Two test cases for wrongful life — Harriton v Stephens; Waller v James; Waller v Hoolahan (unreported, HCA, Gleeson CJ and Gummow J, 29 April 2005, [2005] HCATrans 301) — have recently been granted leave to be heard by the High Court. These medical negligence cases involve controversial issues of reproductive freedom and abortion and have drawn much attention in Australia and indeed internationally, where they have been characterised as cases where plaintiffs seek damages for being born.

The cases are seen by their representatives as being merely a logical extension of the ordinary wrongful birth scenario, where the basic principles of negligence allow parents to sue a medical practitioner for negligence that has resulted in pregnancy and the birth of a child. These types of actions are relatively new in that they arise as a result of the advances in medicine that legally allow women a measure of reproductive freedom so that they can, to the extent that nature allows, make a decision about whether to conceive or whether to continue a pregnancy to birth.

However, in the test cases, the plaintiffs are one step further removed in that the factual issues in both cases relate to a decision that both plaintiffs’ mothers were not given the opportunity to make — that is, a decision to take steps to avoid conception or to undergo an abortion.

**Facts and issues**

In the case of Alexia Harriton, the defendant, Dr Stephens, allegedly failed to diagnose Olga Harriton’s rubella infection in the first trimester of her pregnancy. This led to a continuation of the pregnancy and the birth of Alexia. Harriton, the causation question would be whether Mrs Harriton would have elected to undergo a legal abortion if her rubella infection had been diagnosed in a timely manner. In Waller, the causation question would be whether Mrs Waller would have undergone the IVF procedure leading to the conception and implantation of Keeden. If successful in proving causation, the mothers in each case would be able to claim general damages associated with the pregnancy and birth of the child, plus the extraordinary costs associated with the child’s disability.

As far as the authors are aware, the courts have not yet decided the number of years to which these extraordinary costs would extend if the claim were brought by the parent. Certainly in Cattanach v Melchior (2003) 215 CLR 1, the claim for the costs of raising a normal healthy child extended to the age of 18 years, when the child would attain his or her majority and there would be no legal requirement for a parent to continue financial responsibility for the child.

Since it is the parent’s claim, if the child is disabled, the claim for extraordinary costs associated with caring for that disabled child might arguably extend to the end of the parent’s life — when the parent’s responsibility for care would expire — and not to the end of the child’s life. This of course would depend on a number of factors, such as whether it is both likely and reasonable that the parent of the child would continue to care for the child for the rest of the parent’s life.

The wrongful life action asks the court to decide whether, in circumstances where an action is available to the parent for a doctor’s negligence leading to the birth of a disabled child, the child can bring a claim in his or her own right, relying on the same allegations of negligence, but extending the doctor’s duty to the child in circumstances where the proper discharge of the duty would have avoided the child’s conception or birth.

Both the Harriton and Waller cases ran together with a third case, Edwards v Blomely [2002] NSWSC 461; BC200203086, before Studdert J in the NSW Supreme Court. The Court was asked to determine whether the plaintiffs had a cause of action and, if so, what category of damages was available to them. All plaintiffs were unsuccessful on the first question and so the second question was not considered.

**Judgment of Studdert J**

The reasoning of Studdert J followed on from the English case of McKay v Essex Area Health Authority [1982] QB 1166. Studdert J reasoned that the sanctity of human life prevented a
finding that a doctor owes a duty of care to an unborn child that would allow the mother the opportunity of aborting that unborn child. Additionally, Studdert J reasoned that the doctor did not cause the injuries and disabilities of the plaintiffs, but rather created a necessary precondition to those injuries and disabilities by preventing the opportunity for the plaintiffs being aborted. Finally, Studdert J found it difficult to see whether damage had occurred at all, as it would be like equating existence with non-existence.

**Judgment of NSW Court of Appeal**

The plaintiffs appealed and the matter was heard before the Court of Appeal comprising Spigelman CJ, Mason P and Ipp JA ([2004] NSWCA 93; BC200402174). Again, the plaintiffs/appellants were unsuccessful, but with Mason P dissenting.

Spigelman J held that a duty in negligence had to reflect values generally or values held widely in the community, but that here the duty asserted by the appellants did not reflect values even generally, let alone held widely. In relation to the persons whom the doctor ought reasonably to have had in contemplation, Spigelman CJ held that these were confined to the parents, especially the mother, and that any decision as to whether to continue the pregnancy or to conceive was theirs alone. Thus, the relationship between the tortfeasor and the disabled person was not sufficiently direct.

Ipp JA held that the claims required the Court to compare being born with a disability to non-existence and, because this was impossible, the claims were doomed to fail. In relation to causation, even though the doctor’s negligence was a historical cause of the harm suffered, Ipp JA held that public policy would prevent such a finding.

Mason P, however, felt that there was no conceptual difference between a wrongful birth case and the present cases and that the contention that the appellants could not demonstrate the monetary value of non-existence offended the principle of judicial agnosticism.

**International judgments**

International judgments have produced varied outcomes on the wrongful life issue, with several states in the US, together with The Netherlands and France (prior to being overturned by legislative intervention), allowing damages for wrongful life. It remains to be seen how relevant public policy will be in the reasoning of the various judges and, if the plaintiffs/appellants are successful, whether legislative intervention to limit damages — such as followed Cattanach v Melbhor — will occur.

**Practical consequences**

If the plaintiffs/appellants are successful and there is no legislative intervention, this of course does not mean that they will automatically be awarded significant damages by way of compensation. Having won only the right to commence proceedings, they will be required to fight the usual difficult battle that even seemingly straightforward medical negligence cases face.

If the plaintiffs/appellants are unsuccessful, then compensation — which can be applied for the welfare of a disabled child born in these types of scenarios — will only be permitted if the parent is inclined to bring a wrongful birth action. Such actions are not always brought by parents for reasons alluded to by Spigelman CJ and Ipp JA, in that the parents may believe litigation of this kind is unseemly or offensive to the sanctity of life, even if their view prior to the birth would have been to elect for termination of the pregnancy.

One would hope, of course, that even though these types of cases are brought in the name of the parent, that the parent would feel morally obliged to apply some part of any compensation received for the benefit of the child. Even if the child is disabled, there is no safety net in the form of investment of funds by an independent body, such as the Office of the Public Trustee, to ensure that the intended beneficiary receives the money. This is one of the major problems with wrongful life claims.

**Wrongful birth damages and a disabled child**

In terms of the prospect of claiming the costs associated with raising a child born as a result of negligence, recent amendments to civil liability legislation in NSW, SA and Queensland have extinguished a parent’s right to claim these damages in a wrongful birth action concerning a normal, healthy child.

In NSW, legislation provides that a plaintiff can only claim damages for the ‘additional costs associated with rearing or maintaining a child suffering from a disability’. The term ‘disability’ is not defined. The same situation exists in SA, where the ‘ordinary costs’ of raising a child are not claimable but extra costs involved in raising a child who is ‘mentally or physically disabled’ are permitted. The Queensland legislation is very similar. However, unlike legislation in the other States, the Civil Liability Act 2003 (Qld) is silent as to whether the right to claim for a disabled child is available.

Prior to the amendments to civil liability legislation, there was a Queensland decision dealing with a claim for a wrongful birth which resulted in the birth of a disabled child. The case of Veivers v Connolly [1995] 2 Qd R 326 involved a very similar factual scenario to the Harriton case, in so far as the plaintiff contracted rubella during the pregnancy and brought a claim for damages. In addition to general damages, the plaintiff was awarded approximately $95,000 for the costs associated with raising the disabled child.

In the UK, the English Court of Appeal allowed the costs of raising a disabled child in Parkinson v St James and Seacroft University Hospital NHS Trust [2001] 3 All ER 97 and the costs associated with raising a normal child born to a mother with a disability in Rees v Darlington Memorial Hospital NHS Trust [2003] QB 20.

All States and Territories in Australia, therefore, would appear to allow parents of disabled children to bring an action for compensation in the form of a wrongful birth claim. As
mentioned above, the question, however, is how to calculate those costs so that the claim is still the parent's claim and does not become a pseudo-claim for the child — even though, practically speaking, the claim is brought for the benefit of that disabled child.

As noted above, where the child suffers from a disability but the claim is brought by the parent, the additional costs of raising that child are arguably claimable from the date of the child's birth and for the entirety of the parent's expected lifetime. The range of damages claimable in a case involving a child with a disability is extremely variable. Such damages will depend very much upon the individual circumstances of the child and whether it is reasonable, for example, for the defendant to be financially responsible for the costs of that child remaining at home with his or her parent, as opposed to living in an institution where the parent may have minimal or less significant costs. In some cases, the outcome of allowing a disabled child to bring a wrongful life claim for the costs associated with his or her disability would be greater compared to that of a parent bringing a wrongful birth claim for the extraordinary costs associated with raising a disabled child.

Update on wrongful birth claims

Recent amendments to the civil liability legislation of each State and Territory have affected a plaintiff's entitlement to claim general damages, the extent of damages claimable and, in some cases, the prospect of claiming damages for the costs of raising a child born as a result of negligence.

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In Victoria, 7 to be entitled to an award of general damages a plaintiff must show that his or her injury can be assessed above a prescribed monetary minimum. For the financial year ending 30 June 2003, that minimum was $12,000. In July 2004, the WA District Court handed down judgment in the case of Gentile v Ferri [2004] WADC 144. The case involved the failure by the defendant (a specialist obstetrician and gynaecologist) to properly apply Filshie clips, as a result of which the plaintiff became pregnant and gave birth to her third child, a healthy son. Macknay DCJ, in assessing the plaintiff's entitlement to general damages, took into consideration the 'detriment arising from her pregnancy, the birth and its aftermath'. The plaintiff was awarded $20,000 in general damages.

In NSW, a plaintiff's entitlement to general damages in cases involving terminations or miscarriages (where the plaintiff does not suffer any related psychological or physical impairment) is much more difficult to assess,
must show that he or she has suffered a significant injury. In addition, a plaintiff will not recover general damages unless the physical impairment is assessed as exceeding 5 per cent or the psychological impairment is assessed as exceeding 10 per cent. The legislation specifically defines the loss of a foetus as a significant injury. However, it is not certain that this would include a case involving a termination or a miscarriage, and there has been no judicial determination that the authors are aware of on this point.

In Queensland, a plaintiff's injury is assessed on a scale of 0 to 100, and a formula contained within the legislation sets out the monetary amount to be awarded in accordance with the assessment made.

In SA, a plaintiff's entitlement to general damages is also assessed according to a scale, this time of between 0 and 60. The scale reflects 60 equal gradations of economic loss, ranging from a case where the injury is not significant enough for an award of general damages to a case where the injury is of the 'gravest conceivable kind'. A formula applies according to the assessment made.

In the NT, a plaintiff's injury must be assessed as equal to or greater than a 5 per cent impairment of the whole person. The legislation provides formulae to calculate a plaintiff's entitlement to general damages, depending on the assessment made.

In Tasmania, a plaintiff is not entitled to an award of general damages unless he or she can show that the injury can be assessed over a prescribed monetary minimum, which at June 2004 was $4000. Once assessed over this amount, formulae apply to calculate the amount to which a plaintiff will be entitled.

There has been no judicial determination that the authors are aware of in Queensland, SA or the NT as to whether an unplanned pregnancy would constitute an injury significant enough for an award of general damages.

In the ACT, no threshold for general damages applies, and plaintiffs are entitled to refer to previous decisions on non-economic loss in making their claim. The authors are unsure of any decisions of this kind that can be used as a guide.

For those States and Territories where the costs of raising a normal healthy child are not prohibited, Brown v Thoo is a guide to both how to calculate the costs and what is reasonable. Here, the child was born without disability and Sorby J awarded the plaintiff approximately $101,000 for the cost of raising the child to the age of 18 years. Another guide is Gentile v Ferri, where again the child was born without disability and Sorby J awarded the plaintiff approximately $101,000 for the cost of raising the child to the age of 18 years.

It is clear that in NSW, SA and Queensland, the entitlement to damages for a plaintiff who has given birth to, or fathered, a healthy child will be significantly reduced. In addition, where the plaintiff has not suffered a psychological or physical injury in conjunction with the unplanned pregnancy, the plaintiff's entitlement to damages could be assessed as minimal.

**Conclusion**

Plaintiffs' entitlements to damages in wrongful birth claims have been moulded and restricted by amendments to civil liability legislation occurring Australia wide. The amendments in relation to thresholds for general damages and the right to claim the cost of raising a child without disability significantly reduced the range of damages claimable. In the absence of judicial application of these amendments, the lawyer's task of providing advice is a particularly difficult one. It will be interesting to see how plaintiffs fare as more cases that are governed by the new legislation come before the courts.

One of the arguments against wrongful life claims is the fact that damages are still available in all Australian States and Territories for negligence resulting in the birth of a disabled child through a parental claim for wrongful birth. If no claim is pursued by the parents, at the end of the day there will be a breach of duty of care by a doctor, but no remedy available to the person who suffers damage as a result of that negligence. Any wrongful birth claim brought by the parent for a disabled child cannot put either the parent or the child in the position they would have been in but for the negligence, given the limitations on those types of actions. This result, however, is in keeping with the flavour of civil liability amendments to date.

One can argue that, to allow a disabled person to sue in his or her own right, and to determine what to sue for and how the money will be spent (under the protection of the protective commissioner or some other guardian), is surely consistent with respect for the dignity of a person and this is reflective of community values. The issue, however, is more complex than this and we await the decision and reasoning of the High Court.

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**Endnotes**

3. See Madden B 'Changes to the definition of negligence' (2003) 12(1) HLB 6-12.
7. Section 28LE, Wrongs Act 1958 (Vic).
9. Section 52, Civil Liability Act 1936 (SA).
10. Section 27, Personal Injuries (Liabilities and Damages) Act 2003 (NT).
11. Section 27, Civil Liability Act 2002 (Tas).