Wrongful life claims: dignity, disability and "a line in the sand"

Warwick J Neville and Buddhima Lokuge

A recent High Court decision held that children born with disabilities not caused by medical intervention, but not diagnosed antenatally, could not claim general damages for their pain and suffering, nor special damages for the needs created by their disabilities and their loss of earning capacity. (MJA 2006; 185: 558-560)

The law has regularly struggled with how to deal justly with disability associated with medical interventions, particularly in relation to competence and consent, as well as causality and compensability.

For example, at least since the landmark litigation in the 1970s arising out of the effects of thalidomide,[1,2] courts have trod warily in defining what is actionable and what is compensable. In the 1990s, leaving aside the ongoing ramifications of the *Rogers v Whitaker* decision,[3] perhaps the most controversial medicolegal cases dealt with by the High Court of Australia were the decisions in *Marion's Case*[4] and *P v P*,[5] both of which concerned the rights of children with profound disability, and whether, in their alleged best interests, they should be sterilised. Following judgment in both cases authorising the sterilisation, there was significant and understandable dispute about what enhanced, and what impaired, the human dignity of those with disability.[6]

Courts have endeavoured to be careful in recognising and awarding damages in novel areas of law, such as "wrongful birth" and "wrongful life". The High Court of Australia has recently given judgment in both kinds of action: in 2003 allowing a claim for wrongful birth (*Cattanach v Melchior*),[7] but in May 2006 disallowing two separate claims for wrongful life (*Harriton v Stephens*[8] and *Waller v James/Waller v Hoolahan*[9]).

Here, we briefly summarise the wrongful birth action,[7] and then examine in detail the most recent High Court judgment on claims for wrongful life,[8,9] which involved the intersection of congenital disability, claims for negligence and the award of damages. The terms "wrongful birth" and "wrongful life" are defined in the Box.

The High Court and wrongful birth

In the 2003 claim for wrongful birth (*Cattanach v Melchior*),[7,12] the High Court of Australia by a bare majority of 4 : 3, and contrary to recent authority in the United Kingdom,[13] held a consultant obstetrician and gynaecologist, who had negligently performed a sterilisation procedure, liable for the costs of raising the child born subsequent to the failed procedure. The finding of negligence was relatively unproblematic.[7,14] However, what did cause concern was the judgment that the medical specialist was liable for the costs of raising the healthy, but initially unwanted, child. Understandably, the decision unleashed a significant tide of comment.[15,16] The then Premier of New South Wales, Bob Carr, called on the federal government to introduce legislation "that protects doctors in other categories, in private medicine . . .".[17]

One immediate consequence of the *Cattanach v Melchior* judgment was the decision by three states — NSW, Queensland, and South Australia — to enact legislation that now prevents the bringing of wrongful birth suits in those jurisdictions (*Civil Liability Act 2002* (NSW), s.71; *Civil Liability Act 2003* (Qld), s.49A; *Civil Liability Act 1936* (SA), s.67).

Terminology and concepts[10]

- *Wrongful birth — a "wrongful birth" action is one brought by the parent(s) of an initially unwanted or unintended child, born (with or without disability) as a consequence of negligence before birth.*[11]

This was the situation in *Cattanach v Melchior*, a case of negligent sterilisation.[7]

- *Wrongful life — a "wrongful life" action is ". . . one brought by (or on behalf of) a child complaining of negligent conduct before birth which results in its birth when had there been no negligence it would not have been born. In short, the essence of the claim is that the child would have been better off not to be born at all."*[11]

The defendant medical practitioner does not cause the disability but, rather, fails to avert it. This was the situation in *Harriton v Stephens*[8] and *Waller v James*.[9]

In both types of actions, the breach of duty may occur before conception (as was the situation with *Waller v James*, where the child's father was not advised that he had a heritable condition), *ex utero* (eg, in vitro or in relation to fertility treatment), or *in utero* (eg, in failure to diagnose disability).[11] ◆

The High Court and wrongful life

The 2006 decision of the High Court in *Harriton v Stephens* and *Waller v James/Waller v Hoolahan*, this time by a majority of 6 : 1, rejecting two separate claims for wrongful life, is certain to be welcomed by medical practitioners and politicians alike. The High Court resoundingly rejected claims for damages by two disabled children. The claims were on the basis that they would have been better off not being born rather than being born with their severe disabilities.[8,9] The child appellants argued that their births were the result of negligent action by the treating medical practitioners and they sought compensation for being born with disabilities. Justice Susan Crennan summarised the issue at the end of her leading judgment in *Harriton v Stephens:*

> *Cattanach v Melchior* [in 2003] represents the present boundary drawn in Australia by the common law . . . in respect of claims of wrongful birth and wrongful life. Life with disabilities, like life, is not actionable [par. 277].[8]

Procedural anomaly and evidence

Before going to the High Court, these cases were presented to the NSW Supreme Court, and this Court was asked, based only on an agreed set of facts, to determine whether the novel claim for wrongful life could, and should, be recognised. If this was so, the Court was then asked to assess what damages would flow from such a finding. The two children involved, Alexia Harriton and Keeden Waller, were unsuccessful in their claims. Later, in the High Court, reservations were expressed about the lack of a formal trial before the Supreme Court hearing and the difficulties that

ensued in properly evaluating the untested evidence presented in the agreed set of facts. As well, the agreed set of facts was somewhat lacking in clinical detail. Indeed, the agreed set of facts posed a range of unanswered questions: for example, why was Dr Paul Stephens advised to concede that he was negligent in reassuring Alexia Harriton's mother that she did not have rubella when the pathology report was very vague in its detail? Also not explained in any judgment was how or why Alexia's parents' claims were out of time and therefore statute-barred.

The agreed facts

Harriton v Stephens

Alexia Harriton was conceived naturally. In August 1980, her mother, Olga, contracted a fever and noticed a rash. She also suspected that she was pregnant. She went to her general practitioner, Dr Max Stephens, and told him of her concern about being pregnant and possibly having had rubella. Dr Stephens recommended that Mrs Harriton have a blood test to determine the pregnancy and the likelihood of having contracted rubella. The testing was done by Macquarie Pathology Services. Dr Stephens noted the clinical history of the patient as: "Urgent? Pregn? Recent rubella contact."

Nine days later, Mrs Harriton saw Dr Paul Stephens, the son of Dr Max Stephens. He had the report from Macquarie Pathology Services. It read:

> Rubella – 30; if no recent contact or rubella-like rash, further contact with this virus is unlikely to produce congenital abnormalities. Preg test – positive.

Dr Paul Stephens advised Mrs Harriton that she was pregnant; he also assured her that she had not contracted rubella.

In the agreed statement of facts presented to the Court, it was common ground that Dr Paul Stephens had been negligent in advising Mrs Harriton in the way that he did, and that he had, accordingly, breached his duty of care to her (i) in his advice that she did not have rubella, and (ii) in failing to arrange a more detailed blood test. It was also agreed that, in 1980, a reasonable medical practitioner in the position of Dr Stephens would have advised Mrs Harriton of the high risk of her child *in utero* having been exposed to rubella and, therefore, the risk of it being born profoundly disabled. The parties also agreed that had Mrs Harriton received competent medical advice, she would have terminated the pregnancy. Alexia was born with, and continues to suffer from, what the courts have described as "catastrophic disabilities", which include blindness, deafness, mental retardation and spasticity.

Waller v James/Waller v Hoolahan

Keeden Waller was conceived via in-vitro fertilisation (IVF) procedures in August 2000. Keeden's father suffered from "Factor III [antithrombin III; AT3] deficiency" as well as a low sperm count and poor sperm motility. Deficiency of AT3 is generally a hereditary condition, and is characterised by a predisposition to thrombosis. Mr Waller notified the family's GP about the AT3 condition, and the GP in turn notified Sydney IVF Pty Ltd. Keeden's father was taking warfarin daily for the AT3 deficiency. Tests were conducted to determine whether there was a genetic reason for the condition of his sperm.

Mr and Mrs Waller were advised to proceed with intracytoplasmic sperm injection. This course was accepted. After collection of 19 eggs from Mrs Waller, and sperm from Mr Waller, 17 eggs were successfully fertilised. Two embryos were transferred to Mrs Waller and, on confirmation that she was pregnant, Mrs Waller was referred to Dr Hoolahan, an obstetrician and gynaecologist. One embryo implanted successfully. Subsequently, on the recommendation of Dr Hoolahan, the fetus Mrs Waller was carrying was tested for Down syndrome. This test proved negative. There was no screening of the fetus for Mr Waller's AT3 condition. Nor were Keeden's parents advised of the possibility that it was an inheritable condition.

Mrs Waller's labour was protracted. Keeden was diagnosed, 5 days after his birth, with cerebral thrombosis. As a consequence, he suffers from cerebral palsy and has uncontrolled seizures. He also has AT3 deficiency, inherited from his father. It was alleged that the defendants in this case, namely the treating obstetrician, Sydney IVF, the hospital at which Keeden was delivered, and others who attended Mrs Waller in the course of her delivery, should have advised her of the risk of AT3 deficiency being passed on to any offspring. Consequently, it was argued that, had Keeden's parents been advised of this risk, they would have had the pregnancy terminated.

The judgments of the High Court

Justice Crennan wrote the leading judgment in both cases. Gleeson CJ and Gummow, Hayne and Heydon JJ all concurred with her reasons. Callinan J wrote short separate judgments in both appeals which also found against the children in their claims. Kirby J was the sole dissentient in both matters. He accepted that a "compensatory principle" should apply so as to allow recovery.

The remainder of this article considers the reasoning of the Court and what it might portend for the future.

A crucial issue for the dissentient, Kirby J, was that

> Denying the existence of wrongful life actions erects an immunity around health care providers whose negligence results in a child who would not otherwise have existed, being born into a life of suffering [par. 153].[8]

While contentious, especially given that the High Court has never claimed or sought to quarantine health care providers, or anyone else for that matter, from the general operation of the law in relation to negligence, Kirby's approach is consistent with the majority judgment in *Cattanach v Melchior,*[7] but not with recent decisions in the UK.[18]

The crucial question for the majority of the Court was whether Alexia and Keeden suffered "damage" which was recognisable at law. The antecedent questions of whether either child was owed a duty of care, and whether there had been a relevant breach of that duty, were effectively subsumed by the focus of most of the majority Justices on whether there was damage recognisable by the law for which the defendants should be held liable. The duty postulated by Alexia was that Dr Paul Stephens should have diagnosed rubella and then advised Mrs Harriton to terminate the pregnancy. This duty also proposed that the measure of damages required that an assessment should be made so as to compensate Alexia to the degree necessary to place her in the position she would otherwise have been in but for the negligence of Dr Paul Stephens. That comparative position was one of "non-existence". The High Court held that the law does not, and could not,

recognise “non-existence” as a relevant comparator and, therefore, there was no compensable damage. Hayne J said emphatically:

> It is because the appellant [Alexia] 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 [par. 172].[8]

After reviewing judgments from both common and civil law jurisdictions around the world (in which, with very few exceptions, claims for wrongful life have been rejected), and that Alexia had no cause of action against Dr Paul Stephens, Crennan J accepted the remarks of the Chief Justice of NSW, James Spigelman, when he said in his judgment in the NSW Court of Appeal that

> . . . in cases of this kind, to find damage which gives rise to a right to compensation it must be established that non-existence is preferable to life with disabilities [par. 251].[8]

Crennan J rejected arguments that (a) life with disability was a devalued life — rather, Alexia’s disabilities “are only one dimension of her humanity”; (b) a “new compensatory principle” required the awarding of damages in this case; and (c) a principle of “corrective justice” in this case would, and should, overcome the difficulties inherent in the claim.[19] In relation to the rights of the parents, Alexia’s parents were statute-barred. The wrongful life action of Keeden’s parents has yet to be determined.

Conclusion

So what does this case mean for the law and for medical practice? Firstly, it certainly does not diminish the responsibility of medical practitioners in their duty of care owed to patients, especially pregnant women. Secondly, it is clear that a “line in the sand” has been drawn as to what the law will recognise as compensable damage. As Crennan J said:

> To have a cause of action in negligence [Alexia] needs to show damage suffered by her and a duty of care on Dr P R Stephens to avoid that damage [par. 218].[8]

The Court pointed out that Dr Stephens did not cause the damage suffered by Alexia; that was caused by her mother’s rubella. Thirdly, it is more than a philosophical or jurisprudential point made by the Court and worthy of further consideration — that non-existence cannot be compared favourably to living a life with disabilities (*Disability Discrimination Act 1992* [Cwlth]).[20] As Gleeson CJ said in one of the three dissenting judgments in *Cattanach v Melchior:*

> The value of human life, which is universal and beyond measurement, is not to be confused with the joys of parenthood, which are distributed unevenly.[7]

This was undoubtedly the case here. Perhaps the larger question then is what, for a community, is the responsibility owed to people with disability and those who care for them? That is a question that politicians, judges and the rest of us must grapple with.

Competing interests

None identified.

Author details

Warwick J Neville, BA, LLB, STD, Australian Research Council Doctoral Scholar
Buddhima Lokuge, MB BS, MPH, General Practice Registrar, Australian Postgraduate Award Scholar
Regulatory Institutions Network (RegNet), Australian National University, Canberra, ACT.
Correspondence: warwick.neville@anu.edu.au

References

1 Distillers Co. (Biochemicals) Ltd v Thompson (Laura Anne). [1971] AC 458.
2 Bennett DMJ. The liability of the manufacturers of thalidomide to the affected children. *Aust Law J* 1965; 39: 256-268.
3 *Rogers v Whitaker* (1992) 175 CLR 479.
4 *Marion’s Case, Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.
5 *P v P* (1994) 181 CLR 583.
6 Cica N. Sterilising the intellectually disabled: the approach of the high court of Australia in *Department of Health v JWB and SMB*. *Med Law Rev* 1993; 1: 186-231.
7 *Cattanach v Melchior* (2003) 215 CLR 1. http://www.austlii.edu.au/au/cases/cth/HCA/2003/38.html (accessed Oct 2006).
8 *Harriton v Stephens* [2006] HCA 15 (9 May 2006). http://www.austlii.edu.au/au/cases/cth/high_ct/2006/15.html (accessed Oct 2006).
9 *Waller v James*; *Waller v Hoolahan* [2006] HCA 16 (9 May 2006). http://www.austlii.edu.au/au/cases/cth/high_ct/2006/16.html (accessed Oct 2006).
10 Hoyano L. Misconceptions about wrongful conception. *Mod Law Rev* 2002; 65: 883-906.
11 Kennedy I, Grubb A. Medical law. 3rd ed. London: Butterworths, 2000: 1530-1531, 1586, and 1586.
12 Gerber P. Failed sterilisations and the unwanted child: a new medicolegal minefield? *Med J Aust* 2004; 180: 123-125.
13 *McFarlane v Tayside Health Board* [2000] AC 59.
14 Skene L. Law and medical practice: rights, duties, claims and defences. 2nd ed. Sydney: Butterworths, 2004: 357-363.
15 Cane P. The doctor, the stork and the court: a modern morality play. *Law Q Rev* 2004; 120: 23-26.
16 Seymour J. *Cattanach v Melchior*: legal principles and public policy. *Torts Law J* 2003; 11: 1-10.
17 Transcript, ABC radio program, *PM*. Doctors fear High Court ruling on contraceptive failure will further push up medical indemnity insurance. 17 July 2003.
18 Dyer C. Disabled mother whose sterilisation failed cannot claim the extra costs of bringing up a child. *BMJ* 2003; 327: 950.
19 Todd S. Wrongful conception, wrongful birth and wrongful life. *Syd Law Rev* 2005; 27: 525-542.
20 O’Neill N, Rice S, Douglas R. Retreat from injustice: human rights law in Australia. 2nd ed. Sydney: Federation Press, 2004: 491-495.

(Received 29 Jun 2006, accepted 18 Sep 2006) ❏