EDWARDS v BLOMELEY; HARRITON v STEPHENS; WALLER v JAMES*

WRONGFUL LIFE ACTIONS IN AUSTRALIA

CONTENTS

I INTRODUCTION

> Children all around the country are going into court and claiming that they should have been aborted. Parents are agreeing with their children, and they too are asking courts to award them damages because they did not abort.[1]

So begins one recent American article on the subject of wrongful life and wrongful birth claims in tort. An action for wrongful life is a claim brought by a child against a defendant for failing to prevent them from being born. Wrongful life claims need to be distinguished from wrongful birth claims,[2] in which the action is brought by the parent or parents of an unintended child. Typically, both types of action will be brought against an allegedly negligent medical service provider, although in both cases any genetic or disease-related birth defects exhibited by the child are not caused or produced by negligent diagnosis or treatment by a physician.

The gist of both claims is that, but for the medical practitioner's negligence and/or breach of contract in failing to sterilise the parent competently, or failing to detect a pregnancy or foetal abnormality at a sufficiently early stage for an

* [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) ('*Edwards*'); *Harriton v Stephens* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002) ('*Harriton*'); *Waller v James* [2002] NSWSC 462 (Unreported, Studdert J, 12 June 2002) ('*Waller*').

1 Kimberly D Wilcoxon, 'Statutory Remedies for Judicial Torts: The Need for Wrongful Birth Legislation' (2001) 69 *University of Cincinnati Law Review* 1023, 1023.

2 Terms such as 'wrongful pregnancy' and 'wrongful conception' are also found in the cases.

abortion to be procured, or similar breach of duty, the child would not have been born at all. From the mother's point of view, she has been deprived of an opportunity to manage her fertility, including choosing to terminate the pregnancy, and the opportunity to determine the size of her family. From the child's point of view, he or she has been born forced to suffer from disability and denied the opportunity of non-existence.

While wrongful birth claims have generally been accepted by the courts, wrongful life cases (despite their long history[3]) have been enormously controversial. This is because, when brought as negligence actions, wrongful life claims raise questions at all stages of the standard duty, breach, causation and harm paradigm. The extent and scope of the duty of care owed to the unborn, the identification of life as the relevant harm, and the causal nexus between harm and breach of duty are all problematic. In addition, there are significant difficulties concerning the appropriate measure of damages.

In Australia, the New South Wales Supreme Court has recently rejected three wrongful birth life claims in the cases of *Edwards*, *Harriton* and *Waller*, each decided by Studdert J. The decisions provide a useful overview of many of the legal and policy arguments surrounding the wrongful life and wrongful birth debates.

This case note canvasses the state of wrongful life claims in Australia and other key jurisdictions in light of the longstanding recognition of wrongful birth actions. Due to public policy objections and clear obstacles of legal principle, I conclude that there is little prospect of widespread acceptance of the wrongful life cause of action in the near future.

II THE FACTS

In each of *Edwards*, *Harriton* and *Waller*, it was alleged that the pregnancy in question would never have occurred, or would have been terminated, but for the negligence of the defendant. In each case, the plaintiff was born with significant disabilities not directly caused by the negligent act or omission. The claims were variously pleaded in negligence and breach of contract, or negligence alone. Whilst the facts differed somewhat, all three wrongful life cases were framed in such a way as to require the Court to determine as a preliminary matter of law the question of whether a cause of action for wrongful life is recognised at common law in Australia and, if so, what categories of damages are available.

Edwards arose out of an unsuccessful vasectomy procedure performed on the plaintiff's father. It was common ground between the parties that the doctor both failed to perform the vasectomy with reasonable care and skill and failed to

[3] Arguably, the first wrongful life claim was *Zepeda v Zepeda*, 190 NE 2d 849 (Ill Ct App, 1963). However, this case and others like it, although termed 'wrongful life' cases, are more properly viewed as 'dissatisfied life' cases, typically based on allegations of injury stemming from illegitimacy. See generally Harvey Teff, 'The Action of "Wrongful Life" in England and the United States' (1985) 34 *International and Comparative Law Quarterly* 423. Wrongful life cases as currently understood may more properly be regarded as originating with *Gleitman v Cosgrove*, 227 A 2d 689 (NJ, 1967).

advise the parents that the vasectomy had failed or had probably failed.[4] It was conceded that the defendant's negligent operation and advice was the cause of the child's conception and birth.[5] The plaintiff was born with a rare chromosomal disorder known as 'Cri du Chat syndrome', with symptoms including both intellectual and motor disability, speech and language impairment, hyperactivity, sleep disorders and various other conditions.

In *Harriton*, the plaintiff's mother was wrongly advised that an illness she had contracted during the first trimester of pregnancy was not rubella. The child was born blind and deaf with significant physical and mental impairment. Her condition was such that she would require 24 hour a day care for her entire life, with no prospect of improvement. The parents were barred by the *Limitation Act 1969* (NSW) from bringing a separate claim, as the plaintiff was 21 years old at the time of the hearing.

Waller arose in the context of in vitro fertilisation. The plaintiff's father suffered from antithrombin 3 (AT3) deficiency, known to the defendants but not investigated, which was passed to the plaintiff. Several days after birth the plaintiff suffered a cerebral thrombosis, resulting in permanent brain damage, cerebral palsy and uncontrolled seizures. Had the parents been advised that the AT3 deficiency was genetic and could be passed to their child, they would either have deferred egg harvest or embryo transfer until suitable testing for AT3 was identified, or else have used donor sperm. The plaintiff claimed general damages, economic loss and *Griffiths v Kirkemeyer*[6] damages for gratuitous domestic and nursing services.

III THE STATE OF THE LAW

Given that there were no binding Australian decisions on the issue of wrongful life,[7] Studdert J conducted an extensive review of decisions in wrongful life cases across a range of other jurisdictions. I shall focus upon cases from the England, the United States and France.

A *England*

The decision of the Court of Appeal in *McKay v Essex Area Health Authority*[8] is the most influential precedent on the subject of wrongful life. *McKay* was the first case in England in which the novel cause of action was considered and its

[4] *Edwards* [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) [3].

[5] Ibid.

[6] (1977) 139 CLR 161.

[7] Only two Australian authorities were considered by Studdert J, both involving children born disabled as a result of rubella or measles contracted by the mother during pregnancy: *Bannerman v Mills* [1991] Aust Torts Reports ¶81-079; *Hayne v Nyst* (Unreported, Supreme Court of Queensland, Williams J, 17 October 1995).

[8] [1982] QB 1166 ('*McKay*').

arguments against the recognition of wrongful life claims have convinced judges[9] and legislators[10] around the common law world.

Like *Harriton*, *McKay* concerned a child whose severe disabilities resulted from rubella. The child plaintiff sued both the hospital laboratory operated by the defendants and her mother's treating doctor. The laboratory's alleged negligence lay in failing to make or interpret the tests of the mother's blood samples or to inform the doctor of the results, whilst the doctor's alleged negligence concerned a failure to advise or inform the mother of the desirability of an abortion.

I shall now examine the principal arguments put forward in *McKay*, concerning issues of duty of care, the nature of the harm suffered and questions of public policy.

1 *Duty of Care*

It was conceded in *McKay* that a duty of care was owed to the unborn child by both defendants. Cases such as *Watt v Rama*,[11] *Burton v Islington Health Authority*,[12] *de Martell v Merton & Sutton Health Authority*[13] and *X and Y (By Her Tutor X) v Pal*[14] placed the existence of such a duty beyond dispute. The duty may even exist and be breached prior to a plaintiff's conception.[15] In the Court's opinion in *Edwards*, this duty was confined to a responsibility not to injure the child, whether by act or omission, before or after birth.[16] It was accepted that a duty would lie, for example, in cases such as those involving the drug thalidomide.[17]

The child's right not to be injured before birth had not been infringed by either defendant in *McKay*, so that

> [t]he only right on which she can rely as having been infringed is a right not to be born deformed or disabled, which means, for a child deformed or disabled before birth by nature or disease, a right to be aborted or killed.[18]

In both *McKay* and *Harriton* it was argued that the duty was not so extensive, but could be confined to a duty to give the mother an opportunity to choose whether or not to abort. In *Harriton*, the mother and child were said to be a 'unity in duality' during the pregnancy, with the mother acting as agent for the child.[19] Therefore the duty owed to the child was identical to that owed to the mother. Nonetheless, it is clear that, as with other loss of chance cases, it is fundamental

[9] Studdert J described the case as 'very persuasive authority': *Edwards* [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) [50].

[10] The *Congenital Disabilities (Civil Liability) Act 1976* (UK) c 28 now precludes any possible action for wrongful life in the United Kingdom. This statute was passed while *McKay* was being considered by the English courts.

[11] [1972] VR 353.

[12] [1993] QB 204.

[13] [1992] 3 All ER 820.

[14] (1991) 23 NSWLR 26.

[15] Ibid 37 (Clarke JA).

[16] [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) [63].

[17] See, eg, *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458.

[18] [1982] QB 1166, 1178 (Stephenson LJ).

[19] *Harriton* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002) [15].

to the success of such claims that the plaintiff establish that she would have actually exercised the lost opportunity had she been correctly advised.[20] The distinction then rests not on whether to abort but on whether the decision to abort lies with the doctor or the mother. In both situations, the outcome for the unborn child is the same. Stephenson LJ in *McKay* held that neither defendant owed the child a duty to give the mother an opportunity to abort, even though that duty may be owed to the mother, reasoning that

> [t]o impose such a duty towards the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy. It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving.[21]

In *Harriton*, Studdert J regarded the authorities as not assisting the plaintiff, and the decision in *McKay* as being directly against her on this point. His Honour, 'fortified by considerations of public policy', thus concluded that '[consistent] with *McKay* ... the content of the duty of care owed to the plaintiff was not to injure her, and nothing else.'[22] This view of the duty of care may be questioned. In cases such as *Hill v Van Erp*,[23] for example, which concerned a beneficiary deprived of an intended bequest due to the solicitor's negligence in drawing up the will, the High Court accepted that a duty of care in tort was owed to the beneficiary. The unborn child may be said to be in a similar situation in terms of the foreseeability of damage or loss occurring in the event of negligence towards the mother.

However, in *Hill v Van Erp* the loss sustained was purely economic. In contrast, in wrongful life cases it could be argued that the child is born with two injuries, one being the physical condition (not caused by the doctor) and the other being the need for ongoing and special care which is causally connected with the medical practitioner's breach of duty. Although a similar argument was rejected in *Edwards* on the grounds that it misconceived the distinction between damage and damages, no reasons were given and the conclusion is open to doubt.

The plaintiff in *Harriton* argued that had the defendant given proper advice to the plaintiff's mother, there would have been no loss suffered because the plaintiff would not have been born. Because of the failure to give accurate advice, the plaintiff was born and consequently confronted with extraordinary expense as a result of her disabilities. As such, counsel for the plaintiff contended that her claim could therefore be properly regarded as a claim for pure economic loss rather than as one for personal injury.[24] Studdert J was 'not attracted by

[20] See, eg, *Bennett v Minister for Community Welfare* (1992) 176 CLR 408; *Chappel v Hart* (1998) 195 CLR 232. This point was explicitly made by Stephenson LJ in *McKay* [1982] QB 1166, 1179.

[21] [1982] QB 1166, 1180.

[22] *Harriton* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002) [21].

[23] (1997) 188 CLR 159.

[24] *Harriton* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002) [45]–[46].

this ... submission.'[25] His Honour felt that

> [t]o categorise the 'damage' suffered by the plaintiff as pure economic loss disregards the essential nature of the claim, namely that it is one which allegedly arises in consequence of physical harm suffered; hence it ignores the fundamental distinction emphasised in *Mahoney v Kruschich (Demolitions) Pty Ltd* between 'damage' and 'damages'.[26]

2 *The Nature of the Harm Suffered*

In *McKay*, Stephenson LJ pointed out that, under the normal compensation principle of restitutio in integrum, the plaintiff would need to be compensated for the difference between the value of his or her life as a healthy normal child and the value of his or her life as an injured child. To characterise the harm in this way in wrongful life cases raises major problems of causation, in that defendants who had not caused the injury would be expected to compensate the plaintiff for it. As a matter of law, all the defendant has done is create a necessary precondition for the harm to occur, which is insufficient to establish causation.[27] The only loss for which defendants can be held liable is that caused by their negligence, which in wrongful life cases is the difference between the child's present disabled existence and no existence at all. Defining 'existence', of whatever nature, as a 'loss' or 'harm' was recognised in *McKay* as leading to an 'intolerable and insoluble problem'.[28] Ackner LJ asked:

> how can a court begin to evaluate non-existence, 'the undiscovered country from whose bourn no traveller returns?' No comparison is possible and therefore no damage can be established which a court could recognise. This goes to the root of the whole cause of action.[29]

Stephenson LJ commented that

> [e]ven if a court were competent to decide between the conflicting views of theologians and philosophers and to assume an 'after life' or non-existence as the basis for the comparison, how can a judge put a value on the one or the other, compare either alternative with the injured child's life in this world and determine that the child has lost anything, without the means of knowing what, if anything, it has gained?[30]

These sentiments were strongly endorsed in *Edwards*:

> there are many in society who believe that the gift of life affords the opportunity for life after death and to all such persons the notion that non existence may be preferable to life with disabilities, however severe, is surely unaccept-

25 Ibid [47].
26 Ibid.
27 See, eg, the illustration given by Deane J in *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506, 523 to the effect that the fact that a person has a head is not a cause of his or her being decapitated, notwithstanding that possession of a head is an essential precondition of decapitation.
28 [1982] QB 1166, 1192 (Griffiths LJ).
29 Ibid 1189.
30 Ibid 1181.

> able. ... [H]ow can a worldly court resolve this conflict between believers and non-believers?[31]

3 *Public Policy*

In rejecting 'this novel cause of action'[32] in *McKay*, Stephenson LJ made it clear that his view was arrived at as a matter of principle and public policy, rather than merely based on logic or absence of precedent. The first concern, already noted, was that to allow the cause of action would bring into question the value of human life. Ackner LJ took a similar view, emphasising the 'sanctity of human life'[33] and the 'social implications in the potential disruption of family life and bitterness which it would cause between parent and child'.[34]

Griffiths LJ was strongly influenced by a second public policy concern, namely the difficulties in assessing damage and the problem of defining the class of eligible plaintiffs suffering from different degrees of disability. Noting the 'element of artificiality' in assessing damages for traditional types of personal injury, for example the impossibility of correlating pain and money, Griffiths LJ nevertheless felt that 'rough justice' could be achieved.[35] This is because the process is anchored to the pre-injury condition of the plaintiff, a condition that can be ascertained with reasonable certainty. It is in this respect that wrongful life claims differ so markedly from other personal injury assessments, in that 'the common law does not have the tools to fashion a remedy in these cases'.[36] As the Supreme Court of Texas has pointed out:

> It has long been held that imprecision of damages is not a bar to recovery. But this is not just a case in which the damages evade precise measurement. Here, it is impossible to rationally decide whether the plaintiff has been damaged at all.[37]

A final source of apprehension was that recognition of wrongful life claims would open the courts to claims by disabled children against their mothers for not having an abortion.[38] This was seen as a greater objection than the extra burden which would fall on doctors.

B *The United States*

The United States is the only jurisdiction in which a sizeable number of wrongful life claims has been brought. The cause of action has been rejected in 26 States,[39] and recognised in only four: California, Connecticut, New Jersey and

[31] *Edwards* [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) [75].
[32] *McKay* [1982] QB 1166, 1184 (Stephenson LJ).
[33] Ibid 1188.
[34] Ibid.
[35] Ibid 1192.
[36] Ibid 1193 (Griffiths LJ).
[37] *Nelson v Krusen*, 678 SW 2d 918, 925 (Tex, 1984) (citations omitted).
[38] *McKay* [1982] QB 1166, 1181 (Stephenson LJ).
[39] *Elliott v Brown*, 361 So 2d 546 (Ala, 1978); *Walker by Pizano v Mart*, 790 P 2d 735 (Ariz, 1990); *Lininger v Eisenbaum*, 764 P 2d 1202 (Colo, 1988); *Garrison v Medical Centre of Delaware Inc*, 581 A 2d 288 (Del, 1989); *Kush v Lloyd*, 616 So 2d 415 (Fla, 1992); *Atlanta*

Washington. California was first, with the decisions in *Curlender v Bioscience Laboratories*[40] and *Turpin v Sortini*.[41]

In *Curlender*, the child plaintiff suffered from a genetic defect known as Tay-Sachs disease. He was awarded damages for pain and suffering and any special pecuniary loss resulting from his impaired condition. The Court commented on the 'groundless' fear expressed in earlier decisions (such as *McKay*) that recognition of wrongful life claims would enable parents to be sued by their offspring for failing to procure an abortion.[42] Their Honours reasoned that in a situation in which the parents had been correctly advised and still chose not to abort, the parental decision would constitute a *novus actus interveniens*, absolving medical personnel from liability. In these circumstances, the Court concluded 'we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring.'[43]

Turpin v Sortini was a decision of the Supreme Court of California, concerning an appeal by a child born with hereditary deafness. An incorrect diagnosis of an older sibling's deafness had deprived the parents of an opportunity not to conceive the plaintiff. Notwithstanding the extra degree of separation, that is, the duty here being owed to the older sibling rather than to the plaintiff or her parents, the Court allowed the plaintiff's claim for extraordinary expenses for specialised teaching, training and hearing equipment over her lifetime, whilst disallowing the claim for general damages.[44]

In *Procanik v Cillo*, the Supreme Court of New Jersey allowed a child plaintiff born with congenital rubella syndrome to recover, by way of special damages, the extraordinary medical expenses referable to his disability.[45] The child's claim for general damages to compensate for pain and suffering and a diminished child-

Obstetrics & Gynecology Group v Abelson, 398 SE 2d 557 (Ga, 1990); *Blake v Cruz*, 698 P 2d 315 (Idaho, 1984); *Siemieniec v Lutheran General Hospital*, 512 NE 2d 691 (Ill, 1987); *Cowe v Forum Group Inc*, 575 NE 2d 630 (Ind, 1991); *Bruggeman v Schimke*, 718 P 2d 635 (Kan, 1986); *Petre v Opelousas General Hospital*, 517 So 2d 1019 (La Ct App, 1987) (affirmed in part and reversed in part on other grounds in 530 So 2d 1151 (La, 1988)); *Kassama v Magat*, 767 A 2d 348 (Md, 2001); *Viccaro v Milunsky*, 551 NE 2d 8 (Mass, 1990); *Strohmaier v Associates in Obstetrics & Gynecology*, 332 NW 2d 432 (Mich Ct App, 1982); *Wilson v Kuenzi*, 751 SW 2d 741 (Mo, 1988); *Greco v United States*, 893 P 2d 345 (Nev, 1995); *Azzolino v Dingfelder*, 337 SE 2d 528 (NC, 1985); *Smith v Cote*, 513 A 2d 341 (NH, 1986); *Gleitman v Cosgrove*, 227 A 2d 689 (NJ, 1967); *Becker v Schwartz*, 386 NE 2d 807 (NY, 1978); *Flanagan v Williams*, 623 NE 2d 185 (Ohio Ct App, 1993); *Hester v Dwivedi*, 733 NE 2d 1161 (Ohio, 2000); *Ellis v Sherman*, 515 A 2d 1327 (Pa, 1986); *Nelson v Krusen*, 678 SW 2d 918 (Tex, 1984); *James G v Caserta*, 332 SE 2d 872 (W Va, 1985); *Dumer v St Michael's Hospital*, 233 NW 2d 372 (Wis, 1975); *Beardsley v Wierdsma*, 650 P 2d 288 (Wyo, 1982); *Phillips v United States*, 508 F Supp 537 (1980).

40 106 Cal App 3d 811 (1988) ('*Curlender*').

41 643 P 2d 954 (Cal, 1982).

42 *Curlender*, 106 Cal App 3d 811, 829 (1988).

43 Ibid.

44 *Turpin v Sortini*, 643 P 2d 954, 957, 964–5 (Cal, 1982).

45 478 A 2d 755 (NJ, 1984). The Supreme Court of Washington also confined damages awarded to special costs referable to the plaintiffs' disabilities in *Harbeson v Parke-Davis Inc*, 656 P 2d 483 (Wash, 1983).

hood was rejected. The Court referred to the perplexing philosophical problem of deciding between defective life and no life, and said:

> Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living. We seek only to respond to the call of the living for help in bearing the burden of their affliction.[46]

Despite these three major cases, one can only conclude (as did Studdert J in *Edwards*) that the difficulties in establishing harm, proving causation and calculating damages, as well as public policy concerns about the preciousness of human life, present a major stumbling block for the recognition of wrongful life as a cause of action, even in the United States.[47]

C *France*

One possible solution for plaintiffs in wrongful life cases would be to frame their claims in terms of contract instead of tort. This is the approach taken in France. Recently there, a wrongful life claim was upheld by the Full Chamber of the *Cour de Cassation*.[48] This case was based on the general principle under the French *Code Civile* that a third party to a contract may be compensated for loss resulting from harm caused in the irregular performance of a contract.

However, because of the differences between the French and common law legal systems, including the presence of the *Code Civile* in France and the operation of the doctrine of precedent in common law countries, this case is of limited relevance to Austalian plaintiffs. The doctrine of privity of contract precludes any suit in Australia by a child for breach of contract against the mother's treating doctor or service provider. Cases such as *Hill v Van Erp*[49] overcome any difficulties in tort about duties being owed to third parties to a contract. Attempts to evade the restrictions of the privity doctrine by utilising devices such as agency, trust and others canvassed in *Trident General Insurance Co Ltd v McNeice Bros Pty Ltd*,[50] for example, would seem to have little prospect of success. Whilst a number of Justices of the High Court of Australia were willing to consider inroads on the privity doctrine in the context of a third party beneficiary being denied a benefit under the contract in *Trident*,[51] wrongful life cases do not present a parallel situation.

One line of argument put by the plaintiff in *Harriton*[52] relied on the decision in *Trident*. The Court was urged to recognise the existence of a trust of any contractual promise expressed by the defendant to the plaintiff's mother. It was suggested that the existence of a trust could be inferred from the circumstance

46 *Procanik v Cillo*, 478 A 2d 755, 763 (NJ, 1984).
47 [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) [35].
48 *Perruche* (2000) Case No 9913701 (Unreported, *Cour de Cassation Assemblée Plénière*, 17 November 2000).
49 (1997) 188 CLR 159.
50 (1988) 165 CLR 107 ('*Trident*').
51 See the judgments of Mason CJ and Wilson J, Toohey J, and Gaudron J.
52 [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002) [76]–[78].

that any contract with the plaintiff's mother was made for the benefit of the plaintiff. This argument was rejected by Studdert J, on the ground that his Honour could find no basis for any contractual obligation owed by the defendant towards the child plaintiff.[53] *Trident* was confined to determination of the extent of liability under a public liability insurance policy. Various attempts to base similar arguments on statutory provisions were also rejected.[54] In any case, claims brought in contract would still be faced with a variant of the public policy barriers identified in tort claims, such as whether there was an implied term to abort, whether non-existence could be classed as a benefit, as well as the difficulties involved in assessment of damages.

IV Decisions on Wrongful Birth

Although the courts have been reluctant to accept wrongful life as a cause of action, there is ample authority to support the existence of a tort of 'wrongful birth'. These are claims that as a result of the alleged medical negligence, the mother gives birth to an unwanted child (which may or may not be unhealthy), even though the doctor's acts or omissions do not inflict direct, physical injury to the child.[55]

Causation is simple to establish where the wrongful birth claim arises from failed sterilisations or abortions which occur as a consequence of allegedly negligent operative technique. The birth of the unwanted child is the very event which the patient sought to avoid, and the medical practitioner's acts or omissions have led to the unwanted result. The causation issue is more complex where the pregnancy is wanted but the foetus is abnormal. This Part reviews the key wrongful birth cases in Australia and England and considers whether these decisions should influence the jurisprudence on wrongful life claims, as was argued by counsel in *Edwards*, *Harriton* and *Waller*.

A *England*

There have been a number of decisions at a high level recognising wrongful birth as a cause of action in England. In *Udale v Bloomsbury Area Health Authority*,[56] the plaintiff gave birth to a healthy child following a negligently performed sterilisation procedure. She was awarded damages for pain and suffering and loss of earnings during pregnancy, as well as damages to reflect the disturbance of the family's finances. The claim for the cost of the child's upbringing was rejected on public policy grounds.[57] *Emeh v Kensington & Chelsea & Westminster Area Health Authority*[58] also featured an unsuccessful sterilisation

[53] Ibid [78].
[54] *Edwards* [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) [129]–[133].
[55] Law Book Company, *Laws of Australia*, vol 27 (at 1 November 2002) 27 Professional Liability, '3 Negligence' [16].
[56] [1983] 2 All ER 522 ('*Udale*').
[57] Ibid 530–1.
[58] [1985] QB 1012 ('*Emeh*').

procedure, but in this case the child was born with congenital abnormalities. Damages were claimed for breach of contract in respect of the pregnancy, birth and upkeep of the child. The Court of Appeal, disapproving *Udale*, allowed the damages claimed and declined to limit them to extra costs related to the child's disability.[59] *Thake v Maurice*[60] was an action brought concurrently in tort and contract for the birth of a healthy child following a negligently performed vasectomy. Again, the Court of Appeal held that damages were recoverable in tort for the mother's pain and suffering associated with the pregnancy, along with the costs of the child's upbringing.[61]

Both *Emeh* and *Thake* were overruled recently by the House of Lords in *McFarlane v Tayside Health Board*.[62] In *McFarlane*, the mother's claim for pain and discomfort associated with the pregnancy and delivery of a healthy child was allowed, but not the parents' joint claim for the cost of the child's upbringing. Lord Steyn said that considerations of distributive justice precluded acceptance of the claim,[63] whilst Lord Clyde felt that the parents' joint claim went beyond restitution for the wrong.[64] In *Parkinson v St James & Seacroft University Hospital NHS Trust*[65] (decided after *McFarlane*), the plaintiff was allowed to recover some costs of raising a disabled child, limited to extra expenses associated with the child's disability. *Groom v Selby*[66] and *Rees v Darlington Memorial Hospital NHS Trust*[67] were the most recent cases considered, decided in 2001 and 2002 respectively. In both cases, the plaintiff recovered additional costs referable to the difference between bringing up a healthy child and a disabled child.

B *Australia*

Wrongful birth claims also have a respectable pedigree in Australia. Cases here include *Veivers v Connolly*,[68] *CES v Superclinics (Australia) Pty Ltd*[69] and *Melchior v Cattanach*,[70] all decisions at the State appellate level. In *Veivers*, the mother of a severely handicapped child, born as a consequence of the defendant's negligence, recovered costs associated with past and future care of the child, covering a period of 30 years. In *CES*, the repeated failure by the defendants to diagnose a woman as pregnant resulted in the plaintiff mother losing the opportunity to terminate her pregnancy lawfully. The child in that case was not

[59] Ibid 1025 (Slade LJ).
[60] [1986] QB 644 ('*Thake*').
[61] Ibid 682–3 (Kerr LJ).
[62] [2000] 2 AC 59 ('*McFarlane*').
[63] Ibid 82–3.
[64] Ibid 105–6.
[65] [2002] QB 266.
[66] (2002) 64 BMLR 47.
[67] [2002] 2 All ER 177.
[68] [1995] 2 Qd R 326 ('*Veivers*').
[69] (1995) 38 NSWLR 47 ('*CES*').
[70] [2001] QCA 246 (Unreported, McMurdo P, Davies and Thomas JJA, 26 June 2001) ('*Melchior*').

disabled. The New South Wales Court of Appeal allowed her claim in a split decision. Priestly JA held that damages recoverable did not include the costs of raising the child, because it was argued that the child could have been adopted.[71] Kirby P would have allowed damages for the cost of raising the child,[72] while Meagher JA considered that the cause should fail.[73]

The Queensland Court of Appeal decision in *Melchior* is the leading Australian case on assessment of damages in wrongful birth claims, and is currently on appeal to the High Court.[74] In *Melchior* the parents were held to be entitled to recover the reasonable costs of raising the child, the Court declining to follow the contrary view laid down by the House of Lords in *McFarlane*.[75]

C *Distinguishing Wrongful Birth Claims*

It is assumed by the Australia courts that wrongful birth is a recognised cause of action on proof of negligence.[76] Some damages are recoverable for past and ongoing costs of raising a disabled child, although the measure of such damages is still unsettled and will remain so until the High Court considers the issue in the *Melchior* appeal.

The central questions for present purposes are: what is, or should be, the relationship between the established tort of wrongful birth and any emerging cause of action of wrongful life? Should the availability to a child's parents of a wrongful birth action preclude the opportunity for the child to launch a wrongful life claim?

In *Harriton*, Studdert J addressed various arguments made by the plaintiff urging that a wrongful birth action by the parents was not a satisfactory substitute for recognition of an independent claim by the child. These arguments were based on consistency, coherence and distributive justice, as well as on various financial considerations. It was submitted that

> it would be wrong to recognise a remedy as being available to the parent and yet deny that same remedy to the child when in a very real way the burden of meeting costs ... is the burden of the child born disabled and any damages recover[ed] ... by the parent would be for the benefit of the child.[77]

However, the 'coherence and consistency' argument is something of a double-edged sword, since Lord Steyne in *McFarlane* was able to conclude that 'coher-

71 Ibid 79–85.

72 Ibid 70, 78.

73 Ibid 85–7.

74 *Cattanach v Melchior* (No B59 of 2001); special leave to appeal granted 19 March 2002 (Gaudron and Kirby JJ).

75 [2000] 2 AC 59; see the discussion above Part III(A).

76 See, eg, *F v R* (1982) 29 SASR 437 (Mohr J); aff'd (1983) 33 SASR 189; *Petrunic v Barnes* [1988] Aust Torts Reports ¶80-147; *Bannerman v Mills* [1991] Aust Torts Reports ¶81-079; *Kambouroglou v Women's Hospital (Crown Street)* (Unreported, Supreme Court of NSW, Toose J, 2 December 1980).

77 *Harriton* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002) [58]. This is an example of the distributive justice argument. For similar arguments, in the context of the Hillsborough Stadium disaster, see *Frost v Chief Constable of South Yorkshire Police* (1999) 2 AC 455, 503–4.

ence and rationality demand that the claim by the parents should also be rejected.'[78]

Further arguments put in *Edwards* on the adequacy of a wrongful birth suit centred on public policy considerations, in particular the requirement in justice that a negligent doctor should be liable to pay costs associated with bringing up a child who would never have been born but for the doctor's negligence.[79] It was submitted that wrongful birth actions by the parents of disabled children were inadequate to achieve justice, in that the parents' claim may be limited to the period of the child's minority, that monetary sums awarded to the parents are outside the child's control, that the child has no control over the parents' decision to sue or not to sue, and that the parents' claim may be defeated by limitations provisions (as was the case in *Harriton*).[80]

However, all of these arguments were rejected. Studdert J considered that none overcame the basic dilemma of whether the claim for wrongful life was cognisable at all, which in his view it was not.[81] This was because the duty of care owed to the parent was different from that owed to the child, leading to the conclusion that the defendants had not breached their duties of care and that the disabilities suffered by the plaintiffs were not caused by the defendants.[82] Further, cost pressures in relation to professional indemnity insurance, the subject of considerable debate and press coverage in the context of the present insurance crisis, were considered a relevant factor telling against recognition of wrongful life, since 'the judiciary cannot be indifferent to the economic consequences of its decisions.'[83] While this was not relied upon as a decisive argument in the judgment, it can hardly be argued that recognition of wrongful life as a separate cause of action would cause unwarranted cost blow-outs for defendants, given that such claims are now substantially subsumed into wrongful birth actions in terms of damages awarded.

V CONCLUSION

> [W]rongful life cases ... expose the profound ethical tension between respecting parents' rights to control their health care ... and preserving the rights and dignity of disabled persons against the denigration that some believe is implied by awarding damages.[84]

There is little prospect of widespread acceptance of the wrongful life cause of action in the near future. The few American jurisdictions in which such claims have been accepted appear to have largely disregarded the obstacles that are posed by questions of legal principle, in particular the problem of defining non-

78 [2000] 2 AC 59, 83.
79 [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) [114].
80 [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) [111].
81 Ibid [112]–[113].
82 Ibid [113].
83 Ibid [120], citing *Kinzett v McCourt* (1999) 46 NSWLR 32, 51 (Spiegelman CJ).
84 Alexander Morgan Capron, 'Job in Court' (1999) 29(5) *The Hastings Center Report* 22, 22.

existence as a harm for legal purposes. The decisions in favour of child plaintiffs appear to be 'predicated on the needs of the living ... [seeking] only to respond to [their] call ... for help in bearing the burden of their affliction',[85] rather than being concerned with consistency of principle.

Laudable as these intentions are, it does little service to the law to override precedent and long-established notions of harm, fault and causation. Developing and reconceptualising a legal principle in a reasoned fashion is not the same as overriding it for the sake of a desired outcome in a given case. The fact that liability in negligence is a function of fault rather than need is a fundamental obstacle for many injured, disabled or otherwise needy members of society. So long as the fault principle is maintained, compensation in tort can only be achieved by those 'lucky enough' to be able to attribute their loss to the fault of another. Making exceptions in selected categories of case is not the solution.

The denial of wrongful life claims does not necessarily preclude *any* recovery in respect of an unintended child since there is usually the possibility of a wrongful birth claim by the parent(s). Equally, it also does not imply that negligent medical practitioners may escape all liability for the consequences of their actions. Here, too, wrongful birth claims can perform the normal tort functions of compensation, deterrence, appeasement, justice, promotion of safety, punishment and so forth, based on fault of the defendant as well as to the plaintiff.

It is axiomatic that claims brought by parents must be limited to compensation of losses sustained by the parents themselves and not those sustained by the child. Whilst there will be considerable areas of overlap, particularly in terms of p[ure economic loss, the assessment of damages cannot be identical.

Against this must be weighed the policy objections to wrongful life claims, discussed above. At present, the only Australian authorities on wrongful life are first instance decisions, and the High Court has had no opportunity to express its view. Statutory remedies, combined with a reassessment of current policies on social security, may be the best way forward. The only other path requires a radical revision or reconceptualisation of existing principle.

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[85] *Procanik v Cillo*, 478 A 2d 755, 763 (NJ, 1984).

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