

# **Children as a Blessing: A Reason for Undermining Autonomy?**

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## INTRODUCTION

Every individual should be provided with the opportunity to exercise freedom in every aspect of his or her life. “The control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one’s life”<sup>1</sup> and as a result, the ability to exercise this control is fundamental.

Women are choosing to limit their fertility through contraceptive measures such as the taking of oral contraceptives, abortion or even sterilisation in attempts to limit their fertility. Reasons for this are vast and include attempts to limit financial obligations, pursuance of career-focused goals or simply a desire to limit the size of one’s family. However, many judges seem to fail to take this into account in their decision-making in cases on wrongful conception. This is problematic because the right to reproductive autonomy is important and requires recognition if it is breached. Therefore, I will be analysing a range of judgments in order to determine whether it is possible to afford recognition to this fundamental right to autonomy, and whether there are appropriate means for vindicating any breaches of this right.

Inherent throughout this dissertation is the opinion that there is a lack of respect for female reproductive autonomy in the law, especially in wrongful conception cases. Reproductive autonomy encapsulates an individual’s right to make important decisions about all things in relation to their health, contraception, pregnancy and child rearing. It also extends to, “the ability to decide, *when*, if ever, to have children, [and this] remains one of the most critical freedoms captured by the notion of reproductive autonomy”.<sup>2</sup> Furthermore, “it requires that women be free to define their roles in society according to their concerns and needs as women”.<sup>3</sup> From this it can be deduced the concept of reproductive autonomy is inherently subjective, and will differ depending on the values, goals and standards of individuals.

Wrongful conception and wrongful birth are particular examples of specific claims in medical negligence. A claim in wrongful conception usually arises when either a man or a woman undergoes a sterilisation procedure, the procedure is negligently performed, the individual dispels with contraceptive measures and as a result, a child is conceived.<sup>4</sup> Wrongful birth, on the other hand, refers to situations where a child is born with some form of a congenital defect that should have been identified at the early stages of pregnancy. However, the defect is left undetected, and a child is born.<sup>5</sup> Usually, in these cases, parents argue the loss of the

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<sup>1</sup> John Robertson *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton University Press, America, 1994).

<sup>2</sup> Nicollet Priaulx “Reproductive Autonomy” in Peter Cane and Joanne Conaghan (eds) *The New Oxford Companion to Law* (Oxford University Press, Oxford, 2008).

<sup>3</sup> Kerry Peterson “Wrongful Conception and Birth: The Loss of Reproductive Freedom and Medical Irresponsibility” (1996) 18 Syd LR 503 at 504.

<sup>4</sup> At 505.

<sup>5</sup> At 505.

opportunity to terminate the pregnancy requires compensation. Although the terms are often used interchangeably, this dissertation will focus primarily on wrongful conception.

In order to succeed in a claim for wrongful conception under the common law, the plaintiff is required to satisfy three general requirements. Namely, the plaintiff must establish they were owed a duty of care, the duty was breached, and finally they suffered a directly attributable loss<sup>6</sup>. If the plaintiff is able to satisfy these requirements, they are likely to be awarded damages. It is up to the court's discretion which remedies are available to a successful claimant. However, the court will usually try to return the claimant to the situation they would have been in had the wrong not occurred.

As a result of what appears to be Judges' inability to acknowledge losses to autonomy suffered in wrongful conception cases, I am going to explore whether the common law in the United Kingdom and Australia has succeeded in identifying the true nature of the loss. I will also determine whether adequate redress for breaches to this fundamental right is available.

Specifically, I will consider the current position of the law on the availability of child-rearing costs as a remedy for the losses suffered in wrongful conception cases. This requires consideration for whether the approaches taken in these jurisdictions adequately recognise the intangible loss of autonomy as the true nature of the harm suffered. Further, I will acknowledge the common law has developed so as to adequately recognise the parental responsibility that arises in these cases amounts to a continuing incapacity, and the concept of harm extends beyond physical injury alone.

Finally, I will consider New Zealand's approach to compensating victims of wrongful conception cases under Accident Compensation and, determine what we can learn from the United Kingdom and Australia.

The reoccurring argument throughout this dissertation will be that if a woman makes a choice to remove her ability to reproduce, this choice needs to be respected. It is not something that is taken lightly, it is a choice made with consideration for an intricate network of values and subjective preferences. Thus, it is absurd that in a number of wrongful conception cases a woman has been required to consider the conception of an unwanted child as a blessing. I will argue, "it should not be the role of a court to trivialise values by reference to the abstract goods of children in society. Following an invasive surgery to avoid a child, it should be obvious that the prospect of a baby will not herald [a] sense of joy".<sup>7</sup>

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<sup>6</sup> Mary B Sullivan "Wrongful Birth and Wrongful Conception: A Parent's Need for a Cause of Action" (2000) 15 J.L. & Health 106 at 114.

<sup>7</sup> Nicolette Prialx "Joy to the World! A Healthy Child is Born! Reconceptualizing 'Harm' in Wrongful Conception" (2004) 13(1) Soc. & Legal Stud 5 at 12.

There is great value in the right to reproductive autonomy and as a result, the law needs to afford adequate respect to breaches of it. As an intangible loss, the law has grappled with how to appropriately compensate for this type of loss. It is through a recognition that intangible losses too deserve recognition in our law, that parental responsibility amounts to an on-going incapacity and that the concept of ‘injury’ and harm’ can be extended beyond physical loss that the law achieves this goal. I propose interference with the intangible interest of reproductive autonomy is a compensable loss and although difficult to redress, the most adequate provision of damages is the tangible award of child-rearing expenses. Awarding child-rearing costs may not be the silver bullet answer to the issue of adequate recompense. However, “some aspect of claims for the financial costs of raising a child, for example the cost of childcare, respond directly to a parent’s loss of autonomy by facilitating some small measure of personal freedom and relief”,<sup>8</sup> and as a result, it can be justified.

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<sup>8</sup> Isabel Karpin “The Economic Value of Human Relationships: *Cattanach v Melchior* Revisited” in Heather Douglas and others (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (HART Publishing, Oxford, 2014) at 156.

## PART A: THE EXISTING LEGAL FRAMEWORK

### *Chapter I: United Kingdom*

#### *A. Tort Law and Medical Negligence*

A tort can be described as a non-contractual act or omission that gives rise to injury or harm to another that amounts to a civil wrong.<sup>9</sup> The United Kingdom has maintained a traditional tort law position for claims of medical misadventure. The approach taken is guided by the Aristotelian principle of corrective justice. The system is underpinned by the idea that if someone suffers a wrong, he or she is entitled to be compensated for that wrong by the wrongdoer. In deciding which remedies are available, the court is inclined to return the plaintiff to the position he or she would have been in had the wrong not occurred.

I will now turn to consider the English common law approach to claims for compensation in wrongful conception cases. Analysis of this jurisdiction makes it clear that the law can be developed to recognise the loss of autonomy is a compensable loss that requires recognition.

##### *1. McFarlane v Tayside Health Board*

The leading case on wrongful conception in the United Kingdom is *McFarlane v Tayside Health Board*.<sup>10</sup> Prior to *McFarlane*, claims for damages in wrongful conception cases were made under two key heads: the pain and suffering of pregnancy and childbirth; and the maintenance costs of raising the resulting child. Both were generally accepted, and couples were often compensated in both instances.<sup>11</sup>

In *McFarlane*, Mr McFarlane underwent a vasectomy after he and his wife decided they were content with the size of their family. Following the procedure, the couple were wrongly informed that Mr McFarlane's sperm count was negative, and he would no longer be capable of fathering children. Two years later, Mrs McFarlane fell pregnant with their fifth child. As a result, the couple sought damages for the pain and suffering of the pregnancy itself, and maintenance costs for the 'unwanted child'. Although the House of Lords ultimately concluded compensation would be available for the pain and suffering caused by pregnancy and childbirth, they refused to award damages for child-rearing.

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<sup>9</sup> *Tort Law American Law Yearbook: A Guide to the Year's Major Legal Cases and Developments* (Gale, Detroit, 2010) at 224.

<sup>10</sup> *McFarlane v Tayside Health Board* [2000] 2 AC 59.

<sup>11</sup> Although damages for child maintenance were initially rejected in the case of *Udale v Udale v. Bloomsbury Area Health Authority* [1983] 2 All E.R. 522, the position was later changed by the Court of Appeal in a number of subsequent cases such as *Emeh v. Kensington, Chelsea and Westminster Area Health Authority* [1985] Q.B. 1012 and *Thake v. Maurice* [1985] 2 W.L.R. 215, at 230, per Peter Pain J so as to allow damages under both heads of claim.

The main area of contention was the availability of damages for the cost of raising the subsequent child and I will now turn to each of the Judge's judgments to consider how each justified denying compensation.

Lord Slynn underwent an extensive analysis of international case law before concluding damages for child-rearing costs should not be available for three key reasons:

- any estimation of how much it costs to raise a child would be arbitrary and rough at best;
- a doctor cannot be said to take on the assumption of responsibility for pure economic loss; and
- it would not be fair, just or reasonable to impose such liability.<sup>12</sup>

Although I agree with Lord Slynn's opinion that it is difficult to accurately calculate how much a child will cost, this cannot constitute an excuse. It is true no two families are going to be affected in the same way and there are many factors to consider, for example whether previous children were educated privately. However, I would suggest there are ways to reduce this issue. The damages awarded could be means-based as suggested by Brooke J in the case of *Allen v Bloomsbury Health Authority*.<sup>13</sup> Lower-socioeconomic families who require more financial support would be entitled to greater levels of compensation, while those who are well off and have more of an ability to absorb the extra financial burdens would be compensated to recognise the loss of autonomy but not to the same extent as those who require more help.

Alternatively, research could be carried out to determine the average costs of raising a child in the particular jurisdiction and a lump sum award could be made to that effect. Although neither of these suggestions are necessarily perfect, it is not enough to say, "this is too hard."

Finally, my response to Lord Slynn's opinion that a doctor only owes a duty of care to prevent pregnancy and the assumption of responsibility cannot be extended beyond this would be to ask him, whether it is fair just and reasonable to impose the burden of parental responsibility on to an individual who has taken a serious step to prevent the assumption of that very form of responsibility? Furthermore, it is foreseeable that should a doctor fail to achieve the objective of preventing a pregnancy it is likely that a child will result. Therefore, I would suggest that the assumption of responsibility is capable of being extended further.

Lord Steyn rejected Lord Slynn's assumption of responsibility test and favoured consideration for distributive justice. He considered what a layman travelling on the London Underground would consider fair, just and reasonable. He concluded an objective person would consider any

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<sup>12</sup> *McFarlane*, above n 10, at 11-12.

<sup>13</sup> *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651 at 662.

award of damages for a healthy child morally repugnant, and as a result, refused to award damages.<sup>14</sup>

As highlighted by Nicolette Priaulx, a feminist writer, pregnancy and childbirth are not universally experienced events. They are limited both to female members of society and those who make a positive choice to become mothers. Herein lies our first issue with the idea of distributive justice. The reality is, with a wrongful conception cause of action, the most affected parties are women. Not only do they endure pregnancy, but the general position in society is that child-rearing responsibilities lie primarily with the mother. This is why critics such as Priaulx have an issue with the ‘distributive justice’ approach taken. It is concerned with allocating burdens equally across society as a whole, yet wrongful conception is not an issue that affects society collectively. She argues “considering the already extensive burden of responsibility which women confront in matters of reproduction... it should be of great concern that the English law of tort has further privatised responsibility for the care of children brought about by negligence.”<sup>15</sup>

As the law in the United Kingdom stands, pregnancy, childbirth and the parental responsibility that arises as a result of failed medical procedures are considered a “harmless and inevitable part of life, for which individuals, in particular women must now be prepared to bear the cost”.<sup>16</sup> This seems counterproductive in a society where we also promote reproductive choice and family planning. I would agree with Priaulx, allowing the court to send a message to women that they must accept a failed sterilisation procedure directly undermines their reproductive choices. Further, I would argue a distributive justice approach is not suitable for a cause of action that does not affect society as a whole.

Finally, I am inclined to ask why Lord Steyn considered it appropriate to consider distributive justice in the first place. Tort law is inherently focused on the principle of corrective justice and the vindication of rights, not the distribution of burdens. Therefore, it could be said that the application of a distributive justice approach in these circumstances is inappropriate to begin with.

Lord Hope, in his judgment, focused on whether the question is one of public policy or one of law. He settled for the latter<sup>17</sup>. He highlighted the law does not suggest child-rearing costs are too remote to be foreseeable. Rather he stated that when the court is considering a claim for pure economic loss alone, foreseeability is not the only requirement. There must also be sufficient proximity between the negligent act and the loss claimed – requirements he held

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<sup>14</sup> *McFarlane*, above n 10, at 82.

<sup>15</sup> Nicolette Priaulx “That’s One Heck of an ‘Unruly Horse!’” *Riding Roughshod Over Autonomy in Wrongful Conception* (2004) 12 *Feminist Legal Studies* 317 at 329.

<sup>16</sup> At 329.

<sup>17</sup> *McFarlane*, above n 10, at 27.

could not be satisfied on the facts.<sup>18</sup> Furthermore, Lord Hope concluded it would not be fair, just and reasonable to compensate in these circumstances as the liability arising would be disproportionate to the fault committed.<sup>19</sup>

Arguably there are two key issues with Lord Hope's judgement. Firstly, he determined that it was a question of law rather than one of policy, but then instead of applying the general principles of tort law and concluding that damages should be available, he turned to public policy to dismiss the claim.<sup>20</sup> As stated by Hale LJ "... it is clear that at the heart of the reasoning [in *McFarlane*] was the feeling that to compensate for the financial costs of bringing up a healthy child is a step too far".<sup>21</sup>

Secondly, he failed to apply the general principles of tort law. Any loss suffered as a foreseeable consequence of a failed sterilisation procedure should be compensated for as per the basic principles of corrective justice. Lord Hope conceded the costs associated with raising a child are directly foreseeable yet refused to award compensation. He noted child-rearing costs were unavailable in this case because extra elements need to be satisfied in cases of pure economic loss. However, the losses suffered in wrongful conception cases are not purely economic as the true nature of the loss is the interference with reproductive autonomy.

A loss to autonomy is an intangible loss, yes, but it is not of a wholly economic nature. Recoverable losses extend to, any reasonably foreseeable loss directly caused by the unexpected pregnancy. "Pregnancy [is] equated with personal injury, leading to consequential not purely economic loss, which includes the cost of upbringing"<sup>22</sup> Therefore, if the elements of the tort are satisfied as they are in this case, it should not be argued the real loss suffered is purely economic so as to avoid providing compensation. Further, failure to apply basic principles of tort law can be regarded as discriminatory. As stated by Kirby J:<sup>23</sup>

... given that it involves a denial of the application of ordinary compensatory principles in the particular given circumstances of childbirth and child-rearing, circumstances that biologically and socially pertain to the female experience and traditionally fall within the domain of women. If such a distinction is to be drawn, it is the responsibility of the legislature to provide it, not of the courts, obliged as they are to adhere to established legal principle.

The losses suffered in wrongful conception cases cannot be regarded as purely economic. There may be some financial detriment as a result of a need to provide for a growing child, however

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<sup>18</sup> At 27.

<sup>19</sup> At 24-25.

<sup>20</sup> Nicolette Prialux, above n 15, at 319.

<sup>21</sup> *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] 3 WLR 376 at 755.

<sup>22</sup> Angus Stewart "Damages for the Birth of a Child" (1995) 49 J.Law Soc.Sc. 298 at 300.

<sup>23</sup> *Cattanach v Melchior* [2003] H.C.A 38 (16 July, 2003, Australia) at [162].

the losses go far beyond this. A dependent infant requires a mother to give up not only her time, but often her career, leisure activities and many other aspects of her life. However, this does not mean that an economic award of damages is not suitable. There is scope for the provision of material compensation for intangible losses due to the fact, “some aspects of claims for the financial costs of raising a child, for example the cost of childcare, respond directly to a parent’s loss of autonomy by facilitating some small measure of personal freedom and relief<sup>24</sup>.”

Lord Clyde also concluded the question is one of law rather than one of public policy, taking the stance that for every good policy argument against awarding damages, there is an equally strong argument for it.<sup>25</sup> However, he considered it unreasonable for parents to be relieved from the financial burden of raising a child when any burden is far outweighed by the benefits. He suggested providing compensation would be going beyond what equates to reasonable restitution.<sup>26</sup> Lord Clyde concluded:<sup>27</sup>

... even if a sufficient causal connection does exist, the cost of maintaining the child goes far beyond any liability which in the circumstances of the present case, the defendant could reasonably have thought they were undertaking.

He thereby circumvents the normative application of the law through labelling the birth of any child a blessing far out weighing any detriment.

It must be acknowledged there is some benefit in society considering the birth of healthy children as positive. Especially when there is great value in the ability to reproduce. It is possible to see that couples who are unable to conceive naturally themselves would consider awarding child-rearing costs in wrongful conception cases insensitive. However, these cases must be considered subjectively in the circumstances. This is because the concept of loss to autonomy is inherently subjective. No two women will be affected in exactly the same way, and as a result, the nature and extend of the harm requires a consideration for the impact on the particular woman’s life in the specific circumstances. Every plaintiff in a wrongful conception case has taken very specific and permanent steps to prevent pregnancy and this needs to be acknowledged.

Lord Millet provides the dissenting judgment in *McFarlane*. He concurred with the majority concluding compensation should not be available for the birth of a healthy child. However, where his judgment substantially differed is that he refused to accept any substantial loss was suffered. In relation to the claim for child maintenance he commented, “there is something

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<sup>24</sup> Isabel Karpin, above n 8, at 162.

<sup>25</sup> *McFarlane*, above n 10, at 39.

<sup>26</sup> At 34-35.

<sup>27</sup> At 37.

distasteful, if not morally offensive to treat the birth of a normal, healthy child as a matter for compensation”.<sup>28</sup>

What may be the most significant element of Lord Millet’s judgment for the purposes of this dissertation, is his acknowledgement that the ‘real’ harm suffered was the invasion to Mrs McFarlane’s bodily autonomy. He did not attempt to belittle the true nature of the loss by labelling it as purely economic. Lord Millet suggested the proper means of loss suffered by the McFarlane’s was not the consequence of the birth or conception of the ‘unwanted’ child, but rather, the loss of freedom to limit the size of their family.<sup>29</sup> As a result, he suggested the award of a conventional sum to recognise the loss. Although this was not adopted by the majority in *McFarlane* the idea was further explored in a subsequent case *Rees v Darlington Memorial Hospital*.<sup>30</sup>

Despite his accurate identification of the true nature of the harm in this case, Lord Millet failed to acknowledge that any loss of autonomy is inherently subjective. This is clear in his suggestion of a fixed conventional sum. He considered the specific type of autonomous loss was the inability to limit the size of one’s family alone. Thereby suggesting the loss suffered in every case will be the same, and a fixed sum would be adequate to address this. In reality, the nature of loss is much border than this and requires a subjective analysis of the situation.

Although the House of Lords managed to come to a unanimous decision, the manner in which they reached this end was not straightforward. Furthermore, the case has not been received without criticism. Arguably the Court of Appeal has subsequently made various attempts to circumvent the ‘*McFarlane* Principle’ as demonstrated by the following cases I will discuss.

What is significant about *McFarlane* in particular is the court’s recognition that the losses suffered in wrongful conception cases are not solely financial. Rather, there are intangible losses to autonomy that deserve recognition. We also see the idea of a conventional sum introduced as a potential remedy for adequate recognition of a wrong. More specifically, it becomes apparent that the correct principle for dealing with cases of wrongful conception is corrective rather than distributive justice. Finally, it is highlighted that intangible losses require vindication even if this requires an extension of what amounts to harm beyond physical or financial losses alone. My issue with the *McFarlane* judgment is that due to the subjective nature of a loss to reproductive autonomy, it cannot be said that the losses suffered will be the same in every case. Thus, a general claim that a child will always amount to a blessing is not sufficient.

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<sup>28</sup> At 42.

<sup>29</sup> At 45.

<sup>30</sup> *Rees v Darlington Memorial Hospital N.H.S Trust* 1/22003 U.K.H.L. 52; 1/22004 1 A.C. 309.

Further, it is inappropriate to label the loss suffered in wrongful conception cases as purely economic. Any financial loss suffered can be directly attributed to a loss of autonomy, and the parental responsibility that remains continues to affect a mother's autonomy. For example, the existence of the child amounts to continuous incapacity to return to work due to the requirement to provide on-going care.

## 2. *Parkinson v St James and Seacroft University Hospital NHS Trust*

*Parkinson*<sup>31</sup> illustrates the Court of Appeal's attempt to carve out an exception to the 'McFarlane principle.' The court justified the award of additional costs for the raising of a disabled child on the basis that it would be fair, just and reasonable, as there are extraordinary costs associated with maintaining a disabled child.

Lady Justice Hale provided a strong judgment in this case. She highlighted the key concern in wrongful conception cases is, "the invasion of the right to bodily integrity, not only in pain and loss of amenity (including freedom and autonomy) but also financial consequences".<sup>32</sup> She rejected the argument that the only loss suffered is purely economic. She endorsed the view of Lord Millet in *McFarlane* for this reference to the need to acknowledge breaches to bodily integrity and autonomy, but noted he failed to acknowledge this idea sufficiently.

It is clear that as a woman, Hale LJ brings a specific perspective to this issue. Apparent in her judgment is an understanding of the array of burdens that fall upon women. Furthermore, she acknowledged the loss to autonomy does not end once the child is born and exists as a continuing incapacity. The human body is capable of recovering from the stresses of pregnancy, however, the responsibility that arises and the limits that are imposed by the birth of an infant are long-lasting. Once she gives birth, a woman becomes legally responsible for the resulting child. Parental responsibility becomes automatic and failure to sufficiently carry out this duty will result in criminal liability. With the exception of adoption, a woman who falls pregnant due to a surgeon's negligence is unable to escape the unwanted obligations, and parental responsibility lasts a lifetime.<sup>33</sup>

Some would argue this is not necessarily true as there is always the option of abortion or adoption to dispel the responsibilities that arise. There are a number of issues with this. In most cases, women who have sought sterilisations do not consider themselves capable of becoming pregnant so are more likely to disregard any symptoms of pregnancy. As a result, by the time women realise they are pregnant, it is often too late to seek an abortion. Further, it is apparent from the case law the court does not consider the failure to seek an abortion, or to adopt the

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<sup>31</sup> *Parkinson*, above n 21.

<sup>32</sup> At [57].

<sup>33</sup> At [69].

resulting child as a break in the chain of causation. It has also been concluded failure to seek a termination or to adopt a child does not make the award of damages too remote.<sup>34</sup> Thus, these arguments seem somewhat irrelevant.

Lady Justice Hale suggests a failure to adequately acknowledge the parental responsibility that arises with child-rearing has led to the court's past inability to identify the true nature of the losses suffered.<sup>35</sup> Identifying that the law has focused primarily on the financial losses, she notes these are not independent. This ties in with the thesis of this dissertation, autonomy constitutes a compensable loss and child-rearing costs are a justifiable head of damages, as they are directly attributable to that loss. Lady Justice Hale clearly agrees: "left to myself, I would not regard the upbringing of a child as pure economic loss but a loss that is consequential upon the invasion of bodily integrity and loss of personal autonomy<sup>36</sup>." She argued the loss of autonomy extends beyond the financial burden imposed to the parental responsibility that ensues.

Consideration of what we can take away from Hale LJ's judgment in *Parkinson* is twofold. Not only does she acknowledge that it is not enough to disregard the losses suffered in wrongful conception as purely economic, but she encourages us to recognise that the loss to reproductive autonomy suffered goes beyond the initial loss of the ability to limit the size of one's family. Thereby extending Lord Millet's concept of autonomous loss. She explains the limits imposed on a woman's life begin from the very moment she realises she is pregnant, right up until the child becomes wholly independent some eighteen years later. A pregnant woman is unable to eat or drink what she wants, she is forced to buy new clothes, she must submit herself for intrusive medical examinations, must give up full time work and is responsible for the daily care of the resulting child. She cannot participate in activities she may have previously enjoyed and must devote substantial amounts of her time to the child's care<sup>37</sup>.

If the recognised loss is the extended concept of the loss to autonomy, it becomes clear the provision of child-rearing costs is permissible. This is because, "some aspects of claims for the financial costs of raising a child, for example the cost of childcare, respond directly to a parent's loss of autonomy by facilitating some small measure of personal freedom and relief<sup>38</sup>."

*Parkinson* demonstrates the UK's acceptance of the proposition that intangible losses require vindication. Furthermore, we see Hale LJ's general acceptance of the idea that parental responsibility amounts to a continuing incapacity for the mother. She highlights that the loss

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<sup>34</sup> *McFarlane*, above n 10, at 9.

<sup>35</sup> *Parkinson*, above n 21, at [71].

<sup>36</sup> Lady Justice Hale "The Value of Life and the Cost of Living – Damages for Wrongful Birth (Staple Inn Reading)" (2001) 7(5) B.A.J 747 at 761.

<sup>37</sup> At 762.

<sup>38</sup> Isabel Karpin, above n 8, at 162.

of autonomy extends beyond the inability to exercise reproductive choice to the other various areas of her life. From preventing return to the work force, to limiting her ability to engage in activities previously enjoyed. Finally, we see a reconceptualisation of the concept of harm beyond physical injuries to include intangible interests.

### 3. *Rees v Darlington Health Board NH Trust*

Another key case subsequent to *McFarlane* is *Rees v Darlington Health Board*<sup>39</sup>. What I consider specifically significant about this case is the adoption of Lord Millet's concept of a conventional sum for the recognition of an invasion to reproductive autonomy. The question I wish to consider is whether the adoption of a conventional award can be interpreted as placing more emphasis on the true nature of the loss suffered?<sup>40</sup> Further, I want to determine whether a conventional sum is the most effective manner of compensating a loss to reproductive autonomy.

Mrs Rees was a woman who suffered from a visual impairment and as a result of her disability, felt unable to adequately perform parental duties. She sought a sterilisation procedure but unfortunately this was negligently performed. In response to the negligence, Mrs Rees sought damages for the cost of raising the unplanned child. Initially, the UK Court of Appeal (CA) awarded extra costs considering it a simple extension of the law already carved out in *Parkinson*. However, this was later overturned by the House of Lords on Appeal. The central question was did the CA successfully apply, "an autonomy-based approach to address[ing] the harm of unsolicited parenthood"?<sup>41</sup>

Priaulx notes that the CA's constant pursuance of a back-door method of circumventing the *McFarlane* principle demonstrates "the obvious injustices it brings about".<sup>42</sup> Despite their inherent refusal to review the conclusion in *McFarlane*, their decision to substitute the additional award of damages for a conventional sum is significant.

Some critics argue a conventional award in and of itself is directly contrary to the *McFarlane* principle. In theory, what the conventional award is doing is recognising a child is not in fact always a blessing.<sup>43</sup> Lord Steyn labelled the conventional sum "a backdoor evasion of the legal policy enunciated in *McFarlane*".<sup>44</sup> However, Lord Bingham in *Rees* advanced the view that a conventional award is not intended to be compensatory nor punitive but rather acts to recognise

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<sup>39</sup> *Rees v Darlington Memorial Hospital NHS Trust (CA)* at [2003] Q.B.

<sup>40</sup> Nicolette Priaulx, above n 15, at 320.

<sup>41</sup> At 320.

<sup>42</sup> At 322.

<sup>43</sup> Clare Dixon "An Unconventional Gloss on Unintended Children" (2004) 153 *New Law Journal* 1732 at 1732.

<sup>44</sup> *McFarlane*, above n 10, at [53].

the real nature of the wrong suffered. It is there to provide a level of justice that cannot be reached by applying the *McFarlane* principle in isolation.<sup>45</sup>

Clare Dixon stated neither the majority's nor the minority's approaches in *Rees* can be reconciled with the principle set out in *McFarlane*<sup>46</sup>. Therefore, it has been argued it no longer constitutes "good law."

Some suggest the adoption of a conventional award in *Rees* serves to recognise the correct nature of the wrong. However, arguably a fixed award applicable to all cases of wrongful conception achieves no more than mere 'lip service for the principle of bodily autonomy'.<sup>47</sup> Priaux argues the conventional sum acts merely as a gloss to the *McFarlane* principle and if we are to even attempt to recognise the wrong suffered in wrongful conception cases we need to reconsider what exactly is meant by both 'harm' and 'autonomy.' This builds on the idea that the concept of harm goes beyond purely economic or physical injury alone.

We know from an analysis of the case law, the 'harm' suffered in wrongful conception cases is considered purely economic. Arguably, this conclusion is reached by taking a purely objective look at the issue, despite its inherently subjective nature. Respecting reproductive autonomy is about allowing a woman to live out her life according to her personal values standards and goals. The nature of these standards, values and goals will be different for each individual. In some situations, the harm may be primarily economic but, in any case, where a woman has taken specific steps to prevent conception, there will be a loss of autonomy. The degree of loss suffered may vary and in order to sufficiently compensate an individual for the particular harm suffered, a subjective approach is required. This is where issues arise with the conventional award.

A conventional award cannot recognise an individual's loss of autonomy when a fixed award assumes all victims of unsolicited parenthood are impacted in the same way. This is because.<sup>48</sup>

... if commitment to reproductive autonomy requires at a minimum respect for an individual's right to make choices, then how do we respond to an approach that constructs the compensable loss as a single moment of frustrated choice?

Priaux suggests a broader definition of autonomy so as to encapsulate a commitment to the diverse situations faced by individuals. This builds on Hale LJ's argument that the concept of a loss to autonomy goes beyond the initial lack of respect for autonomous choice and extends to anything a woman wishes to protect.

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<sup>45</sup> *Rees*, above n 30, at [8].

<sup>46</sup> Clare Dixon, above n 43, at 1733.

<sup>47</sup> Nicolette Priaux, above n 15, at 329.

<sup>48</sup> At 329.

Ensuring a subjective analysis of the effect unsolicited parenthood has on the individual in the circumstances would demonstrate, “commitment to recognising the diverse situations of individuals, [and] the varying degrees that individuals may be harmed through the failure to respect their reproductive choices”.<sup>49</sup> To achieve this, the law must encapsulate women’s perceptions on reproduction and acknowledge financial harm is only part of the picture. Further it must be recognised autonomy relates to much more than reproductive choice. It extends to other interests and parts of people’s lives, arguably it includes anything a woman wishes to protect by choosing not to become a parent. This builds on my proposition that we need to acknowledge that the concept of harm is not restricted to physical loss alone.

If we are going to take a subjective view in independent circumstances and award damages based on the facts of the case, we are moving away from a ‘conventional sum.’ Although it could be argued the conventional sum is a step in the right direction, this is not enough.

Corrective justice is underpinned by the idea that if someone suffers a wrong, they are entitled to be compensated, and to be placed back in the situation they would have been in had the wrong not occurred. A conventional sum does not achieve this. It succeeds in compensating to an extent, but it does not go as far as placing someone back in the position they would have been in had the wrong not occurred. Thus, a conventional sum acts to recognise the real nature of the loss but does not go as far as providing compensation.

Further, if we adopt the approach suggested by Priaulx that the sum should not be fixed and should depend on the circumstances of the case, we are moving away from the idea of a conventional sum into an area closer to child-rearing costs. This is why I argue child-rearing costs are the more appropriate option as they can be tailored to the specific nature of the loss suffered in each circumstance.

Provision of child-rearing costs would reduce the financial burden experienced and provide an opportunity to seek child care help to enable a mother to return to work, and to engage in activities that were an integral part of life before the birth of the child. Thereby returning some measure of the autonomy lost and reducing the lasting incapacity imposed by the child. It should be noted that by lasting incapacity, I do not mean to suggest that a child amounts to an incapacity, but rather that the ongoing parental responsibility that arises incapacitates the mother from returning to activities she engaged in before becoming a parent. Therefore, I conclude despite recognising that a conventional sum does some work in affording recognition to the loss of autonomy it does not go far enough.

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<sup>49</sup> At 330.

## ***B. Isolating the Relevant Principles in the UK***

Having considered the common law approach on the nature of the harm suffered in wrongful conception cases and the forms of compensation available in the UK, it is clear this is a difficult area of law. Arguably, the judicial turmoil that has unfolded since the *McFarlane* judgment demonstrates, “how far the law has come adrift from principle”.<sup>50</sup> However, I would argue there are a few things we can learn. It is clear the courts have started to acknowledge that the true nature of the loss in any wrongful conception case cannot be identified as purely economic. Furthermore, it is also possible to identify the suggestion that the concept of harm is broader than physical injury alone.

Financial burdens may be imposed by the birth of an unplanned child, but the losses go far beyond this. As first recognised by Lord Millet in *McFarlane*, the true nature of the loss is to the autonomy of the woman.<sup>51</sup> However, Millet’s idea of autonomy was limited to the initial disrespect of reproductive choice and arguably, this is an overly restrictive view of the concept.

Lady Justice Hale expands on this idea in *Parkinson* and acknowledges that the loss to autonomy is broader than this. She argues it encompasses the very real effects on a woman’s life. It includes the responsibility of the fulltime care of the child, the loss of the ability to engage in fulltime work, the inability to engage in activities enjoyed before the birth and, changes to social engagement, just to provide a few examples. This largely amounts to a conclusion that the parental responsibility that arises constitutes a continuing incapacity.

Hale LJ highlights that the loss to reproductive autonomy is inherently subjective and will require consideration for the specific impact on an individual’s life. This is because what is important to an individual is based on a complex network of values, goals, and standards unique to them. Especially significant is Hale LJ’s opinion that the financial losses suffered in wrongful conception cases are not independent. Rather, they are directly attributable to the loss of autonomy and as a result, material means of compensation for intangible losses become appropriate.

This idea is furthered in the case of *Rees* where the Court of Appeal award a conventional sum to recognise the true nature of the loss. Therefore, it can be concluded that the courts in the UK acknowledge that compensation is required in wrongful conception cases and the manner in which they provide this is through a conventional sum. I have suggested that this objective measure of compensation is not sufficient for an inherently subjective loss. Although a conventional sum does provide compensation per se, it does not satisfy the corrective justice

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<sup>50</sup> Laura Hoyano “Misconceptions about Wrongful Conception” (2002) 65 *The Modern Law Review* 883 at 900.

<sup>51</sup> *McFarlane*, above n 10, at 38.

requirement of returning the plaintiff to the position they would have been in had the wrong not occurred. Suggesting that the award of child rearing expenses may be more appropriate.

Finally, a consideration for the UK approach on this issue has highlighted that the appropriate principle of law in cases wrongful conception is corrective justice. Tort law is concerned with vindication of rights and an analysis of the preceding cases suggest that recognition and vindication of rights is also necessary for intangible losses. Distributive justice is concerned with the distribution of burdens and as wrongful conception is not a cause of action that is experienced by society as a whole, the distributive justice framework is not appropriate. It is also strange to suggest that distributive justice should be considered in an area of law that is inherently corrective justice focused.

## *Chapter II: Australia*

### ***A. Introduction***

Australia has maintained a tort-based approach to cases of medical negligence. The key case I will consider in analysing the Australian approach is the High Court decision in *Cattanach v Melchior*.<sup>52</sup> This is because I admire the way the Australian High Court has not only managed to identify the true nature of the harm in wrongful conception cases but has also identified the inherently subjective nature of the losses suffered. Moreover, they responded adequately by awarding a form of compensation that is capable of addressing the directly attributable loss of autonomy.

Furthermore, the Australian approach demonstrates the concepts of ‘harm’ and ‘injury’ are not limited to physical losses alone. Rather they are capable of encompassing intangible losses too.

### ***B. Tort Law in Australia***

Before *Cattanach*, the law in Australia, was fragmented and uncertain. The central question I am considering, however, is whether the Australian High Court manage to grapple with issues of reproductive autonomy more successfully than the House of Lords in *McFarlane* and, whether they have adopted a more appropriate remedy for this loss. Although the Majority of the High Court decided in favour of the Melchiors, ultimately supporting “a view that the negligent curtailment of reproductive choice is a significant harm warranting compensation<sup>53</sup>,” the outcome of the case has attracted significant debate.

Content with the size of her family, Mrs Melchior underwent a sterilisation procedure. In an appointment with her surgeon, Dr Cattanach, Mrs Melchior informed him she had previously had her right fallopian tube removed. As a result, when performing the surgery, Dr Cattanach only performed a tubal ligation on her left fallopian tube. In reality, Mrs Melchior still had both fallopian tubes and subsequently became pregnant.

Consequently, Mrs Melchior sought damages for the pain and suffering of the pregnancy and for maintenance costs of raising the subsequent child. Significantly, Mr and Mrs Melchior were jointly successful in the latter. Dr Cattanach and the State of Queensland appealed to the High Court of Australia as a result of this finding.

In *McFarlane*, the House of Lords concluded damages for the cost of child-rearing would not be awarded as it is contrary to public policy. The minority in *Cattanach* reached the same

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<sup>52</sup> *Cattanach*, above n 23, at [126].

<sup>53</sup> Isabel Karpin, above n 8 at 156.

conclusion. The majority, on the other hand, decided in favour of the claimants on the basis that the loss was not ‘pure economic loss’ but rather, a loss that flowed directly from the negligent actions of Dr Cattnach. Furthermore, the majority also acknowledged that public policy arguments should not be used to displace normal principles of recovery under tort law.

In reaching their conclusion, the majority dismissed many of the arguments relied upon in *McFarlane*. In response to the statement that a child is always a blessing and any benefit derived from parenthood far outweighs any detriment, the High Court disagreed. It was held:<sup>54</sup>

It is impermissible in principle to balance the benefit to one legal interest against the loss occasioned to a separate legal interest. The benefits received from the birth of a child are not legally relevant to the head of damage that compensates for the cost of maintaining the child.

In further advancing his argument, Kirby J referred to his own judgment in the case of *CES v Superclinics*<sup>55</sup> where he stated any argument claiming the birth of a child is a benefit in every circumstance is a fiction that should not be applied without objective evidence on the facts of the particular case.<sup>56</sup> He thereby acknowledges that any loss of reproductive autonomy is inherently subjective and should be treated that way.

Further, Kirby J referred to Lord Steyn’s use of the objective traveller on the London Underground and concluded, the use of this so-called figure is nothing more than:<sup>57</sup>

A fictional character... elevated to a modern Delphic oracle so as to amount to something more than the subjective view of the judge as to what he reasonable believes the ordinary citizen would regard as right.

Kirby J suggested this is a clear example of the biased opinion of a white middle class man disguised as a ‘public policy’ argument used to deny the normal principles of recovery under tort law. It could also be suggested that this is an illustration of the Australian High Court’s disregard for Lord Steyn’s use of a distributive justice framework in an area that is inherently focused on corrective justice principles.

Kirby J suggested rather than accepting such fiction, the court would be better placed in carrying out their intended function and applying the established controls of tort liability. He held the general principles of corrective justice must be applied. If a wrong is suffered, and the

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<sup>54</sup> *Cattnach*, above n 23, at [90].

<sup>55</sup> *CES v Superclinics (1995) 38 NSWLR 47*.

<sup>56</sup> At [73]-[74].

<sup>57</sup> *Cattnach*, above n 23, a [135].

elements of the tort are satisfied, the complainant is entitled to be compensated and returned to the position they would have been in had the wrong not occurred.

When considering the nature of the loss suffered in wrongful conception, the minority favour the view that the true nature of the harm was purely economic. The majority on the other hand accepted the notion that the real harm suffered was the expenditure that resulted and the responsibility that arose due to the defendant's negligence.<sup>58</sup> An express acknowledgement that the concept of harm or injury can be extended beyond physical injury. Further, they explained the losses directly affected autonomy as "parental responsibility is not simply or even primarily a financial responsibility. The primary responsibility is to care for the child... the out of pocket expenses on food, clothing, housing, schooling etc. are not independent<sup>59</sup>." Therefore, it was accepted by the majority that the loss was consequential and that damages would be available under the ordinary application of tort law.

### ***C. Isolating the Relevant Principles in Australia***

The conclusion reached in *Cattanach* affords more respect to the idea of reproductive autonomy. It raises important questions about the view on parenthood and reproduction in society today. Further, the High Court acknowledged the nature of the harm as an interference with autonomy. By providing damages for the maintenance of a child, the court effectively provided Mrs Melchior with some means to limit the interference with her reproductive autonomy.

We live at a time where it is not uncommon for people to go to great lengths to limit their ability to reproduce and limit parental responsibility. Arguably by extending the law to allow damages for child-rearing costs, what the majority did was pay tribute to changing societal values and recognise a more modern opinion on the role of women in society. The court acknowledged the costs associated with raising an unplanned child are a harm consequential to the injury suffered to reproductive autonomy. They chose not to paint the real loss suffered with a superficial gloss or to label it as 'purely economic.'

Furthermore, it can be argued that this case demonstrates a greater understanding of the effects wrongful conception cases have on women in particular. It acknowledges the burden of unsolicited parenting does not fall squarely onto to parents but more heavily on to women and further, that the loss suffered is inherently subjective.

Although awarding damages for the cost of child-rearing may not be the most effective way of recognising reproductive rights, I think it is justifiable. This is because, "some aspects of claims

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<sup>58</sup> At [67]-[68].

<sup>59</sup> Lady Justice Hale, above n 36, at 762-763.

for the financial costs of raising a child, for example the cost of childcare, respond directly to a parent's loss of autonomy by facilitating some small measure of personal freedom and relief from childcare duties".<sup>60</sup> As aforementioned, by awarding a mother compensation for the upbringing of the child, the court has not only acknowledged the interference with reproductive choice but they have also provided the means to try and regain some of the autonomy lost. This, I think is the correct approach to any wrongful conception claim because it amounts to an active step in trying to return the aggrieved woman back to the position she would have been in but for the negligence endured. This is a central part of corrective justice and as a result, should be maintained.

Child-rearing is an expensive venture, and someone has to meet the financial burdens of raising a child, "no court would be moved by the argument coming from a punitive father that he should not be required to provide financial support for the child he has fathered on the grounds that he has bestowed on the mother a priceless blessing<sup>61</sup>." So, why should the court accept the same argument from a medical professional who has deviated from the expected level of appropriate practice?

Although the outcome of this case has divided the legal community, it is a ruling that has received endorsement from 'pro-choice' writers and has been described, as "recognition of the philosophy of freedom of individual choice that underlies the modern family<sup>62</sup>." However, on the other side, there are many that believe the High Court has gone too far. Some describe the outcome as secular liberalism run rampant and argue the precedent not only undermines the joys of children but undermines the sanctity of life<sup>63</sup>. However, I would argue that comments like these are made without regard for the subjective nature of the loss suffered. Acknowledgement that each case must be considered subjectively with regard for the exact effect a child imposes on its mother makes arguments that a child is a blessing in every circumstance highly unpersuasive.

It must be acknowledged this is not a perfect answer to the issue. The reality is, any private law litigation is going to be expensive for both the plaintiff and the wrongdoer, but this should not act as a barrier to recompense when it is owed. There are some practical difficulties associated with the award of maintenance costs as a remedy. However, I would argue are ways to get around this.

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<sup>60</sup> Isabel Karpin, above n 8, at 162.

<sup>61</sup> Regina Greycar "Public Liability: A Plea for Facts" (2002) 23 UNSWLJ 810 at 815.

<sup>62</sup> Natasha Cica "Can't Buy Me Love – Public Policy Implications of *Cattanach v Melchior*" (2003) 10 Agenda: A Journal of Policy Analysis and Reform 367 at 377.

<sup>63</sup> At 376.

## *Chapter III: New Zealand*

### ***A. Introduction***

Wrongful conception cases in New Zealand are dealt with fundamentally differently from both the United Kingdom and Australia. New Zealand is one of the only jurisdictions in the world to have adopted a wholly no-fault Accident Compensation Scheme. As a result, New Zealand has strayed away from the tort system in order to pursue “community responsibility, comprehensive entitlements, rehabilitation and administrative efficiency<sup>64</sup>.”

Under ACC, any patient who can satisfy the Accident Commission they have suffered a ‘personal injury’ or a ‘treatment injury’ as defined under the Accident Compensation Act 2001 (ACA), will be entitled to some form of compensation. However, in return for this right, they forego the ability to sue in tort.<sup>65</sup>

I am going to consider whether the ACC scheme is capable of being interpreted in a manner that can provide compensation for losses to autonomy suffered in wrongful conception cases. It appears that New Zealand is fundamentally behind the times in refusing to acknowledge that the loss suffered in wrongful conception cases is not purely economic. However, I suggest that the legislation is capable of being interpreted in a manner that can allow intangible losses of autonomy to be considered ‘personal injuries’ and as a result, adequate compensation can be provided under the scheme.

### ***B. Historic Background***

In order to analyse whether the ACC system successfully acknowledges the true loss in wrongful conception as a loss to reproductive autonomy and whether it is capable of addressing this loss, it is helpful to consider the purpose behind the scheme. Any analysis of ACC must begin with the Woodhouse Report.

The Woodhouse Report was released by a Royal Commission of Inquiry developed to consider tort law in New Zealand, with specific regard for issues associated with accidents, incapacity and negligence. In revealing their conclusions, the commission recommended reform.<sup>66</sup>

One of the most prominent themes in the report is the idea of community responsibility. That is, the notion of distributing losses suffered by individuals across society as a whole. Something

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<sup>64</sup> Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for personal injury in New Zealand; Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967).

<sup>65</sup> Accident Compensation Act 2001, s 317.

<sup>66</sup> Royal Commission of Inquiry, above n 64, at [484].

which I have already argued can be difficult to justify in cases of wrongful conception. As aforementioned, the losses suffered in wrongful conception cases do not fall equally onto society as a whole, but more squarely onto the shoulders of women. This suggests a distributive justice framework is not appropriate. Furthermore, as established earlier, wrongful conception cases are concerned with gaining vindication for the breach of fundamental rights rather than the rehabilitation of injuries. Therefore, it is better suited to a corrective justice model, something I will argue is still identifiable in the ACC scheme.

### ***C. Medical Misadventure***

In this part, I am going to be focusing primarily on the development of the law in relation to cases of medical misadventure and then more specifically wrongful conception.

‘Personal injury’ was first expressly referred to in the accident compensation legislation of 1974 as, “medical, surgical or first aid misadventure<sup>67</sup>.” In 1992, the legislation was extended to provide more extensive definitions for both ‘medical mishap’ and ‘medical error<sup>68</sup>.’ The specific definitions were adopted in response to Parliamentary displeasure with the courts’ ability to clarify the scope of no-fault compensation in relation to what used to be dealt with as medical negligence under tort law.<sup>69</sup> Effectively, the adoption of these more extensive definitions narrowed the scope for success by incorporating tort law requirement into the scheme.<sup>70</sup>

In order to satisfy the definition of medical misadventure, the plaintiff needed to establish that they were owed a duty of care, the duty had been breached and, a directly attributable loss had been suffered. Thus, they had to satisfy the same test as under tort law. This was despite the fact that the defendant could no longer be held liable for their actions. Arguably, this was not easily reconciled with the idea of a no-fault scheme.<sup>71</sup> As a result, amendments in 2005 introduced the concept of ‘treatment injury’ to provide cover for cases which had previously fallen under the ACC provisions for ‘medical mishap’ or ‘misadventure.’ This was an attempt at removing the fault-based requirement unintentionally introduced through the adoption of the definition of ‘medical error’ and ‘medical mishap’.<sup>72</sup> The Accident Compensation Act 2001 has maintained the definition of ‘treatment injury’ introduced in 2005.

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<sup>67</sup> Accident Compensation Act 2001, s 2.

<sup>68</sup> Accident, Rehabilitation and Compensation Insurance Act 1992, s 5.

<sup>69</sup> Petra Butler “A Brief Introduction to Medical Misadventure” (2004) 36 VUWLawRw 811 at 812.

<sup>70</sup> Kerry Peterson, above n 3, at 812.

<sup>71</sup> Stephen Todd “Accidental Conception and Accident Compensation” (2012) 28 Tolley’s Journal of Medical Negligence 196 at 198.

<sup>72</sup> Simon Connell “Justice for Victims of Injury: The Influence of ACC On the Civil and Criminal Law In New Zealand” (LLM Thesis, University of Otago, 2011) at 80.

Despite efforts to remove any fault-based elements from the scheme through the adoption of ‘treatment injury,’ it appears this objective may not have been achieved. Stephen Todd states “although the definition of treatment injury makes no reference to medical mishap or medical error they remain as critical determinates for cover”.<sup>73</sup> Arguably, in order to establish that a treatment injury has occurred, the plaintiff is still required to prove fault on the part of the medical professional. This is due to the fact that the Act does not provide compensation for injuries that are considered a “necessary or ordinary part” of any treatment<sup>74</sup>. As a result, the court will be required to determine whether there has been a mishap, in order to be satisfied that that the result was not ordinary or necessary.

Furthermore, the requirement that the claimant must be able to show that the injury was not “subsequent to an underlying health condition”,<sup>75</sup> also requires them to show they suffered some form of negligent treatment. The ability to identify these clear elements of tort law in a supposed ‘no-fault’ system is what makes drawing an analogy with the tortious systems in the UK and Australia helpful to this enquiry. In order to gain recompense under both tort and ACC, it appears the claimant will be required to prove they sustained injury through some form of negligence. Therefore, it can be elements of fault are still present and thus, corrective justice and vindication of rights are still necessary under ACC.

#### ***D. Personal and Treatment Injuries***

Anyone who suffers either a ‘personal injury’<sup>76</sup> or ‘treatment injury’<sup>77</sup> as defined under the Act will receive entitlements as long as they satisfy the relevant criteria.<sup>78</sup>

Personal injury is defined broadly as death, or “physical injuries suffered by a person, including, for example, a strain or a sprain”.<sup>79</sup> The definition also encompasses mental injuries suffered as a result of physical injuries,<sup>80</sup> or work-related mental injuries. However, personal injury generally does not include, “injury caused wholly or substantially by a gradual process, disease, or infection”.<sup>81</sup>

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<sup>73</sup> Stephen Todd, above n 71, at 199.

<sup>74</sup> Accident Compensation Act 2001, s 32(1)(c).

<sup>75</sup> Section 32(2)(a).

<sup>76</sup> As defined under s 26 of the Accident Compensation Act 2001.

<sup>77</sup> As defined under s 32 of the Accident Compensation Act 2001.

<sup>78</sup> Entitlements include not only compensation for personal and treatment injuries on weekly monthly or lump sum basis but also compensation for lost earnings, rehabilitation and funeral grants etc. as per Accident Compensation Act 2001, s 69.

<sup>79</sup> Accident Compensation Act 2001, s 26(1)(c).

<sup>80</sup> Section 26(1)(d) and (da).

<sup>81</sup> Section 26(2).

‘Treatment injury’ is defined as a personal injury suffered by a person seeking, receiving or referred for treatment by a registered health professional and is caused by treatment.<sup>82</sup> Treatment is defined under s 33 as the ‘giving of treatment’, which also suggests that it may be necessary to point towards some form of negligence to prove that the “giving of treatment” resulted in a “treatment injury”.

How broadly these definitions are able to be interpreted has been a question of judicial concern since the adoption of ACC. Key to this analysis is the issue of pregnancy and whether it constitutes a ‘personal injury.’ This has been considered in a number of cases and constitutes the starting point for determining how ACC deals with cases of wrongful conception.

### ***E. Pregnancy as an Injury***

The early position on pregnancy as a personal injury stems from Cooke P’s dicta in *L v M*.<sup>83</sup> The Accident Compensation Act 1972 failed to provide a specific definition for a personal injury caused by an accident. As a result, Cooke P held the legislation needed to be interpreted literally taking an ordinary approach. He acknowledged the “physical and mental distress” suffered in response to a failed sterilisation and the subsequent pregnancy could constitute a personal injury.<sup>84</sup>

*XY v ACC* was a later case also involving a failed sterilisation.<sup>85</sup> The court having conceded that pregnancy as a result of failed serialisation would constitute an injury under ACC was subsequently required to consider whether ACC would cover child-rearing expenses. Specifying the particular injuries suffered in these cases are pregnancy and child-birth alone, the court denied damages. Relying on the argument that once the child is born the injury is fully healed, they considered the cost of raising a child too far removed from the injury itself.<sup>86</sup> Thus, it was established the pregnancy would constitute a compensable personal injury but any claims for child-rearing costs would fail.

That is until the 1992 amendments were incorporated. Alterations made to the definitions of ‘personal injury’ in 1992, “appeared to be an insurmountable hurdle”<sup>87</sup> making it impossible for the courts to award compensation in wrongful conception cases.

These amendments effectively separated ‘accident’ and ‘medical misadventure’ therefore, making proof of ‘personal injury’ a pre-requisite for success. Furthermore, the 1992 definition

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<sup>82</sup> Section 32(1).

<sup>83</sup> *L v M* [1979] 2 NZLR 519 (CA).

<sup>84</sup> At 529.

<sup>85</sup> *XY v Accident Compensation Corporation* (1984) 2 NZFLR 376 (HC) [XY].

<sup>86</sup> At 380.

<sup>87</sup> Rosemary Torbin “Common Law Actions on the Margin” (2008) 1 N.Z.L.Rev 37 at 49.

of ‘accident’ excluded, “anything that was treatment by, or at the direction of, a registered health professional<sup>88</sup>.” This meant wrongful conception cases could no longer be considered ‘accidents.’ Rather, the qualifying category of cover would be medical misadventure. The definition of ‘medical misadventure’ was therefore, key to any claim of this nature and included, ‘personal injury’ caused either by ‘medical error’ or ‘medical mishap’ before the adoption of the concept of treatment injury.

### 1. *Allenby v H*:

The position on whether pregnancy can be considered a ‘personal injury’ was revisited in the landmark case of *Allenby v H*.<sup>89</sup> Not only did this case represent a reversal of the Court of Appeal’s judgment in *ACC v D*<sup>90</sup> but it also, “represents a realignment with the visionary principles of the Woodhouse Report”.<sup>91</sup> As a result of the mental illness suffered due to her failed sterilisation procedure, the respondent brought an action for damages under the ACA. Applying the precedent from *ACC v D* both the High Court and Court of Appeal denied cover for pregnancy as a personal injury. However, the Supreme Court came to a unanimous conclusion that pregnancy could, in fact, be considered a personal injury.

The key focus of the judgment was whether ‘impregnation and the developing physiological impacts of pregnancy were properly to be treated as personal injury within the meaning of s 26 of the Act’.<sup>92</sup> The Supreme Court’s judgment was based on two instrumental questions; namely what effect the 1992 reforms had on cover for pregnancy caused by an accident, and secondly, whether pregnancy could be considered a personal injury caused by medical misadventure.

In response to the first issue, it was concluded the 1992 amendments had no effect on a complainant’s ability to gain cover for pregnancy caused by rape (accident). “If pregnancy is covered as the physical consequence of an accident, it must follow that the same physical consequence is covered when it occurs by a different cause, namely medical misadventure<sup>93</sup>.” In response to the latter question, Blanchard J concluded it was intended that ‘medical misadventure’ should have a broad meaning so as to encompass injuries that would not ordinarily be considered physical injuries. Additionally, the Supreme Court highlighted pregnancy has significant effects on the anatomy of a woman and causes a substantial degree of both discomfort and suffering. They note the ACC legislation refers specifically to ‘sprains

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<sup>88</sup> Yasmin Moinfar “Pregnancy Following Failed Sterilisation Under the Accident Compensation Scheme” (2009) 40 VUWLR 805 at 813.

<sup>89</sup> *Allenby v H* [2011] NZSC 71.

<sup>90</sup> A case where it was held that pregnancy could not constitute a personal injury for the purpose of ACC.

<sup>91</sup> Nicola Brazendale “*Allenby v H*: A Realignment with the Accident Compensation Scheme’s Social Contract Roots?” (2012) 18 Mata Koi Auckland U L Rev 288 at 288.

<sup>92</sup> Stephen Todd, above n 71, at 198.

<sup>93</sup> *Allenby*, above n 89, at [9] and [68].

and strains<sup>94</sup> and the symptoms of pregnancy go far beyond this. Therefore, they concluded it is likely that Parliament would have intended cover for pregnancy.

As for the argument that pregnancy should be excluded as it is a ‘gradual process’ explicitly prohibited from cover<sup>95</sup> Blanchard J, recognised gradual process injuries may be covered where they are causatively linked to a personal injury as with pregnancy.<sup>96</sup>

The ACC scheme successfully recognises interference with bodily integrity by providing compensation for the duration of pregnancy. However, I would argue this is not enough. Key to a person’s autonomy is the ability to make choices about how they live their lives. This includes how many children to have or whether to become a parent at all. As a result, arguments have been made that the birth of an unwanted child not only undermines a parent’s decision not to have any more children but also interferes with their ability to live out their lives in the way they intended. It is from arguments like these that parents have made claims for lost earnings under ACC. This was the key issue in the case of *J v Accident Compensation Corporation*.<sup>97</sup>

### ***F. Compensation Beyond Pregnancy***

Having established that pregnancy is capable of constituting a personal injury, I will now turn to consider whether compensation is available for directly attributable losses such as lost earnings and child rearing costs.

#### *1. J v ACC*

Content with the size of her family and the extent of her financial obligations, Mrs J underwent a sterilisation procedure which was negligently performed. Believing the procedure had been successful, Mr and Mrs J dispelled with contraceptive measures and subsequently, Mrs J fell pregnant and a healthy child was born.

Referring to *Allenby*, there was no question as to whether Mrs J would be entitled to compensation for the pain and suffering endured as a result of the pregnancy or childbirth, but the quintessential question, in this case, was whether she would be entitled to damages for her lost earnings. The High Court concluded compensation would not be awarded to this effect on the basis that once the child is born, the mother is no longer suffering from the injury, as any harm suffered has been healed.<sup>98</sup> Unsatisfied, Mrs J appealed to the Court of Appeal.

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<sup>94</sup> Accident Compensation Act 2001, s 26(1)(b).

<sup>95</sup> Section 26(2).

<sup>96</sup> *Allenby*, above n 89, at [21].

<sup>97</sup> *J v Accident Compensation Corporation* [2017] 3 NZLR 804.

<sup>98</sup> *Accident Corporation v J* [2016] NZHC 1683 at [26].

Although the majority dismissed the appeal, I wish to focus on Kós P's minority judgment and the important issues raised. Not only does Kós P suggest that ACC legislation can be interpreted so as to provide compensation for child-rearing costs and lost earnings, he also highlights the importance of recognising the right to reproductive autonomy and the need to vindicate any breach of this right. A judgment that aligns very closely with the thesis of this dissertation.

Of key concern was whether Mrs J would be entitled to compensation for lost earnings, as per s 103 of the Act. If the complainant is unable because of his or her personal injury to engage in employment they were involved in before the personal injury, they will be entitled to compensation.<sup>99</sup> The court was presented with two alternatives, either they needed to recognise a child is a consequence of the pregnancy (the injury) and acknowledge if it was not for the injury, Mrs J would have maintained her employment. Alternatively, they needed to acknowledge a child can constitute an injury, even if it is not physically or mentally effecting Mrs J's ability to return to her employment.

In making their determination, the majority engaged in a legislative interpretation activity. Considering the purpose of the Act,<sup>100</sup> the meaning of incapacity, and finally, the meaning of impairment.

In determining the breadth of s 103, the court made some key background considerations. Primarily that medical assessment is at the centre of the Act. The majority held, in order to be entitled to compensation, the plaintiff needs to be able to point towards a medical condition as the preventative cause of an inability to return to work. They reinforced this argument by referring to s 103(2) which requires the corporation to refer to assessments performed by medical professionals. They also noted vocational rehabilitation refers to the rehabilitation of a person to 'medically sustainable employment'.<sup>101</sup>

Also considered significant was the Act's provision of independent childcare costs. The fact the legislation explicitly refers to care by an independent third party rather than a parent or family member suggests it was not intended that the legislation would cover child-rearing expenses. The majority concluded the Act is, "strictly focused on addressing physical and mental medical barriers to employment and does not view parental barriers to employment in the same way".<sup>102</sup>

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<sup>99</sup> Accident Compensation Act 2001, s 103(2).

<sup>100</sup> Section 3.

<sup>101</sup> *J v ACC*, above n 97, at [27].

<sup>102</sup> At [28].

With this in mind, it was held the barrier preventing Ms J returning to employment was not the physical injury of pregnancy, as she had fully recovered. Rather, the barrier was the existence of a dependent child, and a dependent child cannot constitute an injury. Something I would like to argue is a misconception. It is not the child that amounts to an incapacity but the continuing parental responsibility.

Further, Ms J's counsel attempted to draw an analogy with the lasting incapacity faced by an injured football player.<sup>103</sup> It was suggested Ms J's inability to return to work was analogous to an amputee footballer's inability to return to his career. Although the wounds would heal, the incapacity would remain and as a result compensation should be awarded.

The majority dismissed this argument stating the footballer continued to suffer from the loss of his leg, whereas Ms J's body recovered fully from the pregnancy. An interesting conclusion especially considering football is not only a predominantly male-dominated sport but also requires an assumption of risk. It is evident cover under the ACA is available for individuals who suffer an injury during sporting activities. Critics of this highlight that when an individual joins a sports team, they are consenting to physical contact and thereby take on the risk of physical injury. If injury then occurs, it is likely compensation would be awarded under the ACA. Yet in cases of wrongful conception which primarily relate to women's rights and should involve lesser chances of risk, there is no compensation available. Further, particular steps have been taken to avoid the injury (pregnancy) and still compensation is denied.

The conclusion reached by the majority in response to the analogy with the football player was as a result of their failure to acknowledge the true nature of the harm. The Court considered only the physical harms suffered as a result of pregnancy itself rather than the extended harms suffered to autonomy. These harms are the ones that persist long past the birth of the child. The harm to autonomy continues to affect Mrs J as the loss of the leg continues to affect the football player. Although the footballer continued to suffer a physical loss, Ms J continued to suffer an intangible loss both of which are worth recognising.

Ms J's counsel made one further argument, namely that if the court would not accept that the Act could be interpreted to compensate for lost earnings then Ms J should retain her right to a common law claim. In making this argument, the court highlighted the difficulties that would arise with reopening the door to the common law. Namely how it would create a discrepancy in the general no-fault position.<sup>104</sup> A reversion back to the common law would leave New Zealand in a position of choosing whether to follow in the footsteps of the UK or Australia. In order to effectively recognise the true nature of the harm as a loss to autonomy and to

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<sup>103</sup> At [35].

<sup>104</sup> At [38].

adequately recompense that wrong, I would encourage New Zealand to follow the Australian approach.

I will now turn to the minority judgment where, Kós P provided a strong dissent and raised a number of key ideas I wish to explore further. The premise of his judgment was his view: <sup>105</sup>

...the failed sterilisation caused Ms J an injury for which she has cover under the Act. A baby is the natural consequence of the injury. The need to care for the baby is also a natural consequence of the injury. The inability of the mother to engage in her former employment, because of the need to care for the baby, maybe a third natural consequence of the injury.

Therefore, he is a proponent of the idea that the losses suffered in wrongful conception cases may be somewhat financial, but any financial loss is directly attributed to a loss of autonomy.

He endorsed Richardson J's view, that the correct interpretation of the ACA is "generous and uniggardly".<sup>106</sup> Considering past judgments and their refusal to recognise the costs associated with the maintenance or lost earnings that result from the birth of an unplanned child, Kós P found himself unable to agree with those pronouncements. His central issue was with the opinion that becoming a parent is primarily advantageous, and any disadvantages are far outweighed by benefits. Further, he had an issue with the majority's failure to acknowledge that losses to autonomy are inherently subjective. He stated: <sup>107</sup>

I am unable in 2017 to agree with that conclusion. It may well reflect different social conditions prevailing over thirty years ago...but in part it seems to reflect an inference that a claim for the costs caused by the need to care for a child born in such circumstances are adventitious and inconsistent with the proper discharge of parental duties. I would draw the contrary inference.

President Kós argued claimants in wrongful conception cases are entitled to the social contract policy at the heart of the accident compensation legislation. They have suffered a personal injury and a directly attributable loss as a result of that injury, therefore, it is unreasonable to say any benefits associated with this loss outweighs any actual loss.<sup>108</sup> Especially in light of changing social attitudes regarding reproduction. We live at a time where family planning education is provided and encouraged, therefore, we should not later undermine decisions made in accordance with this. Rather we should vindicate the rights of those who have their autonomy curtailed.

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<sup>105</sup> At [51].

<sup>106</sup> *Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436 (CA) at 438.

<sup>107</sup> *J v ACC*, above n 97, at [57].

<sup>108</sup> At [57].

Despite concluding it is clear Ms J suffered a personal injury, Kós P highlighted the question was not how long the injury lasted but rather, whether Ms J could be considered ‘incapacitated’?<sup>109</sup> Injury and incapacity do not necessarily overlap, rather an injury can have healed, but the person may still be left incapacitated. The same applies to rehabilitation. Just because an injury has healed does not mean the injury will not require extensive rehabilitation. This Kós P argued, suggested ACC is not solely focused on a claimant’s health as the majority submitted. President Kós stated if Parliament had intended entitlement to rely solely on injury, they would have been explicit about this.

He proposed that entitlements are concerned with incapacity rather than whether an injury has come to an end. As a result, Kós P concluded Ms J remained incapacitated and should be entitled to compensation. He stated:<sup>110</sup>

In my view the answer must be yes, as a simple matter of direct causation. Ms J was both legally and morally obliged to care for her child. She could not just ignore it and go out to work. But for her personal injury... she would be able to return to work.

He considers the ever-remaining responsibility to care for a dependent child as much of an employment-incapacitating occurrence as the loss of a leg for a professional footballer. Thus, it can be said Kós P agrees with Hale LJ and the UK CA in their view that parental responsibility is capable of amounting to an incapacity that prevents a mother from returning to her previous life.

### ***G. Isolating the Issues in New Zealand***

What is apparent from an analysis of the law in New Zealand is that ACC is considerably behind the times in recognising women’s rights to reproductive autonomy. Through the current application of the ACC legislation, compensation is only available for the duration of pregnancy and childbirth. Further, there is a failure to recognise the loss in any wrongful conception case is not purely economic. Something that the law in both the United Kingdom and Australia has developed to recognise. Overseas jurisdictions have acknowledged that intangible losses require recognition, that the resulting parental responsibility amounts to an on-going incapacity and finally, that the concept of injury or harm can be extended beyond physical injury alone.

As a result of the conclusion reached in *J v ACC*, lost earnings are not available, and it appears the position is the same in regard to child-rearing costs. Therefore, it is clear that in New

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<sup>109</sup> At [61].

<sup>110</sup> At [64].

Zealand, reform is required. The conclusion reached in *J v ACC* was as a result of the failure to recognise the true nature of the loss, and it is only when the court acknowledges that the real injury suffered is a loss of autonomy does it become justified to award child-rearing costs.

Any loss to reproductive autonomy is a fundamental loss that requires both acknowledgement and compensation. I would argue the ACC legislation as it currently stands is capable of affording this recognition due to the visible fault-based elements that remain. I will discuss other ways in which ACC is capable of recognising this right in chapter IV.

Furthermore, I would argue New Zealand needs to adopt the provision of child-rearing costs as a remedy. There are a number of justifications for this argument, firstly, the provision of child-rearing costs is one of the only ways to return some measure of autonomy to a mother.

Secondly, some would argue the ACC scheme is concerned solely with distributive justice and as a result, provision of child-rearing costs is going too far. I would disagree, when critics argue adoption of the no-fault scheme abolishes the idea of corrective justice, this is due to the fact that compensation is provided by the state rather than the wrongdoer. This is the feature of corrective justice dispelled by ACC but otherwise, corrective justice is still relevant. Further, as discussed above, there are still strong elements of fault visible through the concept of ‘treatment injury.’ As a result, it can be said the ACC legislation is still primarily concerned with compensating for a recognisable loss. Thus, I would argue awarding child-rearing costs is in fact in line with the purpose behind the ACC legislation as it is a method of compensating a personal injury.

Despite arguments that expanding ACC cover to childcare is a misapplication of what ACC is about, this is not necessarily true. It may not be a natural fit, but it is a justifiable one. ACC is to act as a replacement for common law actions and as a result, if a loss suffered would usually be covered under the common law then it is a strong indication it should be covered by ACC.

Further, a refusal to acknowledge there are still fault based elements in the scheme would leave the law unable to compensate for losses suffered in wrongful conception cases. Claimants would be left with their rights breached and no form of vindication, and this is unacceptable.

The position in New Zealand on wrongful conception cases is outdated and this requires reform as outlined in the following chapter. There are still strong elements of fault visible in the ACC legislation making corrective justice a relevant consideration.

## **PART B: ENCOURAGING CHANGE**

Having considered the current position on the recognition of reproductive rights under ACC and the compensation available, I will now turn to consider how we can strengthen our law on these issues.

### *Chapter IV: Developments for Greater Recognition*

There has not been a great deal of discussion surrounding the protection of women's rights in wrongful conception in New Zealand. Most of the legal debate has centred around whether pregnancy is a compensable personal injury, rather than whether pregnancy as a result of a failed sterilisation is a breach of reproductive autonomy.

Compensation is currently unavailable for child-rearing expenses and loss of future income. Some would argue failure to provide compensation of this kind amounts to a fundamental under-appreciation for infringement to a women's reproductive autonomy. I agree and suggest the ACC legislation is capable of being interpreted so as to encompass cover for intangible non-physical losses.

#### ***A. Intangible Losses as Personal Injuries***

Key to this argument is that a breach of bodily integrity amounts to a personal injury. A breach of bodily integrity is analogous to a breach of reproductive autonomy as they are both intangible-non-physical injuries. Thus, should it be accepted an infringement of bodily integrity is a physical injury amounting to personal injury under s 26, an analogy can be applied.

Mallon J in the case of *Monk v ACC*<sup>111</sup> held, "physical injury includes interference with bodily integrity<sup>112</sup>." In the case of *ACC v D* the high court was also willing to interpret s 26(1)(b) broadly enough to encompass a loss to bodily integrity.<sup>113</sup> However, the Court of Appeal overturned this judgment and required some level of physical harm to the body in order to claim a personal injury.<sup>114</sup> Thus, it appears that the current position under ACC is that a breach of the right to bodily integrity is not a physical injury capable of amounting to a personal injury under the ACA.

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<sup>111</sup> *Monk v Accident Compensation Corporation* [2012] NZAR 1 (HC).

<sup>112</sup> At [17].

<sup>113</sup> *Accident Compensation Corporation v D* [2007] NZAR 679 (HC).

<sup>114</sup> At [55].

In 2013, the Court of Appeal were indirectly required to reconsider whether ACC can be interpreted to cover intangible non-physical loss in *C v ACC*.<sup>115</sup> Mrs C underwent a sterilisation procedure which failed. At her twenty-week scan, she inquired as to whether her child would suffer from any abnormalities. She was assured the child was healthy and as a result, she proceeded with the pregnancy. Once the child was born it became apparent it suffered from spina bifida. In her submissions, Mrs C argued had she known her child would suffer from this abnormality, she would have sought an abortion. Consequently, she sought compensation for the loss of the opportunity to make a choice as to whether to have a termination. Further, she argued the loss of the opportunity to make this choice amounted to a personal injury.

Although this argument was originally dismissed in the High Court, the Court of Appeal came to the contrary conclusion relying on the expansive interpretation of ‘personal injury’ endorsed in *Allenby*. As a result, it has been held:<sup>116</sup>

... the continuation of the pregnancy following an incorrect diagnosis, and the consequential inability of the mother to implement her choice to terminate the pregnancy, could constitute a physical injury suffered by the mother for the purpose of the definition of personal injury.

By drawing an analogy, I would argue the loss of the opportunity to limit the size of your family or to choose how to live your life is also capable of amounting to personal injury. If this argument is accepted then a loss to reproductive autonomy amounts to a physical injury, which is also a personal injury under s 26. Meaning there would be no need to amend the ACC legislation to adequate recompense for the loss. If, however, this argument is not accepted, a broader interpretation of incapacity may be required.

### ***B. Parental Responsibility as an Incapacity***

Kós P in *J v ACC*<sup>117</sup> argued the ACA can be interpreted to provide cover for lost earnings by recognising that parental responsibility amounts to an ‘incapacity’.<sup>118</sup> Adopting this view means the complainant satisfies the requirements for on-going weekly compensation under s 103. If ACC is going to be truly all-encompassing then it needs to be capable of providing compensation and upholding the social contract in the majority of situations, so as to prevent people from returning to the common law, one of the key reasons the ACC legislation was adopted in the first place.

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<sup>115</sup> *C v Accident Compensation Corporation* [2013] NZCA 590.

<sup>116</sup> Samuel Hack and others (eds) *Personal Injury in New Zealand* (online loose-leaf ed, Brookers) at [AC26.03(13)].

<sup>117</sup> *J v ACC*, above n 95.

<sup>118</sup> *ACC v J*, above n 96, at 820.

If neither of these arguments are accepted, my last suggestion would be that we need to reconceptualise what we as a society regard as a harm or injury. Doing so would allow ACC to sufficiently recognise rights to reproductive autonomy, and to provide child-rearing costs as a remedy.

It is recognised interference with interests in autonomy do not fit neatly with the current parameters of either tort law or Accident Compensation. “It is simply not seen as an equivalent to the tangible damage that tort law recognises”.<sup>119</sup> Neither is it currently recognised as something worth compensating under ACC. However, it is considered significant enough a right to deserve recognition in other areas of the law such as in the tort of trespass to the person. Therefore, it is about time our domestic legislation recognises the right to reproductive autonomy.

Despite their refusal to provide a specific head of damages, the House of Lords do recognise the importance of the right to autonomy in both *McFarlane* and *Parkinson*. Arguably, the case of *Rees* illustrates an even stronger step in the right direction through the award of a conventional sum. I would suggest that if we can reconceptualise what it means to suffer a ‘harm’ or an ‘injury’ so as to encapsulate intangible losses to autonomy then it will be easier to incorporate them into both tort law and ACC.

### ***C. Reconceptualising ‘Harm’ and ‘Injury’***

Identifying the birth of a child as an injury, “ultimately requires the courts to recognise a new wrong<sup>120</sup>.” Prialx notes that historically the notion of a harm has been associated with physical damage to the body. However, the law has been developed to recognise other forms of harm too. She gives the example of a stolen wallet. Although the owner of the wallet would not be considered to have suffered a physical injury they have still suffered a setback and have had an interest defeated.<sup>121</sup> This is an example of how the concept of harm can be extended beyond tangible physical injury. Joanne Conagham and Wade Mansell suggest “while some kinds of harms are easily assimilated within the traditional corpus of the law, others do not lend themselves so easily<sup>122</sup>.” Further, Conagham notes while the law has readily protected, and advanced values typically endorsed by men, it has been much slower to afford the same protection for values more closely associated with women.<sup>123</sup>

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<sup>119</sup> Victoria Chico “Known Unknowns and Unknown Unknowns: The Potential and The Limits of Autonomy in Disclosure of Genetic Risk” (2012) 28(3) *Journal of Professional Negligence* 162 at 164.

<sup>120</sup> Nicolette Prialx, above n 7, at 7.

<sup>121</sup> At 10.

<sup>122</sup> Joanne Conagham and Wade Mansell *The wrongs of Tort* (2<sup>nd</sup> ed, Pluto Press, London 1999) at 161

<sup>123</sup> At 48.

When considering the predominantly female suffered harms in the law, feminist scholars have adopted the concept of ‘gendered harm’ for referring to these.<sup>124</sup> Arguably wrongful conception claims are a clear example of a gendered harm as the consequential losses are primarily suffered by women.

As has been noted “the experience of pregnancy and childbirth is not universal... as actual mother and carer of an unintended child, women will be the most affected by decision making in this area”.<sup>125</sup> Therefore, Prialx questions why the concept of ‘harm’ in wrongful conception cases, “does not translate into cognizable legal harm”.<sup>126</sup> Furthermore, what the case law has shown us is the focus has been the economic losses suffered as a result of a wrongful conception case. Perhaps this is due to the fact that the majority of the judges who have heard these cases have been male, and have approached the issue from, “the skewed viewpoint of a father whose almost exclusive role lies in economic provision<sup>127</sup>.” As a result, the courts have failed to adequately consider the non-pecuniary harm suffered by women in particular.<sup>128</sup> Therefore, restricting the concept of ‘harm’ or ‘injury’ to economic losses alone is taking a very short-sighted view of what society considers harmful and injurious. Rather:<sup>129</sup>

Any assessment of harm needs to consider a series of intangible, non-pecuniary and relational harms. Refusal to acknowledge the fuller range of interests that individuals seek to protect both excludes and misrepresents the reality of their motivation.

Many feminist theorists argue the first issue to address is that a child is not always a blessing. Furthermore, the harm really suffered in wrongful conception cases is, “the invasion of an individual’s interest in preventing conception, [and] it does not raise the abortion issue or implicate ‘sanctity of life’ concerns”.<sup>130</sup> Arguably a loss suffered to a person’s autonomy is more significant than economic loss or physical injuries to the body. As Amy Burstein states, “whereas pregnancy and childbirth occur during defined episodes, motherhood is chronic<sup>131</sup>.” This is due to the fact that it persists for a large portion of a woman’s life.<sup>132</sup> So if the correct harm to be recognised is the breach of autonomy, what does this mean and how it is adequately addressed?

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<sup>124</sup> Regina Greycar and Jenny Morgan *The Hidden Gender of the Law* (2<sup>nd</sup> ed, Federation Press, Sydney, 2002)

<sup>125</sup> Nicolette Prialx, above n 7, at 11.

<sup>126</sup> At 11.

<sup>127</sup> Anthony Jackson “Actions for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England” (1995) 57 *Loy. L.A. Int'l & Comp. L. Rev* 535 at 598.

<sup>128</sup> At 598.

<sup>129</sup> Nicolette Prialx, above n 7, at 16.

<sup>130</sup> Jennifer Mee “Wrongful Conception: The Emergence of a Full Recovery Rule” (1992) 70 *Wash. U. L. Q.* 887 at 899.

<sup>131</sup> Amy Bernstein “Motherhood, Health Status and Health Care” 11(3) *Women’s Health Issues* 173 at 173.

<sup>132</sup> Nicolette Prialx, above n 7, at 16.

Priaulx suggests, “at a minimum, this requires respect for an individual’s right to take actions based upon their personal values and beliefs”.<sup>133</sup> Further, Emily Jackson notes “autonomy is not just the right to pursue ends that one already has, but also to live in an environment which enables one to form one’s own value system and to have it treated with respect”.<sup>134</sup> Having defined autonomy, it is clear to me that in any wrongful conception case, a loss of autonomy is recognisable. Not only is a woman’s choice not to reproduce undermined, but she also loses the ability to live her life the way she chooses. She is burdened with the responsibility and care of a child for a minimum of eighteen years.

The law as it currently stands “limits respect for women’s reproductive choices” and fails to acknowledge that a wrongful conception in and of itself is a harm.<sup>135</sup> Failing to recognise the breach of reproductive autonomy as an actionable injury not only communicates to the plaintiff that their personal decisions are not valued but also that they lack the ability to make important choices about their own lives because, there is no recompense available when a right is infringed.

Therefore, should ‘loss of bodily autonomy’ become a recognised harm or personal injury under the ACC legislation, there would be no denying the loss suffered in wrongful conception cases is the loss of autonomy. As a result, the commission would be required to address this loss through the award of some form of compensation under both principles of corrective and distributive justice. Adopting loss of autonomy as the key harm in wrongful action cases also removes one of the main hurdles faced at common law.

It appears to me that the ACC legislation is currently capable of being interpreted so as to appropriately acknowledge the true nature of the loss suffered in wrongful conception cases and, of providing appropriate recompense through the provision of child-rearing costs. Adopting the precedent from *C v ACC*, it appears intangible losses can be considered physical injuries for the purpose of the ACA. If, however, this is unaccepted, we need to reconceptualise the generic ‘harm’ principle to extend beyond physical losses alone to encompass intangible losses to fundamental interests. This may therefore, require an amendment to the definition of ‘personal injury’ under the ACA. If this is achieved, and the legislation is amended from suggesting that only physical losses will be covered, applicants will be entitled to either on-going maintenance for the raising of unplanned children, or alternatively a lump sum payment. An amendment that needs to be made to ensure the most appropriate method of compensation is available in New Zealand.

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<sup>133</sup> At 15.

<sup>134</sup> Emily Jackson *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, Oxford, 2001) at 6.

<sup>135</sup> Nicolette Priaulx, above n 7, at 16.

## CONCLUSION

My analysis of multiple jurisdictions' approaches to the wrongful conception claim has made it clear that "the judiciary seem to prefer medical paternalism over patient autonomy, male dominance over reproductive choice and a legal forum for the resolution of medical ethics<sup>136</sup>." Decisions in this area have been made with heavy reliance on Judge's own clouded opinions and beliefs on the role women 'should' hold in society. As the law currently stands in New Zealand, pregnancy as a result of a failed sterilisation is a harm women are told they must endure and, there is no recompense available for the breach of their fundamental rights.

In 2018 we live in a society where family planning is actively encouraged, procedures to limit the ability to reproduce are available and abortion is legalised. If we are going to provide people with these options and acknowledge the importance of reproductive autonomy it is time to ensure sufficient recompense is available when things go wrong.

I have argued the central loss suffered in a wrongful conception claim is the loss of reproductive autonomy not pure economic loss. Further, I have acknowledged that it is an inherently subjective loss deserving of compensation. Specifically, the form of compensation best suited for providing real redress to unintended mothers are child-rearing expenses.

Having analysed the common law approach in the United Kingdom the House of Lords have highlighted the importance of acknowledging the right to reproductive autonomy through the adoption of conventional award. Despite criticisms of the overly objective nature of this award of damages, I would also argue that the court's active attempt to recognise these rights is a step in the right direction.

Australia, the most liberal in their approach, awards damages to cover the cost of maintaining a child born as a result of a failed sterilisation procedure.<sup>137</sup> Arguably by providing parents with means to lessen the burden suffered as a result of medical negligence, Australia have sufficiently recognised the importance of reproductive autonomy. However, it has been argued that this is going too far. In any successful tortious claim, the financial burden imposed on the wrongdoer will be extensive. Providing child-rearing costs for all children born as a result of medical negligence is not cheap. This is one of the key reasons that a number of Australian states have legislated to override the *Cattanach* position.

New Zealand, having departed from tort law to adopt a no-fault compensation scheme refuse to award compensation for both child-rearing costs and loss of earnings in wrongful conception

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<sup>136</sup> Robin MacKenzie "From Sanctity to Screening: Genetic Disabilities, Risk and Rhetorical Strategies in Wrongful Birth and Wrongful Conception Cases" (1999) 7 *Feminist Legal Studies* 175 at 181

<sup>137</sup> With the exception of some states which have legislated otherwise.

cases. There is also an apparent lack of recognition for the breach of autonomous rights in our law. Currently, there are no means for obtaining compensation for a breach of an intangible loss. I have suggested ACC can be reconciled with acknowledgement of reproductive rights, through the acceptance that intangible losses are physical injuries too and that parental responsibility is a lasting incapacity. Further, I have suggested that there are still elements of fault visible in our ‘no fault’ scheme.

Although it may not be clear which jurisdiction’s approach to the wrongful conception claim is most advantageous, it is heartening to see reproductive autonomy receiving recognition in both the United Kingdom and Australia. It appears that New Zealand is lagging behind in recognising this fundamental right.

As I have highlighted, the starting point for reform has to be a focus on developing a recognition that the fundamental loss suffered in any wrongful conception case is not a purely economic but rather the loss of reproductive autonomy. Compensation should not be limited to physical injuries or financial losses alone and the most appropriate means of providing recompense is awarding child-rearing costs. Thus, it is time the ACC legislation is developed or interpreted in a manner that acknowledges the equally significant intangible losses suffered in wrongful conception cases.

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