

- Facts: Doc failed to properly insert an Implanon – W became pregnant – by time she wanted to terminate, too late
- Held: although at time of unplanned pregnancy, she had no desire to have children – intended to reconsider position when she reached her 30s
- Damages: to the notional assessment of damages TJ applied a ‘contingency’ of 10%, given she may have later chose to have another child

WRONGFUL LIFE ACTIONS

[P child] may argue that [doc] is liable for the tort of wrongful life. On the facts, [doc] negligently failed to warn [mother] of the risk that [risk], leading to [P]’s injury of [disability] upon birth.

[P] may seek compensation for pain and suffering, as well as the financial costs of living with a disability, as opposed to not living at all.

NB: not valid claim in AU

- Following *Harrington; Waller*, having held that life is not an actionable damage, this is not yet a valid CoA in AU
 - Crennan J (maj): ‘a comparison between a life with disabilities and non-existence, for the purposes of proving actual damage and having a trier of fact apprehend the nature of the damage caused, is impossible’
- BUT cannot ignore Kirby J’s dissent that damages should be **awarded**, not for ‘wrongful life’ but for **proved pain and suffering**, because...
 - Crts have been willing to assign monetary values to many intangible injuries and nebulous losses
 - Long accepted that difficulties of quantification don’t preclude relief where it is accepted that P has suffered actionable damage

Harrison v Stephens; Waller James & Anor

- *Harrison*: GP failed to diagnoses P’s mother’ rubella during first trimmest of pregnancy – P born with catastrophic disabilities – P claimed her mother would’ve had abortion had she been made aware of potential birth defects
- *Waller*: P born severely disabled as result of his father’s anti-thrombin 3 deficiency being passed onto him during IVF
 - Both claimed damages from respondents for having to live this life disabled
- HC (6:1): dismissed appeal – Crennan, Gleeson, Gummow, Callinan answered no to each of the following issues:
 - **DoC**
 - For an action in wrongful life to be brought in negligence, necessary for DoC to extend beyond a duty not to injure an unborn child
 - Maj found no such DoC can exist
 - To superimpose further DoC on doc to a foetus to advise mother so that she can terminate in the interest of the foetus not being born, which may or may not be compatible with doc’s DoC, has capacity to introduce conflict and incoherent into legal principle
 - **Causation**
 - Maintained distinction b/n suing doc for causing physical damage (being the disability) + suing for causing a life of disabilities
 - **Damages**
 - WL actions carry perceived impossibility of compensation
 - Action based on retrospective comparison b/n injured existence and complete non-existence which proves to be the single greatest obstacle in succeeding
 - Comparison b/n life with disabilities and non-existence to prove actual damage and have jury apprehend this nature of damage is impossible
 - No present field of human discourse (incl. philosophy) that would allow person experiential access to non-existence

- Penalty: 12m prison sentence BUT suspended in public interest – not barred from practising

PASSIVE EUTHANASIA:
Withholding / Withdrawing Treatment

[Doc] may be liable for death of [patient] in regard to the [withholding / withdrawal] of the [treatment causing death] because that action falls within the ambit of passive euthanasia.

If this is found to be unlawful euthanasia, [doc] may be exposed to serious criminal liability in the same way as if she had taken active steps to end [patient]'s life.

1. Actus Reus

- Generally, an omission to do an act preventing death is not an AR that can give rise to liability for murder / MS
 - BUT exception lies where law imposes an obligation to act

a. Was [doc] under a duty to act? – would most doctors have taken such steps

- Under CL, [doc] is under a duty to **take reasonable steps** that other doctors would've taken **to save or prolong life**
- Consider: would other doctors have taken the same steps as [doc], or another path of action?

It is arguable that here, [doctor] [was/was not] under a duty as most doctors [would / would not] have taken such steps because...

b. Did [doc]'s act / omission unreasonably cause / hasten death?

- It is also unlawful for [doc] to do an act or omit to do an act that unreasonably causes or hastens [patient]'s death
 - Omission – failure to act when under duty
 - E.g. termination of life support – stopping is not positive act of doc, but decision to strive no longer to save him
- Ask: did the [doc]'s actions bring about [patient]'s death?

It is arguable that here, [doctor] took such unlawful steps as it is clear that [withholding/withdrawing] treatment [did / did not] bring about [patient]'s death.

2. Mens Rea

- If [doc] was under a duty to treat and s/he omitted to do so, s/he will be guilty of murder / MS if s/he had the requisite MR (*Airdale*)
- An omission to give the appropriate treatment where there is a duty to treat may be homicide if the intention was the cause the patient's death (*Instan, Stone*)

3. Exceptions (lawful excuses)

- Despite the general principle that it is unlawful for a doctor to do / omit to do any act that causes / hastens the patient's death, there are circumstances

a. A competent adult has refused treatment, either at the time or in advance

- A doc who acts upon this refusal will not be held criminally or civilly liable for doing so
- *Re T*: T consented to advance to a c-section but refused blood transfusion as she was a JW
- *Re B*: B was tetraplegic, on ventilator + requested to be turned off – HELD: B was competent and had been unlawfully treated since her request to have the ventilator turned off
- *MTPD Act*: proves that a competent properly informed adult can indicate in an ACD they do not want treatment of a particular kind

b. A substituted DM has refused on the patient's behalf [ADULTS only]