Wrongful birth claims
Is the damages path any clearer?

The decision in Waller v James was much anticipated by practitioners looking for judicial guidance as to the calculation of damages in wrongful birth actions. While the scope of damages was addressed, the plaintiffs failed in the claim, so these comments remain obiter and we continue to await binding authority. By Dimitra Dubrow and Erica Dobson

The entitlement to “wrongful birth” damages has been recognised in Australia since the High Court’s 2003 decision in Cattanach v Melchior (Cattanach). A wrongful birth claim is a claim for damages pursued by parents for the costs associated with the pregnancy and birth and for the costs of raising a child born as a result of negligence. Damages may also be payable for the parents’ pain and suffering.

In some states, legislation restricts the recovery of damages to the costs of raising a child with disabilities but in Victoria there is no such restriction and the costs of raising a healthy child without disability are claimable.

Wrongful birth claims can arise in a number of circumstances. They include failed sterilisation procedures, failure to diagnose pregnancy or foetal abnormalities or a maternal condition such as rubella within time to allow for a lawful termination, and failure to provide genetic counselling which would have resulted in the pregnancy not occurring or being terminated.

Although the entitlement to damages was made clear in Cattanach, the parameters of the damages available were not, and there has remained uncertainty as to what damages are recoverable in such actions.

The decision in Waller v James (Waller) was expected to provide clarity about the assessment of damages, however because the plaintiffs were unsuccessful in their claim, the comments made in relation to damages are not definitive.

PREVIOUS AUTHORITIES

The case of Cattanach involved a pregnancy and birth following a failed sterilisation procedure. The damages awarded were for the medical costs and pain and suffering associated with the unwanted pregnancy and childbirth and the costs of raising a child without disabilities until the child turned 18. Since then, the courts have consistently awarded the costs of raising a child to 18 years of age.

Notably, in the case of G and M v Armellin (Armellin) an allowance was also made for private school fees, the Court taking into account that the parents had been privately educated and that the child was already being privately educated. Though claimed, the fees for tertiary education were not allowed on the basis that it is not part of a parent’s legal responsibility to support a child through tertiary education. In Armellin, the claim was for the cost of raising one of twin children born following the transfer of two embryos in the course of IVF against the wishes and instructions of the parents that only one embryo be transferred. The Court confirmed that the recovery of damages for wrongful birth was
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not limited to cases of an unwanted pregnancy, such as arose in Cattanach, and that the birth of a child in other circumstances such as those before the Court, may result in compensable damage.7

As wrongful birth claims developed, so did an argument that the damages should be limited by the income and circumstances of the particular household. This argument posits that damages should not exceed the amount which has and would be expended on a child in that household. Another contentious issue has been whether government benefits should be deducted from any damages.

In the case of Thoo v Brown8 the Court addressed the question of how damages should be calculated. The plaintiff relied on a sociologist and researcher adopting a statistical model which also took into account the circumstances of the specific household in relation to earnings, housing, transport and education. The defendant’s argument was that the costs should be calculated on the basis of what had been spent on the child to date and a reliance on this to project into the future to determine future costs. Sorby J accepted the plaintiff’s approach as a fairer way to evaluate damages.9

It seems that courts are unlikely to award damages based purely on what would be expended on a child in that household. Rather, as referred to in Armellin, the costs of raising a child by consideration to what is reasonable rather than necessary or extravagant is likely to prevail.10

In cases involving children with disabilities, there has been much debate as to whether damages should be awarded beyond the age of 18. In an earlier decision of Veivers v Connelly11 the Court awarded damages for the cost of raising a severely disabled child for a further 30 years. The argument for claims extending to the joint life expectancy of the child and their parents is based on the practical reality that many parents of children with a disability will continue to provide and care for them beyond the age of legal majority.

Where the cause of action is based on failure to diagnose or warn of a foetal abnormality which would have given rise to a termination, the cost of raising a child without disability would ordinarily be deducted on the basis that, while this pregnancy would have been terminated, another would have followed and the costs of raising a child would have been incurred regardless of the negligent care or advice.

FACTS OF WALLER V JAMES

In Waller the plaintiffs, Lawrence and Deborah Waller, sought medical advice from Dr Christopher James, a gynaecologist who specialised in infertility. Their doctor noted in the referral that Mr Waller suffered from a thrombotic condition known as AT3 deficiency, which causes the blood to clot in the arteries and veins. Mr Waller also disclosed the condition to Dr James and advised that he was taking Warfarin. Dr James arranged for fertility testing and recommended that the couple proceed with IVF treatment to increase the chances of falling pregnant. No genetic testing for the AT3 deficiency gene was undertaken and no advice was provided regarding the risk of passing the genetic defect on to the Wallers’ children. The defendant did, however, refer the plaintiffs for genetic counselling and to an IVF clinic, such referral constituted writing the contact details of the genetic counsellor, and rejected the plaintiffs’ argument that it was not a proper referral which conveyed that the matter was not of significance.12

Notwithstanding that the Court found that Dr James had acted in accordance with his duty of care, and that they would not have proceeded to have Keeden if properly advised,13 it was not satisfied that the plaintiffs had established that Keeden’s AT3 deficiency caused or materially contributed to the stroke and subsequent brain damage.14

In addition, the Court noted that the harm suffered by the plaintiffs, namely, the costs associated with raising a severely disabled child as well as the plaintiffs’ psychological harm, was caused by the stroke. It was therefore necessary for the plaintiffs to prove that the stroke was caused by Keeden’s AT3 deficiency in order to succeed in their claim, because the AT3 deficiency in itself did not cause any harm.15

Justice Hislop concluded that the medical evidence before him was such that it was impossible to make a finding that the genetic condition had caused or materially contributed to the stroke. At most, there were possible risk factors identified for CSVT, one of which was AT3 deficiency.16 He therefore concluded that it would be unfair to hold the defendant responsible for the effects of the stroke in relation to his failure to adequately advise in relation to AT3 deficiency and further that the damage claimed was too remote.17
**ASSESSMENT OF DAMAGES**

Because the plaintiffs’ claim failed on causation, the Court’s comments on how damages should be assessed are not binding. However, Justice Hislop provided his views on how damages should be assessed in wrongful birth claims.

In relation to the period for which damages are to be awarded, the Court confirmed that wrongful birth claims should be limited to the period of time in which there is a legal responsibility to care for the child, i.e. 18 years, notwithstanding that the costs of raising a disabled child would likely extend beyond that period and the parents would continue to have a moral obligation to care for the disabled child. Justice Hislop accepted that the issue is still open and will depend on policy considerations if claims are to be considered beyond the period of legal responsibility.

The Court also found that in wrongful birth cases where the plaintiff parents wanted a child, the costs of raising a healthy child should be deducted from any damages awarded for the additional losses which arose out of the defendant’s negligence, such as in this case where the child suffers from a disability.

As the plaintiffs did not succeed in their claim, it was unnecessary to determine whether damages awards should be offset by government benefits that the plaintiffs and Keeden would be entitled to. However the Court noted that “to the extent Keeden is supported by the community, then the plaintiffs’ burdens are reduced and the economic consequences are ameliorated. On any rational view, to compensate the plaintiffs on the assumption that Keeden would not receive any such benefits would result in over-compensation and would not be reasonable.”

In relation to care, the Court considered that it would be preferable to compensate the plaintiffs for gratuitous care provided on a Griffith v Kerkemeyer type basis as opposed to awarding loss of wages to the plaintiffs for the time needed to provide care to Keeden instead of working, but that the latter would be more appropriate given the policy considerations associated with the former.

Another issue in claims involving severely disabled children is future paid care. In this case, His Honour considered that there was no evidence to suggest that the plaintiffs would cease to be involved in Keeden’s care and as such, a claim for 24-hour paid care was unreasonable. In addition, the Court found that the plaintiffs’ claim did not provide evidence that they would be able to fund such care in the absence of a substantial verdict.

The defendant submitted that the Court should only award damages for future paid care with consideration of what the plaintiffs could actually afford. The Court doubted whether this submission would be adhered to in determining damages in cases such as this.

**CONCLUSION**

Waller has provided practitioners with some guidance in relation to how damages will be assessed in wrongful birth claims but there is still policy considerations which require further clarification in a binding decision. It remains to be seen how an appellate court might determine the question of damages, particularly whether damages should be limited to the first 18 years regardless of any disability suffered by the child, but it seems likely that the general law of offsets will apply to protect against over compensation in these claims.

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2. In Victoria, recovery of pain and suffering damages are limited to those who can establish that they have suffered a significant injury in accordance with Part VBA of the Wrongs Act 1958 (Vic).
3. Legislation in New South Wales, Queensland and South Australia restricts the recovery of wrongful birth damages to the costs of raising children with a disability. See ss70 and 71, Civil Liability Act 2002 (NSW), ss49A and 49B, Civil Liability Act 2003 (Qld) and ss67, Civil Liability Act 1936 (SA).
6. [2009] ACTCA 6 and [2008] ACTSC 68. The plaintiffs were not successful at first instance but Bennett J assessed and made findings in relation to damages. The Court of Appeal allowed the plaintiffs’ appeal and damages as assessed by Bennett J were awarded.
9. Walsh, Anna and Meagher, Carly, A guide to general damages for “wrongful birth” cases, (2004) 13(5) HLB. The methodology adopted by the sociologist, Dr Paul Henman, has been adopted in a number of cases including G and M v Armellin (2008) ACTSC 68 at [220] and [221].
10. [2008] ACTSC 68 at [228] and [229].
14. Note 13 above, at [148]-[150].
16. Note 13 above, at [238], [260].
17. Note 13 above, at [239].
19. Note 13 above, at [267].
20. Note 13 above, at [278].
22. Note 13 above, at [292].
23. Note 13 above, at [326].
24. Note 13 above, at [335].
25. Note 13 above, at [340]. See also article on the Waller decision and damages, Madden, B and Cockburn, T, “Assessment of damages in wrongful birth cases – Waller v James”, Australian Civil Liability, June 2013, 6.