judgment adhering to its earlier determination,[4] in order to allow leave to appeal to be sought in this Court.[5]

[5] The appellant argues that the first respondent has cover and that the decision of the Court of Appeal in *Accident Corporation v D* is wrong. The first respondent is neutral as to whether her remedy is through cover under the Act or through her civil action. But the Accident Compensation Corporation, appearing as an interested party, argues that the Court of Appeal's determination in the *Accident Corporation v D* is right and should be confirmed, which would result in the appeal being dismissed and the civil proceedings continuing.

[6] If impregnation is not a personal injury within the meaning of the Act, there is no cover both for physical injury and any resulting mental injury (for which under the Act there is cover only if it is "suffered by a person because of physical injuries

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2 The operation was carried out in January 2004 and the first respondent gave birth in March 2005. Accordingly, the relevant legislation is the Injury Prevention, Rehabilitation, and Compensation Act 2001 as it stood before it was amended in July 2005.

3 *Accident Compensation Corporation v D* [2008] NZCA 576 per Arnold and Ellen France JJ; William Young P dissenting.

4 *Allenby v H* [2011] NZCA 251 (Glazebrook, Arnold and Ellen France JJ).

5 *Allenby v H* [2011] NZSC 71.

suffered by the person"[6]). If so, unless a claimant falls within a specific statutory provision which permits cover for mental injury consequential on specified crimes,[7] including rape, she will have no cover for the adverse mental consequences which are not uncommon in the case of unlooked-for pregnancies.

The legislative background

[7] The Injury Prevention, Rehabilitation, and Compensation Act 2001 provides cover on the basis of line-drawing which reflects policy choices. Such line-drawing has resulted in legislation which is technical. Approaches taken to the interpretation of provisions under earlier accident compensation legislation need to be treated with some caution in considering the current legislation. Nor is this easy legislation to follow. It contains much cross-referencing, repetition, and circularity in expression.

[8] It is accepted that, before enactment of the Accident Rehabilitation and Compensation Insurance Act 1992, the first respondent would have received cover. That is because "personal injury by accident" was defined from 1974 to include any "medical misadventure".[8] In addition, it is clear that a woman who became pregnant following a sexual assault would have cover because pregnancy was specifically identified as "actual bodily harm" arising out of a sexual crime.[9] Whether outside medical misadventure or criminal acts pregnancy could amount to "personal injury by accident" was doubted in dissent in the Court of Appeal by Cooke J in *L v M* but was a matter never finally resolved before the legislation was changed.[10] Indeed, the 1972 Act, unlike the 2001 Act, left "personal injury" undefined.

[9] Nothing in the legislative history indicates that any change was intended in relation to cover for pregnancy resulting from medical misadventure or a sexual crime when the new legislation was enacted in 1992. It might have been expected that, if cover was withdrawn for pregnancy in those two situations, some explicit

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6 Section 26(1)(c).
7 Section 21.
8 Accident Compensation Act 1972, s 2(1), definition of "personal injury by accident". This definition was inserted by the Accident Compensation Amendment Act 1974, s 2(1).
9 Accident Compensation Act 1972, s 105B(1). This section was inserted by the Accident Compensation Amendment Act 1974, s 6.
10 At 529–530.

acknowledgement of the change would have occurred in the legislative processes. The new legislation was preceded by a report of the Law Commission in 1988[11] and a report of a ministerial working party in 1991,[12] neither of which indicated any proposal to change the then existing cover for pregnancy. There is no mention of dropping such cover in the Hansard reports of the debates on the Bill. (Although one submission received by the Select Committee raised concerns that the cover for rape might have been removed in the Bill, there is no response to it.)

[10] It seems from the report of the ministerial working party and a report of the Minister of Labour[13] that reform in 1992 was prompted in part by concern that cover for injuries arising from accidents had been extended by an expansive interpretation of "accident" in judicial and administrative decisions. The new Act therefore defined "accident" by reference to "a specific event or series of events" involving "the application of a force or resistance external to the human body ... but does not include a gradual process".[14] Nor did "accident" include treatment given by a registered health professional, so that it is made clear that "medical misadventure" cannot amount to "an accident".[15] In addition, the new legislation removed the equation of "personal injury by accident" with "medical misadventure". Accordingly, "personal injury caused by medical misadventure" is now defined in the 2001 Act by s 32 as "personal injury that is suffered by the person seeking or receiving treatment given by or at the direction of a registered health professional".[16]

[11] The Corporation argues that the restructuring and re-expression of the legislation in 1992, which has been carried through into the 2001 Act, means that pregnancy has not been covered since 1992 either for medical misadventure or rape because pregnancy is not within the definition of "personal injury" (contained in s 26 of the Act) which is now necessary for the cover provided by s 20. We were advised by the Solicitor-General that the Corporation considers it is not therefore required to

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

12 *Report of the Ministerial Working Party on the Accident Compensation Corporation and Incapacity* (1991).

13 WF Birch *Accident Compensation*: *A Fairer Scheme* (Office of the Minister of Labour, Wellington, 1991).

14 Accident Rehabilitation and Compensation Insurance Act 1992, s 3, definition of "accident".

15 Ibid.

16 The restriction to the person being treated is eased by s 32(6) to permit cover to spouses, children or third parties who suffer personal injury through infection by the person being treated.

provide cover for pregnancy following rape, but will pay for the costs of a termination if the woman is eligible for it. His submission was that this is because there is cover for "personal injury that is a mental injury" ("a clinically significant behavioural, cognitive, or psychological dysfunction") caused by specified criminal acts under s 21 (including sexual violation), irrespective of whether the pregnancy itself is covered, and that a termination can be covered as "treatment" for that mental injury.

"Medical misadventure"

[12] Medical misadventure arises out of medical error or medical mishap.[17] Medical mishap (an adverse consequence of treatment[18]) is not in issue here. Rather, it is said that the failed sterilisation resulted from medical error. Medical error does not exist "solely because desired results are not achieved", but must amount to "the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances".[19] Whether the failure in the sterilisation undertaken was because the appellant did not observe the standard of care and skill reasonably to be expected is not conceded or established. It is however assumed for the purposes of the strike out determination that the pregnancy was the result of such medical error.

Cover under the Act

[13] A person has cover for "personal injury" under the Act if the personal injury (as defined in s 26(1)) is caused in one of the ways specified in s 20(2). They are:

> (a) personal injury caused by an accident [defined in s 25 by reference to "a specific event, or a series of events ... that involves the application of a force (including gravity) or resistance external to the human body ... ", which "is not a gradual process", and which is not is "treatment given ... in New Zealand, by or at the direction of a registered health professional"]:

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17 Injury Prevention, Rehabilitation, and Compensation Act 2001, s 32(1).
18 Section 34.
19 Section 33.

(b) personal injury caused by medical misadventure suffered by the person [defined by s 32 as "personal injury that ... is suffered by the person seeking or receiving treatment given by or at the direction of a registered health professional" with the exception that where personal injury caused by medical misadventure is "an infection", spouses, children and third parties directly infected are covered]:

(c) personal injury caused by medical misadventure in circumstances described in section 32(6) [those infected by the person treated]:

(d) personal injury caused by treatment given to the person for personal injury for which the person has cover:

(e) personal injury caused by a work-related gradual process, disease, or infection suffered by the person:

(f) personal injury caused by a gradual process, disease, or infection that is personal injury caused by medical misadventure suffered by the person:

(g) personal injury caused by a gradual process, disease, or infection consequential on personal injury suffered by the person for which the person has cover

(h) personal injury caused by a gradual process, disease, or infection consequential on treatment given to the person for personal injury for which the person has cover:

(i) personal injury that is a cardio-vascular or cerebro-vascular episode that is personal injury caused by medical misadventure suffered by the person:

(j) personal injury that is a cardio-vascular or cerebro-vascular episode that is personal injury suffered by the person to which section 28(3) applies [a work-related injury].

[14] A failed sterilisation, being "treatment given by ... a registered medical practitioner", is excluded by s 25(2) from being an "accident" under s 20(1)(a). If pregnancy following a failed sterilisation is "personal injury" it can therefore only be covered under s 20 if caused directly by or in consequence of medical misadventure.

[15] A sexual assault, on the other hand, falls within the definition of "accident" which, apart from specific and temporally-confined occurrences described in s 25(1)(b) to (e) (and which are of no application to the present case), is:

(a) a specific event, or a series of events, that—

(i) involves the application of a force (including gravity) or resistance external to the human body, or involves the

sudden movement of the body to avoid such a force or resistance external to the human body; and

(ii) is not a gradual process.

If pregnancy is a "personal injury", it is covered if caused by a sexual assault.

"Personal injury"

[16] Under s 26, "personal injury" is defined as:

(a) the death of a person; or

(b) physical injuries suffered by a person, including, for example, a strain or a sprain; or

(c) mental injury suffered by a person because of physical injuries suffered by the person; or

(d) mental injury suffered by a person in the circumstances described in section 21 [which includes mental injury caused by an act which is a described offence, including sexual violation]; or

(e) damage (other than wear and tear) to dentures or prostheses that replace a part of the human body.

In addition s 26(2) excludes "personal injury caused wholly or substantially by a gradual process, disease, or infection unless it is personal injury of a kind described in section 20(2)(e) to (h)" (set out in [13] above). These provisions limit personal injury caused by a gradual process or infection or disease to those where the gradual process or infection or disease is: itself personal injury for which there is cover (s 20(2)(f)); "consequential on personal injury" or "treatment" "for which the person has cover" (s 20(2)(g) and (h)); or "work-related" (s 20(2)(e)). Except in the case of "work-related" gradual processes, they are concerned with consequential injury following on from personal injury caused by accident or medical misadventure or one of the other causative circumstances identified in s 20.

[17] Two aspects of the meaning of "personal injury" as defined in s 26 arise in the present case. First, it is necessary to determine whether the physical

consequences of pregnancy (and any mental consequences resulting from the physical consequences) amount to personal injuries (a question which in argument turned largely on whether the non-malignant natural consequences of conception are properly characterised as "injury"). Secondly, it is necessary to consider whether any personal injury resulting from pregnancy is properly seen as "caused wholly or substantially by a gradual process, disease, or infection" and, if so, whether it is within the exceptions to the general prohibition that such process does not amount to "personal injury" (as it will be if it is itself personal injury for which there is cover – in this case because it results from medical misadventure, in a case of sexual violation because it results from accident).

"Physical injury"

[18] The meaning of "personal injury caused by medical misadventure" covers physical impact upon the person, expansively viewed. As Blanchard J says, it has a statutory meaning. An infection is not in general speech referred to as a personal injury. And yet the terms of s 32(6) make it clear that it is so regarded for the purposes of personal injury caused by medical misadventure. Thus the legislation envisages that an infection may be a personal injury. Treatment includes lack of treatment, so that physical consequences which could have been prevented may be injury for the purposes of the definition. If a "sprain or strain" amounts to personal injury,[20] impregnation (with its profound impact on the physiology of the woman) is properly seen as physical injury for the purposes of the definition of "personal injury" adopted by the legislation. It must be interpreted in the light of the purposes of the Act which are concerned with establishing entitlements for impairment, rehabilitation, and treatment.

[19] Physical impact which is significant enough to support such responses (as pregnancy clearly is) is in my view "physical injury" within the meaning of the Act. Such interpretation, as Blanchard J explains, is consistent with the legislative

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[20] Section 26(1)(b).

history.[21] It involves physical impacts that are more than merely transitory and of greater consequence than the examples given of a strain or sprain.[22] I do not consider there to be any convincing reason based on the statute's text or purpose for treating pregnancy as being outside the scope of "personal injury" as defined in the Act. In this context, and for the reasons more fully developed by Blanchard J and Tipping J, I consider that 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.

Cover for "gradual process"

[20] I accept that many of the physical consequences of impregnation are the result of a gradual process. If the physical impacts of pregnancy relied on as personal injuries for which there is cover are wholly or substantially caused by a "gradual process" (pregnancy), they are covered only if within the causative descriptions in s 20(2)(e) to (h). Unlike an accident, which is defined by reference to a specific event or events in which physical force is applied and which excludes "a gradual process", "gradual processes" may result in "personal injury" if the personal injury is the result of the causation described in one of these four paragraphs.

[21] Section 20(2)(a) (personal injury caused by accident) and s 20(2)(b) (personal injury caused by medical misadventure) are not included in the exceptions. The injuries directly caused by accident or medical misadventure under s 20(2)(a) and (b) cannot therefore themselves be injuries "caused wholly or substantially by a gradual process, disease, or infection". But they may themselves be injuries which constitute or set up "a gradual process, disease, or infection" which, if in turn causative of personal injuries, will be covered if within the scope of cover provided within s 20(2)(e) to (h).

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21 At [39]–[48].

22 The physical consequences of pregnancy were discussed in detail in the judgment of Hale LJ in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 All ER 97 at [63]–[68]. See also the judgment of Mallon J in *Accident Compensation Corporation v D* [2007] NZAR 679 (HC) at [71]–[74].

[22] In paragraphs (g) and (h) of s 20(2) the personal injury which is the basis of cover must be caused by a gradual process *consequential* on personal injury or its treatment, for which original personal injury the person has cover (this might include personal injury by accident under s 20(2)(a) or personal injury caused by medical misadventure under s 20(2)(b) which is not itself a gradual process). As a result, the physical consequences of impregnation by rape (if accepted to be an accident within the meaning of s 25 and therefore covered by s 20(1)(a)), are within the scope of s 20(2)(g). So too is personal injury caused by infection contracted through an operation, which is covered by s 20(2)(h) on the basis of cover for the original physical injury by, for example, accident under s 20(2)(a) or medical misadventure under s 20(2)(b). If impregnation is, as I think, a personal injury caused by medical misadventure in the circumstances of a failed sterilisation, it has cover by reason of s 20(2)(b) and the consequential physical impact due to the developing pregnancy is covered through application of s 20(2)(g).

[23] There is also, I think cover for personal injuries due to the gradual process of pregnancy through s 20(2)(f). In that provision, the personal injury which is the subject of cover is caused by "a gradual process, disease, or infection *that is personal injury caused by medical misadventure suffered by the person*". Impregnation or conception strikes me as exactly such personal injury. It has immediate physical impact but it also constitutes a process which itself has consequential physical impact properly characterised, for the reasons discussed in [18]–[19], as physical injuries for the purposes of the definition of personal injury.

[24] While there is some awkwardness in the references both to the "personal injury" for which cover is provided by s 20(2)(f) and (g) and the causative "gradual process ... that is personal injury caused by medical misadventure suffered by the person" or the causative "gradual process ... consequential on personal injury for which the person has cover", the meaning is clearly intended to be expansive in relation to the consequences of the original personal injury, whether caused by medical misadventure or in some other way that is covered under the Act. If linked by "gradual process" or "disease" or "infection" to the original personal injury, subsequent personal injury is covered.

[25] Since I accept that impregnation is physical injury, I also consider that the physical consequences brought about by the process of pregnancy, which are themselves physical injuries within the definition of "personal injury" (for the reasons given at [20]), are within the cover provided by s 20(2)(f) and (g). The scheme of s 20 is that impregnation as a result of failed sterilisation is a physical injury covered by s 20(2)(b) and the consequential physiological changes through pregnancy are covered as personal injury "caused by a gradual process that is personal injury caused by medical misadventure" under s 20(2)(f) or "consequential on personal injury ... for which the person has cover" under s 20(2)(g).

[26] If impregnation is a personal injury suffered by medical misadventure it is covered by s 20(2)(b). If it is a personal injury suffered by accident, as is the case in respect of sexual violation (as Blanchard J concludes), then it is covered by s 20(2)(a). The subsequent and gradual physiological impacts of pregnancy are then themselves personal injuries, or are causative of personal injuries, which are covered under s 20(2)(f) and (g).

A "gradual process" need not be intrinsically harmful

[27] I agree with the conclusion reached by Mallon J in the High Court in *Accident Corporation v D* that "gradual process" is not a term confined to the progress of intrinsically harmful conditions.[23] I do not accept the argument that the references in s 20(2)(f) to "disease" or "infection" compel a different interpretation.

[28] In the first place, the words "a gradual process" are general, as they need to be to cover consequential personal injury resulting over time from personal injury for which there is cover. It is necessary to refer explicitly to "disease" and "infection" to ensure that a narrow view of consequences is not taken such as would confine them to what is intrinsic to the original personal injury. I view the references to "disease" and "infection" as clarifying that the coverage of medical misadventure extends to personal injury suffered as a result of disease or infection if it was caused

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[23] At [77]–[79].

by medical misadventure, as well as to personal injuries through gradual processes arising out of the personal injury caused by medical misadventure.

Is impregnation following a failed sterilisation "caused by medical misadventure"?

[29] I agree with Blanchard J at [80] and Tipping J at [86] that where the purpose of the medical treatment was to prevent pregnancy and pregnancy ensued because of medical error in carrying out the treatment, the impregnation is rightly seen as "caused" by the medical misadventure.

Conclusion

[30] In indicating that a woman who is impregnated through rape suffers personal injury with cover under s 20(2)(a) and has cover for the physical impacts of the gradual process of pregnancy under s 20(2)(g) (matters not directly in issue but which cannot be avoided in the analysis of the legislative provisions and their history), I prefer not to enter into the discussion about other circumstances in which impregnation and the process of pregnancy may be covered under the Act. They are matters which would require more thorough argument than has been addressed to us. In particular, I have considerable doubt about whether the concept of "consent", referred to in the reasons of Blanchard J and Tipping J, is useful in the context of this legislation and the meaning it gives to "accident".

[31] It is sufficient for the purposes of the present appeal to conclude that the appeal must be allowed. A woman who becomes pregnant following a failed sterilisation suffers personal injury in the impregnation caused by medical misadventure within the cover provided by s 20(2)(b) and further personal injuries during the pregnancy "caused by a gradual process that is personal injury caused by medical misadventure" within the cover provided by s 20(2)(f).

BLANCHARD, McGRATH AND WILLIAM YOUNG JJ

(Given by Blanchard J)

Introduction

[32] In January 2004 the first respondent had an operation which was intended to render her sterile. It transpired that the operation failed to achieve that purpose. A clip had not been correctly attached to one of her fallopian tubes. She became pregnant and in early 2005 gave birth to a child by caesarean section. She has brought proceedings in the High Court claiming damages from the surgeon and from the District Health Board which employed him. But can she do so? Assuming that the surgeon negligently performed the operation, does the patient have cover for medical misadventure under the accident compensation scheme? That would bar her common law claim.

[33] Because in a similar case,[24] which was not appealed to this Court, the Court of Appeal had already determined that cover did not exist in such circumstances – on the basis that pregnancy is not a "personal injury" under the legislation – the High Court in the present case made an order removing a question directly to the Court of Appeal. The question framed by the High Court was:

> Is the [first respondent's] pregnancy and/or the caesarean section she had to deliver her [child], said to have arisen as a consequence of the negligence of the [appellant and second respondent] (details of which are contained in the [first respondent]'s statement of claim filed in this proceeding) covered as personal injury caused by medical misadventure pursuant to the provisions of Section 20(2)(b) (prior to its amendment on 1 July 2005) of the Accident Compensation Act 2001?

[34] The Court of Appeal delivered a brief judgment in which, as was appropriate, it simply followed its earlier decision.[25] Leave to appeal was granted by this Court, with the consent of the respondents.

[35] The first respondent, the woman who had the failed operation, abides the decision of the Court. She indicated through her counsel that depending upon our

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[24] *Accident Compensation Corporation v D* [2008] NZCA 576.
[25] *Allenby v H* [2011] NZCA 251.

determination she would either maintain her damages claim or seek her entitlements under the accident compensation scheme. The Accident Compensation Corporation has appeared through counsel as an interested party to make the argument that cover is not available to her and to oppose the arguments in favour of cover which were made for the appellant surgeon, supported by the District Health Board, which is the second respondent.

The legislation

[36] The appeal concerns the provisions of the Injury Prevention, Rehabilitation and Compensation Act 2001[26] as they stood in 2004, before a series of amendments beginning in 2005. It will be necessary in due course to refer to a number of those provisions, but for the moment it suffices to give a brief description of the most relevant of them.

[37] A person has cover for personal injury suffered in New Zealand "caused by medical misadventure"[27] and for personal injury "caused by a gradual process, disease, or infection that is personal injury caused by medical misadventure".[28] Personal injury relevantly means "physical injuries … including, for example, a strain or a sprain".[29] Personal injury caused by medical misadventure means personal injury that:

> (a) is suffered by the person seeking or receiving treatment given by or at the direction of a registered health professional … ; and
>
> (b) is caused by medical error or medical mishap.[30]

A medical error is a failure of a registered health professional to observe a standard of skill and care reasonably to be expected in the circumstances.[31] This case

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[26] The Act is still in force but had its name changed to the Accident Compensation Act 2001 as from 3 March 2010.
[27] Section 20(1) and 20(2)(b).
[28] Section 20(1) and 20(2)(f).
[29] Section 26(1)(b).
[30] Section 32(1).
[31] Section 33(1).

involves alleged medical error. It does not involve a medical mishap, which is a rare adverse consequence of properly given treatment.[32]

[38] The question framed by the High Court expressly refers to para (b) of s 20(2) but para (f) was also a focus of the appeal. The appellant submits that the first respondent has cover under the Act because she suffered a personal injury caused by medical misadventure (under (b)) or a personal injury caused by a gradual process that is personal injury caused by medical misadventure (under (f)).

Legislative and interpretive history

[39] If the events in this case had occurred prior to the commencement of the Accident Rehabilitation and Compensation Insurance Act 1992, it is common ground that the first respondent would have had cover for her pregnancy. We have to determine whether things changed as a result of the reforms and restructuring of the accident compensation scheme by the 1992 Act, whose provisions were, for present purposes, carried forward in the Accident Insurance Act 1998 and again in the 2001 Act without substantive change. The case put forward by the Corporation is that under the 1992 Act and subsequently there was no longer cover for someone in the position of the first respondent; that her pregnancy was not a "personal injury" within the legislative scheme under the 2001 Act.

[40] The form and history of the legislation before the 1992 Act, as it related to pregnancy consequent on medical misadventure or sexual violation, casts some light, in our view, on the legislative purpose in that Act. We will therefore discuss the approach of the legislative scheme to pregnancies resulting from sexual violation, as well as to those resulting from failed sterilisations. Amendments to the scheme have marched in tandem, affecting or potentially affecting its application to both situations. The same question of whether the pregnancy is a personal injury as defined by the legislation from time to time arises in relation to both situations. Determination of that question in the one case may indicate how it must be determined in the other.

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[32] Section 34.

[41] In the Accident Compensation Act 1972, as originally enacted, "personal injury by accident" was not defined except for the purpose of including incapacity resulting from certain occupational diseases. An amendment was soon made, in 1974, which substituted a new definition. It did so, in part, rather cumbersomely by a cross-reference to a section which introduced cover for injuries inflicted in the course of criminal offending. Since it is agreed that the definition adopted in the Accident Compensation Act 1982 made no change in substance, but is much easier to follow, it is preferable to explain the changes made in 1974 by reference to the language used in 1982:[33]

> "Personal injury by accident"—
>
> (a) Includes—
>
> (i) The physical and mental consequences of any such injury or of the accident:
>
> (ii) Medical, surgical, dental, or first aid misadventure:
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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:
>
> (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:

[42] It will be seen that this definition extended the coverage of the scheme in two presently significant ways. First, the consequences both physical and mental of any medical misadventure were covered. A medical misadventure was, without more, a personal injury by accident. There was no definition of medical misadventure, but it plainly extended to any form of medical negligence giving rise to physical or mental consequences for the patient. Secondly, the definition expressly recorded that a pregnancy consequential upon rape was "actual bodily harm" and thus was a personal injury.

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[33] Accident Compensation Act 1982, s 2(1).

[43] Both these changes were mentioned in what came to be influential dicta from Cooke J in a dissenting judgment in *L v M*, a case about a failed sterilisation operation decided under the law as it stood before the amendment.[34] The Court of Appeal had to determine whether the Accident Compensation Commission (as the Corporation was then styled) had exclusive jurisdiction to decide when a person had suffered personal injury by accident and so was entitled to cover under the Act. The majority (Woodhouse and Richardson JJ) held that it did. Cooke J disagreed and therefore went on to consider whether a common law claim made by the woman against her doctor was barred by the Act. In doing so, Cooke J commented that the words "personal injury by accident" in the original (pre-1974) definition had to be understood in their ordinary sense:[35]

> In the ordinary sense the conception and the consequent childbirth can be said to have been caused by accident — namely the failure of the operation. But I do not think that either the conception or the childbirth could be described as a *personal injury* to the mother.

He added that it had not been argued that pregnancy, however unwanted, or the childbirth could naturally be described as personal injuries. But he took note of the changes made by the 1974 amendment, in particular by express inclusion of medical misadventure, which he considered had occurred in the case before the Court. He said it was arguable that under the new definition this would be enough to bring s 5(1) of the 1972 Act (the bar on claims for damages) into play — that it was unnecessary to show as well anything that would ordinarily be called a personal injury. He mentioned only the bar, but the obvious corollary is that he considered there would have been cover for the pregnancy resulting from the medical misadventure if it had occurred after the 1974 amendment. He observed also that after the amendment pregnancies caused by rape were included within the scope of personal injury by accident.

[44] In a case decided under the 1972 Act as it stood after the 1974 amendment, Speight J was guided by Cooke J's obiter comment about the amending legislation and held that there had been a personal injury by accident when a sterilisation

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34 *L v M* [1979] 2 NZLR 519 (CA).
35 At 529 (emphasis added).

operation failed because there had been what he termed "operational negligence or difficulties of an unexpected or undesigned variety".[36]

[45] The *L v M* case had gone back to the Corporation, which made a determination that the woman in question did have cover under the Act even as it stood before the 1974 amendment. The case eventually returned to the High Court where it is reported as *XY v Accident Compensation Corporation*.[37] The argument now was about what entitlements the woman had by way of compensation. Jeffries J said that what he called the basic liability question of cover under the Act was not before the Court. With some obvious reluctance he accepted that:[38]

> It has been decided, and it is not challenged in any way, that conception by a woman of a child in the circumstances was a medical misadventure *and an injury*. That itself could be described as a highly artificial result *but it is the base from which we must proceed*. It is also accepted that pregnancy and birth are still part of the injury.

[46] There matters rested until the 1992 Act. Whereas under the 1972 and 1982 Acts there was cover for "personal injury [caused] by accident" and four particular classes of case were expressly included within that coverage, under the 1992 Act it became necessary to show both that there was a personal injury and that it had a specified cause. The Act continued to give cover for "personal injury [which is] caused by an accident"[39] but it defined "accident" as a specific event or series of events involving the application of force external to the human body.[40] It dropped the reference to "actual bodily harm (including pregnancy and mental or nervous shock)" arising from the commission of certain crimes, including sexual violation by rape. But it continued cover for mental or nervous shock caused by criminal offending, including sexual violation by rape.[41] It also continued cover for personal injury caused by "medical misadventure"[42] but for the first time it defined that

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36 *Accident Compensation Commission v Auckland Hospital Board* [1980] 2 NZLR 748 (HC) at 753.
37 *XY v Accident Compensation Corporation* (1984) 2 NZFLR 376 (HC).
38 At 380 (emphasis added).
39 Section 8(2)(a).
40 Section 3.
41 Section 8(3).
42 Section 8(2)(c).

expression as medical error or medical mishap.[43] Medical misadventure was no longer treated as per se giving rise to personal injury.

[47] There was no specific mention of pregnancy in any of the provisions for cover under the 1992 Act or its successors. Nor was it mentioned in reports made beforehand. The 1992 Act had been preceded by a report from the Law Commission in 1988,[44] a report of a ministerial working party in 1991[45] and a report by the Minister of Labour, the Hon WF Birch, tabled in Parliament as a supplement to the 1992 budget. The Minister of Labour's report expressed concern that "a series of statutory, administrative, and judicial decisions" had resulted in an extension of the scheme's boundaries beyond what was originally intended in respect of "injuries" arising from an "accident", and that this had resulted in substantial cost increases.[46] While some important proposed changes in the scheme had been canvassed to correct the situation, there was no statement of any intended omission or limitation of the existing coverage for pregnancy resulting from medical misadventure or from rape.

[48] Following the passage of the 1992 Act there were several decisions in the District Courts declining cover for unwanted pregnancies resulting from failed sterilisations on the basis that they were not personal injuries within the reframed legislative scheme. There were no High Court decisions in point under any of the 1992, 1998 or 2001 Acts prior to *Accident Compensation Corporation v D*, although obiter views on the present issue were expressed either way.[47]

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43 Section 5(1).

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

45 *Report of the Ministerial Working Party on the Accident Compensation Corporation and Incapacity* (1991).

46 WF Birch *Accident Compensation*: *A Fairer Scheme* (Office of the Minister of Labour, Wellington, 1991) at 8.

47 *SGB v WDHB* [2002] NZAR 413 (HC) and *Patient A v Health Board X* HC Blenheim CIV-2003-406-14, 15 March 2005. Both Courts rejected on the facts allegations of a surgeon's breach of a duty of care to warn the patient. The existence of any bar to the common law claim therefore did not require decision.

Accident Compensation Corporation v D

[49] In *Accident Compensation Corporation v D* Mallon J held at first instance that pregnancy resulting from a medical error or mishap was covered under the 2001 Act.[48] After an extensive survey of the statutory history and the cases which had interpreted the legislation in its various forms, the Judge said that in England, Australia and elsewhere, where there had been negligence in sterilisation procedures and conception had followed, common law damages claims had succeeded for the immediate consequences of the pregnancy and childbirth. Mallon J saw the development of the common law in such cases, which included *McFarlane v Tayside Health Board* in the House of Lords[49] and *Cattanach v Melchior* in the High Court of Australia,[50] as having no direct relevance to interpretation of accident compensation legislation in this country, but as indicating that an earlier reluctance to allow compensation for the "God-given ability to conceive and bear child" was out of date.[51] Some of the cases had viewed pregnancy following a failed sterilisation as an "injury" for the purpose of a common law claim, because it was a harm to the woman or an invasion of her bodily integrity despite being a natural bodily process.

[50] Mallon J considered the physical impact of a pregnancy, saying that if the kinds of changes and resulting effects which she described had been suffered by reason of some other impact upon the body, there would be little difficulty in calling them harm, detrimental physical impacts, impairment or interference. To a lesser or greater extent the physical impacts gave rise to pain and discomfort.[52] They were, in her view, capable of being described as an injury. The Judge then found that s 26, defining personal injury and excluding certain gradual processes, did not exclude natural processes per se, the focus being on the cause. Personal injury caused wholly or substantially by a gradual process was covered if the personal injury was caused by medical misadventure. The legislative changes made in 1992 had not indicated an intention to exclude pregnancy, however caused, from cover.

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48 *Accident Compensation Corporation v D* [2007] NZAR 679 (HC).
49 *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL).
50 *Cattanach v Melchior* [2003] HCA 38, (2003) 215 CLR 1.
51 At [55].
52 At [75].

[51] The result Mallon J reached, in a comprehensive judgment to which the foregoing summary does not do full justice, was that pregnancy was capable of being described as a physical injury. It had not been expressly excluded from cover and nothing in the 2001 Act or its history indicated to the Judge that it was intended to be excluded. There was a strong policy consideration that supported its inclusion. It was covered where it was caused by medical error or mishap.

[52] The High Court judgment was, by majority, reversed on appeal.[53] Arnold and Ellen France JJ said that they had not found the question easy to resolve, but took the view that an unwanted pregnancy is not a "personal injury" under the 2001 Act because it is not a "physical injury"; that these phrases suggested a need for harm or damage.[54] It was plain to them that the 1992 legislation was intended to narrow cover and reduce the "elasticity" of the previous regime. The approach to pregnancy and to victims of crime had been raised in a submission by the Otago District Law Society on the 1992 Bill and no change had been made to reflect that concern.[55] The majority accepted that the way in which the common law had developed might well have some relevance. But the starting point was the statutory scheme which, the Judges considered, did not give cover in the case. They did accept that there was "something odd" about the fact that it appeared that, on their approach, an unwanted pregnancy would be the only result of medical misadventure for which cover was not available. But, if medical misadventure had not resulted in any injury, there would not be any cover "and that is in effect what occurs in the case of a pregnancy, albeit unwanted". There were "inevitably oddities in a non-exhaustive scheme that has to draw the line somewhere".[56]

[53] The majority also said that it was arguable that Mallon J had not fully grappled with the issue of what constituted the injury. She had referred to the physical impact of pregnancy but said that the injury began with conception. The majority endorsed comments made in an article on the case.[57] It cited difficulties with the High Court's approach raised by a commentator. It was the birth of the

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53 *Accident Compensation Corporation v D* [2008] NZCA 576.
54 At [54]–[55].
55 Otago District Law Society "Submission on the Accident Rehabilitation and Compensation Insurance Bill 1992" at [2.1] and [3].
56 At [69].
57 Rosemary Tobin "Common Law Actions on the Margin" [2008] NZ L Rev 37 at 51.

child that was the injury about which the plaintiff was complaining and for which she sought redress, rather than the physical impact of the pregnancy. Mallon J had described the injury as a gradual process beginning with conception and continuing throughout pregnancy. If that were so, then she needed to explain why conception itself could be classified as a physical injury. And if the injury did begin with conception and continued through the pregnancy until the child was born, then it was difficult to see why other unplanned pregnancies did not fall within the definition.[58] The majority added that the other alternative was that the injury occurred with the addition of the clip in the tubal ligation operation. But that in itself was not the complaint: rather, it was the resultant pregnancy.

[54] In his dissenting judgment, William Young P saw little difference between s 20(2)(b) and (f). He said that the expression "personal injury" mainly (and especially in the phrase "personal injury by accident") applied to adverse events associated with external trauma. But it was not so confined. It encompassed the adverse consequences of a "work-related gradual process, disease or infection" and, more importantly in the present context, s 20(2)(f) proceeded on the basis that the consequences of a "gradual process, disease or infection" caused by medical misadventure could be personal injury. The paradigm case of medical misadventure, the Judge said, was a misdiagnosis of cancer which results in a treatable condition becoming untreatable. The progress of the disease was not a "physical injury" or a "personal injury" within the ordinary meaning of those phrases but it was clear to him nonetheless that cover was available.[59] In this context – where causation was so significant – William Young P saw the expressions "personal injury", "physical injuries" and "gradual process" as sufficiently broad to encompass unwanted pregnancy which resulted from medical misadventure. He did not see his approach as inconsistent with the "rather confused" legislative history.[60]

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58 At [70].
59 At [77].
60 At [78].

The 2001 Act

[55] Part 2 of the 2001 Act (ss 19–38) determines whether a person has cover under the Act. Sections 20–24 give cover for personal injury or (under s 21) mental injury, but in either case only in stipulated circumstances. Sections 25–35 define key terms relating to cover, including, in s 26, "personal injury" and, in s 32, "personal injury caused by medical misadventure". The latter term is defined by reference to causation by "medical error", itself defined in s 33.

[56] As will be seen, each of s 20 [Cover for personal injury suffered in New Zealand] and s 26 [Personal injury] refers to the other. The best starting point is s 26(1) which, as relevant to the present case, defines "personal injury" (in para (b)) as "physical injuries suffered by a person, including, for example, a strain or a sprain". So, whenever the Act gives cover for some kind of personal injury, it is requiring that the claimant has suffered some form of physical injury unless the personal injury comes within the other paragraphs of s 26(1). As the illustration provided by s 26(1)(b) indicates, "physical injuries" are those suffered by the claimant which have some appreciable and not wholly transitory impact on the person but which are not necessarily long-lasting or ones that cause serious bodily harm.

[57] Subsection (2) of s 26 then excludes from the definition any personal injury caused wholly or substantially by "a gradual process, disease or infection unless it is a personal injury of the kind described in section 20(2)(e) to (h)".

[58] That leads back to s 20 which begins with a statement that:

> (1) A person has cover for a personal injury if—
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> (a) he or she suffers the personal injury in New Zealand on or after 1 April 2002; and
>
> (b) the personal injury is any of the kinds of injuries described in section 26(1)(a) or (b) or (c) or (e);[61] and
>
> (c) the personal injury is described in any of the paragraphs in subsection (2).

[61] It is only para (b) (physical injuries) which is relevant to this case.

Subsection (2) then lists various kinds of personal injury which have cover:

> (a) personal injury caused by an accident to the person:
>
> (b) personal injury caused by medical misadventure suffered by the person:
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> (c) personal injury caused by medical misadventure in circumstances described in section 32(6):
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> (d) personal injury caused by treatment given to the person for another personal injury for which the person has cover:
>
> (e) personal injury caused by a work-related gradual process, disease, or infection suffered by the person:
>
> (f) personal injury caused by a gradual process, disease, or infection that is personal injury caused by medical misadventure suffered by the person:
>
> (g) personal injury caused by a gradual process, disease, or infection consequential on personal injury suffered by the person for which the person has cover:
>
> (h) personal injury caused by a gradual process, disease, or infection consequential on treatment given to the person for personal injury for which the person has cover:
>
> (i) personal injury that is a cardio-vascular or cerebro-vascular episode that is personal injury caused by medical misadventure suffered by the person:
>
> (j) personal injury that is a cardio-vascular or cerebro-vascular episode that is personal injury suffered by the person to which section 28(3) applies.

[59] Cover under s 20 is therefore available only if, first, the claimant has suffered a personal injury and, second, that injury was caused in one of the specified ways. As the language used in s 20 indicates, in referring to the "kinds" of injury "described" in other sections, the application of the Act depends on judgment of likeness by reference to described categories. In addition, the cumulative elements of the definition indicate that the "kinds of injury" described in the paragraphs of s 26 are controlled by the requirement of the injury be "described" in s 20(2).

[60] Paragraph (a) of subs (2) effects the scheme's original purpose by giving cover for personal injury caused by an accident to the claimant. "Accident" is defined in s 25 in terms of certain occurrences, the commonest (and only relevant one) of which is:

> (a) a specific event, or a series of events that—

(i) involves the application of a force (including gravity) or resistance external to the human body; or involves the sudden movement of the body to avoid such a force or resistance external to the human body; and

(ii) is not a gradual process:

Section 25(2)(a)(i) excludes from "accident" an occurrence which is treatment given by or at the direction of a registered health professional. Therefore a medical misadventure cannot be an accident for the purposes of the legislation.

[61] Section 32 defines "personal injury caused by medical misadventure". It means personal injury that (a) "is suffered by the person seeking or receiving treatment given by or at the direction of a registered health professional" and that (b) is "caused by medical error or medical mishap".

[62] "Medical error" is defined in s 33(1) as "the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances"; in other words, where the registered health professional was negligent. The medical misadventure provisions are thus an exception to the "no fault" nature of the accident compensation scheme. That in itself may suggest that they are concerned with things which are not ordinarily to be classed as physical injuries. That view is reinforced by the statement in subs (3) of s 33 that medical error can arise, not just in the giving of treatment, but when the registered health professional is "deciding whether or not to give treatment" (and so extending cover to situations where no treatment is actually given).

[63] Subsection (6) of s 32 contains an even more unusual extension of the meaning of "personal injury". It treats a person (the claimant) to whom an infection is communicated by another person as having suffered a personal injury (caused by medical misadventure) if that other person "suffered a personal injury caused by medical misadventure and the injury is an infection". Under this provision, a negligently misdiagnosed or mistreated infection is classified as a personal injury both to the person who originally suffered it and to the person to whom it was subsequently transmitted.

[64] Returning again to s 20(2), it seems that a distinction must be intended as between para (b):

> "Personal injury caused by medical misadventure suffered by the person".

And para (f):

> "Personal injury caused by a gradual process, disease, or infection that is personal injury caused by medical misadventure suffered by the person".

In the first situation, in para (b), there must be a medical misadventure, that is, for our purposes, a medical error; and it must give rise to a physical injury. The Solicitor-General gave the example of the surgeon having amputated the wrong (good) leg of the claimant patient.

[65] In the second situation, in para (f), the personal injury must both (a) be caused by medical misadventure and (b) it must also take the form of a gradual process, disease or infection. The Solicitor-General suggested the example of gangrene consequent upon the amputation of the wrong leg. The gangrene could in this example be regarded as a personal injury because it would not have been suffered but for the severing of the leg. So it would also fit within para (g). The gangrene is certainly a disease or infection but, as well, it would seem to come within the term "gradual process." The Solicitor-General was, however, also helpfully able to supply an example of a gradual process which would not also be termed either a disease or an infection – an adhesion caused by excessive (negligent) radiation treatment. There is little difficulty in accepting that this would be a personal injury.

[66] Where, however, the medical misadventure involves misdiagnosis of a disease, perhaps without any form of treatment being given, it is not a natural use of language to speak of the progression of the disease (say the enlargement of a cancerous tumour and the spreading of the cancer to another part of the body) as a physical injury. Yet it is common ground that the affected person has cover under s 20 if this is suffered as a consequence of negligent treatment or negligent failure to administer treatment.

[67] Paragraph (c) of s 20(2) gives cover to the sufferer of the transmitted infection which is the subject of s 32(6) to which reference has already been made.

Discussion

[68] From the tortuous history of the accident compensation scheme and the complex drafting of the provisions in the 2001 Act, as it stood at the relevant time, which describe the coverage of the scheme, two conclusions can immediately be drawn. The first is that, as has been seen in the description of the provisions of the 2001 Act, the expression "personal injury" is used in an expansive way. It has a statutory meaning. The second is that it is most unlikely that Parliament, having expressly extended the scheme in 1974 to give cover for pregnancy resulting from rape, would have sought to remove that cover in 1992 without very directly addressing the subject in the new legislative provisions. It is all the more unlikely that Parliament would have been invited to do so in an indirect way when no mention was made in any of the parliamentary materials and no such change had been suggested by the Law Commission.

[69] It will be remembered that the Minister of Labour's report in 1992 had expressed concern about substantial cost increases in the administration of the scheme. But nothing in the materials to which we have been referred or in the submissions of counsel suggests that there had been cost increases relating to cover for pregnancies resulting from rape or from medical misadventure which could justify the adjective "substantial" in the context of the overall cost of the scheme. In fact, it seems that there are relatively few such claims. Mallon J recorded in her first instance decision in *Accident Compensation Corporation v D* that the Corporation had advised that there were only 72 such medical misadventure claims over an 11 year period from 1992 to 2003, that is, about six or seven per year.[62] Indeed, it seems that there may not be very substantial numbers of claims for any forms of medical misadventure, judging by the fact that from 1992 the legislation has made provision for a medical misadventure account, enabling special levies on registered health professionals,[63] but the Court was informed that has never been implemented.

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62 At [6].

63 Section 228.

We were not referred by counsel to any figures showing that there have been, or are likely to be, significant numbers of claims seeking cover for pregnancy following rape.[64] There would not appear to be any large sum at stake for the Corporation relative to the overall cost of the accident compensation scheme.

[70] The Minister of Labour also stated in his report in 1992, with reference to medical misadventure, that there would be no return to the right to sue. The signals were therefore that in this respect the legislation would not effect any change to the pre-1992 position – to "the base from which we proceed", as Jeffries J had called it.[65] That base, as we have seen, was a determination by the Corporation that pregnancy following a failed sterilisation was a personal injury by accident under the 1972 Act, even before it was amended. That determination was made despite the doubt expressed by Cooke J. In contrast to the lack of any indication of change in this respect, there had been specific mention in the Minister's report, or a direct overturning in the 1992 legislation, of three judicial extensions of coverage the effects of which it was intended to reverse.[66]

[71] The question, then, is whether the language used in the 2001 legislation leads the Court to find that, nevertheless, the previous coverage for pregnancy resulting from rape or a failed sterilisation has been removed. We are not persuaded by the arguments advanced by the Corporation that the 1992 Act, and consequently the 2001 Act, did in fact remove the existing cover in either of these respects. We will state our reasons and then deal with some particular submissions made by the Corporation.

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64 Under the abortion law as defined in the Contraception, Sterilisation, and Abortion Act 1977, and particularly s 187A of the Crimes Act 1961, the fact that a pregnancy is the result of a sexual violation may be taken into account in determining whether its continuance would result in serious danger to the life or physical or mental health of a woman, which is a ground for the authorisation of an abortion. Figures from the Abortion Supervisory Committee's reports to Parliament show only very small numbers of pregnancies have been terminated because of risk to mental health after criminal offending.

65 *XY v Accident Compensation* Corporation, above n 37, at 380.

66 Back injury caused merely by bodily movement (*Wallbutton v Accident Compensation Commission* [1983] NZACR 629 (HC)), mental injury where no physical injury was suffered (*Accident Compensation Corporation v E* [1992] 2 NZLR 426 (CA)) and injury not shown to be caused by an identified external event (*Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436 (CA)).

[72] To begin with, the words of para (a) of s 20(2) ("personal injury caused by an accident"), read in light of the definition of "accident" found in s 25, can fairly be seen as covering a pregnancy caused by rape. It has always been accepted that under the scheme an "accident" includes a deliberate act on the part of another person which causes injury to the person who seeks cover under the scheme. So someone assaulted by a burglar has cover for injuries caused by the assault. A rape is of course a species of assault. The conception of a child (an impregnation of the victim) is a physical consequence of the rape and should not be differentiated, for the purpose of coverage under the scheme, from any other physical consequence, such as a tearing of the vagina, which plainly may be far more transitory than the pregnancy. The pregnancy is properly to be regarded for the purposes of the accident compensation scheme as an injury suffered by her.

[73] It is true that s 21, which gives cover for mental injury caused by an act performed by another person where the act is of a kind within the description of certain offences, including sexual violation by rape, does not expressly confer cover for pregnancy as was the case under the legislation before 1992. But that is because it is dealing with cover for mental injury only.[67] The evident purpose of the section is to extend cover to a victim of an act falling within the description of a listed offence where the victim has suffered mental injury but no physical injury, and so would not otherwise have suffered a personal injury as defined in s 26. Under the latter section, mental injury is classed as personal injury only when suffered because of physical injuries or when suffered in the circumstances described in s 21.

[74] It would be quite extraordinary if, on the argument made for the Corporation, there were to be coverage for a rape victim for any physical harm suffered during the assault and for any mental injury whether or not she had suffered such physical harm, but any impregnation resulting from the rape was not covered as a physical injury. Apparently recognising this, the Corporation has in practice gone some way towards redressing the unfairness created by its restrictive interpretation by paying for the cost of termination of such a pregnancy in cases where it accepts that the rape victim has suffered a mental injury qualifying under s 187A of the Crimes Act but

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[67] "Mental injury" is defined in s 27 to mean "a clinically significant behavioural, cognitive, or psychological dysfunction".

not otherwise. That might well leave a victim who cannot successfully assert mental injury, or one who can but does not wish to have her pregnancy terminated, without cover for the expense and the pain and suffering of the pregnancy and childbirth. The legislation does not require such an unattractive result.

[75] The Solicitor-General reminded the Court that the absence of any specific mention of pregnancy in the 1992 legislation was drawn to the attention of Parliament in a submission on the Bill and that no change was made in response. But it may have been considered that a change was unnecessary because the reference in the 1982 legislation to pregnancy resulting from sexual violation was simply an illustration that did not need repetition. The absence of any acknowledgement of the point made by the submitter does suggest that the Select Committee must have believed that no radical change was being made.

[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. The conclusion that there is cover under para (b) makes it unnecessary to consider the alternative argument that the first respondent has cover under para (f) for the impregnation because it was a personal injury caused by a gradual process that was personal injury caused by medical misadventure. It is worth repeating, however, that the use of the term "personal injury" in para (f), and indeed throughout subs (2), in connection with events that would naturally be described as illnesses rather than injuries, shows that, despite s 26(1)(b), the term is being given an extended meaning.

[77] To hold that there was no cover in the circumstances of this case would be to create what the Court of Appeal majority in *Accident Compensation Corporation v D* recognised would be an "odd" gap in the general coverage for medical misadventure which would be detrimental for the woman patient (in that she could not recover compensation without litigation) and might cause the registered health professional

either to have to pay for additional insurance cover, over and above the compulsory accident compensation levies, or to decline to perform sterilisations because of the risk of being sued.[68] And if common law damages claims were to be permitted they would, based on the experience in other jurisdictions, give rise to very difficult issues in the assessment of damages, as is demonstrated by the cases to which Mallon J referred.[69]

[78] The fact that if the same surgeon also performed vasectomies he or she might need insurance in respect of those procedures does not persuade us otherwise.[70] The risks there for the professional would seem to be related more to the quality of the advice given to a patient rather than to the performance of what is a relatively simple procedure. In any event, the suggested anomaly in that instance arises from the fact that the unwanted consequence of negligently performing a procedure on the man is visited in physical terms on a third party (the woman), and that there is no applicable statutory provision equivalent to s 32(6). In other than such an exceptional circumstance the Act confines cover for medical misadventure to an injury suffered by the person being treated, which is of course the position of a woman whose sterilisation fails. Denial of coverage for her pregnancy consequent upon medical misadventure would not be consistent with the overall spirit of the statute which appears to us still, after 1992, intended to provide universal coverage for accidents and for the consequences of medical misadventure.

[79] Some further arguments for the Corporation require an answer. It was submitted that pregnancy is a natural process and should not be regarded as a physical injury to the mother, even if it is an unwanted consequence of rape or of negligence by a surgeon. The Solicitor-General argued that, in the absence of some complication of such a pregnancy (which he accepted might sometimes qualify for cover) there is no damage to the woman's anatomy. The pregnancy, it was submitted, is merely the occurrence of a unique natural biological process which has to occur (as an essential part of human existence). In contrast, the development of an

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68 The same problem would exist for an employer of a registered health professional, such as the second respondent.

69 See Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers Ltd, Wellington, 2009) at [6.9.03].

70 Cover is not available in such circumstances: see *SGB v WDHB*, above n 47.

undetected cancerous tumour is destructive (though the Solicitor-General did not say it was unnatural) and not bound to occur.[71]

[80] If, however, the purpose of the medical treatment is to prevent pregnancy from occurring and by reason of medical error that purpose is not achieved, it does not seem to us that, just because the pregnancy then occurs as a biological process, there should be no cover for the consequences. The development of the foetus following impregnation occurs because of the medical error, just as in the case of the undetected tumour. It causes significant physical changes to the woman's anatomy, which of course occur naturally but still cause discomfort and, at least ultimately, pain and suffering. If a disease or infection consequential on medical misadventure can be classified by the statute as a personal injury, it does not involve any greater stretching of language to similarly include a pregnancy which has the same cause. We should add that it can make no difference that the direct cause of the pregnancy is an act of sexual intercourse which occurs separately from the negligently performed operation. The pregnancy is still caused by the surgeon's negligence, and would not have happened without that negligence. It is the same in a case of negligent treatment by a health professional falling under s 32(6), where the transmission of the infection occurs separately from the failure to properly treat the patient who passes on the infection, and is directly caused by the proximity of the patient and the person to whom the infection is passed. Another example would be where a medical practitioner negligently carries out a vaccination procedure sought by a patient who later catches from a third person the very disease against which he or she wished to be protected.

[81] The Solicitor-General also drew attention to the fact that the Act does not authorise midwives to provide treatment services for persons with cover under the Act. He made the submission that if Parliament had intended pregnancy to be covered it would have permitted the use of the services of a midwife in that instance. It is certainly curious that it has not done so, but that may just have been an oversight which happened because the subject of pregnancy was not being addressed in a

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[71] The Solicitor-General did not in terms seek to have the Court adopt the approach taken in the Court of Appeal in *Accident Compensation Corporation v D* of excluding cover for pregnancy because it is not a pathological condition, but his argument appeared to be a re-casting of that view.

direct manner. It is, weighed against the arguments in favour of cover, insufficient to persuade us that cover against pregnancy was intended to be withdrawn from women who were victims of rape or suffered medical misadventure in the form of a failed sterilisation.

[82] Finally, it was also submitted for the Corporation that to hold that there was cover in the present case or in the case of rape might open the door to claims for other unwanted pregnancies, such as could result from a bursting condom or indeed from unprotected sexual intercourse. But this "floodgates" argument lacks force. It is obvious that in those other situations there is unlikely to be any element of treatment and thus no medical misadventure. And where a woman chooses to engage in intercourse, during which she suffers no physical harm but as a result of which she falls pregnant, it cannot sensibly be said that there has been an "accident" within the statutory definition. Given the history of the legislation and the lack of anything to indicate that any pregnancy which does not result from rape or medical misadventure is to be covered, the definition of "accident" must be adjusted for the particular context, as the interpretive section, s 6, enables. Although in physical terms there is an application of force in any act of sexual intercourse, a resulting pregnancy should not be treated as an accident consequent upon an application of force where the woman has truly given her consent to the act of intercourse. That plainly would be outside the purpose of the accident compensation scheme.

[83] Having seen Tipping J's concurring reasons in draft, we add that in dealing with an exceptional situation we are not to be taken as in any way suggesting any change in the settled position concerning cover for sports injuries or injuries incurred in other situations of risky activity.

Result

[84] For these reasons, we would allow the appeal and hold that the first respondent had cover under the Act for the physical effects of her pregnancy. The question framed by the High Court should therefore be answered "yes". Costs should be reserved.

TIPPING J

[85] I gratefully adopt Blanchard J's account of the issues arising on this appeal and his description of the relevant legislative provisions. I agree with his conclusion that pregnancy which results from a failed sterilisation operation has cover under the 2001 Act. The personal injury involved results from medical misadventure. I also agree with the analysis which Blanchard J has adopted to reach that conclusion. Because of the significance of the issues involved I will briefly state my own reasons for allowing the appeal.

[86] It is self-evident that the reason a woman undergoes a sterilisation operation is because she wishes to avoid becoming pregnant. She wishes to eliminate that risk when engaging in sexual intercourse. If the sterilisation operation is negligently performed, and therefore ineffective, the resulting pregnancy is caused by medical misadventure, under the terminology and criteria in force at the relevant time. That much is relatively straightforward.

[87] The next question, and it is a key question in the case, is whether the resulting pregnancy amounts to "personal injury" under and for the purposes of the legislation. That expression is defined to mean "physical injuries ... including, for example, a strain or a sprain". The question whether a woman who becomes pregnant as a result of a failed sterilisation operation thereby suffers physical injuries is the same question as that which arises if a pregnancy is the result of rape. The answer must logically be the same in respect of both causes. The fact that one results from medical misadventure and the other from accident cannot make any difference.

[88] I am unable to accept that the changes which occur to a woman's body as a result of pregnancy do not come within the compass of the expression "physical injuries" in the context of the legislation in issue. Clearly the bodily changes are of a physical kind. The only issue is whether they represent an injury or injuries for the purposes of the Act. I consider they do. In both cases (rape and failed sterilisation) the bodily changes which ensue qualify as personal injury. They are apt to cause a substantial degree of physical discomfort and, quite often, substantial pain and

suffering. The changes produce bodily sensations which are of much greater consequence and duration than the examples given of a strain or a sprain.

[89] I am not persuaded to a different view by the argument that pregnancy is "a natural process" and is necessary for the survival of the human species. A woman is entitled to choose whether or not to become pregnant. If she does not wish to do so, the consequences of her becoming pregnant are not to be discounted because pregnancy per se is a natural process. A woman who takes steps to avoid a natural consequence of sexual intercourse ought to be regarded as suffering physical injury when those natural consequences follow as a result of medical misadventure. In the same way, a woman who is raped, and becomes pregnant as a result, thereby suffers physical injury caused by the accident of sexual assault.

[90] This reasoning does not lead to all unwanted pregnancies being covered by the Act. In order to attract cover the pregnancy must be caused either, as here, by medical misadventure, or by rape.

[91] In order to explain why that is so, it is necessary to examine the relevant definition of "accident" set out in s 25(1)(a)(i) of the 2001 Act. It is as follows (emphasis added):

> **25 Accident**
>
> ...
>
> (a) *a specific event, or a series of events, that—*
>
> (i) *involves the application of a force (including gravity) or resistance external to the human body,* or involves the sudden movement of the body to avoid such a force or resistance external to the human body; and
>
> (ii) *is not a gradual process*.

[92] For there to be an accident under this definition, there must be an application of external force to the body of the person said to have suffered the accident. In the case of rape, the relevant application of force is by the rapist's penis to the victim's genitalia. That force is applied without the true consent of the victim. In a case where there is consent, but it is vitiated by some factor, and indeed in some other

cases, the amount of force involved may well be exactly the same or virtually the same as when the sexual connection is truly consensual. Hence I do not consider it possible to say that in the case of truly consensual sexual connection no external force is involved. That is not an appropriate basis upon which to distinguish cases of rape from those involving ordinary consensual intercourse. The appropriate basis for the distinction between the two lies in the absence or presence of true consent. If there is no true consent the force applied amounts to an accident. If there is true consent the force applied does not amount to an accident.

[93] At first blush this distinction might appear dubious in light of the definition of accident. The definition makes no distinction between force to which the recipient consents and force to which she does not consent. But s 6 of the 2001 Act makes it clear that, as is conventional, the definition of "accident" in s 25 applies only if the context does not otherwise require. In the present very unusual and difficult context, I consider the definition of accident cannot apply without some adjustment. The context is that of a fundamental biological process whereby human life is perpetuated. The force involved is of a particular and unique kind. As I have demonstrated, the force in a rape case may be no more than the force in a wholly consensual case. Parliament cannot have intended that the force involved in a consensual case would mean that an ensuing unwanted pregnancy which occurred by reason, for example, of failed contraception or carelessness as to contraception, had cover under the Act because it resulted from an accident. It is necessary therefore in this very special context to adjust the literal meaning of the 25 definition of accident, as permitted by s 6, so as to exclude from its reach the application of force involved in sexual intercourse to which the woman concerned truly consents. Pregnancy which results in those circumstances is not caused by an accident.

[94] I am not suggesting that in other contexts, such as sports injuries, the presence or absence of consent should dictate whether an accident has occurred. An injury suffered as a result of willing participation in an activity where the risk of injury from external force is inherent, is, despite that willing participation, still personal injury caused by an accident. I am adopting the foregoing approach to what constitutes an accident in a pregnancy case solely to deal with the fact that force is involved in a case of consensual sexual intercourse. I consider it would be contrary

to the policy and purposes of the accident compensation legislation to regard such consensually applied force as meaning that an ensuing pregnancy had been caused by an accident.

[95] Returning to the present case, I agree with Blanchard J that the first respondent's pregnancy attracted cover under the 2001 Act because it involved a personal injury as defined in s 26(1)(b). That personal injury was caused by medical misadventure under s 20(1)(c) via s 20(2)(b). The appellant cannot therefore be sued at common law. I would therefore allow the appeal with the consequences proposed by Blanchard J.

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