

CONTINUING PROFESSIONAL DEVELOPMENT

Wrongful Birth and Wrongful Life

“Not to have been born exceeds every reckoning”.

(Sophocles “Oedipus Coloneus”).

Nothing in the area of medical negligence arouses so much angst and passion as those cases which are commonly called “wrongful birth” or “wrongful life”.

There is a dichotomy between what is thought to be community morals or expectations and the application of legal principle. Nowhere is this distinction so sharply drawn as in the two cases decided by the High Court in very closely related areas, *Cattanach v Melchior* [2003] HCA 38; (2003) 215 CLR 1 (“wrongful birth”) and *Harriton v Stephens* [2006] HCA 15; (2006) 226 CLR 52 (“wrongful life”).

These two cases throw up for stark consideration the following issues:-

1. What is human life?
2. What value is human life compared to non-existence?
3. Does the medical profession owe a duty of care in respect of human life from inception?
4. Is that duty to be categorised separately in respect of the rights of parents and/or children?
5. Does ethics play a role in the determination of the above questions, and if so where is the intersection between law and ethics?

The issue in *Cattanach v Melchior* was described by Chief Justice Gleeson in his usual concise way as follows:-

“If in consequence of medical negligence, a couple become the parents of an unintended child, can a Court, in an award of damages, require the doctor to bear the cost of raising and maintaining the child?”¹

¹ *Cattanach v Melchior* [2003] HCA 38; 215 CLR 1 at [1].

A claim for damages was brought jointly by a couple not based upon the existence of any disability on the part of either mother or child or any special or unusual needs, but just the ordinary costs of raising a child to the age of 18. Why limited to 18 is a matter of some conjecture, but they were the facts which confronted the High Court. The case was based upon a failed sterilization procedure in a public hospital. The relationship between parent and child was the source of legal and moral responsibilities which was the basis of the claim for damages in view of Gleeson C.J.

Fundamental to the consideration of this case was the consideration of the value of human life. Blackstone, in a different age where religious ideas commanded almost universal ascent, referred in his Commentaries to human life as “the immediate gift of God, a right inherent by nature in every individual”.² Thus, “the value of human life was regarded as universal and

² William Blackstone, *Commentaries* 1:125.

beyond measurement but not to be confused with the joys of parenthood which are often distributed unevenly”.³

At its crassest level, the argument in relation to damages was to the effect that a birth of an unintended child means that the parents have an extra mouth to feed. However, the Court wrestled with the idea that this was but part of the consequences of parenthood. Apart from the pure financial consequences, the family dynamics might be gravely affected by the impact upon the siblings of another sibling who may have special needs.

Further, in the sight of the law a child is a blessing as well as a burden and “it is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth” (*McFarlane v Tayside Health Board* (2000) 2 AC 59 at 114).

Apart from raising the issue in respect of the bulk of the claim being pure economic loss, the question remained whether it was a consequential claim for damages in relation to personal injury to Mrs Melchior and what role did

³ *Cattanach v Melchior* [2003] HCA 38; 215 CLR 1 at [1] (Gleeson CJ).

Mr Melchior play in all of this in terms of his entitlement to damages? (See *Perre v Apand Pty Limited* (1999) 198 CLR 180). This latter case raises issues relating to the characterisation and quantification of financial or economic loss. Unlike a claim under Lord Campbell's Act which is founded upon statutory provisions, the claim which arose in *Cattanach* was concentrated upon some of the financial consequences of the familial relationship. There is, nonetheless, a foundational statutory concept of the liabilities created by the parent/child relationship such as the *Family Law Act* (s.60B) where children are acknowledged to have the right to be cared for by both parents and section 66C where the parents have the primary duty to maintain the child. Similarly, support provisions are made under the *Child Support (Assessment) Act 1989* (Cth) in section 3. Thus, the financial costs which were the subject of the parents' claim were a foreseeable consequence of the medical negligence found to have occurred. However, there is no general rule that one person owes to another a duty to take care not to cause reasonably foreseeable financial

harm, even assuming that what is involved here is so described (*Perre v Apand Pty Limited* *ibid*).

By a very slim majority, the High Court upheld the entitlement to damages in the form of the costs of raising a child to the age of 18, whilst acknowledging the difficulties of quantifying that cost. Given the authorities in both Britain and America were inconsistent with that derived by the High Court, the issue of coherence loomed large, particularly in the decision of the Chief Justice. In the words of the Chief Justice in dissent:

“The claim under consideration displays all the features that have contributed to the law’s reluctance to impose a duty of care and to avoid causing economic loss. The liability sought to be imposed is indeterminate. It is difficult to relate coherently to other rules of common law and statute. It is based upon a concept of financial harm that is imprecise; an imposition that cannot be concealed by an arbitrary limitation of a particular claim in a subject matter or time. It is incapable of rational or fair assessment. Furthermore, it involves treating, as actionable damage, and as a matter to be regarded in exclusively financial terms the creation of a human relationship that is socially fundamental. The accepted approach in this country is that “the law should develop novel categories of negligence incrementally

and by analogy with established categories. The recognition of the present claim goes beyond that and is unwarranted”.⁴

Ultimately all of the Judges of the High Court had to wrestle with the fundamental principle governing the recovery of damages in tort which was enunciated in multiple cases and is thought to be best expressed by Lord Blackburne in *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25 as:

“That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation”.⁵

It is trite to say that this principle of compensation has largely proved to be of limited value and the calculation of damages for tortious liability is very much an inexact science. It was noted on a number of occasions throughout *Cattanach* by all the Justices that the common law does not exist in a vacuum. It is expressed by judges to respond to their perceptions of the requirement of justice, fairness and reasonableness in their society.

⁴ *Cattanach v Melchior* [2003] HCA 38; 215 CLR 1 at [39] (Gleeson CJ).

⁵ At p.39.

Thus, the question of sterilization initially commenced in the early seventies and threw up a few cases where, by the time of *Cattanach*, there was noted to be a substantial and growing body of decisional law not only in common law countries but in countries with civil law systems. Much reference was made not only to English and American authorities, but German, Dutch and other European decisions. It was certainly front and centre that the religious aspects of the debate needed to be taken into account. Justice Meagher in the matter of *CES v Superclinics (Australia) Pty Limited* (1995) 38 NSWLR 47 at 5 where he cited with approval the words of Griffiths LJ in *McKay v Essex Area Health Authority* [1982] 1QB 116 who stated “Such a claim seems utterly offensive; there should be rejoicing that the hospital’s mistake bestowed the gift of life upon the child”. Justice Meagher believed the law should proceed on the basis that human life is sacred and that to abort a child in-utero was a common law misdemeanour. In part it is noted that His Honour reasoned with reliance upon St. John’s Gospel in the Christian Bible.⁶

⁶ John 16:21 – “A woman giving birth to a child has pain because her time has come;

In his judgment in *Cattanach*, Justice Kirby referred to the fact that in many judicial opinions perceptions of moral or ethical factors are illustrated by the recourse to the Biblical citation such as that referred to by Justice Meagher. There has even been resort to the successor of the man on the Clapham Omnibus who is now referred to as the passenger on the London Underground. This fictional character, according to Kirby J is “elevated to a modern Delphic Oracle” so as to amount to something more than the subjective view of the judge as to what he reasonably believes that the ordinary citizen would regard as right. It was Kirby’s view that instead of pretending to such fictions, judges should be willing to take responsibility for applying the established judicial controls over the expansion of tort liability.

The concepts that the Courts have had to grapple with in this situation are riddled with such legal fictions. Among others, the notion that in every case the birth of a child is a blessing is a fiction which the law should not apply to

but when her baby is born she forgets the anguish because of her joy that a child is born into the world.” (NIV).

a particular case, in the view of Justice Kirby, without objective evidence that bears it out. (See “Superclinics” *CES* (1995) 38 NSWLR 47 at 73 to 74.) In order to try and put the matter on a sound footing Kirby J adopted the view that *Cattanach* was not a case of pure economic loss but rather an instance of direct injury to the parents, certainly to the mother after receiving negligent advice about the risk of conception following sterilization. Thus economic loss was not pure but rather consequential. In the view of Kirby J “if there is any area where the law has no business in intruding it is in the enforcement of judicial interpretations of scripture and in giving effect to legal assertions about “blessings”, litigious “time bombs”, “desirable paradigms of family relationships”, the pertinence of “natural love and mutual confidence between parent and child” “clear values and family life” and the belief that “ill behaved” children cause “more trouble and very little joy”.⁷

⁷ at [151].

His Honour was criticizing the approaches of his fellow Judges in *Cattanach*.

The matter is even more complicated in a wrongful birth case by the possibility that a child may be born with a disability against which the parents might want to safeguard. That is to say, in the classic case where parents may carry a gene which would result in a disabled child, is there a difference in the damages to be awarded for the cost of rearing a disabled child compared to that of an ordinary child? Applying ordinary principles, one would say yes, although this is by no means a certain outcome. Again the position is clouded by the fact that the Judges do not want to see the value of a disabled child as less than a child which has no such disabilities. Current morality and assessment of disability as enshrined in various legislative instruments would not tolerate such discrimination.

It is interesting to note that in the three years between *Cattanach* and *Harriton* (*Harriton v Stephens* [2006] HCA 15) there appears to have been

a certain stasis in the thinking of the High Court in terms of applicable tort law.

In *Harriton*, the High Court held that children born with profound disabilities were not entitled to damages when medical practitioners failed to warn the plaintiff of the particular risks in circumstances where mothers might have elected to terminate their pregnancies. The same considerations that arose in *Cattanach* so far as the value to be placed on human life arose even more so in *Harriton*. If in fact the birth of the child is itself the actionable damage, then there is no reason at all why the child is not entitled to damages. The contrast between this view of the assessment of damages and the value of a life of a child based upon the costs of maintaining him at least negates what is described as “the unedifying proposition that the child is not worth the constant looking after”. (See *McFarlane v Tayside Health Board* (2000) 2 AC 59 HL). At least there is a value in the child which was actionable as opposed to what was canvassed as being the offence to the child in the *Cattanach* situation where he is

valued only in so far as his costs of maintaining him up to a certain age is concerned.

The collateral issues that arise as a result of the considerations thrown up by both *Cattanach* and *Harriton* is the unstated proposition that the abortion of the unwanted foetus is very much in the frame as a solution to both wrongful birth and wrongful life.

The problem with this lies in the fact that by the time a defective or unwanted foetus is recognised, in most instances the time for ready termination has long passed. It is commonly accepted that a termination beyond twenty-four weeks of maturity is regarded as a late abortion, and in Australia the availability of such late abortion is largely governed by ethical committees set up in various public hospitals. It is not available in many public hospitals at all.

The interesting question arises as to when human life actually begins. For the medical profession, until the foetus emerges as an actual living and

breathing human being, the foetus is regarded as in some fashion not a legal entity. Indeed, until quite recently, the law took the same view in relation to actions by mothers whose foetus was damaged or aborted as a result of a motor vehicle accident.

It is here that the intersection of law morality and ethics clash. In most jurisdictions now an abortion is not regarded as illegal if performed under medical supervision for cause. There is no logical reason why, provided the delivered foetus is not viable or deceased, late abortion should be treated in any significantly different way by the law to that of early abortion (defined usually as up to at maximum twenty-four weeks).

The definition of early and late abortion seems to be conditioned by the viability of the foetus if delivered at or about the twenty-four week mark. Certainly by twenty-four weeks it is almost certain that the foetus will

survive at least for a period of time as a living breathing human being.

Before that it is not at all certain that viability is guaranteed.⁸

Late term abortion, whilst subject to ethics committees in major public hospitals in Australia, is available overseas for no other consideration than the wishes of the mother or terminate the pregnancy. It is well known that a significant number of Australians have availed themselves of this where there is some doubt about the likelihood that they will have a child that would develop normally.

Even the approved late term abortions seem to carry some form of opprobrium about which the medical profession is gravely concerned. In a recent case, an expert who performs late term abortions following approval by an ethics committee was asked about the process of late term abortions and was hesitant to answer unless he was assured that the press was not present in the Courtroom. This is because the distressing fact is that late term abortions have to involve Feticide as a necessary pre-condition

⁸ See also approach in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

otherwise a living infant would have to be resuscitated and given every attention to help it survive. It is a brutal procedure.

From a social point of view, if the disabled child were able to sue as a result of the negligence of the attending physicians, there would be less likelihood of abortions being sought overseas, or illegally, or even with consent of the various ethics committee in Australia. The social consequences may be less significant by the delivery of a disabled child and the lethality of late term abortions if adequate damages were available to assist the family.

Harold Lunz in his esteemed “Assessment of Damages” for Personal Injury and Death (4th Ed) adopts a similar approach when he says “It would be preferable in Australia to allow the child to sue and to award the damages in the child’s action. The damages could then be retained under the control of the Court and would not be at risk of dissipation by the parents”.⁹

Let us revert back to the questions which we posited at the outset of this discussion.

⁹ At p. 641.

1. **Human Life:** Whilst medically this links to a continuum from the date of conception, for practical purposes the medical profession seems to have adopted that point of gestation where a foetus is viable, albeit in an assisted manner.

2. *Harriton v Stephens* stands for the proposition that because there is no comparator to gauge the value of existence from non-existence, damages are literally incalculable. Thus, the impaired child is not entitled to sue for damages solely because he/she might otherwise have been aborted.

3. Does the Medical Profession owe a duty of care from inception? Clearly the answer is yes, but from a causation point of view wrongful life will result in damages whilst wrongful birth will not.

4. The duty is to be categorized separately in respect of wrongful birth as opposed to wrongful life cases. The foundation for this is the approach to the negligence of the Medical Profession which essentially absolves it of

liability on the basis of a lack of a comparison between existence and non-existence.

QQ 2 and 5 need to be considered together. Moral arguments always underpin the so-called Policy considerations in the various jurisdictions which have had the issues of *Cattanach* and *Harriton* under consideration. Thus, in the leading English authority of *MacFarlane v Tayside Health Board* (2000) 2 AC 59 (HL) such factors as a baby being “a blessing not a detriment” (Per Lord Millett *ibid* at 114) and “a focus on the just dissolution of burdens and losses among members of society” (per Lord Steyn *ibid* at 82) were the levers for the House of Lords arriving at a different conclusion to *Cattanach*.

There is no question that moral considerations, including a particular view of what constitutes Human Existence continue to dominate the debate in this arena. The question that now has to be asked, is “Where to next?”

Perhaps the reasoning of Justice Beazley reflects the direction in which the debate should move. In *Waller v James* [2015] NSWCA 232 Her Honour decided a claim brought by the parents of a disabled child who was born with a genetic disorder and suffered permanent disability as a result of a stroke four days after birth. The child had brought proceedings in the High Court which were heard at the same time as *Harriton v Stephens* and for reasons outlined above the appeal was dismissed. Following this the parents brought their own cause of action.

The appellants identified the “right to plan their family” as the interest said to have been infringed by the doctor when he failed to cause them to be informed of the hereditary aspect of anti-thrombin deficiency (ATB). Her Honour was prepared to accept that the interest said to be infringed is capable of protection by the law such as to permit a claim for economic loss and that the scope of the doctor’s duty extended to it.

Her Honour’s findings are consistent with the underlying rationale for the recognition of actionable negligence in the case of a doctor’s failure to

warn, diagnose or treat confirmed by *Wallace v Kam* [2013] HCA 19; (2013) 250 CLR 375. Viewed in this way Justice Beazley did not believe it was a novel case. Statutory provisions such as section 71 of the *Civil Liability Act 2002* (NSW) (enacted to limit the impact of *Cattanach*) proscribe recovery of damages for the costs associated with rearing or maintaining a child but this provision 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.

It would seem that subject to causation and remoteness of damage a parent is entitled to a claim. In respect to causation some guidance is given in *Wallace v Kam* when the High Court talked about the relevant “rule of responsibility” in the context of a medical negligence case. Having referred to the duty of a medical practitioner [at 36] and the policy underlying the duty, the plurality said (at [37]):

“The appropriate rule of attribution, or rule of responsibility.... is therefore one that “seeks to hold the doctor liable for the consequence of material risks that were not warned of [and] that were

unacceptable to the patient”. The normative judgement that is appropriate to be made is that the liability of a medical practitioner who has failed to warn the patient of material risks inherent in a proposed treatment “should not extend to harm from risks that the patient was willing to hazard...”

In late term abortion cases the patients usually will discover disabilities in-utero when they are under the care of an ante-natal clinic and in certain circumstances a feto-maternal clinic where the doctors have access to high quality ultrasonography and are in a position to provide advice to parents about the actual or possible risks of a disability in their unborn child. If the parents prove that they would have terminated a pregnancy given this advice and it was negligent not to give the advice, it would seem on first principles that causation is established subject to proving that termination was a viable option.

Finally, given that the focus in *Cattanach* was on pecuniary loss, are other damages such as General Damages available? We are indebted to the research skills of Matthew Parsons for the following summation of the current position.

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State Chambers

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General damages in cases of wrongful birth (Matthew Parsons)

Whether or not general damages may be awarded for non-pecuniary loss has not specifically been considered by an appellate court within the Australian jurisdiction.

In *Cattanach v Melchior* (2003) 215 CLR 1, the High Court established that the costs of rearing a healthy child could be recovered in cases where a medical practitioner's negligence had led to the birth of a child, contrary to the wishes of the parents. The damages awarded in this case concerned economic loss and did not specifically make an award for non-pecuniary loss of any description.

McHugh and Gummow JJ at [90] discuss that in calculating the costs of rearing a child, the emotional or other benefits derived from the fact of having a child do not offset the damage sustained by the plaintiff. In doing so, they allude to the possible existence of claims for the 'loss of enjoyment of life' in wrongful life cases. In such cases, the damages compensating for loss of enjoyment or amenity of life would be offset against the emotional benefit and happiness stemming from parenthood. The point was not specifically decided as it was not raised on the appeal.

The dissenting judgment of Hayne J refuses any extent of compensation with regard to wrongful birth on the basis that a 'process of evaluation' as to the relative benefits and detriments of child rearing is neither possible nor desirable in light of public policy considerations. Heydon J at [310] in dissent, specifically adverts to the fact that parents should be allowed to claim for diminished enjoyment of life if they are allowed to claim for economic loss in rearing the child.

In *Neville v Lam (No 3)* [2014] NSWSC 607, Beech-Jones J considered whether or not a mother of a ‘wrongfully birthed’ disabled son could recover non-pecuniary loss for her diminished enjoyment of life in caring for her son. At [164] his honour stated:

‘Such a claim could conceivably be pitched as one for the hours lost while engaged in child rearing on one hand, or it may be that the particular parent suffers stress, depression or some even more significant psychiatric conditions from doing so.’

However, his honour appeared to defer to the idea of preventing a ‘process of evaluation’ with regard to the relative benefits and detriments of rearing a child, drawing upon the dissenting judgment of Hayne J in *Cattanach*. Consequently, at [166] his honour stated:

‘If a claim for non-pecuniary loss is pitched in a manner that necessarily involves or requires an assessment of the relative benefits and detriments of rearing a child, then it cannot be entertained.’

It was stated that damages could only be awarded where they stemmed from a psychiatric illness arising in the plaintiff from the wrongful birth, rejecting the notion of damages for loss of enjoyment of life. In doing so, his honour appears to have regarded the dissenting view in *Cattanach* as binding.

The position taken by Bennett J in *G & M v Sydney Robert Armellin* [2008] ACTSC 796 is in direct opposition to that of *Lam*. His honour at [202] acknowledged that disappointment, distress, sickness, anxiety and

devastation were felt on the part of the plaintiff when a doctor negligently implanted her with two embryos instead of one. This was particularly characterized by a strain on her relationship and culminated in a holiday having to be cancelled due to cost concerns.

At [209], his honour found that these issues were common and expected upon the birth of a child, however, he did not ascribe them to the birth of the second child and concluded that they were likely to have occurred anyway. His honour, whilst finding for the defendant in terms of liability, tentatively suggested that an award of general damages for the plaintiff would have amounted to \$55,000 for emotional distress. However, this was largely attributed to the pain and suffering relating to an additional birth.

English authorities

English authorities have addressed the issue of general damages stemming from wrongful childbirth with more rigour and depth. In *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1984] 3 All ER 1044, a sterilization procedure was negligently performed, leading the plaintiff to give birth to a disabled child. Slade LJ found that in addition to the economic losses compensated for, an extra award for ‘pain and suffering’ should be available (particularly in light of the additional attention and care the disabled child would require). His lordship held that in calculating the relevant pain and suffering, it was necessary to offset any figure against the emotional benefits derived from the love and joy of the child. This appears to be largely consistent with the proposed model of the majority in *Cattanach*.

McFarlane v Tayside Health Board [2000] 2 AC 59 concerned the negligent provision of a vasectomy to sterilize the plaintiff. Whilst they had been advised that the procedure was successful, a year later, they conceived a child. With regard to general damages, Lord Steyn at [p. 76] considered that where a child was born due to negligent sterilization, there was no liability for the life of the child. As sterilization was meant to prevent pregnancy, damages could only extend to the foreseeable risk of a pregnancy arising, and not to the entire life of the child. As such, general damages were only awarded for the loss of enjoyment and pain and suffering suffered as a result of the pregnancy and the immediate aftermath of it, excluding the impact of the child after it was born. However, this case is in distinction to *Emeh* in that the former concerned a severely disabled child, whilst the child in *McFarlane* was healthy.

Parkinson v St James and Seacroft University Hospital [2001] EWCA Civ 530 acknowledged a distinction that arises where the baby is born disabled, as opposed to healthy babies in wrongful birth cases. The case turned upon a mother who gave birth to a disabled child after a negligent sterilization procedure. In this case, Hale LJ at [293] acknowledged that the birth of a child is inherently 'good'. Based upon this analysis, it was held that damages for wrongful birth would only arise where the baby was disabled. In such cases, damages would only represent the additional costs and losses incurred between a healthy baby and a disabled baby.

Rand v East Dorset Health Authority (No 2) [2000] Lloyd's Rep Med 377 concerned the failure of a medical practitioner to recognize and advise of the presence of Down's syndrome in a foetus. The claimants submitted that they would never have proceeded with the pregnancy had they known of the defect.

In citing *Allen v Bloomsbury Health Authority*, Newman J acknowledged that:

‘The law is willing to recognize a claim for general damages in respect of the foreseeable additional anxiety, stress and burden involved in bringing up a handicapped child.’

The relevant consideration is whether the burdens are consequential upon a breach of the duty of care. His honour held that the burdens of having a disabled child are ‘obvious’ and the loss of amenity caused by being required to expend time caring for a disabled child is a real and physical consequence. Critically, his honour noted that damages for non-pecuniary loss in this circumstance are not to be calculated by reference to commercial costs or hourly rates as they are not economic losses. The loss manifests in having to sacrifice substantial time, pleasure and enjoyment of life in having to care for their daughter. As such, where real and significant loss of enjoyment in life can be observed, general damages should be awarded to compensate for the impacts upon the parents’ lives.
