Synopsis

Few legal issues highlight the tension between ethics and legal principles than the question of wrongful birth.

The High Court looked at the issue of wrongful birth in *Cattanach v Melchior* (2003) 215 CLR 1 which involved a negligently-performed sterilization operation. It held by a majority of 4:3 that child rearing damages were recoverable based on orthodox principles of negligence. The dissentients invoked policy concerns that an award of damages would 'commodify' the child.

Recently, Beazley P in *Waller v James* [2015] NSWCA 232 was prepared to accept that the right of a parent to plan their family was something capable of protection in law, such that the scope of a doctor's duty of care extended to permit a claim for economic loss.

Questions of causation and remoteness of damage remain debatable in the context of late term abortions for foetuses with suspected disabilities.

Can this debate escape moral considerations?

The next presentation by Cranitch SC and Campbell will explore these issues.

Talking Points

Is it possible to say that a severely disabled child has been harmed by the mere fact of being born? To make out a case for wrongful life, does a disabled child have to show that non-existence is preferable to a life with disabilities? Should damages be discounted for the joys, benefits and support that a child's life may bring to the parents? These are some of the perplexing philosophical problems involved in deciding between what is claimed to be a defective life and no life.

In 2003, the High Court held (4:3) that where an unplanned child is born through medical negligence, the parents may sue the negligent doctor to recover the costs of raising the child to maturity: *Cattanach v Melchior* (2003) 215 CLR 1.[1] That case arose from negligent advice following a negligently performed sterilisation operation.[2] Both parents and child were normal and healthy.

This decision prompted legislative intervention restricting child-rearing damages in NSW in *wrongful birth* cases[3]: s.71 *Civil Liability Act 2002* (NSW). Section 71, however, does not preclude the recovery of damages associated with rearing a child who suffers from a disability (that is, in *wrongful life* cases[4]). The basis of the action in *wrongful life* is not that the doctor's negligent advice caused the disability suffered by the child, but rather that, properly advised, the child would never have been born.

In 2006, the High Court held (6:1) that children born with profound disabilities were not entitled to damages where medical practitioners negligently failed to warn the parents of the particular risks[5], in circumstances where the mothers would have elected to terminate their pregnancies had they been aware that there was a real risk

of the children being born with such disabilities: *Harriton v Stephens* [2006] HCA 15; (2006) 226 CLR 521; *Waller v James* [2006] HCA 16; (2006) 226 CLR 136.

The moral conundrum in wrongful life cases such as these is that the Court is in effect assessing the 'damage' caused by a life being brought into existence. Crennan J in *Harriton v Stephens* rejected the claim on this basis: "*A comparison between a life with disabilities and non-existence, for the purposes of proving actual damage and having a trier of fact apprehend the nature of the damage caused, is impossible*".[6]

Kirby J in dissent in *Harriton* argued that the notion that a person's *life* could be *wrongful* is counterintuitive. What is wrongful is the *negligence*, not the child's life, and it is precisely by focusing on the plaintiff's *life* rather than on negligent causation of physical damage, that courts have been led to misapply ordinary principles and thus deny recovery.[7]

Other jurisdictions have, like Australia, tended to reject the notion that damages are recoverable in wrongful life claims on the basis that to assess damages according to orthodox principles would involve a comparison of life with disabilities, and no life at all.

In the United States, causes of action in wrongful life have been rejected in 26 States and recognised in only four.[8] The tort was recognised by the Court of Appeals of California in *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811 (1980). There, the child plaintiff suffered from a genetic defect. He was awarded damages for pain and suffering and for the loss resulting from his impaired condition. 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*".[9]

Similarly, the Supreme Court of New Jersey in *Procanik v Cillo* 478 A 2d 755 (1984) allowed a child plaintiff born with a syndrome caused by congenital rubella to recover the extraordinary medical expenses referable to his disability by way of special damages. However, the child's claim for general damages to compensate for pain and suffering and a diminished childhood was rejected: "*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.*"

In England, the decision of the Court of Appeal in *McKay v Essex AHA* [1982] QB 1166 was the first case in which the cause of action for wrongful life was considered. *McKay* concerned a child whose severe disabilities resulted from rubella in the mother's blood. The child was born partly blind and deaf. The failure to advise or inform the mother of the desirability of an abortion was the basis of the cause of action.

The Court of Appeal unanimously rejected the plaintiff's claim in negligence, holding that the damage had not been caused by the defendant's negligence but rather by an act of nature for which the defendant was not responsible. The Court identified a number of policy factors which were held to militate against the claim (at p.1189ff):

- wrongful life actions postulate a duty to terminate life and this would make an unacceptable inroad on the principle of the "sanctity of human life";
- such actions would expose medical practitioners to liability in respect of "mercifully trivial abnormalities";
- such actions would open the door for wrongful life actions to be brought against mothers for failing to abort;
- it would be impossible to assess damages because one cannot compare the plaintiff's disabled position with non-existence; and
- the repugnance of a conclusion which by inference would regard the life of a handicapped person as not worthwhile.

At the heart of these debates lies the ultimate ontological conundrum and talking point: Can 'existence' be a legal injury?

TJD

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[1] The only question on which special leave to appeal was granted was whether damages for the costs of raising the child were recoverable (duty of care, breach and damage were all conceded).

[2] The House of Lords in *McFarlane v Tayside Health Board* [2000] 2 AC 59 had rejected such a claim; *cf Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; and *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

[3] That is, actions brought by a parent alleging that an act of medical negligence has caused the birth of an unplanned child: *Harriton* at [12] per Kirby J.

[4] That is, actions brought by children alleging that an act of medical negligence has caused their birth.

[5] *Wallace v Kam* [2013] HCA 19; 250 CLR 375.

[6] at [252]-[253].

[7] *Harriton v Stephens* at [10] (Kirby J); See also *Edwards v Blomeley* [2002] NSWSC 460, [6].

[8] Penelope Watson, "Legal and Ethical Issues in Wrongful Life Actions" (2002) 26(3) *Melbourne University Law Review* 736.

[9] *Curlender v. Bio-Science Labs.,* 165 Cal. Rptr. 477, 488 (Cal. Ct. App. 1980).