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'Wrongful Life' and the Law

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Do we have a right not to be born? Is it better to never have been born than to have been born with catastrophic disabilities? Can life itself be an injury? Does a child have a right to sue for 'wrongful life' where a doctor fails to provide information that would have led the child's mother to terminate her pregnancy? These questions raise difficult moral, ethical and legal issues which have occupied the minds of lawyers, philosophers, scientists and legislators in recent times. They highlight the increasing intersection of law and morality in contemporary society.

On 9 May 2006, the High Court of Australia, by a 6:1 majority, rejected the wrongful life claims of two severely disabled children.¹ Alexia Harriton and Keeden Waller claimed that their parents were not advised of the risk that they could be born disabled, thereby denying the parents the opportunity to make an informed decision to terminate the pregnancy. This article examines the case brought by Alexia Harriton against Dr Paul Stephens, who misdiagnosed rubella in the first trimester of her mother's pregnancy. Alexia claimed that her mother would have had an abortion had she been made aware of the potential birth defects arising from contracting rubella while pregnant.

What is 'wrongful life'?

An action for wrongful life is a species of medical negligence. The wrongful life action is brought by or on behalf of a disabled child claiming that but for medical negligence, he or she would never have been born. It can be distinguished from wrongful birth claims on the following basis: in a wrongful life action, damages are claimed by or on behalf of the disabled *child* in respect of the damage caused by the disability; whereas in a wrongful birth action, the *parents* claim damages for the cost of raising the child. Wrongful birth actions have been recognised as a valid cause of action in Australia and can be brought irrespective of whether the child is born healthy or disabled.²

Recognition of 'wrongful life' overseas

Wrongful life has been recognised as a cause of action in the Netherlands and in Israel,³ and in some states of the United States.⁴ A claim based on contract has been allowed in France.⁵ However, wrongful life claims have been rejected in the United Kingdom,⁶ in a number of states in the United States,⁷ and also in Canada⁸ and Germany.⁹

Harriton v Stephens – a case study

1. Facts

In early August 1980, Alexia Harriton's mother suffered an acute illness with a fever and rash. She suspected she was pregnant and was concerned that she may have rubella. She was advised to have a blood test. Dr Paul Stephens, a medical practitioner, interpreted the results of the test. He confirmed that she was pregnant, but assured her that she did not have rubella.

On 19 March 1981, Alexia was born suffering catastrophic disabilities as a result of her mother's exposure to rubella in the first trimester of her pregnancy. Alexia's disabilities include blindness, deafness, mental retardation and spasticity. She lives a life of profound suffering and requires constant care and attention.

2. Claim

Alexia sued Dr Paul Stephens in the Supreme Court of New South Wales claiming compensatory damages. Her claim was brought in both tort and contract, although the latter claim was dismissed at trial.¹⁰ It was agreed by all parties that, for the purpose of determining the issues in dispute, Dr Paul Stephens was negligent in informing Alexia's mother that she did not have rubella and in failing to arrange further and more detailed blood testing. It was further agreed that a prudent medical practitioner would then have advised Alexia's mother of the high risk that a foetus which had been exposed to the rubella virus would be born with severe disabilities and that the only way to prevent a child from suffering these disabilities throughout its life would be to terminate the pregnancy. Had she been advised properly, Alexia's mother would have obtained a lawful termination of the pregnancy and Alexia would never have been born.

Alexia's claim for damages included a claim for special damages for past and future medical and care expenses, and general damages for pain and suffering. Alexia's parents did not pursue a wrongful birth claim to recover the costs of raising her. They are now unable to do so as the relevant limitation period has expired.

3. Law

The first matter requiring determination in a tort action is the question of liability on the part of the defendant. To establish liability in negligence it was necessary for Alexia to prove that:

- (1) Dr Stephens owed her a *duty of care*;
- (2) Dr Stephens *breached* that duty; and
- (3) Dr Stephen's breach of duty caused her legally recognised *damage*.¹¹

All three elements must be proven. It is not enough for a plaintiff in a negligence action to show that a defendant owed a duty of care and acted without reasonable care. The plaintiff must show legally recognised damage caused as a result of the breach of the relevant duty. Therefore, even though it was accepted, for the purpose of determining the issues in dispute, that Dr Stephens had breached any relevant duty, Alexia also needed to show that a *duty of care* was owed by Dr Stephens to avoid the kind of damage she suffered. Proof of damage requires proof that a plaintiff is left worse off as a result of the defendant's breach of duty. Thus, to prove damage, Alexia had to show that she is worse off

now than prior to Dr Stephens' breach of the alleged duty. If Dr Stephens had not been negligent, Alexia asserts that she would not exist. Therefore, she had to prove that her life with disabilities is worse than non-existence. This requires a comparison between non-existence (non-being) and disabled being.¹²

Upon proof of each of the three essential elements, a plaintiff in a negligence action will receive damages. Accordingly, the next matter for determination becomes the *quantum of damages* to be awarded. Damages are divided into special and general damages.¹³ In negligence actions, damages are awarded on the basis of the *compensatory principle*. That is, the aim of tort damages is to provide monetary compensation to put the injured plaintiff back in the position he or she would have occupied had the tort not been committed.¹⁴ In practical terms, this requires a comparison to be made between the position the plaintiff would have been in had the tort not been committed and the position the plaintiff is shown to be in at the time of trial.

4. Issues

Determination of Alexia's tort claim involved consideration of three main issues:¹⁵

- *The duty issue*. Did Dr Stephens owe Alexia a duty of care? That is, did Alexia's case fall within the duty a doctor owes to take reasonable care to avoid causing pre-natal injury to a foetus?
- *The damage issue*. Was Alexia's damage a legally cognisable form of damage and was it capable of being quantified?
- *The policy issues*. If a duty of care was owed to Alexia and her damage was capable of quantification, were there any policy considerations that should preclude the claim? Equally, were there any policy considerations that supported recognition of Alexia's claim?

5. Procedural history

The trial judge, Studdert J, of the New South Wales Supreme Court, dismissed Alexia's tort action against Dr Stephens on the ground that no cause of action was established.

- *The duty issue*. Studdert J found that the duty owed by a health care provider to an unborn child is merely a duty not to damage or injure. It did not include an obligation to give advice to the mother of an unborn child that could deprive that unborn child of the opportunity of life.¹⁶ Therefore, no relevant duty was owed. He further held that Alexia was not born disabled because of any breach of duty by Dr Stephens. Nature caused her disability.¹⁷
- *The damage issue*. His Honour found that the impossibility of determining damage and the impossibility of assessing compensatory damages supported rejection of Alexia's claim.¹⁸
- *The policy issues*. Studdert J held that weighty public policy considerations militated against recognition of wrongful life.¹⁹ In his Honour's view, recognising wrongful life would:
 - (i) erode the value of human life and undermine the perceived worthiness of those born with disabilities;
 - (ii) open the door to actions brought by anyone born with a disability regardless of the severity of their disability;

- (iii) enable children born with disabilities to sue their mothers for failing to undergo an abortion if advised of the risk of disability; and
- (iv) place unacceptable pressure on the cost of insurance premiums of medical practitioners.²⁰

On appeal, a majority of the New South Wales Court of Appeal (Spigelman CJ and Ipp JA; Mason P dissenting) dismissed Alexia's appeal.²¹ Alexia then appealed to the High Court.

6. High Court decision

By a 6:1 majority, Alexia's appeal was dismissed. The leading judgment was delivered by Crennan J (with whom Gleeson CJ, Gummow and Heydon JJ agreed). Hayne and Callinan JJ delivered shorter concurring judgments. Kirby J dissented and allowed Alexia's appeal.

(a) Majority reasoning

- *The duty issue*. In her leading judgment, Crennan J identified three major concerns in respect of the duty issue: coherency of the law; the difficulty of confining the proposed duty of care to grievously disabled persons; and the nature of the damage alleged.²²

The first two of these are dealt with below under the rubric of policy considerations. Ultimately, however, the case was decided on the basis that the damage alleged could not be proven by Alexia, could not be apprehended by the person said to be subject to the duty, and could not be apprehended or evaluated by the court. This point is explained in the following paragraph.

- *The damage issue*. Crennan J held that no legally recognisable damage (loss, damage or detriment caused by an alleged breach of duty) could be shown. In order to prove that she was worse off, Alexia had to show that non-existence was preferable to a life with disabilities.²³ However, Crennan J stated:

'There is no present field of human learning or discourse, including philosophy and theology, which would allow a person experiential access to non-existence, whether it is called pre-existence or afterlife. There is no practical possibility of a court (or jury) ever apprehending or evaluating, or receiving proof of, the actual loss or damage as claimed by the appellant. It cannot be determined in what sense Alexia Harriton's life with disabilities represents a loss, deprivation or detriment compared with non-existence.'²⁴

Thus, in respect of the compensatory principle, it was held by the majority that damages could not be assessed because in all the circumstances comparisons with able-bodied children or with a notional life without disabilities could not be made.²⁵

- *The policy issues*. Citing concerns about coherency in the law, Crennan J held that recognition of a wrongful life claim would be incompatible with other areas of law such as discrimination legislation and criminal law provisions sanctioning those who wrongfully take a life.²⁶

As to the difficulty of confining the proposed duty of care to grievously disabled persons, Crennan J was of the view that to discriminate on the basis of severity of damage would be inconsistent with other categories of negligence in which a duty of care exists. As her Honour pointed out: 'Other categories of established negligence, in which a duty of care exists, do not discriminate between those

damaged by a breach of the duty on the basis of the severity or otherwise of the damage.²⁷

Fundamentally, Crennan J's judgment in this case sought to uphold the value of human life. Her Honour said:

'[I]t is odious and repugnant to devalue the life of a disabled person by suggesting that such a person would have been better off not to have been born into a life with disabilities.'²⁸

(b) Dissenting judgment

In dissent, Kirby J espoused the view that 'wrongful life' is a misleading and unhelpful label. His Honour explained:

'The plaintiff in a wrongful life action does not maintain that his or her existence, as such, is wrongful. Nor does the plaintiff contend that his or her life should now be terminated. Rather, the "wrong" alleged is the negligence of the defendant that has directly resulted in present suffering.'²⁹

In allowing the appeal, Kirby J held that the duty relationship between Alexia and Dr Stephens was 'unremarkable' in that she sued a medical practitioner for failure to observe proper standards of care when she was clearly within his contemplation as a foetus, *in utero* of a patient seeking his advice and care. He noted that Alexia evidenced the 'salient feature' of vulnerability to harm, and that denying the existence of a duty would provide immunity to health care providers.³⁰

In response to the argument regarding the impossibility of quantifying Alexia's damage, Kirby J stated that it had no application in so far as Alexia's special damages were concerned. His Honour said:

'Because a plaintiff in a wrongful life action would not have any economic needs had the defendant exercised reasonable care, a loss in this regard is directly caused by the defendant's negligent acts and omissions.'³¹

Kirby J therefore held that special damages should be recoverable on ordinary principles. He was also in favour of awarding general damages for proved pain and suffering.³²

Implications of *Harriton v Stephens*

The majority decision of the High Court in *Harriton v Stephens* leaves Alexia Harriton without any compensation despite the admitted wrongdoing of Dr Stephens. She will continue to suffer in her profoundly disabled state requiring constant care and attention for the rest of her life. Further, by dismissing Alexia's appeal, the High Court has effectively excluded actions for wrongful life in Australia.

References

¹ *Harriton v Stephens* [2006] HCA 15; *Waller v James*; *Waller v Hoolahan* [2006] HCA 16.

² In *Cattanach v Melchior* (2003) 199 ALR 131, the High Court allowed the parents of a healthy child to recover the reasonable costs of maintaining and raising the child when the child was born following a negligent sterilisation procedure.

³ *Zeitsov v Katz* (1986) 40(2) PD 85.

⁴ *Turpin v Sortini* 182 Cal Rptr 477 (1982); *Procanik v Cillo* 478 A 2d 755 (1984).

⁵ *Perruche* case (17 November 2000), noted in (2000) *Bull Civ* No 9, 15.

⁶ *McKay v Essex Area Health Authority* [1982] QB 1166.

⁷ *Gleitman v Cosgrove* 227 A 2d 689 (1967); *Becker v Schwartz* 386 NE 2d 807 (1978); *Kassama v Magat* 792 A 2d 1102 (2002).

⁸ *Lacroix v Dominique* (2001) 202 DLR (4th) 121.

⁹ See discussion in *Harriton v Stephens* [2006] HCA 15, [237].

¹⁰ Alexia claimed she had a cause of action as a beneficiary of a con-

tract between her mother and her mother's obstetrician. This contract claim was dismissed in the trial court and not pursued in the High Court. It is not considered in this article.

¹¹ *Donoghue v Stevenson* [1932] AC 562.

¹² Herein lies the major difficulty with Alexia's case. How can one apprehend and evaluate non-existence? Non-existence is not something that a person can experience and subsequently say is preferable to existence with disabilities.

¹³ Special damages include losses which are capable of precise mathematical calculation – for example, the medical expenses incurred up to the date of verdict. General damages compensate for less tangible losses and are by their nature incapable of precise mathematical calculation. Such losses include pain and suffering, and loss of enjoyment of life.

¹⁴ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25.

¹⁵ *Harriton v Stephens* [2006] HCA 15, [41] per Kirby J.

¹⁶ *Harriton v Stephens* [2002] NSWSC 461, [21].

¹⁷ *Ibid* [25].

¹⁸ *Ibid* [33].

¹⁹ *Ibid* [71].

²⁰ *Ibid*.

²¹ *Harriton v Stephens* (2004) 59 NSWLR 694.

²² *Harriton v Stephens* [2006] HCA 15, [243].

²³ *Ibid* [252].

²⁴ *Ibid* [253].

²⁵ *Ibid* [265].

²⁶ *Ibid* [263].

²⁷ *Ibid* [261].

²⁸ *Ibid* [258].

²⁹ *Ibid* [10].

³⁰ *Ibid* [72].

³¹ *Ibid* [87].

³² *Ibid* [109].

Reflect and debate:

What is your view of 'wrongful life' claims? How do you react to the outcome in *Harriton v Stephens*? Does it accord with prevailing standards of morality? Has justice been done? What do you think of Kirby J's dissenting judgment?

