CASE NOTE

WRONGFUL BIRTH AND LOST WAGES: *J v Accident Compensation Corp*

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Wrongful birth cases, where the claimant seeks damages for undergoing an unwanted pregnancy after receiving negligent advice or treatment, raise a difficult mix of legal and policy questions. New Zealand courts have juggled with such claims and their place within accident compensation legislation since the no-fault compensation scheme was first introduced in 1972.[1] Under the current statute, the Accident Compensation Act 2001 (the Act),[2] the courts have recognised that where a pregnancy arises from medical misadventure, such as a negligent sterilisation operation, the resulting pregnancy and birth may be a personal injury for which the claimant is entitled to compensation under the scheme.

In *J v Accident Compensation Corp* the claimant, Ms J, went further, seeking earnings related compensation (ERC) under the Act for being unable to work while she raised her child.[3] The Court of Appeal split 2–1, with the majority rejecting her claim. The majority held she had recovered from the covered injury (the pregnancy and birth) and was unable to work due to her parenting responsibility and choices.[4]

This note reviews the judgments and discusses gender issues arising in the case. In summary, the way Ms J's injuries are discussed significantly downplays

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1 For more information on the case law and legislative changes see Rosemary Tobin "Common Law Actions on the Margin" [2008] NZ L Rev 31 at 46–52.

2 Originally called the Injury Prevention, Rehabilitation, and Compensation Act 2001 but renamed in 2010. See Accident Compensation Amendment Act 2010, s 5(1)(a).

3 *J v Accident Compensation Corp* [2017] NZCA 441, [2017] 3 NZLR 804 [*J* (CA)].

4 At [32] per Cooper and Asher JJ.

the way in which she may remain injured after the birth. Second, the decision makes clear that the costs of the negligently performed sterilisation primarily rest on the complainant, the mother, and no common law remedy for her loss is available.

I begin by providing a short history of coverage for "wrongful birth" under New Zealand's accident compensation scheme, then summarise the background facts, the majority and minority opinions, and the issues before the Court of Appeal in Ms J's case.

I A SHORT HISTORY OF ACCIDENT COMPENSATION CORPORATION (ACC) COVERAGE FOR WRONGFUL BIRTH

Coverage of "wrongful birth" under the accident compensation scheme has varied with various iterations of the legislation and case law. A 1974 amendment to the original 1972 legislation included any "medical misadventure" as an eligible personal injury for compensation.[5] This was interpreted by the Courts (and therefore ACC) as including pregnancy resulting from a failed medical procedure, such as a failed sterilisation.[6] Pregnancy following a sexual assault was also covered as it was specifically included as "actual bodily harm" that could occur from a sexual crime.[7] Therefore under the 1972 and 1982 accident compensation statutes, following a wrongful birth an eligible claimant could recover a lump sum for the injury of the pregnancy and birth, expenses and lost earnings during that time.[8] However, coverage did not extend to pecuniary losses suffered after the birth. A claim for the costs of raising the child for the first six years of its life was denied in *XY v Accident Compensation Corp* in 1984 on the basis that the injury (the pregnancy) had ended and maintenance of a child was not a loss but an ordinary part of parenthood.[9]

5 Accident Compensation Act 1972, s 2(1) definition of "personal injury by accident", as amended by the Accident Compensation Amendment Act 1974, s 2(1).

6 See, for example, *Accident Compensation Commission v Auckland Hospital Board* [1980] 2 NZLR 748 (HC) at 753. Due to a comment by Cooke J in a dissenting judgment in *L v M* [1979] 2 NZLR 519 (CA) at 530, there was some doubt expressed in later judgments that such a medical misadventure would also amount to "personal injury", even though it was accepted to be covered by ACC.

7 Accident Compensation Act 1972, s 105B(1), inserted by the Accident Compensation Amendment Act 1974, s 6.

8 See Accident Compensation Act 1972, ss 105B(1) and 105B(2), and Accident Compensation Act 1982, s 2, definition of "personal injury by accident" at (a)(iv), and s 92.

9 *XY v Accident Compensation Corp* (1984) 2 NZFLR 376 (HC) at 381.

The significant legislative changes enacted in the Accident Rehabilitation and Compensation Insurance Act 1992 narrowed the scheme, and were considered by the courts to have removed coverage for pregnancy following medical misadventure.[10] The 2001 Act, however, was widely regarded as returning the scheme to more generous coverage, including for medical cases. Initially the Court of Appeal denied wrongful birth claims under the 2001 Act.[11] However in 2012, the Supreme Court in *Allenby v H* held that pregnancy resulting from a failed sterilisation was a personal injury caused by medical error under the 2001 Act.[12] Two of the three judgments considered that such a pregnancy was also covered under the 1992 Act and that the 1992 Act had not changed the law on that point.[13]

There are a small but steady number of wrongful birth claims to ACC.[14] It was reported that in the two years after the *Allenby* judgment, ACC paid out $40,470 on 18 accepted claims for negligently performed sterilisation operations, some of which pre-dated the *Allenby* case.[15] ACC refused 27 claims, primarily where it was decided the pregnancies were not a result of the treatment.

II *J v ACC*: FACTS

In 1998, Ms J underwent a sterilisation operation in order to avoid future pregnancies. The operation failed as the clips that should have been placed on her fallopian tubes were instead attached to her bladder wall reflection. Eight years later, Ms J discovered she was in the late stages of pregnancy and gave birth.

Ms J sought cover from ACC for the pregnancy arising from the failed sterilisation operation. ACC initially declined her claim but this was overturned on review. ACC then appealed to the District Court, where, in line with existing New Zealand authority at that time,[16] her claim was denied.

10 See, for example, *Accident Compensation Corp v D* [2008] NZCA 576.

11 See, for example, *Accident Compensation Corp v D*.

12 *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425 at [95].

13 At [9] per Elias CJ, and at [71] per Blanchard J.

14 The Accident Compensation Corp is the Crown entity responsible for administering New Zealand's universal no-fault accident compensation scheme.

15 Deidre Mussen "Mums sue ACC for cost of raising unplanned children" *Stuff* (online ed, 25 September 2014).

16 See *Accident Compensation Corp v D*, above n 10.

However, following the 2012 decision of the Supreme Court in *Allenby* — that pregnancy resulting from medical misadventure could be covered as an injury under the Act[17] — ACC accepted her claim.

Initially, Ms J was granted cover for the physical effects of the pregnancy and birth. ACC determined she was entitled to ERC for approximately 11 weeks, which covered the immediate pre and post birth period, as "she was unable to work because of her pregnancy at that time".[18] It appears the cessation date was chosen (around 10 weeks past the birth) because at that time she "was discharged from medical services following the birth of her son".[19]

Ms J sought a review of ACC's decision to end her ERC at that date, which was dismissed. She successfully appealed to the District Court, where Judge Powell held that her responsibility to care for her son was a direct consequence of the pregnancy and nothing in the legislation required pregnancy as an injury to stop at the birth of the child or meant the consequences of the pregnancy could not be considered in determining entitlements.[20] ACC appealed to the High Court where Nation J found in ACC's favour.[21] Justice Nation considered Ms J's injury to be the pregnancy and held that following the birth of the child "because J's pregnancy was no longer operative" she could no longer be entitled to compensation.[22]

Justice Nation granted Ms J leave to appeal to the Court of Appeal on four questions of law, as follows.[23]

> i) Would it be inconsistent with the scheme of the Act governing entitlement to weekly compensation to extend cover to a mother who is entitled to cover for her pregnancy beyond the period when she is suffering the physical effects of the pregnancy?

17 *Allenby v H*, above n 12. This was a civil claim for damages by Ms H against the surgeon for her sterilisation operation. The surgeon applied to strike out her claim on the basis that she had cover under the Insurance, Rehabilitation and Compensation Act 2001. ACC appeared as an interested party to argue that she did not have coverage under the ACC scheme.

18 *J* (CA), above n 3, at [7].

19 *J v Accident Compensation Corp* [2015] NZACC 222 (DC) at [2] [*J* (DC)].

20 At [14] and [19].

21 *Accident Compensation Corp v J* [2016] NZHC 1683, [2016] 3 NZLR 551 at [2].

22 At [40].

23 *J v Accident Compensation Corp* [2016] NZHC 2769.

ii) In terms of s 103(2) of the Act, can a person be "unable" to engage in pre-injury employment on grounds other than physical or mental inability?

iii) Does the Act require that pregnancy, as an injury, stop at the birth of the child?

iv) Should s 103(2) be interpreted so as to allow a claimant to establish an inability to engage in employment because of the consequences of a pregnancy, namely the birth of a child, independent from the physical effects of the pregnancy itself?

Prior to the hearing in the Court of Appeal, Ms J sought leave from the Supreme Court to appeal directly to that Court under s 8 of the Supreme Court Act 2003 (a "leapfrog" appeal). The Supreme Court determined it did not have jurisdiction to hear the appeal because the High Court decision was pursuant to s 162 of the Act, which provides that decisions of the Court of Appeal on statutory appeals under the accident compensation legislation are final.[24]

III THE COURT OF APPEAL DECISION

A The accident compensation legislation

To receive ERC Ms J needed to come within s 103 of the Act. Her pregnancy was an eligible personal injury because it arose from a medical misadventure.[25] Of relevance, s 103 provides:

> **103 Corporation to determine incapacity of claimant who, at time of personal injury, was earner or on unpaid parental leave ...**
>
> i) 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.

24 *J v Accident Compensation Corp* [2017] NZSC 3 [*J* (SC)]. See generally Accident Compensation Act 2001, s 162.

25 Following *Allenby v H*, above n 12, see *J* (CA), above n 3, at [6]. Pregnancies that are a result of rape are also an eligible personal injury.

...

iii) 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.

iv) If the answer under subsection (2) is that the claimant is unable to engage in such employment, the claimant is incapacitated for employment.

v) 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.

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

The Court of Appeal split 2–1 on Ms J's claim. Justices Cooper and Asher rejected Ms J's claim. They considered Ms J had recovered from her pregnancy at the time the ERC was halted and that her inability to work arose not from the injury of pregnancy or birth but from the need to care for the resulting child.[26] Thus they answered the questions of law posed as follows:[27]

a) Yes: it is inconsistent with the scheme of the Act governing entitlement to weekly compensation to hold that a mother, who is granted cover for her pregnancy, is entitled to weekly compensation beyond the period when she is suffering the physical or mental effects of the pregnancy.

b) No: for the purposes of s 103(2) of the Act, a person cannot be considered to be "unable" to engage in pre-injury employment on grounds other than physical or mental inability.

...

d) No: s 103(2) should not be interpreted so as to allow a claimant to establish an inability to engage in employment because of the consequences of a pregnancy, namely the birth of a child, independent from the physical effects of the pregnancy itself.

The majority considered question (c) did not need to be answered as no party

26 *J* (CA), above n 3.

27 At [46].

had argued "that the physical and mental effects of pregnancy necessarily stop at the moment of the birth of a child".[28]

President Kós dissented, concluding that Ms J was entitled to ERC under s 103 "for so long as the need to care for the child precluded her return to employment".[29] President Kós considered Ms J's incapacity to work was directly caused by the injury, stating "Ms J was both legally and morally obliged to care for her child. She could not just ignore it and go out to work."[30] Consistent with s 103(2), she was unable to return to her previous employment as a kitchen porter and housekeeper in a hotel because of her personal injury.[31] His Honour concluded that Ms J would be entitled to ERC while her child care obligations were unrelieved by family or paid provider assistance, or until the child started school, any of which would allow her to resume her former employment.[32]

The majority and Kós P agreed on the approach for interpreting the ACC legislation — "generous and unniggardly" as per existing case law[33] — and there was no difference of opinion in how previous New Zealand case law on wrongful births may apply. But the majority and the minority differed on the heart of Ms J's claim, which was the nature of the injury and what prevented her from returning to work.

The majority divorced the baby from the pregnancy and birth and considered that Ms J's incapacity to return to her previous employment resulted from needing to care for her baby, not the covered injury.[34] In addition, the majority considered the need to care for the baby to be a 'parental barrier' to employment (that is, a separate cause) and the statutory ERC provisions only covered where a claimant was unable to work due to mental and physical barriers arising from the injury.[35] In contrast, for Kós P the "presence of the baby is the incontestable and permanent consequence of the injury suffered by

28 At [46].

29 At [51].

30 At [64].

31 At [64]. See also *J* (CA), above n 19, at [7].

32 At [72].

33 At [14] per Cooper and Asher JJ and at [52] per Kós P (citations omitted)

34 See, for example, at [32].

35 At [26]–[28].

Ms J".[36] President Kós considered Ms J's incapacity to return to her employment to be a direct consequence of her injury.[37] He noted that the ability of some mothers who have suffered a wrongful birth to make childcare arrangements may relieve the incapacity preventing them working, but "the inability to make such arrangements does not cause the incapacity".[38]

I do not intend to discuss the merits of the Court's analysis from a statutory analysis or foreseeability point of view. I suggest that in the absence of express statutory language, Ms J's eligibility under s 103 is essentially determined by policy considerations about loss-apportionment, the "cost" of motherhood and parenting, and views on the physical and mental impact of mothering a baby. In particular there are two matters that are relevant from a gender perspective. These are:

i) the lack of detail or analysis of any post-birth physical and mental symptoms Ms J was facing. The judgments are silent on the substantial physical and mental changes that occur to a woman *after* the pregnancy and birth of a child. This analysis is highly relevant to when her injury ended; and

ii) the references in the two judgments to whom should bear the cost of raising the child, and, in the majority's judgment, the lack of remedy available to Ms J.

B When does the injury end?

The majority recorded ACC's position that Ms J's entitlements end when the physical consequences of childbirth to the mind and body are "fully healed".[39] The judges also adopted the statements of Blanchard and Tipping JJ in *Allenby* that the physical changes of pregnancy may involve discomfort, substantial pain and suffering.[40]

There was no examination of the physical and mental effects that may occur either to Ms J or to other claimants in her position several weeks after the birth. Such an analysis is necessary to determine whether these are effects of the pregnancy or the birth, or from having to care for a fully dependent newborn

36 At [65].

37 At [67].

38 At [67].

39 At [1].

40 At [17]–[18].

baby. The Court did acknowledge that a woman may not be able to work for a period because of the pregnancy and birth, but stated that once she recovered, as they found Ms J had, this incapacity was gone.[41] The District Court decision recorded that just over 10 weeks after giving birth Ms J was "discharged from medical services" and ACC had submitted that "there is no evidence that the appellant was incapacitated beyond [the date of the discharge] due to the physical effects of her pregnancy".[42] Nor does it appear that any evidence as to continuing injuries was before the Court of Appeal or High Court. The majority starkly framed the pregnancy and birth as completed events, stating "[t]he pregnancy is complete; Ms J has recovered".[43] While it is possible that at 10 weeks after birth Ms J had fully recovered and was in her pre-injury position, there was no indication that the view expressed was based on medical evidence.[44] Certainly it would be difficult for the Court to have made a finding of continuing incapacity on medical grounds in the absence of evidence to the contrary — a reminder for counsel in the preparation of the initial review and subsequent appeals. But, there was also no recognition in the judgments that at 10-week post-partum woman would likely still be suffering from various physical and mental ailments.

I argue that it would be a rare mother who, 10 weeks after giving birth, is "fully recovered" and has returned to her pre-injury state. There is no reference in the judgments to fatigue, extreme and constant sleep deprivation, massive hormonal changes (including higher relaxin levels, meaning a mother is prone to more sprains and strains), possible lactation, possible after-effects of the birth (such as healing scars from a caesarean, episiotomy or vaginal tears), or post-natal depression.[45] These symptoms are generally invisible in public discussions and cultural representations of new mothers. Should Ms J have had such symptoms, cataloguing these would have been necessary in order to

41 At [32].

42 *J* (CA), above n 3, at [2] and [7]. There appears to have been evidence before the District Court of Ms J's pre-pregnancy health, some of which is briefly recorded in noting "contextual matters".

43 *J* (CA), above n 3, at [32].

44 The meaning of the reference to Ms J having being discharged from "maternal care" at [2] of the District Court judgment is unclear. It seems most likely to be the standard discharge from her lead maternity carer (midwife or obstetrician) to return to receiving primary care from her general practitioner.

45 See, for an example of birth after-effects, Crishan Haran and others "Clinical guidelines for postpartum women and infants in primary care – a systematic review" *BMC Pregnancy and Childbirth* (online ed, 29 January 2014).

determine whether her ability to return to her pre-injury employment under s 103(2) was impaired. Those symptoms may not prevent her from working, but to suggest that a new mother is "completely recovered" is, it seems, unrealistic.

The majority's view of Ms J's "complete recovery" informed two key planks of their judgment. First, it allowed their Honours to portray Ms J's circumstances and continuing inability to work as inconsistent with the statutory provisions for ERC. For example, the Act requires ERC eligibility to be determined by medical and occupational assessments.[46] Because the majority considered Ms J to be completely recovered, they considered a medical assessment would be "inefficient and nonsensical" for her.[47] However, for the reasons above, I suggest that if a new mother had a medical assessment at 10 weeks post-birth, a doctor would likely note a number of "symptoms" that she did not suffer in her pre-injury, pre-pregnancy, state. A medical and occupational assessment would, therefore, be highly relevant to whether Ms J could return to work. Second, it allowed the majority to characterise any remaining effects on Ms J as separate to the physical and mental effects of the injury, that is, "parental barriers". Therefore, these remaining effects did not fall within the majority's interpretation of s 103 as concerning only physical and mental barriers to employment, even though this is not expressly stated in the Act.[48]

The gender make-up of those present in the courts cannot be ignored. All the Judges who heard the ERC claim, from District Court, High Court to Court of Appeal, were male.[49] All counsel appearing were male, with the exception of counsel for ACC in the District Court. Some of the male lawyers and judges involved were fathers. I am not suggesting that female judges who had given birth would have decided the case differently. However, it was unfortunate that all speakers and decision-makers in the High Court and Court of Appeal, discussing the impact of pregnancy and childbirth on a female claimant's ability to work post-pregnancy, were male. Perhaps this contributed to a missed opportunity for a more complete assessment of the effect of the injury (pregnancy and childbirth) to Ms J at the time her ERC ceased at 10 to 11 weeks post-birth.

46 Accident Compensation Act 2001, ss 55(1)(d) and 55(1)(e).

47 At [33].

48 At [28] and [36].

49 The panel of five judges of the Supreme Court who refused leave, based on a technical jurisdiction point, were split 3–2 male-female. See *J* (SC), above n 24.

In the 2007 High Court decision of *Accident Compensation Corp v D*,[50] Mallon J (herself a mother) discussed the physical effects of pregnancy, including by quoting an extract from the Australian Medical Association Journal on the features of pregnancy, when concluding that pregnancy was a personal injury.[51] The extract was referred to the Court by counsel, again illustrating the importance of the evidence counsel decide to adduce, both about the individual's injuries and also about what injuries may be expected generally. A similar consideration of Ms J's situation would have given the Court of Appeal an opportunity to truly consider whether Ms J was impaired by physical effects that could be characterised as a covered injury as opposed to "childcare responsibilities". This could have provided a path, within the approach to the legislation favoured by the majority, to award Ms J ERC for a longer period of time than just 10 weeks post-birth, even if ongoing child maintenance costs would still not have been covered.

C Where should the cost of the injury lie?

As a result of the negligent sterilisation, Ms J suffered costs that, but for the injury, she could have avoided. After all, Ms J had consciously decided she did not wish to have further children. As a result of the pregnancy, she will: bear the cost of raising the baby; lose income due to a period of being unable to work (during which she will also miss out on receiving retirement scheme contributions from her employer); and likely suffer the financial penalty identified as affecting mothers returning to the workforce after parental leave.[52] President Kós recorded that Ms J was without a partner or family member who could assist with childcare, lacked the financial resources to cease working for a period to care for the child, and was in low-paid employment that meant childcare rates were unaffordable.[53]

The majority considered Ms J's childcare costs as separate to the injury and essentially a matter of personal choice, stating "all mothers respond differently

50 *Accident Compensation Corp v D* [2007] NZAR 679 (HC) at [71]–[76].

51 This decision was overturned on appeal in *Accident Compensation Corp v D*, above n 10, but later endorsed by the Supreme Court in *Allenby*, above n 12.

52 Recent research indicates women who return to work after becoming a parent earn hourly wages that are 4.4 per cent lower on average than the wages they would have received if they had not had a child. There was no significant effect of becoming a father on hourly wages. See Isabelle Sin, Kabir Dasgupta and Gail Pacheco *Parenthood and Labour Market Outcomes* (Ministry for Women, May 2018) at 34.

53 At [66].

to the responsibilities of childcare" and noting some mothers may take maternity leave, while others return to work and engage third party childcare.[54] This statement ignores that whatever the choice taken, that is, stay-at-home parenting versus working and paying for childcare (or some combination of both), Ms J would bear these costs.

Although the majority held that Ms J's claim for ERC was not covered by the accident compensation legislation, they also strongly doubted she could successfully sue for common law damages for raising the child, should the statutory bar on claims for common law damages be surmountable.[55] The majority explained that this was the position in England, Canada and Ireland.[56] They acknowledged that in *Cattanach v Melchoir* the High Court of Australia allowed recovery of the costs of raising and maintaining a child following a "wrongful birth", but noted this result was reversed by legislation in Queensland, New South Wales and South Australia.[57]

The majority identified three main themes from the overseas case law to illustrate the difficulties they saw with any civil claim by Ms J, which were primarily policy matters.[58] First, the common law generally regards the birth of a healthy child as a blessing. Second, there are difficulties in quantifying the costs of raising a child. Third, the potential scope of liability for medical practitioners would be disproportionate to their duties and the extent of any negligence. The majority also noted that there would be difficult legal and practical considerations such as identifying who would suffer the loss (where the father or another relative provides care for the child), and depending on whether third party childcare is used.[59]

In his minority judgment, Kós P also examined the common law position, but in contrast to the majority, suggested that "on the present and progressive state of this country's law of torts" it was likely the Australian position of *Cattanach v Melchoir* would be followed and, in a claim similar to Ms J's, the

54 *J* (CA), above n 3, at [40].

55 Noted at [39], although the latter point was not argued.

56 At [39].

57 At [39].

58 At [40].

59 It is not the focus of this note to engage with these arguments. In other areas of law, such as contract, difficulties in quantifying damages will not prevent a deserving plaintiff from obtaining a remedy, and courts will assess damages as best as they can from the available evidence: Hugh Beale *Chitty on Contracts* (32nd ed, Sweet and Maxwell, 2017) at [26-015].

consequent costs of child-rearing sheeted to the negligent surgeon.[60]

The majority's position means that women who suffer a negligent sterilisation bear the cost of raising the child and of their lost wages, unable to recover these from either ACC or through the common law. Mothers are almost always the primary carers of infant children, so the majority's approach has a disproportionate effect on women.[61] What the majority describes as "parental barriers to employment"[62] (that is, having a newborn to care for) will almost always be barriers exclusively faced by women. A not insignificant number of female claimants will be without a legal avenue to remedy the economic consequences of a negligently performed operation.

Ms J, or others in her position, may be able to obtain some social security support to off-set their costs. President Kós noted that Ms J's social security entitlements were approximately 40 per cent of what she would receive from ERC.[63] Ms J was able to receive the domestic purposes benefit (DPB), which, as Kós P stated, is available for "ordinary conception" for which the state "assumes substantially less economic responsibility".[64] The DPB was only available if Ms J was not in a relationship. The DPB (now the Solo Parent Support (SPS) payment) is part of a social welfare safety net and, unlike ERC, is not a labour right that would have recognised Ms J's forced absence from the labour market or would have remedied monetary losses she suffered from the negligence. In addition, receipt of the DPB/SPS payment comes with additional restraints on a claimant's personal life, for example, due to the eligibility criteria, entitlement would cease if she entered into a domestic relationship with someone, even if this was only a few months after the birth.[65] If Ms J or another claimant was parenting with a partner they would not be able to claim the SPS and would simply have to bear the lost wages and additional costs caused by the wrongful birth.

60 At [69]–[70], citing *Cattanach v Melchoir* [2003] HCA 38, (2003) 215 CLR 1.

61 Sin, Dasgupta and Pacheco, above n 52, at 34.

62 *J* (CA), above n 3, at [28].

63 At [54].

64 At [2] per Cooper and Asher JJ and at [70] per Kós P.

65 See Social Security Act 1964, ss 20A and 63(b).

IV CONCLUSION

The Act was not prescriptive in what the answer to Ms J's claim ought to be. Instead, judicial interpretation was required, and in this case, the majority's interpretation of the legislation came down to the judges' view of the nature of the injury against a complex policy background.

This debate plays out time and time again in wrongful birth cases — cases in which claimants seek economic remedies for insults not just to their bodies, but to their reproductive rights and their ability to control their own fertility and family size. Claimants must seek recognition of the economic value of these rights against a common law that historically undervalues domestic work, considers children a blessing, is ignorant of the physical and mental burden of birthing and parenting a small child, and expects maternal love to involve fiscal (and other) sacrifice.[66] In *XY v ACC* Jeffries J emphasised that:[67]

> This court does not find that our supreme legislative body intended to stigmatise possibly the highest expression of love between human beings, that of a mother for her child, as a continuing injury to her by making compensation payable during dependency.

As reflected in the *J* judgment, and in other wrongful birth cases, the burden of the law failing to provide a remedy falls primarily on women. What, if any, difference would it have made if the bench had included a female judge who had given birth? Diversity of thought amongst those hearing the case and counsel appearing assists those present in asking the right questions and challenging the socio-political underpinnings of previous decisions. You can both love a child and regret the opportunities lost due to their birth and parenting, and compensation awarded for a negligent sterilisation does not undermine the relationship between parent and child.

The common law in this space needs to continue evolving at the pace and degree of nuance that is easily found in other areas of the law, such as breach of contract or the quantification of commercial damages. It must surely be straightforward to recognise, in this day and age, that a child arising from a wrongful birth can be both a blessing and also cause economic loss to the

66 The latter two points are both prominent in *XY v Accident Compensation Corp*, above n 9, at 381.

67 *XY v Accident Compensation Corp*, above n 9, at 380.

mother that ought to be properly compensated by the person who caused it. Our society, through ACC, supports people who cannot work following an injury. As Kós P pointed out in his dissenting judgment, a wrongful birth is an unusual "injury', but it is nevertheless an injury — and an incapacity — that prevents the claimant from resuming employment.[68]

I do not consider that *J v ACC* will be the last word on the issue. There is judicial debate on the issue of compensation for loss following a wrongful birth, as illustrated by the split judgments in the Court of Appeal and the different conclusions in the lower courts. The issue may come before the courts again, or even better than the issue winding its way through the court system, Parliament might make better provision for lost wages following a wrongful birth.

68 At [64].