HIGH COURT OF AUSTRALIA

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

Matter No S231/2005

KEEDEN WALLER (BY HIS TUTOR DEBORAH WALLER) — APPELLANT

AND

CHRISTOPHER JAMES & ANOR — RESPONDENTS

Matter No S232/2005

KEEDEN WALLER (BY HIS TUTOR DEBORAH WALLER) — APPELLANT

AND

BRIAN HOOLAHAN — RESPONDENT

Waller v James
Waller v Hoolahan
[2006] HCA 16
9 May 2006
S231/2005 and S232/2005

ORDER

In each matter, the appeal is dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

P W Bates for the appellant (instructed by Autore and Associates)

S J Gageler SC with J K Kirk for the respondents (instructed by Blake Dawson Waldron)

CATCHWORDS

Waller v James
Waller v Hoolahan

Torts – Medical negligence – Wrongful life – Agreed for the purposes of separate questions at first instance that respondents negligently failed during *in vitro* fertilisation (IVF) program and antenatal care to investigate and advise or warn parents in relation to genetic condition of the father where the condition posed a risk to the appellant child – Child conceived with inherited genetic condition – Child suffered serious disabilities as a result of the inherited genetic condition – Whether child can recover damages from the respondents.

Duty of care – Medical practitioners and medical service providers – Whether respondents owed the child a duty of care to investigate and advise or warn parents in relation to the risks of the inherited genetic condition, enabling parents to make informed decisions about IVF or termination of pregnancy – Foreseeability of risk to the appellant – Whether the facts of the case fall within the established duty of care which medical practitioners owe to foetuses to take reasonable care to prevent pre-natal injury – Vulnerability of the appellant – Need to distinguish duty of care from other elements of negligence – Relevance of duty of care owed to the appellant's mother – Whether duty of care owed to the appellant included duty to terminate life – Whether such a duty admissible in law.

Damage – Whether a life with disabilities is actionable damage – Whether it is possible to prove damage by comparing a life with disabilities with non-existence.

Damages – Assessment – Measure of damages – Compensatory principle –Non-existence as a comparator – Comparison to child born without genetic condition and consequent disabilities – Whether claim for special damages quantifiable – Whether only special damages may be awarded.

Public policy – Principle of the sanctity of human life – Whether life is capable of constituting a legally cognisable injury – Effect on disabled people of awarding damages for wrongful life – Whether it would be appropriate to award damages in respect of minor defects in circumstances where a child's mother would have terminated her pregnancy had she been warned of the risk of such defects – Whether disabled child could sue his or her mother for failing to terminate her pregnancy – Whether awarding damages for wrongful life would undermine familial relationships.

Statutes – Whether common law can be developed by analogy with legislation – Whether it is possible to develop the common law by analogy in circumstances

where there is no relevant legislative provision in any Australian jurisdiction – Relevance of legislature's inaction.

Words and phrases – "wrongful life", "wrongful birth".

1 GLEESON CJ. I have had the advantage of reading in draft form the reasons for judgment of Crennan J.

2 I agree that both appeals should be dismissed with costs, for the reasons given by her Honour.

GUMMOW J. Each appeal should be dismissed with costs.

I agree with the reasons of Crennan J.

5 KIRBY J. These appeals from the New South Wales Court of Appeal[1] were heard together with that in *Harriton v Stephens*[2]. Like the appeal in *Harriton*, they concern the issue of whether the tort of negligence is capable of affording relief for so-called "wrongful life"[3].

6 In my view, for the reasons explained in *Harriton*, such actions are consistent with the general principles of negligence law. The established duty of care which health care providers owe to the unborn in respect of pre-natal injuries requires the exercise of reasonable care in investigating risks of disability that might afflict prospective children and warning those in relevant relationships with the provider of such risks[4]. The heads of damages ordinarily available in personal injury cases are quantifiable and may be awarded. There are no convincing reasons of legal principle or policy to preclude recovery[5]. All of these conclusions are applicable to the present case. They should be applied. The appeals should be allowed.

The procedural background

7 The essential facts in these proceedings were agreed between the parties for the purposes of determining whether the appellant's pleadings disclosed a cause of action[6]. As in *Harriton*, there has not, as yet, been a trial[7]. While the parties doubtless saw advantages in adopting this course, it entailed a decided disadvantage. As in the courts below, this Court has not had the advantage of a record of relevant evidence and judicial findings on such evidence as a basis for resolving the legal questions presented.

---

1 *Waller (by his tutor Waller) v James* (2004) 59 NSWLR 694.

2 [2006] HCA 15.

3 Regarding the shortcomings in the label "wrongful life" see *Harriton* [2006] HCA 15 at [8]-[13].

4 *Harriton* [2006] HCA 15 at [71]-[72].

5 *Harriton* [2006] HCA 15 at [110]-[152].

6 The statement of agreed facts is set out in full in *Waller v James* [2002] NSWSC 462 at [6].

7 Regarding this procedural posture see *Harriton* [2006] HCA 15 at [34]-[36]. Cf *Waller* [2002] NSWSC 462 at [5].

8 On the contrary, in several respects, the agreed statement of facts is seriously deficient[8]. This Court must therefore do the best it can with the agreed facts. It is not permissible to fill in evidentiary gaps in the agreed statement. One of the risks occasioned by the procedural course adopted is that the agreed statement may not provide sufficient detail to conclude that a cause of action exists. Alternatively, the statement may be so sparse in content that the detail that helps to produce a proper outcome to the application of the law may be lacking or unconvincing. In that event, the party who is endeavouring to establish a cause of action will fail in that endeavour[9].

The facts

9 Keeden Waller (the appellant) is the only child of Mr Lawrence Waller and Mrs Deborah Waller. He was born on 10 August 2000. Because the parents had experienced difficulty in achieving conception, they consulted Dr Noonan, who is a medical practitioner in general practice. Dr Noonan arranged for an analysis of Mr Waller's semen. This analysis disclosed a low sperm count and poor sperm motility. Accordingly, Dr Noonan referred the appellant's parents to Dr Christopher James (the first respondent). Dr James is an obstetrician and gynaecologist. He has a special interest in problems of human infertility.

10 In his letter of referral to Dr James, Dr Noonan noted that Mr Waller suffered from "Factor III deficiency". This is a blood disorder which is also known as anti-thrombin 3 deficiency ("AT3"). This deficiency results in a propensity of the blood of the affected individual to clot in the arteries and veins. The letter also noted that, for this deficiency, Mr Waller had been prescribed the anticoagulant Warfarin daily. By inference, Mr Waller was duly undertaking this therapy.

11 Mr Waller consulted Dr James on 3 March 1999. At that time, Mr Waller also disclosed his AT3 deficiency and the fact that he was taking Warfarin. Dr James arranged for Mr Waller to undergo fertility tests to be performed by Sydney IVF Pty Ltd (the second respondent) ("Sydney IVF"). These tests were aimed at determining whether there was a genetic reason for the condition of his sperm. The tests were not, as such, concerned with Mr Waller's AT3 deficiency, its genetic basis, or the potential it had to be passed on to his offspring.

12 Subsequently, Dr James recommended to Mr and Mrs Waller an *in vitro* fertilisation procedure known as intra-cytoplasmic sperm injection. This

---

8 Cf *Waller* (2004) 59 NSWLR 694 at 704-705 [46]-[55].

9 *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 694 per Sir Thomas Bingham MR.

involved harvesting eggs from Mrs Waller and injecting them with sperm taken from Mr Waller. The Wallers accepted this recommendation. On 11 November 1999, Dr James harvested nineteen eggs from Mrs Waller. Technicians in the employ of Sydney IVF successfully injected seventeen eggs with Mr Waller's sperm. On 14 November 1999, the first respondent transferred two embryos, produced in this way, to Mrs Waller's uterus. On 27 November 1999, testing, arranged at Dr James's request, confirmed that Mrs Waller was pregnant.

13 On 22 December 1999, Dr James referred Mrs Waller to Dr Brian Hoolahan (the third respondent). Dr Hoolahan, also an obstetrician and gynaecologist, specialised in pre-natal care. Mrs Waller consulted Dr Hoolahan on numerous occasions. At some of these consultations she was accompanied by Mr Waller. At Dr Hoolahan's suggestion, Mrs Waller underwent testing to determine whether the foetus suffered from Down's syndrome. This test returned a negative result.

14 On 10 August 2000 Mrs Waller gave birth to Keeden at the Shoalhaven District Memorial Hospital. The delivery occurred in the presence of Dr Phillip Paris-Browne, who was the obstetrician on call. Mrs Waller and the appellant were discharged on 14 August 2000. However, on 15 August 2000, Keeden was returned to the Hospital. He was diagnosed as suffering from a cerebral thrombosis.

Questions for decision

15 By a tutor, Keeden sued the respondents in negligence in the Supreme Court of New South Wales[10]. He claimed general damages for pain and suffering, special damages for the needs created by his serious disabilities and damages for a loss of earning capacity. With the consent of the parties, Studdert J, in that Court, posed two questions for separate determination in advance of a trial. These questions, in substance the same questions as were before this Court in *Harriton*, were[11]:

> "1. If the first, second and third [respondents] failed to exercise reasonable care in their management of the [appellant's parents], and but for that failure the [appellant] would not have been born, does the [appellant] have a cause of action against each of the said [respondents]; and

---

10 The appellant also brought actions against Illawarra Area Health Service which was responsible for the operation of Shoalhaven District Memorial Hospital and Dr Paris-Browne. These actions were settled on 10 April 2003.

11 *Waller* [2002] NSWSC 462 at [3].

2. If so, what categories of damages are available?"

16 For the purposes of the proceedings it was agreed by the parties that the respondents should have advised Mr and Mrs Waller that Mr Waller's AT3 deficiency was genetic and that it was therefore susceptible to being transferred to his children. It was also agreed that had such advice been given, Mr and Mrs Waller would have (1) deferred undergoing artificial insemination until methods were available to ensure that only embryos without the AT3 deficiency were transferred; or (2) used donor sperm avoiding that risk; or (3) terminated the pregnancy upon discovery of the risks of a child being born with serious genetic disabilities.

An action for physical injuries

17 Significantly, in his statement of claim, Keeden alleged that Dr Hoolahan was negligent not only in failing to warn the parents of the risk of his acquiring AT3 deficiency but also in respect of the management of Mrs Waller's pregnancy, his delivery and the administration of neo-natal care. The latter allegations mean that the case against Dr Hoolahan is materially different from that brought against Dr James and Sydney IVF. It is a claim arising out of alleged physical injuries. Such a claim is legally uncontroversial. It presents no novel issue of legal principle.

18 As is apparent from the questions posed, these appeals concern the liability of Dr Hoolahan only in so far as the particulars of negligence alleged an entitlement to recover on the basis of "wrongful life". The decision of this Court will have no direct effect on Dr Hoolahan's liability with respect to Keeden's claim for physical injuries[12]. That claim will fall to be decided by the Supreme Court on the basis of familiar negligence doctrine.

The appellant's disabilities

19 The statement of agreed facts throws little light on the precise nature and extent of the appellant's disabilities. It provides only that, as a result of the cerebral thrombosis, Keeden "suffers from permanent brain damage, cerebral palsy and uncontrolled seizures" resulting in a need for "a level of care greater than would be expected of a child who did not have his disabilities". These disabilities are said to be likely to "continue past the age of 18". It is unclear to what extent Keeden's present disabled condition results from his genetic AT3 deficiency or additional undisclosed injuries allegedly sustained due to the circumstances of his birth and immediate neo-natal care. However, one or both of these causative factors are alleged to be involved in Keeden's profound

---

12 See *Waller* [2002] NSWSC 462 at [8].

disabilities. If a trial were permitted on all claims, it would allow the contested issues of causation and the liability, if any, to Keeden of the respondents to be clarified in the usual way.

The history of the proceedings

20 *Before the primary judge*: Studdert J found against Keeden on the first stated question. His Honour's reasons for doing so are effectively the same as those that he gave in *Harriton*[13]. Studdert J found that, while the respondents owed the appellant a duty of care[14], the content of that duty only extended to exercising reasonable care to guard against acts and omissions that might cause Keeden to sustain pre-natal injuries. Leaving aside the action for physical injuries commenced against Dr Hoolahan, he held that the respondents had not breached this duty[15]. It appears that one of the main reasons for Studdert J's conclusion in this regard was that a duty of the scope postulated for Keeden could potentially conflict with the duty that these respondents owed to Keeden's mother[16].

21 Studdert J added that, even if a relevant and applicable duty existed, the respondents' agreed negligence did not cause the damage of which Keeden complains[17]. The reasons given in support of this conclusion were brief. His Honour acknowledged that Dr James and Sydney IVF had "played a very important role in facilitating the development of the embryos which were implanted in [Mrs Waller's] womb"[18]. However, Studdert J concluded that the appellant's relevant disabilities were not caused by the respondents because they were genetic in origin[19].

22 Relying once again on the decision of the English Court of Appeal in *McKay v Essex Area Health Authority*[20], Studdert J also held that Keeden's action

---

13 *Harriton v Stephens* [2002] NSWSC 461.

14 *Waller* [2002] NSWSC 462 at [22], [36], [42].

15 See *Waller* [2002] NSWSC 462 at [37], [39], [43]-[44].

16 *Waller* [2002] NSWSC 462 at [31].

17 *Waller* [2002] NSWSC 462 at [37]-[39], [43].

18 *Waller* [2002] NSWSC 462 at [37].

19 *Waller* [2002] NSWSC 462 at [39].

20 [1982] QB 1166.

failed because the damages that he claimed were not susceptible to quantification[21]. Finally, his Honour cited several public policy considerations which, in his opinion, militated against recognising the appellant's cause of action. These included that the action would (1) offend the principle of the sanctity of human life by the postulated termination of the pregnancy and the end of Keeden's life; (2) degrade disabled members of society; (3) logically give rise to a cause of action entitling children to sue their mothers claiming that they should not have given birth to them and that this would destroy familial relationships; and (4) place intolerable pressure on medical indemnity insurance premiums[22].

23 As Studdert J found against Keeden on the threshold point of whether he enjoyed a viable cause of action, the second question, concerning what heads of damages were recoverable, fell away.

24 *In the Court of Appeal*: The appellant appealed to the New South Wales Court of Appeal. His appeals were heard and decided concurrently with the appeal against the first instance decision in *Harriton*. They were dismissed by a majority (Spigelman CJ and Ipp JA; Mason P dissenting)[23]. The reasons of the majority for dismissing the appeals cover similar ground to that traversed in *Harriton*.

25 However, Spigelman CJ considered that the reasons for dismissing the appeals in the present case were stronger than those in the case of *Harriton*. His Honour stated[24]:

> "On the issue of duty, matters arise in [this case] that do not arise in the case of [*Harriton*]. The implications of recognising a duty in a case involving the effects of a maternal disease on a child [as in *Harriton*,] are not the same as the transmission of characteristics through genetic inheritance.
>
> ... [T]he implications of the expansion of genetic knowledge ... raise[] questions of scope and indeterminate outcome of liability, which do not arise in [the case of *Harriton*]. In particular, the case raises an important issue of how public policy should respond to the practicability of eugenics."

---

21 *Waller* [2002] NSWSC 462 at [47]-[53].

22 *Waller* [2002] NSWSC 462 at [66].

23 *Waller* (2004) 59 NSWLR 694.

24 *Waller* (2004) 59 NSWLR 694 at 702 [29]-[30].

26 By special leave, the appellant appeals to this Court. The questions to be decided are those posed by Studdert J in the Supreme Court[25].

A comparison with the facts in *Harriton*

27 *Some differences*: It is necessary to notice some differences between the facts and procedural history of these appeals and of *Harriton*. First, as observed by Spigelman CJ[26], the appellant's disabilities are qualitatively different from the disabilities that affected the plaintiff in *Harriton*. In *Harriton*, the disabilities resulted from the plaintiff's contracting the rubella virus from her mother *in utero*. In the present proceedings, the disabilities can be traced to the transmission of genes for the blood disorder AT3 and, possibly, the events surrounding the birth and associated neo-natal care.

28 Secondly, the factual matrix in the present appeals is significantly more complex than that in *Harriton*. In *Harriton*, there was a single defendant, a medical practitioner in general practice. He was not involved in either the process of the plaintiff's conception or her birth. In this case, the appellant sued multiple defendants whose agreed lack of care occurred both before (in the case of Dr James and Sydney IVF) and after (in the case of Dr Hoolahan) the appellant's conception. Furthermore, unlike the plaintiff in *Harriton*, who only brought an action for wrongful life, the appellant's action here includes a claim for physical injuries[27].

29 Thirdly, the appellant's parents in this case have commenced proceedings in their own right against the respondents[28]. The actions against the first and second respondents are pleaded both in negligence and contract. The actions against the third respondent are pleaded in negligence only[29]. These actions have been stayed pending the determination of the appellant's right to bring his action for wrongful life[30]. They were commenced before legislative restrictions were enacted in New South Wales preventing actions for "wrongful birth"[31]. This

---

25 See above these reasons at [15].

26 (2004) 59 NSWLR 694 at 702 [29]-[30] quoted above in these reasons at [25].

27 See above these reasons at [17].

28 *Waller* [2002] NSWSC 462 at [1].

29 *Waller* [2002] NSWSC 462 at [2].

30 *Harriton* (2004) 59 NSWLR 694 at 724 [179].

31 *Civil Liability Act* 2002 (NSW), ss 70 and 71.

contrasts with the position in *Harriton* where the plaintiff's parents did not commence proceedings of their own within the applicable limitation period[32].

30 Not all of these distinctions between the present case and *Harriton* are of significance. For instance, the fact that the appellant's parents have commenced litigation for "wrongful birth" does not have any bearing on the determination of these appeals. The reasons that I stated in *Harriton* explain why this is so[33]. How could the existence of a right to relief, vested in other legal persons to vindicate injury to *their* interests, justify denying relief to *another* individual who alleges that *he* has sustained a different injury of *his own*? The occurrence of situations involving a single act of negligence giving rise to a multiplicity of actions vesting in different plaintiffs, even where the damage overlaps to some extent, is not unknown in the law of torts.

31 *Some similarities*: Notwithstanding the foregoing differences between this case and *Harriton*, there are two basic similarities. A "normal" life was not possible either for Keeden or the plaintiff in *Harriton*. Subject to the unresolved complaint about the process of delivery and any damage that can be differentiated and attributed to that aspect of Keeden's claim, in neither case was there anything that could have been done to ameliorate either the risk of the disabilities occurring or their severity other than by performing an abortion or, in the case of Keeden, avoiding the risky conception in the first place.

32 Secondly, Keeden, like the plaintiff in *Harriton*, is required to show that he has suffered damage as a result of the failure of the respondents to exercise reasonable care. This requires him to establish that he would not have been conceived or born but for the respondents' negligence and, by virtue of this fact, that his present state of suffering is so profound, enduring and incurable that it is worse than non-existence[34].

The issues for decision

33 *Duty of care*: I consider that it is clear that the respondents owed the appellant a duty of care, the discharge of which required the exercise of reasonable care in investigating and warning his parents of risks of disabilities that were reasonable foreseeable, as likely to afflict him once born. This duty follows from the established obligation which health care providers owe to the

---

32 *Harriton* (2004) 59 NSWLR 694 at 724 [179].

33 *Harriton* [2006] HCA 15 at [145]-[148].

34 See *Harriton* [2006] HCA 15 at [104].

unborn in respect of pre-natal injuries. My reasons for this conclusion are essentially those that I expressed in *Harriton*[35].

34 Like the plaintiff in *Harriton*, the appellant was unquestionably foreseeable by the respondents and vulnerable to the consequences of negligence on their part. Furthermore, to a greater extent than the defendant in *Harriton*, the respondents in this case, especially the first and second respondents, enjoyed special control over the circumstances that resulted in the damage caused to the appellant. These salient features are powerful considerations supporting the recognition by the common law of a duty of care in such a case[36].

35 There are no contra-indications to the existence of a duty that would warrant absolving the respondents from responsibility for their professional acts or omissions that are accepted as negligent in fact. It is true that a duty of care owed to the appellant might sometimes conflict with that owed to the appellant's mother[37]. However, the mere fact of potential incompatibility between duties is not a persuasive reason for denying the existence of a legal duty which would otherwise have arisen[38]. Any such conflict, if it existed in the particular facts, would have to be resolved on the basis of the evidence. It could not be resolved by an *a priori* determination that no duty existed to the child, whatever the circumstances and whatever the evidence of the mother's needs, expectations and wishes.

36 In the Court of Appeal, Spigelman CJ suggested that to acknowledge a duty in the present facts would be to expose health care providers to liability which was indeterminate[39]. The threat of indeterminate liability is a sound basis for denying the existence of a duty of care[40]. The basic explanation as to why this is so lies in the notion that what the law requires should be discoverable in advance. However, imposing a duty of care on the respondents would not entail a risk of indeterminate liability. Indeed, it relevantly could be determined and confined, namely to Keeden. It can hardly be contended that the class of plaintiffs to whom such a duty would be owed by the respondents is indeterminate. It is true that breach of a duty in a case of "wrongful life" may

---

35 *Harriton* [2006] HCA 15 at [71]-[72].

36 *Harriton* [2006] HCA 15 at [65].

37 *Harriton* [2006] HCA 15 at [248]-[250].

38 See *Harriton* [2006] HCA 15 at [74]-[76].

39 See above these reasons at [25].

40 *Ultramares Corporation v Touche* 174 NE 441 at 444 (1931); *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 555, 593.

result in liability which is very extensive. But this is quite different from saying that the liability is indeterminate[41]. It is not. It is discoverable by the application of established doctrine in the usual way.

37 The indeterminate liability concern, when present, is typically identified in cases involving pure economic loss[42]. In a sense, this is unremarkable considering that the possibility of indeterminate liability eventuating in cases involving pure economic loss is greater than in cases involving physical injury. In part, this is because economic loss, not being bound by physical limitations, can spread widely. It is also because economic loss, unlike physical damage, is capable of "rippling", conceivably indefinitely, from the individuals immediately affected to others[43]. However, even if the problem of indeterminate liability arose in a case involving physical loss, like the present, it does not necessarily follow that a duty of care cannot exist as a matter of law[44]. Arguably, the imposition of liability is less contestable where the damage is physical damage because of the higher value that tort law places on personal security and well-being than on economic interests[45]. As Professor Peter Cane states[46]:

> "Because of the importance attached to personal health and well-being and to the physical integrity of tangible property, the law is prepared to impose liability for negligent misfeasance in favour of all foreseeable victims of bodily injury and property damage, however many they may be."

The argument of indeterminacy should be rejected.

38 *Causation*: As in the case of the plaintiff in *Harriton*, I do not consider that the need for the appellant to establish causation in fact presents him with any real difficulty. There is sufficient information in the statement of agreed facts for

---

41 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 204 [50], 254 [202], 303 [336].

42 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 529-530 [21], 537 [46]-[47], 548 [77], 571 [155], 575 [166].

43 Stapleton, "Duty of Care and Economic Loss: A Wider Agenda", (1991) 107 *Law Quarterly Review* 249 at 255.

44 *Woolcock* (2004) 216 CLR 515 at 571 [155].

45 Mason, "The Recovery and Calculation of Economic Loss", in Mullany (ed), *Torts in the Nineties*, (1997) 1 at 1-2.

46 Cane, "The blight of economic loss: Is there life after *Perre v Apand*?", (2000) 8 *Torts Law Journal* 246 at 256.

this Court to hold in his favour on this point. The suffering and consequential economic loss of which the appellant complains would not have been endured but for the respondents' negligence. Indeed, the evidence pointing towards the existence of the requisite causal relationship is arguably stronger in this case than in *Harriton* in relation to the first and second respondents. As the agreed facts reveal, these respondents were responsible for extracting eggs from the appellant's mother, injecting them with his father's sperm and implanting two selected embryos in the appellant's mother's womb[47]. They were immediately and directly involved in the appellant's conception.

39 *Damage*: It is unnecessary in these appeals to embark on a detailed analysis of the issue of the quantifiability of damage. Before this Court, counsel for the appellant contended that the appropriate "comparator", if one was required, was an ordinary person without AT3 deficiency. This submission is inconsistent with the compensatory principle as it has been expressed hitherto[48]. That principle does not contemplate a comparison between a plaintiff in his or her injured state and a hypothetical person who had not sustained those same injuries. It involves a comparison with the condition of the plaintiff as he or she would have existed but for the negligence of the defendant. Although this comparison involves a hypothetical exercise, it is one quite different from that advanced for the appellant.

40 For the reasons explained in *Harriton*, it is unnecessary for the appellant to resort to a novel "comparator". The fact that the compensatory principle necessitates a comparison with non-existence does not defeat a claim for "wrongful life"[49]. I will not repeat my reasons for reaching that conclusion. It suffices to say that courts have long engaged in comparing existence with non-existence, most obviously in cases concerning the withdrawal of life-sustaining medical treatment[50]. True it is that those cases have not been concerned with assigning a monetary value to the difference between existence and non-existence[51]. However, this is not a crucial distinction. The principal objection to recognising actions for wrongful life is that a comparison between existence and non-existence is, according to those who would reject the admissibility of wrongful life actions, an impossible exercise because it involves unknowables or

---

47 See above these reasons at [12].

48 *Harriton* (2004) 59 NSWLR 694 at 737-738 [271].

49 *Harriton* [2006] HCA 15 at [95]-[109].

50 See *Harriton* [2006] HCA 15 at [95].

51 *Harriton* [2006] HCA 15 at [256].

immeasurables[52]. But these cases demonstrate that this is not so. In any case, the insistence on the existence of a "comparator" invokes a tool of reasoning. It involves a legal fiction. In other fields of law the essentiality of such a fiction, as a postulate of legal analysis, has been rejected[53]. Where, as here, there is a duty of care, acknowledged breach, arguable causation and provable damage, the invocation of a legal fiction should not stand in the way of relief to a person suffering grievous damage in consequence of a lack of professional care.

41 *Public policy*: In Keeden's case, it is unnecessary to review the public policy considerations that are said to militate against recognising "wrongful life" actions. I examined what I regarded as the most significant of these in *Harriton*[54]. None of them furnishes a convincing reason for refusing to provide relief for which ordinary negligence doctrine would otherwise provide. Many of these considerations, such as the assertions that permitting "wrongful life" actions would impose a duty to kill[55] and deprecate disabled members of society[56], evaporate when the precise nature of the complaint in cases such as the present is properly understood. "Wrongful life" actions do not literally involve the complaint that life *per se* is wrongful. As in everyday personal injury actions, the complaint is rather that particular suffering and loss caused by the tortfeasor is legally wrongful[57].

42 Other policy arguments, such as the contentions that allowing "wrongful life" actions would result in litigation being commenced in respect of every trivial birth "defect"[58], or encourage the development of the notion of a right to be born "perfect", or lead children to sue their mothers for bringing them into this world with suggested "defects"[59], ignore virtually all of the elements of the tort of negligence which plaintiffs are required to make out. For the reasons stated by me in *Harriton*, none of the so-called policy reasons for departing from past negligence doctrine and for denying recovery in this case is made good.

---

52 See *Harriton* (2004) 59 NSWLR 694 at 737 [265].

53 See *Harriton* [2006] HCA 15 at [96]-[100].

54 *Harriton* [2006] HCA 15 at [110]-[152].

55 See *Harriton* [2006] HCA 15 at [111]-[112].

56 See *Harriton* [2006] HCA 15 at [119]-[122].

57 *Harriton* [2006] HCA 15 at [10].

58 See *Harriton* [2006] HCA 15 at [123]-[126].

59 See *Harriton* [2006] HCA 15 at [127]-[133].

43 The only point that I would add to what I said in *Harriton* relates to the concern voiced by Spigelman CJ in the Court of Appeal, noted above, that allowing these appeals would require the courts to grapple with the issue of eugenics[60] about which the common law is, now, rightly, very cautious. Clearly, Spigelman CJ considered that this was an area into which the courts should be reluctant to enter. His argument was similar to Ipp JA's contention that the courts should wait for legislative determination of such issues, the resolution of which by judges could involve unforeseen consequences, as a result of unknowable advances in genetic technologies such as those deployed in the present case[61].

44 However, as Professor Jane Stapleton has noted, the recurring assertion that an issue falls more appropriately within the functions of parliament does not, without more, offer any real explanation of why the courts should stay their hand in a given case[62]. It is unclear why judges should exercise restraint in developing the common law in circumstances where it concerns genetic technologies while the courts have for centuries decided other controversies, as acute in their time, in order to resolve in a reasoned manner new questions upon which parties seek a legal ruling. The holding of this Court in *Cattanach v Melchior*[63] denies such an unprincipled and unilateral act of judicial self-denial. In my opinion, it would amount to an unauthorised departure from judicial duty.

45 The fact that permitting "wrongful life" actions is likely to lead to consequences which, because of the limited capacity to forecast advances in genetic technologies, are as yet unknown does not strengthen this supposed policy argument. All decisions that recognise a cause of action in new circumstances or which alter the course of the common law will have unforeseen consequences. Decisions which result in a change in legal principle in, for instance, the law of torts, will inevitably have economic consequences and ramifications for the insurance industry and the premium-paying population which cannot be fully anticipated. Yet before and since *Donoghue v Stevenson*[64]

---

60 See above these reasons at [25].

61 *Harriton* (2004) 59 NSWLR 694 at 746-747 [338]-[347].

62 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 at 68-69.

63 (2003) 215 CLR 1.

64 [1932] AC 562.

to the present day[65], this has not been accepted as a reason why judges should refuse to express the common law applicable to new circumstances and, where necessary, to develop and elaborate the common law to meet changed social and technological circumstances. The present is simply another such case.

Conclusions

46 From the foregoing and on the basis of what I said in *Harriton*, it follows that Studdert J erred in foreclosing the appellant's right to have his action decided after a trial on the merits in which the entirety of the evidence propounded for and against his claim is adduced and findings made in the normal way. This was not a case where, on the abbreviated statement of facts agreed by the parties, it could be conclusively found that Keeden Waller did not have a cause of action against the respondents, or any of them, on the basis of the clarification of his claim as one for so-called "wrongful life". None of the reasons derived from the ordinary features of the tort of negligence stands in the way of his action as propounded. None of the suggested grounds of legal principle or public policy suggests the opposite outcome.

47 It follows that the majority of the Court of Appeal erred in failing to correct the orders of Studdert J. This Court should now do so.

Orders

48 The appeals should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In place of those orders it should be ordered that the appeals to that Court be allowed with costs. The orders of Studdert J should be set aside. The respondents should pay the appellant's costs in the Supreme Court of New South Wales. The questions separated for determination should be answered:

1. Yes.

2. The categories available in personal injuries cases.

49 The proceedings should be remitted to the Supreme Court of New South Wales for trial consistently with these answers.

---

65 See, eg, *Brodie v Singleton Shire Council* (2001) 206 CLR 512; *Cattanach* (2003) 215 CLR 1.

50 HAYNE J. For the reasons I give in *Harriton v Stephens*[66] I agree with Crennan J that the appellant in these appeals has not suffered what the law should recognise as "damage". Again, I prefer to leave aside any consideration of what that might suggest about the existence of a duty of care. I agree that each appeal should be dismissed with costs.

---

66 [2006] HCA 15.

51 CALLINAN J. These are two appeals which were argued at the same time as the appeal in *Harriton v Stephens*[67]. They raise a closely related issue to that appeal and may themselves be dealt with together for reasons which will appear. They are brought from the Court of Appeal of New South Wales in proceedings in which both the appellant and his parents were plaintiffs. This Court is not concerned with the claim by the parents. Nor is it concerned with the case brought in the same proceedings against a fourth and a fifth defendant which has been settled.

The facts

52 The appellant's parents were anxious to have a child. They had difficulty in conceiving because the appellant's father had a low level of sperm and very poor motility. A medical practitioner referred them to the first respondent, Dr James, an obstetrician and gynaecologist whose specialty was infertility. In referring them to the first respondent, the medical practitioner informed him that the appellant's father suffered an anti-thrombin 3 ("AT3") deficiency ("the deficiency"), which caused his blood to have a propensity to clot. The appellant's father also told the first respondent, in the course of an early consultation, of the deficiency, and that he took a drug, Warfarin for the treatment of it. He told the first respondent that he also suffered from deep vein thrombosis and pulmonary emboli.

53 The first respondent arranged for a number of tests to be conducted upon the appellant's father in March 1999. None of them was designed to elucidate anything about the deficiency, its genetic basis, or its transmissibility to any child whom he might father.

54 On 5 May 1999, the first respondent arranged for the genetic testing of the appellant's father by the second respondent to determine if a chromosomal abnormality was responsible for his low sperm count. This test was not apt for the obtaining of information of any kind about the deficiency.

55 In July 1999, the first respondent recommended that the appellant's parents undergo a process called an "intra-cytoplasmic sperm injection" involving a micro-injection of sperm into an egg using the appellant's father's sperm and the appellant's mother's ovum. The appellant's parents underwent the process which was monitored by the first and second respondents, and in the course of which eggs were harvested from the appellant's mother, some of which were successfully injected with sperm from the appellant's father. Embryos developed, two of which were inserted into the appellant's mother's uterus by the

---

67 [2006] HCA 15.

first respondent. Seven other embryos were cryogenically preserved in the second respondent's storage facilities.

56 The appellant's mother's pregnancy was subsequently confirmed. She was then referred by the first respondent to an obstetrician, the respondent in the second of these appeals, whom it is convenient to call the third respondent as these appeals are being considered together.

57 In due course, the appellant's mother too underwent a number of tests arranged by the third respondent, but none of them were tests with respect to the deficiency, and its possible consequences for the foetus.

58 The appellant's mother attended a number of consultations with the third respondent during her pregnancy. She also visited the fourth defendant's hospital for a consultation with a midwife there. The appellant's mother was content for her confinement to take place at that hospital. Both parents of the appellant attended several antenatal classes conducted by or on behalf of the fourth defendant.

59 From about 6.00 pm on 8 August 2000 the appellant's mother was in labour. Until about 7.00 am on 10 August 2000 she was in contact with employees of the fourth defendant, one of whom was a medical practitioner, the fifth defendant who directed midwives employed by the fourth defendant to induce or accelerate labour vaginally by the administration of an appropriate drug. The appellant was delivered vaginally at 1.00 pm on 10 August 2000.

60 On 15 August 2000, the appellant was diagnosed as suffering from cerebral thrombosis. His brain is permanently damaged. He suffers from cerebral palsy and has uncontrolled seizures. He has needed, and will need constant care and treatment.

61 The appellant alleges that the first, second and third respondents ought to have, but did not investigate and advise his parents in relation to the deficiency, and that they were therefore deprived of the opportunity of understanding the possibility of the transmission of it to the appellant. Had they known of it, they would have had the appellant's mother's pregnancy terminated.

62 It can be seen that the case against the third respondent may well raise different factual and other issues from the case against the first and second respondents, but the issues with which this Court is presently concerned are common to both appeals as the questions posed by Studdert J at first instance[68] show. The two preliminary questions posed by his Honour were as follows:

---

68 *Waller v James* [2002] NSWSC 462.

"(1) If the first, second and third [respondents] failed to exercise reasonable care in their management of the [appellant's mother and father], and but for that failure the [appellant] would not have been born, does the [appellant] have a cause of action against each of the said [respondents]; and

(2) If so, what categories of damages are available?"

63 Consistently with his Honour's reasoning in *Harriton v Stephens*[69], Studdert J answered the first question adversely to the appellant. It was unnecessary for him therefore to consider any question of damages but because the issue of them had been extensively argued, he dealt with it, effectively holding that compensatory damages in a case of this kind were simply unassessable[70].

64 The Court of Appeal of New South Wales (Spigelman CJ and Ipp JA, Mason P dissenting)[71] rejected the appellant's appeals to it in a judgment the essential aspects of which I have summarized in my reasons for judgment in *Harriton*, and need not therefore repeat here. Nor is it necessary for me to restate my reasoning in *Harriton* which leads me to the same conclusion in these appeals. The relevant facts and issues are indistinguishable from those considered in *Harriton*. The appellant's claims are therefore defeated by the same logic as denies the appellant in *Harriton* any right to relief. This appellant too, cannot be heard, as a matter of logic, to say that he "should never have been brought into existence", in which event he would not have been able to say anything at all.

65 I would dismiss both appeals with costs.

---

69 [2002] NSWSC 461.

70 [2002] NSWSC 462 at [57].

71 *Waller (by his tutor Waller) v James* (2004) 59 NSWLR 694.

66 HEYDON J. I agree with Crennan J.

67 CRENNAN J. These two appeals and the appeal in *Harriton v Stephens*[72] were heard consecutively, and the judgment in *Harriton v Stephens* disposes of the appellant's case in each of the two appeals. Therefore, the reasons for judgment in *Harriton v Stephens*[73] will need to be read in conjunction with these reasons for judgment.

68 By majority (Spigelman CJ and Ipp JA, Mason P dissenting) the Court of Appeal of New South Wales[74] dismissed an appeal brought by Keeden Waller (by his tutor Deborah Waller) (the appellant in this Court) against a judgment in the Supreme Court of New South Wales (Studdert J)[75] dismissing with costs a claim for damages against Dr Christopher James ("Dr James") and Sydney IVF Pty Ltd ("Sydney IVF"), and also dismissing with costs a separate claim for damages against Dr Brian Hoolahan ("Dr Hoolahan").

69 Whilst it is not relevant to the present appeals, those claims had been brought by the appellant in proceedings in which his parents were also plaintiffs and in which a fourth and fifth defendant had also been sued.

70 The appellant was conceived as a result of in vitro fertilisation ("IVF"). His parents, Deborah and Lawrence Waller, had experienced difficulty conceiving for some time, and after a test showed that Mr Waller had a low fertility rate, they were referred by their general practitioner to Dr James, an obstetrician and gynaecologist with a practice in infertility and IVF procedures. The referral letter mentioned the fact that Mr Waller had anti-thrombin 3 deficiency ("AT3 deficiency"), a condition which results in a propensity for the blood to clot. The letter also stated that Mr Waller was taking Warfarin daily for this condition.

71 Dr James discussed the AT3 deficiency with the appellant's parents during one of their early consultations with him. He arranged for fertility tests and other investigations to be carried out by Sydney IVF, a company which provided testing services. The tests confirmed that Mr Waller had low fertility. However, none of the tests conducted was directed to (or appropriate for) obtaining information about the genetic basis of Mr Waller's AT3 deficiency. Dr James subsequently recommended IVF treatment. The appellant's parents relied on this recommendation and commenced IVF treatment on 14 October 1999. The

---

72 [2006] HCA 15.

73 [2006] HCA 15.

74 *Waller (by his tutor Waller) v James* (2004) 59 NSWLR 694.

75 *Waller v James* [2002] NSWSC 462.

appellant's mother, Mrs Waller, became pregnant after the first cycle of IVF treatment.

72 After the pregnancy had been confirmed Dr James referred Mrs Waller to a specialist obstetrician, Dr Hoolahan, for antenatal care. Mrs Waller saw Dr Hoolahan on numerous occasions during the pregnancy. Dr Hoolahan carried out testing which excluded the presence of Down's syndrome, but failed to advise the appellant's parents that the AT3 deficiency was genetically transmissible and of its potential consequences.

73 The appellant was born on 10 August 2000 with a genetic AT3 deficiency. The propensity of the appellant's blood to clot is a permanent disability in itself. It was a difficult birth. The appellant was released from hospital on 14 August 2000. However, he was brought back to the hospital the next day with cerebral thrombosis. As a result of the thrombosis, the appellant has permanent brain damage, cerebral palsy and uncontrolled seizures.

74 The appellant's injuries are permanent and mean that he will require a greater level of care than a child without disabilities for the rest of his life. The appellant brought actions in negligence against Dr James, Sydney IVF and Dr Hoolahan[76]. He claimed general damages, economic loss and damages for gratuitous care. The appellant also claimed damages from the hospital and Dr Hoolahan for negligence in relation to his delivery and/or neonatal care, including diagnosis and treatment of the AT3 deficiency, but those additional matters were not in issue in the appeals to this Court and need not be considered further.

75 The parties prepared an agreed statement of facts for the purposes only of a separate determination under the provisions of Pt 31 of the Supreme Court Rules 1970 (NSW) of the following questions:

> "1. If the first, second and third defendants failed to exercise reasonable care in their management of the first and second plaintiffs [Mr and Mrs Waller], and but for that failure the third plaintiff [Keeden Waller] would not have been born, does the third plaintiff have a cause of action against each of the said defendants; and
>
> 2. If so, what categories of damages are available?"

76 Relevantly, the agreed statement of facts included the following facts. Dr James, Sydney IVF and Dr Hoolahan ought to have investigated and advised

---

76 [2002] NSWSC 462.

the appellant's parents in relation to Mr Waller's AT3 deficiency, but did not. The appellant's underlying AT3 deficiency is genetic not iatrogenic. If the couple had been advised that the AT3 deficiency of the appellant's father was genetic and could be passed on to any child they conceived they would have:

> "(a) deferred egg harvest and/or embryo transfer until methods to ensure transfer of only AT3 deficiency free embryos were identified; or
>
> (b) used donor sperm; or
>
> (c) if informed after confirmation of pregnancy of the 50% chance or the certainty of the foetus suffering from the AT3 deficiency, sought and obtained a lawful termination."

77 Consistent with the trial judge's reasoning and the answers given by him to the questions for separate determination in Alexia Harriton's case[77], Studdert J answered "No" to the first question, so the second question did not arise.

78 The appellant appealed to the Court of Appeal contending that Studdert J erred in law in not concluding that all three respondents owed a duty of care to the appellant. It was submitted that the duty owed extended to providing the appellant's parents with all of the material facts which would bear on his potential health thus enabling them to make decisions about their IVF treatment or a lawful termination of pregnancy. The appellant further contended that Studdert J erred in failing to find that each respondent jointly or severally caused, or materially contributed to, the appellant's AT3 deficiency and to his other injuries and disabilities; that Studdert J further erred in failing to recognise that being born disabled was damage recognised by the common law; and that his Honour also erred in holding there was no principled basis on which damages could be assessed in respect of such a claim. The majority in the Court of Appeal[78] found the appellant's damage was not actionable for the reasons already summarised in the reasons for judgment in *Harriton v Stephens*[79].

The issue

79 The main issue is whether the appellant who was born disabled has a cause of action in negligence against the respondents on the agreed facts which have been summarised above. If such a cause of action exists the next issue is

---

77 *Harriton v Stephens* [2002] NSWSC 461.

78 (2004) 59 NSWLR 694.

79 [2006] HCA 15.

whether the heads of damages are different from, or limited to, damages generally available in claims for personal injury.

80 All respondents are being sued by the appellant for causing, or materially causing, his life with disabilities (flowing, it is said, from the implantation of the embryo which became him, which distinguishes the facts of the appellant's case against Dr James and Sydney IVF from his case against Dr Hoolahan), by failing to investigate and advise his parents about the AT3 deficiency: in particular, by failing to inform his parents that the AT3 deficiency was liable to be transmitted to offspring. It was agreed that such advice would have enabled the appellant's parents to make lawful decisions which would have resulted in the appellant not being born.

81 The judgment in *Harriton v Stephens*[80] disposes of the appellant's case against Dr Hoolahan. It also disposes of the appellant's case against Dr James and Sydney IVF to the extent that identical or substantially similar submissions were made, particularly in respect of the nature of the damage claimed. The conclusion reached in *Harriton v Stephens*[81] that the damage alleged is not such as to be legally cognisable in the sense required to found a duty of care, makes it unnecessary to determine other matters to which reference was made. Further, the discussion of the compensatory principle to be found in *Harriton v Stephens*[82] took into account submissions made on that issue in these appeals.

82 However, that leaves for consideration submissions only fully argued in these appeals which relate to the transmission of genetic inheritance, including genetic disease. It was contended that the appellant's parents should have been given, but were deprived of, a timely opportunity to consider the appellant's best interests, as "their (prospective) child" or as a "potential person", in being implanted and born alive with the genetically transmitted AT3 deficiency. It was submitted that IVF is an important field of medical practice, that public policy and widespread community values (gleaned from legislation permitting IVF procedures)[83] support parents who decide in particular cases that the transmission of genetic disease would not be in the best interests of a "potential child", and that IVF processes are specifically indicated to prevent the selection and implantation of embryos which would have such a disease.

---

80 [2006] HCA 15.

81 [2006] HCA 15.

82 [2006] HCA 15 at [264]-[270].

83 *Human Reproductive Technology Act* 1991 (WA); *Infertility Treatment Act* 1995 (Vic); Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995 (SA).

83 By reference to *Griffiths v Kerkemeyer*[84], it was contended that the appellant had "new needs created by being born alive" different from damage constituting a loss of pre-existing capacity, and that the appellant's claims would be better described as "wrongful (tortious) needs" or "wrongful (tortious) suffering" claims rather than "wrongful life" claims. It was further contended that public policy considerations supported a cause of action against Dr James and Sydney IVF for a class of complainants limited to children who suffer grievous disabilities as a result of a genetic deficiency which can be investigated in embryos produced by IVF procedures, prior to implantation, whose mother (or parents) would not have had the embryo implantation if she (or they) had been advised that the deficiency was genetic and liable to be transmitted to offspring. Problems associated with a mediated duty of care and a class of complainants, confined by reference to the severity of injury caused by breach of a duty of care, have been dealt with in *Harriton v Stephens*[85].

84 It was accepted that the conduct of Dr James and Sydney IVF, which is complained about, did not cause the appellant's blood clotting disorder. However, it was contended that the appellant's cause of action against Dr James and Sydney IVF was "stronger" than Alexia Harriton's cause of action (and implicitly the appellant's cause of action against Dr Hoolahan), because Dr James and Sydney IVF practised in the specialist medical field of "embryo creation and implantation" and each was actively involved in the "transmission" of the blood clotting disorder because Mrs Waller's pregnancy could only have come about as the result of the successful implantation of an embryo.

85 It can be accepted that the role of parents undertaking IVF procedures, the role of those offering such treatment and procedures and any ability to investigate genetic disease while undertaking IVF procedures are matters of fact which distinguish the cause of action of the appellant's parents against Dr James and Sydney IVF and their cause of action against Dr Hoolahan. No aspect of the claims of the appellant's parents is in issue in these appeals.

86 The appellant's claimed damage in each of his appeals is his life with disabilities. This inevitably involves an assertion by the appellant that it would be preferable if he had not been born, irrespective of whether the conduct about which he complains occurred prior to, or during, his mother's pregnancy with him. For the reasons set out in *Harriton v Stephens*[86], the appellant's life with

---

84 (1977) 139 CLR 161.

85 [2006] HCA 15 at [242]-[250].

86 [2006] HCA 15.

disabilities is not legally cognisable damage in the sense required to found a duty of care towards him. This is so whether or not the proposed duty of care is formulated as a duty upon Dr James and Sydney IVF to him as a "prospective child" of the parents, or a "potential child", or a "potential person", or as a duty of care upon Dr Hoolahan to him as a foetus. For those reasons, and the reasons set out in *Harriton v Stephens*[87], the appellant's damage in each of the appeals is not actionable.

87 The decision of the majority of the Court of Appeal should be upheld. Each of the appeals should be dismissed with costs.

---

87 [2006] HCA 15.