

# Wrongful life appeal

*Harriton v Stephens, Waller v James & Anor, Waller v Hoolahan* [2005]

HCA Trans 301 (29 April 2005)

By Anna Walsh

On 29 April 2005 the High Court, comprising Gleeson CJ and Gummow J, granted leave for the plaintiffs in two 'Wrongful Life' actions to appeal to the High Court. These test cases will decide whether there is a sufficient duty of care and causal nexus between a doctor's failure to provide information to a woman to allow her to make an informed choice about terminating her pregnancy, and the person born as a result of the continuation of the pregnancy. It will also determine the category of damages available to the plaintiffs who, but for the negligence, would not have been born to a life with severe disabilities.

In the case of *Alexia Harriton (by her Tutor George Harriton) v Dr Stephen*, the defendant allegedly failed to diagnose Olga Harriton's rubella infection in the first trimester of her pregnancy. This led to a continuation of the pregnancy and the birth of Alexia (now 24) who is deaf, dumb and blind.

In the second case of *Keeden Waller (by his Tutor Deborah Waller) v James & Anor*, the defendants allegedly failed to diagnose his father's blood clotting disorder, AT3 deficiency, prior to invitro fertilisation. This led to Keeden's conception and birth with cerebral palsy.

Both cases ran together with a third, *Edwards v Dr Blomely*, before Studdert J in the NSW Supreme Court.<sup>1</sup> The Court was asked to determine whether the plaintiffs had a cause of action and, if so, what category of damages were available to them. All the plaintiffs were unsuccessful on the first question, and so the second question

did not arise.

Studdert J's reasoning, which followed on from the English case of *McKay v Essex Area Health Authority*,<sup>2</sup> was that the sanctity of human life prevented a finding that a doctor owes a duty of care to an unborn child that would allow the mother the opportunity of aborting. Additionally, Studdert J reasoned that the doctor did not *cause* the injuries and disabilities of the plaintiffs, but rather created their necessary *precondition* by preventing the opportunity to abort. Finally, Studdert J found it difficult to see whether damage had occurred at all, as it would be like equating existence with non-existence.

The plaintiffs appealed and the matter was heard before the Court of Appeal, comprising Spigelman CJ, Mason P and Ipp JA.<sup>3</sup> Again, the plaintiffs/appellants were unsuccessful (but with Mason P dissenting).

Spigelman CJ held that a duty in negligence had to reflect values generally or those held widely in the community but that here, the duty asserted by the appellants did not reflect community values even generally, let alone those held widely in the community. Spigelman CJ held that the doctor ought reasonably to have considered the parents, especially the mother, and that any decision as to whether to continue the pregnancy or to conceive was theirs alone, making the relationship between the tortfeasor and the disabled person insufficiently direct.

Ipp JA held that the claims required the court to compare being born with a disability to that of non-existence and because this was impossible, the

claims were doomed to fail. In relation to causation, even though the doctors' negligence was a historical cause of the harm suffered, Ipp JA held that public policy would prevent such a finding.

Mason P, however, felt that there was no conceptual difference between a wrongful birth case and traditional analysis in negligence, and that the contention that the appellants could not demonstrate the monetary value of non-existence offended the principle of judicial agnosticism.

A Notice of Appeal was filed with the High Court on 20 May 2005. Certainly, sensitive questions will continue to be in focus when the case is argued before the High Court. International judgments have produced varied outcomes on this issue with several states in the US together with the Netherlands and France (prior to being overturned by legislative intervention) allowing damages for wrongful life. It remains to be seen how relevant public policy will be in the reasoning of the various judges and if the plaintiffs/appellants are successful; and whether legislative intervention, such as followed *Cattanach v Melchior*, will occur. ■

**Notes:** 1 [2002] NSWSC 461. 2 [1982] QB 1166. 3 [2004] NSW CA 93.

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