

damages for 'wrongful birth'

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The Queensland Supreme Court in *Melchior & Another v Cattnach & Another* [2000] QSC 285 recently held that plaintiff parents were entitled to damages for the 'wrongful birth'¹ of a child conceived due to the negligence of a doctor. The judgment is significant in that damages (in the amount of \$211,921.72) were allowed, amongst other things, for the ongoing care of the child until it reaches the age of independence, pain and suffering and loss of consortium.

Background

The plaintiffs were the parents of a healthy boy, who was born despite the performance of a sterilisation procedure by the first defendant, a doctor. The first plaintiff had mistakenly told the doctor that her right fallopian tube had been removed in an operation 20 years prior. The first plaintiff sought damages for pain and suffering for the pregnancy and birth and their after-effects on her health, expenses incurred, loss of income, and future losses. The second plaintiff sought damages for lack of consortium. Significantly, both plaintiffs sought damages for past and future expenses of raising their child.

Issues raised by the case

- Should the birth of a child be considered a 'blessing' and should damages therefore be unavailable on public policy grounds?
- Is it desirable for a child to know that his/her parents brought legal action to recover damages for the child's birth?
- If a precedent for the award of damages is set, would doctors be placed under 'subconscious pressure' to encourage abortion to avoid claims for medical negligence?
- Should the fact that the parents chose not to abort the child or adopt it out at birth break the chain of causation and therefore be the point at which damages become unavailable?

The Decision

The Court considered the doctor negligent for not informing the first plaintiff that if her right fallopian tube was present, she faced a considerable increase in the risk of pregnancy than would usually be the case after a sterilisation procedure.

The defendants argued that damages should be curtailed according to the time at which the child could have been adopted out. Holmes J discussed the cases of *CES v Superclinics* (1995) Aust Torts Reports 81-360, and *McFarlane v Tayside Health Board (Scotland)* (House of Lords, 25 November 1999), and considered that there was no clear line of authority in those cases. Accordingly, the Court took from those decisions the reasoning it considered sound.

On this basis, Holmes J awarded damages, including a sum for the ongoing cost of raising the child. She rejected the argument that the birth of a child should always be considered a 'blessing' and noted that the introduction of an undesired child into a family might have a range of emotional and financial consequences.

Holmes J agreed with Kirby P in *CES v Superclinics* that a child whose parents' financial burden was lessened by an award of damages would be happier than one whose parents were precluded from relief by public policy.

Holmes J also rejected the argument that failure to adopt broke the chain of causation and that recovery should only be allowed up until the point where the parents could have adopted the child out.

Appeal Pending

An application was made by the defendants to stay the judgment, pending determination of any appeal: [2000] QCA 373 (13 September 2000). In hearing this application, Thomas JA commented that there were arguable grounds for appeal. An appeal court would face similar difficulties to those faced by Holmes J, namely the lack of clear authority on this issue.

The decision of Holmes J in *Melchior* will most likely be appealed. On appeal, a court may:

- hold that damages are only available for pain and suffering up until birth;
- hold that damages are recoverable only up until the point at which the child could have been adopted;
- affirm the decision and hold that damages are recoverable for the cost of raising the child until independence.

It is unclear how an appeal court would treat this case. The case raises interesting legal and ethical problems and is likely to reach the High Court.

NOTES

- 1 'Wrongful birth' refers to the situation where parents claim damages, not where a child claims damages either from his or her parents or from a third party, where for instance he or she is born with a disability.