

CATTANACH -v- MELCHIOR [2003] HCA 38 (16 July 2003)

PRELIMINARY

On 16 July 2003, the High Court upheld the Queensland Court of Appeals decision to allow a plaintiff mother's recovery of child rearing costs as a result of a failed sterilisation procedure.

By a narrow four to three majority, the full bench of the High Court ruled in favour of Mrs Melchior, by dismissing the appeal in a landmark decision causing widespread division and comment among the Australian medical and legal community.

THE FACTS

On 13 March 1992, the first defendant, Dr Cattanach attempted, unsuccessfully, to perform a tubal ligation procedure at the request of the plaintiff, Mrs Melchior.

Mrs Melchior informed Dr Cattanach of her mistaken belief that she had her right ovary and right fallopian tube removed in an operation when she was 15 years, when in fact, the right fallopian tube was still present.

During the operation, neither the right ovary or right fallopian tube were visible, due to adhesions from previous surgery, and in reliance on the information given by Mrs Melchior, Dr Cattanach performed an effective tubal ligation on the left fallopian tube only.

The plaintiff's pregnancy was discovered in November 1996, and a healthy baby boy was born in May 1997, joining two sisters to become the Melchiors third child.

Expert evidence led at the decision at first instance suggested that the most likely cause of the unlikely pregnancy was a transmigration of an ovum from the left ovary to the right fallopian tube.

The plaintiff subsequently brought proceedings for negligence against Dr Cattanach and the State of Queensland, as the Authority responsible for the Redland Hospital within which this procedure was performed.

DECISION AT FIRST INSTANCE

Mrs Melchior was successful at the first instance before Holmes J in

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the Supreme Court of Queensland in establishing that the first defendant, Dr Cattnach was negligent in not verifying through known testing procedures what he was told by the plaintiff with regards to the believed non-existence of her right ovary and right fallopian tube.

It was established that Dr Cattnach also failed to discharge his duty of care in not warning Mrs Melchior of the risks associated with the possible failure of the sterilisation procedure with reference to her circumstances, and in so doing, effectively denied her the option of electing to undertake testing to verify its believed non-existence.

On the basis of the finding of negligence, Holmes J, considered the scant Australian authority on the extent to which damages are recoverable for the birth of a healthy child, as applicable to the extent of recovery in the case before him.

In applying the pure economic loss principles canvassed in Perre -v- Apand¹, Holmes J concluded that child rearing damages were recoverable as His Honour considered there was “*no obvious justice or reasonableness in an arbitrary cutting off of damages beyond those immediately associated with the pregnancy and birth*”².

Judgment was awarded in the amount of \$103,672.39 to the first plaintiff, Mrs Melchior, \$3,000.00 to the second plaintiff, Mr Melchior for loss of consortium, and a further \$105,249.33 to both plaintiffs for the past and future costs of raising their child.

COURT OF APPEAL DECISION

On appeal before McMurdo P, Davies JA and Thomas JA, the Trial Judge’s findings with respect to negligence on the part of the first defendant were unanimously upheld.

The decision with respect to the inclusion of child rearing costs in Melchior’s recoverable damages was upheld by McMurdo P and Davies JA, with Thomas JA dissenting.

The majority, in revisiting the pure economic loss principles set out previously in the High Court decision of Perre -v- Apand³ concluded that the appellant’s negligence was a commonsense cause of the loss incurred in rearing the child.

The majority rejected the *benefit of parenthood* argument, which states that the benefits of parenthood always outweigh the burdens, financial or otherwise.

This reasoning was considered inaccurate, and even fanciful, on the basis that such an argument cannot be used to preclude an otherwise

¹ (1999) 198 CLR 180 at 193

² Melchior & Anor v Cattnach & Anor [2000] QSC 285 paragraph 60.

³ (1999) 198 CLR 180 at 193

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clear case of pure economic loss on the basis of modern Australian society, however regrettable it may be, does not universally regard children as a blessing.

Further, Davies JA expressed the view that the only moral offensiveness arising from a case such as this would come from attempts to reduce or set off the entitlement to damages by the emotional benefits gained from raising the child.

Thomas JA, dissenting, expressed his preference for the *limited damages rule*, as established in similar common law jurisdictions, which does not allow the recovery of costs of raising a child because that cost does not flow from a compensable loss, as the existence of the child is nothing but a blessing and a benefit.

The appeal was accordingly dismissed with costs.

THE HIGH COURT DECISION

Special leave to appeal was granted to both original appellants by the High Court, limited to the question of whether an Australian Court can award damages which include the cost of raising and maintaining the child from a tortiously liable medical practitioner whose negligence has failed to prevent the conception.

The majority, comprised of McHugh, Gummow JJ (in a joint judgment), Kirby J, and Callinan J dismissed the appeal, upholding the Court of Appeal's decision to allow the Melchior's to recover from the negligent respondent the cost of raising their son, Jordan.

The appellants submitted that it was wrong in legal principle to include such an amount in the respondent's damages for policy reasons, or in the alternative that the Court of Appeal erred in the calculation of these damages, essentially by not reducing them to account for the benefit gained by the existence of the child.

MAJORITY DECISION OF MCHUGH J, GUMMOW J, KIRBY J AND CALLINAN J

In a joint judgment, McHugh and Gummow JJ, dismissed the appellant's submissions that the award of child rearing costs in damages devalues a child's life, on the basis that it was not contended that the damage the respondent suffered was the parent-child relationship.

The correct perspective, in their Honours' views, was that the economic loss that would be incurred in future was the applicable damage to be

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compensated for, which is linked, but not inseparable from the parent-child relationship. Further, it was the negligence of Dr Cattanach that was wrongful and caused the respondent's economic loss, not the birth of the unplanned child. On this basis, the child rearing costs were considered recoverable.

With regards to the question of a reduction in those damages to account for the benefit derived from the child's existence, their Honours stated at such a consideration was legally irrelevant as the benefits would only be a potential set-off in the case of a mother claiming for loss of enjoyment of life as a result of the birth of the child. The *benefits* are too remote a consideration to logically set-off against recoverable economic loss.

Their Honours considered that if the action itself is allowed, which it clearly is, then recovery of consequential damages is allowed also, as policy considerations, if they were relevant at all, should logically have operated long ago to deny the whole action.

Kirby J, in his judgment, noted with frustration the persistent reluctance of Australian Courts to be honest about the fact that policy does and should affect their reasoning. Kirby J was firmly in agreement with the majority's reasoning the policy considerations, however honestly embraced or pertinent they may be, cannot be used to define otherwise arbitrary limits to their recovery of damages.

In His Honour's opinion, the logical conclusion to be reached in this case was that compensation for the foreseeable costs of child rearing be included in the respondent's damages. Any other conclusion was considered by His Honour to be a legislative prerogative, and not open to be reached through judicial reasoning.

His Honour, Callinan J considered the characterisation by the respondent's of their claim for damages as *economic loss*, as McHugh J pointed out, made consideration with respect to recovery a relatively straightforward and uncontroversial one.

His Honour also noted that the alternative of disallowing the respondent's recovery would create a new form of immunity for doctors and hospital authorities. Effectively, medical providers within this newly created zone would unfairly join other classes of defendants, for example barristers and rescuers, whose immunity has been deliberately characterised as such after extensive considerations of public policy.

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MINORITY JUDGMENT OF GLEESON CJ, HAYNE AND HAYDEN JJ

The judgment of Chief Justice Gleeson was characterised by a refusal to depart from what His Honour viewed as the clearly accepted approach in Australia, being that novel cases such as this one should be developed *incrementally and by analogy with established categories*⁴.

His Honour expressed the view that such a *departure* in this case would involve not only dealing with incoherent concepts of compensable financial harm, but more disturbingly *treating, as actionable damage, and as a matter to be regarded in exclusively financial terms, the creation of a human relationship that is socially fundamental*⁵.

Similarly, Hayne J, in allowing the appeal, was evidently influenced in his conclusion by His Honour's refusal to accept that this case could be confined to purely economic considerations, as it involved the creation of human life.

His Honour felt compelled to consider the myriad of considerations which would inevitably influence any attempt at valuation of a human life, concluding that allowing the appeal in this instance would rightly deny the respondent parents the opportunity to commodify their child's life to reach a market value figure in recoverable damages.

The judgment of Hayden J demonstrated a similar vein of distaste for the subversion of established legal and statutory duties which require the parent to act in the best interests of their child, including the acceptance of the parental obligation to financially support the child, a non-compensable norm in our society.

His Honour considered that allowing recovery in this case for child rearing costs would contradict, and thus undermine, this principle. By so doing, this would cause one to reach the conclusion that no duty of care actually existed on the part of the doctor to prevent the economic loss in the form of child rearing costs despite, as His Honour conceded, such loss was reasonably foreseeable.

EFFECT OF THE HIGH COURT DECISION

The effect of the decision in Cattanach v Melchior is a long awaited clarification of the scope of recoverable damages in cases where the negligence on the part of the medical provider

⁴ Sutherland Shire Council -v- Heyman 1985 157 CLR 424 at 481 per Brennan J

⁵ Paragraph 39 at page 12.

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has failed to prevent the birth of a child.

The majority found that this case was essentially a claim for pure economic loss based on failed sterilisation.

Unlike the Court of Appeal decision, the High Court's decision applies to all Australian States and to all contraceptive services, advice and procedures.

The result of this case has far reaching consequences for the Australian medical and insurance community, whose discontent at the decision is evidently being felt by State Governments Australia wide.

Queensland Attorney-General Rod Welford has indicated that the High Court decision in Melchior will likely be reversed by statute in this state, to provide a limitation of liability for health care providers within the sphere of contraceptive or family planning services.

The legislative commitment that has been advanced in Queensland will likely be followed in other states, with Premier Carr in New South Wales urging the Commonwealth Government to legislate nationally.

To this end, the office of Federal Attorney-General Daryl Williams is currently considering a national legislative response.

Please contact either Tim Hancock or Justin Beirne if you require any further information regarding the implications of this case.

The partners of Quinlan Miller & Treston gratefully acknowledge the research and contribution of our Nyree Harris in the preparation of this case note.