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Module 4

REPRODUCTION

4.1 Wrongful Birth

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

  - **SCCA (Majority: Kirby ACJ and Priestly JA) (Minority: Meagher JA)**
  - **FACTS:**
    - Student (still at uni) (CES) approaches doctor and claims missed period, concerned about pregnancy and if so wanted a abortion, a lack of testing, false negatives, delay, and 4 doctors later it was too late to perform an abortion safely and CES then gave birth
    - CES forced to give up her studies, relationship was strained and then severed, she then began depression and consulted with psychiatrists whose reports indicate that she never came to terms with the early arrival of her daughter
  - **BREACH:**
    - CES claimed the respondent doctors broke their duties of care in a number of ways. The acts and omissions were: the failure to conduct a full physical, urine tests, the failure to perform other tests and advice that she continue taking a contraceptive pill
    - Expert evidence of a gynaecologist given, stating the absence of discharge of a person who previously gave regular periods, should be given the consideration and perhaps preliminary diagnosis of being pregnant first (similar to the principle in *O'Shea v Sullivan*)
    - There was also an implied term in contract that CES be given reasonable care
  - **CAUSATION:**
    - Would the plaintiff have had the abortion, if she had known that she was pregnant (which she would have known if reasonable care and skill had been given in diagnosing her) with the knowledge that the abortion would have been illegal
    - onus on the defendants to prove the pregnancy would not have led plaintiff to serious danger (physically or mentally)
    - Kirby says it is really the doctor who performs the abortion to determine its lawfulness with their consideration of whether or not the pregnancy would cause the serious danger to the physical or mental health of the plaintiff, their honest belief is the one which should be in question (rather than other defendants)
  - **ABORTION AND THE CRIMINAL LAW**
    - Would it have been lawful for the plaintiff to have an abortion – NSW Crimes Act s82-84 (old provisions which still constitute the law of abortion in NSW) – go to case law to define “unlawful” (beginning with *R v Davidson* and then *R v Wald*) – Kirby in *CES* extends that the "serious danger" described in *Wald* extends post birth (mental health) (may not be solid precedent but may evidence an extension)
• DAMAGES
  - N.B. (today no damages would be awarded due to s71 CLA)
  - (Majority awarded damages, minority did not)
    Per Priestly J:
    - maintained the plaintiffs had to mitigate their loss by seeking to put their kid up for adoption and damages should be recoverable up to the date when this would have been possible - (this opinion receives criticism from judges in *Cattanach v Melchior*)
    Per Kirby J:
    – rejects the ‘every child is a blessing’ argument, parents have already assessed the circumstances and have determined it would be a burden, the birth of a child is simply how the negligence of the respondent manifests in economic consequences
    - court should not deduct an amount of damages for enjoyment the child may bring the parents, any benefits conferred on the parents were not asked for and indeed were actively sought to be avoided
    Kirby would’ve granted full damages (for upkeep
    Per Meagher J: (in dissent)
    - every child is a cause of joy to its parents: = doesn’t foster medical competence and doesn’t address CES’s wishes to avoid any such joys
    - awards no damages
  • N.B. Until CES the law relating to negligence for the birth of an unwanted child, in circumstances where what the Plaintiff was complaining of was the deprivation of a lawful termination, focused on the health of the mother during the term of the pregnancy. After CES the courts permitted the health of the mother to be considered after she had given birth to the child.
  • Case settled before going to HCA.

  o *Cattanach v Melchior* [2003] HCA 38.
    • Revisits CES, HCA analysed damages
    • 4-3 dismissed the appeal (Majority: McHugh, Gummow, Kirby and Callinan JJ) (Minority: Gleeson CJ, Hayne and Heydon JJ)
  • FACTS:
    Dr failed to advise of material risk of getting pregnant in circumstances in which he ought to have been aware that there was a higher chance of getting pregnant than originally thought. Dr Cattanach relied on the patient’s report saying that right fallopian tube was not present. Dr C tied the left fallopian tube as per instruction. But not the right as he thought wasn’t there. Plaintiff falls pregnant.
  • N.B. today no damages recoverable pursuant to s71 CLA
  • ISSUE
    HC agreed damages were recoverable not only for birth of child but also to maintain child until 18 y.o, however, arguments revolved around whether there should be an amount setoff for the benefits of having a child
    - McHugh and Gummow JJ
    • Could find no value of 'general recognition' that would deny the patient’s their normal common law remedies flowing from a proven breach of duty and they didn’t think that damages should be precluded simply due to speculation as to the psychological damages which might be occasioned to publicly labelling a child as unwanted.
    • Could find no distinction in terms of recovery between the birth of a healthy child or a disabled child.
- Kirby J

- Kirby didn’t consider the loss to be pure economic loss (uncomfortable with categorising the birth of a child in this way as Gleeson does), rather loss consequent upon direct injury to the parents. He dismissed providing no recovery because the notion that the birth of a child was a blessing was unconvincing and based on a legal fiction. He dismissed limiting recovery to birth and immediate consequences because it would sever the causal link between various outcomes of pregnancy (‘incontestably arbitrary’) and that both kinds of damage (birth and upbringing were equally foreseeable and neither too remote. He dismissed recovery of additional costs if the child was disabled or parents were disabled because it was arbitrary and unacceptable and reinforced views about disability that were contrary to contemporary Aust. values.

- Dismissed recovery offset by the benefit of having the child for same reasons as McHugh and Gummow - it requires comparison with different kinds of costs and benefits and was inconsistent with Aust. law. Thus he supported full recovery.

- Kirby deems such the birth of a child must be treated as any other kind of consequence stemming from negligence and implies (at 180) that any deviance from this norm should come from the legislature not the judiciary. (despite House of Lords in McFarlane v Tayside - which disallowed damages for upkeep of a child from wrongful birth)

- Callinan J

- Regarded overseas authorities which limited recovery to not include damages for upbringing as based on emotional and moral values rather than the law. He found there to be pure economic loss and that damages should thus be awarded.

- Gleeson CJ (dissenting)

- The law imposes obligations on the parents to support the child which are inconsistent with viewing these obligations as damage. Law shouldn’t assign a value to the creation of a parent/child relationship because:
  1. Involves treating a socially fundamental relationship as actionable damage.
  2. The liability sought to be imposed is indeterminate. There is no reason to assume financial burdens will cease at 18 for example. As well as this, loss of career prospects and opportunities are likely larger than cost of maintenance but this is not accounted for or unable to be accounted for

- Characterises the harm in a manner which makes damages difficult to quantify

- Claim for upkeep should be treated as pure economic loss, rather than loss consequential from physical injury (therefore awardable to Ms Melchior not Mr Melchior) [not completely sensitive to the emotional and physical trauma of a pregnancy]. Loss of opportunity for earning capacity (pregnancy will restrict earning capacity) will likely be larger than costs of upkeep.

- Hayne J (dissenting)

- The focus should be on the actionable wrong - failing to give correct advice. Considered House of Lords in McFarlane v Tayside. Satisfied that public policy dictated limiting the benefits and burdens to a parent. Required the parent to prove all the costs in bringin up the child and such a commodification of the child was contrary to public policy. One exception was extra costs associated with a child with special needs. Damages for birth
and confinement don’t offend public policy because those costs were costs 'which affected the parent alone'.

- Heydon J (dissenting)

- The CA found a loss in circumstances where there wasn’t a real loss. The award of damages encouraged parents to exaggerate the abilities of their child or the troubles of their children. It generated litigation which causes distress to children if they hear about it - this he found most repellent especially considering the law should be upholding the interests of the child as a paramount concern. A child was not an economic commodity and he expressed concerns about determining the length of time for which costs could be awarded for maintenance.

- Policy consideration:

  If wrongful birth claims did not exist as an avenue to litigate against negligence then there would be a gap where a doctor could be in breach of its duty and there would be no way to recover damages for a plaintiff.

  o **Civil Liability Act 2002 (NSW) ss 70-71.** (amended after *Cattanach v Melchior*)

**DAMAGES FOR THE BIRTH OF A CHILD PROVISIONS**

- **s70:**
  1. This Part applies to any claim for damages in civil proceedings for the birth of a child.
  2. This Part does not apply to any claim for damages by a child in civil proceedings for personal injury sustained by the child pre-natally or during birth.

- **s71:**
  1. The court cannot *award* damages for economic loss for any proceedings involving a claim for the birth of a child, regarding:
     1. the costs associated with rearing or maintaining the child that the claimant has incurred or will incur in the future, or
     2. any loss of earnings by the claimant while rearing the child.
  2. Subsection (1) (a) does not preclude the recovery of any additional costs associated with rearing or maintaining a child who suffers from a disability that arise by reason of the disability