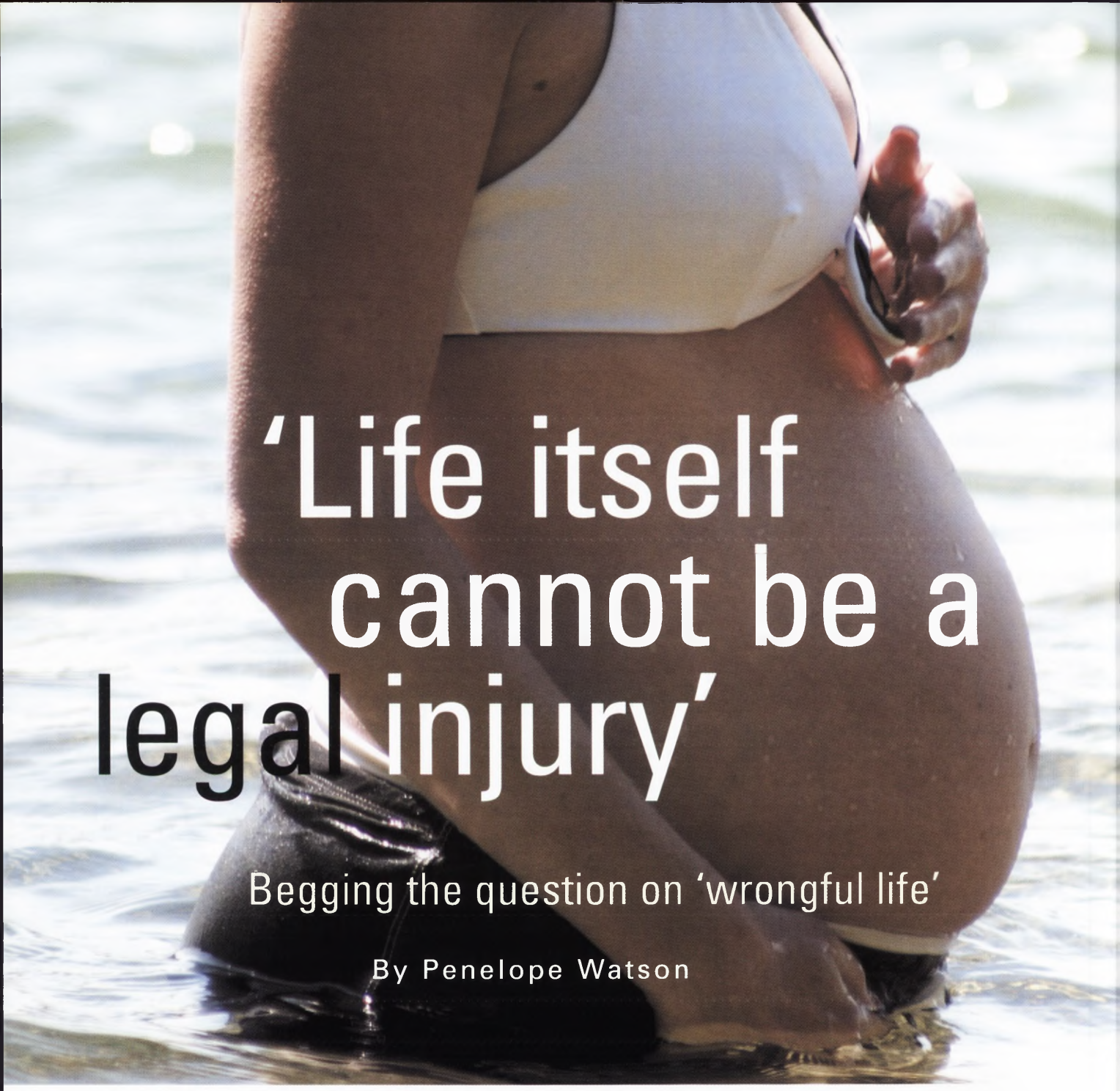

'Life itself cannot be a legal injury'

Begging the question on 'wrongful life'

By Penelope Watson

'This proposition [that life itself cannot be a legal injury] is a question begging conclusion [which] illustrates the problems stemming from the label "wrongful life", with its spurious invocation of legal and ethical principles upholding the sanctity of life.'[1]

New South Wales has again confronted the issue of wrongful life, the Court of Appeal deciding 2:1 against the plaintiffs in *Harriton v Stephens*, *Waller v James* and *Waller v Hoolahan*, heard together to determine 'substantially identical' issues.[2]

Despite the loss, the dissenting judgment by Justice Mason offers a

glimmer of hope for such plaintiffs in their search for a just resolution to this 'complex and difficult problem at the intersection of law and morality'.[3] The cases are currently on appeal to the High Court. Wrongful life is so intertwined with other highly charged and contentious legal and moral issues – such as abortion, euthanasia, eugenics, autonomy and self-determination, human rights, the dignity and value of the disabled, religion and the sanctity of life – that responses are guaranteed to be emotive and range across a broad spectrum of opinion. Even on questions of law, 'discussion is bedevilled by different views as to the legal concepts that are engaged'.[4]

WRONGFUL LIFE AND WRONGFUL BIRTH

Wrongful life actions are negligence claims brought by a disabled plaintiff who would not have been born or conceived if his or her parents had been advised of the risk of disability. They are distinguished from wrongful birth actions, which are based on the same facts but brought by the parents of the unintended child, either healthy[5] or disabled, to redress their own loss.

Defendants in both cases are doctors or other healthcare providers. The most common factual scenarios for breach of duty concern negligent performance, or failure to warn, in sterilisation procedures performed on either parent; and failure to diagnose rubella during the first trimester of pregnancy. Failure to detect a pregnancy or foetal abnormality in time for a legal abortion to be obtained, unsuccessful abortion attempts, inaccurate testing or reporting of genetic risks and conditions in parent or child, and negligent advice and/or provision of contraception, are others. Given the rapidity of technological advances, errors in genetic testing and counselling are certain to assume greater legal significance in future, including those relating to in-vitro fertilisation as in *Waller*.

Cases of pre-natal injury, such as deformity caused by teratogenic prescription drugs like thalidomide[6] or DES,[7] are distinguishable from wrongful life and wrongful birth. The same applies to foetal injury arising from trauma in road and other accidents. Both of these involve legally cognisable injuries directly caused by negligent breach of duty, whereas issues about the nature of the harm suffered, duty of care and causation are at the heart of the wrongful life controversy.

CAUSE OF ACTION

Wrongful life actions in Australia and elsewhere have focused on recognition of the cause of action. Wrongful birth as a cause of action is now accepted in Australia, the UK, Canada, South Africa, and many but not all US States, leaving damages as the principal legal question.[8] The NSW Supreme Court decided in 2002 that there was no recognised cause of action for wrongful life in Australia in the three test cases of *Edwards v Blomeley*,[9] *Harriton v Stephens*[10] and *Waller v James*.[11] This was consistent with the approach taken in most of the common law world, and heavily influenced by the conservative views espoused by the English Court of Appeal in the leading case of *McKay v Essex Area Health Authority*.[12] The High Court's recent decision in favour of the plaintiff in the wrongful birth case of *Cattanach v Melchior*[13] may auger well for wrongful life, even though it was decided by a narrow majority. Certainly, Justice Mason derived support for his views in *Harriton* from aspects of the judgments. The High Court allowed parents to be compensated for the costs of raising a normal, healthy, but unintended, child, born following a negligent sterilisation, rejecting the contrary public policy-based view held in the House of Lords.[14]

NSW SUPREME COURT: *HARRITON* AND *WALLER*

In *Harriton* and *Waller* the plaintiffs were both born profoundly disabled. The pregnancies would have been prevented or terminated if the parents had been correctly advised. In *Harriton* the plaintiff's mother was wrongly informed by a general practitioner that an acute illness with fever and rash which she suffered during early pregnancy was not rubella. Alexia was born blind, deaf, spastic and mentally retarded, requiring 24-hour-a-day care with no prospect of improvement. She was 21 years old at the time of the litigation. Her parents were unable to bring a claim in their own right because of the *Limitation Act* 1969.

In *Waller* the plaintiff, Keeden, was conceived by means of in-vitro fertilisation. The defendants were two obstetricians and gynaecologists, and an IVF company. >>

Keeden's father suffered from antithrombin 3 (AT3) deficiency, which is genetically transmissible and results in a propensity for blood to clot. This exposes the sufferer to a risk of cerebral thrombosis. There was somewhere between a 50 per cent chance and certainty that the condition would be passed to the foetus. The defendants should have known these facts and ought to have investigated the father's deficiency and advised the parents of its potential consequences.

Keeden was born with AT3 deficiency, a disability in itself. Several days later he was diagnosed with cerebral thrombosis, which caused permanent brain damage, cerebral palsy and uncontrolled seizures. If the parents had been properly advised, they would have either deferred egg harvest or embryo transfer until suitable testing for AT3 was identified, or used donor sperm.[15] Keeden was two years old at the date of hearing. Separate proceedings by his parents for wrongful birth were deferred pending resolution of the wrongful life claim. Both plaintiffs claimed general damages, economic loss and damages for gratuitous care, and Keeden also claimed loss of income.

Justice Studdert defined wrongful life as 'a claim brought by a child seeking damages in consequence of a failure to prevent the child from being born'.[16] He held that no such action could be maintained at common law in Australia. For this reason, the second issue concerning the appropriate measure of damages was not decided. The duty owed to the child plaintiff was limited to a duty not to injure the child, and in both cases this duty had not been breached. The child had not been born disabled because of any breach of duty by the defendant(s). His Honour also referred to the impossibility of determining that damage had been suffered by the child, as well as the impossibility of assessing compensatory damages. Finally, he reiterated the 'weighty considerations of public policy against recognition of "wrongful life" claims',[17] and concluded that 'no claim is maintainable ... in tort, in contract or under the *Fair Trading Act*'.[18]

Foreseeability of injury has never, of itself, been sufficient to ground a duty of care.

NSW COURT OF APPEAL

Both plaintiffs challenged this decision in the Court of Appeal on the issues of the scope of the duty of care, causation, and 'legally cognisable' injury. Alexia also challenged the rejection of her claim in contract, and the decision that assessment of compensatory damages would have been impossible. Justice Ipp and Chief Justice Spigelman formed the majority, deciding in favour of the defendant medical practitioners.

The most interesting judgment is the dissent. Justice Mason offered a way forward for plaintiffs, differing from the majority on every significant issue, including application of the compensatory principle, the nature of the harm suffered, the scope of the doctor's duty, causation, the need for consistency between the claims of parent and child, and onus of proof.

Acknowledging the absence of any controlling precedent, Justice Mason referred to the different categorisations of the problem in various jurisdictions. These ranged from 'strict logic, viewing the outcome as an inexorable consequence of applying ostensibly neutral and universal principles of tort law ... [to] recognis[ing] the influence of policy. Some see the issue in terms of causation, others in terms of recoverable damages, others in terms of identifying the proper plaintiff to receive the damages. Many authorities talk in terms of a duty of care, although ... some deny duty because of fundamental problems in assessing damages and/or problems in describing the nature of the injury inflicted.'[19] The 'strict legalism' of cases such as *Becker v Schwartz*[20] was contrasted with those in which 'policy factors ... peep out' as in *McKay v Essex*.

Justice Mason 'discern[ed] principles favouring [the plaintiffs] in ... *Cattenach v Melchior*' which 'throw considerable light upon the issues [in wrongful life] and the framework in which they ought to be addressed'. The majority judges in *Cattenach* were Justices Kirby, McHugh, Gummow, and Callinan, with Chief Justice Gleeson and Justices Hayne and Heydon in dissent. The major arguments are canvassed below.

DUTY OF CARE, FORESEEABILITY AND CAUSATION

The standard views from *McKay*, adopted by the majority in *Harriton*, are that the scope of the duty of care is confined to a duty not to actively injure the foetus, and that the disabled plaintiff's injuries are a result of natural disease or genetic processes, not medical negligence. Foreseeability of injury has never, of itself, been sufficient to ground a duty of care. In Justice Mason's view, defining duty in this way 'mistakes the scope of the duty of care and skews later analysis. The scope of the doctor's duty to a patient is not necessarily limited to an obligation not to cause harm or injury'. The duty may extend to a duty to prevent self-harm, palliative care or retardation of a medical condition, and interventions to relieve preventable consequences of ongoing conditions.[21]

It has been clear since *Watt v Rama* that a duty of care is owed to the unborn, extending to care of the foetus, and enforceable by the child under the 'born alive' rule.[22] This is usually discharged by advice, to and care of, the mother. The 'antipathy between the mother's interest that may justify abortion and the child's interest' identified by the majority, was rejected by Justice Mason as 'non-existent ... the perceived dichotomy of interests between mother and child is in fact a false one'.

This is because the doctors' negligence included failing to advise the parents, and *ex hypothesi*, the children would have been better off if this had been done. 'Since an element of the appellants' claim is that they were born into a life of suffering, their >>

interest is entirely congruent with that of their mothers.'[23]

Much of the discussion in wrongful life and birth cases has been about corrective versus distributive justice as the dominant purpose of tort law. Justice Mason saw recognition of wrongful life as 'foster[ing] the societal objectives of genetic counselling and prenatal testing, and discourag[ing] malpractice'.

The issue of causation depends on how the relevant harm is viewed. If the harm is defined as the physical/intellectual disability, then it is not causally connected to the doctor's negligence. However, if the harm is defined as the life of suffering associated with being born catastrophically disabled, then the appellants' 'disabilities were in one sense caused by the negligence of the respective doctors, who omitted to give advice and treatment to the mothers'.[24]

The same applies if the harm is defined as pure economic loss arising from the disability. 'To state that a person is afflicted with a (congenital) disease is no answer to a posited duty of care or the application of normal causation principles in relation to a treating doctor. If the doctor becomes involved and has the capacity to avoid or negate the disease … [but fails to do so] he or she will normally be held liable for the consequences … This is commonplace in medical negligence litigation involving disabilities stemming from preventable or curable diseases.'[25]

Justice Ipp applied the two-limbed test of causation from *Tambree v Travel Compensation Fund*[26] and *Harvey v P*.[27] He concluded that on the first limb of the test 'the respondents caused the appellants' loss by causing them to be born in a disabled condition' but on the second normative limb, he exonerated them on policy grounds.

'LIFE ITSELF CANNOT BE A LEGAL INJURY'

Justice Mason described the majority's proposition in *Harriton* that life itself cannot be a legal injury as 'a question begging conclusion [which] illustrates the problems stemming from the label "wrongful life", with its spurious invocation of legal and ethical principles upholding the sanctity of life'.[28] This conclusion 'deals fallaciously with the causation issue'[29] and ignores the High Court's rejection in *Cattenach* of the 'life as a blessing' argument. As many judges and commentators have pointed out, the existence of contraception, the declining birth rate in all advanced nations, legal abortion, and legally recognised rights to die in some circumstances, all indicate a societal view that life is not always a blessing in all circumstances.

The wrongful life debate, especially in the USA, has been closely connected with issues about abortion. Some opponents of wrongful life see it as encouraging abortion, since doctors would feel compelled to advise abortion as a defensive strategy for fear of litigation. Others see wrongful life claims as undercutting the mother's

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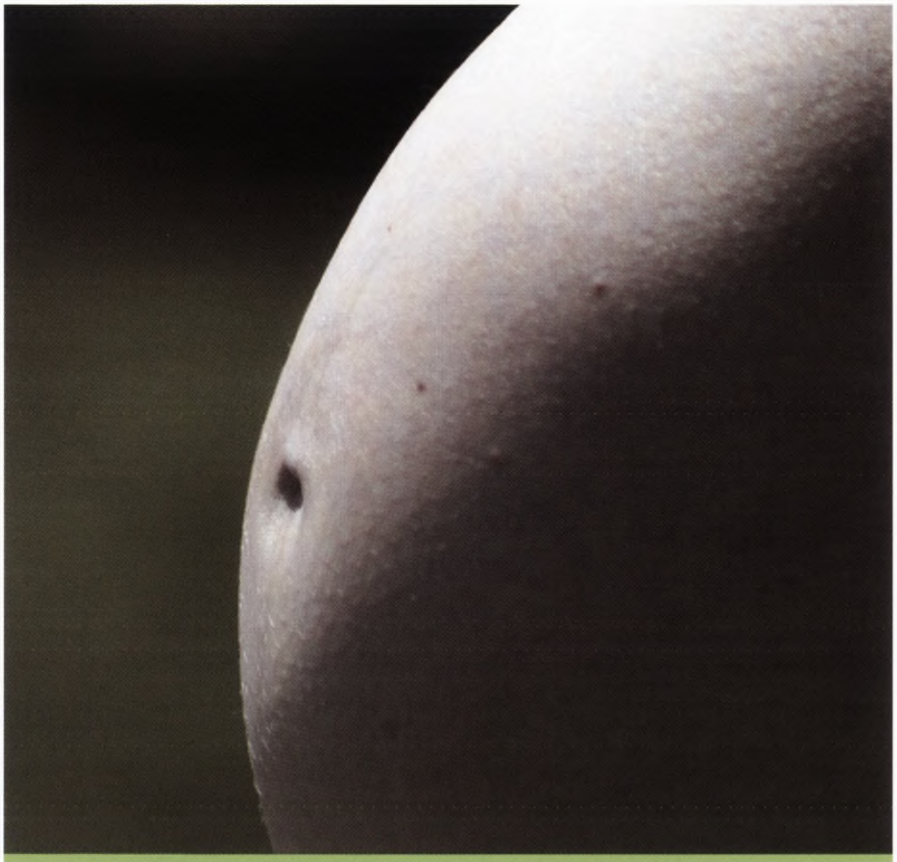
right, guaranteed constitutionally in the USA, to control her own body in the early stages of pregnancy. This proceeds from a fear of wrongful life claims being brought against parents as well as doctors. Neither of these strands of the abortion debate was significant in *Harriton*.

EXISTENCE VERSUS NON-EXISTENCE

Justice Ipp described the compensatory principle laid down in *Livingstone v Rawyards Coal Company*[30] as a 'formidable obstacle' for the plaintiffs, even while acknowledging Justice Kirby's view that it was 'of limited value as a guide to the type of answers that should be given' in novel areas such as wrongful birth.[31] Justice Ipp reasoned that the compensatory principle requires that the claims be based on a comparison between the [plaintiff's] actual financial position and his position had there been no negligence. For these plaintiffs, that would have resulted in their not being born at all. 'At common law, even an award of damages for the expenses incurred and likely to be incurred would require a comparison with a non-existent state.'[32]

This existence versus non-existence argument, developed strongly in *McKay v Essex*, is one of the central planks in the case against wrongful life. Lord Justice Ackner asked 'how can a court begin to evaluate non-existence, "the undiscovered country from whose bourn no traveller returns?"'.[33] In the words of Justice Weintraub, in the most influential US wrongful life case, 'man, who knows nothing of death or nothingness, cannot possibly know whether [a plaintiff would have been better off not being born]'.[34] *McKay v Essex in* 1982 and *Gleitman v Cosgrove* in 1967 were the first wrongful life cases in the UK and USA respectively,[35] and both have contributed enormously to the way in which the debate has been framed and understood. Since that time, many other cases have been attempted, especially in the USA, but most have run aground on these same arguments. Justice Mason based his views on his analysis of the dissenting judgments in *Cattenach,* which show 'the legitimacy of approaching a novel tort problem by considering whether courts can make a rational and just comparison between the plaintiff's condition affected and unaffected by the defendant's conduct … Impossibility, not difficulty is the touchstone.'[36] 'To contend that the appellants cannot prove any loss because they cannot demonstrate the monetary value of non-existence offends commonsense and principle'[37] and runs counter to judicial agnosticism. Almost 40 years have passed since *Gleitman*, and the law of negligence has developed and expanded considerably in regard to other novel categories of loss such as nervous shock and pure economic loss, and invasion of dignitary interests. It is time to reassess and re-conceptualise the issues in this novel category as well.



The existence versus non-existence argument is one of the central planks in the case against wrongful life.

CONSISTENCY WITH PARENTS' CLAIM

The consistency argument is a double-edged sword, being equally capable of supporting decisions in favour of or against a claim. In *Macfarlane v Tayside*, for example, one judge used the rejection of wrongful life as grounds for not recognising wrongful birth.[38] Justice Mason demonstrated the incoherence of allowing one cause of action but not the other, since both are 'based upon losses stemming from the creation of life (by God or nature) in circumstances where medical negligence contributed to this outcome with all of its consequences'.[39]

He said: 'there is no conceptual difference between the critical event that generates the parents' recognised claims … and the child's putative wrongful life claim. If there is >>

a relevant distinction as regards "life" being the nub of the complaint, the child's ... claim is superior to that of the parents, because the gravamen of the claim by the severely disabled child is much more than the parent-child "relationship".'[40]

Inconsistency was one of the main arguments against wrongful life accepted in *McKay*. This did not find favour with the majority in *Cattenach*, which 'suggests at least the possibility that *McKay* may not represent the law in Australia, otherwise there would be that structural inconsistency of principle abhorred by the law'.[41]

Chief Justice Spigelman and Justice Ipp followed *McKay* closely. The persuasiveness of *McKay* will be one of the key issues to be decided in the current appeal.

DAMAGES

Plaintiffs in wrongful birth actions generally seek damages for the mother's pain and discomfort, anxiety and distress, out-of-pocket expenses, and economic loss associated with the pregnancy and birth. Most significantly, they also seek the costs of rearing the child to the age of majority, the latter claim being available to both parents. The extent of costs recoverable for disabled children, and whether any upkeep costs at all should be recovered for healthy children, are the principal issues.

In the few successful wrongful life cases in the USA, damages have been awarded only for extraordinary medical and other expenses associated with or arising from the disability. In no case has an award for general damages, that is, pain and suffering and loss of amenity, been allowed. Similarly, no cases have allowed damages for future rearing costs. The additional claim for loss of income put in *Waller* is not normally even attempted.

The inconsistency of allowing recovery in wrongful birth but denying upkeep costs was pointed out by three of the majority judges in *Cattenach*. The negligent defendants bore the onus of proving 'some legitimate basis recognised in the law for providing an immunity from a head of damages for personal injury well recognised at law', which they were unable to do.

Justice Hayne, while denying the parents' claim in relation to their healthy child, suggested that in the case of a disabled child with special needs, the parents 'could seek to demonstrate the costs incurred in meeting those needs without in any way denying or diminishing the benefits of being parent to the child'.[42]

The majority decided the parents' loss in *Cattenach* was based on personal injury, rejecting the categorisation of the damage as pure economic loss adopted by both the Queensland Court of Appeal in *Melchior* and the House of Lords in *MacFarlane*.

Based on this, Justice Mason also classified *Harriton* as a claim for damages for personal injury, avoiding the concerns about indeterminacy and remoteness that arise in regard to pure economic loss.

The views expressed in *Cattenach* above provided support for Justice Mason's conclusion that general damages should be awarded, since 'the common law is averse to accepting that even a novel claim for damages ... will carry less than the full range ... normally allowed'.[43] The defendants had failed to discharge the onus which they bore to show why a recognised head of damages should be denied. This makes Justice Mason, along with Justice Handler (dissenting) in *Procanik v Cillo*,[44] the only judges in the common-law world so far to allow a claim for general damages for wrongful life.

AN 'ENLIGHTENED AND COMPASSIONATE SOCIETY ... SHOULD DO MORE'

Justice Ipp based his rejection of wrongful life partly on the view that it 'involv[ed] the common law going beyond the "keep out" signs erected by parliaments throughout the country' in a clear reference to the passage of the *Civil Liability Act* 2002 (NSW) and other state equivalents. As Justice Mason said: 'I know of no legal principle that directs the common law to pause or to go into reverse simply because of an accumulation of miscellaneous statutory overrides ... the common law has stood resolute to its fundamental principles except when clearly expressed legislation indicates that they must be abandoned.'[45] It must stand resolute on this occasion as well.

In *Ferguson v Hamilton Civic Hospitals*[46] Justice Krever said: 'I confess to a feeling of discomfort over a state of affairs, in an enlightened and compassionate society, in which a patient ... suffers catastrophic disability but is not entitled to be compensated.' A sound case can be made for recognition of the wrongful life cause of action, and for treating damages in wrongful life in a similar fashion to that adopted for wrongful birth by the High Court in *Cattenach*. The choice facing the High Court is whether to act in a compassionate fashion or to shelter behind 'spurious legal and ethical principles' to deny compensation. Chief Justice Spigelman said that 'the delineation of legal duties has never been derived from an exclusively legal analysis. The law is not, nor has it ever been, an entirely autonomous, isolated and self-sufficient intellectual construct ... Cases such as the present require attention to the ethical foundation of the relevant legal principles ... The most important aspect of that ethical basis is that a duty in negligence must reflect values generally, or even widely, held in the community.'[47]

Given the variability of views in the community on matters of policy and morality, it is argued that such decisions are better left to individuals, and should be dealt with as questions of personal choice, handled in the same way as adult sexual preference, censorship, abortion and contraception. The dramatically different views claimed for 'the traveller on the London Underground' (that is, the reasonable man) in *MacFarlane* and *Melchior* suggest that judges may not be the best indicators of community standards on moral issues. As Chief Justice Dixon said: 'Intuitive feelings for justice seem a poor substitute for a rule antecedently known, more particularly where all do not have the same intuitions'.[48] 'In the end, the question must be whether we will continue to adhere to well-established tort principles, or instead will discard those principles ...'[49]

The soundest way for the law to proceed is to adhere to established legal principles, applying the normal tests for negligence, but incorporating the compassionate and caring approach expected of an advanced Western democracy. There is no basis in principle for distinguishing this class of victims of medical negligence from any other, and certainly no basis in morality or policy for denying redress to such catastrophically injured and deserving plaintiffs. 'New categories of wrong may generate novel remedial responses. The maxim that the law will not permit a wrong to go without a remedy is not a licence to write a blank cheque, but it reflects the way that the law has often responded ... in novel claims.'[50] In affirming the decision in *Ferguson* referred to above, the Ontario Court of Appeal said: 'We agree that in situations such as the instant one, "an enlightened and compassionate society" ... should do more'.[51] The ball is squarely in the High Court's court. ■

Notes: **1** Per Mason P, *Harriton* (by her tutor) *v Stephens*; *Waller* (by his tutor) *v James & Anor*; *Waller* (by his tutor) *v Hoolihan* [2004] NSWCA 93, para 131. **2** Ibid per Ipp JA at para 171. **3** Ibid per Spigelman CJ at para 1. **4** Ibid per Mason P at para 65. **5** Note per Mason P at para 68, wrongful conception or pregnancy (parental claims in respect of healthy children) distinguished from wrongful birth (parental claims re disabled children). **6** For example *S v Distillers Co (Biochemicals) Ltd* [1969] 3 All ER 1412. **7** Diethylstilboestrol, prescribed during pregnancy, causing cervical cancer in adult female offspring eg *Sindell v Abbott Laboratories* 607 p.2d 924, 26 Cal. 3d 588 (1980); *Enright v Eli Lilly & Co* 155 A.D. 2d 64,533 N.Y.S. 2d 49 (1990). **8** See P Watson, 'Damages for Wrongful Birth' (2003) 56 *Plaintiff* 32. **9** [2002] NSWSC 460 (Edwards) (Unreported, Studdert J, 12 June 2002). This was the only one of the three cases not pursued on appeal. **10** [2002] NSWSC 461 (*Harriton*) (Unreported, Studdert J, 12 June 2002). **11** [2002] NSWSC 462 (*Waller*) (Unreported, Studdert J, 12 June 2002). For a detailed discussion of these cases and wrongful life generally, see P Watson, 'Wrongful Life: Damnum Sine Injuria?' (2002) 53 *Plaintiff* 37. **12** [1982] 1 QB 1166. **13** [2003] HCA 38, 16 July 2003. The court split 4:3 and delivered six separate judgments totalling 165 pages. **14** *MacFarlane v Tayside Health Board (Scotland)* [2000] 2 AC 59 (HL). **15** See *Griffiths v Kirkemeyer* (1977) 139 CLR 161. **16** *Edwards*, above n 5, [6]. **17** *Edwards*, above n 5, [35(6)]. **18** *Edwards*, above n 5, [35(7)]. **19** Per Mason P at para 67. **20** 413 NTS 2d 895, 900-1 (1978). **21** At para 111. **22** *Watt v Rama* [1972] VR 353, X and Y (by her tutor X) v Pal (1991) 23 NSWLR 26, *Burton v Islington Health Authority* [1993] QB 204. **23** At para 115. **24** At para 116. **25** At para 121. **26** [2004] NSWCA 24. **27** [2004] NSWCA 97. **28** Above n 1. **29** At para 132. **30** (1880) 5 App Cas 25, per Lord Blackburn at 39. **31** *Cattenach v Melchior*, above n 11, at 159. **32** Per Ipp JA at para 232. **33** *McKay v Essex* supra n 10 at 1189. **34** *Gleitman v Cosgrove* 49 NJ 22 (1967), at 63. **35** excluding *Zepada v Zepada*, 190 NE 2d 849 (1963) more properly classified as 'dissatisfied life' in which plaintiff unsuccessfully sued his father for disadvantages said to stem from illegitimacy. **36** At para 146. **37** At para 152. **38** Lord Steyne, *MacFarlane*, above n14. **39** At para 93. **40** At para 137. **41** Per Mason P, at para 105. **42** Per Mason P, *Harriton*, at para 87. **43** At para 103. **44** 478 A.2d 755 (NJ 1984) at 766. **45** Per Mason P at para 164. **46** (1983) 40 OR (2d) 577 at 618-19, referring to a victim of medical negligence denied redress because he was unable to prove fault. **47** At para 19, and summary of holdings point iii. **48** *National Insurance Co of NZ Ltd v Espagne* [1961] 105 CLR 569 at 572. **49** *Liniger v Eisenbaum* 764 P 2d 1202 (1988) per majority at 1212 (arguing against wrongful life on causation grounds). **50** Per Mason P at 167. **51** (1985) 50 OR)2d) 754 at 755.

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