Actions for Wrongful Birth

by
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English common law traditionally resisted a claim for damages in circumstances where what was complained of was the birth of a healthy child following a failed sterilization. Such claims had been dismissed as being contrary to public policy.

Recent cases in England and Australia have allowed such claims (commonly referred to as "wrongful birth" cases). The latest in the line of Australian decisions considering legal issues in reproduction is *Cattanach v Melchior.*[1] A decision as remarkable for its conclusions as it is for the misconceptions it has raised in the popular press. *Cattanach v Melchior* is important for two reasons. Firstly, it emphasises the growing unease and contradictions inherent in an application of the rules governing pure economic loss post-*Perre v Apand Ltd*.[2] Secondly, it places Australian law on remoteness "out of kilter" with the majority of the common law world.

This article presents a detailed analysis of *Cattanach v Melchior,* together with a comparison of relevant English cases which have reached contrary conclusions to the Australian decision. It is hoped that this article may be of assistance to Malaysian lawyers confronting the issue of "wrongful birth".

Facts:

Mrs Melchior was referred by her general practitioner to the defendant, a specialist gynaecologist and obstetrician. In the course of her consultations with defendant, the plaintiff explained that she wished to have a sterilization procedure performed. She also told him that, when she was fifteen, she had had an appendectomy. The plaintiff's mother had informed her that the surgeon had removed not only her appendix, but also her right fallopian tube.

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[1] *Cattanach v Melchior* (2003) 199 ALR 131
[2] (1999) 198 CLR 180

In March 1992 the defendant performed a laparoscopic tubal ligation procedure on the plaintiff. The procedure involving the application of a filshie clip to the plaintiff's left fallopian tube.

Four years after the procedure Mrs Melchior fell pregnant and subsequently gave birth to a healthy child.

Originally the plaintiff and her husband commenced proceedings on the basis that the defendant must have incorrectly applied the filshie clip. At the birth of Mrs Melchior's child, the filshie clip was noted to be intact. It transpired that Mrs Melchior had become pregnant because her right fallopian tube was also intact, though obscured by scar tissue and convoluted. An ovum had transmigrated from her left ovary to her right fallopian tube, rendering her fertile.

Mrs Melchior and her husband sued alleging both breach of contract and negligence. The former cause of action could not be maintained as the defendant had carried out the sterilization procedure in the course of his duties in a public hospital. The particulars of negligence pleaded were a failure to warn of the risk of pregnancy, a failure to seek the hospital records of the appendectomy performed on Mrs Melchior in 1967 and a failure to perform a hystereosalpingogram on Mrs Melchior. A hystereosalpingogram may have indicated the presence of two functioning fallopian tubes.

Decision at First Instance

At first instance[3] Justice Holmes dismissed the last two particulars of negligence. She described as "impracticable" the notion that a doctor be required to "cross-check" fully the medical history of every patient. The hystereosalpingogram was described as painful and not always entirely accurate.

Given, however, that the defendant could not be entirely sure that the plaintiff's right fallopian tube had been removed, the trial Judge determined

[3] (2001) Aust Torts Reports 81-597

that the defendant ought to have warned the plaintiff, that, in the absence of proof of the removal of the fallopian tube, the risk of her falling pregnant was of the order of magnitude of 10 times more than that which existed in a "normal" sterilization procedure. He should then have advised her to undergo a hystereosalpingogram.

As has been noted elsewhere[4], the mere failure to advise of a risk is insufficient to sound in damages. The plaintiff needs to prove causation in that, had she been advised of the risk, she would have taken steps to avoid the risk. In the present case, Justice Holmes was satisfied that, had Mrs Melchior been advised of the increased risk of pregnancy, she would have elected to have the hystereosalpingogram, the presence of the intact right fallopian tube would have been detected and appropriate precautions against conception would have been taken. The trial judge awarded damages for birth and confinement and costs of raising the child until the child turned 18.

Decision of the Court of Appeal

The Queensland Court of Appeal[5] dismissed unanimously the appeal as to liability. The court was, however, divided as to the recoverability of the claim for maintenance of the child. While the Court unanimously agreed with the trial Judge's characterization of the loss suffered by the Melchiors as pure economic loss, only President McMurdo and Justice Davies opined that the costs of maintaining the child, until the child turned 18, were recoverable.

The defendant submitted there was a distinction to be made between economic loss occasioned by the pregnancy and birth, and economic loss occasioned by the child's existence in the family. If damages were recoverable at all for economic loss, the defendant submitted they were limited to the former.

The defendants were granted leave to appeal to the High Court, but only

[4] See generally Devereux, J.A. "Throwing The Baby Out With The Bathwater: An Antipodean Perspective On Claims For Failed Sterilisation" (2002) 2 No. 1 Commonwealth law Journal 141. The article in the Commonwealth Law Journal was written prior to the hearing of the High Court action in *Cattanach v Melchior.*

[5] [2001] QCA 246

as to the question of whether the costs of maintaining the child until 18 were recoverable.

Relevant Antecedents

There were few prior Australian cases on point. Of the three directly relevant, two were from Queensland. In *Dahl v Purnell*[6], the District Court of Queensland allowed a claim for the birth of a child following a failed vasectomy. Although damages were awarded for the costs of maintaining the child until it reached majority, the amount awarded was discounted to account for the benefits to the parents of having a child. In *Veivers v Connolly*[7] the Queensland Supreme Court awarded damages following the birth of child who was severely disabled. The particulars of negligence were that the medical practitioner had failed to diagnose the mother's rubella.

Then, in *CES v Superclinics (Australia) Pty Ltd*[8], damages were awarded to a woman who gave birth to a healthy child in circumstances where she had been deprived of the opportunity to seek an abortion. The first pregnancy test conducted by the defendants wrongly indicated she was not pregnant. The second test, which indicated she was pregnant, was wrongly communicated to he plaintiff as indicating she was not pregnant.

The New South Wales Court of Appeal, by majority, permitted damages to be awarded – but not for the costs of maintaining the child until it turned 18. Justice Meagher, dissenting, refused the award of damages at all because the woman, by failing to adopt out the child, had failed to mitigate her loss. President Kirby would have been happy to award the plaintiff damages until the child turned 18, pointing out that the widespread use of contraception put paid to the myth that the birth of a child was universally regarded as a blessing. In an effort to produce a workable outcome for the plaintiff, however, he reluctantly agreed with Priestley J.A. that the award of damages be confined to the costs of birth and confinement.

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[6] (1993) 15 QLR 33
[7] [1995] 2 QdR 326
[8] (1995) 38 NSWLR 47

An important antecedent was the House of Lords decision in *MacFarlane v Tayside Health Board*.[9] The case is authority for the view that, in England and Scotland, damages are recoverable for the birth of a child following a failed sterilization, but not for the upkeep of the child until majority.

Applying the principles applicable to negligence claims in England, the House of Lords found that it would not be "fair, just and reasonable" to allow recovery for costs of maintaining the child. Lords Slynn, Steyn and Clyde were not persuaded that there were compelling public policy arguments against allowing the recovery of damages for birth. Lord Hope rejected recourse to public policy arguments, saying public policy was more properly the province of the legislature.

In dissent, Lord Millett suggested that allowing parents the benefits of parenthood while avoiding the costs would be "subversive of the mores of society" – accordingly he rejected all elements of the parents claim including damages for birth and upbringing of the child.

The High Court Decision in *Cattanach v Melchior*

The High Court in *Cattanch v Melchior*, by a majority of 4-3, dismissed the defendants appeal. Young provides a good overview of the High Court's decision.[10] The summary of the various judgments in Cattanach below is modelled on Young's approach, modified and expanded for present purposes.

Justices McHugh and Gummow

Justices McHugh and Gummow considered whether, consistent with the approach of the High Court in *Brodie v Singleton Shire Council*[11], an immunity could be found for doctors against damages for maintaining the child. Their Honours could find no compelling reason to grant such an advantage in litigation to doctors.[12]

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[9] [2000] 2 AC 59
[10] Young, R. "Cattanach v Melchior" (2004) 11 Journal of Law and Medicine 153
[11] (2001) 206 CLR 512
[12] Note 1 at 153

As a matter of policy, the law recognized underlying values respecting the importance of life and nurturing of infant children. Their Honours could find no values or "general recognition"[13] which would deny the plaintiffs their normal common law remedies flowing from a proven breach of duty. In particular, viewing the birth of a child as always a blessing denied the reality of widespread community use of contraception[14], and their Honours did not think that damages should be precluded simply due to speculation as to the psychological damage which might be occasioned to publicly labelling a child as unwanted.[15] Their Honours could find no distinction in terms of recovery between the birth of a healthy child or a disabled child.[16]

The defendants had argued that, were recovery for costs of upbringing permitted, set-off should be made for the benefits of having children. Their Honours held that no such set-off should be allowed – since the benefits of having children were of a different class of damages than the cost of raising the children. The analogy provided was that of a coal miner "forced to retire because of injury, [who] 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."[17]

Justice Kirby

Justice Kirby was not convinced that the loss could properly be characterized as pure economic loss – rather it was loss consequent upon direct injury to the parents.[18]

He considered that, in the present circumstances, there were five possible answers to the question of recoverability of damages:[19]

1. No recovery permitted if a healthy child was born.

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[13] Note 1 at 153
[14] Note 1 at 154
[15] Note 1 at 154
[16] Note 1 at 154
[17] Note 1 at 156-157
[18] Note 1 at 180
[19] Note 1 at 168

2. Recovery limited to birth and immediate circumstances
3. Recovery of additional costs if the child is disabled or if the parents are disabled
4. Recovery permitted but offset by the benefits of the birth of a child
5. Full recovery

His Honour dismissed the first approach since the notion that the birth of child was a blessing, he stated, was unconvincing and based on a legal fiction.[20] The second approach his Honour thought involved severing the causal link between various outcomes of pregnancy which was "incontestably arbitrary." [21] Both kinds of damage (birth and upbringing) he thought were equally foreseeable as a consequence of negligence. Each is directly caused. Neither is too remote".[22]

Adopting the third approach, his Honour noted, would not "stick in the gullet of Lord Steyn's hypothetical underground traveller"[23] [the updated "man on the Clapham omnibus] – but was arbitrary and therefore unacceptable.[24] It also reinforced views about disability that are "contrary to contemporary Australian values reinforced by the law". [25]

The fourth approach involved a comparison of different types of costs and benefits and was inconsistent with Australian law, except as it acknowledged "any proved economic benefits" derived by the parents from the birth of the child.[26]

His Honour chose the last outcome as being that most consistent with the ordinary principles of negligence.[27]

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[20] Note 1 at 169-174
[21] Note 1 at 175
[22] Note 1 at 175
[23] Note 1 at 176
[24] Note 1 at 176
[25] Note 1 at 177
[26] Note 1 at 179
[27] Note 1 at 180

Justice Callinan

Justice Callinan, after reviewing relevant overseas authorities which limited recovery so as to not include damages for upbringing of a child, noted that such authorities were based on "emotional and moral values" rather than the law.[28] Although finding the assessment of damages in the present case to be distasteful, His Honour noted the normal principles of the law required that it be done.[29] The matter was one which involved pure economic loss and recovery of damages should be permitted.[30]

Chief Justice Gleeson

The Chief Justice, dissenting, noted that the immediate cause of the damage was the normal process of human reproduction resulting in a parent-child relationship.[31] The Chief Justice noted that the law imposed obligations on parents to support the child – which was inconsistent with viewing such obligations as damage. [32]

The Chief Justice stated the law should not assign a value to the creation of such a relationship. Assessing the plaintiffs claim involved indeterminacy both as to quantum and potential claimants.[33] The Chief Justice also questioned why the cut-off for damages should be the child's majority. In the present circumstances, why could the defendant not also be liable for the costs of tertiary education, or the child's wedding?[34]

The Chief Justice concluded that the defendant's claim "displays all the features that have contributed to the law's reluctance to impose a duty of care to avoid causing loss. The liability sought to be imposed is indeterminate. It is difficult to relate coherently to other rules of common law and statute. It is based upon a concept of financial harm that is imprecise…it is incapable of rational or fair assessment. Furthermore, it involves treating, as actionable

[28] Note 1 at 209.
[29] Note 1 at 211
[30] Note 1 at 213
[31] Note 1 at 133
[32] Note 1 at 143
[33] Note 1 at 144
[34] Note 1 at 141

damage, and as a matter to be regarded in exclusively financial terms, the creation of a human relationship that is socially fundamental."[35]

Justice Hayne

Justice Hayne, also in dissent, stated that the focus in the present case ought to always be on the actionable wrong – the failure by the doctor to give the correct advice.[36] Labelling the claim as involving questions of reproductive autonomy, he noted, distracted from, and clouded, the real issue.[37]

His Honour started from the view that all damages which were directly caused by the breach of duty were prima facie recoverable.[38] The emphasis was then on arguments which suggested that a particular class of damages was not recoverable.[39] His Honour considered a number of such arguments[40] - "the child as blessing argument", "the set-off for benefits of the child", "the impossible prediction as to the future of the child", "the award of damages could damage the child" "the relevance of the motive for seeking sterilization". Taking into account all these arguments, and the decision of the House of Lords in *MacFarlane v Tayside*, His Honour expressed himself satisfied that public policy dictated limiting the award of damages. This was because the birth of a child involved both benefits and burdens to a parent. Allowing a parent to claim for the economic consequences of bringing-up a child involved requiring the parent to prove all the costs involved, inevitably ending-up in a conclusion that bringing up the child "was more trouble than it was worth".[41] Such a commodification of the child was contrary to public policy. The one exception his Honour permitted was extra costs associated with a child with special needs.[42]

Damages for birth and confinement did not offend public policy because

[35] Note 1 at 144
[36] Note 1 at 182
[37] Note 1 at 183
[38] Note 1 at 183
[39] Note 1 at 183
[40] Note 1 at 184-188
[41] Note 1 at 200
[42] Note 1 at 201

those costs were costs "which affected the parent alone".[43] In utilising public policy arguments to reach his conclusions, His Honour cited with approval Oliver Wendell Holmes' idea that public policy is "the secret root from which the law draws all the juices of life".[44]

Justice Heydon

Justice Heydon, dissenting, suggested that there were three reasons why the Court of Appeal had erred.[45] The reasoning of the Court of Appeal presupposed a loss in circumstances where what has occurred was not really a loss. This was because "since the law assumes that human life has unique value and brings into existence corresponding duties of a unique kind, the impact of new life in a family is incapable of estimation in money terms". [46]Secondly, that an award of damages encouraged parents to exaggerate the abilities of their children or the troubles of their children, which was "entirely alien to the assumptions and goals of the legal system".[47] Finally, that an award of damages generated litigation which causes distress to children if they hear about the litigation.[48] The latter Justice Heydon found most repellent, especially given the general thrust of the law to safeguard the best interests of the child as a paramount concern.

Justice Heydon described the policy of the law to treat the birth of a child as valuable *per se*, not because it conferred blessings or economic advantages, but because it was life. A child was not a commodity capable of recompense.[49]

Like the Chief Justice, Justice Heydon expressed concerns about determining the exact length of time for which a child could expect to be maintained.[50] He also pointed out that, since the common law recognizes no caps on damages awards, the possibility existed for a very large damages

[43] Note 1 at 201
[44] Note 1 at 191
[45] Note 1 at 227
[46] Note 1 at 227
[47] Note 1 at 227
[48] Note 1 at 227
[49] Note 1 at 228-231
[50] Note 1 at 215

claim in respect of a child born into a rich family.[51]

Further Thoughts:

It is hard not to agree with Seymour's comment that "reading *Cattanach v Melchior* is a dispiriting experience….Too often the analysis is cumbersome and discursive, with the result that it is frequently difficult to discover the precise basis for the conclusions reached." [52]

Part of the problem would seem to be that the majority and minority judgments approach the same issue using a different analysis. On the one hand, there is reliance upon what Seymour describes as the "personal views and the perceptions of desirable public policy." This arises from the analysis of the issue as determining the monetary value of Jordan Melchior. On the other, again, Seymour's description, is "a search for firm legal principle" arising from the question of the forseeability (or remoteness) of damages for the upkeep of a child.

The minority judges, while strongly rejecting the commodification of children, seem perfectly prepared to do so when what is involved is not a healthy child, but a disabled child. There is less logic here than sympathy for the plight of those who must shoulder the burden of a sick child.[53] Understandable perhaps, but hardly consistent with the logical development of principle.

This is not to assert that the position in other common law countries is any better. Kirby J describes the unfolding of the law in England as exhibiting a mixture of "exhausted principle and obscure pragmatism". [54]

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[51] Note 1 at 214-215

[52] Seymour, J. "*Cattanch v Melchior*: Legal Principles and Public Policy" (2003) Torts Law Journal 14. Similar frustration is expressed by Vranken. M. "Damages for Wrongful Birth – The Australian Perspective" (2003) International Journal of Family Law 210 "… unfortunately, an apparent inability, whether deliberate or not, among the current members of the High Court of Australia to act as team players makes for rather user-unfriendly case law. Six separate judgments, totaling some 165 pages and 605 footnotes, are testing even for the most dedicated of law students or practitioners".

[53] Seymour above note 55

[54] Quoting with approval the view expressed in Hoyano, LCH "Misconceptions about Wrongful Conception" (2002) Modern Law Review 883 at 905.

English courts, having denied recovery for the upkeep of a healthy child (again rejecting commodification of the child) now permit damages for the birth of a disabled child[55] and, somewhat curiously, for the birth of a healthy child to a disabled mother.[56] Drawing the line between someone who has a healthy child (for which no recovery is possible) and someone with an unhealthy child, or who herself is suffering a disability (for whom recovery is possible) is deceptively easy. Waller LJ in Rees asks:

> Assume the mother with four children [who had] no support from husband, mother or siblings, and then compare her with the person who is disabled but who has a husband, siblings and a mother all willing to help. I think ordinary people would feel uncomfortable …that it was simply disability which has made a difference.

The analysis is further advanced by Priaulx. She notes:

> Parallels can be drawn. The diminished ability to care for a child need not derive from disability alone. Lone parenthood, coupled with a lack of social and familial support, typifies an analogous situation where individuals may honestly believe themselves to be diminished in their capacity to care for a child….Courts may well find themselves unable to identify an appropriate demarcation between "suffering a disability" and "suffering hardship" in one's ability to care for a child.[57]

An alternative danger has been highlighted by Weir. He argues that inferior courts in England may well "illustrate their antipathy" to the strictures of the *McFarlane* decision by finding disabilities, where there are, in fact, none.[58]

In Australia, at least one court has been able to find lawful grounds for an abortion in circumstances where continuance of the pregnancy did not pose a threat to the physical mental health of the mother – but where mental health

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[55] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] 2 FLR 401; Groom v Selby [2002] Lloyds Med Rep Med 1.
[56] *Rees v Darlington Memorial Hospital NHS Trust* [2002] 1 FLR 799
[57] Priaulx, N. "Parental Disability and Wrongful Conception" (2003) Family Law Journal 117
[58] Weir, T. *Rees v Darlington Memorial Hospital* [2002] 6 Edinburgh Law Review 248

problems following the birth of the child did do. [59] What then, of the situation in England where a healthy woman seeks sterilization, the sterilization is negligently performed, and the healthy mother gives birth to a healthy child – but the woman subsequently develops health problems as a result of childbirth? Are damages recoverable for wrongful birth? Douglas[60] and Prialux[61] think so.

The stage has now been reached where, unlike the majority of jurisdictions in the US [62], and in England and Scotland, Australian courts have determined that damages are recoverable for the maintenance of an unwanted child, until that child turns 18. In choosing to depart from the common law world, it might have been thought that the High Court would clearly delineate the public policy considerations which make Australian parents (and their children) different from the rest of the common law world. Yet there is precious little in the decision which points to such differences. The High Court identifies no peculiarities of Australian society, its values or aspirations, which make it a "distinct society" and deserving of different rules.

It is, of course, true that Australian law, adopting as it does the tests of liability for pure economic loss in *Perre v Apand*, has already departed from the "fair, just and reasonable" test of the English Courts. But have we really gained anything useful? There would seem to be such a plurality of approaches to economic loss in *Perre v Apand* that it is hard to surmise any more than that the test is ultimately so flexible so as to allow the law on economic loss to be the modern day equivalent of "the length of the Chancellor's foot".

All bar one of the High Court Judges found that *Melchiors* claim was one of pure economic loss (and thus was subject to the tests in *Perre v Apand*)

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[59] *CES v Superclinics*

[60] Douglas, G. [2002] Family Law 348. Priaulx note 56.

[61] Priaulx above, note 60

[62] The cases are reviewed by McMurdo P in the Court of Appeal's decision in *Melchior v Cattanach* note 7. *Rieck v Medical Protective Co of Fort Wayne Ind* 219 NW 2d 242 (1974); *Terrell v Garcia* 496 SW 2d'124 (1974); *Wilbur v Kerr* 628 SW 2d 568 (1982); *Cockrum v Baumgartner* 447 NE 2d 385 (1983); *McKernan v Aasheim* 687 P 2d 850 (1984); *Girdley v Coates* 825 SW 2d 295 (1992). Opposing cases are *Custudio v Baker* 27 ALR 3d 884 (1967); *Sherlock v Stillwater Clinic* 260 NW 2d 190 (1977); *Ochs v Borrelli* 187 Conn 253 (1982); *Burke v Rivo* 551 NE 2d 1 (1990); *Lovelace Medical Centre v Mendez* 805 P 2d 603 (1991).

– yet each of them came to such a different conclusion as to how the claim should be determined.

It has been stated elsewhere[63] that it is impossible not to be struck by McMurdo P's comments that there are obvious differences between the *Melchior*'s case and *Perre v Apand*. The doctor and patient relationship is quite different to the commercial relationship between the parties in the *Perre* case. Moreover, in *Melchior*, unlike *Perre*, there was no question that the defendants owed the plaintiffs a duty of care; by the time the dispute reached the High Court, the question in *Melchior* was whether the damages concerned were too remote.

There remains a live question whether the loss suffered in *Melchior* was truly pure economic loss.[64] The loss to Mr. Melchior may well be described in this way. But surely the loss to Mrs Melchior was consequential upon a direct injury to her? If this is right, then the determination of her claim should proceed along normal remoteness lines, and Mr. Melchior's claim should have proceeded along the *Perre v Apand* lines. It is untidy, perhaps, that this should be so. The situation becomes further complicated by the possibility of sequential claims being made, in circumstances where the parents of the unwanted child are divorced. As Thomas JA pointed out, in these circumstances the father's claim might be the cost of maintenance he might otherwise be obliged to pay, and the mother's claim might be for the balance of the child's needs. [65]

The question of set-off for the benefits of having a child is likely to prove troublesome. While it is true that some of the benefits of having a child are difficult to quantify (such as companionship), others are more readily identifiable. Social security benefits routinely accrue to parents – why is it not possible to account for these? Justices McHugh and Gummow's coal miner analogy bears

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[63] Note 8 at 150

[64] The point has been made elsewhere see Devereux, J.A. *Melchior v Cattanch* (2001) 8 Journal of Legal Medicine 248. See also Lavery, J "Rearing Expenses after Unwanted Pregnancy: Australia versus the United Kingdom" (2000) 9(2) Australian Health Law Bulletin 19 and McGivern, B. "Tortious Liability for (Selected) Genetic Harm: Exploring the Arguments" (2002) 10 Torts Law Journal 3 at note 68.

[65] Note 8 at 149

further thought. It might be true that a parent who gives birth to an unwanted child might enjoy some collateral benefits (similar to the coal miner's sitting in the sun reading his favourite newspaper) – but social security benefits, for one, would seem to be directly correlative and not collateral. The same could presumably be said of those families where children maintain their parents in their dotage – a matter referred to by the Chief Justice.

The issue of set-off for the benefits of having a child has been considered in U.S. cases where, somewhat unsurprisingly perhaps, similar problems have been encountered in trying to decide whether such set-offs should be permitted.[66] The issue there arises out of section 920 of the Restatement (Second) of Torts - "the benefit rule":

> When the defendant's tortious conduct has caused harm to the plaintiff or his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of the damages, to the extent that this is equitable.

In the restatement, it is important to note that the interest of the plaintiff which has been harmed must be carefully identified – for it is only benefits relating to that interest for which "set-off" is allowed. This "same interest" limitation prevents damages resulting from the injury to one particular interest from being diminished by showing that some other interest has been benefited. Within the Australian context, a strict application of the benefit rule would suggest, for example, that social security benefits, or maintenance in old age, are pecuniary benefits which are the same interest as that which has been damaged by the failed sterilization. Companionship, on this analysis, would not be able to be off set.

Some US Courts have been willing to construe widely, the interest affected by the birth of an unwanted child. So, in *Troppi v Scarf*[67], where pregnancy followed a pharmacist supplying tranquillizers instead of contraceptive pills,

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[66] The American cases on set-off and mitigation of loss summarized in this note are discussed by Milsteen, below note 78

[67] 31 Mich App 240 (1971)

the Court permitted offset of all aspects of childbirth, by non-pecuniary benefits that might accumulate to the parents from the birth of a child. A similar approach to *Troppi*'s case is *Sherlock v Stillwater*[68].

To the extent to which the benefit rule has been allowed to offset pecuniary benefits with non-pecuniary ones the Illinois Appellate Court opined that this had been a misapplication of the rule (*Cockrum v Baumgartner*[69]). The rewards of parenthood were described as emotional in nature and thus different from the plaintiff's financial interests. Similarly, this is the approach of the Court in *Custodio v Bauer*.[70]

Focussing on the interest affected, in order to assess whether set-off should be permitted for benefits is interesting, conceptually, for another reason. Being precise about exactly what interests are affected may provide the solution for navigating the maze of damages or not in the failed sterilization debate.

Reading the English, American and Australian cases leads to the conclusion that the focus is very much on the "child as damage". Thus expressed, views as to the extent of recoverability of damage will always be sharply divided; dependent upon the factors identified above by Seymour.

If the focus is changed slightly, the outcome becomes less contentious.[71] So in *Coleman v Garrison*[72] as well as *Bushman v Burns*[73]; the cause of action was expressed to be wrongful pregnancy or wrongful conception. Viewed in this way, the focus is squarely upon pregnancy, rather than birth, as the wrong for which redress is sought. Damages for the costs of confinement, loss of income etc. are readily recoverable – but not so the costs of maintaining the child which may be considered too remote.

An alternative, and perhaps more realistic way to view the matter, is to

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[68] 260 NW (2d) 169 (1977)
[69] 99 Ill App (3d) 271 (1981)
[70] 251 Cal. App (2d) 303 (1967)
[71] See'generally on this point Milsteen below note 78
[72] 327 A. (2d) 757 (1974)
[73] 83 Mich App 453 (1978)

start by acknowledging that unwillingly falling pregnant may be viewed as disastrous by different people, for different reasons. That is to say, for different people, different interests will be affected. For some, the reason not to have another child may be based on a well grounded fear of harm to self; for example, for a woman who has been warned that falling pregnant again could be disastrous to her health. For others, the reason may be economic – the inability to properly provide for "another mouth to feed". For still others there may be social or work related reasons it may be inappropriate to fall pregnant. A dancer in a ballet company may not, for example, be permitted to continue dancing while pregnant.

Since the law of torts is directed toward the compensation of individuals….for losses which they have suffered in respect of all their legally recognised interests, a determination of the specific interests the parents sought to protect through sterilization would necessarily relate to the appropriateness of damages to be awarded….Only after the motivation, "the why", has been discovered may the courts properly determine "how much".[74]

Milsteen[75] suggests there are three primary motivations for avoiding pregnancy. These he describes as The Therapeutic Motivation, The Eugenic Motivation and The Socio-Economic Motivation. Milsteen suggests that the courts, when assessing claims for wrongful birth, should focus on "the motivation" for avoiding pregnancy in the first place.

In the therapeutic motivation, avoidance of pregnancy is sought to protect the physical or mental health of the parents. Milsteen's example is the case of *Custodio v Bauer*[76], where the female concerned was advised to undergo a sterilization procedure to avoid aggravating an existing bladder and kidney condition. Viewed in this way the Court was able to note:

The purpose of the operation was to save the wife from the hazards

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[74] Prosser, W. Handbook on the Law of Torts West Publishing, 4th ed, 1971 at para 1. quoted in Milsteen below note 65.

[75] Milsteen, J.L. "Recovery Childrearing Expenses in Wrongful Birth Cases: A Motivational Analysis" (1983) 32 Emory Law Journal 1167

[76] 251 Cal App (2d) 303 (1967)

> to her life which were incident to childbirth. It was not the alleged purpose to save the expense incidental to the pregnancy and delivery….The expenses alleged are incidental to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation.[77]

Identifying the damage caused as limited to the health to the mother has the effect of limiting the off-set which might be thought to accrue from the benefit of having a child. Since having the child is unlikely to have any benefit to the health of the mother, no off-set would be permitted.

The Eugenic Motivation focuses on a couple deciding not to have children to avoid the known possibility of having a disabled child. If this is the motivation for having a sterilization, and that sterilization fails, then damages should be awarded for the costs of birth and confinement plus the extraordinary costs of raising a disabled child –medication, prostheses, care etc. Again, set-off would not be available as companionship is different from economic costs.

The Economic Motivation focuses on one of two motivations. A "pure" economic motivation – where the parents simply cannot afford to have more children; or a "socio-economic" motivation – where parents choose not to have any more children, for fear that it would impact upon their desired lifestyle and activities. In either case, the interest damaged is having the child and damages should be awarded accordingly.

Milsteen's argument is appealing, but leaves unanswered some questions. What, for example, of the parents for whom the eugenic motivation is the key motivation in having a sterilization – which fails. The mother then gives birth to a child – who is perfectly healthy. Would such a woman be denied damages on the basis that her interests were limited to avoiding the birth of an *unhealthy* child, which was not infringed by the birth of a *healthy* child?

Despite the possible shortcomings of Milsteen's analysis, it is clear that at least some judges are keen to analyse the loss occasioned following a failed

[77] 251 Cal App (2d) at 318

sterilisation in terms of the particular interests of the plaintiff which have been affected. Thus, McMurdo P in *Melchior* notes that the loss for which the Melchiors claimed was precisely the type of harm which, by undergoing the sterilization, they were keen to avoid. Similarly, Priaulx, commenting on the decision of the court in Rees notes:

An interesting aspect of the judgment in Rees is the critical emphasis placed upon the claimant's communication of her purpose in undergoing the operation as being relevant to the issue of the surgeon's assumption of responsibility…[78]

American courts have carefully considered the argument that, by failing to adopt out her child, or to seek a lawful abortion, the plaintiff in a wrongful birth action has failed to mitigate her loss – and that damages should be reduced accordingly. In America, this issue is referred to as "the unavoidable consequences doctrine", the clearest statement of which appears in section 918 of the Restatement (Second) of Torts "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort".

American courts have been scathing in their commentary on the suggestion that a woman should be forced to have an abortion, in order to mitigate her loss. In *Troppi v Scarf*[79] the Court noted three reasons against forcing a woman to have an abortion or adopt out her child. Firstly, the Court noted there was an interest in permitting a child to be raised by his natural parents. Secondly there was the mother's right to keep the child unless she was proven unfit. Finally there was the possibility of psychological harm that might result to a child from being adopted out.

In *Rivera v New York*[80] the Court held that requiring a woman to have an abortion would "constitute an invasion of privacy of the grossest and most pernicious kind." In *Mason v Western Pennsylvania Hospital*[81] Justice Brosky

[78] Priaulx above note 60
[79] 31 Mich App 240 (1971)
[80] 94 Misc. (2d) 157 (1978)
[81] 268 Pa Super 354 (1981)

suggests that requiring a woman to undergo an abortion "carries a pungent odour of moral depravity." Echoes of the American courts findings can be seen in *CES v Superclinics*.[82] It is a pity the High Court did not make more of the opportunity presented to it in *Cattanch*'s case to either affirm the view expressed in *CES* – or to distance itself from such a view.

In permitting recovery of damages for maintenance of a child, the arbitrariness of the age of majority as the cut-off point for maintenance requires further thought. As the Chief Justice points out, there are foreseeable obligations on a parent which may survive the child's majority – university education or marriage, for example. Why should these damages be regarded as too remote?

That the decision in *Melchior* was settled by the narrowest of majorities suggests the matter is one which may subsequently be reconsidered. Already the Queensland legislature has acted to prevent a repeat of such a damages award.[83] Developments in other common law jurisdictions are eagerly awaited.

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[82] Above note 7
[83] Justice and Other Legislation Amendment Act 2003 (Qld)