

## DAMAGES FOR ‘WRONGFUL BIRTH’: WHERE TO AFTER *CATTANACH*?

### ABSTRACT

In *Cattanach v Melchior* a majority of the High Court of Australia held that damages for wrongful birth can include compensation for the cost of raising a healthy child. The case raises questions about what it is that constitutes harm for purposes of bringing a claim in negligence. This article critically reviews the High Court decision in light of the continental-European experience. It is suggested that the recent House of Lords decision in *Rees* offers a workable compromise for both proponents and opponents of compensation.

### I INTRODUCTION

If, as the result of medical negligence, an unplanned but healthy child is born, can a court in awarding damages to the parents, require the doctor to bear the cost of raising the child? On 16 July 2003, the High Court of Australia in *Cattanach v Melchior*<sup>1</sup> (*Cattanach*) answered this question in the affirmative. While the decision was reached by a narrow (four-to-three) majority only, the ruling affirmed a (two-to-one) decision by the Queensland Court of Appeal to award damages in the amount of \$105,000. The damages were to compensate for the cost of raising and maintaining a healthy child after a failed sterilisation. Any set-off of ‘benefits’ derived from the child was refused.

The decision in *Cattanach* is of interest for various reasons. First, it goes against the House of Lords decision in *McFarlane v Tayside Health Board*.<sup>2</sup> *McFarlane* held that, in equivalent circumstances, a doctor cannot be required to bear the cost of raising and maintaining the child. The decision in *McFarlane* has since been confirmed by the House of Lords in *Rees v Darlington Memorial Hospital NHS Trust*,<sup>3</sup> albeit subject to one — rather peculiar<sup>4</sup> — judicial gloss.

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\* Associate Professor and Reader, Faculty of Law, The University of Melbourne. I am grateful to Katrien Berghs, Faculty of Law, Catholic University of Leuven (Belgium) for her kind assistance in accessing some of the European material used in writing this article.

<sup>1</sup> [2003] HCA 38.

<sup>2</sup> [2000] 2 AC 59.

<sup>3</sup> [2004] 1 AC 309.

<sup>4</sup> The House of Lords allowed a ‘conventional award’ in respect of ‘the legal wrong’ done to the mother. The consideration that this award was labeled as neither compensatory nor purely nominal warrants closer scrutiny. See the discussion from a

Secondly, *Cattanach* goes against a recent trend in the Australian High Court to re-balance the responsibilities of parties in negligence actions. Greater emphasis is currently placed on the need to avoid encroaching unnecessarily upon the autonomy of private parties — and, in particular, the defendant — in the conduct of their affairs. In the same vein, victims are being told to take greater responsibility for their actions, especially where these have implications for the claimant's own personal health or safety. In part, the problem here is a broader one as it is related to the demise of proximity as a yardstick for determining duty and the replacement thereof with what has become known as the salient features approach, occasionally in competition/combination with the more familiar incremental approach to dealing with novel cases at common law.

The case also goes against a political trend in Australia — in no small part due to pressure by the public liability, medical and professional indemnity insurance industry — to turn the tide away from what are perceived as crippling compensation pay-outs in negligence actions. In October 2002, the federal government released a report on the review of negligence law. The Ipp report, named after the NSW Supreme Court judge who chaired the review panel, comprises a series of recommendations.<sup>5</sup> All are indicative of the government's desire, as reflected in the panel's official terms of reference, to '[d]evelop and evaluate principled options to *limit* liability and *quantum* of ... damages'.<sup>6</sup> The net result has been a plethora of legislation, largely at the state and territory levels, which in turn is leading to a redrawing of the common law map of negligence in Australia.<sup>7</sup>

Further of interest in *Cattanach* is the open use of public policy arguments by some of the dissenting judges. Apart from Kirby J, perhaps, the post-Mason High Court of Australia has tended to display some considerable reluctance to openly acknowledge the legitimacy of policy in determining duty of care issues. *Cattanach* is different in that some of the more conservative judges felt compelled

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comparative perspective under V B, *Options Available to the High Court of Australia*, below.

<sup>5</sup> There are 61 recommendations in total: Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002).

<sup>6</sup> Emphasis added. The terms of reference, together with the text of the report itself, can be found at <http://revofneg.treasury.gov.au>. For an (extensive) academic discussion of the report, see the various commentaries in 'Forum. Reform of the Law of Negligence: Balancing Costs and Community Expectations' (2002) 25 *University of NSW Law Journal* 808–903.

<sup>7</sup> At the time of the aforementioned forum more than 30 Bills reportedly were before the Commonwealth, State and Territory Parliaments relating to some aspect of negligence law: Joanne Davidson, 'Forum. Foreword', above n 6, 808. For a list of primary statutes/Bills as of April 2003, see Martin Davies and Ian Malkin, *Torts* (4<sup>th</sup> ed, 2003) 13.

to justify their disagreement with the majority by making express reference to policy considerations.<sup>8</sup>

Finally, *Cattanach* also confirms a dubious practice in the contemporary High Court of producing excruciatingly lengthy judgments with little if any attempt by its seven members to act as team players.<sup>9</sup> The single issue for determination in *Cattanach* was the award of damages. Yet, somehow, this required the writing of six separate judgments, totalling 165 pages and 606 footnotes!

This article seeks to review the decision in *Cattanach* from a comparative, continental European perspective. The issues raised in the High Court of Australia, whether or not they are ultimately reflected in the judgments of the majority or minority judges, bear a remarkable similarity to the arguments entertained by the top courts of the legal family of the (European) civil law. Ideally, the continental European experience can lend (moral) support for the compromise position reached in the House of Lords' decision of *Rees*.

## II FACTUAL BACKGROUND

Mr and Mrs Melchior married in 1984. Mrs Melchior was 32 years of age at the time. She had her first child in 1985, and another in 1988. In 1991 the Melchiors decided to have no further children. It would seem that, initially, Mr Melchior had agreed to undergo some form of sterilisation, but, when crunch time came, according to Mrs Melchior, he 'kept on procrastinating'.<sup>10</sup> In the end, she decided to do something about it herself. Mrs Melchior consulted a general practitioner, who referred her to Dr Cattanach, a consultant obstetrician and gynaecologist at the local public hospital.

In 1992, Dr Cattanach recommended, and subsequently performed, a tubal ligation. In this particular instance, he attached a clip to the left tube only. No clip was attached to the right tube. In this Dr Cattanach was guided by information provided by Mrs Melchior. Specifically, when Mrs Melchior first consulted Dr Cattanach, she had told him that her right ovary and right fallopian tube had been removed at the age of 15. When Dr Cattanach performed the tubal ligation, what he saw appeared consistent with that account. In 1996 Mrs Melchior discovered that she was pregnant. As it turned out, her right tube had never been removed. She gave birth to a healthy child in 1997.

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<sup>8</sup> See IV C, *Moral Dimension of the Issue Before the High Court*, below.

<sup>9</sup> This particular criticism is the topic of a separate article in preparation by the author.

<sup>10</sup> *Cattanach*, [2003] HCA 38, [11]. The factual account is largely taken from the judgment by Gleeson CJ.

## III THE TRIAL JUDGE AND FIRST APPEAL

Mr and Mrs Melchior brought proceedings in the Supreme Court of Queensland against Dr Cattanach and the State of Queensland.<sup>11</sup> They sued in both tort and contract. The claim in contract was not pursued at the trial, possibly because the sterilisation procedure was carried out free of charge in a public hospital.

Before Holmes J, it was first claimed that Dr Cattanach had been negligent in the manner in which the medical procedure was carried out. That claim was rejected by the Court. Instead, the case was decided as one of negligent advice and failure to warn. Specifically, the trial judge found that, by reason of certain aspects of her condition, it was not negligent for Dr Cattanach to have failed to observe that, at the time of the sterilisation procedure, both tubes were still intact. Rather, the finding of negligence was based upon the consideration that Dr Cattanach had too readily and uncritically accepted his patient's assertion that her right tube had been removed. He should have advised her to have the matter specifically investigated prior to the sterilisation procedure. It was further held that Dr Cattanach should have warned Mrs Melchior that, if she was wrong, she might conceive.

Three distinct claims for damages were made in the Supreme Court. The ultimate appeal to the High Court would only concern the third claim, but, for the sake of completeness, all three will be touched upon briefly.

The first claim was for damages relating to the unintended pregnancy and birth. Those damages were assessed and allowed at \$103,672.39. They included compensation for pain and suffering plus loss of amenities, both associated with the pregnancy and childbirth; loss of some part-time earnings; loss of capacity to undertake future employment resulting from a thrombosis associated with the pregnancy; plus various expenses, including the cost of household care, and medical and pharmaceutical costs.

The second claim was by Mr Melchior for loss of consortium as a result of his wife's pregnancy and childbirth. This claim was also allowed, but, as Mr Melchior retained the benefit of his wife, only a modest award of \$3,000 was deemed warranted to recognise that 'the first three years of a child's life can impose considerable strain on any household'.<sup>12</sup>

The third, and most controversial claim was for the (past and) future cost of raising and maintaining the child until the age of 18. It resulted in the award of an additional \$105,249.33. The award was based on a detailed, but, in the trial judge's view, modest schedule of anticipated expenses prepared by the Melchiors and

<sup>11</sup> (2001) Aust Torts Rep 81–597.

<sup>12</sup> *Cattanach*, [2003] HCA 38, [14] (Gleeson CJ quoting from trial judge, Holmes J).

covering both items parents are legally obliged to provide<sup>13</sup> and items of a more discretionary nature: food, clothing, medical and pharmaceutical expenses, child care, travelling to and from school, birthday and Christmas presents, entertainment and the like.

Dr Cattanach and the State of Queensland challenged the primary judge's findings on liability, causation and the third claim for damages. The Court of Appeal<sup>14</sup> unanimously rejected the appeal as to liability and causation. It was divided on the issue of damages for the cost of child rearing. Leave to appeal to the High Court was restricted to the latter issue of damages.

#### IV BEFORE THE HIGH COURT

##### *A Preliminary Matters*

The only real authority on the damages issue in Australia prior to *Cattanach* is *CES v Superclinics*.<sup>15</sup> That decision was the product of a compromise. A two-to-one majority of the NSW Court of Appeal rejected the public policy argument against the award of damages for the birth of a healthy child. The dissenting judge in *CES*, Meagher JA, ruled against the recovery of any expenses for the raising of the child. Kirby JA, for the majority, would have been happy to allow full recovery. The other member of the majority, Priestley JA, wanted to allow recovery of damages but for a short time only, ie, until the child could have been put up for adoption. It was on this last basis — Kirby declaring to go along with Priestley for the sake of reaching a majority — that the matter was ultimately referred back to the lower court for retrial.

The defendants in *Cattanach* did not argue that the Melchiors ought to have considered adoption (or, perhaps, abortion). Even so, *obiter* observations by Callinan J, writing for the majority, suggest that the issue is not necessarily entirely irrelevant. His Honour put it as follows:

It may be that because of the possibility of changed views in society about reproductivity, the Court may be forced to confront an argument that a decision not to abort, or not to offer for adoption, should be regarded as a

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<sup>13</sup> Under federal statute law, parents must provide a child with the 'necessaries of life' until the age of 16. See the *Family Law Act 1975* (Cth) and the *Child Support (Assessment) Act 1989* (Cth).

<sup>14</sup> [2001] QCA 246 (Unreported, McMurdo P, Davies and Thomas JJA, 26 June 2001).

<sup>15</sup> (1995) 38 NSWLR 47 (CA).

failure on the part of the parents to act reasonably ... but it is unnecessary for the Court to decide here whether that is so.<sup>16</sup>

Gleeson CJ, dissenting, was far less hesitant in canvassing this duty-to-mitigate-loss type of argument:

It was not contended in this case, on behalf of the appellants, that the fact that Mr and Mrs Melchior did not have their child adopted by another couple breaks the causal relationship between the medical negligence and the costs of raising and maintaining the child. *However, the possibility of adoption, even if it is purely theoretical, serves to indicate the significance of the parent – child relationship as an element of the damage of which the respondents complain.*<sup>17</sup>

### B *The High Court's Perspective(s) on the Legal Issue*

In a case note on the *Cattanach* decision, Seymour has argued that the core issue before the Court was a simple one: could the claim for compensation be determined by application of established principles of negligence law and, if so, were there any compelling policy reasons to deny compensation.<sup>18</sup> In essence, a majority — comprising McHugh, Gummow, Kirby and Callinan JJ — answered that question in favour of the Melchiors, whereas the minority judges — Gleeson CJ, Hayne and Heydon JJ — begged to differ on, primarily, policy grounds. Unfortunately, as pointed out by Seymour, the style (and the length!) of the multiple individual judgments (only McHugh and Gummow JJ produced a joint judgment) quickly turn a reading of the *Cattanach* decision into a 'dispiriting experience'.<sup>19</sup> Be this as it may, when searching for a common legal theme or thread that runs through the various judgments, it would seem that the question as to what constitutes compensable harm in negligence actions takes pride of place. And it is to that question we will turn next.

#### 1 *Is the Claim for Pure Economic Loss?*

The most senior judge on the bench, Gleeson CJ, while writing for the minority, formulated the issue before the Court as follows:

<sup>16</sup> *Cattanach*, [2003] HCA 38 [294].

<sup>17</sup> *Ibid* [26] (emphasis added).

<sup>18</sup> John Seymour, '*Cattanach v Melchior*: Legal Principles and Public Policy' (2003) 11 *Torts Law Journal* 208, 215.

<sup>19</sup> *Ibid*. Interestingly, Lord Bingham of Cornhill in *Rees* was more upbeat. Commenting specifically on the division of opinion among the members of the High Court of Australia, his Lordship suggested that this 'gives the competing arguments a notable sharpness and clarity': above, n 3, [2].

In truth, what is involved is a new manifestation of an old problem: the way in which the law of tort deals with the consequences of negligent conduct of one person that affects the financial interests of others, as distinct from conduct that injures another's person or property.<sup>20</sup>

In this particular instance, the alleged financial loss, in his Honour's opinion, was not simply consequential to personal injury. Specifically, the claim was not based upon any special disability or need on the part of either mother or child. Instead, the claim was for pure economic loss, suffered by both parents, because of having to raise an extra child. Interestingly, the harm itself then was found to lie, not in the child's conception as such, but in the parent-child relationship it created. In this manner his Honour sought to uphold the reasoning in *McFarlane*. There a sharp distinction had been drawn between, on the one hand, the damage (which, according to Lord Cullen, occurred at conception), and, on the other hand, the consequences flowing from that harm, in particular the cost of maintaining the unintended child.<sup>21</sup>

Gleeson CJ reasoned that, when treated as an issue of pure economic loss, the claim for compensation had to fail: it displayed all the features that account for the law's reluctance to impose a duty of care in pure economic loss scenarios.<sup>22</sup> First, the liability sought to be imposed was indeterminate. Admittedly, by formulating the harm suffered in terms of the coming into being of a parent-child relationship, the focus of the inquiry could be limited to the financial consequences of the child's birth for the parents only. Thus the need to take into consideration any adverse impact upon others, for example any brothers or sisters the child might have, could be avoided. Even so, in his Honour's opinion difficulties remained in drawing an appropriate demarcation line as for the parents' claim. In the present case the claim for compensation of child-rearing expenses was both modest and selective. But Gleeson CJ asked why, if the purpose of a claim in negligence is full compensation, the foreseeable adverse financial consequences to the parents would necessarily cease when the child turns 18. Similarly, his Honour considered that, logically, there was no reason for parents to limit themselves to the financial consequences as per the present claim. For instance, if the cost of birthday or Christmas presents was to be included, why not the expenses associated with a wedding? Also, if the cost of schooling was a relevant item for compensation purposes, why not also factor in the cost of tertiary education? Furthermore, what basis in principle would there be to disallow compensation for adverse career prospects of parents following the birth of an unintended child?<sup>23</sup> In sum, the lack of precision in the notion of economic loss itself was seen as a reason to tread cautiously in this area.

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<sup>20</sup> *Cattanach*, [2003] HCA 38 [4].

<sup>21</sup> *Ibid* [25].

<sup>22</sup> *Ibid* [39].

<sup>23</sup> *Ibid* [32].

Apart from the above issues of indeterminacy and imprecision, Gleeson CJ foreshadowed difficulties of coherence in relating the claim, if allowed, to the existing legal landscape. The common law does not permit a child to treat its own birth as actionable damage.<sup>24</sup> Only statute law allows the death of a human being to be complained of as an injury with limited access to compensation.<sup>25</sup> The parent-child relationship triggers legal obligations, both under national and international law, that are in support and protection of the child, and thus are difficult to reconcile with treating that relationship as actionable harm. It followed that, in the opinion of Gleeson CJ, parents can only lawfully avoid the legal ramifications of a parent-child relationship through the process of adoption.

In the result Gleeson CJ expressed his preference for a cautious, incremental approach to novel categories of negligence. Under this approach one works 'by analogy with established categories'.<sup>26</sup> Any recognition of the present claim was said to go beyond that.

The other judges for the minority did not really address the issue before the court from this particular angle. Rather their comments on public policy sought to move the case beyond its purely economic or financial dimension.<sup>27</sup> As for the majority, Callinan J was the only other High Court judge to consider the case in terms of pure economic loss. However, his Honour did so only briefly and towards the end of his judgment. While agreeing with the classification of the Melchior's claim in terms of damages for economic loss, Callinan J did not regard this as creating an obstacle to recovery. Specifically, Callinan J said:

The only other matter in this appeal that was at issue was what both parties characterised as an entitlement or otherwise to damages for economic loss. I think that characterisation, although necessarily general and therefore imprecise, is reasonable in the circumstances ...<sup>28</sup>

## 2 *Is the Claim Instead for Consequential Economic Loss?*

In a joint response, McHugh and Gummow JJ, for the majority, expressly rejected the suggestion by Gleeson CJ that the damage suffered was either the parent-child

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<sup>24</sup> *McKay v Essex Area Health Authority* [1982] QB 1166. For a normative treatment of 'wrongful life' claims, see Penny Dimopoulos and Mirko Bagaric, 'The Moral Status of Wrongful Life Claims' (2003) 32 *Common Law World Review* 35.

<sup>25</sup> In Victoria, the relevant statute is the *Wrongs Act 1958* (Vic).

<sup>26</sup> The quote is from Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481.

<sup>27</sup> See, in particular, the observations by Hayne J in Part IV C below.

<sup>28</sup> *Cattanach* [2003] HCA 38 [302].



relationship or the coming into existence thereof.<sup>29</sup> Instead, the relevant damage was said to be simply the expenditure incurred or to be incurred in the future. To describe this expenditure as economic loss was considered unhelpful as it did not 'advance understanding greatly, one way or the another'.<sup>30</sup> Rather the ordinary *restitutio* principles were held to apply.<sup>31</sup> By way of justification for their approach McHugh and Gummow JJ added that, to refuse compensation in respect of unintended but healthy children, while allowing recovery in respect of equally unintended but unhealthy children, would amount to discrimination on grounds of a distinction 'irrelevant to the object sought to be achieved, [i.e.] the award of compensatory damages to the parents'.<sup>32</sup>

Kirby and Callinan JJ, the two other members for the majority, each issued separate judgments. Kirby J appears to have anticipated any remoteness concerns one might voice as regards the above reasoning by McHugh and Gummow JJ. Clearly, Kirby J also rejected the label of pure economic loss. But to him the claim was for consequential loss as a result of 'direct injury to the parents' who suffered 'profound and unwanted physical events (pregnancy and childbirth)'.<sup>33</sup> As indicated above, Callinan J generally concurred with the characterisation of the claim in terms of economic loss.

### 3 *Any Need to Balance Costs and Benefits?*

As for the subsidiary submission that any costs involved in raising the child have to be offset against the benefits of the birth, the majority was unequivocal in its determination. In particular, McHugh and Gummow JJ considered it an error to think that a balancing act in awarding damages for the cost of raising a child is inevitably required.<sup>34</sup> More strongly, in this particular instance the benefits received from the birth of a child were said to be 'not legally relevant to the head of damage that compensates for the cost of maintaining the child'.<sup>35</sup> Their Honours suggested that things might have been different if the mother had claimed damages for her own loss of enjoyment of life.

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<sup>29</sup> Ibid [67]: 'To do so is to examine the case from the wrong perspective' (McHugh and Gummow JJ).

<sup>30</sup> Ibid [66]. The speech by Lord Millett in *McFarlane* was quoted from in support of this proposition: [2000] 2 AC 59, 109.

<sup>31</sup> See the reference to, and the quote from, McHugh J in *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49, 54: *Cattanach*, [2003] HCA 38 [71].

<sup>32</sup> *Cattanach*, [2003] HCA 38 [78].

<sup>33</sup> Ibid [148].

<sup>34</sup> Ibid [90].

<sup>35</sup> Ibid [90]. Query why this is so. Some parents benefit financially from having children. The parents of tennis star Kim Clijsters or the Williams sisters could surely testify to this!

*C Moral Dimension of the Issue before the High Court.*

Searching for a common principle in *McFarlane*,<sup>36</sup> Kirby J found the analysis by Buxton LJ in *Greenfield*<sup>37</sup> compelling. His Lordship there suggested that the decision in *McFarlane* represented an application of the three-fold (duty of care) test in *Caparo*.<sup>38</sup> The third criterion in the *Caparo* test contains a direct reference to public policy. *Cattanach* provided Kirby J with an opportunity to reminisce about his past, unsuccessful, efforts to persuade others in the High Court of Australia as for the merits of the *Caparo* approach. His Honour acknowledged having been forced to ‘admit defeat’<sup>39</sup> in *Graham*.<sup>40</sup> In particular, it was the explicit reference to policy that was considered to render the *Caparo* approach ‘unsuitable’<sup>41</sup> for Australian courts in resolving novel questions of negligence liability. It is with considerable tongue in cheek that Kirby J next pointed out that two of the three dissenting judges in *Cattanach* felt compelled to openly rely on policy considerations in justifying their reluctance to award damages in the case at hand!<sup>42</sup>

When looking at the dissenters in *Cattanach*, the observations by Hayne J stand out. Public policy considerations were deemed crucially important as they were said to be ‘determinative’<sup>43</sup> in deciding the case. His Honour reasoned that these policy considerations displayed two characteristics. First, they sought to expand the debate beyond the purely economic or financial consequences of pregnancy and childbirth. Second, they aimed to bring into the debate values contemporary Australian society holds about the worth ascribed to life in general, and to the establishment and maintenance of a ‘good and healthy’<sup>44</sup> relationship between parent and child, in particular. As to the former, if attention was paid to all (rather than just the economic) consequences of the negligence, one such non-economic consequence clearly was that a new life had come into being.<sup>45</sup> This life was ‘not an article of commerce and to it no market value can be given’.<sup>46</sup> As for the second characteristic of the public policy argument, even if it were possible to value the life of a new child, ‘[p]ublic policy forecloses that inquiry’.<sup>47</sup>

<sup>36</sup> *McFarlane*, [2000] 2 AC 59.

<sup>37</sup> *Greenfield v Irwin* [2001] 1 WLR 1279.

<sup>38</sup> *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

<sup>39</sup> *Cattanach*, [2003] HCA 38 [121].

<sup>40</sup> *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 194 ALR 337, 398–400.

<sup>41</sup> *Cattanach*, [2003] HCA 38 [121].

<sup>42</sup> His Honour refers to the reasons of Hayne J, especially [194] and [258], and to the reasons of Heydon J, especially [354].

<sup>43</sup> *Cattanach*, [2003] HCA 38 [194].

<sup>44</sup> *Ibid* [243].

<sup>45</sup> *Ibid* [248].

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid* [258].

Heydon J, the newest member on the High Court bench, expressly concurred with Hayne J in this regard:

The child is *itself* valuable, not because it confers blessings or economic advantages or other advantages, *but because it is life*.<sup>48</sup>

In response to the above type of observation, Callinan J noted the arguments against awarding damages tended to involve emotional and moral values or perceptions ‘of what public policy is, or should be’.<sup>49</sup> To Callinan J, a much stronger policy argument, in favour of damages and not raised by any of his colleagues for the majority, was the need to avoid conferring ‘a new form of immunity’<sup>50</sup> upon doctors and hospital authorities. And it was in this manner that an otherwise conservative judge found himself, perhaps rather unexpectedly, in a position of tipping the balance on the Bench in favour of the Melchioris!

## V CRITIQUE

At one level the net result of *Cattanach* is perfectly clear. For the majority, once it is established that the birth of a healthy child was the result of medical negligence, it would be illogical to deny the parents compensation for the foreseeable consequences of the negligence, (reasonable) child-rearing expenses included. For the minority, on the other hand, it is distasteful to attach monetary value either to the parent-child relationship (Gleeson CJ) or to the coming into being of the child itself (Hayne and Heydon JJ). However, at another level both the majority and the minority decisions invite a revisiting of what it is that constitutes harm for the purposes of bringing a claim in negligence.

### A *Wrongful Birth: Where is the Harm?*

Wrongful ‘birth’ cases differ from the more familiar wrongful ‘death’ scenarios. Quite apart from the consideration that claims of the latter type, in accordance with the familiar Latin maxim *actio personalis moritur cum persona*, are ‘creatures of statute’<sup>51</sup> in any event, the difference between both scenarios is conceptual, practical as well as moral in nature. For it is one thing to hold medical professionals liable for the wrongful infliction of personal injury triggering death.

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<sup>48</sup> Ibid [354] (emphasis added). For a revealing view on the role of the judiciary by this newest member of the High Court of Australia, see J Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) 14 *Australian Intellectual Property Journal* 78.

<sup>49</sup> *Cattanach*, [2003] HCA 38 [292].

<sup>50</sup> Ibid [295].

<sup>51</sup> Ibid [245] (Hayne J).

It is quite another thing to expect them to cover the child-rearing expenses of persons they fail to prevent from coming into this world. Where the wrong amounts to a failure of timely detection of a disease or disorder affecting the newly born, tort law correctly sees no problem in allowing recovery for the extra expense of raising any such child.<sup>52</sup> But, where the alleged breach results in the birth of a perfectly healthy baby, difficult legal and moral issues inevitably arise — in particular, when claims for damages are made that go beyond the cost associated with the unwanted pregnancy and childbirth itself.

The legal question fundamentally concerns the concept of compensable harm. Damage is the gist of any negligence action.<sup>53</sup> It is hard to grasp that the birth of a child itself constitutes harm. Where no personal injury or property loss occurs, any harm sustained by the parents can only be financial in nature, i.e. the cost involved in raising the child. Pure economic loss is a category of harm that has only recently, and cautiously, been opened up to recovery in Australian negligence law. As discussed above, there are various reasons for this caution.<sup>54</sup> One such reason is that, in a commercial setting, which is where pure economic loss claims tend to arise, courts are anxious not to distort unduly the operation of market forces. Generally, it is considered a normal consequence of competition that loss for one business entity represents gain for another. Wrongful birth actions clearly fall outside the ordinary commercial setting. Even so, if allowed, any decision to award damages in wrongful birth scenarios may require a similar balancing of benefits and costs in raising the child. The majority in *Cattanach* was surprisingly dismissive in this regard.

The moral dilemma is obvious. There are ethical implications when a monetary value is attached to the life of a healthy human being. Of course, courts are used to compensating intangible, non-pecuniary loss. They do so all the time. But it is one thing to order compensation for loss of life or for the reduced quality of that life. It

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<sup>52</sup> In the United Kingdom both healthy parents of a disabled child and the (partially) disabled parent of a healthy child have been allowed to recover damages for the extra cost of rearing an unintended child. See, respectively, *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 (CA) and *Rees v Darlington Memorial Hospital NHS Trust* [2003] QB 20 (CA).

<sup>53</sup> Damage, i.e. loss or injury, is an essential part of the plaintiff's cause of action, which is not complete without it. The old action on the case required proof of actual harm. This remains true today of the modern torts, including negligence, which are derived from the action on the case: H Luntz and D Hambly, *Torts. Cases and Commentary* (5<sup>th</sup> ed, 2002) 335. By way of recent illustration of the point, Luntz and Hambly cite *Munnings v Australian Government Solicitor* (1994) 118 ALR 385, affirmed (1994) 120 ALR 586.

<sup>54</sup> See the discussion of the dissenting judgment by Gleeson CJ: IV B, *The High Court's Perspective(s) on the Legal Issue*, above. See also *Perre v Apand* (1999) 198 CLR 180.

is quite another thing to compensate life itself where this involves a perfectly healthy human being. Further, also to be considered is the impact on the unplanned child itself, when it learns that the parents have approached the courts for an official valuation. Here again the majority in *Cattanach* was surprisingly quick to dismiss the matter.

## B *Options Available to the High Court of Australia*

### 1 *Elsewhere in the Common Law*

In *Cattanach* several courses of action presented themselves to the High Court of Australia. At one end of the spectrum, it was open to the Court to deny recovery beyond, no doubt, compensation for any medical expenses associated with the pregnancy and delivery itself. This had been the House of Lords approach in *McFarlane*. It is the solution that prevails in New Zealand, although the matter there obviously<sup>55</sup> does not arise at common law.<sup>56</sup> It also is the option that prevails in Canada and in the overwhelming majority of states in the USA.<sup>57</sup> The main reason for not allowing recovery then is the public policy objection to dealing with children essentially in terms of a financial liability.

### 2 *French based Civil Law Systems*

Support for this no-compensation-entitlement approach can also be found in legal systems that do not belong to the common law. In *X v Y*<sup>58</sup> the French *Cour de*

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<sup>55</sup> A statutory (no fault) accident compensation scheme has been in operation for some three decades in New Zealand. The current legislation is contained in the *Injury, Rehabilitation and Compensation Act 2001* (NZ). In general, there is great reluctance to burden the ACC (the Accident Compensation Corporation) with the cost of the upkeep of a healthy child born as a result of compensable 'medical misadventure': Re Z: Decision no. 764 (1982) 3 NZAR 161; *XY v ACC* (1984) 2 NZFLR 376; *SGB v WDHB* [2002] NZAR 413.

<sup>56</sup> Callinan J, however, was struck by the similarity in the language used by Jeffries J in *XY v Accident Compensation Corporation* (1984) 2 NZFLR 376, 380: *Cattanach*, [2003] HCA 38 [288].

<sup>57</sup> *Kealy v Berezowski* (1996) 136 DLR (4<sup>th</sup>) 708. Note, however, the reference by Kirby J to obiter statements in *Kealy* (at 741), suggesting that the door is left open for exceptions, such as economic necessity or the creation of an unreasonable financial burden on parents: *Cattanach*, [2003] HCA 38 [129].

<sup>58</sup> Cass civ, I, 25 June 1991, *Bull civ*, I, 140, no. 213; *D*, 1991, 566, note P Le Tourneau; *JCP*, 1991, II, 21784, note JF Barbieri; *RTD civ*, 1991, 753, note P Jourdain. The *Cour de cassation* decision is in conformity with the highest administrative court of France, the *Conseil d'Etat*, in CE, 2 July 1982, *D*, 1984, 425, note JB d'Onorio; *D*, 1984, Info rap, 21, note F Moderne and P Bon; *Gaz Pal*, 1993, 1, 193, note F

*cassation* dismissed an appeal from a woman who gave birth to a healthy child following a failed abortion attempt. The trial judge had earlier ruled that there existed a direct and certain link between the continuation of the pregnancy and the failure by the surgeon to ascertain that the abortion had been carried out successfully. In rejecting the mother's claim for compensation the *Cour de cassation* was at pains to stress that

[t]he mere existence of the child does not itself constitute compensable harm, even though the birth is the result of a failed attempt at bringing the pregnancy to an end. The decision of the appellate court shows that the child was perfectly healthy; Miss P did not prove that the birth caused her moral harm that was certain; she simply alluded to anticipated difficulties in her life as a young woman and in her perspectives for the future. Thus, what prevents the mother from claiming compensation is the absence of specific harm that goes beyond the normal burdens of motherhood.<sup>59</sup>

Specific, additional harm would exist if, for example, the child were to be seriously handicapped at birth, thus having an extra negative affect on the living conditions of the mother.<sup>60</sup> But, according to the authors of the classic Dalloz text on obligations at civil law, the Court's main problem with the mother's claim in *X v Y* was its perceived lack of legitimacy.<sup>61</sup> Legitimacy is one of three conditions for compensating harm pursuant to Article 1382 ff of the *Code civil*.<sup>62</sup>

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Moderne. These references were taken from F Terré, P Simpler, and Y Lequette, *Droit civil. Les obligations* (6<sup>th</sup> ed, 1996) 558.

<sup>59</sup> 'Mais attendu que l'existence de l'enfant qu'elle a conçu ne peut, à elle seule, constituer pour sa mère un préjudice juridiquement réparable, même si la naissance est survenue après une intervention pratiquée sans succès en vue de l'interruption de la grossesse; que l'arrêt attaqué relève que l'enfant était parfaitement constitué et retient que Mlle P. ne prouvait pas que la naissance ait été pour elle la cause d'une souffrance morale certaine et se bornait à faire état de difficultés probables dans sa vie de jeune fille et ses perspectives d'avenir; qu'ainsi, en l'absence d'un dommage particulier qui, ajouté aux charges normales de la maternité, aurait été de nature à permettre à la mère de réclamer une indemnité': D, 1991, 566, 567.

<sup>60</sup> 'des troubles dans les conditions d'existence': CE, 27 September 1989, *Gaz Pal*, 1990.2.421, concl. M Fernacciari; D, 1991, 80, note M Verpeaux; D, 1990, somm, 298, note P Bon and P Terneyre.

<sup>61</sup> Terré, Simpler, and Lequette, above n 58, 558: '*La Cour de cassation ... à précisé que l'existence de l'enfant conçu ne peut, à elle seule, constituer pour sa mère un préjudice juridiquement réparable... parce qu'il n'y a pas d'intérêt légitime à en demander la réparation...*' (emphasis added).

<sup>62</sup> The other requirements are that the harm must be 'certain' and 'direct' or 'personal'. See Genevieve Viney and Patrice Jourdain (sous la direction de J Ghestin), *Traité de Droit Civil. Les Conditions de la Responsabilité* (2<sup>nd</sup> ed, 1998) 60, 66 and 94.

The unavoidable side effect of this first approach is, as noted by Callinan J in *Cattanach*,<sup>63</sup> the creation of a legal immunity for medical professionals. The practical consequences thereof can be particularly painful when, as in the French case of *X v Y* above, the claimant is an unmarried young person with limited means of financial support, whose own mother was dead and father unknown, and who had spent her childhood in the care of the social security services.

### 3 *German based Civil Law Systems*

At the other end of the spectrum sits the solution ultimately favoured by the majority in *Cattanach*. Under this approach, what constitutes the harm is not the childbirth itself but rather it is the ensuing financial consequences. There is no duty for parents to mitigate their loss by, say, resorting to an abortion or making the child available for adoption. Not even a reduction of the damages award by any benefits of the childbirth is deemed appropriate in the circumstances. This essentially represents the legal position in South Africa, the Netherlands and Germany. The leading German case dates from 1980. In this '*Leiturteil*'<sup>64</sup> the *Bundesgerichtshof* explicitly rejected the expression 'child as harm'. In particular, the Federal Supreme Court considered that '[t]he label 'child as harm' paints an inappropriate and legally unsuitable picture'.<sup>65</sup>

A more recent decision of the Federal Constitutional Court deals with the validity of the German abortion legislation under the constitution. It provided the *Bundesverfassungsgericht* with an opportunity to observe, by way of obiter comment,<sup>66</sup> that to treat the parents' responsibility for raising their children as a cost factor may run foul of the constitutional protection of human dignity.<sup>67</sup> Even so, subsequent decisions by the *Bundesgerichtshof* confirm its 1980 stance that to award damages for the cost of raising a child is not in contradiction with the child's dignity as a human being.<sup>68</sup>

<sup>63</sup> *Cattanach*, [2003] HCA 38 [295].

<sup>64</sup> The label is borrowed from a note under a Dutch Hoge Raad decision nearly two decades later: HR 21 February 1997, *NJ*, 1999, No. 145, note CJHB, 854. Markesinis traces the first successful claim for compensation in a wrongful birth case to a 1924 decision of the *Bundesgerichtshof*'s predecessor, the *Reichsgericht*: Basil Markesinis, *The German Law of Torts. A Comparative Introduction* (3<sup>rd</sup> ed, 1994) 155.

<sup>65</sup> '*das Schlagwort "Kind als Schaden" eine unangemessene und aus rechtlicher Sicht auch untaugliche Betrachtungsweise darstellt*': BGH, 18 March 1980, BGHZ 76, 259; *NJW* 1980, 1450.

<sup>66</sup> According to the author of the note under HR 21 February 1997, above n 64, 854.

<sup>67</sup> BVerfG, 28 May 1993, *NJW*, 1993, 1751: '*Die Verpflichtung aller staatlichen Gewalt jeden Menschen in seinem Dasein um seiner selbst willen zu achten, verbietet es, die Unterhaltungspflicht für ein Kind als Schaden zu begreifen*'.

<sup>68</sup> BGH, 16 November 1993, *NJW*, 1993, 788; BGH, 27 June 1995, *NJW*, 1995, 2407.

The Supreme Court of the Netherlands has since followed in the footsteps of its German counterpart. The *Hoge Raad*, in a decision dated 21 February 1997, reviewed the traditional objections to awarding compensation for the cost of care and education of an unintended healthy child.<sup>69</sup> The decision rejected the argument that an entitlement to compensation is necessarily based upon the conception that the child itself is regarded as damage or a damage factor. It also refuted the argument that to award compensation is contrary to the human dignity of the child, in that its right to exist would thereby be negated. Specifically, the Dutch *Hoge Raad* said:

It is our reasoning that the idea that the child itself must be viewed as harm or a factor of harm, is misplaced. At issue is only the compensation for an additional burden on the family income as a result of the physician's fault. The very reason for this extra (financial) burden is the acceptance (by the parents) of the child. Such reasoning cannot be said to run counter to the dignity of the child as a human being either. On the contrary, it is also in the child's interest that the parents should not be refused the possibility of compensation on behalf of the whole family, including the new child.<sup>70</sup>

Both under German<sup>71</sup> and Dutch<sup>72</sup> law the compensation claim of the parents tends to be analysed as arising in contract rather than tort. This approach need not surprise as it is in line with a less rigid distinction overall in the civil law between tort and contract as compared to the common law.<sup>73</sup>

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<sup>69</sup> HR 21 February 1997, above n 64, 837.

<sup>70</sup> *'In deze gedachtingang is geen plaats voor de opvatting dat het kind zelf als schade of schadefactor moet worden gezien. Het gaat immers uitsluitend om vergoeding voor de extra last die als gevolg van de fout van de arts op het gezinsinkomen wordt gelegd en die juist door de aanvaarding van het kind ontstaat. Voormelde gedachtingang kan evenmin worden gezegd in strijd te komen met de waardigheid van het kind als mens of zijn bestaansrecht te ontkennen. Integendeel mag, mede in het belang van het kind, aan de ouders niet de mogelijkheid worden onthouden om ten behoeve van het gehele gezin, met inbegrip van het nieuwe kind, aanspraak op vergoeding van de onderhavige kosten te maken'*: para 3.8 of the judgment. For a longer extract (in English) of this decision, see W. van Gerven, J. Lever, and P. Larouche, *Ius Commune Casebook for the Common Law of Europe, Tort Law* (2000) 133, 134.

<sup>71</sup> In its 1980 decision the *Bundesgerichtshof* observed that this goes for the claim of both parents: above n 65.

<sup>72</sup> This is most obvious from how the appellate judge approached the matter in the 1997 decision of the Dutch *Hoge Raad*: above n 64 [17].

<sup>73</sup> On this point, see Markesinis, above n 64, 152.



#### 4 *Room for a Compromise?*

Since the House of Lords decision in *Rees v Darlington Memorial Hospital NHS Trust*<sup>74</sup> ('*Rees*') an in-between position has become available. *Rees* was decided after *Cattanach*. In it the House of Lords declined the opportunity to reconsider *McFarlane*<sup>75</sup> in light of *Cattanach*. However, it also acknowledged that the parents of an unintended child were the victim of someone else's lack of care. These parents had lost the opportunity to lead their lives in the way they wished and planned to do. This state of affairs warranted official judicial recognition. The decision in *Rees* therefore acts as a declaratory judgment of sorts in which the court put on record that the plaintiff was the victim of a legal wrong. But the House of Lords went one step further. In recognition of this legal wrong, the plaintiff became entitled to an award that was more than merely nominal. Yet, the need for an (always speculative) cost-benefit analysis in determining the appropriate compensatory damages was avoided. Specifically, the plaintiff received a 'conventional' award the amount of which was arrived at without the need for calculation as would have been required if the purpose had been to put the plaintiff back in the position s/he would have been in but for the harm inflicted by the wrongdoer.

How sensible is the approach in *Rees*? The manner in which the House of Lords arrived at the actual amount of damages awarded (15,000 pounds), remains somewhat of a mystery. Lord Nicholls of Birkenhead acknowledged that the amount of a conventional award 'inevitably' had 'an arbitrary character'.<sup>76</sup> What is clear is that the amount favoured by Lord Millett in *McFarlane* (5,000 pounds), was considered inadequate. More importantly, perhaps, there was no unanimity among the Lords themselves about the very idea of a conventional award in the first place. Lord Steyn articulated the objections of the dissenters by stressing that there were limits to the permissible creativity of judges and that, on this occasion, 'the majority had strayed into forbidden territory'.<sup>77</sup> Also, the notion of a conventional award was said to amount to 'a backdoor evasion of the legal policy enunciated in *McFarlane*'.<sup>78</sup>

As for the latter objection, the majority in *Rees* acknowledged and confirmed the policy considerations that underpinned the decision in *McFarlane*. It is useful to list the more important strands thereof. First, there was the unwillingness to regard an unintended child as a financial liability and nothing else. Second, there was the recognition that the rewards of parenthood could not be quantified. Furthermore,

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<sup>74</sup> [2004] 1 AC 309.

<sup>75</sup> [2000] 2 AC 59.

<sup>76</sup> [2004] 1 AC 309, 319.

<sup>77</sup> *Ibid* 328.

<sup>78</sup> *Ibid*.

there was a sense that the award of potentially large sums of damages to the healthy parents of a healthy child might offend the community's sense of how public resources should be allocated in instances where the defendant is the National Health Service, i.e. a public organisation juggling competing demands on its always scarce financial resources. The majority in *Rees* acknowledged that the decision in *McFarlane* was both a very recent and a unanimous one. It declared to have no desire to disturb that decision as to do so 'would be wholly contrary to the practice of the House [of Lords]'.<sup>79</sup> However, the majority downplayed the effect of its decision by stating that *Rees* merely added 'one gloss'<sup>80</sup> to *McFarlane*.

As for the objection to 'straying into forbidden territory', Lord Steyn, dissenting, explained that:

No United Kingdom authority is cited for the proposition that judges have the power to create a remedy of awarding a conventional sum in cases such as the present. There is none. It is also noteworthy that in none of the decisions from many foreign jurisdictions, with varying results, is there any support for such a solution. This underlines the heterodox nature of the solution adopted.<sup>81</sup>

This need not be the end of the matter. The observations below seek to address these objections to the decision in *Rees* by adding a European civil law dimension.

### 5 *European Civil Law, Declaratory Judgments and Damages for Moral Harm*

The decision in *Rees* to put on record that a breach of a duty of care occurred can hardly be called revolutionary. First, the net effect of the outcome in *Rees* is not unlike that of a declaratory judgment at civil law. Declaratory judgments are not a wholly foreign concept in common law jurisdictions either.<sup>82</sup> Secondly, the concept of a conventional award imposed upon the wrongdoer may not exist as such in the civil law. But it is reminiscent of another traditional feature of damages awards in civil law systems, most notably the *ex aequo et bono* compensation of moral harm. In French based legal systems, in particular, the concept of compensable harm is a very broad one.<sup>83</sup> And it in turn is based on an equally broad notion of legitimate interest.<sup>84</sup> For purposes of compensating harm, a familiar distinction then is made between material and non-material harm. Material harm is essentially the same as

<sup>79</sup> [2004] 1 AC 309, 316 (Lord Bingham of Cornhill).

<sup>80</sup> Ibid.

<sup>81</sup> Ibid 327–8.

<sup>82</sup> 'No claim or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right *whether or not* any consequential relief is or could be claimed': *Civil Procedure Rules* (1999) RSC R 15.16 (emphasis added).

<sup>83</sup> G Viney and P Jourdain, above n 62, [248].

<sup>84</sup> Ibid.

pecuniary loss in the common law. Moral harm (*préjudice moral*) refers to intangible loss,<sup>85</sup> not unlike (but broader than) non-pecuniary harm at common law. In civil law, the consideration that the harm is of a moral nature does not itself provide grounds for denying recovery,<sup>86</sup> nor is it a reason to be less forthcoming in the amount of damages to be awarded.<sup>87</sup> The contractual or non-contractual nature of the liability also is irrelevant in this regard.<sup>88</sup> The entitlement to damages for moral harm can even be transferred to the victim's estate.<sup>89</sup>

Of course, difficulties of quantification inevitably arise, even in the civil law. But, significantly, this does not render compensation for moral harm of secondary importance to compensation for harm of a pecuniary nature. To be clear, in French based legal systems moral damages can be awarded in the absence of any material harm. A case in point is the protection of one's personality rights (*droit de la personnalité*).<sup>90</sup> Specific examples, provided by Belgian case law, include harm to one's honour or reputation, or even to one's religious or philosophical beliefs.<sup>91</sup> Admittedly, these types of cases would not normally qualify as instances of negligence at common law. Yet, in the civil law the legal basis for the compensation of moral harm in all of the above scenarios traditionally is the general tort law provision of Article 1382 *Code civil*.<sup>92</sup>

In principle, the requirements for the award of damages for moral harm are identical to those for pecuniary harm: the harm must be personal, certain and not illegitimate.<sup>93</sup> In practice, the courts do not always distinguish clearly between material and non-material harm when deciding upon the amount of damages to be awarded.<sup>94</sup> Also, with moral harm the aim seems consolation rather than compensation properly.<sup>95</sup> The civil law preference is for remedying moral harm in kind.<sup>96</sup> Significantly, though, where monetary compensation is awarded, the courts are by no means restricted to awarding the symbolic 1 franc or, for that matter, its contemporary substitute: the euro. In the *Bergmans* case the husband and parents of the deceased sought compensation for the moral harm inflicted by the tortfeasor.

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<sup>85</sup> Ibid [253].

<sup>86</sup> Both the highest civil and administrative courts are in agreement on this point: *ibid* (footnote 74).

<sup>87</sup> *Ibid* 25.

<sup>88</sup> *Ibid* (footnote 75).

<sup>89</sup> *Ibid* (footnote 77).

<sup>90</sup> *Ibid* [256].

<sup>91</sup> Eric Dirix, *Het Begrip Schade* (2<sup>nd</sup> ed, 1998) 63–4.

<sup>92</sup> Belgian Cass, 17 March 1888, *Pas*, 1881, I, 163.

<sup>93</sup> E Dirix, above n 91, [90].

<sup>94</sup> *Ibid*, para 89.

<sup>95</sup> Belgian Cass, 10 October 1972, *Arr Cass* 1973, 146; *Pas*, 1973, I, 147; *RW*, 1972-73, 718; *RGAR*, 1973, no 9001; *JT*, 1973, 163, note Tunc.

<sup>96</sup> E Dirix, above n 91, [90].

The Belgian *Cour de cassation* ruled that both the existence and extent of the moral harm is for the trial judge to determine. The Court next observed:

Bearing in mind that the defendants are entitled to full compensation of the moral harm they sustained, the law does not limit the entitlement to one symbolic franc; to award a higher amount is not contrary to public morality.<sup>97</sup>

Even though the French counterpart of the Belgian *Cour de cassation* has difficulty with the notion of compensable moral harm in wrongful birth scenarios,<sup>98</sup> it would seem that at least the spirit of the continental European law supports the majority ruling in *Rees*.

## VI CONCLUSION

The High Court of Australia decision in *Cattanach* raises questions about what constitutes harm for purposes of bringing a negligence claim. These questions are both legal and moral in nature. Clearly, the High Court is divided. An analysis of *Cattanach* in a broader, comparative (European) context confirms that no consensus exists on the international scene either. In fact, the French and German approaches are diametrically opposed to each other. Even so, the European tradition favours a broad approach to the notion of compensable harm. It may be possible to make the link between the French notion of moral harm (*préjudice moral*) and the concept of a ‘conventional’ award of damages as articulated most recently by the House of Lords in *Rees*.

It would be an interesting development if, one day, the decision in *Rees* were also to lead to a greater consensus in the High Court of Australia. Of course, the legislature may always decide to pre-empt the debate. This is precisely what seems to be happening in New South Wales and Queensland already.<sup>99</sup>

<sup>97</sup> “Overwegende dat de verweerders recht hebben op de volledige vergoeding van de morele schade die zij hebben geleden; dat dit recht bij de wet niet beperkt blijft tot het bekomen van een symbolische vergoeding van 1 frank en dat het toekennen van een hogere som niet strijdig is met de goede zeden”: Belgian Cass, 7 December 1970, *Arr Cass*, 1971, 339 at 340; *Pas* 1971, I, 319; *RGAR* 1971 no 8637.

<sup>98</sup> *X v Y*, above n 58. In Belgium one in five Flemish gynaecologists reportedly has been confronted with a claim for compensation in the past five years. Unwanted pregnancy following sterilisation is at the top of the list of complaints. However, from a total of 11 cases, none has thus far led to an actual court conviction: Concentra (Media), ‘Zeker een Vlaamse gynaecoloog op vijf juridisch vervolgd’ *Het Belang van Limburg*, 9 March 2004; De Standaard Online, ‘Een op vijf gynaecologen juridisch vervolgd’ *De Standaard*, 10 March 2004.

<sup>99</sup> Civil Liability Amendment Bill 2003 (NSW); Justice and Other Legislation Amendment Bill 2003 (QLD).