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Wrongful Life: *Damnum Sine Injuria?*

New South Wales has recently become the first Australian state to exhaustively consider, and reject, wrongful life as a cause of action. Whilst there is some future scope for development, objections at the legal and ethical levels are likely to remain compelling for some time to come.

Introduction

Damnum sine injuria: harm in the absence of a legal wrong. In New South Wales the recent decisions by the New South Wales Supreme Court in the cases of *Edwards v Blomeley*,[1] *Harriton v Stephens*[2] and *Waller v James*,[3] handed down together by a single judge, have denied legal redress to disabled plaintiffs born as a result of medical negligence. In all three cases, Studdert J held that no action for wrongful life could be maintained at common law in Australia, therefore the second issue tested, concerning heads of damage recoverable, did not arise. Studdert J concluded that "no claim is maintainable … in tort, in contract or under the *Fair Trading Act*".[4]

Wrongful Birth and Wrongful Life Defined

Wrongful birth claims are brought by the parent(s) of an unintended child, for financial or emotional injury suffered by them when a child is born as a consequence of negligence. The child may be born healthy or with disabilities. A wrongful life action is brought by or on behalf of the child itself, and always involves disability. Both are species of negligence. Wrongful birth as a cause of action is recognised in Australia and throughout the common law world. Wrongful life claims have been attempted since 1967[5] but have met with limited success.

Defendants range from doctors to genetic counsellors,[6] laboratory technicians and hospital authorities, manufacturers of contraceptive pills and devices,[7] and chemists.[8] The medical defendant has not caused any genetic or disease-related birth defects exhibited by the child. The gist of both claims is that but for a medical practitioner's negligence and/or breach of contract the child would not have been born at all. Factual scenarios involve negligent sterilisations, incorrect advice about maternal exposure to disease during pregnancy, failure to detect a pregnancy or foetal abnormality in time for an abortion to be procured, and similar breaches of tortious and/or contractual duty.

The judgments of Studdert J in the New South Wales cases, particularly that in *Edwards*, provide a useful overview of many of the legal and policy arguments surrounding the wrongful life and wrongful birth debates. While there is considerable overlap in the ethical and philosophical areas, the legal problems differ between the two types of claim. Wrongful birth cases do not encounter the same legal hurdles as wrongful life cases. Duty of care owed to the mother, breach of duty and causation are conceptually straightforward. In earlier cases courts struggled with the requirement of harm but this is rarely problematic now. Wrongful birth cases generally revolve around claims for pain and suffering during pregnancy and past and ongoing costs of caring for the unintended child. The major area of dispute is not the viability of the cause of action, but rather the appropriate measure of damages.

Wrongful life cases, on the other hand, raise questions at all stages of the standard duty, breach, causation and harm paradigm of negligence. The extent and scope of the duty of care owed to the unborn, the definition of existence or life as harm, the requirement of a causal nexus between harm and breach of duty, are all problematic. There are further issues concerning the appropriate measure of damages.

Edwards, Harriton and *Waller*: the Facts

Edwards arose out of an unsuccessful vasectomy procedure performed on the plaintiff's father, as well as a failure to advise the parents of the probable lack of success. The plaintiff was born with a rare chromosomal disorder causing intellectual ▶

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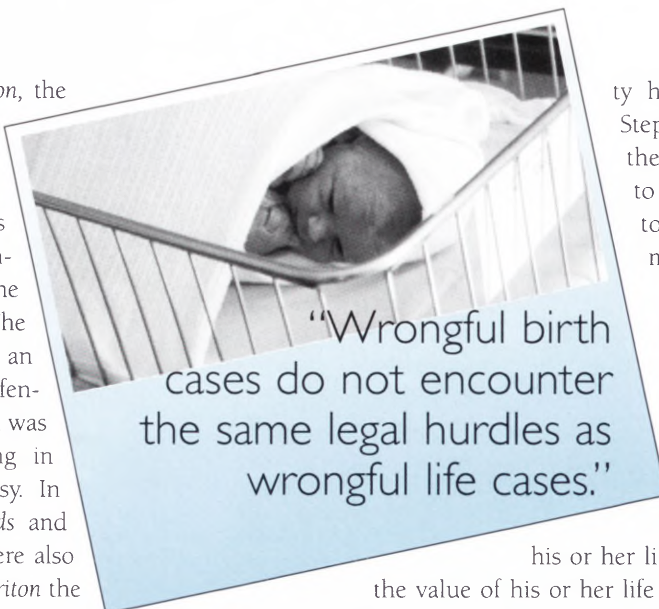
and other disabilities. In *Harriton,* the plaintiff's mother was wrongly advised that an illness she had contracted during early pregnancy was not rubella. The child was born blind, deaf, spastic and mentally retarded. *Waller* arose in the context of in-vitro fertilisation. The plaintiff's father suffered from an AT3 deficiency, known to the defendants but not investigated, which was passed to the plaintiff resulting in brain damage and cerebral palsy. In two of the three cases, *Edwards* and *Waller,* wrongful birth actions were also brought but not decided. In *Harriton* the parents were statute barred.



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Principal Arguments Against Wrongful Life

McKay v Essex Area Health Authority[9] in 1982 was the first wrongful life case in the Commonwealth, and remains the single most influential case on the subject. It has persuaded courts around the common law world, including Studdert J in the three New South Wales cases. Both earlier reported Australian decisions[10] followed *McKay.* A similar approach has been adopted in Canada. Austria and Germany have likewise rejected wrongful life claims. The United States is the only jurisdiction in which a sizeable number of wrongful life claims has been brought. There the cause of action has been rejected in twenty-three states, the main grounds of rejection summarised in *Edwards* being the impossibility of calculating damages, failure to prove causation, inability to establish damage, and public policy grounds and the preciousness of human life. Similar arguments from *McKay* are summarised below.

1. Duty of care

Cases such as *Watt v Rama,*[11] *Burton v Islington Health Authority*[12], *de Martell v Merton & Sutton Health Authority*[13] and *X & Y (by her tutor X) v Pal*[14] placed the existence of a duty of care to the unborn beyond dispute. The issue in *McKay* was the scope of that duty. In *Edwards*, Studdert J regarded the duty as being confined to a duty not to injure the child, whether before or after birth. The child's right not to be injured before birth had not been infringed by the defendants in *McKay*, so that the only right on which she can rely as having been infringed is a right not to be born deformed or disabled, which means, for a child deformed or disabled before birth by nature or disease, a right to be aborted or killed.

It was argued that the duty could be confined to a duty to afford the mother an opportunity to choose whether to abort, thus couching the duty in terms of patient autonomy of the mother. As with other loss of chance cases, however, the success of such an argument depends entirely on the plaintiff establishing that she would have exercised the lost opportunity had she been correctly advised. Stephenson LJ concluded that neither defendant owed *the child* a duty to give the mother an opportunity to abort, even though that duty may be owed to the mother

2. Nature of damage or harm: existence vs non-existence

Under normal compensation principles of *restitutio in integrum*, the plaintiff would be compensated for the difference between the value of his or her life as a healthy normal child and the value of his or her life as an injured child. In wrongful life cases, the difference is between the child's present disabled existence and no existence at all. Defining existence, of whatever nature, as a loss or harm was recognised by all judges in *McKay* as leading to an "intolerable and insoluble problem". Ackner LJ asked: "[H]ow ... [can] a court begin to evaluate non existence, 'the undiscovered country from whose bourn no traveller returns?'" No comparison is possible and therefore no damage can be established which a court could recognise. This goes to the root of the whole cause of action.

These sentiments were strongly endorsed in *Edwards*.

3. Sanctity of human life and public policy

In rejecting "this novel cause of action", Stephenson LJ made it clear that his view was arrived at as a matter of principle and public policy, rather than merely based on logic or absence of precedent. Ackner LJ took a similar view, emphasising the "sanctity of human life" and the "social implications in the potential disruption of family life and bitterness which it would cause between parent and child". These arguments have been seen as compelling in all jurisdictions.

4. Difficulty in assessing damage

Griffiths LJ was principally influenced by the difficulties in assessment of damage and the problem of defining the class of eligible plaintiffs suffering from different degrees of disability. Noting the "element of artificiality" in assessing damages for traditional types of personal injury, for example the impossibility of correlating pain with money, Griffiths LJ nevertheless felt that "rough justice" could be achieved. This is because the process is anchored to the pre-injury condition of the plaintiff, a condition which can be ascertained with reasonable certainty. However, in wrongful life claims "the common law does not have the tools to fashion a remedy". As the Supreme Court of Texas pointed out:

"It has long been held that imprecision of damages is not a bar to recovery. But this is not just a case in which the damages evade precise measurement. Here, it is impossible to rationally decide whether the plaintiff has been damaged at all".[15]

5. Fear of actions against parents

Apprehension was expressed that recognition of wrongful life claims would open the courts to claims by disabled children against their mothers for not having an abortion. This was seen as a greater objection for public policy reasons than the extra burden which would fall on doctors.

Successful Wrongful Life Claims

Wrongful life claims have been successful in only four American states.[16] In *Curlender v Bio-Science Labs*[17], the disabled child plaintiff was awarded damages for pain and suffering and any special pecuniary loss resulting from his impaired condition. The view expressed in *Park v Chessin*[18] that there is a "fundamental right of a child to be born as a whole, functional human being" seems to have been accepted in *Curlender*. In that case the court commented on the "groundless fear", discussed above, of children suing their parents for not aborting them. Their Honours reasoned that in a situation in which the parents had been correctly advised and still chose not to abort, the parental decision would constitute a *novus actus interveniens*, absolving medical personnel from liability. They continued:

"Under such circumstances 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".

In the few subsequent American decisions which have accepted the cause of action, the courts have refused to award general damages. In *Turpin v Sortini*[19], an incorrect diagnosis of an older sibling's congenital deafness had deprived the parents of an opportunity not to conceive the plaintiff, afflicted with the same condition. The court allowed the plaintiff's claim for extraordinary expenses for specialised teaching, training and hearing equipment over her lifetime, whilst disallowing the claim for general damages. In the Supreme Court of New Jersey[20] a child plaintiff suffering from congenital rubella syndrome recovered extraordinary medical expenses referable to his disability. Rejecting the claim for pain and suffering and a diminished childhood, the court referred to the perplexing philosophical problem of deciding between defective life and no life, and said:

"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."[21]

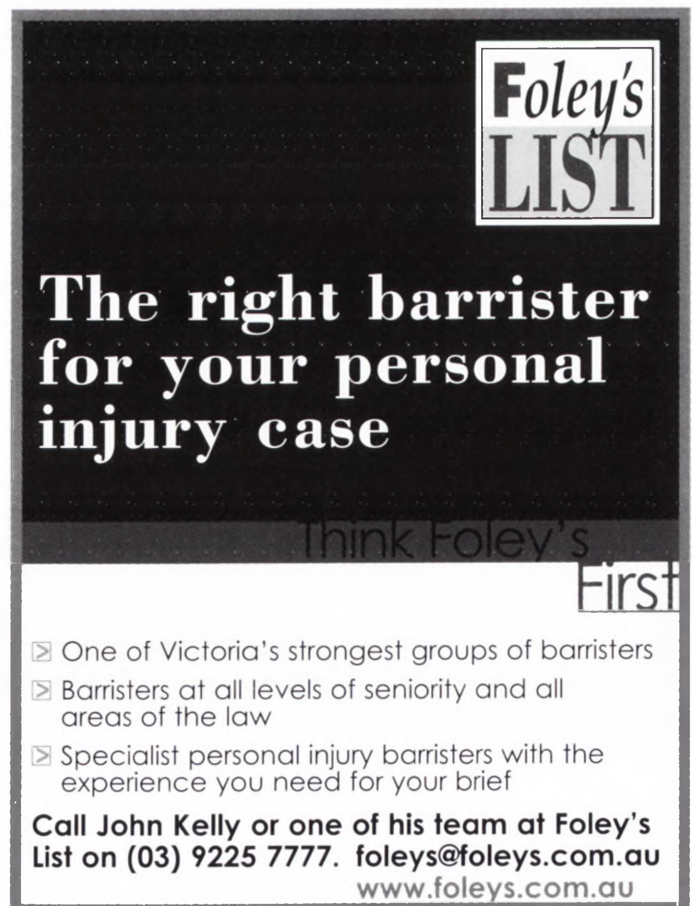
Additional Arguments Advanced in NSW

All the above arguments from *McKay* were raised in the New South Wales cases as well as two others. The plaintiff in *Harriton* sought to evade the restrictions of the privity doctrine in contract, relying on the decision in *Trident General Insurance Co Ltd v McNeice Bros Pty Ltd*.[22] It was argued that the existence of a trust of any contractual promise made to the mother could be inferred from the circumstance that any contract with the plaintiff's mother was made for the benefit of the plaintiff.

Whilst a number of the members of the High Court were willing to consider inroads on privity where a third party beneficiary was denied a benefit under an insurance contract, wrongful life cases do not present a parallel situation. Studdert J could find no basis for any obligation by the defendant towards the child plaintiff in the contract between the defendant and the mother,[23] or indeed in any statutory provisions.[24] Claims brought in contract would still be faced with a variant of the public policy barriers identified in tort claims, such as whether there was an implied term to abort, whether non-existence could be classed as a benefit, and so on, as well as the difficulties involved in assessment of damages.

The second argument turned on pure economic loss. The plaintiff in *Harriton* argued that, had the defendant given proper advice to the plaintiff's mother, there would have been no loss suffered because the plaintiff would not have been born. Because of the failure to give sound advice, the plaintiff was born and is confronted with extraordinary expense as a result of her disabilities. Her claim may then properly be regarded as a claim for pure economic loss rather than as one for personal injury. Studdert J was "not attracted by this...submission." His Honour felt that:

"[t]o categorise the 'damage' suffered by the plaintiff as pure economic loss disregards the essential nature of the claim, ▶



namely that it is one which allegedly arises in consequence of physical harm suffered; hence it ignores the fundamental distinction emphasised in *Mahoney v Kruschich (Demolitions) Pty Limited* between 'damage' and 'damages'."

Recognition of Wrongful Birth is Not Sufficient

Recognition of wrongful birth claims by parents is not a substitute for a separate right grounded in the child. Arguments based on consistency, coherence and distributive justice, as well as on various financial considerations, were put forward in *Edwards*, including the possibility that the parents' claim may be limited to the period of the child's minority, that the decision to sue, as well as any monetary sums awarded to the parents, would be outside the child's control, and that the parents' claim may be defeated by limitations provisions (as was the case in *Harriton*). Additional arguments centred on public policy considerations, in particular the requirement in justice that a negligent doctor should be liable to pay costs associated with bringing up a child who would never have been born but for the doctor's negligence. These arguments were all rejected in *Edwards*, without detailed reasons. Studdert J further justified his rejection of wrongful life by reference to cost pressures in relation to professional indemnity insurance, stating that "the judiciary cannot be indifferent to the economic consequences of its decisions."

Conclusion: "an enlightened and compassionate society should do more."[25]

There would seem to be some scope for future development of wrongful life as a cause of action. The principal conceptual links between wrongful life and birth are the concern with the sanctity of human life, and fears about the measurability of damages. Both have been able to be accommodated in wrongful birth, at least to the degree that the cause of action is regarded as viable. It is axiomatic that wrongful birth claims brought by parents must be limited to compensation of losses sustained by the parents themselves and not those sustained by the child. Whilst there will be considerable areas of overlap, particularly in the financial arena, the assessment of parental damages can make no allowance for pain and suffering and loss of amenity experienced by the child.

The major dissimilarities between the two causes of action are in the areas of harm and scope of the duty of care. Inroads have yet to be made here for wrongful life plaintiffs. The type of floodgates argument posed by Studdert J (above) has appealed to judges in negligence as diverse in approach as Lord Buckmaster[26] and Kirby J and is a perennial favourite. Yet it could confidently be expected that, even if wrongful life were allowed, only in the most extreme cases would non-existence be held to be preferable to existence. In addition, the floodgates argument, based solely on economic and administrative considerations, cannot justify "denial of redress in meritorious cases" on any moral or philosophical grounds.

American decisions in favour of child plaintiffs appear to have been "predicated on the needs of the living... seek[ing] only to respond to the[ir] call ... for help in bearing the burden of their affliction",[27] rather than consistency with established tort principle. Differing views on the nature of rights of the unborn may also be at the heart of some decisions, and different perspectives on the "life as a blessing" argument. The fact that liability in negligence is a function of fault rather than need is a fundamental obstacle for many injured, disabled or otherwise needy members of society. In wrongful life cases fault is clearly present, yet traditional approaches to the concept of harm have kept the causal nexus from being proved, leaving plaintiffs in a position of *damnum sine injuria*. At present, the only Australian authorities on wrongful life are first instance decisions, and the High Court has had no opportunity to express its view. PL

Footnotes:

1. [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002).
2. [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002).
3. [2002] NSWSC 462 (Unreported, Studdert J, 12 June 2002).
4. *Edwards*, above n 1, [35(7)].
5. *Gleitman v Cosgrove* 49 NJ 22, 227 A 2d 689 (1967).
6. *Park v Chessin* 400 N.Y.S. 2d 110 (1977).
7. *Rieck v Medical Protective Company* 64 Wis 2d 514 (1974).
8. *Troppi v Scarf* 31 Mich. App. 240 (1971).
9. [1982] 1 QB 1166 ('*McKay*').
10. *Bannerman v Mills* [1991] Aust Torts Reports 81-079, *Hayne v Nyst* (unreported, Supreme Court of Queensland, Williams J, 7 October 1995).
11. [1972] VR 353.
12. [1992] 3 All ER 833; [1993] QB 204 (CA).
13. [1992] 3 All ER 820.
14. [1991] 23 NSWLR 26.
15. *Nelson v Crusen*, 678 SW 2d 918 (Tex 1984).
16. California, Connecticut, New Jersey and Washington.
17. *Curlender v Bio-Science Labs* 106 Cal App 3d 811, 165 Cal.Rptr 477.
18. 400 N.Y.S. 2d 110, 112 (1977), later overruled.
19. 643 P 2d 954 (Cal).
20. *Procanik v Cillo*, (1997) NJ 339; 478 A 2d 755.
21. *Procanik v Cillo*, quoted in *Edwards*, above n 1, [42].
22. [1988] 165 CLR 107.
23. *Harriton*, above n 2, [78].
24. *Edwards*, above n 1, [129]-[133].
25. *Ferguson v Hamilton Civic Hospitals*
26. *Donoghue v Stevenson* [1932] AC 562; [1932] All ER Rep 1.
27. *Procanik v Cillo* NJ 339; 478 A 2d 755 (1997), quoted in *Edwards*, above n 1, [42].