IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2021-404-000975
[2021] NZHC 2752

UNDER	The Accident Compensation Act
IN THE MATTER OF	an appeal pursuant to s 162 of the Act
BETWEEN	AZ Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 15 September 2021

Appearances: P G Schmidt for the Appellant
A S Butler for the Respondent

Judgment: 14 October 2021

JUDGMENT OF VAN BOHEMEN J

This judgment was delivered by me on 14 October 2021 at 4.00pm
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors/Counsel:
A Butler, Wellington
ACC (M Mercier – Principal Solicitor)
Schmidt & Peart Law, Auckland

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Introduction

[1] AZ appeals a decision given in the District Court at Wellington on 15 March 2021 dismissing an appeal by AZ against the decision of the Accident Compensation Corporation (Corporation) declining cover under the Accident Compensation Act 2001 (ACC Act).[1]

[2] AZ was born with spina bifida following the misreading of an ultrasound scan made at 20 weeks of her mother's pregnancy and the consequent loss of the mother's right to elect to terminate the pregnancy. The District Court Judge held that the misreading of the scan did not cause the spina bifida and that AZ's condition was wholly or substantially caused by her underlying health conditions. For those reasons, AZ did not have cover for her injuries under the ACC Act.

[3] On 19 May 2021, the District Court Judge granted AZ leave to appeal on the basis of an agreed statement of facts and an agreed question of law.[2]

Agreed Statement of Facts

[4] The Agreed Statement of Facts is:

(a) In October 2002, Ms Z attended the Tarawera Medical Centre as she suspected she may be pregnant. Her GP organised an ultrasound scan which confirmed a pregnancy of around 10 weeks' gestation.

(b) On February 2003, Ms Z underwent a 20-week anatomy scan. A review of the scanning imagery taken on that day shows that the fetus had a lemon-shaped head, which should have prompted further anatomy scanning. Further scanning would have revealed that the baby had spina bifida and the mother would have been able to elect termination of the pregnancy.

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1 *AZ v Accident Compensation Corporation (ACC)* [2021] NZACC 45.
2 *AZ v ACC* [2021] NZACC 75.

(c) The parties accept that the misreading of the 20-week scan was a failure to deliver treatment to the expected standard. The parties also accept that spina bifida is a condition that typically develops in the four to six-week stage of pregnancy and was well developed by the time of the 20-week scan.

(d) Ms Z has previously provided a statement explaining that – and the Corporation does not dispute that – she would have elected to terminate the pregnancy (and would have been able to do so) but that opportunity was lost as a result of the misdiagnosis.

(e) The pregnancy continued and the baby, AZ, was born on 24 June 2003.

(f) The Corporation provided Ms Z cover for the continuation of her pregnancy past 20 weeks.

(g) AZ was born with spina bifida and several other related health conditions. In a letter dated 29 November 2017 from Dr Bobby Tsang (Specialist Paediatrician at the Wilson Centre for Children), AZ's problems are listed as:

(i) Spina bifida with myelomeningocele closed at birth, Waikato Hospital;

(ii) Hydrocephalus with VP shunt infection at 18 months, revised VPS 14/01/05 uncomplicated;

(iii) Asymptomatic right upper lumbar hernia;

(iv) Neurogenic bladder on CIC;

(v) Neurogenic bowel with functioning CHAIT button, October 2016;

(vi) Dysplastic hips with previous fractured left femur, on Alendronate Sodium 10 mg weekly;

(vii) Neuromuscular scoliosis with fusion T8 to pelvis, 20/08/17;

(viii) Learning disorder with executive function difficulties, managed by Dr Mayes;

(ix) Esotropia with spectacles;

(x) Overweight;

(xi) Skin flap required plastic surgery, August 2013.

[5] In addition to the above agreed facts, I record the following passage from the District Court Judge's decision:[3]

> [8] The appellant has undergone various surgeries and will require ongoing medical treatment. She is confined to a wheelchair. In addition, she suffers from a range of other significant disabilities and developmental challenges. It is unlikely that the appellant will be able to maintain employment, and she will continue to need assistance from family or caregivers for the rest of her life.

Agreed Question of Law

[6] The Agreed Question of Law is:

Can a person born with spina bifida (claimant) obtain cover for treatment injury where:

(a) The existence of the claimant's spina bifida was not, but should have been, detected at the 20-week scan stage;

(b) Had the spina bifida been detected, the claimant's mother would have elected termination; and

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3 *AZ v ACC*, above n 1.

(c) The misdiagnosis meant that the opportunity to elect termination was lost to the claimant's mother?

District Court decision

[7] The District Court Judge said it was settled law that an unborn child can be granted cover for an injury suffered in utero if born alive, and that a mother can be granted cover for an injury suffered during pregnancy, including pregnancy. The Judge considered it necessary to consider the circumstances of each claimant from their own perspective. In the present case, Ms Z had been granted cover for the continued pregnancy, not for spina bifida, and the pregnancy was not personal injury suffered by AZ.[4]

[8] The Judge considered that the principal issue for determination was whether the misreading of the scan had caused or contributed in a material way to AZ's spina bifida.[5] The Judge observed that the fetus had continued to develop following the misdiagnosis but said that the failure to diagnose the spina bifida condition did not result in AZ missing out on any treatment that would have cured or lessened the effects of the spina bifida.[6]

[9] The Judge referred to the Court of Appeal's decision in *Cumberland v ACC*, where the Court held that the mother whose pregnancy had continued after a failure to diagnose spina bifida in a 20-week scan had suffered personal injury.[7] The Judge noted that, in assessing the approach to causation where there had been a failure to diagnose, the Court of Appeal had said that:[8]

> … the relevant question is: if the diagnosis had been properly made and treatment had followed, was the patient more likely than not to have recovered? If the answer is "yes", it can be said the misdiagnosis caused the injury.

[10] The Judge said that if the scan had been read correctly, it would have been for Ms Z to have weighed up whether she wished to continue her pregnancy or to be

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4 At [26]
5 At [30].
6 At [34].
7 *Cumberland v ACC* [2013] NZCA 590, [2014] 2 NZLR 373.
8 *AZ v ACC*, above n 1, at [35]; citing *Cumberland v ACC*, above n 7, at [50].

treated by termination of the pregnancy. The Judge accepted that Ms Z would have elected termination but said the purpose of termination would have been to treat the pregnancy. Termination would have meant that Ms Z did not suffer the physical injuries associated with pregnancy. The purpose of termination would not have been to enable AZ to receive treatment that would have enabled AZ to "recover" from her spina bifida.[9]

[11] The Judge said that while termination of the pregnancy would have halted the progress of the spina bifida, that was not treatment leading to AZ's recovery. Like the reviewer who had considered the Corporation's refusal to grant cover, the Judge said it was not possible to reconcile a medical treatment that resulted in the death of a fetus with treatment for the purpose of a person's recovery / improvement in their medical condition.[10]

[12] The Judge concluded that the misdiagnosis could not be said to have caused or contributed to the development of AZ's spina bifida and related conditions and found that AZ's condition was wholly or substantially caused by her underlying health conditions.[11]

Submissions for AZ

[13] Counsel for AZ, Mr Schmidt, who was also counsel for the claimant mother in *Cumberland*, submits that the present case is the logical sequel to *Cumberland* and to the Supreme Court's earlier decision in *Allenby v H*.[12] In *Allenby*, the Supreme Court had held that an unexpected pregnancy following a failed sterilisation procedure was a personal injury to the mother, who was entitled to cover under the ACC Act. In *Cumberland*, the Court of Appeal had held that a mother, whose child was born with spina bifida because of a misdiagnosed scan that had resulted in the mother losing the opportunity to terminate the pregnancy, had suffered personal injury and was entitled to cover under the ACC Act.

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9 *AZ v ACC*, above n 1, at [38] – [41].
10 At [41].
11 At [43].
12 *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425.

[14] Mr Schmidt says that central to both earlier decisions is that, when interpreting and applying the ACC Act, the Courts had regard to the purpose of treatment, the consequences of failure and the purposes of the compensation scheme in the ACC Act. He submits that the purpose of the treatment should largely inform the decision about cover.

[15] Mr Schmidt accepts that AZ's spina bifida up to the point of the 20-week scan was an underlying health condition for which AZ could not claim cover under the ACC Act. However, at the point that the scan was made and misdiagnosed, both AZ and her mother had received treatment. The misdiagnosis and the loss of the opportunity for Ms Z to elect termination of her pregnancy was a treatment failure which resulted in personal injury for AZ as well as for Ms Z. Just as the continued pregnancy was a personal injury for the mother, as accepted in *Cumberland*, the continued progression of the spina bifida in AZ was a personal injury for AZ. As a result of the treatment failure, AZ had been born with the injurious condition of spina bifida for which she should have cover under the ACC Act.

[16] Mr Schmidt submits that, in holding that AZ had no cover because the scan and the misdiagnosis did not cause AZ's spina bifida, the District Court's decision was at odds with *Allenby* and *Cumberland* and other decisions such as *ACC v Stanley* and *Wire v ACC*, where it was accepted that a worsening of a condition that could have been alleviated by surgery amounted to personal injury.[13] He notes that this principle has been applied even when the condition was terminal.[14] Mr Schmidt submits that the Court of Appeal in *Cumberland* did not hold that cover for failure to treat a condition was available only when the condition could be cured and notes that the condition in that case was pregnancy which termination did not "cure."

[17] Mr Schmidt says that it is accepted that if the scan had not been misdiagnosed and treatment had been provided, the treatment would have been termination of the pregnancy in order to avoid the risk of serious disability in the child. The purpose of termination would have been two-fold: to prevent the development of abnormalities in the fetus and to end the pregnancy. Mr Schmidt says the Corporation's approach

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13 *ACC v Stanley* [2013] NZHC 2765; and *Wire v ACC* [2015] NZACC 221.
14 *Robertson v ACC* [2014] NZHC 762 and *Robertson v ACC* [2014] NZHC 2489.

does not reflect the dual purpose of the treatment. He submits that causation is satisfied because a primary purpose of the available treatment, that is termination, was to arrest development of fetal abnormalities and that a failure to provide that treatment allowed spina bifida to continue to develop in the fetus and in the child once born.

[18] Mr Schmidt says that, at the time the treatment failure occurred, at the 20 weeks' gestation scan, it was not possible to separate out the interests of the mother and the fetus. He accepts that it is necessary for the fetus to have treatment in order for it to have cover but says it is erroneous to say that the decision to terminate the pregnancy must be considered only from the perspective of the mother. Mr Schmidt says that the decision as to what was in the best interests of the fetus was for the mother to make and that included considerations of how to avoid the pain and suffering endured by a child born with spina bifida and the impacts of that condition on the wider family.

[19] Mr Schmidt also refers to s 187A of the Crimes Act 1961 which, until its repeal by the Abortion Legislation Act 2020, provided that it was not unlawful to terminate a pregnancy of not more than 20 weeks' gestation where there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped. He says that section shows that the purpose for which Parliament had authorised a termination in these circumstances was to avoid serious handicap in the child once born. That is, trying to prevent the physical or mental abnormality being eventually expressed in the child once born is a statutory purpose of the treatment. Mr Schmidt accepts that the section enabled but did not mandate termination in such circumstances but says that the enabling was a statutory purpose. Mr Schmidt says the purposes of conducting the scan and of having the option to terminate the pregnancy were undermined by a failure to deliver treatment to the proper standard, which, under the common law, would be negligence.

[20] Mr Schmidt refers to the purposes of the ACC scheme as set out in the Woodhouse Report,[15] which led to the original Accident Compensation Act 1972, and which has continued to inform successor versions of the ACC Act. Mr Schmidt

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[15] *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, Wellington, December 1967). [Woodhouse Report]

highlights the objectives of comprehensive entitlement for cover under the scheme and the need to avoid unequal treatment of identical losses by virtue of the cause of the injury. He says the scheme was intended to be a no fault regime for the downstream consequences of personal injury by accident and other personal injury covered by the regime, namely medical misadventure, now treatment injury. The intention was to avoid uncertain and unpredictable outcomes of common law processes, particularly with regard to actions for negligence. He notes that in *Adlam v ACC*, the Court of Appeal reaffirmed that the "generous, un-niggardly interpretation" of what is personal injury, called for by Richardson J in the Court of Appeal's decision in *ACC v Mitchell*,[16] is not affected by changes to the legislation since its introduction.[17]

[21] Mr Schmidt submits that, in the case of a missed prenatal diagnosis of spina bifida, cover for both the mother's continued pregnancy and the child after birth can be easily managed by the current accident compensation scheme and ensures that all of the injurious consequences of the treatment failure are covered. To hold that the mother's injury is covered under the ACC Act but that cover for the child must be pursued though civil litigation would result in a gap in coverage under the scheme and in unequal treatment for the injured parties. Ms Schmidt also says the costs of litigation would be a barrier to recovery for many but that the exposure to the possibility of civil damages would increase insurance costs for the medical profession.

Submissions for the Corporation

[22] Counsel for the Corporation, Mr Butler, submits that the decision of the District Court Judge was correct because AZ does not have cover under the ACC Act. The Corporation's case is based on two core propositions. First, AZ's injuries were not caused by the treatment, the scan, or the treatment failure, the misreading of the scan. Secondly, cover must be assessed from the perspective of the claimant and termination of Ms Z's pregnancy would not have been treatment for AZ. In addition, and as the District Court Judge found, spina bifida is a pre-existing underlying health condition for which no cover can be provided.

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16 *ACC v Mitchell* [1992] 2 NZLR 436 (CA) at 438.
17 *Adlam v ACC* [2018] NZCA 457, [2018] 2 NZLR 102 at [9].

[23] Mr Butler says the District Court Judge's decision and the Corporation's position are not inconsistent with *Allenby* and *Cumberland* or with other decisions that have recognised that a treatment injury can arise from a failure to diagnose or treat a condition that continues to progress as a consequence. *Allenby* and *Cumberland* were concerned with the right of a mother to cover in circumstances where, as in *Allenby*, the mother became pregnant as a consequence of a failed sterilisation operation or, as in *Cumberland,* where the mother lost her right to terminate her pregnancy of a fetus with spina bifida, because of the misdiagnosis of the 20-week scan. In both cases, the Courts accepted that the pregnancy was a personal injury to the mother. The decisions made no findings about the right of the later born children to cover under the ACC Act.

[24] Mr Butler says the Corporation does not accept that it is not possible to separate out the interests of the mother and the fetus and says that the ACC Act as administered has always distinguished between the interests of a mother and a fetus and that a fetus is covered only to the extent that the fetus suffers their own injury. The Corporation accepts that the scan was treatment of the mother and of the fetus. Depending on the results of the scan, it would have enabled treatment of certain conditions of the fetus in utero and would have allowed for preparations to be made for the later birth of the child. The Corporation also accepts that termination of the pregnancy is treatment and that the reason for the treatment is spina bifida, but says the treatment is of the mother, not of the fetus. The Corporation says it cannot be treatment from the perspective of the fetus because termination is not in the best interests of the fetus.

[25] Mr Butler says the purpose of s 187A of the Crimes Act was to decriminalise abortion in the circumstances provided for in the section. It provided no statutory purpose mandating termination of a pregnancy. The section addressed the situation of the person performing the abortion, the medical practitioner. It enabled the practitioner, in consultation with the mother, the patient, to terminate the pregnancy. Mr Butler agrees that the decision on termination lies with the mother because it is treatment of the mother. If the decision is to terminate the pregnancy, no issue of cover under the ACC Act arises. If the decision is not to terminate or if the option to exercise that decision is lost through a misreading of the scan, there is no difference from the child's perspective. It is born with spina bifida and the injuries caused by that

condition. Yet, under Mr Schmidt's analysis, one child would have cover and the other would not. For these reasons, the Corporation does not accept that a lack of cover for AZ amounts to injustice.

[26] The Corporation acknowledges the difficult circumstances of AZ, her mother and her family. However, the ACC Act, as originally enacted and as subsequently amended, is not the fully comprehensive regime for which Mr Schmidt contends. That is a reality that the Corporation must deal with. The ACC Act has always established limits within which cover is provided. While those limits have been adjusted over time in successive legislative amendments, and while the Courts have exhorted the Corporation to adopt a generous and non-niggardly approach to the interpretation of the ACC Act, Mr Butler says the Courts have also said that that exhortation cannot be relied upon to avoid the boundaries set by the ACC Act's "crystalline" drafting as stated by Kós J in *Murray v ACC*.[18]

[27] Mr Butler says the fact a person may have to sue at common law in negligence to recover for personal injury that is not covered by the ACC Act is not a reason for extending cover under the ACC Act. He acknowledges, however, that, the Courts in the other common law jurisdictions, notably England and Australia, have not recognized a right to recover in "wrongful life" cases, which dealt with situations similar to that of AZ.

[28] Mr Butler notes that AZ and her family have rights to support from the social welfare system administered by the Ministry of Social Development and from the health care system administered by the Ministry of Health and district health boards. He says the fact that the benefits available under the social welfare arrangements may not be as generous as those available under the ACC Act is an unfortunate reality that is outside the powers of the Corporation to address.

Analysis

[29] Following a joint application of the parties seeking leave pursuant to s 162(1) of the ACC Act, the District Court Judge granted leave to appeal on the Agreed

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18 *Murray v ACC* [2013] NZHC 2967 at [36] and [69].

Question of Law as formulated.[19] The question concerns the interpretation and application of the ACC Act. Under s 162(5) of the ACC Act, the High Court Rules 2016 and ss 126 to 130 of the District Court Act 2016, apply to the appeal as if it were an appeal under s 124 of the District Court Act. The appeal, therefore, is by way of rehearing, in accordance with s 127 of that Act.

[30] While the appeal is on a point of law, the policy implications of the appeal are significant, as are the consequences for AZ and her family. An important underlying aspect to this case, which was accepted by both parties, is that at the current state of medical knowledge there is no available in utero treatment for spina bifida. Once the condition has been diagnosed, the option is either to terminate the pregnancy or to allow the pregnancy to go to term in the knowledge that the child that is born is likely to suffer various disabilities, depending on the type and severity of the condition, for the rest of their life.

[31] The facts of this case are very similar to those considered by the Court of Appeal in *Cumberland*, which was also concerned about the application of the ACC Act following the birth of a child with spina bifida after a misdiagnosis of the 20-week scan. In *Cumberland*, however, the question was whether the mother had cover under the ACC Act. The Court of Appeal specifically noted the question of cover for the injured of the child related to the spina bifida condition was being pursued separately.[20]

[32] In the event, the question of cover for the child in that case did not proceed. This is the first time, therefore, that this Court has considered whether a child born with spina bifida has cover under the ACC Act for injuries related to that condition after being born following a misdiagnosis of a scan and the loss of the opportunity to terminate the pregnancy.

[33] As Mr Schmidt and Mr Butler agreed, AZ's situation is similar to those considered by the Court of Appeal of England and Wales in *McKay v Essex Area Health Authority*[21] and by the High Court of Australia in *Harriton v Stephens* and

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19 *AZ v ACC*, above n 2, at [3].
20 *Cumberland v ACC*, above n 7, at [11].
21 *McKay v Essex Area Health Authority* [1982] 1 QB 1166.

Waller v James.[22] In those cases, the question before the Courts was whether children, who had been born with disabilities following failures to diagnose diseases in the fetuses during pregnancy and to advise the pregnant mothers of their rights to terminate their pregnancies, had a cause of action and a right of recovery against relevant medical staff based on the children's "wrongful entry into life" or "wrongful life."

[34] Those decisions were based on the application of common law principles and so are not directly relevant to AZ's claim for cover under the ACC Act.[23] However, the discussion of some of the issues, including in the dissenting judgments of Mason P in the New South Wales Court of Appeal and of Kirby J in the High Court of Australia, is relevant to the current proceeding. I discuss those decisions below. I start, however, with the ACC Act.

[35] In undertaking the following analysis, I seek to apply the "generous, un-niggardly" approach to the interpretation of the ACC Act called for by the Court of Appeal in *Mitchell*[24] and reaffirmed in *Harrild v Director of Proceedings*,[25] *Adlam*[26] and *J v ACC*.[27] At the same time, as the Court of Appeal also said in *J v ACC*, that approach does not displace the primacy of s 5 of the Interpretation Act 1999, which directs courts to ascertain meaning from the text of an enactment in the light of its purpose.[28] As Kós J said in *Murray,* that approach does not provide a basis for departing from the ACC Act if the meaning and effect of the statutory words are clear.[29]

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22 *Harriton (by her tutor Harriton) v Stephens* [2006] HCA 15, (2006) ALR 391; and *Waller (by his tutor Waller) v James* [2006] HCA 16, (2006) ALR 457.

23 I note, however, that when *Cumberland* was considered in the High Court, Faire J observed, in obiter, that if the child were to claim cover, such a claim would amount to "wrongful life" and that he agreed with the Court of Appeal in *McKay v Essex Area Health Authority* that to entertain such a claim would be contrary to public policy as a violation of the sanctity of human life; see *C v ACC* [2011] NZAR 389 at [77].

24 *ACC v Mitchell*, above n 16.

25 *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) at [130].

26 *ACC v Adlam*, above n 17.

27 *J v ACC* [2017] NZCA 441 at [13] – [14].

28 At [14].

29 *Murray v ACC*, above n 18, at [69].

[36] It is also relevant to recall the following observations of Elias CJ in *Allenby* about the 2001 Act, namely that it:[30]

> … 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. It contains much cross-referencing, repetition and circularity in expression.

[37] Although the ACC Act has been amended again since *Allenby*, those observations are still apposite.

Relevant provisions of Accident Compensation Act 2001

[38] Section 3 of the ACC Act describes the purpose of the ACC Act as follows:

> The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through–
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> …
>
> (c) ensuring that, where injuries occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation:
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> (d) ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment:
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> …

[39] Section 6 provides that "*entitlement"* means the entitlements described or referred to in s 69 (as set out below).

Section 8 provides:

> (1) When this Act says a claimant has cover, it means that the claimant has cover for a personal injury—

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30 *Allenby v H*, above n 12, at [7].

(a) under any of sections 20, 21, or 22, for a personal injury suffered on or after 1 April 2002; or

(b) under Part 10 or Part 11, for a personal injury suffered before that date.

(2) When this Act says that an injury **is covered by this Act**, it means that the injury is a personal injury for which a claimant has cover.

[40] Section 20 provides:

(1) A person has cover for a personal injury if—

(a) he or she suffers the personal injury in New Zealand on or after 1 April 2002; and

(b) the personal injury is any of the kinds of injuries described in section 26(1)(a) or (b) or (c) or (e); and

(c) the personal injury is described in any of the paragraphs in subsection (2).

(2) Subsection (1)(c) applies to—

(a) personal injury caused by an accident to the person:

(b) personal injury that is treatment injury suffered by the person:

…

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

…

[41] Section 26 provides:

(1) Personal injury means, among other things:

(a) the death of a person; or

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

...

(2) Personal injury does not include 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).

[42] Section 32 provides:

(1) *Treatment injury* means personal injury that is—

(a) suffered by a person—

(i) seeking treatment from 1 or more registered health professionals; or

(ii) receiving treatment from, or at the direction of, 1 or more registered health professionals; or

(iii) referred to in subsection (7); and

(b) caused by treatment; and

(c) not a necessary part, or ordinary consequence, of the treatment, taking into account all the circumstances of the treatment, including—

(i) the person's underlying health condition at the time of the treatment; and

(ii) the clinical knowledge at the time of the treatment.

(2) *Treatment injury* does not include the following kinds of personal injury:

(a) personal injury that is wholly or substantially caused by a person's underlying health condition:

(b) personal injury that is solely attributable to a resource allocation decision:

(c) personal injury that is a result of a person unreasonably withholding or delaying their consent to undergo treatment.

…

[43] Section 33 provides:

(1) For the purposes of determining whether a treatment injury has occurred, or when that injury occurred, **treatment** includes—

(a) the giving of treatment:

(b) a diagnosis of a person's medical condition:

(c) a decision on the treatment to be provided (including a decision not to provide treatment):

(d) a failure to provide treatment, or to provide treatment in a timely manner:

(e) obtaining, or failing to obtain, a person's consent to undergo treatment, including any information provided to the person (or other person legally entitled to consent on their behalf if

the person does not have legal capacity) to enable the person to make an informed decision on whether to accept treatment:

(f) the provision of prophylaxis:

(g) the failure of any equipment, device, or tool used as part of the treatment process, including the failure of any implant or prosthesis (except where the failure of the implant or prosthesis is caused by an intervening act or by fair wear and tear), whether at the time of giving treatment or subsequently:

(h) the application of any support systems, including policies, processes, practices, and administrative systems, that—

(i) are used by the organisation or person providing the treatment; and

(ii) directly support the treatment.

[44] Section 69(1) provides:

(1) The entitlements provided under this Act are—

(a) rehabilitation, comprising treatment, social rehabilitation, and vocational rehabilitation:

(b) first week compensation:

(c) weekly compensation:

(d) lump sum compensation for permanent impairment:

(e) funeral grants, survivors' grants, weekly compensation for the spouse or partner, children and other dependants of a deceased claimant, and child care payments.

[45] Section 317 (the statutory bar on civil proceedings for personal injury) provides:

(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—

(a) personal injury covered by this Act; or

(b) personal injury covered by the former Acts.

Requirements to be satisfied for AZ to have cover under the ACC Act

[46] Although AZ was not a legal person until she was born, it is accepted that if the ACC Act's requirement for cover are established, she has cover even if the injuries commenced before she was born.

[47] It is accepted that for AZ to have cover under the ACC Act, she must satisfy the requirements of s 20(1) which, as Mr Butler said, is the primary but not exclusive gateway to cover.

[48] For AZ to have cover in terms of s 20, she must establish that:

(a) The personal injury was suffered in New Zealand after 1 April 2002;

(b) The personal injury is a kind of injury described in s 26(1)(b): that is, physical injury; and

(c) The injury personal is described in s 20(2)(f); that is treatment injury caused by a gradual process.

Was the injury suffered in New Zealand after 1 April 2002?

[49] There is no question that AZ's injury was suffered after 1 April 2001. AZ was born in June 2003. The injury suffered by AZ began with the initial development of spina bifida, which is assumed to have been at the four to six-week stage of the pregnancy. Based on the relevant dates in the Agreed Statement of Facts, that would probably have been in September 2002. The injuries that AZ suffers as a consequence of the spina bifida are set out in the Agreed Statement of Facts at [4](g) above.

Was the injury physical injury?

[50] As Mr Butler accepted, the injuries suffered by AZ as a consequence of the spina bifida are physical injury for the purposes of s 26(1)(b). That is consistent with the findings of the Supreme Court in *Allenby* that the physical consequences of pregnancy to a mother's body were physical injuries. Blanchard J for the majority,

and Elias CJ and Tipping J in their separate and largely concurring judgments, decided that the pregnancy or the impacts of pregnancy on the mother were physical injury.

[51] Elias CJ said:[31]

> [23] … 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.

[52] Blanchard J said:[32]

> [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. …

[53] Tipping J said:[33]

> [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.

[54] The Court of Appeal in *Cumberland* observed that *Allenby* had been decided before the ACC Act was amended in various respects in 2005 but considered that none of the amendments affected the applicability of *Allenby* to the decision before it, although the relevant terminology had changed from "medical misadventure" to "treatment injury".[34]

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31 *Allenby v H*, above n 12. As Elias CJ observed at [18], "If a 'sprain or strain' amounts to personal injury, 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."

32 Ibid.

33 Ibid.

34 *Cumberland v ACC*, above n 7, at [21].

[55] Following *Allenby*, the Court of Appeal in *Cumberland* accepted that the continued pregnancy following a misdiagnosed scan was personal injury:[35]

> [34] As noted, the appellant relies on personal injury of the kind described in s 26(1)(b), that is "physical injuries suffered by a person, including, for example, a strain or a sprain". The appellant has given unchallenged evidence that, had she been given a correct diagnosis following the 20-week scan, she would have chosen to seek an abortion. The question is therefore whether continuation of the pregnancy following the incorrect diagnosis and the consequential inability of the mother to implement her choice to terminate the pregnancy can constitute a physical injury suffered by the mother for the purpose of the definition of "personal injury."
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> [35] We are satisfied that the answer is "yes". In so concluding we agree with Blanchard J in *Allenby* that the expression "personal injury" is used in an expansive way. By analogy with the impregnation of the victim as a physical consequence of rape or of a failed sterilisation treatment, we consider that the continued pregnancy of the appellant following a misdiagnosis in the 20-week scan is capable of being an injury suffered by the appellant for the purposes of the Act. It is true that the appellant fell pregnant by natural process prior to the 20-week scan. But the analytical focus for the purposes of cover must be on the physical consequences to the appellant in the period post the misdiagnosis.
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> [36] What has occurred to the appellant following the errors by the health professionals is ongoing development of the foetus. This causes significant and ongoing physical changes to the anatomy of the appellant which, whilst occurring naturally, cause discomfort and ultimately pain and suffering. Like Blanchard J we see merit in the comparison with the case of an undetected tumour.

[56] In *Allenby*, and as followed by the Court of Appeal in *Cumberland*, the Courts accepted that the physical consequences and physiological changes arising from of the continuation of pregnancy were physical injury to the mother. Those physical consequences for the mother would have been the same, whether or not the fetus had spina bifida. But from the perspective of the fetus, the physical consequence of the continuation of the pregnancy was the continued development of the spina bifida. I agree with Mr Schmidt that this situation is very similar to the analogy of the unarrested tumour, as developed by Blanchard J in *Allenby* and applied in *Cumberland*. It is also similar to the situations considered in *ACC v Stanley* and *Wire v ACC*.[36]

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35 Ibid.

36 *ACC v Stanley*, above n 13; and *Wire v ACC*, above n 13.

[57] For these reasons, I am satisfied that the continued development of the spina bifida in the fetus as a consequence of the continued pregnancy following the misdiagnosed scan was physical injury to the child once born.

Was the injury treatment injury?

[58] Whether the personal injury to AZ was treatment injury is the key question for determination.

[59] The relevant sections are ss 20, 26, 32 and 33 of the ACC Act. In summary, they provide that:

(a) Physical injury that is caused wholly or substantially by a gradual process or disease is not personal injury unless it is treatment injury (ss 26(2) and 20(1));

(b) Personal injury includes treatment injury caused by a gradual process (ss 20(1)(c) and 20(2)(f));

(c) Treatment injury does not include personal injury wholly or substantially caused by an underlying health condition (s 32(2)(a));

(d) Treatment injury must have been personal injury:

(i) Suffered when receiving treatment from a registered health professional (s 32(1)(a)(ii));

(ii) Caused by treatment (s 32(1)(b)); and

(iii) Not an ordinary consequence of the treatment (s32(1)(c))

(e) Treatment includes a failure to provide treatment (s 33(1)(d)).

[60] As the Chief Justice observed in *Allenby*, there is a circularity in these sections.[37] However, their combined effect is that the personal injury suffered by AZ following the misreading of the scan will be covered if the injury was treatment injury in terms of s 20(2)(f), that is, treatment injury caused by a gradual process.

[61] It is accepted that AZ's injury was caused wholly or substantially by a gradual process. The question for determination is whether the injury was caused by treatment, in particular a failure by registered health professionals to provide treatment, to AZ. That is, was it the consequence of the misdiagnosis of the scan and the failure to undertake further scans and, upon the expected confirmation that the fetus had spina bifida, to advise Ms Z of her right to terminate her pregnancy?

[62] If the injury was caused by the misdiagnosis and the failure to take subsequent steps, and that failure constituted "treatment" of AZ under s 33(1)(d), the injury:

(a) Was suffered when receiving treatment from a registered health professional for the purposes of s 32(1)(a);

(b) Was "caused by" treatment for the purposes of s 32(1)(b);

(c) Was not the ordinary consequence of the treatment for the purposes of s 32(1)(c);

(d) Was not wholly or substantially caused by an underlying health condition for the purposes of s 32(2)(a);

(e) Was not excluded from being personal injury by s 26(2); and

(f) Was personal injury for the purposes of s 26(1)(b).

[63] It follows that the two key questions to be answered are:

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37 *Allenby v H*, above n 12, at [7].

(a) Was the injury "caused" by medical intervention or a failure of medical intervention?

(b) If so, was that intervention or failure of intervention "treatment" of AZ for the purposes of the ACC Act?

Was the injury caused by medical intervention or a failure of medical intervention?

[64] In *Allenby*, the Supreme Court held that the mother who became pregnant as the result of a failed sterilisation had suffered personal injury, for the reasons cited previously.

[65] The Supreme Court reached that conclusion by analysing the application of s 20(2)(f) which, at that time provided:

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

[66] After reviewing the "tortuous" history of the legislation, Blanchard J concluded that the expression "personal injury" is used in an expansive way in the ACC Act.[38] Later in the majority judgment, he said:[39]

> [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 fetus 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.

[67] Tipping J said:

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38 At [68].
39 At [80].

> 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.

[68] In *Cumberland*, the Court of Appeal said:[40]

> [36] What has occurred to the appellant following the errors by the health professionals is ongoing development of the fetus. This causes significant and ongoing physical changes to the anatomy of the appellant which, whilst occurring naturally, cause discomfort and ultimately pain and suffering. Like Blanchard J we see merit in the comparison with the case of an undetected tumour.
>
> …
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> [50] If the "traditional" or standard approach to causation is applied to cases of failure to diagnose resulting in personal injury, the relevant question is: if the diagnosis had been properly made, and proper treatment had followed, was the patient more likely than not to have recovered? If the answer is "yes", it can be said that the misdiagnosis "caused" the resulting injury.
>
> (footnotes omitted)

[69] The above analyses concluded that pregnancy or the effects of pregnancy amounted to physical injury for the purposes of s 20(1)(b) and personal injury for the purposes of s 20(2)(f). The analyses compared the consequences of pregnancy with those of a disease and reasoned there should be no difference in result between a person whose pregnancy continued as a result of misdiagnosis and that of a person whose disease continued as a result of misdiagnosis.

[70] It is clear, therefore, that the Supreme Court in *Allenby* and the Court of Appeal in *Cumberland* considered that the injuries suffered by the mothers as a consequence of the pregnancies were caused by medical error: the failed sterilisation in *Allenby* and the misdiagnosis of the scan in *Cumberland*. While those analyses were made from the perspective of the mother, they must apply equally from the perspective of the fetus in this case which, as Mr Butler accepts, was subject to treatment by the scan.

[71] As stated in the Agreed Question of Law, it is accepted in the present case that the spina bifida should have been detected by the scan, that Ms Z would have elected termination if it had been detected and that the misdiagnosis meant that the opportunity

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[40] *Cumberland v ACC*, above n 7.

to elect termination was lost. If mother and fetus were both the subject of the scan and, as found by the Court of Appeal in *Cumberland*, the misdiagnosis "caused" the continuation of the pregnancy, it must follow that the continuation of the pregnancy and the spina bifida were both caused by the misdiagnosis and the lost opportunity to terminate the pregnancy.

[72] For these reasons, I disagree with the finding of the District Court Judge that the misreading of the scan cannot be said to have caused or contributed to AZ's spina bifida and related conditions. For the same reasons, I disagree with the Judge's finding that AZ's condition was wholly or substantially caused by AZ's underlying health condition. That finding was based on the finding that the misreading of the scan could not be said to have caused or contributed to AZ's spina bifida and related conditions.[41]

Was the failure of medical intervention "treatment"?

[73] As discussed, the District Court Judge did not accept that termination of Ms Z's pregnancy could constitute treatment of the fetus. The Judge said that termination of the pregnancy could not be treatment of the fetus because termination was not treatment that would have enabled AZ to recover from her spina bifida and that it was not possible to reconcile a medical treatment that resulted in the death of a fetus with treatment for the purpose of a person's recovery or improvement in their medical condition. In other words, the Judge considered that "treatment" for the purposes of the ACC Act can include only medical intervention aimed at the recovery or improvement of the patient being treated. Thus, termination of a pregnancy is "treatment" from the mother's perspective but cannot be "treatment" from the perspective of the fetus because the purpose of the treatment is the termination of the fetus.

[74] The District Court Judge's decision, and the decision of the reviewer of the ACC's initial decision declining cover, both referred to a definition of "treatment" in *Dorland's Illustrated Medical Dictionary*, namely "the management and care of a patient for the purpose of combating the disease or disorder".[42] The reviewer also

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41 *AZ v ACC*, above n 1 at [43].

42 Newman W A Dorland *Dorland's Illustrated Medical Dictionary* (32nd ed, Elsevier, Philadelphia, 2011).

noted that "care" was defined as "the services rendered by the members of the health profession for the benefit of a patient" and that "recovery" was defined as "a return to a normal or healthy condition." The reviewer concluded that, "there is no way to reconcile a medical procedure which, by design, results in the death of a fetus with the definition of treatment for the purposes of returning a patient to normal health." As noted at [9] above, the District Court Judge said:[43]

> I agree with the Reviewer that it is not possible to reconcile a medical procedure which results in the death of a fetus with treatment undertaken for the purpose of achieving a person's recovery/improvement in their medical condition.

[75] The difficulty with the conclusions of the Reviewer and the District Court Judge is that they were based on a definition of treatment and related definitions drawn from a medical dictionary and not from the ACC Act.

[76] Section 33 does not define treatment as such but describes the kinds of treatment covered by the ACC Act. It does not state what the purpose of "treatment" must be. In particular, there is nothing in the section or anywhere else in the ACC Act from which it may be inferred that "treatment" for the purposes of the ACC Act is limited to treatment for the recovery or improvement of the patient. In that respect, there is no "crystalline drafting", as discussed by Kós J in *Murray,*[44] that limits the interpretation of "treatment" in the way decided by the District Court Judge.

[77] In support of the District Court Judge's interpretation, Mr Butler referred to the passage of the decision in *Cumberland,* to which the District Court Judge had also referred, where the Court of Appeal had said:[45]

> … the relevant question is: if the diagnosis had been properly made and treatment had followed, was the patient more likely than not to have recovered? If the answer is "yes", it can be said the misdiagnosis caused the injury.

Mr Butler submits that this passage supports the Corporation's view that treatment must be for the purpose of promoting the patient's recovery.

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43 *AZ v ACC*, above n 1, at [41].
44 *Murray v ACC*, above n 18.
45 *Cumberland v ACC,* above n 7, at [35].

[78] However, in that passage the Court of Appeal was considering the issue of causation, as the District Court's decision acknowledged.[46] I do not consider that this passage is authority for the proposition that "treatment" for the purposes of the ACC Act is limited to treatment that makes it more likely that that the person being treated will recover. The Court of Appeal did not address the question of what constitutes "treatment" for the purposes of determining cover under the ACC Act.

[79] Of course, most medical treatment has the objective of promoting a patient's recovery. But some treatment does not. One example is palliative care, which is aimed at assisting people with life-limiting illnesses. In those situations, recovery is not the objective. It must be the case, nonetheless, that if palliative care caused physical injury to a patient, the patient would have cover under the ACC Act.

[80] The Corporation's related arguments are that the fetus was not the object of the treatment and that must be so because treatment must be in the interests of the object of the treatment. These arguments, in turn, raise the question of whether it is possible or even necessary to distinguish between the interests of the mother and the fetus at the time the treatment or treatment failure occurred. Mr Schmidt says it is possible, but that at that stage of gestation, it is for the mother to decide what is in the interests of the fetus.

[81] I do not consider it is necessary to determine whether the mother and fetus were being treated separately or who would have decided what was in the interests of the fetus. I consider that the question of whether the fetus was receiving treatment should be considered objectively.

[82] As Mr Butler accepted, when the 20-week scan was undertaken, the scan was treatment of the mother and of the fetus. That must be so: the scan was of the mother's uterus for the purpose of ascertaining the development and health of the fetus. The Court of Appeal in *Cumberland* described the purpose of the 20-week scan as follows:[47]

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46 *AZ v ACC*, above n 1, at [35].
47 *Cumberland v ACC,* above n 7.

> [9] An obstetric ultrasound scan may be carried out at various times during pregnancy depending on the perceived clinical need, and information sought to be obtained. An anatomy scan in the second trimester is typically performed just prior to 20 weeks' gestation. The information obtainable from the ultrasound includes the age of the fetus and confirmation of the estimated delivery date; the position of the placenta; the amount of fluid around the fetus; and observation of the key foetal structures including for the purpose of diagnosing abnormalities.

[83] The misdiagnosis of the scan, which was the start of the treatment failure, must equally apply to both the mother and the fetus. It would be artificial to say the misdiagnosis did not relate to the fetus because the misdiagnosis was of the condition of the fetus. As a result of the misdiagnosis, the mother lost the opportunity to terminate the pregnancy which, as is accepted in the Agreed Question of Law, she would have exercised. Had that opportunity not been lost, the pregnancy would have been terminated and the fetus and the spina bifida would not have continued to develop.

[84] At the time Ms Z was pregnant with AZ, s 2 of the Contraception, Sterilisation and Abortion Act 1977 (CSA Act) defined "abortion" to mean:[48]

> … a medical or surgical procedure carried out or to be carried out for the purpose of procuring—
>
> (a) the destruction or death of an embryo or fetus after implantation; or
>
> (b) the premature expulsion or removal of an embryo or fetus after implantation, otherwise than for the purpose of inducing the birth of a fetus believed to be viable or removing a fetus that has died.

[85] It is clear, therefore, that the treatment opportunity forgone was a medical or surgical procedure which, in accordance with s 32 of the CSA Act, could be carried out only by a medical practitioner. The purpose of the procedure would have been the death or destruction of the fetus.[49]

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[48] The Contraception, Sterilisation and Abortion Act 1977, including the definition of "abortion" was significantly amended by the Abortion Legislation Act 2020 with effect from 24 March 2020. The relevant part of the definition provides that "abortion" means "intentionally causing the termination of a woman's pregnancy by any means."

[49] Although the new definition of abortion is focused on the termination of the pregnancy rather than the destruction of the fetus, the procedure itself has not changed. I do not consider that the change of definition would produce a different result if the present proceeding had related to events occurring after 24 March 2020.

[86] In that respect, the term "procedure" as used in the CSA Act is purpose or value neutral. It is used to describe what the doctor or surgeon, as the case may be, does.

[87] I consider that the term "treatment" as used in the ACC Act is similarly purpose and value neutral. It is used to describe, generically, the actions of the medical practitioner. It is the practitioner, and not the ACC Act, who decides what the treatment should be and the purpose of the treatment.

[88] Accordingly, for the purposes of s 33(1)(a) – (f), treatment includes:

(a) The taking of actions the practitioner considers appropriate;

(b) Diagnosing the patient's medical condition;

(c) Deciding what actions should be taken;

(d) Failing to take appropriate actions or failing to take such action in a timely manner;

(e) Obtaining the consent of the patient or, in the case of a minor, the patient's guardian, to the proposed actions;

(f) Providing protection to a patient.

[89] With the possible exception of s 33(1)(f), "the provision of prophylaxis", the other paragraphs of s 33(1) do not provide that treatment must have a particular purpose.

[90] While obtaining patient consent is a form of "treatment", obtaining consent is not a pre-requisite for cover under the ACC Act. That is consistent with the Act's purpose – which is focused on the rehabilitation of those injured and not on the actions of those who may have caused the injury. That is why I do not consider it necessary to decide whether the mother would be giving consent on behalf of the fetus when consenting to terminate the pregnancy.

[91] I do not accept the Corporation's argument that the medical procedure that was not provided, the termination, would have been treatment of the mother but not of the fetus. I consider that is inconsistent with the language of the CSA Act and the ACC Act. The object of the procedure would have been the fetus. The reason for the procedure would have been the condition of the fetus because of the spina bifida. If the procedure would have been treatment from the perspective of the mother, it must also have been treatment from the perspective of the fetus even if the purpose of the treatment was the termination of the fetus.

[92] For these reasons, I consider that the treatment, that is the treatment failure, applied to both the mother and the fetus. I also consider that the purpose of the treatment does not determine whether the mother or the fetus are covered by the ACC Act. The Act itself makes no direction in this respect.

[93] The result is that there was a failure of treatment and the consequence of the treatment failure was the birth of AZ with spina bifida. I consider that, on a straightforward interpretation of the ACC Act, the spina bifida and related conditions with which AZ was born are personal injury caused by treatment failure and are therefore treatment injury for the purposes of s 32 of the ACC Act. In accordance with ss 20(1)(b) and (c) and 20(2)(f), that treatment injury is personal injury for which AZ has cover in accordance with s 8.

[94] I consider that result to be consistent with the Corporation's approach to cover for other injuries that might be suffered by a fetus in utero. Mr Butler acknowledged that if a fetus suffers a treatment injury in utero through an untoward event associated with medication, the child, when born, will have cover for that injury. Here, the treatment failure of the mother and the fetus resulted in the birth of a child with physical injury. There is no reason in logic why the child in the first case has cover but the child in the second case does not. The question of consent or lack of consent on the part of the fetus does not arise in either case.

[95] The fact that a child born with spina bifida whose mother chose not to terminate the pregnancy does not have cover under the ACC Act is not relevant to the analysis because there was no treatment failure in such a case. In the same way, mothers who

elect not to terminate their pregnancies are also not covered because there has been no treatment failure and thus no injury with respect to their continued pregnancies.

[96] As I discuss below, I consider that this result is consistent with the general policy of "no fault" cover that has been at the heart of the ACC Act through its various iterations and amendments. Before considering the policy of the ACC Act, however, I consider it instructive to analyse the reasons that underlie the Corporation's reluctance to accept that AZ and others in her situation have cover under the ACC Act by reference to the "wrongful life" cases.

The "wrongful life" cases

[97] It is apparent that the Corporation's position, and that reached by the District Court Judge, stem from a reluctance to accept that there should be cover under the ACC Act for a claimant who says, in effect, "If I had been treated properly, I would not have been born". That is, "I should not have been born."

[98] This is the issue grappled with in the "wrongful life" cases. For present purposes, it is sufficient to consider the decisions in *McKay v Essex Area Health Authority*[50] and *Harriton v Stephens*.[51] Both involved claims by children born with severe physical abnormalities following a failure by medical staff to diagnose and advise the mother of the consequences of having rubella in the early months of pregnancy. As a result, the mother in each case did not exercise her right to terminate her pregnancy and their children were born with severe physical disabilities.

McKay v Essex Area Health Authority

[99] In *McKay*, the Court of Appeal of England and Wales decided the plaintiff had no common law right to compensation from the doctor or the hospital, whose laboratory had been negligent in its blood test analysis, for essentially two reasons. First, it was contrary to public policy to recognise that a doctor had a duty of care to terminate a fetus which was likely to be born with physical abnormalities. Secondly,

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50 *McKay v Essex Area Health Authority*, above n 21.
51 *Harriton (by her tutor Harriton) v Stephens*, above n 22.

it was not possible to quantify the damages that should be payable if such a duty should be held to exist.

[100] Stephenson LJ considered that the child had been injured by the rubella which had infected her mother and that the injuries were not the result of any act or omission of the defendants. The only result for which the defendants were responsible was the child being born. Stephenson LJ said:[52]

> … this child has not been injured by either defendant but by the rubella which has infected the mother without fault on anybody's part. Her right not to be injured before birth by the carelessness of others has not been infringed by either defendant, any more than it would have been if she had ben disabled by disease after birth. Neither defendant has broken any duty to take reasonable care not to injure her. The only right on which she can rely as having been infringed is a right not to be born deformed or disabled, which means, for a child deformed or disabled before birth by nature or by disease, a right to be aborted or killed; or if that last plain word is thought dangerously emotive, deprived of the opportunity to live …
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> …
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> But the complaint of the child, as of the mother, against the authority, as against the doctor, is that their negligence burdened her (and her mother) with her injuries. That is another way of saying that the defendants' breaches of their duties resulted, not just in the child's being born but in her being born injured or, as the judge put it, with deformities. But as the injuries or deformities were not the result of any act or omission of the defendants, the only result for which they were responsible was her being born. …
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> ...
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> There is no doubt that this child could legally have been deprived of life by the mother's undergoing an abortion with the doctor's advice and help. So the law recognises the difference between the life of a fetus and the life of those who have been born. But because a doctor can lawfully by statute do to a fetus what he cannot lawfully do to a person who has been born, it does not follow that he is under a legal obligation to a fetus to do it and to terminate its life, or that the fetus has a legal right to die.
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> …
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> I am therefore compelled to hold that neither defendant was under any duty to the child to give the child's mother an opportunity to terminate the child's life. That duty may be owed to the mother, but it cannot be owed to the child.
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> To impose such a duty towards the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy.
> …

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52 *McKay v Essex Area Health Authority*, above n 21, at 1178 – 1180.

[101] On the second ground for declining to accept that any duty was owed to the child, that is, the impossibility of quantifying compensation, Stephenson LJ said:[53]

> … The only way in which a child injured in the womb can be compensated in damages is by measuring what it has lost, which is the difference between the value of its life as a whole and the value of its life as an injured child. But to make those who have not injured the child pay for that difference is to treat them as if they have injured the child, when all they have done is not having taken steps to prevent its being born injured by another cause.
>
> The only loss for which those who have not injured the child can be held liable to compensate the child is the difference between its condition as a result of their allowing it to be born alive and injured and its condition if its embryonic life had been ended before its life in the world had begun. But how can a court of law evaluate that second condition and so measure the loss to the child? …
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> …
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> To measure loss of expectation of death would require a value judgment where a critical factor lies altogether outside the range of human knowledge and could only be achieved, if at all, by resorting to the personal beliefs of the judge who has the misfortune to attempt the task. If difficulty of assessing damages is a bad reason for refusing the task, impossibility of assessing them is a good one.

Harriton v Stephens

[102] The facts in *Harriton* were similar to those in *McKay*. The first instance court had found against the claim by the child. That decision was upheld by majority decision of the New South Wales Court of Appeal, with Mason P dissenting.[54]

[103] On further appeal to the High Court of Australia, the principal judgment in favour of dismissing the claim by the child was given by Crennan J, with whom three judges agreed. Two other judges gave separate, concurring judgments. Kirby J dissented.

[104] Crennan J dismissed the claim essentially on the same bases as the Court of Appeal had dismissed the claim in *McKay*.

[105] On whether the doctor owed a duty of care to the appellant, Creenan J stated:[55]

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53 At 1181 – 1182.
54 *Harriton (by her tutor Harriton) v Stephens* [2004] NSWCA 93; (2004) 59 NSWLR 694.
55 *Harriton (by her tutor Harriton) v Stephens*, above n 22.

> [244] It was not Dr P R Stephens's fault that Alexia Harriton was injured by the rubella infection of her mother. Once she had been affected by the rubella infection of her mother it was not possible for her to enjoy a life free from disability. The agreed facts assert that Dr P R Stephens should have treated Mrs Harriton differently, in which case rubella would have been diagnosed. However, on the agreed facts, it was not possible for Dr P R Stephens to prevent the appellant's disabilities. Dr P R Stephens would have discharged his duty by diagnosing the rubella and advising Mrs Harriton about her circumstances, enabling her to decide whether to terminate her pregnancy; he could not require or compel Mrs Harriton to have an abortion.
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> …
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> [249] It is not to be doubted that a doctor has a duty to advise a mother of problems arising in her pregnancy, and that a doctor has a duty of care to a fetus which may be mediated through the mother. However, it must be mentioned that those duties are not determinative of the specific question here, namely whether the particular damage claimed in this case by the child engages a duty of care. To superimpose a further duty of care on a doctor to a fetus (when born) to advise the mother so that she can terminate a pregnancy in the interest of the fetus in not being born, which may or may not be compatible with the same doctor's duty of care to the mother in respect of her interests, has the capacity to introduce conflict, even incoherence, into the body of relevant legal principle.
>
> (footnotes omitted)

[106] On the quantification of damages, Creenan J said:[56]

> [251] Because damage constitutes the gist of an action in negligence, a plaintiff needs to prove actual damage or loss and a court must be able to apprehend and evaluate the damage, that is the loss, deprivation or detriment caused by the alleged breach of duty. Inherent in that principle is the requirement that a plaintiff is left worse off as a result of the negligence complained about, which can be established by the comparison of a plaintiff's damage or loss caused by the negligent conduct, with the plaintiff's circumstances absent the negligent conduct. …
>
> [252] A comparison between a life with disabilities and non-existence, for the purposes of proving actual damage and having a trier of fact apprehend the nature of the damage caused, is impossible.

[107] By contrast, in his dissenting judgment, Kirby J held that there was no difficulty in establishing that the doctor owed the appellant a duty of care.[57] He also considered that the Courts had grappled successfully with other circumstances which had involved comparing existence with non-existence in legal settings,[58] and said that

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56 Ibid.
57 At [72].
58 At [95].

he would have held that general damages for proved pain and suffering and special damages for needs created by the negligence of a medical practitioner in respect of a fetus in utero were recoverable in an action brought by or on behalf of the child.[59]

[108] Kirby J was critical of the policy arguments made against recognising a duty of care and a right to damages in "wrongful life" cases and said:[60]

> [112] It is axiomatic that wrongful life actions do not entail the proposition that the fetus *should* have been terminated. Less still do they impose a *duty* to kill. It would be impossible to comply with any such duty considering that medical practitioners can never compel an expectant mother to undergo an abortion. A defendant in a wrongful life action will discharge his or her duty of care if reasonable care is exercised in detecting foreseeable risks which may befall the fetus; warning of those risks where the reasonable person would have done so; and taking reasonable care in providing advice and guidance to the patient or sending the patient to those who can give such advice. Sometimes, the duty can be discharged by doing nothing. If a mother chooses to continue a pregnancy or to conceive in the first place where a proper, careful and informative warning has been given, that is her decision to make. No liability will accrue to the health care provider if a mother adopts such a course having been accurately advised of the risks and competently treated.
>
> (footnotes omitted)

Discussion

[109] It is clear that the decisions in *McKay* and *Harriton* (and also *Waller v James*,[61] which was decided at the same time as *Harriton*) were heavily influenced by a judicial reluctance to accept that doctors should be held liable to the child for failing to terminate the pregnancy of the child's mother. They were concerned that to do so would amount to recognising a duty on the doctor to terminate the life of the fetus. It is apparent that those concerns were also reflected in the judges' unwillingness to accept that it was possible to quantify damages if there had been a breach of a doctor's duty of care to the fetus.

[110] I consider that similar concerns influenced the District Court Judge's conclusion that "treatment" for the purposes of the ACC Act could not include termination of a pregnancy, at least from the perspective of the fetus.

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59 At [109].
60 Ibid.
61 *Waller (by his tutor Waller) v James*, above n 22.

[111] However, two things are plain from the decisions in *McKay* and those of the majority in *Harriton*. The first is that the judges' analyses of causation are not consistent with the analyses of the Supreme Court in *Allenby* and the Court of Appeal in *Cumberland*. The second is that the concerns that influenced the decisions not to recognise a duty of care have little relevance in New Zealand under the ACC Act.

[112] In both cases, the judges emphasised that the rubella caused the injuries and refused to accept that the doctors' admitted negligence had any bearing on liability to the child. Yet, as Mason P said succinctly and cogently in his dissenting judgment in the New South Wales Court of Appeal in *Harriton*: [62]

> To state that a person is inflicted with a (congenital) disease is no answer to a posited duty of care or the application of normal causation principles in relation to a treating doctor. If the doctor becomes involved and has the capacity to avoid or negate the disease by the exercise of reasonable care and skill then he or she will normally be held liable for the consequences of the breach of duty of care. This is commonplace in medical negligence litigation involving disabilities stemming from preventable or curable diseases that befall plaintiffs during their lifetime.

[113] This analysis, which was endorsed by Kirby J in the High Court of Australia,[63] is similar to the reasoning of Blanchard J in *Allenby*, namely that even if the direct cause of pregnancy was sexual intercourse, the pregnancy was still caused by the surgeon's negligence in that case.[64] It is also similar to the reasoning of the Court of Appeal in *Cumberland* where the Court held that the doctor's misdiagnosis of the spina bifida and the loss of the mother's right to elect to terminate the pregnancy caused the pregnancy to continue.[65]

[114] Mason P also considered that the perceived dichotomy between the interests of the mother and those of the child was false and that the negligent acts of the doctor in failing to advise the mother had consequences for both mother and the later born child.[66]

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62 *Harriton (by her tutor Harriton) v Stephens*, above n 54, at [121].
63 *Harriton (by her tutor Harriton) v Stephens*, above n 22 at [39].
64 *Allenby v H*, above n 12, at [80].
65 *Cumberland v ACC*, above n 7, at [36].
66 *Harriton (by her tutor Harriton) v Stephens*, above n 54, at [115].

[115] Mason P's analysis reinforces my own conclusion that there can be no difference in terms of the causative effect of the doctor's actions in the present case whether they are viewed from the perspective of the fetus or the mother. In both cases, the actions were causative of the pregnancy continuing and of the child being born with spina bifida.

[116] More generally, the fact that the analyses of the decisions in *McKay* and *Harriton* are so markedly different from the analyses in *Allenby* and *Cumberland* indicates those decisions can have little bearing on the approach this Court takes in the present case, even putting aside the very different context in which they were decided. However, when the ACC context is taken into account, it is clear that the concerns that influenced those decisions have no relevance in New Zealand.

[117] As the Woodhouse Report stated in its proposals for an accident compensation scheme, the object of the scheme was "compensation for all injuries, irrespective of fault and regardless of cause".[67] While there have been adjustments in the various iterations of the ACC Acts with respect to causation, the "no fault" principle has been a constant of the various versions of the Act.

[118] As McGrath J said in *Harrild v Director of Proceedings*:[68]

> The policy of successive accident compensation statutes in New Zealand, including the 2001 Act, has been to provide compensation for persons suffering personal injury without requiring that they show fault to establish their entitlement.

[119] In other words, the judicial reluctance in *McKay* and *Harriton* to accept that the doctors owed a duty of care is irrelevant in the context of the ACC Act where cover is not dependent on breach of duty.

[120] Similarly, concerns over quantification of loss or damage have no relevance in the ACC context. Section 69, which sets out the entitlements of a person who has cover under the Act, specifies what those entitlements are. These include, for a person such as AZ, lump sum compensation for permanent impairment. Consistently with

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67 Woodhouse Report, above n 15, at [279](c).
68 *Harrild v Director of Proceedings*, above n 25, at [130].

the purpose of the ACC Act as set out in s 3, the focus of the entitlements in s 69 is on the rehabilitation of the person injured. No comparison between existence and non-existence, as concerned the judges in *McKay* and *Harriton*, is required.

[121] In summary, the two policy reasons that underlie the decisions in *McKay* and *Harriton* have no relevance in the ACC context. Nonetheless, the decisions serve as a powerful reminder that, in the context of the ACC, the focus must be on the injury and not on fault or, indeed, on causation except to the extent the Act itself requires it.

[122] In this respect, I consider that the Corporation's approach in the present case is not consistent with the no fault regime it is required to administer. To say that the misdiagnosis of the scan was treatment for the purposes of the mother but not treatment for the purposes of AZ is, in effect, to require AZ to show fault or a duty of care towards her when none is required by the policy of the Act or the language of the relevant provisions.

[123] I consider that, to be consistent with the no-fault principle of the ACC Act, the term "treatment" should be interpreted neutrally and without imposing any value judgment on the purpose for which the treatment was offered. In the case of treatment provided to a pregnant mother because of her pregnancy, treatment for the mother can also be treatment for the fetus. The misreading of the scan and the loss of the mother's opportunity to elect termination amounted to a treatment failure that caused personal injury to the child and the mother and for which both are entitled to cover under the ACC Act.

[124] I consider this conclusion to be consistent with the language and policy of the Act, with the "generous, un-niggardly" approach to the interpretation of the ACC Act called for by the Court of Appeal[69] and with the decisions of the Supreme Court in *Allenby* and the Court of Appeal in *Cumberland*.

[125] I acknowledge that this conclusion will produce a disparity in benefits available to AZ as compared to the benefits available to a person born with spina bifida where there was no treatment failure. That is the consequence, however, of the

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69 *ACC v Mitchell*, above n 16.

disparity in cover provided under the ACC Act and that available under the social welfare system.

[126] As Sir Geoffrey Palmer QC noted in his retrospective analysis of the Woodhouse Report, one constant feature of the ACC scheme has been a discrimination in public programmes that relieve the consequences of some misfortunes and disabilities but not others.[70] As Sir Geoffrey went on to discuss, that discrimination can only be addressed through legislative reform. For the present, however, the fact that there are more generous entitlements available under the ACC Act than are available under the social welfare system is no reason for declining cover to AZ.

Result

[127] AZ's appeal is allowed.

[128] In response to the Agreed Question of Law, the Court declares that a person born with spina bifida (claimant) has cover for treatment injury under the Accident Compensation Act 2001 where:

(a) the existence of the claimant's spina bifida was not, but should been, detected at the 20-week scan stage;

(b) had the spina bifida been detected, the claimant's mother would have elected termination; and

(c) the misdiagnosis meant that the opportunity to elect termination was lost to the claimant's mother.

Costs

[129] AZ is entitled to costs on the appeal as sought in the Notice of Appeal.

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[70] Sir Geoffrey Palmer QC *"A Retrospective on the Woodhouse Report: The Vision, the Performance and the Future*" (2019) VUWLR 401 at 413.

[130] I award costs to AZ on a 2B basis. If the parties are unable to agree costs, they may submit memoranda of no more than five pages.

[131] I thank both counsel for their excellent submissions on a novel and difficult question.

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G J van Bohemen J