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‘Wrongful Life’: the High Court decisions in *Harriton v Stephens* and *Waller v James; Waller v Hoolahan*

In May 2006, the High Court of Australia handed down its decisions in Harriton v Stephens and Waller v James; Waller v Hoolahan. These cases examined the issue of so-called ‘wrongful life’. By majority in both cases, the High Court held that there is no cause of action in negligence for a wrongful life.

A wrongful life claim is brought by a disabled child against a medical professional on the basis of the medical professional’s failure to prevent the child’s existence, and hence the child suffers a life of disability and pain. Wrongful life claims typically involve a medical professional failing to advise the child’s parents of the disabilities that the child would be likely to suffer. The disabilities are not caused by the medical professional; they may, for example, be the result of a genetic abnormality or an illness. The child’s parents say that, had they been made aware of the potential disabilities, they would have decided not to conceive or to terminate the pregnancy. The child seeks compensation to put himself or herself in the position he or she would have been in had the negligence not occurred; that is, he or she would not have been born. The court must compare existence with non-existence – a comparison which involves unique problems.

Mary Westcott

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CONTENTS

EXECUTIVE SUMMARY

In May 2006, the High Court of Australia published its judgments in the cases of *Harriton v Stephens*[1] and *Waller v James; Waller v Hoolahan*.[2] These cases deal with the issue of a so-called 'wrongful life': **page 1**.

A wrongful life claim is brought by a disabled child against a medical professional on the basis of the medical professional's failure to prevent the child's existence, and hence the child suffers a life of disability and pain. Wrongful life claims typically involve a medical professional failing to advise the child's parents of the disabilities that the child would be likely to suffer. The disabilities are not caused by the medical professional; they may, for example, be the result of a genetic abnormality or the child's mother contracting rubella (German measles) during the first trimester of her pregnancy. The child seeks compensation to put himself or herself in the position he or she would have been in had the negligence not occurred; that is, he or she would not have been born: **pages 1-2**. The plaintiffs in *Harriton v Stephens* and *Waller v James; Waller v Hoolahan* were born disabled, but would not have been born if their mothers had been aware of the risk that they would be born disabled: **pages 3–4**.

At first instance, the trial judge in the New South Wales Supreme Court concluded that the plaintiffs did not have causes of action against the defendants: **pages 5–10**. The plaintiffs appealed to the New South Wales Court of Appeal. By majority, the Court of Appeal upheld the trial judge's decisions: **pages 10–13**. The plaintiffs then appealed to the High Court of Australia. In both cases, by 6-1 majority decisions, the High Court held that there is no cause of action in negligence for a wrongful life: **pages 13–19**.

The High Court's refusal to recognise wrongful life claims means Australia's position on wrongful life is in line with that in most other jurisdictions: **pages 19–22**.

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1 *Harriton v Stephens* (2006) 226 ALR 391; [2006] HCA 15 (9 May 2006), available at http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html.

2 *Waller v James; Waller v Hoolahan* (2006) 226 ALR 457; [2006] HCA 16 (9 May 2006), available at http://www.austlii.edu.au/au/cases/cth/HCA/2006/16.html.

1 INTRODUCTION

In May 2006, the High Court of Australia published its judgments in the cases of *Harriton v Stephens*[3] and *Waller v James; Waller v Hoolahan*.[4] These cases, which were heard consecutively, required the High Court to decide whether a child can successfully claim compensation under the tort of negligence for a so-called 'wrongful life'.

A wrongful life claim is brought by, or on behalf of, a disabled child against a medical professional on the basis of the medical professional's failure to prevent the child's existence, and hence the child suffers a life of disability and pain. Wrongful life claims typically involve a medical professional failing to advise the child's parents of the disabilities that the child would be likely to suffer. The disabilities are not caused by the medical professional; they may, for example, be the result of a genetic abnormality or the child's mother contracting rubella (German measles) during the first trimester of her pregnancy. The child's parents say that if they had been made aware of the potential disabilities, they would have decided not to conceive or to terminate the pregnancy. The child seeks compensation to put himself or herself in the position he or she would have been in had the negligence not occurred; that is, he or she would not have been born. This involves the comparison, for the purpose of damages, between life and non-existence.

In 6-1 majority decisions, the High Court dismissed the appeals by Alexia Harriton in *Harriton v Stephens* and by Keedon Waller in *Waller v James; Waller v Hoolahan*. This meant that the decision of the New South Wales Court of Appeal stood: that is, the plaintiffs could not be compensated for their 'wrongful' lives.

2 WRONGFUL LIFE AND WRONGFUL BIRTH

A typical medical negligence case involves a plaintiff seeking compensation from a medical professional for an act or omission of the medical professional that results in impairment or defect. A wrongful life case differs from this in that the medical professional does not cause the impairment or defect, but rather fails to advise the plaintiff's parents of the risks of disability or birth defect either prior to conception

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[3] *Harriton v Stephens* (2006) 226 ALR 391; [2006] HCA 15 (9 May 2006), available at http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html.

[4] *Waller v James; Waller v Hoolahan* (2006) 226 ALR 457; [2006] HCA 16 (9 May 2006), available at http://www.austlii.edu.au/au/cases/cth/HCA/2006/16.html.

or during the mother's pregnancy, and therefore she does not have an abortion.[5] The medical professional may be a doctor, genetic counsellor, laboratory technician, hospital authority, manufacturer of contraceptive pills or devices, or a chemist.[6]

A recent article identified two main reasons why courts have generally not allowed wrongful life claims.[7] These are:

> *(1) it is legally and logically impossible to calculate damages allegedly suffered by the child, because being born alive is not a legally cognizable injury regardless of the severity of the defective condition experienced by the child; and*
>
> *(2) a physician or other health care provider cannot be held liable for damages when the alleged negligence did not proximately cause the congenital impairment or defect.*

The set of facts that can lead to a wrongful life action may also lead to an action for a 'wrongful birth'. While a wrongful life claim is brought by a child who alleges that a medical practitioner has been negligent and this negligence resulted in him or her being born, a wrongful birth case is brought by a parent who contends that his or her child was born as a result of negligence on the part of a medical practitioner, such as failing to perform a sterilisation correctly.

In 2003, the High Court addressed the issue of wrongful birth in the case of *Cattanach v Melchior*.[8] The Court held that the parents of an 'unintended' but healthy child could recover compensation for raising and maintaining their child to the age of 18.[9] However, following that decision, the Queensland Parliament passed legislation to prevent a court from awarding damages for the costs

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5 Barry A Bostrom, 'Willis v Wu In the Supreme Court of South Carolina', *Issues in Law and Medicine*, 20(3), 2005, pp 275 – 278, p 276.

6 Penelope Watson, 'Wrongful life: damnum sine injuria?', *Plaintiff*, Issue 53, October 2002, pp 37 – 40, p 37.

7 Barry A Bostrom, 'Willis v Wu In the Supreme Court of South Carolina', p 277.

8 *Cattanach v Melchior* (2003) 215 CLR 1; [2003] HCA 38 (16 July 2003), available at http://www.austlii.edu.au/au/cases/cth/high_ct/2003/38.html.

9 This case, and the statutory changes introduced in response to the decision, are discussed in a Queensland Parliamentary Library publication: Nicolee Dixon, 'The Costs of Raising a Child: Cattanach v Melchior and the Justice and Other Legislation Amendment Bill 2003 (Qld)', *Research Brief No 2003/24*, Queensland Parliamentary Library, September 2003, available at http://www.parliament.qld.gov.au/view/publications/documents/research/ResearchBriefs/2003/200324.pdf.

ordinarily associated with rearing or maintaining a child who was born following a sterilisation procedure or a contraceptive procedure or advice.[10]

3 THE PLAINTIFFS: ALEXIA HARRITON AND KEEDON WALLER

The plaintiffs in *Harriton v Stephens* and *Waller v James; Waller v Hoolahan* were born with "catastrophic"[11] disabilities. Alexia Harriton was born with disabilities including "blindness, deafness, mental retardation and spasticity."[12] Keedon Waller was born with a genetic anti-thrombin 3 deficiency (AT3 deficiency) which results in a propensity for the blood to clot. At five days old, Keedon suffered cerebral thrombosis which caused "permanent brain damage, cerebral palsy and uncontrolled seizures".[13] Both plaintiffs required ongoing care. At the time of the High Court decisions, Alexia was aged 25 years and Keedon was aged five years.[14]

3.1 ALEXIA HARRITON

Alexia's disabilities resulted from rubella suffered by her mother during the first trimester of her pregnancy with Alexia.

In August 1980, Mrs Harriton visited her general practitioner. She told him she thought she was pregnant and that she had recently suffered a fever and rash, and she was concerned that the rash was caused by rubella. Her doctor ordered tests to determine whether she was pregnant and whether she had been exposed to the rubella virus. The tests confirmed that she was pregnant but her doctor, Dr Paul Stephens, assured her that her symptoms were not caused by the rubella virus.

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10 The *Justice and Other Legislation Amendment Act 2003* (Qld) amended the *Civil Liability Act 2003* (Qld) by inserting sections 49A (Failed sterilisation procedures) and 49B (Failed contraceptive procedure or contraceptive advice).

11 *Harriton v Stephens; Waller v James and Waller v Hoolahan* 59 NSWLR 694; [2004] NSWCA 93 (29 April 2004), para 174, available at http://www.lawlink.nsw.gov.au/scjudgments/2004nswca.nsf/2004nswca.nsf/WebView2/5590F9E5A37E9177CA256E620018FA1E?OpenDocument.

12 *Harriton v Stephens* [2006] HCA 15, para 212.

13 *Waller v James; Waller v Hoolahan* [2006] HCA 16, para 73.

14 Alexia Harriton was born on 19 March 1981 and Keedon Waller was born on 10 August 2000.

The parties in *Harriton v Stephens* agreed that if the doctor owed Alexia a duty of care, he was negligent in informing Mrs Harriton that she did not have rubella and in failing to order further testing. The parties also agreed that a reasonable practitioner in the position of the respondent would have advised Mrs Harriton of the high risk of having a severely disabled child after contracting rubella in the first trimester of pregnancy. If she had received this information, it was agreed that Mrs Harriton would have had an abortion.

3.2 KEEDON WALLER

Mr and Mrs Waller had difficulty falling pregnant so they sought the advice of a general practitioner who ordered tests which showed that Mr Waller had a low sperm count and poor sperm motility. The doctor referred the couple to Dr Christopher James, an obstetrician and gynaecologist with an interest in infertility problems. In his referral, the general practitioner informed Dr James that Mr Waller had an AT3 deficiency and that he was taking medication to control it. Dr James ordered tests which confirmed Mr Waller's low fertility but he did not arrange for tests to obtain information about the genetic basis of Mr Waller's AT3 deficiency. Dr James recommended that the Mr and Mrs Waller receive in vitro fertilisation (IVF) treatment. They did, and became pregnant.

Dr Hoolahan oversaw Mrs Waller's pregnancy. He ordered tests which showed the foetus did not have Down's syndrome but he did not advise Mr and Mrs Waller that the AT3 deficiency could be hereditary. Keedon Waller was born on 10 August 2000. He and his mother were discharged from the hospital after four days but a day later Keedon was readmitted suffering from cerebral thrombosis. As a result of the cerebral thrombosis, Keedon received brain damage, suffers uncontrolled seizures and has cerebral palsy.

The parties agreed that if Mr and Mrs Waller had been advised that the AT3 deficiency was genetic, they would have opted to:

- defer undergoing IVF until methods were available to check whether the embryos contained the AT3 deficiency;
- use donor sperm; or
- terminate the pregnancy if there was a risk of a child being born with serious genetic disabilities.

4 DECISIONS IN THE NEW SOUTH WALES SUPREME COURT

Alexia Harriton[15] and Keedon Waller[16] initially had their cases heard by Studdert J in the New South Wales Supreme Court. Theirs were two of three cases, in which similar questions were addressed, heard by Studdert J over two days in March 2002. The third case, *Edwards v Blomeley*,[17] was not appealed. The defendant in *Harriton v Stephens* was Dr Paul Stephens. The defendants in *Waller v James* were Dr Christopher James, Sydney IVF Pty Limited and Dr Brian Hoolahan.

At the time that Studdert J heard the cases, there had been no Australian case in which a wrongful life action had been successful.[18] In his judgments, Studdert J provided a comprehensive review of wrongful life cases in Australia and other jurisdictions. His Honour was most strongly influenced in his decisions by the judgment of the English Court of Appeal in *McKay v Essex Area Health Authority*[19] and quoted extensively from it.[20] This English decision was also discussed and quoted by the New South Wales Court of Appeal and the High Court of Australia in the plaintiffs' subsequent appeals.

4.1 MCKAY V ESSEX AREA HEALTH AUTHORITY

4.1.1 Background

The case of *McKay v Essex Area Health Authority* was the first time that a court in a Commonwealth country addressed the issue of wrongful life.[21] The only courts

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15 *Harriton v Stephens* [2002] NSWSC 461 (12 June 2002), available at http://www.lawlink.nsw.gov.au/scjudgments/2002nswsc.nsf/2002nswsc.nsf/WebView2/CB9D4DF2F2B1D2E8CA256BC60002E6B4?OpenDocument.

16 *Waller v James* [2002] NSWSC 462 (12 June 2002), available at http://www.lawlink.nsw.gov.au/scjudgments/2002nswsc.nsf/2002nswsc.nsf/WebView2/B8E459835243D84BCA256BC60003C0AE?OpenDocument.

17 *Edwards v Blomeley* [2002] NSWSC 460 (12 June 2002), available at http://www.lawlink.nsw.gov.au/scjudgments/2002nswsc.nsf/2002nswsc.nsf/WebView2/30EBFDEEE7451EBBCA256BC600025217?OpenDocument.

18 *Edwards v Blomeley* [2002] NSWSC 460, para 7.

19 *McKay v Essex Area Health Authority* [1982] 1 QB 1166.

20 See, for example, *Edwards v Blomeley* [2002] NSWSC 460, paras 14 - 22.

21 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1178.

which had previously heard a wrongful life claim were American courts.[22] In all but one of these American cases, the claim for wrongful life had been unsuccessful.[23]

The plaintiff in *McKay v Essex Area Health Authority*, Mary McKay, was born disabled as a consequence of her mother contracting rubella during her pregnancy. It was argued for Mary that if the defendant Health Authority and doctor had not been negligent in failing to advise her mother that she had been infected with rubella, her mother would have terminated her pregnancy. Her claim was initially struck out on the basis that it "disclosed no reasonable cause of action against either defendant."[24] The plaintiff appealed to the High Court, which set the order aside. The Court of Appeal reinstated the original decision.

4.1.2 Court of Appeal Decision

The Court of Appeal judges, Stephenson, Ackner and Griffiths LJJ, delivered separate judgments but unanimously agreed that the plaintiff's claim for a wrongful life disclosed no reasonable cause of action.[25] Their Honours identified a number of reasons for refusing the claim:

- the defendants' negligence had not caused the plaintiff's disabilities, just meant that she was born;
- it was impossible to quantify damages;
- it was against public policy; and
- the legislature, not the courts, should decide how to deal with such matters.

Impossibility of Assessing Damages

The judges in *McKay v Essex Health Authority* grappled with the difficulty of assessing damages for a wrongful life. In his judgment, Griffiths LJ said:[26]

> *To my mind, the most compelling reason to reject this cause of action is the intolerable and insoluble problem it would create in the assessment of damage. The basis of damages for personal injury is the comparison between the state of the*

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22 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1186.

23 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1186.

24 *Edwards v Blomeley* [2002] NSWSC 460, para 13.

25 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1171.

26 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1192 – 1193.

> *plaintiff before he was injured and his condition after he was injured.* … [In a claim for wrongful life,] [t]*he court … has to compare the state of the plaintiff with non-existence, of which the court can know nothing; this I regard as an impossible task.*

Stephenson LJ discussed the difficulty in measuring the financial loss involved in comparing the life of a disabled child with that of non-existence. He said:[27]

> *The only loss for which those who have not injured the child can be held liable to compensate the child is the difference between its condition as a result of their allowing it to be born alive and injured and its condition if its embryonic life had been ended before its life in the world had begun. But how can a court of law evaluate that second condition and so measure the loss to the child? Even if a court were competent to decide between the conflicting views of theologians and philosophers and to assume an "after life" or non-existence as the basis for the comparison, how can a judge put a value on the one or the other, compare either alternative with the injured child's life in this world and determine that the child has lost anything, without the means of knowing what, if anything, it has gained?*

Summing up, Stephenson LJ stated:[28]

> *… If difficulty in assessing damages is a bad reason for refusing the task, impossibility of assessing them is a good one.*

Ackner LJ also discussed the difficulty in comparing the known with the unknown to assess damages for a wrongful life:[29]

> *… What then are her injuries, which the doctor's negligence has caused? The answer must be that there are none in any accepted sense. Her complaint is that she was allowed to be born at all, given the existence of her pre-natal injuries. How then are her damages to be assessed? Not by awarding compensation for her pain, suffering and loss of amenities attributable to the disabilities, since these were already in existence before the doctor was consulted. She cannot say that, but for his negligence, she would have been born without her disabilities. What the doctor is blamed for is causing or permitting her to be born at all. Thus, the compensation must be based on a comparison between the value of non-existence (the doctor's alleged negligence having deprived her of this) and the value of her existence in a disabled state.*
>
> *But how can a court begin to evaluate non-existence, "the undiscovered country from whose bourn no traveller returns?" No comparison is possible and therefore no damage can be established which a court could recognise. This goes to the root of the whole cause of action.*

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27 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1181.

28 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1182.

29 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1189.

Public Policy

Stephenson LJ set out a number of public policy reasons for not allowing the plaintiff's wrongful life claim. His Honour stated that allowing a wrongful life claim would impinge on the sanctity of human life.[30] It would also mean regarding the life of a disabled person as so much less valuable than that of a normal child that it would not be worth preserving.[31] In addition, it would mean that a doctor would have to pay damages to a child who has suffered a virus or disease in utero but who has been born "with some mercifully trivial abnormality"[32] because it is based on the assumption that a child has a right to be born "perfect" or "normal" or not at all.[33] The Lord Justice also pointed out the opportunity it would open for a child born with a disability to sue his or her mother for not having an abortion.[34]

Role for Legislature not Courts

The Court of Appeal was of the view that it should be up to the legislature, not the courts, to resolve the legal problems associated with wrongful life. Ackner LJ noted that it was argued that if the doctor had "properly discharged his obligation of care towards the unborn child,"[35] he would have advised her mother to have an abortion. On the facts, her mother would have done so. Thus, Ackner LJ concluded that the duty of care would involve a duty to the foetus "to cause its death".[36] His Honour stated:[37]

> *I cannot accept that the common law duty of care to a person can involve, without specific legislation to achieve this end, the legal obligation to that person, whether or not in utero, to terminate his existence. Such a proposition runs wholly contrary to the concept of the sanctity of human life.*

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30 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1180.

31 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1180.

32 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1181.

33 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1180.

34 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1180.

35 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1188.

36 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1188.

37 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1188.

Griffiths LJ stated:[38]

> *The common law does not have the tools to fashion a remedy in these cases. If society feels that such cases are deserving of compensation, some entirely novel and arbitrary measure of damage is called for which … would be better introduced by legislation than by judges striving to solve the insoluble.*

4.2 STUDDERT J'S DECISIONS IN HARRITON V STEPHENS AND WALLER V JAMES; WALLER V HOOLAHAN

After reviewing wrongful life cases from various jurisdictions and addressing the arguments raised by counsel in the trials, Studdert J concluded that Alexia Harriton and Keedon Waller did not have causes of action against the defendants. While the defendants owed the plaintiffs a duty of care not to injure them, the plaintiffs were not injured by the defendants breaching their duty of care.[39] Studdert J added that the impossibility of determining "damage" would, of itself, be sufficient to reject the claims, as would the impossibility of assessing compensatory damages.[40] His Honour stated that there were also "weighty" public policy considerations against recognising wrongful life claims.[41]

The public policy considerations that militated against recognition of wrongful life claims were:[42]

- sanctity of life considerations;
- the impact on the self-esteem of those born with disabilities, and "their perceived worthiness by other members of society"; and
- the possibility that a child could sue his or her mother for failing to have an abortion when advised by a medical professional that the child may be born disabled.

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38 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1193.

39 *Harriton v Stephens* [2002] NSWSC 461, para 81 and *Waller v James; Waller v Hoolahan* [2002] NSWSC 462, para 68.

40 *Harriton v Stephens* [2002] NSWSC 461, para 81 and *Waller v James; Waller v Hoolahan* [2002] NSWSC 462, para 68.

41 *Harriton v Stephens* [2002] NSWSC 461, para 81 and *Waller v James; Waller v Hoolahan* [2002] NSWSC 462, para 68.

42 *Edwards v Blomeley* [2002] NSWSC 460, para 119.

5 NEW SOUTH WALES COURT OF APPEAL DECISIONS

Alexia Harriton and Keedon Waller appealed against Studdert J's findings. Their appeals were heard concurrently in the New South Wales Court of Appeal by Spigelman CJ, Mason P and Ipp JA. The issue addressed by the Court was whether a medical adviser to prospective parents owes a duty of care to the prospective child that includes conduct which, "if it had been properly performed without negligence, would have led to termination of the pregnancy or non-conception".[43]

Spigelman CJ and Ipp JA dismissed the appeals. Mason P dissented, upholding the appeals. He held that the plaintiffs had a cause of action against the respective defendants and that the categories of damage available in personal injuries cases were available.

5.1 SPIGELMAN CJ AND IPP JA

5.1.1 Compensatory Principle

Spigelman CJ and Ipp JA analysed the compensatory principle, a tenet of the common law, to determine whether it was possible to assess damages in a wrongful life case. Ipp JA quoted the "classic formulation"[44] of the compensatory principle expressed by Lord Blackburn in *Livingstone v Rawyards Coal Company*:[45]

> [W]*here any injury is to be compensated by damages, in settling the sum of money to be given for … damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation …*

Ipp JA stated that it was "impossible to use non-existence as a comparator"[46] and that "the application of the compensatory principle in its orthodox form defeats

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43 *Harriton v Stephens; Waller v James; Waller v Hoolahan* [2004] NSWCA 93, para 13.

44 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 215.

45 *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25 at 39, cited in *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 215.

46 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 265.

claims of the kind brought by Keeden and Alexia".[47] In support of his argument, he quoted leading torts lawyer and academic, Professor Harold Luntz:[48]

> *Conceptually such actions are not reconcilable with tort principles, since in accordance with such principles they involve a comparison between being born with a handicap and non-existence, a comparison which it is impossible to make in money terms.*

5.1.2 Duty of Care

Spigelman CJ found that there was not a sufficiently direct relationship between the plaintiff and defendant for the defendant to owe the plaintiff a duty of care, and the purported duty did not reflect community values.

5.1.3 Policy Considerations

Ipp JA set out a number of policy considerations to add weight to the arguments against accepting the plaintiffs' claims. These considerations included sanctity of life arguments,[49] the ability of parents to claim the expenses associated with rearing and maintaining disabled children where there has been medical negligence,[50] the great cost to the community of extending the boundaries of tort law as a result of sympathy for plaintiffs,[51] and continuing future advances in genetic science which mean that it is not possible to know the consequences of allowing claims for wrongful birth.[52]

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47 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 234.

48 Harold Luntz, *Assessment of Damages for Personal Injury*, 4th ed, LexisNexis Butterworths, 2002, para 11.8.8, cited in *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 234.

49 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 348.

50 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 349.

51 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 335.

52 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 338.

5.2 MASON P

Justice Mason delivered a dissenting judgment. In an article in *Precedent*, Penelope Watson stated:[53]

> *Justice Mason …* [differed] *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.*

5.2.1 Causation

Mason P was unable to accept that the defendants did not have any causal responsibility for the plaintiffs' conditions. His Honour said:[54]

> *To state that a person is inflicted 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 by the exercise of reasonable care and skill then he or she will normally be held liable for the consequences of the breach of duty of care. This is commonplace in medical negligence litigation involving disabilities stemming from preventable or curable diseases that befall plaintiffs during their lifetime.*

5.2.2 Assessing Damages

Mason P held, contrary to Spigelman CJ and Ipp JA, that it was possible to quantify damages in the case of wrongful birth. He compared such an assessment with "assessing damages for shortening of life expectancy in the case of an insensate victim" and withholding life-sustaining treatment for "severely defective newborn-infants and the terminally ill".[55] His Honour said it "necessarily involves the law in weighing up the unknown uncertainty of death or non-existence against the known reality of severe, irremediable suffering".[56]

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53 Penelope Watson, "'Life itself cannot be a legal injury': Begging the question on 'wrongful life'", *Precedent,* Issue 64, September/October 2004, pp 24-31, p 26.

54 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 121.

55 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 157.

56 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 157.

5.2.3 Influence of Legislation on the Common Law

In his judgment, Ipp JA argued that at present, Australian legislatures are restricting liability for negligence, and therefore courts should not increase the instances in which a person will be liable in negligence.[57] In relation to this, Mason P stated:[58]

> *This, with respect, is extra-legal analysis. I do not deny that legislation may exercise a gravitational pull upon the development of legal principle in particular fields … But I know of no legal principle that directs the common law to pause or go into reverse simply because of an accumulation of miscellaneous statutory overrides.*

6 THE HIGH COURT

Alexia Harriton and Keedon Waller appealed the New South Wales Court of Appeal decision to the High Court of Australia. The appeals were heard consecutively by the High Court. By a 6-1 majority, the appeals were dismissed and the decision of the Court of Appeal upheld. The majority consisted of Gleeson CJ and Gummow, Heydon, Crennan, Hayne and Callinan JJ. Justice Kirby dissented.

As in the earlier hearings, the issue to be decided was whether the plaintiffs, who were born disabled, had a cause of action in negligence against the defendants, and if so, whether the heads of damages are those generally available in personal injury claims.[59]

6.1 CRENNAN J, WITH WHOM GLEESON CJ, GUMMOW J AND HEYDON J CONCURRED

Justice Crennan provided the principal judgment in the two cases. She upheld the Court of Appeal's decision for a number of reasons including:

- the inability of the plaintiffs to show damage caused by breach of the purported duty of care (life with disabilities is not legally recognised as damage);
- the impossibility of assessing damages;

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57 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 337.

58 *Harriton v Stephens; Waller v James and Waller v Hoolahan* [2004] NSWCA 93, para 164.

59 *Harriton v Stephens* [2006] HCA 15, para 216 and *Waller v James; Waller v Hoolahan* [2006] HCA 16, para 79.

- the possible inconsistency between the interests of a mother and her foetus; and
- policy considerations.

6.1.1 Inability to Prove Damage

Crennan J stated that damage is an "essential ingredient in the tort of negligence"[60] and that no duty of care is owed if the plaintiff cannot prove damage or a court cannot evaluate the damage. Her Honour asserted:[61]

> *There is no practical possibility of a court (or jury) ever apprehending or evaluating, or receiving proof of, the actual loss or damage as claimed by the* [plaintiff]*. It cannot be determined in what sense Alexia Harriton's life with disabilities represents a loss, deprivation or detriment compared with non-existence.*

A life with disabilities is not legally recognised as damage and thus no duty of care is owed to the plaintiffs by the defendants.

6.1.2 Impossibility of Assessing Damages

Crennan J said that it was impossible to compare a life with disabilities with non-existence,[62] and if damages were to be calculated it would require the creation of an awkward fiction.[63] Her Honour approved of Ipp JA's discussion of the "manifold difficulties in assessing damages in respect of the claim".[64]

6.1.3 Possible Conflict of Interest Between a Mother and her Foetus

Crennan J noted that the interests of a mother and her foetus do not always coincide.[65] Thus, if a further duty of care is imposed on the doctor with respect to the foetus, it may conflict with the doctor's duty of care to the mother. It could

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60 *Harriton v Stephens* [2006] HCA 15, para 276.

61 *Harriton v Stephens* [2006] HCA 15, para 253.

62 *Harriton v Stephens* [2006] HCA 15, para 252.

63 *Harriton v Stephens* [2006] HCA 15, para 276.

64 *Harriton v Stephens* [2006] HCA 15, para 270.

65 *Harriton v Stephens* [2006] HCA 15, para 247.

also mean that a mother could be held liable to her child for wrongful life if she fails to obtain an abortion after being advised of a risk of disability to the child.[66]

6.1.4 Policy Considerations

Crennan J also discussed some of the policy considerations to be taken into account in deciding the plaintiffs' claims. Her Honour said that if a disabled person were able to claim his or her life as "actionable damage",[67] it would be inconsistent with legislation prohibiting discrimination on the basis of disability.[68] Her Honour also stated:[69]

> … *it is odious and repugnant to devalue the life of a disabled person by suggesting that such a person would have been better off not to have been born into a life with disabilities.*

It would also be incompatible with the law's sanction of those who wrongfully take a life. Crennan J supplied the following example:[70]

> *No person guilty of manslaughter or murder is entitled to defend the accusation on the basis that the victim would have been better off, in any event, if he or she had never been born.*

If a duty of care were found to be owed to Alexia and Keeden, Her Honour questioned how it could be determined to whom the duty would be owed. Would it just be those "whose disability is so severe they could be said to constitute a group for whom life is not worth living?".[71]

Counsel for Alexia Harriton argued that she was suffering as a result of Dr Stephen's negligence and that the suffering would go uncompensated if the wrongful life claim was unsuccessful.[72] Crennan J addressed this argument by stating that corrective justice itself is insufficient to determine a novel claim in

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66 *Harriton v Stephens* [2006] HCA 15, paras 248 - 250.

67 *Harriton v Stephens* [2006] HCA 15, para 263.

68 *Harriton v Stephens* [2006] HCA 15, para 263.

69 *Harriton v Stephens* [2006] HCA 15, para 258.

70 *Harriton v Stephens* [2006] HCA 15, para 263.

71 *Harriton v Stephens* [2006] HCA 15, para 261.

72 *Harriton v Stephens* [2006] HCA 15, para 271.

negligence.[73] Her Honour also stated that a life without disabilities was not possible for the plaintiff, and if her wrongful life claim was successful, it would make Dr Stephens liable for disabilities that he did not cause.[74]

6.2 HAYNE J

Hayne J focussed on determining whether Alexia Harriton had suffered damage in the sense recognised by the common law. His Honour concluded that Alexia's disabilities were not a form of damage because "[s]he could have no life other than the life she has."[75] Because damage (an essential element of negligence) could not be established, His Honour held that the plaintiffs' appeals must be unsuccessful.

6.3 CALLINAN J

Callinan J discussed some of the policy issues raised by the appeal, but stated that his decision was made purely on logic.[76] His Honour said that it does not work logically for a plaintiff to say that he or she should not have been brought into existence because if that had happened, he or she would not have been able to say anything.

Some policy reasons which weighed against the plaintiffs' claims included the likelihood that doctors would more readily advise patients to have abortions if the plaintiffs' appeals succeeded. Also, to maintain coherence in the law would mean that a mother who does not terminate her pregnancy despite being aware of risks of disability would be liable to the child.[77]

Like Crennan J, Callinan J believed that it is impossible to compare existence with non-existence, however he held that a fiction should be created to enable a comparison between "an ordinary, non-disabled life and a disabled life".[78]

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73 *Harriton v Stephens* [2006] HCA 15, para 275.

74 *Harriton v Stephens* [2006] HCA 15, para 270.

75 *Harriton v Stephens* [2006] HCA 15, para 182.

76 *Harriton v Stephens* [2006] HCA 15, para 206.

77 *Harriton v Stephens* [2006] HCA 15, para 205.

78 *Harriton v Stephens* [2006] HCA 15, para 205.

His Honour concluded by stating that issues relating to wrongful life should be left to the legislature.[79]

6.4 KIRBY J

Kirby J provided the sole dissent in each judgment. His Honour allowed the appeals and held that the plaintiffs had a cause of action against the defendants. His Honour decided that the categories of damage are those available in personal injuries cases. Kirby J stated: "The ordinary principles of negligence law sustain a decision in the appellant's favour. None of the propounded reasons of legal principle or legal policy suggests a different outcome."[80] In his judgment, His Honour focussed on four main issues:

- causation;
- duty of care;
- damage; and
- policy.

6.4.1 Causation

Kirby J considered that causation was not a problem for the plaintiffs. His Honour said that the plaintiffs' suffering would have been avoided if the defendants had not been negligent.[81]

6.4.2 Duty of Care

Kirby J regarded the duty of care owed by health care providers to a foetus to be wide enough to encompass a duty to the foetus in these instances.[82] His Honour stated that if the court were not to find that health care providers owed such a duty, it would amount to an immunity for health care providers and thus would not

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79 *Harriton v Stephens* [2006] HCA 15, para 206.

80 *Harriton v Stephens* [2006] HCA 15, para 155.

81 *Harriton v Stephens* [2006] HCA 15, para 40 and *Waller v James; Waller v Hoolahan* [2006] HCA 16, para 38.

82 *Harriton v Stephens* [2006] HCA 15, para 71 and *Waller v James; Waller v Hoolahan* [2006] HCA 16, para 33.

provide a deterrent to "professional carelessness or even professional irresponsibility".[83]

6.4.3 Damage

Kirby J was able to overcome the problems for the plaintiffs presented by the compensatory principle by pointing to its exceptions. First, "[t]here can never be an *exact* equivalence between a personal injury and money".[84] Second, "notwithstanding the compensatory principle, the courts have been willing to assign monetary values to many intangible injuries and nebulous losses,"[85] such as pain and suffering and loss of expectation of life. Third, judges have to do their best with limited evidence to assess the extent of a plaintiff's loss.[86]

His Honour addressed the issue of comparing existence with non-existence in a wrongful life case by noting that courts compare existence with non-existence in other contexts, such as when deciding cases involving the withdrawal of life-saving medical treatment from severely disabled people and the terminally ill.[87]

6.4.4 Policy

Kirby J was not convinced by the policy arguments raised in the lower courts and other cases.[88] His Honour said:[89]

> *Some of them are premised on a misunderstanding of the tort of negligence. Most depend upon what I regard as a distorted characterisation of wrongful life claims. A number seem to rest on religious beliefs rather than on the application of legal doctrine in a secular community. … Judges have no right to impose their religious convictions (if any) on others who may not share those convictions.*

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83 *Harriton v Stephens* [2006] HCA 15, para 153.

84 *Harriton v Stephens* [2006] HCA 15, para 82.

85 *Harriton v Stephens* [2006] HCA 15, para 83.

86 *Harriton v Stephens* [2006] HCA 15, para 84.

87 *Harriton v Stephens* [2006] HCA 15, para 95.

88 *Harriton v Stephens* [2006] HCA 15, para 110.

89 *Harriton v Stephens* [2006] HCA 15, para 110.

His Honour examined and countered many of the policy arguments in his judgment. For example: the argument that "life" cannot amount to a legal injury because it would violate the sanctity of human life, was refuted on the basis that there are numerous qualifications to the principle, such as, in some cases of self-defence, it is permissible to kill another person.[90] With respect to the argument that allowing wrongful life actions would mean that the life of a disabled person would be worth so much less than that of a normal person that it is not worth preserving, Kirby J quoted Kaus J in *Turpin v Sortini*:[91]

> [I]*t is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society*.

7 POSITION IN OTHER JURISDICTIONS

A number of wrongful life cases have been heard by courts in various jurisdictions, but only a small proportion of these have been successful.[92] In those jurisdictions where wrongful life claims have been successful, the legislatures have prohibited or restricted such claims, either as a result of the court decision or in anticipation of such a decision.[93]

7.1 UNITED KINGDOM

As discussed in section 4.1 above, in *McKay v Essex Area Health Authority*, the English Court of Appeal determined that the claim for a wrongful life was not a reasonable cause of action. It has been a very influential case in a number of jurisdictions.

After the plaintiff in *McKay v Essex Area Health Authority* was born, but before the Court of Appeal brought down its decision, the UK Parliament passed the *Congenital Disabilities (Civil Liability) Act 1976* (UK). It provides that any child born after 22 July 1976 cannot bring an action for wrongful life. The law was drafted by the Law Commission after a review was conducted into whether there

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90 *Harriton v Stephens* [2006] HCA 15, para 117.

91 *Turpin v Sortini* 182 Cal Rptr 337 at 344-345 (1982), quoted in *Harriton v Stephens* [2006] HCA 15, para 121.

92 *Harriton v Stephens* [2006] HCA 15, para 224.

93 *Harriton v Stephens* [2006] HCA 15, para 224.

should be a liability for wrongful life.[94] The reason that the Law Commission considered such a law as necessary was because they: [95]

> *… were of the opinion that it would impose an intolerable burden on the medical profession because of a subconscious pressure to advise abortions in doubtful cases for fear of actions for damages.*

7.2 UNITED STATES

A number of wrongful life claims have been made in the United States. While there have been a small number of successful claims, most claims have been unsuccessful.[96] In *Harriton v Stephens*, Crennan J pointed out that the two most common reasons that American courts have rejected claims for wrongful life are:[97]

- it requires an impossible comparison between life with a disability and non-existence; and
- it is not possible to ascertain damages.

7.3 ISRAEL

In 1986, the Supreme Court of Israel recognised a claim for wrongful life. The majority of the Court used a fictional comparator of "life as a healthy child" to overcome the difficulty of comparing life with a disability with non-existence.[98]

7.4 CANADA

A few wrongful life claims have been before the courts, but such claims have not been successful.[99] The Canadian courts have been influenced by the English Court of Appeal decision in *McKay v Essex Health Authority*.[100]

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94 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1192.

95 *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1192.

96 *Edwards v Blomeley* [2002] NSWSC 460, para 34.

97 *Harriton v Stephens* [2006] HCA 15, para 233.

98 *Harriton v Stephens* [2006] HCA 15, para 236.

99 *Harriton v Stephens* [2006] HCA 15 (9 May 2006), para 235.

100 *Edwards v Blomeley* [2002] NSWSC 460, paras 29 – 32.

7.5 SINGAPORE

The High Court of Singapore rejected a claim for wrongful life in *JU v See Tho Kai Yin*.[101] The Court relied on *McKay v Essex Health Authority* in its decision.[102]

7.6 FRANCE

A wrongful life claim based on the French Civil Code was upheld by the Full Chamber of the Cour de Cassation.[103] Following this 2002 case, the French legislature passed laws prohibiting wrongful life claims.

7.7 GERMANY

Wrongful life claims have been rejected in Germany for reasons including the impossibility of determining damages and sanctity of life considerations.[104]

7.8 AUSTRIA

In 1999, the Austrian Supreme Court rejected a claim for wrongful life.[105]

8 CONCLUSION

In its 6-1 majority decisions in *Harriton v Stephens* and *Waller v James; Waller v Hoolahan*, the High Court confirmed that in Australia there is no cause of action in negligence for a wrongful life. The majority judges regarded the major impediments to the wrongful life claim to be:

- the inability of the plaintiffs to prove damage (a necessary element of negligence) caused by breach of the purported duty of care;[106]

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101 *JU v See Tho Kai Yin* [2005] 4 SLR 96.

102 *Harriton v Stephens* [2006] HCA 15, para 55.

103 *Edwards v Blomeley* [2002] NSWSC 460, para 44.

104 *Edwards v Blomeley* [2002] NSWSC 460, para 45.

105 *Edwards v Blomeley* [2002] NSWSC 460, para 46.

- the impossibility of assessing damages due to the inability to compare life with disabilities and non-existence; and
- public policy considerations, such as the lives of people with disabilities being valued just as highly as those without disabilities.

In his dissent, Kirby J stated his concern that failing to find a duty of care in wrongful life cases would result in an immunity for health care providers and thus would not provide a deterrent to professional carelessness or irresponsibility.[107] His Honour did not regard the comparison between life with disabilities and non-existence as an impossibility because the courts already deal with such matters, such as when determining whether life saving treatment should be provided to severely disabled people or the terminally ill. His Honour countered the policy arguments set out in the lower courts and in other wrongful life cases.

The High Court's decisions in *Harriton v Stephens* and *Waller v James; Waller v Hoolahan* means that Australia is in line with most other jurisdictions in its refusal to recognise wrongful life claims. The decision means that children who are born disabled, but would have been aborted or not conceived if their parents had been aware of the risks of disability the children faced, are unable to claim damages from the medical professionals who failed to prevent their existence.

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[106] In *Waller v James; Waller v Hoolahan* [2006] HCA 16, para 86, Crennan J stated: "[Keedon's] life with disabilities is not legally cognisable damage in the sense required to found a duty of care towards him."

[107] *Harriton v Stephens* [2006] HCA 15, para 153.

APPENDIX A - NEWSPAPER ARTICLES:

Author **Michael Pelly**

Title **Suing for disability ruled out**

Source **Sydney Morning Herald**

Date Issue **10 May 2006**

Page **1**

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