HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

STEPHEN ALFRED CATTANACH & ANOR APPELLANTS

AND

KERRY ANNE MELCHIOR & ANOR RESPONDENTS

Cattanach v Melchior [2003] HCA 38
16 July 2003
B22/2002

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation:

D F Jackson QC with C Newton for the appellants (instructed by Deacons)

B W Walker SC with M E Eliadis for the respondents (instructed by Shine Roche McGowan)

Interveners:

R J Meadows QC, Solicitor-General for the State of Western Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

C J Kourakis QC, Solicitor-General for the State of South Australia with C Jacobi intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

CATCHWORDS

Cattanach v Melchior

Negligence – Medical negligence – Negligent advice following sterilisation procedure – Birth of child – Damages – Whether damages recoverable for past and future costs of raising and maintaining child until the age of 18 years – Whether award of damages should be reduced through reference to benefits and pleasures derived, or to be derived, from child.

Public policy – Family relationships – Negligent advice following sterilisation procedure – Birth of child – Damages – Whether birth of child is a legal harm for which damages may be recovered – Whether departure is required from ordinary tortious rules as to causation and economic loss.

Damages – Negligence – Medical negligence – Negligent advice following sterilisation procedure – Birth of child – Whether recovery limited to damages for pain, suffering, inconvenience and costs of pregnancy and childbirth – Whether additional damages recoverable for past and future costs of raising and maintaining child until the age of 18 years – Whether absence of physical injury to father of child indicates that damage amounts to pure economic loss – Whether unplanned pregnancy constitutes injury to mother – Applicable rules governing recovery in such a case – Whether award of damages should be reduced through reference to benefits and pleasures derived, or to be derived, from child – Whether recovery limited to cases involving extra costs caused by disability of parent or child.

GLEESON CJ.

The issue

1 If, in consequence of medical negligence, a couple become the parents of an unintended child, can a court, in an award of damages, require the doctor to bear the cost of raising and maintaining the child?

2 Such a question has divided judicial opinion in many countries. Recently, the House of Lords held that, according to the laws of England and Scotland, the answer is no[1]. At least to the present time, that is also the preponderant view in North America. The reasons for judgment of other members of the Court refer to the case law in other jurisdictions. The question cannot be answered by intuition. The intuitive response of many people would probably vary according to the circumstances of particular cases; including some circumstances that the law would regard as irrelevant. Courts seek to answer the question by reference to general principles, based upon legal values. Those principles may allow for exceptions or qualifications, but such exceptions or qualifications themselves must be founded upon principle. The differing responses given by courts throughout the world show that the relevant principles are not easy to identify, or apply.

3 The way in which the question is framed is closely related to the facts of the present case; and those facts are uncomplicated. A claim for damages was brought jointly by the respondents, as a couple, and an award of damages was made to them jointly. The claim was not based upon the existence of any disability on the part of either mother or child, or any special or unusual needs which will take the cost of raising the child out of the ordinary. The first appellant is an obstetrician and gynaecologist who provides sterilisation services in the course of his practice. It is lawful for him to do so; just as it was lawful for the first respondent, Mrs Melchior, to seek those services. Mrs Melchior did not have to justify her decision to become sterilised, and the reasons she gave in evidence were not unusual. They were not based on considerations of financial hardship, or medical necessity. She decided she wanted no more children. The claim with which this Court is concerned was based on tort, rather than contract. That is because Mrs Melchior undertook her sterilisation procedure in a public hospital. The second appellant, the State of Queensland, is the authority responsible for the hospital at which Dr Cattanach attended Mrs Melchior.

4 The legal uncertainty surrounding the issue as it is presented in this case is not only the result of the fact that widespread availability and use of sterilisation services, associated with the possibility that medical negligence may result in

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1 *McFarlane v Tayside Health Board* [2000] 2 AC 59.

unintended conception, is a comparatively recent social phenomenon. In truth, what is involved is a new manifestation of an old problem: the way in which the law of tort deals with the consequences of negligent conduct of one person that affects the financial interests of others, as distinct from conduct that injures another's person or property. The distinction between what is often called pure economic loss, and loss, including financial loss, flowing from injury to person or property, is not always clear, or satisfactory. Even so, it is embedded in the law of tort, and forms the basis of established rules governing liability for damages[2]. The common law shows more caution in imposing tortious liability for conduct that has an adverse effect upon purely financial interests than it shows in relation to conduct that causes damage to person or property[3]. There are sound reasons of legal policy for that.

5 In identifying the nature of the alleged loss for which Mr and Mrs Melchior seek damages, it is to be noted that its immediate cause was the process of human reproduction (conception, pregnancy and birth), resulting in a parent-child relationship. That relationship is the source of legal and moral responsibilities which are the basis of their claim for damages.

6 The common law has always attached fundamental value to human life; a value originally based upon religious ideas which, in a secular society, no longer command universal assent. Blackstone, in his *Commentaries*[4], referred to human life as "the immediate gift of God, a right inherent by nature in every individual". Many people who now respect the same value, do so upon different grounds. However, in this context, the concept of value is ethical, not economic. It does not depend upon the benefits, tangible or intangible, that some children bestow upon their parents. It may be assumed that most children enrich the lives of their parents. But, in the eyes of the law, the life of a troublesome child is as valuable as that of any other; and a sick child is of no less worth than one who is healthy and strong. The value of human life, which is universal and beyond measurement, is not to be confused with the joys of parenthood, which are distributed unevenly. The fact that the present problem involves human reproduction, and the parent-child relationship, is significant; but not because it introduces an ethical dimension that forecloses debate. The problem to be addressed is legal. In any event, it may be doubted that theology provides the answer to a financial dispute, between a provider of sterilisation services and aggrieved patients, concerning the extent of the damages to be awarded on account of the birth of a child.

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2 *Tame v New South Wales* (2002) 76 ALJR 1348 at 1351 [6]; 191 ALR 449 at 452.

3 Feldthusen, *Economic Negligence*, 4th ed (2000) at 1, 10-11.

4 *Commentaries on the Laws of England* (1765), Bk I at 125.

7 There is another consideration which might influence the intuitive response of some people, but which also is legally irrelevant. Whatever the principle that determines the answer to the question posed above, it applies regardless of the financial circumstances of the parents. The common law does not permit courts to impose a means test upon plaintiffs. Wealthy parents, who might reasonably be expected to spend more on bringing up their children, may have a larger claim than poor parents, to whom the birth of an unintended child might cause comparatively greater financial hardship. This would be so simply because a tortfeasor takes a victim as he or she is found.

8 In the present case, McMurdo P, in the Court of Appeal, made the pertinent observation that neither side invited the court to take account of the social security benefits, which may or may not be means tested, to which parents are entitled in various circumstances. It is accepted as relevant that the social context in which this issue is to be resolved is that of a secular society, in which attitudes towards control over human reproduction have changed. It is also to be noted that modern governments accept a responsibility to make welfare arrangements for the benefit of supporting parents.

9 The argument for the appellants, and some of the reasoning in *McFarlane v Tayside Health Board*[5], points to an apparent incongruity. To say that, as a result of the birth of an unintended child, the parents have an extra mouth to feed, is true. But it is a small part of the truth. Except for people who live at the most basic level of subsistence, it is an obviously incomplete description of the consequences of parenthood. It is incomplete even as a description of the financial consequences. It is not difficult to think of cases in which the birth of a child, and the formation of a parent-child relationship, could have serious effects upon the future earning capacity of a mother, or a father. There are parents for whom the cost of feeding and maintaining an unintended child would be of minor importance compared to other financial consequences. Furthermore, the financial consequences of the birth of a child may extend beyond those which directly affect the parents. The child's siblings, for example, might be affected; in some cases, substantially. Their prospects of inheritance may be diminished. Or their parents may have less money available to provide them with financial assistance. The incongruity is said to lie in selecting, out of the lifelong, and manifold, consequences of the birth of a child, a few particular financial incidents of the parent-child relationship. As the point was expressed in argument in *McFarlane*[6], the claim focuses only on one aspect of the existence of a child, namely, the child's financial needs until adulthood, and involves a partial and

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5 [2000] 2 AC 59.

6 [2000] 2 AC 59 at 62.

selective approach to the results of the child's birth and existence. Whether the law permits, and how it deals with, such selectivity is an issue to be addressed. Whatever be the correct response to that issue, it cannot be disposed of as though the dispute in the present case concerns an item of consequential pecuniary loss incurred, or to be incurred, by a plaintiff suing for damages for personal injury[7]. If that were not otherwise clear, it is made so by the role of Mr Melchior. Only by overlooking the form of the claim and of the order that was made, by disregarding Mr Melchior altogether, and by treating reproduction as a form of personal injury to Mrs Melchior, could the issue be so regarded. That is not the way the case was dealt with by the trial judge, or any member of the Court of Appeal of Queensland. This Court must deal with the claim that was made, and the judgment that is under appeal. Mr Melchior cannot be ignored as a faintly embarrassing irrelevancy. His role is one of the defining features of the claim as it was presented. It was a joint claim, and joint damages were awarded.

The facts and the proceedings

10 The issue in this Court is narrower than the issues that arose for determination by the trial judge or the Court of Appeal.

11 Mr and Mrs Melchior married in 1984, when Mrs Melchior was aged 32. They had a child in 1985, and another in 1988. In 1991, they agreed to have no more children. Mrs Melchior explained in her evidence that they had two healthy children, and were quite happy with the size of their family. She did not wish to continue taking oral contraceptives. Her health was good. The couple had planned their finances around bringing up two children. Mr Melchior had a medical condition that caused him some concern about its possible transmission to a male child, but that concern turned out to be misplaced. It was a factor in his agreeing to some form of sterilisation, but, when it came to the point, according to Mrs Melchior, he "kept on procrastinating". She decided to do something about it herself. She consulted a general practitioner, who referred her to Dr Cattanach.

12 In 1992, Dr Cattanach recommended, and subsequently performed, a tubal ligation. Although it was claimed at trial that he did so negligently, that claim was rejected. The finding of negligence made by the trial judge, and upheld by the Court of Appeal, rested on a different basis. The trial judge found that, when Mrs Melchior first consulted Dr Cattanach, she told him that, when she was 15 years old, her right ovary and her right fallopian tube had been removed. When Dr Cattanach performed the tubal ligation, what he saw appeared consistent with that history. Accordingly, he attached a clip only to the left

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7 cf Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed (2002), Ch 4.

fallopian tube. In 1996, at the age of 44, Mrs Melchior discovered that she was pregnant. In 1997, she gave birth to a son, Jordan. It turned out that, contrary to her belief, her right fallopian tube had not been removed. The trial judge found that, by reason of certain aspects of her condition, it was not negligent of the doctor to have failed to observe that at the time of the sterilisation procedure. The finding of negligence was based upon a conclusion that Dr Cattanach had too readily and uncritically accepted his patient's assertion that her right fallopian tube had been removed, that he should have advised her to have that specifically investigated, and that he should have warned her that, if she was wrong about that, there was a risk that she might conceive. The case was decided as one of negligent advice and failure to warn.

13 There was evidence as to the financial circumstances of the couple. Mr Melchior is a freight operations agent. At the time of the hearing, his weekly pay, after tax, was about $800. Mrs Melchior had engaged in various forms of part-time employment at periods during her marriage but, as from December 1997, she worked full-time, without salary, in the family home.

14 The trial judge, Holmes J, had before her three distinct claims for damages. This appeal is concerned only with the third. The first was a claim by Mrs Melchior for damages relating to the pregnancy and birth. Those damages were assessed and allowed at $103,672.39. They included compensation for pain and suffering, and loss of the amenities of life, associated with pregnancy and childbirth, the loss of some part-time earnings, the loss of capacity to undertake future employment resulting from a thrombosis associated with the pregnancy, and various expenses, including the cost of household care, and medical and pharmaceutical costs. The second claim was by Mr Melchior for loss of consortium as a result of his wife's pregnancy and childbirth. This claim was allowed, and, like the first claim, it is not the subject of the present appeal. However, because of one aspect of the way in which the trial judge assessed the claim, it is worth noting what she said about it:

> "While recognising the toll which the events must have taken on the marriage, it has not in this State been the practice to make substantial awards for loss of consortium. In any event, Mr Melchior retains the benefit of his wife's company and she is not significantly disabled. Although the first three years of a child's life can impose considerable strain on any household, and in the circumstances of this case must have made matters very difficult, there is every probability that life will improve as Jordan grows older. Indeed, this is an area in which some deference may be paid to the 'blessing' argument; it is clear from Mr Melchior's evidence that Jordan is now the source of considerable gratification to him, and it is possible that he will prove to be a source of mutual joy and a strength to the Melchiors' relationship in years to come. In the circumstances of this case I do not consider a large award is warranted. I allow $3,000.00 in this regard."

15 The "'blessing' argument", to which her Honour referred, was an argument, given weight by some members of the House of Lords in *McFarlane*, that, in the sight of the law, a child is a blessing as well as a burden, and that it "is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth"[8]. Holmes J's response to that consideration was to make some reduction in Mr Melchior's claim for loss of consortium. It was treated as irrelevant to the third claim, which is the subject of the present appeal.

16 Dr Cattanach and the State of Queensland appealed to the Court of Appeal of the Supreme Court of Queensland. By majority, (McMurdo P and Davies JA, Thomas JA dissenting) the appeal was dismissed[9]. An application for special leave to appeal to this Court was made. Gaudron and Kirby JJ, upon terms as to costs, made a grant of special leave "limited to the question of damages for raising and maintaining the child".

The claim for the costs of raising and maintaining the child

17 Before coming to a consideration of the legal issues involved, it is necessary to refer to the nature, and some of the incidents, of the third claim. It was a joint claim by Mr and Mrs Melchior, and resulted in an award of damages to them jointly in the sum of $105,249.33.

18 The claim was particularised in the Statement of Claim by a contention that the "plaintiffs will jointly incur expenses [associated] with rearing Jordan". Details of the claim were provided through the evidence of Mr Melchior, who gave the following answer to a question asked by his counsel:

> "Kerry hasn't been working for a number of years, so is it the case that the family has to be housed, clothed, fed, educated and entertained out of [your] income? -- Everything comes out of that income. There is no other."

19 The costs with which this Court is concerned, and which were recovered from the appellants by way of an award of damages, are costs that were, or will be, met out of Mr Melchior's income. In the Court of Appeal, McMurdo P and Thomas JA described the third claim as a claim for pure economic loss and Davies JA said it should be decided according to the principles applied by this Court in *Perre v Apand Pty Ltd*[10], a case concerned with pure economic loss. In this respect, having regard to the role of Mr Melchior, the Court of Appeal was

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8 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 114.

9 [2001] QCA 246.

10 (1999) 198 CLR 180.

plainly correct. From his point of view, how could the claim be anything other than a claim for pure economic loss? And if it were merely a claim for loss consequential upon personal injury to Mrs Melchior, what was the court doing making an award of damages in favour of Mr Melchior? Other cases may arise, concerning the consequences of negligent provision of sterilisation or like services, in which the claims may be framed differently, and different legal considerations may arise. We are not called upon to answer all the questions that may arise in those cases; and it is not in keeping with the method by which the common law has developed to seek to do so.

20 Mr Melchior, for the purposes of his evidence, prepared a detailed schedule setting out the anticipated costs of raising Jordan until the age of 18. Holmes J accepted the schedule as "a reasonable representation of the costs of raising a child". For the early years, about half of the estimated expenditure was on food. In later years, that proportion dropped to about one-third. Other items included clothing, medical and pharmaceutical expenses, child care, travelling to and from school, birthday and Christmas presents each year, and entertainment. If, in principle, it is possible to recover such costs by way of damages for negligence in the provision of sterilisation services, then it is not easy to see why the claim should be limited to the first 18 years of the life of the unintended child. It is a feature of affluent societies that children remain financially dependent upon their parents for longer periods. Many children are supported by their parents well beyond the age of 18. The claim in the present case did not cut out at the age when attendance at school was no longer compulsory (in Queensland, 15). Why it did not continue into a period of tertiary education is not clear. It was not restricted to items which Mr and Mrs Melchior were legally obliged to provide. It included items of reasonable discretionary expenditure. By the standards of many parents, the expected expenditure on the cost of education was strikingly low. This Court is not asked to decide whether the amounts which Mr and Mrs Melchior plan to spend on food, or education, or presents, for their son are reasonable. However, there is a dispute as to whether the law allows them to pass the cost on to Dr Cattanach, and the State of Queensland. The issue to be determined is whether the costs of feeding, clothing, educating, maintaining and entertaining the child are damages for which the appellants are liable at the suit of the respondents. The modesty of a claim as presented in a particular case might lead a court to overlook the implications, for other cases, of the acceptance of a claim of that character. However, this is a financial claim, and an understanding of its details is necessary for a decision upon the question of principle which it raises.

Actionable damage

21 In order to succeed in their claim, the respondents must show that they have jointly suffered damage (which is the gist of an action in negligence), and that the appellants owed them a duty of care to avoid causing damage of that kind.

22 In Fleming, *The Law of Torts*[11], it is said:

> "What qualifies as actionable damage is a question of policy largely defined by the 'duty' rules considered in the preceding chapter. The reason is that the concept is relative, dependent on the circumstances of the occasion. For example, while physical injury from external trauma is categorically included, liability for mental distress is more hedged ... Property damage is widely conceived, embracing any interference which diminishes the value of the object, like contamination, without necessarily amounting to structural damage. Purely economic loss, however, is actionable only under controlled conditions."

23 In an action for the tort of negligence, there is a distinction between the "damage" said to have been suffered by a plaintiff, and the "damages" awarded as compensation for each item or aspect of that damage, usually as a single sum[12]. Damage is "loss or harm occurring in fact"[13]. Such loss or harm will involve an interference with a right or interest recognised as capable of protection by law. Description of a right or interest said to have been interfered with may sometimes be tendentious. It might be said, for example, that Mr and Mrs Melchior have a "right to choose" the size of their family. It is more accurate to say that they have the freedom to make such a choice. If a right of choice exists in relation to some matter, then presumably anyone who causes the person with such a right to do anything he or she does not choose to do inflicts a form of legal harm. That is a loose concept. Similarly, assertions of interference with financial interests may require closer analysis. Not every form of unexpected or unintended expenditure results in financial loss or harm.

24 The lack of precision in the concept of financial or economic loss was discussed in *Perre v Apand Pty Ltd*[14]. There, the example was given of a child whose parents are killed as a result of the negligent conduct of another. Claims for compensation in such cases are governed and controlled by statute[15]. However, the need for such statutory provisions, as was recited in the preamble

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11 9th ed (1998) at 216.

12 *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323; *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 526-527.

13 *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435 at 442 per Viscount Simon LC.

14 (1999) 198 CLR 180 at 193 [6].

15 eg *Compensation to Relatives Act* 1897 (NSW).

to Lord Campbell's Act[16], stemmed from the rule in *Baker v Bolton*[17] that, in a civil court, the death of a human being could not be complained of as an injury. The historical explanation of that rule is controversial[18]. Even so, a moment's reflection upon the forms of disadvantage that might result to one person from the death of another reveals the difficulty of identifying and measuring all the economic consequences of death. In the present case, we are concerned with the obverse case. Medical negligence resulted in human reproduction and a parent-child relationship, from which flowed the obligations reflected in the damages that were awarded at trial. Attention is then concentrated upon some of the financial consequences of that relationship.

25 In the Inner House of the Court of Session in *McFarlane*, the Lord Justice Clerk, Lord Cullen, distinguished between the damage and the consequences flowing from it[19], and described the costs of raising and maintaining the unintended child as falling into the second category[20]. With respect, such a distinction is sound, and necessary. His Lordship identified the damage as occurring at conception[21]. For my part, I would regard as an integral aspect of the damage, said to be actionable damage, the parent-child relationship.

26 The parent-child relationship is the immediate cause of the anticipated expenditure which the respondents seek to recover by way of damages. If they have suffered actionable damage, it is because of the creation of that relationship and the responsibilities it entails. Mr and Mrs Melchior have the legal status of guardians and custodians of their son, subject to any order of a court, until he attains the age of 18 years[22]. Their responsibilities extend to the physical, mental, moral, educational and general welfare of the child[23]. The *Family Law*

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16 9 & 10 Vict c 93.

17 (1808) 1 Camp 493 [170 ER 1033].

18 Malone, "The Genesis of Wrongful Death", (1965) 17 *Stanford Law Review* 1043; *Admiralty Commissioners v SS Amerika* [1917] AC 38; *Woolworths Ltd v Crotty* (1942) 66 CLR 603.

19 1998 SLT 307 at 310.

20 1998 SLT 307 at 310.

21 1998 SLT 307 at 310.

22 *Family Law Act* 1975 (Cth), s 61C(1).

23 *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 278 per Brennan J.

Act 1975 (Cth) recognises (s 60B) that children have the right to be cared for by both their parents, regardless of whether the parents are married, and (s 66C) that the parents of a child have the primary duty to maintain the child. Similar provision is made in the *Child Support (Assessment) Act* 1989 (Cth) (s 3). This, it appears to me, is the significance of the topic of adoption. It was not contended in this case, on behalf of the appellants, that the fact that Mr and Mrs Melchior did not have their child adopted by another couple breaks the causal relationship between the medical negligence and the costs of raising and maintaining the child. However, the possibility of adoption, even if it is purely theoretical, serves to indicate the significance of the parent-child relationship as an element of the damage of which the respondents complain. It was the existence, and continuation, of that relationship that formed the vital link between the potential interference with their financial interests resulting from conception and the actuality of such interference following birth. That relationship is the key to an accurate understanding of the damage they claim to have suffered. However, as an examination of the details reveals, the claim for damages is not limited to expenses that will be incurred as a result of legal obligation. It extends to expenses that will be incurred as a matter of moral obligation, and to others that will be incurred as a matter of parental discretion. The relationship will last for the joint lives of the parties to it, although the legal (as distinct from the natural and moral) incidents of the relationship will probably come to an end sooner. No attempt has been made in argument, or in the approach taken by the Supreme Court of Queensland, to confine the respondents' claim, as a matter of principle, to one that reflects bare legal obligations. At the same time, no attempt has been made to pursue to its logical conclusion the question of the full extent of the claims which people in the position of the respondents are entitled to make. If the appellants are said to be subject to an indeterminate liability, that is important to the question of the existence of their duty of care.

27 The coming into existence of the parent-child relationship is critical to the actionable damage of which the respondents complain. That relationship has multiple aspects and consequences; some economic, and some non-economic; some beneficial to the parents, and some detrimental. The case for the respondents treats that relationship as a source of economic loss or harm for which the law of negligence will make the appellants liable in damages.

28 That the incurring of the financial costs the subject of the respondents' claim was a foreseeable consequence of the medical negligence found to have occurred is not in question. However, one thing is clear. There is no general rule that one person owes to another a duty to take care not to cause reasonably foreseeable financial harm, even assuming that what is here involved is properly

so described[24]. The reasons for that were discussed in *Perre v Apand Pty Ltd*[25]. The burden that would be imposed upon citizens by such a rule would be intolerable. In *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*, Mason J said[26]:

> "The common law has exhibited a marked reluctance to allow recovery of pure economic damage sustained as a result of negligence. Before *Hedley Byrne & Co Ltd v Heller & Partners Ltd* in the long line of cases that commenced with *Cattle v Stockton Waterworks Co* no plaintiff succeeded in recovering economic damage which was not consequential upon physical damage ... It was otherwise if the plaintiff had a proprietary or possessory interest in property: in that event he could recover consequential financial loss".

29 *Cattle v Stockton Waterworks*[27] was treated by learned commentators as an early example of the law's reluctance to recognise a duty to take care to avoid causing purely pecuniary loss. For example, Professor Fleming, in 1977, treated the case as falling within the category of "relational interests" in respect of which, he said, opposition to recovery for pecuniary loss was most ingrained[28]. Negligent interference with profitable contractual expectations was given as an example[29]. The term "relational loss" has been used in respect of cases where "[t]he plaintiff suffers economic loss because of some relationship which exists between the plaintiff and the injured third party"[30]. Here we are not concerned with an injured third party, but with plaintiffs claiming to be injured jointly, their economic loss flowing from the coming into existence of a relationship by reason of which they incurred financial and other responsibilities. It is the very existence of the third party which, by reason of the relationship to him of the plaintiffs, is said to give rise to loss or harm. It might be added that, although

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24 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 555, 558-559, 598.

25 (1999) 198 CLR 180 at 192-193 [5]-[7].

26 (1976) 136 CLR 529 at 584-585.

27 (1875) LR 10 QB 453.

28 Fleming, *The Law of Torts*, 5th ed (1977) at 169-171.

29 See also *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1.

30 Feldthusen, *Economic Negligence*, 4th ed (2000) at 193-194. See also Cane, *Tort Law and Economic Interests* (1996) at 454.

Mr Melchior's claim for loss of consortium was relational in nature, such claims are now anomalous, and bear a proprietorial character inconsistent with current ideas as to the relationship between husband and wife[31]. Holmes J, when assessing compensation for injury to the marital relationship, allowed some set-off by reference to the parental relationship. This passed unremarked in the Court of Appeal, presumably because no point was made about it in argument.

30 Since, as all the members of the Court of Appeal recognised, we are not here dealing with a claim for financial loss consequential upon personal injury to a plaintiff, or damage to a plaintiff's property, but with a claim for recovery of pure economic loss arising out of a relationship, then it can scarcely be asserted with any degree of plausibility that legal principle or authority leads inexorably to the result for which the respondents contend. On the contrary, as Lord Steyn observed in *McFarlane*[32], we are concerned with a proposal for a new head of liability for economic loss which must be justified by cogent reasons. The respondents, in addition to establishing that they have incurred what the law recognises as loss or harm, must show that the duty of care which Dr Cattanach owed them extended to a duty of care to protect them from that kind of loss or harm. In *Sutherland Shire Council v Heyman*[33] Brennan J pointed out that "a postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered". He went on to say: "The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it."

31 In deciding the related questions whether the creation of a parent-child relationship involves actionable damage in the form of economic loss, and whether the law imposed a duty of care on Dr Cattanach to avoid or prevent that damage, it is appropriate to measure the present case against the reasons of policy for the law's reluctance to impose liability of this kind. These were discussed in *Perre v Apand Pty Ltd*[34]. A specific example of that caution, in which the policy reasons are examined, is the decision of the House of Lords in *Caparo Industries Plc v Dickman*[35], where it was held that the liability of auditors for negligent mis-statements in certifying corporate accounts did not extend to the economic loss

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31 See Brett, "Consortium and Servitium: A History and Some Proposals", (1955) 29 *Australian Law Journal* 321, 389 and 428.

32 [2000] 2 AC 59 at 79.

33 (1985) 157 CLR 424 at 487.

34 (1999) 198 CLR 180 at 192-193 [5]-[6].

35 [1990] 2 AC 605.

suffered by investors who bought shares in the company whose accounts were certified. The House of Lords drew a line at the company and its members, and denied a duty of care to protect the financial interests of members of the public who might contemplate investing in the company. In the same way, in *McFarlane*, when addressing the present problem, the House of Lords drew a line at the birth of the child, allowing damages which included matters associated with the birth, but denying damages thereafter.

32 The first reason for caution is the potential indeterminacy of the financial consequences of a person's acts or omissions, and the need for "some intelligible limits to keep the law of negligence within the bounds of common sense and practicality"[36]. In this context, indeterminacy does not mean magnitude. By focusing on the parent-child relationship, it is possible to draw a line short of adverse effects upon siblings and others. But even if account is taken only of foreseeable adverse financial consequences to the parents, there is no reason to suppose they will cease when the child turns 18, or to restrict them to those that form the subject of the present claim. If the cost of birthday and Christmas presents is to be included, why not, in an appropriate case, the expense associated with a wedding? If the cost of schooling is included, why not, in an appropriate case, the cost of tertiary education? Furthermore, as was noted earlier, the adverse financial implications of the assumption of parental responsibility might extend beyond the incurring of additional items of expenditure. What basis in principle is there for distinguishing between child-rearing costs and adverse effects on career prospects, which, in the case of some parents, might far exceed the costs of raising and maintaining a child?

33 Reference has already been made to another reason for caution in this area, which is the lack of precision in the concept of economic loss, as distinct from injury to person or property, which is usually readily identifiable. What kinds of detriment or disadvantage flowing from the parent-child relationship would be regarded as financial loss or harm? Parents might go through their lives making financial and other arrangements, and adjusting their circumstances, to accommodate the needs or reasonable requirements of their children. To what extent, and in what circumstances, would this count as economic harm?

34 So far, attention has been confined to financially negative aspects of the parent-child relationship. But why should that be so, especially if we are dealing with a claim that comprehends moral and natural obligations, as well as legal obligations? There was a time when the law imposed obligations on children to care for their parents. Blackstone wrote[37]:

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36 *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 633 per Lord Oliver of Aylmerton.

37 Blackstone, *Commentaries on the Laws of England* (1765), Bk I at 441.

> "The duties of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverance ever after; they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws."

In modern society, legal obligations of children to support their parents have largely disappeared[38]. But with an ageing population, and increasing pressure on welfare resources, the financial aspects of caring for parents are likely to become of more practical concern. Unless attention is confined to strict legal obligations, (and, if it were, the respondents' claim would need substantial revision), then what justification is there for ignoring the natural and moral obligations owed by children to parents, and the financial consequences that may entail? Why should we focus exclusively on child care and ignore care of the aged? It is difficult to justify treating a relationship as damage, and then measuring the consequential harm by reference only to those aspects of the relationship that are easy to count, and that arise sooner rather than later. Although our society does not regard children as economic assets, it does not follow that they should be treated as unmitigated financial burdens.

35 Another reason for the law's hesitancy in this area is a problem of legal coherence. An example of such a problem, in a different context, resulting in the denial of a duty of care, is to be found in the recent decision of this Court in *Sullivan v Moody*[39]. The matter was referred to by Lord Steyn in *McFarlane*[40]. The common law does not allow a person to treat his or her own birth as actionable damage[41], just as it does not allow the death of a human being to be complained of as an injury. Where it is the parent-child relationship that is in question, the law imposes obligations, in support and protection of the child, which are difficult to reconcile with a recognition of the relationship as damage. The Queensland *Criminal Code* contains provisions relating to abortion (ss 224,

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38 In the times of the Poor Laws, entitlement to relief was related to satisfaction by children of their obligations to their parents. See Holdsworth, *A History of English Law*, vol 4, 2nd ed (1937) at 156-157, 387-402.

39 (2001) 207 CLR 562 at 581-582 [55]-[60].

40 [2000] 2 AC 59 at 83.

41 *McKay v Essex Area Health Authority* [1982] QB 1166.

225, 226), infanticide (ss 291, 294, 313), concealing the birth of a child (s 314), failing to supply the necessaries of life (s 324), endangering the life of a child by abandonment or exposure (s 326), and cruelty to children (s 364). A child is not a commodity that can be sold, or otherwise disposed of, in order to mitigate hardship to a parent. The legal incidents of the parent-child relationship can only lawfully be avoided by adoption. The various ways in which common law and statute protect the child, by imposing and reinforcing parental obligations, reflect international norms. Article 23 of the International Covenant on Civil and Political Rights 1966 declares that "[t]he family is the natural and fundamental group unit of society", and Art 24 provides that every child shall have the right to such measures of protection as are required by the child's status as a minor, on the part of the child's family, society and the State. Article 10 of the International Covenant on Economic, Social and Cultural Rights 1966 requires that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children". Article 18 of the Convention on the Rights of the Child 1989 refers to "the principle that both parents have common responsibilities for the upbringing and development of the child". The recognition of the family as the natural and fundamental group unit of society, which is repeatedly expressed in international instruments[42], in conjunction with declarations of the need to provide for the care and protection of children, is not easy to reconcile with the idea of the parent-child relationship as something the law will regard as an element of actionable damage.

36 The next matter to be considered is what was earlier described as the selectivity of the respondents' approach to the incidents of the parent-child relationship created in consequence of the negligence of which they complain. The object of an award of damages in a case such as the present is not to punish a wrongdoer; it is to restore the plaintiffs, as nearly as possible as can be done by an award of financial compensation, to the position in which they would have been but for the wrongdoing[43]. It is to effect "reasonable restitution for the wrong done"[44]. Is that object achieved by the award of damages made in favour

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42 eg American Declaration of the Rights and Duties of Man 1948, Art VI; American Convention on Human Rights 1969, Art 17; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988, Art 15; Cairo Declaration on Human Rights in Islam 1990, Art 5(a); Arab Charter on Human Rights 1994, Art 38(a).

43 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn, cited by Lord Clyde in *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 104-105.

44 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 105 per Lord Clyde.

of the respondents at trial? They have a loving relationship with a healthy child. It does not involve any special financial or other responsibilities that might exist if, for example, the child had an unusual and financially burdensome need for care. The financial obligations which the respondents have incurred, legal and moral, are of the same order as those involved in any ordinary parent-child relationship. They must feed the child. Of course, he remains their child. Does reasonable restitution involve obliging Dr Cattanach to pay for the food? The Christmas and birthday presents, for which they claimed and were awarded damages, will presumably be received with gratitude, and perhaps, at some future time, reciprocated. Does reasonable restitution require Dr Cattanach to pay for them? The entertainment they will provide the child will, no doubt, be enjoyed. Should Dr Cattanach have to pay for it? Some of those items would be unremarkable in a claim, in the Family Court, by one parent against another, for child maintenance. But when they appear in a schedule of damages in tort, they prompt questions as to the nature of the entire claim. When Mr and Mrs Melchior have spent the money itemised in their claim on food, clothing, education, maintenance and entertainment, what will they have to show for it? An adult son. No allowance has been, or can be, made for that.

37 This is a question that has consistently vexed courts considering this problem. An answer that has been given is that, in awarding damages in tort, it may be appropriate to set off like against like, but if a financial loss is suffered, it is neither necessary nor appropriate to set off a non-financial benefit. In this connection, the exemplar, referred to in argument in the Scottish courts in *McFarlane*, and in the judgments in that case[45], is the coal miner who, having been injured, and having suffered the loss of his future earning capacity, does not have his damages reduced to allow for the benefit of a future life of unemployed leisure in the open air. With respect to those who think otherwise, that example seems to me to re-state, rather than to answer, the present problem. As with many suggested analogies, the real question is whether it is analogous. The injured miner's claim for loss of earning capacity is for financial loss consequent upon physical harm, a well recognised form of actionable damage. He will be compensated for the consequences of that harm, including financial loss in the form of loss of earning capacity. His loss of earning capacity, a recognised head of damages, is not mitigated by his enforced leisure. Here, however, the question is whether human reproduction and the creation of a parent-child relationship is actionable damage. It is disputed that, in answering that question, some of the detrimental financial consequences of that relationship can be selected, and all the other consequences, financial and non-financial, ignored.

38 One of the grounds upon which "wrongful life" claims by children have been rejected is the impossibility of making a rational or fair assessment of

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45 1998 SLT 307 at 316.

damages[46]. A similar difficulty is encountered in awarding damages for loss of expectation of life[47]. The indeterminate nature of the financial consequences, beneficial and detrimental, of the parent-child relationship has already been noted. In deciding whether, in the contemplation of the law, the creation of that relationship is actionable damage, it is material to note that it is unlikely that the parties to the relationship, or the community, would regard it as being primarily financial in nature. It is a human relationship, regarded by domestic law and by international standards as fundamental to society. To seek to assign an economic value to the relationship, either positive or negative, in the ordinary case, is neither reasonable nor possible.

Conclusion

39 The claim under consideration displays all the features that have contributed to the law's reluctance to impose a duty of care to avoid causing economic 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; an imprecision that cannot be concealed by an arbitrary limitation of a particular claim in subject matter or time. It is incapable of rational or fair assessment. Furthermore, it involves treating, as actionable damage, and as a matter to be regarded in exclusively financial terms, the creation of a human relationship that is socially fundamental. The accepted approach in this country is that "the law should develop novel categories of negligence incrementally and by analogy with established categories"[48]. The recognition of the present claim goes beyond that, and is unwarranted.

40 The appeal should be allowed. The orders made by the Court of Appeal (except as to costs) should be set aside. The appellants' appeal to that Court should be allowed in part. The judgment of Holmes J should be varied by setting aside that part which orders the appellants to pay the respondents the sum of $105,249.33.

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46 *McKay v Essex Area Health Authority* [1982] QB 1166.

47 See eg *Skelton v Collins* (1966) 115 CLR 94 at 130 per Windeyer J.

48 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481 per Brennan J.

41 McHUGH AND GUMMOW JJ. By majority (McMurdo P and Davies JA; Thomas JA dissenting), the Queensland Court of Appeal[49] dismissed an appeal against a judgment in the Supreme Court of Queensland (Holmes J)[50] awarding damages against the first and second defendants, Dr Cattanach and the State of Queensland. Dr Cattanach is a specialist obstetrician and gynaecologist. The plaintiffs, Mr and Mrs Melchior, are husband and wife. In this Court, they are the respondents and Dr Cattanach and the State are the appellants.

42 It was admitted on the pleadings that the State was the statutory successor to the Brisbane South Regional Health Authority, which had operated the Redland Hospital. Dr Cattanach was a consultant obstetrician and gynaecologist at the Redland Hospital where, on 13 March 1992, he performed on Mrs Melchior a sterilisation procedure. Thereafter, in 1997, Mrs Melchior gave birth to the couple's third child, a son. At the time of the trial, the child was a healthy, active three year old.

43 Mr and Mrs Melchior had married in 1984 and, prior to the sterilisation procedure, there were two children of the marriage, daughters each born by Caesarean section in 1985 and 1988 respectively. The primary judge described as follows the personal circumstances of Mr and Mrs Melchior before Mrs Melchior was referred to Dr Cattanach by her general practitioner:

> "They were satisfied with a family of two, and in 1991 discussed together the prospect of taking steps to ensure that they would have no more children. They had planned their finances around bringing up two children, and Mrs Melchior did not wish to continue using oral contraceptives. Mr Melchior said that he was also influenced by the fact that he suffered from Charcot-Marie-Tooth syndrome, a disease causing muscular atrophy in his feet and legs. It was his understanding that while his daughters were unlikely to inherit the condition, a male child would be at risk. (He was in fact wrong on the latter aspect.) He was content, therefore to limit his family to the two daughters he had."

44 In 1967, when Mrs Melchior was aged 15, she underwent an appendectomy. The surgical notes indicated that, in the course of the operation, her right ovary was found to be filled with a blood clot and was removed; there was no abnormality in the left ovary or either fallopian tube and those organs were left intact. Mrs Melchior had been told by her mother that an ovary had been removed.

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49 [2001] QCA 246.

50 (2001) Aust Torts Rep ¶81-597.

45 Mrs Melchior and her husband brought their action in both tort and contract. There appears to have been no basis for any action in contract by Mr Melchior. The trial judge found that, whilst Mrs Melchior's initial consultation with Dr Cattanach had been as a private patient, she had been admitted to hospital for the sterilisation surgery as a public patient. It was not suggested that at that latter stage there had existed any contractual relationship between Dr Cattanach and either plaintiff. Accordingly, the trial judge determined the plaintiffs' claims as issues in tort. The State admitted its vicarious liability for any negligence established against Dr Cattanach.

46 Holmes J found that Dr Cattanach was negligent after the sterilisation procedure in failing to inform Mrs Melchior of various matters. The first was that the oral history she gave of the removal of the right fallopian tube in 1967 had not been positively confirmed during the sterilisation procedure. The second was that, if the fallopian tube were present, there was a ten-fold increase in the risk of her falling pregnant than was usual after the performance of the sterilisation procedure. The third was that an available procedure, an hysterosalpingogram, was likely to disclose the existence of a functioning fallopian tube.

47 The Court of Appeal upheld the finding of negligence against Dr Cattanach and the conclusion that his negligence was the probable cause of Mrs Melchior's pregnancy.

48 The award of damages had three components. The first was an award in favour of Mrs Melchior of $103,672.39 consisting of damages for her pain and suffering in respect of the pregnancy and birth, the effect on her health (including a supervening depression), lost earning capacity (past and future), various hospital, medical, pharmaceutical and travel expenses (both past and future), the cost of maternity clothes and damages described as *Griffiths v Kerkemeyer*[51] damages for care that she might need. The second was an award to Mr Melchior of $3,000 for loss of consortium in accordance with the remedy allowed in *Toohey v Hollier*[52] for all practical, domestic disadvantages suffered by a husband in consequence of the impaired health or bodily condition of his wife. The third was an award in favour of Mr and Mrs Melchior for $105,249.33 for the past and future costs associated with raising and maintaining their child until he reaches the age of 18.

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51 (1977) 139 CLR 161.

52 (1955) 92 CLR 618.

49 No appeal was taken to the Court of Appeal respecting the first and second categories of damages. However, with respect to the third category, Dr Cattanach and the State contended that Holmes J had erred in law in allowing any costs for the rearing of the child and that her Honour had erred in failing to apply the decision of the House of Lords in *McFarlane v Tayside Health Board*[53]. Davies JA, who, with McMurdo P, constituted the majority, stated the issue thus arising as follows:

> "Should the parents of a healthy child, born in consequence either of a negligently performed sterilization operation or of negligent advice or of a negligent omission to advise as to the consequences of that operation be entitled to recover from the negligent doctor the costs of reasonable maintenance of the child during his or her minority?"

The majority of the Court of Appeal answered that question in the affirmative and dismissed the appeal with costs.

50 Upon an undertaking by Dr Cattanach and the State that they would not seek to disturb any costs orders made in the courts below and would pay Mr and Mrs Melchior's costs of an appeal to this Court, this Court granted special leave limited to one ground. This is whether the Court of Appeal erred in holding that damages were recoverable by Mr and Mrs Melchior for the reasonable costs of raising and maintaining their child. Thus, if it be held in this Court that the Court of Appeal was not in error, the appeal fails, and no question arises respecting quantum or the manner in which it was determined.

51 The appellants would be liable under ordinary principles for the foreseeable consequences of Dr Cattanach's negligence. There was no finding of contributory negligence. Questions of remoteness or insufficient causal connection between the breach of duty by Dr Cattanach and the claimed loss did not arise. Nor was reliance placed upon any supposed illegality or limitation or objection in the policy of the law respecting the performance of sterilisation procedures. Further, in the course of argument in this Court, the appellants expressly disavowed any ground of appeal that, rather than an award in favour of both respondents, there should have been an award only in favour of Mrs Melchior, to the exclusion of Mr Melchior.

52 In *Rees v Darlington Memorial Hospital NHS Trust*[54], Robert Walker LJ said of *McFarlane* that, while their Lordships "disavowed any intention of

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53 [2000] 2 AC 59.

54 [2003] QB 20 at 30.

deciding the case on the grounds of public (or social) policy, there is a strong moral element in the basis of the decision".

53 In *McFarlane*[55], Lord Slynn of Hadley said that a doctor undertaking a duty of care in regard to the prevention of pregnancy does not assume responsibility for economic losses imposed on or accepted by parents in bringing up a child. To that, Hale LJ responded in *Parkinson v St James and Seacroft University Hospital NHS Trust*[56]:

> "Given that the doctor clearly does assume some responsibility for preventing conception, it is difficult to understand why he assumes responsibility for some but not all of the clearly foreseeable, indeed highly probable, losses resulting."

Against that background of current authority in the United Kingdom, the appellants took another tack in their submissions.

54 The appellants' primary submission to this Court is that there can be no award in damages for the cost of rearing and maintaining a healthy child who would not have been born but for the negligent failure of a gynaecologist to give certain advice. Further, and in the alternative, it is submitted that any such award of damages should be limited in some way, in particular by treating the arrival of the healthy child as a benefit to be set off against the damages.

55 The appellants based these submissions upon the propositions that, as a matter of the policy of the law, the birth of a healthy child is not a legal harm for which damages may be recovered, and that this result would follow whether action was brought in tort or contract. This policy of the law, the appellants submitted, reflects "an underlying value of society in relation to the value of human life". In several of the State jurisdictions in the United States, in decisions upon which the appellants rely, the denial of awards of damages for the expense of raising an unwanted, healthy child has been based upon a public policy against "meddling" with "the concept of life and the stability of the family unit" including apprehended harm to a child upon later learning that the money for its nurture has been provided by damages recovered in a "wrongful birth" action[57].

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55 [2000] 2 AC 59 at 76.

56 [2002] QB 266 at 289.

57 *Wilbur v Kerr* 628 SW 2d 568 at 570-571 (1982); *Boone v Mullendore* 416 So 2d 718 at 721-723 (1982); *MA v United States* 951 P 2d 851 at 855 (1998).

56 It can hardly be disputed that, in myriad ways, the law reflects a concern with the value of life and the welfare of infant children. But, against that general background, even in the exercise of the *parens patriae* jurisdiction, hard choices are to be made rather than broad statements repeated. The matters considered by the Court in *Marion's Case*[58] provide a recent example. It was there held by majority that the Family Court of Australia had jurisdiction to authorise the carrying out of a sterilisation procedure upon the intellectually disabled child in question, but that the joint guardians of the child had no power to act in the matter without a court order[59]. On the other hand, Brennan J (one of the minority) was of the opinion that neither parents, guardians nor the court had power to authorise the non-therapeutic sterilisation of intellectually disabled children[60].

57 Merely to repeat those propositions upon which the appellants rely does not explain why the law should shield or immunise the appellants from what otherwise is a head of damages recoverable in negligence under general and unchallenged principles in respect of the breach of duty by Dr Cattanach. There may be a temptation, yielded to in some of the many cases in other countries to which we were referred in argument, to treat the arrival of the third child of Mr and Mrs Melchior as a "wrongful birth" and thus as the wrong inflicted upon Mr and Mrs Melchior; but this means attention is directed away from the remedies available to the parents in respect of the breach of duty by Dr Cattanach.

58 In *Brodie v Singleton Shire Council*[61], Gaudron, McHugh and Gummow JJ referred to the use of the term "immunity" in various areas of tort law to indicate a protection against action in respect of rights and duties which otherwise exist in the law. In various instances referred to in that passage, including the position of barristers and liability for straying animals, the protection is expressed as the negation of the existence of a duty of care and is founded upon particular views of public policy. Similarly, public policy negates the existence of a duty of care in respect of the negligent acts of a member of the

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58 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

59 (1992) 175 CLR 218 at 325-326.

60 (1992) 175 CLR 218 at 285.

61 (2001) 206 CLR 512 at 555-556 [94].

Australian armed forces if "the matters complained of formed part of, or an incident in, active naval or military operations against the enemy"[62].

59 The protection contended for in the present case would not operate in that way. The subject of the protection is recovery of a particular head of damages for an admitted breach of duty. But, that limitation notwithstanding, there is, as Callinan J indicates in his reasons at [295], a judicial aversion to the enjoyment of special privilege or advantage in litigation unless strong reason for its retention (as was the issue in *Brodie*) or creation (the present case) can be demonstrated.

60 In *Smith v Jenkins*[63], Windeyer J observed that "public policy" in relation to the common law of torts is not to be thought of as like that public policy which invalidates contracts and, one might add, certain trusts and conditions attached to voluntary dispositions by will or settlement. In those areas, the starting point has been the favour with which the law has looked upon the right of private contract and the performance of contracts, and upon the freedom of disposition of property, by dispositions *inter vivos* and testamentary[64]. Countervailing policies matured by the long course of judicial decision into detailed doctrines.

61 Some (such as the restraint of trade doctrine, the rules against perpetuities, and the rules against contractual restraints upon alienation considered in *Hall v Busst*[65]) are based upon economic notions.

62 Other policies protect and maintain the proper relationship between the citizen and the branches of government[66]. The authorities here include the great case of *Egerton v Earl Brownlow*[67] concerning the importuning of the advisers of the Crown to secure the bestowal of honours by the Crown and the decisions of this Court respecting the "lobbying" of legislators, Ministers and public officers

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62 *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344 at 362 per Dixon J. See also *Groves v The Commonwealth* (1982) 150 CLR 113 at 117, 122; *Mulcahy v Ministry of Defence* [1996] QB 732 at 744-746, 750-751.

63 (1970) 119 CLR 397 at 418.

64 See *Hill v Van Erp* (1997) 188 CLR 159 at 223-224; *Corbin on Contracts*, Interim Edition, vol 15, §§1375-1376.

65 (1960) 104 CLR 206 at 217-218, 224-225, 245-246.

66 See *Farnsworth on Contracts*, 2nd ed (1998), vol 2 at 9-10.

67 (1853) 4 HLC 1 [10 ER 359].

in *Wilkinson v Osborne*[68], *Horne v Barber*[69] and *Wood v Little*[70]. Other cases are protective of the authority of the courts. They include the treatment in *Brooks v Burns Philp Trustee Co Ltd*[71] of covenants to oust the jurisdiction of the courts, the reservation identified in *Regie National des Usines Renault SA v Zhang*[72] respecting the maintenance in Australian courts of actions for certain foreign wrongs, and the rule, applied in *Hunter v Chief Constable of the West Midlands Police*[73], that it is against the policy of the law to permit a civil action for damages to be used for a collateral attack on a final decision of a criminal court of competent jurisdiction.

63 Further, the division of opinion between Dixon CJ and Windeyer J on the one hand, and Kitto J on the other, in *Church Property Trustees, Diocese of Newcastle v Ebbeck*[74] as to the tendency of a condition in a will, respecting religious faith, to promote domestic discord between spouses, at bottom concerns the policy of the law respecting family relationships. So does the common law rule that there is no publication for the purposes of the law of defamation when one spouse transmits defamatory matter to the other spouse[75].

64 The appellants' submissions would bring this case within that general area respecting family relationships. But several points should be made immediately. First, the general considerations advanced by the appellants have not, as in the contract and disposition of property cases, matured into a coherent body of legal doctrine. No doubt that is not a fatal obstacle. The policy of the law cannot be static. Yet the novelty of the outcome for the present case of the appellants'

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68 (1915) 21 CLR 89.

69 (1920) 27 CLR 494.

70 (1921) 29 CLR 564.

71 (1969) 121 CLR 432.

72 (2002) 76 ALJR 551 at 563 [60]; 187 ALR 1 at 17.

73 [1982] AC 529.

74 (1960) 104 CLR 394. See also the remarks of Lord Wilberforce in *Blathwayt v Baron Cawley* [1976] AC 397 at 425-426.

75 *Wennhak v Morgan* (1888) 20 QBD 635 at 639 per Manisty J:

> "[W]ould it be well for us to lay down now that any defamation communicated by a husband to a wife was actionable? To do so might lead to results disastrous to social life".

submissions calls for a more careful scrutiny than would be required where there was a developed body of legal principle directly relevant.

65 Secondly, this is a case in tort. Further consideration of the remarks of Windeyer J in *Smith v Jenkins*[76] is appropriate. His Honour, after speaking of contract, turned to tort, observed that public policy "after all is the bedrock foundation on which the common law of torts stands" and continued[77]:

> "Here the question is different. It seems to me a mistake to approach the case by asking whether the plaintiff is precluded by considerations of public policy from asserting a right of action for negligence. The proper inquiry seems to me to be simply: is there for him a right of action? That depends upon whether in the circumstances the law imposed a duty of care; for a right of action and a duty of care are inseparable. The one predicates the other. Duty here does not mean an abstract and general rule of conduct. It is not the duty to God and neighbour of the catechist's question. It is a concept of the law, a duty to a person, which he can enforce by remedy at law. Lord Atkin's famous generalizations need some qualifications and require some exceptions. For instance, negligent misstatements are now actionable, but the duty of care in that field depends, it has been held, not simply on foreseeability of harm but on a special relationship between the parties. If a special relationship be in some cases a prerequisite of a duty of care, it seems to me that in other cases a special relationship can exclude a duty of care."

Barwick CJ and Owen J spoke to similar effect[78].

66 It is here that the case for the appellants encounters difficulty. Duty, breach and damage are all conceded. The interest of the respondents which the law of negligence protected[79] in respect of the negligent misstatement or

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76 (1970) 119 CLR 397 at 418. See further *Gollan v Nugent* (1988) 166 CLR 18 at 46-48, where it was held in respect of an action for trespass to goods and conversion that the law does not deny an owner's right to possess property merely because of an intention to carry on criminal conduct.

77 (1970) 119 CLR 397 at 418. See also *Gala v Preston* (1991) 172 CLR 243 at 249-250, 263, 270-271, 291-292.

78 (1970) 119 CLR 397 at 400, 425 respectively.

79 *Tame v New South Wales* (2002) 76 ALJR 1348 at 1377-1378 [168]-[175]; 191 ALR 449 at 489-490; Grubb (ed), *The Law of Tort*, (2002), §§1.11-1.13; *Prosser and Keeton on Torts*, 5th ed (1984) at 5-6.

omission by Dr Cattanach was that of each of the respondents in the planning of their family or, as it has been put in the United States, in their reproductive future. The injury to that interest had varied elements. There were those matters reflected in the first award of some $103,000 to Mrs Melchior, but there were also those touching the responsibility the spouses incurred to rear their third child. That responsibility was both moral and legal. The *Child Support (Assessment) Act* 1989 (Cth) imposed obligations upon the parents of an "eligible child" who was under the age of 18 years[80]. It does not advance understanding greatly, one way or the other, to describe the expenditure required to discharge that obligation as "economic loss"[81].

67 Nor is it correct to say that the damage that the respondents suffered was the parent-child relationship or the coming into existence of the parent-child relationship. To do so is to examine the case from the wrong perspective. In the law of negligence, damage is either physical injury to person or property or the suffering of a loss measurable in money terms or the incurring of expenditure as the result of the invasion of an interest recognised by the law. The parent-child relationship or its creation no more constitutes damage in this area of law than the employer-employee relationship constitutes damage in an action *per quod servitium amisit*. In the latter case, the employer suffers damage, for example, only when it is forced to pay salary or wages to its injured employee although deprived of the employee's services[82]. It does not suffer damage merely because its employee has been injured. Similarly, for the purpose of this appeal, the relevant damage suffered by the Melchiors is the expenditure that they have incurred or will incur in the future, not the creation or existence of the parent-child relationship. If, for example, their child had been voluntarily cared for up to the date of trial, they could have recovered no damages for that part of the child's upbringing. And, if it appeared that that situation would continue in the future, then the damages they would be able to recover in the future would be reduced accordingly.

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80 See ss 3, 4, 24; *Luton v Lessels* (2002) 76 ALJR 635 at 636 [4]-[7], 640-642 [32]-[41], 650 [90], 659-661 [152]-[175]; 187 ALR 529 at 530-531, 537-539, 550, 563-566.

81 cf *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 204 [50], 218-220 [100]-[105], 240-242 [165]-[170], 330-331 [430].

82 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392.

68 The unplanned child is not the harm for which recompense is sought in this action[83]; it is the burden of the legal and moral responsibilities which arise by reason of the birth of the child that is in contention. The expression "wrongful birth" used in various authorities to which the Court was referred is misleading and directs attention away from the appropriate frame of legal discourse. What was wrongful in this case was not the birth of a third child to Mr and Mrs Melchior but the negligence of Dr Cattanach.

69 The submissions by the appellants introduce notions of public policy not in formulating the relevant duty of care nor, in so far as they would have the reasoning apply also in contract, to strike at the bargain itself. Rather, as remarked above, the appellants seek the proscription of a particular head of recovery of damages. The ground advanced is that the policy of the law does not allow of any treatment as compensable harm of the third category of damages awarded by Holmes J.

70 In *McFarlane*[84], Lord Millett treated what was involved as the "admission of a novel head of damages"; this raised a matter "not solely a question of principle" because "[l]imitations on the scope of legal liability arise from legal policy". His Lordship continued[85]:

> "Legal policy in this sense is not the same as public policy, even though moral considerations may play a part in both. The court is engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper. It is also concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases."

71 In this Court, the respondents dispute the first proposition that what was involved in the third category of the award made by Holmes J was a novel head of damages. They refer to the statement of general principle by McHugh J in *Nominal Defendant v Gardikiotis*[86]:

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83 cf Weir, "The Unwanted Child", (2000) *Cambridge Law Journal* 238; "Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant", (1982) 68 *Virginia Law Review* 1311 at 1317.

84 [2000] 2 AC 59 at 108.

85 [2000] 2 AC 59 at 108.

86 (1996) 186 CLR 49 at 54.

> "When a defendant has negligently injured a plaintiff, the common law requires the defendant to pay a money sum to the plaintiff to compensate that person for any damage that is causally connected to the defendant's negligence and that ought to have been reasonably foreseen by the defendant when the negligence occurred[87]. The sum of money to be paid to the plaintiff is that sum which will put the plaintiff, so far as is possible, 'in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation'[88]. Consequently, when a plaintiff asserts that, but for the defendant's negligence, he or she would not have incurred a particular expense, questions of causation and reasonable foreseeability arise. Is the particular expense causally connected to the defendant's negligence? If so, ought the defendant to have reasonably foreseen that an expense of that kind might be incurred?"

72 Both questions, posed with respect to the third category of the award at trial in the present case, should be answered in the affirmative. Indeed, later in his speech in *McFarlane*, Lord Millett had discounted any distinctions between pure and consequential economic loss, saying[89]:

> "The distinction is technical and artificial if not actually suspect in the circumstances of the present case, and is to my mind made irrelevant by the fact that Catherine's conception and birth are the very things that the defenders' professional services were called upon to prevent. In principle any losses occasioned thereby are recoverable however they may be characterised."

73 In addition, notwithstanding what had been said by Lord Millett in *McFarlane* (in the first passage set out above), the appellants in the present case displayed no enthusiasm for a distinction between "legal policy" and "public policy"; they rightly preferred the term "policy of the law". In the course of giving his answers to the questions put by the House of Lords in *Egerton*, Cresswell J said[90]:

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87 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 at 423, 425; *Chapman v Hearse* (1961) 106 CLR 112 at 122.

88 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39.

89 [2000] 2 AC 59 at 109.

90 (1853) 4 HLC 1 at 87 [10 ER 359 at 394-395].

> "I have already observed that I presume we are not asked our opinions as to public policy, but as to the law; and I apprehend that when in our law-books of reports we find the expression, it is used somewhat inaccurately instead of 'the policy of the law.' Thus, contracts in restraint of trade have been said to be illegal as against public policy, but in truth, it is part of the common law that trade shall not be restricted, as was held in the Year Book[91]; and unreasonable contracts in restraint of trade violate the policy of that part of the common law, and are therefore illegal. So, in bankruptcy, the object and policy of the bankrupt-laws is to make a rateable distribution of the bankrupt's property amongst all his creditors, and preferences given to particular creditors by a trader in contemplation of bankruptcy are in violation of the policy of the bankrupt-laws, and are therefore held to be fraudulent and void."

More recently, Lord Radcliffe began a lecture on the subject, perhaps inevitably titled "Riding an Unruly Horse"[92], with the statement[93]:

> "Every system of jurisprudence tends to produce in the course of its own development a conception of a 'public policy' or 'public interest' which on occasions overrides its normal recognition and enforcement of legal rights and interests."

74 Much of the maturation of the policy of the law to which reference has been made above took place in England in cases decided at a period in which the body of statute law was comparatively small, representative and responsible government as now understood was in its infancy, and there was no universal franchise. Lord Diplock made the point, with particular reference to the development of the criminal law, in *R v Knuller (Publishing, Printing and Promotions) Ltd*[94]. Much has changed. Thus, whether by asserting a general superintendence of morality or otherwise, the courts today are no longer able to create common law criminal offences[95].

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91 2 H 5, pl 26.

92 See *Richardson v Mellish* (1824) 2 Bing 229 at 252 [130 ER 294 at 303] and the other equine metaphors collected by Kirby J in *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 232.

93 Radcliffe, *The Law & Its Compass*, (1960) at 37.

94 [1973] AC 435 at 473-474.

95 *R v Rogerson* (1992) 174 CLR 268 at 304; *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435 at 457-458, 464-465, 490, 496.

75 Hence the force of Lord Radcliffe's further remarks[96]:

> "Public policy suggests something inherently fluid, adjusted to the expediency of the day, the proper subject of the minister or the member of the legislature. The considerations which we accept as likely to weigh with them are just not those which we expect to see governing the decisions of a court of law. On the contrary, we expect to find the law indifferent to them, speaking for a system of values at any rate less mutable than this."

Lord Atkin spoke to similar effect in *Fender v St John-Mildmay*[97], as earlier had Isaacs J in *Wilkinson v Osborne*[98] and Winfield in his influential essay, "Public Policy in the English Common Law"[99].

76 What was put by Isaacs J in *Wilkinson*[100] may be adapted to the present case by posing two questions. First, are the underlying values respecting the importance of human life, the stability of the family unit and the nurture of infant children until their legal majority an essential aspect of the corporate welfare of the community? Secondly, if they are, can it be said there is a general recognition in the community that those values demand that there must be no award of damages for the cost to the parents of rearing and maintaining a child who would not have been born were it not for the negligent failure of a gynaecologist in giving advice after performing a sterilisation procedure?

77 Allowing an affirmative answer to the first question, nevertheless the answer to the second must be that the courts can perceive no such general recognition that those in the position of Mr and Mrs Melchior should be denied the full remedies the common law of Australia otherwise affords them. It is a beguiling but misleading simplicity to invoke the broad values which few would deny and then glide to the conclusion that they operate to shield the appellants from the full consequences in law of Dr Cattanach's negligence. The present is one of that class of case identified by Viscount Haldane in *Rodriguez v Speyer*

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96 Radcliffe, *The Law & Its Compass*, (1960) at 43-44.

97 [1938] AC 1 at 10-11.

98 (1915) 21 CLR 89 at 97.

99 (1928) 42 *Harvard Law Review* 76 at 95-99.

100 (1915) 21 CLR 89.

Brothers[101]; the question is whether the underlying values which the appellants invoke are "so definite that [they] must be applied without reference to whether a particular case involves the real mischief to guard against which [they were] originally introduced"[102].

78 The reliance upon values respecting the importance of life is made implausible by the reference to the postulated child as "healthy". The differential treatment of the worth of the lives of those with ill health or disabilities has been a mark of the societies and political regimes we least admire[103]. To prevent recovery in respect of one class of child but not the other, by reference to a criterion of health, would be to discriminate by reference to a distinction irrelevant to the object sought to be achieved, the award of compensatory damages to the parents[104].

79 To suggest that the birth of a child is always a blessing, and that the benefits to be derived therefrom always outweigh the burdens, denies the first category of damages awarded in this case; it also denies the widespread use of contraception by persons such as the Melchiors to avoid just such an event. The perceived disruption to familial relationships by, for example, the Melchiors' third child later becoming aware of this litigation, is at best speculative. In the absence of any clear and accepted understanding of such matters, the common law should not justify preclusion of recovery on speculation as to possible psychological harm to children.

80 The point was emphasised as follows in *Custodio v Bauer*[105]:

> "One cannot categorically say whether the tenth arrival in the Custodio family will be more emotionally upset if he arrives in an environment where each of the other members of the family must contribute to his support, or whether he will have a happier and more well-adjusted life if he brings with him the wherewithal to make it possible."

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101 [1919] AC 59 at 77.

102 [1919] AC 59 at 77.

103 Hoyano, "Misconceptions About Wrongful Conception", (2002) 65 *Modern Law Review* 883 at 900-901.

104 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478.

105 59 Cal Rptr 463 at 477 (1967).

81 In *McFarlane*[106], Lord Steyn concluded:

> "Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing."

82 Another, and to us the preferable, view was later put by Hale LJ in *Parkinson*[107]:

> "The traveller on the Underground is not here being invoked as a hypothetical reasonable man but as a moral arbiter. We all know that London commuters are not a representative sample of public opinion. We also know that the answer will crucially depend upon the question asked and the amount of relevant information and argument given to help answer it. The fact that so many eminent judges all over the world have wrestled with this problem and reached different conclusions might suggest that the considered response would be less emphatic and less unanimous."

83 Her Ladyship's remarks return one to the identification by Isaacs J in *Wilkinson*[108] of that which has general recognition in the community. It may well be said that changes in the composition and attitudes of society in Australia in the century since Isaacs J wrote that judgment have made it very difficult to make broad assumptions as to what, apart from expression in legislation, the courts in the exercise of the judicial power to develop and apply the common law should accept as the paradigm of social behaviour. However, that realisation serves but to emphasise the point made by Lord Radcliffe some 40 years ago that the policy of the law should be slow to fix upon something "inherently fluid"[109].

84 There remains the subsidiary submission by the appellants respecting the "setting-off" of the emotional satisfaction and other benefits enjoyed by Mr and Mrs Melchior from the birth of their third child. The assumption here is that there is no bar to recovery of damages under the third category recovered at trial; the contention is that those damages should have been limited in some way.

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106 [2000] 2 AC 59 at 82.

107 [2002] QB 266 at 290.

108 (1915) 21 CLR 89 at 97-98.

109 Radcliffe, *The Law & Its Compass*, (1960) at 43.

85 Section 920 of the *Restatement (Second) of Torts*, issued in 1977, sets out what in the United States is described as the "benefit rule":

> "When the defendant's tortious conduct has caused harm to the plaintiff or to 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 damages, to the extent that this is equitable."

Comment *b* to the *Restatement* notes:

> "Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited."

86 Speaking of §920, it has been said[110]:

> "In the wrongful birth context, application of the rule requires an identification of the interest a plaintiff sought to protect in attempting to avoid the conception of a child, and a determination of whether a special benefit to that interest was conferred upon the plaintiff as a result of the defendant's tortious conduct. This 'same interest' limitation prevents damages resulting from the injury to one particular interest from being diminished by a showing that some other interest has been benefitted."

In some cases in the United States[111], a broad interpretation has been given to the notion of "same interest" with the effect of allowing an offsetting of what was said to be postnatal non-pecuniary benefits of parenthood, thereby resulting in a significant reduction in the damages recovered. Thus, in *Troppi v Scarf*[112], a Michigan court said:

> "Since pregnancy and its attendant anxiety, incapacity, pain and suffering are inextricably related to child bearing ... it would be [unsound] to attempt to separate those segments of damage from the economic costs of an unplanned child in applying the 'same interest' rule."

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110 Milsteen, "Recovery of Childrearing Expenses in Wrongful Birth Cases: A Motivational Analysis", (1983) 32 *Emory Law Journal* 1167 at 1180.

111 For example, *Troppi v Scarf* 187 NW 2d 511 (1971); *Sherlock v Stillwater Clinic* 260 NW 2d 169 (1977); *Boone v Mullendore* 416 So 2d 718 (1982).

112 187 NW 2d 511 at 518 (1971).

87 In other decisions, for example *Custodio v Bauer*[113], the contrary result has been reached, it being emphasised that the offsetting benefit must be to the interest protected. A similar point was made in this Court, with reference to §920 as it appeared in the first *Restatement* issued in 1939, by Dixon J in *Public Trustee v Zoanetti*[114]. His Honour stated as a general proposition[115]:

> "[W]hen there are two interests adversely affected you cannot treat recompense for one as a gain arising from the occurrence and operating in relief of the loss of or injury to the other interest."

His Honour continued, with reference to Comment *b* to §920[116]:

> "Indeed, even when one of two separate interests is benefited in consequence of a wrongful act, the benefit cannot be set off against an injury to the other. ... It is not immaterial to notice that in describing some of the various applications given to this principle the *Restatement* includes the proposition that damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife."

88 Earlier in his reasons in *Zoanetti*, Dixon J identified the different interests of a wife in the life of her husband, founded upon the economic or pecuniary advantages of the marriage, and her interests founded upon affections and feelings[117]. So in this case the interests of Mr and Mrs Melchior in controlling the size of their family, for the economic and apprehended eugenic reasons referred to above, have a different character or quality to the affection they would give and hope to receive from a child of their marriage, whatever the circumstances in which Mrs Melchior conceived and was brought to term.

89 In argument, reference was made to the case of a parent bringing a "nervous shock" action for the death of a child and of a widow bringing an action under the compensation to relatives statutes. Could it be said that in the first case there was to be an offset for the expenditure saved for future support of a child

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113 59 Cal Rptr 463 (1967).

114 (1945) 70 CLR 266.

115 (1945) 70 CLR 266 at 278.

116 (1945) 70 CLR 266 at 278. The example referred to in the first *Restatement* appears unchanged in Comment *b* to §920 in the second *Restatement*.

117 (1945) 70 CLR 266 at 277.

and, in the second, for the removal of the inconveniences involved in the wife looking after her husband? In each case, there would be no set-off because of the principles indicated by Dixon J in *Zoanetti*. The same is true of the present case.

90 The statement of relevant legal principle by Dixon J also shows why it is an error to think that awarding damages for the cost of raising a child inevitably requires the courts to balance the "monetary value of the child"[118] against the cost of maintaining the child. In assessing damages, it is impermissible in principle to balance the benefits to one legal interest against the loss occasioned to a separate legal interest. The benefits received from the birth of a child are not legally relevant to the head of damage that compensates for the cost of maintaining the child. A different case would be presented if the mother claimed damages for "loss of enjoyment of life" as the result of raising the child. If such a head of damage were allowable, it would be correct to set off against the claim all the benefits derived from having the child. But the head of damages that is relevant in the present case is the financial damage that the parents will suffer as the result of their legal responsibility to raise the child. The benefits to be enjoyed as a result of having the child are not related to that head of damage. The coal miner, forced to retire because of injury, 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. Likewise, the award of damages to the parents for their future financial expenditure is not to be reduced by the enjoyment that they will or may obtain from the birth of the child.

91 Logically, those persons like Lord Millett who would deny the cost of maintaining the child because of what they see as the immeasurable benefits gained from the birth of the child must deny the right of action itself. If the immeasurability of those benefits denies damages for the cost of maintaining the child, there must also be denied recovery for the hospital and medical costs of the birth and for the attendant pain and suffering associated with the birth. Yet, illogically as it seems to us, those persons permit the action and allow damages to be recovered in respect of these two heads of damage.

92 The appeal should be dismissed with costs.

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118 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 111 per Lord Millett.

93 KIRBY J. This appeal[119] concerns an aspect of the law of negligence. It requires the determination of whether damages may be recovered following negligent advice after a sterilisation procedure which resulted in an unexpected pregnancy and consequent birth. The issues of negligence and causation are not now in dispute. However, part of the damages is contested.

The facts and history of the proceedings

94 The proceedings are an outcome of the failure of a sterilisation operation and the omission of the surgeon to give his patient adequate warning of the risks of further conception. Such a risk existed because, during the surgery, the surgeon detected and clipped only one fallopian tube[120]. In fact, there was another intact fallopian tube obscured by adhesions that were the consequence of a childhood operation upon the patient about which the surgeon had been informed.

95 The patient, being uninformed about the risk of further conception and believing that the sterilisation had succeeded, resumed unprotected sexual relations with her husband. She failed to explore the option of an available further investigation (hysterosalpingogram) to establish the risk of residual fertility. These events resulted in the birth of a child who was healthy. He was the third child and first son of the couple. The parents have acknowledged their love for him although his birth was unplanned[121].

96 The parents sued the surgeon and the State of Queensland, the latter as responsible for the hospital where the surgery was performed. A count in contract was pleaded but not pursued. This left as the sole claim one framed in negligence. The primary judge found negligence against the surgeon for which he and the State were liable, in respect of his failure to inform his patient after the operation of the possibility that the sterilisation might have been ineffective. She found that such failure was a material cause of the pregnancy that followed[122].

97 The primary judge awarded the mother damages for her pain and suffering in respect of the pregnancy and birth, the effects of the pregnancy on her health,

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119 From a decision of the Supreme Court of Queensland (Court of Appeal): *Melchior v Cattanach* [2001] QCA 246.

120 *Melchior v Cattanach* (2001) Aust Torts Reports ¶81-597 at 66,620-66,621 [8]. Relevant additional facts are set out in the reasons of Callinan J at [266]-[273].

121 (2001) Aust Torts Reports ¶81-597 at 66,629 [51], 66,635 [80].

122 (2001) Aust Torts Reports ¶81-597 at 66,626 [33].

her lost earning capacity and the cost of maternity wear, along with damages[123] for future care that she might need[124]. She also awarded the father a small sum for loss of consortium. These awards are not in contest in this Court. However, the primary judge went on to award damages to the parents in the sum of $105,249.33 for past and future costs associated with raising and maintaining the child[125]. The surgeon and the State ("the appellants") appealed to the Queensland Court of Appeal challenging the primary judge's findings on liability, causation and that aspect of damages that concerned the costs of child-rearing.

98 The Court of Appeal unanimously rejected the challenges to the findings on liability in negligence and causation[126]. However, on the issue of damages for the costs of child-rearing, that Court divided. By majority, the appeal was dismissed[127]. Special leave to appeal to this Court was granted, limited to the recoverability of the costs of raising and maintaining the child. The sole question before this Court, therefore, concerns the principle governing the recovery of the costs of child-rearing rather than the precise manner in which (or duration for which)[128] any costs of child-rearing should be provided. The appellants submitted that it was wrong in legal principle to include such a component in the parents' damages and, if it was not, that the courts below had erred in their approach to the calculation of the amount recoverable.

99 It is in this way that this Court is obliged to answer the question whether, in proceedings brought by parents having the legal and moral responsibility to raise a child, born in consequence of a failed sterilisation procedure (or as a result

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123 Claimed to be based on *Griffiths v Kerkemeyer* (1977) 139 CLR 161. See reasons of Callinan J at [276].

124 (2001) Aust Torts Reports ¶81-597 at 66,635 [81]-[82].

125 (2001) Aust Torts Reports ¶81-597 at 66,635 [81]-[82].

126 [2001] QCA 246 at [2]-[4] per McMurdo P; [72]-[76] per Davies JA; [132]-[133], [137] per Thomas JA dissenting.

127 [2001] QCA 246. Extracts from the dissenting opinion of Thomas JA appear in the reasons of Callinan J at [279].

128 The primary judge allowed $17,698.80 for past costs of rearing the respondents' son together with interest on that amount of 5% for three years and $84,895.53 for the costs of raising the child to age 18, making the total awarded. See (2001) Aust Torts Reports ¶81-597 at 66,634 [79], 66,635 [81]. In contemporary circumstances, at least in some cases, where tertiary education would be a reasonable possibility, provision until legal majority might be insufficient. However, that question was not an issue in the appeal.

of an omission to warn properly of a risk of such failure), the costs of child-rearing may be included in the parents' damages. If it may, a subsidiary question arises as to whether the sum allowed for that item should be reduced to allow for the joys and benefits derived, and any prospects of support in the future, from the birth of a child.

100 No statute law provides the answer to these questions. It is therefore necessary to apply the common law. There is no authority of this Court establishing a clear rule with sufficient particularity to yield immediately a solution to the issues in the appeal. In *Registrar of Titles v Spencer*[129], this Court, in its early days, adopted the general principle governing damages in tort expressed by Lord Blackburn in *Livingstone v Rawyards Coal Company*[130]. His Lordship there said that basic principle provided for the recovery of[131]:

> "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

101 This principle of compensation (or restoration) is, however, of limited value as a guide to the answers that should be given to the problem now before us. Courts have repeatedly acknowledged that the calculation of damages in tort is an inexact activity "accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe"[132].

102 There being no binding authority and the general principle being of limited guidance, it is necessary to have resort to the usual sources of the common law invoked by the courts in such circumstances. Those sources are: (1) the state of any legal authority that may be developed and applied by analogy

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129 (1909) 9 CLR 641 at 645. See also *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191; *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625 at 646-647; *Todorovic v Waller* (1981) 150 CLR 402 at 412; *Johnson v Perez* (1988) 166 CLR 351 at 367, 371; *Haines v Bendall* (1991) 172 CLR 60 at 63; *The Laws of Australia – Torts* (2003) at 595 [33.10:7].

130 (1880) 5 App Cas 25.

131 (1880) 5 App Cas 25 at 39; cf *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 at 54 cited in the reasons of McHugh and Gummow JJ at [71].

132 *Watson, Laidlaw and Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104 at 118 (HL) per Lord Shaw.

to new circumstances; (2) any applicable considerations of relevant legal principle; and (3) any considerations of legal policy[133].

Past legal authority on failed sterilisation

103 *Early English authority*: Sterilisation operations, and their consequences, have, for as long as they have existed, caused sharp differences of opinion amongst judges of the common law. An early example can be found in the English Court of Appeal in *Bravery v Bravery*[134]. There, a husband had undergone a sterilisation operation in 1938, despite protests of his wife who wanted more children. Eventually, the wife petitioned for divorce on the ground of his cruelty. Her claim was dismissed. However, Denning LJ dissented. He acknowledged that the operation could be lawful where done for "just cause", such as to prevent the transmission of an hereditary disease. However, his Lordship went on[135]:

> "But when it is done without just cause or excuse, it is unlawful, even though the man consents to it. Take a case where a sterilisation operation is done so as to enable a man to have the pleasure of sexual intercourse, without shouldering the responsibilities attaching to it. The operation then is plainly injurious to the public interest. It is degrading to the man himself. It is injurious to his wife and to any woman whom he may marry, to say nothing of the way it opens to licentiousness; and, unlike contraceptives, it allows no room for a change of mind on either side."

104 In unusually sharp language, the majority in *Bravery* (Sir Raymond Evershed MR and Hodson LJ) felt "bound to dissociate ourselves from the general observations of the Lord Justice at the end of his judgment"[136]. This rebuke arose from the deeply felt differences that informed judicial opinions on the subject of sterilisation in 1954. The intervening half-century has not removed these strong feelings. But it has taught the need to keep them in check and to adhere, so far as possible, to the neutral application of basic legal principles, more important than ever where passions are aroused by a legal controversy.

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133 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347; cf *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 at 43-44 [8] ("Principle"), 46-47 [14] ("Authority"), 66-67 [33] ("Policy"); see also at 71 [48], 75 [64].

134 [1954] 1 WLR 1169; [1954] 3 All ER 59.

135 [1954] 1 WLR 1169 at 1180; [1954] 3 All ER 59 at 67-68.

136 [1954] 1 WLR 1169 at 1175; [1954] 3 All ER 59 at 63.

105 In the 1960s, and thereafter, social attitudes to various forms of contraception, including sterilisation, began to change in Australia as in other like countries. The changes make the attitudes of Denning LJ expressed in *Bravery* seem increasingly anachronistic. In part, the changes have come about as a result of greater knowledge of, and discussion about, human sexuality[137]; in part, they have followed advances in the technology of contraception and sterilisation procedures; and in part, they have reflected social changes affecting the role of women and of marriage, the economic expectations of individuals and the altered place of religion in society. These and other considerations present the background against which judicial decisions in various countries concerning failed sterilisation procedures must be viewed.

106 The common law does not exist in a vacuum. It is expressed by judges to respond to their perceptions of the requirement of justice, fairness and reasonableness in their society. By the 1970s, the concurrent happening of the social and technological changes that I have mentioned began to produce claims by disappointed patients who had undergone sterilisation operations for the purpose of removing the risk of conception and the need to use other forms of contraception, only to discover that the operations had failed, that conception had occurred, that a baby was born and that they were, as a consequence, burdened both with short-term and long-term losses[138]. What commenced as a relatively small number of cases is now a substantial and growing body of decisional law, not only in common law countries but also in countries with civil law systems.

107 An early decision in England in *Udale v Bloomsbury Area Health Authority*[139] attempted to stem the tide of such claims. In that case, involving the birth of a child following the failure of a sterilisation operation, Jupp J awarded the patient damages for pain and suffering and loss of earnings during pregnancy. His Lordship allowed a small amount for the disturbance of family finances caused by the unexpected conception. However, he rejected the patient's claim for the costs of raising the child (sought in that case to the age of sixteen). He found that to allow damages of such a kind was contrary to public policy, being disruptive of family life and inconsistent with the sanctity of human life[140].

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137 Following such developments as the publication of the Kinsey Reports: Kinsey et al, *Sexual Behavior in the Human Male* (1948); *Sexual Behavior in the Human Female* (1953).

138 An early United States case was *Coleman v Garrison* 349 A 2d 8 (1975), modified in part by *Garrison v Medical Center of Delaware* 581 A 2d 288 (1990).

139 [1983] 1 WLR 1098; [1983] 2 All ER 522.

140 [1983] 1 WLR 1098 at 1107, 1109; [1983] 2 All ER 522 at 529, 531. He drew some support from *McKay v Essex Area Health Authority* [1982] QB 1166.

108 As more such cases came before the courts differing views soon emerged. The approach of Jupp J was not followed in a number of the English cases that ensued, including *Emeh v Kensington and Chelsea and Westminster Area Health Authority*[141], *Thake v Maurice*[142] and *Benarr v Kettering Health Authority*[143]. In those cases, the judges rejected the argument that public policy prevented the recovery of damages for the cost of child-rearing. As far as the later judges were concerned, the normal legal principle of recovery of damages would apply. A person injured through the negligence of another could recover damages on the compensatory principle for all losses that were reasonably foreseeable to the tortfeasor at the time of the wrong. Such losses included, in a case of such a kind, the basic costs of child-rearing.

109 *Limited Australian authority*: This was the state of the understanding of the English common law when cases of this kind first arose before Australian courts. An early instance was *Dahl v Purnell*[144], decided by Pratt DCJ in the District Court of Queensland. That case involved a failed vasectomy. As in the present appeal, the claimant proved a want of proper warning about the risks of post-operative conception. The claim that public policy prevented an award of damages because the child was born healthy, was rejected by Pratt DCJ, with reference to the later English decisions[145]. An amount of nearly $37,000 was allowed for the cost of future upbringing of the child to the age of eighteen years. A not dissimilar approach was taken by de Jersey J in the Supreme Court of Queensland in *Veivers v Connolly*[146]. Such was the position of Australian law when *CES v Superclinics (Australia) Pty Ltd*[147] was decided by the New South Wales Court of Appeal.

110 *CES* was an instance of repeated negligent misdiagnosis of a patient's pregnancy which the patient claimed had deprived her of the chance to procure a lawful abortion that she would have undergone[148]. Several points not presently

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141 [1985] QB 1012 at 1020-1021.

142 [1986] QB 644.

143 [1988] NLJ 179.

144 (1992) 15 Qld Lawyer Reps 33.

145 (1992) 15 Qld Lawyer Reps 33 at 36 referring to *Thake* and *Emeh*.

146 [1995] 2 Qd R 326.

147 (1995) 38 NSWLR 47.

148 (1995) 38 NSWLR 47 at 69, 84.

material were argued in the case. Relevantly to the issues in this appeal, the Court of Appeal divided on the extent of the damages that the unmarried parents of the unplanned child could recover.

111 In dissent, Meagher JA concluded that no damages for rearing the child could be recovered[149]. In part, his Honour, following Jupp J in *Udale*, reasoned that this was so on the basis of the legal principle that such a claim was "utterly offensive". He said that "there should be rejoicing that the hospital's mistake bestowed the gift of life upon the child". In part, his Honour reasoned (with reliance upon St John's Gospel in the Christian Bible[150]) that the child was a "joy" for which the parents were obliged to give credit; that the calculation of the allowance for such "joy" was impossible; and that this fact demonstrated the impermissibility of recovering damages on that basis. Various other arguments of policy were called in aid[151].

112 *CES* was a decision in which I participated in the Court of Appeal. By reference to the state of authority in England and to United States cases at that time, I rejected the argument that, as a matter of policy, the "sanctity of human life" prevented the law from allowing damages for the "economic consequences" of the unplanned and unwanted pregnancy consequential upon medical negligence[152]. Whilst acknowledging that a court in such a case was required to assess damages for the net injury incurred by the victim of negligence, and that each case would depend on its own facts, I saw no reason "grounded in public policy" to deny full recovery by the parents of the damages claimed by them to compensate for the damage they had suffered, "physical, psychological and economic"[153].

113 The third judge in *CES*, Priestley JA, concluded, contrary to the reasoning of Meagher JA, that the parents were entitled to recover "any damage flowing from the negligent advice" to the effect that the mother was not pregnant, subject to considerations of foreseeability and remoteness[154]. However, Priestley JA

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149 (1995) 38 NSWLR 47 at 86 citing *McKay v Essex Area Health Authority* [1982] QB 1166 at 1193 per Griffiths LJ.

150 (1995) 38 NSWLR 47 at 87 citing John 16:21.

151 (1995) 38 NSWLR 47 at 87. Such as the policy against encouraging "unnatural" parental rejection of a child in the hope of enhancing damages.

152 (1995) 38 NSWLR 47 at 74-77.

153 (1995) 38 NSWLR 47 at 77.

154 (1995) 38 NSWLR 47 at 84.

concluded that, after a very short interval, the parents could have surrendered the child to adoption. The mother's decision to keep the child was her own choice. After that decision was made, the defendant was not legally responsible for the parents' financial costs of rearing the child[155].

114 In the exigencies, in order to provide guidance for the consequent retrial and to trial courts generally, I agreed in Priestley JA's approach as expressing the highest common denominator of the majority, whilst stating my dissent from it[156]. The resulting approach attracted numerous highly critical reviews[157]. Neither in this appeal nor in most other recent decisions on the issue[158] has the argument been accepted that a plaintiff is disentitled to damages because she failed to procure a termination of her pregnancy or, upon birth of the child, failed to arrange for its adoption.

115 This Court granted special leave to appeal in *CES*[159]. Had that appeal been decided, it is likely that the issues now before the Court, or many of them, would have been resolved. But the claim in *CES* was settled before the hearing of the appeal was completed. The result has been continued uncertainty in Australian law as to the principles to be applied[160]. The unloved holding established by the Court of Appeal majority in *CES* hardly represents a clear foundation for the resolution of the present appeal. This appeal cannot, therefore, be decided by reference to the state of Australian judicial authority particular to the issue in controversy.

116 Since *CES*, there have been many judicial decisions in other countries that have addressed the approach to be taken, in default of legislation, to problems of the present kind. Unfortunately, these decisions too have not spoken with a single voice.

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155 (1995) 38 NSWLR 47 at 84.

156 (1995) 38 NSWLR 47 at 78-79.

157 Swanton, "Damages for 'Wrongful Birth' – *CES v Superclinics (Aust) Pty Ltd*", (1996) 4 *Torts Law Journal* 1 at 6-7; Graycar and Morgan, "'Unnatural Rejection of Womanhood and Motherhood': Pregnancy, Damages and the Law", (1996) 18 *Sydney Law Review* 323 at 340-341.

158 eg *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 74.

159 *Nafte v CES* (1996) 7 Leg Rep SL3.

160 See eg *Edwards v Blomeley* [2002] NSWSC 460 at [96].

117 *United States authority*: In the United States of America, full recovery for the ordinary costs of raising a child born after sterilisation procedures have failed in consequence of medical negligence or negligent advice is allowed in a small number of States. In some States, judicial decisions allow recovery limited to the economic expenses but offset by an allowance for the emotional and other benefits derived by the parents as a consequence of the unexpected birth. Most States, however, deny the recovery of the costs of child-rearing, at least where the child in question is born without disabilities[161]. They usually do so on public policy grounds.

118 A summary of the United States cases, indicating the diversity of the principles applied in that country to 1997, may be found in *Emerson v Magendantz*[162]. The differences of opinion, and the often sharply divided views within individual State courts, illustrate the difficulty of procuring a consensus about what the principles of the common law require. However, it is fair to say that in the majority of jurisdictions in the United States courts have adopted a remedy of limited recovery that excludes the cost of child-rearing as an element of damages in medical malpractice suits following a failed sterilisation[163].

119 *Recent United Kingdom cases*: In the United Kingdom, the law has taken a different turning in the last three years following the decision of the House of Lords in *McFarlane v Tayside Health Board*[164]. In that case, for reasons stated in differing ways by the five participating Law Lords, it was held that the parents of a healthy child, born following a negligently performed sterilisation procedure, could not recover damages for the cost of bringing up that child from a local health authority legally responsible for the operation. In effect, their Lordships reversed fifteen years of English appellate authority which, after *Udale*, had, with substantial consistency, held that maintenance costs were recoverable in such circumstances because they flowed directly from the failed sterilisation, were reasonably foreseeable, were contemplated both by the parents and the surgeon concerned and were not too remote[165].

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161 Baugher, "Fundamental Protection of a Fundamental Right: Full Recovery of Child-Rearing Damages for Wrongful Pregnancy", (2000) 75 *Washington Law Review* 1205.

162 689 A 2d 409 (1997).

163 *Emerson* 689 A 2d 409 at 411-412 (1997). Thirty United States jurisdictions have adopted this approach. Two have adopted a full recovery rule without offsetting allowance for emotional and economic benefits.

164 [2000] 2 AC 59.

165 Hoyano, "Misconceptions About Wrongful Conception", (2002) 65 *Modern Law Review* 883 at 884.

120 Possibly because of the lack of agreement in the several reasons in *McFarlane* about the justification for the reversal of the previous authority of courts in England[166] and Scotland[167], courts in later cases and commentators in the United Kingdom have searched for a common principle to guide decision-makers on the application of the law. In my reading, the closest that anyone has come to identifying a common principle in *McFarlane* seems to be Buxton LJ in *Greenfield v Irwin*[168]. His Lordship there suggested that the true foundation of that decision was that it represented a particular application of the three-fold test propounded by the House of Lords in *Caparo Industries Plc v Dickman*[169]. That test is commonly followed in England (and other countries) when judges are asked to resolve novel claims for damage framed in reliance on the tort of negligence. As Buxton LJ points out in *Greenfield*, Lord Slynn of Hadley[170] and Lord Hope of Craighead[171] in *McFarlane* referred to the *Caparo* test in their reasons. According to Buxton LJ, Lord Steyn[172], by using the language of what was "fair, just and reasonable", did so implicitly, those considerations being the third (policy) criterion mandated by the *Caparo* test.

121 Whilst I find Buxton LJ's analysis compelling in this regard[173], it presents two significant difficulties for me in this appeal. The first is that Lord Steyn expressly repudiated as the foundation for his conclusion in *McFarlane*[174], an explanation explicitly grounded in public policy. Of more immediate

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166 Especially *Thake* [1986] QB 644 (CA). Leave to appeal to the House of Lords was refused. See also *Gold v Haringey Health Authority* [1988] QB 481 at 484; *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651 at 662.

167 *McFarlane v Tayside Health Board* 1997 SLT 211; *Allan v Greater Glasgow Health Board* 1998 SLT 580; *Anderson v Forth Valley Health Board* 1998 SLT 588.

168 [2001] 1 WLR 1279 at 1285 [19]-[20].

169 [1990] 2 AC 605 at 617-618.

170 [2000] 2 AC 59 at 75-76.

171 [2000] 2 AC 59 at 95-97.

172 [2000] 2 AC 59 at 82-83.

173 Set out in *Greenfield* [2001] 1 WLR 1279 at 1285 [19]-[20].

174 [2000] 2 AC 59 at 82-83.

importance, this Court has rejected the *Caparo* analysis[175]. After repeated efforts on my part to persuade this Court of the merits of the *Caparo* approach[176], I have been forced to admit defeat[177]. To the extent that *McFarlane* in the House of Lords, explicitly or implicitly, rests on a *Caparo* analysis, it provides no foundation of legal principle for guidance to this Court concerning the content of the requirements of the common law of Australia. I cannot forbear to mention the extent to which all members of this Court have referred in this appeal (correctly in my view) to considerations of principle and policy[178]. Yet it was the explicit reference to policy in the *Caparo* analysis that was considered enough to make the three-stage approach adopted there unsuitable for Australian courts in resolving novel questions of negligence liability[179].

122 The conclusion that the present appeal cannot be decided by the application of the *Caparo* three-fold test is an important one. If I were approaching this appeal in the manner that *Caparo* mandates, I would be forced to confront directly, and even more explicitly, the competing issues of policy necessary to the resolution of the third step in the *Caparo* analysis. However, obedient to the authority of this Court, I must put the *Caparo* analysis aside. Although I regard it as self-evident that courts take such policy considerations into account in deciding novel problems of this kind, the majority of this Court does not accept that such a transparent evaluation of issues of policy is appropriate to the courts in Australia[180]. I am therefore obliged to approach the

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175 *Sullivan v Moody* (2001) 207 CLR 562.

176 eg in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 420-427 [246]-[253]; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 476-477 [117]-[121], 484-485 [138]-[140]; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 286-291 [289]-[302]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 80-86 [223]-[235]; and *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 604-605 [241].

177 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183 at 228-229 [236]-[238]; 194 ALR 337 at 398-400.

178 cf reasons of McHugh and Gummow JJ at [76]-[77]; reasons of Callinan J at [292], [301].

179 cf *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 211-212 [80], 302 [333]-[334]; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 288-289 [101]; *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49] and authorities there cited.

180 cf reasons of Hayne J, especially at [194], [258]; reasons of Heydon J, especially at [354].

issues of legal principle and legal policy, relevant to this appeal, in a somewhat different way.

123 In the United Kingdom, despite Lord Steyn's denials, the proposition that the rejection in *McFarlane* of an entitlement to compensation for raising a healthy child rested, to some extent, on considerations of legal policy appears to be borne out by the course that decisional authority has followed since *McFarlane* was decided. In several cases, at trial and in the English Court of Appeal, questions have been raised about the scope of *McFarlane* and of the principle to be derived for its application to different fact situations.

124 Such was the case in *Rand v East Dorset Health Authority*[181]. There, as a result of negligence, an antenatal screening failed to detect that a foetus had Down's Syndrome. But for this negligence, the mother said she would have opted for a termination of her pregnancy which was certainly available in such circumstances. Notwithstanding *McFarlane*, the parents recovered an award for the financial consequences flowing from the child's disability which the judge held to be different in principle from awarding damages in consequence of the child's existence as such. The health authority did not appeal[182].

125 In *Parkinson v St James and Seacroft University Hospital NHS Trust*[183] a mother was awarded damages, upheld by the Court of Appeal, in a case where sterilisation had been carelessly performed and the child, who was born as a consequence, had a disability that involved the mother in extraordinary costs over and above those of normal upbringing.

126 In *Rees v Darlington Memorial Hospital NHS Trust*[184], the English courts had to consider the claim of a single mother who had given birth to a healthy child but who was herself severely visually impaired. Because of the mother's impairment the failure of her tubal ligation, resulting in conception, had imposed on her extra childcare costs, the avoidance of which had constituted the main reason that had led her to seek sterilisation. The trial judge refused the claim whilst acknowledging that the general rule in *McFarlane* was "fast dissipating"

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181 [2000] Lloyds Rep Med 181.

182 See also *Lee v Taunton and Somerset NHS Trust* [2001] 1 FLR 419.

183 [2002] QB 266.

184 [2003] QB 20.

in England[185]. However a majority of the Court of Appeal in *Rees*[186] reversed that decision. The House of Lords has heard an appeal which stands for judgment.

127 Since *Rees*, in *AD v East Kent Community NHS Trust*[187] a totally disabled mother in an institution, who gave birth to a healthy child in circumstances of alleged inadequate supervision, sued the Trust for negligence. The trial judge declined to adopt a further exception to *McFarlane*. He voiced criticisms of the state that the common law of England had reached[188]. He granted the plaintiff leave to appeal.

128 The law in the United Kingdom following these cases can be described, fairly, as exhibiting a mixture of "exhausted principle and obscure pragmatism"[189]. Although the appellants in this Court urged that any consideration of the issues of disability be postponed until a case arose presenting such facts, this would not, in my view, be a correct course to adopt. The decisions in England and Scotland since *McFarlane* illustrate "how far negligence law has come adrift of principle"[190]. They provide a preview, and a warning, against following the same course in Australian law. At least, we should not follow the English authority without a serious reflection on the consequences that will ensue if we do.

129 *Other common law countries*: In Canada, the trend of decisional law has generally reflected a disinclination of judges to provide damages for child-rearing

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185 Unreported, Queen's Bench, 9 March 2001 quoted in Hoyano, "Misconceptions About Wrongful Conception", (2002) 65 *Modern Law Review* 883 at 899.

186 [2003] QB 20 per Robert Walker and Hale LJJ; Waller LJ dissenting.

187 Unreported, Queen's Bench, 23 May 2002, Cooke J noted Hoyano, "Misconceptions About Wrongful Conception", (2002) 65 *Modern Law Review* 883 at 902-903.

188 Noted Hoyano, "Misconceptions About Wrongful Conception", (2002) 65 *Modern Law Review* 883 at 903.

189 Hoyano, "Misconceptions About Wrongful Conception", (2002) 65 *Modern Law Review* 883 at 905 citing Steele, "Scepticism and the Law of Negligence", (1993) *Cambridge Law Journal* 437 at 466-467.

190 Hoyano, "Misconceptions About Wrongful Conception", (2002) 65 *Modern Law Review* 883 at 892.

in cases of the present kind[191]. Even then, exceptional circumstances have been acknowledged as possibly requiring the exceptional provision of compensation for the costs of child-rearing[192].

130 In New Zealand, the position is complicated by the existence of the accident compensation scheme[193]. However, within that context, the administrative determinations and judicial decisions on review have also reflected a general unwillingness to burden the Accident Compensation Corporation with the costs of the upkeep of a healthy child born as a result of compensable "medical misadventure"[194].

131 In South Africa, on the other hand, the arguments of public policy that have elsewhere been successful in drawing a line against recovery in such cases, have not found favour in the courts. Both in early decisions[195] and in a more recent case[196] the South African Supreme Court of Appeal has rejected the defendants' arguments of public policy. Whilst accepting that unexpected and unwanted births from failed sterilisation procedures cannot, as such, constitute a "legal loss" within South African delictual law, the economic burden of the parents' obligation to maintain the child has been recognised as a loss for which damages may be recovered.

132 *Civil law approaches*: In the civil law systems in Europe, judicial opinions are as divided as they are in the common law. The law is still developing. However, where, following failed sterilisation, a healthy child is born, the law in France, like that of the United Kingdom following *McFarlane*, denies damages for the costs of the child's upbringing[197]. Yet in Germany, a

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191 *Doiron v Orr* (1978) 86 DLR (3d) 719; *Cataford v Moreau* (1978) 114 DLR (3d) 585; *Fredette v Wiebe* (1986) 29 DLR (4th) 534.

192 *Kealey v Berezowski* (1996) 136 DLR (4th) 708 at 741.

193 The legislative scheme governed by the *Injury Prevention, Rehabilitation, and Compensation Act* 2001 (NZ).

194 *Re Z: Decision No 764* (1982) 3 NZAR 161; *XY v Accident Compensation Corporation* (1984) 2 NZFLR 376; cf *SGB v WDHB* [2002] NZAR 413.

195 *Edouard v Administrator, Natal* 1989 (2) SA 368 affd *Administrator, Natal v Edouard* 1990 (3) SA 581.

196 *Mukheiber v Raath* 1999 (3) SA 1065.

197 See *McFarlane* [2000] 2 AC 59 at 73, 80. See also *Greenfield* [2001] 1 WLR 1279 at 1288-1290 [31]-[36] per Buxton LJ.

limited measure of support may be recovered for such costs. In the Netherlands, the Hoge Raad held in 1997, contrary to the submission of the Advocate-General, that full damages for child-rearing may be recovered in such cases[198]. Where a disabled child is born, German law permits full recovery; the law in Britain seems for the moment to allow recovery of additional costs. In France, following legislation, no costs of upbringing may be recovered although the parents have certain other personal rights which they may pursue[199].

133 *Emerging common themes*: This short review of the current state of judicial authority in a number of developed countries, necessarily brief and incomplete, reveals the difficulties of the problems presented to courts asked to provide a component of damages for the costs of upbringing of a child born after negligently performed sterilisation procedures. There are common themes in the solutions offered by the several courts cited. But there is little consensus in the present state of authority as to the basic approach that should be taken.

134 The majority of courts have adopted control mechanisms of one kind or another to limit the liability of a surgeon, hospital or health service so as to exclude the potentially large amounts incurred in the upbringing of a child born in such circumstances. However, the definition of the "cut-off" point and the explanation of why and how it is to be found, varies significantly.

135 Lying deep in many of the judicial opinions are perceptions of moral or ethical factors, illustrated by the recourse to Biblical citations[200]. Sometimes, to avoid the appearance of unreliable personal opinions, judges have attempted to objectify the foundation for their judgments. Lord Steyn did this in *McFarlane* by his appeal to the supposed opinion of the passenger in the London Underground[201]. This fictional character, a successor to the man on the Clapham omnibus[202], is elevated to a modern Delphic oracle so as to amount to something more than "the subjective view of the judge [as to] what he reasonably believes

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198 See *McFarlane* [2000] 2 AC 59 at 73; Weir, "The Unwanted Child", (2002) 6 *Edinburgh Law Review* 244 at 250.

199 Weir, "The Unwanted Child", (2002) 6 *Edinburgh Law Review* 244 at 250.

200 eg *CES* (1995) 38 NSWLR 47 at 87 per Meagher JA; *XY v Accident Compensation Corporation* (1984) 2 NZFLR 376 at 381 per Jeffries J.

201 [2000] 2 AC 59 at 82: "Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing."

202 cf Jones, "Bringing up Baby", (2001) *Tort Law Review* 14 at 18.

that the ordinary citizen would regard as right"[203]. However, the fiction has proved unconvincing to many of the judges to whom it was addressed by the House of Lords[204] and to academic commentators who have analysed the reasoning in *McFarlane* since that decision was delivered[205].

136 Instead of pretending to such fictions, judges should, in my view, be willing to take responsibility for applying the established judicial controls over the expansion of tort liability. Even if, in Australia, they reject the explicit controls stated in *Caparo*, they should accept that[206]:

> "Every system of law must set some bounds to the consequences for which a wrongdoer must make reparation … In any state of society it is ultimately a question of policy to decide the limits of liability."

137 The setting of such bounds by a legislature can be arbitrary and dogmatic. Subject to any constitutional restrictions, Parliaments, motivated by political considerations and sometimes responding to the "echo-chamber inhabited by journalists and public moralists"[207], may impose exclusions, abolish common law rules, adopt "caps" on recovery and otherwise act in a decisive and semi-arbitrary way[208]. Judges, on the other hand, have the responsibility of expressing, refining and applying the common law in new circumstances in ways that are logically reasoned and shown to be a consistent development of past decisional law. Of course, in a general way, judges should take the economic outcomes of their

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203 *McFarlane* [2000] 2 AC 59 at 82 per Lord Steyn.

204 eg Hale LJ in *Parkinson* [2002] QB 266 at 290 [82] cited by McHugh and Gummow JJ at [82]; cf Robert Walker LJ in *Rees* [2003] QB 20 at 32 [41].

205 eg Hoyano, "Misconceptions About Wrongful Conception", (2002) 65 *Modern Law Review* 883 at 898.

206 *McLoughlin v O'Brian* [1981] QB 599 at 623.

207 *Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218 at 233 [60]; [2002] 3 All ER 78 at 91-92.

208 In a number of Australian jurisdictions legislation has recently been introduced to impose restrictions on the recovery of damages for injury: see eg *Motor Accidents Compensation Act* 1999 (NSW); *Civil Liability Act* 2002 (NSW). The *Personal Injuries Proceedings Act* 2002 (Q) was introduced in accordance with s 4(1) "to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury". See *The Laws of Australia – Torts* (2003) at 596 [33.10:7]; *Review of the Law of Negligence* (Justice David Ipp, Chairman) (2002) at 181-183.

decisions into account[209]. But they have no authority to adopt arbitrary departures from basic doctrine[210]. Least of all may they do so, in our secular society, on the footing of their personal religious beliefs or "moral" assessments concealed in an inarticulate premise dressed up, and described, as legal principle or legal policy[211].

The competing choices

138 An analysis of the foregoing, and other, legal authority indicates that several possibilities compete for the solution of the quandary before this Court in this appeal. Confining myself to the chief of these, the possible responses to a claim in negligence by parents seeking to recover damages in respect of the costs of rearing an unplanned child born in the given circumstances are:

(1) That no damages may be recovered where the child is born healthy and without disability or impairment;

(2) That damages may be recovered but confined to the immediate damage to the mother (and loss of consortium for the father) together with any expenses and loss of earnings immediately consequential on the pregnancy and delivery but excluding the costs of upkeep until self-reliance of a healthy child;

(3) That damages may be recovered but confined to the foregoing together with any additional costs of rearing a child born with a disability or born to a parent or parents with a disability;

(4) That damages may be recovered in full for the reasonable costs of rearing an unplanned child to the age when that child might be expected to be economically self-reliant, whether the child is "healthy" or "disabled" or "impaired" but with a deduction from the amount of such damages for the joy and benefits received, and the potential economic support derived, from the child; and

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209 *Kinzett v McCourt* (1999) 46 NSWLR 32 at 51 [97] per Spigelman CJ.

210 cf *McFarlane* [2000] 2 AC 59 at 76 per Lord Slynn; Hoyano, "Misconceptions About Wrongful Conception", (2002) 65 *Modern Law Review* 883 at 905.

211 Swanton, "Damages for 'Wrongful Birth' – *CES v Superclinics (Aust) Pty Ltd*", (1996) 4 *Torts Law Journal* 1 at 7. See also reasons of Gleeson CJ at [6]; cf Meagher JA in *CES* (1995) 38 NSWLR 47 at 86-87.

(5) That full damages against the tortfeasor for the cost of rearing the child may be allowed, subject to the ordinary limitations of reasonable foreseeability and remoteness, with no discount for joys, benefits and support, leaving restrictions upon such recovery to such limitations as may be enacted by a Parliament with authority to do so.

139 It is convenient to collect the foregoing main solutions to the problem under these headings. In substance, the issue for this Court is which of them represents the solution that seems most harmonious with the applicable considerations of legal authority, principle and policy, as viewed in contemporary Australia.

Option 1: No damages

140 In substance, the foundation for the first option can normally be traced to religious, political or social views resting upon specific attitudes to the dignity of the human person, for example as that person is believed to be created in the image of God. Some of a secular persuasion might rely on concepts of fundamental human rights, resting on notions of inherent human dignity[212]. There are resonances of this latter discourse in Hale LJ's reasoning in *Parkinson*, objecting to an approach to damages that would treat a disabled child as having less worth than a healthy child or that would "commodify" the status of childhood[213]. For similar reasons, Hayne J in this Court rejects an approach that he considers would involve treating "life" as an "article of commerce" with "market value"[214].

141 Apart from some hints of a human rights explanation for denying recovery altogether, most of the judicial expositions of this viewpoint have been expressed in terms reflecting an opinion that the birth of a "normal, healthy baby [is] a blessing, not a detriment"[215]. Although it is acknowledged that it may sometimes, in the result, represent a "mixed blessing", it is regarded as offensive to the natural gratitude that should exist for healthy progeny to countenance demands for money so that persons other than the parents will assume

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212 See reasons of Heydon J at [353].

213 *Parkinson* [2002] QB 266 at 293 [89]-[90]. Her Ladyship concluded that any such risks could be answered by recognising that the disabled child simply costs more to keep.

214 Reasons of Hayne J at [248]. See also reasons of Gleeson CJ at [35].

215 *McFarlane* [2000] 2 AC 59 at 114 per Lord Millett.

responsibility for the upkeep of a child, which law[216] and morality pronounce is the responsibility of the parents[217].

142 In the face of such natural obligations, it has been held that the law should refuse to countenance a legal proceeding that contravenes such deeply felt ethical and legal values[218]. The law, it is said, should not permit "conduct inconsistent with the duty to nurture children"[219]. The judge's task of assessing the damages for such a claim has been described as "distasteful"[220]. It is for that reason, so it is argued, that the law rejects, as "morally offensive", even grotesque, a parental claim that the birth of a healthy baby is "more trouble and expense than it is worth"[221]. Put another way, an irrefutable presumption is established that may be explained in terms of the fact that, although initially unwanted, the child, once born, will virtually always be loved so that the joys and benefits of its birth and the prospect of reciprocal love and support will be taken, as a matter of law, to outweigh the costs and burdens involved in its upbringing[222]. For the law to be otherwise would threaten the most fundamental of social institutions, the family unit, which is to be treated as natural and sacred in law and life[223].

143 Various subsidiary arguments of principle and policy have been advanced to support this option. They include the contention that compensation for the

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216 *Family Law Act* 1975 (Cth), s 66C; *Child Support (Assessment) Act* 1989 (Cth), s 3; *A New Tax System (Family Assistance) Act* 1999 (Cth), s 21. See also *Criminal Code* (Q), ss 286, 324; *Crimes Act* 1900 (NSW), s 44; *Criminal Code* (WA), s 344; *Criminal Law Consolidation Act* 1935 (SA), s 30; *Criminal Code* (NT), ss 183, 184; *Children's Services Act* 1986 (ACT), ss 109, 110; *Children and Young People Act* 1999 (ACT), ss 17-21; *Children and Young Persons Act* 1989 (Vic), s 4.

217 See reasons of Heydon J at [323]-[337]. See also reasons of Gleeson CJ at [35].

218 *CES* (1995) 38 NSWLR 47 at 85-86 per Meagher JA.

219 Reasons of Heydon J at [404].

220 Reasons of Callinan J at [296].

221 *McFarlane* [2000] 2 AC 59 at 114.

222 *McFarlane* [2000] 2 AC 59 at 97 per Lord Hope; cf *Parkinson* [2002] QB 266 at 290-291 [83].

223 See reasons of Gleeson CJ at [35], [39], reasons of Hayne J at [258], reasons of Heydon J at [323], [354], [371].

costs of upbringing is too difficult to calculate[224] and should therefore not be attempted; that it is offensive to present a child, however many years later, with knowledge that it was originally unwanted and the law should not lend itself to such an affront; and that providing for recovery would encourage parents to assert, and perhaps even feel, a lack of love for the child[225] which the law should not countenance.

144 None of these arguments bears close analysis. The calculation of the value of countervailing considerations such as joy and love may indeed be difficult. On the other hand, for a very long time judges and juries have been obliged to put money values on equally nebulous items such as pain and suffering and loss of reputation. Calculation of the cost of rearing a child is, by comparison, relatively straightforward. Such calculations are regularly performed for insurance and other purposes[226]. The mechanics of calculation may be solved although the question of principle remains.

145 The notion that a child might be hurt emotionally following the later discovery that parents had sought sterilisation and had gone to court to recover damages for its failure to prevent the child's birth is unconvincing[227]. It is difficult to accept that children in today's age learning such facts would not realise, if explained to them, that the claim was brought simply for the economic consequences of medical negligence and to burden the tortfeasor with (and spare the family of) such financial consequences. The experience of post-birth parental love would usually allay the hypothetical hurts attributed to hypersensitive children later learning that their births were originally unexpected. The notion that parents would be encouraged, in court or out, to treat such a child as an unwanted "brute"[228] is sheer judicial fantasy. The reality, acknowledged in this case as in all others that I have read, is that, once born and known to them, the child is accepted and loved by the parents. In the real world, cases of this kind are about who must bear the economic costs of the upkeep of the child. Money, not love or the preservation of the family unit, is what is in issue.

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224 *CES* (1995) 38 NSWLR 47 at 87 per Meagher JA. See also reasons of Gleeson CJ at [39]; cf reasons of Callinan J at [297].

225 *CES* (1995) 38 NSWLR 47 at 86. See reasons of Heydon J at [391].

226 eg AMP-NATSEM, *Income and Wealth Report*, Issue 3, October 2002, setting out costs in current dollars for the average family to raise children.

227 cf *Thake* [1986] QB 644 at 667.

228 The word used by Meagher JA in *CES* (1995) 38 NSWLR 47 at 87.

146 The principle that a child is always to be treated by the common law as a "blessing" can probably be traced to *Christensen v Thornby*, a decision in the United States[229]. Although the supposed principle has been rejected as a universal rule in that country[230], the notion persists in the case law[231]. To some degree it was reflected in the appellants' submissions before this Court.

147 The "blessing" idea has a double aspect. First, it is said that the birth of a healthy child is a blessed event and cannot possibly constitute "harm", "injury" or "damage" for which a person will be heard to claim in a court of law. To say otherwise, it is suggested, would require a court to postulate that it would have been better that the child concerned had not been born. That would be repugnant to the basic idea of the sanctity and value of each human life which every legal system, including the common law, upholds[232]. Secondly, if, contrary to this proposition, there is harm, injury or damage of some kind, it cannot sound in money damages because the blessing of such a child will always overwhelm the burdens so as to expel any right of financial recovery[233]. On this theory, "after the birth of a normal healthy child the injury is entirely healed"[234]. To hold to the contrary, it is suggested, would open up a vast array of potential claims by parents, grandparents and other carers, including for the opportunity costs involved in having to spend thousands of hours on the upbringing of a child that might otherwise have been devoted to money-making activities[235].

148 These arguments are equally unconvincing. The notion that in every case, and for all purposes, the birth of a child is a "blessing" represents a fiction which the law should not apply to a particular case without objective evidence that bears it out[236]. In any event, it is not the birth of the child that constitutes the

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229 255 NW 620 at 622 (1934).

230 eg in *Custodio v Bauer* 59 Cal Rptr 463 (1967).

231 See eg *Kealey* (1996) 136 DLR (4th) 708.

232 eg Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 434 cited by Lord Steyn in *McFarlane* [2000] 2 AC 59 at 83.

233 cf *MY v Boutros* [2002] 6 WWR 463 at 488 [158].

234 *XY v Accident Compensation Corporation* (1984) 2 NZFLR 376 at 380.

235 LaCroix and Martin, "Damages in Wrongful Pregnancy Tort Actions", in Ireland and Ward, *Assessing Damages in Injuries and Deaths of Minor Children* (2002) 93 at 100.

236 *CES* (1995) 38 NSWLR 47 at 73-74.

harm, injury or damage for which the parents sue. Instead, it is for the economic harm inflicted upon them by the injury they have suffered as a consequence of the negligence that they have proved. Contrary to the assumptions that appear to have been accepted by the courts below, the present was not a case of pure economic loss. It was, rather, an instance of direct injury to the parents, certainly to the mother who suffered profound and unwanted physical events (pregnancy and child-birth) involving her person, after receiving negligent advice about the risks of conception following sterilisation. Any economic loss was not pure, but consequential[237]. The applicable distinction was explained by Gleeson CJ in *Tame v New South Wales*[238]:

> "Unscientific as may be the distinction between 'pure' economic loss, 'parasitic' economic loss, and damage to property, the care which the law requires people to show for the person or property of others is not matched by a corresponding requirement to have regard to their financial interests. The distinction is not based on science or logic; it is pragmatic, and none the worse for that."

149 In his reasons in this appeal, Gleeson CJ suggests[239] that the distinction is inapplicable to this case which involves a form of pure economic loss. With respect, that reasoning is flawed. It gains no support from the fact (thought critical to the point) that the father himself suffered no physical injury. The mother certainly did and, whatever the position of the father, she would be entitled to recover on normal principles without disqualification. On no view could her claim for the costs of child-rearing be viewed as involving "pure" economic loss. The claim of the parents (including the father) is made in common for that item of loss. To that extent the father's claim is made concrete by the physical injury suffered by the mother. It is artificial to sever the parents' claim which is made jointly for the same sum. It is a concern about indeterminate liability that has led the common law to impose upon claims for economic loss various conditions, including that the plaintiff should have suffered physical injury. It is a "pragmatic" condition and it is satisfied in this case by the physical injury to the mother. The precondition being fulfilled, the parents should recover the consequent loss. To deny such recovery is to provide a zone of legal immunity to medical practitioners engaged in sterilisation procedures that is unprincipled and inconsistent with established legal doctrine[240].

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237 See reasons of McHugh and Gummow JJ at [67]-[68]; cf reasons of Gleeson CJ at [9], [19], [30], reasons of Callinan J at [299].

238 (2002) 76 ALJR 1348 at 1351 [6]; 191 ALR 449 at 452. See also *Caparo* [1990] 2 AC 605 at 622.

239 Reasons of Gleeson CJ at [9], [19]-[20], [30].

240 cf reasons of McHugh and Gummow JJ at [57]-[64]; reasons of Callinan J at [295].

150 This being the case, the parents were entitled to recover damages for the economic consequences of the established physical events caused by the negligence without having to satisfy the special tests adopted by the common law for so-called "pure" economic loss, applicable to cases where such physical events are absent[241].

151 The spectre of supplementary claims by grandparents and other carers evaporates on analysis. Such claims would face difficulties that are simply not present in a claim of the present kind, brought by the parents, particularly by a mother. The language of "blessings" too is a distraction from the real subject matter of parental claims. Neither the invocation of Scripture nor the invention of a fictitious oracle on the Underground (not even its Australian equivalent[242]) authorises a court of law to depart from the ordinary principles governing the recovery of damages for the tort of negligence. If such recovery is to be denied, its rejection must find some other and different reasons or another and different law-maker. If there is any area where the law has no business in intruding[243], it is in the enforcement of judicial interpretations of Scripture and in giving legal effect to judicial assertions about "blessings", litigious "time bomb[s]"[244], "desirable paradigm[s] of family relationships"[245], the pertinence of "natural love and mutual confidence between parent and child"[246], "key values in family life"[247] and the belief that "ill-behaved" children cause "more trouble and very little joy"[248]. Such considerations risk diverting their exponents from the evidence in the particular case, especially the economic evidence: overwhelming legal

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241 *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1964] AC 465 at 517; *Perre* (1999) 198 CLR 180 at 267-270 [242]-[247].

242 The person "on the Emu Plains omnibus": *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 376.

243 *CES* (1995) 38 NSWLR 47 at 87 per Meagher JA.

244 Thomas JA in the Court of Appeal [2001] QCA 246 at [159] quoted by Heydon J at [368].

245 Reasons of Hayne J at [258].

246 Reasons of Heydon J at [328], [404].

247 Reasons of Heydon J at [322].

248 Reasons of Heydon J at [350].

analysis with emotion[249]. I agree that there is a need to rein in judicial declamations[250]. In this area of discourse most of them have been on the side of those who most vehemently denounce their making.

152 In short, if the application of ordinary legal principles is to be denied on the basis of public policy, it is essential that such policy be spelt out so as to be susceptible of analysis and criticism. Desirably, it should be founded on empirical evidence, not mere judicial assertion[251]. Yet this was not attempted in the present case, whether at trial or on appeal.

153 Before this Court, the Attorneys-General for South Australia and Western Australia intervened, by leave, to advance arguments supportive of the appellants. They tendered affidavit materials concerning the number of sterilisation cases in those States, the potential numbers of procedures that might, on average, fail and the possible costs that could be incurred by the public healthcare systems if the common law were as it was found to be in the courts below. Such affidavit evidence, although admissible for the purpose of considering the States' application to intervene in private litigation, is not admissible to supplement the record in the appeal involving the parties. By the authority of this Court, the parties and the Court are strictly confined to the evidentiary record[252]. The most that can be said of the material provided by the States is that it shows what commonsense would suggest in any event. Cases of this kind have potentially large economic consequences. In default of enforceable contractual immunities from liability or statutory exemptions from, or "caps" upon, liability, the application of ordinary principles of tort liability will result, potentially, in substantial judgments precisely because the foreseeable consequences of the negligence are large. The issue is, therefore, who should bear those consequences: the victim of the legal wrong or the person responsible for it, the tortfeasor?

154 To complain about the potential increase in amounts recoverable in some such cases[253] is also irrelevant to legal principle. According to that logic, the

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249 *CES* (1995) 38 NSWLR 47 at 71-72; cf Markesinis and Unberath, *The German Law of Torts*, 4th ed (2002) at 179.

250 Reasons of Heydon J at [316].

251 Hoyano, "Misconceptions About Wrongful Conception", (2002) 65 *Modern Law Review* 883 at 905-906. See reasons of McHugh and Gummow JJ at [77].

252 *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [17]-[19], 25 [73], 51 [158], 63 [190], 97 [290], cf at 79 [240]-[241], 117-118 [355]-[356].

253 cf reasons of Heydon J at [306]-[310].

courts should terminate tortious recovery altogether for it undoubtedly imposes substantial burdens and inconvenience on tortfeasors. Such a conclusion would be absurd. Where large economic losses have resulted from a person's negligence involving physical harm, the ultimate issue is who should bear the burdens of the economic losses. In our legal system that burden normally falls on the person whose negligence is found to have caused the losses.

Option 2: Limiting compensation to immediate damage

155 A variation of the first option is the one which, so far, has gained most support in the common law in the United Kingdom, the United States and Canada. This is to allow the parents to whom a child is born following the negligent failure of sterilisation procedures or the provision of inadequate or inappropriate advice in the given circumstances to recover certain compensation for the immediate consequences of the pregnancy to the mother (and possibly the family) but to draw a line soon after delivery of the child so as to exclude any recovery of the costs of child-rearing.

156 In the United Kingdom, this is what the House of Lords held in *McFarlane*[254]. However, there was no unanimity in the speeches of their Lordships to mark out clearly the limits of what might be recovered.

157 According to Lord Slynn[255], damages could be recovered by the mother for the pain and inconvenience of the pregnancy and delivery, for the extra costs of healthcare, of baby clothes and the mother's loss of earnings. According to Lord Steyn[256], recovery is limited to the injury to the mother and loss of earnings during the last stages of her pregnancy. For Lord Hope[257], the damages for negligence would extend to compensation for the injury to the mother, including for the physical and emotional problems proved and any loss of earnings. But they would not include provision for the costs of the baby's layette because this was to be regarded as part of the normal costs of child-rearing. Lord Clyde[258], on the other hand, would provide a general solatium for the injury to the mother including for the costs of the baby's layette and for the mother's loss of earnings during the pregnancy. Moreover, Lord Millett[259] would provide no damages for

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254 [2000] 2 AC 59.

255 *McFarlane* [2000] 2 AC 59 at 74, 76.

256 *McFarlane* [2000] 2 AC 59 at 84.

257 *McFarlane* [2000] 2 AC 59 at 97.

258 *McFarlane* [2000] 2 AC 59 at 105-106.

259 *McFarlane* [2000] 2 AC 59 at 114.

the mother's pain and suffering nor for her distress at the pregnancy for this was part of parenthood for which the law, on public policy grounds, denies an entitlement to claim. Lord Millett would limit recovery to an amount proper for the defendant's breach of the right of the parents to decide for themselves upon the size of their family. For this his Lordship considered that a conventional sum of £5,000 would be appropriate. How precisely that sum was made up or justified is not clear.

158 The variety of the opinions of their Lordships suggests that different principles were at work in the differentiation between the damages that were held to be recoverable in cases of this kind and the damages that were not. It might be true that, generally in actions of tort, the calculation of damages is partly arbitrary, that exactitude is an illusion and that line-drawing is always a necessity. But the diverse opinions of their Lordships in *McFarlane* illustrate what can happen when judges embark upon the "quicksands" of public policy[260], at least when doing so leads them away from basic legal principle.

159 In the United States, in virtually all jurisdictions in which some damages are allowed for births following negligent failure of a sterilisation procedure (or consequential advice), provision is made for the mother's recovery of her loss of wages during the confinement, the father's loss of consortium, medical and hospital expenses involved in the confinement and some provision for parental pain and suffering and emotional distress[261]. Most courts have denied the full costs of raising a healthy child, only those of Wisconsin and New Mexico providing for the recovery of such costs[262]. In general, such judicial decisions are founded on assertions of public policy or the policy of the law. Sometimes, however, reference is made to the supposed impossibility of calculating the net costs of raising the child[263]. Sometimes the line drawn is explained by reference to the parental decision to "forego the option of adoption" and instead "to retain the child as their own with all the joys and benefits that are derived from parenthood"[264]. But commonly the division between the recoverable costs of the

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260 Jones, "Bringing up Baby", (2001) *Tort Law Review* 14 at 16-17.

261 Baugher, "Fundamental Protection of a Fundamental Right: Full Recovery of Child-Rearing Damages for Wrongful Pregnancy", (2000) 75 *Washington Law Review* 1205 at 1214-1215.

262 LaCroix and Martin, "Damages in Wrongful Pregnancy Tort Actions", in Ireland and Ward, *Assessing Damages in Injuries and Deaths of Minor Children* (2002) 93 at 97.

263 *Emerson* 689 A 2d 409 at 412-413 (1997).

264 *Emerson* 689 A 2d 409 at 413 (1997).

immediate aftermath of the unwanted pregnancy and the irrecoverable consequences of child-rearing is simply attributed to public policy with a passing nod towards the law's respect for the sanctity of life, the blessings of children and the importance of the family unit, and occasional invocations of Scripture.

160 In my view, the best attempt to justify the otherwise arbitrary differentiation between the immediate consequences of the medical negligence (loss of wages, hospital costs, mother's pain and layette) and longer-term consequences (child-rearing costs to self-reliance) is that made by Laws LJ in *Greenfield*[265]. His Lordship appeals to dual notions of causation and justice:

> "In principle no damages are awarded for a benefit, or I would say for any condition that is other than a detriment or taken to be a detriment.
>
> Here is the value in the present context of the distinction between damage attributable to the effects of pregnancy and confinement and alleged damage attributable to the existence of the healthy child that is born. The first may be said to be a detriment; the second cannot possibly be so categorised …
>
> It is to be noted that if this lady were to obtain the damages she seeks, she would happily be in a position whereby she would look after her much loved child at home, yet at the same time in effect would receive the income she would have earned had she stayed at work. In my judgment that is not just compensation; it is the conferment of a financial privilege, which has nothing to do with just compensation."

161 The difficulty with this reasoning is that severing the causal link between various outcomes of the pregnancy is incontestably arbitrary. Both kinds of damage are equally foreseeable as a consequence of negligence. Each is directly caused. Neither is too remote. So far as the appeal to justice is concerned, it is unrealistic to expect that, once the child is born, the mother will hate or neglect it because initially it was unexpected and undesired. That truly would be an hypothesis contrary to public policy and ordinary human experience. Parents in the given situation must make the most of their circumstances. However, responsibility for the financial costs of such circumstances remains to be attributed. So long as child-rearing costs are imposed on the parents alone, the dual purposes of the law of torts are, to that extent, unfulfilled. There is neither proper compensation for the victims of the legal wrong nor the provision of a civil sanction that promotes care and discourages carelessness in the future, in the knowledge that the burden of it will fall on others.

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265 [2001] 1 WLR 1279 at 1292 [51]-[54].

162 The propounded distinction between immediate and long-term costs of medical error is not drawn in other cases of medical negligence. It is arbitrary and unjust in this context. Such a distinction could even be said to be discriminatory, given that it involves a denial of the application of ordinary compensatory principles in the particular circumstances of child-birth and child-rearing, circumstances that biologically and socially pertain to the female experience and traditionally fall within the domain of women. If such a distinction is to be drawn, it is the responsibility of the legislature to provide it, not of the courts, obliged as they are to adhere to established legal principle[266].

Option 3: Extra costs of disabled births

163 A number of the earlier cases, both in England[267] and Australia[268], concerned claims brought by parents of children born with disabilities after failed sterilisation. Sometimes the sterilisation procedures were sought for the precise reason of avoiding such risks. Further, as the cited cases in England since *McFarlane* demonstrate, the supposed public policy that forbids compensation for the costs of upkeep of a healthy child is severely challenged when the unexpected child is born with significant disabilities[269] or where the child is healthy but the unexpecting parent is relevantly disabled[270]. In such cases, it has been suggested, the provision of compensation for the *extra* costs of rearing the child whom the parent(s) sought to avoid by sterilisation, would not "stick in the gullet" of Lord Steyn's hypothetical Underground traveller[271].

164 This differentiation is also arbitrary and therefore unacceptable as a statement of the common law. In Australia, even the use of the description of such parents as "afflicted with a handicapped child"[272] would be offensive to most such parents and contrary to their attitudes about themselves, their child and others. Essentially, such differentiation rests on outmoded reasoning similar to

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266 cf reasons of Heydon J at [311]: "The common law does not permit capping." However, in Australia, legislatures commonly so provide.

267 *Emeh* [1985] QB 1012.

268 *Veivers* [1995] 2 Qd R 326.

269 *Rand* [2000] Lloyds Rep Med 181; *Parkinson* [2002] QB 266.

270 *Rees* [2003] QB 20.

271 *Parkinson* [2002] QB 266 at 295 [95].

272 *Jones v Berkshire Area Health Authority* unreported, 2 July 1986 cited by Heydon J at [317].

that of Denning LJ in *Bravery*[273]. According to such reasoning, because married (or other permanent) sexual relationships between a fertile man and woman commonly give rise to the procreation of children, departure from that purpose is to be treated as exceptional unless there is some good reason to justify it, such as the avoidance of a disabled child or an unwanted child of a disabled parent. Such thinking (like the earlier notion of enforced adoption) bears little relationship to reality in contemporary Australia. That reality includes non-married, serial and older sexual relationships, widespread use of contraception, same-sex relationships with and without children, procedures for "artificial" conception and widespread parental election to postpone or avoid children. The "stick in the gullet" test for the recovery of damages is simply the latest illustration of judges applying to the legal rights of individuals in contemporary society values formed in the far-off days of judicial youth, thirty or more years earlier, when social facts were significantly different.

165 The rule limiting recovery to the *extra* costs incurred for, or by, children or parents with disabilities is no more than an attempt to carve a tolerable exception from the supposed "stick in the gullet" prohibition on any recovery for an unexpected birth following a failed sterilisation or negligently omitted advice. That prohibition is revealed in such cases as manifestly unjust and therefore offensive to notions of fairness and reasonableness that inform the content of the common law[274]. It ignores the fact that, in Australia and in like countries, millions of people use contraceptives daily to avoid the very result which the appellants would have the Court say is always to be viewed by the law as a benefit (except perhaps where the parent or child is disabled[275]).

166 Apart from the arbitrariness of this exception it has a further flaw. It reinforces views about disability and attitudes towards parents and children with physical or mental impairments that are contrary to contemporary Australian values reinforced by the law[276]. English judges have been forced into this unhappy differentiation because of the authority of *McFarlane*. Some of them show obvious discomfort with it and some even rebellion. I am unconvinced that Australian law should go down the same path for it leads away from established legal principle.

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273 [1954] 1 WLR 1169 at 1180; [1954] 3 All ER 59 at 67-68; cf *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 182-188 per Lord Scarman.

274 cf *Fassoulas v Ramey* 450 So 2d 822 at 830 (1984) per Ehrlich J (diss).

275 cf *Emerson* 689 A 2d 409 (1997).

276 cf *Parkinson* [2002] QB 266 at 293-294 [91]-[92]. See *Disability Discrimination Act* 1992 (Cth); *X v Commonwealth* (1999) 200 CLR 177 at 223-224 [147].

Option 4: Compensation with discount for joys and benefits

167 An alternative approach that would permit adherence to ordinary recovery principles but provide for the "moderation" of damages, at least in cases like this where a child is born healthy, is to require a discount from the compensation for the costs of child-rearing of an allowance for "the 'satisfaction, the fun, the joy, the companionship, and the like' derived from bringing up a child"[277].

168 The theory behind this approach is that the plaintiff is only entitled in law to damages for the net loss that has been suffered and must bring to account any benefits, to offset the burdens, that flow from the wrong. Thus *a* child may have been undesired but *the* child, once born assumes a different complexion because of the consequential joys and benefits that it brings to the parents for which they should make allowance.

169 This was the approach favoured in early cases both in England[278] and Australia[279], although in the latter it was suggested that, whilst each case depended on its own facts, only a "small amount" should be deducted on this ground.

170 More recently, the need to make such a deduction has been invoked in England, in responding to the *Caparo* formula[280], to justify the conclusion that no damages for child-rearing should be allowed in the case of a healthy child on the footing that the joys and benefits necessarily and invariably outweigh the costs and burdens of child-rearing[281]. Several judges have declared that it is impossible to set off benefits of such a character against costs of such a kind[282]. However, in a number of jurisdictions of the United States juries, which

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277 Seymour, *Childbirth and the Law* (2001) at 126.

278 *Thake* [1986] QB 644; cf Swanton, "Damages for 'Wrongful Birth' – *CES v Superclinics (Aust) Pty Ltd*", (1996) 4 *Torts Law Journal* 1 at 11.

279 *Dahl* (1992) 15 Qld Lawyer Reps 33 at 36-37; cf Graycar and Morgan, "'Unnatural Rejection of Womanhood and Motherhood': Pregnancy, Damages and the Law", (1996) 18 *Sydney Law Review* 323 at 337-339.

280 [1990] 2 AC 605 at 618.

281 *McFarlane* [2000] 2 AC 59 at 76 per Lord Slynn, 95 per Lord Hope; cf *Parkinson* [2002] QB 266 at 290-291 [83].

282 eg Lord Slynn in *McFarlane* [2000] 2 AC 59 at 75; cf *CES* (1995) 38 NSWLR 47 at 87 per Meagher JA.

commonly decide such cases, are instructed to discount from the costs of child-rearing the benefits conferred by having and raising the child. Such juries do so[283].

171 The approach of such United States decisions has been influenced by an interpretation of the American Law Institute's *Restatement of Torts 2d*. As Donaldson[284] writes, it recognises:

> "[E]ven while causing tortious harm, one may also provide an incidental benefit to another, and … when the tortious conduct causing the harm sued upon has at the same time conferred a special benefit to the interest of the plaintiff in the action, the value of the benefit conferred should be considered in mitigation of damages, to the extent that such consideration would be equitable."

172 The application of the *Restatement* to permit offsetting the joys and benefits of the child's birth has been criticised as inconsistent with the true scope of §920[285]. According to this criticism, it is erroneous to offset dissimilar costs or burdens. The process has been described as equivalent to "comparing apples to oranges"[286].

173 Although I was initially attracted to this fourth option, I have concluded with the critics that it is inconsistent with the approach hitherto taken by Australian law and cannot be justified as a matter of legal principle[287]. For example, no-one until now has suggested that the damages of a negligently injured worker or pedestrian, totally incapacitated for work, should be reduced to allow for the fact that the injuries have resulted in a kind of benefit – having relieved the injured person from the obligation to answer the morning alarm or the necessity to travel to work on a cold day. Any such "benefits" and "joys" as

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283 *Ochs v Borrelli* 445 A 2d 883 (1982); *University of Arizona Health Sciences Center v Superior Court of the State of Arizona* 667 P 2d 1294 (1983).

284 "Wrongful Pregnancy Damages", 89 ALR4th 632 at 638 cited in *CES* (1995) 38 NSWLR 47 at 76.

285 Baugher, "Fundamental Protection of a Fundamental Right: Full Recovery of Child-Rearing Damages for Wrongful Pregnancy", (2000) 75 *Washington Law Review* 1205 at 1226.

286 *Johnson v University Hospitals of Cleveland* 540 NE 2d 1370 at 1374 (1989).

287 eg *Sharman v Evans* (1977) 138 CLR 563 at 578; cf *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 286; Kahn-Freund, "Expectation of Happiness", (1941) 5 *Modern Law Review* 81 at 85-86.

result from unplanned and undesired idleness are treated by the law as too remote or of a different character so that they are not offset but ignored.

174 In one United States case[288], explained in the language of the *Restatement*, it was said, correctly in my view:

> "[I]t hardly seems equitable to not only force this benefit upon [the parents] but to tell them they must pay for it as well by offsetting it against their proven emotional damages. With respect to economic benefits, the same argument prevails."

175 It might be appropriate to deduct from the costs of child-rearing any proved economic benefits received, or likely to be received, by the parents as a result of the birth of the child. However, the emotional and other benefits and burdens resulting from such a birth cannot be assessed comprehensively at the beginning of life. They are different in quality from the costs incurred in child-raising. They have nothing to do with the legal wrong for whose foreseeable consequences the tortfeasor must restore the parents. Legal principle requires that such joys and any like benefits of the unexpected birth be ignored in calculating the recoverable damages.

Option 5: Compensation to include foreseeable costs of child-rearing

176 The application of the general rule, requiring the tortfeasor to pay the victims of the wrong for the reasonably foreseeable consequences of any proved negligence, obliges the inclusion in the recoverable damages of a sum for the costs of child-rearing. Clearly such costs are within the ambit of the compensable principle required by "corrective justice". Lord Steyn conceded as much in *McFarlane*[289]. It is true that, if the action is brought by the mother or the parents, it is she or they, and not the child, who recovers the verdict[290]. Perhaps this is a defect in our legal procedures that should, and could, be repaired by legislation or protective court orders. But it is not a defect peculiar to this type of litigation. Furthermore, as has been correctly conceded, even without protective orders parents will normally feel a duty to devote the damages recovered towards the benefit of their child[291].

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288 *Marciniak v Lundborg* 450 NW 2d 243 at 249 (1990).

289 [2000] 2 AC 59 at 82.

290 cf reasons of Heydon J at [312].

291 cf reasons of Heydon J at [312], [341]-[342].

177 The supposed reasons for departing from the general rule of the common law have been variously explained. In so far as they relate to a suggested disproportion between the original wrong and the cost burden imposed as a consequence, this is unconvincing and unprincipled, at least so far as legal analysis is concerned. In many cases, especially those involving vulnerable people, the damages recoverable may bear little relationship to the degree of the tortfeasor's initial culpability[292]. If the suggested reason for denying recovery is the natural joy derived by the parents from the smile of their child, I would answer, as Peter Pain J did in *Thake*[293]: "[E]very baby has a belly to be filled and a body to be clothed." As to the contention that the burden on the medical profession, particularly obstetricians, and their medical indemnity insurance would be prohibitive, the answer that a court must give is that such considerations cannot succeed at common law. Particularly, they cannot succeed in this case because no evidence was tendered addressed to the issue. Any such considerations must therefore be addressed to the other branches of government, principally the legislature. So far as "public policy" is invoked to justify an arbitrary departure from the principle of "corrective justice" it is necessary to repeat the caution that judges must observe in appealing to, or applying, such contestable considerations[294].

178 One writer has argued that the House of Lords decision in *McFarlane* reflects a particular factual context in the United Kingdom whereby most patients in this class of case bring their claim, in effect, against the local authority representing the National Health Service[295], not, as in Australia, against an individual physician or surgeon or healthcare facility legally responsible for the legal wrong. Concern to protect the viability of the National Health Service at a time of multiple demands upon it might indeed help to explain the invocation in the House of Lords in *McFarlane* of the notion of "distributive justice"[296]. But such a consideration has no part to play in the identification of an applicable Australian public policy. In other recent cases, this Court has insisted upon following the star of legal principle. It has not diverted from that course because of concerns that legislatures, for their own purposes and within their own much

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292 cf *Joslyn v Berryman* [2003] HCA 34.

293 [1986] QB 644 at 666; cf Graycar and Morgan, "'Unnatural Rejection of Womanhood and Motherhood': Pregnancy, Damages and the Law", (1996) 18 *Sydney Law Review* 323 at 337.

294 *McLoughlin v O'Brian* [1983] 1 AC 410 at 430 per Lord Scarman; *Emeh* [1985] QB 1012 at 1021, 1028.

295 Jones, "Bringing up Baby", (2001) *Tort Law Review* 14 at 19.

296 [2000] 2 AC 59 at 83 per Lord Steyn.

larger powers of law-making, might later modify or reverse the exposition of the common law as offered by this Court[297].

179 In the present case the negligence of the appellants was established. It was found that such negligence caused direct loss to the parents, including the physical and emotional impact on the mother[298]. Those findings are not in issue in this appeal. They constitute the starting point for analysis of the scope and limits of the parents' recovery. Ordinary principles of tort liability would entitle the victims of the appellants' wrong to recover from the appellants all aspects of their harm that are reasonably foreseeable and not too remote. By the application of that test the inclusion in the parents' damages of a component for the costs of child-rearing involved no legal or factual error. Neither did the omission to deduct from that sum an allowance for estimates of the joys and like benefits derived, or proved likely to be derived, from the birth of the child. On the contrary, the provision of a zone of immunity to the appellants would have involved legal error. The Court of Appeal and the primary judge were correct to resist it.

180 The comparatively modest amount allowed in this case evidences no exaggeration or excess. Such amounts have been allowed in the past in Australia, England, South Africa and elsewhere without prompting legislative intervention. Keeping in mind the financial costs of the care of the child, the allowance for the costs of child-rearing is hardly exceptional in terms of common law principle. To deny it would be. Any such denial would be arbitrary. As such, denial is the business, if of anyone, of Parliament not the courts[299].

Orders

181 The majority in the Court of Appeal were correct to conclude that no error had been shown in the allowance provided by the primary judge for the cost of rearing the respondents' additional child. The appeal from the Court of Appeal's order should be dismissed with costs.

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297 See eg *Brodie* (2001) 206 CLR 512; *Tame* (2002) 76 ALJR 1348; 191 ALR 449; *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33.

298 See *Parkinson* [2002] QB 266 at 285-287 [63]-[69].

299 *McFarlane* [2000] 2 AC 59 at 95 per Lord Hope.

182 HAYNE J. By 1992 the respondents had two children of their marriage. In that year the first respondent, the wife, underwent a tubal ligation which was performed by the first appellant ("the doctor") at a public hospital in Queensland. The operation did not have the desired effect of sterilising the first respondent. In 1996 she became pregnant and, on 29 May 1997, was safely delivered of a third child.

183 The respondents sued the doctor and the State of Queensland in both tort and contract. The claim in contract was not pressed at trial and has not been pressed on appeal. At first instance, the trial judge (Holmes J)[300] found that the doctor had failed adequately to inform the first respondent of the possibility that the procedure undertaken would not be effective and to give her the option of considering further investigation. The trial judge rejected contentions that the doctor had conducted the procedure carelessly. The finding that the doctor had failed to exercise reasonable care in giving advice to the patient was not challenged in this Court. The critical question for decision is whether damages to be awarded to the respondents should include any amount for the costs that will be incurred in maintaining the child. I answer that question, no.

184 The trial judge awarded both respondents damages which included amounts for costs already incurred in maintaining the child and the present value of amounts that would be incurred on that account. The doctor and the State appealed to the Court of Appeal of Queensland. That Court (McMurdo P, Davies JA, Thomas JA dissenting) dismissed the appeal[301]. In this Court, the appellants challenged the assessment of the damages awarded only in so far as those damages included past or future costs of maintaining the child. They made no point about the trial judge's decision to award the damages to the respondents jointly and made no point about the awarding of damages to the first respondent for pain and suffering and loss of amenities occasioned by the pregnancy and childbirth, for her past and future economic loss, or for past and future costs of providing care for the family. Nor did the appellants challenge the award to the second respondent of $3,000 for loss of consortium consequent upon his wife's pregnancy and the birth of a third child.

185 Questions of the kind which must be examined in this matter have been considered in many different jurisdictions around the world. Those questions have arisen against different factual backgrounds. In some cases, like the present, both mother and child have been healthy. In some, either mother or child has had (or in some cases both mother and child have had) some medical problem. (For the moment, it is convenient to adopt the dichotomy between

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300 *Melchior v Cattanach* (2001) Aust Torts Reports ¶81-597 at 66,626 [33].

301 *Melchior v Cattanach* [2001] QCA 246.

"healthy" and "disabled" children used in other jurisdictions without pausing to examine the difficulties that the terminology and even the dichotomy itself may entail.) In some cases, like the present, the complaint made against the doctor concerns the advice that the doctor did, or did not, give to the patient. In some, the complaint has been about the way in which the sterilisation procedure has been carried out. In some cases, like the present, it is the woman who has sought sterilisation; in some, it is the man. In some cases there have been genetic reasons for seeking to prevent conception; in some, the reasons have been financial, social or a combination of such factors.

Overseas decisions

186 In America the dominant view is that no damages are to be awarded for the costs of rearing a healthy child[302]. In the United Kingdom the House of Lords has recently held[303] that parents could not recover damages for the costs of rearing a healthy child, but the Court of Appeal has since held that such costs may be recovered as damages by the healthy parent of a disabled child[304] and the partially disabled parent of a healthy child[305]. In Canada it has been held that the damages to be awarded against a doctor who performs a sterilisation negligently should not include child rearing costs[306]. By contrast, courts in South Africa[307] have allowed damages of this kind. (In New Zealand the question that arises concerns the operation of the national accident compensation scheme[308] not the law of negligence.)

187 Courts that have considered the problem have taken different paths in reasoning to their conclusion. Much more often than not, the conclusion reached by appellate courts has not been reached unanimously. In the United States the

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302 See, for example, *Emerson v Magendantz* 689 A 2d 409 at 411-412 (1997) and the cases there cited.

303 *McFarlane v Tayside Health Board* [2000] 2 AC 59.

304 *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266.

305 *Rees v Darlington Memorial Hospital NHS Trust* [2003] QB 20.

306 *Kealey v Berezowski* (1996) 136 DLR (4th) 708.

307 *Mukheiber v Raath* 1999 (3) SA 1065.

308 See, for example, *Re Z: Decision No 764* (1982) 3 NZAR 161; *XY v Accident Compensation Corporation* (1984) 2 NZFLR 376; *SGB v WDHB* [2002] NZAR 413.

reasons given have often reflected the influence of §920 of the *Restatement of Torts 2d*:

> "When the defendant's tortious conduct has caused harm to the plaintiff ... 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 damages, to the extent that this is equitable."

Further, the reasons given have often assumed that emotional and spiritual advantages flow from the birth of a healthy child which will necessarily outweigh any financial costs that will be incurred. Sometimes public policy is invoked. Sometimes, most notably in *McFarlane v Tayside Health Board*[309], consideration of its application is rejected as unhelpful.

The legal problem

188 It is important to begin by accurately identifying the legal problem that arises. In doing that, it is convenient to begin by putting on one side the difficulties that may arise from the husband's joining in his wife's claim. The wife sued her doctor for negligence. The doctor was held to have failed to exercise reasonable care (here, as it happens, by not giving proper advice, not by performing the procedure carelessly).

189 The existence of a duty of care was not disputed. That a treating doctor owed his or her patient a duty to take reasonable care in treating that patient, and to take reasonable care in tendering to the patient suitable advice about the treatment, was undisputed and is indisputable. What duty of care the doctor owed to his patient's husband or why he owed that duty, were questions that were not explored in argument. Beyond saying that it is not self-evident how the doctor owed Mr Melchior a duty to offer *him* any advice it is neither necessary nor appropriate to examine that question further. It is as well, however, to consider why a doctor owes a patient the duties that were conceded to be owed here.

190 The physical integrity of an individual's person and property has always been treated as of central importance in the law of negligence. Likewise the autonomy of the individual called on to make decisions affecting that physical integrity has been given great weight[310]. It is, then, not surprising that a doctor should owe his or her patient a duty to take reasonable care in carrying out procedures on the body of the patient, and a duty to take reasonable care in

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309 [2000] 2 AC 59.

310 *Rogers v Whitaker* (1992) 175 CLR 479.

proffering advice about that treatment and its consequences. That a particular procedure is conducted at the patient's choice, rather than for an immediately identified therapeutic reason, leads to no different answer. The interest of the patient which is at stake in the events described is the patient's interest in physical integrity. The patient permits an invasion of that integrity only upon being sufficiently informed of what is to be done, why it is to be done and what are the consequences that will, or may, follow from it.

191 Where the procedure contemplated concerns the patient's reproductive capacity it may be accurate to describe the interest at stake as being the patient's reproductive autonomy. I take leave to doubt, however, the utility of identifying the interest in this way, if only because it may reflect echoes of the wholly different debate in the United States about issues discussed in the decision of the Supreme Court of the United States in *Roe v Wade*[311]. But, whether or not the interest at stake is identified as reproductive autonomy, the interest is one which, if infringed, may affect the holder of that interest in a way which leads to the birth of another. In such a case the effect of the infringement of that interest is not confined to effects on the plaintiff.

192 If the wife suffered loss or damage of which the doctor's negligence was a cause, she is, prima facie, entitled to recover damages for that loss or damage. In the present matter the wife alleged that the negligence of the doctor was a cause of several different consequences for her. They were:

(a) her falling pregnant with the associated pain and discomfort of pregnancy and childbirth, together with some further deleterious physical consequences for her which followed from her pregnancy;

(b) the financial consequences for her of pregnancy and childbirth; and

(c) the financial consequences for her of having another child to maintain and nurture.

Each was a reasonably foreseeable consequence of the negligence of the doctor. It follows that the relevant question is why the wife was *not* entitled to recover damages for all these consequences; it is not why she *should* be held to be entitled to recover for them.

193 It is important to approach the question without assuming its answer by classifying the claim and arguing from that classification to a conclusion. In particular, to describe the wife's claim as one of economic loss caused by negligent advice would ignore the first consequences identified or it would treat

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311 410 US 113 (1973).

her claim as if it were two distinct claims when, in truth, it was but a single claim for damages. There being no dispute about the existence or ambit of the duty of care owed by the doctor to his patient, the dispute was confined to what damages were to be allowed for what in this Court must be accepted to have been a negligent failure by the doctor to tender proper advice. To describe the claim as for "wrongful birth" or "wrongful conception" would divert attention from the relevant wrong: the negligent failure to give proper advice.

194 Several different heads of argument can be identified in the reasons of those courts outside Australia which have considered questions of the kind raised in this matter. They can be described as (a) the "blessing" argument, (b) the "set off" argument, (c) the "impossible prediction" argument, (d) the "damage the child" argument, (e) the "motives and damages" argument, and (f) the "public policy" arguments. As will become apparent, each is an argument that at some point or other begins to blend with one or more of the other arguments. It is the last set of arguments, about public policy, which I consider to be determinative here.

"Blessing"

195 In *Kealey v Berezowski*[312], in the Ontario Court (General Division), Lax J said:

> "In *our* hierarchy of societal values, the benefits which a child brings are regarded as so essentially worthwhile that we tend to regard those who are childless by choice as unusual and we extend our comfort to those who long for a child but are unable to have one. In short, the love, companionship, affection and joy which a child brings is thought to so outweigh the burdens that we bridle at the thought that the law could be so foolish as to regard this as a compensable loss." (original emphasis)

This argument, that the birth of a child, or at least the birth of a healthy child, is always a blessing for the parents, has played a prominent role in the United States cases[313]. Sometimes it has been sought to buttress the conclusion that the child is a blessing, by saying that parents who persist with the pregnancy, forego releasing the child for adoption, and choose to retain the child as their own, are to be taken as concluding that, for them, the benefits of retaining the child outweigh

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312 (1996) 136 DLR (4th) 708 at 732.

313 *Public Health Trust v Brown* 388 So 2d 1084 at 1085-1086 (1980); *Beardsley v Wierdsma* 650 P 2d 288 (1982); *Terrell v Garcia* 496 SW 2d 124 (1973).

the economic costs of child rearing[314]. Yet as has been rightly pointed out in other cases in the United States[315], the blessing argument not only finds its expression in sentimental terms, it is an argument which is usually traced to assertions of "universally-shared emotion and sentiment"[316].

196 The chief criticism of the blessing argument can be put in different ways. First, it may be said that it imposes upon parties a paradigm of family life which may or may not be apt to their circumstances. Secondly (and this is no more than a restatement of the first argument in other words), there will be cases in which the birth of an unwanted child does put one or both of the parents of that child in circumstances which, whatever measure is applied, are worse than the circumstances in which that parent, or those parents, would have been but for the negligence of which complaint is made. The parent or parents are worse off economically, emotionally, socially and spiritually. That is not to say that the child is nothing but a burden or that there is *no* benefit in the relationship between parent and child. But the relevant inquiry which is to be made in a claim for damages for negligence is: what is the position of the plaintiff as a result of the defendant's tortious conduct compared with the position that would have obtained if the tort had not been committed? That is not answered by saying that parenthood brings both benefits and burdens.

197 It is important, however, to notice the limits of the criticism that is levelled at the blessing argument. The criticism denies the universal validity of a factual proposition which can be expressed as: all children are a blessing to all parents. The criticism does not deny that parenthood does bring both benefits and burdens. It will be necessary to examine later what follows from that fact.

198 This leads to consideration of the "set off" argument and the "impossible prediction" argument. It is convenient to look at them together.

"Set off" and "impossible prediction"

199 The former of these two arguments suggests that the financial costs of bringing up a child are to be reduced by an allowance for the benefits that the parent will obtain from parenthood both during and after the period of a child's financial dependence on the parent. The latter suggests that so uncertain are the predictions that would have to be made about the future for a young child, and

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314 *Public Health Trust v Brown* 388 So 2d 1084 at 1085-1086 (1980); *Emerson v Magendantz* 689 A 2d 409 at 419 (1997).

315 *Cockrum v Baumgartner* 447 NE 2d 385 at 388 (1983).

316 *Public Health Trust v Brown* 388 So 2d 1084 at 1085 (1980).

the consequences for the parent of that child, that it would be wrong to allow anything for the economic costs of bringing up the child.

200 Both are arguments which require or assume that a monetary sum could be identified as the "worth" of a child's love or emotional support for a parent. At first sight, that may seem a startling proposition. But the law has long since sought to measure pain and suffering in amounts of money. Measuring the converse experience in money is no more or less absurd, or difficult, than expressing the pain of a broken limb as a dollar amount. Hitherto the courts have *not* sought to value the future benefits to be derived from what, ideally, would be a relationship of mutual love and support between parent and child but there has not been any occasion to do so. The set off argument assumes that it is possible to make useful predictions about what the future will hold for parent and child. At the least that is difficult. It may even be that, as McCardie J said[317], in the context of a claim for the wrongful *death* of an infant child, the claim "is pressed to extinction by the weight of multiplied contingencies".

201 Again, however, the criticisms of the set off argument must not obscure the fact that it rightly acknowledges that parenthood does bring benefits and burdens. Again it will be necessary to return to consider the consequences that should be held to follow from this fact. The criticisms that are made of the proposition, that benefits and burdens are to be set off one against the other, go no further than making the point that to do so would be hard. It would be hard because it is hard to predict the future, and it would be hard because some of the burdens are economic, and many of the benefits are not.

"Damage the child"

202 The "damage the child" argument approaches the problem from what may seem to be an altogether different point of view from arguments about the advantages which parenthood brings to the parents. It asks what will the child think when, in years to come, he or she discovers not only that the birth was unwanted, but also that one or both of the parents sought to put a monetary value on the cost of maintaining the child, and recover that from another, rather than bear that cost. Why, so the argument runs, should whatever risk this discovery may present to the welfare of the child be inflicted upon the child for the financial benefit of the parent?

203 To this there are said to be several answers. First, it is not self-evident that the feared consequences of harm to the child are likely, let alone inevitable. Much would turn on what was said on the subject, when and how, and on the nature of the relationship that had been established between parent and child both

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317 *Barnett v Cohen* [1921] 2 KB 461 at 472.

before and after these revelations were made. Secondly, recovery of damages which include the costs of maintaining the child may, in at least some cases, make a considerable difference to the material well-being of the child. But for their recovery the child may have faced the consequences of the parents' financial hardship. Thirdly, the parent or parents bring the action to recover loss which will be suffered by the parents, not loss suffered by the child. In no other circumstances does the possibility of detriment to a person *not* party to the action prevent recovery of damages otherwise proved to have been sustained by the plaintiff as a result of the defendant's negligence.

204 What those answers do not address is the more deep-seated problem that lies in the fact that the parent seeks to advance his or her economic interests by contending that the child to whom the parent owes obligations is to be regarded as nothing more than an economic burden on the parent. It will be necessary to return to the significance of this matter at the end of these reasons. For the moment, it is enough to say that the answers made to the damage the child argument are answers which attack the universal validity of a particular factual proposition about harming the child. The answers do not deal with what might be described as the consequent commodification of the child.

"Motives and damages"

205 Does it matter *why* the plaintiff sought sterilisation, or advice about that subject? Some of the cases suggest that different answers to the central question in this case might be given depending upon whether the person seeking sterilisation did so for financial, medical, or other reasons. That is, there are indications in some of the cases that a person who seeks sterilisation for financial reasons should be treated differently from a person who decides, for some other reason, not to have any further children. Or, if no distinction should be drawn according to whether there is some financial reason to seek sterilisation, should a person who seeks sterilisation to avoid the risk of passing on some inherited characteristic or condition be precluded from recovery of the costs of bringing up the child from a doctor who performs the sterilisation without reasonable care, if that child does not have the feared characteristic or condition?

206 Would it matter if the doctor was not told everything that moved a patient to seek sterilisation? How would the not uncommon case of mixed motives be resolved? What if the motives of the patient and the patient's partner differed? As Lord Millett pointed out in *McFarlane*[318], not only may those who perform a sterilisation not know why the procedure is sought, "they have no need to know [the] reasons and it would be impertinent of them to enquire".

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318 [2000] 2 AC 59 at 110.

207 What legal principle would be engaged to make motive a relevant consideration? Is it a principle about duty of care or about remoteness of damage? A parent's liability for the costs of maintaining the child is the inevitable consequence of having a child. It is, therefore, by no means evident that the motive for avoiding future pregnancy bears upon what damages should be allowed if, as a result of a doctor's negligence, a patient becomes a parent. The consequences which it is sought to avoid are plainly a reasonably foreseeable consequence of the doctor's breach if, as a result of failing to take reasonable care, the patient or the patient's partner falls pregnant. Again, as Lord Millett pointed out[319], "[i]t is difficult to justify a rule which would make [the doctors'] liability depend on facts which were unknown to them and which are, to put it crudely, none of their business".

208 There is a further set of questions which raise similar issues to those which arise under the heading of motive. How are the damages allowed for bringing up a child to be assessed? Unless the motives of the parent are taken into account, does it mean that if wealthy parents want, and are able, to spend large sums in the care and education of a child, the negligent doctor should bear all of those costs regardless of the capacity of the parents to bear them? Should recovery be limited to the costs of some hypothetical average amount outlaid in bringing up a child? Again, it would be difficult to justify a rule under which the extent of the liability of a careless doctor did not depend upon the particular damages shown to have been suffered by the plaintiff. Why should the damages to be allowed to a plaintiff be limited to some standardised amount?

209 The debate about the significance of a patient's motives and the damages to be allowed assumes that the costs of bringing up a child are recoverable. It diverts attention from the fundamental question of whether they are recoverable at all.

210 Obviously, nothing in the debate about these subjects bears *directly* upon the validity of that assumption. Not only does the debate offer no direct assistance in testing the validity of the assumption, I do not consider that it affords any real insight into the nature of the problems thrown up when the assumption is tested. Pointing to wealthy parents educating a child at the expense of a careless doctor may be thought by some to be a useful polemical device, but it does not shed light on the underlying problem. Nor does identifying the motive for the parent seeking treatment assist the debate. Once it is recognised that seeking sterilisation is legal, and it is accepted that there may be many reasons why sterilisation is sought, the motive of the patient should not affect the relief to be granted if the doctor is careless. The central question

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319 [2000] 2 AC 59 at 110.

remains, whether damages for the costs of bringing up the child should be allowed at all.

211 It is convenient to deal more fully at this point with the decision of the House of Lords in *McFarlane*. To do so will invite attention to some further questions that might be grouped under the several headings already mentioned and, at the same time, it will serve to introduce some of the questions presented by reference to public policy and values.

McFarlane v Tayside Health Board

212 The decision in *McFarlane* departed from what had been said in two earlier decisions of the English Court of Appeal[320], which had accepted that damages for the negligent performance of, or advice about, sterilisation might include the costs of bringing up the child. *McFarlane* was a case in which the complaint made was about the advice that a doctor gave, not about the care with which a procedure had been conducted. Four members of the House (Lord Slynn of Hadley, Lord Steyn, Lord Hope of Craighead and Lord Clyde) held that the mother was entitled to general damages for the pain, suffering and inconvenience of pregnancy and childbirth. The fifth member of the House, Lord Millett, would have allowed no damages on this account. All members of the House held that damages were not to be allowed for the costs of maintaining and rearing the child. Their Lordships divided on whether special damages and damages for loss of earnings occasioned by pregnancy and childbirth were recoverable.

213 Three of their Lordships (Lords Slynn, Steyn and Hope) characterised the costs of bringing up the child as pure economic loss[321]. Each may be understood as identifying the relevant question as being whether the doctor had owed the patient a duty to take reasonable care in giving advice which was a duty that protected the patient's economic interests. Lord Slynn concluded[322] that there was no duty of that kind because the doctor had not assumed responsibility for the expense of rearing the child. Lord Steyn invoked notions of "corrective" and "distributive" justice[323] and concluded[324] that "commuters on the Underground" would not accept that to impose such a liability would be a "just distribution of

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320 *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012; *Thake v Maurice* [1986] QB 644.

321 [2000] 2 AC 59 at 76 per Lord Slynn, 83-84 per Lord Steyn, 89 per Lord Hope.

322 [2000] 2 AC 59 at 76.

323 [2000] 2 AC 59 at 82.

324 [2000] 2 AC 59 at 82.

burdens and losses among members of a society". Although not expressed in terms of duty of care, his Lordship's reference[325], "[i]f it were necessary to do so", to the claim not satisfying the requirement of being fair just and reasonable may be thought to locate the references to distributive and corrective justice in the field of ascertaining or limiting a duty of care. Lord Hope expressly invoked[326] the tripartite test of fair just and reasonable[327], commonly used in the United Kingdom[328] in connection with ascertaining the existence of a duty of care, to conclude that the costs of bringing up the child should not be recoverable while, at the same time, denying[329] that the costs of maintenance had been shown to exceed the value of the benefits of parenthood.

214 The fourth member of the majority in the House of Lords (Lord Clyde) was of the view[330] that maintenance costs went "far beyond any liability which ... the defenders could reasonably have thought they were undertaking". Characterising the claim as a claim for economic loss following upon allegedly negligent advice[331], Lord Clyde concluded[332] that it was not "reasonable" for the parents, having accepted the addition to their family, to be "relieved of the financial obligations of caring for their child".

215 The fifth member of the House (Lord Millett) took a different path to his conclusions that no damages should be allowed for either the pain, suffering and inconvenience of pregnancy or childbirth or for the costs of rearing the child. His Lordship said[333] that "the law must take the birth of a normal, healthy baby to be a blessing, not a detriment". Lord Millett concluded[334] that, although it is a mixed blessing, "society itself must regard the balance as beneficial" and that it

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325 [2000] 2 AC 59 at 83.

326 [2000] 2 AC 59 at 94-97.

327 *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618.

328 cf *Sullivan v Moody* (2001) 207 CLR 562.

329 [2000] 2 AC 59 at 97.

330 [2000] 2 AC 59 at 105.

331 [2000] 2 AC 59 at 105.

332 [2000] 2 AC 59 at 105.

333 [2000] 2 AC 59 at 113-114.

334 [2000] 2 AC 59 at 114.

would be "subversive of the mores of society for parents to enjoy the advantages of parenthood while transferring to others the responsibilities which it entails". The pain and distress of pregnancy and delivery were, in his Lordship's view[335], "as much an inescapable precondition of [the child's] birth as the expense of maintaining her afterwards was its inevitable consequence". If the latter was not allowable, nor should the former.

216 On these bases, Lord Millett concluded that no damages should be allowed for the pain and distress of pregnancy and delivery but rather[336] a conventional, albeit small, sum should be allowed as damages to reflect that the parents had "lost the freedom to limit the size of their family" and thus had been "denied an important aspect of their personal autonomy". In addition, in a conclusion that seems sharply at odds with the reasoning which denied all except this small conventional sum of damages, Lord Millett would have allowed as special damages the costs of replacing equipment for the care of a baby which parents had disposed of in the belief that they would have no further children.

217 All five members of the House expressly disclaimed any reliance on considerations of public policy[337]. Yet, as Lord Steyn rightly pointed out[338], denying liability for the cost of bringing up the child "by saying that there is no loss, no foreseeable loss, no causative link or no ground for reasonable restitution is to resort to unrealistic and formalistic propositions which mask the real reasons" for the decision. Further, to attempt to identify separate duties of care according to the nature of the loss suffered is to ignore the fact that the negligent conduct had a number of different consequences, some physical, some economic, but all of which were reasonably foreseeable. Moreover, to fasten upon the fact that the negligence in question was the negligent provision of advice appears to entail that a different outcome may, even necessarily will, be reached in cases where the procedure or patient's examination is conducted carelessly from the outcome of cases of negligent advice like the present.

218 If broad concepts like fairness and justice, distributive or corrective justice, or the views of commuters on the Underground are relevant, it is not to be supposed that distinctions between economic and physical consequences or between negligent procedures and negligent advice are maintainable.

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335 [2000] 2 AC 59 at 114.

336 [2000] 2 AC 59 at 114.

337 [2000] 2 AC 59 at 76 per Lord Slynn, 83 per Lord Steyn, 95 per Lord Hope, 100 per Lord Clyde, 108 per Lord Millett.

338 [2000] 2 AC 59 at 82.

219 Despite the express disavowal of reliance on public policy, invocation of the concepts I have mentioned reveals not only that the courts must decide how the common law is to develop but also that the decision was thought, in *McFarlane*, to be affected by consideration of what would best reflect society's needs and society's wishes. Before turning to consider the place which "public policy" or "values" should have in the resolution of the question presented in this case, it is convenient to notice one further aspect of the matter dealt with by Lord Millett – the significance of choice.

Choice

220 At various points in the debate about whether damages should be allowed for the cost of bringing up a child, reference is made to the parents having made a choice to keep the child rather than offer it for adoption, or to their having made a choice not to terminate the pregnancy by abortion. As mentioned earlier, this "choice" has been said to reveal that for the parent the benefits of having the child outweigh the burdens[339]. Sometimes, it has been advanced (as it was in *McFarlane*) as an argument about causation – the parents' choice is said to break the causal nexus between negligent conduct and expenditure on bringing up the child.

221 Inevitably, references to "choice" invite attention to the fact that *for the individual* the decision the parent makes, or refrains from making, is necessarily determined by the application of a combination of reason, emotion and beliefs that is unique to that individual. Whatever the decision, so long as the decision is to pursue a lawful course, it would be wrong for the law to characterise that course as unreasonable. To do so would deny the individual's autonomy to choose the lawful course of action which, to that individual, seems best.

222 That a parent has decided to keep the child (or did not decide not to continue with the pregnancy or to offer the child for adoption) is the premise for debate. To adopt and adapt what was said in one American case (in a dissenting opinion)[340], "[a] person who has decided that the economic or other realities of life far outweigh the benefits of parenthood" is confronted by the result which, but for the want of care by the defendant, would have been avoided. To say that a child is born and not given for adoption as a result of the plaintiff's choice to keep the child tells only part of the story. Not only does it ignore the fact of the defendant's negligence, "choice" is an expression apt to mislead in this field. For some, confronted with an unplanned pregnancy, there is no choice which they

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339 *Public Health Trust v Brown* 388 So 2d 1084 at 1085-1086 (1980).

340 *Public Health Trust v Brown* 388 So 2d 1084 at 1087 (1980). See also *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 74 per Kirby ACJ.

would regard as open to them except to continue with the pregnancy and support the child that is born. For others there may be a choice to be made. But in no case is the "choice" one that can be assumed to be made on solely economic grounds. Human behaviour is more complex than a balance sheet of assets and liabilities. To invoke notions of "choice" as bespeaking *economic* decisions ignores that complexity.

"Public policy"

223 Public policy has long played a key role in the development of the common law. For Oliver Wendell Holmes it was "the secret root from which the law draws all the juices of life"[341]. Its influence in the common law can be traced at least to Coke[342] and perhaps well before[343]. Over the centuries the prominence given to that influence has ebbed and flowed but its influence has been constant. It was invoked by Lord Mansfield in *Jones v Randall*[344] in relation to a wagering contract. It was deployed in connection with contracts of restraint of trade even before the landmark decision in *Mitchel v Reynolds*[345]. As Winfield pointed out in 1928[346]:

> "Public policy, like misery, made some very incongruous bedfellows. The man who bet on Napoleon's life[347], the worker who fettered his own freedom of trade, the parent who wished to tie up his estate indefinitely or to get his daughter too well married, the parish officers who compounded for a lump sum with the father of a bastard child[348], the person who made a simoniacal contract[349], the testator who made a gift dependent on the

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341 Holmes, *Common Law*, (1882) at 35.

342 *Egerton v Brownlow* (1853) 4 HL Cas 1 at 144-145 [10 ER 359 at 417].

343 Winfield, "Public Policy in the English Common Law", (1928) 42 *Harvard Law Review* 76 at 79-82.

344 (1774) 1 Cowp 37 at 39 [98 ER 954 at 955-956].

345 (1711) 1 P Wms 181 at 192 [24 ER 347 at 351].

346 Winfield, "Public Policy in the English Common Law", (1928) 42 *Harvard Law Review* 76 at 86.

347 *Gilbert v Sykes* (1812) 16 East 150 [104 ER 1045].

348 *Cole v Gower* (1805) 6 East 110 at 110 [102 ER 1229 at 1229].

349 *Kircudbright v Kircudbright* (1802) 8 Ves 51 [32 ER 269].

> acquisition of a dukedom[350] – are all here cheek by jowl. Perhaps matters were edging on the absurd when it was held that a colliery fire engine must be reckoned as personal property on the ground of 'public benefit and convenience'[351]."

224 In the middle of the 19th century, the role to be played by public policy in judicial decision making came under close scrutiny in England. In *Egerton v Brownlow*[352], the judges were asked to express their opinion about the validity of a proviso to a testamentary gift that, if the donee died without having acquired the title of Duke or Marquis of Bridgewater, the gift should be void. Widely differing views were expressed about the role of public policy. Platt B[353] treated public policy as an abstract standard, independent of time and circumstances. At the other end of the spectrum, Alderson B[354], and Parke B[355] with whom Wightman and Erle JJ agreed[356], regarded public policy as no more than a guide for ascertaining the object of a particular law and considered that to give it any wider role would trespass upon the legislature's role. In the opinion of Parke B[357], public policy:

> "is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience', or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the

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350 *Kingston v Pierepont* (1681) 1 Vern 5 [23 ER 264].

351 *Lawton v Lawton* (1743) 3 Atk 13 at 13-16 [26 ER 811 at 811-812].

352 (1853) 4 HL Cas 1 [10 ER 359].

353 (1853) 4 HL Cas 1 at 99 [10 ER 359 at 399].

354 (1853) 4 HL Cas 1 at 106-107 [10 ER 359 at 402].

355 (1853) 4 HL Cas 1 at 122-124 [10 ER 359 at 408-409].

356 (1853) 4 HL Cas 1 at 100 [10 ER 359 at 399-400].

357 (1853) 4 HL Cas 1 at 123 [10 ER 359 at 408-409].

> province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community."

225 These views did not prevail in *Egerton v Brownlow*. Rather, it was the views expressed by Pollock LCB that were adopted by the House of Lords. As Pollock LCB rightly pointed out[358]:

> "This doctrine of the public good or the public safety, or what is sometimes called 'public policy', being the foundation of law, is supported by decisions in every branch of the law; and an unlimited number of cases may be cited as directly and distinctly deciding upon contracts and covenants as the avowed broad ground of the public good and on that alone; and the name and authority of nearly all the great lawyers (whose decisions and opinions have been extensively reported) will be found associated with this doctrine in some shape or other."

His Lordship concluded[359] that to "discard the public welfare from ... consideration" would "abdicate the functions of [judicial] office" and that, accordingly, he was bound to look for the principles that informed earlier decisions and not shrink from applying them "to any new and extraordinary case that may arise".

226 As Winfield suggested[360], the views of Alderson B, repudiating any role for public policy in judicial decision making, came altogether too late in the development of the common law. What those views amounted to was the denial of any but the most limited role to the courts in the development of the common law: a role which assumed that the judges do no more than discover and declare the common law. It is a view which denies that there are occasions when judges in a common law system must make choices about the way in which the common law is to develop.

227 What techniques may be used in making those choices may be a matter for debate. Sir Owen Dixon, in his address "Concerning Judicial Method"[361],

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358 (1853) 4 HL Cas 1 at 144-145 [10 ER 359 at 417].

359 (1853) 4 HL Cas 1 at 149 [10 ER 359 at 419].

360 (1928) 42 *Harvard Law Review* 76 at 90.

361 Dixon, "Concerning Judicial Method", in *Jesting Pilate and other Papers and Addresses*, (1965) 152 at 157.

advocated what he called "the high technique and strict logic of the common law". Yet he considered[362] that the technique of the common law could "meet the demands which changing conceptions of justice and convenience make", and thus recognised that these conceptions could legitimately bear upon the development of the common law. Others have given greater emphasis to the need, on occasions, for judges to make law. Lord Reid said that to deny that judges make law was to believe a fairytale[363]. And it has been said[364] that now "the law-making function of [the High Court] is accepted by the overwhelming majority of lawyers". It is unnecessary to do more in this case than recognise that judges in a common law system can and must make choices about the development of that law.

What is the role of public policy in the development of the common law?

228 In 1921, Benjamin Cardozo said[365] that, confronted by an entirely new point, an American judge was influenced by four forces not always separated one from the other. They were the force of logic or analogy, the force of history, the force of custom and "the force of justice, morals and social welfare, the mores of the day"[366]. But the role to be accorded to this fourth force cannot be seen as having been settled in England by the decision in *Egerton v Brownlow*. After *Egerton v Brownlow*, there was what one author[367] described as a period of scepticism and hesitation[368]. Increasingly frequent reference was thereafter

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362 "Concerning Judicial Method", in *Jesting Pilate and other Papers and Addresses*, (1965) 152 at 165.

363 Reid, "The Judge as Law Maker", (1972) 12 *Journal of the Society of Public Teachers of Law* 22 at 22.

364 McHugh, "The Judicial Method", (1999) 73 *Australian Law Journal* 37 at 39-40.

365 Cardozo, *The Nature of the Judicial Process*, (1921) at 51; Cardozo, *The Growth of the Law*, (1924) at 61-62.

366 Cardozo, *The Growth of the Law*, (1924) at 62.

367 Knight, "Public Policy in English Law", (1922) 38 *Law Quarterly Review* 207 at 212.

368 See, for example, *Evanturel v Evanturel* (1874) LR 6 PC 1; *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484.

made[369] to the "unruly horse" metaphor given to the law by Burrough J in *Richardson v Mellish*[370].

229 Yet there are two features of the development of English common law after *Egerton v Brownlow* which it is important to recognise. First, as was said in *Evanturel v Evanturel*[371]:

> "[T]he determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time. Many transactions are upheld now by our own Courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion."

Thus, Paine's *Age of Reason* was considered as a blasphemous libel in the late 18th century[372] because *any* attack on Christianity was illegal, but in 1917 a denial of Christianity was held not blasphemous[373]. Toleration of different religious views had increased. By contrast, political practices once common (such as sale of titles) were later condemned as contrary to public policy[374]. The standards of acceptable political behaviour had changed.

230 Secondly, although contrary views were expressed[375], the better view of English common law in the first decades of the 20th century appears to have been that the circumstances which would attract condemnation on public policy grounds were neither a closed class nor of fixed and immutable content. In *Rodriguez v Speyer Brothers*[376], Viscount Haldane said:

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369 For example, *In re Beard; Reversionary and General Securities Co Ltd v Hall* [1908] 1 Ch 383 at 386-387; *In re Bowman; Secular Society Ltd v Bowman* [1915] 2 Ch 447 at 471; *In re Wallace; Champion v Wallace* [1920] 2 Ch 274 at 288-289.

370 (1824) 2 Bing 229 at 252 [130 ER 294 at 303].

371 (1874) LR 6 PC 1 at 29.

372 *R v Williams* (1797) 26 How St Tr 653.

373 *Bowman v Secular Society Ltd* [1917] AC 406.

374 *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1.

375 For example, *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484 at 491 per Lord Halsbury LC.

376 [1919] AC 59 at 81.

> "I think that the change in the view taken of the law as to covenants in restraint of trade, and the illustration it affords of the fashion in which decisions which were right in their time may cease to be of valid application, are highly instructive. For they show that between the class of cases in which, as in the instance of the rule against perpetuities, the law, although originally based on public policy, has become so crystallised that only a statute can alter it, and the different class, such as that of the cases relating to wagers, in which the principle of public policy has never crystallised into a definite or exhaustive set of propositions, there lies an intermediate class. Under this third category fall the instances in which public policy has partially precipitated itself into recognised rules which belong to law properly so called, but where these rules have remained subject to the moulding influence of the real reasons of public policy from which they proceeded."

231 Until appeals from Australian courts to the Privy Council were abolished, the common law applied in Australia walked in step with the courts at Westminster. Inevitably, then, this Court sought to give effect to what was understood to be the view prevailing in English decisions about the role to be accorded to public policy. Early decisions of this Court on that subject must be understood in that light.

232 In this Court, in 1915, Isaacs J noted[377] that Lord Halsbury had said in *Janson v Driefontein Consolidated Mines Ltd*[378] that a court could not invent a new head of public policy. Accordingly, so Isaacs J concluded[379], the public policy which a court could apply as a test of validity of a contract was limited to

> "some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the Courts of the country can therefore recognize and enforce. The Court is not a legislator: it cannot initiate the principle; it can only state or formulate it if it already exists."

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377 *Wilkinson v Osborne* (1915) 21 CLR 89 at 96.

378 [1902] AC 484 at 491.

379 (1915) 21 CLR 89 at 97.

Even so, Isaacs J recognised the possibility of changes in the application of public policy, citing[380] in that connection the passage from the advice of the Judicial Committee in *Evanturel v Evanturel*[381] set out above.

233 As Windeyer J was later to point out[382], "the distinction between creating a new head of public policy and defining the scope of heads already formulated by judicial decision is perhaps verbal rather than real". Nonetheless, there is evident reason for the greatest hesitation in resorting to public policy considerations in areas in which they have not previously been seen as engaged.

Public policy in contract and succession

234 Public policy considerations have most often been considered in connection with contract and succession to property. In those areas public policy plays a wholly negative role, denoting (as was said in a different context) "a justification or excuse for not applying, or recognising the application of, an otherwise applicable rule of law"[383]. A contract will not be enforced if it is unlawful (as, for example, a contract to commit a crime), if it is injurious to foreign relations or to the prejudice of public safety, if it is injurious to the proper working of justice, if it is an unreasonable restraint of trade, if it is injurious to good government, if it is an attempt to oust the jurisdiction of the courts or if it is injurious to the status of marriage or promotes sexual immorality. In the field of succession the rule against perpetuities is rooted in public policy. In addition, some forms of conditional gift have been held bad for reasons of public policy. *Egerton v Brownlow* itself was such a case[384].

235 In both contract and succession the operation of public policy considerations is now well developed. In particular, there is a clear articulation of the need to resolve the tension between competing policies of the law. In the case of contract, it is well accepted that the law will seek to give effect to bargains that are struck between those of full age and capacity. To refuse to enforce a particular bargain on the grounds of public policy trenches upon the general policy favouring the enforceability of bargains. In succession, effect is

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380 (1915) 21 CLR 89 at 97.

381 (1874) LR 6 PC 1 at 29.

382 *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 452.

383 Carter, "The Role of Public Policy in English Private International Law", (1993) 42 *International and Comparative Law Quarterly* 1 at 1.

384 See also, for example, *Church Property Trustees, Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394; *Blathwayt v Baron Cawley* [1976] AC 397 at 425-427.

generally given to the decision a person of full age and capacity makes about the disposition of his or her property on death. That is qualified in some respects – by the rule against perpetuities and by considerations of public policy which are held to strike down some forms of disposition. In addition, the legislation providing for testators' family maintenance further qualifies that general freedom of disposition. But in both contract and succession there is a discernible policy of the law which resort to public policy considerations would confine or modify.

Public policy and tort

236 Compared with the degree to which the operation of public policy considerations has been developed in the law of contract and succession, the role of public policy in the development of the law of tort has been given less prominence. Considerations of public policy have found some reflection in connection with developments in defences to defamation[385]. Those developments grew out of the common law of qualified privilege in which "the common convenience and welfare of society" was long established as the criterion of protection[386]. They offer no guidance to the resolution of the problems presented in this matter. They may, therefore, be put to one side.

237 Public policy has also been invoked to deny recovery in negligence between those engaged in a joint criminal enterprise[387]. Its deployment in that context has not been without controversy. Four members of the Court in *Gala v Preston* preferred to express their decision in the language of proximity and duty of care[388] rather than in the form of a general exclusionary rule[389].

238 In 1967, Kitto J said[390] that to discuss the application of the law of negligence to a sport or game "in terms of 'judicial policy' and 'social expediency' is to introduce deleterious foreign matter into the waters of the common law – in

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385 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 565.

386 *Toogood v Spyring* (1834) 1 Cromp M & R 181 at 193 [149 ER 1044 at 1050].

387 *Gala v Preston* (1991) 172 CLR 243 at 270-271 per Brennan J, 277-278 per Dawson J, 291 per Toohey J; cf *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438; *Smith v Jenkins* (1970) 119 CLR 397; *Progress and Properties Ltd v Craft* (1976) 135 CLR 651; *Jackson v Harrison* (1978) 138 CLR 438.

388 (1991) 172 CLR 243 at 254.

389 (1991) 172 CLR 243 at 249-250 per Mason CJ, Deane, Gaudron and McHugh JJ.

390 *Rootes v Shelton* (1967) 116 CLR 383 at 387.

which, after all, we have no more than riparian rights". This notwithstanding, in the last decades of the 20th century, increasing attention was given to the role of public policy in the development of the law of tort[391]. That has largely been confined to one aspect of the law of negligence – duty of care – which is consistent with duty of care being one of the principal analytical devices for controlling the apparent breadth of recovery that would follow were all careless conduct causing loss held to be actionable. Even here, however, the courts have not infrequently failed to articulate the "policy" reasons which have underpinned a particular conclusion. Either the effect of a determination of liability (deterrence or loss-spreading) has been elevated to a reason for the determination, or the reasons have been obscured behind a conclusory expression like "fair just and reasonable"[392].

239 Further, it is always necessary to recall the considerations identified by Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[393]. Policy considerations have a significant part to play in any judicial definition of liability and entitlement in new areas of the law. But as Stephen J went on to say[394]:

> "That process should however result in some definition of rights and duties, which can then be applied to the case in hand, and to subsequent cases, with relative certainty. To apply generalized policy considerations directly, in each case, instead of formulating principles from policy and applying those principles, derived from policy, to the case in hand, is ... to invite uncertainty and judicial diversity."

240 Although sterilisation procedures have been available and used for much of the 20th century[395] this is the first time in which this Court has had to consider what damages should be allowed where the procedure was effected negligently or negligent advice was given about the subject.

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391 Stapleton, "Duty of Care Factors: a Selection from the Judicial Menus", in Cane and Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming*, (1998) 59.

392 Stapleton, "Duty of Care Factors: a Selection from the Judicial Menus", in Cane and Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming*, (1998) 59.

393 (1976) 136 CLR 529 at 567.

394 (1976) 136 CLR 529 at 567.

395 *Christensen v Thornby* 255 NW 620 (1934). See also the description of the use of such procedures in California in Miller and Dean, "Liability of Physicians for Sterilization Operations", (1930) 16 *American Bar Association Journal* 158.

241 Duty of care is not the only analytical tool that can be, or has been, used to control the reach of the tort of negligence. Rules about remoteness of damage can serve that purpose. Whether, since *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)*[396], remoteness of damage does curtail recovery in negligence to any significant extent may be open to debate. What is not contestable, however, is that remoteness rules are a means of confining recovery and that the particular rule adopted in requiring that damage not be too remote is based in public policy choices made by the courts. The basis stated in *The Wagon Mound*[397] was that the former rule of causation[398] had led "to nowhere but the never-ending and insoluble problems of causation". And as has more recently been recognised those problems of causation are themselves problems which invite attention to policy questions[399]. In the end, the former rule based on causation was rejected as unduly lax. A characterisation of that kind can be founded only in some conception of what is or is not a desirable outcome. What is important for present purposes is that the rules about remoteness of damage reveal that duty of care is not the only analytical tool deployed to control the reach of the tort of negligence, and that considerations of public policy have an important part to play in the development and application of other analytical tools.

242 Of course it must be recognised, as it was 150 years ago[400], that "it may be that Judges are no better able to discern what is for the public good than other experienced and enlightened members of the community". But as Pollock LCB went on to say, "that is no reason for their refusing to entertain the question, and declining to decide upon it".

Public policy in this case

243 All of the arguments *against* allowing damages for the costs of bringing up a child born as a result of careless advice or treatment by a doctor are arguments that have two characteristics. First, they seek to expand the field for

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396 [1961] AC 388.

397 [1961] AC 388 at 423.

398 *In re Polemis and Furness, Withy & Co* [1921] 3 KB 560.

399 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 516; *Chappel v Hart* (1998) 195 CLR 232 at 256 [63]; *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 29-31.

400 *Egerton v Brownlow* (1853) 4 HL Cas 1 at 151 per Pollock LCB [10 ER 359 at 419].

debate beyond the economic consequences of pregnancy and childbirth. Secondly, they explicitly or implicitly invoke values which it is said are society's values. Although variously described, the values invoked all relate to the worth that is to be ascribed to the life of an individual, and the worth that can be found in establishing and maintaining a good and healthy relationship between parent and child.

244 The contrary arguments point to the undeniable fact that a parent is legally bound to maintain his or her child until the child is aged 18 years[401]. Incurring that liability is an inevitable consequence of the birth of the child. But for the negligence there would not be that liability. To restore the plaintiff to the position in which the plaintiff would have been but for the negligence, it is necessary to recompense the plaintiff for the value of that liability. Two further steps then are taken in the argument in support of that conclusion. First, it is said that the valuation of that liability is a task not different in any relevant respect from that undertaken by a court dealing with a wrongful death claim. Secondly, it is said that to hold that damages for maintaining the child are not recoverable would give the tortfeasor an immunity from the ordinary operation of principles of negligence.

245 These last two points may be dealt with briefly. First, wrongful death claims are creatures of statute. The courts are required to value the *pecuniary* loss sustained by a dependant by reason of the death[402]. It has long been established that attention must be confined in such actions to economic consequences alone. What is done in those cases, created and regulated as they are by legislation, sheds no light on the present problem.

246 Secondly, to speak of "immunity" or "exemption" of a tortfeasor from the consequences of the tort may or may not be an accurate description of the result of the conclusion that damages for the cost of bringing up the child are not recoverable. But beyond sounding a warning note that care is required before reaching the conclusion, it says nothing about the strength or weakness of the arguments that support or detract from the conclusion.

247 The balance of these reasons seeks to make an argument that can be expressed in two steps. First, the consequences for a parent of negligent advice or treatment by a doctor in connection with sterilisation will usually include non-financial benefits; they will not be confined to economic detriment.

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401 *Family Law Act* 1975 (Cth), s 61C(1); *Child Support (Assessment) Act* 1989 (Cth), s 3.

402 *Blake v Midland Railway Co* (1852) 18 QB 93 at 109-111 [118 ER 35 at 41-42]; *De Sales v Ingrilli* (2002) 77 ALJR 99 at 109-110 [55]; 193 ALR 130 at 143.

Secondly, the net value or worth of the consequences probably cannot be assessed in monetary terms, but even if it could be, the parent should not be permitted to attempt to demonstrate that the net worth of the consequences of being obliged to rear a healthy child is a financial detriment to him or her.

Consequences

248 The matters discussed earlier in these reasons reveal that to look at the consequences of negligence of the kind now in question as confined to *economic* consequences narrows the focus of attention unduly. First, to confine attention to economic consequences would require a refusal to award anything for pain and suffering associated with pregnancy and childbirth on the ground that pain and suffering has no economic value: it cannot be bought and sold in a market. Secondly, if attention is to be paid to *all* of the consequences of the defendant's negligence, one of those consequences is that there is a new life in being: a life with all the value, and all of the potential for good and evil, of any other human being. That life is not an article of commerce and to it no market value can be given. The fact of its existence brings to the plaintiff the economic burdens identified. It may, it may not, bring to the plaintiff some future economic benefits. It may, it may not, bring to the plaintiff some non-economic rewards or benefits which the plaintiff may, or may not, consider outweigh the financial burdens.

Valuation

249 To value the life of the new child would at least be unrealistic if not impossible. In any event, to attempt to do so is not to the point in an action brought by a plaintiff for the vindication of *his* or *her* interests. But are the benefits which may, but need not, flow to a parent from having a child to be wholly ignored in seeking to mould relief that will vindicate the parent's interests? Is it enough to say that the benefits, to the extent that they are economic, cannot be measured because there are too many contingencies which will affect the measurement and, to the extent that they are not economic, must be left out of account because there is no market place in which they are traded?

250 To my mind these last questions must be answered no. The possibility of benefits, economic and non-economic, cannot be ignored. Saying that the benefits cannot be measured, or cannot be measured in money, is not reason enough to ignore them and to confine inquiry to the adverse economic consequences of parenthood. If assigning value to the benefits of having a new child *is* impossible, it means that no value can sensibly be determined for the balance between benefits and burdens.

251 If, contrary to that conclusion, some assessment of the net value of benefits and burdens can be made, the choice which must then be made is

whether the law is to permit parents, or their opponents, to embark upon a calculation of the net worth of a new child to the parent.

252 It is important to emphasise that recognising that there are benefits and burdens makes no assumption about what that net worth will be. It does not assume that the benefits will outweigh the burdens or vice versa. It does no more than recognise that there may be both benefits *and* burdens. While acknowledging the validity of the criticisms that are made of the set off argument, it replies to those criticisms by saying that to show that *solving* the problem is hard does not deny the *existence* of the problem presented by there being countervailing benefits.

253 The particular question which must ultimately be answered in this case is, are the ordinary costs of rearing the child to be an admissible head of damage? That particular question is, however, rooted in the more general question I have identified earlier – what relief will vindicate the parent's interest injuriously affected by the doctor's negligence? Because the interests at stake are those of the parent, not the child, the question is what damages are to be allowed to the parent for the consequences for the parent of the defendant's negligent conduct? The consequences for the parent are known only in part when the trial takes place. It is known that the parent has incurred some expenditure. It is known whether the parent has begun to establish a good relationship with the child. (It may be doubted that a parent would readily assert that the relationship was an unmitigated and unrelieved burden.) What is not known is what will happen in the future. Will the relationship flower, or will it wither and die? Will the child, in any sense, truly be a blessing? Will the child provide financial support for the parent when the parent faces hard times? None of this is known.

254 Confining attention to the financial outgoings incurred during the child's minority is to have the courts ignore some consequences of parenthood, such as the emotional and spiritual rewards it may bring. Although it may be thought that those rewards, in greater or lesser measure, are the more probable outcome of events, focusing on economic consequences ignores them.

255 I would answer no, to what I have described as the particular question: are the ordinary costs of rearing a child to be an admissible head of damage? I would give that answer regardless of whether the claim is framed in contract or tort. The common law should not permit recovery of damages for the ordinary costs of rearing a child.

256 I speak of "ordinary" costs not to distinguish between the wealthy parent, who wishes nothing but the most expensive upbringing for a child, and other parents. Rather, I refer to the ordinary costs of bringing up a child to distinguish between cases where the child has no abnormal or special needs for expenditure in care or maintenance, and the child whose upbringing is more costly than normal because of special needs. The extra costs, over and above ordinary

expenditures, may, in some cases, be recoverable. The law should not, however, permit recovery of damages for the ordinary costs of rearing a child even if the child has special needs.

257 As Lord Millett said in *McFarlane*[403], "[t]he admissibility of any head of damage is a question of law". The law should not admit this head because it would be necessary to put a price on the value *to the parent* of the new life. Again, I adopt Lord Millett's statement of the point[404]:

> "If the monetary value of the child is assessed at a sum in excess of the costs of maintaining him [or her], the exercise merely serves to confirm what most courts have been willing to assume without it. On the other hand, if the court assesses the monetary value of the child at a sum less than the costs of maintaining him [or her], it will have accepted the unedifying proposition that the child is not worth the cost of looking after him [or her]."

258 Public policy forecloses that inquiry. To do so affirms, or at least does not detract from, what is seen to be the desirable paradigm of family relationships in which child and parent are of mutual support one to the other. In that sense, and only in that sense, the law might be seen as concluding that every child is a blessing. But the point is more deep seated than a factual generalisation of very doubtful validity. It is a point which draws attention to the process of valuation that would have to be undertaken in order to arrive at a true measure of the infringement of the parent's interest.

259 Once it is accepted that there are benefits and burdens in parenthood, it will be in the economic interests of the parent to assert that the burdens outweigh the benefits. Foreclosing the inquiry prevents the parent (in pursuit of the parent's own economic interests) inflicting harm on the child to whom the parent owes obligations by the parent denying the benefits of that relationship. To put the matter another way, the parent should not be permitted to embark upon proving that the economic costs of the child will, in the long run, outweigh whatever advantages or benefits the parent may derive from the child's existence and the relationship between parent and child. As Gummow and Kirby JJ rightly point out in *Gifford v Strang Patrick Stevedoring Pty Ltd*[405]:

> "the law has long placed particular value on the protection of the young from serious harm. The *parens patriae* jurisdiction referred to in *Marion's*

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403 [2000] 2 AC 59 at 112.

404 [2000] 2 AC 59 at 111.

405 [2003] HCA 33 at [89].

> *Case*[406] provides one illustration. The entitlement of parents of a child to be heard in child welfare proceedings concerning a child provides another illustration[407]. Further, through the imposition of obligations and the conferral of rights, both the general law and contemporary statute law have treated the relationship of parent and child as a primary means by which to secure the public interest in the nurturing of the young[408]."

260 To hold, as I do, that the parent should be prevented from embarking upon this inquiry resolves the conflict which otherwise would exist between the duty of the parent to preserve and protect the interests of the child by advancing the mutual worth of the bond between them, and the interest of the parent in seeking recompense for a wrongful invasion of the parent's interests.

261 In putting the proposition that way there are obvious allusions to the equitable rules about conflict of duty and interest[409]. The allusion is deliberate, but it is not intended to suggest that there has been, or should be, the direct importation and application of such rules in this case. Rather, it is sought to derive support from these equitable rules for the development of a similarly "inflexible rule"[410] in the common law of damages for negligence and breach of contract: a rule which would preclude the parent from recovering damages for the ordinary consequences which flow to the parent from being obliged to raise and maintain a child born as a result of the infringement of the parent's interests. The parent would be denied treating the child as a commodity to be given a market value. The parent would be denied this, not because revelation of the claim may damage the child, but because the law should not permit the commodification of the child.

262 The recompense obtainable by the parent would be confined to those matters which affect the parent alone: the pain and suffering of pregnancy and childbirth, and those costs of the failed procedure that have been thrown away. By adopting this rule, the law would refuse, as Lord Millett said[411], "to regard a

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406 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 at 258-259.

407 *J v Lieschke* (1987) 162 CLR 447 at 462, 463-464; cf *In re Gault* 387 US 1 (1967).

408 cf *Russell v Russell* (1976) 134 CLR 495 at 549.

409 *Bray v Ford* [1896] AC 44 at 51 per Lord Herschell; *Chan v Zacharia* (1984) 154 CLR 178 at 198-199 per Deane J; *Breen v Williams* (1996) 186 CLR 71 at 132-138 per Gummow J.

410 *Bray v Ford* [1896] AC 44 at 51 per Lord Herschell.

411 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 114.

normal, healthy baby as more trouble and expense than it is worth". No less importantly, the law would refuse to allow a parent to seek to demonstrate the contrary.

263 Other considerations would arise if the child had special needs which would require the expenditure of money to meet those needs. In such a case the parent could seek to demonstrate the costs incurred in meeting those needs without in any way denying or diminishing the benefits of being parent to the child.

264 The appeal should be allowed.

265 CALLINAN J. The question that this appeal raises is whether a doctor and a health authority are liable in damages for the costs of rearing to age 18 a child whom his parents conceived as a result of a negligent failure on the part of the doctor to advise that the mother might still, despite an attempted sterilization performed upon her, give birth to a child.

The facts

266 In December 1967, when she was 15 years old, the first respondent underwent an appendectomy at the Balmain Hospital in Sydney. Because her right ovary was found to be filled with a blood clot the surgeon removed it. The other reproductive organs, including the left and right fallopian tubes were unaffected and left intact.

267 The respondents married in 1984. Two daughters, delivered by Caesarean section, were born to them. For various reasons, including a fear, later established to be unfounded, of an hereditary disease of the second respondent, and the first respondent's age, they wished to limit their family to these two children.

268 The first respondent contacted the first appellant, who is a gynaecologist, in November 1991 with respect to the possibility of performance by him of a procedure for her sterilization. The first appellant formed the view that the first respondent's right fallopian tube as well as her right ovary had been removed in 1967. He arranged for her to undergo an ultrasound scan. By January 1992 he had concluded, and told the first respondent, that there were no impediments to the successful completion of the procedure.

269 After undergoing pre-operative admission to the Redland Hospital for various purposes, including HIV testing, on 4 March 1992, the first respondent was admitted as an in-patient on 12 March 1992 for the sterilization procedure. The procedure, a tubal ligation, was performed laparoscopically by the first appellant at the Redland Hospital on 13 March 1992. It entailed the insertion of two instruments into the body, one just below the navel and the other just above the pubic bone. The purpose of the first was to introduce a laparoscope to enable the organs to be viewed. The second was a cannula, through which a clip applicator was passed to enable a clip to be placed across the fallopian tube. The surgery was performed under general anaesthetic. The first appellant described what he found and did as follows:

> "Good view small bowel associated with right adnexal area – extensive adhesions. No right tube or ovary visible. Consistent with patient's history of right salpingo-oophorectomy. Left tube and ovary normal. One Filshie clip applied to tube and application checked."

("Salpingo-oophorectomy" means the removal of both the ovary and its associated fallopian tube.) The first appellant did not see any right ovary or fallopian tube. He thought this to be consistent with the history he believed he had been given that both had been removed.

270 The right fallopian tube had however, been obscured by bowel adhesions resulting from the surgery in 1967. As the first appellant was unaware of its existence, he applied a clip to the left fallopian tube only. He did not see the first respondent again, but was the author of a letter (which came to be signed by the medical superintendent of the second appellant) to the first respondent's general practitioner. In it he described the procedure and its apparent outcome, although he did make one obvious mistake by a reference to the application of a clip to the right tube. The letter was not brought to the attention of the respondents.

271 In November 1996, at the age of 44, the first respondent fell pregnant. She bore a healthy son, again following a Caesarean section, on 29 May 1997. Expert representatives of the parties were present at the birth.

272 After the delivery the uterus was moved outside the abdominal cavity. At first, all that could be seen were the adhesions of the bowel to the uterus. After dissection however, it became apparent that the right fallopian tube was present. It was convoluted and compressed, and turned almost 180 degrees back upon itself. It was attached by adhesions to its own supporting structures and to the uterus itself, and was displaced towards the uterus from its normal position. By a similar procedure the left fallopian tube was viewed. It could be seen to be effectively ligated by an appropriately placed Filshie clip.

273 In September 1997, four months after the birth, the first respondent underwent a hysterosalpingogram, a procedure in which dye is inserted into the uterus under pressure and the results are observed on x-ray. It showed that the right fallopian tube was patent. The consensus of medical opinion was that the first respondent had conceived by transmigration of an ovum from the left ovary to the right fallopian tube. At the time of the trial the child was healthy, active, normal in all respects, and a valued member of the family.

The trial

274 The respondents sued the appellants in contract and negligence. The action in contract was not pursued at the trial, presumably because the attempted sterilization was undertaken free of charge at a public hospital. The respondents alleged negligence both in the performance of the operation, and in the giving of professional advice by the first appellant. This Court is not concerned with the former of the allegations. The particulars of the latter relevantly were:

"(a) Failing to inform or alternatively adequately inform the first plaintiff of the risk or possibility that the procedure would fail and that she may not be rendered sterile;

(b) Failing to enquire of the first plaintiff that she adequately understood that she may not be rendered sterile by the operation;

…

(j) Failing to adequately check to determine the presence of a functional right fallopian tube."

275 The primary judge, Holmes J, made findings of negligence, effectively of negligent professional advice, against the first appellant in these terms[412]:

> "In the circumstances I conclude that Dr Cattanach was negligent in terms of particular (a); that is, in failing adequately to inform [the first respondent] of the possibility that the procedure would fail to be effective because of the possibility of the continuing existence of the right fallopian tube so as to give her the option of considering further investigation in the form of a hysterosalpingogram. That negligence was a material cause of her pregnancy and the birth of Jordan."

Her Honour then turned to the issue of damages. She summarized the appellants' submissions on the issue as follows[413]:

> "The [appellants], by an amended entry of appearance and defence, pleaded that all damages other than those for pain and suffering ought to be curtailed by reference to the time at which Jordan could, in theory, have been adopted. In his submissions, Mr Griffin QC did not seek to direct me down any specific path to that conclusion – for example, public policy considerations, application of a 'fair just and reasonable' test, or the failure to adopt as raising remoteness or causation issues – relying more generally on the effect of the decision of the House of Lords in *McFarlane v Tayside Health Board*[414] in limiting the scope of damages. Although Mr Griffin's submissions went so far as to propose that no damages at all should be awarded in respect of the birth of a healthy child, he acknowledged that the weight of authority was to the effect that damages for pain and suffering from the pregnancy at least were recoverable. In

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412 (2001) Aust Torts Rep ¶81-597 at 66,626 [33].

413 (2001) Aust Torts Rep ¶81-597 at 66,626 [36].

414 [2000] 2 AC 59.

adverting to *McFarlane v Tayside Health Board*, he drew a distinction between economic loss occasioned by the pregnancy and birth, and economic loss occasioned by the child's existence in the family, suggesting that if damages were recoverable at all for economic loss, they were limited to the former."

276 After reviewing the authorities in this country and the United Kingdom her Honour turned to the most recent decision of this Court concerning claims for economic loss, *Perre v Apand Pty Ltd*[415]. There were, in her Honour's opinion, factors present here which were indistinguishable from several which were influential with most members of this Court in *Perre*. In consequence, she held that the respondents should recover damages, including as one component, the costs of rearing the child. Her Honour accordingly assessed damages as follows[416]:

"**The first [respondent's] damages**

Pain and suffering and loss of amenities	$30,000.00
Interest on $20,000 for 3.75 years @ 2%	$1,500.00
Past economic loss	$3,003.00
Interest for 3.5 years @ 5%	$525.52
Future economic loss	$10,000.00
Past *Griffiths v Kerkemeyer* damages	$13,300.00
Interest for 3 years @ 2%	$851.12
Future *Griffiths v Kerkemeyer* damages	$28,476.00

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415 (1999) 198 CLR 180.

416 (2001) Aust Torts Rep ¶81-597 at 66,635 [81].

Special damages	$15,473.06
Interest on special damages	$543.69
	$103,672.39
Second [respondent's] damages	
Loss of consortium	$3,000.00
First and second [respondents'] damages	
Past costs of raising Jordan	$17,698.80
Interest @ 5% for 3 years	$2,655.00
Future costs of raising Jordan	$84,895.53
	$105,249.33"

The appeal to the Queensland Court of Appeal

277 The appellants appealed to the Court of Appeal on both issues, liability and damages. Because special leave to appeal to this Court was confined to the latter, the former requires no further consideration. The Court of Appeal was unanimous as to the respondents' entitlement to damages, except as to the expense of rearing the child. McMurdo P thought that the case was governed by *Perre* and that the trial judge's assessment of damage by analogy with it was correct, and should be affirmed. Her Honour did not think that there was any compelling public policy which obliged her to reject or reduce the respondents' assessment.

278 Davies JA reached the same conclusion as the President. There were, in his opinion also, no "policy factors which ought to preclude recovery of a loss which, policy factors aside, ought to be reasonable."[417]

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417 [2001] QCA 246 at [99].

279 The basis for the dissenting opinion of Thomas JA is to be found in the following paragraphs[418]:

> "Principles concerning the allowance and assessment of damages have evolved in a pragmatic way, and their development has often been influenced by policy considerations. Thus, for a long time the common law refused to allow damages resulting from the death of a human being. The evolution of the law of damages progressed through a period of lump sum jury assessments, in which summings-up more commonly urged caution than sanguinity. In the 20th century jury assessments tended to be supplanted by lump sum assessments by trial judges. Recognition of the desirability of lump sum assessments survived until the 1970s, finally to be supplanted by recognition that, in general, assessment ought to be through the identification of separate heads of damage and the allocation of identifiable damages to each. Damages for the cost of rearing an initially unwanted child are not at this point of time a recognised head of damage, and of course the ultimate issue is whether it ought to be. The fundamental question arising in this case is how to determine what the plaintiff has lost, and whether and how the plaintiff's undoubted benefit is to be brought into account. The gaining of a healthy child may in one sense be regarded as the receipt of a collateral benefit, a subject which the courts have not solved in any comprehensive or logically satisfactory way. But once again in this area recourse has been had to 'justice, reasonableness and public policy'.
>
> The benefit of parenthood of a healthy child who becomes a welcome member of a family is substantial. Families are important units in a community. It is in the interest of the community that parental responsibility, love and trust between parent and child and strong family units be maintained. There is also a widely perceived sense of continuity (which some see as potential immortality) in the procreation of one's own children. In this case [the first and second respondents] are both the natural parents and the custodians of their child. I do not consider it fair or desirable that someone else be required to maintain the child in addition to compensating [the first respondent] for the injury that has been done to her and compensating [the second respondent] for the injury done to his rights.
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> …
>
> It is accepted in our society that natural parents are liable to contribute to the succour and maintenance of their children. Under the *Family Law Act* parents have a duty to maintain their children even when

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418 [2001] QCA 246 at [195]-[200].

> the child is in the care of others, and children have the right to be cared for by both their parents regardless of whether their parents are married, separated or have never lived together. The criminal law also imposes a legal duty upon persons having the care of a child under 16 to provide the 'necessaries of life'.
>
> These obligations are cornerstones of our society and apply to all parents whether they become parents with enthusiasm, surprise or reluctance. This is not to say that someone else could not be ordered to indemnify parents against the financial burden of parenthood. But in my view to do so under circumstances such as the present would create an unfair and inappropriate obligation upon a defendant."

280 It followed that his Honour would have adopted a "limited damages rule" and reduced the damages by $105,249.33.

The appeal to this Court

281 In this Court it was accepted that the claim in contract had been abandoned. There were other matters that were not in dispute: that no distinction should be made between the respective liabilities of each of the appellants, or the entitlements of each of the respondents; and that, despite any inconsistencies between an absence of challenge to the respondents' other heads of damages, and the challenge to the damages awarded for the costs of rearing the child, the former should stand.

282 Something should however be said about the heads and quantum of damages. The respondents' claims were modest ones. The fact that this is so does not provide any basis for a denial to them of their cause of action. Logically, if they had been able to establish them, claims might have been maintainable for the cost of tertiary education and expenses voluntarily, but conventionally incurred by parents whilst children remain dependent on them. The allowance by Windeyer J in *Parker v The Commonwealth*[419] of a sum that a father might have set aside for a daughter's wedding had he survived, despite the absence of express provision for it under the relevant analogue of Lord Campbell's Act there, has not been regarded as inappropriate, and indeed has subsequently frequently been allowed in other cases. That the damages may be substantial, or that they may vary very much from case to case does not mean that they are indeterminate. Indeed the contrary is the case. Variation results from the requirement that careful regard be had to the particular facts of each case. The law has long taken the view that a tortfeasor who has injured, for example, a budding business genius or a potential world champion golfer, must

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419 (1965) 112 CLR 295 at 314.

compensate that victim to the extent of the loss likely to be sustained, notwithstanding that the damages would be only a small fraction of those if the victim's prospects were modest.

The authorities

283 As in the intermediate court of appeal, the appellants urged the Court to adopt approaches of the kind which were preferred by the majority in the House of Lords in *McFarlane v Tayside Health Board*[420] which resulted in a decision denying the costs of rearing a child to a parent after a preventative procedure has been carelessly and incompetently performed. It should be pointed out that before the appeal was determined in the House of Lords, the preponderance of judicial opinion in the United Kingdom was to a somewhat different effect. That opinion is fully summarized in their Lordships' speeches and needs no repetition here. The balance of opinion in the House was that it was not fair, just and reasonable that a doctor or a hospital should bear the cost of rearing a child by reason of negligence on the part of either in failing to prevent an unwanted pregnancy. Other matters considered relevant were the so-called principles of distributive justice[421], disproportion between the damages claimed and what would, and should constitute "reasonable restitution" for the consequences of the negligent conduct by the doctor[422], and the offsetting joy that the advent and rearing of a child bring to a parent's life. Lord Millett took a quite different view. He would not have awarded the parents any damages beyond a "conventional sum which [it] should be left to the trial judge to assess, but which [he] would not expect to exceed £5,000 in a straightforward case like the present."[423] His Lordship said[424]:

> "This does not answer the question whether the benefits should be taken into account and the claim dismissed or left out of account and full recovery allowed. But the answer is to be found in the fact that the advantages and disadvantages of parenthood are inextricably bound together. This is part of the human condition. Nature herself does not permit parents to enjoy the advantages and dispense with the disadvantages. In other contexts the law adopts the same principle. It

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420 [2000] 2 AC 59.

421 [2000] 2 AC 59 at 76 per Lord Slynn of Hadley, 82-83 per Lord Steyn, 96 per Lord Hope of Craighead.

422 [2000] 2 AC 59 at 83 per Lord Steyn, 106 per Lord Clyde.

423 [2000] 2 AC 59 at 114.

424 [2000] 2 AC 59 at 114.

> insists that he who takes the benefit must take the burden. In the mundane transactions of commercial life, the common law does not allow a man to keep goods delivered to him and refuse to pay for them on the ground that he did not order them. It would be far more subversive of the mores of society for parents to enjoy the advantages of parenthood while transferring to others the responsibilities which it entails.
>
> Unlike your Lordships, I consider that the same reasoning leads to the rejection of Mrs McFarlane's claim in respect of the pain and distress of pregnancy and delivery. The only difference between the two heads of damage claimed is temporal. Normal pregnancy and delivery were as much an inescapable precondition of Catherine's birth as the expense of maintaining her afterwards was its inevitable consequence. They are the price of parenthood. The fact that it is paid by the mother alone does not alter this."

284 As with *McFarlane*, courts in other jurisdictions in cases of this kind have discussed and weighed the advantages and disadvantages of bearing and rearing children, and have attempted to identify universal, moral, family values. Some examples suffice to show the themes that are threaded through many of the judgments.

285 Lax J in *Kealey v Berezowski*[425] comprehensively makes the sort of case that the appellants seek to make here. First her Honour points out that a definitional framework[426] is required to distinguish between a "wrongful birth", a term adopted in respect of a child damaged at birth, "wrongful life", the birth of an abnormal child born as a result of a planned pregnancy, and "wrongful pregnancy", a term descriptive of a birth of a healthy child following a medical failure to prevent or terminate an unwanted pregnancy. Both the events in *Kealey* and this case would fall into the last category of cases. Her Honour said this[427]:

> "No one would disagree that the responsibilities of rearing a child entail burdens, financial and otherwise. But, successfully meeting those responsibilities also brings innumerable benefits in the form of personal satisfaction and happiness. The responsibilities and the rewards are inextricably bound together and do not neatly balance one against the other, at least not in the case of children. Who can say whether the time,

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425 (1996) 136 DLR (4th) 708. See also *Mummery v Olsson* (2001) Ont Sup CJ LEXIS 96 and *MY v Boutros* [2002] 6 WWR 463.

426 (1996) 136 DLR (4th) 708 at 723.

427 (1996) 136 DLR (4th) 708 at 738-739.

toil and trouble, or the love, guidance and money which parents devote to a child's care and upbringing, will bring rewards, tangible or intangible, today, tomorrow or ever. No court can possibly determine this in any sensible way. Nor should it attempt to do so. If damages are awarded for child-rearing costs, it is my view that the correct approach is as suggested in *Thake v Maurice*. The responsibilities and the rewards cancel each other out."

286 Later Lax J said this[428]:

"Life is about choices and not everything in life is predictable or planned. To transform a mistake, measured in millimeters, into a monetary award in this case, cannot be right. Nor, in my view, can every mistake be evaluated by rules designed for different reasons. The Kealeys are willing and able to assume and have assumed their responsibilities as parents to their third daughter as they should. Ashley is ensured a happy and successful childhood in a family which has welcomed her, loves her and can afford to raise her. The responsibilities should remain where they are."

287 The approach in the United States of America which is summarized by LaCroix and Martin[429] is generally, but not invariably in accord with the majority of the House of Lords in *McFarlane*:

"The 1967 decision of the California Court of Appeals in *Custodio v Bauer* was the first to recognize that a physician could be held liable for the birth of an unplanned, healthy child. …

Custodio was the first case in which damages for wrongful pregnancy were awarded, and the court allowed full recovery of childrearing costs. …

Since the *Custodio* decision, courts have diverged in their award of childrearing damages. Most courts have awarded damages for losses incurred during and immediately after the pregnancy. They include the cost of the failed procedure; the medical expenses of pregnancy and delivery; the mother's lost income during and immediately after the pregnancy; and the husband's loss of consortium. A minority of states has allowed damages for the mother's pain and suffering during pregnancy

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428 (1996) 136 DLR (4th) 708 at 741.

429 LaCroix and Martin, "Damages in Wrongful Pregnancy Tort Actions", in Ireland and Ward, *Assessing Damages in Injuries and Deaths of Minor Children* (2002) 93 at 97-98.

> and delivery or for emotional distress after delivery. However, as in wrongful birth actions, state courts have split over the issue of damage recovery for childrearing costs. Only in Wisconsin and New Mexico have state courts allowed recovery for the full cost of raising a healthy child. Other state courts in Arizona, California, Connecticut, Massachusetts, Maryland, and Minnesota have allowed recovery for childrearing costs offset by the value of the child's aid, comfort, society and assistance, ie, the child's benefits to the parents. The application of the partial recovery rules is intended 'to prevent a windfall to the parents and an undue financial burden to the physicians'. The majority of state courts (Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming) ruling on the issue denies any recovery of childrearing costs. Only one state, Massachusetts, allows recovery for pain and suffering associated with the burdens of raising another child. At present there does not appear to be any trend bringing the divergent approaches to damages in wrongful pregnancy suits closer together."

288 In South Africa in *Mukheiber v Raath*[430] damages for the costs of rearing the child were allowed. Similarly, under the Civil Law damages have been awarded by German courts for the full maintenance costs of bringing up a child[431]. In New Zealand the position is affected by the expressions used in the relevant national compensation statute but the language of one Justice at least resonates with that of judges in other jurisdictions. In *XY v Accident Compensation Corporation*[432] Jeffries J said this[433]:

> "This Court thinks the answer lies in an analysis of ordinary meaning of the words applying the accepted, even conventional views of

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430 1999 (3) SA 1065.

431 Markesinis and Unberath, *The German Law of Torts*, 4th ed (2002) at 179:

> "The position in private law thus seems to have settled in the following way. (i) Both parents have a contractual claim for wrongful birth and pregnancy cases; (ii) this entitles them to full maintenance costs (whether the child is healthy or not; if it is not the measure of damages may be greater to cover the extraordinary medical expenses); (iii) the mother may additionally claim pain and suffering in cases of wrongful birth that result from a complicated birth."

432 (1984) 2 NZFLR 376.

433 (1984) 2 NZFLR 376 at 380.

> human affairs. It has been decided, and it is not challenged in any way, that conception by a woman of a child in the circumstances was a medical misadventure and an injury. That itself could be described as a highly artificial result but it is the base from which we must proceed. It is also accepted that pregnancy and birth are still part of the injury. To name regeneration of the species, perhaps its most fundamental urge, an injury, in whatever circumstances, is to introduce novel and very fundamental changes to accepted human thinking. In the light of the foregoing for a Court to hold that once the birth had taken place there was no longer an injury and therefore by definition no loss could result from it seems an almost welcome return to normalcy. This Court does not find that our supreme legislative body intended to stigmatise possibly the highest expression of love between human beings, that of a mother for her child, as a continuing injury to her by making compensation payable during dependency. To put it simply after the birth of a normal healthy child the injury is entirely healed. The theory of this solution is that the artificiality which calls conception, pregnancy and the event of birth an injury ends with the event and normalcy reimposes itself. The Court takes care not to go further, as some decisions in other countries have done, by proclaiming the birth as a positive benefit. It is not necessary to this reasoning. The foregoing might be called the epitome of the answer but it can be expounded by looking at the words of the section."

289 Before this case the only relevant decision of an appellate court in Australia was *CES v Superclinics (Australia) Pty Ltd*[434]. There Kirby ACJ concluded that it was a matter for the trial judge on all of the facts to decide whether a set-off (for the joys and satisfaction of parenthood) should occur, and if it should, against what component of damages it should be, making the point, however, that it should not be assumed that the birth of a child was in all circumstances a blessing. Nonetheless, for the sake of achieving a majority judgment, his Honour concurred with the orders proposed by Priestley JA who took the view that damages for the period beyond the time at which the mother could have given up her child for adoption, did not flow from the negligence of the defendant, but were a consequence of her own personal choice[435].

290 Meagher JA (in dissent) expressed an entirely different opinion. He was very much influenced by his earlier conclusion that an abortion in the circumstances would have been illegal. He also expressed his abhorrence of any

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434 (1995) 38 NSWLR 47.

435 (1995) 38 NSWLR 47 at 78-79.

assertion that the birth of a healthy child could provide the basis for an award of damages[436].

The arguments against damages

291 I cannot help observing that the repeated disavowal in the cases of recourse to public policy is not always convincing. Davies JA in the Court of Appeal in this case was, with respect, right to imply that it would be more helpful for the resolution of the controversy if judges frankly acknowledged their debt to their own social values, and the way in which these have in fact moulded or influenced their judgments rather than the application of strict legal principle.

292 In substance, almost all of the arguments that can be made against the awarding of damages for the costs of rearing a child consequent upon what Lax J would categorise as a wrongful pregnancy, do involve emotional and moral values and perceptions of what public policy is, or should be. Some of the arguments against an award overlap. The conventional expression, "natural love and affection", used by lawyers in the past as the moral consideration for the making of a gift, sums up the nature of the overwhelming benefit suggested in the cases as fully offsetting any financial burden attached to the raising of a child. It is repugnant to our society, perhaps even universally so, one argument goes, to treat the birth of a child as an occasion for an award of damages. The illegality (in some circumstances in some jurisdictions) of abortion argues against an award of damages. The next matter relied upon, and one which cannot sit happily with the first that I have mentioned, is the mother's freedom to give the child up for adoption or, in some jurisdictions in some circumstances (legally) to abort the child. That the tortfeasor (a surgeon) made an error in relation to a few millimetres only of tissue is, I think, perhaps the least persuasive of all. It is not possible to imply (as would be necessary to ground the claim) another argument goes, an undertaking by the defendant to provide restitution equivalent to the costs of rearing a child. An award of damages for the cost of rearing a child gives rise to a disproportionality between what a doctor undertakes to do and the damages which the patient seeks to recover. Common or overwhelming public opinion is against the recognition of the relevant claim. That opinion is readily identifiable by, and apparent to, all judges. Alternatively it should at least be regarded as a question of fact in every case whether, or the extent to which, the joys of parenthood offset the monetary costs. A rule against recovery is desirable in order to discourage medical practitioners from performing abortions of healthy foetuses. The damages are a windfall to the parents. It is impossible, if damages are awarded, to shield a child from the unwelcome and unhappy knowledge that he or she was an unwanted and unplanned child. It is simply impossible to assess in monetary terms the advantages and disadvantages of parenthood: no damages

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436 (1995) 38 NSWLR 47 at 85-87.

at all should therefore be awarded for the costs of rearing the child. To give damages as sought is to give long-term damages and therefore necessarily excessive damages. Logically, a notional age of 18 represents an arbitrary cut off point: the loss may in fact be indeterminate, and the law leans strongly against indeterminacy of loss. To award damages of the kind sought is not to do what is fair, just and reasonable or, to use the words of Thomas JA in the Court of Appeal in this case, it would not be "fair or desirable that someone else be required to maintain the child in addition to compensating [the first respondent] for the injury that has been done to her and compensating [the second respondent] for the injury done to his rights."[437]

293 Further arguments against a relevant award were noted and accepted by Thomas JA[438]:

> "It is accepted in our society that natural parents are liable to contribute to the succour and maintenance of their children. Under the *Family Law Act* parents have a duty to maintain their children even when the child is in the care of others, and children have the right to be cared for by both their parents regardless of whether their parents are married, separated or have never lived together[439]. The criminal law also imposes a legal duty upon persons having the care of a child under 16 to provide the 'necessaries of life'[440]."

294 All but one of these arguments were either explicitly or implicitly called in aid by the appellants in this appeal. It was not argued that a decision not to offer the child for adoption, or not to abort the foetus was more or less morally, or otherwise praiseworthy, or repugnant, than to undergo sterilization. It may be that because of the possibility of changed views in society about reproductivity, the Court may be forced to confront an argument that a decision not to abort, or not to offer for adoption, should be regarded as a failure on the part of the parents to act reasonably (as apparently Priestley JA did as to the latter in *CES*) but it is unnecessary for the Court to decide here whether that is so.

295 One strong contrary argument against the appellants which I accept, is that a holding for them here would be tantamount to the conferral of a new form of immunity upon doctors and hospital authorities. Hitherto, the classes of defendants enjoying immunities have done so essentially for public purposes, and

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437 [2001] QCA 246 at [196].

438 [2001] QCA 246 at [199].

439 *Family Law Act* 1975 (Cth), Pt VII, ss 60B, 66C.

440 *Criminal Code* (Q), ss 286, 324.

in at least a well-understood, if not always unquestioned public interest. For example, the immunity of advocates, of judges[441], of parliamentarians[442] for various purposes, of the instrumentalities entitled to the shield of the Crown[443] and, until very recently, of highway authorities, fall into this category. The loss of the last, consequent upon the decision of this Court in *Brodie v Singleton Shire Council*[444] is indicative perhaps of an increasing judicial aversion to the enjoyment of special privilege or advantage in litigation unless strong reason for its creation or retention can be demonstrated[445].

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441 See *Rajski v Powell* (1987) 11 NSWLR 522; *Mann v O'Neill* (1997) 191 CLR 204; *Re East; Ex parte Nguyen* (1998) 196 CLR 354.

442 See for example the *Defamation Act* 1889 (Q), s 10(1) which provides that: "A member of the Legislative Assembly does not incur any liability as for defamation by the publication of any defamatory matter in the course of a speech made by the member in Parliament."

443 See Seddon, *Government Contracts: Federal, State and Local*, 2nd ed (1999) at 111-125. Seddon notes at 112 that:

> "Broadly, a body set up for 'governmental' purposes will be treated as a manifestation of the Crown and thus able to claim relevant privileges or immunities."

However, see also *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 288-289 where Gibbs CJ said:

> "[M]any functions formerly regarded as matters of private concern are now carried out by instrumentalities of government and the question whether the functions in question are traditionally or peculiarly governmental is likely to be increasingly unhelpful in deciding whether the body formed to carry out those functions enjoys the privileges and immunities of the Crown …
>
> The answer to the question must in the end depend upon the intention to be derived from the statute under which the body in question is constituted."

444 (2001) 206 CLR 512.

445 See in relation to the immunity of advocates, *Giannarelli v Wraith* (1988) 165 CLR 543. In *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 281 [362]-[363]; 167 ALR 575 at 670 I pointed out that *Giannarelli* is a recent decision of this Court based on sound policy and legal grounds and adopted Mason CJ's comments (at 557) in *Giannarelli* that "the exception which the law creates is not to benefit counsel but to protect the administration of justice."

296 It may well be seen by some to be distasteful for others to claim, and indeed for judges to assess, damages in a situation of this kind. The fact that I might as a judge find it personally distasteful to be required to assess damages of the kind claimed, can however provide no reason to refuse to award them if the application of legal principle requires me to do so[446].

297 That so many judges in superior courts in different jurisdictions on various occasions have been essentially of the same mind in rejecting the relevant claim, albeit that they have not always expressed themselves in precisely the same way in doing so, is a matter not lightly to be disregarded. But in the event I find myself obliged to confirm the assessment. There is nothing novel in the contention that courts may be called upon to assess what is in reality unassessable with precision, or has no true monetary equivalent. Here, in truth the damages can be assessed with a reasonably high degree of precision unlike damages for pain and suffering or damages for defamation which this Court has held should be assessed with an eye to the damages conventionally awarded in cases of personal injuries[447]. Nor is it novel for a court to look solely to, and give compensation for financial consequences, and to ignore emotional ones. Lord Campbell's Act enacted in various but generally consistent forms in the States requires no less of judges than this. No one would seriously suggest that an offset (assuming it were legally permissible) should be made against the value of the support lost by a surviving spouse on the death of a good provider who was also incidentally a tyrannical, unpleasant and generally disagreeable companion whose company the survivor would thereafter be spared.

298 The respondents are entitled to be compensated for the costs they are likely to incur in rearing the child until he is 18 years old which is all that they claim. In this case, the claim as formulated was a reasonably simple one. Whether social security or other state benefits may or should be taken into account was not in issue. The reciprocal joy and affection of parenthood can have no financial equivalence to the costs of rearing him. One is no substitute for the other. There is no reason to suppose in any event that the reciprocal bonds of obligation and affection will be any the less if the parents are compensated for the cost of bringing up the child.

299 The appellants were negligent. The respondents as a result have incurred and will continue to incur significant expense. That expense would not have been incurred had the first appellant not given negligent professional advice. All of the various touchstones for, and none of the relevant disqualifying conditions

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446 See *De Sales v Ingrilli* (2002) 77 ALJR 99 at 136 [189]; 193 ALR 130 at 180: "That a judge might find a task distasteful is not a reason for the judge not to do it."

447 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44.

against, an award of damages for economic loss are present here. Holmes J at first instance, as with McMurdo P and Davies JA on appeal, were right to identify those touchstones and apply *Perre* to the case as they did. No identifiable, universal principle of public policy dictates any different result. The damages are not indeterminate. That they should be awarded is also consistent with the underlying notion that their availability in tort serves as a measure of deterrence of tortious conduct.

300 It is important to revert to the precise question to be answered in this case. It is whether damages for professional advice negligently given, or negligently omitted to be given, can be awarded to cover the cost of the healthy product of an unwanted pregnancy. It also is equally important to note some questions which do not fall to be answered in this case. There is no relevant ground of appeal raising any questions as to any of the other heads of damages awarded by the trial judge. It is not a case in contract. There is no issue of contributory negligence. It is not a case of negligent misstatement. It is not a case in which any party has sought to distinguish between the respective entitlements of the parents even though the father here was apparently not the recipient of the negligent advice, and was, at one point at least, procrastinating and ambivalent about whether his wife should undergo sterilization. It is not a case in which any entitlement to damages for loss of consortium or the costs associated with an evaluation of the pain and suffering of the confinement is contested. Nor was any challenge made to the damages awarded to the mother for her economic loss. Accordingly, incongruities, if any, between what might have been claimed, awarded, or offset in fact, do not need to be considered.

301 Despite the large measure of agreement by those judges whose conclusions the appellants would invoke, the matters relied on by them do not, with respect, commend themselves in law to me. The "windfall" argument is one of these. The denial of damages to the parents could equally be described as a windfall to the tortfeasor. To many, the abortion of a child or the offering of him for adoption, particularly within wedlock, would be more morally repugnant than the claiming of damages in respect of the rearing of the child. And there are many harsher truths which children have to confront in growing up than the knowledge that they were not, at the moment of their conception, wanted. This Court has rejected[448] the approach of the House of Lords in *Caparo Industries Plc v Dickman*[449], one essential element of which is a test of fairness, justice and reasonableness. One of its difficulties lies in the inevitable differences in points

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448 See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 193-194 [9]-[12] per Gleeson CJ, 210-212 [77]-[82] per McHugh J, 302-303 [332]-[335] per Hayne J, 325 [403] per Callinan J.

449 [1990] 2 AC 605.

of view as to what is fair, just and reasonable. Some would, in any event, readily hold that a tort having been committed, a victim having suffered quantifiable monetary loss, the victim should in fairness, justice and reasonableness be compensated: that the tortfeasor should pay. Arguments of distributive justice are in my opinion unimpressive. Judges are obliged both in principle and in terms of their judicial oath[450] to do equal justice between rich and poor. On one application of such a principle (of distributive justice), the doctor, or the public health authority (or perhaps their insurer) on the basis of having the longer pocket, should pay. I would certainly not decide the case on such a basis. That a negligent person should pay furthers the ends of corrective justice. It is easy to think of much more difficult cases of the assessment of damages, for example, damages for loss of opportunity, or for pain and suffering. I accept the relevance in the debate of the existence of obligations imposed by the law relating to families, paternity and maternity, and like enactments, as well as the sanctions of the criminal law, for a failure to maintain and support children[451]. But the imposition of these legal obligations can no more absolve the negligent professional from his liability for damages than it can the negligent motorist from his obligation in tort to pay the increased cost of the care of a child he has negligently run over even though the parents may remain obliged to support the child by providing that care.

302 The only matter in this appeal that was in issue was what both parties characterized as an entitlement or otherwise to damages for economic loss. I think that characterization, although necessarily general and therefore imprecise, is reasonable in the circumstances, the parties having put aside, for the purposes of this appeal, any controversy with respect to damages for any physical assault, operation, intrusion or physical contact, of any kind. That being so, the case necessarily becomes, as McHugh J suggested early in the argument, a relatively simple one[452]. The arguments of the appellants should be rejected.

303 I would dismiss the appeal with costs.

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450 eg *Oaths Act* 1867 (Q), s 3:

> "I AB do sincerely promise and swear that as a judge of the Supreme Court of Queensland *I will at all times and in all things do equal justice to the poor and rich* and discharge the duties of my office according to the laws and statutes of the realm and of this State to the best of my knowledge and ability without fear favour or affection." (emphasis added)

451 [2001] QCA 246 at [199] per Thomas JA.

452 Transcript of proceedings, 11 February 2003 at 13-14.

HEYDON J.

Background issues

304 The circumstances of the appeal are fully set out in the reasons for judgment of Hayne J.

305 The procedural structure of this litigation has meant that many issues which might have arisen did not arise. Some of those issues, however, trigger reflection on the nature of future litigation if the law permits recovery of the costs of raising a healthy but unplanned child from a negligent medical practitioner.

306 *Expensive upbringing.* The claim which succeeded in this case was not greedy. It was entirely moderate. It does, however, suggest disquieting possibilities in relation to other much more ambitious claims. The plaintiffs appear to have had only a modest combined income before the birth of their son, Jordan. The second plaintiff at the time of the trial was grossing $55,000-60,000 per annum (with a large overtime component in those figures). Even before the birth the first plaintiff's earnings were no more than a few thousand dollars per year. The plaintiffs' claim for the costs of Jordan's upkeep corresponded with that which persons on modest incomes of the type they received could provide. One element that perhaps went a little beyond that was an item for the cost of a "moderately priced private school" at $800 per semester or term. Fees of that order are not only "moderate" but relatively very low. Private secondary education had been contemplated for Jordan's two older sisters, but those plans had to be abandoned because of the expense. The defendants make no complaint of the trial judge's inclusion of that particular item, but it poses the question: what can parents recover in relation to a child who is unplanned and enters a family accustomed to the most expensive primary, secondary and indeed tertiary education? If a Princeton education was contemplated and was feasible for the planned children, can its cost be denied in relation to the unplanned child? And if the parents and the planned children took expensive overseas holidays, can their cost be denied in relation to the unplanned child? If it had been the practice of the family for expensive presents to be given to the planned children, why cannot the cost of expensive presents to the unplanned child be recovered from the defendant? Jordan's parents recovered a sum referable to numerous items which in scope, quantity and cost were very modest – inexpensively priced clothes and toys and pastimes and presents and parties. But even they claimed $200 as the cost of Jordan's share of a holiday in the United States when he was in his first year, and it was allowed by the trial judge. Rich parents might legitimately seek to contend that they should recover from a negligent defendant the cost of expensive clothes, toys, pastimes, presents and parties of the type which the planned siblings of the unplanned child had enjoyed or were going to

enjoy. In *Allen v Bloomsbury Health Authority*[453] Brooke J held that the defendants were liable to pay for all such expenses as might reasonably be incurred for the education and upkeep of the unplanned child, having regard to the condition in life of the child and the reasonable requirements of the child. That would include expensive schools if that was how the child's siblings had been educated, even though this might result in "a very substantial claim"[454]. In *Benarr v Kettering Health Authority*[455], the costs of private education were held recoverable because the parents were "upper middle-class", were "deeply interested in obtaining the best possible education that they can for their children" and "had decided that their children would be privately educated". And in *McFarlane v Tayside Health Board*[456] Lord Hope of Craighead said that "a very substantial award of damages might have to be made for the" upbringing of the child of "the expatriate banker or businessman whose work required him to reside with his wife in countries where suitable facilities for education were not available or to adopt an itinerant lifestyle."

307 Potential problems in relation to house extensions and larger family cars have also been identified[457].

308 On the other hand, it has been said that the amounts recoverable should be set "at a reasonable and not an extravagant level, albeit that the well to do may well have exceeded that level because they have the means to enable them to express their love and care for the child in a more expensive fashion"[458].

309 *Duration of upbringing.* An overlapping issue also arises. If parents are entitled to recover for the costs of rearing an unplanned child until the age of 18 on the ground that they are legally obliged to maintain the child until that age, why are they not entitled to recover for the costs of maintaining the child after that age if it was the practice of that family to do so? Does the ambit of the damages extend to cover "everything that can reasonably be described as

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453 [1993] 1 All ER 651 at 662.

454 [1993] 1 All ER 651 at 662.

455 (1988) 138 New LJ 179.

456 [2000] 2 AC 59 at 91; see also Lord Clyde at 106.

457 eg *McFarlane v Tayside Health Board* 1997 SLT 211 at 217 per Lord Gill. See also *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098 at 1109-1110; [1983] 2 All ER 522 at 531-532, where the problem was solved illogically.

458 *Allan v Greater Glasgow Health Board* 1998 SLT 580 at 585 per Lord Cameron of Lochbroom.

necessary for the upbringing of the child until the end of school, university, independence, maturity?"[459] Parents often do maintain their children well after the age of 18 − occasionally until death. In South Africa "liability ... lapses when the child is reasonably able to support itself"[460]. That test leaves open room for considerable differences of opinion.

310 *Diminished enjoyment of life.* Further, if parents are entitled to recover for the costs of rearing a child, why are they not entitled to recover for the costs of diminished enjoyment of life, since the greater the number of children and the wider their age range, the more domestic work the parents must do and the less leisure time the parents have? Particular (h) of damage in this case was: "The first and second plaintiffs have both sustained the loss of enjoyment and amenity of their married life by reason of the added responsibility and burden of raising Jordan." The trial judge did not award damages of this kind, and did not deal with this part of the claim; perhaps it was not pressed. But this particular claim is not surprising. Among the respects in which the capacity of parents of a given number of children to enjoy life can be diminished by the birth of further children is the reduced enjoyment to be derived by the parents from those whose births were intended. While celibacy may have no pleasures and marriage may have many pains, one of the pleasures which can be derived from marriage is the company of children: that pleasure may be reduced, nullified or more than nullified by the arrival of additional children. Claims in respect of the "services of parents" and "emotional burdens" have been made in America[461]. If parents can recover for diminished leisure or diminished enjoyment of parent-child relationships, can siblings recover in respect of diminished opportunities to spend time with their parents and diminished opportunities to enjoy the benefits which they might have enjoyed had their parents' financial reserves not been used on the unplanned child[462]?

311 *Moderating the damages.* McMurdo P understandably showed unease about some of these problems in noting that the costs claimed in this case were "moderate reasonable costs"[463] while in general favouring a "modest" approach

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459 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 74 per Lord Slynn of Hadley.

460 *Mukheiber v Raath* 1999 (3) SA 1065 at 1081 [51] (Supreme Court of Appeal).

461 *McKernan v Aasheim* 687 P 2d 850 at 851 (Wash, 1984).

462 See *Custodio v Bauer* 59 Cal Rptr 463 at 476-477 (1967); *Cox v Stretton* 352 NYS 2d 834 at 839-840 (1974); *White v United States* 510 F Supp 146 (1981).

463 [2001] QCA 246 at [58].

leading to "moderation of damages"[464]. The trouble is that the common law of tort compensates for loss. Loss remains loss even if it is suffered by a rich family, and even if a rich family loses more than a poor one. The common law does not permit capping. Dismissal of the appeal carries the certain consequence, for better or for worse, that the skills and ingenuity of the lawyers who advise plaintiffs as a class, whether rich or poor, will be devoted at once to extending recovery far beyond the limited level which the present plaintiffs sought. That is not in itself necessarily an argument against recovery. But it does indicate the nature of the litigation which will ensue if recovery is permitted.

312 *Child's non-entitlement.* Where, as here, damages are awarded in a lump sum in part to cover expenditures which are to take place in the future, the award carries no guarantee that they will actually be so spent in the future. The recipients are at liberty to spend the damages on themselves or on any other purpose whatsoever. Neither side suggested, and no Anglo-Australian or American case drawn to the Court's attention suggests, that there is any applicable exception to the general rule that the damages recovered may be spent as the plaintiff wishes[465]. However, in Canada a trust has been imposed in favour of the child[466].

The authorities in outline

313 While there is authority at intermediate appellate level in this country favouring the proposition that the first defendant owed the plaintiffs a duty of care[467], there was no superior court authority before this case favouring the recovery of the head of damages in controversy in this appeal. There was no authority of the Supreme Court of Queensland favouring recovery of that head of

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464 [2001] QCA 246 at [64].

465 *Todorovic v Waller* (1981) 150 CLR 402 at 412. Similarly, where damages are recovered by a plaintiff for services rendered by third parties, there is no obligation to pay the damages to the third parties: *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 177, 193-194; *Kars v Kars* (1996) 187 CLR 354 at 372.

466 *Krangle (Guardian ad litem of) v Brisco* (2000) 184 DLR (4th) 251 (BCCA). A similar development has occurred in England in relation to services rendered by third parties: *Hunt v Severs* [1994] 2 AC 350.

467 Kirby ACJ and Priestley JA agreed on this point, though Meagher JA dissented, in *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.

damage[468]. The only decision of an appellate court in this country opposed it[469]. The House of Lords held, after close consideration, that the relief sought is not available in English or Scots law[470]. That approach has been followed in Canada[471]. In New Zealand, where the common law of negligence in relation to personal injuries is severely confined by statute, the position is not clear[472]. The relief sought is denied in the majority of United States jurisdictions (though in most instances there are dissenting opinions). It seems that full recovery is permitted only in Wisconsin[473] and New Mexico[474]. In a minority of jurisdictions

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468 *Dahl v Purnell* (1992) 15 QLR 33 was a decision of the District Court. *Veivers v Connolly* [1995] 2 Qd R 326 did not concern a healthy child, and no argument of the kinds debated in this appeal that rearing costs should not be recovered was presented.

469 *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47: the opinion of Priestley JA was adverse to the recovery of child-rearing costs and Meagher JA agreed on this point, though going further in opposing all recovery. There is no contrary Australian authority, since in *F v R* (1982) 29 SASR 437 nothing was awarded in relation to the head of damages in controversy in this appeal.

470 *McFarlane v Tayside Health Board* [2000] 2 AC 59. While that case has been criticised, the prior "authorities" to the contrary are far from satisfactory. They were two Court of Appeal decisions. *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012 concerned a child with congenital abnormalities, but recovery evidently included, in addition to the costs referable to abnormality, the costs which would have been incurred had the child been normal. Judgment was not reserved; the Court did not discuss the arguments debated in American or earlier English authority in detail; and what the Court said about healthy children was obiter. *Thake v Maurice* [1986] QB 644, which concerned a healthy child, followed what was said in *Emeh's* case, but the contrary view was not argued in view of *Emeh's* case. There was a line of single judge authority and opinion disagreeing with the Court of Appeal both before (*Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098; [1983] 2 All ER 522) and after (*Gold v Haringey Health Authority* [1988] QB 481 at 484 per Lloyd LJ, agreeing with an unreported opinion of Ognall J: *Jones v Berkshire Area Health Authority* (2 July 1986)).

471 eg *MY v Boutros* [2002] 6 WWR 463 (Alberta QB); cf *Kealey v Berezowski* (1996) 136 DLR (4th) 708 (Ont Ct (General Division)).

472 *SGB v WDHB* [2002] NZAR 413.

473 *Marciniak v Lundborg* 450 NW 2d 243 (Wis, 1990).

474 *Lovelace Medical Center v Mendez* 805 P 2d 603 (NM, 1991).

recovery is permitted subject to an offset for the benefits gained by the parents (subject again to dissenting opinions)[475]. South Africa permits recovery[476].

The position of the defendants

314 The defendants accepted that since a duty of care, a breach of duty, causation in fact and damage of various kinds had been found against them; since special leave had been granted only in relation to the third head of damages; and since all the calculations needed to produce the third head of damages were feasible and had been done, the question was whether the duty of care extended to that third head of damages and if it did, why it did. They submitted that it did not follow from their concessions about duty, breach, causation and damage that the plaintiffs could recover the damages in controversy. The plaintiffs said that those concessions meant that as a matter of general principle child-rearing costs were recoverable, but contended that the issue was whether some special exception existed to prevent recovery.

315 A trial or intermediate appellate court which was faced with authorities in the condition described above would normally be regarded as taking a new step in the law − as extending the common law − if it allowed the head of recovery under consideration. That is how Thomas JA, at least, viewed the matter in the Court of Appeal[477]. The defendants accordingly submitted that this Court was being asked to take a new step, or to confirm that the Supreme Court of Queensland was correct in taking a new step. The defendants in effect submitted that the plaintiffs bore a burden of persuasion as to why that step should be or should have been taken.

316 Counsel for the defendants rightly described the leading South African case[478] as "declamatory". The same expression can be applied to many of the other authorities, both those favouring recovery and those opposing it. The difficulty of the subject has led more to the emphatic statement of conclusions than to the detailed exposition of the reasoning underlying them.

317 The sum awarded for child-rearing expenses which is in controversy in this appeal is approximately equivalent to that which might be recovered for a moderately severe personal injury having long term detriments, like a badly

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475 The position as at 1997 is summarised in *Emerson v Magendantz* 689 A 2d 409 (RI, 1997).

476 *Mukheiber v Raath* 1999 (3) SA 1065 (Supreme Court of Appeal).

477 [2001] QCA 246 at [195].

478 *Mukheiber v Raath* 1999 (3) SA 1065 (Supreme Court of Appeal).

broken leg, or for the destruction of a very expensive uninsured car in a motor accident, or for serious damage to a dwelling caused by a negligently driven runaway truck, or for some substantial interruption to the profitability of a business. Each of these events is in some way, if not a catastrophe, at least a calamity for the victim. Many judges and other lawyers across the common law world have opposed recovery of a sum for child-rearing expenses because they have an instinctive revulsion against seeing the birth of a healthy child as comparable in any way with a badly broken leg, the destruction of a very expensive car, serious damage to a building, or some substantial injury to a business[479]. Others, like Ognall J, point out that "those who are afflicted with a handicapped child or who long desperately to have a child at all and are denied that good fortune would regard an award for this sort of contingency with a measure of astonishment"[480]. Yet others, like Weir, see it as "a grotesque waste of public funds" that "hospitals, strapped for funds for curing the sick", should be "paying out loads of money in respect of perfectly healthy children and adolescents … to parents who were in no way obliged to spend it on them"[481]. But it has been one thing to reach a conclusion after experiencing revulsion or feeling astonishment or observing a grotesque result. It has been another thing to formulate legal reasoning to support the conclusion reached. Despite the difficulties in identifying decisive legal reasoning in the authorities, counsel for the defendants relied on the main arguments, such as they are, advanced in those decisions in other jurisdictions which have denied recovery for child-raising costs. The defendants relied on the fact that though there was not universal agreement in the common law world that there should be no recovery for child-rearing costs, there was widespread opposition to recovery. Not all opponents relied on the same reasons, but the condition of the authorities suggested that the result arrived at was just.

318 While the defendants conceded a duty of care, they said that the law limited "the type of injury to which it extends" by what Deane J in *Jaensch v Coffey* called "overriding requirements or limitations"[482]:

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479 "To name regeneration of the species, perhaps its most fundamental urge, an injury, in whatever circumstances, is to introduce novel and very fundamental changes to accepted human thinking": *XY v Accident Compensation Corporation* (1984) 2 NZFLR 376 at 380 per Jeffries J.

480 *Jones v Berkshire Area Health Authority* (unreported, 2 July 1986), quoted by Lloyd LJ, who said many would no doubt agree, in *Gold v Haringey Health Authority* [1988] QB 481 at 484.

481 Weir, "The Unwanted Child", (2002) 6 *Edinburgh Law Review* 244 at 247.

482 (1984) 155 CLR 549 at 583, applied by Callinan J in *Tame v New South Wales* (2002) 76 ALJR 1348 at 1408-1409 [330]; 191 ALR 449 at 533.

> "It is not and never has been the common law that the reasonable foreseeability of risk of injury to another automatically means that there is a duty to take reasonable care with regard to that risk of injury ... Reasonable foreseeability on its own indicates no more than that such a duty of care will exist if, and to the extent that, it is not precluded or modified by some applicable overriding requirement or limitation. It is to do little more than to state a truism to say that the essential function of such requirements or limitations is to confine the existence of a duty to take reasonable care to avoid reasonably foreseeable injury to the circumstances or classes of case in which it is the policy of the law to admit it. Such overriding requirements or limitations shape the frontiers of the common law of negligence. They may apply to preclude altogether the existence of a duty of care in particular circumstances ... or to limit the content of any duty of care or the class of persons to whom it is owed ... or the type of injury to which it extends ...".

Deane J supported the proposition enunciated in the last nine words by a reference to *Best v Samuel Fox & Co Ltd*[483]. There the House of Lords held that a wife had no claim for loss of consortium against a tortfeasor who had injured her husband. Lord Goddard pointed out that an employee whose employer was negligently killed or permanently injured by a tortfeasor and who therefore lost the employment had no claim against the tortfeasor. Nor, statute apart, did the employer's wife or children, even though their standard of living had in consequence fallen[484]. Deane J's point was that even if a tortfeasor physically injured both husband and wife, so that she could claim in respect of her physical injuries, she could not claim for that kind of injury described as "loss of consortium".

319 The defendants also relied on *Sutherland Shire Council v Heyman*[485], where Brennan J said:

> "[A] postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered and in reference to the plaintiff or a class of which the plaintiff is a member."

That sentence was applied by Hayne J in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*[486]. Brennan J continued:

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483 [1952] AC 716.

484 [1952] AC 716 at 731.

485 (1985) 157 CLR 424 at 487.

486 (2000) 205 CLR 254 at 290 [104].

> "It is impermissible to postulate a duty of care to avoid one kind of damage – say, personal injury – and, finding the defendant guilty of failing to discharge that duty, to hold him liable for the damage actually suffered that is of another and independent kind – say, economic loss. Not only may the respective duties differ in what is required to discharge them; the duties may be owed to different persons or classes of persons. That is not to say that a plaintiff who suffers damage of some kind will succeed or fail in an action to recover damages according to his classification of the damage he suffered. The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it."

320 The defendants said there was nothing novel in seeing instances where, though a duty of care existed, breach of it permitted recovery only in relation to some forms of loss but not others. The instances given were nervous shock as it was understood before recent clarification[487]; actions in defamation by a plaintiff who had to rely on illegality or any reputation arising out of illegality[488]; other actions, including personal injury actions, resting on the conduct of illegal enterprises[489]; damages for the costs of care before *Griffiths v Kerkemeyer*[490]; and actions to recover financial loss attributable to the plaintiffs' impecuniosity[491]. The defendants attributed the fact that if this case were to be numbered among these few instances it would be exceptional to the simple circumstance that the present case was unusual in nature, arising out of the birth of a human child.

321 The defendants' primary position was: "The birth of a normal, healthy child should not be regarded as a legal harm or wrong for which damages may be awarded."

322 It is convenient to go directly to the reasons why the arguments advanced by the majority of the Court of Appeal are unsound, rather than setting out in detail each of the defendants' contentions or going to every part of the four thoughtful but divergent judgments in the Supreme Court. Those arguments are

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487 *Tame v New South Wales* (2002) 76 ALJR 1348; 191 ALR 449.

488 *Wilkinson v Sporting Life Publications Ltd* (1933) 49 CLR 365.

489 *Meadows v Ferguson* [1961] VR 594.

490 (1977) 139 CLR 161 – a decision cut back by statute in some jurisdictions, and increasingly less esteemed in others.

491 *Owners of Dredger Liesbosch v Owners of Steamship Edison* [1933] AC 449.

unsound because they take insufficient account of the law's assumptions about some key values in family life as reflected in the unenacted and enacted law. They also take insufficient account of the type of litigation that is likely to take place if recovery of rearing costs is permitted. That in turn meant that they failed to deal with three objections to the outcome which the Court of Appeal majority approved.

Fundamental assumptions of the law relating to parents and children

323 It is a fundamental assumption underlying many rules of the common law and many statutory provisions that, in general, where the interests of children collide with other interests, the interests of the children prevail; that parents have duties of a high order to advance the interests of their children; that those interests are best advanced by nurture in stable marriages; and that one of the interests of children which the law recognises is the need to avoid the harm which may flow from publicity connected with litigation in which their interests are at stake.

324 The raising of children to a point at which they achieve sufficient maturity to render themselves capable of independent social existence is a lengthy process. It is a commonplace that children have a "special vulnerability"[492]. This special vulnerability is not only a vulnerability to hunger if they are not fed, to disease if they are not sheltered, and to physical harm if they are not cared for. It includes psychological vulnerability. Children can lack confidence. They can be fragile and sensitive. They depend on love, and on the perception that they are loved, in order to build up confidence and stability.

325 For centuries the courts have intervened in the relationship between parents or guardians and children in order to protect children who were abused or neglected or in peril either as to property or person. In *In re X (A Minor) (Wardship: Jurisdiction)*[493] Latey J said:

> "All subjects owe allegiance to the Crown. The Crown has a duty to protect its subjects. This is and always has been especially so towards minors … And it is so because children are especially vulnerable. They have not formed the defences inside themselves which older people have,

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492 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 304 per Gaudron J.

493 [1975] Fam 47 at 52, approved in *In re C (A Minor) (Wardship: Medical Treatment) (No 2)* [1990] Fam 39 at 46 per Lord Donaldson of Lymington MR. See also *In re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11 at 25.

> and, therefore, need especial protection. They are also a country's most valuable asset for the future."

It was part of the Crown's prerogative as pater patriae or parens patriae to exercise jurisdiction over charities, idiots, lunatics and children[494], "infants and lunatics … being unable to take care of themselves"[495]. The jurisdiction "rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as *parens patriae*, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects"[496]. This jurisdiction devolved upon the courts.

326 The importance of the jurisdiction and the rights enforced in it is revealed by the fact that it is not a jurisdiction to be taken away by statute except in the clearest language[497].

327 In wardship proceedings the applicant seeks to commit the child to the protection of the court and asks the court to make whatever order it thinks fit for the child's benefit[498]. Hence the jurisdiction must be exercised "for the best interests of the child"[499]. The "main consideration was the welfare of the

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494 *Falkland v Bertie* (1696) 2 Vern 333 at 342 [23 ER 814 at 818] per Lord Somers LC; *In re Spence* (1847) 2 Ph 247 at 252 [41 ER 937 at 938] per Lord Cottenham LC; *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 259 per Mason CJ, Dawson, Toohey and Gaudron JJ, 280 per Brennan J.

495 *Eyre v Shaftsbury (Countess of)* (1722) 2 P Wms 103 at 111 [24 ER 659 at 662] per Sir Joseph Jekyll MR, Gilbert B and Raymond J.

496 *Hope v Hope* (1854) 4 De G M & G 328 at 345 [43 ER 534 at 541] per Lord Cranworth LC.

497 *Johnson v Director-General of Social Welfare (Vict)* (1976) 135 CLR 92 at 97 per Barwick CJ, Stephen and Mason JJ concurring.

498 *In re B (J A) (An Infant)* [1965] Ch 1112 at 1117 per Cross J; *Fountain v Alexander* (1982) 150 CLR 615 at 635 per Mason J.

499 *R v Gyngall* [1893] 2 QB 232 at 252 per Kay LJ.

child"[500] – "welfare in its widest sense"[501]. That is the "dominant"[502] or "paramount"[503] or "primary"[504] or "first and paramount"[505], though not the "sole" consideration[506].

328 The welfare of children is seen as normally being advanced by permitting them to live with and to be under the guardianship of their parents. The law presumes it to be in the interests of children to be "under the nurture and care" of a parent − a "natural protector, both for maintenance and education"[507]. That perception rests on the natural love and mutual confidence between parent and child − the duty of parents to advance the welfare of the children, the urge parents normally have to do this, and the trust children have that their parents will do this. "The responsibilities and powers of parents extend to the physical, mental, moral, educational and general welfare of the child. They extend to every aspect of the child's life."[508] "The acknowledged rights of a father with respect to the custody and guardianship of his infant children are conferred by the law, it may be with a view to the performance by him of duties towards the

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500 *In re O'Hara* [1900] 2 IR 232 at 239 per FitzGibbon LJ.

501 *In re O'Hara* [1900] 2 IR 232 at 254 per Holmes LJ.

502 *Goldsmith v Sands* (1907) 4 CLR 1648 at 1653 per Griffith CJ; *Moule v Moule* (1911) 13 CLR 267 at 269 per Griffith CJ; *J v C* [1970] AC 668 at 697 per Lord Guest; *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 293 per Deane J.

503 *Ward v Laverty* [1925] AC 101 at 108 per Viscount Cave; *J v C* [1970] AC 668 at 697 per Lord Guest.

504 *Thomasset v Thomasset* [1894] P 295 at 300 per Lindley LJ.

505 *In re B (A Minor) (Wardship: Sterilisation)* [1988] AC 199 at 202 per Lord Hailsham of St Marylebone LC; *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 293 per Deane J.

506 *In re Thain* [1926] Ch 676 at 684 per Eve J.

507 *United States v Green* 26 Fed Cas 30 at 31 (1824) per Story J; *J v Lieschke* (1987) 162 CLR 447 at 463 per Deane J.

508 *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 278 per Brennan J.

children, and, in a sense, on condition of performing those duties"[509]. Parents have a "duty to nurture, control and protect" their children[510].

329 While the welfare of the child is the paramount consideration in resolving wardship and guardianship controversies, there are others. One is that the "child should have an opportunity of winning the affection of its parent, and be brought for that purpose into intimate relation with the parent"[511]. By the same token the parent should have an opportunity of winning the affection of the child. The value which the law places on this is evidenced by the continuation of access by a father to his child even though he has separated from the mother and that child. "Even when they live apart, we attach a great deal of importance to trying to preserve as good and as close a relationship as possible between the child and the parent with whom he is not living."[512]

330 "The law recognises … the natural duties of the father. Now the natural duties of a father are to treat his child with the utmost affection and with infinite tenderness, to forgive his child without stint and under all circumstances."[513] These duties are "sacred duties"[514]. These propositions were stated at a time when, and in a case in which, fathers were assumed to have greater rights than is now the case[515] but what they say about paternal duties remains correct, and must now also be true of maternal duties.

331 In this Court, emphasis has been laid on the fact that the duty to nurture children lies at the heart of marriage. In *Russell v Russell*[516] Jacobs J said:

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509 *In re Fynn* (1848) 2 De G & Sm 457 at 474 [64 ER 205 at 212] per Sir James Knight Bruce VC.

510 *J v Lieschke* (1987) 162 CLR 447 at 462 per Brennan J.

511 *In re Thain* [1926] Ch 676 at 690 per Warrington LJ.

512 *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 at 294 [93] per Hale LJ.

513 *In re Agar-Ellis* (1883) 24 Ch D 317 at 327 per Brett MR.

514 *In re Agar-Ellis* (1883) 24 Ch D 317 at 329 per Brett MR.

515 *J v C* [1970] AC 668 at 694 per Lord Guest, 721 per Lord Upjohn; *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 291, 293 per Deane J.

516 (1976) 134 CLR 495 at 548-550.

> "[M]arriage as a social institution which the law clothes with rights and duties attaching to the parties thereto is primarily an institution of the family. It is true that marriage can be regarded as a social relationship for the mutual society help and comfort of the spouses but it cannot be simply so regarded. The primary reason for its evolution as a social institution, at least in Western society, is in order that children begotten of the husband and born of the wife will be recognized by society as the family of that husband and wife …
>
> The nurture of children by, and in recognized and ordered relationship with, their parents is … integral to the concept of marriage as it has developed as an institution in our society ...
>
> [B]y marriage and the procreation of children in the marriage relationship each parent has social rights and duties of nurture in respect of those children which arise from and are part of the marriage relationship which exists or which previously existed."

Jacobs J was in dissent in the result in that case, but that does not affect the force of those observations. They are consistent with the proposition, accepted by Deane J, that the law presumes that it is in the interests of children to be under the nurture and care of their parents[517]. And they support the following view of Thomas JA, dissenting in the Court of Appeal[518]: "Families are important units in a community. It is in the interest of the community that parental responsibility, love and trust between parent and child and strong family units be maintained." The family "remains the central and cherished structure in our lives"[519]. It follows that "planting seeds of discontent and discord between spouses is contrary to the policy of the law … [S]tability of marriage is the general policy of the law. And that stability must depend upon marriages being in general supported by harmony and sustained by happiness … [T]he consortium of matrimony … should not be interfered with, hampered or embarrassed"[520].

332 The parens patriae jurisdiction has stimulated a long history of legislation intended to promote the welfare of children who are neglected or otherwise in

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517 *J v Lieschke* (1987) 162 CLR 447 at 463.

518 [2001] QCA 246 at [196].

519 *Kealey v Berezowski* (1996) 136 DLR (4th) 708 at 731-732 per Lax J.

520 *Church Property Trustees, Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394 at 415 per Windeyer J. See also Dixon CJ at 404.

peril[521]. It is common for this legislation to stipulate that in resolving controversies, whether they relate to the welfare of children, to guardianship, to custody, or to adoption, the welfare of the child is the first and paramount consideration[522].

333 There is also other modern legislation which seeks to promote the welfare of children. The *Family Law Act* 1975 (Cth), s 60B(1), provides that the object of Pt VII of the Act is "to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children." Section 66C(1), which is in similar terms to the *Child Support (Assessment) Act* 1989 (Cth), s 3(1), provides that the parents of a child have the primary duty to maintain the child. The specific duties of parents are enforced by maintenance orders under other provisions of the Act[523].

334 The *Criminal Code* (Q), s 286, provides:

> "(1) It is the duty of every person who has care of a child under 16 years to –
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> (a) provide the necessaries of life for the child; and
>
> (b) take the precautions that are reasonable in all the circumstances to avoid danger to the child's life, health or safety; and
>
> (c) take the action that is reasonable in all the circumstances to remove the child from any such danger;
>
> and he or she is held to have caused any consequences that result to the life and health of the child because of any omission to perform that duty, whether the child is helpless or not.
>
> (2) In this section –

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521 eg the New South Wales legislation analysed by Kirby P in *Shales v Lieschke* (1985) 3 NSWLR 65 at 72-80.

522 eg *Guardianship of Infants Act* 1925 (UK), s 1 (which Lord Upjohn said "enshrined the view of the Chancery Courts" in *J v C* [1970] AC 668 at 724).

523 *Luton v Lessels* (2002) 76 ALJR 635 at 646 [65] per Gaudron and Hayne JJ; 187 ALR 529 at 544.

'**person who has care of a child**' includes a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child."

And s 324 provides:

"Any person who, being charged with the duty of providing for another the necessaries of life, without lawful excuse fails to do so, whereby the life of that other person is or is likely to be endangered or the other person's health is or is likely to be permanently injured, is guilty of a misdemeanour, and is liable to imprisonment for 3 years."

335 There are similar but not identical provisions in jurisdictions other than Queensland[524].

336 In *In re C (A Minor) (Wardship: Medical Treatment) (No 2)* Lord Donaldson of Lymington MR said that in wardship proceedings courts could make[525]:

"orders forbidding the publication of information about the ward or the ward's family circumstances. Consistently with this, applications to the court in wardship proceedings are made within the privacy of the court sitting in chambers and the decision of the court and its reasons for that decision are not normally given in open court."

This is one of the few exceptions to the strict rule that justice is administered in open court. In *Scott v Scott*[526] Viscount Haldane LC said of wards of court:

"[T]he judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge."

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524 eg *Crimes Act* 1900 (NSW), ss 43 and 44; *Criminal Law Consolidation Act* 1935 (SA), s 30; *Criminal Code* (WA), ss 262, 263 and 344; *Crimes Act* 1900 (ACT), s 39; and *Criminal Code* (NT), ss 149, 183 and 184.

525 [1990] Fam 39 at 46.

526 [1913] AC 417 at 437.

This language is reminiscent of that of Cardozo J, giving the opinion of the New York Court of Appeals in *Finlay v Finlay*[527]:

> "The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as parens patriae to do what is best for the interest of the child … He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights 'as between a parent and a child', or as between one parent and another."

In *Scott v Scott* Lord Atkinson said[528] that in wardship cases the judges "act as the representatives of the Sovereign as parens patriae, and exercise on his behalf a paternal and quasi-domestic jurisdiction over the person and property of the wards for the benefit of the latter". In the same case Lord Shaw of Dunfermline said[529]:

> "The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs."

Underlying these explanations is a perception that the public disclosure of evidence and argument in wardship proceedings, whose primary purpose is the welfare of the ward, can be damaging to the welfare of the ward.

337 Similarly, there can be noted in legislative provisions governing adoption two clear themes. One is that the welfare and interests of the child are paramount. The other is that the fact of adoption is to be kept in very large measure confidential. Thus by the *Adoption of Children Act* 1964 (Q), s 10, "the welfare and interests of the child concerned shall be regarded as the paramount consideration". It is not necessary to obtain the consent of a child under the age of 12 to adoption: s 26(1). There is a prohibition on public statements that a parent or guardian of a child wishes to have it adopted, or that a person wishes to adopt a child, or that a person is willing to make arrangements with a view to the adoption of a child: s 44(1). There are restrictions on the publication of the names of applicants for adoption, the child being adopted, the father or mother or a guardian of the child, or the adopter of the child: s 45(1). Applications to

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527 148 NE 624 at 626 (NY, 1925).

528 [1913] AC 417 at 462.

529 *Scott v Scott* [1913] AC 417 at 483.

courts or tribunals are to be heard in camera in the absence of the public: s 58. There are strict duties of confidentiality on public officers in relation to information about adoptions: s 59. Sections 44, 45, 58 and 59 create criminal offences, punishable by a penalty or imprisonment for six months: s 53. Adopted persons are entitled to information about their birth parents, and their relatives and birth parents are entitled to certain other information, but only after the adopted person has attained the age of 18: see s 39B and the definition of "adopted person" in s 39A. It follows that persons under the age of 12 need not know that they have been or are to be adopted, and that no material is to be published which might enable anyone else to learn that persons of any age have been adopted. These provisions reflect a legislative assumption that it may be harmful for persons under the age of 12 to know that the people who bring them up are not their natural parents; and extreme measures are taken to prevent persons under the age of 12 from learning the truth[530].

The nature of litigation to recover rearing costs

338 Personal injury litigation at common law, like much other litigation, is not fought in an altruistic way. Plaintiffs injured by reason of a tort are, understandably enough, interested in stressing the resulting damage to various of their pre-injury capacities in order to achieve the maximum possible damages recovery. Further, since there can be no return to the court if the injuries turn out to be worse than they were apprehended to be, there is every reason to assemble evidence which points to the worst possible outcomes. Hence in ordinary personal injury litigation some plaintiffs will feel a strong temptation to exaggerate their symptoms, or at least depict them – to treating doctors, to other doctors, to their lawyers and to the court – in the most forceful way of which they are capable. There are restraints of conscience against this. And there are tactical restraints: excess is likely to breed a counter-reaction from the trier of fact. A further restraint comes from the objective assessments of medical science.

339 However, a new order of litigation would arise if the law permitted plaintiffs to sue in respect of the apprehended cost of future events relating to the ordinary needs and weaknesses of their children. The restraints on plaintiffs exaggerating the needs and weaknesses of their children are likely to be much more attenuated than the restraints against plaintiffs exaggerating their own needs and weaknesses.

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530 For similar legislation in other jurisdictions protecting confidentiality, see *Adoption Act* 2000 (NSW), ss 134-143 and 180; *Adoption Act* 1984 (Vic), ss 83, 88 and 121; *Adoption Act* 1988 (Tas), ss 71 and 109; *Adoption Act* 1988 (SA), ss 24, 31, 32 and 36; *Adoption Act* 1994 (WA), ss 124 and 127; *Adoption Act* 1993 (ACT), s 97; and *Adoption of Children Act* (NT), ss 60-61.

340 It is no answer to contend that the courts are well equipped to reject perjured claims and deflate exaggerated ones. Nor is it an answer to say that the fear of perjured evidence ought not to operate to prevent otherwise desirable developments in the law.

341 For one thing, the subject-matter of the testimony is peculiarly within the consciousness of the parents − family ambitions, family hopes, family habits, children's weaknesses. It is thus difficult to counter false testimony by objective evidence known to the defendant. While in conventional personal injury litigation there are intervening checks on exaggeration, because of the objective assessments of medical science, in personal injury litigation directed to recovering the costs of rearing normal children these checks would have only a limited role to play.

342 For another thing, the parents may well feel not only self-interest in recovering a lump sum in their own right, but may also feel a duty to increase the funds available for the support of their children. These are factors combining with unusual power to generate exaggerated claims.

343 To exaggerate one's own hopes, habits and weaknesses with a view to increasing an award of damages involves no breach of duty to any third party. But a conflict between parental duty and parental self-interest can be created when a parent exaggerates the hopes open to a child, the habits of the child's family, or the weakness of the child in order to generate higher damages to be paid to the parent, even if the motive for these exaggerations is a sincere desire to improve the financial basis of the child's future. The conflict can be created in at least three ways.

344 First, there are dangers in parents holding out unrealisable hopes for their children or in representing to others that they hold out these hopes. Some parents will not successfully resist the temptation to seek to recover greater damages calculated by reference to educational training for the unplanned child of the highest quality and price by suggesting that the family ambition was to ensure the best education for the planned children with a view to the highest professional and personal goals being attained − even if they are in truth quite unattainable for any of the children.

345 Secondly, if the permitted quantum of recovery rose to particular levels, it would be hard for parents to resist the temptation to give evidence of family habits and customs in relation to the planned children − and indeed of family "traditions" which were created after the arrival of the unplanned child − calculated to increase recovery against the defendants responsible for the unplanned birth. That evidence would speak of very lavish presents, very luxurious holidays, very expensive parties.

346 Thirdly, parents should maintain the self-esteem and self-confidence of children, and not emphasise the proneness to diseases and illnesses, the weaknesses, the incapacities, the disabilities, the mental slowness, the character difficulties or the misbehaviour of children. They should not denigrate the physical or mental or moral capacities of their children. This duty would be breached if parents were to stress or exaggerate characteristics which may call for medical or psychiatric or other professional attention in the years after the trial with a view to increasing damages recovery at the trial. Some argue strongly against maintaining any distinction between children who are "normal and healthy" and those who are not[531]. But once that distinction is abandoned, the temptation to expand the areas of claimed weakness is likely to increase. If there is no recovery of rearing costs for normal healthy children but there is for others, parents will have a strong incentive to identify and accentuate matters which might move a child into the category of being other than normal and healthy. But even if there is no distinction, so that rearing costs are recoverable however healthy or otherwise a child is, parents will have a strong incentive to accentuate matters which might arguably call for expenditures in future and which might increase the potential for higher damages recovery.

The weakness of the majority approach

347 Against that background, the reasoning of the majority of the Court of Appeal can be seen to be invalid for three reasons. First, it leads to the award of damages for a supposed loss in circumstances where what has happened is incapable of characterisation as a loss. That is because, since the law assumes that human life has unique value and brings into existence corresponding duties of a unique kind, the impact of a new life in a family is incapable of estimation in money terms. Secondly, the award of damages to which the majority reasoning leads would have the result, entirely alien to the assumptions and goals of the legal system, of encouraging parents to exaggerate the abilities of their children, the customs of their families or the troubles of their children. It would encourage parental misrepresentation of the parent-child relationship, and create an odious spectacle. Thirdly, the majority reasoning tends to generate litigation about children capable of causing the children distress and injury if they hear about it.

348 Before turning to these three reasons, it is desirable to deal with one criticism commonly employed against those who oppose recovery.

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531 eg McMurdo P: [2001] QCA 246 at [29], [50]. See also the trial judge: (2001) Aust Torts Rep ¶81-597 at 66,629 [52].

The difficulty of assessing actual loss

349 It has often been argued that the birth of children brings advantages, and the difficulty of offsetting these advantages against the costs of bringing up the children points against recovery. It is said that since the benefits and the costs are difficult to reduce to money terms, it is desirable to assume that the former outweighs the latter or that they balance each other[532].

350 Arguments of this type have been put in a variety of ways, but they tend to depend on the proposition that the birth of every child brings joy. They are correspondingly weakened by the circumstance that as a matter of fact not every child brings joy. The plaintiffs tended to treat the proposition that all children bring to their parents joy outweighing the burdens of parenthood as being crucial to the defendants' contentions. The plaintiffs made much of the falsity of that proposition as a universal rule, and of the extent to which potential parents strove to avoid producing children. In fact, the proposition so strongly assailed by the plaintiffs was not crucial to the defendants' contentions. The various criticisms which can be made of the defendants' proposition do not affect the force of other contentions they advanced against the majority reasoning in the Court of Appeal. Those other contentions can coexist with the fact that many children, even well-behaved ones, cause their parents immense trouble, and ill-behaved ones cause even more trouble and very little joy.

351 There is one other weakness in the arguments just referred to. They tend to concentrate on the practical difficulties and disadvantages of seeking to compare the money sums which can be calculated as having been spent on rearing a child and as likely to be spent on rearing it in future with the value of that child as a life capable of bringing happiness to its parents. In contending that in practice comparisons cannot be made, the arguments referred to assume that in principle it is legitimate to try to do so. That is to be doubted.

The non-comparability of human life and money

352 The first matter which the reasoning of the majority of the Court of Appeal does not sufficiently take into account is that it is not possible to treat the costs of bringing up children as loss or damage to the parents because of the

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532 See *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 87 per Meagher JA; *Kealey v Berezowski* (1996) 136 DLR (4th) 708 at 732 per Lax J; *McFarlane v Tayside Health Board* 1997 SLT 211 at 216-217; *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 97 per Lord Hope of Craighead, 114 per Lord Millett. For American versions of the arguments, see *Coleman v Garrison* 349 A 2d 8 at 12 (Del, 1975); *Miller v Johnson* 343 SE 2d 301 at 308 (Va, 1986) per Russell J (dissenting).

nature of the human child, the nature of the parent-child relationship and the duties which human birth causes to spring up.

353 A duty lies on parents to preserve and nurture their children whether or not they actually experience joy from the existence of those children. To link that duty with the extent of pleasure which a particular child's life gives its parents would smack "of the commodification of the child, regarding the child as an asset to the parents"[533]. A child is not an object for the gratification of its parents, like a pet or an antique car or a new dress. Nor is it a proprietary advantage which has accompanying burdens needing to be met if the advantage is to be fully secured − such as a partly paid up share or mortgaged land. The child has a "value" which must be fostered whether it pleases its parents or repels them. It is contrary to human dignity to reduce the existence of a particular human being to the status of an animal or an inanimate chattel or a chose in action or an interest in land. It is wrong to attempt to place a value on human life or a value on the expense of human life because human life is invaluable − incapable of effective or useful valuation.

354 It is thus the policy of the law that the birth of a child is not to be discounted or devalued, even if many actual children are not blessings. The child is itself valuable, not because it confers blessings or economic advantages or other advantages, but because it is life.

355 The Court below reasoned that the interest of the plaintiffs affected by the defendants' conduct is their "free choice … to limit the number of their children, to not be blessed with a child", and thus that compensation is not sought for the "wrongful birth or new life of the child" itself but for relief from "the additional financial burden that will be placed on the family" − the financial burden flowing from the legal and moral responsibilities which the arrival of the child imposes on the parents[534]. If a seller delivers too many cattle to a farmer, and the farmer later seeks to recover the costs of feeding the excess cattle from the seller, no doubt it can be said that compensation is not sought for the excess cattle themselves, but for relief from the financial consequences of the legal and moral responsibilities which their arrival imposed on the farmer. If a veterinary surgeon conducts the sterilisation of a dog negligently, and the dog's owner later seeks to recover the costs of feeding the puppies, no doubt it can be said that compensation is not sought for the puppies, but for relief from the financial consequences of the legal and moral responsibilities which their arrival imposed on the owner. If under a contract incapable of termination, machinery is sold

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533 *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 at 293 [89] per Hale LJ.

534 [2001] QCA 246 at [53] per McMurdo P.

which calls for excessive maintenance and repair, no doubt it can be said that compensation is sought by the buyer not for the machinery itself, but for relief from the financial consequences of the responsibilities which its acquisition has generated. However, the new child is not to be compared to an excessive supply of animals or unwanted puppies or a piece of machinery needing constant maintenance and repair. "[A] child should not be viewed as a piece of property, with fact finders … assessing the expense and damage incurred because of a child's life"[535]. "It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth."[536] Its worth is as a child, not as a commodity. Hence its life has "worth" in a sense quite distinct from the way commodities have "worth". Thus in *CES v Superclinics (Australia) Pty Ltd*[537] Meagher JA said:

> "[O]ur law has always proceeded on the premise that human life is sacred. That is so despite an occasional acknowledgment that existence is a 'vale of tears'. Hence, in criminal law, except within closely defined limits, to take another's life is murder; to threaten to do so is a criminal offence. To abort a child in utero is a common law misdemeanour. In the law of torts, negligently to shorten someone's life sounds in damages. Negligently to render someone sterile is tortious. Blackstone's *Laws of England*, vol 1, Chapter 1, Section 1 [states]:
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> > 'Life is ... a right inherent by nature in every individual and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.'"

Further, it is a serious offence to incite, counsel or aid someone to commit suicide or attempt to commit suicide[538]. "Respect for life and the rights proceeding from it are at the heart of our legal system and, broader still, our civilization."[539] Hence the expenses of nurturing life can never outweigh life itself, and a parent cannot be heard to contend in court that that parent has suffered compensable loss from the birth of the child.

356 Human life is invaluable in the sense that it is incapable of valuation. It has no financial worth which is capable of estimation. It cannot be sold for

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535 *Beardsley v Wierdsma* 650 P 2d 288 at 293 (Wyo, 1982).

536 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 114 per Lord Millett.

537 (1995) 38 NSWLR 47 at 86.

538 eg *Criminal Code* (Q), s 311 (the penalty is life imprisonment).

539 *Cockrum v Baumgartner* 447 NE 2d 385 at 389 (Ill, 1983).

money, at least not lawfully. The duty cast on parents which flows from the arrival of new human life is also incapable of valuation or estimation or discharge by payment. The financial costs of child-rearing can be calculated, but they represent only part − and in some ways an insignificant part − of the onerous aspects of the duty. To calculate them in money terms and then permit their recovery in relation to the performance of the duty is to engage in an activity lacking any meaningful correspondence with the duty, just as much as seeking to calculate the economic and other advantages of the new life is to engage in an activity lacking any meaningful correspondence with the phenomenon under consideration.

357 Assume that an action is started within, but near the end of, the limitation period, and that its hearing is delayed until the child is nearly eighteen. Assume that if child-rearing expenses were recoverable, the total award, with interest, would be $200,000. Assume that the parents had a very low income, were near retirement age at the time of the trial, and had accumulated no assets. Assume that the child had demonstrated great intellectual ability, likely to result in the capacity to earn a large income; that it was extremely precocious, having already finished a university degree; and that it had entered into employment carrying a salary of $100,000 per annum. Assume also that it had entered a contract to pay its parents an annuity of $30,000 per annum from the time of the father's retirement until the death of the longer living of the two parents. Assume that the net present value of that annuity greatly exceeded $200,000. Should the parents be able to recover $200,000 or any part of it? If they can, is it open to the defendant to contend that in fact the birth of the child turned them a profit? The answer is that the law contemplates neither parental recovery nor an offset in relation to the annuity. This is not because there is any impracticability in permitting both the recovery and the offset. In limited circumstances of the kind postulated, there is no impracticability. Rather, the law rejects the regime contemplated because it is alien to basic legal assumptions about human life in families.

358 The idea that human life has a value not commensurable with the costs of nurturing it was attacked by McMurdo P[540] and by Davies JA as resting on the erroneous view that the birth of a child is always a blessing. Davies JA said that that view had rested on "a religious basis" and was "underpinned" by a "religious belief" that had declined[541]. That scarcely demonstrates the absurdity of the proposition under attack. As Thomas JA said, "not all religious or cultural influences are necessarily wrong"[542]. The opinion that human life is of unique

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540 [2001] QCA 246 at [51].

541 [2001] QCA 246 at [80]-[81].

542 [2001] QCA 246 at [164].

value, while it is shared by many religions, is not limited to them. Nor is it limited to particular moralities. It underpins much of the common law. And if a sedulous attempt were to be made to weed out of the common law every principle that rested on religious or moral values, it would be radically changed.

359 The idea that human life has a value not commensurable with the costs of nurturing it so far as it rested on the idea that the birth of a child is a blessing was also attacked by McMurdo P and Davies JA on the ground that "community views" had changed[543]. The evidence of change was that the arrival of unplanned children can be perceived as a financial and personal disaster. The evidence of change was also found in what was said to be community acceptance and encouragement of contraception and sterilisation, and the wider availability in some jurisdictions of abortion. This case is not about the desirability of contraception, sterilisation or abortion. On occasion the plaintiffs seemed to attribute to the defendants a disapprobation of these practices which did not in fact exist. But whatever the degree of popularity of, or state encouragement for, or virtue in these kinds of birth control, it does not follow that it is wrong to treat a human birth as the creation of something uniquely worthwhile. Nor does it follow that damages should be recoverable for the rearing of children whose unplanned births occurred when an attempt at birth control failed. In *McFarlane v Tayside Health Board*, Lord Gill, the trial judge, said[544]:

> "It is true that the law no longer upholds the sanctity of life as an absolute value: but I do not interpret the social and legislative changes … as indicating that the law no longer favours and promotes family relationships. In my opinion, the law has not reached the stage where family relationships and the worth of a child's existence are values to which it is indifferent. If I am right, a principle of law that affirms that the existence of a child can be an actionable loss to his parents would seem to conflict with those values."

360 The plaintiffs suggested that the defendants' reliance on the value of human life was flawed, because the damages awarded for loss of expectation of life for wrongful death are low. In *Benham v Gambling*[545] the House of Lords limited the damages to £200. Viscount Simon LC said[546]:

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543 [2001] QCA 246 at [51], [80]-[82].

544 1997 SLT 211 at 216-217.

545 [1941] AC 157.

546 [1941] AC 157 at 166.

> "It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing ...".

He also said[547]:

> "The truth, of course, is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead me to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, very moderate figures should be chosen ...
>
> I trust that the views of this House, expressed in dealing with the present appeal, may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy."

The House of Lords has since adjusted the figure more than once to allow for inflation[548], but awards in England remained low until this head of damages was abolished there, and they remain low here[549].

361 The answer to this objection propounded as a matter of Scots law, which has equal validity in Australian law, was put thus by Lord Gill[550]:

> "[T]he sum of money awarded in Scotland for the death of a child has always been relatively nominal and it has never been suggested, so far as I am aware, that such a sum represents even an attempt to express any meaningful value of a child's existence in monetary terms. Moreover, I do not consider that the assessment of a sum of damages for the loss of a son or daughter in childhood is the same process as the assessment of the value to the parents of a living child's existence throughout an assumed normal lifespan."

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547 [1941] AC 157 at 168.

548 *Naylor v Yorkshire Electricity Board* [1968] AC 529 (£500); *Gammell v Wilson* [1982] AC 27 (£1250).

549 Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed (2002) at [3.4.2]-[3.4.4].

550 *McFarlane v Tayside Health Board* 1997 SLT 211 at 215.

Trindade and Cane say[551]:

> "[T]he fact that the sum is small and conventional shows the law's dislike for the task of valuing life."

That is because life is invaluable in the sense that it is beyond monetary value or monetary valuation. It is "incapable of being measured in coin of the realm"[552]. And the sum is small partly because there is widespread consciousness of the power of Windeyer J's observations in *Skelton v Collins*[553]:

> "Still less can I grasp the idea that a man's life is a possession of his that can be valued in money. This must be for many people repugnant to opinions, sometimes half felt sometimes deeply held, about the meaning of life and death, duty and destiny. And for others, less attached or persuaded in their opinions, it must be unacceptable simply because life and money are essentially incommensurable. And the idea does not become more easily acceptable when the measure of the worth of life is said to be a balance of happiness over unhappiness. In some of the judgments and articles that I have read the postulated inquiry seems to depend upon some doctrine of Epicurean hedonism, in others upon a conviction that tribulation endured does not deprive life of value. The differing views have been eloquently expressed. But for myself I doubt the relevance to the present question of any particular philosophy. For the question is not, I think, Is life a boon? – but, Are the years of life that a man expects something that belongs to him, the loss of which can be measured in money?"

362 It is not the case that the value of a child's life is only the present equivalent of £200 in 1941. Nor is it the case that the value of a child's life can be assessed at a figure exceeding the costs of raising it[554]. The child's life, like all human life, has a value which is beyond comparison with money. It is not the case that the lives of some individuals are great and valuable boons to them and the lives of others are worth little. The limited, conventional and controversial allowance in wrongful death cases does not demonstrate that human life has little value. It says nothing about whether the costs of rearing children so exceed the benefits to their parents as to be recoverable in tort. In any event, the wrongful

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551 Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 526.

552 *Benham v Gambling* [1941] AC 157 at 168 per Viscount Simon LC.

553 (1966) 115 CLR 94 at 130.

554 As suggested in *McFarlane v Tayside Health Board* 1997 SLT 211 at 216 per Lord Gill.

death cases relate to the value of the life of one human being to that human being, while one approach to the present problem concerns not the value of a child's life to itself but to its parents.

The undesirable temptations to parents

363 The law recognises that the essential unit of society, at least so far as the rearing of children is concerned, is the family. Tort rules ought not to be modified so as to blur or obscure that recognition. Hence it is undesirable to adopt "a rule of damages that would require parents, if their litigation is to succeed, to persuade a judge or jury that their child is not worth to them the cost of rearing that child"[555]. This line is commonly taken in American cases which oppose the provision of an offset to the recovery of child-rearing costs. The recovery of child-rearing expenses would lead to an "intolerable … inquiry concerning the probable value of a child to his or her parents".

> "The inquiry would be intolerable because it would require a determination of whether the child represents a loss to his or her parents. Would they be better off if the child had never been born? Is the child worth less than it would cost to raise him or her and, if so, how much less? Even if such an inquiry could lead to a reasoned, and not merely speculative, conclusion, a doubtful proposition, the balancing of costs and benefits treats the child as though he or she were personal property. The very inquiry is inconsistent with the dignity that the Commonwealth, including its courts, must accord to every human life, and it should not be permitted.
>
> The court suggests that such an inquiry would be no different in principle from other inquiries in which we now engage, such as inquiry into parental loss of consortium due to a child's serious impairment from injury, or inquiry into parental loss due to a child's death. I disagree. The policy assumption underlying the assessment of damages for loss of a child's consortium or for a child's death is that a child's life has value and its impairment or termination results in loss to the parents. That assumption is consistent with the respect for human life that ought to be embodied in the public policy of this Commonwealth. The assumption underlying the availability of damages due to a child's birth, however, is that the child's net value to his or her parents, in light of associated costs, is less than nothing. How much less determines the amount of the plaintiff's damages. Surely, sound public policy requires a recognition

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555 *Burke v Rivo* 551 NE 2d 1 at 7 (Mass, 1990) per O'Connor J dissenting (Nolan and Lynch JJ concurring).

> that injury or death of a child, but not a child's life, represents loss to others."[556]

364 In these circumstances, "permitting recovery … requires that the parents demonstrate not only that they did not want the child but that the child has been of minimal value or benefit to them. They will have to show that the child remains an uncherished, unwanted burden so as to minimize the offset to which the defendant is entitled."[557] Recovery of rearing costs "would thus engender the unseemly spectacle of parents disparaging the 'value' of their children or the degree of their affection for them in open court"[558].

365 Davies JA said, in the course of propounding several convincing arguments why, if recovery of rearing costs is permitted, there should be no set-off for emotional benefits[559]:

> "[I]t is, from a policy point of view, undesirable that courts should have to make an assessment of damages which includes weighing the likely prospective good and bad qualities of a child. That would be morally offensive. It would, as Thomas JA has noted, tend to encourage parents to disparage their children, it would be likely to harm the relationship between the parents and the child and it would be likely to harm the psychological well-being of the child."

This is true. Yet calculating the costs of rearing a child can involve assessing its likely bad qualities − physically and emotionally − to see whether particular financial provision is called for. Davies JA's reasoning thus points against this head of recovery.

366 McMurdo P, in opposing any limitation of recovery to children with disabilities, said[560]: "To draw a distinction between the benefit of a healthy normal child and those with disabilities invites the distasteful spectacle of litigating this question in public." It is true that the spectacle would be distasteful, and worse than distasteful. But the same type of spectacle would arise whatever the extent of recovery, because the scale of the extent of recovery

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556 *Burke v Rivo* 551 NE 2d 1 at 7 (Mass, 1990) per O'Connor J dissenting (Nolan and Lynch JJ concurring).

557 *Cockrum v Baumgartner* 447 NE 2d 385 at 390 (Ill, 1983).

558 *Public Health Trust v Brown* 388 So 2d 1084 at 1086 n 4 (Fla, 1980).

559 [2001] QCA 246 at [88].

560 [2001] QCA 246 at [50].

would increase the more it could be demonstrated that the child had any type of difficulty.

367 In *Lovelace Medical Center v Mendez*[561] the Supreme Court of New Mexico declined to permit recovery of damages for detriments in the form of the emotional distress caused by the arrival of an unplanned child, because if that were permitted, proof of emotional and psychological benefits to the parents, being of the same kind as the detriments, would be allowed[562]. The Court said:

> "A trial over such issues … could result in the unseemly spectacle of the parents' attempting to prove how slight or nonexistent was the psychological benefit they derived from their additional child in order to minimize the offset to their nonpecuniary interests. We hold that permitting such a dispute to be litigated would be contrary to public policy."

The same unseemly spectacle would follow from the attempt by parents to prove deficiencies in their child, including deficiencies in its psyche, in order to enhance a claim to damages for child-rearing costs.

368 Similarly, Thomas JA in the Court of Appeal[563], speaking of Kirby ACJ's preference for an offset solution in *CES v Superclinics (Australia) Pty Ltd*[564], said that it:

> "presents difficulties. The problems associated with a legal system in which plaintiff parents have a strong economic incentive to denigrate the value of their child tends to make litigation a time bomb and truth a casualty."

369 However, the problem would exist even if there were no offset solution. A rule of law which created a temptation in parents to exaggerate the educational goals their children might achieve would be alien to the parental duty to be realistic about their children's future and not to point children down paths which it is beyond their powers to walk along. A rule of law which created a temptation in parents to exaggerate the standard of living of the family in terms of presents, parties, holidays and general lifestyle would be alien to the health of family life. A rule of law which created a temptation in parents to exaggerate the physical or

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561 805 P 2d 603 at 613 (NM, 1991).

562 Pursuant to *Restatement (Second) of Torts* (1979), §920.

563 [2001] QCA 246 at [159].

564 (1995) 38 NSWLR 47 at 77.

mental or character weaknesses of their children with a view to suggesting expensive remedies for those weaknesses would be alien to the parental duty to maintain the self-esteem and self-confidence of children, and, even if the children did not learn of what was said, it would be alien to a duty not to denigrate children to others.

370 Thomas JA rightly deplored "the prospect that little or no damages would be awarded for loving mothers and fathers while generous compensation would be obtained by those who disparage and reject their child"[565].

371 Since there is a question whether a rule of law exists which permits parents to recover from negligent defendants the costs of rearing their children, it is relevant to consider the consequences of the rule. The rule under consideration would encourage parents both to exaggerate and to denigrate their children's aptitudes. The rule would encourage parents to search for characteristics of the children which might call for future expenditures with a view to recovering monetary compensation to meet those possible expenditures. The rule would encourage parents to describe personal ambitions for their children and family hopes of a kind which could sound in money but may not be advantageous to the children because the testimony postulates career paths which the children may be incapable of pursuing. The rule would mandate parents to assert their own economic interests to the maximum by exaggerating their duties to the child in the light of possible features of the child's future life. Thus the rule would tend to tempt parents to breach their duties to build up the esteem of their children, to direct them into career paths they are capable of following, and to abstain from denigration of their qualities and capacities. And it would hold out these temptations in litigation conducted in public, and often designed to advance the self-interest of the parents. The rule would tend to reduce the ties between parents and children to matters of coins and notes, to treat the personal duty of parents as something dischargeable by cash payments, to resolve personal worth into exchange value, and to substitute the mores of the counting house for the ethics of family life. That the supposed rule has these consequences points strongly to the conclusion that it does not exist. It would tend to generate a form of litigation focusing, not on the general expenses of child-rearing, but on the particular position of one particular child.

The impact of the litigation on the unplanned child

372 In this case the trial judge, McMurdo P and Davies JA each thought that knowledge gained by a child of litigation in which attempts were being or had been made by its parents to recover the costs of its upkeep from a defendant who

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565 [2001] QCA 246 at [169].

negligently failed to prevent it from coming into existence was not damaging to that child. On the other hand, Thomas JA thought that it was.

373 Thomas JA said that among the reasons which, considered as a whole, he saw as providing "a strongly persuasive and rational basis" for denying a recovery of rearing costs were the "protection of the mental and emotional health of the child" and "the undesirability of a child learning that the court has declared its birth to be a mistake"[566]. Many other lawyers have shared Thomas JA's opinion.

374 *United States.* In *Sherlock v Stillwater Clinic*[567], a case permitting recovery of rearing costs subject to an offset for the benefits which the child brought, the majority of the Supreme Court of Minnesota was troubled by "the psychological consequences which could result from litigating such claim". They concluded[568]:

> "It is ... our hope that future parents and attorneys would give serious reflection to the silent interests of the child and, in particular, the parent-child relationships that must be sustained long after legal controversies have been laid to rest."

These passages reflect an assumption, on the part of judges favouring recovery of rearing costs, that litigation by parents to recover rearing costs can be damaging to the unplanned children involved.

375 In *Wilbur v Kerr*[569] the Supreme Court of Arkansas said: "the child's welfare has troubled all who have examined the problem." The Court refused recovery of rearing costs from a doctor who negligently performed a vasectomy for the following reasons[570]:

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566 [2001] QCA 246 at [169].

567 260 NW 2d 169 at 176 (Minn, 1977).

568 260 NW 2d 169 at 177 (Minn, 1977). As Thomas JA said, this "appears to be something of a pious hope … [I]t would be unrealistic to rely on litigants to hold back": [2001] QCA 246 at [176].

569 628 SW 2d 568 at 571 (Ark, 1982).

570 The relevant passage has been frequently quoted or referred to since: eg *Boone v Mullendore* 416 So 2d 718 at 721-722 (Ala, 1982); *McKernan v Aasheim* 687 P 2d 850 at 855-856 (Wash, 1984).

> "It is a question which meddles with the concept of life and the stability of the family unit. Litigation cannot answer every question; every question cannot be answered in terms of dollars and cents. We are also convinced that the damage to the child will be significant; that being an unwanted or 'emotional bastard', who will some day learn that its parents did not want it and, in fact, went to court to force someone else to pay for its raising, will be harmful to that child. It will undermine society's need for a strong and healthy family relationship. We have not become so sophisticated a society [as] to dismiss that emotional trauma as nonsense."

376 In *Boone v Mullendore*[571] the Supreme Court of Alabama said that to award as damages the cost of raising a child born after a negligent failure to remove a mother's fallopian tubes "could have a significant impact on the stability of the family unit and the subject child". The Court referred to:

> "the possible harm that can be caused to the unwanted child who will one day learn that he not only was not wanted by his or her parents, but was reared by funds supplied by another person. Some authors have referred to such a child as an 'emotional bastard' in a realistic, but harsh, attempt to describe the stigma that will attach to him once he learns the true circumstances of his upbringing."

377 In *McKernan v Aasheim*[572] the Supreme Court of Washington en banc said:

> "[T]he simple fact that the parents saw fit to allege their child as a 'damage' to them would carry with it the possibility of emotional harm to the child. We are not willing to sweep this ugly possibility under the rug by stating that the parents must be the ones to decide whether to risk the emotional well being of their unplanned child."

378 In *University of Arizona Health Sciences Center v Superior Court of the State of Arizona*[573] Gordon VCJ said: "Although later discovery of their parents' feelings toward them may harm only a few children, I think a few are too many."

379 In *Burke v Rivo*[574] O'Connor J, in whose dissent Nolan and Lynch JJ concurred, said that the recovery of rearing costs "would encourage litigation

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571 416 So 2d 718 at 721-722 (Ala, 1982).

572 687 P 2d 850 at 855-856 (Wash, 1984).

573 667 P 2d 1294 at 1302 (Ariz, 1983).

574 551 NE 2d 1 at 8 (Mass, 1990).

harmful to families − litigation designed to produce the result, ultimately to be discovered by the child, that he or she was supported not by the parents, because they did not want him or her, but by an unwilling stranger".

380 Some American courts have endeavoured to reduce the perceived risk of harm in various ways. One is to address a message to the child in the judgment stating that its parents' complaint does not imply "any present rejection or future strain upon the parent-child relationship" or amount to rejection of the child as a person, but simply represents an endeavour to test the limits of the doctor's liability[575]. Another technique is to abstain from naming the parents as parties[576]. These techniques may or may not be successful, but they do disclose an assumption that there is a real risk of harm if they are not employed.

381 *England.* In *Udale v Bloomsbury Area Health Authority*[577] Jupp J refused damages for the cost of rearing a child born after a failed sterilisation operation. He referred with favour to numerous arguments against recovery, one of which was[578]: "It would be intolerable ... if a child ever learned that a court had publicly declared him so unwanted that medical men were paying for his upbringing because their negligence brought him into the world." He said[579]: "It is highly undesirable that any child should learn that a court has publicly declared his life or birth to be a mistake − a disaster even − and that he or she is unwanted or rejected. Such pronouncements would disrupt families and weaken the structure of society."

382 *Scotland.* In *McFarlane v Tayside Health Board* Lord Gill said[580]: "[M]ost people would find it unseemly that … the child concerned might later learn not only that his birth was a consequence of negligence, but that his parents raised an action that implied that they would have preferred that he had not been born."

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575 See *Rieck v Medical Protective Co of Fort Wayne, Ind* 219 NW 2d 242 at 245-246 (Wis, 1974); *Coleman v Garrison* 349 A 2d 8 at 14 (Del, 1975).

576 *Anonymous v Hospital* 366 A 2d 204 (Conn, 1976).

577 [1983] 1 WLR 1098; [1983] 2 All ER 522.

578 [1983] 1 WLR 1098 at 1106; [1983] 2 All ER 522 at 529.

579 [1983] 1 WLR 1098 at 1109; [1983] 2 All ER 522 at 531.

580 1997 SLT 211 at 217.

383 *New South Wales.* In *CES v Superclinics (Australia) Pty Ltd*[581], a case in which a mother sued medical practitioners who had negligently failed to diagnose her pregnancy and deprived her of the opportunity to have an abortion, Meagher JA said, in a judgment denying claims by the mother in relation to pain and suffering and lost income (as to which he was in dissent), and by both parents in relation to the expense of rearing the child (as to which he was not in dissent):

> "Having given birth to a healthy child in August 1987, the plaintiff claimed at a court hearing in December 1993 that the child, then over six years old, was unwelcome, a misfortune, perhaps a disaster, certainly a head of damages. For all I know the child was in court to witness her mother's rejection of her. Perhaps, on the other hand, the plaintiff had the taste to keep her child out of court. Even if that be so, it does not mean the unfortunate infant will never know that her mother has publicly declared her to be unwanted. When she is at school some [âme] charitable – perhaps the mother of one of her 'friends' – can be trusted to direct her attention to the point. That a court of law should sanction such an action seems to me improper to the point of obscenity."

384 *Adoption regime*. The confidentiality which surrounds adoption suggests a perception by the legislature of the damage which can flow to children from learning that their parents regard them as a burden.

> "Inasmuch as both the natural and adoptive parents are aware of the adoption, this confidential air surrounding the proceedings appears to be primarily designed to protect the child from either public or, in the case of a young child, his own knowledge of the adoption. There are several reasons why it is desirable that a young child should not know of his adoption. Among these are that he will feel natural, that he will not know he was unwanted by his natural parents, and that he will not feel discriminated against in his adoptive home because he is not a natural child. Knowledge of the adoption, however, would not seem nearly as likely to cause emotional harm as knowledge of the sterilization claim, since the adopted child would have no reason to suspect that his parents did not want him although they may be adoptive parents. But knowledge of the adoption would give the child knowledge that his natural parents did not want him and considered him a burden which is the precise thing that the parents in the instant case are claiming, and in this respect,

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581 (1995) 38 NSWLR 47 at 86.

knowledge of both may be considered equally likely to cause emotional injury to the child and, therefore, objectionable."[582]

385 *The Court of Appeal's reasoning*. In the Court of Appeal McMurdo P said that there were two sound answers to arguments of that kind[583]:

"First, an unwanted or unplanned pregnancy does not mean that the child when born is not cherished by the family. Such births are a common enough occurrence, although most are not caused by established medical negligence. It is only the financial and social burden arising from the negligence that was unwanted, not the child that is consequently born ... The fact that a child born in such circumstances is regarded by parents and family as a blessing is no reason to exclude [scil recovery of] the moderate and reasonable economic loss caused to the family.

Second, in Australian society, we have become accustomed to claimants pursuing tortious claims against insured friends and relatives; we are no longer shocked when a husband sues his wife in a motor vehicle accident case for damages for personal injuries, children sue parents for whom they work when injured in the work place or students sue their school for damages arising from negligence. What then is wrong with a parent or parents claiming damages for raising a child conceived because of medical negligence; this is no criticism of the blameless child but is a recognition of the parents' entitlement to economic loss suffered through the appellants' negligence."

386 Davies JA's answer to this argument was[584]:

"[I]t is said that the bringing of such a claim may detrimentally affect the relationship between the parents and the child and may detrimentally affect the psychological well-being of the child. On the assumption that the bringing of such a claim does not involve any assessment of the non-financial benefits and burdens of bringing up the child, I do not see how it can have any such effect. The bringing of any claim for damages by the parents, here the claims for pain, suffering and loss of amenities by the first respondent and the second respondent's claim for loss of consortium, disclose the fact that the conception was unwanted. In any event an unwanted conception is not uncommon and I think it unlikely that the

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582 RJL, "The Birth of a Child Following an Ineffective Sterilization Operation As Legal Damage", (1965) 9 *Utah Law Review* 808 at 812 n 23.

583 [2001] QCA 246 at [59]-[60].

584 [2001] QCA 246 at [97].

> disclosure of that fact would be likely to harm the relationship or the well-being of the child. Moreover the addition of a financial claim for the support of the child with its attendant financial benefit to the family and the child is, if successful, more likely to be something for which the child will be grateful than a matter which he or she will regret."

387 The trial judge in this case took the same approach, and added[585]:

> "To suppose that parents, because they cannot recover damages, will never mention to their child the misfortune which brought about his or her conception is unrealistic; and the greater the economic burden placed on the family the more probable such an outcome."

388 This reasoning has been employed in earlier cases[586].

389 The majority reasoning does not give sufficient weight to the argument turning on the risk of harm to the child. It is convenient to examine successively various relevant strands in that reasoning.

390 *No risk of harm?* The proposition that there is no risk of harm at all is extremely questionable. That proposition has been disputed by many judges. And the proposition is inconsistent with the assumptions underlying adoption legislation.

391 *Unplanned pregnancies generating litigation.* Even if McMurdo P and Davies JA are correct in saying that unwanted or unplanned pregnancies are common, their commonness does not negate the potentiality of harm for particular children on learning the facts. It is one thing to learn of an unplanned pregnancy which took place because the child was born too soon or because of casual contraceptive failure. It is another thing to learn that not only did an unplanned pregnancy take place after the parents had resolved never to have children again, and had resorted to medical procedures causing considerable pain or discomfort and expense to ensure that outcome, but also that the parents were

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585 (2001) Aust Torts Rep ¶81-597 at 66,629 [53].

586 *Custodio v Bauer* 59 Cal Rptr 463 at 477 (1967); *Boone v Mullendore* 416 So 2d 718 at 725 (Ala, 1982); *Flowers v District of Columbia* 478 A 2d 1073 at 1079 (DC, 1984); *Thake v Maurice* [1986] QB 644 at 667; *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012 at 1021, 1025; *Burke v Rivo* 551 NE 2d 1 at 4-5 (Mass, 1990); *Marciniak v Lundborg* 450 NW 2d 243 (Wis, 1990); *Administrator, Natal v Edouard* 1990 (3) SA 581 at 592 (AD); *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 75; and *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 75.

prepared to engage in litigation. That litigation will have much at stake and is bound to be bitterly fought. It is usually fought against a professional who is defending his or her reputation and possibly his or her continuing right to practise. An uninsured professional will be seeking to protect his or her assets. An insured professional will be attempting to prevent the levying of higher professional indemnity insurance premiums or the refusal of cover in future. Further, if the professional is insured, the medical insurer is likely in modern conditions to be in a condition of some desperation. If a hospital is joined, it will have every reason to resist the claim. But even if the litigation is not fought with any particular bitterness, it will inevitably involve for the plaintiffs stress, expense, publicity and grave risks as to costs. The litigation will reveal intimate details of the parents' matrimonial history and motivations. It will reveal that the parents were attempting to shift to another set of shoulders the burden of fulfilling the parents' duty of paying for the child's rearing and the burden of funding the numerous expenditures flowing from motives other than bare duty. Thus there is no close analogy between the position of a child which guesses or discovers that its birth has been unplanned and took place by reason of some contraceptive error or misfortune and the position of a child which learns that its parents were not only prepared to submit to some form of surgery in an endeavour to prevent birth forever, but also prepared to undertake the stresses, pains and risks of litigation to recover the costs of its upbringing and prepared publicly to ventilate in open court and in devastating detail the lengths to which they were prepared to go to prevent the birth. In this very case, should Jordan ever read the judgments of the courts, or be told about their contents in detail, he will learn of his parents' decision that his mother should undergo a sterilisation operation to ensure that he would never be born, he will learn that his mother gave evidence that his birth was "a major disruption to the family", he will learn that it caused her to become "depressed and angry" and he will learn that she found his care "exhausting"[587]. In short, he will learn that, as McMurdo P said, "his conception was not regarded as a family blessing"[588]. He will also learn of the effects on her body which caused her to recover substantial sums independently of the head of damage under consideration. He will learn that his birth was unusual in being preceded by the institution of proceedings in relation to his conception. He will learn that his birth was unusual in being attended by experts summoned by both sides who were eager, by examining his mother's uterus outside the abdominal cavity, and by examining other organs, to ascertain how his mother's undesired pregnancy had come about[589]. The harm which may be suffered by children who learn that their birth was unplanned and took place for reasons other than third party negligence is not relevantly comparable with

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587 (2001) Aust Torts Rep ¶81-597 at 66,629 [51].

588 [2001] QCA 246 at [58] n 91.

589 [2001] QCA 246 at [113].

that which may be suffered by those who learn that their birth was allegedly the result of third party negligence resulting in litigation.

392 *The cherished child/financial burden distinction.* McMurdo P drew a distinction between the "cherished" child whose arrival is a "blessing" and the "financial and social burden arising from the negligence" which caused the child to be born. The distinction drawn by McMurdo P is less likely to be drawn by some children. The determination of the parents, in pursuit of monetary compensation for the "financial and social burden", to reveal in public their private motivations and decisions and the pain and inconvenience which medical procedures caused, and to itemise to the last cent each piece of expenditure for the first eighteen years of the child's life or whatever longer period is relied on, is likely to impress the children with the "burden" rather than the "blessing" aspect of their existence.

393 *Is only moderate and reasonable loss recoverable?* McMurdo P's characterisation of recoverable loss as being only "moderate" and "reasonable" corresponds, of course, with her preferred position on quantum generally. That preference is based on worries which attract sympathy, but it is wholly unsound in law. It is likely, however, that if the law permits recovery at all, damages will be sought in immoderate amounts which may become large to the point of being unreasonable. If sought on a satisfactory evidentiary basis, those damages will have to be awarded.

394 *Analogy with suing schools?* While there is a sense in which schools are in loco parentis, there is no relevant analogy between the present problem and the phenomenon of pupils suing schools of the kind to which McMurdo P appealed. The range of emotions ex-pupils have towards their schools is likely to be quite different from the range of emotions they have towards their parents.

395 *Analogy with suing friends or relatives for transport or work injuries?* There is no valid comparison between an injured spouse suing the other spouse whose negligent driving caused an accident or an injured child suing its parent for injuries sustained while working for the parent, on the one hand, and parents recovering the cost of rearing their child. It is regrettably difficult for modern society to operate without some risk of injury on the roads or at work. That is why there is statutory compulsion to insure against those risks and why there are statutory creatures to meet the claims if the obligation is not fulfilled. The degree of fault entitling recovery in motor car accidents is very slight, and in the case of workers' compensation claims it is non-existent. No bitterness or pain within families is likely to be caused by that type of litigation. Children employed by their parents are likely to be of a sufficient age to avoid the kind of harm to younger children which is under discussion. Litigation to recover the rearing costs of unplanned children is of a quite different kind from litigation against insured relatives or friends.

396 *Wider implications of the argument.* Davies JA noted, importantly, that it is not only the bringing of a claim for rearing costs which may disclose to a child that its conception was unwanted: disclosure of that fact can flow from litigation similar to the first plaintiff's claim for the first head of damages (pain, suffering and loss of amenities) and from litigation similar to the second plaintiff's claim for the second head of damages (loss of consortium). He concluded that the claim for rearing costs could not be denied on the basis of disclosing unwanted conceptions, since they would be disclosed anyway by forms of litigation whose availability is not in question in this appeal. The difficulty can, of course, be resolved by denying the availability of those forms of litigation in a case in which that is a live issue. It could also simply be accepted as arising from a not unreasonable compromise under which those forms of litigation are permitted for particular reasons, but not litigation for child-rearing costs.

397 *Will the child perceive the damages as assisting its upbringing?* Davies JA's allusion to the fact that the damages awarded may help the parents to bring up the child does not in terms meet the difficulty raised in relation to possible damage to the child.

398 For one thing, there is no obligation on the parents to spend the damages recovered to compensate for child-rearing costs in actually paying those costs. There are considerable risks that in some cases the capital sum received as damages will be speedily dissipated rather than being spent steadily over time on the child's maintenance. Even if in some cases the potential injury to the child can be nullified or palliated by the reflection that the money recovered was spent sensibly in advancing family interests, the fact is that in others it will not because the money will not be so spent.

399 For another thing, the contention that the child is more likely to welcome than to regret the making of a successful financial claim, with its benefit to the child and the family as a whole, and that the "suit … is in no reasonable sense a signal to the child that the parents consider the child an unwanted burden"[590], is rational if the matter is approached entirely materialistically, but does not necessarily negate the risk of an irrational reaction from children who are not proceeding materialistically. The reactions of children are often not rational, they often do not proceed materialistically, and they often understand conduct as sending adverse signals even if there is "no reasonable sense" in which it does.

400 *Parental judgments of benefit.* The argument based on the risk of harm has been countered on occasions in the United States by saying, as the Supreme Judicial Court of Massachusetts said in *Burke v Rivo*[591]: "it is for the parents, not

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590 *Marciniak v Lundborg* 450 NW 2d 243 at 246 (Wis, 1990).

591 551 NE 2d 1 at 5 (Mass, 1990).

the courts, to decide whether a lawsuit would adversely affect the child and should not be maintained". The problem is that the parents are torn between conflicting forces. Even if they perceive a risk that the litigation will harm the child, they have the strongest motives of self-interest to prosecute it, and also strong motives of duty to the child and its siblings to do so, and to seek to recover as much as they can from the defendant. They are thus in a position of conflict between duty and interest, and to some degree in a position of conflict between duty and duty. Those conflicts would be removed if the head of damages under discussion were not recoverable.

401 *Actual expenditure of damages*. It follows almost inevitably from the straitened economic position of most citizens that expenditure at the best of times tends to exceed income, and that any windfalls that come along are not saved, but are very soon deployed to meet some pressing need. Parents who received a capital sum by way of damages partly calculated by reference to the future costs of child-rearing would, if they behaved prudently, invest that sum so as to meet recurrent expenditures over the balance of the period for which the compensation was awarded. But it is nearly inevitable that many will be tempted not to do that, but to spend it on urgent needs well before the time for particular expenditures has come. Intra-family concord will not be advanced when children learn that the course described to the court for their education, maintenance and advancement in life was not in fact followed because the money awarded to finance that course had to be devoted to other claims thought at the time, no doubt rightly, to be more pressing. If the parents' claim depended on a theory of expensive education being needed to fulfil high ambitions, the gap between the education offered and the standard achieved, the target being held out and the extent to which it was missed, may depress the unplanned child. If the parents' claim depended on a luxurious style of life, the child may not be happy to learn of this after experiencing something less.

402 *True and false claims about the child's weaknesses.* If the parents' claim depended on the need to spend money in order to overcome some physical or mental or emotional or character deficiency in the child, it is not likely to help the child to hear about this if the claim is not soundly based, and even less likely to help the child if it is soundly based.

403 *Conflicting views of parents on initiating proceedings.* Since the Court of Appeal upheld an award in favour of both parents, in that Court's contemplation it is apparently open to one to sue but not the other. If one parent wishes to commence proceedings for substantial damages and another, fearing proceedings will harm the child, opposes that wish, the possibility of litigation plants seeds of discontent and discord between spouses.

Conclusion

404 The various assumptions underlying the law relating to children and the duties on parents created by the law would be negated if parents could sue to recover the costs of rearing unplanned children. That possibility would tend to damage the natural love and mutual confidence which the law seeks to foster between parent and child. It would permit conduct inconsistent with a parental duty to treat the child with the utmost affection, with infinite tenderness, and with unstinting forgiveness in all circumstances, because these goals are contradicted by legal proceedings based on the premise that the child's birth was a painful and highly inconvenient mistake. It would permit conduct inconsistent with the duty to nurture children.

405 For those reasons, if there was a duty of care, it did not extend to the head of damage under consideration, and that head is not recoverable.

Wrongful life cases

406 There is a fourth possible reason why the conclusion of the majority of the Court of Appeal is invalid. It rests on an arguable inconsistency between permitting parents the right to recovery of damages, particularly rearing costs, in relation to the birth of an unplanned child and denying unplanned children the right to recovery of damages in relation to their own birth.

407 Children may sue defendants, including professionals who have negligently caused them to suffer disabilities, whether by conduct before conception[592] or by conduct after conception but before birth[593]. But the law in

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592 *Kosky v The Trustees of the Sisters of Charity* [1982] VR 961.

593 *Watt v Rama* [1972] VR 353; *X and Y (by her Tutor X) v Pal* (1991) 23 NSWLR 26.

England[594], Scotland[595], Canada[596], most American States[597] and Australia[598] prevents children suffering disabilities from suing negligent professionals responsible for their birth but not otherwise responsible for causing any harm which led to those disabilities.

408 In *McFarlane v Tayside Health Board*[599] Lord Steyn referred to the following passage from Trindade and Cane, *The Law of Torts in Australia*[600]:

> "[I]t might seem somewhat inconsistent to allow a claim by the parents while that of the child, whether healthy or disabled, is rejected. Surely the parents' claim is equally repugnant to ideas of the sanctity and value of human life and rests, like that of the child, on a comparison between a situation where a human being exists and one where it does not."

Lord Steyn said: "In my view this reasoning is sound. Coherence and rationality demand that the claim by the parents should also be rejected."

409 However, it is undesirable to deal with this issue in this case. Lord Steyn's point was not developed by the defendants in this Court, and the plaintiffs did not deal with it.

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594 *McKay v Essex Area Health Authority* [1982] QB 1166.

595 *P's Curator Bonis v Criminal Injuries Compensation Board* 1997 SLT 1180 at 1199 per Lord Osborne.

596 *Arndt v Smith* [1994] 8 WWR 568 at 573-575 [17]-[28] (BCSC); *Mickle v Salvation Army Grace Hospital* (1998) 166 DLR (4th) 743 at 748 (Ont Ct (General Division)); *Jones (Guardian ad litem of) v Rostvig* (1999) 44 CCLT (2d) 313 (BCSC); *Lacroix (Litigation Guardian of) v Dominique* (2001) 202 DLR (4th) 121 (Man CA).

597 See the analysis of the authorities made by Studdert J in *Edwards v Blomeley* [2002] NSWSC 460 at [33]-[43].

598 eg *Bannerman v Mills* (1991) Aust Torts Rep ¶81-079; *Edwards v Blomeley* [2002] NSWSC 460; *Harriton v Stephens* [2002] NSWSC 461; *Waller v James* [2002] NSWSC 462.

599 [2000] 2 AC 59 at 83.

600 3rd ed (1999) at 434.

Anomalies and implications

410 As was noted above, Davies JA in the Court of Appeal pointed out that if the mother can recover for pain and suffering and lost wages, and the father can recover for loss of consortium, but neither can recover for rearing costs, the outcome, particularly so far as it rests on the desire to avoid damage to the child, is not wholly rational. If the child on hearing of any litigation in which its parents contended in the court that its birth was unwanted, is at risk of damage, that risk will equally exist whether the litigation is directed to the recovery merely in respect of the mother's pain and suffering and wage loss or whether it is directed also to the recovery of rearing costs. Similarly, in *Flowers v District of Columbia*[601], Ferren J said:

> "It is not necessarily true that a child would be less likely to learn about litigation to recover the costs of the pregnancy … than about litigation to recover the costs of child-rearing. Thus, the … concern that a child not learn he or she was unplanned must be premised on a belief that parents would keep secret a limited damage award, but not a complete damage award. That is a dubious proposition."

And as Faulkner J, sitting in the Supreme Court of Alabama, said in *Boone v Mullendore*[602]:

> "Will a child feel any less an 'emotional bastard' if its parents recover the damages permitted by the majority rather than full and complete damages?"[603]

411 This criticism has some force. One partial answer is that the law may represent a justifiable compromise pursuant to which the mother recovers for losses closely connected with her bodily interests, but not otherwise, and in particular does not recover for economic losses in the form of rearing costs; this outcome could be aided by the fact that the child, its proposed activities and its capacities will play a much less central role in proceedings limited to that head of recovery. Another answer is that if there is an irrationality, it points as much against any recovery by the parents at all as it does against a denial of recovery for rearing costs. In logic, it may be that the entire claim should be dismissed. That is, if the policy of protecting the child from knowledge that it was unwanted

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601 478 A 2d 1073 at 1079 n 1 (DC, 1984).

602 416 So 2d 718 at 724-725 (Ala, 1982).

603 This criticism was also made in *Burke v Rivo* 551 NE 2d 1 at 4 (Mass, 1990); *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 75 per Kirby ACJ; and *Thake v Maurice* [1986] QB 644 at 667-668 per Peter Pain J.

is crucial, that points against the mother recovering for her pain and suffering, lost income and expenses of birth; and against the father recovering for loss of consortium.

412 This latter approach would deny the existence of any duty of care at all. The findings below and the narrowness of the grant of special leave to appeal necessarily compelled the defendants to concentrate analysis on the relatively narrow question whether the controversial head of damages is recoverable, and to abstain from any contention that there was no duty of care. If attention is widened beyond the confines established by the procedural history of this case to the question whether there is a duty of care, there is much to be said for the answer: "There is not"[604]. Arguably the case is one where, despite the reasonable foreseeability of the expenditure for which the plaintiffs claimed, "to find a duty of care would so cut across other legal principles as to impair their proper application and thus lead to the conclusion that there is no duty of care of the kind asserted"[605]. Arguably the case is one where to find a duty would cause the tort of negligence to "subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms"[606]. The legal principles and statutory provisions so impaired would be those which require parents to act in the best interests of their children. The compromise solution has considerable attraction in that it impairs those principles and provisions much less than the total recovery solution, while meeting an unquestioned hurt of the mother's. But these questions, and for that matter other fundamental questions, namely, what damages (if any) are recoverable in contract, and what rules apply to children said not to be "normal" or "healthy", must be left for a case in which a decision is necessary and in which specific argument is offered.

Orders

413 The appeal should be allowed. In accordance with undertakings given by the defendants when special leave was granted, none of the costs orders made

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604 However, there is little authority for that view, apart from the opinion of Meagher JA in *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47; but see *Szekeres, By and Through Szekeres v Robinson* 715 P 2d 1076 at 1078 (Nev, 1986) and *McFarlane v Tayside Health Board* 1997 SLT 211 at 214 per Lord Gill (damages not recoverable for distress of normal pregnancy and labour).

605 *Sullivan v Moody* (2001) 207 CLR 562 at 580 [53] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

606 *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

below should be disturbed, and the defendants should pay the plaintiffs' costs of the appeal.

414 The following orders should be made.

1. The appeal is allowed.

2. The judgment of the Court of Appeal is set aside.

3. In lieu thereof the appeal to the Court of Appeal is allowed to the following extent: the judgment of Holmes J dated 23 August 2000 is varied by deleting paragraph 3 thereof ("The First and Second Defendant pay the First and Second Plaintiff the amount of $105,249.33").

4. The appellants are to pay the respondents' costs of the appeal (including their costs of the special leave application).