'Wrongful life' claims

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On 9 May 2006, the High Court of Australia dismissed 'wrongful life' claims brought on behalf of two patients.[1] One of the cases involved the alleged negligent failure by a general practitioner to diagnose prenatal rubella and to advise the mother of the risks to the fetus associated with rubella. This article outlines the case and discusses the nature of 'wrongful life' and 'wrongful birth' claims.

Case history

In early August 1980, Mrs Olga Harriton experienced a fever and noticed a rash. Suspecting she might be pregnant, she saw a general practitioner on 13 August 1980. She told the GP that she thought she was pregnant and that she was concerned that her illness was rubella. The GP ordered blood tests and recorded the following notes: 'Urgent, ?pregn, ?recent rubella contact'.

On 21 August 1980, the GP received the following results from the pathology company:

'Rubella – 30

If no recent contact or rubella-like rash, further contact with this virus is unlikely to produce congenital abnormalities.

Preg test – positive'.

Mrs Harriton saw another GP at the practice on 22 August 1980. The GP advised her that she was pregnant but reassured her that her symptoms were not caused by the rubella virus. The GP referred the patient to an obstetrician for the management of her pregnancy. The referral letter stated:

'Herewith Mrs Olga Harriton. LMP 15/7/80. +ve preg test. She had ?viral illness 2/52 ago and rubella titre 30. I have reassured her that she has no problems. Could you please see and continue. Paul. PS: Morning sickness. Debendox PRN.'

Alexia Harriton was born on 19 March 1981, suffering from significant physical and intellectual disabilities; the consequence of exposure to the rubella virus in utero. She requires constant supervision and care for the rest of her life.

Alexia's parents did not commence legal proceedings in their own names. By reason of the expiry of the relevant limitation period, they were precluded from doing so. Alexia subsequently commenced legal proceedings against the GP alleging 'wrongful life'.

In her claim against the GP, Alexia alleged a negligent failure to diagnose prenatal rubella and failure to advise Mrs Harriton of the high risk that a fetus exposed to the rubella virus would be profoundly disabled. Mrs Harriton asserted that had she received this advice, she would have terminated the pregnancy.

In February 2002, the Supreme Court of New South Wales considered the following questions:

- If the GP had failed to exercise reasonable care in his management of Mrs Harriton and, but for that failure she would have obtained a termination of the pregnancy, and as a consequence Alexia would not have been born, does Alexia have a cause of action against the GP?
- If so, what categories of damages are available?[2]

The Court was not actually asked to consider if the GP had been negligent. The facts were agreed between the parties only for the purpose of determining the legal questions. The Court answered the first question in the negative and therefore the second question did not need to be decided. The Court found that while a GP owes a duty of care to an unborn child to take reasonable care to avoid causing that child physical injuries in utero, that duty did not include an obligation to give advice to the mother of an unborn child that could deprive that unborn child of

the opportunity of life. Second, Studdert J held that there was no breach of the accepted duty of care that health care providers owe to unborn children to guard against acts or omissions that might cause physical injury because the GP did not do anything which caused Mrs Harriton to contract rubella. Third, the Court considered that, to recover for negligence, Alexia's claim necessitated a comparison between her present position and the position that she would have been in but for the GP's alleged negligence. As Alexia would not have been born had the GP exercised reasonable care, Studdert J found such a comparison was an 'impossible exercise'. Finally, the Court found that public policy considerations militated against recognising 'wrongful life' actions. Studdert J stated that recognising wrongful life actions would erode the value of human life; undermine the perceived worthiness of those born with disabilities; open the door to actions brought by anyone born with a disability regardless of their disability; enable children born with disabilities to sue their mothers for failing to undergo an abortion if advised of the risk of disability; and place unacceptable pressure on the cost of insurance premiums of medical practitioners.

Alexia appealed to the New South Wales Court of Appeal. A majority of that Court dismissed the appeal in April 2004. By special leave, Alexia appealed to the High Court. The High Court, by 6–1 majority, dismissed the appeal on 9 May 2006. The Court found that no legally recognisable damage could be shown. Comparing a life with nonexistence for the purposes of proving actual damage was impossible as it could not be determined that Alexia's life represented a loss compared with nonexistence. The damage claimed by Alexia was not amenable to being determined by the Court by the application of established negligence principles. Consequently, the claim could not succeed.

Discussion and risk management strategies

'Wrongful life' claims are brought by disabled children rather than their parents. In contrast, in 'wrongful birth' claims, a patient sues the medical practitioner who failed to prevent her conception and subsequent pregnancy. The patient may allege a negligent failure to diagnose pregnancy, or, more commonly, a failed sterilisation or termination of pregnancy. In these claims, the mother sues the medical practitioner who failed to prevent or diagnose her pregnancy and damages are awarded to the mother for the birth of the child born as a result of the negligence. In deciding whether damages are awarded for 'wrongful birth', it is irrelevant whether the baby is born with or without birth defects – although damages are likely to be higher if the child has congenital defects.

A High Court decision in 2003 established that damages may not only be awarded for pain and suffering and any loss of income due to the pregnancy and birth, but also for the costs of raising the child to 18 years of age.[3] Following this decision, legislation was introduced in New South Wales, Queensland and South Australia preventing an award of damages for the costs of raising a child in 'wrongful birth' claims.

The recent decision of the High Court means that disabled children are unable to sue medical practitioners for 'wrongful life', but the parents of disabled children are still able to pursue a claim in their own right for 'wrongful birth' if the conception and subsequent pregnancy arises out of a doctor's negligence.

Conflict of interest: none.

References

1. *Harriton v Stephens* [2006] HCA 15; *Waller v James* [2006] HCA 16.
2. *Harriton v Stephens* [2002] NSWSC 461.
3. *Cattanach v Melchior* [2003] HCA 38.

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