WRONGFUL BIRTH assessment of damages: Judgment pending

By Bill Madden

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Almost 10 years have passed since the High Court of Australia confirmed the recoverability of damages for the cost of raising a child, in the well-known decision *Cattanach v Melchior*.[1] Yet a number of aspects of the assessment of such 'wrongful birth' damages have yet to be the subject of a comprehensive court ruling.

Following a New South Wales Supreme Court hearing in February 2012 before Justice Hislop, *Waller v James*, a judgment addressing the assessment of damages issues is now pending.[2] This article summarises the argued damages issues regarding the costs of raising the child.[3] It does not attempt to analyse the merits of the arguments and the potential outcomes, nor is it a comprehensive statement of all the damages issues in *Waller v James*, but addresses only those likely to be of general interest and application.

It should be noted that the *Waller v James* litigation pre-dated the *Health Care Liability Act* 2001 (NSW) and the *Civil Liability Act* 2002 (NSW). Although a 'common law' matter, the outcome is also likely to be of relevance to more recent claims, which are governed by the civil liability legislation in New South Wales, Queensland and South Australia (see below).

THE FACTS, BRIEFLY

Many will recall that the *Waller v James* litigation has a history. In 2006, it came before the High Court[4] with *Harriton v Stephens* for consideration of the availability of wrongful life damages.[5] The High Court by majority held that the damage then alleged to have been suffered by the child, Keeden – life with disabilities – was not such as to be legally cognisable in the sense required to found a duty of care.[6]

In the intervening period, the *Waller v James* litigation was reduced to a claim only by the parents for wrongful birth damages and only against one of the then defendants – Dr Christopher James.

Nevertheless, the relevant key facts as previously summarised by the High Court remain as an appropriate *précis*. Dr James was a gynaecologist with a practice in infertility and IVF procedures, who was consulted by Mr & Mrs Waller. Mr Waller suffered an inherited anti-thrombin deficiency, a condition which results in a propensity for the blood to clot.[7] Dr James subsequently recommended IVF treatment. Mrs Waller became pregnant after the first cycle of IVF treatment. Her son, Keeden, was born on 10 August 2000 with a genetic anti-thrombin deficiency. Keeden was released from hospital on 14 August 2000. However, he was brought back to the hospital the next day with cerebral thrombosis. As a result of the thrombosis, he suffered permanent brain damage, cerebral palsy and related disabilities.[8]

BREACH OF DUTY AND CAUSATION

So that the previous wrongful life legal issues could be determined by the courts including the High Court, assumptions were made. At that time, breach of duty on the part of Dr James was stated conditionally[9] and causation was accepted by the parties for the purposes of the proceedings.[10]

At the recent hearing, breach of duty and causation were contested. Extensive argument was therefore necessary in relation to scope and content of duty, breach of duty and causation. Those arguments, which are fact-sensitive, are best left for comment and analysis once the judgment has been published.

COSTS OF RAISING A CHILD

In *Cattanach*, McHugh & Gummow JJ summarised the wrongful damages issues as follows (footnotes omitted):

> '[48] The award of damages had three components. The first was an award in favour of Mrs Melchior of $103,672.39 consisting of damages for her pain and suffering in respect of the pregnancy and birth, the effect on her health (including a supervening depression), lost earning capacity (past and future), various hospital, medical, pharmaceutical and travel expenses (both past and future), the cost of maternity clothes and damages described as *Griffiths v Kerkemeyer* damages for care that she might need. The second was an award to Mr Melchior of $3,000 for loss of consortium in accordance with the remedy allowed in *Toohey v Hollier* for all practical, domestic disadvantages suffered by a husband in consequence of the impaired health or bodily condition of his wife. The third was an award in favour of Mr and Mrs Melchior for $105,249.33 for the past and future costs associated with raising and maintaining their child until he reaches the age of 18.
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> [49] No appeal was taken to the Court of Appeal respecting the first and second categories of damages. However, with respect to the third category, Dr Cattanach and the State contended that Holmes J had erred in law in allowing any costs for the rearing of the child...'

It was that third component, an award in favour of Mr and Mrs Melchior for $105,249.33 for the past and future costs associated with raising and maintaining their child until he reaches the age of 18, which was ultimately allowed by the High Court.[11]

It may assist to recall the remarks of McHugh & Gummow JJ as to the nature of the claim (footnotes omitted):

> '[67] Nor is it correct to say that the damage that the respondents suffered was the parent-child relationship or the coming into existence of the parent-child relationship. To do so is to examine the case from the wrong perspective. In the law of negligence, damage is either physical injury to person or property or the suffering of a loss measurable in money terms or the incurring of expenditure as the result of the invasion of an interest recognised by the law. The parent-child relationship or

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Wrongful birth damages assessment issues

- Does the claim extend beyond the legal majority of the child?
- Is the provision of 'gratuitous' care by the parents recoverable?
- Is the recovery by the parents limited by what costs they can afford to pay?
- What discount rate should apply?

its creation no more constitutes damage in this area of law than the employer-employee relationship constitutes damage in an action *per quod servitium amisit*. In the latter case, the employer suffers damage, for example, only when it is forced to pay salary or wages to its injured employee although deprived of the employee's services. It does not suffer damage merely because its employee has been injured. Similarly, for the purpose of this appeal, the relevant damage suffered by the Melchiors is the expenditure that they have incurred or will incur in the future, not the creation or existence of the parent-child relationship. If, for example, their child had been voluntarily cared for up to the date of trial, they could have recovered no damages for that part of the child's upbringing. And, if it appeared that that situation would continue in the future, then the damages they would be able to recover in the future would be reduced accordingly.

[68] The unplanned child is not the harm for which recompense is sought in this action; it is the burden of the legal and moral responsibilities which arise by reason of the birth of the child that is in contention. The expression "wrongful birth" used in various authorities to which the Court was referred is misleading and directs attention away from the appropriate frame of legal discourse. What was wrongful in this case was not the birth of a third child to Mr and Mrs Melchior but the negligence of Dr Cattanach.'

Against that background, seven key damages assessment issues can be enumerated.

1. Costs unrelated to the child's disability

The defendant argued that the plaintiffs cannot recover the costs that they would, in any event, have incurred in raising a non-disabled child. That submission flowed from the particular facts of the *Waller v James* litigation. In consulting Dr James, it was said, the plaintiffs (unlike in the failed sterilisation in *Cattanach*) wished to have a child. Hence it was submitted that the plaintiffs' claim should be limited to the additional costs incurred as a result of the child's disabilities.

2. Beyond legal majority?

In *Cattanach*, the child suffered no particular disability. However, in *Waller v James*, the child's disabilities were extensive such that the plaintiffs submitted he would never live independently. A claim was therefore made in respect of his care for the duration of his life. That duration was agreed as being until his age 52 years, hence slightly less than the lifespan of his mother.

The defendant submitted that his liability for economic loss does not extend to losses incurred by the plaintiffs in continuing to care for Keeden after the point in time at which the plaintiffs have no legal (or relevant moral) responsibility to do so.

3. Care by the parents

The plaintiffs claimed costs/expenses at commercial rates for the time they had spent and would in the future spend, caring for their son.

The defendant submitted that such past or future 'gratuitous' care is not recoverable, or if it be recoverable, that by analogy the recovery rates should be limited by reference to an award rate for employed carers or by reference to the rates and caps provided by the *Civil Liability Act* 2002 (NSW). It was said that the nature of the care was fundamentally different to that recognised by the High Court in *Griffiths v Kerkemeyer*[12] and should be rejected, given the approach taken by the High Court in *CSR v Eddy*.[13] It was further submitted by the defendant that if such past or future 'gratuitous' care is recoverable, then there ought to be no award for interest on the past component, by analogy with the current position under the *Civil Liability Act* 2002 (NSW).

However, the defendant submitted that the plaintiffs should be able to recover such wage loss as they may incur, through absenting themselves from their usual employment so as to care for their child.

4. Care by paid carers

As noted above, the plaintiffs claimed at commercial rates for the time they would in the future spend, caring for their son.

Consistent with the submissions outlined in the preceding paragraph, the defendant submitted that, by analogy, the recovery rates should be limited by reference to an award rate for employed carers or by reference to the rates and caps provided by the *Civil Liability Act* 2002 (NSW).

5. Limitation based on parental income

The defendant submitted that the claim by the plaintiffs should extend only to income that the parents have and will forego, because of the care that they have and will

provide to the child. In other words, the plaintiffs cannot recover damages for compensation they could not incur, absent an award of damages.

6. Offsets for government assistance

To the extent that the child is or would in the future become entitled to assistance such as a disability pension, the defendant submitted that same should be offset against the claim by the parents. Other benefits identified were those relating to pharmaceuticals, utilities, mobility and the like.

7. Discount rate

The costs of raising the child part of the claim was argued by the defendant to not be a personal injury claim and hence not governed by the High Court decision imposing a 3 per cent discount rate, *Todorovic v Waller*.[14]

Rather, it was said, by analogy the 5 per cent discount rate provided by the *Civil Liability Act* 2002 (NSW) should apply.

CLAIMS GOVERNED BY CIVIL LIABILITY LEGISLATION

Following *Cattanach*, New South Wales,[15] Queensland[16] and South Australia[17] amended their civil liability legislation – each in a slightly different way. Given the facts of *Waller v James*, the Queensland provisions would apparently not apply at all, given that they are limited in application to sterilisation and contraception failures.

However, even allowing for the application of the civil liability legislation provisions, each of the three jurisdictions seek to limit recovery of the costs ordinarily associated with rearing or maintaining a child. New South Wales goes a little further, also precluding a claim for any loss of earnings by the claimant while the claimant rears or maintains the child. None of the civil liability provisions expressly provide whether such claims are limited to the child's majority or go beyond it. None expressly refer to the provision of past and future 'gratuitous' care, and none address any limitation based on parental income or benefit offsets.

It follows that for the jurisdictions with and without civil liability legislation overlays, the anticipated NSW Supreme Court judgment will be of relevance.

CONCLUSION

Following the hearing of *Waller v James* before the New South Wales Supreme Court in February 2012, a judgment addressing the assessment of damages issues is awaited with interest. ■

Notes: **1** [2003] HCA 38. **2** The hearing began on 31 January 2012 and concluded on 24 February 2012. D Higgs SC, R Royle & J Donnelly appeared for the plaintiffs, instructed by Slater & Gordon. J K Kirk SC & V Thomas appeared for the defendant, instructed by Blake Dawson (now Ashurst). **3** The litigation included personal injury / mental harm claims by the parents, which are not addressed. **4** The plaintiffs were then represented by P W Bates, instructed by Autore & Associates. The defendants were represented by S J Gaegler SC, with J K Kirk instructed by Blake Dawson Waldron (later, Blake Dawson; now, Ashurst). **5** *Waller v James* [2006] HCA 16, (2006) CLR 136; *Harriton v Stephens* [2006] HCA 15, (2006) 226 CLR 52. **6** *Waller v James* [2006] HCA 16, (2006) CLR 136 per Crennan J at [81]. **7** *Ibid*, at [70]. **8** *Ibid*, at [71] – [73]. **9** *Ibid*, at [15] per Kirby J. **10** *Ibid*, at [16] per Kirby J. **11** By majority McHugh, Gummow, Kirby & Callinan JJ; Gleeson CJ, Hayne & Heydon JJ dissenting. **12** [1977] HCA 45; (1977) 139 CLR 161. **13** [2005] HCA 64; (2005) 226 CLR 1. **14** [1981] HCA 72; (1981) 150 CLR 402. **15** *Civil Liability Act* 2002 (NSW), s71. **16** *Civil Liability Act* 2003 (QLD), s49A, 49B. **17** *Civil Liability Act* 1936, s67.

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Slater and Gordon Ltd represents the plaintiffs in the litigation referred to in this article.

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