Opinion

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The Law and Life: Unwanted Life and the Courts[i]

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Introduction

In recent years, senior appellate courts around the world have been called upon to adjudicate on very difficult issues involving life. Examples readily abound. For example, in the care of the frail and incompetent, the House of Lords determined, in 1993, that Tony Bland could have nutrition and hydration withdrawn from him, notwithstanding that doing so would directly cause his death.[ii] A similar, and similarly problematic, decision was delivered last year in the Victorian Supreme Court case of *re BWV*.[iii] In 2000, the English Court of Appeal determined that it was licit to separate Siamese twins notwithstanding that one of them was certain to die in the procedure and that the prospects of success for the other twin were problematic.[iv] We may leave to one side, on this occasion, the infamous IVF litigation which ignored the rights of children born pursuant to artificial reproductive technologies, firstly in the Federal Court[v] then in the High Court of Australia,[vi] commonly referred to as the "McBain case." Nor is it necessary to note the significant and troubling High Court cases in the early 90's which authorised the sterilisation of children with disabilities.[vii]

Courts in Australia have recently been required to examine two cases in the always problematic areas known as `wrongful birth', `wrongful life' or `wrongful conception.' One case was decided by the High Court, the other by the NSW Court of Appeal.

Cattanach v Melchior[viii]

In this case, the High Court had to consider whether a woman on whom a tubal ligation was performed, and who was not informed that such a procedure might fail, could recover from the doctor who performed it the cost of raising the child conceived after the tubal ligation. A reason for the failure of the procedure was because of the possibility of the continuing existence of her right fallopian tube, which had not been found during earlier examination, nor during the procedure.

Dr Cattanach, the treating gynaecologist, had relied upon information provided by Mrs Melchior that during an appendectomy when aged 15, she had had her right ovary removed. Dr Cattanach assumed that at the same time she also had the right fallopian tube removed. The fact was that Mrs Melchior's right tube was not removed, and Dr Cattanach did not check to ensure that it had been. Mrs Melchior subsequently gave birth to a healthy son.

At first instance, Holmes J of the Queensland Supreme Court held that Dr Cattanach had been negligent in failing to inform Mrs Melchior of the possibility of failure of tubal ligation. He awarded damages in the order of $105,249.33 in relation to the past and future costs of raising the child. On appeal, the Queensland Court of Appeal upheld the award of damages for the cost of raising a healthy child.

The case was appealed to the High Court of Australia. By a 4:3 majority, the High Court upheld the right to claim damages for the birth of a healthy, although unwanted, child whose conception was possible only following a negligent act by a medical practitioner.

For the majority justices, the central question was whether damages flowed upon there being established an act of negligence. In the view of those justices who constituted the majority (McHugh, Gummow, Kirby and Callinan JJ) it was illogical to deny damages to the parents of the child in relation to *all* foreseeable expenses arising from the negligent act. These foreseeable costs included the reasonable expenses of raising the child. The majority justices rejected the argument, which featured prominently in the reasoning of the dissenting members of the Court (Gleeson CJ, Hayne and Heydon JJ), that the birth of a healthy child is a blessing and, therefore, the parents did not suffer any "damage" which attracted, in law, compensation. The justices in the majority rejected as irrelevant the creation of a parent and child relationship. They said that to focus on the new relationship would divert attention from the main question, namely, whether there should be an award of damages for the cost to the parents of raising and maintaining a child who, but for the negligence of a treating gynaecologist, would not have been born? Their honours answered:

> [T]he courts can perceive no such general recognition that those in the position of Mr and Mrs Melchior should be denied the full remedies the common law of Australia otherwise affords them. It is a beguiling but misleading simplicity to invoke the broad values which few would deny and then glide to the conclusion that they operate to shield the appellants from the full consequences in law of Dr Cattanach's negligence.[ix]

Quite illogically, the court noted that the Melchiors had suffered damage, not in the creation or existence of the parent-child relationship, but in the expenditure that they have incurred or will incur in the future. With the reformer's zeal for which he is renowned, Kirby J said that "to deny [the parent's right to recover child-rearing costs] is to provide a zone of legal immunity to medical practitioners, engaged in sterilisation procedures, that is unprincipled and inconsistent with established legal doctrine."[x]

Space allows only a brief look at the reasoning of those justices who constituted the minority of the Court; first, the Chief Justice, Murray Gleeson. His Honour said that the harm complained of arose directly out of the creation of a parent-child relationship. He stressed the difficulty of assessing the costs arising from the creation of the relationship. The Chief Justice said:

> It is difficult to justify treating a relationship as damage, and then measuring the consequential harm by reference only to those aspects of the relationship that are easy to count, and that arise sooner rather than later. Although our society does not regard children as economic assets, it does not follow that they should be treated as unmitigated financial burdens.[xi]

Adopting remarks from the 2000 House of Lords decision in *McFarlane v Tayside Health Board*,[xii] Hayne J said that "the parent should not be permitted to embark upon proving that the economic costs of the child will, in the long run, outweigh whatever advantages or benefits the parent may derive from the child's existence and the relationship between parent and child."[xiii] Even more bluntly, his Honour was strongly of the view that "the law should not permit the commodification of the child."[xiv] Consequently, Hayne J held that "the common law should not permit recovery of damages for the ordinary costs of rearing a child."[xv]

Of the three dissenting justices, perhaps Heydon J is the most persuasive in his argument. His first reason for rejecting recovery of damages for the cost of raising a healthy child is, like that of Gleeson CJ and Hayne J, that human life is invaluable in the sense that it is incapable of valuation. His Honour said:

It is not possible to treat the costs of bringing up children as loss or damage to the parents because of the nature of the human child, the nature of the parent-child relationship and the duties which human birth causes to spring up.[xvi]

> The second ground for dissenting, according to Heydon J, based perhaps more on grounds of policy than anything else, is the genuine fear that more and more novel claims will flow - even, for example, the costs of an expensive education – if a claim for the costs of raising a healthy child were to be allowed.[xvii]

Commenting on this case, one academic said: "The birth of a further child was the very thing the doctor [Dr Cattanach] was supposed to prevent. The doctor's negligence was found to be a direct cause of the parents' unwanted financial obligations. Much more difficult are the cases involving the birth of disabled children when the doctor's negligence has not caused the disabilities." Judgment in one such case has just been delivered by the NSW Court of Appeal. It would seem inevitable that it, too, will go to the High Court for final determination.

Harriton (by her tutor) v Stephens;
Waller (by his tutor) v James; Waller (by his tutor) v Hoolahan[xviii]

Alexia Harriton and Keeden Waller were each born disabled to a catastrophic degree. They claimed damages, being the [alleged] harm they suffered by being born disabled. None of the treating doctors caused their disabilities, subject to the qualification noted below in relation to Alexia.

Facts

In the case of Alexia it was agreed as between the parties that it would have been prudent medical practice in 1980 to advise a pregnant woman who had rubella in the first trimester of her pregnancy that there was a very high risk that the unborn child would suffer grievous injury as a result of the rubella infection. It was also agreed that in such circumstances, prudent medical practice would have been to counsel a woman that the only way to prevent a child from suffering these injuries throughout his life would be to terminate the pregnancy. Had the rubella to which Alexia's mother been exposed been diagnosed, she would have exercised her "lawful right" to terminate the pregnancy. Alexia was born with severe congenital disabilities caused by the rubella virus with which Mrs Harriton had been infected in the first trimester of her pregnancy. Alexia's injuries included blindness, deafness, mental retardation, spasticity, inability to care for herself and the need for 24 hour care. She has already attained her age of majority, having been born in 1981.

Keeden was born in August 2000. There were two reasons for his disabilities. First, his father suffered from a genetic condition known as antithrombin 3 deficiency ("AT3") which could be passed to one's offspring. AT3 is a blood-clotting disorder; it results in a propensity for blood to clot. Secondly, Keeden's disabilities also included permanent brain damage and cerebral palsy as a result of a cerebral thrombosis which occurred, at least in part, by reason of the circumstances of his delivery. Thirdly, Keeden was conceived through IVF procedures. There had been no screening for AT3. Had Keeden's parents been advised of the AT3 deficiency, they would have deferred egg harvest and/or embryo transfer until methods to ensure transfer of only AT3 deficiency free embryos were identified; or they would have used donor sperm; or they would have sought and obtained a "lawful termination" of Mrs Waller's pregnancy.

Duty of Care

The trial judge held that each of the treating doctors owed a duty of care to each of the children. The scope of that duty was not to injure them. None of the treating medical practitioners caused the injuries from which the children suffered (the injuries being the result of contact with the rubella virus, in the case of Alexia, and the AT3 deficiency, in the case of Keeden). There being no breach of duty, there could be no award of damages. Even if a breach of duty could be established, there were insuperable difficulties in the assessment of damages. Studdert J, at first instance, held that it would be impossible to determine that damage had been suffered by reason of being born disabled. Moreover, there were, in his Honour's view, weighty public policy reasons for rejecting "wrongful life" claims. These grounds were, in substance, upheld by the NSW Court of Appeal (Spigelman CJ and Ipp J; Mason P dissenting).

The primary grounds of appeal were that the trial judge erred in failing to find that the duty of care owed by the treating medical practitioners included a duty to provide each mother with the necessary information to enable them to make an informed choice as to whether their pregnancies should be terminated. It was accepted by the court that had each

mother been informed of the conditions from which their children suffer, each child would have been aborted or, in the case of Keeden, he would not have been implanted into his mother's womb.

One of the more novel grounds of appeal was the proposal that courts could, and should, award damages on the basis that there was a compensatory principle based on "corrective justice." As argued by the appellant's counsel, this submission proposed that `if harm to a plaintiff is brought about by a breach of duty, then damages should be awarded.' The majority in the Court of Appeal (Spigelman CJ and Ipp J) rejected this argument.

The most developed judgment of the majority is that of Ipp J. From a long judgment, let us take one example only. Having explored in some detail the extensive legal authorities which require that there be, on the one hand, a causal nexus between the negligent act complained of and the damage suffered, and, on the other hand, the attempt by courts to establish an adequate quantum of damage, Ipp J said:

> …the claim for expenses to cater for the needs caused by Keeden's disabilities must, according to well-settled principle, be based on a comparison between the actual financial position of Keeden compared with his financial position had the respondents [doctors] not been negligent. Had the respondents not been negligent, Keeden would not have been born at all. At common law, even a award of damages for the expenses incurred and likely to be incurred would require a comparison with a non-existent state.[xix]

Ipp J then quotes from a leading textbook thus: "Conceptually such actions [wrongful life] are not reconcilable with tort principles, since in accordance with such principles they involve a comparison between being born with a handicap and non-existence, a comparison which it is impossible to make in money terms."

There is still much ink to be spent on this case, and that of *Cattanach v Melchior*. The result from NSW is to be welcomed. One would be very brave, however, in the light of the High Court's judgment, to predict that it will withstand the expected High Court challenge.

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[i] One commentator rightly makes the point that the terminology used in certain kinds of cases is unsatisfactory. Professor John Seymour, from the Faculty of Law, Australian National University, Canberra, continues: "…they may be referred to as `wrongful birth' or `wrongful pregnancy' cases. The term `unwanted birth' is more satisfactory." "*Cattanach v Melchior*: Legal principles and public policy," (2003) 11 *Torts Law Journal* 208 at p.209 fn.4. The title of this note obviously reflects agreement with this observation.

[ii] *Airedale NHS Trust v Bland* [1993] AC 789.

[iii] *Gardner Re BWV* [2003] VSC 173.

[iv] The case of the separation of conjoined twins, Jodie and Mary from Malta, understandably became a *cause celebre* and led to a proliferation of academic and other literature. The case is formally known as *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147; [2000] 4 All ER 961. For an Australian judgment which grappled with very similar facts, see the decision of Chesterman J of the Queensland Supreme Court in *Queensland v Nolan* [2001] QSC 174.

[v] The decision of the Federal Court was delivered by Sundberg J in July 2000. *McBain v The State of Victoria* (2000) 99 FCR 116.

[vi] (2002) 209 CLR 372. The High Court of Australia dismissed, on procedural grounds, the challenge to the judgment of Sundberg J by the Australian Catholic Bishops Conference. The substantive issues of the appeal regarding the legal rights of children born pursuant to IVF remain unresolved. The writer was formerly Research Fellow at the Australian Catholic Bishops Conference, Canberra and in that capacity had the conduct of the legal proceedings in both the Federal and High Courts.

[vii] *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218; *P v P* (1994) 181 CLR 583.
[viii] *Cattanach v Melchior* (2003) 199 ALR 131.
[ix] *Ibid* at para. [77].
[x] *Ibid* at para. [149].
[xi] *Ibid* at para. [34].
[xii] [2000] 2 AC 59 at 111. The High Court decision in *Cattanach v Melchior* takes a different approach to that adopted by the House of Lords in *McFarlane v Tayside Health Board*.
[xiii] (2003) 199 ALR 131 at [259].
[xiv] *Ibid* at [261]. Heydon J used the same terminology at [353].
[xv] *Ibid* at [255].
[xvi] *Ibid* at [352].
[xvii] Generally, see *ibid* at [306, 311 and 371].
[xviii] [2004] NSWCA 93 (29th April 2004).
[xix] Para.[232]