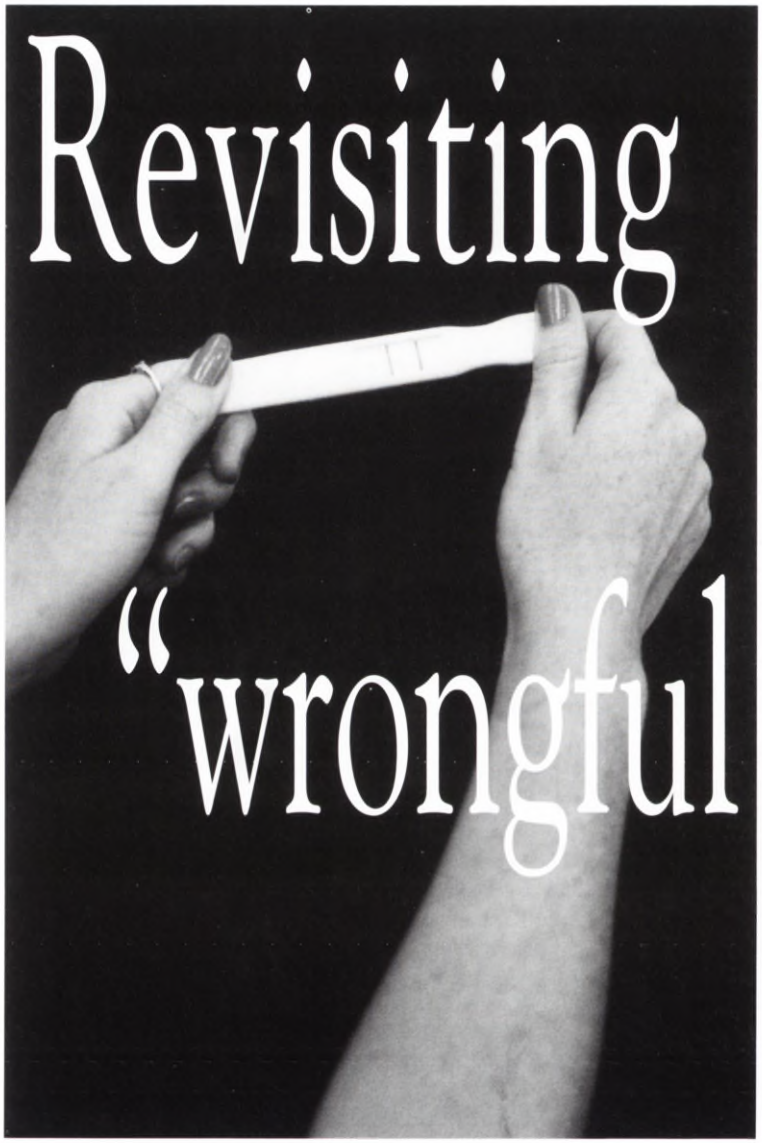
Revisiting "wrongful life"



Sydney-based lawyers Maurice Blackburn Cashman are set to lodge a Supreme Court action seeking damages in the name of a child born with severe congenital abnormalities due to undiagnosed rubella infection. The action will revive a consideration of claims for "wrongful life".

On 17 November, 2000 France's highest court, the Cour de Cassation, ruled that a limited claim for damages for "wrongful life" was permissible under French civil law.[1] In *Perruche* a child was born with severe disabilities due to his mother's rubella infection early in the pregnancy. The defendant doctors and pathology laboratory negligently failed to diagnose the rubella and the mother was wrongly advised that the illness that she had was not rubella. But for the negligent advice the pregnancy would have been terminated.

A claim was brought on behalf of the parents for their emotional distress and pecuniary losses. A claim was also brought on behalf of the child for compensation for the injuries that he suffered. It was the claim for "wrongful life" on behalf of the child which was at issue in the Cassation Court.[2]

In upholding the right of the child to bring an action in his own name the Court ventured into an area of law, ethics and public policy which most common law courts have successfully avoided for years. The time has come, it is suggested, for Australian courts to revisit the thorny problem of "wrongful life".

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"Wrongful birth" and "wrongful life"

Claims for "wrongful birth" are recognised in Australia and throughout the common law world. These cases are brought by parents alleging that, but for the negligence of a health professional, a woman's pregnancy would not have occurred or would not have been continued.

The typical "wrongful birth" claim involves failed sterilisation (either vasectomy or tubal occlusion procedure), failure to diagnose a pregnancy, or failure to diagnose a condition which, if known, would have resulted in the pregnancy being terminated.[3] The area of dispute in these cases has usually been the extent of the damages recoverable by the parents.

In *McFarlane v Tayside Health Board,*[4] a failed sterilisation claim, the House of Lords determined that parents were entitled to compensation for emotional distress and pain and suffering related to the pregnancy as well as out-of-pocket expenses and economic loss directly related to the pregnancy. A claim for the cost of raising a child was

rejected on the basis that the birth of a healthy child should not be considered a compensable injury.

In *Melchior v Cattanach,*[5] another failed sterilisation claim, the Queensland Supreme Court declined to follow *McFarlane* and awarded damages for the costs of raising a healthy child. That case is now on appeal.

The only Australian appellate decision in the area is *CES v Superclinics*[6] in which a healthy child was born following a negligent failure to diagnose a pregnancy. Damages for the mother excluded the costs of raising the child.

Unlike the claim by parents for "wrongful birth", courts have been less accommodating to claims by disabled children who seek damages for "wrongful life".

The problem with "wrongful life" claims

In "wrongful life" claims there is never a problem establishing that the defendant owed the child a duty of care or that there was a breach of duty. The difficulties arise with respect to causation and damages.

The defendants typically assert legal defences to absolve themselves from liability for admitted or found negligence. First, the defendants argue that the child's disability was not "caused" by their negligence. They say that it was the genetic inheritance, or the congenital abnormality, or the in utero infection which was the "cause" of the disability. This argument does have a superficial appeal. The reality is, however, that the negligence caused the child to be "born with the disability". The biological cause of the disability is not the issue.

Second, the defendants argue that if the real injury is "being born" then no damages are recoverable. This is because it is impossible to value "life", even a life with disabilities, against the alternative: "non-existence". This argument also has superficial appeal. Indeed it is impossible to assess the value of "life versus non-life". But assessing the value of the extraordinary care costs required of a disabled person is not difficult. It happens in every claim for personal injuries.

The defendants, and those who oppose "wrongful life" claims, supplement their legal arguments with emotional ones. They say that to permit such claims implicitly supports the eugenic policies of the Nazi regime. It would be dangerous, not to mention an indignity to the disabled, to suggest that there are some lives that are "not worth living".

But these emotive arguments are fallacious as well. It should not be forgotten that Australian law permits a woman to terminate a pregnancy if certain conditions apply. That law exists to support the rights of women; it is not a policy of eugenics. Furthermore, aborting a foetus known to have a high likelihood of being born with severe congenital disabilities would hardly be considered by many to be immoral. In fact, some might consider it immoral not to.

English and Australian decisions

The English Court of Appeal in 1982 refused to recognise "wrongful life" claims. In *McKay v Essex Area Health Authority*[7] the child was born suffering disabilities due to an undiagnosed rubella infection. But for the defendants' negligence the pregnancy would have been terminated. The arguments regarding causation and damage, referred to above, were accepted by the Court of Appeal.

In that case it was suggested that what the child was really arguing for was "a right to die" and a corresponding duty on behalf of the doctors to kill her. As Stephenson LJ put it:

> *To impose such a duty toward the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy. It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving, and it would even mean that a doctor would be obliged to pay damages to a child infected with rubella before birth who was in fact born with some mercifully trivial abnormality. These are the consequences of the necessary basic assumption that a child has a right to be born whole or not at all, not to be born unless it can be born perfect or "normal," whatever that may mean.*[8]

In the end it was conceded that the real reason why the defendants' negligence did not sound in damages for the child was that it would be contrary to public policy to permit such a recovery.

Importantly, in the *McKay* case Stephenson LJ acknowledged that the practical consequences of this decision on the case before the Court was slight. This is because the parents were still entitled to advance their own action for damages:

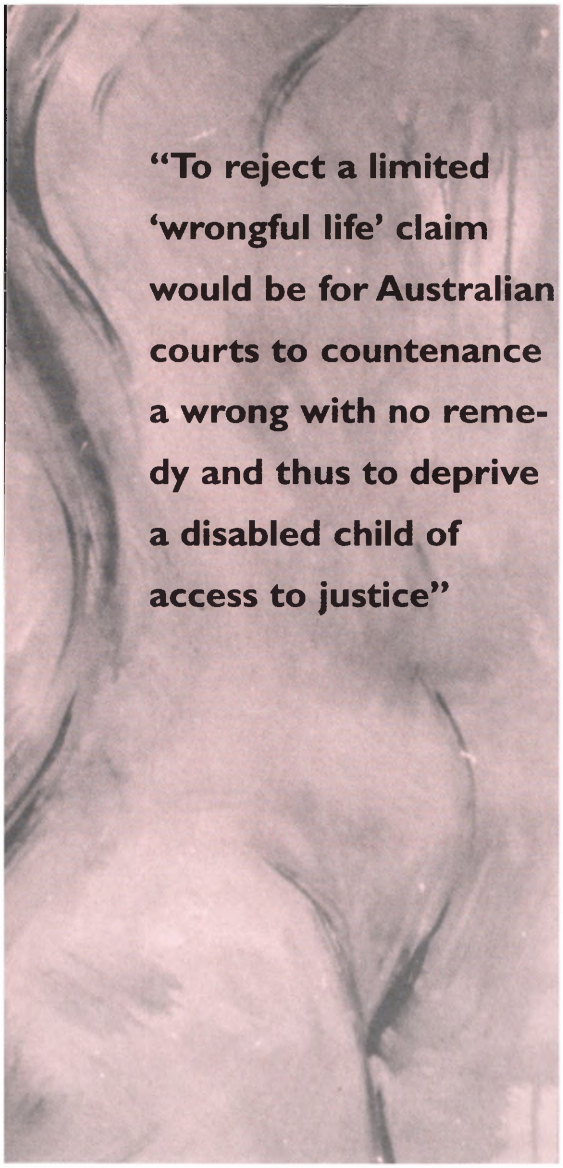
> *The importance of this cause of action to this child is somewhat reduced by the existence of her other claim and the mother's claims, which, if successful, will give her some compensation in money or in care.*[9]

Bannerman v Mills[10] is the only reported Australian decision which deals squarely with "wrongful life". In that case the plaintiff's claim for damages arising from a negligently undiagnosed rubella infection in utero was struck out by the Master as disclosing no reasonable cause of action. The decision in *McKay* was followed without question.

The Queensland case of *Vievers v Connolly*[11] also involved rubella infection. The claim was brought by the mother and the child. The child's action, which would have sought damages for "wrongful life", was not even considered in the judgment and appears not to have been advanced. The mother was awarded compensation for her own distress and losses and also for the extraordinary costs - past and future - involved in caring for her disabled daughter.

American decisions

Claims for "wrongful life" are acknowledged in several American jurisdictions[12] with many others declining to permit the claim either through legislation or the decision of State courts. Significantly for the Australian scene, the decision in *McKay* (which was followed in *Bannerman v Mills*) relied heavily on the 1967 decision of the Supreme Court of New Jersey in *Gleitman v Cosgrove.*[13] That case also involved a child born with severe disabilities due to a negligently undiagnosed rubella infection. Neither the parents nor the child were successful. The claim was defeated on the grounds of public policy and the impossibility of calculating damages. In a dissenting opinion, one of the judges stated that the majority: ▶



"To reject a limited 'wrongful life' claim would be for Australian courts to countenance a wrong with no remedy and thus to deprive a disabled child of access to justice"

permits a wrong with serious consequential injury to go wholly unredressed. That provides no deterrent to professional irresponsibility and is neither just nor compatible with expanding principles of liability in the field of tort.[14]

The *Gleitman* case was, however, superseded by the 1984 New Jersey decision in *Procanik v Cillo*.[15] In this case the issue was, once again, the negligent failure to diagnose rubella in utero. The Court outlined the history and controversies surrounding "wrongful life" claims and concluded that the child was entitled to a claim in his own right. The claim was limited to the "extraordinary expenses" made necessary by the child's condition. It did not award general damages for the child's pain and suffering.

Importantly, the parents' claim, which would have included a component for the care costs of their son, was barred by the lapse of a limitation period. No such limitation applied to the child's claim. In that case it was said:

Whatever logic inheres in permitting parents to recover for the cost of extraordinary medical care incurred by a birth-defective child, but in denying the child's own right to recover those expenses, must yield to the injustice of that result. The right to recover the often crushing burden of extraordinary expenses visited by an act of medical malpractice should not depend on the "wholly fortuitous circumstance of whether the parents are available to sue".

The present case proves that point. Here, the parents' claim is barred by the statute of limitations. Does this mean that Peter must forego medical treatment for his blindness, deafness, and retardation? We think not.[16]

Although this case was decided after *McKay* it was evidently not brought to the Master's attention in *Bannerman v Mills* despite the total reliance on *McKay* in determining that there was no cause of action for "wrongful life" in Australia.

Where to now?

The legal landscape has changed considerably since the English Court of Appeal handed down its decision in *McKay* in 1982. In the recent *Perruche* case the Court of Cassation considered the many ethical and policy arguments against "wrongful life" claims and found them wanting. It also considered the *McKay* decision and preferred the logic of the subsequently decided American case of *Procanik v Cillo*.

It is the writer's view that the time has come for a rational reappraisal of this legally tricky and emotionally charged issue in Australia. The following points are relevant:

- Judges appreciate a distinction between a claim for the costs involved in raising a normal, healthy child versus the costs of raising a disabled child. Even in the "wrongful birth" claims referred to above where the costs of raising a child have been rejected, the possibility of a different result for a disabled child has remained open.
- Modern Australian judges would not, I suggest, allow themselves to be led by the emotive and, it is submitted "false logic", raised to defeat "wrongful life" claims in the past. Instead they will focus on the fact that, unless compensation were to be given, there would be a negligent act leading to serious consequences - but no remedy. This would be contrary to one of the main reasons for the existence of tort law: to deter negligent conduct.
- The argument that the defendants did not "cause" the child's injuries - the birth did - would be reviewed in the light of recent High Court cases dealing with legal causation.[17] The proper question is not "What caused the disability?" but rather "Did the breach of duty cause the damage complained of?" The duty of care involved in genetic testing or the determination of foetal abnormalities is called into existence to permit parents to make an informed decision whether to conceive or continue a pregnancy. The duty is not "to prevent life" but rather to equip parents with the information to "prevent life with disabilities".
- The "public policy" arguments raised by those opposed to "wrongful life" claims will need to be re-evaluated. Many of these same arguments were addressed and rejected by the Queensland Supreme Court in *Melchior v Cattanach*. In that case the trial judge observed that:

  public policy is like an unruly horse, and once you get astride of it you never know where it will carry you.[18]
- So long as a claim for a child does not seek general damages, there can be no objection that a court is being asked to value "life versus non-life". One of the central difficulties in these cases - and the one which seems to raise the greatest ethical and metaphysical problems - would thus be avoided.

Floodgates?

Every time plaintiffs agitate for the recognition of a novel tort claim the defence raises the cry "This will open the floodgates to more litigation!" In the present "litigation crisis" climate this will certainly be the case.

But allowing a limited "wrongful life" claim as was done in *Perruche* and *Procanik v Cillo* would not, it is submitted, open any floodgates. It is not a novel claim at all. Compensation for the

extraordinary costs of caring for a disabled child is already available as part of the parents' "wrongful birth" claim. The "wrongful life" action simply ensures that the child will be able to secure payment of those expenses in the unusual case where the parents do not sue.[19]

To reject a limited "wrongful life" claim would be for Australian courts to countenance a wrong with no remedy and thus to deprive a disabled child of access to justice. In an area of law noted for its rhetoric on "dignity for the disabled" one could hardly think of a greater indignity than to deprive the disabled of compensation which would allow them to make the most out of their lives. PL

Footnotes:

1. Cour de Cassation Case No 9913701. For a copy of this decision (in French) see the Internet site: www.courdecassation.fr/agenda/arrets/arrets/99-13701
2. There was no appeal from earlier decisions confirming the parents' right to a claim.
3. The failure to diagnose actual or potential foetal abnormalities can arise in cases of negligent genetic testing, amniocentesis and ultrasound examination. As our ability to detect such abnormalities increases so too must the opportunities for "birth-related torts".
4. [1999] UKHL 48
5. [2000] QSC 285
6. (1995) 38 NSWLR 47
7. [1982] 1 QB 1166
8. Above, at 1180-81
9. Above, at 1178
10. (1991) Aust Torts Reports 81-079
11. (1995) 2 Qd R 326
12. New Jersey, Washington and California
13. (1967) 227 A. 2d 689
14. Above, at 703
15. 478 A. 2d 755
16. Above at 762
17. For example *Chappel v Hart* (1998) 195 CLR 232 and *Naxakis v Western General Hospital* (1999) 197 CLR 269
18. Above note 5
19. For example, where the parents have died, have chosen not to sue or their claim is barred by the expiry of a limitation period.