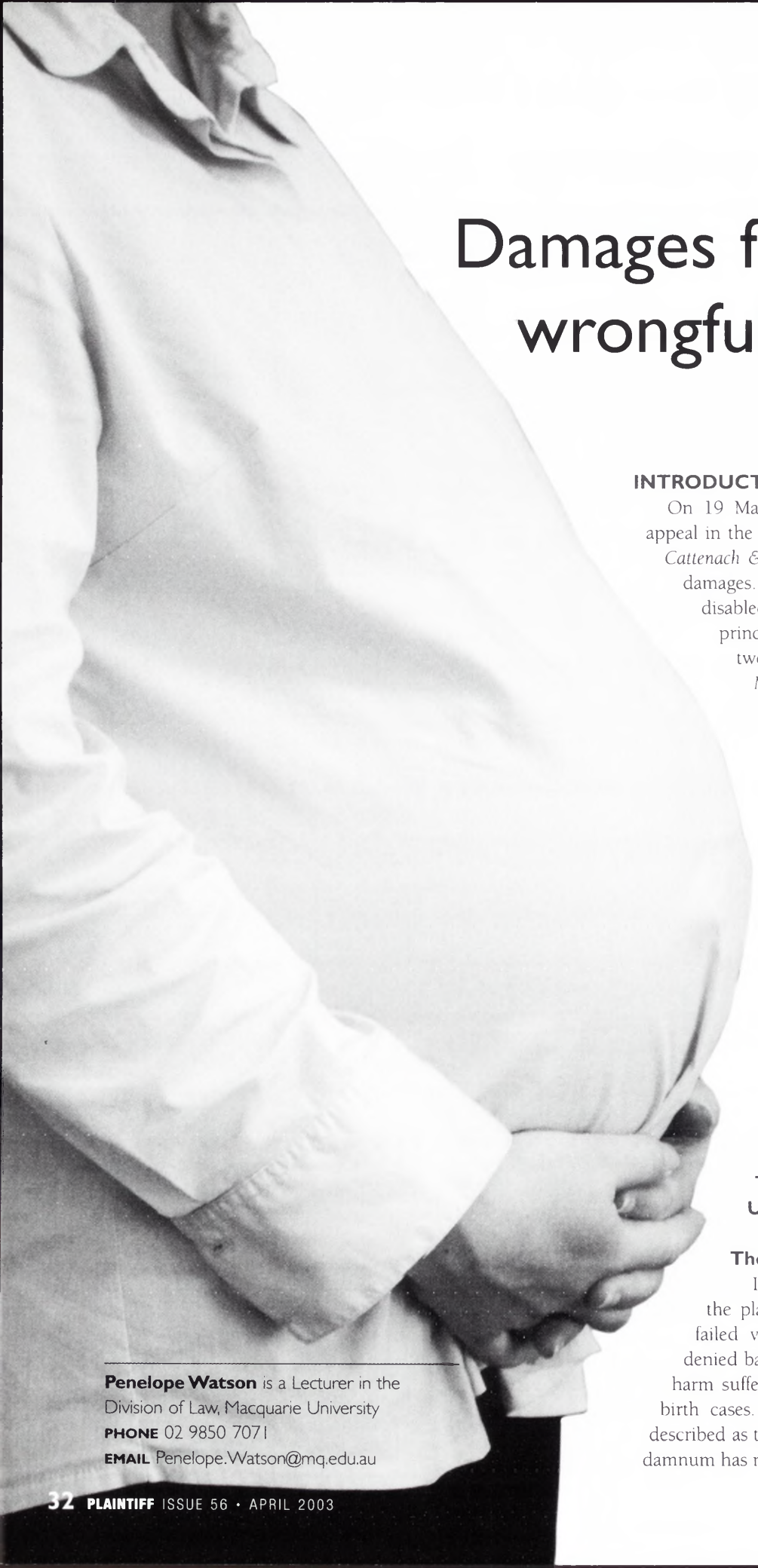
PENELOPE WATSON, NSW

Damages for wrongful birth



INTRODUCTION

On 19 March 2002, the High Court granted leave to appeal in the Queensland wrongful birth case of *Melchior v Cattenach & Anor*[1], the sole issue being the measure of damages. Wrongful birth cases may concern healthy or disabled children. There is no justification, either in principle or policy, for differentiating between the two on questions of liability or compensation. In *Melchior*, the High Court must decide whether parents of a normal, healthy but unintended child, born as a result of medical negligence, are entitled to be compensated for the costs of raising the child. A clear choice exists between the views of the Queensland Court of Appeal on the one hand, and the House of Lords on the other. The multiplicity of cases from the United States range across the entire spectrum, from no recovery to full recovery, and do not offer any consistent guidance. This article examines the law in Australia and the United Kingdom on damages for wrongful birth, and concludes that the Australian view expressed in *Melchior* is both correct in principle and more consistent with contemporary community values and expectations than the English position.

THE COMPETING POSITIONS: UNITED KINGDOM VS AUSTRALIA

The House of Lords in *MacFarlane*

In *MacFarlane v Tayside Health Board (Scotland)*[2] the plaintiffs conceived a healthy child following a failed vasectomy. At first instance their claim was denied based on the 'child as a blessing' argument (no harm suffered), which has a strong history in wrongful birth cases. On appeal[3], the court 'took what may be described as the traditional view of delictual liability: where damnum has resulted from injuria, the law recognises a legal

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interest which must be made good by an award of damages'.[4] Issues of public policy were considered to be 'not for the court' to decide.

The House of Lords allowed the mother's claim for pain and discomfort and associated financial loss, but not the parents' joint claim for upkeep costs. Their Lordships did not regard it as 'fair, just and reasonable'[5] to impose such economic losses on a doctor and his employer.

Lord Slynn of Hadley saw the principal issues as liability for economic loss, based on *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[6], and the extent of the duty owed to both parents. For pure economic loss, foreseeability by itself was insufficient to establish liability,[7] and a relationship of 'neighbourhood' or 'proximity' was also required, dependent on whether it is 'fair just and reasonable' for the law to impose the duty.[8] He concluded that there was no such relationship, as the doctor had not assumed responsibility. He saw this conclusion as proceeding from the 'inherent limitation of the liability relied on'[9] rather than from public policy. The Canadian case of *Kealey v Berezowsk*[10] took a similar approach.

In Lord Steyne's view, cases from other jurisdictions which had allowed upkeep costs appeared to be based primarily on ideas of corrective justice, treating the cases as ordinary tort cases in which there were no factors negativing liability. His Lordship agreed that such an analysis supports awards of upkeep costs, but instead perceived distributive justice to be a more satisfactory foundation for an award of damages for upkeep costs. His Lordship continued:

'...to explain decisions denying a remedy for the cost of bringing up an unwanted child by saying that there is no loss, no foreseeable loss, no causative link or no ground for reasonable restitution is to resort to unrealistic and formalistic propositions which mask the real reasons for the decisions. ... [Where upbringing costs have been denied]...the real reasons have been grounds of distributive justice. That is, of course, a moral theory.'[11]

Lord Clyde saw policy as 'a very unruly horse, and when once you get astride of it, you never know where it will carry you'[12], incapable of dictating a 'confident solution'. His Lordship also rejected the benefits rule, but ultimately his conclusion rested on his belief that the upkeep claim went beyond restitution for the wrong. Lord Millett alone denied the claim for solatium as well as the upkeep claim, but did recognise that the plaintiffs had suffered both injury and loss in the form of denial of personal autonomy, meriting award of a 'conventional sum...not exceed[ing] 5000'[13].

It is observed that *Macfarlane* has been held not to preclude recovery for additional expenses associated with bringing up a disabled child.[14]

Australia

The only Australian wrongful birth cases decided prior to *Melchior v Cattanach,*[15] were *Dahl v Purnell*,[16] *Vievers v Connolly*[17] and *CES v Superclinics (Australia) Pty Ltd*[18]. These are all decisions of appellate state courts. In *Dahl*, moderate damages were awarded for the upkeep of a healthy child. In *Vievers*, the mother of a severely handicapped child recovered costs associated with past and future care of the child, covering a period of thirty years. De Jersey J found the circumstances were sufficient to characterise the case as 'exceptional' within the requirements of *Caltex Oil (Australia) P/L v The Dredge "Willemstad"*[19], establishing the 'sufficient degree of proximity', and making the costs of caring for the child a foreseeable loss consistent with *Sutherland Shire Council v Heyman.*[20]

In *CES v Superclinics*, the New South Wales Court of Appeal allowed the mother's claim in a split decision, Kirby A-CJ joining with Priestley JA to form a majority. Damages awarded did not include upkeep costs as the child could have been adopted. Kirby A-CJ alone would have allowed upkeep expenses, and rejected the 'child as a blessing' argument. His Honour saw 'no other reason grounded in public policy to prevent a full recovery...for damage incurred, physical, psychological and economic'[21]. Priestley JA adopted a causation based position and Meagher JA dissented, considering the cause of action not to be maintainable at all.

The Queensland Court of Appeal decision in *Melchior* awarded reasonable costs of raising a healthy child, explicitly declining to follow the House of Lords in *McFarlane*. At trial, Mrs Melchior was awarded $103,672 damages for personal injuries for pain and suffering, the effect on her health including depression, loss of amenities, past and future lost earning capacity, various out of pocket expenses, and *Griffiths v Kirkemeyer*[22] damages. Her husband was awarded $3000 damages for loss of consortium. Neither was challenged on appeal, the only issue being the fairly moderate sum of $105,249 awarded for past and future maintenance expenses. McMurdo P and Davies JA formed a majority, Thomas JA dissenting, and allowed the costs of raising the child. The principal grounds of difference between *MacFarlane* and *Melchior* are considered below.

PURE ECONOMIC LOSS

All judges in *Melchior* viewed the upkeep claim as one for pure economic loss, in line with the House of Lords. The law in Australia on pure economic loss differs from that in England, and the High Court has firmly rejected the English *Caparo* view[23]. This difference in the law was central to the trial judge's rejection of *MacFarlane* in *Melchior,* a view which was upheld by the Court of Appeal.

Pure economic loss has been recoverable in tort since the House of Lords decided *Hedley Byrne* in 1963, but the limits are still being explored. Foreseeability of harm alone is insufficient to establish a duty of care.[24] In *Caltex Oil*, Gibbs J, after emphasising that *prima facie* pure economic loss is not recoverable in tort, said:

'However there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to ▶

cause him such damage by his negligent act. It is not necessary, and would not be wise, to attempt to formulate a principle that would cover all cases in which such a duty is owed.'

All members of the High Court in *Perre v Apand* endorsed the views expressed in *Caltex Oil*, and all except Kirby J preferred them to the position taken in *Caparo*.

The decision in *Melchior* in favour of upkeep costs was based on *Perre v Apand*. In view of the 'relatively small and determinate class of people' (plaintiffs in whom negligent sterilisation has led to pregnancy) and the 'discrete determinate risk', McMurdo P felt that to allow the parents' claim represented 'a cautious and incremental extension' of the categories of recoverable economic loss, concluding:

'...the law imposes a duty of care upon a medical practitioner to avoid the forseeable risk of the costs of raising a child conceived through negligence in the context of a failed sterilisation performed for socio-economic reasons, subject to any appropriate limiting control mechanisms.'[25]

POLICY AND MORALITY

Dixon CJ in *National Insurance Co of NZ Ltd v Espagne*[26] said, 'Intuitive feelings for justice seem a poor substitute for a rule antecedently known, more particularly where all do not have the same intuitions.' A similar view was expressed by McHugh J in *Perre v Apand*:

'If negligence doctrine is to escape the charge of being riddled with indeterminacy, ideas of justice and morality should be invoked only as a criteria of last resort when more concrete reasons, rules or principles fail to provide a persuasive answer to the problem.'[27]

Lord Clyde in *MacFarlane* discussed the unhelpful nature of the 'unruly horse' of public policy, demonstrating how each argument could be met by a competing argument. The decisions of Lord Steyn and Lord Clyde in *MacFarlane* illustrate the problem. Lord Steyn's choice to opt for a distributive justice approach, in preference to the usual corrective justice purpose of tort, is entirely a personal choice, not one anchored to principle.

Negligence law, by its very insistence on fault, is fraught with moral judgements and issues of fairness. Corrective and distributive justice represent competing claims on morality and fairness, which may at times coincide in a given case. In *Perre v Apand*, McHugh J referred to negligence law as needing to 'serve its principal purpose as an instrument of corrective justice'. The *restitutio in integrum* principle underlying tort law is essentially about corrective rather than distributive justice, since it compensates the rich more generously than the poor, and imposes burdens on defendants related to consequences rather than in proportion to moral fault. Lord Steyn recognised that corrective justice would dictate recovery for upkeep costs, and his preference for distributive justice can only be viewed as proceeding from 'moral distaste'[28]. McMurdo P in *Melchior* could 'see no control mechanisms which require the rejection of the claim for economic loss other than public policy considerations, treated as distributive justice issues by Lord Steyn in *MacFarlane*'.

THE CHILD AS A BLESSING

McMurdo P discussed in detail the child as a blessing argument,[29] which has been influential in many cases, operating either to deny the upkeep claims altogether, as in *MacFarlane*, or by reducing claims by setting off benefits against damages as in the American cases of *Burke v Rivo*[30] *and Ochs v Borrelli*[31].

McMurdo P stated that she was 'far from persuaded' by the blessings argument, which 'appeals to some for religious or moral reasons.' Her Honour found that drawing distinctions between healthy and disabled children 'offends the respect and value the law places on every life and undervalues the benefit from and the valuable contribution of those born with disabilities,' preferring to avoid the 'distasteful spectacle of litigating this question in public'.[32] In both *MacFarlane* and *Melchior* it was accepted that no proper distinction could be made between the tests applied to healthy and disabled children.

Australia, in common with other Western developed nations, is experiencing declining fertility rates.[33] The free availability of contraception, surgical sterilisation, legal abortion in many cases, and the growing number of young women and couples choosing not to have children indicates clearly that 'children are not universally regarded as a blessing.'[34] This was recognised by United States courts 30 years ago in *Troppi v Scarf*[35], and

endorsed by Kirby J in *CES v Superclinics*, as well as the Court of Appeal in *Melchior*. The House of Lords view to the contrary can only be regarded as out of touch with contemporary reality.

CONCLUSION

The correct approach to damages for upkeep costs in wrongful birth cases, and the one likely to be endorsed by the High Court, is that taken by the Queensland Court of Appeal in *Melchior*. The House of Lords decision in *MacFarlane* is neither consistent with the trend of previous United Kingdom authority, nor defensible in terms of principle or contemporary mores.

There is no justification for excluding upkeep claims by wrongful birth plaintiffs, which constitute 'exceptional case[s],' within the meaning of *Caltex Oil*. On the test in *Perre v Apand*,[36] the plaintiffs' case is even stronger, as long as it is accepted that some 'impairment of legal rights,' such as deprivation of autonomy, has occurred.

Once upkeep claims are accepted in principle, there is still a question of degree. The choice is between 'modest reasonable costs' of child rearing, or more extensive costs including such things as a bigger house, bigger car, private school fees, and overseas holidays. The issue did not arise on the facts of *Melchior*, but McMurdo P expressed the view that:

'Although every case will turn on its own facts, there is much to commend a modest approach to damages for the reasonable costs of child raising; the need for control measures of the type referred to in *Perre*; the duty to mitigate and causation issues are all factors in favour of moderation of damages in this category.'[37]

While this view has appeal, there does not seem to be any ground in principle for singling out this category of claim from any other based on pure economic loss. While the principle of *restitutio* remains, the normal rules as to remoteness still apply, subject to appropriate set-offs for social security and other collateral assistance. PL

ENDNOTES:

1 [2001] QCA 246.
2 [2000] 2 AC 59 (HL).
3 Second Division of the Scottish Court of Session.
4 per Lord Hope of Craighead in the House of Lords, at 980.
5 see *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL), per Lord Bridge at 617-18, discussed below.
6 [1964] AC 465.
7 *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL).
8 per Lord Oliver, *Caparo*, quoted and endorsed in *McFarlane* at 971.
9 at 973.
10 [1996] 136 DLR (4th) 708, per Lax J at 739 – 741.
11 at 977- 78.
12 per Burroughs J in *Richardson v Mellish* (1824) 2 Bing 229, at 252.
13 at 1006.
14 *Parkinson v St James & Seacroft University Hospital* [2001] 3 All ER 97. *Groom v Selby*[2001] EWCA 1522 and *Rees v Darlington Hospital NHS Trust* [2002] EWCA Civ 88.
15 [2001] QCA 246.
16 15 QLR 33.
17 [1995] 2 QdR 325.
18 [1995-96] 38 NSWLR 47.
19 [1976-77] 136 CLR 529.
20 [1985] 157 CLR 424, at 466-67.
21 above n 121, at 77
22 [1977] 139 CLR 161.
23 *Sullivan v Moody* [2001] HCA 59.
24 *Perre v Apand Pty Ltd* [1999] 198 CLR 180; *Hill v Van Erp* [1997] 188 CLR 159; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (unreported, HCA, 18 March 1997).
25 at par [45].
26 [1961] 105 CLR 569 at 572.
27 at 212.
28 Per Davies JA in *Melchior* at par [88].
29 at pars [49] – [58] incl.
30 551 NE 2d 1 (Mass 1990).
31 187 Conn 253.
32 at par [50].
33 see Australian Bureau of Statistics data cited in *Melchior*, at F/N 81.
34 *Melchior*, at par [51] .
35 187 NW 2d 511 (1971), discussed in *Melchior* at par [51].
36 See quote per Gaudron J, above.
37 at par [64].