

M+R Reporter



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M+R News In Brief

Inside this Issue:

**Better off dead?
Pages 1-3**

**Draftspersons liable
to subsequent
owners
Pages 3-4**

Philip Rowell has been invited to act as a presenter at the LexisNexis Mealey's International Asbestos Conference, scheduled to take place in London in November this year. Philip will present the topic *Problems Down Under—Australia's Growing Asbestos Crisis*.



**Philip Rowell
Partner**

BETTER OFF DEAD?

**Harriton -v- Stephens
Waller -v- James**

**High Court of Australia
9 May 2006**

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In *Cattanach -v- Melchior [2003]*, the High Court held that damages were recoverable for "wrongful birth" claims. In other words, the Court held that parents of an unplanned child, born following the negligence of a medical practitioner, could claim damages for the cost of raising that child. (Please note that subsequent legislation in New South Wales and Queensland has severely curtailed wrongful birth claims).

This month we discuss two recent High Court decisions that deal with "wrongful life" claims. The appellants in both proceedings were born with significant disabilities. They sought compensation for their disabilities and associated pain and suffering, because the medical negligence of the respondents meant that their parents lost the opportunity to terminate the pregnancy that concluded with their birth. In both cases, the Court was asked to decide whether these children had a legally recognised claim for "wrongful life" and how compensation for such a claim should be assessed.

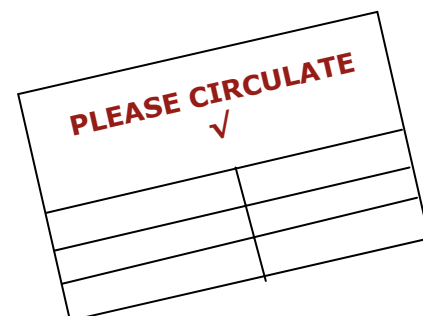
In *Harriton's* case, Alexia Harriton, now 25 years old, brought a claim through her litigation tutor against Dr. Paul Stephens alleging he was negligent in failing to diagnose rubella in her pregnant mother. Consequently, he did not advise her mother about the significant risks of contracting rubella during pregnancy and her mother lost the opportunity to terminate the pregnancy. Harriton was born with blindness, deafness, mental retardation and spasticity. She requires constant supervision and care for the rest of her life.

In *Waller's* case, Keeden Waller, now six years old, brought a claim through his litigation tutor against his mother's two obstetricians and an IVF clinic. Waller was conceived through the IVF process. His father had a blood disorder, AT3, that causes his blood to clot. His father treated his condition with a daily dose of anticoagulants.

Shortly after his birth Waller was diagnosed with cerebral thrombosis. This resulted in severe brain damage, cerebral palsy and uncontrolled seizures.

Scope of Services:

Professional indemnity
Directors' + officers'
cover
Public + products
liability
Trade + transport
+ aviation
General insurance
Self insurance
Construction risk
Medical defence
Contractual +
commercial litigation
Employment contracts
Policy drafting +
interpretation
Employment law
Equal opportunity
Discrimination law
OH+S



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Both appeals to the High Court proceeded on an agreed set of facts. The cause of Waller's injuries was never established, however, it was agreed that his father's AT3 was susceptible to being transferred to his children and that had his parents been properly advised they would have deferred IVF until methods of detecting AT3 in embryos was available.

Both Harriton and Waller lost their cases at first instance. They ran parallel appeals to the New South Wales Court of Appeal. They lost those appeals. They then ran parallel appeals to the High Court.

The High Court

The High Court by majority, with Kirby J. dissenting, dismissed Harriton's and Waller's appeals and held that wrongful life claims were not actionable. Both appeals were dismissed for similar reasons. We limit our discussion to the reasons given in *Harriton's case*.

The leading judgment given by Crennan J. was supported by Gleeson CJ, Gummow and Heydon JJ. Hayne and Callinan JJ. delivered separate judgments.

The majority were troubled by the following issues:

- + Stephens' duty to Harriton was a duty not to injure her and she was not born disabled because of any breach of that duty by him.
- + The impossibility of assessing damages. Any assessment would involve comparing Harriton's current position with her position, had the pregnancy been terminated.
- + The existence of public policy considerations against recognising "*wrongful life*" claims.

In her judgment, Crennan J. looked at the issue on a world scale drawing on instances from numerous jurisdictions. She referred to the English Court of Appeal decision in *Mackay -v- Essex Area Health Authority* which unanimously decided to reject the claim of a child affected by rubella. Stephenson LJ. discussed the public policy issue triggered by wrongful life claims: -

".....it would mean that regarding the life of a handicapped child was not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving."

She held that an essential element of the tort of negligence is proof of the existence of compensable damage. In order to find damage that gives rise to compensation, it would have to be established that non-existence was preferable to life with disabilities. Further, she held it was not the medical practitioner's fault that Harriton was injured by the rubella infection. Once that had occurred, it was not possible for her to enjoy life free from disability, so it follows that he caused no harm.

"... negligence requires proof of fault and harm ..."

Hayne J., in a separate judgment, added that negligence requires proof of fault and harm. Deciding whether a Plaintiff has suffered harm requires some comparison of the appellant's position before and after the alleged negligence. As she has never had and can never have any life other than the life she has, with the disability she has, she cannot show that she has suffered loss.

Callinan J. adopted a logical approach. He held that as a matter of logic, Harriton cannot be heard to say that she should never have been brought into existence as, in that event, she would be unable to say anything at all.

"... in a wrongful life action, it is not the life which the Plaintiff claims is wrongful, but rather their suffering ..."

Kirby J. delivered a strong dissenting judgment in both appeals. He held that in both cases the medical practitioners owed the appellants a duty of care as both were vulnerable to harm. The appellants could foreseeably be injured if the medical practitioners failed to exercise due care.

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Denying the existence of this duty could be seen as giving an immunity to health care providers which he believed the common law should resist.

He held there was danger in labelling the claim as a wrongful life claim. He explained that in a wrongful life action, it is not the life which the Plaintiff claims is wrongful, but rather their suffering in that life.

If the claim was viewed in this context, it would not offend public policy considerations as the common law readily recognises that compensation should be paid when negligence results in suffering.

Overview

In many respects, the claims were novel and gave rise to ethical, moral and public policy considerations. Generally speaking, wrongful life claims seek damages that are not recoverable by parents in wrongful birth claims and this perhaps explains why the appellants persisted with their claims. However, these High Court decisions are quite emphatic in holding that wrongful life claims have no place in the common law. Following moves taken by Queensland and NSW to reduce the application of *Cattanch's case*, it is unlikely that any legislature will intervene to reverse these recent decisions.



**By Peter O'Connor
Winter Clerk**

DRAFTSPERSONS LIABLE TO SUBSEQUENT OWNERS

**Lawley & Baines -v- Terrace Designs Pty. Ltd.
& Ors.**

**Victorian Civil and Administrative Tribunal
11 July 2006**

In the last edition of The Reporter, I discussed the *Taitipanui decision*, in which a building surveyor was held to owe a duty of care to subsequent purchasers of a domestic residence. I commented that this represented a significant extension of the

duty of care for building surveyors and speculated that future developments may extend liabilities for other building professionals.

On 11 July 2006, the same VCAT Senior Member responsible for the *Taitipanui decision*, Roger Young, held that a draftsman retained to design residential units owed a duty of care to subsequent owners for building defects that arise from negligent design.

While this decision raises numerous interesting legal issues, this case note will focus on the VCAT's findings in relation to the architectural draftsman.

LEGAL PROCEEDINGS

The VCAT decision arises from two separate legal proceedings. The first proceeding concerned 57 Evansdale Road, Hawthorn. The second related to the adjoining property. Both dwellings were designed by the draftsman and built by the same builder. They formed a duplex and shared a party wall. Both dwellings suffered from common building defects. The owners of both dwellings were subsequent purchasers.

***"... the draftsman was not
involved during the construction
phase of the project ..."***

VCAT proceedings were brought against the architectural draftsman, the builder, the builder's director and the warranty insurer. The soil engineer and building surveyor were subsequently joined to the proceedings by the builder.

The draftsman was retained by the builder to prepare planning permit drawings and later to prepare construction drawings. The draftsman was not involved during the construction phase of the project.

The owners alleged that the draftsman owed them a duty of care. They alleged that the construction drawings were deficient and resulted in substandard dwellings being constructed by the builder.

DECISION

Senior Member Young, held that the draftsman owed a duty of care to the subsequent owners. He found that an important consideration was whether the draftsman had complied with his statutory obligation under the *Building Act 1993* and the *Building Regulations 1994*, in particular regulation 15.2 which requires that: -

"A registered building practitioner must –

- (a) Perform his or her work as a building practitioner in a competent manner and to a professional standard....."*

He held that this statutory obligation overrode the terms of a draftsman's retainer.

"... The Tribunal appears to have equated the draftsman's role ... to that of a building surveyor..."

Young drew comfort from the statutory scheme requiring building practitioners to carry professional indemnity insurance. This suggested that the legislature sought to protect subsequent owners from the negligence of building professionals. He held that subsequent owners were vulnerable to risk of injury and damage by reason of a draftsman's negligence. It was reasonably foreseeable that subsequent owners would suffer loss if a draftsman's work was not completed in a professional and competent matter.

OVERVIEW

The principles of this decision apply equally to all building professionals involved in the design of residential buildings including architects and engineers.

It is clear that the Tribunal has drawn heavily on the decision in *Moorabool Shire Council & Anor. -v- Taitipani & Anor.* [2006] VSCA 30. The Tribunal appears to have equated the draftsman's role in the construction process to that of a building surveyor. This is a significant finding given that a building surveyor is a creature of statute and has

mandatory statutory obligations prior to and throughout the construction phase of a project.

This decision suggests that draftsmen may have responsibilities outside their retainer.

I suspect this is not the last word on this decision. Watch this space for further developments.



**By Adrian Sella
Senior Associate**

UPCOMING EVENTS

On 27 September 2006, we will be hosting a cocktail function for our clients in Sydney. The function will be held at Café Sydney.

On 19 November 2006, we will be travelling to the Yarra Valley for a country race meeting. The day will be shared with our Melbourne clients.

Interesting Thought

Every morning in Africa a gazelle wakes up. It knows it must run faster than the fastest lion or it will be killed. Every morning a lion wakes up. It knows it must outrun the slowest gazelle or it will starve to death. It doesn't matter whether you're a lion or a gazelle: when the sun comes up, you'd better be running.

Courtesy of Tom Hafey, AFL Legend



Tom Hafey and Patrick Tuohey (Lawyer) at the M+R professional staff dinner 2006

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