

Wrongful Birth as a Form of Claim: Where are we at

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Wrongful Birth

- The correct characterisation of damages
- The scope of damages
- Limitation periods

What is the injury and who is the injured

- Wrongful birth is the conception and/or pregnancy and birth arising from a doctor's negligence

Injury – pregnancy and childbirth

- *Thake v Maurice* [1986] UK case
 - Awarded rearing costs but refused pain and suffering
 - Joy of motherhood relevant
- *McFarlane v Tayside Health Board* (2000) UK case
 - Law regarded the birth of a healthy normal baby as a blessing and not a detriment

Cattanach v Melchior

- High Court did not consider the question of personal injury
- Dr Cattanach's negligence caused the pregnancy and birth – he was liable for foreseeable consequences

Injury

- Unwanted, unplanned nature of the pregnancy grounds for injury
- Injury can be conception
- Continuation of pregnancy

Does a father suffer injury

- Law acknowledges father's right
- His loss is consequential on the injury suffered by mother
- Close personal relationship is necessary
- "father's claim is made concrete by the physical injury suffered by the mother" (Kirby, J, *Cattanach*)

- Action by mother alone – damages consequential on her personal injury
- Joint action by both parents – damage consequential on the mother's personal injury
- Action by father alone – damages are for economic loss

Damages – the cost of rearing the child

- *Cattanach* – parents could recover compensation for raising and maintaining child to age 18
- Legislative limit on recovery:
 - (NSW) Civil Liability Act s.71
 - (QLD) Civil Liability Act ss.49A, 49B
 - (SA) Civil Liability Act s.67

***CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47**

- Parents entitled to recover any damage flowing from the negligent advice (Priestley)
- BUT defendant not legally liable beyond date parents could have surrendered child for adoption

G&M v Armellin [2008] ACT SC 68

- Decision on liability reversed on appeal – useful to demonstrate damages conundrum
- Bound by *Cattanach*
- Provisionally assessed damages for the cost of raising second twin to age 18

What does a wrongful birth claim look like?

- Issues in the assessment of damages

Damages

- Are costs limited to those arising from child's disability
- Can the costs allowed extend beyond majority
- What care costs can the parents recover

Limitation based on parental income?

- Offsets for government assistance
- Discount rate

Conclusion

- Define the injury
- Guidance as to recoverable damage

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