WRONGFUL BIRTH OR WRONGFUL LAW: A CRITICAL ANALYSIS OF THE AVAILABILITY OF CHILD-REARING COSTS AFTER FAILED STERILISATION OPERATIONS IN NEW ZEALAND

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Abstract

This article explores the availability of child-rearing costs after failed sterilisation operations in New Zealand. It is divided into three main sections. First, how the accident compensation scheme has dealt with the issue thus far. This article discusses how New Zealand case law and the Accident Compensation Act 2001 provides inadequate cover for parents. Second, this article discusses how New Zealand courts should respond to a common law claim for child-rearing costs. This involves an analysis of the law in the United Kingdom and Australia. This article argues that, while allowing full child-rearing costs is the preferred option, the common law in general is not the ideal place for failed sterilisation cases to be determined. Finally, this article concludes that New Zealand should utilise and expand its pre-existing accident compensation scheme to encompass claims for child-rearing costs following failed sterilisation operations.

I. Introduction

The English Court of Appeal once stated that:[1]

> … a healthy baby is so lovely a creature that I can well understand the reaction of one who asks: how could its birth possibly give rise to an action for damages?

However, when a person has undergone a sterilisation operation, the birth of a child is exactly what they were trying to avoid. When this operation

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1 *Thake v Maurice* [1984] 2 All ER 513 at 526.

goes wrong, and a child is born, it is reasonable that a parent would want to recover the associated costs. This is known as the tort of wrongful birth.

In New Zealand, the starting point for a potential wrongful birth claim, is the Accident Compensation Scheme ("ACC"). The Accident Compensation Act 2001 ("ACA") provides comprehensive insurance cover for personal injuries that fall under its scope, whilst simultaneously removing the right to sue for compensatory damages in relation to that injury. It then provides entitlements based on the available cover. Controversy exists at the margins of cover, where it is unclear whether the personal injury is covered by ACC or whether the right to sue remains available. The Woodhouse Principles[2] have guided judicial interpretation of ACA to ensure that cases on the margins fall on the correct side of the line. Wrongful birth is the epitome of a case on the margins.

It has been established in New Zealand that pregnancy following a failed sterilisation operation is a personal injury under ACC.[3] It has also been established that there are no entitlements available for loss of earning capacity following a failed sterilisation under ACC.[4] However, given that cover is provided for the personal injury, a claimant is potentially barred from bringing a common law claim for child-rearing costs. This is problematic as it creates a legal black hole whereby a claimant can neither claim under ACC nor at the common law for the loss they have sustained. This article explores the legal black hole in the litigation surrounding *J v ACC* and why the courts have held that there are no entitlements to loss of earning capacity under ACC in failed sterilisation cases.[5] In particular, this article explains how *J v ACC* has closed the door to a common law claim in damages and why the current legal framework surrounding failed sterilisation cases is unsatisfactory.

This article then discusses how failed sterilisation cases would be determined under the common law. There are three options arising from international case law that New Zealand could take: denying child-rearing costs,[6] allowing child-rearing costs,[7] or rewarding a lump sum for loss of autonomy.[8] These options will be discussed in turn. The positions in the United Kingdom and Australia will be compared in order to show that allowing recovery for

2 Namely: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency. *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967) [Woodhouse Report].

3 *Allenby v H* [2012] NZSC 33.

4 *J v ACC* [2017] NZCA 441.

5 Ibid.

6 This is the position taken in the United Kingdom, Canada and the United States (in some cases). See *McFarlane v Tayside Health Board* [2009] 2 AC 59; [1999] 4 ALL ER 961 (UK); *Cataford v Moreau* (1978) 114 DLR (3d) 585 (Canada); *Szekeres v Robinson* 715 P 2d 1076 (Nev 1986) (USA).

7 This is the option favoured by the High Court of Australia. See *Cattnach v Melchior* [2003] HCA 38.

8 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309.

child-rearing costs is the most appropriate and justified common law option. This article will then conclude that, nevertheless, the common law is not the optimal place for failed sterilisation cases to be determined. The policy decisions involved should be left to policy makers.

This article then argues that expanding ACC to provide full compensation for the consequences of failed sterilisation operations is the best approach for New Zealand. An expansion would include the ability to claim for the cost of pregnancy and raising the subsequent child. This final option is the preferred option as it provides proper compensation for parents, protection for doctors, and is consistent with the original aims of ACC to be a comprehensive no-fault scheme. It is argued that New Zealand should utilise and expand its pre-existing accident compensation scheme so that parents can recover for the full and fair cost of raising a child born due to a failed sterilisation operation.

II. Wrongful Birth under the Accident Compensation Act 2001

A. The Litigation in J v ACC

J was a single woman with no family and limited financial resources. She decided that she did not want children. In 1998, J therefore underwent a sterilisation operation. However, despite the sterilisation, she became pregnant and in June 2006 J gave birth to a child. As it turned out, the doctor who had performed her operation had been negligent and J was not made sterile. J made a claim to ACC for the pregnancy and loss of earning capacity that she suffered as a result of this unwanted child.

J was granted ACC cover for the physical effects of the pregnancy.[9] ACC also granted J weekly compensation for the period that she was unable to work due to the pregnancy. This was a period of just over 2 months. J sought a review of this decision, which was dismissed. She appealed to the District Court on the basis that under ss 100(1)(a) and 103(2) of the ACA, she was entitled to weekly compensation for on-going lost earnings resulting from her pregnancy and childbirth. The question for the District Court was whether J was incapable "because of her personal injury to engage in employment in which she was employed when she suffered the personal injury".[10]

Judge Powell quashed the decision of the reviewer and held that Ms J was entitled to weekly compensation under s 103(2) of the ACA.[11] Focusing on statutory interpretation, he found that the words "because of … her personal injury" were wide enough to encompass the broad consequences of

9 This was after the Supreme Court judgement in *Allenby*, above n 3.
10 Accident Compensation Act 2001, s 103(2).
11 *J v ACC*, above n 4, at [16].

the pregnancy.[12] This included lost earnings. Judge Powell felt that this was the inevitable result of the extension of cover to include pregnancy in *Allenby v H*,[13] stating that there is nothing in the Act that requires pregnancy as an injury to stop at the birth of the child.[14] ACC was granted leave to appeal to the High Court.[15]

Nation J in the High Court overturned the District Court decision and held that, following the birth of the child, J's injury was no longer operative and she could claim no further compensation from it.[16] He looked to the scheme of the ACA, and in particular the fact that under s 102, a medical assessment can be undertaken to determine the question in s 103.[17] This, he held, meant that the ACA focused on the physical or medical aspects of injury, which do not include the care of a child.[18] The scheme of the Act did not intend to cover childcare, as it is not a personal injury.[19]

J appealed to the Court of Appeal but the majority of Cooper and Asher JJ dismissed her claim.[20] The concurrent appeal to the Supreme Court was declined on jurisdictional grounds, as the ACA does not provide for the possibility of leapfrog appeals.[21] Kós P (dissenting) would have allowed J's claim and his judgment is arguably the more persuasive. For J, the majority decision means that she has no further appeals and receives no entitlements under ACC for the ongoing effects of the failed sterilisation, despite having cover for her pregnancy. For ACC, this decision means that there is potentially no future avenue for parents to claim for child-rearing costs. The Court of Appeal decision is elaborated on below, as well as the probable impact it has on the availability of a common law claim in negligence.

B. ACC Cover for Pregnancy

New Zealand Courts have been asked to consider failed sterilisation claims under ACC on several occasions. Under the Accident Compensation Act 1972, pain and suffering from a pregnancy after a failed sterilisation was covered, as personal injury by accident was interpreted to include medical misadventure.[22] However, the 1992 amendments narrowed the definition of

12 At [14].
13 *Allenby*, above n 3.
14 *J v ACC* above n 4, at [14]–[16].
15 *ACC v J* [2015] NZACC 311.
16 *ACC v J* [2016] NZHC 1683 at [41].
17 Accident Compensation Act 2001, ss 102–103; *ACC v J* [2016] NZHC 1683.
18 *ACC v J* [2016] NZHC 1683 at [63].
19 *ACC v J* [2016] NZHC 1683 at [48].
20 *J v ACC,* above n 4 .
21 *J (SC 93/2016) v ACC* [2017] NZSC 3. See also Accident Compensation Act 2001, s 162.
22 *L v M* [1979] 2 NZLR 519.

personal injury, and pregnancy was neither expressly included or excluded.[23] This, along with the 2001 amendments, and the change from medical misadventure to treatment injury in 2004, made it unclear how wrongful births would be treated.[24] The position was somewhat clarified in *ACC v D,* [25] in which the Court of Appeal held that the ordinary and natural use of the term personal injury does not encompass pregnancy, even if it is unwanted. This was overruled in *Allenby,*[26] in which the Supreme Court held that "personal injury" in s 26 ACA should be interpreted expansively to include the physical effects of pregnancy.[27] The Supreme Court took the view that the physical changes to a woman's body during pregnancy constituted a "personal injury" under s 26, despite it being a natural process.[28] As these changes were caused by medical misadventure, they allowed H's appeal.[29]

As a result of *Allenby*, it is now established that a woman is covered by ACC for the pain and suffering resulting from a pregnancy caused by a failed sterilisation operation. However, the tumultuous road to *Allenby* reflects the inherent controversy that comes with wrongful birth claims.[30] In the Supreme Court, Blanchard J went so far as to describe the confusing series of legislative changes and judicial decisions as "tortuous".[31] The controversy only increases when considering claims for entitlements after a failed sterilisation pregnancy, such as child-rearing costs.

C. Loss of Earning Capacity Entitlements

J claimed that she was entitled to loss of earning capacity arising out of her personal injury of pregnancy.[32] The basis of her claim was s 103(2) ACA which establishes an entitlement to weekly compensation arising out of personal injury for which a claimant has cover. Section 103 states:

> S103 Corporation to determine incapacity of claimant who, at time of personal injury, was earner or on unpaid leave

23 Nicola Peart "*ACC v D* [2008] NZCA 576" [2009] NZLJ 3 at 102.
24 Simon Connell "Sex as an 'accident'" [2012] NZLJ 188 at 188.
25 *CC v D* [2008] NZCA 576
26 *llenby*, above n 3.
27 At [69].
28 Per Blanchard, McGrath, William Young at [80]; Tipping J at [88]; and Elias CJ at [19].
29 Per Blanchard, McGrath, William Young at [84]; Tipping J at [95]; Elias CJ at [31].
30 Alison Gordon "New Zealand Supreme Court considers a case of medical misadventure, unexpected pregnancy, personal injury and the Accident Compensation Act" (2012) 20(6) HLB 83 at 83.
31 *Allenby*, above n 3, at [68].
32 *J v ACC*, above n 4.

> (2) The question 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
>
> (3) If the answer under subsection (2) is that the claimant is unable to engage in such employment, the claimant is incapacitated for the purposes of this Act.

Section 21 of the Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005 inserted "at the time of incapacity" to replace "at the time of personal injury". Therefore, the ACA focuses on incapacity to work arising out of a personal injury, rather than just the existence of a personal injury. The Accident Compensation Corporation (ACC) must determine whether the claimant was incapacitated by reference to whether they can engage in employment in which they were employed at the time of the personal injury.[33]

Prior to 1992, when cover for medical misadventure pregnancies was allowed, child maintenance entitlements (as it was then called) were considered too remote.[34] Jeffries J in *XY v ACC*,[35] argued that the words "actual and reasonable expenses … necessarily and directly resulting" from the personal injury in s 121 Accident Compensation Act 1982 were concerned solely with monetary detriment and loss.[36] As such, maintenance costs were not monetary losses but rather arose from a state of parenthood, which inevitably involves financial sacrifice.[37]

In *Allenby*,[38] neither loss of earning capacity nor child-rearing costs were raised in argument, and the Supreme Court was silent on the issue. However, the Corporation stated following *Allenby* that it did not consider that claims could extend to child-rearing costs.[39] New Zealand's foremost tort law scholar Stephen Todd was of the same opinion. He argued that the wording of s 103(3) indicated that the inability to work must relate to the physical incapacity of the mother rather than the need to care for a child.[40] Within this argument he uses the generalisation that "many women continue to work" following childbirth and make "childcare arrangements as they are

33 *Giltrap v ACC* DC Wellington 141/06, 9 June 2006; see also *ACC v Vandy* [2011] 2 NZLR 131; *Revitt v ACC* [2012] NZACC 407.
34 *XY v ACC* (1984) 4 NZAR 219 at 222.
35 *XY v ACC* (1984) 2 NZFLR 376.
36 At 381.
37 At 381.
38 *Allenby*, above n 3.
39 Rosemary Tobin "Unwanted Pregnancy: The outer boundary of 'treatment injury' in the New Zealand accident compensation scheme" (2015) 23 JLM 204 at 215.
40 Stephen Todd *The Law of Torts in New Zealand* (7th ed, Thompson Reuters, Wellington, 2016) at 59–60.

able".[41] This, he contends, means that following childbirth, women are not unable to work as a fact and simply "decide not to work for many different reasons".[42] However, this argument disregards the fact that the decision to return to work is a decision that parents would not have had to make but for the doctor's negligence.

Nonetheless, the majority judgment of the Court of Appeal in *J v ACC*[43] mirrored Todd's perspective. Cooper and Asher JJ focused on the issue of causation and asked whether the "but for" test was enough, or must the barrier preventing J from working be part of an on-going physical injury?[44] The "but for" test was clearly made out in this case as, but for the doctor's negligence, J would not have had a dependent child. However, Cooper and Asher JJ turned to the scheme of the ACA and interpreted the text of s 103(2) in light of its purpose.[45] They found that the scheme was concerned with physical and mental effects of personal injury, and that ss 102 and 103(2) put medical assessment at its centre.[46] As such, they held that an inability to work must stem from a physical or mental injury, of which a child is neither. They stated:[47]

> [32] Once the mother is physically and mentally recovered, she will not be unable to work any more "because of" her pregnancy. Her inability to work will arise because of the need to provide care for the child. Ms J is not unable to work because of her personal injury. She is unable to work because she has a dependent child.

This means that a claim for any type of child-rearing costs is currently unavailable under the ACC scheme for J or anyone else. However, this outcome is problematic due to the language and reasoning used to come to the decision. The majority judges argued that considerations from overseas cases mean that any outcome of a common law claim by J would be uncertain, and therefore they were not convinced that the ACA had removed her right to successfully sue for damages at common law.[48] These considerations were that "the law regards the arrival of a healthy child as a blessing,"[49] and that "the costs associated with bringing up a child are outweighed by the joy and mutual love and affection that the child brings".[50] These arguments will be disputed

41 Stephen Todd "Accidental Conception and Accident Compensation" (2012) 28 PN 196 at 205–206.
42 At 205–206.
43 *J v ACC*, above n 4.
44 At [12].
45 At [14].
46 At [26].
47 *J v ACC*, above n 4.
48 At [41]
49 At [40].
50 At [40].

in depth below, but it is worth noting at this stage that these arguments are inconsistent with the Supreme Court decision in *Allenby.*[51] In *Allenby*, the Supreme Court moved away from these social considerations in deciding that pregnancy was a personal injury under ACC. Many commentators have stated that this is a "welcome approach to such cases".[52] While the Court of Appeal did not expressly rely on these considerations in coming to their decision, as shall be discussed they are inappropriate considerations in the context of wrongful births. The inconsistency between the approaches of the Supreme Court and the Court of Appeal to wrongful birth potentially calls into question the validity of the Court of Appeal decision.

Kós P's dissent in *J v ACC*[53] is a welcome step away from this type of language. Kós P would have allowed compensation for loss of earning capacity for so long as the need to care for the child precluded J's return to work.[54] He too used the purposive approach to come to his decision, but instead focused on how the case law surrounding ACA indicates that the Act must be given a "generous and unniggardly" interpretation.[55] Kós P also looked to s 3 ACA, which makes clear that the focus should be on rehabilitation. He argued that this indicated that the ACA is not solely concerned with J's physical health.[56] Finally, Kós P took an holistic look at J's incapacity to work and found that in her particular circumstances she could not make child arrangements, there was no father, no family, and she did not have adequate financial resources.[57] He argued that the majority's decision implies that J's employment incapacity stems from these circumstances rather than the presence of the child.[58] Requiring J to make these arrangements, he argues, is the equivalent to asking a woman to procure an abortion or adoption.[59] Ultimately, Kós P applies the "but for" test and finds that J's incapacity to work is a direct consequence of the treatment injury that caused the birth of the child.[60]

Kós P's reasoning is persuasive and consistent with the generous and unniggardly approach that is used interpreting the ACA.[61] His reasoning

51 *Allenby*, above n 3.
52 Anthea Williams "Case Comment – Cumberland v Accident Compensation Corporation" (2014) 45 VUWLR 525*; Allenby*, above n 3; *C v ACC* [2013] NZCA 590 at 532.
53 *J v ACC*, above n 4.
54 At [51].
55 *J v ACC*, above n 4 at [52] quoting *ACC v Mitchell* [1992] 2 NZLR 436; *Harrild v Director of Proceedings* [2003] 3 NZLR 289.
56 *J v ACC* at [62].
57 At [66].
58 At [67].
59 At [67].
60 At [64].
61 It should be noted that Kos P has found that a generous and unniggardly approach is not possible in cases where the ACA is clearly delineated see *Murray v ACC* [2013] NZHC 2967 at [37].

is also more in line with the Supreme Court in *Allenby,*[62] as it relies on considerations that are more appropriate in the context of wrongful birth.

Nonetheless, the majority disagreed and the current position in New Zealand is that, while pain and suffering from pregnancy is a personal injury under ACC, the economic consequences of the pregnancy, such as loss of earnings or child-rearing costs, are not.[63] The Court of Appeal has drawn a line that will determine whether or not claimants maintain their right to sue for damages at the common law. The statutory bar in ACA applies to individuals who have cover under ACC. As parents in a wrongful birth dispute are covered by ACC for the pregnancy, but do not have s 103 loss of earning entitlements, the door to bringing a common law claim for child-rearing costs is potentially closed.

D. Does the Statutory Bar Apply?

ACC operates by providing comprehensive insurance cover while removing the right to sue for damages. The statutory bar in s 317 applies to any cover that claimants have under ACA:

> S317 Proceedings for Personal Injury
>
> (1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of
>
> personal injury covered by this Act; or
>
> personal injury covered by the former Acts.

In essence, persons covered under ACC are barred from bringing a common law claim for the covered injury in exchange for compensation under the scheme.[64] As such, the scope for common law proceedings automatically extends as the scope of cover provided by the Act is contracted.[65] It should be noted that the bar on proceedings does not extend to exemplary damages.[66] However, the benefits under ACC are not intended to be a "complete indemnity".[67] The Supreme Court in *Davies v Police* stated, "claimants are to receive … compensation for loss which is fair rather than full".[68] This, they contended, was a part of the social contract in which the ACC scheme

62 *Allenby*, above n 3.
63 *J v ACC*, above n 4.
64 *Queenstown Lakes District Council v Palmer* CA83/98 [1998] NZCA 190; [1999] 1 NZLR 549.
65 At 10.
66 *Donselaar v Donsellar* [1982] 1 NZLR 81, *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149.
67 *Davies v Police* [2009] NZSC 47, (2009) 24 CRNZ 644 at 652 per Elias CJ.
68 At 652.

was based.[69] While this case was overturned by Parliament in s 6 of the Sentencing Amending Act 2014, this was in relation to claimants "topping up" their entitlements with various claims. The concept of the social contract is still relevant when discussing the application of the statutory bar.

Applied to child-rearing costs, the problem is that s 317 prevents persons from bringing proceedings independently of the Act for damages arising directly or indirectly out of a personal injury covered by the Act.[70] A child is undoubtedly a consequence of the personal injury of pregnancy and, therefore, there is a chance that a common law claim for child-rearing costs would be barred. The Courts have not resolved this question in relation to wrongful birth. The majority of the Court of Appeal in *J v ACC*[71] stated they would not determine the issue but noted that it remains possible that J has a claim that is not barred by the Act.[72] Todd agrees, as he believes that child-rearing costs are an economic consequence of the parent-child relationship not of the physical injury to the mother (the pregnancy).[73] As such, he suggests that a claim for damages at common law for this "separate and independent head of financial damage" may not be barred by the accident compensation scheme.[74] This argument will be disputed below (III 2(d)) but for the sake of clarity, it is necessary to emphasise that the existence of the child is a direct consequence of the pregnancy, and that the pregnancy is covered by ACC.

Like the majority in *J v ACC*,[75] Kós P (dissenting) did not determine the issue but stated that J is unlikely to be able to pursue a claim against the surgeon because of the statutory bar.[76] This is likely to be the correct answer because of the difference between cover and entitlements under ACC. While loss of earning capacity and child-rearing costs are not claimable under ACC after *J v ACC*,[77] a common law claim for child-rearing costs will likely still be barred because the statutory bar operates when there is ACC cover, regardless of entitlements. If a claimant has cover, then any eligibility for entitlements under ACC flow from this cover.[78] To illustrate this, J was *covered* by ACC for her personal injury of pregnancy. However, she was not eligible for the *entitlement* of loss of earning capacity under s 103. The statutory bar applies when a claimant has cover, regardless of their entitlements. This means that J is likely to be barred from being a common law claim for any loss arising out of her personal injury of pregnancy.

69 At 652.
70 Accident Compensation Act 2001, s 317.
71 *J v ACC*, above n 4, at [41].
72 At [41].
73 Todd, above n 40, at 60.
74 At 60.
75 *J v ACC*, above n 4.
76 At [70].
77 *J v ACC*, above n 4.
78 Todd, above n 40, at 74.

This is a startling outcome for J. Not only is she unable to receive loss of earning capacity entitlements under ACC but also it is highly likely that she would be barred from bringing a claim for damages under the common law. This legal black hole is unjust as J has suffered loss at the hands of a negligent doctor and has no way to recover that loss. New Zealand's current approach to wrongful birth as laid out in *Allenby*[79] and *J v ACC*[80] reflects the extent to which statutory interpretation can stretch under ACA, as the statutory wording is not broad enough to include child-rearing costs.[81] Indeed, some argue that only a "strained" interpretation of ACA can include compensation for lost earnings.[82]

E. Is Change Needed?

However, maintaining this status quo does not clarify the law and simply adds to the multitude of claims that a parent must make. An expectant mother already has access to publicly funded maternity care, a potential Work and Income New Zealand claim as a solo mother, other social security benefits, and a claim under ACC for the additional costs of pregnancy. They would then need to file a claim in negligence against the doctor or hospital for the costs of raising the child (if this is available). This is excessive. Kós P stated in *J v ACC*[83] that there is now an "uneasy patchwork" between ACC entitlements, social security, public health benefits, each with different economic results.[84] In addition, parents are likely to be entitled to far more under ACC than under other social benefits. For example, J's social security benefits were around 40 per cent of the compensation she was awarded in the District Court under ACC.[85] Therefore, it is not a question of government support or no government support at all, but rather a question of what would provide parents with comprehensive compensation that reflects the position they were put in due to a doctor's negligence. The existing fractured entitlements scheme is not achieving this. Until ACA is amended, case law will continue to develop in a "piecemeal fashion" adding case law on to an already "unwieldy and incoherent statute".[86]

There are two ways that this can be remedied. First, *Allenby* could be overturned so that claimants have no cover under ACC.[87] This would remove the statutory bar in s 317 and claimants would be free to bring a claim in

79 *Allenby*, above n 3.
80 *J v ACC*, above n 4.
81 Rosemary Tobin "Wrongful Birth in New Zealand" (2005) 12 JLM 294 at 304.
82 At 304.
83 *J v ACC*, above n 4.
84 At [54].
85 At [54]. Note that this compensation was lost in the High Court and Court of Appeal.
86 Williams, above n 52.
87 *Allenby*, above n 3.

negligence at the common law. As shall be seen, such a claim should succeed. Second, ACC could be expanded to include an entitlement to child-rearing costs after a failed sterilisation operation has occurred. Both will be discussed in turn, but it is argued that the latter is preferable as it is in line with the original aims of ACC and ensures that policy makers make policy decisions.

III. Child-Rearing Damages at the Common Law

If New Zealand were to overturn *Allenby* and a claimant similar to J were to bring a claim against the doctor for damages at the common law, two questions would arise.[88] First, whether a claim for damages against a negligent doctor should succeed, and second, whether this is the appropriate route for New Zealand to be taking in regards to the tort of wrongful birth.

The first question is not easy to answer. Unfortunately, the international common law is not settled on the matter of child-rearing costs and jurisdictions dramatically deviate from one another. If a child-rearing costs case could be brought in New Zealand, a judge would be faced with three options: total denial of child-rearing costs, allowance of full child-rearing costs, and compensation for non-pecuniary loss. These will be discussed in turn but, as shall be seen, allowing a claim for child-rearing costs is the preferable outcome as "every baby has a belly to be filled and a body to be clothed,"[89] and parents have the right to determine the size of their family.[90]

Part III will first outline the relevant principles of negligence, and the arguments for and against an award of damages in relation to child-rearing costs that have arisen in the United Kingdom and Australia. It will then explain why developing the tort of wrongful birth may not be the best route for New Zealand to take in regards to providing compensation for failed sterilisation operations.

A. Principles of Negligence

It must first be established that a common law claim for child-rearing costs would be available under general principles of negligence. The requirements for negligence are that there was a breach of a duty of care, the damage was caused by the breach of that duty, and the damage was sufficiently proximate.[91] The issues surrounding failed sterilisation cases are premised on the fact that the doctor has breached the duty of care, either in failing to adequately perform the operation or in failing to properly advise the patient of the potential consequences. The damage is the pregnancy and subsequent

88 *Allenby*, above n 3.
89 *Thake v Maurice* [1984] 2 All ER 513 at 526.
90 Yasmin Moinfar "Pregnancy Following Failed Sterilisation Under the Accident Compensation Scheme" (2009) 40 VUWLR 805.
91 Todd, above n 40, at 150.

child and is directly caused by the doctor failing to sterilise their patient. In *Allenby,*[92] Tipping J stated that it is a relatively straightforward fact that the doctor's negligence causes the resulting pregnancy.[93] Nonetheless, it has been argued that child-rearing costs involve a *novus actus interveniens* or are too remote to be applied to the negligent doctor. These arguments are examined below. Nonetheless, under general principles of negligence, a parent should be able to recover from a doctor who has negligently performed a sterilisation operation.

The principles of negligence in Australia and the United Kingdom are the same, although as shall be seen, the countries differ extensively on matters of policy. These questions of policy and the various arguments that judges use to either decline or allow child-rearing costs are discussed below.

B. Denial of Child-Rearing Costs

A total denial of child-rearing costs is the approach favoured in the United Kingdom following the House of Lords decision in *McFarlane.*[94] Mr McFarlane underwent a vasectomy operation and was told that his sperm count was negative. Nonetheless, a year later he and his wife discovered that they were pregnant with their fifth child. They claimed £10,000 for the pain and suffering of the pregnancy and £100,000 for the cost of maintaining their new child. Their initial claim was unsuccessful as it was held to be against public policy to treat the child as a loss.[95] There were several appeals and eventually the case ended up in the House of Lords. As Lord Slynn stated "the facts … are very few, the legal issue difficult".[96]

The House of Lords denied the McFarlanes' claim and held that child-rearing costs are not recoverable in the United Kingdom.[97] While this decision was clear as to the outcome, the decision is far from clear in its reasoning as to *why* damages for child-rearing costs are not recoverable. The five separate judgements differ extensively in their reasoning. Lord Slynn held that it was not fair, just or reasonable to extend responsibility for the cost of raising the child to the doctor.[98] Lord Steyn took a distributive justice approach and held that child-rearing costs could not be allowed because the average person would think that the parents ought not to be compensated.[99] Lord Hope of Craighead held that since the benefits of raising a child could not be calculated or offset against the financial burden, the costs were not

92 *Allenby*, above n 3.
93 *Allenby,* above n 3.
94 *McFarlane v Tayside Board* [1999] 4 All ER 961.
95 *McFarlane v Tayside Board* OHCS 11 Nov 1996.
96 *McFarlane*, above n 94.
97 *McFarlane*, above n 94.
98 At 970.
99 At 975.

recoverable.[100] Lord Clyde had similar reasoning but added that it was appropriate to limit damages to the birth so as to provide proper restitution.[101] Finally, Lord Millett held that it would be "subversive of the mores of society" to allow parents to enjoy the benefits of having a child whilst avoiding the burden.[102] What is clear is that all five Law Lords sought to deny the claim for child-rearing costs, but struggled to articulate why on the basis of legal principle, rather than resorting to opinion.[103] Lord Steyn stated that his fellow judges were masking the true reasons for their decision, which were moral, instinctive and based on distributive justice.[104]

Following the *McFarlane*[105] decision, many cases and academic literature have supported the total denial of child-rearing costs.[106] The reasons for denying a claim include, and go beyond, those discussed in *McFarlane*. These include issues such as denigration to the child, the benefits offset test, causal responsibility issues, concerns around encouraging abortion, and the difficulty of damages quantification. Each shall be discussed in turn.

a) Denigration of the child

The most common argument in favour of denying child-rearing damages is that it would result in a denigration of the child's worth. In particular, the child would grow up knowing it was unwanted and paid for by another, resulting in psychological harm.[107] This has been dubbed the "emotional bastard" theory.[108] It is an emotive argument, as it goes against human dignity to allow a human being to be categorised as harm.[109] Several cases have expressed such reservations, stating it may be harmful to the child if they find out that they were unwanted.[110]

100 At 988.
101 At 994.
102 At 1006.
103 LCH Hoyano "Misconceptions about Wrongful Conception" (2002) 65 Mod LR 883 at 885.
104 *McFarlane*, above n 94.
105 *McFarlane*, above n 94.
106 See Cordelia Thomas "Claims for Wrongful Pregnancy and Damages for the Upbringing of the Child" (2003) 26 UNSWLJ 125; Todd, above n 41; B Steininger "Wrongful Birth and Wrongful Life: Basic Questions" (2010) 1 JETL 125; *McFarlane v Tayside Health Board* [2009] 2 AC 59*; Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 522.
107 Thomas, above n 106.
108 At 152.
109 Ewa Bagińska "Wrongful Birth and Non-Pecuniary Loss: Theories of Compensation" (2010) 1 JETL 171.
110 *XY v ACC* (1984) 2 NZFLR 376*; Udale v Bloomsbury Area Health Authority QBD* [1983] 1 WLR 1098, [1983] 3 All ER 522; *Cattanach v Melchior* [2001] QCA 246 (Unreported, McMurdo P, Davies JA and Thomas JA, 26 June 2001); *Wilbur v Kerr* 275 Ark 239 at 571.

Some academics have attempted to solve this problem by arguing that there is a distinction between the birth of the child and the child's existence.[111] For example, Todd describes the ultimate question as whether it is appropriate to put an economic value on the life of a child, or whether the claim can be seen as a "straightforward application of ordinary principle" under which the parents can recover damages that represent their financial loss, with the child considered the harm.[112] He states that the latter is inconsistent with many other rules affecting the parent-child relationship,[113] but does not expand on what these other rules are. These arguments lack recognition of the reality that parents are faced with when they have an unplanned pregnancy. It is also inconsistent with general principles of tort law, as there is no reason why there should not be a straightforward application of ordinary principle.

There is a difference between not wanting to be pregnant, and not wanting the child once it is born. The fact that a child is unplanned does not predict the consequent parent-child relationship.[114] This argument confuses the value that parents place on the child and the economic burden that has been placed upon them. As Family Law Professor Mark Strasser states, parents are "suing for money to help raise the child rather than to rid themselves of an unwanted burden".[115] He also questions the legal foundation of denying such a claim, purporting that the denigration of the child arguments stem from the "field of morals".[116]

It is questionable as to why denigration of the child has even been a decisive factor in relation to child-rearing damages in the first place. European Tort Law Professor Barbara Steinenger acknowledges that harm to the child may be a factor that the parents take into account when deciding whether to bring a claim in the first place, but it has no place in denying compensation for negligence.[117] This is because, even if it is accepted that there will be psychological harm to the child in knowing that its parents brought a claim due to its existence, the denying of such a claim will not avoid or ameliorate such harm. The parents still brought a claim. Alternatively, the child may learn of the fact that they were unplanned regardless of whether the parents file a claim for their cost of upbringing at all.[118] It might even be favourable

111 B Steininger "Wrongful Birth and Wrongful Life: Basic Questions" (2010) 1 JETL 125 at 130.
112 Stephen Todd "Wrongful Conception, Wrongful Birth and Wrongful Life" (2005) 27 Syd LR 525 at 527.
113 Todd, above n 41, at 210.
114 Steininger, above n 111, at 132.
115 Mark Strasser "Misconceptions and Wrongful Births: A Call for a Principled Jurisprudence" (1999) 31 Arizona state LJ 161 at 195.
116 Steininger, above n 111, at 129.
117 At 132–133.
118 Owen M Bradfield "Healthy law makes for healthy children: Cattanach v Melchior" (2005) 12 JLM 305 at 312.

to the child to allow compensation through improving the economic position of the family.[119]

b) The benefits offset approach

The second argument against allowing child-rearing costs is the non-economic benefits of having a child are seen to outweigh, or be equal to, the economic costs of raising a child. All five Law Lords in *McFarlane* discussed this approach, although only Lord Millett found that the case should turn on the benefits offset approach.[120] The benefits offset approach has been considered sensible and appropriate by many subsequent cases and commentators.[121]

Courts in Europe have refined this approach to take into account the motivation of the parents in having the original sterilisation operation.[122] These courts are more likely to award child-rearing damages if the motivation for the sterilisation was financial. However, if the motivation was emotional, then recovery for child-rearing costs is seen as less justified.[123] Again, this stems back to the belief that a child should not be considered a loss or harm by the law. Todd describes this as the "core contention" to allowing recovery and sees no reason why the economic loss should be separated from the emotional benefit to the parents in providing for their child's "happiness, self-esteem and security".[124] Nonetheless, there is no reason why the economic costs and emotional benefits need to be intertwined as a matter of law, and, in addition, it raises multiple complications and inconsistencies.

The first issue with the benefits offset approach is the impossibility of quantifying the benefits of having a child, in order to offset them against the economic losses. In *McFarlane*,[125] it was recognised that a child's life had inestimable value, and there is no evidence as to how the House of Lords itemised the factors to come to the conclusion that the benefits outweighed the losses.[126] Indeed, many criticise this approach because pecuniary and non-pecuniary factors should not be weighed against each other.[127] Strasser argues that even if there is plausibility in the idea that judges could assign a dollar value to the non-pecuniary benefits, it is not the case that these benefits would outweigh the cost in every case.[128] The fact that courts have assumed there is

119 Steininger, above n 111, at 132–133.
120 *McFarlane*, above n 94.
121 Alverez IJ "A Critique of the Motivational Analysis in Wrongful Conception Cases" (2000) 41 Boston College L Rev 585 at 598; Todd, above n 112, at 533.
122 At 598.
123 At 598.
124 Todd, above n 112, at 533.
125 *McFarlane*, above n 94.
126 *McFarlane*, above n 6; see also M Hogg "Damages for Pecuniary Loss in Cases of Wrongful Birth" (2010) 1 JETL 156 at 164.
127 Steininger, above n 111, at 137. This is the case in Germany.
128 Strasser, above n 115, at 193.

a balance, or that the benefits outweigh the harm, simply demonstrates the fundamental flaw with the approach. A blessing can be a burden and a child can be both, but this does not mean that there has not been a loss.[129]

The second main issue with the benefits offset approach is that it seems to imply that the more loving a parent, the less damages are available.[130] This is reproachable, as all children are born with equal value.

Finally, the motivation of the parents should be irrelevant to recovery for the cost of their unplanned child. Compensating certain parents discriminates against parents who were subject to the same negligence but who opted for sterilisation for different reasons.[131] This argument stems back to the fact that the parents simply did not ask for these benefits or burdens. They were imposed on them. The parents have already completed their own benefits/burden analysis when deciding to undergo a sterilisation operation. They have come to their own conclusion that the burden outweighs the benefits. Why should the courts reverse this conclusion? Ultimately, a benefits offset approach allows a child to go through life potentially "ill-clothed, ill-fed, and ill-educated," despite the fact that a claim for wrongful birth is based on the right of parents to protect and plan their families.[132]

Unlike the Court in *McFarlane,* the New Zealand Supreme Court in *Allenby*[133] steered away from using the benefits offset approach. This was a welcome contrast to previous cases. For example, in 1984 in *XY v ACC*[134] the Court stated that most parents would see it as a privilege to raise a child and that financial cost is part of the mutuality of the parent-child relationship.[135] More than 30 years later, Kós P (dissenting) in *J v ACC*[136] expressly doubted the application of this conclusion stating that it reflected different social conditions that prevailed at the time.[137] However, the majority of the Court of Appeal in *J v ACC*[138] listed what they saw were the broad considerations that would be taken into account in such cases if it came to the common law. Unfortunately, this included that the arrival of a healthy child is a blessing that outweighs the costs associated with bringing up that child.[139] While this statement is obiter, it was a significant step backwards for New Zealand. New Zealand should not follow precedent that has been described as "Lord Millet

129 Margaret Fordham "Blessing or Burden? Recent developments in Actions for Wrongful Conception and Wrongful Birth in the UK and Australia" (2004) Sing JLS 462 at 483

130 Kashi JS "The case of the unwanted blessing: wrongful life" (1977) 31 U Miami LR 1409 at 1417.

131 Alverez, above n 121, at 620.

132 Alverez, above n 121, at 621.

133 *Allenby*, above n 3.

134 *XY v ACC* (1984) 2 NZFLR 376.

135 At 381.

136 *J v ACC*, above n 4.

137 At [57].

138 *J v ACC*, above n 4.

139 At [40].

borrowing a page or two from Sophocles … and from some tenderer than thou book of soft core philosophy".[140]

c) Difficulty of quantification

The third argument against allowing child-rearing damages is the difficulty in quantifying the damage. While it is easy to accept that reasonable expenses incurred through child-rearing might include education, clothing and food, it can be difficult to know where the line is to be drawn. Todd argues that wedding expenses, tertiary education costs, adverse career prospects for the parents, and moral obligations owed by children to the parents in their old age could all be relevant factors.[141] He also questions the age at which child-rearing costs would end.[142] Because of this indeterminate nature, Todd argues that proper compensation would range too high for a court to deem palatable.[143]

However, it is only difficult to determine what the real range of costs would look like because courts, such as in *McFarlane*,[144] do not attempt to estimate costs before they deem them inestimable.[145] Strasser comments that there seems to be no reason why experts in the field could not give an estimate as they do in other areas of the law.[146] He cites *Marciniak v Lundborg*,[147] where the Wisconsin Supreme Court noted that estimates of child-rearing costs might be less speculative than calculations in many other malpractice actions, such as those involving pain, suffering, and mental anguish.[148] The same court also stated that population studies can provide figures about the costs of raising a child.[149] In *Rivera v State*,[150] a court of New York stated that insurance companies, estate planners and private parties in matrimonial settlements often make child-rearing estimations.[151] In other areas of tort law, such as defamation, courts are willing to establish several factors that assist judges in coming to a figure that represents the damage to a person's reputation. For example, extent of publication, defendant's social standing and the defendant's behaviour are all used to aggravate or mitigate damages.[152]

140 Thomas, above n 106, at 150.
141 Todd, above n 112, at 533.
142 Todd, above n 41, at 209.
143 Todd, above n 112, at 533.
144 *McFarlane*, above n 94.
145 Alverez, above n 121, at 606.
146 Strasser, above n 115, at 183.
147 *Marciniak v Lundborg* 450 NW 2d 243 (Wis 1990).
148 At 246.
149 At 246.
150 *Rivera v State* 404 NYS 2d (Ct Cl 1978) 950.
151 At 953.
152 These are now codified in the Defamation Act 1992, Part 3.

There is no reason why courts could not create a similar list of factors in wrongful birth cases. In fact, factors such as the cost of education, food, clothing and shelter are considerably more tangible than those in defamation cases.

In any case, parents should not be denied child-rearing damages just because it is too hard to determine what their real damage has been.[153] It is fair to assume that most parents in these cases would prefer a fair estimate of their child's cost even if it did not equate to full compensation, as opposed to nothing at all.

d) Causal responsibility issues

The fourth argument against allowing child-rearing damages is that there has been a break in the chain of causation, or a *novus actus interveniens*, between the doctor's negligence and the economic cost of raising the child. In failed sterilisation cases, applying the "but for" test means that the child would not have been born but for the doctor's negligence. In other words, the doctor's negligence caused the birth of the child.[154] One way to argue that this chain has been broken is by contending that child-rearing damages are a purely economic and separate head of damages and therefore not consequential on the pregnancy. This has the benefit of avoiding the child being considered the damage.[155] However, this argument became problematic when Lord Steyn in the House of Lords defined the child as the economic, rather than consequential, damage and relied on distributive justice in order to deny the parents' claim. Lord Steyn stated:[156]

> It is my firm conviction that where courts of law have denied a remedy for the cost of bringing up an unwanted child the real reasons have been grounds of distributive justice.

As such, Lord Steyn was purporting that distributive justice required the economic burden to fall on the parents rather than the negligent doctor because the causal chain was broken. This means that parents' duty to financially support their child superseded the duty of care that the doctor had.[157] As such, imposing liability on the doctor for child-rearing costs was seen to subject the doctor to a "medical paternal suit".[158] This view is

153 Bagińska, above n 109, at 181.
154 For an example of a pregnancy caused by an intervening act, as opposed to the initial treatment injury see *A v ACC* [2018] NZACC 3 at [33].
155 M Hogg "Damages for Pecuniary Loss in Cases of Wrongful Birth" (2010) 1 JETL 156 at 161.
156 *McFarlane*, above n 94, at 970.
157 Hogg, above n 155, at 161.
158 Thomas, above n106, at 125.

supported by Todd, who states that the complaint is not about the physical consequences to the mother from pregnancy, but about the consequences arising from the existence of the child.[159]

This argument is problematic as it relies on the premise of the economic cost of raising a child not being consequential on a pregnancy.[160]This is simply not the case. As has been stated, but for the doctor's negligence the child would not exist. Lady Hale has stated child-rearing costs are directly consequent on the "invasion of bodily integrity" suffered by a woman who did not wish to be pregnant.[161] For the purposes of ACC, an invasion of bodily integrity is a physical injury, and has been interpreted as such on several occasions.[162] Strasser has stated that a negligently performed sterilisation operation resulting in the birth of a child is not "difficult to anticipate".[163] Applying common sense, it would be difficult to find a reasonable person who believed that pregnancy would not directly result in the cost of raising a child.

The second issue with this line of reasoning is that categorising the harm as pure economic loss "coloured" the Lordships' views in *McFarlane* of what an ordinary person would consider compensable.[164] Based on pure economic loss, their Lordships held that economic loss from a healthy baby is generally regarded by society as a good thing.[165] Lord Steyn went so far as to state that if commuters on the Underground were asked if the parents of an unwanted but healthy child should be able to sue the doctor for the costs of raising the child the "overwhelming number of ordinary men and women would answer the question with an emphatic 'no'".[166] He gives no evidence as to this supposition and it can only be assumed that it is his own subjective view. In addition, it disregards the subjective desire of the mother to avoid such economic loss and the doctor's role in causing it. It is difficult to accept that child-rearing costs can be considered pure economic loss. They are inherently and inextricably linked to the pregnancy.

e) Duty to mitigate loss

159 Todd, above n 112, at 532.
160 Victoria Chico "Savior Siblings: Trauma and Tort Law" (2006) 14 Med LR 180 at 187.
161 In Thomas, above n 106, at 139.
162 *Patient A v Health Board X (Patient A)* HC Blenheim CIV2003406 14, 15 March 2005 per Baragwanath J at [55]; *ACC v D* [2007] NZAR 679 (HC) at [76]; *Cattanach* v Melchior [2003] HCA 38, (2003) 199 ALR 131 (although Hayne J saw the invasion into bodily integrity as the operation rather than the pregnancy itself).
163 Strasser, above n 115, at 186.
164 *McFarlane*, above n 94.
165 Chico, above n 160, at 189.
166 *McFarlane*, above n 94, at 970.

A further problem of causal attribution is the mother's tortious duty to mitigate her loss. In wrongful birth cases, this will manifest as the mother's duty to either abort or adopt her child.[167] This argument has not found favour in judgments where it has been raised.[168] The main problem with this line of thinking is that plaintiffs are only expected to take reasonable measures to mitigate their loss. Neither abortion nor adoption can or should be considered reasonable for any mother in this context.[169] The House of Lords in *McFarlane*,[170] as well as by Courts in Germany, Switzerland, Denmark, and multiple other jurisdictions have rejected this argument.[171] Indeed, it is an argument that has been described as carrying a "pungent odour of moral depravity".[172] In any case, it is contrary to public policy for the law to create obstacles for parents who are willing to raise their own children.[173] As such, it is fairly certain that this argument will not assist the denial of child-rearing damages.

Related to this argument is the proposition that awarding child-rearing damages might urge doctors to encourage abortion to avoid potential liability.[174] This argument is speculative at best.

C. Allowing Child-Rearing Costs

It has been seen that there are several disadvantages to courts making awards of damages for child-rearing costs, albeit none that is particularly compelling. However, the question remains as to whether allowing recovery for child-rearing costs has any particular advantages. For the answer to this, one needs to look no further than Australia.

In *Cattanach v Melchior*, the High Court of Australia found that the defendant doctor could be liable for the child-rearing costs of the Melchiors, whose child was born as a result of a failed sterilisation operation.[175] Mrs Melchior underwent a tubal ligation operation, whereby a Filshie clip was placed on her left fallopian tube. She was told that her right fallopian tube had been removed in her youth. However, her right fallopian tube was intact and she became pregnant and subsequently gave birth to a child. Mr and Mrs Melchior sued Dr Cattanach for the negligent advice and performance of the operation. They claimed damages for the pain and suffering during the pregnancy, and the costs associated with raising the child until he was 18. The High Court of Australia held that Dr Cattanach was negligent in not

167 Steininger, above n 111, at 141.
168 Hogg, above n 155, at 162.
169 Strasser, above n115, at 198.
170 *McFarlane*, above n 94.
171 Steininger, above n 111, at 142.
172 Kashi, above n 130, at 1418.
173 At 1417.
174 Steininger, above n 111, at 139.
175 *Cattanach*, above n 7.

advising Mrs Melchior that her right fallopian tube could still be intact. In doing so, the Justices stuck to principle, stating that arguments such as the need to preserve the family unit, the child as a blessing, and any perceived emotional benefits were unconvincing. Kirby J stated that:[176]

> The notion that in every case, and for all purposes, the birth of a child is a "blessing" represents a fiction, which the law should not apply to a particular case without objective evidence that bears it out.

It should be noted that *Cattanach* has not been received favourably in Australia and three states have since overridden the case through various statutory amendments.[177] However, *Cattanach* remains binding common law in the states of Victoria, Western Australia, the Northern Territory, the Australian Capital Territory, and Tasmania.[178] Like *MacFarlane*, the case has been criticised for being an extremely long decision with six separate judgments that do not reach a clear or binding consensus.[179]

Nonetheless, the Australian High Court's approach is preferable as it means that families have the ability to provide for their children, that doctors are held accountable for their negligence, and that the reproductive rights of women and families are respected.

a) Ensures the child has a secure upbringing

One advantage of allowing child-rearing costs is that it ensures the child has a secure upbringing. For example, the judges in *Cattanach*[180] found flaws in the argument that child-rearing damages would cause harm to the child, or be contrary to the principles of family law.[181] In particular, they found that the so-called moral concerns for not wanting the child to be considered harm actually hurts the child by ensuring that its parents do not have adequate funding to raise it.[182] In fact, the parents are placing value on the child's life in seeking the means that are necessary to raise it.[183] Owen Bradfield goes

176 *Cattanach*, above n 7.
177 See Justice and Other Legislation Amendment Act 2003 which amends the Civil Liability Act 2003, ss 49A and 49B (Queensland); Civil Liability Act 2002 s 71 (New South Wales); Civil Liability Act 1936 s 67 (South Australia); and Law Reform (Ipp Recommendations) Act 2004, s 58 inserts s 67 into the Civil Liability Act 1936 (South Australia).
178 See *G and M v Armellin* [2008] ACTSC 68; *Re A Medical Practitioner* [2008] TASSC 73; *Homsi v Homsi* [2016] VSC 354; *Roberts-Smith v Crawshaw* [2014] WASC 12.
179 Fordham, above n 130, at 481.
180 *Cattanach*, above n 7.
181 Bradfield, above n 118, at 313.
182 At 310.
183 At 311.

so far as to say that the parents' claim could be viewed as an indication of their emotional bond to the child, as they initially did not want children and now are seeking the economic means in order to properly raise it.[184] It is these people who might even be considered the most suited to parenting, and therefore the law should support them by ensuring they have the means necessary to provide for the previously unwanted child.[185] Therefore, the judges in *Cattanach*[186] were prepared to consider policy factors as inherently linked to the question of child-rearing damages.[187] This is the preferred approach, as it is the solution that both adheres to tort law principles, and truly benefits the child.

b) Doctor accountability

Common criticisms of allowing child-rearing costs are that it would cause insurers to lift premiums, doctors to refuse sterilisations, limit family planning methods, and take excess costs from the public hospital system that should be used elsewhere.[188] However, these arguments must be balanced against the need to compensate the family who has suffered an unjustified loss. The law should not shy away from finding doctors liable for fear that they will participate in defensive practice. That is why they have insurance. It is essentially a balance between distributive justice and corrective justice.[189] However, as has been stated above, the arguments in favour of distributive justice rely on classing the child as pure economic loss. Once it is accepted that the child is a direct consequence of the pregnancy caused by the doctor's negligence, the balance should tip in favour of corrective justice. Allowing child-rearing damages ensures that doctors are appropriately held accountable for their negligence. This point will be elaborated on in relation to ACC in section IV.

c) Exception for disabilities

A strong argument for allowing child-rearing damages is that it removes the discriminatory distinction between unwanted children born healthy, and those born disabled. In *Parkinson,*[190] it was held that despite the decision in *McFarlane,*[191] child-rearing damages were available for the cost of raising a child that was disabled. This was because applying the benefits/burdens offset approach, a healthy child and a disabled child are worth the same, but the

184 At 312.
185 Kashi, above n 130, at 1415.
186 *Cattanach*, above n 7.
187 Thomas, above n 106, at 153.
188 Bradfield, above n 118, at 314 [this is why ACC would be beneficial].
189 At 314.
190 *Parkinson*, above n 106.
191 *McFarlane*, above n 94.

disabled child simply costs more.[192] It has also been made an exception to the Australian statutory amendments that reversed the decision in *Cattanach v Melchior*.[193] Todd agrees with this approach, stating that one should "grasp the nettle" and recognise that a healthy child is a cause for celebration whereas a disabled child is a cause for condolence.[194]

However, this argument has been extensively criticised for being discriminatory, and offensive. Associate Health and Disability Commissioner Dr Cordelia Thomas states that the approach in *McFarlane*[195] suggests that a disabled child could never offer any joy or benefit to the family, which is untrue.[196] The judges in *McFarlane*[197] were unable to complete a benefits/burdens offset analysis because they were intangible. Disabled children are of intangible value to their parents.[198] McMurdo P in *Melchior v Cattanch* identified that it is offensive to suggest that disabled children cannot enrich the lives of their parents, as well as the wider community.[199] Owen Bradfield argues that if a healthy child is described as a blessing then it is implying that the birth of a disabled child is not a blessing.[200] He states that this is "not only unequal and unfair, but offensive".[201] Steineger points out that all the arguments against considering child-rearing damages apply irrespective of the disability of the child.[202]

Overall, it is questionable as to why disability would be the decisive factor in awarding child-rearing damages.[203] While it could be accepted that a child's disability might be a factor in quantifying the respective damages, it should not be the deciding factor as to whether parents receive any damages at all.[204] Practically speaking, it is questionable as to why the Judges in *McFarlane*[205] limited the disabled child's damages to childhood, where her/his disabilities and dependence may likely carry through into the entirety of her/his life.[206] It is also impossible to know how a young child's disabilities will affect them

192 *Parkinson*, above n 106; See also Stephen Todd *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at 393.
193 See above n 7; Joanna Manning "Civil Proceedings in Personal Injury Cases" in PDG Skegg and Ron Paterson (eds) *Medical Law in New Zealand* (Thompson Reuters, Wellington 2015) 1061 at 1098.
194 Todd, above n 112, at 536.
195 *McFarlane*, above n 94.
196 Thomas, above n 106, at 140.
197 *McFarlane*, above n 94.
198 Thomas, above n 106, at 141.
199 *Cattanach*, above n 7.
200 Bradfield, above n 118, at 311.
201 At 312.
202 Steininger, above 111, at 145.
203 At 145.
204 At 146.
205 *McFarlane*, above n 94.
206 Thomas, above n 106, at 141.

throughout their life.[207] Allowing child-rearing damages to all who can show that they became pregnant due to a doctor's negligence are preferable to a discriminatory outcome.

d) Reproductive freedom of women

Finally, the decision in *Cattanach*[208] ultimately protects the right of a woman to control her own body and the size of her family. The idea is that if a woman is free to decide all matters relating to childbearing, she should be free to control her fertility. It is that freedom that has been denied by the doctor's negligence.[209]

By allowing damages for the cost of child-rearing, the judgment in *Cattanach* respects the reproductive freedom of women and recognises that there are many circumstances and factors that will dictate whether a woman wants a child or not.[210] In particular, the problematic arguments against child-rearing costs, such as the argument that women should mitigate their loss through adoption or abortion (discussed above) are avoided. The mitigating their loss argument is nonsensical as, firstly, it is "tantamount to reproductive coercion" to infer that it is in some way a woman's duty to get rid of her child, and secondly, it is discriminatory towards parents who have strong religious or cultural beliefs that are anti-abortion or anti-adoption.[211]

Allowing child-rearing damages also respects the woman's choice to specifically avoid conception, pregnancy, birth and the raising of a child, without undermining this decision by calling her unwanted child a "blessing". As Owen Bradfield states, "having decided to evade these benefits, it hardly seems equitable to force them onto unwilling parents and then force the parents to pay for them".[212] In any case, it is clear that not all women will regard a child as a blessing, hence the extensive use of contraception.[213]

Ultimately, it is well recognised that parents have the right to determine the size of their family. Not allowing child-rearing damages would mean that this right was unsupported by the remedy necessary to protect it.[214] In effect, the woman will be penalised for exercising her autonomy in deciding to have a sterilisation operation.

Allowing the costs of child-rearing also ensures that women are not discriminated against. The impact of child-rearing (such as career limitations and financial responsibilities) falls disproportionately on women, so denial of damages could be seen as discriminatory. Thomas is a particular advocate for this argument, as gender equality is inherently related to a woman's ability

207 At 141.
208 *Cattanach*, above n 7.
209 Thomas, above n 106, at 153.
210 *Cattanach*, above n 7.
211 Bradfield, above n 118, at 317.
212 At 315.
213 At 311.
214 At 317.

to control her fertility.[215] She finds it ironic that judges have focused on the physical pain and suffering of childbirth, rather than the consequent child-rearing, considering the profound and lasting change a child can cause to a woman's life.[216] This lasting change impacts women more than men, as one in three children are raised by a solo parent, most commonly by the mother.[217] Allowing damages for the cost of raising a child removes this discriminatory financial burden.

D. Loss of Autonomy

It has been argued that allowing child-rearing costs is a significantly preferable option to denying child-rearing costs at the common law. However, there is a third option for parents to bring a claim for non-pecuniary loss arising out of the birth of their child. Loss of autonomy is an alternative claim that parents can bring in relation to the birth of the child after a failed sterilisation operation.

The concept arose in the United Kingdom in *Rees v Darlington*.[218] In this case, Ms Rees was visually disabled and opted for a sterilisation operation to avoid having children that she feared she would be unable to care for. However, the doctor did not adequately block her fallopian tubes, and did not tell Ms Rees that the sterilisation was unsuccessful. A year later she gave birth to her son. She issued proceedings in negligence for the cost of raising her son, including the additional expenses that she would incur as a result of her visual disability. The court did not feel it could overturn the decision in *McFarlane,*[219] issued four years prior, and therefore opted for a conventional lump sum that represented Ms Rees' loss of autonomy.

The loss of autonomy approach has several benefits. First of all, by refocusing on the parents, it avoids the pitfalls and arguments against the allowance of full child-rearing damages.[220] They are recovering for a breach of these reproductive rights due to the doctor's negligence, as opposed to recovering for the existence of a child. In effect, it sidesteps the moral dichotomy of classifying a child as a legal loss. Because of this, it is the most popular and least contested concept in relation to wrongful birth claims.[221]

However, this type of reward also sidesteps the true loss that has occurred. Full damages for the costs of raising the child are appropriate and justified. There is therefore no need for an alternative claim of loss of autonomy. This problem is demonstrated by the quantification of the lump sum reward. In

215 Thomas, above n 106, at 154.
216 At 155.
217 At 155.
218 *Rees v Darlington*, above n 8.
219 *McFarlane*, above n 94.
220 Steininger, above n 111, at 150.
221 Bagińska, above n 109, at 186.

Rees v Darlington[222] this was set at £15,000, although no explanation was given as to why this was the appropriate amount. Stephen Todd admits that there will be an "element of arbitrariness" in deciding the lump sum amount, but rationalises it on the basis that it assists the parents in re-organising their lives and adjusting to their new living conditions.[223] Why this rationalisation could not also apply to setting the amount for full child-rearing damages is unclear.

E. Application to New Zealand

It has been argued that compensation for child-rearing costs should be awarded in failed sterilisation cases brought under the law of torts. Kós P (dissenting) in *J v ACC*[224] expressly favoured *Cattanach*[225] because of what he saw as New Zealand's "progressive" approach to the law of torts.[226] Allowing child-rearing costs is in line with the general principles of negligence and ensures that children have a secure upbringing. It also avoids problematic arguments about the value of a child and the reproductive freedom of women.

However, the question remains as to whether the courts are the appropriate arbiter of this question in New Zealand. If the courts were to allow child-rearing costs, they would have to overturn *Allenby*[227] so that the statutory bar in ACA did not apply. This is consistent with Todd's arguments, as he states that the ACC scheme exists to compensate the consequences of accidents and medical treatment, not to pay for the economic consequences of having children.[228] That may be so under its current statutory wording, but there are also several reasons why the courts are not an appropriate place for dealing with wrongful birth claims.

First, there is a real risk of confusing and contradictory judgments as courts grapple with an inherently moral and political decision. Wrongful birth is a traditional tort until the related public policy concerns are considered.[229] Judges deny claims for compensation because of their moral opinion of not wanting to define a child as a loss. For example, the courts in *Allenby*[230] and *ACC v D*[231] both looked at the same legislative history of ACC, yet interpreted

222 *Rees v Darlington*, above n 8.
223 Todd, above n 41, at 210.
224 *J v ACC*, above n 4.
225 *Cattanach*, above n 7.
226 *J v ACC*, above n 4, at [70]. The majority of the Court of Appeal in this case leaned towards following *McFarlane.*
227 *Allenby*, above n 3.
228 Todd, above n 41, at 206.
229 Kimberley Wilcoxon "Statutory Remedies for Judicial Torts: The Need for Wrongful Birth Legislation" (2001) 69 U Cin L Rev1023 at 1053.
230 *Allenby*, above n 3.
231 *ACC v D*, above n 25.

it differently.[232] Their difference in interpretation was based on line drawing, the Court of Appeal taking a restrictive approach, and the Supreme Court taking an inclusive approach.[233] This inconsistency reflects the difficult public policy issues surrounding wrongful birth. Parliament has the fact-finding tools to investigate the impact and scope of wrongful birth, and the constitutional authority to make value judgements that judges struggle with.[234] As such, Parliament is better placed to decide where the line should truly be drawn.

Second, leaving claims for wrongful birth to the courts would be contrary to the purpose of ACC and the approach taken in New Zealand to personal injury litigation (which is mostly barred). ACC is intended to provide comprehensive no-fault cover for accidents and treatment injury. In *ACC v Ambros*,[235] it was noted that the aim of the ACC scheme developed a social contract by spreading the economic consequences of negligent behaviour over the whole community and to provide no-fault compensation.[236] Leaving out claims arising from failed sterilisation operations would lump the economic consequences of negligent behaviour on the doctor.

Third, New Zealand's unique framework of common law and ACC to cover personal injury leaves the law in an unstable position. On one hand, the judiciary has the task of interpreting the ACA in a way that is both unniggardly and just, but on the other hand, they do not set the parameters of funding. If the courts were to decide that compensation should be available for child-rearing costs following a failed sterilisation, they would not be in the position to adjust levies accordingly.[237] Therefore, the courts are put between a rock and a hard place, where they must interpret the ACA correctly, but also must take into account the policy considerations of not upsetting the financial stability of ACC.

IV. Expanding ACC

It has been argued that parents who suffer a failed sterilisation and end up with an unwanted child should be compensated by the law but that the judiciary is not best suited for dealing with this question. However, child-rearing costs are unavailable under the current ACC scheme. In this section it is argued that ACC should be expanded to include compensation for the costs of raising a child that was born due to a failed sterilisation operation. This option is preferable as it is consistent with the foundational principles of

232 Nicola Brazendale "*Allenby v H*: A Realignment with the Accident Compensation Scheme's Social Contract Roots?" (2012) 18 Auckland UL Rev 288 at 292.
233 At 292.
234 Wilcoxon, above n 229, at 1053.
235 *ACC v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.
236 At [25].
237 Ken Oliphant "Beyond Woodhouse: Devising New Principles for Determining ACC Boundary Issues" (2004) 35 VUWLR 915 at 922.

ACC, it ensures that doctors are not tied up in litigation, and is unlikely to cause extreme economic detriment to ACC.

A. Woodhouse Principles

In coming to the conclusion that ACC should be expanded to include wrongful birth, a look at the origins of ACC is required. In December 1967, the Commission of Inquiry into Compensation for Personal Injury, chaired by Mr Justice Woodhouse, released a report (known as the Woodhouse Report) to the Government that called into question the adequacy of common law damages for personal injury.[238] The Commission proposed replacing this common law regime with a no-fault statutory scheme based on comprehensive entitlement and administered as an independent authority.[239] The proposal was based on five core principles: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.[240] This proposal resulted in what is now the ACC scheme. Initially, these five core principles drove the interpretation of ACC, resulting in a generous and unniggardly approach to the scheme.[241] However, post the 1992 amendments, concerns of costs and fiscal responsibility dominated and cover began to be confined.[242] This confinement marked the beginning of the Woodhouse Principles, particularly comprehensive entitlement, being subverted.[243] In particular, the Woodhouse Report proposed a scheme that would be eventually extended to include illness and disability in order to fully realise the five core principles. This has not been achieved. Rather, the current scheme merely focuses on accidents and personal injury and does not fulfil the first two fundamental Woodhouse principles, community responsibility and comprehensive entitlement.[244] The lack of recognition of the principles has led some to call them "irrelevant" and at best "paid lip-service" or even ignored.[245] This does seem to be the case.

Ken Oliphant is a proponent of this belief, and questions whether the Woodhouse Principles can be seen as the foundation for the current ACC

238 SL Anderson "The Woodhouse Report on Compensation for Personal Injury in New Zealand (1969) 1 AULR 1 at 1.

239 At 1.

240 New Zealand. Royal Commission to Inquire into and Report upon Workers Compensation. *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967) [Woodhouse Report].

241 *ACC v Mitchell* [1992] 2 NZLR 436.

242 Tobin, above n 81, at 295.

243 Moinfar, above n 90, at 825.

244 Oliphant, above n 237, at 915.

245 At 925.

scheme.[246] He states that the Woodhouse Principles would provide guidance for a universal scheme that embraces both injury and illness, of which ACA is not.[247] Indeed, Woodhouse saw an accident scheme as a mere "temporary staging post on the road to universality".[248] Yet, since 1990, there has been limited discussion[249] for an extension of ACC to include sickness, disability or illness and the scheme has, if anything, been narrowed in some places and expanded in others.[250] While Oliphant agrees that failure to have proper regard to the foundational principles of ACC results in an incrementally extended, informal, ad hoc scheme, he would have new principles devised, rather than relying on the foundational principles already in existence.[251] Others believe that judges should still use the foundational Woodhouse Principles to interpret statutory words as broadly as possible.[252]

The litigation surrounding failed sterilisations and child-rearing costs emphasises the need to refocus ACC on these foundational principles in order for parents to be able to receive real compensation for their loss. The decision in *Allenby*[253] realigns ACC with the principles of the Woodhouse Report.[254] As such, taking an inclusive approach to ACC is in line with what ACC was originally intended to be.[255] It is simply inappropriate to leave wrongful birth to litigation in the private sphere.[256] Other failed surgical procedures are fully covered by ACC and leaving out failed sterilisations could call into question the inclusion of treatment injury in the ACC scheme at all.[257] Defining a pregnancy as a personal injury resulting in compensation for loss of employment undoubtedly creates some strain on the statutory wording. But it is within the spirit of the Woodhouse Report.[258] Therefore, it is the statutory wording that should be amended in order to give full effect to the core principles of ACC and fully compensate parents who have suffered loss.

B. Economic Considerations

246 At 915.
247 At 915.
248 At 917.
249 For some of the limited discussion see Geoffrey Palmer "New Zealand's Accident Compensation Scheme: Twenty Years On" (1994) 44 UTLJ 223; Geoffrey Palmer "Accident Compensation in New Zealand: Looking Back and Looking Forward" [2008] NZLR 81 at 89–90.
250 Oliphant, above n 237, at 921–922.
251 At 922.
252 Geoff McLay "Accident Compensation – What's the Common Law Got to Do With It?" [2008] NZLR 55 at 72.
253 *Allenby*, above n 3.
254 Brazendale, above n 232, at 288.
255 Moinfar, above n 90, at 810.
256 Oliphant, above n 237, at 936.
257 McLay, above n 252, at 74.
258 Rosemary Tobin "Common Law Actions on the Margin" [2008] NZ Law Review 37 at 53.

A common argument against including child-rearing costs in ACC is the potential cost that this would have to the Corporation. This is sometimes framed as the "floodgates" argument, whereby allowing one claim would open the floodgates to endless claims at an unsustainable cost. It has been the primary barrier to extending entitlements under ACC.[259] This is not to say that financial considerations are not tenable. There are obviously limits to what the ACC scheme will be able to afford. Indeed, costs associated with raising a child are likely to be quite substantial, however calculated.[260] However, while this is the case, there have been very few claims made in relation to failed sterilisations. As such, in the context of the entire ACC scheme, the costs are unlikely to be excessive or unmanageable.[261] In addition, the Court of Appeal has stated that the ACA does not purport to replicate tort law, and compensation arising out of ACC will not provide complete restitution, as would be available under tort law.[262] The Supreme Court has made similar comments that compensation should be "fair" rather than "full" and that this is a central plank to the social contract that ACC establishes.[263]

In any case, economic factors ought not to be the primary driving force behind ACC entitlements.[264] *McFarlane*[265] has come under particular criticism for the unarticulated and underlying policy that the National Health Service in the United Kingdom should not be hampered with the costs of raising unplanned children.[266] This is a problematic motivation for refusing child-rearing damages, as an individual suffering loss should not be left to bear that loss in order to protect the financial interests of the negligent defendant.[267] The fact that the defendant is publicly funded should not change this.[268] What should change is the state's ability to effectively compensate claimants who suffer loss at the hands of negligent state-financed defendants.[269] The argument that ACC should not be hampered with the financial burden of raising unplanned children is similarly flawed. The no-fault cover for treatment injury under ACC protects negligent doctors and this should not change in the context of a failed sterilisation operation.

One particular issue raised is that allowing recovery for child-rearing costs following a failed sterilisation operation would open the floodgates to pregnancies arising from other causes. The most common scenarios put forward are burst condoms, and rape. Failed sterilisation operations and burst

259 Oliphant, above n 237, at 921.
260 Todd, above n 41, 204–205.
261 Tobin, above n 39, at 215.
262 *ACC v Algie* [2016] NZCA 120, [2016] 3 NZLR 59 at [28].
263 *Davies v Police* [2009] NZSC 47, [2009] NZLR 189 at [18].
264 Oliphant, above n 237, at 992.
265 *McFarlane*, above n 94.
266 Steininger, above n 111, at 140. The speculation has been confirmed in *Rees v Darlington*, above n 8.
267 Steininger, above n 111, at 141.
268 At 141.
269 Fordham, above n 129, at 483.

condoms can be described as failed precautions.[270] It could even be argued that a burst condom that has been prescribed is a treatment injury.[271] Under a no fault scheme, it is reasonable to question why these types of accidents should not also be included.[272] In addition, pregnancies caused by rape are covered by ACA and there is therefore scope to argue that child-rearing costs should also be expanded to this scenario.[273] However, these scenarios involve accidents, rather than treatment injury, which is the focus of this article. A separate discussion would perhaps be required. In any case, the economic and floodgates concerns involve changes to levies and require line drawing based on policy. This is clearly a problem for Parliament.

C. Protecting Negligent Doctors

A key benefit of including treatment injury under the ACC scheme is that it protects doctors from facing litigation and private claims for compensation. One of the core policies of the accident compensation scheme was to exclude such claims.[274] Protecting doctors from civil liability is beneficial to them being able to go about their day-to-day operations.[275] In *Allenby*,[276] the Supreme Court noted that to hold that there was no cover under ACC would cause the doctor to have to pay for additional insurance cover over and above the ACC levies, or even to decline performing surgeries to avoid being sued.[277] This would be an unsatisfactory position for doctors and society.

D. Looking Forward

Expanding ACC to provide full comprehensive cover for treatment injury after negligent sterilisation operations is the best way to ensure that parents and doctors are properly protected and compensated. It is in line with the original aims of the Woodhouse Report and represents the true intention of a no-fault compensation scheme. Importantly, it puts the power in the hands of Parliament, rather than the courts, to decide the compensation limits, levies, rates and policy decisions related to child-rearing costs. Extensive changes to ACC cover are generally unpopular, and need to be undertaken carefully to avoid financial pitfalls as have occurred in the past.[278] Indeed, in the context of child-rearing costs, any type of recovery is going to be inherently messy

270 Connell, above n 24, at 189.
271 At 189.
272 Brazendale, above n 232, at 294.
273 *Allenby*, above n 3.
274 Moinfar, above n 90, at 806.
275 Brazendale, above n 232, at 293.
276 *Allenby*, above n 3.
277 At [77].
278 "Fixing up the ACC" Oct 15 2009 <www.stuff.co.nz>.

and controversial. Nonetheless, recovery for child-rearing damages following failed sterilisation operations is justified.

V. Conclusion

In New Zealand, the most appropriate place for child-rearing costs to be available is under an expanded ACC scheme. The litigation in *J v ACC* demonstrates the complexity of New Zealand's legal framework with the uncertain crossover of ACC and the common law. In particular, the courts are in a difficult position of interpreting the ACA expansively, but not being the ones setting the ACC levies. This has led to a narrow interpretation of s 103 and the Court of Appeal deciding that compensation for loss of income under ACC is not available following failed sterilisation operations past the birth of the child.[279] This case, along with *Allenby,*[280] also closes the door to a potential common law claim against the negligent doctor. This may be the appropriate interpretation of the current statute, but it is not the most appropriate outcome for New Zealand.

One option is for the Courts to overturn *Allenby* and open the possibility of claimants suing the negligent doctor for child-rearing costs.[281] However, this too presents difficulties. The international common law is not settled on the matter, and the topic is rife with moral judgements on issues of policy. The international decisions are discriminatory towards women and the disabled, and the arguments relating to women mitigating their loss through abortion or adoption are appalling. The Australian decision provides some hope, but the overriding statutes in several states are problematic. Ultimately, child-rearing damages cannot avoid issues of morality and policy. Arguably, such issues are best left for Parliament.

This brings the argument back to New Zealand and how child-rearing damages will be dealt with when they inevitably arise. Expanding ACC makes the most sense so cases such as *J v ACC* have appropriate and full compensatory cover. This enables Parliament to decide who can claim, when claims are appropriate and how much claimants can receive. It avoids courts making inappropriate decisions based in morality rather than law and is in line with the original aims of ACC in the Woodhouse Report. ACC, once expanded, solves the problems that have surfaced in the United Kingdom and Australia. Unlike these jurisdictions, New Zealand has the benefit of a pre-existing and functional ACC scheme. They should use it.

279 *J v ACC*, above n 4.
280 *Allenby*, above n 3.
281 *Allenby*, above n 3.