

A photograph of a pregnant woman in a white lab coat, sitting in a chair. She is viewed from the side, and her hands are resting on her belly. The background is a plain, light-colored wall.

DAMAGES FOR WRONGFUL BIRTH

Do these claims still bear fruit?

By Anna Walsh and Libby Brookes

Wrongful birth damages involve a claim by a parent or parents against a doctor, hospital or medical facility for negligence that has resulted in pregnancy and/or the birth of a child.

Photography Bill Madden

The damages sought generally fall into the following categories: non-economic loss, economic loss, out-of-pocket expenses, future treatment expenses and the costs of raising the child.

The recent High Court decision in *Harriton v Stephens*¹ ended any hope that children born as a result of such negligence might be able to seek damages in their own name. The only recourse for a disabled child now is for their parent to bring a wrongful birth claim of their own and hope that any damages awarded are applied towards their needs.

The public outcry following the *Melchior v Cattanach*² decision, and the ongoing international media coverage that followed each step of the *Harriton* case, resulted in considerable discussion in the community about wrongful birth claims – and rightly so. Such claims represent an interesting by-product of the reproductive freedom that Australians have enjoyed for quite some years.

Today, women and men can elect to undergo surgery to become sterilised, women can ingest or have injected various contraceptive drugs, and elect to terminate a pregnancy up to around 20 weeks' gestation. Advances in medical technology have made the detection of foetal abnormalities possible and, with it, the option to undergo termination of pregnancy to avoid the birth of a child with disabilities. Pre-genetic diagnosis has also allowed parents using in vitro fertilisation the option of not implanting embryos with unwanted characteristics or diseases. However, human error can occur when using any technology and in the wrongful birth scenario, the result is a pregnancy that is unplanned or unwanted, and the birth of a child.

Wrongful birth cases fall into two categories: those involving pre-conception negligence, such as a failed sterilisation or contraceptive; and those involving post-conception negligence, such as a failure to diagnose a pregnancy or to diagnose foetal abnormalities.

Whether one agrees with the morality of reproductive technologies and the option to abort life for being imperfect or unwanted, the fact remains that reproductive technologies and termination of pregnancy are available, are utilised by women in Australia every day and are funded by the government. Some will argue that the birth of a child through human error means that the child was meant to be. Others say that as reproductive technology advances, we must take responsibility for addressing the legal liabilities that flow from it. As more people make use of such technology, it is arguable that claims are likely to increase.

Recent legislative intervention, however, may have left some plaintiff lawyers wondering whether these types of claims are still worth pursuing. The right to claim the costs of raising a normal healthy child born as a result of negligence has been extinguished in several jurisdictions.³ Although exceptions have been made for cases involving a disabled child, the appropriate scope of damages for such cases has not been judicially decided in Australia.

Consequently, practitioners have no court-approved framework for calculating damages in cases involving the extraordinary costs associated with raising a disabled child. This article does not address the ethical considerations

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raised by wrongful birth cases, but focuses on the current legal consequences flowing from negligence that leads to pregnancy in Australia, specifically damages for non-economic loss and the costs of raising the child.

NON-ECONOMIC LOSS

All Australian states and territories have enacted legislation within the last few years to limit liability and reduce damages for personal injury. Different methods apply in each jurisdiction as to how to assess non-economic loss and what compensation figure will apply. In NSW,⁴ Victoria,⁵ Northern Territory⁶ and Tasmania,⁷ a plaintiff must reach a threshold or monetary minimum before compensation can be awarded under this head of damage. No thresholds apply in the ACT, Western Australia or Queensland; however, formulae are used in Western Australia⁸ and Queensland⁹ to determine what compensation figure will apply, based on a scale. There has been some case law interpreting these new methods of assessing non-economic loss, which may assist the plaintiff practitioner in advising on the likely scope of compensation under this head of damage.

Most wrongful birth cases deal with women who have given birth to a normal, healthy child. As far as we are aware, there have been no judicial determinations in Australia applying the new assessments of non-economic loss to a woman claiming for a termination of pregnancy that was necessary after a doctor's negligence caused her to conceive; a woman who has given birth to a disabled child; or, for that matter, a man who has fathered a disabled child that, but for the negligence, would have been aborted.

It is accepted that where a woman conceives or a pregnancy continues because of medical negligence, that birth is a physical injury, with any emotional distress being a secondary injury not requiring her to satisfy the requirements of nervous shock. A father suffers no physical injury and, as such, must demonstrate a recognised psychiatric injury in order to qualify for non-economic loss damages.

In the 2004 NSW District Court decision in *Brown v Thoo*,¹⁰ Sorby J assessed the plaintiff as being 26% of a most extreme case.¹¹ This case involved post-conception negligence, with a failure by a general practitioner to insert an Implanon contraceptive device into the plaintiff's arm, resulting in the birth of a healthy child, the plaintiff's sixth.

In assessing the level of impairment, the court took into consideration the fact that the pregnancy was unplanned, the shock and depression associated with discovering the pregnancy, the pain and suffering associated with the pregnancy and the birth of her child, her depression after the birth, her difficulty in coping at home and her difficulty coping with family tasks as the child grew older. The court's assessment of 26% of a most extreme case for non-economic loss entitled the plaintiff to damages of \$31,000.

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In a more recent NSW case¹² involving allegations of a doctor failing to occlude the plaintiff's fallopian tubes with filshie clips, the court noted that had the plaintiff been successful on liability, she would have been assessed as being 25% of a most extreme case. The plaintiff had given birth to a normal child, her seventh, and claimed to suffer from shock, anxiety, stress, pain and suffering from the pregnancy and birth, and some depression not requiring formal treatment.

In Western Australia, the 2004 District Court decision of *Gentile and Gentile v Ferris*¹³ involved the failure by the defendant, a specialist obstetrician and gynaecologist, to properly apply filshie clips to the plaintiff's fallopian tubes, resulting in the plaintiff giving birth to her third child, a healthy son. The court awarded the plaintiff damages of \$20,000 for non-economic loss.

Cases involving the birth of a disabled child would probably involve a significantly higher assessment than that in *Brown* or *Gentile*, due to the more onerous parental obligations and the effect that this would have on family life generally.

Cases where plaintiffs allege that disabled or healthy children were terminated as a result of negligence are unlikely to satisfy the various legislative thresholds.

COSTS OF RAISING A NORMAL, HEALTHY CHILD

In Victoria, the ACT, Northern Territory and Western Australia, no specific legislation prohibits a plaintiff from claiming the costs of raising a normal healthy child; however, the case law has been generally sparse as to how such awards are calculated, with the majority being agreed between the parties.

Interestingly, in Queensland, ss49A and B of the *Civil Liability Act* 2003 specifically provide that no damages may be awarded for the ordinary costs of rearing or maintaining a child born as a result of a failed sterilisation technique or failed contraceptive procedure or contraceptive advice. This arguably leaves open those cases involving negligence arising from a failure to diagnose pregnancy that results in the birth of normal healthy child, or cases involving a failure to diagnose and advise of foetal abnormalities resulting in the birth of a disabled child.

In *Melchior*, the parties agreed to damages of just over \$105,000 for the costs of raising the child up to the age of 18. Similarly, in the Western Australian case of *Gentile*, the court allowed the sum agreed between the parties of \$77,000 for the cost of raising the child up to the age of 18.

The only case in Australia where a court was specifically asked to address how to calculate the cost of raising a child was in the NSW case of *Brown*. Here, the court was asked to decide between the plaintiff's expert's normative approach, using a basket-of-goods model of 14 components making up the costs of raising the child (which included food, clothing, housing, utilities, transport, childcare and education based on the costs specific to the plaintiff), and the defendant's actual expenditure model, based on the amount of money the plaintiff had spent on her child to date, with projected figures into the future.

The court preferred the plaintiff's normative approach, as it allowed a fairer evaluation of the costs to the plaintiff of maintaining the standard of living that existed prior to the birth of the fifth child. The plaintiff was awarded around \$101,000 for the costs of raising the child to the age of 18.

EXTRAORDINARY COSTS OF RAISING A DISABLED CHILD

Recent tort reform legislation in NSW, South Australia and Queensland has extinguished a plaintiff's right to claim damages for the ordinary costs associated with raising a normal, healthy child. In NSW, s71 of the *Civil Liability Act* 2002 provides that a plaintiff can claim damages only for the 'additional costs associated with rearing or maintaining a child suffering from a disability'. The term 'disability' is not defined. The same applies in South Australia, where the 'ordinary costs' of raising a child are not claimable but extra costs involved in raising a child who is 'mentally or physically disabled' are permitted.¹⁴ Queensland legislation¹⁵ is silent as to whether one can claim the extraordinary costs of raising a disabled child.

Clearly, the extraordinary costs of raising the disabled child would be the largest component of this type of claim. We have been unable to find any judicial determinations of such extraordinary costs that have been decided under the new civil liability legislation.

When assessing the care component in these types of cases, one should review the Queensland decision of *Veivers v Connolly*.¹⁶ This was a case involving a mother infected by rubella during her pregnancy and a failure by her general practitioner to perform blood tests that would have diagnosed the condition. The plaintiff's child was born with profound injuries, and was deaf and almost blind as well as having severe intellectual and physical disabilities.

The plaintiff was awarded past *Griffiths v Kerkemeyer* damages of \$300,000, with \$400,000 for future care based on an agreed figure of a further 30 years of care. The ultimate damages award was reduced by 5% for the contingency that there might have been no lawful opportunity for the plaintiff to have terminated the pregnancy. An earlier Queensland case of *Dahl v Purcell*,¹⁷ involving a failed sterilisation procedure, also allowed damages for gratuitous care.

Apart from these cases, there is no authority in Australia that entitles the plaintiff to claim the commercial cost of gratuitous care provided in the past and to be provided into the future for a disabled child.

A defendant might argue that as the claim is being made by the parent, the measure of damages should be their lost opportunity to engage in paid employment as a result of their need to care for the child. If there is no evidence that the parent will return to work, then perhaps they can claim damages for the disruption to their lifestyle caused by their new obligation to care for their disabled child.

However, if courts accept that damages for gratuitous care can be allowed, then in terms of future gratuitous care, the plaintiff should arguably be required to show that they intend to continue caring for their disabled child as opposed

to purchasing paid care, which is clearly a reasonable extraordinary cost associated with caring for a disabled child, or using institutional care paid for by the government.

In terms of paid care, the current environment encourages the private sector to provide services and respite care, as opposed to the government. This means that parents are likely to incur real out-of-pocket costs associated with caring for their disabled child. However, one disturbing argument utilised by defendants in negotiating settlements of these claims is that when assessing the future costs of care for the disabled child, one should consider what the parents would have expended in the future, irrespective of an award of compensation.

This argument was attempted by the defendant in *Brown* for an actual expenditure model as opposed to a normative approach. The practical consequences of adopting this approach for a disabled child, or any child for that matter, is that wealthy parents who are in a position to afford adequate care for their children prior to the settlement of the claim or birth of the child will be awarded higher damages than those parents who are struggling financially and could never afford decent services. This result hardly seems fair. However, support for this defence position is seen in the English decision of *Rand v East Dorset Health Authority*,¹⁸ where the court held that parental means, not the disabled child's needs, provides the test for recovery.

Leaving aside whether one bases the care component on gratuitous care or actual incurred costs, the question arises as to how far into the future such calculations can be projected. Is it to the child's 18th birthday, to the likely end of the parents' lifetimes or of the child's? When there is a need for 24-hour-a-day care, calculations for 10, 20 and 30 years will result in significant variation.

If we rely upon the tortious principle that the purpose of compensation is to put the plaintiff back into the position they would have been in but for the negligence, then a credible argument can be made that the care component must be projected for as long as the plaintiff cares for the child. Defendants, however, are likely to argue that parents' legal obligation to care for their children only until the age of 18¹⁹ is the benchmark for when a defendant's obligation to pay compensation should cease.

CONCLUSION

Clearly, the range of damages claimable in a case involving a child with a disability is extremely variable, and will depend very much upon the individual circumstances of the plaintiff's child and the plaintiff themselves. As there is no settled view in Australia, nothing is lost by putting forward a claim with all the bells and whistles and advising the client that either compromise is required to achieve settlement or a test case will need to be run, with no real way of predicting the outcome.

Damages are not normally available for the costs of raising a normal, healthy child. Although the case law is still sparse, the attitude of the courts has been to award relatively low amounts to the mothers for pregnancy and birth of a child. Case law supports the cost of raising a normal, healthy child

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to be around \$70,000 to \$100,000. In the absence of being able to claim for these costs, it is arguable that wrongful birth cases may not be commercially viable, given the difficulty that usually accompanies the liability aspect of these claims.

Certainly, in NSW, where the cost of raising a normal healthy child are not recoverable, and cost penalties apply under the *Legal Profession Act 2004* for cases worth less than \$100,000, it would be difficult to justify running such a claim unless there is a reasonable amount of economic loss flowing from the physical or emotional damage arising from the pregnancy or termination.

In the absence of judicial application and interpretation of these legislative amendments affecting cases where there is a claim for the extraordinary costs of raising a disabled child, the lawyer's task of providing advice is a particularly difficult one. No doubt a test case will one day be run to determine the scope of the damages available but, until that time, it is necessary for lawyers to be armed with up-to-date knowledge of the law, some creativity and an understanding of the defence position so as to ensure that robust negotiations will lead to a reasonable compromise for both parties. ■

Notes: **1** [2006] HCA 15 (9 May 2006). **2** (2003) 215 CLR 1. **3** NSW, Queensland and South Australia. **4** Section 16, *Civil Liability Act 2002* (NSW) requires the plaintiff to be at least 15% of a most extreme case. **5** Section 28LE, *Wrongs Act 1958* (Vic) requires the plaintiff to have 5% physical impairment or 10% psychological impairment. **6** Section 27, *Personal Injuries (Liability and Damages) Act 2003* (NT) requires the plaintiff to have 5% whole person impairment. **7** Section 27, *Civil Liability Act 2002* (Tas) requires the plaintiff to be above a prescribed monetary minimum, which was \$4,000 as at July 2004. **8** Section 9, *Civil Liability Act 2002* (WA). **9** Sections 61 and 62, *Civil Liability Act 2003* (Qld). **10** *Brown v Thoo* (unreported judgment, Sorby J, District Court NSW, 22 September 2004). **11** Under s16 of the *Civil Liability Act*. **12** *Sharman v Dr Boshell* (unreported judgment, Garling J, District Court NSW, 8 September 2006). **13** [2004] WADC 144. **14** Section 67, *Civil Liability Act 1936* (SA). **15** *Civil Liability Act 2003* (Qld). **16** (1994) Aust Tort Reports 81-309. **17** [1992] 15 Qld Lawyer Reports 33. **18** [2000] Lloyds Med Reports 181. **19** Section 61C(1), *Family Law Act 1975* (Cth).

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