Before the High Court

"Unnatural rejection of womanhood and motherhood"†: Pregnancy, Damages and the Law
A note on *CES v Superclinics (Aust) Pty Ltd*

REG GRAYCAR AND JENNY MORGAN*

> ... [N]ot only would it be a bold and brave judge ... who would seek to interfere with the discretion of doctors acting under the Abortion Act 1967 [England], but I think he would really be a foolish judge who would try to do any such thing ...: Baker P in *Paton v British Pregnancy Advisory Service Trustees and anor*[1]

1. *Introduction*

In late November 1986, a 21 year old woman went to a 24 hour medical clinic. She alleges that she told the doctor who saw her that she was concerned about the possibility of pregnancy and that, if she were pregnant, she wanted to terminate the pregnancy. While the doctor's notes of that visit do not record this, they do record that she returned a week later, still not having menstruated, and on this occasion a blood test for pregnancy was ordered. On 2 December 1986, a pathology company to which the sample had been sent returned a negative result (this was actually a false negative, an extremely rare result: she was in fact pregnant) and this was conveyed to the woman by telephone some days later. Four weeks later, still not having menstruated, she returned to the clinic and for the third time, was seen by the same doctor. No further tests were ordered, nor was the woman examined on that occasion. A week later, on 6 January 1987, she again attended at the clinic but this time was seen by a different doctor. Her evidence is that she explained the history, told the doctor of the earlier negative test, but still expressed concern that she might be pregnant. That doctor conducted no physical examination, nor did he suggest repeating the test. He recalls only that she was prescribed a contraceptive pill. The young woman then went interstate for two weeks. She attended the clinic again on 23 January and saw a different doctor who conducted a physical examination (external only) and also took a blood test. That test

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† *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 522 at 531.

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1 ("*Paton*") [1979] QB 276 at 282.

yielded a positive result yet when she phoned for the result, she was told (wrongly) that it was negative.

The young woman's evidence is that on each occasion she visited the clinic, she indicated that she was anxious about being pregnant, and that she did not want to have a child at that stage of her life. Despite this, her pregnancy was not diagnosed until she attended her family's general practitioner in March 1987, at which time she was advised that her pregnancy of some 19.5 weeks (according to an ultrasound) could not be terminated safely. All the specialist medical evidence presented during the trial, including opinions from two leading specialists in obstetrics and gynaecology, made it clear that the medical treatment she alleges she received fell well below the standard to be expected of a competent medical practitioner, and in that sense breached the centre's and (at least some of) the individual doctors' duties of care.

Despite the fact that so far, this sounds like a fairly straightforward instance of medical negligence, to be settled without the need for protracted proceedings, the High Court will be considering aspects of this case. Special leave was granted[2] to the defendant doctors and medical centre against a decision of the Court of Appeal,[3] which reversed the trial judge's decision.[4] In that initial decision of April 1994, Newman J, without making any formal findings on the facts, and having expressly taken the woman's case at its highest for the purpose of his legal analysis, stated:

> [I]f these were the only issues in this litigation I would, particularly relying upon the expert evidence of the late Professor Shearman [Professor of Obstetrics and Gynaecology, Sydney University], have come to the conclusion that in relation to the plaintiff's claim against the first, third and fourth defendants, that a breach of duty had occurred in each of those cases.[5]

However, Newman J decided that the plaintiff was not entitled to damages since her case depended upon a claim that she had lost an opportunity to do something he determined was illegal (viz, have her pregnancy terminated) and therefore the law did not permit her to claim damages. The Court of Appeal, by majority (Kirby A-CJ, Priestley JA; Meagher JA dissenting), reversed this decision, but the majority could not agree on the appropriate approach to the assessment of damages. Priestley JA decided that any liability of the defendants for damages ended after the birth: since "keeping the child after that time was something which [the plaintiff] chose to do, any expense of rearing the child thereafter was not relevantly caused by the breach of duty, but by the plaintiff's own choice, and no defendant is legally responsible for it".[6] Kirby

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2 Special leave application No S140/95 15 April 1996.

3 *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 ("*Superclinics*").

4 *CES v Superclinics*, unreported, Newman J, Supreme Court of NSW, 18 April 1994.

5 Id at 15–6. In his report of 2 December 1987 (quoted by Kirby A-CJ in *Superclinics*, above n3 at 52), Dr Shearman commented: "[T]here is quite an extraordinary statement in the card dated 27th January 1987. This states "LMP [last menstrual period] 19th October. Nil symptoms of pregnancy". This is really quite remarkable. *The* symptom of early pregnancy is amenorrhoea [absence or suppression of menstrual discharge]. In a young sexually active woman with previously regular periods ... responsible medical practice indicates that the onset of amenorrhoea is due to pregnancy until proved otherwise."

6 *Superclinics*, above n3 at 84.

A-CJ (as he then was) concluded that the damages would have included the costs of rearing the child, but that, in order to provide guidance to the next trial judge,[7] the only order possible was one based on Priestley JA's approach. In their special leave application, the defendants argued that the High Court should reinstate Newman J's decision. In addition to the issue of illegality, they also asked the High Court to hold that as a matter of public policy, "the birth of a healthy child can never sound in damages". The respondents to the appeal (CES and PA, the child's father) have indicated that they will cross appeal with respect to damages.

The case raises a multitude of issues. Amongst these are the doctrine of illegality and how that affects what would otherwise be a simple case of medical negligence; the respective roles of doctors and courts in collateral (non-criminal) proceedings in making assessments as to the availability and "lawfulness" of abortion in any particular case and, in particular, in contexts where any such abortion would be purely hypothetical; and the availability and quantum of damages for the cost of upbringing of a healthy child whose birth would not have occurred but for the negligence of the defendant. The judgments under review are also significant for the insights they provide into the persistence of gendered assumptions in aspects of tort law and damages assessment.[8]

2. *Illegality*

A. *Illegality First Raised at Trial*

Newman J found that had the plaintiff's pregnancy been diagnosed "at a time when it was safe to have it terminated she would have taken appropriate steps to have a termination".[9] However, he denied recovery on the grounds of "illegality". At the beginning of the second day of the trial, Newman J raised the issue of illegality, pointing out that "[n]obody has raised a defence of illegality, from my reading of the defences".[10] The plaintiffs argued that the Supreme Court Rules required that illegality be specifically pleaded. Not only had it not been pleaded, but, they argued, nothing in the defendants' medical reports indicated any illegality. In their view, this precluded the defendants from relying on illegality. However, Newman J, in a separate judgment on this issue, held that as no illegal act had actually occurred (she had not, of course, had the abortion), the defendants were not obliged to plead illegality under the Supreme Court Rules since in his view, the case was pleaded as a loss of opportunity to commit an illegal act. In the Court of Appeal, only Kirby A-CJ discussed the pleadings issue and while he disagreed with the approach

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7 The matter had to go back to trial because the trial judge had expressly not made any findings, nor had he, in view of his decision, attempted to assess damages.

8 See the recent decision of the *High Court in Wynn v NSW Insurance Ministerial Corporation* (1995) 70 ALJR 147; and see generally, Graycar, R, "Women's Work: Who Cares?" (1992) 14 *Syd LR* 86; "Damaged Awards: The Vicissitudes of Life as a Woman" (1995) 3 Torts LJ 160. See also Shaw, J, "Wrongful Birth and the Politics of Reproduction: West German and English Law Considered" (1990) 4 *Int'l J L & Fam* 52.

9 *CES v Superclinics*, above n4 at 5.

10 Transcript, appeal papers at 74 (30 November 1993).

taken by Newman J, he found that that error had not itself caused a miscarriage of justice.[11]

B. The Plaintiff's Cause of Action

The plaintiff pleaded her case as a loss of opportunity to terminate her pregnancy which, she claimed, was the cause of her injury. According to Kirby A-CJ, this meant that she had to establish, on the balance of probabilities, that had she had the chance, she would have successfully secured the termination of the pregnancy.[12] Generally speaking, a woman in the position of CES finds out that she is pregnant very early in her pregnancy and, at that time, she considers her options. She may be very pleased to be pregnant; she may be shocked and distressed, but after a period of reflection, she may decide that she is in fact pleased to be pregnant even if that pregnancy was not planned. She may be quite sure that she does not want to continue the pregnancy. It is relatively safe to terminate a pregnancy up to 12 weeks, and while the risk increases thereafter, it is still possible for a period after that. Often, that gives a woman several weeks to consider her options, including termination, in the context of being pregnant. In this case, the defendant's (alleged) negligence was the very thing that deprived the plaintiff of the opportunity to make her decision in context, and to have her situation assessed in context. Not finding out until it was too late to terminate her pregnancy gave her no real option but to continue it.[13] The plaintiff, in evidence, never wavered from the position that she would have terminated the pregnancy. And the medical evidence presented was that she would have been referred for a termination.[14] Kirby A-CJ found that the plaintiff had established on the balance of probabilities that she "would have successfully sought and obtained a termination".[15] He continued, taking the plaintiff's case at its highest, that this established the plaintiff's cause of action, "subject to the defence of illegality". Because of the way the case was pleaded, he considered it necessary to examine "[t]he implications of the possibility that a termination might have been unlawful".[16] We will return to the difficulties that confront any civil court in attempting to evaluate the lawfulness of any particular abortion, not least one that was purely hypothetical, and the appropriateness of judges attempting to stand in the shoes of a relevant medical decision maker, after we consider the "defence of illegality".

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11 *Superclinics*, above n3 at 56.

12 Ibid.

13 Kirby A-CJ draws a distinction between her case as pleaded, in which the opportunity to terminate was constructed as the cause of action, rather than the damage itself, and a loss of opportunity pleaded as the damage. The former case (her case) requires proof on the balance of probabilities that she would have had an abortion, while the latter requires her, in his view, to demonstrate simply that the opportunity she lost was of some value. In the second scenario, he notes that the damages available would be limited to the loss of the opportunity itself and therefore might be less than she might otherwise have secured: id at 56–7.

14 Evidence of Dr Kok, her family doctor, and Dr Weisberg, Director of the Family Planning Association. Despite this evidence, Newman J held that she did not meet the criteria for a lawful termination because she had not been referred to a psychiatrist during her pregnancy. See Tricker, C M, "Sex, Lies, and Legal Debate: Abortion Law in Australia: Note on *CES v Superclinics Australia*" (1995) 17 *Syd LR* 446 at 448–9.

15 *Superclinics*, above n3 at 58.

16 Id at 57.

C. *The Law of Illegality:* Gala v Preston

As noted, Newman J held that the plaintiff could not recover because of illegality. He quoted at length from the High Court's decision in *Gala v Preston*,[17] but acknowledged that it was not directly applicable. *Gala v Preston* was concerned with the issue of joint illegal enterprise. The effect of such illegality is, in appropriate contexts, to negate the existence of a duty of care between two persons jointly involved in certain illegal conduct, the rationale being the difficulty of determining the standard of care other than by reference to the illegal nature of the activity.[18]

The question must be asked who in this case was involved in any (joint) illegal enterprise? Not the defendants: there is no suggestion that the medical centre or any of the individual doctors was involved in any way in what has always been a hypothetical abortion, save that the issue upon which they were consulted was whether the plaintiff was pregnant. Since one possible outcome for any patient consulting a doctor about pregnancy is that she might seek (and obtain) a termination,[19] is it suggested that a doctor owes no duty to such a person to provide her with proper professional medical care?[20]

Another possibility might be the "hypothetical doctor" to whom the woman would have been referred for a termination, assuming that doctor decided to terminate her pregnancy knowing that such a termination would be "unlawful". Even there, it does not follow that the woman herself was necessarily engaged in "unlawful conduct", as was pointed out by both Kirby A-CJ and Priestley JA, since she would have had no knowledge of the doctor's unlawful activity.[21]

If there was any possible illegal conduct affecting this case, it could only have been that of the hypothetical third party medical practitioner to whom the plaintiff would have been referred for a termination. Supposing, however, purely hypothetically, that the doctor had told the woman that s/he was proposing to perform an unlawful termination and thus the pregnant woman knew of the "illegality": the facts would still not come within *Gala v Preston* joint illegality as the hypothetical doctor in question is not the defendant in the case.

Newman J acknowledged that *Gala v Preston* was not applicable, but nonetheless held against the plaintiff on "illegality". Is there an alternative doctrine of "illegality" which, while not going to negate a duty of care, could nonetheless be used to deny recovery once a plaintiff's prima facie case has been made out?

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17 (1991) 172 CLR 243.

18 Id at 254–5.

19 One in four pregnancies in NSW ends in termination: see Adelson, P, Frommer, M and Weisberg, E, "Termination of Pregnancy in New South Wales, 1990" (1996) 20 *ANZ J Public Health* 64 at 67.

20 Newman J at trial appears to have accepted that the defendant doctors in this case are "unconnected" to any illegality: *CES v Superclinics*, above n4 at 17. A suggestion that such a doctor owes no duty, which is not far from the decision in this case, could be based only on some broader public policy notion of illegality: see text below.

21 *Superclinics*, above n3 at 67 per Kirby A-CJ; at 84 per Priestley JA.

D. *"Defence" of Illegality?*

If there is any such alternative doctrine, is it based on *Gala v Preston* or does it derive from some general (unarticulated) notion of public policy?[22] In his judgment, Kirby A-CJ discussed at length the provisions of the *Crimes Act* 1900 (NSW) governing abortion and went on to consider Brennan J's approach to the issue of illegality in *Gala v Preston.* Brennan J (as he then was) pointed out that the "criminal law is the chief legal means by which the peace and order of society are protected". Therefore, it is inappropriate for the civil law "to impair the criminal law's normative influence". The role of the illegality doctrine is "to limit the admission of a civil duty of care in order not to trespass upon the operation of the criminal law".[23] In Kirby A-CJ's words, "the question in the present case is not whether the scope of a civil duty of care should be limited. It is whether to allow such a duty to sound in damages would trespass unacceptably on the operation of the criminal law."[24] Relying on Brennan J's dictum, Kirby A-CJ suggests that there is a general defence based on this policy which would, in an appropriate case, have the effect of denying damages where a case of negligence has already been made out. However, he held that a termination in this case would most probably not have been unlawful and in any event, even if it were, on the principle laid out by Brennan J "to allow recovery for damages for the loss of the opportunity of that operation would not affect the substantive application of the criminal law".[25]

There are suggestions in the other judgments that such a defence exists independently of, or in addition to, joint illegality negating a duty of care. Newman J concluded that "the common law does not categorise the loss of an opportunity to perform an illegal act as a matter for which damages may be recovered".[26] Meagher JA expressly agreed with Newman J, and stated that "the plaintiff's claim is repelled by statutory illegality"; he also added "the plaintiff's action contravenes the general public policy of the law".[27]

In his judgment, Kirby A-CJ expressed a preference for the approach to illegality taken in *Veivers v Connolly* ("*Veivers*").[28] There, the Supreme Court of Queensland awarded damages to a woman expressly for the loss of opportunity to terminate her pregnancy. The circumstances were that the plaintiff gave birth to a child with severe disabilities flowing from her having contracted rubella in the very early stages of pregnancy. Suspecting this possibility, the plaintiff had sought a blood test and the defendant was found negligent in respect of the process adopted for testing her for rubella. Had the test been properly carried out, the likelihood of the child being born with severe disability would have been explained to the plaintiff as being very high. The trial

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22 Harold Luntz has commented: "Public policy is notoriously an 'unruly horse' and its expression ... may depend ... on the degree of indignation which the conduct of the plaintiff arouses": *Assessment of Damages* (3rd edn, 1990) at 256.

23 *Gala v Preston*, above n17 at 271–2 (cited by Kirby A-CJ in *Superclinics*, above n3 at 68–9).

24 *Superclinics*, above n3 at 69.

25 Ibid.

26 *CES v Superclinics,* above n4 at 17.

27 *Superclinics*, above n3 at 85–6. And, Priestley JA appears to have assumed the relevance and centrality of illegality to her case.

28 [1995] 2 Qd R 326.

judge had no hesitation in accepting that had that information been available to her, she would have terminated the pregnancy. De Jersey J then turned to consider the lawfulness of a termination in those circumstances by reference to the Criminal Code (Qld) and held as follows:

> I am satisfied that in Queensland, and in particular, North Queensland, as at the mid 1970's [when the child was born], were it known that a woman had been infected with rubella in the early stages of pregnancy, therapeutic terminations commonly occurred, provided the necessary certificates and consents were obtained.[29]

He concluded "with great assurance, that a termination would probably have been offered, duly certificated and consented to, and carried through". When it came to the assessment of damages, however, de Jersey J, after awarding damages for the cost of the child's upkeep and future care, addressed the possibility that the pregnancy may not have been lawfully terminated and although he held it highly probable that it would have been, he pointed out that this could not be found to have been certain. On that basis, he reduced the damages by 5 per cent to take account of that contingency.

In effect, what he did was to use the possibility (slim, as he pointed out) that a lawful termination would not have been available to reduce the damages. But this approach seems to conflate causal indeterminacy with the assessment of damages in relation to the probability of future occurrences or with the evaluation of loss of a chance.[30] It does not sit easily with the fact that a negligence action does not require 100 per cent proof of the facts that make up the cause of action: that is, a plaintiff must prove, on the balance of probabilities, that the events that establish duty, breach and damage, occurred. Colloquially, that is seen as a 51 per cent standard. In *Veivers*, the effect of de Jersey J's analysis is rather that she had established, on a 95 per cent probability, that the pregnancy would have been terminated and that is more than enough to establish her cause of action. It will be recalled that in *Superclinics* Kirby A-CJ made a clear finding that the plaintiff had established, on the balance of probabilities, that she would have sought and obtained an abortion.[31] Once her cause of action is established, then damages fall to be assessed by normal assessment principles, and the possibility of her not establishing the cause of action is no longer relevant.[32]

There is some real doubt as to whether the decision in *Gala v Preston* supports a general notion of illegality as a defence or whether there is some kind of broader public policy override which has the effect of denying damages in a case apparently "tainted by illegality". Furthermore, the difficulties in envisaging how such a defence could possibly operate in a case like the present one demonstrates the very real hurdles in any possible application. Whose illegality would be relevant? What onus would a defendant bear? What would a defendant have to plead? In this context, all those difficulties are compounded

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29 Id at 329–30. The Criminal Code provisions are analogous to those in the NSW *Crimes Act*.

30 See *Hotson v East Berkshire Health Authority* [1987] AC 750; *Malec v Hutton* (1990) 169 CLR 638; *Poseidon Ltd and Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; see also Fleming, *The Law of Torts* (8th edn, 1992) at 226–7.

31 See above nn13–5 and text accompanying.

32 Nor does it seem appropriate to treat illegality as a "vicissitude of life".

by the fact that the situation before the court was purely hypothetical. Nor is the approach taken by de Jersey J in *Veivers* persuasive, namely, the use of a possible (once again, hypothetical) 5 per cent chance of illegality as the basis for a reduction in damages. In terms of the judges' own assessments of illegality, perhaps Priestley JA addresses most directly the enormous obstacles in the path of anyone attempting, outside the context of a criminal prosecution, to decide whether any particular (hypothetical) abortion is "lawful" or "unlawful":

> [A]s the law stands it cannot be said of any abortion that has taken place and in respect of which there has been no relevant court ruling, that it was either lawful or unlawful in any general sense. ... [U]nless and until the particular abortion has been the subject of a court ruling, is there anyone with authority to say whether the abortion was lawful or not lawful.[33]

The issue raised by Priestley JA is discussed in more detail in the following section.

3. *Abortion and the Law*

As we have pointed out elsewhere,[34] there is no one area of "the law" dealing comprehensively with the subject of abortion, a phenomenon that can be subject to a variety of different legal doctrines. For example, abortion has been the subject of a number of (unsuccessful) applications for injunctions by fathers or putative fathers, in England and in Australia, and aspects of these actions are considered further below. It has been held that such an application brought by a married man with respect to his wife is within the jurisdiction of the Family Court of Australia, thereby making abortion a "family law" issue.[35] In jurisdictions with Bills of Rights, abortion cases have come before the courts as constitutional law issues;[36] while the well publicised case of the young woman from Ireland wanting to travel to England to terminate a pregnancy which followed her being raped by a school friend's father, was seen as an international human rights issue involving freedom of movement.[37]

Despite these diverse contexts, the most common legal category into which Australians tend to see abortion fitting appears to be the criminal law. While the statutory law, to be found in the *Crimes Act* 1900 (NSW),[38] makes it an offence for either a doctor or a woman to terminate a pregnancy "unlawfully", two key decisions in New South Wales and Victoria have established that the

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33 *Superclinics*, above n3 at 83. It does not appear that the doctrine of *ex turpi causa* has any application here either. Any suggested illegality on the part of this plaintiff is totally hypothetical (and see the analysis of Kirby A-CJ at 67, and Priestley JA at 84). Nor would denying her damages under that principle be consistent with the decided cases: see Higgins J in *Winter v Commonwealth of Australia* (1992) 112 ACTR 10; *Italiano v Barbaro* (1993) 114 ALR 21; see also Fleming, above n30 at 305 n108.

34 Graycar, R and Morgan, J, *The Hidden Gender of Law* (1990) at 4–5.

35 *In the Marriage of F and F* (1989) FLC 92–031.

36 In the United States, see, inter alia, *Roe v Wade* 410 US 113 (1973); *Webster v Reproductive Health Services* 492 US 490 (1989); for Canada, see *Morgentaler, Smoling and Scott v R* (1988) 44 DLR (4th) 385.

37 *Attorney General v X and others* (1992) 15 BMLR 104, Supreme Court of Ireland. For a comment, see Smyth, A, "The 'X' Case: Women and Abortion in the Republic of Ireland, 1992" (1993) 1 *Fem Leg Stud* 163.

38 For a discussion of the relevant provisions and their equivalents in other Australian jurisdictions, see Cica, N, "The Inadequacies of Australian Abortion Law" (1991) 5 *Aust J Fam L* 37.

defence of necessity applies in certain circumstances. In the case of *R v Davidson*,[39] Menhennit J held that an abortion was not unlawful if a doctor honestly believed, on reasonable grounds, that it was "necessary to preserve the woman from serious danger to her life or her physical or mental health ... [and] not out of proportion to the danger to be averted",[40] that is, a test of necessity and proportion. This was clarified by Levine DCJ in *R v Wald*,[41] adding that a doctor could also take account of economic and social grounds in assessing the danger to a woman's physical or mental health.[42] Since then, there have been no prosecutions in New South Wales.[43] However, abortion has been the subject of judicial consideration in other contexts.

The main context in which the issue has come before Australian courts has been in applications by men seeking injunctions to stop women from having abortions. None of these applications has succeeded in Australia (or in England). In Australia, the case law has specifically followed the English approach, set out in *Paton v British Pregnancy Advisory Service Trustees and anor*,[44] to the effect that a foetus is not a legal entity that can be recognised as the bearer of legal rights and therefore an injunction will not issue to protect the foetus. In the leading Australian case, Gibbs CJ reaffirmed the view in *Paton* and agreed that "a foetus has no right of its own until it is born and has a separate existence from its mother".[45] Significantly, for the purposes of the present case, Gibbs CJ was also asked to respond to an argument by the putative father that an injunction should issue to prevent a breach of the criminal law. It was argued that T was quite healthy and the only reason given for wanting an abortion was that it would be "best for everyone". This meant, so the argument went, that the proposed abortion was likely to be in breach of Queensland's Criminal Code. Gibbs CJ referred to the reluctance of civil courts in using the civil law to prevent breaches of the criminal law[46] and concluded:

> It would seem to me quite unjustifiable, in the circumstances of the present case, to assume that the respondent would be convicted by a jury of an offence against s.225 of the Code if she proceeded to have an abortion, and on that assumption to interfere in the most serious way with her liberty of action.[47]

In 1989, the Family Court of Australia was asked by a man to issue an injunction to prevent his wife, from whom he was recently separated, from terminating her pregnancy.[48] Lindenmayer J held that such an application was a matter within the court's jurisdiction.[49] However he declined to exercise that

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39 [1969] VR 667.
40 Id at 672.
41 (1971) 3 DCR (NSW) 25.
42 Note that Kirby A-CJ suggested that the *Wald* test was unnecessarily limited in considering only the period of the pregnancy: *Superclinics*, above n3 at 60. For further discussion of "the law" on abortion, see Petersen, K, *Abortion Regimes* (1993); Cica, above n38; and Graycar and Morgan, above n34 at ch9.
43 In *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8, Maguire J held that the analysis represented in *R v Davidson* also represented the law in Queensland.
44 Above n1.
45 *Attorney General (Qld) (ex rel Kerr) v T (No 1)* (1983) 57 ALJR 285 at 286.
46 See *Gouriet v Union of Post Office Workers* [1978] AC 435.
47 *Attorney General v T*, above n45 at 286.
48 *In the Marriage of F and F*, above n35.
49 Ibid. He held that it was a "matter arising out of the marital relationship" and therefore fell

jurisdiction in this case. In the course of setting out his reasons for not issuing an injunction, he stated:

> It would be wrong for any person to interpret this decision, however, as in any way condoning, encouraging or permitting the wife to undergo an abortion. That is not the issue in these proceedings. The only issue is whether the wife should be restrained, by order of this Court, from having an abortion if she chooses to do so. The refusal of that restraint does not constitute any endorsement by the Court of the wife's intended course of action. ... My decision in this case can have no bearing on the question of criminality of any subsequent conduct of the wife or any other person.[50]

What is significant about the reasoning in these Australian cases is that the judges were not prepared, for the purposes of the applications before them, to make a determination as to the legality or otherwise of the proposed procedure. In both cases, the matter came before the courts at a time when a termination of pregnancy remained not only the stated intention of the woman, but a very real possibility. Yet Newman J in *CES v Superclinics,* faced with a plaintiff whose case was in part constructed upon the fact that, whatever her intention might have been had her pregnancy been diagnosed at an early stage, the defendant's negligence had deprived her of the option of terminating her pregnancy, believed it appropriate for him to evaluate the lawfulness of what could only be the most hypothetical abortion. In the Court of Appeal, while the judges came to different conclusions, all three considered it necessary to their determination to do likewise. What is striking is that those analyses were undertaken more than six years after the events the subject of the civil proceedings, and focussed on a purely hypothetical possibility, whereas Gibbs CJ and Lindenmayer J, both faced with women *at that time* dealing with a decision to have an abortion, declined to engage in that same speculation. Both expressed the view that to the extent that the unlawfulness of any abortion was to be determined by a court, the criminal courts were the ones to do it. In this they echoed the approach taken in England:

> My own view is that it would be quite impossible for the courts in any event to supervise the operation of the Abortion Act 1967. The great social responsibility is firmly placed by the law upon the shoulders of the medical profession: see *per* Scarman LJ in *Reg v Smith (John)* [1973] 1 WLR 1510, 1512.
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> ... [N]ot only would it be a bold and brave judge ... who would seek to interfere with the discretion of doctors acting under the Abortion Act 1967, but I think he would really be a foolish judge who would try to do such a thing, unless, possibly, where there is clear bad faith and an obvious attempt to perpetrate a criminal offence. Even then, of course, the question is whether that is a matter which should be left to the Director of Public Prosecutions and the Attorney-General.[51]

In 1990, there were 29 348 terminations of pregnancy in New South Wales.[52] As far as we know, there were no prosecutions of the doctors for terminating

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within s114(1) of the *Family Law Act* 1975 (Cth).

50 Id at 77, 438.

51 *Paton*, above n1 at 281–2 per Baker P. This approach was endorsed by the Court of Appeal in *C v S* [1988] QB 135.

52 These figures are based on a study reported in Adelson et al, above n19. In the year 1994–95,

those unwanted pregnancies. As Kirby A-CJ pointed out, referring to "the reality of the availability of termination procedures in our society today":

> [t]aking that reality into account would permit commonsense to intrude into the Court's deliberations. It would allow the Court to take into account the fact that it would be most unlikely that any medical practitioner, still less the first appellant, would have been prosecuted and taken to trial. There is an air of unreality in the contrary approach favoured by Newman J and favoured by the majority in this Court.[53]

The effect of the *Wald* and *Davidson* rulings has been effectively to delegate to the medical profession the decision about whether the circumstances support lawful termination of pregnancy. This is the position that has been taken in the Australian cases in which the lawfulness of a particular abortion was raised. Those courts decided that it was inappropriate for them to engage with the question of lawfulness for the purposes of the proceedings before them.

It was suggested earlier that there is considerable uncertainty as to the scope and content of a general defence of illegality (as opposed to the principle of joint illegal activity) in the context of negligence. The issue that raises a supposed illegality in the present case, namely the lawfulness of a purely hypothetical abortion, is certainly an unsatisfactory context in which the High Court might attempt to clarify the law on abortion and its relevance to illegality. It is submitted that the preferable approach is for courts in collateral proceedings (such as negligence actions) to leave for the criminal courts, where appropriate, determination of any illegality. The application of the law on abortion has for the past quarter century been left to the medical profession who, it is assumed, given the incidence of Medicare-funded terminations, are administering the law in a proper professional and lawful manner.[54]

4. *Wrongful Birth: Are Damages Available for the Costs of Bringing Up a Healthy Child?*

The second main issue raised by the appellants is the public policy argument to the effect that the birth of a healthy child can never sound in damages. There is a significant body of case law on that issue in England, and a smaller number of cases in Australia. With one exception, *Udale v Bloomsbury Area Health Authority* ("*Udale*"),[55] the courts in England, Scotland and Australia

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there were 77 231 payments under the Medicare scheme for "evacuation of gravid uterus by curettage" (figures supplied by the Health Insurance Commission). Only in South Australia is there a requirement that terminations of pregnancy are separately recorded: see Petersen, above n42 at 119–20, and Adelson, et al, above n19.

53 *Superclinics*, above n3 at 70.

54 The suggestion that it is appropriate to leave this matter to the medical profession is not in any way an argument that, in matters of medical negligence, the issue of the standard of care is to be left to doctors (compare *Rogers v Whitaker* (1992) 175 CLR 479 and *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118). Nor is it to argue that, as a matter of policy, we want to support the delegation of abortion decision making to doctors in preference to women making their own decisions, in consultation with their doctors. Rather, the precise issue here is by whom, *as between doctors and courts in non criminal cases* (and especially, courts more than six years after the event) is the evaluation of a woman's situation to be made for the purpose of deciding whether an abortion is unlawful within the terms of a criminal statute.

55 [1983] 2 All ER 522.

have not seen fit to impose a blanket bar on recovery of damages for the costs of upkeep of a child in such cases.[56]

The main legal context in which such cases have arisen is failed sterilisations.[57] While this is a slightly different legal context to that in *Superclinics*, in both situations, through alleged negligence, a child is born who would not otherwise have been born. Accordingly, on the issue of damages, there is no reason why those cases would not be directly applicable. Indeed, Meagher JA adopted *Udale*, a failed sterilisation case, as his model for decision making, treating it as directly applicable. As the first of the reported English cases, and the one relied on by Meagher JA and the appellants in their application for special leave, *Udale* warrants some discussion, before the contrasting decisions are referred to.

In *Udale*, the plaintiff was the mother of four daughters. She and her husband decided not to have any more children and in October 1977, she underwent a laparoscopic sterilisation. However, in November 1978 she gave birth to a baby boy. There was no dispute about the negligence of the doctor in performing the operation: the only issue was the question of damages.

After the operation, Mrs Udale had complained of pain, particularly after intercourse, and intermenstrual bleeding. She was referred to a psychiatrist and was also prescribed antibiotics and medication for blood pressure. Finally, in July 1978 she discovered she was 16 weeks' pregnant. Mrs Udale stated that she was shattered by the news and was angry at having been deprived of the choice of bearing a child or having an abortion, since it was too late for the latter option. She was also worried about the possible effects on her baby of the medication which she would not have taken had she known that she was pregnant.

In his judgment, Jupp J described Mrs Udale as "a motherly sort of woman, nice looking but rather overweight ... Psychologically, she gave the appearance of being healthy".[58] He continued:

> It did take ... some time for Mrs Udale to settle down to the idea of having a baby. But then things began to change. She is not only an experienced mother but, so far as I am able to judge, a good mother, who has all the proper maternal instincts which make her work long and hard to look after her offspring. ... Moreover, as she said in evidence, her husband had always wanted a boy and I think she must have wished one of her four children had been a boy.[59]

Jupp J said:

> Mrs Udale was grateful [David] was a boy, she felt that was her reward at the end of it all. Another girl, she said, would not have been welcome. Of

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56 Nor has that approach been taken in the Federal Republic of Germany: see Shaw, above n8.

57 However, there are exceptions: involving failed abortions (*Sciuriaga v Powell* (1979) 123 Sol J 406); and, directly on point for these purposes, a case where the negligence was failure to diagnose a pregnancy (*Gardiner v Mounfield* (1989) 5 BMLR 1 (QBD)). In the latter case, the judge allowed damages for the costs of upkeep of the child having found that had the plaintiff "been told she was pregnant at the proper time she would have had a termination under general anaesthetic. I am satisfied on the evidence (a) that her desire would have been for a termination and (b) that the relevant criteria under the Act would probably have been met".

58 *Udale*, above n55 at 526.

59 Ibid.

> course, the housework was (to use her expression) 'colossal', but she went back to her job, as before, when David was not quite a year old. Mrs Udale, to her credit, made no attempt to play down the fact that here was a son, David, who was happy, healthy and, as it turned out, much loved. One is inevitably reminded of the Gospel (John 16:21): 'A woman when she is in travail hath sorrow, because her hour is come: but as soon as she is delivered of the child, she remembereth no more the anguish, for joy that a man is born into the world'.[60]

The defendants did not dispute that damages were payable for her loss of earnings, for the original operation, the shock and anxiety of an unwanted pregnancy, the symptoms of pregnancy which she thought attributable to illness or disease and which led to her taking unnecessary medication; "the very real fear, after the pregnancy was diagnosed, that the drugs may have harmed, even deformed, the child; she must have feared a mongol might be born"; and the two further operations. However, Mrs Udale had also claimed damages for the extra costs involved in raising the child to age 16. On those matters, Jupp J concluded as follows:

> The considerations that particularly impress me are the following. (1) It is highly undesirable that any child should learn that a court has publicly declared his life or birth to be a mistake, a disaster even, and that he or she is unwanted or rejected. Such pronouncements would disrupt families and weaken the structure of society. (2) A plaintiff such as Mrs Udale would get little or no damages because her love and care for her child and her joy, ultimately, at his birth would be set off against and might cancel out the inconvenience and financial disadvantages which naturally accompany parenthood. By contrast, a plaintiff who nurtures bitterness in her heart and refuses to let her maternal instincts take over would be entitled to large damages. In short virtue would go unrewarded; unnatural rejection of womanhood and motherhood would be generously compensated. This, in my judgment, cannot be just. (3) Medical men would be under subconscious pressure to encourage abortions in order to avoid claims for medical negligence which would arise if the child were allowed to be born. (4) It has been the assumption of our culture from time immemorial that a child coming into the world, even if, as some say, 'the world is a vale of tears', is a blessing and an occasion for rejoicing.
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> I am reinforced in the second of these considerations by the fact that, if I had to award damages to Mrs Udale under the disputed heads, I would have to regard the financial disadvantages as offset by her gratitude for the gift of a boy after four girls. Accordingly ... the last three heads of damage are irrecoverable.[61]

Jupp J concluded that it was legitimate, "without detracting from the above principles of public policy, to have some regard to the disturbance to the family finances which the unexpected pregnancy causes".[62] In fact, he decided that increasing the award for "pain, suffering, inconvenience, anxiety and the like" could take some account of those factors "without regarding the child as unwanted" and awarded £8000 under that head.

We have referred to this judgment in considerable detail as it was key to Meagher JA's discussion of this issue (he also quoted the same passage from the Bible), but it is important to note that it is merely one trial judge's view of

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60 Id at 527.
61 Id at 531.
62 Ibid.

this issue: in no other subsequent case have the policy considerations outlined by Jupp J been found determinative. Indeed, the English Court of Appeal has twice declined to follow Jupp J's approach. In *Thake v Maurice* ("*Thake*"),[63] a case involving a failed vasectomy, Peter Pain J in the English High Court upheld a claim for breach of contract and negligence in failure to warn of the possibility that the vasectomy would not be completely successful. He awarded damages, including for the costs of upkeep, and explicitly rejected the policy arguments put by Jupp J in that case.

> ... I do not accept that it is part of our culture that the birth of a healthy child is always a blessing. It may have been the assumption in the past. I feel quite satisfied that it is not the assumption today.[64]
>
> I have to have regard to the policy of the state as it expresses itself in legislation and in social provision. I must consider this in light of modern developments. By 1975 family planning was generally practised. Abortion had been legalised over a wide field. Vasectomy was one of the methods of family planning which was not only legal but was available under the national health service. It seems to me to follow from this that it was generally recognised that the birth of a healthy baby is not always a blessing. It is a blessing when the baby is to be born to the happy family life which we would all like a baby to have. Many people hold that that end can be best achieved by restricting natural fertility.
>
> The policy of the state, as I see it, is to provide the widest freedom of choice. It makes available to the public the means of planning their families or planning to have no family. If plans go awry, it provides for the possibility of abortion.[65]

He also dismissed the suggestion that an award of damages would lead the child to feel rejection.[66] The Court of Appeal rejected the claim based on breach of contract, but upheld the negligence finding and allowed a cross appeal increasing the damages by £1500.[67]

In *Emeh v Kensington Area Health Authority* ("*Emeh*"),[68] a child was born with a congenital abnormality (thereby needing extra care) to a plaintiff who had undergone a negligently performed sterilisation operation, and did not discover that she was pregnant until she was 20 weeks pregnant. The Court of Appeal allowed an appeal by the plaintiff, awarding her damages for loss of future earnings, maintenance of the child to trial and in the future, the plaintiff's pain and suffering up to the time of the trial and future loss of amenity and pain and suffering, including the extra care that the child would require. After considering the decisions in *Udale* and *Thake*, all three members of the Court of Appeal expressed their preference for the approach in *Thake*.[69]

A smaller number of analogous cases has come before Australian courts. In *F v R*,[70] the Full Court in South Australia overturned a finding of negligence in

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63 [1984] 2 All ER 513.
64 Id at 527.
65 Id at 526.
66 Ibid.
67 [1986] QB 644.
68 [1985] QB 1012.
69 For another English decision following this approach, see *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651.

a wrongful birth case.[71] The trial judge had awarded damages to a woman who was not warned that the sterilisation might not be effective,[72] but the Full Court, having decided that the defendant doctor was justified in not warning of the risk of failure since the risk was so statistically small, did not discuss the damages issue. More recently, two courts in Queensland have awarded damages for the costs of upkeep of a child. In *Dahl v Purnell*[73] the male plaintiff had had a vasectomy after which his sperm count did not reduce sufficiently to render him sterile. Unfortunately, a staff member of the surgeon told the female plaintiff (the wife) over the telephone that the sperm count was "okay" which led them to cease using other contraception. She became pregnant and sued, inter alia, for the costs of upkeep of the child. It was argued for the defendant that there was a question as to whether the law ought to permit recovery for the birth of a healthy child, and if it did, whether and to what extent the contingency of a healthy addition to the family ought to be offset. Pratt DCJ stated:

> ... I feel that in Queensland 1992, where family planning is officially encouraged, where vasectomy expenses may be claimed on Medicare, and where, although abortion on demand is still illegal, anyone interested is aware that an abortion can be had on demand, at worst, after an hour or two's ride in a motor car or aeroplane to a neighbouring Australian state, the approach of Jupp J in *Udale* ... is positively anachronistic.[74]

Pratt DCJ went through the policy considerations extracted above as set out in *Udale* and rejected each in turn. On the fourth, that is, that a child coming into the world is always a blessing, he stated:

> [W]hatever the assumptions may have been from time immemorial as to the blessing of children, despite the view from time to time that the world is a vale of tears, the reality for modern Queenslanders is that their children will have to be educated well into their 20s if they are to take a comfortable place in the society of the 21st century.[75]

Referring to Pain J's judgment in *Thake v Maurice*, Pratt DCJ added: "[Pain J] observed that every baby, however lovely, has a belly to be filled and a body to be clothed. ... The law relating to damages is concerned with reparation in money terms, and this is what is needed for the maintenance of a baby".[76] However, he did take into account the factor of offsetting for the benefits of the child and reduced the award for the costs of "services, physical care and upbringing, past and future" by $1000 leaving an award of $3000 under that head, making a total award of $64 561.05.

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70 (1983) 33 SASR 189.

71 (1982) 29 SASR 437. Mohr J had held that the relevant negligence was a failure to warn of the risk of its not being entirely effective.

72 He would have awarded the plaintiff $10 000 for pain and suffering and $250 under *Beck v Farrelly* (*Griffiths v Kerkemeyer* (1977) 139 CLR 161), but commented, without referring to any of the arguments put in *Udale*: "I cannot find that the care of the child has been a matter which sounds in damages": id at 442.

73 (1992) 15 Qld Lawyer Reports 31.

74 Id at 35.

75 Id at 36.

76 Ibid, quoting from *Thake*, above n63 at 526.

And, in *Veivers v Connolly*,[77] damages were also awarded for the cost of the child's upbringing though as noted above, they were reduced by 5 per cent to take account of the possibility that the plaintiff may not have been able to terminate her pregnancy. This approach is in our view misconceived for reasons we outlined above.

In *CES v Superclinics* only Kirby A-CJ addressed these issues in any detail. Meagher JA simply restated some of the *Udale* considerations with approval: the tenor of his judgment suggests, however, that he would not agree that *any* damages could be awarded: to do so would in his view provide "a significant bonus for unnatural motherhood".[78] Priestley JA would have allowed damages to the time of the birth, but treated the claim for the costs of upkeep as not causally connected to any damage flowing from the negligence of the defendants: the plaintiff "chose" to keep her child rather than give her up for adoption, and this "choice" constituted a novus actus interveniens, thereby severing the chain of causation. On the issue of adoption, Meagher JA agreed with Priestley JA, though he treated it not as an issue of novus actus, but of mitigation: in his view, since the law requires a plaintiff to mitigate her loss, "why does that not require the mother to put the child of which she vociferously complains out to adoption"? This issue of the plaintiff's "choice" will be discussed separately below.

One final comment is warranted on Meagher JA's conclusion. He stated that all of the matters are "lucidly" and "correctly" set out by Jupp J in *Udale* and noted: "The fact that it has met the disapproval of a Queensland court in *Dahl v Purnell* (1992) 15 Qld Lawyer Reps 31 hardly dents its authority".[79] This may well be so, given the different legal hierarchies involved (and of course no English decision is strictly binding on any Australian court) but he failed to acknowledge that *Udale* has "met the disapproval" of the English Court of Appeal in *Thake v Maurice* and *Emeh*.[80] Indeed, it has not been specifically followed in any case in England.[81]

Kirby A-CJ made a number of significant comments on the so-called "policy" arguments:[82] "If some damages are recoverable it is difficult to see the legal principle which excludes the foreseeable costs that flow from the wrong".[83] After rejecting the view that the plaintiff has suffered no damage, and responding to the argument that she had been delivered of a "blessing", he echoed Pain J in *Thake v Maurice*:

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77 *Veivers*, above n28.

78 *Superclinics*, above n3 at 87.

79 Ibid. In the original typescript judgment, Meagher JA described *Dahl v Purnell* as "mercifully unreported".

80 In *Gold v Haringey Health Authority* [1988] QB 481 at 484, while the question of damages did not arise as the Court of Appeal held that there had been no negligence, Lloyd LJ commented that on the issue of the availability of damages for the birth of a healthy child, the earlier conflict of trial judgments had been resolved by the unanimous decision of the Court of Appeal in *Emeh*.

81 Nor has the approach set out there been adopted in Scotland, having been specifically rejected recently in *Allan v The Greater Glasgow Health Board* (1993) 17 BLMR 135.

82 It is noteworthy that in all these cases, when "policy arguments" are referred to, they are used in support of denying recovery. Yet there are many other "policy arguments" that would support an award of damages: see Shaw, above n8.

83 *Superclinics*, above n3 at 72.

> The widespread use of contraceptive measures is itself an indication of a general social disagreement with the theory that every potential child must necessarily be considered an unalloyed blessing. Sentiments which permit a judge to proclaim that a conscious decision or expressed desire not to have a child is an "unnatural rejection of womanhood and motherhood" are out of harmony with the modern Australian society in which the Australian common law must operate.[84]

He pointed out "[d]amages cases are not about love. They are principally about recoverable costs".[85] And, on the issue of the child discovering s/he's "not wanted":

> [I]t was not the child as revealed which was unwanted. Nor is the child's existence the *damage* in the action. The birth of the child is simply the occasion by which the negligence of the respondents manifests itself in the economic injury to the parents. It is the economic damage which is the principal unwanted element, rather than the birth or existence of the child as such.[86]

One concern often raised about assessing damages for the costs of bringing up a child is that the damages are "too hard to calculate". Kirby A-CJ pointed out that the assessment of damages routinely requires the measurement of imponderables, particularly with regard to non-economic losses. In fact, there are clear criteria that could be applied in calculating the costs of upbringing of a child. For example, under the *Family Law Act* 1975 (Cth), the court, in determining an amount of child maintenance, "may have regard ... to any relevant findings of published research in relation to the maintenance of children".[87] The Australian Institute of Family Studies (AIFS) regularly publishes data on those costs, and such data could provide a guide to courts having to determine such damages.[88] Josephine Shaw, in her analysis of the German case law on wrongful birth, points out that damages for the costs of maintenance are assessed there, not in accordance with "the law of obligations" (tort law), but rather "according to the principles of family law".[89]

It was noted above that in *Dahl v Purnell*, a small amount was deducted from the damages for the non-economic loss to take account of the "joy" brought by a healthy child. Kirby A-CJ did not reject this approach outright, but decided instead that each case should be assessed on a case by case basis and no such offset was warranted here. However, this approach leaves it open to individual decision makers to evaluate the quantum of any particular parent's love for their unplanned child: as Meagher JA suggests, the mother who gets the most joy from her child has the most significant reduction while the one who says, as he put it, "I hate and loathe the child" would experience no discount.[90] This

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84 Id at 76.

85 Id at 74.

86 Id at 75.

87 Section 66J(2)(b).

88 This data is published quarterly in the AIFS' newsletter, *Family Matters*. For a discussion of the two different methods of calculating those costs, see Snider, G, "Measuring the Cost of Children" (1995) *Family Matters*, Issue No 40, Autumn 1995, at 44.

89 Shaw, above n8 at 63. She notes that those damages do not take account of the lifestyle and circumstances of the individual family, but rather, are calculated on an "average" scale. Compare this with the discussion in *Allen v Bloomsbury*, above n69, about whether it was appropriate to award damages for the costs of private schooling.

90 See the discussion by Reichman, A, "Damages in Tort for Wrongful Conception — Who

is clearly unsatisfactory: no matter how much joy a child may bring, children need financial support. It costs no less to feed, clothe and house a much loved child than any other. Moreover, as has been pointed out, would a court in a child maintenance case accept an argument from a father unwilling to pay child support that he had "bestowed upon the mother a priceless blessing"?[91]

5. *The Plaintiff's "Choice" to Keep her Child*

Priestley JA decided that damages could not be awarded for the cost of the upkeep of the child because that damage was not a consequence of the original negligence, but was instead caused by the plaintiff's decision to keep her child, rather than give the child up for adoption. Paradoxically, he points out that giving a child up for adoption might cause the plaintiff "pain of heart then, and emotional problems in later life, and had these things happened, the negligent ... defendants would, I think, be responsible".[92] It is difficult to understand why that damage would be characterised as causally related to the negligence while the far more likely scenario, of her keeping the child, was not.

It is also surprising to find this suggestion here when it is nowhere made in any of the Anglo-Australian wrongful birth cases flowing from negligent sterilisation.[93] There too, the plaintiffs "chose" to keep their unplanned children, yet courts have not characterised that choice as a novus actus interveniens, or as Meagher JA did, a failure to mitigate. Many, if not most, of those cases involved married couples: is the difference here the fact that CES was a young "unmarried mother"? This of course resonates with the 1960s phenomenon of the unmarried mothers' homes and the babies surrendered for adoption. But times have changed. The incidence of adoption has declined dramatically in Australia: there were some 9798 adoptions in 1971–2 compared with 764 in 1993–4.[94] Of those 764, only 177 were adoptions by non-relatives of Australian-born children under one year old, of which 98 were in New South Wales.[95] There are a number of reasons for this decline. Since 1973, financial support for sole parents has been available through the social security system and the stigma attaching to "single mothers", or sole parents as they are now called, has minimised dramatically. Moreover, since the early 1970s, irrespective of what some of the judgments imply, abortion has been widely available and funded under Medicare. Furthermore, the social and emotional consequences of giving up babies for adoption are now widely discussed.

The majority's approach on this issue can be directly contrasted with that taken in the English case discussed above of *Emeh*: there the Court of Appeal overturned the trial judge's decision that the plaintiff should be denied recovery

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Bears the Cost of Raising the Child?" (1985) 10 *Syd LR* 568 at 581–5.

91 Bickenback, J E, "Damages for Wrongful Conception: *Doiron v Orr*" (1980) 18 *U W Ont L Rev* 493 at 498, cited by Reichman, id at 575.

92 *Superclinics*, above n3 at 84.

93 See Swanton, J, "Damages for 'wrongful birth' — *CES v Superclinics (Aust) Pty Ltd*" (1996) 4 *Torts LJ* 1 at 9–10.

94 Zabar, P and Angus, G, *Adoptions Australia 1993–1994*, Australian Institute of Health and Welfare: Child Welfare Series No 11, Australian Government Printing Service, Canberra 1995, table 17.

95 Id, tables 5, 8 and 9.

because she had not undergone an abortion at 20 weeks gestation. The Court of Appeal held that this was neither a novus actus nor a failure to mitigate: only if it was held unreasonable for her not to have terminated her pregnancy, could it have affected her claim.[96] In the social circumstances of the 1980s and 1990s, where of 258 051 births in 1994,[97] fewer than 0.001 per cent babies are given up for adoption, making the statistical likelihood of this "choice" minimal, it is grossly unreasonable to deny the plaintiff damages on this basis.

6. *Conclusion*

In the late 20th century, family planning, including termination of pregnancy, is commonplace in Australia, while giving up children for adoption is extremely rare. Whereas one in four pregnancies ends in termination, considerably fewer than one in a thousand babies born is given up for adoption. Since 1971, there has been no prosecution involving an "unlawful" abortion in New South Wales. The High Court, in reviewing the decision in CES, has the opportunity, and we would argue, the obligation, to take account of that social reality.

This case of alleged medical negligence has been obscured by a view of the role of civil courts in abortion decision making that is out of step both with the decided cases and with the current social practice. The fact that the issue of abortion was raised as part of the cause of action seems to have led the judges, in considering this case, to depart from established legal principle. Courts in non-criminal jurisdictions have rightly, in our view, refrained from engaging with the issue of the "lawfulness" of abortion, leaving that decision to the woman in consultation with her medical practitioner; or, to the extent that it may be a matter within the purview of courts, to a criminal court in an appropriate case. Moreover, the judges in *Superclinics* appear to have drawn upon a notion of illegality inconsistent with established case law and have expanded the notion dramatically. It would be disturbing to think that some might have done so more by reference to their own views about abortion than any reasoning based on legal doctrine.[98]

The plaintiff should have an opportunity to have her case decided at trial untrammelled by those irrelevant considerations and should recover, if a finding of negligence is ultimately made, the full cost of her loss.

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96 *Emeh*, above n68.

97 Australian Bureau of Statistics, *Births Australia 1994*, Australian Government Printing Service, Canberra 1995, table 1.

98 Compare the comment by Cory J of the Supreme Court of Canada in *Hall v Herbert* (1993) 101 DLR (4th) 129 at 153: "The *ex turpi causa* defence by its very nature invites the pronouncement of arbitrary and personalized conclusions from the bench". And see also the comment by Kirby P (as he then was) in *Yates v Jones* (1990) Aust Torts Rep 81–009 at 67 635: "To guard against preconceptions and emotional responses to claims such as the present, the only safe course for the Court to adopt is to resort to basic common law principles and to apply them neutrally to the facts of the case".