

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

The High Court of Australia has recently had reason to examine the legal concept of damages for “wrongful life”, that is a claim for damages on behalf of a severely disabled plaintiff, who alleges that negligence (usually of a medical practitioner) resulted in the loss of opportunity to terminate the pregnancy that resulted in the plaintiff’s life.

It must be noted these claims are important in that they are directed toward the disabled plaintiff itself and its loss. Undoubtedly, the parents of the disabled children, if the disability arose from a practitioner’s negligence, would have claims for the economic loss of raising a child with severe disabilities and the pain and suffering.

The High Court of Australia handed down its decisions recently in three appeals, *Harriton v Stephens* [2006] HCA 15 (*Harriton*), *Waller v James* and *Waller v Hoolahan* [2006] HCA 16 (*Waller*) which were heard consecutively. By a majority of six to one, the High Court dismissed each appeal and upheld the decisions of the Court of Appeal. The majority of the High Court held that each appellant was unable to prove the actual damages claimed which was necessary to show a duty of care was owed. Therefore, they had no right to bring a case for negligence against their mother’s doctors.

The cases involved two disabled people born with lifelong disabilities. The appellant in the case of *Harriton*, a 25 year old, was born with severe congenital disabilities including blindness, deafness, mental retardation and spasticity as a result of her mother being infected with rubella virus in the first trimester of her pregnancy. The appellant in this case alleged that if her mother had been given proper medical advice, her mother would have lawfully terminated the pregnancy and she would not have been born, and therefore not had to endure life with her disabilities.

In *Waller*, the appellant, a 5 year old, was born with a genetic AT3 deficiency. The appellant had cerebral thrombosis causing him to suffer from permanent brain damage, cerebral palsy and uncontrolled seizures. The appellant in this case sued the Respondents for causing or materially causing his life with disabilities, by failing to investigate and advise his parents about the AT3 deficiency and failing to inform his parents that it could be transmitted to offspring.

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**FOR FURTHER INFORMATION
PLEASE CONTACT**

Tim Hancock

☎ 07 3223 6411

✉ thancock@qmtlaw.com.au

Authorised by:

Christopher Campbell

Managing Partner

QUINLAN MILLER & TRESTON

GPO Box 2500

Brisbane QLD 4001

Telephone: 3223 6403

E-mail: ccampbell@qmtlaw.com.au

At first instance, in the Supreme Court of New South Wales, Studdert J posed the following two questions:

1. Does the plaintiff have a cause of action against the defendant if the defendant failed to exercise reasonable care in his management of the plaintiff's mother and but for that failure, the mother would have obtained a lawful termination of the pregnancy? and
2. If so, what categories of damages are available?

Studdert J dismissed both claims and found that the plaintiff's had no cause of action against the defendant's. His Honour held that the compensatory damages in each case were simply unassessable. In *Waller*, Studdert J concluded that the appellant's relevant disabilities were not caused by the respondents because they were genetic and in *Harriton*, Studdert J found that the only duty owed to the appellant was not to harm her and therefore she could not recover.

Each appellant appealed to the Court of Appeal of New South Wales on the basis that Studdert J erred in law in failing to conclude that the respondent's owed a duty of care to the appellants. By majority (Spigelman CJ and Ipp JA, Mason P dissenting), the Court of Appeal dismissed each appeal against the decision of Studdert J finding that the appellant's damages were not actionable.

In particular, in the Court of Appeal, Spiegelman CJ found that to 'acknowledge a duty in the present facts would be to expose health care providers to liability which was indeterminate. The threat of indeterminate liability is a sound basis for denying the existence of a duty of care'.

The main issue before the High Court of Australia (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ, Kirby J dissenting) was whether the tort of negligence is capable of providing relief for 'wrongful life'. The High Court considered whether the appellant's had a cause of action in negligence against the respondents and if such a cause of action arose, what heads of damages were available in the claims for personal injury.

Each appellant needed to show that the damages they suffered were as a result of the respondent's failure to exercise reasonable care. The appellant's claimed they had suffered damages (their life with disabilities) and they asserted that it would have been preferable if they had not been born. Further, both appellant's contended that their mother's doctor owed a duty of care to them, not just to their mother.

To have a cause of action in negligence, the appellant's were required to show the damages they suffered and that the respondent's had a duty to avoid that damage. The courts then need to be able to assess the damage, the loss, deprivation or detriment caused by the alleged breach

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of the duty. In the absence of proof of damage, the negligence claim must fail.

Crennan J gave the leading judgements and the rest of the majority agreed with her reasoning. Crennan J held that in proving actual damage, a comparison between a life with disabilities and non-existence (through termination of the pregnancy resulting in the plaintiff) is impossible. She further found that the disabilities could not represent a loss, deprivation or detriment compared with non-existence, however, physical damages such as a broken leg represented a loss, deprivation or detriment. Further, her Honour noted that 'not every claim for damage is actionable. The principles of negligence are designed to set boundaries in respect of liability'.

Crennan J noted that all human beings are valuable to the community irrespective of any disability or perceived imperfection and their disabilities are only one dimension of their humanity. She stated that 'to allow a disabled person to claim his or her own existence as actionable damage, is not only inconsistent with statutes prohibiting differential treatment of the disabled, but it is also incompatible with the law's sanction of those who wrongfully take a life'. Crennan J concluded that life with disabilities, like life, is not actionable.

The majority of the High Court held that 'the damages alleged were not legally cognisable in the sense required to found a duty of care' and therefore, the appellant's damages in each of the appeals were not actionable. Further, that it is not possible to compare each appellant's life with non-existence and that it is necessary to compare their life with that of another person. Each appellant would not have had a life free from disabilities and they cannot show that they suffered damage. Therefore, each appellant's disabilities did not form a damage.

Kirby J was the only dissenting judge and he considered that each appeal should be allowed. In his judgement in *Waller*, he considered that the actions were consistent with the general principles of negligence law and that the heads of damages ordinarily available in personal injury cases are quantifiable and may be awarded. Further, Kirby J found no reasons of legal principle or policy to preclude such a recovery. In his judgement in *Harriton*, Kirby J held that general damages for proved pain and suffering and special damages for needs created by the negligence of the medical practitioner in respect of a foetus *in utero* are recoverable in an action brought by or for that child.

Kirby J found that the respondent's owed the appellant's a duty of care and this followed the established obligation which health care providers owe to the unborn in respect of pre-natal injuries. His Honour held that imposing a duty of care on the Respondent would not have a risk of indeterminate liability and that this argument of indeterminacy should

be rejected.

Kirby J considered that 'denying the existence of wrongful life actions erects immunity around health care providers whose negligence results in a child who would not otherwise have existed, being born into a life of suffering'. Kirby J found that the law should not provide such immunity to health care providers.

As a result of their decision, there is in Australia, no ability for a severely injured plaintiff to obtain damages in respect of his or her life of disability as compared to his or her non-existence had the opportunity to terminate the pregnancy which resulted in his disabled life not been lost.

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