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Waller v James [2013] NSWSC 497 (6 May 2013)

Key Points

- The Court considered the assessment of damages in wrongful birth cases.

Background

The 2003 High Court decision of Cattanach v Melchoir [2003] HCA 38 (Cattanach) is often cited as the principle authority in determining the recoverability of damages for the cost of raising a child in a "wrongful birth" claim. That being said, Cattanach failed to address numerous aspects relevant to wrongful birth claims, including for example, consideration as to whether compensation ought to be paid for the "normal" parental services provided to a child.

The recent New South Wales Supreme Court decision of Waller v James has provided some anticipated clarification on such issues.

As wrongful birth claims are becoming more and more widespread throughout Australia, the ongoing development in this area ought to be routinely examined.

The Facts

After having difficulty conceiving, Mr and Mrs Waller (the plaintiffs) consulted Dr James (the defendant), a gynecologist that specialised in infertility and ICF procedures.

It was known by both parties that Mr Waller suffered from an inherited condition called anti thrombin deficiency (ATD), a condition which is largely symptomatic in adults and carries with it the propensity for blood to clot. Relevantly, the plaintiffs mistakenly believed that the inheritance of ATD required both parents to have the condition.

Following the defendant's recommendations, the plaintiffs underwent IVF treatment and Mrs Waller soon fell pregnant. On 10 August 2000, Keeden Waller was born and was soon diagnosed as inheriting ATD from his father.

Keeden was discharged from hospital on 14 August 2000. However, the following day, he suffered an extensive cerebral sinovernous thrombosis (CSVT) commonly known as a stroke. As a result of the CSVT, Keeden was left with permanent brain damage, cerebral palsy and other related disabilities.

The plaintiffs alleged that a factor contributing to the CSVT was Keeden's ATD and the defendant had a duty to inform, or cause the plaintiffs to be informed, of the hereditary aspects of the condition. The plaintiffs argued that had they been adequately informed of the likelihood of Keeden inheriting the ATD, they would never have proceeded to conceive the child.

The plaintiffs therefore claimed damages for:

- their involvement in the IVF procedure and the pregnancy;
- psychiatric and physical injury caused by or resulting from Keeden's injuries and disabilities; and
- the cost of having, raising and caring for Keeden.

Whilst the court's determination of the above allegations is briefly discussed below, the comments of Hislop J, in relation to the assessment of damages in wrongful birth cases, is of particular relevance.

The Law

Hislop J was of the opinion that the question of the potential inheritability of ATD was of significance to the plaintiffs and, as such, it was a matter to which the plaintiffs ought to have been informed. In this regard, whilst his Honour acknowledged that such information did not necessarily need to have been provided by the defendant, at the very least, it was incumbent upon him to inquire as to whether the plaintiffs possessed up to date knowledge on the disorder and if not, to provide the plaintiffs with a written referral to a specialist genetic consultant.

The court ultimately found that a further referral would "not have been an exercise in futility" and that a further explanation by the defendant would have led to the specialist consultation taking place.

Whilst the court considered that a subjective element was involved in determining whether the plaintiffs, if properly advised, would have proceeded to have Keeden, it was acknowledged that the determination of causation was not without difficulty. In considering this issue, his Honour looked at (and approved) the observations of Cox J in Gover v South Australia at 566 (which was quoted with approval by Gummow J in Rosenberg at 462) which recognised that:

> *"...The court has to reach a decision about a topic to which the patient, in most cases, will not have addressed his mind at the time that matters most. His evidence as to what he would have done is therefore hypothetical and is very likely to be affected, no matter how honest he is, by his own particular experience ... It will often be very difficult to prove affirmatively that a plaintiff would not have taken a risk, say, that the evidence shows that many other people freely take..."*

Conclusion

In consideration of the above, Hislop J ultimately decided he was required to consider what a reasonable person, uninfluenced by the retrospective anger of the plaintiffs, would have done in the circumstances. Having regard to the evidence that was adduced with respect to the inheritance aspects of ATD, his Honour concluded that had the plaintiffs been properly informed, they would not have elected to have had Keeden.

As to the issue of causation, his Honour applied a two prong test as follows:

- whether the plaintiffs' harm would have occurred "but for" the acts or omissions of the defendant; and

- whether the defendant should have to answer for the consequences of those acts or omissions.

In considering the defendant's liability, Hislop J was of the opinion that the harm complained of by the plaintiffs was not a reasonably foreseeable consequence of the acts/omissions alleged against the defendant. His Honour considered that whilst it was foreseeable that Keeden may inherit ATD and may become symptomatic later in life, the consequences of his CSVT were not reasonably foreseeable and as such, the loss sought to be recovered was too remote.

As liability was unable to be established, Hislop J ultimately ruled in the defendant's favour.

Do damages claimed and awarded cease once the child reaches legal maturity?

In Waller, it was accepted by the parties that Keeden would require care for the remainder of his life and as such, the plaintiffs claimed that they were entitled to damages for the duration of Keeden's lifespan (which was agreed to be up until the age of 52 years).

The defendant, however, contended that the scope of his liability was to be determined with regard to the nature of the harm of which damages were to be awarded. As the relevant harm in the circumstances was the burden of raising a child with disabilities, the defendant argued that the claim should be limited to the period in which the plaintiffs have a legal responsibility to care for Keeden (that is, up until the age of 18).

Whilst Hislop J acknowledged the lack of authority with respect to awarding a plaintiff damages for caring for a child beyond legal maturity, he was of the opinion that if damages were to be awarded in this case, they ought to only be awarded up until Keeden's 18th birthday. As an aside, his Honour also noted that any entitlement beyond this age would depend on policy considerations.

Deduction for costs of rearing a non-disabled child

Further to the above, due to the fact that the plaintiffs wanted a child (albeit without ATD) and that the loss wholly resulted from the CSVT, rather than merely the ADT, Hislop J was of the opinion that if damages were to be awarded, they ought to be limited to the additional losses caused by virtue of Keegan's disability.

Should damages be offset against the plaintiffs' claims for future expenses?

It was recognised by the court that once Keeden reached the age of 16, he would be entitled to receive a disability support pension as well as other relevant social security allowances and benefits. The defendant submitted that those allowances should be offset against the plaintiffs' claims for future out of pocket expenses and that by virtue of such social security benefits, there would be a reduction in the plaintiffs' burden to provide for Keeden and incur expenditure.

Agreeing with the above submissions, Hislop J noted that "on any rational view, to compensate the plaintiffs on the assumption that Keeden would not receive any such benefits would result in over compensation and would not be reasonable".

His Honour further noted that if this issue was unable to be determined in accordance with statutory provision, the general law, as stated in Manser v Spry and Harris (As Administratrix of the Estate of Hollins) v Commercial Minerals Ltd would also apply to achieve a similar result.

Discount Rates

It was submitted by the defendant that the portion of the claim relating to the costs of raising Keeden was not a personal injury claim and therefore the High Court decision of Todrovic v Waller was not applicable (relevantly, Todrovic imposes a 3% discount rate). Accordingly, it was argued that the statutory discount rate of 5% should apply (ass provided by the Civil Liability Act (NSW)).

However, the court rejected this submission and held that a claim for economic loss arising from raising and caring for a child was not a stand-alone claim but could rather be categorised as part of a total claim for damages for personal injury. It therefore followed that, had the plaintiffs succeeded in the action, a Todrovic discount rate of 3% would have applied.

Gratuitous Care: are the plaintiffs entitled to recovery for the time they have spent (and will continue to spend) caring for their child?

The defendant assumed that the basis for the plaintiffs' claim for damages for gratuitous care was to apply, by analogy, the principles established in Griffiths v Kerkemeyer.

In Kerkemeyer, the High Court held that in a claim for personal injury, the injured party was entitled to recover an amount equivalent to the commercial cost of providing nursing and domestic services that had been and that would be provided voluntarily by family or friends. The need for such services entitled the injured party to recover the reasonable cost of meeting those needs at commercial rates. It was suggested however that the present matter was different to Kerkemeyer as the plaintiffs in the present case were the providers of the gratuitous services.

The defendant then pointed to the High Court's approach in CSR Limited v Eddy [2005] HCA 64, where it was held that not only was Kerkemeyer an "anomaly" that was "contrary to fundamental and basic principle", but that the loss of capacity to provide gratuitous personal or domestic services was not a compensable, separate item of damage.

On the basis of the above authority, the defendant submitted that the only right to recover for gratuitous care was pursuant to the principles of Kerkemeyer, a decision which was not applicable to the current facts.

Although Hislop J's remarks in response to the above submissions were somewhat vague, after stating that he would prefer to compensate on a Kerkemeyer basis, his Honour was of the opinion that "the issue involves policy considerations in the light of which the preferable course, at first instance would be, to adopt the alternative of awarding loss of wages".

In relation to the award of interest on gratuitous care, his Honour merely noted that if damages for gratuitous care were capable of being awarded pursuant to the principles of Kermemeyer, than interest should also be awarded.

Claims for future care

As an alternative to the claim for past and future gratuitous care, the plaintiffs claimed for future paid care on the basis of 24 hour, 7 days a week live-in care provided at commercial rates. In considering this issue, Hislop J made note of the fact there was no evidence before him that the plaintiffs would be able to fund such care, unless a verdict was made in their favour.

In response, the defendant submitted that in accordance with the principles of compensation, the plaintiffs' claim should extend only to income that the parents had (and would) forgo as a result of the care they had previously and would continue to provide to the child.

Whilst his Honour considered the defendant's submission to be "unattractive", he noted that a court at first instance may be bound to accede to it. However, that being said, his Honour noted that upon appeal, a more pragmatic approach may prevail.

Lessons Learnt

- A claim for wrongful birth may be limited up until the period in which the child reaches legal maturity.
- In circumstances where a plaintiff planned to have a child, but the child was born with a disability due to a doctor's negligence, damages may only be awarded with respect to the additional losses the plaintiff incurs by reason of that child's disability (i.e. damages may not be awarded with respect to the actual birth of the child itself).
- Any social security benefits or entitlements will generally be offset in the assessment of damages so that the plaintiff cannot "double dip" compensation for the same loss or expense.
- Gratuitous care provided by parents ought to be assessed by reference to an award for lost wages. However this is not absolute as it will also be subject to policy considerations.
- The portion of the claim relating to economic loss arising from raising and caring for a child is not a "stand-alone claim" but is rather to be categorised as part of the total claim for damages for personal injury.

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