

CASE NOTE*

VICTORY FOR RELUCTANT PARENTS: *CATTANACH V MELCHIOR*

I INTRODUCTION

In the landmark decision of *Cattanach v Melchior*,¹ handed down on 16 July 2003, the High Court held, contrary to precedent in the United Kingdom and Canada, that the parents of a child born as a result of a doctor's negligence are entitled to recover damages for the costs of raising the child until adulthood. This represents a victory for the parents of children born as a result of failed sterilisations and negligent advice who, in the United Kingdom, for example, as a result of the 2000 House of Lords decision in *McFarlane v Tayside Board of Health*,² ('*McFarlane*') are restricted to claiming damages for pain and suffering and medical expenses arising out of the pregnancy.

II FACTS AND DECISION AT FIRST INSTANCE

The Melchiors already had two daughters when Mrs Melchior decided to undergo voluntary sterilisation by means of tubal ligation in 1992. Mrs Melchior had undergone an appendectomy at the age of 15 and had been told that, as a result of a blood clot discovered in her right ovary, both the right ovary and ovarian tube had been removed. She told this to her gynaecologist, Dr Cattanach, who performed the sterilisation and accordingly placed a Filshie clip on the left fallopian tube only. The right fallopian tube could not be seen on an ultrasound done prior to surgery, consistently with Mrs Melchior's understanding that the right ovary and tube had been removed in her youth. However, the right tube was in fact intact, and Mrs Melchior subsequently became pregnant and gave birth to a healthy son, Jordan. Mrs and Mr Melchior then sued Dr Cattanach for the negligent advice and performance of the sterilisation and claimed damages for

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1 (2003) 199 ALR 131.

2 [2000] 2 AC 59.

the pain and suffering associated with childbirth and the costs of raising Jordan until the age of 18. Mr Melchior also claimed for loss of consortium.

At trial in the Supreme Court of Queensland, Holmes J allowed recovery for all three heads of damage on the basis that Dr Cattnach should have warned Mrs Melchior that her right ovary might be intact, that if it were she stood a much higher risk of conceiving, and that there was a procedure she could undergo to confirm whether the tube had been removed.³ Her Honour treated the costs of child-raising as pure economic loss, relying on criteria set out in *Perre v Apand*⁴ such as control by Dr Cattnach and vulnerability on the part of the Melchiors.⁵ Her Honour's decision was upheld by a majority of the Queensland Court of Appeal.⁶ All three judges of the Court of Appeal agreed with Holmes J that this was a claim for pure economic loss,⁷ and the majority (McMurdo P and Davies JA, Thomas JA dissenting) found that the Melchiors were entitled to succeed. Justices Gaudron and Kirby granted special leave to appeal to the High Court, confined to the issue of whether the parents could recover damages for the cost of raising their son.⁸

III THE ISSUES

This is the first time the High Court has addressed the issue of parents' entitlement to recover damages for child-raising in respect of a child born as a result of medical negligence. Damages for medical expenses and the pain and suffering associated with childbirth are relatively uncontroversial, and have been awarded in many jurisdictions, including New South Wales⁹ and Queensland.¹⁰ However, whether parents can recover child-rearing costs for a child born as a result of a doctor's negligence is a contentious issue. Courts in the United Kingdom and Canada have refused recovery for such damages, and in the United States, only Wisconsin and New Mexico have allowed recovery.¹¹

The High Court had a number of difficult arguments to consider in reaching its decision. Most of these were policy arguments against recovery of the type being considered, arguments which have been relied upon in other jurisdictions to preclude recovery. How can the birth of a healthy child, or any child for that

3 *Melchior v Cattnach* (2000) 81 Aust Torts Reports ¶ 81-597, 66 625.

4 (1999) 198 CLR 180.

5 *Melchior v Cattnach* (2000) 81 Aust Torts Reports ¶ 81-597, 66 631.

6 *Melchior v Cattnach* [2001] QCA 246 (Unreported, McMurdo P, Davies and Thomas JJA, 26 June 2001).

7 *Ibid* [37]–[44] (McMurdo P), [77] (Davies JA), [144]–[145] (Thomas JA).

8 *Cattnach v Melchior* (2003) 199 ALR 131, 136.

9 *CES v Superclinics* (1995) 38 NSWLR 47.

10 *Dahl v Purnell* (1993) 15 QLR 33. In this case, Pratt DCJ allowed recovery of the costs associated with the pain and suffering of childbirth, loss of consortium, costs of raising the child and the parents' voluntary services in raising the child. See also *Veivers v Connolly* [1995] 2 Qd R 326, where de Jersey J allowed damages for pain and suffering and child-rearing costs associated with the birth of a severely handicapped child.

11 *Cattnach v Melchior* (2003) 199 ALR 131, 217 (Heydon J), citing *Marciniak v Lundborg*, 450 NW 2d 243 (Wis, 1990) and *Lovelace Medical Center v Mendez*, 805 P 2d 603 (NM, 1991).

matter, be considered an injury rather than a blessing? How can parents be allowed to recover for the 'harm' of an unwanted birth without offsetting an amount for the joys of parenthood? And, if this is possible, how are such 'joys' to be calculated in fiscal terms? Should parents be allowed to recover damages according to the kind of lifestyle they are able to offer their child, so that wealthy parents recover the expenses of luxurious holidays and a private school education, while low-income earners receive only modest damages? What is to become of the child when they learn that their existence was unwanted, and that every expense of their upbringing is being paid for by someone else? All of these issues were addressed in the High Court judgment.

IV THE MAJORITY DECISION

The majority of the High Court, consisting of McHugh and Gummow JJ in a joint judgment, Kirby and Callinan JJ, found that damages for the costs of raising the child were recoverable. Within the majority, McHugh and Gummow JJ and Kirby J all found, contrary to the majority of the Queensland Court of Appeal, that the claim for the costs of child-rearing was not one for pure economic loss, but rather flowed logically from the injury sustained by Mrs Melchior as a result of Dr Cattanach's negligence.¹² Justices McHugh and Gummow pointed out that it defied logic to allow the recovery of damages for medical expenses and for the pain and suffering of childbirth, but not for the costs of raising the child.¹³ Only Callinan J agreed with the Queensland majority that this was a case of pure economic loss.¹⁴ Justices McHugh and Gummow stated that the damage claimed was not the child or the parent-child relationship, but rather the burden of the legal and moral responsibilities arising from parenthood.¹⁵ Justice Kirby stated that the injury was constituted by the economic harm rather than the birth of the child.¹⁶

The manner in which the Court dealt with issues of policy is of particular interest, given that certain members of the House of Lords in *McFarlane* considered policy factors to be irrelevant.¹⁷ Unlike the House of Lords, the judges of the High Court openly discussed considerations of policy, although Kirby J considered that the High Court's rejection of the 'fair, just and reasonable' test¹⁸ would give policy considerations a less direct role than the acceptance of the test would have allowed.¹⁹ His Honour also spoke of the need for policy considerations to be clearly enunciated and susceptible to analysis

12 Ibid 150–1 (McHugh and Gummow JJ), 171 (Kirby J).

13 Ibid 157.

14 Ibid 212.

15 Ibid 151.

16 Ibid 171.

17 See also Kylie-Maree Scheuber, 'Damages for Wrongful Conception: Moving Away from Policy Considerations?' (2001) *University of Queensland Law Journal* 230.

18 *Caparo Industries v Dickman* [1990] 2 AC 59.

19 *Cattanach v Melchior* (2003) 199 ALR 131, 163–4.

when relied upon to preclude recovery, and decried the practice of basing judicial decisions on subjective moral considerations.²⁰

The most significant policy argument advanced in support of Dr Cattanach's position was the 'benefits' argument: that the costs and hardships associated with an unwanted pregnancy must be offset by the benefits, which flow naturally from the birth and life of a healthy child and necessarily outweigh the costs and hardships. The four majority judges gave short shrift to this argument, citing the general rule that the benefits accruing to one legal interest as the result of a wrongful act are not to be offset against the harm caused to another legal interest.²¹ Justices McHugh and Gummow accepted the law's recognition of the value of life and the welfare of children, but emphasised the greater importance of individual choice.²² Their Honours cited the example of the coalminer who, 'forced to retire because of injury, does not get less damages for loss of earning capacity because he is now free to sit in the sun each day reading his favourite newspaper'.²³

The majority also gave consideration to prevailing community standards, stating that while these respect the importance of human life, the stability of the family unit and the nurture of infant children, they do not require that the Melchioris be denied complete recovery.²⁴ Justice Kirby referred to notions of community standards as a 'fiction' and instead professed a preference for judges taking responsibility for exerting judicial controls over liability.²⁵ These findings contrast with the approach taken by at least one member of the House of Lords, who held in *McFarlane* that the Underground traveller would 'instinctively' consider that the law of tort has no business providing remedies to parents of a healthy child, something which 'all of us regard as a valuable and good thing'.²⁶

Of the argument that recovery for child-rearing costs would cause the child to suffer psychological harm in later life, McHugh and Gummow JJ said this was not enough to preclude recovery in the absence of clear and accepted understanding on the point.²⁷ Justice Kirby went further, stating '[i]t is difficult to accept that children in today's age learning such facts would not realise, if explained to them, that the claim was brought simply for the economic consequences of medical negligence'.²⁸ Furthermore, Kirby J described the idea that parents would be forced to denigrate their children publicly in order to maximise economic benefit as 'sheer judicial fantasy'.²⁹

20 Ibid 172–3.

21 Ibid 156–7 (McHugh and Gummow JJ), 211–12 (Callinan J), 178 (Kirby J).

22 Ibid 148.

23 Ibid 156–7.

24 Ibid 153–4 (McHugh and Gummow JJ).

25 Ibid 167.

26 *McFarlane* [2000] 2 AC 59, 82 (Lord Steyn).

27 *Cattanach v Melchior* (2003) 199 ALR 131, 154.

28 Ibid 170.

29 Ibid 170.

V THE MINORITY JUDGMENTS

The difference between the majority and minority judgments rests broadly on their different conceptions of the claim. The majority judgments tended to regard the Melchior's claim as being within the bounds of an ordinary negligence claim (or economic loss claim, in the case of Callinan J), and thus allowed the claim notionally before going on to consider whether it should be precluded on the basis of policy considerations.³⁰ On the other hand, the minority judges treated the claim as a novel one, focusing on differences between the claim in the present case and recovery under ordinary negligence principles. Gleeson CJ, for example, would have allowed the appeal, stating that the claim could not be recognised by analogy with established categories of recovery.³¹

Cattanach v Melchior contains the first opinion of Heydon J since his Honour's appointment to the High Court. It is the most conservative of the minority judgments, reminiscent of the House of Lords' treatment of issues relating to the value to be placed on the birth of a healthy child and the value of human life generally. Justice Heydon advanced three major reasons as to why the reasoning of the Queensland Court of Appeal was flawed.³² First, the birth of a child was incapable of characterisation as a 'loss', unlike, for example, a broken leg.³³

A child is not an object for the gratification of its parents, like a pet or an antique car or a new dress. ... It is contrary to human dignity to reduce the existence of a particular human being to the status of an animal or an inanimate chattel or a chose in action or an interest in land.³⁴

Secondly, allowing parents to claim child-rearing costs was impermissible because it would encourage parents to act inconsistently with their duties to the child by forcing them to exaggerate the child's potential and inadequacies in order to maximise fiscal benefit.³⁵ Finally, Heydon J based his decision on an argument expressly rejected by McHugh, Gummow and Kirby JJ – that allowing recovery would generate litigation which was bound to cause children psychological harm in later life.³⁶

The judgment of Heydon J, at least in part, can be reconciled with his Honour's fervent disapproval of judicial activism, which he expressed in a speech delivered at the *Quadrant* dinner in October 2002. There, his Honour emphasised the importance of deciding cases by interpreting the law according to the books, and criticised the use of judicial power for illegitimate purposes, often

30 See *Cattanach v Melchior* (2003) 199 ALR 131, 148 (McHugh and Gummow JJ). It was stated that the damages sought were 'recoverable in negligence under general and unchallenged principles in respect of the breach of duty by Dr Cattanach'.

31 Ibid 144–5.

32 Ibid 227.

33 Ibid 228–33.

34 Ibid 228–9.

35 Ibid 233–5.

36 Ibid 235–43.

‘the furthering of some political, moral or social program’.³⁷ Consistently with this position, Heydon J characterised the claim in *Cattanach v Melchior* as a novel one,³⁸ and pointed out the necessity to decide the case on the basis of legal reasoning as opposed to feelings of personal revulsion or astonishment at the claim.³⁹ Indeed, it would appear that considerations as to the possible psychological impact on the child of these kind of claims were drawn by his Honour from the ‘fundamental assumption underlying many rules of the common law and many statutory provisions that, in general, where the interests of children collide with other interests, the interests of the children prevail’.⁴⁰ However, in respect of the finding that the birth of a child is not compensable as a ‘loss’ his Honour draws heavily upon moral considerations. The influence of morals is manifest in statements such as, ‘[i]t is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth’.⁴¹ There is an apparent inconsistency between his Honour’s reasoning on this point and his Honour’s advocacy of ‘the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge’.⁴²

Like Kirby J, Hayne J found that the Melchiors’ claim flowed naturally from Mrs Melchior’s claim for the pain and suffering of pregnancy, and was not, therefore, a claim for pure economic loss.⁴³ His Honour’s reasons were rooted firmly in policy considerations.⁴⁴ Justice Hayne considered that the benefits of parenthood must be taken into account in an assessment of damages, but that it was virtually impossible to value the life of a child.⁴⁵ Like Heydon J, he pointed to the undesirability of allowing parents to exaggerate the burden created by their child to the detriment of parental responsibility.⁴⁶ In a similar vein, his Honour spoke of the need to affirm the ‘desirable paradigm of family relationships’.⁴⁷

Chief Justice Gleeson treated the claim as one for pure economic loss, finding that it possessed the feature of indeterminacy, which would preclude recovery under principles relating to economic loss.⁴⁸ However, his Honour appears to have based his decision largely on his finding that the ‘damage’ in this case was the parent–child relationship,⁴⁹ which is recognised within the community as a special relationship, incapable of valuation in economic terms. Although similar to Justice Heydon’s first reason for his decision, Chief Justice Gleeson’s decision appears to be less about the importance of promoting family values and more

37 Justice Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) Jan–Feb *Quadrant* 9, 10.

38 *Cattanach v Melchior* (2003) 199 ALR 131, 217.

39 *Ibid* 218.

40 *Ibid* 220.

41 *Ibid* 229, citing *McFarlane* [2000] AC 59, 114 (Lord Millett).

42 Justice Dyson Heydon, above n 36, 10.

43 *Cattanach v Melchior* (2003) 199 ALR 131, 184.

44 *Ibid*.

45 *Ibid* 198.

46 *Ibid* 200.

47 *Ibid*.

48 *Ibid* 140–1.

49 *Ibid* 138–9.

about the difficulties associated with characterising the parent–child relationship as an injury capable of compensation.⁵⁰ Unless the Melchior’s claim were to be restricted only to expenses for legal obligations to the child (as opposed to moral ones), then it was impossible to characterise the parent–child relationship as a ‘harm’, disregarding the mutual benefits and support flowing between child and parent.⁵¹

VI A NOTE ON ECONOMIC LOSS

Although a majority of the High Court found that the Melchior’s claim for child-rearing costs was not one for pure economic loss,⁵² the opposite characterisation by the learned trial judge, Court of Appeal judges and two High Court judges gives rise to some uncertainty as to how wrongful birth cases should be argued. The trial judge drew a distinction between loss arising out of the pregnancy and childbirth and loss associated with the existence of the child, the latter being more readily capable of characterisation as ‘economic loss’.⁵³ Her Honour then went on to consider the indicia relating to a claim for *pure* economic loss, as set out in *Perre v Apand*.⁵⁴

The learned judges of the Queensland Court of Appeal also found that the claim was one for pure economic loss. Justice McMurdo appears to have relied chiefly on the fact that this was how the claim was argued, without further analysis.⁵⁵ Justice Davies agreed with the House of Lords that claims of this kind were claims for pure economic loss, although his Honour also found that the claim was ‘one which is both an immediate consequence of and closely related to the invasion by the conception and birth of the first respondent’s right to bodily integrity’.⁵⁶ Like Gleeson CJ, Thomas JA emphasised that Mr Melchior’s appearance as a plaintiff, despite not having suffered any physical injury, was indicative of the fact that the claim had to be one for pure economic loss.⁵⁷ Justice Callinan appears to have accepted without further elaboration the Court of Appeal’s finding that the claim for child-rearing costs was a pure economic loss claim, and that the indicia from *Perre v Apand* were therefore applicable.⁵⁸

Claims for pure economic loss are claims for damages based on ‘financial loss to others, unconnected with physical injury to their persons or property’.⁵⁹ As noted by Wilcox J in *McMullin v ICI Australia*,⁶⁰ claims for economic loss

50 Ibid 143–4.

51 Ibid 142, 143–4.

52 Ibid 150–1 (McHugh and Gummow JJ), 172 (Kirby J), 184 (Hayne J).

53 *Melchior v Cattanach* (2000) 81 Aust Torts Reports ¶ 81-597, 66 631.

54 (1999) 198 CLR 180.

55 *Melchior v Cattanach* [2001] QCA 246 (Unreported, McMurdo P, Davies and Thomas JJA, 26 June 2001) [37].

56 Ibid [77].

57 Ibid [144] (Thomas JA); *Cattanach v Melchior* (2003) 199 ALR 131, 134 (Gleeson CJ).

58 *Cattanach v Melchior* (2003) 199 ALR 131, 140–1 (Gleeson CJ), 212 (Callinan J).

59 *Perre v Apand* (1999) 198 CLR 180, 191 (Gleeson CJ).

60 (1997) 72 FCR 1.

resulting from physical damages are ‘unexceptionable’.⁶¹ ‘It is the daily task of judges and juries to assess economic losses flowing from a physical injury to the plaintiff or damage to the plaintiff’s property.’⁶² Although subject to the argument that damages for the costs of child-rearing might be too remote from the initial injury (the pregnancy and subsequent childbirth), the costs of raising the child would still appear to be sufficiently connected to the initial injury to preclude the claim being characterised as one for pure economic loss. Although *Mr Melchior*’s claim might be described as one based on pure economic loss, it is difficult to see how *Mrs Melchior*’s claim can be characterised as pure economic loss in the same way as the claim of the potato farmers in *Perre v Apand*. Justice Kirby’s reasoning on this point seems to address the issue in a practical way:

On no view could [Mrs Melchior’s] claim for the costs of child-rearing be viewed as involving ‘pure’ economic loss. The claim of the parents (including the father) is made in common for that item of loss. To that extent the father’s claim is made concrete by the physical injury suffered by the mother. It is artificial to sever the parents’ claim which is made jointly for the same sum.⁶³

Although the majority found in favour of the Melchiors, the differences in their reasoning in relation to the issue of economic loss are significant in terms of how similar claims will be argued in the future. The emphasis placed by Gleeson CJ on the father’s involvement in the Melchiors’ claim suggests that his Honour might have characterised the claim differently had it been brought by the mother alone. This brings to bear the interesting possibility that, if the interpretation of Gleeson CJ were to prevail, a couple in the position of the Melchiors would need to establish their entitlement to recover relying upon the *Perre v Apand* criteria, while a single mother in Mrs Melchior’s position might be entitled to damages for child-raising as ordinary economic loss associated with a physical injury. Because of the inconsistency this would cause, it is submitted that Justice Kirby’s interpretation of the Melchiors’ claim is to be preferred.

VII POTENTIAL FUTURE IMPACT OF THE JUDGMENT

The High Court judgment in *Cattanach v Melchior* is of great significance, both to parents whose failed sterilisations have resulted in unwanted pregnancies, and to doctors and insurers, for whom the decision represents a further blow at a time of rising premiums and concerns over increasing liability. Indeed, some members of the High Court gave consideration to the detrimental effect upon the medical profession should the Melchiors succeed. However, McHugh and Gummow JJ and Callinan J spoke of judicial aversion to persons enjoying special privilege or exemption in litigation without a strong reason.⁶⁴ Justice Kirby stated

61 Ibid 75.

62 Ibid.

63 *Cattanach v Melchior* (2003) 199 ALR 131,172.

64 Ibid 148 (McHugh and Gummow JJ), 211 (Callinan J).

that such concerns could not be canvassed by the Court, and must be addressed to the legislature.⁶⁵

These concerns will become even more significant as claimants come forward, particularly given Justice Callinan's suggestion that, despite the modest claim made by the Melchiors, damages could notionally be recovered for the costs of tertiary education and other expenses beyond the age of majority.⁶⁶ Although claims for such damages will no doubt be subject to considerations of remoteness, the majority's characterisation of the claim as an ordinary negligence claim, rather than a claim for economic loss, means that damages of this kind will probably be allowed under normal principles of negligence. Parents in the position of the Melchiors will not need to rely upon factors such as vulnerability and reliance within the doctor–patient relationship in order to succeed in their claims.

Another argument that may surface in future claims is one that found favour with Priestley JA in *CES v Superclinics*,⁶⁷ namely, that the mother's failure to adopt the child out once born is a failure to mitigate.⁶⁸ Acting Chief Justice Kirby found this argument unconvincing, holding that it would be unreasonable to inflict upon the mother the added trauma of having to offer the child for adoption, and that 'natural sensibilities and legal obligations' imposed upon parents the responsibility of maintaining the child.⁶⁹ At first instance in the present case, Holmes J considered that a failure to adopt was not a failure to mitigate, nor did it break the chain of causation.⁷⁰ This point was not raised before the High Court, however Callinan J pointed out that the failure to offer the child for adoption, or to terminate the unwanted pregnancy, may become relevant in future cases, given changing views in society about reproductivity.⁷¹

The judgment raises interesting questions as to the characterisation of childbirth and parenthood generally within modern society, where citizens go to great lengths to limit the size of their families, and indeed, to avoid having families altogether. The majority appears to recognise this modern trend, treating the costs of raising a child born as a result of negligence as the consequential harm of an injury for which parents are entitled to compensation, just as victims of negligence ordinarily are in respect of damages that are not too remote. The minority judgments, on the other hand, rest upon the characterisation of parenthood as a blessing regardless of the parents' intention in pursuing permanent contraceptive intervention. In fact, Heydon J, similar to Lord Millett in *McFarlane*, suggests that the interests of the child in not being the subject of this kind of litigation may preclude *any* kind of recovery for wrongful birth,

65 Ibid 179–180.

66 Ibid 205–6. Chief Justice Gleeson and Justice Heydon also considered this possibility at 137 and 215 respectively.

67 (1995) 38 NSWLR 47.

68 Ibid 84–5.

69 Ibid 79.

70 *Melchior v Cattanach* (2000) 81 Aust Torts Reports ¶ 81-597, 66 630.

71 *Cattanach v Melchior* (2003) 199 ALR 131, 210.

including recovery for the mother's pain and suffering, and the expenses of childbirth.⁷²

Political rumblings following the decision indicate that Parliament may legislate to preclude couples such as the Melchiors from bringing actions to recover child-rearing costs. It will be interesting to see whether the government goes down this path, given Justice Kirby's comments that precluding recovery for child-rearing costs (as opposed to consequential damages in other actions) might be said to be discriminatory, on the basis that such responsibilities have traditionally fallen upon women.⁷³ *Cattanach v Melchior* represents a recognition in Australia of the fact that couples (and indeed single women) do not always welcome the birth of a child and, in fact, frequently take precautions to prevent that result. It remains to be seen whether the legislature will intervene to render 'wrongful birth' actions separate from ordinary negligence actions once more. On the basis of at least three of the majority judgments in *Cattanach v Melchior*, one might well enquire as to the justification for removing from one group within society a liberty enjoyed by most others: to bring an action in negligence against a tortfeasor who causes both physical harm and consequential loss to the injured party.

72 Ibid 241, 244.

73 Ibid 176.