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The Costs of Raising a Child: Cattanach v Melchior and the Justice and Other Legislation Amendment Bill 2003 (Qld)

The issue decided by the High Court in Cattanach v Melchior was whether, if as a consequence of medical negligence, a couple become the parents of an 'unintended' but healthy child, a court can, in an award of damages, require the doctor to bear the cost of raising and maintaining that child. By a narrow majority (4 judges to 3), the High Court decided that the parents could recover compensation for raising and maintaining their child to age 18, thus departing from the law in the United Kingdom on this matter. Each justice (apart from the joint judgement of McHugh and Gummow JJ) had a different line of reasoning in reaching his conclusion.

On 21 August 2003, the Justice and Other Legislation Amendment Bill 2003 (Qld) was introduced into the Legislative Assembly in order to, among other things, amend the Civil Liability Act 2003 (Qld) by preventing a court from awarding damages for the costs ordinarily associated with rearing or maintaining a child.

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1 INTRODUCTION

The issue decided by the High Court in *Cattanach v Melchior* was whether, if as a consequence of medical negligence, a couple become the parents of an ‘unintended’ but healthy child, a court can, in an award of damages, require the doctor to bear the cost of raising and maintaining that child.¹ By a narrow majority (4 judges to 3), the High Court decided that the parents could recover compensation for raising and maintaining their child to age 18, creating a variance from the law in the United Kingdom on this matter. Each justice (apart from the joint judgement of McHugh and Gummow JJ) had a different line of reasoning in reaching his conclusion.

Previous Australian judicial decisions have allowed damages to be recovered for pain and suffering connected with the birth of a healthy child born as a consequence of a negligently performed medical procedure resulting in pregnancy but it was unclear whether damages would be recoverable for the financial cost of raising a child.

The High Court decision has raised a number of legal, moral, and ethical questions such as the value to be placed on a child and whether the joy of having, and the responsibility to, the child exceed the economic considerations. In other words, should a child be regarded as a ‘damage’ for which compensation is recoverable from the doctor responsible for its existence? It certainly has implications for the medical profession and medical indemnity insurers.

On 21 August 2003, the Justice and Other Legislation Amendment Bill 2003 (Qld) was introduced into the Legislative Assembly in order to, among other things, amend the *Civil Liability Act 2003* (Qld) by preventing a court from awarding damages for the costs ordinarily associated with rearing or maintaining a child.

2 PREVIOUS AUSTRALIAN AUTHORITY REGARDING ‘UNINTENDED’ PREGNANCIES

The case which raised issues closest to those produced by the *Cattanach* case was the 1995 New South Wales Court of Appeal decision in *CES v Superclinics (Australia) Pty Ltd.*² It was held 2-1 that damages could not be recovered for the

¹ *Cattanach v Melchior* [2003] HCA 38 (16 July 2003), para 1, per Gleeson CJ, at http://www.austlii.edu.au/au/cases/cth/high_ct/2003/38.html

² (1995) 38 NSWLR 47, at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme%5fct/unrep108.html?query=%22superclinic%22>

cost of raising a child that was born as a consequence of a doctor's negligence in failing to diagnose a patient's pregnancy in sufficient time for her to undergo a termination. There was a considerable divergence in the reasons given by each judge in making that finding. Priestly JA agreed that the parents should be able to recover any foreseeable damages flowing from the negligent advice but said that the mother's decision to keep the child and not have it surrendered for adoption was her choice and the defendant was not legally responsible for the cost of raising the child that she had chosen to keep. Thus, for Priestley JA, the matter was one of 'causation'. The doctor's negligence was not the direct cause of the economic damage suffered. His Honour allowed damages only up until the time when the child could have been given up for adoption.

Kirby A-CJ rejected that viewpoint that the 'sanctity of human life' prevented the law from providing damages for economic consequences of the unwanted pregnancy resulting from negligence and saw no reason grounded in public policy to deny full recovery of damages claimed to compensate for the damage suffered. He saw the question as being what expenses would reasonably be incurred in raising a child, born as a consequence of medical negligence, from birth to adulthood; in other words, allowing recovery for a loss which reasonably flows from the negligent act. This would include the cost of raising a child to adulthood.

Meagher JA dissented, finding that the claim could not be established by the plaintiff and would not allow damages of any kind because the common law does not award damages where the defendant's negligence results in the plaintiff being unable to perform an unlawful act (ie have an abortion). No damages could be recovered for rearing the child. To allow that claim would be offensive and undermined the fact that the child was a joy for which the calculation of compensation was impossible.

The case settled before it was determined by the High Court on appeal.

3 OVERSEAS AUTHORITIES

In the 2000 case of *McFarlane v Tayside Health Board*, the House of Lords in England found that while the doctor was liable for certain damages related to the birth resulting from a negligently performed sterilisation (although the Law Lords differed on what the limits were on what might be recovered), the costs of bringing up a healthy child were not recoverable.³ The judgements contain many public policy reasons for denying those expenses and references were made by some of their Lordships to the 'moral repugnancy' of placing a money value on a child; the

³ [2000] 2 AC 59.

benefits of having a child outweighing any financial burdens; and the effect on the child of finding out that he or she was not wanted.

Interestingly however, in 2001, the English Court of Appeal in *Parkinson v St James and Seacroft University Hospital* held that the parents could recover damages where a disabled child is born as a result of medical negligence for the cost of providing for the special needs and the care of the child.⁴ The judges distinguished the facts from those in *McFarlane* on the basis that the latter involved the cost of raising a healthy child and emphasised that only the costs related to meeting the special needs of the disabled child could be recovered, not normal maintenance costs of rearing any child.

In most United States jurisdictions, it is not possible to claim for the cost of raising a healthy child. However, there is no consistency among the states on this issue.⁵

4 CATTANACH V MELCHIOR

4.1 THE FACTS

Dr Cattanach provided sterilisation services in the course of his practice as an obstetrician and gynaecologist. Mr and Mrs Melchior had two children and did not wish to have any more. So, in 1992, Mrs Melchior sought a sterilisation procedure from Dr Cattanach in a Queensland public hospital. Mrs Melchior had told Dr Cattanach that her right ovary and fallopian tube had been removed at 15 during an operation. When the sterilisation procedure was being performed, what the doctor saw appeared consistent with that story. Accordingly, he attached a clip to the left tube only. In 1996, at age 44, Mrs Melchior became pregnant giving birth to a son, Jordan, in 1997. Apparently, her right fallopian tube had never been removed as Mrs Melchior had believed and the conception occurred when ovum from the left ovary transmigrated to the right fallopian tube. During the sterilisation procedure, the right tube was obscured by bowel adhesions. At the time of the trial, Jordan was a healthy and active 3 year old. Mr Melchior is a freight operations agent and Mrs Melchior ceased her periods of part-time employment to work full time in the home.

⁴ [2001] EWCA Civ 530.

⁵ See discussion of the US position by Kirby J in *Cattanach v Melchior* at paras 117-118.

4.2 TRIAL JUDGE FINDINGS

Although the Melchiors brought their action against Dr Cattanach and the State of Queensland (responsible for the hospital at which the procedure was performed) in tort and contract, no basis for an action in contract was found. Accordingly, the claim became one in tort.⁶ The trial judge found that, by reason of certain aspects of Mrs Melchior's condition, it was not negligent of Dr Cattanach not to have observed her right tube at the time of the procedure. However, Dr Cattanach was negligent because he had too readily accepted his patient's assertion that her right tube had been removed whereas he should have advised her to seek further investigation, and should have warned her that, if she was wrong, a pregnancy might result. Thus, the negligence was based on negligent advice and failure to warn. The State admitted vicarious liability for any negligence found against the doctor.

The claim for damages had three parts with the first two no longer in issue at the time of the High Court appeal. The first was a claim by Mrs Melchior for damages relating to pregnancy and birth, for which the trial judge awarded her \$103,672 (including damages for pain and suffering, loss of amenities of life, loss of some part-time employment earnings, loss of capacity to take up further employment as a consequence of thrombosis associated with the pregnancy, and certain other expenses such as medical costs). The second claim was by Mr Melchior for loss of consortium as a result of his wife's pregnancy and childbirth for which he received an award of \$3,000.

The third claim, that which was the subject of the appeal to the High Court, was a joint claim by the Melchiors for expenses to be incurred to raise and maintain Jordan. It was particularised during the trial as being the cost of housing, clothing, feeding, educating and entertaining Jordan to age 18 out of Mr Melchior's income. The trial judge awarded over \$105,249 for this claim which she described as being a quite reasonable representation of the costs of raising a child.

4.3 COURT OF APPEAL FINDINGS

Dr Cattanach and the State appealed to the [Queensland Court of Appeal](#) that this third claim should not have been allowed. The appeal was dismissed by a 3-2 majority.⁷ McMurdo P considered the trial judge's assessment of damage by

⁶ *Melchior v Cattanach* (2001) Aust Torts Rep ¶81-597 at 66,626.

⁷ *Melchior v Cattanach & Anor* [2001] QCA 246 (26 June 2001), at <http://www.austlii.edu.au/au/cases/qld/QCA/2001/246.html>

analogy with a recent High Court decision concerning economic loss, *Perre v Apand Pty Ltd*,⁸ and said that there were no policy reasons to compel a reduction of the assessment. Davies JA agreed and also found that there were no policy factors to preclude recovery of a loss that ought to be reasonable. However, Thomas JA dissented on the basis of policy considerations. His Honour did not consider it fair or desirable that someone else be required to maintain the child in addition to compensating for injury that has been done to the person of the plaintiff.

Special leave to appeal to the High Court on this one ground (whether the Court of Appeal erred in finding that damages were payable by Dr Cattanach to the Melchiors for the reasonable costs of raising and maintaining their child) was granted. The appellants undertook not to disturb any costs orders already made and to pay the Melchiors' costs of appeal.

4.4 THE HIGH COURT DECISION

The Western Australian and South Australian Attorneys-General were granted leave to intervene in the High Court action. The Attorneys-General sought to offer arguments in support of the appellants. They also pointed out the large economic consequences for public healthcare systems if the claim was allowed.

The Melchiors had to show to the Court that they had jointly suffered damage and that Dr Cattanach and the State of Queensland (the appellants) owed them a duty of care to avoid causing damage of that kind. In other words, was the damage actionable?

The options for recovery of damages were –

- no damages where a child is healthy and without disability or impairment;
- damages confined to the immediate damage to the mother (and loss of consortium to the father) plus any expenses and loss of earnings immediately consequential on the pregnancy and delivery, but excluding the costs of rearing the child;
- damages confined to the foregoing plus any additional costs of rearing a child born with a disability or to parents with a disability;
- damages in full for the reasonable costs of rearing an unplanned child to the age where the child might be expected to be economically self-reliant, whether the

⁸ (1999) 198 CLR 180.

child is healthy or disabled or impaired, but with a deduction for the joys and benefits received, and potential economic support derived, from the child; and

- damages in full for the cost of rearing the child with no discounts for joys, benefits or support, leaving such restrictions as Parliament imposes.⁹

On 16 July 2003, a 4-3 majority of the High Court chose the fifth option, upholding the findings of the Court of Appeal and dismissing the appeal by Dr Cattnach and the State of Queensland. As a consequence, the Melchiors were able to retain the \$105,249 damages for the cost of raising and maintaining Jordan in addition to the award of \$103,672.79 in relation to the pregnancy and birth and the \$3,000 to Mr Melchior for loss of consortium that were not under challenge.

The majority justices tended to regard the issue as being resolved purely by applying negligence principles. Given that Dr Cattnach's negligence caused the pregnancy and subsequent birth of the child, the doctor was liable for damages for the foreseeable consequences, one of these being the cost of bringing up the child. Their Honours did not find any public policy grounds that dictated a different result nor that there should be any set-off from the amount of damages awarded because the Melchiors have the benefit of a healthy child.

The finding, in essence, was that a doctor whose negligent performance of a medical procedure resulted in the birth of an unplanned but healthy child is liable for the cost of bringing up the child.

This means that the law on this point differs from that in the United Kingdom and the United States of America.

4.4.1 Majority Judgements

McHugh and **Gummow JJ** delivered a joint judgement dismissing the appeal. It was found that the particular expense claimed for was causally connected to the defendant's negligence and, secondly, that kind of expense ought to have been reasonably foreseen by the defendant when the negligence occurred.¹⁰

Contrary to some other members of the Court, their Honours did not believe that describing the compensation sought as being for economic loss, or regarding the damage suffered as the coming into existence of the parent/child relationship advanced the case greatly. Indeed, to describe the damage as the parent/child relationship would be to see the matter from the wrong perspective. The unplanned

⁹ As outlined by Kirby J in *Cattnach v Melchior*, para 138.

¹⁰ *Cattnach v Melchior*, paras 71-72, per McHugh and Gummow JJ.

child is not the harm for which compensation is sought but, rather, the financial burden of the legal and moral responsibilities that arise by reason of the birth.¹¹ Their Honours saw the arguments raised by the appellants as being that the policy of the law does not allow of any treatment as compensable harm of the type of damages awarded by the trial judge – that being for the reasonable cost of raising a child to age 18.

Their Honours also noted that even if it can be said that there is a general recognition in the community of the value of respecting the importance of human life, stability of the family unit, and the nurture of a child as an aspect of the corporate welfare of the community, it did not follow that the same such values would demand that there can be no award of damages for the cost to the parents of rearing and maintaining a child who would not have been born if not for the negligence of the doctor.¹² The comment was made that:

*It is a beguiling but misleading simplicity to invoke the broad values which few would deny and then glide to the conclusion that they operate to shield the appellants from the full consequences in law of Dr Cattanach's negligence.*¹³

Their Honours added that:

*To suggest that the birth of a child is always a blessing and that the benefits to be derived therefrom always outweigh the burdens, denies the first category of damages awarded.... It also denies the widespread use of contraception ... to avoid such an event.*¹⁴

Nor did their Honours accept that there should be a 'set-off' of the 'benefits' of having a child against the damages incurred. Their Honours stated that it is impermissible to balance the benefits to one legal interest against the loss occasioned to a separate legal interest. The head of damages relevant here is the financial damage that the parents will suffer as a result of their legal responsibility to raise a child. The benefits to be enjoyed as a result of having the child are not related to that head of damage. It might have been a different situation if the mother had claimed damages for 'loss of enjoyment of life' against which it would be correct to set off against that claim, the benefits derived from having the child.¹⁵

¹¹ *Cattanach v Melchior*, paras 67-68, per McHugh and Gummow JJ.

¹² *Cattanach v Melchior*, para 76, per McHugh and Gummow JJ.

¹³ *Cattanach v Melchior*, para 77, per McHugh and Gummow JJ.

¹⁴ *Cattanach v Melchior*, para 79, per McHugh and Gummow JJ.

¹⁵ *Cattanach v Melchior*, para 90, per McHugh and Gummow JJ.

Kirby J held that the appeal should be dismissed on the basis that the Court of Appeal was correct in finding that the Melchiors were entitled to claim the cost of rearing their additional child. Note that Kirby J was involved in the 1995 New South Wales Court of Appeal decision of *CES v Superclinics (Australia) Pty Ltd* (discussed earlier) in which he would have allowed the recovery of the costs of raising a child.

Kirby J examined a range of English and Australian authorities to assist in determining the issues before him. Kirby J found the state of Australian authorities on failed sterilisation not to be of assistance. Nor did he find UK authorities, or those of other common law or civil jurisdictions, helpful. There was little consensus in authority about the basic approach to be taken. His Honour noted that courts have tended to adopt control mechanisms to limit liability to exclude potentially large amounts incurred in raising a child, and that many of the judicial opinions contained perceptions of moral or ethical factors.¹⁶

His Honour said that there were several possibilities competing for the solution of the quandary before the Court. Those ranged from not allowing any damages to be recovered to full damages being awarded for the cost of rearing the child with no discounts for benefits, joys, and support.¹⁷ The latter option was preferred on the basis of conformity to general legal principles. A tortfeasor must pay the victims of the wrong for the reasonably foreseeable consequences, that are not too remote, of any proved negligence and, in this case, those consequences include the cost of child-rearing.¹⁸ His Honour rejected the argument that any costs of rearing a child should be confined to a child with a disability on the basis that such a distinction between an unhealthy and healthy child would be offensive to many people.

In answer to the argument that the burden on doctors, particularly obstetricians, and their medical indemnity insurance would be prohibitive, Kirby J said that:

[T]he answer that a court must give is that such considerations cannot succeed at common law.... Any such considerations must therefore be addressed by the other branches of government, principally the legislature.¹⁹

His Honour did not believe that the case was one of pure economic loss and said that the parents could recover damages for the economic consequences of the established physical events caused by the negligence. To deny such recovery is to provide a zone of immunity to doctors engaged in sterilisation procedures that is

¹⁶ *Cattanach v Melchior*, paras 133-137, per Kirby J.

¹⁷ *Cattanach v Melchior* paras 138ff, per Kirby J.

¹⁸ *Cattanach v Melchior*, paras 176, 179, per Kirby J.

¹⁹ *Cattanach v Melchior*, para 177, per Kirby J.

unprincipled and inconsistent with established legal doctrine.²⁰ This view was also taken by Callinan J. For Kirby J, the costs to be recovered in this case were within the ambit of the compensable principle required by ‘corrective justice’.

Callinan J also dismissed the appeal. His Honour found that, as a result of the appellants’ negligence, the Melchiors had incurred, and will continue to incur, significant expense. No identifiable, universal principle of public policy dictated any different result.²¹ Callinan J catalogued a range of arguments, which he considered to involve emotional and moral values of what public policy is or should be, that can be made against the awarding of damages for costs of rearing a child. His Honour said that the arguments did not commend themselves in law to him and detracted from the precise question to be answered.²²

4.4.2 Minority Judgements

Gleeson CJ delivered a dissenting judgement. His Honour said that the damages sought were not for financial loss consequential upon personal or property damage suffered by a plaintiff but for pure economic loss arising out of a parent/child relationship. Given the reluctance of the courts to recognise new heads of liability for economic loss without cogent reasons, His Honour could not find any justification for doing so in this case.

Indeed, a number of reasons of policy for the courts’ reluctance to impose liability of such a kind were stated by Gleeson CJ.²³ Those included the potential indeterminacy of the financial consequences of a person’s negligence (eg no reason to suppose the financial obligations will cease when the child turns 18 or that they should be limited to secondary and not extend to tertiary education) and the lack of precision in the concept of economic loss. There was also the difficulty that to impose liability involves treating, as actionable damage and as a matter to be regarded in exclusively financial terms, the creation of a human relationship (parent/child relationship) that is socially fundamental. The recognition of the family as fundamental is repeatedly expressed in international instruments and in declarations about the need to protect and care for children. This is not easy to

²⁰ *Cattanach v Melchior*, para 149, per Kirby J.

²¹ *Cattanach v Melchior*, para 299, per Callinan J.

²² *Cattanach v Melchior*, paras 292, 300-301, per Callinan J.

²³ *Cattanach v Melchior*, paras 32-38, per Gleeson CJ

reconcile with the idea of the parent/child relationship as one that the law will regard as an element of actionable damage.²⁴

Hayne J also allowed the appeal. His Honour did not, however, see the claim as one of economic loss. The consequences suffered by the mother, including the financial consequences of having another child to maintain and nurture, were all a reasonably foreseeable consequence of the negligence of the doctor. Thus, the relevant question was why she should *not* be entitled to recover damages.²⁵

Hayne J noted that overseas courts considering the issue have discussed a number of arguments, many of which overlap to some extent. Many of these arguments did not find favour with His Honour. Those are the ‘blessing’ argument (detracts from the real question of ‘what is the position of the plaintiff as a result of the defendant’s negligence compared with the position that would have obtained if the tort had not been committed?’); the ‘set-off’ and ‘impossible prediction’ argument – that benefits and burdens are to be set off against each other, some of which are economic and many not, and this is too hard (the law has often had to measure intangibles, eg pain and suffering, in amounts of money); ‘motive for sterilisation’ argument (does not advance the resolution of the issue of whether damages are recoverable at all); the ‘choice’ argument (detracts from the possibility that the ‘choice’ not to abort or offer for adoption may not be made solely on economic grounds but is a complex decision).²⁶

However, in terms of a ‘public policy’ argument, Hayne J considered (similarly to an approach taken by one of the Law Lords in *McFarlane*²⁷) that the law should not permit parents to attempt to demonstrate that the net worth of the consequences of having to raise a healthy child is a financial detriment. There are both benefits and burdens in parenthood and it will be in the economic interests of the parents to assert that the burdens are greater than the benefits. Preventing such an inquiry prevents the parents, in pursuit of their own economic interests, inflicting harm on the child by denying the benefits (which brings in another argument - the ‘damage to the child’ argument) of that relationship. The parent is denied treating the child as a commodity to be given a market value. Thus, recompense should be confined to matters affecting the parent alone – pain and suffering of pregnancy and childbirth and costs of the failed procedure.²⁸

²⁴ *Cattanach v Melchior*, paras 35, 39 per Gleeson CJ.

²⁵ *Cattanach v Melchior*, para 192, per Hayne J.

²⁶ *Cattanach v Melchior*, paras 194-223, per Hayne J.

²⁷ *McFarlane v Tayside Health Board* [2000] 2 AC 59, 112 per Lord Millett.

²⁸ *Cattanach v Melchior*, paras 243-264, per Hayne J.

Note also that Hayne J did indicate that if a child had a special need over the normal costs of raising a child, those costs might be recoverable.²⁹

Heydon J allowed the appeal. His Honour said that the reasoning of the majority of the Court of Appeal was invalid for three reasons. The first was that it leads to an award of damages for a supposed loss in circumstances where what has happened is incapable of characterisation as a loss because the law assumes that human life has unique value and brings into existence corresponding and unique duties incapable of putting a money value upon. Secondly, the result would be entirely alien to the assumptions and goals of the legal system, of encouraging parents to exaggerate the abilities, or the troubles, of their children, thus creating an odious spectacle. Thirdly, it tends to generate litigation about children capable of causing the children distress and injury if they hear about it.³⁰

5 REACTIONS AND SOME UNANSWERED QUESTIONS

The High Court decision has inspired a number of different reactions based on legal and moral grounds. It has also fuelled the indemnity insurance crisis faced by doctors, particularly in the obstetrics field.

Some questions are left unanswered by the case including –

- the extent of a doctor’s liability for raising a child. The Melchior’s claim was reasonably modest but the case leaves open the possibility of parents claiming for larger and more discretionary expenses. This point is dealt with in the next heading;
- the causation argument – the effect of parents choosing not to terminate the unplanned pregnancy or give the child up for adoption. This was not decided in this case but some justices (eg Hayne J) did not appear to want to countenance such an argument;
- should there be any set-offs against the award of damages for statutory benefits received by parents after the birth of a child?
- the impact on ‘wrongful life’ cases.

²⁹ *Cattanach v Melchior*, para 263, per Hayne J.

³⁰ *Cattanach v Melchior*, para 347, per Heydon J.

5.1 LEGAL EXPERTS' AND ACADEMIC COMMENT

Harold Lunz, professor in law at the University of Melbourne, commented that while there is a failure rate of about one in 300 sterilisations, in most cases the doctor has not acted negligently. However, a doctor does have a duty to warn the patient that the procedure may not prevent her from becoming pregnant and, provided he or she gives that warning, it is unlikely that he or she can be held to be negligent. Australian National University law professor, Jim Davis, commented that the negligence in this case was (as the High Court found) grounded in the fact that even though Mrs Melchior told the doctor that she believed that her right tube had been operated on, Dr Cattnach should have examined her further. Professor Davis said that the essential issue raised by the case is the amount of damages that could potentially be awarded against a negligent doctor. The Melchiors' claim was reasonably modest but a doctor's liability might be much greater if his or her patient is wealthy and the existing children attend expensive schools.³¹

A similar point about the unexplored scope of the damages recoverable by parents was made by Phillips Fox partner, Michael Regos, who comments that while it is now clear that the costs necessary for bringing up of the child are recoverable, what discretionary costs can be recovered is yet to be determined. Such costs could include items such as tertiary education, boarding school, or holidays.³²

Indeed, a recent cost analysis by a sociologist, Dr Paul Henman of Macquarie University, showed that the cost of raising a first child to age 18 for a typical Brisbane working couple would be approximately \$205,600 but could be more or less depending on the type of household; number of children; position of the child (whether they can use 'hand-me-down' clothes and toys); housing tenure (mortgage or rental); and different levels of expectations (eg private school preferences).³³

A University of Sydney associate professor of law, Barbara McDonald, regards the High Court decision as disappointing because it did not recognise that human life cannot be easily categorised into the normal types of damage – physical injury, property damage, or pure economic loss. She also claims that the case might even open the door to a claim between a husband and wife where, if the wife falls

³¹ Benjamin Haslem, 'What price a child?', *Australian*, 18 July 2003, p 9.

³² Phillips Fox, 'Parents recover child rearing costs: *Cattanach v Melchior*', *Insurance e-Update*, July 2003.

³³ 'High Court award well below average cost of raising a child', *Macquarie University Public Relations and Marketing*, 18 July 2003.

pregnant because she has been negligent about taking the contraceptive pill, the husband responsible for supporting the child could sue her for loss of earnings.³⁴

On the other hand, Professor Reg Graycar of the Faculty of Law at the University of Sydney notes (a view echoing comments by some of the majority justices in *Cattanach v Melchior*) that the law has often had to grapple with placing a value on items that do not lend easily to monetary calculation – damage to reputation in defamation cases being an example. The argument that an award of damages for the costs of child rearing commodifies a human life could be countered by pointing out that the child support system might be regarded as having the same effect. Professor Graycar’s view was that the family now, as a result of the doctor’s negligence, have costs and responsibilities that they would not have had otherwise, and to allow that to go unremedied would go against the policy of freedom of choice about family planning that is central to our community values.³⁵

Indeed, Dr Leslie Cannold, Fellow at the Centre for Applied Philosophy and Public Ethics, University of Melbourne, has commented that a number of justices alluded to the notion of reproductive choice with McHugh and Gummow JJ, for example, stating that:

*The interest of the respondents which the law of negligence protected ... was that of each of the respondents in the planning of their family or, as it has been put in the United States, in their reproductive future.*³⁶

While the decision was not a ‘wrongful life’ case – one which is usually brought against a doctor by a child, usually with a disability, for damages for a negligently performed procedure to prevent their birth – some of the reasoning of the High Court majority might encourage more such actions in the hope that lower courts might adopt a similar approach to the ‘wrongful life’ issue. In the past, considerable reluctance has been shown by the courts in awarding damages.³⁷ Note that a number of the High Court justices did not like to differentiate between a ‘healthy’ child and one with disabilities as determining recovery of damages.³⁸

³⁴ Benjamin Haslem, ‘What price a child?’

³⁵ Reg Graycar, ‘The value of a loved baby can’t cancel out a clear case of medical negligence’, *on line opinion*, 25 July 2003, <http://www.onlineopinion.com.au/view.asp?article=573>

³⁶ *Cattanach v Melchior*, para 66.

³⁷ Clayton Utz, ‘Doctor left holding the baby – and paying for him too’, *News Article*, 18 July 2003.

³⁸ See for example McHugh and Gummow JJ in *Cattanach v Melchior*, para 78.

5.2 STAKEHOLDERS

The immediate response by the Australian Medical Association president on the day the judgement was delivered was that it would add fuel to the fire of the medical indemnity crisis and had ‘stark’ implications for doctors already having difficulties with insurance issues.³⁹ The AMA Vice President called upon State Governments to review the rights of parents to seek damages for rearing a healthy child.⁴⁰

The president of the National Association of Specialist Obstetricians and Gynaecologists argues that the decision will force more obstetricians and gynaecologists out of practice and, if there are more decisions like this, the medical indemnity system will implode.⁴¹ The general manager of professional services at United Medical Protection commented that the decision would have an immediate flow-on effect on those doctors’ premiums because insurers potentially face higher payouts if sterilisation fails.⁴² On the other hand, Medical Indemnity Protection Society chief executive, Paul Nisselle, believes that while insurance premiums will rise, the increases will be small because a case of this type is quite uncommon and doctors usually tend to keep notes about what they told their patient regarding risk of failure.⁴³ The Medical Defence Association also thought that insurers may have already partially factored in the decision into premium rises as the industry was well aware of the pending decision.⁴⁴

This High Court decision comes at a time where many hospitals are already facing a shortage of obstetricians and gynaecological services in the medical indemnity insurance crisis that followed the collapse of United Medical Protection in 2002. Despite subsidies provided by the Federal Government and its attempt to support UMP, and legislative reforms to negligence laws by a number of State Governments, obstetricians are still facing premiums in the vicinity of \$140,000. This steep rise, and fear of litigation, has caused many to leave the profession

³⁹ Ian Munro & Fergus Shiel, ‘Family payout for sterilisation bungle’, *AgeOnline*, 17 July 2003.

⁴⁰ ‘Tort Law Reform Essential in Light of High Court Ruling’, *AMA Media Release*, 18 July 2003.

⁴¹ Benjamin Haslem, ‘What price a child?’

⁴² Cynthia Banham & Daniel Dasey with AAP, ‘Fury over the “DVD player” kid’, *smh.com.au*, 18 July 2003.

⁴³ Benjamin Haslem, ‘What price a child?’

⁴⁴ Chris Griffith et al, ‘Birth law to restrict liability of doctors’, *Courier Mail*, 18 July 2003, p 3.

meaning that in some regional areas, women who want to be privately treated must travel long distances to larger towns.⁴⁵

6 GOVERNMENT RESPONSE

In a *Media Statement* following the High Court ruling, Queensland Attorney-General, the Hon Rod Welford MP, announced that the Government would legislate to contain the effect of the decision on sterilisation services which would be to significantly increase the insurance costs for doctors providing those services. Mr Welford stated that while the proposed laws would limit the level of compensation awarded to exclude the cost of raising the child, it would not prevent patients from recovering for negligent conduct by a doctor during the performance of the medical procedure. The legislation would seek to strike a balance between the right to obtain compensation for negligence and the community's need to access an important medical service.⁴⁶ The move was welcomed by AMA Queensland's president elect, Dr David Molloy, who said it should ease community concerns.⁴⁷

Prime Minister, Hon John Howard MP, who was overseas at the time, disapproved of the decision saying that if that was the state of the law then '*I think the law should be changed...I'm not criticising the High Court because the Court is there to interpret the law*'. However, he noted that negligence laws are state matters.⁴⁸

Acting Prime Minister, the Hon John Anderson MP, said that the High Court decision raised critical questions about the value we place on our children as well as significant issues for medical indemnity. He noted that it was a further sign of the trend '*towards regarding our children as a consumer durable... rather like an expensive fridge or a new DVD player*' and said that he could not help wondering what Jordan will think in later life when he finds that his parents demanded compensation for his birthday presents because he was born against their wishes.

⁴⁵ Ruth Pollard and Ben Wyld, 'Doctors at a premium in the litigation era', *smhOnline*, 12 August 2003.

⁴⁶ Hon Rod Welford MP, Attorney-General and Minister for Justice, 'Queensland Acts to Protect Medical Sterilisation Services', *Media Statement*. 17 July 2003. The text of the Media Statement is reproduced as **Appendix A** to this Research Brief.

⁴⁷ Chris Griffith et al, 'Birth law to restrict liability of doctors'.

⁴⁸ 'Mother resents Anderson DVD quip', *National News*, ninemsn, 18 July 2003.

He said that children were a gift from above and not an economic burden that can be enumerated and tabulated.⁴⁹

It is likely that other states will follow Queensland's lead. The New South Wales Government is considering the matter. However, while the Western Australian Attorney-General disagreed with the ruling, the WA Government had no plans to legislate and the Victorian Attorney-General also said that that State did not intend to do so.⁵⁰ As Clayton Utz points out, in jurisdictions where damages have been limited or capped by legislation, doctors whose negligence results in the birth of a healthy child may be liable for higher damages than if he or she had negligently physically harmed the mother.⁵¹

7 AMENDMENT TO THE CIVIL LIABILITY ACT 2003 (QLD)

On 21 August 2003, the Hon R J Welford MP, Attorney-General and Minister for Justice, introduced the Justice and Other Legislation Amendment Bill 2003 (Qld). While the Bill contains minor or technical changes to a number of statutes, an important amendment will be made to the *Civil Liability Act 2003* (Qld) to reverse the effect of *Cattanach v Melchior*. Mr Welford commented that the decision has cast doubt on the future of medical sterilisations in Queensland, exposed doctors performing those procedures to indeterminate liability, and threatened to undo the benefit of reforms contained in the *Personal Injuries Proceedings Act 2002* and the *Civil Liability Act 2003*.⁵²

The amendment seeks to ensure the ongoing availability of sterilisation services and family planning advice but will not prevent a parent from suing for a negligently performed sterilisation procedure. It is not retrospective but will, after the amendment provision commences, restrict the extent of damages that may be awarded in those circumstances.⁵³

⁴⁹ Hon John Anderson MP, Deputy Prime Minister and Minister for Transport and Regional Services, 'Cattanach Decision: Statement by the Acting Prime Minister', 17 July 2003.

⁵⁰ Louise Dodson, 'Howard urges states to outlaw child payouts', *Age*, 19 July 2003.

⁵¹ Clayton Utz, 'Doctor left holding the baby – and paying for him too'.

⁵² Hon R J Welford MP, Attorney-General and Minister for Justice, Justice and Other Legislation Amendment Bill 2003, (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 21 August 2003, pp 3177-3179, p 3178.

⁵³ Hon R J Welford MP, p 3178.

Part 8 of the Justice and Other Legislation Amendment Bill 2003 inserts a **proposed new Chapter 2, Part 5 (s 49A)** into the *Civil Liability Act 2003*. The proposed provision will apply if, following a procedure to effect the sterilisation of an individual, the individual gives birth to, or fathers, a child because of the breach of duty of a person in advising about or performing, the procedure. In such circumstances, a court cannot award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child. Examples of sterilisation procedures⁵⁴ are given, those being tubal ligation and vasectomy. Section 4 is also amended to make it clear that the provision is not retrospective.

When introducing the Bill, the Attorney-General stated that the new provisions will not prevent the court making an award for the costs of raising a child above the ordinary costs of doing so, such as if the child is severely disabled.⁵⁵

⁵⁴ The *Explanatory Notes* to the Justice and Other Legislation Amendment Bill 2003 (Qld) state that the negligent act or omission must be done or omitted to be done in performing a procedure to effect removal of the ability of a person to procreate (p 10).

⁵⁵ Hon R J Welford MP, Second Reading Speech, p 3177.

APPENDIX A – MINISTERIAL MEDIA STATEMENTS

Hon Rod Welford MP, Attorney-General & Minister for Justice

21 August 2003

New Laws Safeguard Medical Sterilisation Procedures

The Queensland Government today introduced legislation into Parliament to overturn the effects of a High Court decision which cast doubt on the future of medical sterilisations.

Attorney General and Minister for Justice, Rod Welford, said the amendment to the state's negligence laws in the Justice and Other Legislation (Miscellaneous Provisions) Bill 2003 responded to the High Court's ruling in *Cattanach v Melchior*.

Last month, in a split 4-3 judgement, the High Court ruled that a medical practitioner was liable for the costs of raising a healthy child, born as the result of a negligently performed sterilisation procedure.

"This amendment will reinstate Queensland's negligence laws to limit the level of compensation so there can't be similar claims in the future," Mr Welford told Parliament.

"The High Court decision exposed medical practitioners who perform these procedures to indeterminate liability.

"Since the ruling, doctors have responded by stating they will have no choice but to stop conducting medical sterilisations because of the likely massive jump in their insurance premiums.

"We will not stand by and allow these important medical services to disappear.

"These amendments restore certainty by limiting the level of compensation in these cases so there cannot be claims for the costs of raising a healthy child.

"We are not restricting the ability of a parent to sue for a negligently performed sterilisation but limiting the damages which may be awarded in that circumstance.

"This will provide an appropriate limit and safeguard against excessive claims and will ensure the ongoing availability of sterilisation services and family planning advice."

The Justice and Other Legislation (Miscellaneous Provisions) Bill 2003 also amends the Criminal Code to increase the maximum penalty for attempting to pervert justice from two years to seven years.

This brings the punishment of this offence into line with similar offences such as retaliation against witnesses, corruption of jurors, fabricating evidence and corruption of witnesses and conspiring to defeat justice.

Media contact: Greg Milne on 32393478 or 0417 791 336

Hon Rod Welford MP, Attorney-General & Minister for Justice

17 July 2003

Queensland Acts to Protect Medical Sterilisation Services

The State Government is set to introduce urgent new legislation to reverse the effects of a High Court ruling that threatens medical sterilisation services.

Attorney General and Minister for Justice, Rod Welford, said the implications of the High Court ruling in the *Cattanach v Melchior* case could not be ignored.

"Our Government will be acting to ensure these important medical services for both men and women are not compromised by the court decision," Mr Welford.

"We are considering the introduction of legislation possibly as soon as the August session of our State Parliament.

"The High Court decided that a doctor who performed an unsuccessful sterilisation procedure on a woman who subsequently had a child, was liable for all the future costs of raising that child.

"The practical effect of this court decision is to significantly increase the potential liability for doctors providing these important medical services.

"This will mean insurance costs will skyrocket and many doctors will have no choice but to refuse to provide these services."

Mr Welford said the planned legislation would not prevent patients from obtaining compensation for any negligent conduct by a doctor during a sterilisation procedure.

"Our new laws would simply limit the level of compensation so there cannot be claims in any negligence action of this kind for the cost of raising a child," he said.

"The life of a child cannot be brought down to dollar terms - there is more to raising a child than just the cost.

"Our legislation would strike a balance between the rights of people to obtain compensation for negligence and the community's need to access these important medical services."

Media contact: Greg Milne on 32393478 or 0417 791 336

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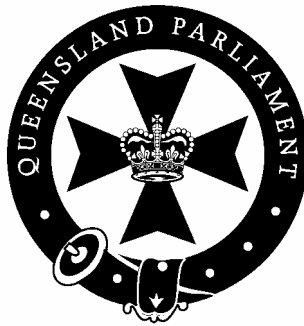
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RBR2003/19	<i>The Housing Bill 2003 (Qld)</i>	Aug 2003
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RBR2003/23	<i>Funeral Benefit Businesses and the Second-Hand Dealers and Pawnbrokers Bill 2003 (Qld)</i>	Sept 2003
RBR2003/24	<i>The costs of raising a child: Cattanach v Melchior and The Justice and Other Legislation Amendment Bill 2003 (Qld)</i>	Sept 2003

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