# Failed sterilisations and the unwanted child: a new medicolegal minefield?

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*A recent High Court decision has held that parents are entitled, in addition to the usual costs arising from a failed sterilisation, to the reasonable costs of raising a healthy child.*
***(MJA 2004; 180: 123-125)***

IN THE RECENT CASE of *Melchior v Cattanach and State of Queensland*, a majority in the Queensland Court of Appeal[1] and in the High Court[2] upheld the finding by the trial judge (Holmes J) that a doctor must pay for all the reasonable costs of raising Jordan Melchior, a healthy boy born as a result of a failed sterilisation.

The defendant doctor's negligence was said to consist of an unreasonable reliance on the history he was given by the plaintiff that her right fallopian tube had been removed, together with her right ovary, during an appendicectomy some 15 years earlier. In fact, the right tube was present and patent. (The doctor's postoperative notes, after performing a left tubal ligation, stated "Good view small bowel associated with right adnexal area — extensive adhesions. No right tube or ovary visible. Consistent with patient's history of right salpingo-oophorectomy." We now know that the right fallopian tube was obscured from view by the bowel adhesions.) Holmes J doubted "that the history [the doctor] obtained could be described in any more than a superficial sense, although he clearly perceived it as so. A little more probing may well have revealed its dubious quality." Her Honour concluded that, in the circumstances, it was incumbent on the doctor to advise the patient that a procedure (namely, a hysterosalpingogram) was available for detecting whether a functioning fallopian tube was present.

I believe that the finding of negligence was highly dubious. It was certainly received less than enthusiastically by the Court of Appeal. In the judgment handed down by the Court of Appeal,[1] the sole reference to the issue of negligence was by Thomas J, who stated, "With some hesitation I have taken the view that the view taken by the learned trial judge was open, although it is not a view that her Honour was bound to take or that I think I would have taken."

The significance of the case therefore turns on the controversial award of damages for the cost of raising Jordan up to the age of 18 years.

Throughout the case presented at the trial and on appeal (and, indeed, in similar cases in the United Kingdom and the United States) the damages (ie, the cost of raising a child conceived as a result of a failed sterilisation) were labelled as flowing from a "wrongful birth" (ie, a birth that would not have happened except for the defendant's alleged negligence). That description obscures the reality, namely that Jordan is, in the eyes of the law, an unwanted child whose parents chose to keep him — and sue — rather than mitigate their "loss" by placing the unwanted child for adoption.

Has the law any place in the area of human reproduction? In posing that question in the High Court appeal,[2] Chief Justice Gleeson, albeit in the minority, answered this question as follows:

> In deciding whether, in contemplation of the law, the creation of [the parent–child relationship] is actionable damage, it is material to note that it is unlikely that the parties to the relationship, or the community, would regard it as being primarily financial in nature. It is a human relationship, regarded by domestic law and by international standards as fundamental to society. To seek to assign an economic value to the relationship, either positive or negative, in the ordinary case, is neither reasonable nor possible.

Without going into the extensive and complex reasoning of each of the judges involved in the case, I will attempt to summarise the views of the majority in the High Court (McHugh, Gummow, Kirby and Callinan JJ), and will briefly discuss the decisions of the dissenting judges (Gleeson CJ, Hayne and Heydon JJ).[2]

Of the majority, Kirby J (whose views were largely shared by the other judges of the majority) reviewed the relevant law in depth, both in Australia and in the United States, the United Kingdom, Canada, New Zealand and South Africa, as well as the approaches of the civil law in some European countries.

His Honour noted that in the United States only a small number of states allow full recovery for the ordinary costs of raising a healthy child born after a failed sterilisation or a failure to adequately warn of potential failure. He further noted that in the United Kingdom the law on the subject had recently veered sharply against awarding damages of the kind at issue in *Melchior v Cattanach*. In a House of Lords decision, *McFarlane v Tayside Health Board*,[3] their Lordships were unanimous in concluding that the parents of a *healthy* child, born in consequence of alleged medical malpractice, were not entitled to recover from the doctor the cost of reasonable maintenance of the child during his or her minority. (The word *healthy* is highlighted here, for reasons that will be discussed below.)

Kirby J observed that the common law does not exist in a vacuum and that it had to respond to the ever-increasing claims by disappointed parents who had undergone sterilisation operations — in preference to using contraceptive devices — only to discover that the operations had failed and

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that they were burdened by an unwanted child and by short-term and long-term losses:

> What commenced as a relatively small number of cases is now a substantial and growing body of decisional law, not only in common law countries but also in countries with a civil law system.[2]

In what Kirby J described as an attempt to "stem the tide of such claims", Jupp J, in the UK case *Udale v Bloomsbury Area Health Authority*,[4] awarded the mother, over and above an amount for pain and suffering and loss of earnings during pregnancy, a small amount for the disturbance of family finances caused by the unexpected conception. However, Jupp J firmly rejected the mother's claim for the cost of raising the child up to the age of 16, such a claim being regarded as "contrary to public policy, being disruptive of family life and inconsistent with the sanctity of human life".[2] Kirby J continued:

> As more such cases came before the courts differing views soon emerged. The approach of Jupp J was not followed in a number of the English cases that ensued, including Emeh v Kensington and Chelsea and Westminster Area Health Authority,[5] Thake v Maurice[6] and Benarr v Kettering Health Authority.[7] In those cases, the judges rejected the argument that public policy prevented recovery of damages for the cost of child-rearing [and asserted that] the normal legal principles of recovery of damages would apply. A person injured through the negligence of another could recover damages on the compensatory principle for all losses that were reasonably foreseeable to the tortfeasor [(wrong-doer)] at the time of the wrong. Such losses included . . . the basic costs of child-rearing."[2]

It is important to note here that the three cases cited by Kirby J were all first-instance cases whose arguments were soundly rejected by a unanimous House of Lords in *McFarlane v Tayside Health Board*,[3] the first occasion the issue was taken on appeal to the House of Lords.

The majority in the High Court having firmly rejected the "English" view (ie, that damages for the cost of child-rearing should *not* be claimable), their Honours thus gave their imprimatur to earlier Australian cases dealing with an unwanted child, the most significant decision being *CES v Superclinics (Australia) Pty Ltd.*[8] That case was an instance of repeated negligent misdiagnosis of the plaintiff's pregnancy, thus depriving the mother of the chance to procure a lawful abortion which, she claimed, she would have undergone. On appeal to the New South Wales Court of Appeal (of which Kirby J was then President), the three judges were divided in their opinion. Although Kirby P and Priestley JA both upheld the appeal, they did not agree on the extent of damages the unmarried parents of the unplanned child could recover. Kirby P would have allowed *full* recovery for the upbringing of the unwanted child. Priestley JA believed that the parents should be entitled to damages relating to the pregnancy and the period shortly afterwards, but not to damages that were too remote or unforeseeable. He argued that

> . . . after a very short interval, the parents could have surrendered the child for adoption. The mother's decision to keep the child was her own choice. After that decision was made, the defendant was not legally responsible for the parents' financial costs of rearing the child. (Restated by Kirby J in the High Court case.[2])

In his dissenting view in the *CES* appeal case,[8] Meagher JA stated that the parents' claim was "utterly offensive" and that "there should be rejoicing that the hospital's mistake bestowed the gift of life upon the child". He concluded that *no* damages for rearing the child could be recovered.

In *Cattanach v Melchior*, Kirby J (now a member of the High Court) noted somewhat dismissively, in relation to Meagher JA's decision in the *CES* appeal, that "lying deep in many of the judicial opinions are perceptions of moral or ethical factors, illustrated by recourse to Biblical citations."[2]

Given such divergent views, Kirby J stated in the High Court that, when sitting in the Court of Appeal, he had reluctantly agreed with Priestley JA, whose views expressed "the highest denominator of the majority", in order to "provide guidance . . . to trial courts generally".[2] He restated his own view in the High Court:

> The application of the general rule, requiring the tortfeasor to pay the victims of the wrong for the reasonably foreseeable consequences of any proved negligence, obliges the inclusion in the recoverable damages of a sum for the costs of child-rearing. Clearly such costs are within the ambit of the compensable principle required by "corrective justice".[2]

I suggest that the major difference between the majority and minority views in *Cattanach v Melchior*[2] turns, in the main, on whether the law should distinguish between claims of negligence brought by parents who bear a child with a disability and parents who bear a healthy child after a failed sterilisation. Kirby J adopted the view that this differentiation

> . . . is arbitrary, and therefore unacceptable as a statement of the common law. In Australia, even the description of such parents as "afflicted with a handicapped child" would be offensive to most such parents and contrary to their attitudes about themselves, their child and others.[2]

The three minority High Court judges, on the other hand, upheld the defendants' argument that the birth of a normal, healthy child should not be regarded as a legal harm or wrong for which damages may be awarded:

> [The contrary arguments] are unsound because they take insufficient account of the law's assumptions about some key values in family life as reflected in the unenacted and enacted law. They also take insufficient account of the type of litigation that is likely to take place if recovery of rearing costs is permitted.[2]

Against that background, it is interesting to briefly review the speeches of the House of Lords in *McFarlane v Tayside Health Board*.[3] Three of their Lordships (Lords Slynn, Steyn and Hope) characterised the costs of bringing up the child as "pure economic loss". In denying the claim, these Law Lords identified the relevant question as being "whether the doctor had owed the patient a duty to take reasonable care in giving advice which was a duty that protected the patient's economic interest". Lord Slynn concluded that there was no duty of any kind, because the doctor had not assumed a responsibility for the expense of rearing the child. Lord Steyn invoked notions of "corrective" and "distribu-

tive" justice, concluding that "commuters on the Underground" would not accept that to impose such a liability would be a "just distribution of the burden and losses among members of the society". Lord Hope expressly invoked the tripartite test of what is "fair, just and reasonable" — commonly used in the United Kingdom to ascertain the existence of a duty of care — to conclude that "the cost of bringing up the child should not be recoverable while, at the same time, denying that the cost of maintenance had been shown to exceed the value of parenthood". (Quoted from Hayne J in the High Court case.[2])

Lord Millett adopted the same view voiced by Meagher JA in the *CES* case,[8] namely that "the law must take the birth of a normal, healthy baby to be a blessing, not a detriment", adding that, although a mixed blessing, "society must regard the balance as beneficial" and that it would be "subversive of the mores of society for parents to enjoy the advantages of parenthood while transferring to others the responsibility which it entails".[3]

It is beyond the scope of this article to examine in detail the views of the High Court judges on the role of "choice" — ie, the exercise of the parents' choice whether to keep Jordan or place him for adoption, thus exploring the "mitigation" principle enshrined in the law of torts. Neither is it appropriate to discuss at length the role public policy plays in the development of the common law, or, indeed, whether human life can be assigned a monetary value. Suffice it to say that a bare majority agreed that the primary judge was correct in concluding that Dr Cattanach's "negligence" was the causative — and reasonably foreseeable — factor in the parents incurring the cost of raising Jordan up to the age of 18 years, being an economic loss of a kind for which the defendants were liable.

The possibility that Jordan may eventually discover that he was born unwanted produced some caustic observations from some members of the minority. Heydon J noted:

> Since there is a question whether a rule of law exists which permits parents to recover from negligent defendants the cost of rearing children, it is relevant to consider the consequences of the rule. The rule under consideration would encourage parents both to exaggerate and to denigrate their children's aptitudes. The rule would encourage parents to search for characteristics of the children which might call for future expenditures with a view to recover monetary compensation to meet those possible expenditures.[2]

In perhaps the most biting indictment of this "rule", Heydon J quoted Meagher JA's warning in the *CES* case:[8]

> Having given birth to a healthy child in August 1987, the parents claimed at a court hearing in December 1993 that the child, then over six years old, was unwelcome, a misfortune, perhaps a disaster, certainly a head of damages. For all I know the child was in court to witness her mother's rejection of her. Perhaps, on the other hand, the plaintiff had the taste to keep her child out of court. Even if that be so, it does not mean that the unfortunate infant will never know that her mother has publicly declared her to be unwanted. When she is at school some *âme charitable* — perhaps the mother of one of her "friends" — can be trusted to direct her attention to the point. That a court of law should sanction such an action seems to me improper to the point of obscenity.

In contrast, none of the majority in the High Court dealt with the issue of the potential effect on the child of discovering that he was unwanted and the subject of legal proceedings.

I believe the case of *Cattanach v Melchior* was one in which an unfortunate factual finding, at first instance, gathered its own momentum, allowing judicial adventurism to triumph, the majority accepting a result that other judges regarded as an "obscenity". The civil law has always shown more caution in imposing tortious liability for negligent acts affecting purely financial interests than it applied to negligent acts causing damage to person or property. At common law, the *death* of a human being is still a *damnum sine injuria* (ie, a loss for which the law provides no remedy).[9] It required Acts of Parliament in all common law countries to allow specified dependants to sue for damages if death was the result of a negligent act. Why should "legal remedies consequent upon the birth of a healthy child, which all of us regard as a good thing"[3] be left to the personal views of common law judges? In the words of Gleeson CJ, quoting from Brennan J in another Australian case,[10] "The accepted approach in this country is that the law should develop novel categories incrementally and by analogy with established categories."[2] The majority in the High Court case clearly did not heed that "accepted approach".

## Competing interests

None identified.

## References


1. *Melchior v Cattanach & Anor* [2001] QCA 246.
2. *Cattanach v Melchior* [2003] HCA 38 (16 July 2003).
3. *McFarlane v Tayside Health Board* [2000] 2 AC 59.
4. *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098; [1983] 2 ALL ER 522.
5. *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012.
6. *Thake v Maurice* [1986] QB 644.
7. *Benarr v Kettering Health Authority* [1988] NLJ 179.
8. *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.
9. *Baker v Bolton* (1808) 1 Camp 493; [170] ER 1033.
10. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.


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