

RIGHTS AND RESPONSIBILITIES IN WRONGFUL BIRTH / WRONGFUL LIFE CASES

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I INTRODUCTION

The parents of a child born as a consequence of medical negligence are entitled, in a 'wrongful birth' claim, to damages for the inconvenience and costs of the birth of even a normal, healthy child. But a disabled child born into a life of suffering and need as a consequence of medical negligence is entitled to nothing in a 'wrongful life' claim because there is no injury in the eyes of the law.

Inconceivable as these propositions may appear, this is the law in Australia as laid down by the High Court.¹ How did this situation come about? And what does it say about the rights and responsibilities of parents, their children and doctors in this country?

II BACKGROUND

Medical errors that lead to the 'wrongful' birth of a child may arise in many ways. Prior to conception a female sterilization procedure or a vasectomy may be negligently performed; or a contraceptive device may be incorrectly implanted; or mistaken advice may be given in genetic counselling or testing that leads parents to conceive a child where, had the correct advice been given, they would not have. After conception, a routine blood test or antenatal ultrasound or amniocentesis can be improperly reported, leading to false assurances that the foetus is not at risk of a congenital abnormality and depriving parents of an opportunity to terminate the pregnancy.

As the medical industry finds new and innovative ways to cater for our right to reproductive freedom – the right to choose whether and when to be parents – the opportunities for medical errors and consequential lawsuits are sure to increase.

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1 In *Cattanach v Melchior* (2003) 215 CLR 1, the parents' 'wrongful birth' claim was allowed, including damages for the costs of raising a normal, healthy child. In *Harriton v Stephens* (2006) 226 ALR 391 ('*Harriton*') and *Waller v James* (2006) ALR 457 ('*Waller*') 'wrongful life' claims advanced by two disabled children were refused.

But the problem is not new. Even before the sophisticated genetic testing and high-technology antenatal screening options we have today were available, doctors made mistakes and children were born as a consequence.

There was a time when parents who brought compensation claims against their doctors in these circumstances were given short shrift by the courts. Some judges considered that a woman who endured an unwanted pregnancy suffered no injury because pregnancy and childbirth were 'natural functions' for women, like eating or breathing. But with the rise of the women's movement in the 1960s and 1970s that view could not be sustained.

Since the 1970s the common law has accepted (sometimes grudgingly) that where parental rights to avoid pregnancy, or terminate one, were violated by medical negligence, a claim for damages would lie. Compensation was limited in most cases to damages for the 'pain and suffering' endured by the woman through pregnancy and childbirth.

A more difficult question has been whether parents are entitled to compensation for the cost of raising the unexpected child in their wrongful birth claims. Some judges have allowed such claims, others have not. In Australia the position was in doubt following the controversial 1995 decision in *CES v Super-Clinics (Australia) Pty Ltd*.² In England in 2000, the House of Lords rejected similar claims. In *McFarlane v Tayside Health Board*³ their Lordships decided that it was contrary to public policy to permit parents to assert that the costs of raising a normal, healthy child was a compensable damage.

In 2003, the issue finally came before the High Court and the majority refused to follow the English position. In *Cattanach v Melchior*, whilst acknowledging the public policy arguments that prevailed in England, the majority found them less than convincing in the modern Australian context. More importantly for what was to come, the Court considered that the question of parental entitlement to compensation for the cost of child-rearing should be determined by the application of legal principle and not public policy.

In *Cattanach v Melchior*, the doctor had admitted breach of duty and accepted his responsibility to pay the mother damages for enduring the pregnancy and childbirth. The only issue was responsibility for the costs of child-rearing. The majority considered that the doctor was, in reality, seeking a 'zone of immunity' from a certain class of foreseeable damages. In their opinion it was contrary to legal principle to allow damages for one foreseeable consequence of the negligence (the pain and suffering of the mother) but refuse the other foreseeable consequence (the cost of raising the child).

III SANCTITY OF LIFE AND DISABLED CHILDREN

Central to the public policy argument against awarding damages to parents for the cost of raising a normal, healthy child was the 'sanctity of life' argument. It

2 In *CES v Super-Clinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 the NSW Court of Appeal denied child-raising costs. The High Court granted leave to appeal, but the case was settled out of court when the Catholic Church sought to intervene.

3 *McFarlane v Tayside Health Board* [1999] 4 All ER 961 ('*McFarlane*').

was put that such claims diminished human life, turning children into a 'commodity' capable of valuation and ignored the immeasurable benefits and blessings of parenthood.

Yet as attractive as the sanctity of life argument appeared to be, it had within it the germ of its own undoing: despite its supposed universal applicability, it appeared only to apply to the birth of normal, healthy children. For proponents of the sanctity of life argument, consistency would require that compensation be refused for the birth of *any* child born as a consequence of medical negligence, not just normal, healthy ones. But, in the opinion of the House of Lords in *McFarlane*, and two of the three dissenting judges in the High Court in *Cattanach v Melchior*,⁴ it was felt that parents were still entitled to compensation for the extraordinary costs of raising a disabled child.

The political response to *Cattanach v Melchior* was swift. Citing public policy concerns, legislators in three states passed laws denying parents the right to damages for the cost of raising normal, healthy children, but preserving their rights to compensation for costs arising from the unexpected birth of a child with disabilities in wrongful birth claims.⁵

IV WRONGFUL LIFE CLAIMS

Despite the view taken by judges and politicians that the parents were deserving of compensation where medical negligence led to the birth of a disabled child, claims by the disabled children seeking compensation for their own suffering and special needs have not fared so well, even though both claims arose from the same kind of medical mistake.⁶

With very few exceptions,⁷ judges in most countries have rejected a wrongful life claim brought by a disabled child.⁸ The inflammatory label 'wrongful life' demonises the child's claim from the outset: the claim is characterised as one where the child has the temerity to come to court asserting 'a right not to be born' or worse, where a termination would have taken place but for the negligence, 'a right to have been killed in utero'.

Of course the child is not claiming that its life is a wrong; the wrong lies with the negligence of the doctor. And the child makes no assertion of a right not to live, but rather that, being born into a life of suffering and need – a condition that

4 Gleeson CJ and Hayne J, but not Heydon J.

5 See *Civil Liability Act 2003* (Qld) s 49A; *Civil Liability Act 1936* (SA) s 67; *Civil Liability Act 2002* (NSW) ss 70, 71.

6 The practical benefits of a claim for the child include that the entitlement does not depend on the fortuitous question of whether the parents bring a wrongful birth claim (they might be dead or statute-barred, as in the *Harriton* case); the compensation was payable for the life of the child, not limited to the time when parents' legal responsibility ended at age 18; and the money would be protected by the courts whereas no such protection existed for money received by parents for their own 'losses' in wrongful birth claims.

7 Courts in four US states and in Israel, France and Holland have upheld wrongful life claims.

8 Most wrongful life claims were brought together with the parents' wrongful birth claims, so the refusal of the child's claim did not mean that no compensation would ever be paid, but would be payable to the parents for their losses.

would have been avoided had the doctor been careful – the doctor should bear responsibility for his or her mistakes.

A *Harriton v Stephens*

In Australia judges were forced to deal with the ‘wrongful life’ problem for the first time in the joint test cases of *Harriton* and *Waller*.⁹

When Alexia Harriton’s mother had a fever and a rash early in her pregnancy, Dr Stephens reassured her that she did not have rubella and that her unborn child was not at risk of the congenital disabilities known to be caused by rubella infection during pregnancy. The advice was wrong. For the purposes of legal argument, it was agreed that Dr Stephens was negligent and that, had the correct advice been given, Alexia’s mother would have had a lawful termination of pregnancy. Accordingly, but for the doctor’s admitted negligence, Alexia would not now be blind, deaf, retarded, spastic and in need of care 24 hours a day. Of course, but for the negligence, Alexia would not ‘be’ at all.

The case was heard in the New South Wales Supreme Court on a point of law only: does the common law recognise a claim for ‘wrongful life’?

Alexia lost her case at trial and by a 2:1 majority on appeal. Predictably, the whole armamentaria of morality, religion and the ubiquitous ‘fabric of society’ arguments were unleashed against Alexia’s claim.

It was asserted that her claim violated ‘core values’ of the sanctity of life:¹⁰ it offended the views of the many ‘believers’ who maintain that life, whatever its travails, brings with it the prospect of ‘an afterlife’;¹¹ it threatened life as we know it by opening the door to children to sue their parents for having them, by encouraging doctors to recommend abortions in questionable cases in order to avoid lawsuits, and by lending support to the proponents of eugenics by sending the message that it is sometimes better to be dead than disabled.¹²

In one way or another all of these ‘public policy’ arguments found favour in the lower courts. Nevertheless, when the High Court agreed to hear Alexia’s case she had the advantage (or so she thought) of the Court’s previous reluctance to accept ‘public policy’ arguments.

It will be remembered that in *Cattanach v Melchior*, the negligent doctor unsuccessfully deployed ‘public policy’ arguments. The High Court was determined to decide that case on the basis of legal principle, not on the vagaries of public policy. It took the same approach to the wrongful life problem.

Justice Kirby dissented in *Harriton* and found that Alexia had made out her claim for damages against Dr Stephens based on strict principles of tort law. In so saying he agreed with the view of Justice Mason who dissented in the NSW

9 This discussion will focus on *Harriton*, as the writer was involved in that case; initially as solicitor and, in the High Court, as counsel.

10 As Lord Griffiths put it: ‘[s]uch a claim seems utterly offensive; there should be rejoicing that the hospital’s mistake bestowed the gift of life upon the child’. *McKay v Essex Area Health Authority* [1982] 2 All ER 771, 790.

11 See *Edwards v Blomeley* [2002] NSWSC 460 [75] (Studdert J).

12 For a comprehensive review of the policy arguments against wrongful life cases see *McKay v Essex Area Health Authority* [1982] 2 All ER 771.

Court of Appeal. But all of the other High Court judges found otherwise and decided wrongful life claims did not form part of Australian common law.

All of the judges accepted that doctors owed a duty of care to the unborn and that their negligence could support a claim in tort for damage caused by negligence. They also accepted that Alexia had a life of suffering and need¹³ and that this would have been avoided had the doctor not been negligent. But, despite this, the majority held that Alexia's life with disabilities did not qualify as *damage* in the eyes of the law and so there was no legal duty on Dr Stephens to have prevented it. Justice Crennan¹⁴ explained:

A duty of care cannot be clearly stated in circumstances where the appellant can never prove (and the trier of fact can never apprehend) the actual damage claimed, the essential ingredient in the tort of negligence. The appellant cannot come within the compensatory principle for measuring damages without some awkward, unconvincing and unworkable legal fiction.¹⁵

The logic of the majority's argument was simple: legal principle insists that to prove *damage* caused by negligence, a plaintiff must prove *harm*. To be *harmed* means to be made *worse off*. To be made *worse off* requires a *comparison* between the plaintiff's present condition and the condition the plaintiff would have been in had there been no negligence.

But, if there had been no negligence, Alexia Harriton would never have existed. Logic dictated that to prove *damage*, Alexia needed to prove that her life of suffering and need is *worse than non-existence*. Since the *comparison* between a life with disabilities and non-existence is *impossible* – it is a matter for philosophers and theologians – Alexia must fail in her claim because she cannot prove that she has suffered any *damage*.

Judges who have supported wrongful life claims have preferred the empirical to the metaphysical and religious excursions supposedly required by the 'legal logic' adopted by the majority in *Harriton*.

The reality of the 'wrongful-life' concept is that such a plaintiff both *exists* and *suffers*, due the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life.¹⁶

Justice Kirby observed that 'the life of legal systems derived from the common law of England has not been fashioned by logic alone'¹⁷ and concurred in the view that

Law is more than an exercise in logic, and logical analysis, although essential to a system of ordered justice, should not become an instrument of injustice.¹⁸

13 The Court accepted the same of the life of Keeden Waller, who suffered the effects of a chromosomal disorder and would not have been conceived but for negligent advice about genetic testing.

14 With whom Gleeson CJ, Hayne and Gummow JJ agreed.

15 *Harriton* (2006) 226 ALR 391, 456.

16 *Curlender v Bio-Science Laboratories* 106 Cal App 3d 477, 488 (1980) (Jefferson PJ).

17 *Harriton* (2006) 226 ALR 391, 410 citing Oliver Wendell Holmes in Oliver Wendell Holmes, *The Common Law* (1881) 1.

18 *Ibid* 413 citing *Procanic v Cillo* 478 A 2d 755, 762 (NJ, 1984).

V CONCLUSION

In the end, the High Court has drawn the line on the difficult and divisive issue of medical negligence claims that lead to the birth of a child.

Parents in Australia are entitled to damages for the negligent violation of their right to reproductive freedom, including compensation for the costs of raising a normal, healthy child. Their rights are, however, limited by statute in some states where damages covering the costs of raising a child are only available if the child is disabled.

Despite the same act of negligence grounding their parents' wrongful birth claim, disabled children in Australia have no right to compensation themselves in a wrongful life claim. This is because they cannot prove that their lives of suffering and need amount to damage in the eyes of the law, since it is impossible to compare a life with disabilities to non-existence.

Many would wince at the results in both cases. There is something unpalatable about parents being compensated for the costs of raising normal, healthy children, even if 'legal principle' supports such a conclusion. But there is also something troubling about denying a disabled child compensation for a life of suffering and need – a condition avoidable had the doctor not been negligent – by asserting that 'legal principle' mandates such a result.

Perhaps the most that can be said is that it is in those compensation claims that seem to threaten our 'core values' that the bluntness of 'legal principle' is exposed for what it is.