Pregnancy and Cover: this far and no further

Woodhouse social contract

- In return for giving up the right to sue New Zealanders would get comprehensive cover under ACC
- Vagaries of the common law negligence action

Time Line

- Common law cases seeking compensation for failed sterilisation began late 1970s early 1980s
- UK often in contract but also in common law negligence – *Udale v Bloomsbury Health Authority*, *Emeh v Kensington Chelsea Westminster AHA*, *Thake v Maurice*.
- ACC claims followed
- *L v M (1979)* – Cook J thought the addition of medical misadventure to the 1974 act meant unplanned pregnancies as a result of medical misadventure could be covered.
- Did not extend to the costs of rearing the child *XY v ACC* (1984

1992 onwards

- 1992 Act – the Courts consistently denied cover for failed sterilisation because of the extensive definitions and the avowed intention of the Government of the time in enacting the 1992 Act to reduce cover.
- No causal link between the medical misadventure and the pregnancy

The common law

- Common law in UK began a rethink
- 1999 -*McFarlane v Tayside Board of Health* – House of Lords refused the the costs of rearing the child.
- Alleviated slightly in *Rees v Darlington Memorial Hospital* where the sum of £15,000was allowed to recognise that a parent, has been denied through the negligence of another, the opportunity to live her life in the way that she wished and planned' *Parkinson v St James University* allowed for the extra cost of bringing up a child who was not a healthy child
- But in Australia the High Court on *Cattenach v Melchior* (2003) allowed a claim for the costs of rearing the child

2001 Act

- 2001 Act – a rethink began.
- Mallon J in *ACC v D* (2007 HC) first to decide that looking at the policy of the 2001 Act (comprehensive cover as a corollary to giving up the right to sue) pregnancy could be a personal injury to the mother being bodily harm or damage or an interference with bodily integrity. Overturned on appeal.
- But then:-

Allenby v H [2011] NZSC 71

- Brought as a common law claim.
- The Supreme Court decided that pregnancy was a personal injury, no common law action lay as cover was under the Act.
- What was needed was a generous and unniggardly interpretation of the legislation.
- How far did cover extend?
- Now answered in *J v ACC* 9 October 2017 a 2:1 spilt decision

J v ACC

- Majority - We record that the practical reality of the situation is that the issue is not a choice between government support for Ms J or no support at all. Ms J has indeed been receiving weekly compensation from Work and Income New Zealand (WINZ) as a solo mother. However, as is often the case when issues of ACC coverage arise, if she qualifies for loss of earnings compensation under the Act, that compensation will be considerably greater than that which is available from WINZ.

J v ACC - majority

- agreed with ACC – cover can include the physical or mental effects of the pregnancy and ends when those physical or mental effects cease to operate (usually shortly after the birth of the child).
- S 103(2) the question that the Corporation must determine is whether the claimant is unable, **because of his or her personal injury,** to engage in employment in which he or she was employed when he or she suffered the personal injury.
- Her inability to work did not arise because of her physical injury but because she had a child to care for.
- What she wants was beyond that contemplated by the Act.

J v ACC (minority)

- The 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, may be a third natural consequence of the injury.