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At last, a common law position on negligent sterilisation

Cattanach v Melchior [2003] HCA 28

The decision in *Cattanach v Melchior* has finally resolved Australia's common law position on the question of whether or not the costs of raising a child are recoverable following the failure of a sterilisation procedure caused by negligence.

On 16 July 2003, the High Court awarded the Melchiors $105,249 for past and future costs associated with raising and maintaining their child until he reaches the age of 18. There is now national uniformity on this issue.[1]

The Facts

In 1991, Mr and Mrs Melchior had two healthy children and decided they were happy with the size of their family. They made financial planning decisions based on the upbringing of two children and decided that Mrs Melchior should undergo a sterilisation procedure.

She underwent this procedure in 1992. Before the procedure was performed, Mrs Melchior consulted with Dr Cattanach and told him that she had undergone surgery when she was 15 years old.

From the information given to him, Dr Cattanach formed the view that Mrs Melchior's right fallopian tube and right ovary were removed at that time.

Dr Cattanach's observations during the course of the sterilisation surgery were consistent with Mrs Melchior's right fallopian tube and ovary having been removed. As a result, he applied a filshie clip only to the left tube.

In 1996, Mrs Melchior discovered that she was pregnant. The most likely method of conception was by transmigration of an ovum from the left ovary to the right fallopian tube.

Dr Cattanach was found to have been negligent on the basis that he did not adequately inform Mrs Melchior of the possibility that the sterilisation procedure would fail if in fact her right fallopian tube was still in existence.

The Appeal

The question to be determined on appeal was whether or not a doctor is required to bear the costs of raising and maintaining a child where a couple become parents of an unintended child as a consequence of medical negligence.

If it was possible to award such damages, should deductions be made to account for financial and other benefits associated with having and maintaining the child?

Decision

The High Court dismissed the doctor's appeal by a 4:3 majority. The majority judgements of McHugh, Gummow, Kirby and Callinan JJ applied the general common law principle that the injured person should recover damages for losses that were reasonably foreseeable to the tort-feasor at the time the negligence occurred.

They concluded there was no legal reason why the doctor should enjoy a special privilege of immunity from the consequences of his negligence.

The argument that damages awarded should be offset by the benefits of having the child was criticised because it involved balancing the benefits of one legal interest against the loss occasioned to a separate legal interest. Kirby J illustrated this by saying that 'a different case would have been presented if the mother claimed damages for ▶

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"loss of enjoyment of life" as a result of raising the child'.[2]

The argument that the birth of a child should always be regarded as a benefit and a blessing was considered by the majority to ignore the fact of widespread use of contraception and sterilisation in modern society in order to avoid receiving this benefit and blessing.

The dissenting judges (Gleeson CJ, Hayne and Heydon, JJ) gave different reasons. Gleeson CJ's reasons can be summarised in the following points:

- The liability sought to be imposed is indeterminate.
- The liability is based on a concept of financial harm that is imprecise.
- The liability is incapable of rational or fair assessment.
- The liability relies as treating as actionable damage and as a matter to be regarded exclusively in financial terms, the creation of a human relationship that is socially functional.

Recognition of liability in these circumstances goes beyond developing novel categories of negligence incrementally.[3]

Hayne J referred to equitable principles and identified a potential conflict between the parents' duty to protect the interests of their child by not exposing them to adversely harmful litigation and the parents' own interests in arguing for compensation.

Heydon J identified numerous ills to society that would necessarily eventuate if parents were entitled to recover the costs of raising their child from litigation arising out of negligent sterilisation procedures.

Implications

No restrictions were placed on the scope of the claims that could be brought for the costs of raising the child in future.

The claim in this case was acknowledged to be modest. How this issue will be dealt with in future will depend on the circumstances of individual cases.

Future claims may seek compensation for maintenance of children beyond the age of 18. Again, whether or not the courts will allow this is a matter for determination in future cases.

No distinction was made between ordinary costs associated with raising a child and extra costs associated with children with special needs. The majority considered that such a distinction was discriminatory.

The impact of this case on future failed sterilisation cases is in doubt. The Queensland Attorney-General has introduced to parliament legislation limiting levels of compensation that can be awarded in failed sterilisation cases. PL

Endnotes: **1** Queensland has allowed recovery of damages of this nature – see *Dahl v Purnell* (1992) 15 Qld Lawyer Reps 33; *Veivers v Connolly* [1995] 2 Qd R 326. NSW adopted a different position in *CES v Superclinics* (1995) 38 NSWLR 47. **2** at [90]. **3** at [39].

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