Damages for raising an unplanned but healthy child

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Future claims for child-rearing costs where a healthy child is born as a result of a doctor's negligence may not be as modest as the claim discussed here.

The High Court of Australia held by a four to three majority in July this year that the parents of an unplanned but healthy child were entitled to damages not only for the costs associated with the birth, but also for raising the child until he was 18 years of age (*Cattanach v. Melchior* [2003]).[1] Dr Cattanach was found in an earlier hearing to have been negligent in a sterilisation procedure he performed on the mother and in providing advice to her (these matters were not discussed in the High Court appeal, which was limited to the question of what damages were appropriate). The amount claimed by the parents for child rearing was modest ($105,249.33) and was in addition to an award of $103,627.39 for the undisputed costs associated with the birth (which were accepted by the defendant doctor and hospital as payable and were not an issue in the appeal).

The High Court judgments cover 120 pages. The one joint judgment and the five separate judgments each give different reasons for their decision. Rather than summarising the judgments here, the arguments are set out for and against awarding compensation for raising a healthy child. (References below are to paragraphs of the judgments.[1])

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In favour – the majority judgment

The four judges in favour of awarding damages for a healthy child used the arguments listed below.

- The parents are entitled to be compensated for 'all aspects of their harm that are reasonably foreseeable and not too remote' (Kirby J, paragraph 179). There is no reason to compensate parents for costs associated with birth but not later child care costs. Both are equally foreseeable and each is directly caused by negligence; no other cases of medical negligence distinguish between immediate and long term costs (Kirby J, 161, 162).
- Although it may be argued that it is against public policy to award compensation for the birth of a healthy child, the arrival of an unplanned child is not always a blessing – as is evident from the widespread use of birth control (McHugh and Gummow JJ, 79; Kirby J, 165). Also, the 'damage' that the parents suffered was not the birth of the child; it was 'the expenditure that they have incurred or will incur in the future' (McHugh and Gummow JJ, 67).
- It may be difficult to calculate the cost of raising a child and 'countervailing considerations such as love and joy' but judges and juries are experienced in 'put[ting] money values on equally nebulous items such as pain and suffering and loss of reputation' (Kirby J, 144; Hayne J, 200; Callinan J, 297).

- Concerns have been expressed about the child's feelings when finding out about the litigation but the child will understand that the 'claim was brought simply for the economic consequences of medical negligence' and to spare the family the costs (Kirby J, 145).
- Awarding damages for raising an unplanned child who is disabled (which has been allowed in a number of earlier cases) but not for raising a healthy child would be discriminatory (McHugh and Gummow JJ, 78). The distinction would be offensive to most parents (Kirby J, 164) and 'contrary to contemporary Australian values reinforced by law' (Kirby J, 166).
- It is inappropriate to 'set off' the benefits from the birth of a healthy child against the costs (McHugh and Gummow JJ, 90). An analogy was given: 'The coal miner, 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' (McHugh and Gummow JJ, 90). (See also Kirby J, 173.)

Against – the minority judgment

The arguments used by the three judges against awarding damages for a healthy child are those listed below.

- 'The birth of a healthy child should not be regarded as a legal harm for which damages may be awarded' (Heydon J, 321). It is morally repugnant to regard a birth as 'actionable damage' (Gleeson CJ, 35, 39). Public policy forecloses any inquiry 'into the value to the parent of the new life' (Hayne J, 257, 258; his emphasis). Justice Hayne spoke at length of public policy's 'key role in the development of the common law' (223 to 242) before addressing 'public policy in this case' (243 to 247). Awarding damages for a healthy child may be regarded with 'instinctive repulsion' and be offensive to parents with a handicapped child or infertile couples who long for a child (Heydon J, 317). Such a policy would 'commodify' the child, contrary to human dignity and 'human life is…incapable of effective valuation' (Heydon J, 353). It 'cannot be sold for money' (Heydon J, 356).
- Children should not be regarded as 'unmitigated financial burdens'; the parents benefit from a healthy child too (Gleeson CJ, 34).
- Damages should be denied to protect the mental and emotional heath of the child. 'It is impossible if damages are awarded to shield a child from the unwelcome and unhappy knowledge that he or she was an unwanted and unplanned child' (Callinan J, 93). The child will inevitably find out not only that the pregnancy was unplanned but also that his parents were prepared to litigate over it. The litigation will be 'bitterly fought', 'reveal intimate details of the parents' matrimonial history and motivations', that his birth was a 'major disruption to the family' and caused [his mother] to become depressed and angry' (Heydon J, 391).
- If parents are allowed to claim damages for bringing up their child, discounted for benefits from having the child, they would be tempted to exaggerate the needs and weaknesses of their children and ignore the pleasures they derive from them (Heydon J, 339 to 347); this would undermine the child's self-esteem and self-confidence (Heydon J, 346).
- Damages would be a windfall to parents; they could spend the money on themselves. 'The award carries no guarantee that [damages] will actually be [spent on expenditures for the child] in the future' (Heydon J, 312).
- The amount of the damages for raising a child would be 'incapable of rational or fair assessment' (Gleeson CJ, 39; Hayne J, 208, 253). They would also be indeterminate and 'the law leans strongly against indeterminacy of loss' (Callinan J, 292). Why should the compensable amount stop when the child is 18 when children are dependent much longer (Gleeson CJ, 20; Heydon J, 309 to 311, 356 to 357).
- Although the Melchiors' claim was modest, it would set a precedent for other cases (Gleeson CJ, 20), and 'suggest[s] disquieting possibilities in relation to other much more ambitious claims' (Heydon J, 306), especially with the 'skills and ingenuity of lawyers who advise plaintiffs' (Heydon J, 393). 'If a Princeton education was contemplated and was feasible for the planned children, can its costs be denied in relation to the unplanned child?' (Heydon J, 306). What claims could be made by rich parents (Heydon J, 306)? Could claims be made for house extensions, larger family cars (Heydon J, 307), parents' 'diminished enjoyment of life' (Heydon J, 310)? Can siblings recover for the costs of 'diminished opportunity to spend time with their parents' (Heydon J, 310)?
- 'An award of damages for the cost of rearing a child gives rise to a disproportionality between what a doctor undertakes to do and the damages which the patient seeks to recover' (Callinan J, 292). It does not seem to be reasonable restitution. Why should Dr Cattanach pay for the child's food and for his Christmas and birthday presents – the giving of which might in future be reciprocated (Gleeson CJ, 36)? It is also a waste of public funds (Heydon J, 317).

Conclusion

Given the complex ethical issues in the case, it is not surprising that there was such a wide range of judicial opinions. Future claims may well be less modest and many people will be concerned about the long term implications of the Court's ultimate decision. These concerns may be shared by governments to such an extent that legislation will be introduced to prevent future claims for child rearing costs where a healthy but unplanned child is born as a result of a doctor's negligence.

Series Editor's comment

When this High Court judgment was first reported in the media, one common medical reaction was outrage that the negligence finding against Dr Cattanach had been upheld. However, that finding was not the subject of the Appeal. The only issue the High Court was asked to consider was whether the parents of an unwanted but healthy child should receive compensation for the costs of rearing the child. Professor Skene has summarised the arguments for and against awarding compensation in this case.

The other medical reaction was along the lines that just as medical indemnity, tort law and compensation reforms were enacted, among other things, to control the medical indemnity 'crisis', this one judgment had the capacity to tip the system back into crisis. For example, Dr Andrew Pesce, Chairman of the Australian Medical Association's Medical Professional Indemnity Task Force, was reported in the *Sydney Morning Herald* as saying that if the ruling pushed insurers to lift premiums for doctors who practise tubal ligations, some could refuse to perform them.[2] He argued that the decision reflected a pattern where doctors' liabilities were incrementally increasing over time, so that 'nobody actually knows what their obligations are'. He added, 'It raises the bar...it gives the legal profession confidence to keep doing these things in general – it just means the situation is made slightly more difficult yet again for doctors.' Focusing on medical indemnity premiums, AMA Vice-President Dr Mukesh Haikerwal was reported in *Australian Medicine* as saying that 'medical indemnity costs will take another hike in the wake of an astonishing decision in the High Court'.[3]

Will this decision impact on total medical indemnity costs? The answer has to be 'Yes', but not dramatically so. This type of claim will arise in two circumstances: delayed or missed diagnosis of pregnancy, and post-sterilisation or failed contraception pregnancies. In the first group, the 'delay' usually means diagnosis well into the second trimester, which usually means termination of the pregnancy is not an option. However, in most cases in the second group, the pregnancy is diagnosed early enough for the woman to elect, if she chooses, to have it terminated. In my experience of such claims, most women choose a termination. For example, there has been a recent spate of Implanon-failure claims but in most the claim is limited to compensation for a termination of pregnancy. In only a few cases have the couple decided to have (and keep) the child, and hence the recent High Court decision will be argued to apply to their claim.

The Melchior's claim for child rearing was said to be 'modest' ($105,249.33). If the other children in a family went to private schools, were taken on overseas holidays, and so on, an 'unwanted' child would be entitled to the same rearing. I seem to recall an estimate recently that 'average' child-rearing costs were in the order of $260,000.[4] But that's the actual total cost incurred over 18 years. The amount awarded to the Melchiors was the sum that would need to be set aside today and invested, so that the capital sum plus the investment income would meet the costs met to date and those incurred in the future until the child turns 18 years of age. Hence $100,000 set aside now may well produce the $200,000 to $250,000 required over 18 years. Time will tell what figure becomes the benchmark for such claims. However, recognising the relatively small number of unwanted pregnancy claims that include an unwanted child component (i.e. the pregnancy was not terminated and the child was not put up for adoption), the impact on total medical liability costs, and hence medical indemnity premiums, should not be substantial.

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It was not argued, for Dr Cattanach, that the Melchiors 'failed to mitigate their loss'. Repugnant though it may seem, it is arguable that the Melchiors had the option to give up the 'unwanted' child for adoption and hence they could have prevented their 'loss' (the cost of raising the child). The counter argument is that 'unplanned' does not mean 'unwanted': the pregnancy was unplanned and (allegedly) resulted from the doctor's negligence but by the time he was born, the child was not 'unwanted'. MT

References

1. *Cattanach v. Melchior* (2003) HCA 38 (16 July 2003). www.austlii.edu.au/cgi-bin/disp.pl/au/cases/eth/high%5fet/2003/38.html?query =%7e+cattanach +v+melchior
2. Banham C. Doctor must pay to raise boy. Sydney Morning Herald 2003 July 17.
3. Anon. Failed appeal fuels indemnity furore. Australian Medicine 2003; 15(14): 3.
4. Lino M. Expenditures on children by families, 2002. Washington DC: US Department of Agriculture, Center for Nutrition Policy and Promotion; 2003 May. Miscellaneous Publication No. 1528-2002.