# RIGHTS AND WRONGS: a post-mortem on birth torts

By David Hirsch

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**The High Court has recently spoken on the vexed question of 'birth torts'.**

In *Cattanach v Melchior*,[1] the court held that the parents of a child born as a consequence of medical negligence are entitled in a 'wrongful birth' claim to damages for the inconvenience and costs to them of the birth of even a normal, healthy child.

Recently, in *Harriton v Stephens* and *Waller v James*,[2] the court held that a disabled child born into a life of suffering and need as a consequence of medical negligence is entitled to nothing in a 'wrongful life' claim because s/he has suffered no injury in the eyes of the law.

How did this situation come about? And what, if anything, does it tell us about the vitality of the common law?

## SOME BACKGROUND

Medical errors that lead to the birth of a child can arise in many ways. Prior to conception, a female sterilisation procedure or a vasectomy can be negligently performed; a contraceptive device can be incorrectly implanted; or mistaken advice can be given in genetic counselling or testing that leads parents to conceive a child. After conception, a routine blood test, an antenatal ultrasound, or an amniocentesis can be improperly reported, leading to false assurances that the foetus is not at risk of a congenital abnormality, and thus depriving parents of an opportunity to terminate the pregnancy.

And as the medical industry finds new and innovative ways to cater for our right to reproductive freedom – the right to choose whether and when to be parents – the opportunities for medical errors and consequential lawsuits are sure to increase.

But the problem is not new. Even before the sophisticated genetic testing and high-tech antenatal screening options we have today, doctors made mistakes and children were born as a result.

There was a time when parents who brought compensation claims against their doctors in these circumstances were given short shrift by the courts. Some judges considered that a woman who endured an unwanted pregnancy suffered no injury because pregnancy and childbirth were 'natural functions' for women, like eating or breathing. But with the rise of the women's movement in the 1960s and 1970s that view could no longer be sustained.

Since the 1970s, the common law accepted (sometimes grudgingly) that a claim for damages would lie where parental rights to avoid or terminate a pregnancy were violated by medical negligence. Compensation was limited in most cases to damages for the woman's 'pain and suffering' endured through pregnancy and childbirth.

A more vexed issue concerns whether parents are entitled to compensation for the cost of raising an unexpected child >>

in their wrongful birth claims. Some judges allowed such claims, others did not. In Australia, the situation became more uncertain following the controversial 1995 decision in *CES v Super-Clinics*.[3] In England, in 2000, the House of Lords also rejected these claims. In *McFarlane v Tayside Health Board*,[4] their Lordships decided that it was contrary to public policy to permit parents to assert that the cost of raising a normal, healthy child was a compensable damage.

In 2003, the issue finally came before the High Court here in Australia, and the majority refused to follow the English position. In *Cattanach*, while acknowledging the public policy arguments that prevailed in England, the majority found them less than convincing in modern Australian society. More importantly, in terms of what was to come, the court decided that the question of parental entitlement to compensation for the cost of child-rearing should be determined by the application of legal principle, and not public policy.

In *Cattanach*, the doctor had admitted breach of duty and accepted his responsibility to pay the mother damages for going through the pregnancy and childbirth. The only issue was responsibility for the child-rearing costs. The majority considered that the doctor was, in reality, seeking a 'zone of immunity' from a certain class of foreseeable damages. In their opinion it was contrary to legal principle to allow damages for one foreseeable consequence of the negligence (the pain and suffering of the mother) but refuse the other foreseeable consequence (the cost of raising the child).

## SANCTITY OF LIFE AND DISABLED CHILDREN

Central to the public policy argument against permitting parents the cost of raising a normal, healthy child is the 'sanctity of life' argument. Proponents assert that such claims diminish human life by turning children into a 'commodity' capable of valuation, and they ignore the immeasurable benefits and blessings of parenthood.

But as attractive as the sanctity of life argument appears to be, it has within it the germ of its own undoing: despite its appeal to universal truths, it appears to apply only to the birth of normal, healthy children. For proponents of the sanctity of life argument, consistency requires that compensation be refused for the birth of *any* child born as a consequence of medical negligence – not just normal, healthy ones. But in the opinion of the House of Lords in *McFarlane* and two of the three dissenting judges in the High Court in *Cattanach*,[5] it was felt that parents were still entitled to compensation for the extraordinary costs of raising a disabled child.

The political response to *Cattanach* was swift. Citing public policy concerns, legislators in three states[6] passed laws denying parents the right to damages for the cost of raising normal, healthy children but preserving their rights to compensation for costs arising from the unexpected birth of a child with disabilities.

## WRONGFUL LIFE CLAIMS

Despite the agreement of judges and politicians that parents deserve compensation where medical negligence leads to the birth of a disabled child, claims by the disabled children seeking compensation for their own suffering and special needs have not fared so well - even though both claims arise from the same medical mistake.[7]

With very few exceptions,[8] judges in most countries have rejected a disabled child's wrongful life claim.[9] Inevitably, the child's claim is demonised at the outset by the inflammatory label 'wrongful life'. The claim is characterised as one where the child has the temerity to come to court asserting 'a right not to be born' or worse, where a termination would have taken place but for the negligence, 'a right to have been killed in utero'.

Of course, the child does not say that its life is a wrong; the fault lies with the negligent doctor. And the child makes no assertion of a right not to live but rather that, being born into a life of suffering and need – a condition that would have been avoided had the doctor been careful – the doctor should bear responsibility for his or her mistakes.

## THE *HARRITON* CASE

Judges in Australia were forced to deal with the 'wrongful life' problem for the first time in the joint test cases of *Harriton v Stephens* and *Waller v James*.[10]

When Alexia Harriton's mother had a fever and rash early in her pregnancy, Dr Stephens reassured her that she did not have rubella and that her unborn child was not at risk of the congenital disabilities known to be caused by rubella infection in pregnancy. The advice was wrong. For the purposes of the legal argument it was agreed that Dr Stephens was negligent and that had the correct advice been given, Alexia's mother would have had a lawful termination of pregnancy. But for the doctor's admitted negligence Alexia would not now be blind, deaf, retarded, spastic and in need of 24 hours of care a day. Of course, but for the negligence, Alexia would not 'be' at all.

The case was run in the NSW Supreme Court on a point of law only: did the common law recognise a claim for 'wrongful life'?

Alexia lost her case at trial[11] and again, by a majority, on appeal.[12]

Predictably, the whole armamentaria of morality, religion and the ubiquitous 'fabric of society' were unleashed against Alexia's claim.

It was asserted that her claim violated 'core values' of the sanctity of life;[13] that it offended the views of the many 'believers' who maintain that life, whatever its travails, brings with it the prospect of 'an afterlife';[14] it threatened life as we know it by opening the door to children suing their parents for having them, by encouraging doctors to recommend abortions in questionable cases to avoid lawsuits, and by lending support to the proponents of eugenics by endorsing the notion that it is sometimes better to be dead than disabled.[15]

In one way or another, all of these 'public policy' arguments found favour in the courts below. But when the High Court agreed to hear Alexia's case, she had the benefit (or so she thought) of the court's views about the role of 'public policy' arguments in legal decision-making.

It will be remembered that in *Cattanach* the negligent doctor deployed 'public policy' arguments and lost. The

High Court had been determined to decide the case on the basis of legal principle, not on the vagaries of public policy. It was going to take the same approach to the wrongful life problem.

Accordingly, the argument before the court focused on issues of duty of care, breach, causation and damage.

Justice Kirby found that Alexia had made out her claim against Dr Stephens based on strict principles of tort law. In so saying, he agreed with the view of Justice Mason who dissented in the NSW Court of Appeal. But all of the other High Court judges found otherwise, and decided that wrongful life claims were inconsistent with established legal principles and so did not form part of Australian common law.

### The High Court's reasoning

All of the judges accepted that doctors owed a duty of care to the unborn and that their negligence could support a claim in tort for damage caused by negligence. They also accepted that Alexia would have a life of suffering and need[16] and that this would have been avoided had the doctor not been negligent. But the majority held that Alexia's life with disabilities did not qualify as *damage* in the eyes of the law, and so there was no legal duty on Dr Stephens to have prevented it.

Justice Crennan[17] explained:

> 'A duty of care cannot be clearly stated in circumstances where the appellant can never prove (and the trier of fact can never apprehend) the actual damage claimed, the essential ingredient in the tort of negligence. The appellant cannot come within the compensatory principle for measuring damages without some awkward, unconvincing and unworkable legal fiction.'[18]

The logic of the majority's argument was simple: legal principle insists that to prove *damage* caused by negligence a plaintiff must prove *harm*. To be *harmed* means to be made *worse off*. To be made *worse off* requires *comparison* between the plaintiff's present condition and the condition s/he would have been in had there been no negligence.

But if there had been no negligence Alexia would never have existed. Logic dictates that to prove *damage*, Alexia must prove that her life of suffering and need is *worse than non-existence*. But since the *comparison* between a life with disabilities and non-existence is *impossible* – it is a matter for philosophers and theologians – Alexia must fail in her claim because she cannot prove that she has suffered any *damage*.

Not surprisingly, those judges who have supported wrongful life claims have preferred reality to the metaphysical and religious excursions supposedly required by 'legal logic'.

> 'The reality of the "wrongful-life" concept is that such a plaintiff both *exists* and *suffers*, due the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life.'[19]

Justice Kirby observed that 'the life of legal systems derived from the common law of England has not been fashioned by logic alone'[20] and concurred with the view that:

> 'Law is more than an exercise in logic, and logical analysis, although essential to a system of ordered justice, should not become an instrument of injustice.'[21]

## DISCUSSION

We now know the legal status of 'birth torts' in Australia:

Parents are entitled to damages for the negligent violation of their right to reproductive freedom, including compensation for the costs of raising even a normal, healthy child. Their rights are, however, limited by statute in some states where the costs of raising a child are available only if the child is disabled.

Despite the same act of negligence grounding their parents' wrongful birth claim, disabled children have no right to compensation for themselves in a wrongful life claim. This is because they cannot prove that their lives of suffering and need amount to damage in the eyes of the law, since it is impossible to compare a life with disabilities to non-existence.

It was inevitable that the 'resolution' of the wrongful birth / wrongful life problem would be unsatisfactory.

On the one hand, there is something unpalatable about parents being compensated for the costs of raising normal, healthy children even if 'legal principle' supports the conclusion. Any discomfort about this outcome in wrongful birth claims can, and in some states has already been, modified by statute.

On the other hand, there is something troubling about denying a disabled child compensation for a life of suffering and need – a condition avoidable had the doctor not been negligent – by asserting that 'legal principle' mandates such >>

a result. But it is highly unlikely that any legislature would pass a law to correct the 'injustice' in denying a disabled child a wrongful life claim.

It is worth considering that especially in the wrongful life scenario (which is not about parental rights but the rights and needs of disabled children), legal principle sits uncomfortably with medical realities. This is hardly surprising. Justice Windeyer famously observed that when it comes to the relationship between tort law and medicine, one sees 'Law, marching with medicine but in the rear and limping a little'.[22]

Wrongful life claims raise 21st century issues. The notion that non-existence can be the desired outcome of proper medical care (whether by avoiding conception or terminating a pregnancy) would have been unthinkable in the 19th century, when the foundations of 'legal principle' were laid. But if the common law is to remain relevant, it must be able to change with the times and accommodate the social and medical realities of the day.

Justice Crennan's decision in *Harriton* does not say that the common law should stand transfixed in the headlights of precedent. But citing the High Court's decision in *Sullivan v Moody*,[23] a recent case where a novel claim was considered, her Honour observed that in considering novel claims, legal principle required that consideration be given to factors including the nature of the damage complained of and the need to preserve the coherence of other legal principles.[24]

In the wrongful life cases, her Honour appeared to use 'legal principle' in a self-justifying fashion. To declare that the disabled child has suffered no damage because 'legal principle' says so, and then to support this conclusion by asserting that to say otherwise would create an incoherence that is contrary to 'legal principle', sounds very much like circular reasoning.

Justice Crennan concluded that:

> 'In the present case the damage claimed is not amenable to being determined by a court by the application of legal method.'[25]

Perhaps so. But one may still ask whether this is an indictment of the claim or the method. The answer, I suggest, has to do with the notion of 'justice' in the circumstances and the extent to which tort law is able to deliver it.

At the end of her judgment, Justice Crennan announced what many would see as a fitting final word on the subject:

> 'Life with disabilities, like life, is not actionable.'[26]

Still, the voices of dissent should not be lightly ignored. Justice Mason, dissenting in *Harriton* in the Court of Appeal, said:

> 'It is one of the hallmarks of a compassionate society that care and treatment is made available to the severely disabled. To suggest that the appellants are somehow impugning life itself by seeking just recompense for even the cost of care is quite irrational, indeed disturbing.'[27]

The legal line has now been drawn in the difficult and divisive issue of birth torts in Australia. However we may feel about the outcome, it is hard not to appreciate just how blunt an instrument 'legal principle' can be. ■

**Notes:** **1** *Cattanach v Melchior* (2003) 215 CLR 1, majority decision 4-3 (Gleeson CJ, Hayne and Heydon JJ dissenting). **2** *Harriton v Stephens* [2006] HCA 15 (9 May 2006) and *Waller v James* [2006] HCA 16 (9 May 2006), majority decision 6-1 (Kirby J dissenting). **3** *CES v Super-Clinics (Aust) P/L* (1995) 38 NSWLR 47 in which the NSW Court of Appeal denied child-raising costs. The High Court granted leave to appeal, but the case was settled out of court when the Catholic Church sought to intervene in the case. **4** *McFarlane v Tayside Health Board* [2000] 2 AC 59. **5** Gleeson CJ, Hayne J but not Heydon J. **6** Queensland, NSW and South Australia. **7** The practical benefits of a claim for the child include that the entitlement does not depend on the fortuitous question of whether the parents bring a wrongful birth claim (they might be dead or statute-barred, as in the *Harriton* case); the compensation is payable for the life of the child, not limited to the time when parents' legal responsibility ends at age 18; and the money is protected by the courts (whereas no such protection exists for money received by parents for their own 'losses' in wrongful birth claims). **8** Courts in four US states and in Israel, France and Holland have upheld wrongful life claims. **9** Most wrongful life claims were brought together with the parents' wrongful birth claims, so the refusal of the child's claim did not mean that no compensation would ever be payable; but it would be payable to the parents for their losses. **10** Above, note 2. This discussion will focus on the *Harriton* case, as the writer was involved initially as solicitor and, in the High Court, as counsel. **11** [2002] NSWSC 461 per Studdert J. **12** (2004) 59 NSWLR 694 per Spigelman CJ and Ipp J; Mason P dissenting. **13** As one judge put it: 'Such a claim seems utterly offensive; there should be rejoicing that the hospital's mistake bestowed the gift of life upon the child.' *McKay v Essex Area Health Authority* [1982] QB 1166 per Lord Griffiths at 1188. **14** *Edwards v Blomeley* [2002] NSWSC 460 per Studdert J at [75]. **15** For a comprehensive review of the policy arguments against wrongful life cases, see *McKay v Essex* above, note 3. **16** And Keedon Waller, who suffered the effects of a chromosomal disorder and would not have been conceived but for negligent advice about genetic testing. **17** With whom Gleeson CJ and Gummow J agreed. **18** *Harriton* at [276]. **19** *Curlender v Bio-Science Laboratories* 106 Cal. App. 3d 811. **20** Citing Oliver Wendell Holmes, *Harriton* at [85]. **21** *Harriton* at [96] citing *Procanic v Cillo* 478 A 2d 755 at 762 (1984). **22** *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 395. **23** (2001) 207 CLR 562. **24** *Harriton* at [242]. **25** *Harriton* at [276]. **26** *Harriton* at [277]. **27** (2004) 59 NSWLR 694 at [124].

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