IN THE SUPREME COURT OF NEW ZEALAND SC 70/2011

BETWEEN **KEITH ALLENBY**

Appellant

AND **H**

First Respondent

AND **MIDDLEMORE HOSPITAL OF COUNTIES MANUKAU DISTRICT HEALTH BOARD**

Second Respondent

AND **ACCIDENT COMPENSATION CORPORATION**

An Interested Party

AND **DOCTORS FOR SEXUAL ABUSE CARE**

Intervener

Hearing:	16 February 2012
Court:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	A H Waalkens QC and C L Garvey for the Appellant
	J M Miller and M Dao for the First Respondent
	P N White and B P Mills for the Second Respondent
	D B Collins QC, B A Corkill QC and S L Scott for the Interested Party
	F Geiringer for the Intervener

CIVIL APPEAL

MR WAALKENS QC:

Yes, if it pleases your Honours, Waalkens. I appear with Ms Garvey for the appellant.

ELIAS CJ:

Yes, thank you, Mr Waalkens and Ms Garvey.

MR MILLER:

May it please your Honours, counsel's name is Miller and I appear with Ms Dao for Ms H.

ELIAS CJ:

Thank you, Mr Miller, Ms Dao.

MR WHITE:

May it please your Honours, counsel's name is White and I appear with Ms Mills for Counties Manukau District Health Board.

ELIAS CJ:

Thank you, Mr White and Ms Mills.

MR COLLINS QC:

Mr Corkill and Ms Scott appear with me for the Corporation, your Honour.

ELIAS CJ:

Thank you Mr Solicitor, Mr Corkill and Ms Scott.

MR GEIRINGER:

May it please your Honours, counsel's name is Geiringer and I appear for the intervener, Doctors of Sexual Abuse Care.

ELIAS CJ:

Thank you Mr Geiringer. Mr Waalkens.

MR WAALKENS QC:

Now, your Honours, the essential issue at the end of the day has to be what the 2001 Act meant and what it means in terms of whether the circumstances of this case are

covered by the Act and it's the appellant's contention that it just simply makes no sense, leaving entirely to one side, the, what we say, there's the plain and ordinary wording of the relevant sections, but also the purpose of the legislation. It just makes no sense that pregnancy is secondary to a medical misadventure, where there are the physical circumstances that flow from that, should not be covered.

Your Honours will see that there is no dispute, firstly, that that result contended for by ACC would make this a remarkable and rather unique circumstance. Seemingly there's no contest that there's no other adverse consequence from medical treatment or medical management where there are physical consequences which are not covered and, indeed, the Court of Appeal noted that there was something odd about that circumstance.

I want to come straight, if I may, to the relevant statutory provisions and they firstly are, and you'd have seen them, physical injuries which are described or defined in section 26 of the 2001 Act. I've worked from my learned friend for the ACC. Their copies of the Act are a little clearer than mine and I apologise for some of the photocopying in my bundle, but you'll see section 26 makes it so very clear that physical injuries include, for example, a strain or a sprain and you'll see we say that that is a useful example against which you measure the concept of a physical injury.

ELIAS CJ:

What's a strain? Is it a medical concept, a strain?

MR WAALKENS QC:

Well, I would interpret it to be something akin to a sprain. That's where the body is or the muscles, whatever the structures of the body are strained or stressed in some way. It has a physical concept to it, but it's, in my submission, a very low level concept of physical consequence with which if you measure pregnancy against and the physical consequences that flow from it, would well be met with what's defined as physical injury.

TIPPING J:

Mr Waalkens, you've just said something that I think may be very important. You said pregnancy and the physical consequences that flow from it. Is the cover sought essentially for the physical consequences of pregnancy rather than pregnancy per se and I'm not trying to split hairs —

MR WAALKENS QC:

Yes, I'm inclined to think it's splitting hairs, your Honour, because the two are so intertwined. All pregnancies have physical —

TIPPING J:

But that is how it comes to be covered, if you like.

MR WAALKENS QC:

Correct, it's not pregnancy per se, it's not just simply the fact of pregnancy. There has to be physical consequences that flow from it.

TIPPING J:

And which will inevitably flow from it.

MR WAALKENS QC:

Absolutely so. There won't be a pregnancy case where there's no physical consequences of differing degrees and I think ACC, indeed, acknowledges that, in fact, at the far extreme there will be cases where on their very restrictive view of the Act there will be injuries that flow from pregnancy. But every stock standard pregnancy, in my submission, will have the type of concepts that section 26(1)(b) is referring to, something at least equivalent to a strain or a sprain. But the guts of the argument, if I may put it broadly like that, really comes down to section 20 and I want to take a little bit of time on this because with the greatest of respect, it's my submission that ACC, and in turn the Court of Appeal majority, completely misunderstood this provision. We can see in subsection (1)(b) that the kinds of injury are set out later on and in subsection (2), there are a list of the various criteria for which subsection (1) applies, being various forms of personal injury that are deemed by the Act to be personal injury and the relevant ones, as your Honours will know, are (b) and (f). (f) is the one I predominately focus upon, although may I note that the case stated or the question of law stated refers only to (b) but (f) is the one that really gives the most instruction in this circumstance, and I want to look at (f), firstly. It identifies personal injury caused by three quite different things. Gradual process is the first thing, disease is a second thing or infection. They're all quite separately identified criteria and your Honours will see those three concepts, gradual process, disease or infection, repeated in four of the — or three other subsections in that

provision. I'll come to those later, but for (f)'s purposes, gradual process, disease or infection that is a personal injury caused by medical misadventure.

It's my submission that a gradual process is a different thing from disease. I had a look in the dictionary, a gradual process is referred to something as develops slowly and progressively. I accept that disease can, likewise, develop slowly and progressively, but not necessarily so, but gradual process, in my submission, has all the hallmarks of something that's natural and it's tailor-made for a pregnancy. ACC fails to recognise this and we can see that if I could take you briefly to a couple of their paragraphs. Firstly, paragraph 55 of their submissions. As did the majority in the High Court, they make much of their —

ELIAS CJ:

Sorry, what —

MR WAALKENS QC:

Fifty-five, your Honour.

ELIAS CJ:

Yes, thank you.

TIPPING J:

Is your point in part, that the gradual process doesn't have to be a disease?

MR WAALKENS QC:

Correct, that's correctly so, Sir. And in fact, I'll come to the point but if I can just signal where I'm getting to, much is made by both the Corporation and by the majority about disease being pathological and that's why it's different from what we're talking about, but there they focus only on the second of the three criteria in subsection (f), which also has gradual process and infection, but paragraph 55, the Corporation say it's correct that the progression of disease arising from a misdiagnosis of cancer is covered and they set out why that's so. And they refer to various criteria including in 55.2 the tumour can cause other organs to fail and harm, and then they concluded at 55.4, "This example of a natural process is wholly different from the process of pregnancy." They failed to make any analysis of actually what a gradual process is. It may be correct what they say about a misdiagnosis of cancer. I say that there is sufficient analogies with that in any event,

but that's only referring to disease as paragraph 55 makes so very clear and if you go on to 56 of the Corporation's submissions, they pick up the point which is indeed correct, the majority in the *ACC v D* [2007] NZAR 679 (HC), [2008] NZCA 576, which I've referred to as *Ballal*, but the *ACC v D* case, the majority made the point that the difference between pregnancy and others is that pregnancy, unlike disease, is not pathological, but again, they're only referring there, and wrongly so, to the second of these three concepts. They're not even discussing gradual process. You'll see the majority's analysis of this, if you wanted to cross-reference that as paragraph 55 of the majority decision in the Court of Appeal, that's behind my tab or behind tab 3 of the case on appeal, where they indeed pick up on that very point at the very end of paragraph 55. And, of course, it begs the question, disease being pathological, I'm no linguist but I gather that pathological comes from the Greek word "pathos" which means disease and indeed pathological is of or relating to disease, so it's only discussing disease, and you can see, if I may take you back to the Corporation's submissions, they introduce this entire discussion at paragraph 49, just a couple of pages earlier, and they, with the greatest of respect, make something of a Freudian slip in 49.1. They say, "The boundary between injury by accident and injury by disease. There is an explicit and precise framework for the coverage of disease or infection." Well, they dropped the words "gradual process."

TIPPING J:

Mr Waalkens, have you found in your researches any explanation for adding gradual process on top of disease or infection?

MR WAALKENS QC:

No, no, in fact, one thing that's very clear is that there's been a huge amount of research done into this from Hansard. Your Honours will see there's minister briefing papers. There's a whole range of different contextual documents. None of which even discuss these key issues. So —

TIPPING J:

Does gradual process take its colour from disease or infection in the sense that it's got to be something that's unnatural, to use a term I've just taken at random.

MR WAALKENS QC:

Well, plainly not, because the misdiagnosed cancer is a natural thing and there are numerous other —

TIPPING J:

Well, it's not natural in the sense of — it's inherently harmful —

MR WAALKENS QC:

It's not wanted.

TIPPING J:

It's inherently harmful. Is pregnancy inherently harmful?

MR WAALKENS QC:

But it's the physical concept or result of the disease that your Honour is addressing there. It's as natural — it's a natural phenomena.

TIPPING J:

Well, like my brother Blanchard, I just have no feel for what was meant by gradual process, stuck in with disease and infection.

McGRATH J:

Is it perhaps intended to get away from the notion of an accident, a single event causing trauma or something of that kind, in trying to offer an additional gradual process in contrast to that?

MR WAALKENS QC:

Yes, correct, and that's the point that I make later on when I, in my submissions, address just whether there's a need to actually identify when the accident occurs or when the injury occurs. Here we're talking about something that gradually develops to a point of being, to use the words of, I think ACC talk about something that's harmful to the body or it's caused some deleterious effect.

McGRATH J:

That's a question that is interesting that you pose, as you say later, but I'm just coming back to trying to explore the reasons for introduction of gradual processes.

MR WAALKENS QC:

Yes, well, it has to be so that it's looking at something that develops over a period of time, whereas when you've got an infection it's immediately there to be seen, a disease is likewise.

TIPPING J:

Well, I don't know about that. An infection may be a gradual process, so may a disease, it gradually develops.

MR WAALKENS QC:

It does gradually develop, but when you've got the — when you've identified the disease, there it is to be seen and you've got these words "gradual process" and as I say they are quite distinctive. They — well there's certainly an additional word there beyond just infection or disease which the Corporation focuses on and as I say, with all due respect, the majority of the Court of Appeal focuses only on.

McGRATH J:

Here we're looking at something that is caused by medical misadventure, aren't we?

MR WAALKENS QC:

Correct, that's correct.

ELIAS CJ:

I don't want to open up too much of a can of worms and it may be that because I haven't had as much experience as some of the other members of the Court with this legislation that I have this query, but I wonder why it is that the Courts very early on set their faces against saying that injury in this legislation is legal injury because the word "personal injury" — the term "personal injury" on one view would be a necessary concept to use to make it clear that you're talking only about injury in law to the person, and it does seem to me that all these refinements in terms of whether things are natural or unnatural and pathological or whatever have come about because the Courts have taken the view that the Act is using sort of lay language in this concept and in this legislation.

MR WAALKENS QC:

Yes, of a restrictive view of injury rather than, as your Honour says, personal injury to the person. Well, that has to be, but later I'm going to take you to the history of how

this developed and — but perhaps before I do could I just take you, please, and commend if I may, Justice Mallon's judgment, which obviously I adopt.

I do commend the entirety of that judgment to you, but in particular on this issue she's got quite a useful analysis at paragraph 79. That's underneath tab 4 of the case. Now here she discusses gradual process, the exclusion – and I should say – I'm sorry, I should introduce it by section 77 – paragraph 77 is the starting point, I beg your pardon, and this is under the heading, "Are natural processes excluded by the legislation?", and you'll see in the second sentence she rightly notes that under subsections (2), (3) and (4) of section 26(1) there are exclusions, in particular section 26(2). That excludes personal injury caused wholly or substantially by a gradual process, disease or infection, and this picks up on why Parliament came to adopt different types of features that needed to be present before certain gradual processes were to be covered and not therefore caught with this exclusion, and Her Honour at paragraph 79, I suggest quite usefully, discusses this. "The exclusion is not for natural processes per se. It is for gradual processes that are not of a certain kind. The focus is on the cause of the gradual process", and then she goes on to refer to that. Having also –

TIPPING J:

Has she used the word natural processes in the first sentence of that paragraph in studied contradistinction to gradual processes, because if her heading is — she's dealing here with natural processes, isn't she? It's her heading.

MR WAALKENS QC:

Yes, yes.

TIPPING J:

Does she really mean it's not for gradual processes per se?

WILLIAM YOUNG J:

Isn't she referring to it as probably encompassing gradual processes, disease and infection?

MR WAALKENS QC:

Yes.

WILLIAM YOUNG J:

The sort of things that happen in the course of nature as opposed to result of external trauma?

MR WAALKENS QC:

That's what I would contend, so she's using it in that general sense, your Honour, and we can see from Her Honour's indeed summary at paragraph 78 of the four different types of — actually that's not it, I beg your pardon.

TIPPING J:

But the real significance it seems to me, Mr Waalkens, is that Parliament has recognised that a gradual process can be a personal injury.

MR WAALKENS QC:

Yes.

TIPPING J:

Because it talks about gradual process that is personal injury.

MR WAALKENS QC:

Yes.

BLANCHARD J:

Well, it's encompassing a number of things that you wouldn't naturally call a personal injury. You go to a doctor for treatment for a disease and the doctor says, "Oh, you haven't got it," and it gets worse. You appear to be covered, but no one would ordinarily say that you'd suffered a personal injury.

MR WAALKENS QC:

No, and that's —

BLANCHARD J:

It's obviously in this context an extended use of that term.

MR WAALKENS QC:

Yes, and that fits again with the very purpose of this broad legislation and its — and — which I'll come to soon, the social contract that was behind it, which is the

purpose, and again section 5 of the Interpretation Act, obviously I know Your Honours are very familiar with it through *Fonterra* and others cases this Court's dealt with, where you need to look at the plain and ordinary meaning but then check it against the purpose, and it fits very neatly with the purposes that I'm going to come to in a moment. In fact, in that regard, my paragraph 24 sets out the extract from Hansard about what was —

WILLIAM YOUNG J:

Sorry, what paragraph, Mr Waalkens?

MR WAALKENS QC:

Paragraph 24. I just note that neither the Court of Appeal nor incidentally did ACC in its response submissions refer to what the Minister actually said about the purpose of the 2001 legislation. They referred to section 3, although, as I've said in my submissions, the Court of Appeal majority did not do so, but the Minister made it very clear that the — fundamentally, and this is a broad comment, it was to get back to the sort of coverage that the scheme first adopted since the — or introduced in the 1970s, and we know that up until 1972 both ACC and I are on the same page in this regard, but pregnancy, secondary to failed sterilisations and the like, was covered and it might be useful if I could just, in that regard, refer to the case in my learned friend's casebook of *XY v Accident Compensation Corporation* (1984) 2 NZFLR 376 (HC), that's the Justice Jeffries' decision, that's tab 17 of my learned friend's blue casebook.

So tab 17, Justice Jeffries. You'll see it's dated 1984 so I think I'm correct in saying prior to the 2001 legislation it was the last High Court case that we've all referred to on the topic, where Justice Jeffries on page 380, and my learned friend has referred to this and it's referred to in some of the judgments, in the second paragraph, complete paragraph, on that page, dealt with this issue that we're vexing with, although note it's 1984. It's already pretty dated. "This Court thinks the answer lies in the ordinary meaning of the words … It has been decided and it is not challenged in any way, that conception by a woman of a child in the circumstances was a medical misadventure and an injury", and I just emphasise those words "and an injury". That's been an accepted proposition up to this point in time. "That itself could be described as a highly artificial result but it is the base from which we must proceed. It is also accepted that pregnancy and birth are still part of the injury. To name regeneration of the species … as an injury … is to introduce novel and very

fundamental changes to accepted human thinking", and then His Honour notes in the next sentence, that determining that once the birth has taken place there's no longer an issue, brings a welcome return to normalcy, and about four lines down, to put it simply, after the birth of a normal healthy child the injury's entirely healed.

Now why I highlight that at this stage is that that was an authoritative judgment, albeit noting the observations were rather highly artificial. That nonetheless is a clear decision by the High Court prior to 2001, that these types of cases were covered and I emphasise that against the backdrop of what we've looked at with the introduction of the 2001 legislation and what was being sought to achieve and I also make the point that my friends and I both, my friends and I obviously take different sides on this, but they say, "Well, Parliament had every opportunity to include it into, include pregnancy in these circumstances," but with the greatest of respect, the more compelling point must be, given cases like *XY*, just prior to the — well, not long before 2001, Parliament surely ought to have excluded this if it seriously is being contended that it was, it should've done so and you'll see in the 1992 Act which my learned friends for ACC say is the most important of the legislative changes when ACC was being reined in and the costs of the scheme were being reined in, you'll see in that Act, in section 10, wording such as, "For the avoidance of doubt, it is hereby declared that personal injury [caused in these circumstances won't be covered]," and there's a whole — there's a range of different —

ELIAS CJ:

Sorry, this is in the 2001 Act?

MR WAALKENS QC:

No, I beg your pardon, your Honour, 1992.

ELIAS CJ:

I'm sorry.

MR WAALKENS QC:

Which ACC — so I'll come to the 2001 Act, because there's a similar provision in it, but as early as 1992, Parliament did turn its mind to saying, "Well, let's avoid all doubt for the avoidance of general doubt or any doubt, let it be clear that these things are not to be covered." And they don't, anywhere, hint at these types of cases, even though the Judges or the Courts, as I say Justice Jeffries in *XY* had had queried

whether it should be covered, so — and likewise section 4 of the '92 Act also makes it clear what is actually being excluded and the same provisions your Honours apply in the 2001 Act at section 26, subsection (2), (3) and (4), all in the 2001 Act refer to particular categories or types of things that are not to be covered, and it is my very strong submission that if Parliament had intended by the words used that these types of cases, and I'm talking here about only pregnancy secondary to a failed sterilisation, shouldn't be covered, or pregnancy generally shouldn't be covered, how easy it would've been for them to have said so.

TIPPING J:

Wasn't there something which specifically mentioned pregnancy in relation to sexual assault?

MR WAALKENS QC:

I'll come to that in a moment —

TIPPING J:

You'll come to that?

MR WAALKENS QC:

Yes, I will, because that is an important thing, but again with the greatest of respect, ACC have got the wrong end of the stick on that, the Courts though —

TIPPING J:

All right, we'll come to it when you —

MR WAALKENS QC:

I will, Sir.

McGRATH J:

So can I just, coming back, you're saying that, I can see what's your point in relation to the express exclusion in section 10 of 1992. Can you just elaborate a bit on section 26 of the 2001 Act? You're referring to the definition of personal injury in section 26 then, are you?

MR WAALKENS QC:

26(2), that's correct.

McGRATH J:

Thank you, sorry, I hadn't caught subsection 2.

MR WAALKENS QC:

Yes.

McGRATH J:

That explains it.

MR WAALKENS QC:

And in fact, (2), (3) and (4), they all refer to things that are excluded.

McGRATH J:

Yes, I can see that, thank you.

MR WAALKENS QC:

Now ACC, in response say, "Ah, but the 1992 legislation," which they say is the main focus of these wind changes, if you like, and reining in the costs in the ACC scheme, they say that at paragraph 20 and I accept that in 1992, that was the time when ACC, when sorry, Parliament decided, "Look, enough is enough, we're going to rein this scheme in, in some ways." ACC says that cost containment and the reining in of the scheme sits with its argument that pregnancy should therefore be excluded, but with the greatest of respect, that does not stand scrutiny. The first point I make is that pregnancy, secondary to a failed sterilisation or a medical misadventure are very rare cases. These aren't — we're not talking about lots and lots of cases here. I'll come to some of the other things that Parliament was concerned about in a moment. They were big numbers and they were big costs. These types of cases are rare and in Justice Mallon's decision at paragraph 6, you probably don't need to turn to it, she refers to an 11 year period up to 2002 or three where there were 72 cases and I did the maths on that, that's six and a half cases of claims for these types of cases per year.

TIPPING J:

And the cost of cover wouldn't be —

MR WAALKENS QC:

It's minuscule.

TIPPING J:

— much, I would've thought.

MR WAALKENS QC:

It's absolutely minuscule and why is that so, because we got parental leave, we've got 14 weeks or something you get under — and whether that was in existence, I don't think that was in existence back then, but you've got the pregnancy consultations for women who are pregnant are paid for, but there would be other bits and pieces that the person suffering an injury by pregnancy is no doubt going to suffer but they will be very small amounts. The big ticket items in the ACC cost schedule are the permanent disability things. That's not these cases.

McGRATH J:

Is it part of your argument that any extra cost, to some extent, be recovered in relation to the charges that those who are exposed —

MR WAALKENS QC:

Your Honour has stolen a bit of my thunder because that was —

McGRATH J:

I'm sorry, you come to it when you're ready to.

MR WAALKENS QC:

That was the next point I'm coming to in a moment.

ELIAS CJ:

Is your submission though not rather overstating things because a substantial risk following pregnancy is depressive illness and it's those consequences that probably have also to be taken into account here? I'm just saying, it's not just a question of paying the fees and so on.

MR WAALKENS QC:

No, no, look, your Honour is of course correct, but the big ticket items are very apparent from ACC submissions in paragraph 24. Could I take you to those?

Because they are entirely different from these pregnancy cases, in paragraph 24. I don't accept this paragraph at all. They talk about there the tightening and confining of eligibility and the Minister of Labour's speech, his Bill, and they give, they conclude then by saying, "The Bill thus reversed the effects of," and the first one is our case 24.1, that's the case I've just taken to you of Jeffries J's. I don't accept that it has that effect at all, but I can show you why it was never intended, because it's not in any of the great numbers of papers that ACC and us have handed to you, there's not any reference to this being an intention whereas each of the other three categories that follow are very much discussed.

The first one is the *Wallbutton v Accident Compensation Commission* [1983] NZACR 629 (HC) case and you'll see the text there and it's accurately described, a lady who got ACC cover because she bent over and said, "Oh, my gosh, I've got a back injury," and I'm not saying it was contrived, but those were problem cases, these back injury cases with big, big numbers for ACC, and then the next one, *Accident Compensation Corporation v E* [1991] 2 NZLR 228 (HC), [1992] 2 NZLR 426 (CA), cover available for the mental consequences despite any physical injury and your Honours will know that that was another big area of concern. They're very difficult to police and contain, pure mental injury cases and the last one, 24.4 is a reference to people who had no external event here, it was a near-miss cot death, but no external event as such that gave rise to the injury.

And I want to take you back to each of those, and if you could just jot in the margin, if you wouldn't mind, 24.2, the bending over, the back injury, you'll see that the Minister's briefing paper behind tab 7 of my learned friend's casebook, that was Bill Birch, I think at the time, I'm not sure anyway, at paragraph 20, specifically refers to that being one of the objectives of tightening or reining in of the ACC medical misadventure regime. So that is specifically identified. Likewise 24.3, the pure mental consequences, the Minister in that same paper at paragraph 63 makes it abundantly clear. They want to outlaw that and they have expressly done so because the Act went on to provide, "You can only get mental injury cover if it's parasitic on a physical injury," and then the last one is 24.4, the absence of an external event there, the near-miss cot death, section 2 subsequently dealt with that, saying, "Well, accident has to be in a force external to the body," but you won't find anywhere, any discussion in the Minister's briefing notes or in any of the Hansard discussions or anywhere. The point that my friends make at 24.1, they say that's the effect of it, that's very much in contest and if it were to have been the effect, it could

only be so that Parliament would've, somewhere in these many papers have said, "Oh, and we're going to deal with this pregnancy problem."

BLANCHARD J:

Perhaps the force of the point you're making is strengthened when you go back to the judgment of Justice Jeffries, who talks about the base from which we must proceed.

MR WAALKENS QC:

Correct.

BLANCHARD J:

So you would expect, if they're changing the base, that they would do so in a very direct and expressed way.

MR WAALKENS QC:

Yes, and I accept that, your Honour, that's exactly my point, and just with this point in mind, could you please turn the page in ACC's submissions to paragraph 28, that this is just completely wrong. They there say a summary of the '92 reforms, because the issue is so laden with policy factors, the better conclusion is the absence of reference to pregnancy should be taken as significant. Judicial statements prior to '92, at a high level, clearly stated pregnancy could not be … that's just abundantly false. "To reverse the established meaning would have required express language," and I say it's the opposite. The last word on it was Justice Jeffries in *XY* and Justice Blanchard's comments pick up on the point I make there.

Well, look, there were some other changes made in 1992 to rein in the cost of ACC and none of them deal with this issue of pregnancy, but there are things like removing lump sum entitlement instead of an independence allowance which was introduced and the other concept of caused by, there's a number of phrases that use, "We're now going to cover personal injury caused by different things," and my concluding remark on this before I come to, Justice McGrath, the point about cost containment again is pregnancy, in my respectful submission, was never on the radar of Parliament and nor did it need to be. It's not a serious cost containment issue, but if it was to be a concern, it is the case that in 1992 Parliament went to the bother of introducing what's called the medical misadventure account and you don't have that

in front of you or anywhere, but it's sections 122 to 124 and I can just briefly summarise what it's —

ELIAS CJ:

Sorry, when was that introduced?

MR WAALKENS QC:

1992.

ELIAS CJ:

Thank you.

MR WAALKENS QC:

This is this major change in the law. And its medical misadventure account and the way it works, if I can summarise, is that there was an opportunity to render a premium or charge health professionals a premium in respect of claims for medical misadventures and there are various mechanical provisions under those three sections that deal with the ability to recover misadventure or medical treatment costs from the profession. In fact it's never been introduced but it's there to be introduced. There's a provision to introduce regulations. To my knowledge they've never been introduced. I remember, of course, the massive scare in the medical profession that this was going to happen, but it hasn't happened, but had there been any concern about cost containment, it's just completely at odds with the fact that Parliament specifically provided a mechanism to deal with that. And that 1992 concept of the medical misadventure account has been repeated in the 1998 Act which is sections 226 to 298, actually that sounds like it may be too many provisions but it's around there, and in the 2001 Act you will find it around section 228, so that concept of the medical misadventure account in recovering the cost from the cause of all this cost blowout, if it were to have been a concern has been retained right through to the present day.

ELIAS CJ:

But never implemented?

MR WAALKENS QC:

But never implemented. But the flipside of this, your Honours, is really, I suppose that one could get a little emotive about this when you act for the health profession

like in my experience I did, what about the cost of litigation? If my friends are right about this, and there's to be personal injury litigation and whatnot, where seriously is the advantage in that? Can Parliament seriously have been intended to have wanted that? Because the risk of litigation, if these types of limited pregnancy cases, i.e. secondary to a medical error or something of that kind, these types of cases are very, very high risk for doctors and health practitioners and DHBs and the whole works. I can —

TIPPING J:

Is an associated point that if this was able to be a common law claim, we'd be faced with the very difficulties that the ACC scheme was designed to avoid, namely the difficulties of assessing damages in some really very, very tricky situations?

MR WAALKENS QC:

Absolutely Sir, there's massive debate in the international arena, jurisprudence about whether the cost of the child are recoverable and there's a whole lot of other subsets that flow from that, but my point is a more basic one than that, your Honour and it is that as I respectfully suggest of no value to the women out there or the families out there who suffer these sorts of things to have to look to the Courts to get recourse with the sort of difficulties and costs that litigation involves. It's also very, very disruptive for health practitioners and this is a little bit and I'm not going to go far on this, but may I say that there's a vey big risk that it's going to have an adverse effect on those who provide this wanted service of sterilisations. Doctors aren't going to do it if they've got this big risk of being sued — because it's the only area in medicine where you can be sued, coupled with all the studies that have made it so very clear overseas that particularly that litigation in this sort of tort area is not of great benefit to the community and it's certainly not for the profession, it may be for the lawyers, but I respectfully submit it goes completely against the tenor of what the social contract behind ACC was at the beginning, which the Government has followed since 1972. It would be a dark day to go back to opening up these areas.

BLANCHARD J:

Could I just ask a question which is related to this? From your understanding of the medical position, have there been any successfully established claims for negligence related to vasectomies which don't turn on the failure to give proper advice, in other words, that there is a physical negligence, if I can put it that way?

MR WAALKENS QC:

Yes, the answer to that is, your Honour, I'm not aware of any — there's an anomaly, as we know, with the vasectomy cases —

BLANCHARD J:

I was thinking about —

MR WAALKENS QC:

And I know, your Honours — there have been no cases that I'm aware of. There are claims that are made and if I may say — perhaps I'm sounding like I'm giving it — it's in the bar of it here, but doctors who get faced with criticisms of a failed vasectomy will say that they're not liable for it because they gave, they warned about the possibility of recanalisation where the structures join up again, so there are known risks of the procedure failing and you can have a failure absent of negligence and it's actually quite difficult to prove these cases as to whether, in fact, the — the child is —

TIPPING J:

The snipping wasn't done properly.

MR WAALKENS QC:

Yes, it's difficult because, yes, you've got a female who becomes pregnant and the argument by the male or the female is, "Oh, you didn't do the vasectomy properly," requires a whole lot of forensic examinations. your Honours can imagine what it will be, it's not easy for these people, but my short point, your Honour, is that I know that these issues are raised, I've had them myself where we've had debates for doctors and these arenas, but I'm not aware of any cases that have actually even been filed or gone to Court. There have been threats of them but I'm not aware of them.

WILLIAM YOUNG J:

So, are there any wrongful birth awards for damages? Could you have been talking about vasectomy —

MR WAALKENS QC:

No.

WILLIAM YOUNG J:

So none have gone — none have resulted in a judgment?

MR WAALKENS QC:

No, no. There are cases in existence, you may have — well you might have, but Mr Miller and I have, I think, two or three of these cases on and there's a few others of the wrongful birth-type cases, so there are cases in the wings, waiting for this determination, but none that have gone to Court and been the subject of a determination.

Now, much has been made in the submissions from ACC which in turn rely, I have to accept, on a number of decisions, like all the District Court decisions post 1992 played a lot of regard on *L v M* [1979] 2 NZLR 519 (CA), the minority dicta of Justice Cooke as he then was, and *L v M* is in tab 16. I just want to say a few things about that, if I may. Tab 16 of ACC's casebook.

Now you'll see from the heading on the first page, the hearing took place in 1979, that's 33 years ago, and we can see from, yes, it's page 520, line 40, it concerned an operation, that was an unsuccessful sterilisation on the 24th of May 1974, so that's 38 years ago. It's a very dated case and it's with all due respect to, I'm not critical of Justice Cooke, but the concept that's adopted, that he picks up on these things being natural and so forth and what not, reflect rather a thinking of that era whereas now life has moved on.

The question in this case was whether ACC had the exclusive jurisdiction to determine whether there was cover and the majority said that's so and they referred it back to ACC. Justice Cooke issued a minority decision and it's been heavily relied upon by the subsequent District Court cases which, in my submission, are not right.

Firstly, there was no argument in this case and Justice Cooke recites this at the last page of that tab, at page 530, second line, end of the second line, "Nor was it argued for the appellant that the pregnancy or the childbirth were themselves personal injury", so that was never argued.

Now, His Honour picks up that same point. He repeats it. There it is, it's line 18, "As already indicated, the contrary was not argued for the appellant," and then he goes on a little further at line 30 or 28, about medical misadventure, "It is arguable that under the new definition this would be enough to bring s 5(1) into play — that it is unnecessary to show as well that anything would ordinarily be called a personal

injury." So, His Honour, this is very much dicta that came from His Honour, but sadly it took on then a lot of reliance from the District Court that followed.

His Honour went on to say, "The decision of Judge Blair in *Re Mrs MrcR: Decision No 156* (1978) 1 NZAR 567 which is in my learned friend's casebook earlier on, "may support this view. As the new definition did not apply at the date of the successful operation." That is because on 24 May, the new amendment to the Act hadn't taken effect. "I would leave the point to be decided in a case where it does arise." Now, in none of the subsequent cases, including all these District Court judgments, all of which are by the same Judge, Judge Middleton, and one by Judge Lovell-Smith, nowhere was that point actually argued or teased out, and I'll come to that very briefly in a minute, but His Honour made it clear in the passage I've just taken you to that he thought it was medical misadventure and that was the answer to it all, and indeed as His Honour said, "unnecessary to show that there was anything of personal injury."

The significance of this is that in the era that this case was determined, *L v M*, there was no equivalent or anything like the 2001 Act in section 20(2)(f) with this gradual process, the medical misadventure caused by and all that sort of stuff. There's nothing remotely like that, that would've been an entirely different instruction to Justice Cooke if he was faced, I respectfully suggest, with the section that we're now dealt with, nor was there any definition in the Act that we now have, section 26, that physical or personal injury includes a strain or a sprain. That also wasn't there.

TIPPING J:

I have to confess I can't see the force of that, Mr Waalkens. They're just giving an example of what would inevitably be personal injury anyway. But you seem to be placing quite a lot of reliance on this strain and sprain.

MR WAALKENS QC:

Well, yes —

TIPPING J:

And I have to say that personally you'll have to work a bit harder to show me that there's much in there.

MR WAALKENS QC:

Well, it's not — look, it's not a big point. It is a little bit of a side-show issue because —

TIPPING J:

I would have thought it was out of the tent, frankly, rather than being a side-show.

MR WAALKENS QC:

I'm not happy to hear that, your Honour. But a strain or a sprain, which people — there's a lot of cases, these cases talk about personal injury that —

TIPPING J:

Well, it's clearly to the body. It's unwanted and it's a harm to the body. I mean, it's got nothing to do with the pregnancy. I don't personally see how you springboard off that into pregnancy, but you may decide that, to leave me alone and —

MR WAALKENS QC:

No.

ELIAS CJ:

Well, pregnancy strains the body.

MR WAALKENS QC:

It's –

ELIAS CJ:

Well, let me tell you, it does.

TIPPING J:

Well, I don't wish to enter into that debate.

MR WAALKENS QC:

And, your Honour, I'm not going to leave it alone because if you have a look at the decision of Justice Elias in the *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) case it refers to the — makes the point that in that case the patient delivered a stillborn baby, and Her Honour makes the point, and I agree with it, that it could not

be suggested that the physical consequences of that could be less than a strain or a sprain. That's the simple point I make. I —

TIPPING J:

I understand that as a value judgement —

MR WAALKENS QC:

Yes.

TIPPING J:

Perhaps I'll — look, Mr Waalkens, I'm probably distracting everybody so I'll — let's move on.

MR WAALKENS QC:

All right, thank you, Sir.

ELIAS CJ:

I think you may not be distracting people. I think it may be quite an important point.

TIPPING J:

Well, it's just — I understand entirely the value judgement but heaven help us if a strain, which could be pretty trivial, qualifies. Well, heavens, pregnancy's huge in comparison, but I don't see the analogy for whether it amounts to a personal injury as strongly.

MR WAALKENS QC:

Yes, well, I've ¥ it's the value judgement that I particularly rely on there —

TIPPING J:

All right, well, I understand that.

MR WAALKENS QC:

— and the physical consequences, of course. So that's —

TIPPING J:

Well, I fully understand that

MR WAALKENS QC:

That's really — yeah — well —

TIPPING J:

You're really saying it ought to be covered.

MR WAALKENS QC:

Yes, and I also say that the reference to strain and sprain is quite helpful. I'm not going to take your Honours to them, you'll be pleased to hear, but there's a number of articles written by commentators, some of whom negatively interpret whether a pregnancy of the type we're talking about could ever be a personal injury because there's a birth and then everything's fine and it's all over and everyone's fine and dandy, whereas the strain and sprain is just the same. People do recover generally speaking from a strain or a sprain so the distinction that's made later isn't really that significant. So that's *L v M*.

The District Court cases, I'm not going to take you through all of those but they start at tab 27, which is the *DK v Accident Compensation Rehabilitation and Compensation Insurance Corporation* [1995] NZAR 529 (DC) decision.

TIPPING J:

Do they add anything to the jurisprudence or do they just —

MR WAALKENS QC:

No, no, they —

TIPPING J:

— simply follow Justice Cooke?

MR WAALKENS QC:

No, they don't. They follow Justice Cooke and they actually misquote Blair and what actually this case is saying and I — but unless it's going to be useful for me to take you to, but I — I was going to do so just because I see ACC are relying quite a bit in setting the historical frame —

TIPPING J:

Well, I'm not wanting to distract you but I just wanted to make it — to understand in advance whether you were saying they made any real difference.

MR WAALKENS QC:

No, they don't, they don't. They don't — the simple point with all of these cases is that they don't contain any separate analysis of the question that Justice Cooke raised, they actually adopt what he said as a given, and —

TIPPING J:

And they continue to base themselves on it despite significant legislative change. That's your key point, is it?

MR WAALKENS QC:

Correct, yes, and in the *DK* case, which is the first of five District Court cases, Judge Middleton made a decision really that these cases don't fall within cover and every other District Court case, including the three of Judge Middleton's, relied on his finding in *DK*, so they don't add anything else. And they also particularly base themselves on a conclusion that there's an absence of direct cause or link between a failed sterilisation and pregnancy because they say it's the sexual intercourse that's the cause, not the failed sterilisation.

Now the other topic I wanted to deal with is the question I think Justice Tipping asked me earlier about the removal of pregnancy from victims of crime. I just want to say something about that.

The 1992 Act is the one that introduced that change, and the changed section in 1992, that's beneath tab 3 of my learned friend's casebook, is section 8, subsection (3), and if you go back a tab you'll see the predecessor Act, which is the 1982 Act. It's under tab 2 at page 1560, the definition of personal injury by accident. You'll see Roman numeral (iv).

McGRATH J:

Sorry, just repeat the section number?

MR WAALKENS QC:

The 1982 Act is on — it's just the definition section 2 on page 1560. The definition, "Personal injury by accident", (iv), "Personal injury by accident includes actual bodily harm (including pregnancy and mental or nervous shock)," for those who suffer

crimes or are victims of crimes, and there's a schedule that refers to rape and all sorts of other sexual crimes, and other crimes too.

And you'll see if we go back to section (8) of the 1992 Act that's been amended in subsection (3) to be, "Cover under this Act shall also extend to personal injury which is mental or nervous shock." So it's dealing only with the mental consequences, not the physical consequences which the predecessor section had dealt with, and in the process having removed reference to the physical, actual bodily harm, they've removed the words "including pregnancy", because they're only in the '92 Act dealing with mental injury, and that's very much the explanation for —

WILLIAM YOUNG J:
So what's the section in the 1992 Act? I missed that, I'm sorry.

MR WAALKENS QC:
Yes, I'm sorry, Sir, section 8, subsection 3.

TIPPING J:
I wondered, at least at first blush, that it would be odd if you were excluding pregnancy as a result of crime but were nevertheless intending to include pregnancy as a result of failed sterilisation.

MR WAALKENS QC:
Well, and more the case is, Sir, your Honour, surely a victim of a rape, how could it possibly be said that you wouldn't get compensated for the physical consequences, the injury consequences of the rape, of —

TIPPING J:
You mean under the Criminal Injuries Compensation?

MR WAALKENS QC:
Well, that's the Act that was amended when this came in. They removed the — they repealed that Act when they brought this 1992 Act provision into effect.

But, in my submission, the answer lies in a combination of something I — a couple of submissions I want to make. Justice Mallon dealt with this fairly comprehensively at paragraph 83, that's the case on appeal under tab 4. So she rightly notes in the

second sentence of that paragraph, "The legislation," this is '92, "referred only to an expanded definition to cover mental injury," and that's correct. "Victims of sexual offences could suffer physical injuries quite apart from the possibility of pregnancy. There is nothing to indicate that Parliament did not intend to provide cover for those physical injuries", and indeed rape, in my submission, where there's a resultant pregnancy, under the 1992 Act, would clearly be an accident for which you would get cover. It meets all of the criteria of being something more than a strain or a sprain. It is very much a non-consensual rape, has all the hallmarks of being a force external to the body, unlike a consensual sexual act, and it would, in my submission, beggar belief that a rape victim who suffers that appalling outcome, would not be entitled to say, "I want cover for the physical damage that I suffer."

McGRATH J:

And that's it under section 8(2), is it?

MR WAALKENS QC:

8(2), that's correct.

McGRATH J:

8(2)(a)?

MR WAALKENS QC:

That's correct Sir.

McGRATH J:

Yes, right.

BLANCHARD J:

And which section do you say it would come in under the 2001 Act? 20(2)(b)?

MR WAALKENS QC:

20(2), I think it is (f). If I just —

BLANCHARD J:

No, (a).

MR WAALKENS QC:

It's a combination, Sir. Just if I can have a moment so I can —

TIPPING J:

Yes, I think it would have to be.

BLANCHARD J:

20(2)(a)?

TIPPING J:

20(2) —

MR WAALKENS QC:

Yes, that's —

TIPPING J:

— (a).

MR WAALKENS QC:

That's where I see it as falling but Her Honour, Justice Mallon, this is slightly where — we don't need to go that far but Her Honour tried to deal with the developing pregnancy in the childbirth under — I have lost my passage of the — Yes, Her Honour dealt with it in footnote 101 which has had a lot of discussion by the Court of Appeal and by ACC where she tried to stitch it into 20(2)(g) which strictly is not required because I submit (a) applies but certainly it is arguable, as Her Honour approaches 20(2)(g), that you have a personal injury suffered by the person, that is the rape and the physical consequences of a rape, much more than a strain or a sprain, without being aggressive towards Justice Tipping on that topic.

WILLIAM YOUNG J:

I think strain means pulled muscle, doesn't it, as opposed to a pulled ligament which is a sprain. I am sure that is what it does mean.

ELIAS CJ:

That is really why I asked, whether there was a medical basis for those concepts.

MR WAALKENS QC:

Yes, look I accept that, I accept that, your Honour.

ELIAS CJ:

Where does that come from though?

WILLIAM YOUNG J:

Wikipedia.

TIPPING J:

But (g) seems to have a slight begging of the question element attached to it.

MR WAALKENS QC:

Well, it does except it identifies that if you've got someone who has had a personal injury, for which you got cover and then you have a gradual process that is consequential to it, and I say that is the pregnancy that follows and that is where Her Honour then starts to get into, well, where is the injury and she, at 101, talks about it starting with conception. And unfortunately in my submissions I rather fell into that debate myself. I don't need to go there because my case is not dependent on an analysis of where the injury actually occurs. We have already had the discussion, but my submission, the gradual process, that is sufficient to cover it, (g) requires identifying an injury following which you have got this gradual process. So Her Honour dealt with that there. But just to finish what Her Honour said in that paragraph 83. She said that cover was available even if the only injury was a mental one. Cover for pregnancy, victims of sexual offences would be captured by the general cover for physical injury.

TIPPING J:

What do you say, Mr Waalkens, was — why was it necessary to remove the specific reference to pregnancy? If you can show me that, I will feel more comfortable?

MR WAALKENS QC:

Well, it is a slightly uncomfortable part of the case, this for me, your Honour. Because I can't. There is no discussion about it, there is just none. The only thinking can be that they didn't need it there because Parliament, in its wisdom, considered that in 1992 when it was making the amendment, it was only going to — it was going to widen, or make it clear that for victims of sexual offences, you can get cover just

for mental and that's all that provision is trying to do. I consider that what Parliament would have intended or believed was that victims of rape and sexual offences are still going to, still get cover for other physical injuries, they include a wide spectrum of things.

TIPPING J:

But if they are going to qualify under section 20(1). Sorry —

MR WAALKENS QC:

Well, if we go back, Sir, to — we should go back to '92 because that — '92, 2001 is just adopted.

TIPPING J:

Yes. But if they are going to qualify under what you might call personal injury caused by an accident —

MR WAALKENS QC:

Yes.

TIPPING J:

— pregnancy needn't have been there in the first place.

ELIAS CJ:

Well, it is there as an illustration I suppose in the statute, rather than in a list of what is covered.

MR WAALKENS QC:

Yes, yes. But Justice Tipping, there is no easy answer to this, I am afraid.

TIPPING J:

No, well I wondered about that.

MR WAALKENS QC:

Yes.

TIPPING J:

I thought there might be.

MR WAALKENS QC:

No, I have got no white rabbit to pull out of the hat for you.

BLANCHARD J:

It just seems to be extraordinary to think, or to say that Parliament, having had cover for pregnancy resulting from a sexual offence, would remove that with no mention at all. I just have difficulty believing that that is what Parliament could have intended to do, sotto voce.

MR WAALKENS QC:

They won't have intended, in my submission, to remove cover for the physical consequences of that. That's my submission.

TIPPING J:

Well, that is the problem. How do you distinguish the physical consequences, that is where we were right at the very beginning. The physical consequences of the, as opposed to the pregnancy per se, and I know that is dancing on the head of a pin a bit but wasn't there a submission to Parliament, or to the Select Committee, by Otago —

MR WAALKENS QC:

Yes, there was, yes.

TIPPING J:

— at which it was urged that the reference to pregnancy be retained.

MR WAALKENS QC:

Be retained.

TIPPING J:

And for reasons that we are not aware of —

MR WAALKENS QC:

Correct.

TIPPING J:

— that submission fell on deaf ears.

BLANCHARD J:

Well, you would think that —

MR WAALKENS QC:

Well, we can't say that though.

TIPPING J:

Well, it went, it went.

MR WAALKENS QC:

Well, it went but it may have gone because Parliament, the Select Committee said, "Well, they are right, but we don't need it."

McGRATH J:

But all we know is that the submission was made. There is no record of it —

MR WAALKENS QC:

Correct.

McGRATH J:

— as I understand it, in the Select Committee report let alone in Hansard, so —

MR WAALKENS QC:

There is not a skerrick of any discussion about it.

McGRATH J:

— you are really stretching this sort of material.

MR WAALKENS QC:

But if I go back, could I go back to principles though. I mean, back in the old days, certainly there was a thinking that childbirth and pregnancy is all natural and it is wonderful and how could you treat it as something that is ever just justiciable, how different is rape. A pregnancy secondary to a rape is abhorrent and given our social contract of the ACC scheme, in my submission, really does beggar belief that

Parliament would have intended to do it. My submission is that they would have known that it would be picked up in the other provisions of the Act.

WILLIAM YOUNG J:

But just looking, I mean supporting you, your view on this, is the thought that the legislature must have intended that a venereal disease or HIV picked up as a result of rape would be covered but that would have to be under section 22(g) on the basis that the personal injury —

MR WAALKENS QC:

Yes.

WILLIAM YOUNG J:

— is in fact the gradual process disease or infection consequential on personal injury.

MR WAALKENS QC:

Correct and the personal injury would be the rape.

WILLIAM YOUNG J:

Yes and you don't need another personal injury in between.

MR WAALKENS QC:

No.

TIPPING J:

I am not necessarily against you here, Mr Waalkens. I am just exploring —

MR WAALKENS QC:

I am pleased to hear that, Sir.

TIPPING J:

— I am just exploring this rather puzzling aspect.

MR WAALKENS QC:

Yes. Look it, I know that we have all agonised over this part of the case. It's not straightforward.

TIPPING J:

Because the other — the ACC seemed to me, in their submissions, to place some weight on this.

MR WAALKENS QC:

Yes, they do.

TIPPING J:

So it is important to get your position as fully elaborated as possible.

MR WAALKENS QC:

Yes and I hope I have done that, Sir.

TIPPING J:

No, no, I am grateful because obviously it is a difficult one.

MR WAALKENS QC:

Can I just have a moment. Yes, look there is another, there is some other judicial observation on this point. In my casebook, under tab 8, Justice Baragwaneth in the *Patient A v Health Board X,* HC Blenheim CIV-2003-406-14, 15 March 2005, case, he really says what I have been commending to you at the — on the top of page 23, paragraph 57.

ELIAS CJ:

Sorry, page or para 23?

MR WAALKENS QC:

Paragraph 57, page 22, on 23.

BLANCHARD J:

Oh, you are looking at the numbers at the bottom.

MR WAALKENS QC:

Oh, I am sorry, I am confusing you all, yes. I've got numbering at the top. Let me just talk to paragraph 57, bottom of that first page, "Likewise pregnancy resulting

from rape is patently 'personal injury': it is caused to the person and entails the legal affront that in terms of legal policy should attract compensation."

TIPPING J:

Well, that's back to the question of whether it is a legal injury or a bodily injury.

MR WAALKENS QC:

Well, it is an injury to the person, yes.

ELIAS CJ:

This argument all springboards off the 1982 Act's inclusion of pregnancy, of reference to pregnancy.

MR WAALKENS QC:

Mhm.

ELIAS CJ:

But it is a recognition that personal injury by accident includes actual bodily harm and then it simply goes on to illustrate —

MR WAALKENS QC:

Correct.

ELIAS CJ:

— by reference to pregnancy and mental or nervous shock.

MR WAALKENS QC:

Yes, yes, I agree with that, your Honour.

ELIAS CJ:

It is not as if there was a list there —

MR WAALKENS QC:

No, no.

ELIAS CJ:

— that said, "This proceeds on the basis that pregnancy is actual bodily harm."

MR WAALKENS QC:

Yes.

ELIAS CJ:

So not sure that really issues of legal injury or bodily injury —

TIPPING J:

No.

ELIAS CJ:

— matter.

TIPPING J:

Well, that was the position in 1982 but the single issue in this case is did Parliament intend to change that in 1992?

ELIAS CJ:

By removing an illustration.

MR WAALKENS QC:

Yes, that would be the response. There is a little bit of a hint in 1992 when the Act was being considered, the discussion paper by the Minister of Labour, Bill Birch, is, in my learned friend's casebook, behind tab 12. And you will see that there is numbers at the top of the headings of each page, they have ascribed a number to each heading and if you go to page 32, it is about three from the end. It is a very pithy section. At the bottom of page 32, heading "Criminal Injury". "The government has considered whether criminal injury should remain covered by the Accident Compensation Scheme. Most victims of criminal injury suffer a physical injury and as such would be eligible for compensation under the proposed Scheme." I accept it doesn't take us any further than there. But he goes over the page, "There is a small group of criminal injury victims, who suffer mental injury but no physical injury et cetera." And again that supports, I believe, my submission that Parliament must have expected that the physical injury that flows from people who suffer these types of crime, victims of these types of crimes, will very likely suffer physical injury and it is going to be covered.

TIPPING J:

Isn't your best point really, if we are looking outside the immediate legislation, the Minister's statement on introduction, that it was designed to continue the existing cover?

MR WAALKENS QC:

Yes, that is the point I made before, yes.

TIPPING J:

Before yes but I would have thought that was by far the most —

MR WAALKENS QC:

Yes.

TIPPING J:

— direct and cogent observation where you are entitled to say, "Well, they clearly can't have intended to remove what was there before."

MR WAALKENS QC:

No, I certainly, that is the point, Sir. Now I have dealt with other anomalies with this. I touched briefly on this earlier with Justice Blanchard about the male vasectomy cases. Yes, there is an anomaly there, I accept that they are not covered, but I'd say there that two points. One, two wrongs don't make a right, that should not dictate that female patients, where there is specific reference to them in the section, like I have been commending to you, are not covered, by dint of what happens to males. But secondly the uncovered — male, the failed male vasectomy case, has other anomalies and difficulties. In particular, this whole concept of secondary victims which —

ELIAS CJ:

Well, that is the purpose of the exclusion.

MR WAALKENS QC:

Yes.

ELIAS CJ:

It follows a policy of it having to be the person who —

MR WAALKENS QC:

Correct.

ELIAS CJ:

— who was treated, who suffers the injury.

MR WAALKENS QC:

Yes, that's so, and I don't at all accept ACC's point that there's some risk of floodgates here, that you're going to then, if this is accepted, you're going to then have all manner of unintended pregnancies covered because this matter is so dependent upon the statutory wording expressly adopting in this case medical misadventure. And Justice Gendall hinted at this too in the *SG* decision, *SGB v WDHB* [2002] NZAR 413 (HC), which in my casebook is at tab 7, where on page 423, and we've all referred to this, both my learned friends for ACC and myself, at paragraph 31, about five or six lines down, the first complete sentence there, "It perhaps could be argued that if there is an abnormal reaction to treatment given to a woman in circumstances where medical error or mishap occurs 'at the time of treatment' then conception might be a 'personal injury'. For example, a medical error or mishap at the time of surgical performance of a tubal ligation so the woman later suffers a 'complication' of conception might fall within the definition of personal injury," then 35(2). "That, however," His Honour went on to say, "is quite a different situation to where a woman conceives naturally and gives birth in a situation where the accidental conception did not arise out of any medical error because of the treatment given to her."

TIPPING J:

Would it follow, Mr Waalkens, that if there was a, rather than an intent at permanent sterilisation, they were contraceptive, something was done and that failed through medical misadventure, that would, by parity of reasoning, be covered, would it not?

MR WAALKENS QC:

Yes, that would be so. If you have a contraception issue that's tied up with some bad advice or something, that gets caught too, but other contraception, accidental —

TIPPING J:

Yes, well, quite, that weren't related to any medical misadventure.

MR WAALKENS QC:

No, no, I accept that, Sir.

TIPPING J:

So that's as far as it would go.

MR WAALKENS QC:

Correct, yes. Now I haven't taken your Honours through my written submissions. I am assuming that you have had a good chance to read them. I'd only be highlighting points that I've made in them but if there are any other matters, those are my submissions.

ELIAS CJ:

Yes, thank you, Mr Waalkens. We'll take the adjournment now but perhaps I could just enquire, did the first and second respondents propose to address us?

MR MILLER:

Respondent nil, Ma'am.

ELIAS CJ:

No, thank you. That's as I understood it.

MR MILLER:

Yes, we will abide by the Court's decision. If the doctor wins, then we have recourse one way. If the ACC wins, then we go the other way.

ELIAS CJ:

Yes, thank you.

MR WHITE:

Your Honour, the second respondent's position is to support Mr Waalkens submissions on this, stronger than abiding the decision, so actively supporting. There is perhaps just one small point I'd like to address your Honours on, on that cost containment issue, if I may.

ELIAS CJ:

Yes. Do you want to address us now?

MR WHITE:

I'm happy to, your Honour.

ELIAS CJ:

Yes.

MR WHITE:

It is relatively short.

ELIAS CJ:

Yes, thank you.

BLANCHARD J:

Madam Registrar, I've never received any written submissions from this intervener.

ELIAS CJ:

No, no, this isn't an intervener. This is a party.

BLANCHARD J:

Party, sorry.

ELIAS CJ:

Second.

McGRATH J:

But he says no more in the written submissions than he's already said.

MR WHITE:

That's correct, your Honour.

ELIAS CJ:

But there's a point arising that you want to address us —

MR WHITE:

There has been a point arising in the exchange on that cost containment that I would like to address, particularly from my client's position as the District Health Board in this, and really to put that framework around. If cases like this do proceed under a tort framework rather than being caught by the ACC cover regime then it is not just as Mr Waalkans has submitted that the doctors will be the likely defendants in this. It is the District Health Boards, which in essence is simply another arm of the state of the Crown, and rather sort of unusual circumstances that a Crown agent, a statutory entity, really sort of trying to apportion where the cost on this lies between the two various Crown entities. And so the cost of this, which I accept as has already been exchanged, is actually not going to be that significant, but that cost, if it's outside the scope of cover, has already been met by the Crown anyway through the vote health budget in providing that cover, and on a policy scheme, applying the ACC legislation as it has been throughout its various stages since the 1970s, it is much more consistent with the overall scheme of that, and as has been reinforced on the introduction of the 2001 legislation, to not expose plaintiffs and defendants, and particularly the plaintiffs in these cases, to the lottery of litigation but rather provide them with the certainty of cover in these situations, when the cost is being met by the Crown anyway. That is all I wanted to address your Honours on.

ELIAS CJ:

Thank you. Thank you, Mr White. We'll take the adjournment now and consider whether we need to hear from the intervener.

COURT ADJOURNS: 11.25 AM

COURT RESUMES: 11.44 AM

ELIAS CJ:

Mr Geiringer, we've been greatly assisted by your submissions and you've heard the discussion this morning. If there is anything you'd like to add, we'd like to hear you on it.

MR GEIRINGER:

Your Honours, I'm fully aware of the fact that I am not the main feature and I will try and keep that in mind in everything I say and the length I speak, also that there has cropped up, since my submissions, in relation to the reply from the interested party, an issue which, any in-depth analysis of which is very much outside of the issue that's before the Court and whilst I may need to touch on it, I will avoid unnecessary

depth, because it is not something, a section 21 analysis is not something this Court is considering, it is not something that is relevant to the first respondent's case and therefore it is not something that the Court, in my submission, ought properly to be delving into. It hasn't had full submission from all the parties, it doesn't have a factual background that is currently before the Court. So I just —

ELIAS CJ:

Mr Geiringer, sorry, could you just pull the microphone a little up towards you, that's right, angle it up.

MR GEIRINGER:

Can I clarify, has all the Court received my submissions there? I understood a comment before —

ELIAS CJ:

No, that was a reference, I think, from Justice Blanchard to the respondent's submissions.

MR GEIRINGER:

Could I take your Honours straight to a quote that's at paragraph 50 of my submissions and it is in the intervener's casebook at tab 3, on page 388 of that report. This is a quote which in many ways encapsulates –

ELIAS CJ:

Sorry, what was the page again?

MR GEIRINGER:

It is tab 3, page 388 of the report.

ELIAS CJ:

Yes.

MR GEIRINGER:

And it is fully set out in paragraph 50 of my submissions. It is a quote which in many ways encapsulates a lot of the substance of the submissions of the intervener. This is Richard Posner, Chief Judge of the — is it Seventh Circuit Federal Court at the time, and Richard Posner will, of course, be a legal personality and jurist known well to this

Court. The quote begins on 388 at the first full paragraph, half way down on the left-hand column. "The medical complications of pregnancy are plainly a form of physical injury. What about the pregnancy itself? Pregnancy resulting from rape is routinely considered a form of grave bodily injury," and there is various cases cited. "Apart from the nontrivial discomfort of being pregnant (morning sickness, fatigue, edema, back pain, weight gain, etc.), giving birth is intensely painful; and when pregnancy is involuntary and undesired, the discomfort and pain have no redemptive features and so stand forth as a form of genuine and serious physical injury, just as in the case of an undesired surgical procedure (a pertinent example being involuntary sterilization). Most surgical procedures cause discomfort and pain; we bear these by-products to cure or avert a greater injury or illness; when there is no greater injury or illness to avert, the by-products become pure injury. No one doubts that a person who is operated on by mistake can recover damages for the pain and suffering inflicted by the operation, which he could not do if he had consented to it." I raise this right at the start to confront directly the questions of Justice Tipping, to my learned friend for the appellant. Your Honour posed the question "Is pregnancy inherently harmful?" I understood your Honour's argument to be one of ejusdem generis in relation —

TIPPING J:

I was not propounding an argument. I was making an enquiry, Mr Geiringer. Would you please be careful.

MR GEIRINGER:

I understood your Honour's question to be directed at the issue of ejusdem generis, the idea of physical injury appears with sprain or strain and whilst it might be accepted that pregnancy is something more than a sprain or strain, the question is, is it something of a type of a sprain or a strain. In the submission of the intervener, very much so and unabashedly, we say that pregnancy is inherently harmful. It's —

TIPPING J:

My question was whether or not gradual process should be construed ejusdem generis with its associated words.

MR GEIRINGER:

The answer in my submission requires —

TIPPING J:

If you are going to purport to address my question, it would be helpful to get it right.

MR GEIRINGER:

I apologise, your Honour, if I misunderstood. The answer to both, in my submission, requires a consideration of what exactly is involved in pregnancy and there has been some talk, both in the decision of Justice Mallon and the submissions of my learned friends, that pregnancy is something that starts with conception and goes to childbirth and if I could say that in the submission of the intervener, that is not correct. The conception, it requires one to think about what is actually involved. Conception is the two gametes coming together to create a Zygote, which grows into an embryo. That is conception. Conception doesn't necessarily result in pregnancy at all. The fertilised Zygote can be expelled from the woman, the woman will never know that she ever had a fertilised Zygote inside her. That can happen quite naturally just by chance, it can happen by the use of contraception and so forth and so the fact that the fertilisation occurs, the conception occurs, doesn't actually necessarily involve any pregnancy at all. Pregnancy starts with implantation, that is when the fertilised embryo attaches to the woman's body, and in the vast majority of cases of course to the wall of the uterus.

BLANCHARD J:

This is interesting but not very helpful.

ELIAS CJ:

It is also in your submissions which we have read.

MR GEIRINGER:

Well, this point is not in my submissions.

BLANCHARD J:

Probably it shouldn't have been.

MR GEIRINGER:

With respect, it directly answers the question of whether pregnancy itself is an injury. If pregnancy starts and may I say this is consistent with the terms of the Contraception, Sterilisation and Abortion Act as it finds abortion which is termination of pregnancy after implantation, before that it is just considered contraception and

this is consistent with other statute law. The point is, at that point, we have a placenta that is attached to the body. It is co-mingled tissue and the only way it will ever be taken away from the body is by a tearing of that tissue and that is the start of pregnancy. So we have a moment at the start of pregnancy and we have an injury. We have another entity that has co-mingled its flesh with the flesh of the woman and the only way it will be removed is through a ripping. When the placenta rips away from the body in a normal birth, there is a gaping wound. That is the only possible way it can happen. So we have then, from that point on, a process which changes every organ in a woman's body and that is in my submissions, but what I am suggesting now is the proper analysis is that there are two things here. There is the existence of the pregnancy itself and there is everything that follows and both are properly regarded as physical injuries. And one — this is much more immediately understandable if one recognises that the start of pregnancy is not something floating in the woman's tubes meeting with another object. It is an attachment of something to her body and an intermingling of the flesh. Of course, pregnancy is desired, we are driven by a need to procreate and we get from our pregnancy something that overjoys us, in the form of a child. So the normal human experience of pregnancy, is a blessing.

ELIAS CJ:

Mr Geiringer, where is this submission going because we do understand all that background and it is referred to in some of the cases but really we are looking at the statutory interpretation point in this case.

MR GEIRINGER:

It comes back to the statutory interpretation because I confront and directly refute the submissions of the ACC, that when one — in terms of the question of what is or is not a personal or a physical injury — one can do so devoid of causation. It is a logical fallacy that when the statute was altered to draw out issues of causation to require causation to be one of the number of classes before there is cover, that that necessarily meant any consideration of what is nevertheless still personal injury, has no issues within it of causation. Just because you separately consider, is causation within class A, B or C, doesn't mean that the statute necessarily requires the Court to ignore causation when it comes to a physical injury. And it is, in the submission of the intervener, very much the way that a normal person would use the concept of physical injury, that is, incorporating ideas of causation. Of course, one doesn't normally think of pregnancy as being an injury, one thinks of it as being something

that is desired, that one wants that has a fabulous outcome but where pregnancy is foisted upon the pregnant woman, through reasons of failed sterilisation or through reasons of sexual assault, the idea of it being a physical injury is quite natural and any serious consideration of what the pregnancy actually involves, and it's all set out in the submissions, leaves one inevitably to conclude it fits within the description of a physical injury, and it is in itself inherently harmful. My learned friend said today that it's only the olden days that we had this archaic attitude of it being a blessing. In my submission, in fact it's only a very small intervening period where any serious analysis could come to that conclusion, the reason being we're talking about a time before the perspective of the woman is being, in my submission, properly appreciated by society and by the Courts and a period that post dates the medical miracles that have come about that put us in a position where a woman can get pregnant with a relative certainty that she's going to live through the experience. This is a very modern thing. Today you'll see in my submissions there are 49 deaths over a period of four years amongst in the order of was it 10,000 pregnancies a year. So mortality, it exists, but it's a relatively minor issue. Of course, go back a hundred years and that's not the case.

So this idea that an analysis of what a pregnancy involves is necessarily a blessing and cannot be regarded as a physical injury, in my submission is a conclusion that one could only come to in a very brief period where we have developed the medicine for it to be safe —

ELIAS CJ:

I think you can take it that we accept that pregnancy is inherently risky. Is that the submission that you're making?

MR GEIRINGER:

And the —

ELIAS CJ:

And that it has physical impacts, including, as you say, permanent impacts.

MR GEIRINGER:

And I assume the Court also accepts that the issue we're discussing is not is pregnancy necessarily going to involve any of these things but whether it is capable of being regarded as an injury. I mean, that is — that's the issue before the Court, so

my learned friend for ACC in his submissions makes a point that, well, these things might happen, but that's not the question. That is the question.

ELIAS CJ:

The question before the Court is whether this is a personal injury within the meaning of section 20 and section 26.

MR GEIRINGER:

Certainly, but none of the precise effects on the woman are being delved into. There has been no factual examination of what happened to this woman though, of course, even in this case, the pregnancy resulted in a surgical operation, so the complications that are there and are possible were in fact there in the very facts of this case. And the question is whether somebody needs to go in and consider whether there has been a physical injury and for that it's whether the pregnancy is, there's physical injury, and therefore a personal injury is capable of including the words, including the concept of pregnancy.

TIPPING J:

It's not so much whether it's capable of, it's whether it does in this context include pregnancy.

MR GEIRINGER:

Whether it does in this context depends what your Honour means in this context. If we assume the facts that this case resulted in a caesarean section —

TIPPING J:

Well, if you don't understand what I mean by "in this context", Mr Geiringer, I'm sorry, but —

ELIAS CJ:

It's in the context —

MR GEIRINGER:

In the context of this Act.

TIPPING J:

— it means in the context of this legislation.

ELIAS CJ:

— of the interpretation, yes.

MR GEIRINGER:

In the context of the legislation, certainly, your Honour. In the context, whether it's capable in the context of this legislation, certainly. The – but not that it does necessarily, though. I would submit that whilst a perfect birth free of any complications may or may not have occurred 12, 2012 years ago, it's certainly not something regularly known to medical science. A woman will experience one or more of —

ELIAS CJ:

I think the indications are that we're getting a little lost about what the — what's the proposition you're putting to us, so that we can understand why it's necessary to go into all this detail?

MR GEIRINGER:

I was attempting to confront the idea of whether pregnancy in this context is — sorry, whether the words of the Act, physical injury and therefore personal injury, are capable of including pregnancy, given the association with the idea of physical injury with sprain and strain and therefore whether like sprain or strain pregnancy is something which can be regarded as inherently harmful. I'm sorry if that —

ELIAS CJ:

No, I think we understand that submission. I'm not sure that it's necessary for you to elaborate on it further.

MR GEIRINGER:

Sorry, I will move on. Perhaps could I confront — is it necessary, your Honours, for me to confront this issue of section 21 which has been raised by —

ELIAS CJ:

This is your —

MR GEIRINGER:

— my learned friend for ACC.

ELIAS CJ:

— your memorandum. I wouldn't have thought so.

TIPPING J:

What's the problem?

ELIAS CJ:

Yes.

MR GEIRINGER:

The issue, your Honour, is that the submission for the ACC that it's unnecessary for this Court to take into account the effect of its determination on a rape victim because a rape victim will have cover —

ELIAS CJ:

Yes.

MR GEIRINGER:

— through another mechanism.

ELIAS CJ:

Yes.

MR GEIRINGER:

And the response is that in fact no such mechanism actually exists as the ACC are applying the Act in the present day.

ELIAS CJ:

Yes.

MR GEIRINGER:

So whether or not that's true, it does not in any way rob from the force the need to consider the effect on these women, because without these women having a recourse through it being a physical injury as determined by the result of the Court in this case there will be no recourse, there is no recourse, and there has been no

recourse, and despite everything that is being said for the interested party, the fact is that the interested party is not giving these women this cover.

BLANCHARD J:

You mean, is — are you — calling a spade a spade, are you saying that if a woman gets raped and gets pregnant, the ACC denies cover?

MR GEIRINGER:

Yes. So they can for every breath they've got come to the Court and say, "Well, there's another avenue," but the women are not getting it and ACC are expressly rejecting the women on terms that directly contradict the submissions that are before the Court.

BLANCHARD J:

Well, you've raised that and I can understand why you've raised it, but we're going to be hearing from the interested party who will no doubt make its position clear.

MR GEIRINGER:

Well, even if they make their position clear before this Court, their position has no effect until they go and actually tell it to the doctors who are treating these women, and they haven't, and despite repeated —

BLANCHARD J:

Well, presumably, Mr Geiringer, if they have a clear position they will make sure that those who are doing treatment know what that position is if it's not already clear.

MR GEIRINGER:

You would hope so, your Honour, except that it's not, it's simply not the case that this position is actually being —

BLANCHARD J:

We understand that.

MR GEIRINGER:

— being implemented by — sorry, it's clear on the papers, your Honour, that this — it may exist in theory, it's not in practice.

BLANCHARD J:

We will be looking for clarification, Mr Geiringer.

MR GEIRINGER:

Thank you, your Honour. The other major thrust I've already touched on in relation to the intervener's submissions is this idea of causation within meaning. I do have an answer to —

TIPPING J:

No, just look, forget about causation for the moment. Do you support Mr Waalkens that paragraph (f) of section 20(2) is the key statutory driver of the entitlement to cover?

MR GEIRINGER:

Your Honour, this is the other reason why it's important, in my submission, to understand this whole business in that, and I'm sorry to —

ELIAS CJ:

What's the answer to —

MR GEIRINGER:

— but of — of an implantation.

ELIAS CJ:

What's the answer to the question though?

MR GEIRINGER:

The answer is it depends on what you're talking about. The mere fact of the pregnancy itself is not a gradual process. It happens immediately. It's inevitable from the process there, from the attachment. As soon as you've got an attachment you've got an injury. That's not a gradual process.

TIPPING J:

Well, if it's not (f), what is it?

MR GEIRINGER:

It's (a) for a rape victim and it's —

ELIAS CJ:

Why do you —

MR GEIRINGER:

— it's two — it's (b) for a medical misadventure and it's the equivalent of (f) or is it (g) for the two different cases for what follows from that initial. This is the point. There are two things that are at issue. There is the fact of the pregnancy, and that happens immediately, and it's not a gradual process. It's implantation then you've got an injury. Other things may flow from that and those things are properly regarded as a gradual process and therefore for (f) and (g). But that implantation, that's not a gradual process.

ELIAS CJ:

Except I thought you'd been at pains to point out to us that it doesn't happen immediately so it is a process, even the implantation.

MR GEIRINGER:

It immediately causes an injury. In fact, not just because as I'm submitting that we've got this intermingling of flesh that's going to have to result in a tearing, that implantation is what triggers the flood of hormones around a woman's body that alter virtually every organ. That's the moment it happens and it happens immediately.

ELIAS CJ:

So your point is that for a rape victim it's 20(1)(a) and (f)?

MR GEIRINGER:

Depending on what's being claimed for. If one is seeking termination, then one is trying to address an injury that is contained, in my submission, entirely within. The injury has occurred as soon as implantation has occurred and the treatment is directed solely at rectifying that injury.

If the child were to be, for example, carried to term and require a caesarean section, then it's quite clearly arguable that that's a gradual process and the treatment or the cover that one is seeking is treatment or cover for a gradual process that followed on.

TIPPING J:

So for rape — it's as the Chief Justice says. So for rape it's (a) so — if you're seeking a termination. If it's a child carried to term and you need a caesarean or other medical processes are involved, it's (f)?

MR GEIRINGER:
Yes.

TIPPING J:
Thank you.

MR GEIRINGER:
My learned friend, if I could go back to the issue of causation, my learned friend's response is to say to the example of a piercing that the mechanisms of the Act properly deal with these distinctions. He says, "A piercing will be covered as a personal injury. It will be an accident but it will nevertheless be ousted by the fact that it was done wilfully by another clause."

I want to draw the Court's attention to that because in my submissions, in making that submission in answer to the intervener's submission, my learned friend for ACC is undermining the main thrust of his case. The main thrust, in my submission, of the ACC's case is to try and convince the Court that pregnancy does not naturally fit within the idea of a physical or a personal injury. Well, what is being done in that submission is the intervener is saying, "Well, here we've got something else that" — sorry, the interested party is saying here we've got something else that the intervener has suggested doesn't fit within physical injury, and it doesn't. But that's okay. It is included but it's dealt with elsewhere. How does that work with the rest of ACC's submissions? It doesn't.

So the point remains that when one considers whether something is or is not a physical injury or personal injury, one must include the idea of causation. One must consider where did this come from, and the fact that the applicant must separately prove that causation is within one or other bucket does not divorce the natural idea of what is or is not a physical injury from the cause, and pregnancy, where it is done willingly, consensually and seeking a child, or even through consensual sex accidentally getting a child does not fit within a natural understanding of personal injury. Where pregnancy results from a failed sterilisation or from rape, it quite clearly, in the submission of the intervener, does.

And on that point I'd like to pick up another thing that's in the submissions for the interested party and that is the idea of a sex worker as part of the floodgates argument. There is, of course, no evidence before the Court as to the extent of that floodgate and it is with considerable doubt that I accept on behalf of the intervener that there is such a floodgate that there are great numbers of these sex workers who are getting pregnant and needing ACC treatment. But, in my submission, whether or not that pregnancy for a sex worker is a work related gradual process is something that Courts would have to consider on the facts. It's not something that's before the Court now. But if the Court does accept that it's a work related gradual process, then yes, it's covered, and the suggested horror of this conclusion that seems to come out of my learned friend's submissions is, in the submission of the intervener, inappropriate. Parliament has decided that this is a legal form of work. If it's a legal form of work, you've got somebody conducting work which has an inherent risk. They're taking steps to avoid that risk. Something goes wrong and the risk eventuates, that's the main purpose of us having an ACC system. It may be surprising because it's only very recently that we've regarded prostitution as a lawful occupation, but if it is a lawful occupation that's a logical —

ELIAS CJ:

All right, so you embrace the floodgates.

MR GEIRINGER:

No — are there floodgates? Certainly in answer to a condom breaking or a vasectomy failing, I adopt the submissions of my learned friend for the appellant that there is no cover in those circumstances. But for the situation of a prostitute who falls pregnant despite her best endeavours, this is a natural consequence of Parliament deciding that prostitution was a lawful occupation, and we've got occupational compensation in the form of ACC.

ELIAS CJ:

All right, well, you don't need to seek to persuade us of that. It's just that you don't resist the submission that's made on behalf of the Corporation that that would be an open possibility on the interpretation of the Act that you're contending for. Is that right?

MR GEIRINGER:

Yes.

ELIAS CJ:

Yes, thank you.

MR GEIRINGER:

And I also wish to address a question posed by His Honour Justice Young in relation to venereal disease, cover for venereal disease from a victim of sexual abuse, a rape victim. The suggestion was in discussion with my learned friend that the injury would be the rape itself and that the venereal disease would be a disease consequent on that injury, and in my submission that analysis has difficulties. It has difficulties because, as is trite in the area of criminal law and rape, there is nothing necessarily to distinguish a woman's physical experience of rape to consensual sex. It's a fallacy to say that rape carries with it some necessary physical injury inherent in the rape. So if one does not accept the proposition that the pregnancy or something involved in the act of the rape linked to the injection into the woman of the fluids of the rapist is in itself a physical injury then there is no such conclusion that a venereal disease will follow from the injury being the act of the rape. There has to be something more there.

If the analysis is accepted, it would also follow that sex is in itself a personal injury and that would, in my submission, cause quite a few other unexpected issues.

The two issues I've confronted primarily are the two issues where my learned friend for the interested party has confronted the submissions of the intervener. It's where I saw the battleground. The interested party has not confronted the US case law but it's all set out there and the conclusions were obvious. It's about whether it's capable in the way that people use these ideas to include pregnancy and the conclusion is overwhelming from the US case law.

As I said as I started out, I don't wish to be too much of a distraction and I have obviously raised issues which the Court was unsure were of too much assistance, so I don't want to speak any more unless there are —

ELIAS CJ:

It's important that we are aware of the penumbra of issues that may not be directly confronted by the parties so we are grateful for those submissions, thank you, Mr Geirginer.

MR GEIRINGER:

Can I say that there were some directly sexually related issues, sexual abuse related issues, which were discussed with my learned friend for the appellant and I fully adopt the analysis, particularly of the changes of the 1992 Act and they have been fully discussed —

ELIAS CJ:

Yes.

MR GEIRINGER:

— between the Court and my learned friend, and my learned friend was slightly tentative in his explanation, the intervener would adopt that interpretation with more force, the reasons behind the '92 variation.

ELIAS CJ:

Thank you Mr Geiringer, thank you.

MR COLLINS QC:

Thank you very much, your Honours. Can I make available to the Court please a one page outline of the submissions which I am hoping to take the Court to.

You will see, your Honours, that I propose to have a very brief introduction, if the Court allows.

I then wish to spend probably about 20 minutes on what I have called the legislative context because I believe that it is incredibly important to understand the legislative evolution of the concepts of personal injury and medical misadventure in order to fully understand Parliament's intentions when it passed the 2001 Act.

I then want to focus upon what is the gravamen of the issue before this Court.

I then want to very briefly touch upon an issue I have with two High Court judgments in which, in my respectful submission, they have erroneously in-conflated issues relating to infringement of bodily integrity with physical injuries.

If necessary, I will then touch upon some of the common law decisions and then I want to deal specifically with His Honour Justice Young's dissent in the Court of Appeal below and *ACC v D*.

By way of introduction, your Honours, we have heard from Mr Waalkens about His Honour Justice Cooke's judgment in *L v M* and it is the Corporation's position that His Honour was entirely correct when he said in *L v M* that conception, pregnancy or childbirth could not be described as personal injury. And that same point was taken 16 years later by Dr Rodney Harrison QC who wrote, in a publication in which he foreshadowed the very arguments which are before this Court, that conception and pregnancy did not constitute physical injuries to the mother. In fact he went on to say that he considered that such an argument would be "extremely far fetched". It is the case for the Corporation that Justice Cooke and Dr Harrison were entirely correct and Parliament did not intend that pregnancy would constitute personal injury.

Furthermore, significant changes to New Zealand's ACC legislation since *L v M* have reaffirmed that Parliament had absolutely no intention to provide cover to a woman who becomes pregnant.

TIPPING J:

Is it fair to say that the submission is that Parliament didn't intend that the physical consequences of pregnancy should not be regarded as personal injury?

MR COLLINS QC:

Should be regarded. Sorry, I think there might have been too many "nots".

TIPPING J:

All right. We will forget them. Because it is the physical consequences that are said really to be the personal injury isn't it.

MR COLLINS QC:

That is the submission that we have heard this morning.

TIPPING J:

Yes.

MR COLLINS QC:

The way in which the case has pleaded and the written submissions focus upon pregnancy. I accept that my friend says, in his submissions today, that it is the consequences of pregnancy which constitutes the personal injury and it is the Corporation's case that Parliament did not intend either, pregnancy or the consequences of pregnancy, to be personal injury. And it didn't intend that in any circumstances, whether it be from a failed sterilisation to the woman, any more than it intended it to be the subject of cover where a woman unintentionally becomes pregnant in circumstances where her partner has suffered a failed vasectomy.

BLANCHARD J:

What do you say about the circumstances of pregnancy, consequent on rape?

MR COLLINS QC:

The pregnancy per se may be the subject of a form of cover under the Act in terms of being able to entitle the woman to abortion as a form of treatment, consequential upon her suffering mental injury for which she does have cover under the Act. And I can take your Honours to the process in the Act where that is set out.

TIPPING J:

So in rape cases, it is necessary to go via mental injury?

MR COLLINS QC:

Yes, and that is only since 1992.

ELIAS CJ:

So you are going to take us to that?

MR COLLINS QC:

Yes, absolutely, yes.

ELIAS CJ:

All right, I will save my question.

MR COLLINS QC:

Now just by way, from the outset, I immediately accept that pregnancy has many, causes many natural physical changes to a woman's body and that those changes continue throughout pregnancy and after pregnancy, and I also unhesitatingly accept that tragically in some cases pregnancy can cause extreme physical damage and even death, and I also accept without hesitation that an unplanned pregnancy can violate a woman's autonomy to control her own body, and I also accept that pregnancy can be an extremely expensive consequence, or can have extremely expensive consequences. However, Parliament had no desire to extend ACC cover to pregnancy, even when unplanned. Cover for an unplanned pregnancy would have involved a significant portion of all pregnant women becoming ACC recipients and the drafters of the scheme did not intend that consequence.

Now I wish to focus on the legislative context, and to assist the Court I have endeavoured to distil down to one page, albeit quite a large page, but it is not in the form of a graph, but I have, I hope, very accurately distilled exactly how the concepts of personal injury and medical misadventure have evolved since 1972 and if this is before your Honours, I hope it will assist you in understanding this quite important legislative evolution.

ELIAS CJ:

Yes, thank you. Are we going to get serially bits of paper for each of these propositions you have here, Mr Solicitor?

MR COLLINS QC:

No, this is it.

ELIAS CJ:

All right, thank you.

MR COLLINS QC:

And I wish to start very briefly with the Woodhouse report. An examination of that report, which is in the Corporation's bundle of authorities under volume 2 at tab 45, reveals that the Commissioners' proposed cover for bodily injury by accident which was undesigned and unexpected, so far as the person injured was concerned. That is at paragraph 289, sub-paragraph (a)

BLANCHARD J:

Does it deal with medical misadventure?

MR COLLINS QC:

No, not — well, I am sorry, Sir. Not in the way in which it subsequently became enacted in 1974 but can I just deal with that very specifically. It recommended that in general cover be provided in respect of injury conditions classified by the International Classification of Diseases and the Commission has identified classifications E800 to E999 in that International Classification and those classifications, which you can find at volume 2 under tab 46 at pages 250 through to 294 of the Corporation's bundle, did not include pregnancy. Pregnancy, including complications thereof, is dealt with in an entirely separate chapter of the International Classification of Diseases and Conditions.

ELIAS CJ:

But —

MR COLLINS QC:

Sorry.

ELIAS CJ:

Does this — can we take from this anything more than it was not contemplated that pregnancy was a disease?

MR COLLINS QC:

What we can take, your Honour, is that the Commissioners did not contemplate that pregnancy would be the subject of cover if the Commissioners' recommendations were accepted by Parliament.

WILLIAM YOUNG J:

At the end of para 289(c) there's a reference in the list of —

MR COLLINS QC:

That's correct, Sir. There is a group of medical —

WILLIAM YOUNG J:

With the exception — with the possible exception of some categories of therapeutic misadventure.

MR COLLINS QC:

Yes, yes, Sir.

WILLIAM YOUNG J:

And then they're listed at 950 in specific terms which don't include pregnancy, but there is 955, "Other and unspecified therapeutic misadventure".

MR COLLINS QC:

Yes, and that is the only reference to what subsequently became medical misadventure.

WILLIAM YOUNG J:

So medical misadventure comes — well, but couldn't pregnancy from a failed — result in, or following a failed sterilisation be within E955?

MR COLLINS QC:

No, with respect, Sir, not when pregnancy is specifically covered by the international classification of conditions and diseases under a separate chapter altogether. That's the Y section.

The point I think I can make —

TIPPING J:

Does that chapter deal with unwanted pregnancies, because it might just cover pregnancies?

MR COLLINS QC:

Under tab 46. I'm sorry, can I just check that point, Sir? No, it doesn't, your Honour, it doesn't deal with unwanted pregnancy. I think —

ELIAS CJ:

It doesn't deal with unwanted pregnancy?

MR COLLINS QC:

So I'm told, yes. The point I wanted to make was this, that there is nothing in the Woodhouse reports that suggest —

ELIAS CJ:

Sorry, so this classification Y —

MR COLLINS QC:

Yes.

ELIAS CJ:

— is concerned with —

MR COLLINS QC:

Complications arising from pregnancy.

ELIAS CJ:

Complications arising from pregnancy, right.

WILLIAM YOUNG J:

Well, not really, is it? I mean, it includes a lot of conditions, doesn't it? Prenatal care, post-partum observation. It's talking about special conditions and examinations without sickness.

MR COLLINS QC:

When I said complications, I meant complications and treatment arising from pregnancy, but it is not confined to unwanted to unplanned pregnancy, which is I think the point that your Honour Justice Tipping was questioning me on.

TIPPING J:

Well, I wasn't interested — I had in mind both whether it was confined to but whether it included any discussion of an unwanted pregnancy being a — well, the word "disease" isn't very apt but that's apparently the word that was used in the heading. The answer is presumably no.

MR COLLINS QC:

Correct.

ELIAS CJ:

This is only classification though, isn't it?

MR COLLINS QC:

It is only classifications, and the point that I was really wanting to make is that Sir Owen and his fellow Commissioners, when they made their recommendations, were not recommending that cover would extend to pregnancy that occurred in any circumstances.

I then want to come onto the 1992 Act, and I can be very, very brief because Your Honours will recall the introduction of that Act in 1972 and personal injury was defined in what by then President Cooke described as "non-exhaustive" terms, later in *Green v Matheson* [1989] 3 NZLR 564 (CA), "Personal injury by accident includes incapacity resulting from an occupational disease."

We then need to focus on the 1974 Amendment. That Amendment came into force in 1975. It provided a more detailed definition as to what constituted personal injury. It was again an open-ended definition, and for present purposes I focus upon (1) the physical and mental consequences of any such injury and (2) medical, surgical, dental or first aid misadventure.

What was also quite instructive was that in that 1974 Amendment Parliament specifically dealt with the situation of a woman who had the misfortune to be raped and to become pregnant as a consequence thereof, and the way in which Parliament dealt with that was to classify that event as being "actual bodily harm". So it wasn't physical or personal injury. It wasn't the physical or mental consequences and it wasn't anything else. It was a sub-species called actual bodily harm.

ELIAS CJ:

Is actual bodily harm defined?

MR COLLINS QC:

Yes, it is. And the phrase, actual bodily harm, came from the Criminal Injuries Compensation Act of 1963.

ELIAS CJ:

Yes.

MR COLLINS QC:

And there had been a lacuna from 19 — well, from the beginning of the Accident Compensation Scheme on 1st April 1974 through to the commencement of the Accident Compensation Amendment Act in — 1974 Amendment Act in 1975, which had inadvertently excluded the victims of rape who became pregnant from cover and that was addressed in that 1974 amendment. But what is important was that the only way that could be done was not by classifying pregnancy as a personal injury, but by classifying it as actual bodily harm and deeming that to be a personal injury in these circumstances, being where a woman became pregnant following rape.

ELIAS CJ:

That has slightly escaped me. Are you going to take us to the —

MR COLLINS QC:

Certainly.

ELIAS CJ:

It would help me to understand that — those linkages.

In particular, the deeming for these purposes as you put it.

MR COLLINS QC:

Unfortunately, your Honour, we don't have the 1974 Amendment provision here before the Court. But can I tell your Honour that it is section 105B of the 1974 Amendment.

McGRATH J:

And is that amending section 2, "Definition of personal injury by accident"?

MR COLLINS QC:

Yes it is Sir. For the purposes of subsection 2.

ELIAS CJ:

Can you just read that out.

MR COLLINS QC:

Yes. Can I just — probably the best way to do it, your Honour, is to actually go to the 1982 Act because we do have that before us and I think the language is exactly the same.

ELIAS CJ:

All right.

TIPPING J:

Page 50 and 60 of the 1982 Act.

ELIAS CJ:

Where do we find this —

TIPPING J:

Tab 2.

ELIAS CJ:

Yes.

MR COLLINS QC:

So, whilst the language is very slightly different from the 1974 Amendment, the effect is exactly the same. So the "Definition of personal injury by accident" now has, under sub-paragraph (iv), the continued reference to actual bodily harm, including pregnancy and mental injury, or nervous shock.

ELIAS CJ:

Well —

WILLIAM YOUNG J:

But doesn't — in little (2) it must mean personal injury includes any consequences of medical, surgical, dental or first aid misadventure. So there is no requirement for bodily harm there.

MR COLLINS QC:

Correct and this is the very point that I will be coming on to, to explain what happened when —

WILLIAM YOUNG J:

What happened next.

MR COLLINS QC:

Sorry?

WILLIAM YOUNG J:

What happened next.

MR COLLINS QC:

Exactly and that's why we will need to spend just a little bit more time on *L v M* I am afraid.

WILLIAM YOUNG J:

Well, *L v M* is decided before this medical, surgical, dental or first aid misadventure gets into the Act, isn't it?

MR COLLINS QC:

It is decided after but it relates to events which preceded that.

WILLIAM YOUNG J:

Before, yes, that is what I meant.

MR COLLINS QC:

I have put in the —

ELIAS CJ:

Sorry, you say that it is a deeming because it is tied to the specified offences.

MR COLLINS QC:

Yes. And I say deeming because it is absent that it is not personal injury.

ELIAS CJ:

Yes.

MR COLLINS QC:

And it is not medical misadventure. It only becomes the subject of cover because of the special sub-classification, actual physical injury.

ELIAS CJ:

Yes, and the Act doesn't adopt actual bodily harm for any other purposes.

MR COLLINS QC:

Correct.

ELIAS CJ:

So it is simply making it clear that it is, in those situations, it is personal injury by accident, so it is definitional rather than inclusive?

MR COLLINS QC:

Correct.

ELIAS CJ:

Yes.

MR COLLINS QC:

That is why I think I am accurate in using the word deeming, your Honour.

ELIAS CJ:

Yes, yes, I think that is accurate.

MR COLLINS QC:

The 1982 Act is very briefly summarised in the A3 sheet which is before you. There were some changes in language but I doubt whether anyone would quibble and suggest that they have any meaning whatsoever.

But before we get on to the 1992 Act, I do think it is necessary for us to go back to *L v M* which I know my friend spent a few moments on this morning, and that is under tab 16 of volume 1 of the Corporation's bundle of authority. Now my friend was entirely correct when he said that the judgment of Justice Cooke was obiter and I would also add that it proved to be extremely influential obiter in this area of

jurisprudence and I think my friend and I fully accept that the facts in *L v M* are in all material respects exactly the same as the facts before this Court. A woman undergoes a sterilisation, that sterilisation procedure is unsuccessful, she becomes pregnant and she sues her gynaecologist who performed the sterilisation procedure, and my friend was also correct when he says that the primary issue before the Court involved one of jurisdiction, did the Corporation have exclusive jurisdiction to determine whether or not the plaintiff was the subject of cover. President Woodhouse and Justice Richardson concluded it was exclusively the role of the Corporation to make that determination. Justice Cooke concluded that Parliament had not removed the Court's jurisdiction to determine whether or not a proceeding was barred.

Now there were three elements to His Honour's judgment which I wish to focus upon. The first is page 530 of the judgment, sorry 529 of the judgment at line 53. Bearing in mind that what His Honour was looking at when he was making this judgment was the Accident Compensation Amendment Act 1974. He concluded, and in the Corporation's view quite correctly, that "[n]either conception or the childbirth could be described as personal injury to the mother". So that is at line 53, 54, and then over the page, at line 17, in the paragraph commencing "Similarly", he emphasises the part that had been missed out on the previous page, that "[p]regnancy, however unwanted, or the childbirth, cannot naturally be described as personal injuries". So that was the first point that His Honour was making.

The second point that His Honour made was that the fact that Parliament had explicitly included pregnancy within the definition of actual bodily injury for the purposes of those unfortunate victims of rape, "strengthened", were his words, His Honour's view that pregnancy was not personal injury to the mother but that he would have reached that conclusion without the specific reference to pregnancy being covered, where the claimant had been raped. And he says that at the top of page 530 at line 11.

And the third point that His Honour makes is this, and this is where things get quite interesting. He said that the "Failed sterilisation was a medical misadventure and therefore arguably personal injury but because the plaintiff's claim predated the 1974 amendments, that point would need to be considered on another occasion, and he says that at page 530, lines 26 through to 34.

What is very important, and this set the scene for this area of jurisprudence right up until the 1992 changes, was that medical misadventure in itself gave rise to cover. It was the subject of cover, medical misadventure, so it was a conflating in the legislation of both the cause and the consequence.

Now that last point which I made was seized upon by His Honour Justice Speight in *Accident Compensation Commission v Auckland Hospital Board* [1980] 2 NZLR 748 (HC), and that case is volume 1 of the Corporation's bundles of authority under tab 18, and in that case, again in all material respects factually the same as *L v M* and the case before this Court, His Honour Justice Speight concluded that a failed sterilisation was medical misadventure and that therefore the subsequent unplanned pregnancy was personal injury. What is very important is that he also emphasised that absent medical misadventure, the pregnancy did not constitute personal injury by accident to the mother.

Thus, to summarise the law as set by Parliament and —

WILLIAM YOUNG J:

Can I just pause there. What I don't quite understand is that as *L v M* went through the ACC system it was treated as medical misadventure.

MR COLLINS QC:

Ultimately again — there are so many reports of the cases which flowed from *L v M,* can I just pause for one second?

TIPPING J:

Because this is the same case as the one that Justice Jeffries, the same people as Justice Jeffries —

MR COLLINS QC:

Yes, it is, yes, and I think, yes, your Honour is correct on that.

WILLIAM YOUNG J:

So how did that happen if medical misadventure wasn't in the definition at the time of the critical events?

MR COLLINS QC:

Yes, I have reflected on that and I can't provide you with a coherent answer. Something happened and I don't know how.

TIPPING J:

Well, you would say someone got it wrong.

MR COLLINS QC:

Well —

ELIAS CJ:

You'd have to say —

WILLIAM YOUNG J:

Well, something must have happened because they could hardly have overlooked it because the point appears quite clearly from Justice Cooke's judgment.

MR COLLINS QC:

It does, it does. So to summarise where Parliament and the Courts had gotten to from the —

McGRATH J:

Can you just highlight, pinpoint the reference from Justice Speight where he says that —

ELIAS CJ:

Sorry, I haven't got to — where is Justice Speight's judgment, at what tab?

MR COLLINS QC:

That's under tab 18 —

McGRATH J:

At tab 18.

MR COLLINS QC:

— of volume 1, your Honour, and if you go to page 752, Sir.

ELIAS CJ:

Yes, thank you.

MR COLLINS QC:

At — and I have it all highlighted, at page 752 and 753. I think it's 752, lines 36 through to *L v M* at line 50, and then over the page at lines 35 through to 50 again, Sir.

McGRATH J:

Thank you.

MR COLLINS QC:

So just to give that snapshot summary of where Parliament and the Courts had gotten to from 1974 through to 1992, pregnancy per se did not constitute personal injury to the mother. If a woman had the misfortune to become pregnant as a result of rape, she was deemed to have suffered actual bodily injury and therefore her pregnancy was personal injury by accident. A failed sterilisation procedure might constitute a medical misadventure. If there were a medical misadventure, pregnancy in those circumstances was a personal injury to the mother.

We now come to 1992.

McGRATH J:

Was that the case or was it just the case that if it was medical misadventure that was sufficient?

MR COLLINS QC:

That was sufficient for the pregnancy to be a personal injury.

McGRATH J:

Thank you.

TIPPING J:

Because it was implicit that all consequences of medical misadventure would be the subject of cover.

MR COLLINS QC:

Yes.

TIPPING J:

As you say, the cause and the consequences were merged.

MR COLLINS QC:

Indeed, yes. And in 1992 that merger was decoupled. But before I get on to that decoupling, could I just re-emphasise and it is a point that my friend has very fairly made, that the key driver behind the 1992 changes to ACC was to reduce the cost of the scheme. It was believed that it was becoming financially unviable and those who were responsible for promoting the 1992 changes clearly believed that significant changes needed to be made in order to contain the cost of the scheme and to more carefully and clearly define the boundaries of the scheme so that the border between cover and events that were not covered was more acutely defined.

McGRATH J:

Yes, and where there were cutbacks, they were spelt out in some detail?

MR COLLINS QC:

Not all but there were a number that were spelt out.

McGRATH J:

Yes.

MR COLLINS QC:

And I have, in my written submissions, taken your Honours to the document *ACC: A Fairer Scheme* that was presented to Parliament as a supplement to the 1992 budget and that document foreshadowed a number of the changes which were to become enacted in the 1992 Act, but the key point I make about that document is that it was aiming to tighten scheme eligibility in an effort to contain cost. Now for present purposes, as is spelt out I hope in the A3 sheet, the key changes were as follows.

The definition of personal injury was carefully prescribed to mean death, physical injuries or mental injuries arising from physical injuries and mental injuries arising from certain types of criminal offending. The existence of an injury was dissected from the cause of the injury, thus medical misadventure was no longer personal

injury per se. A claimant had to first prove personal injury and that their physical injury was caused by medical misadventure in order to get cover for the events that occurred in a medical setting. And medical misadventure was very tightly defined to mean error, which equated with negligence, and then mishap which was further sub-defined to require rarity, an event that had a less than 1% chance of occurring, and severity, death or hospitalisation for 14 days or permanent significant disability, lasting 28 days or more. And the consequence of this was that women who became pregnant as a result of rape, no longer had cover for that pregnancy. They did, however, have cover if they suffered mental injury as did anyone who suffered mental injury as a result of physical injury. Mental injury was in itself quite tightly defined to mean a clinically significant, behavioural, psychological or cognitive dysfunction.

Now the reduction in the scope of cover achieved by the 1992 Act was widely criticised by a number of informed commentators. One such commentator was Dr Rodney Harrison QC who in a publication called *Matters of Life and Death,* which I can take your Honours to, it is in volume 2 under tab 47 of the Corporation's bundles. Volume 2, tab 47. At page 32, I haven't put the entire publication in but in the paragraph commencing, in the first of these two scenarios, Dr Harrison foreshadowed the very argument that is before this Court today and said, about three quarters of the way down that paragraph, "While it may be open to argument that conception and pregnancy constitute physical injuries to the mother, this would seem extremely far fetched". And really what Dr Harrison was doing, was doing no more than reiterating what was the essence of what Justice Cooke had said in *L v M.*

WILLIAM YOUNG J:

Your position basically is that there has to be something beyond gradual process, disease or infection. Is that right?

MR COLLINS QC:

Absolutely, there has to be physical injuries.

WILLIAM YOUNG J:

But often there won't be?

MR COLLINS QC:

Yes.

WILLIAM YOUNG J:

But sorry — but take the cancer, undiagnosed cancer case which you accept attracts cover?

MR COLLINS QC:

Yes.

WILLIAM YOUNG J:

Where is the personal injury there?

MR COLLINS QC:

The personal injury there, Sir, is — and I was going to spend quite some time on this a little later but the essence of it is that the personal injury caused by an undiagnosed tumour is the way in which the tumour impacts upon surrounding tissue, it causes destruction to surrounding tissue and ultimately that destruction can be fatal.

TIPPING J:

Well, it spreads.

MR COLLINS QC:

Yes.

TIPPING J:

And therefore injures the part of the body to which it spreads. I am not talking about metastasis, I am talking about just in general.

MR COLLINS QC:

Yes, I think —

TIPPING J:

That has to be the proposition, doesn't it.

MR COLLINS QC:

Yes.

TIPPING J:

And that is an injury to wherever it goes.

MR COLLINS QC:

Yes. And I do distinguish that from pregnancy.

WILLIAM YOUNG J:

Well, why couldn't that be said of a pregnancy?

MR COLLINS QC:

Well, can I come back to this —

WILLIAM YOUNG J:

I mean it is a value judgement in the end, I guess, isn't it?

MR COLLINS QC:

It is more than a value judgement, I think, Sir. One of the arguments which I will be advancing is that whilst both are natural occurring events, the pregnancy is an essential part of human existence and I won't go any further than to say that. A tumour is the antithesis of that, it is completely the opposite to an essential part of human existence. Untreated, or even treated, it is ultimately totally destructive of human life.

ELIAS CJ:

You will need, when you come on to it, to deal with this question of natural and unnatural because —

MR COLLINS QC:

I say they are both natural.

ELIAS CJ:

Oh, yes, you do say that they are both natural.

MR COLLINS QC:

I say they are both natural.

WILLIAM YOUNG J:

It is pathological or not pathological, is that your assumption?

MR COLLINS QC:

Well, I don't think, with respect to the majority in the Court of Appeal, that that's the complete answer either. But I think I can provide an answer.

WILLIAM YOUNG J:

Well, it can't really be — because although you get a bit of ejusdem generis —

MR COLLINS QC:

Yes.

WILLIAM YOUNG J:

— support for that, what's the point of saying gradual process unless it's something that isn't pathological. Because disease and infection is, so presumably by gradual process, the legislature meant something that wasn't pathological.

MR COLLINS QC:

Oh, not necessarily, Sir. But I think I can come, I think I can deal with that.

WILLIAM YOUNG J:

All right, okay.

TIPPING J:

Well, I signal that I too see that as very central to the —

MR COLLINS QC:

Right. But my point, if I can just raise it now and leave it in the backs of your minds, so that when we come to it, we can explore it in more detail, is that you have still got to have the personal injury, either death, physical injuries or mental injuries arising from physical injuries.

WILLIAM YOUNG J:

What about mental injuries associated with an unwanted pregnancy, mental illness or mental distress?

ELIAS CJ:

It is not a physical injury, consequential on a physical injury on your analysis.

WILLIAM YOUNG J:

All right.

ELIAS CJ:

I am sorry, I am now a little muddled. Not because of you, but you say, you acknowledge that mental injury, consequential on rape is covered.

MR COLLINS QC:

Correct.

ELIAS CJ:

That is a specific provision.

MR COLLINS QC:

Yes.

ELIAS CJ:

And I'd just like to be reminded where I find it.

MR COLLINS QC:

Yes, indeed.

ELIAS CJ:

Because I would like to look at it.

MR COLLINS QC:

In the 2001 Act, your Honour. Section 21 in the 2001 Act.

ELIAS CJ:

I see. Just as if it arises out of an Act?

MR COLLINS QC:

Yes, and then you go to the schedule to see the types of offences which are covered.

ELIAS C J:

Right.

MR COLLINS QC:

And rape is covered.

ELIAS C J:

Yes.

MR COLLINS QC:

I think there are 15 or so different criminal offences that are covered.

ELIAS C J:

Yes.

TIPPING J:

So the inference from that is that the physical side of it is not covered?

MR COLLINS QC:

Correct. And that's what I am saying —

TIPPING J:

It's —

MR COLLINS QC:

From 1992, that's been the position.

ELIAS CJ:

What about physical — this is following rape.

MR COLLINS QC:

Yes.

ELIAS CJ:

What about mental injury caused by the — by postnatal depression, or in this case clearly a major depressive illness and some really horrible circumstances which might well have triggered it —

MR COLLINS QC:

Yes.

ELIAS CJ:

— does that fit within this definition or is it only —

MR COLLINS QC:

Following a rape or following the commission of one of the —

ELIAS CJ:

Well, I know that ultimately it goes back to the rape but in fact the trigger may not be the rape itself but the birth, say. On your argument, if it can trace back to, I don't know, we're not dealing with this case now so perhaps we can't go into it too much, but what would be your answer to that?

MR COLLINS QC:

My answer to that is this, that unless the poor woman can establish that her mental injuries are a consequence of the rape then she does not have cover, the exception being that she would be — sorry, it's not an exception — she would be able to get treatment consequential upon those mental injuries including if necessary termination of that pregnancy as part of the treatment of her mental injuries. But that's the scope of cover.

But just in case I'm sounding too brutal I also need to instantly remind the Court of course physical injuries caused during the course of the physical violence of rape are the subject of cover and that they constitute a personal injury by accident to the victim. But if we're just focusing upon pregnancy, and the consequences of pregnancy, unfortunately only the mental injuries are the subject of cover.

TIPPING J:

If a rape causes a pregnancy and a pregnancy causes a mental injury —

MR COLLINS QC:

That's what I've just said.

TIPPING J:

— it would seem rather niggardly, if I may borrow a word that's in vogue in this area, to say that the mental injury is not caused by a criminal act performed by another person.

MR COLLINS QC:
Well, it is.

TIPPING J:
You accept that it is?

MR COLLINS QC:
Yes.

TIPPING J:
Right, I think that was —

ELIAS CJ:
I'm postulating a case, for example, where there is a rape and — but the pregnancy is desired perhaps, you know. I mean, I'm —

MR COLLINS QC:
You mean to continue the pregnancy is desired?

ELIAS CJ:
To continue the pregnancy, to have the child.

MR COLLINS QC:
Yes, and then —

ELIAS CJ:
And then there is —

MR COLLINS QC:
Then there's post-natal depression.

ELIAS CJ:
Yes.

MR COLLINS QC:

Yes, well, I would have thought that that would be the subject of cover. I'll take — I would have thought that —

ELIAS CJ:

That would be the subject of cover. Because it just goes back to the — I see.

MR COLLINS QC:

Yes, I think I'd be struggling to say that isn't the subject of cover.

TIPPING J:

The election not to terminate could hardly break the chain.

ELIAS CJ:

Well, that's what does seem quite bizarre, that you might be better treated under the regime if you elect a termination than if you elect to proceed with the pregnancy, and that cannot be right.

MR COLLINS QC:

Well, I'm not —

ELIAS CJ:

No, no, you're saying that it all does — I see.

MR COLLINS QC:

Yes, yes. Now just before we leave the language of the legislation, there is just one final point which I want to make and I apologise because this isn't in the written submissions. It's a point my friend might like to reflect on.

It can be fairly said that the 1998 Act and the 2001 Act all substantially re-enacted the relevant provisions of the 1992 Act. However, those last two Acts, the 1998 Act and the 2001 Act had as their primary purpose injury prevention and rehabilitation, and a claimant's first entitlement is to treatment. However, treatment services are not open-ended. The only treatment services that you can get under the ACC scheme are those that are provided by a treatment provider, and "treatment provider" is defined, and your Honours might consider it quite instructive that midwives have been deliberately excluded from those who can provide treatment services under the ACC scheme. And I make the submission that if Parliament had intended

pregnancy, regardless of the circumstances leading to that pregnancy, to be covered under the Act, one would think that logically treatment services for pregnancy would be those which would be provided by a midwife.

TIPPING J:

Are you saying that midwives were in, and were then taken out?

MR COLLINS QC:

No, they were never in because this treatment provider model only came in in 1998.

TIPPING J:

Oh, so it is not as strong as them being in and taken out.

MR COLLINS QC:

But they have never been put in there.

ELIAS CJ:

Does that mean —

MR COLLINS QC:

Sorry your Honour.

ELIAS CJ:

No. Does that mean that victims of rape who you say are covered —

MR COLLINS QC:

Yes.

ELIAS CJ:

— are not entitled to —

MR COLLINS QC:

Midwifery care.

ELIAS CJ:

— midwifery.

MR COLLINS QC:

Care, correct. They have to go get care from another registered health provider.

TIPPING J:

They just go to a —

MR COLLINS QC:

A doctor or an obstetrician or a gynaecologist.

ELIAS CJ:

Oh, is that all it means.

MR COLLINS QC:

It means that a person who is pregnant does not get treatment services provided under ACC by a midwife.

ELIAS CJ:

Right, but can get —

MR COLLINS QC:

From an obstetrician, yes.

ELIAS CJ:

Yes.

MR COLLINS QC:

— or a registered medical practitioner, yes.

ELIAS CJ:

But that on the face of it simply looks like an anomaly which doesn't necessarily bear on the issues that we have to look at.

MR COLLINS QC:

I would agree, your Honour, that it could be dismissed as an anomaly if it weren't for one other interesting provision in the scheme and that is in determining whether or not the actions of a health care provider caused medical misadventure, again Parliament has been very, very prescriptive and it has defined the types of health

care provider who can cause medical misadventure. So the definition of registered medical provider in the legislation includes midwives. So Parliament was conscious of the fact that midwives are there for some purposes, their actions can cause medical misadventure, but when it is a situation where midwifery services would be provided under normal circumstances, no cover is provided by the ACC scheme.

BLANCHARD J:

Well, it still looks like an anomaly.

WILLIAM YOUNG J:

When did — when were midwives able to practice independently?

MR COLLINS QC:

1992, '93, I think it was, your Honour.

WILLIAM YOUNG J:

So by 1998 they were, there were independent midwife practitioners.

MR COLLINS QC:

And they were registered, they are defined in the 1998 Act as treatment, as registered health providers, quite separately.

BLANCHARD J:

All this is incredibly subtle and I am not accusing Parliament of acting by stealth because I don't believe the parliamentarians necessarily comprehended what they were being asked to do, on the argument that you are putting up. It just seems very unlikely.

MR COLLINS QC:

All I can say, Sir, is that it would be an extraordinary anomaly, that if pregnancy was to be the subject of cover and those who were pregnant were to receive treatment, one would think that the primary provider of treatment services for a pregnant woman would be a midwife.

BLANCHARD J:

Well, what you would think is that if Parliament was really intending to remove coverage for pregnancy caused by rape, in circumstances where mental distress was

not necessarily to the level that it had to be to have coverage, that somebody would have said it directly?

MR COLLINS QC:

Well, what I have endeavoured to do, Sir, is to take you through the legislation and the evolution of the legislation and the conclusion that one is left with, in my respectful submission, is this, that in 1992 there were significant changes made. Those significant changes involved the decoupling of the cause of the event with the damage that was complained of, so that thereafter it was necessary to establish personal injury as defined, caused either by accident or medical misadventure, and the primary focus of – and as I have also emphasised, and it seems to have been very widely accepted until today, since 1992, those women who have the misfortune to become pregnant as a result of rape do not have cover for that pregnancy. They only have cover for mental injuries arising from that criminal act.

TIPPING J:

Or discrete injuries caused by the rape.

MR COLLINS QC:

Correct.

WILLIAM YOUNG J:

But your argument about rape pregnancy and medical misadventure pregnancy really are facets of the same propositions, that physical injury in section 26(1)(b) doesn't include pregnancy?

MR COLLINS QC:

Correct.

WILLIAM YOUNG J:

And secondly, there is a lot of significance to be placed in section 20 subsection 2 (e) through to at least (h) in the repetition of personal injury throughout the definitions.

MR COLLINS QC:

Yes. And it is definitely my sub —

WILLIAM YOUNG J:

So they are both — and that's really why you say that pregnancy caused by rape isn't covered, and likewise pregnancy caused by medical mishap isn't covered?

MR COLLINS QC:

Correct, Sir.

WILLIAM YOUNG J:

But if you — if you treated pregnancy as a physical injury for the purposes of section 26(1)(b) but excluded, under section 26(2) unless within 22(e) to (h), then the problem goes away, doesn't it?

MR COLLINS QC:

No, you still have got to prove personal injury.

WILLIAM YOUNG J:

No, well, wouldn't you — you would say pregnancy is a physical injury, it only attracts cover, however, because it is caused by a — associated with a gradual process, it only attracts cover under section 26(2). If it is within section 20 subsection 2(e) to (h) and on that basis if it is caused by medical mishap, or medical misadventure, I should say, there is cover. Well, why don't you think about it. I mean, I don't want to bounce —

MR COLLINS QC:

Oh, I am sorry, I completely lost track of time.

ELIAS CJ:

No, that is fine.

COURT ADJOURNS: 1.06 PM
COURT RESUMES: 2.15 PM

MR COLLINS QC:

Thank you very much, your Honours. Just before the lunch break, His Honour Justice Young put to me a proposition which at the time I thought sounded rather beguiling, Sir, and I was grateful for the lunch break because when I reflected on what your Honour had put to me, I believed that it did miss quite a crucial step in the

legislative process and that legislative step involves, firstly starting with section 20 subsection(1)(b), and from section 20(1)(b), one then has to go to section 26(1) and be satisfied that the events complained of constitute a personal injury as defined in section 26(1)(a) through to (c) for present purposes. And starting off with an analysis that is hinged upon section 26(2) as being the starting point, it leads one to not put the emphasis on having to establish the existence of personal injury.

WILLIAM YOUNG J:

Why can't personal injury just be physical injuries and why can't physical injuries be untoward events affecting the body or something of that sort, which might include pregnancy, and then the exclusions would take out the sort of too broad consequence.

MR COLLINS QC:

Well, with respect, I think you have started to really identify the true issue and that is whether or not pregnancy constitutes physical injury and I do propose to move on to that topic in just a few more minutes after I have just finished dealing with the legislative framework.

The second to last point I wanted to make about where the legislature has gotten us to is that my friend acknowledges the anomaly of pregnancy being caused through a failed vasectomy of the woman's husband or partner and he says it is anomalous and that's the end of the matter. It is more than anomalous, it is quite inconsistent with Parliament's intention. It is, in my respectful submission, quite an extraordinary submission to suggest that a patient in a maternity ward in bed A, who is there because she has become pregnant following a failed sterilisation procedure, is to be treated quite differently from patient B, who is in the same ward, in the bed next door and she is there because her partner or her husband's vasectomy has failed. Both have suffered effectively the same consequence.

ELIAS CJ:

But if we were legislators, we might be able to take that argument on board. But why is it anomalous for the legislature to decide that it will draw the line, in terms of medical misadventure by, in terms of the patient and others?

MR COLLINS QC:

I understand your Honour correctly. I think what you are suggesting —

ELIAS CJ:

I am probably getting it quite wrong.

MR COLLINS QC:

I think I understand what your Honour is saying though, that there has been a deliberate policy decision made by the legislature in relation to medical misadventure —

ELIAS CJ:

Yes.

MR COLLINS QC:

— to distinguish between primary and secondary victims.

ELIAS CJ:

Yes.

MR COLLINS QC:

Well, what I find difficult with that, your Honour, is that when medical misadventure is defined, and we looked at section 32 subsection (6), we see that secondary victims are specifically included in some circumstances. That is 32 subsection (6). And in my respectful submission, it wasn't a question of the legislature drawing a distinction between primary and secondary victims for some circumstances in relation to pregnancy. What the legislature was saying is pregnancy is not personal injury, full stop, regardless of the cause.

ELIAS CJ:

Well, I understand that to be your submission. I am simply indicating that the anomaly that you say is an intended consequence because pregnancy is not covered, can also equally be explained as a decision to draw the line in terms of third parties, except in the case of infections.

MR COLLINS QC:

Well, with respect, one — I would respectfully submit, your Honour, that one would need to have a lot more evidence that that was, in fact, the focus of Parliament's intention. There is no suggestion of that at all. Indeed, in my respectful submission, what Parliament was doing was starting off with the propositions that were articulated by Justice Cooke in *L v M*, pregnancy isn't personal injury except, and the only way that there is cover is prior to 1992 is in relation to that very horrific but rare exception that we have spent some time focusing upon, and that was the status quo.

ELIAS CJ:

Yes, except that there is nothing that indicates Parliament had in mind the sort of reasoning adopted in *L v M*. Is that right. Or am I wrong in that?

MR COLLINS QC:

I think you are incorrect in that respect, your Honour.

ELIAS CJ:

But there is material that indicates —

MR COLLINS QC:

No, there is not material.

ELIAS CJ:

— an intention to exclude pregnancy, or that Parliament was adverting to pregnancy at all.

MR COLLINS QC:

There isn't the material before you, one way or the other, which is why I say the status quo, as at 1992, was that pregnancy was not personal injury, except for the situation covered by rape and except where it was medical misadventure where medical misadventure and personal injury were conflated prior to 1992. And to deal with that, Parliament split the two.

And the final point I wanted to make about legislature, legislation concerns the submission in relation to purpose. My friend places much emphasis on section 3 of the 2001 Act. He says that the 2001 Act was an intention to return all provisions of the 2001 Act back to where the legislative scheme was as at 1st April 1974. I make two submissions. One, in 1992, as we have been at some pains to emphasise,

Parliament made some very significant changes to the meaning of personal injury and medical misadventure and those changes have been replicated in the 1998 Act and the 2001 Act. So whilst as a general aspirational statement there was an intention to return the scheme, as far as possible, to the 1974 status, that needs to be reconciled with the very clear legislative changes that were heralded in 1992. The second point I make is this, that there is also a purpose statement in the 1998 Act. The 1998 Act was in all material respects the same as the 2001 Act and when one looks at the purpose statement of the 1998 Act, it makes no reference at all to returning the legislative scheme to 1974.

I now want to come on and deal with the essence of the case which engages, I hope, what Justice Young has been asking me about. This involves a very, very careful consideration being given to what constitutes physical injuries and why it is that pregnancy does not, was not intended by Parliament to be considered physical injuries for the purposes of the provisions of the Accident Compensation legislation.

BLANCHARD J:

Are you going to be dealing, at some point, about why gradual process is in there, additionally to disease or infection?

MR COLLINS QC:

Yes, I will be, Sir. I think I can take it as accepted, of course, that we would all regard the words "physical injuries" as pertaining to the damage to the anatomy. That was what Justice Wild said in the *Teen v Accident Rehabilitation and Compensation Insurance Corporation* HC Wellington CIV-2003-485-1478, 11 November 2003, case which I have referred to in my written submissions, and what Justice Stevens said in the *Falwasser v Attorney-General* [2010] NZAR 445 (HC) case which is also referred to in the written submissions. And as I emphasised from the outset, it is accepted that pregnancy causes physical changes to a woman and that in some cases the components of the process of pregnancy may involve what in other circumstances would be covered as a physical injury. However, as I hope I've stressed enough, Parliament didn't intend that pregnancy would come within the concept of personal injury and the reason for this, and I have reflected long and hard on how to express this, is that pregnancy is a unique, natural biological process that has to occur. So there are three components to that. It is unique, it is a natural biological process and it has to occur, and it is the combination of those three factors that cause one to conclude that Parliament could not have intended that pregnancy would constitute a

physical injury and therefore fall within the definition of personal injury. Pregnancy is readily distinguishable from the cancerous tumour that Justice Young referred to in (d). I accept that a cancerous tumour may be a natural biological process but it is inherently destructive and it is certainly not an essential part of the human process.

ELIAS CJ:

It is also metaphysical really. It seems hard to imagine that if we are talking about Parliamentary intent, it could have been envisaged that we would be discussing all of this sort of thing. However, sorry, I don't want to deflect you from developing this. You have distinguished it from a tumour because a tumour is inherently destructive.

MR COLLINS QC:

Yes.

WILLIAM YOUNG J:

Alright, well, what is a gradual process that is not a disease or not an infection. I am sure you have got some examples.

MR COLLINS QC:

There are a number in the human body, most of us suffer them as we get older, deteriorating eye sight, deteriorating hearing.

TIPPING J:

Arthritis, although that may be debatable.

MR COLLINS QC:

That is probably closer to a disease, your Honour.

BLANCHARD J:

They are expressly excluded, aren't they?

MR COLLINS QC:

Some of those are, yes. I think the hearing one is.

BLANCHARD J:

But there is a fairly general exclusion somewhere.

MR COLLINS QC:

Ageing.

ELIAS CJ:

Ageing.

BLANCHARD J:

Personal injury caused wholly or substantially by —

TIPPING J:

That would put us all back.

BLANCHARD J:

— wholly or substantially by the ageing process, section 26(4).

MR COLLINS QC:

Yes.

WILLIAM YOUNG J:

So outside anything that looks like it is to do with ageing, what sort of gradual process is being contemplated?

MR COLLINS QC:

A strain arises gradually through repeated action.

WILLIAM YOUNG J:

Sorry, a what?

MR COLLINS QC:

A strain that evolves —

WILLIAM YOUNG J:

But a strain is a physical injury anyway.

MR COLLINS QC:

No, not if it evolves over a gradual period of time.

WILLIAM YOUNG J:

Okay, I am sorry.

MR COLLINS QC:

Solvency toxicity. There are a number of matters that would evolve over a period of time which you wouldn't describe as being a disease.

BLANCHARD J:

What do you mean by "solvency toxicity"?

TIPPING J:

Glue sniffing.

MR COLLINS QC:

Well, unintentional.

TIPPING J:

Unintentional yes.

MR COLLINS QC:

In a work related situation. Exposure to paints and —

WILLIAM YOUNG J:

It has got to be something that could be caused by medical misadventure though, doesn't it?

MR COLLINS QC:

I think it can also be a work related — let me just…

WILLIAM YOUNG J:

Yes, so — legislature contemplates that work related gradual processes may produce a personal injury. Medical misadventure might and then the other two probably don't add much to it.

TIPPING J:

So it contemplates that you have a medical misadventure, which causes a personal injury that leads on to a gradual process.

MR COLLINS QC:
Yes and the —

WILLIAM YOUNG J:
Causes a gradual process that leads to a personal injury, isn't it

MR COLLINS QC:
And so I —

WILLIAM YOUNG J:
Personal injury caused by a gradual process consequential on, caused by medical misadventure. Oh no, we have got two sets of personal injuries.

MR COLLINS QC:
Yes.

TIPPING J:
We have got two sets of personal injury here. This is why it is so, the drafting of this is cold towel stuff.

MR COLLINS QC:
And I think that that second personal injury in (f) is a drafting error.

TIPPING J:
Well, I am not sure.

BLANCHARD J:
I am not sure at all about that.

MR COLLINS QC:
It has been removed since.

BLANCHARD J:
Has it?

MR COLLINS QC:

Yes.

TIPPING J:

Well how does it now read?

MR COLLINS QC:

Personal injury caused by a gradual process, disease or infection that is personal injury caused by treatment — sorry. Personal injury caused by a gradual process, disease or infection that is treatment injury suffered by the person.

ELIAS CJ:

So it substitutes treatment —

MR COLLINS QC:

Yes, but it also takes out that second reference to personal injury.

WILLIAM YOUNG J:

But does treatment injury bring it back in again?

ELIAS CJ:

Yes, it must.

MR COLLINS QC:

I am sorry, Sir, I —

WILLIAM YOUNG J:

Does the concept, treatment injury which I haven't looked at, does that include a concept of personal injury so it comes out of the phrase "personal injury" but then it reappears as part of treatment injury?

MR COLLINS QC:

You still have to establish personal injury separately from treatment injury.

TIPPING J:

But under the definition in the 2001 Act, don't you have to have a gradual process that is — oh dear, maybe not.

MR COLLINS QC:

I know your Honour Justice Young in *D* thought that, for practical purposes, there might not be much difference between (b) and (f) and I have to say that long before I became involved in this case I found myself in respectful disagreement with your Honour there. It always appeared to me, for what it is worth, is that (b) was relating to a medical misadventure that was the direct cause of the injury to the person, the paradigm example being the surgeon who negligently misidentifies the wrong limb and operates. (f) is the situation where the surgeon fails to detect a tumour and that the growth of that tumour causes physical injury from which the person suffers. That is the way I have always interpreted those two sections and I thought that analysis was perfectly reconcilable.

TIPPING J:

So the gradual process under that approach has to be, itself be personal injury caused by medical misadventure.

MR COLLINS QC:

Not necessarily. Yes, it does, yes.

WILLIAM YOUNG J:

But you can't give us an example.

MR COLLINS QC:

Yes, the tumour.

ELIAS CJ:

Or an infection.

WILLIAM YOUNG J:

No, that is already there.

BLANCHARD J:

It is a disease, isn't it.

WILLIAM YOUNG J:

Well, infection is specifically —

ELIAS CJ:

Well, it is under (f).

WILLIAM YOUNG J:

Yes, but it is gradual process, infection or disease or infection so we are looking for, it is like a treasure hunt, we are looking for a gradual process that can be caused by medical adventure that isn't a disease or infection.

TIPPING J:

Isn't the whole idea behind gradual process to signal that in the qualifying circumstances it doesn't have to be — as my brother McGrath said very early in the hearing — a single event, like a discrete accident?

MR COLLINS QC:

Yes.

TIPPING J:

That is presumably why it is there.

MR COLLINS QC:

And another example might be radiation adhesions which evolve through the process of receiving radiation treatment and they occur, and that is assuming that the radiation treatment is being administered inappropriately, there is too much radiation being applied causing damage over a period of time.

TIPPING J:

So there doesn't have to be one single event.

MR COLLINS QC:

Correct.

TIPPING J:

Because that was the essence of accident, wasn't it —

MR COLLINS QC:

Correct.

TIPPING J:

— under the older — well, it is still there, but it's -

MR COLLINS QC:

Yes, yes indeed. So without in any way wishing to sound like somebody standing for the Republican party nomination, I have been very careful to try and identify what it is about pregnancy that makes it so distinguishable from other events and it is for that reason that I have carefully chosen the language, "Unique natural biological process that has to occur".

ELIAS CJ:

You'll have to explain that a little bit more for me.

MR COLLINS QC:

Yes.

ELIAS CJ:

All of those elements.

MR COLLINS QC:

Yes.

ELIAS CJ:

Why unique?

MR COLLINS QC:

Why is pregnancy unique?

ELIAS CJ:

What makes it unique?

MR COLLINS QC:

Because there is just simply nothing else in biology that equates to pregnancy. There is —

ELIAS CJ:

But one might say that about absolutely everything.

MR COLLINS QC:

No, with respect, no. I mean, all diseases, all adverse events, have something in common. Their characteristic is that they cause, inherently cause damage. They — in an evolutionary sense, they are designed to cause damage. They are quite the antithesis to human survival.

TIPPING J:

Is this a sort of Darwinian?

MR COLLINS QC:

Well, I'm trying to avoid that. It is unique because there is just simply nothing else of a biological nature that equates to pregnancy.

ELIAS CJ:

I'd just like to think a little bit more about it.

MR COLLINS QC:

But all disease, all illness, all infections, have the common characteristic that they are inherently destructive.

ELIAS CJ:

Yes, but it depends on the perspective you're bringing to this, doesn't it? I mean, it's not destructive for the — I suppose it's ultimately destructive even for the tumour, but as I say it seems terrifically metaphysical to me.

TIPPING J:

I think what you're suggesting, Mr Solicitor, is, and I'm saying this quite neutrally —

MR COLLINS QC:

Yes.

TIPPING J:

— is that one must not be beguiled by the unwanted nature of the pregnancy when one is examining whether it is objectively a personal injury.

MR COLLINS QC:

Correct, or the cause. Yes. And the reason why I have chosen this language, your Honour, is because I didn't, with the greatest respect to the Court of Appeal, think that the reference to "pathology" was in itself determinative. A tumour, yes, is pathological, but there are many — well, there are aspects of pregnancy which are also pathological, and so it is for that reason that I have carefully chosen the words, "Unique, natural, biological process that has to occur", and it's the combination of those factors which, in my respectful submission, distinguishes pregnancy from everything else that can occur to a human being, and it is because of that that Parliament looks upon it differently so that physical consequences which might flow from pregnancy would, in different circumstances, be the subject of cover but because they are associated with pregnancy they are not.

And could I give an example, as neutral an example as I possibly can. A person picks up eight kilograms of books and goes back to their chambers and strains their back as a consequence. That's covered. But a person who is pregnant, a woman who is pregnant, and is carrying eight kilograms in a different part of her anatomy might strain her back —

TIPPING J:

Eight kilograms!

MR COLLINS QC:

Well, whatever. I did have pretty large children.

WILLIAM YOUNG J:

I think rather like cannabis babies are still measured in pounds and ounces, aren't they?

TIPPING J:

Only in old-fashioned circles.

MR COLLINS QC:

Say six kilos then, whatever.

TIPPING J:

Down a bit, Mr Solicitor.

WILLIAM YOUNG J:

Talk about pounds.

MR COLLINS QC:

But the woman who suffers back strain during the course of pregnancy does not have cover and that is because personal injury does not cover pregnancy or the natural consequences of pregnancy.

Now I can't advance this any further than I have. I've put that submission as clearly as I can. I've tried to rationalise it and provide your Honours with the vehicle that you could use if you so wished to be able to justify the position which the Corporation says Parliament has always intended.

ELIAS CJ:

What's your response to the other way of looking at it which is that pregnancy is the only outcome of medical misadventure that is not covered on your argument?

MR COLLINS QC:

That that was a conscious decision.

ELIAS CJ:

It would be nice if there was some indication of the consciousness.

MR COLLINS QC:

Yes. I'm talking about straight — I just want to make sure I'm getting this perfectly clear, your Honour. Straight injury to a woman who is pregnant is not covered regardless of how she came to become pregnant.

TIPPING J:

But I think your composite submission is neither pregnancy nor its natural consequences.

MR COLLINS QC:

Consequences.

TIPPING J:

Natural consequences.

MR COLLINS QC:

Yes.

TIPPING J:

If something abnormal took place, would you then — would your position then shift?

MR COLLINS QC:

I could be shifted, depending on the circumstances. If there is an intervening event that causes, that is a contributor to the injury, then yes.

TIPPING J:

Why did you put in, if I may be a little pedantic, natural consequences? Would it be better to say, "And its consequences that are not the result of an external event"?

MR COLLINS QC:

Yes, I would say that. I'm trying to say exactly that.

TIPPING J:

Right.

MR COLLINS QC:

I wanted now to come onto part 4 of the submissions on that one page outline that I gave you at the beginning of the hearing, and that's to deal with *Patient A v Health Board X* HC Blenheim CIV-2003-406-14, 15 March 2005 and *ACC v D* [2007] NZAR 679 (HC), the two cases that are relied upon quite extensively by the appellant.

In *Patient A* His Honour Justice Baragwanath — *Patient A*, by the way, is at tab 8 of the appellant's bundles of authority, and *D* is in the case on appeal at tab 4. And I think I'm not doing Her Honour Justice Mallon any disservice when I say that she primarily relied upon the reasoning of Justice Baragwanath in *A* and it's for that reason that I want to focus on that particular judgment first.

And the summary of the submission that I'm about to make is that in both cases Their Honours were attracted to the suggestion that an unplanned pregnancy

following a failed sterilisation operation could be the subject, was the subject of cover because it constituted an infringement of the woman's personal integrity. So we end up with what I have, for the point of shorthand, described as an erroneous conflating of infringement of personal integrity with physical injuries.

Now if I can start off with *Patient A* —

ELIAS CJ:

Sorry, which tab is it?

MR COLLINS QC:

That's under tab 8 of the appellant's bundle of —

ELIAS CJ:

Yes.

MR COLLINS QC:

— authorities, your Honour. If I can invite your Honours to turn to paragraph 54, and 55, because I think that that accurately summarises this concept, and it's all by way of obiter, I have to emphasise. The following points emerge from paragraphs 54 and 55 of His Honour's judgment.

Firstly, that injury includes, "Interference with bodily integrity", and reference is made to *Green v Matheson* at page 572. And then at paragraph 55 His Honour says, "I have concluded that here personal injury was established by proof of failure of the, and in this case I think it was a Filshie clip, and its potential consequence of removing Ms A's protection from pregnancy. For her, the failure of the clip was undoubtedly an injury and a grave one. On any common sense test it did indeed constitute interference with her bodily integrity just as with the failure of a pacemaker in the case of a cardiac patient or an artificial hip joint."

And in *D*, Her Honour Justice Mallon, and I'll just give you the paragraph numbers, Her Honour said, after referring to the judgment in *A*, at paragraph 68, "An alternative view is that the natural and ordinary meaning of physical injuries includes 'interference with bodily integrity', the test adopted by Justice Baragwanath in *Patient A*", and then at paragraph 69, "In my view an interference with bodily integrity is a possible meaning of physical injuries", and it is my submission that this Court

would be making an unfortunate error of law if it were to hold that interference with a person's bodily integrity constituted physical injuries for the purposes of the ACC regime. Such an open-textured interpretation of personal injury would subvert the policy of the 1992 reforms.

The circumstances which Justice Cooke and others of the Court of Appeal were describing in *Green v Matheson*, which is in our bundle of authority, volume 1, under tab 20, the circumstances he was describing as an interference with bodily integrity occurred in the context of a completely different statutory regime. That case concluded that a woman had cover for personal injury by accident when she was an unwitting participant in a medical experiment into the natural progression of carcinoma in situ, and as a consequence she developed invasive cancer. In *Green v Matheson* the Court was dealing with the 1974 definition of medical misadventure as reaffirmed in the 1982 statute. And if one goes to *Green v Matheson*, that is volume 1, tab 20, there are three parts of the judgment of Justice Cooke, then President Cooke I am sorry, which I wish to emphasise.

The first is that the statutory regime then in force permitted cover for the mental consequences of a personal injury, and if you go to that A3 sheet you will see that comes under category one of the 1974 amendments. So, personal injury by accident includes the physical and mental consequences of any such injury.

The plaintiff's claim in *Green v Matheson* that she had been the victim of research and experimentation without her knowledge and consent was held by the Court of Appeal in *Green v Matheson* to have resulted in an interference with her bodily integrity which, along with her claim for outrage, distress, was encompassed, His Honour said, within the words, "The physical and mental consequences of any such injury".

The 1974 and 1982 Acts enabled the Court to view the events complained of, from the standpoint of the patient, that is as an event that was undesired and unexpected from her perspective.

And thirdly, that legislation enabled the Court to conclude that the plaintiff's civil claim was clearly encompassed by the open-ended definition of medical misadventure then in force.

Thus at the top of page 573, the last page of the report, we see the learned President saying "That all of the plaintiff's claims relating to insufficient or wrong treatment, failure to inform, misdiagnosis, misrepresentation and administrative shortcomings" were all encompassed by the concept of medical misadventure as it was then defined.

WILLIAM YOUNG J:

But the Judge also thought that irrespective of that, the concept of personal injury by accident encompassed any adverse consequences to a patient's health caused by wrong medical treatment.

MR COLLINS QC:

Yes, and in this particular case, the adverse consequences which were being claimed were the emotional distress.

WILLIAM YOUNG J:

Yes, but why couldn't an unwanted pregnancy be an adverse consequence to a patient's health unless —

MR COLLINS QC:

Well —

WILLIAM YOUNG J:

— it may come back to what I think is the value judgment, whether you can call a pregnancy a physical injury or whether you can call it an adverse consequence to health.

MR COLLINS QC:

Yes, and the answer to that, I think your Honour has probably identified what the true answer to that is when you postulated two alternatives there, and that is that Justice Cooke had made it very clear in *L v M* and he certainly did not depart in any way whatsoever in *Green v Matheson* that the open-textured definition of personal injury then in place enabled the Court to conclude that all of the emotional harm that Mrs Matheson was seeking compensation for were encompassed within the words, "The physical and mental consequences of any such injury" and medical misadventure, which encompassed both the cause and consequences of the matters

complained of, included everything that she pleaded in her statement of claim as being a wrong done to her.

And in my respectful submission it was quite wrong for Justice Baragwanath to transpose the reasoning in *Green v Matheson* to the legislative regime that has existed since 1992. The legislative regime that was before Justice Cooke was, as I have been at some lengths to emphasise, was very different from what Justice Baragwanath had to consider and he was misdirected when he accepted the argument that the reasoning in *Green v Matheson* could be transposed to the post-1992 ACC provisions, and for exactly the same reasons Justice Mallon was wrong to the extent that she sympathised, albeit by way of obiter, with the approach taken by Justice Baragwanath.

The definition of personal injury that has existed since 1992 simply does not accommodate the suggestion that interference with a person's integrity constitutes personal injury. Personal injury only exists if there is death, physical injuries or specifically defined mental injuries arising from those physical injuries.

Now in that one-page synopsis I identified common law decisions as the next area that I was proposing to go to, but I think I can alert the Court that I propose to be relatively brief on this aspect. I don't think this Court would require much persuading that great caution would need to be taken before attempting even to transpose the reasoning in common law cases to the task of interpreting the very specific provisions of our ACC regime. What can be said, however, is that when one focuses upon the decisions of the House of Lords and Supreme Court of England and Wales in *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL), in *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309, and the Court of Appeal, I'm sorry, of England and Wales in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266, one recognises that none of Their Lordships have suggested that pregnancy constitutes physical injury. What those cases say is that pregnancy and unplanned pregnancy following the various sterilisation scenarios that unfolded in that case, sterilisation in the case of a woman, vasectomy in the case of a man, that what happened in those cases constituted a legal wrong and it was the existence of a legal wrong expressed as a damnum that enabled those very senior law Lords to reach the conclusion that a compensatable wrong had occurred to the plaintiffs in those cases.

So no assistance, in my respectful submission, is really obtained in trying to interpret our legislation by those cases other than to recognise that they haven't said that it constitutes physical injuries.

ELIAS CJ:

No, but if your argument is correct and with the exceptions that you acknowledge for rape, the consequence will be that we're right into that regime —

MR COLLINS QC:

Yes, indeed, Ma'am, yes.

ELIAS CJ:

— for some.

MR COLLINS QC:

For some, yes, indeed. Yes, and it won't just be the neurologist who will have to have PI cover, it will also need to be the gynaecologist as well.

TIPPING J:

And presumably the employing Health Board.

MR COLLINS QC:

Yes, indeed. Yes, they will. Now the only Judge in a —

ELIAS CJ:

I'm sorry to do this to you, but please explain briefly to me why is personal injury not legal injury?

MR COLLINS QC:

In New — in the

ELIAS CJ:

Yes, yes.

MR COLLINS QC:

— context of our ACC legislation?

ELIAS CJ:

Yes.

MR COLLINS QC:

It is because Parliament has carefully defined what constitutes personal injury in quite objective physical terms. Death, physical injuries, mental injuries arising from physical injuries.

ELIAS CJ:

But the physical injuries could simply be damage to the person.

MR COLLINS QC:

No, it has to be identifiable physical injuries, your Honour. And that's why Parliament went to the extent in 1992 of trying to make sure that there was no opportunity for the scheme to go beyond the boundaries that the promoters of the 1992 legislation wanted.

ELIAS CJ:

Well, one can understand the regime that sets up boundaries and has limits as to who can get compensation within those boundaries but there is such a symmetry in terms of the type of relief that can be sought, if you are outside the boundary and if you are within it.

MR COLLINS QC:

Yes.

ELIAS CJ:

So in some respects the — in many cases the woman who is able to get compensation under the Accident Compensation regime, because her pregnancy results from rape, is being bilked of some of the benefits she could obtain if she was outside it, or someone who is outside it because the pregnancy arises through medical misadventure.

MR COLLINS QC:

Yes, your Honour is absolutely right. That is a consequence which flows and in my respectful submission —

ELIAS CJ:

That is an intended consequence?

MR COLLINS QC:

That is the consequence of Parliament's intentions. Now I emphasise that none of the senior Judges from United Kingdom had ventured to suggest that pregnancy constituted physical injuries.

ELIAS CJ:

Well, they don't have to.

MR COLLINS QC:

They don't have to, although it might also have been an avenue that was available to them, if they had so chosen to bring it as a — for the claim to be treated as a personal injury claim. They didn't, because they had the option of using the damnum or the legal wrong route.

Now there is one exception to all of this and that is the judgment of Justice Kirby in *Cattanach v Melchior* [2003] HCA 38, 215 CLR 1, and I wouldn't be doing my job unless I brought that to your Honours' attention, and that is in the appellant's bundle of authorities under tab 10.

Now this is the judgment of the High Court of Australia which has been referred to in our written submissions and also on the appellant's written submissions and the issue in this case was whether or not the costs of child — I was going to use the word "maintenance" but that probably dates me — the cost of caring for a child born as a consequence of a woman becoming pregnant, following a sterilisation procedure, could be covered. All other aspects of the claim had succeeded and they appealed to the High Court of Australia, so in Australia the position is that costs, there is a cost damage, there are damages payable for the fact of pregnancy as there is now in the United Kingdom and in this case it was something in the vicinity a little over $AUS100,000 and this claim was for also a little over $100,000 in relation to the costs of bringing up the child. I thought that the proportional difference between those two was quite surprising, but anyway that is the way they ended up. And by a majority of four to three, those damages were allowable and Justice Kirby at pages 171 and 172 engaged in a reasoning process which, it will not surprise you to learn, I respectfully disagree with, at paragraph 148 and 149.

TIPPING J:

This was a common law reasoning, wasn't it? This wasn't under a statute.

MR COLLINS QC:

Correct, yes.

WILLIAM YOUNG J:

It just bears on a possible meaning of the word "injury", I guess.

TIPPING J:

Yes, yes.

MR COLLINS QC:

And I am just bringing this to the Court's attention because I am duty bound to bring everything to the Court's attention. He described an unplanned pregnancy following a failed sterilisation procedure as constituting profound and unwanted physical events, pregnancy and childbirth, involving the person after receiving negligent advice about the risks of conception following sterilisation and I would respectfully fully agree with that.

However, at 148 His Honour proceeded to categorise the mother's unwanted physical events as physical injuries and he provided no explanation as to how he advanced his reasoning from unwanted physical events to physical injuries and, in my respectful submission, he didn't need to go that far but he did, and then he adopted what in my respectful submission is perhaps the most telling reason why his chain of logic should not be followed, when he said at paragraph 149 that the, "… the father's claim is made concrete by the physical injury suffered by the mother", the consequence being that the father had also suffered the same physical injury. Now with the greatest respect, it is not surprising that no one else has ever dared go so far and the reasoning process, with the greatest of respect to a Judge who is greatly admired, that is a conclusion which is not one that this Court should accept.

Now the final part of my —

ELIAS CJ:

It would be much better if we go away from all this hang-up about economic loss.

MR COLLINS QC:

Yes, yes, trying to find a way around *Caparo.*

ELIAS CJ:

That's why he is using this.

MR COLLINS QC:

He is trying to find a way around *Caparo*.

ELIAS CJ:

It's — as a peg in that context.

TIPPING J:

It's the parasitic theory.

MR COLLINS QC:

I suppose some men are described in worse terms.

ELIAS CJ:

It does sound a bit like the order of service for marriage though.

TIPPING J:

In what respect?

ELIAS CJ:

Well, one flesh.

MR COLLINS QC:

The final part of my submissions, I just wanted to focus on the matters raised by your Honour Justice Young in your brief dissenting judgment in (d) and I have actually already touched on these matters and I will just summarise them for the Court's benefit.

You questioned, your Honour, whether or not there was any practical difference between section 20(2)(b) and 20(2)(f) and I have said that I have always believed that there are two types of physical events which are covered by those two different

provisions, the paradigm example of the first one being the situation where the medical misadventure is the direct cause of the physical injury, and in the second, personal injury is caused by a gradual process, disease or infection that is a consequence of the acts or omissions of a health care provider. So the failure to detect a tumour would be the paradigm example of the first category, the negligent performance of an operation would be the paradigm example of the first category. But more importantly, and I say this with the greatest of respect, I submit that your Honour erred in your analysis when you made reference to the second category of physical injury and suggested that the progress of the disease is not a physical injury or a personal injury within the ordinary meaning of those phrases. We have already touched on this today and I, with the greatest of respect, Sir, suggest that you were wrong to suggest that.

WILLIAM YOUNG J:

Well, I think that is because I treated personal injury as referring to adverse events associated with external trauma.

MR COLLINS QC:

Right, yes, I can understand that, but the tumour is clearly, in my respectful submission, an event that causes a physical — can be a physical injury in itself and certainly causes physical injury.

By way of conclusion then, your Honours, the approach taken by the majority of the Court of Appeal in *D* and by the Court of Appeal in the Court below was correct. The words "physical injuries" were not intended by Parliament to be stretched to encompass pregnancy, even when that event is unplanned and occurs after a medical procedure. The approach taken by the Corporation is consistent with Parliament's intentions and this isn't a situation where the Corporation can be unfairly accused of acting in a niggardly fashion. It's a situation in which the Corporation has acted fully consistently with Parliament's intentions.

Those are my submissions. If I can assist the Court further, I will endeavour to do so.

ELIAS CJ:

Thank you. Thank you, Mr Solicitor. There are no more questions.

MR COLLINS QC:

Thank you very much, and can I, before I take my seat, just record that Mr Marshall, who is sitting in the back of the Court, played a significant role in the development of the Corporation's submissions and I want to record my gratitude to him for that.

ELIAS CJ:

All right, thank you, we're grateful also. Yes, I don't know whether either of the respondents, whether there was anything that arose on which they want to be heard in reply? Not you, Mr Miller, because you are abiding. Was there — no, thank you. Yes, thank you, Mr Waalkens.

MR WAALKENS QC:

Yes, thank you, your Honours. I've got, of course subject to any questions from your Honours, just five points to make. The first is a reference to my learned friend's A3 sheet. I do want to correct one thing and that is in the analysis for the 1992 Act, under point 4, and my friend emphasised this at some length, about cover provided for personal injuries if it's caused by any one of those four things, one of them being medical misadventure. That's actually not what the legislature in 1992 was saying at all. If you go to tab 3 of the casebook for my learned friend, that is the Corporation's casebook, you'll see under section 8 that unlike the other, or certainly the first two, cover shall extend to personal injury which is caused by an accident or is caused by gradual process. For medical misadventure it's different. It's if it is medical misadventure then it shall apply.

ELIAS CJ:

Sorry, we're to correct what?

MR WAALKENS QC:

So in my learned friend's schedule on A3 for the 1992 statute under point 4, he's got, in the introduction, "Cover is available if it's caused by," point 1, point 2, point 3.

ELIAS CJ:

I see.

MR WAALKENS QC:

It's not correct to say that's for medical misadventure.

ELIAS CJ:

Yes, it's not caused by.

MR WAALKENS QC:

No, and —

ELIAS CJ:

That is medical misadventure.

MR WAALKENS QC:

Yes, if it's medical misadventure it's covered, and you'll remember my friend's or the Corporation's theme throughout all of this, and you'll see it in the written submissions, because it's not just a small point, your Honours.

ELIAS CJ:

No.

MR WAALKENS QC:

It's not a —

ELIAS CJ:

I don't think it was intended though —

MR WAALKENS QC:

I'm not suggesting my friend was being tricky or anything. It's obviously a genuine mistake but it's a significant one.

ELIAS CJ:

No, I don't think it's a mistake, is the point I was — I don't think he intended to convey anything other than is in the statute but you're right to draw it to our attention because we might well have made that mistake.

MR WAALKENS QC:

Yes, and why it has some importance is that the Corporation do emphasise the point that the 1992 scheme change were really setting the boundaries of where the Corporation saw — where the legislature saw cover should kick in for medical misadventure.

TIPPING J:

But the caused by came in in 2001.

MR WAALKENS QC:

It came in later, that's right. That's correct, and it —

TIPPING J:

So it applies to this case.

MR WAALKENS QC:

It does indeed but the Corporation you'll see throughout make so — take us all so often back to —

TIPPING J:

I understand your point, Mr Waalkens.

MR WAALKENS QC:

Yes, and why that's also important is this, that the Minister's explanatory paper, which is at tab 12 of the Corporation's casebook, this is the paper, *A Fairer Scheme: Accident Compensation* by Bill Birch, is at pains to make the point that there will be no return to the right to sue, and he makes that point in a number of places. Firstly, if you — again, the numbering's a little tricky but it's at the top of the headings. At page 31 under "Medical misadventure", half way down, "There has been criticism of the scheme arising from the inadequacy of alternative means of calling medical practitioners to account for alleged negligence. There will be no return to the right to sue, instead the government will introduce legislation to effect changes to the disciplinary procedures for the medical profession and as an aside, you need not have any more paper work before you. There were quite radical changes made that dealt with medical practitioners in the Medical Practitioners Act that came into effect in 1995."

And then likewise at page 17 of that same discussion paper, there is — and that is under the heading you will see at page 16, the one before, "The right to sue", the point is being made at the top of page 17, about the tort systems, "Inefficient, expensive, discriminatory, drawn out, anomalous system", and there is a fair bit of rhetoric, if I may categorise it as that, that then follows but you will see the conclusion

on page 18. "The government has decided that where there is cover under the scheme, there will be no return to the right to sue". So one can get from this again, the point I made earlier this morning, that the draftsmen had no intention of changing anything in terms of exposing the public or medical practitioners or health practitioners to the consequences of litigation. So where the Corporation is inexplicably ultimately driven back to the consequences of its interpretation of this to the fact that there will be an exposure to law suits and the like, it just doesn't fit with what the government was announcing at the time.

Now the third point is, my learned friend for the Corporation said that pregnancy is unique and he said that in the three points he was making about it being unique and the biological aspect. If I could ask you please to look at the judgment of Justice Mallon, that is in the case on appeal, under tab 4, at paragraph 75. In my submission she rather neatly dealt with this point.

WILLIAM YOUNG J:
Sorry, what paragraph?

MR WAALKENS QC:
Seventy-five. If these kinds of changes, those are the changes that one has and she discusses them above, with pregnancy, and they are not all there, some of them. "I think there would be little difficulty in calling them harm, detrimental physical impacts, impairment or interference." I don't at all accept, in other words, the point that there is some uniqueness about the consequences that pregnancy produces by way of these physical effects.

The second to last point, point four, the Corporation would suggest that Justice Mallon relied primarily on the case of Justice Baragwanath, *Patient A*, leaving to one side my disagreement with the criticism made about interference with bodily or interference of bodily function and bodily interference of which in the discussion that I have put in my written submissions on the common law there is a good amount of reference to that very concept in the common law as being an appropriate head of damage, you will see that one of the papers the Corporation rely upon is the Witting paper. We haven't looked at it yet. It is in the second bundle of authorities of the Corporation beneath tab 50. And this is a publication that my learned friend has relief upon, in his written submissions. And the author really concludes or summarises this point at page 203, and I have to accept that this is a UK publication

looking at the common law rights and meets and bounds of how one brings these claims to Court, but it is about – it is not lined I am afraid, but it is about a third of the page from the bottom, the sentence to the right-hand side, starting "Furthermore it cannot be doubted", where the author said, "Furthermore it cannot be doubted that the wrongful conception and contamination cases featured the kinds of damage that are so closely analogous to orthodox kinds of damage, that one would be splitting hairs to attempt to draw a line between them." And Justice Mallon who, when you return to her judgment and look at the way she came ultimately to look at *Patient A,* has treated the reference to the common law in a way that is consistent with what is regarded as analogous but all the same orthodox types of damage.

And lastly the point on Justice Kirby's or the criticism made by the Corporation of Justice Kirby's analysis. I haven't taken you to it but in my written submissions I have made reference to the common law, and numerous other common law cases that likewise in similar vein to Justice Kirby, albeit they don't go into the point my friend made about the damage to the father, all the same there is plenty of authority for the proposition that the common law treats — there are numerous common law judgments at high authority including Baroness Hale in *Parkinson v St James & Seacroft University Hospital NHS Trust* and others that treat these types of claims as damage of a physical kind. Subject to any issues that your Honours have, those are my submissions.

ELIAS CJ:

Thank you, Mr Waalkens. Thank you, counsel, for your assistance. We will reserve our decision in this matter.

COURT ADJOURNS 3.17 PM