

# Compensation for the cost of raising children born as a result of medical negligence

## Facts

Mr and Mrs M. wanted no further children. Mrs M. saw a gynaecologist, Dr C., for sterilisation. She told him that, at age 15, she had had her right ovary and fallopian tube removed. Dr C. operated to clip the left fallopian tube to sterilise her. He checked also the right side and it appeared to him that the information she had given was correct. Some five years after the operation, however, she bore another child. It proved that the right fallopian tube was still present, and that an ovum had migrated from the left ovary to the right tube.

## Trial

Mr and Mrs M. sued the doctor, and the State of Queensland (which ran the hospital) for negligence. The trial court found that there had been no negligence in performing the operation. It held the doctor negligent, however, in failing to warn Mrs M. that he could not be certain that the right tube was absent, and that if it was still present, then the chance of her being sterile was reduced, and that she could have a test to establish whether that tube was there or not.

The trial court awarded compensation for: the physical injury to Mrs M. in that she underwent pregnancy and childbirth, with attendant suffering and some resulting injuries; the impairment to the marital relationship as a result of Mrs M.'s injury; and the cost of raising the child to age 18. This result was confirmed on appeal to the Queensland Court of Appeal.

## Appeal

The doctor appealed to the High Court. The appeal was only about whether Mr and Mrs M. were entitled to the cost of raising the child.

## Decision

By a 4:3 majority, the Court held that Mr and Mrs M. were entitled to the cost of raising the child. The majority reasoned that this type of loss was just like any other economic loss flowing from a physical injury (in this case, the unwanted pregnancy) and was allowable on ordinary negligence principles. That is, once the duty of care, the breach of duty and the causation of injury were established, the result followed inevitably.

The minority would have refused to allow this type of damage. Gleeson CJ analysed the case as one of purely economic loss (as distinct from economic loss consequential on injury). Recovery for such losses is more restricted and he did not think it extended to the type of loss in the present case. He also thought it impossible for the law to weigh the

cost of raising the child against the benefit of having a healthy and beloved addition to the family. Hayne J thought that the law should not uphold an argument that, in essence, a healthy child is more trouble and expense to the parents than he is worth as a human being. Similarly, Heydon J thought that a human life should not be considered a loss known to the law.

## KATHERINE O'NEILL

**What price a child? The High Court's decision in *Cattanach v Melchior* (17 July 2003) generated intense interest and much controversy.**

**Deputy PM, John Anderson, described the decision as "repugnant", and the Prime Minister called on the States to change the law to prevent similar claims.**

**Katherine O'Neill, from the Policy and Legislation Section, Attorney General's Department in South Australia, provides a useful summary of this case and some of the issues it raises.**

## Significance

This is the first Australian case to hold that parents can claim from a negligent party the ordinary cost of raising a healthy child born as a result of negligence.<sup>1</sup> This case means that, potentially, whenever medical negligence leads to unwanted pregnancy, the negligent doctor or hospital can be required to pay the cost of raising the child, at least to age 18. Note that of course the parents must prove negligence – there would be no claim if a sterilisation or other procedure failed by chance. Note also that the principle is not confined to sterilisation procedures.

## Other jurisdictions

In the United Kingdom, the House of Lords has ruled that damages are not available for the cost of raising a healthy child who results from an unwanted pregnancy. The case of *McFarlane v Tayside Health Board* [2000] AC 59 was similar to the *Melchior* case, except that it was the

husband who had undergone the sterilisation procedure. The doctor's negligence lay in incorrectly telling the husband that the vasectomy had been successful and he need not use contraception. The House of Lords found that although the birth of a healthy child occasions cost to the family, it is not to be treated as a compensable loss.

In the United States, there are divergent views but the weight of authority is also against such damages. It is clearly allowed in only two States. Similarly, in Canada, the weight of judicial decisions is against recovery (for example, in the 1996 case of *Kealey v Berezowski* a couple who had a third child when a tubal ligation failed because the clip was incorrectly applied, were refused damages for the cost of raising the child).

In South Africa, such recovery has been allowed in *Mukheiber v Raath* (1999). There, a doctor incorrectly told a married couple that he had sterilised the wife, when in fact no sterilisation had been done. The couple relied on this advice and pregnancy resulted. The court awarded confinement costs and maintenance of the child.

No direct comparison can be made with New Zealand, which has a no-fault accident compensation scheme.

### Future

Australian State and Territory Parliaments have the power to change the law as the High Court has declared it. The Queensland Government immediately announced its intention to do so. The intentions of other Australian governments are not yet known.

### Issues

Assuming that this decision remains the law in at least some Australian States and Territories, one question will be what expenses will be allowed. On general principles, it seems likely that courts will allow not just the bare minimum cost of essential items, but also the reasonable costs of raising the child in accordance with the family's lifestyle, values and socio-economic status. In particular, it might consider what expenses have been incurred in raising the other children already in the family. Thus, at least in some cases, expenses such as private schooling, private health cover, private tuition, overseas holidays and such may be allowable. The question will be what costs it would be reasonable for these parents to incur in raising the child. The courts may look at expert evidence about the general cost of raising a child, but will also consider the circumstances of the particular family.

Another question is whether parents will be able to claim expenses likely to be incurred after the child reaches age 18. As Gleeson CJ noted, in many families, parents continue to contribute to the children's support in early adulthood, including paying for tertiary education, travel or a wedding. In principle, it is difficult to distinguish these costs from costs incurred before the child turns 18.

Another issue may be whether, in addition to the actual cost of raising the child, parents will be able to claim for the loss of opportunity to earn income during periods of absence from the workforce to care for the child.

Such cases are likely to be few in number, but in each case the amount at stake could be substantial. It can therefore be expected that the common law in this area will develop slowly and, perhaps, be hard fought.

### Endnote

- Hitherto, the courts have only allowed claims for the extra cost of the care and treatment of a child who is born with a disability as a result of medical negligence. For instance, in the 1995 Queensland case of *Veivers v Connelly*, a doctor failed to diagnose rubella in early pregnancy. The mother lost the opportunity to abort the pregnancy, and the child was born with disabilities. The court awarded money for the cost of the special care needed as a result of the disabilities, but not for the ordinary cost of raising the child. Similarly in the UK, in the 2000 case of *Rand v East Dorset Health Authority*, an antenatal screening failed to detect that the foetus had Down's Syndrome. The mother said that, had she known in time, she would have sought a termination of pregnancy. The court gave damages for the financial costs occasioned by the disability.

## Contemporary issues in family research seminars

In 2003, the Australian Institute of Family Studies is continuing its series of seminars presenting research on national and international issues related to the family. The seminars, designed to promote a forum for discussion and debate, are free and open to the public.

Please note that this year seminars will be held at 11.30 (usually on the third Thursday of each month) in the Seminar Room on the ground floor of the Institute, at 300 Queen Street, Melbourne 3000. They run from one to one and a half hours.

Seminar coordinators this year are Institute researchers *Kelly Hand* and *Jennifer Renda*. People wishing to attend a particular seminar should phone *Grace Soriano* at the Australian Institute of Family Studies. Phone (03) 9214 7888.

### SEMINAR PROGRAM

■ 21 AUGUST 2003

#### **Cohabitation and mental health: Is there a link?**

**David de Vaus**

Associate Professor, Department of Sociology, La Trobe University and Senior Research Advisor, Australian Institute of Family Studies

*Facilitator – Ruth Weston, Australian Institute of Family Studies*

■ 18 SEPTEMBER 2003

#### **Living in low income households in Scotland: Experiences of caring and providing**

**Dr Kathryn Backett-Milburn**

Research Unit in Health, Behaviour and Change and Co-Director, Centre for Research on Families and Relationships, University of Edinburgh.

*Facilitator – David de Vaus, Australian Institute of Family Studies*

■ 16 OCTOBER 2003

#### **Grandparenting in divorced families: A qualitative research study**

**Dr Neil Ferguson**

Research Associate, Cardiff Law School  
Cardiff University, Wales

*Facilitator – Bruce Smyth, Australian Institute of Family Studies*

■ 6 NOVEMBER 2003

#### **Does age-of-entry matter in infants' transition to child care?**

**Dr C. Dissanayake and Dr H. Skouteris**

School of Psychological Science, La Trobe University

*Facilitator – Lisa da Silva, Australian Institute of Family Studies*

■ 4 DECEMBER 2003

#### **How do we know who children live with and why does it matter? Findings from the United States and Australia**

**Dr Peter Brandon**

Department of Sociology  
University of Massachusetts, US

Visitor to the Demography and Sociology Program, ANU, 2003

*Facilitator – Matthew Gray, Australian Institute of Family Studies*

### READERS' LETTERS WELCOMED

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