



GREENWAY CHAMBERS

WRONGFUL LIFE AND WRONGFUL BIRTH THE DICHOTOMY AND ASSESSMENT CHALLENGES

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OVERVIEW

- Wrongful Birth distinguished from Wrongful Life
- Wrongful Birth
 - *Cattanach v Melchior*
- Wrongful Life
 - *Harriton v Stephens*
 - *Waller v James; Waller v Hoolahan*



WRONGFUL BIRTH/WRONGFUL LIFE

- Wrongful Birth
 - Actionable
 - Claimant
 - Essence of the claim
 - Measure of loss
 - Part 11 CLA
- Wrongful Life
 - Not actionable
 - Claimant
 - Measure of loss

CATTANACH V MELCHIOR

- Wrongful birth claim bought by the parents of a child born following a failed sterilisation procedure
- Ms Melchior had given a history to Dr Cattnach that in 1967 her right ovary and fallopian tube had been removed. This history was not correct
- Dr Cattnach carried out the sterilisation procedure by applying a Filshie clip to Ms Melchior's left fallopian tube only
- Ms Melchior subsequently became pregnant following a transmigration of an ovum from the left fallopian tube to the right fallopian tube
- The plaintiffs alleged that in applying a clip to Ms Melchior's left fallopian tube, Dr Cattnach failed to observe that contrary to the history given by Ms Melchior, Ms Melchior in fact had a right fallopian tube

WRONGFUL BIRTH

HIGH COURT

- Special leave
- Sole issue recoverability of damages for raising and maintaining a child
- The High Court held, by majority, that the costs of raising a child were compensable



HIGH COURT

The appellants were negligent. The respondents as a result have incurred and will continue to incur significant expense. That expense would not have been incurred had the first appellant not given negligent professional advice. All of the various touchstones for, and none of the relevant disqualifying conditions against, an award of damages for economic loss are present here. Holmes J at first instance, as with McMurdo P and Davies JA on appeal, were right to identify those touchstones and apply Perre to the case as they did. No identifiable, universal principle of public policy dictates any different result. The damages are not indeterminate. That they should be awarded is also consistent with the underlying notion that their availability in tort serves as a measure of deterrence of tortious conduct.

Callinan J

HIGH COURT

- Costs recoverable whether child under a disability or not

... The differential treatment of the worth of the lives of those with ill health or disabilities has been a mark of the societies and political regimes we least admire. To prevent recovery in respect of one class of child but not the other, by reference to a criterion health, would be to discriminate by reference to a distinction irrelevant to the object sought to be achieved, the award of compensatory damages to the parents.

McHugh and Gummow JJ

Any denial of the cost of rearing and maintaining a child “is the business, if of anyone, of Parliament, not the courts”.

Kirby J

WRONGFUL BIRTH

HIGH COURT

- The position
 - In compensation for the birth of an unintended child resulting from the negligent conduct of a medical practitioner, parents may claim damages for the cost of raising and maintaining the child.



The philosophical dilemma

The question that this appeal raises is one that has exercised the minds of philosophers, theologians, scientists, legislators and lawyers throughout the world: may a child born profoundly disabled who probably would have been aborted by her mother had she been informed of the child's likely condition at birth, as she should have been, but negligently was not, by the medical practitioner responsible for her, sue the practitioner for damages?

Callinan J

- At first instance *Harriton* and *Waller* proceeded on agreed facts
- The Court determined the claims in answer to agreed questions
 - i. If the defendant(s) failed to exercise reasonable care in the management of the plaintiff's mother (and father), and but for that failure the plaintiff would not have been born, does the plaintiff have a cause of action against the defendants(s)?
 - ii. If so, what categories of damages are available?
- In both cases the trial judge answered "no" to the first question so the second question did not arise
- Court of Appeal (by majority) affirms decisions below

HARRITON V STEPHENS

- Wrongful life claim brought by a child born with severe disability caused by infection with the Rubella virus during the first trimester of her mother's pregnancy

The appellant [plaintiff at trial] alleges that if her mother had been given proper medical advice, her mother would have lawfully terminated the pregnancy. Nothing that the respondent doctor did, or failed to do, is alleged to have contributed to the appellant developing any of the disabilities from which she suffers. But it is alleged that if proper advice had been given to the appellant's mother, the appellant would not have been born.

Hayne J

HARRITON V STEPHENS

- Explanation of a claim for wrongful life as distinct from a claim for wrongful birth

It is important to an understanding of the right or interest which the appellant is seeking to protect, to maintain the distinction between suing the doctor for causing physical damage, being the disability, and suing the doctor for causing a "life with disabilities", as the case was put by the appellant in this Court. The former is immediately caused by rubella, whereas the latter is said to be immediately, or materially, or effectively caused by the doctor's failure to advise the mother such that her response would have been to obtain a lawful abortion. In the Court of Appeal, Spigelman CJ was of the opinion that it is not "possible to avoid or obfuscate the fact that an action by a disabled child, as distinct from an action by the parents, involves an assertion by the child that it would be preferable if she or he had not been born". This raises the difficult question of whether the common law could or should recognise a right of a foetus to be aborted, or an interest of a foetus in its own termination, which is distinct from the recognised right of a foetus not to be physically injured whilst en ventre sa mère, whether by a positive act or by an omission..

Crennan J

HARRITON V STEPHENS

- The fundamental problem of assessing damages for wrongful life compared to the alternative of no life at all
- The compensatory principle requires the plaintiff to show that because of the defendant's negligence he or she is worse off than he or she otherwise would have been
- In wrongful life claims the compensatory principle requires a plaintiff to show that by existing the plaintiff is worse off than he or she otherwise would have been
 - Spigelman CJ adverted to this difficulty:

The identification of what is to be regarded as 'acceptable' physical characteristics of children is a field into which the law should not, at least at this stage of the development of knowledge, in my opinion, enter. Specifically, the law should be very slow to decide how much 'disability' is to be regarded as acceptable. Is, for example, hereditary deafness enough?

HARRITON V STEPHENS

- The High Court made two findings
 1. Dr Stephens did now owe the Plaintiff a duty of care

Hayne J said:

It is because the appellant cannot ever have and could never have had a life free from the disabilities she has that the particular and individual comparison required by the law's conception of "damage" cannot be made. Because she has never had and can never have any life other than the life she has, with the disabilities she has, she cannot show that she has suffered damage, as that legal concept is now understood, as a result of a failure to give the advice she says her mother should have been given.

Callinan J said:

(T)he attempt to compare for the purpose of assessing damages, non-existence with the state of existence is impossible.

Crennan J described the assessment of damages as a “forensic impossibility” and “not amendable to being determined by a court by the application of legal method”

HARRITON V STEPHENS

- The High Court made two findings
 2. By majority, the High Court held that as the damage (being an essential part of the tort of negligence) could not be determined, the cause of action was not actionable

WALLER V JAMES & ANOR; WALLER V HOOLAHAN

- A wrongful life claim was brought by a child born with severe disability following artificial insemination of her mother using an embryo with a genetic deficiency
- The Plaintiff suffered a cerebral thrombosis the day following his discharge from hospital. He suffered permanent brain damage, cerebral palsy and uncontrolled seizures
- The Plaintiff and his parents sued the IVF specialist obstetrician Dr James, Ms Waller's attending obstetrician Dr Hoolahan and Sydney IVF Pty Ltd
- At trial the same questions as in *Harriton* were asked and determined in the same way
- In the Court of appeal the question of eugenics was raised by Spigelman CJ
- In the High Court the outcome was on all fours with *Harriton*

WRONGFUL LIFE

THE POSITION

Life with disabilities, like life, is not actionable.

Crennan J



GREENWAY CHAMBERS

ASSESSMENT CHALLENGES

OVERVIEW

- Part 11 of the CLA
- Commercial care and treatment
- Gratuitous care and treatment
- Loss of Earning Capacity
- NDIS



PERSONAL INJURY

- Part 2 of the CLA
- Mental Harm



ECONOMIC LOSS

CATTANACH

...the relevant damage suffered by the Melchiors is the expenditure that they have incurred or will incur in the future, not the creation or existence of the parent-child relationship.

Per McHugh and Gummow JJ

Abnormal or special needs for expenditure in care or maintenance.

Per Hayne J



70 APPLICATION OF PART

- (1) This part applies to any claim for damages in civil proceedings for the birth of a child, regardless of whether that claim is made in tort, in contract, under statute or otherwise.
- (2) This part does not apply to any claim by a child in civil proceedings (within the meaning of Part 1A) sustained by the child pre-natally or during birth.
- (3) This part does not apply to civil liability that is excluded from the operation of this Part by s 3B but, despite that section, does apply to liability of the kind referred to in s 3B(1)(a).

LIMITATION OF THE AWARD OF DAMAGES FOR THE BIRTH OF A CHILD

- (1) In proceedings involving a claim for birth of a child to which this Part applies, the court cannot award damages for economic loss for-
 - (a) the costs associated with rearing or maintaining the child that the claimant has incurred or will incur in the future, or
 - (b) any loss of earnings by the claimant whilst the claimant rears or maintains the child
- (2) Subsection (1)(a) does not preclude the recovery of any additional costs associated with rearing or maintaining a child who suffers from a disability that arise by reason of the disability'

COMMERCIAL CARE AND TREATMENT

- Past expenditure
- Future expenditure



NEVILLE V LAM (No. 3) [2014] NSWSC 607

- Endometrial ablation for severe menorrhagia
- Failed to advise her that she could still conceive
- Gave birth to a son with significant disabilities

CSR V EDDY

- Non-pecuniary loss
- Loss of Earnings
- Actual financial loss

*Their Honours approved a statement by Dixon CH in **Blundell v Musgrave (1956) 96 CLR 73 at 79 to the effect that, for such amounts to be recovered, they must be amounts that will be paid ‘whether [the plaintiff] obtain the amount from the defendant as damages or not’.***

Per Beech-Jones

COMMERCIAL CARE AND TREATMENT

- Parents have legal obligation to provide for their children
- Section 71(2) permits 'additional costs' consequent on disability
- Must establish will likely meet expenditure absent award



COMMERCIAL CARE AND TREATMENT

Until 18 years of age?

The issue appears to be an open one. Any entitlement beyond 18 years will depend on policy considerations. At this stage of the development of the law, If I was awarding damages I would limit them to the period up to [the plaintiff's] 18th birthday.

Per Hislop J



COMMERCIAL CARE AND TREATMENT

If, in principle, it is possible to recover such costs by way of damages for negligence in the provision of sterilisation services, then it is not east to see why the claim should be limited to the first 18 years of the life of the unintended child. It is a feature of affluent societies that children remain financially dependent upon their parents for longer periods. Many children are supported by their parents well beyond the age of 18. The claim in the present case did not cut out at the age when attendance at school was no longer compulsory (in Queensland, 15). Why it did not continue into a period of tertiary education is not clear.

Per Gleeson CJ, dissenting



NO ENTITLEMENT AT COMMON LAW

Such a claim was specifically excluded by Gummow and McHugh JJ in Cattanach (and not addressed by either of Kirby or Callinan JJ). Bearing in mind that the three dissentients in Cattanach would not allow recovery of any costs associated with rearing a child, it means that the judgments of at least five members of the High Court in Cattanach preclude recovery for the cost or value of voluntary care provided to a child in such cases.

Per Beech-Jones in *Neville*

LOSS OF EARNING CAPACITY

- No entitlement in NSW
- Need to review regime in different states and territories
- *Nouri v Australian Capital Territory* [2018] ACT 275



LOSS OF EARNING CAPACITY

With some reluctance have come to the view that notwithstanding the moral obligation that will continue to motivate the parents after Saba turns 18, they are not entitled to damages after this time. My decision is reinforced by the fact that after Saba reaches 18 there will be a legal obligation on NDIS to support her. I have no doubt this will not be to the same extent as the obviously excellent care she receives from her parents. Nevertheless, she will be entitled to support form this scheme.

Per Elkhaim J in *Nouri*



NATIONAL DISABILITY INSURANCE SCHEME ACT 2013

- (a) supporting the independence and social and economic participation of people with disability;
- (b) providing reasonable and necessary supports to disabled person, including early intervention supports, for participants in the scheme; and
- (c) promoting the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in mainstream community.

NDIS

- Not means tested.
- Legal obligation or discretionary spend?
- NDIA right of recovery from non-participant?





A word of caution

QUESTIONS?

